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The Implications of the Constitution's Religion Clauses on New York Family Law

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I. Introduction

The First Amendment of the Constitution, which provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof,"[1] reflects concerns that the framers of the Constitution had regarding government involvement with religious precepts or practices. However, the degree to which the framers intended to ensure that government would not interfere with religious beliefs, doctrine, or custom, either positively or negatively, is unclear. What is clear, however, is that the intention of the Constitution's authors was to mandate some form of separation between church and state.

By creating this zone of neutrality, it was expected that the First Amendment would insulate an individual's religious beliefs from governmental control, support or influence.[2] Moreover, in order to further safeguard these religion-based concepts, the First Amendment's protections have been extended to the states through the Fourteenth Amendment's Due Process Clause, thus guaranteeing that neither federal nor state governments can use their power to abridge religious freedom.[3] The purpose of this article is to identify and assess the ar-

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1. U.S. CONST. amend. I.

2. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Mem'l Church, 393 U.S. 440 (1969); Engle v. Vitale, 370 U.S. 421, 429 (1963).

3. *Engle*, 370 U.S. at 430.

eas of New York's family law which have the potential to impact on the religious beliefs and practices of its citizens' lives and therefore evoke Constitution-related concerns.[4] An examination of the statutory law and case law reveals that the New York judiciary's interpretation of a substantial portion of the state's family law, which on its face appears to conform to the Constitution's First Amendment Religion Clauses' constraints, in fact, differs in language and intent from the statutory scheme promulgated by the state's legislature.

Initially, the article will identify the constitutional parameters of the First Amendment's Establishment and Free Exercise Clauses and describe the conceptualization, evolution, and application of these principles to intrachurch property disputes. Using these concepts as a backdrop, it will then explore the constitutionality of New York's approach to religious marriage contracts and divorces, secular divorce statutes,[5] custody and adoption laws,[6] and visitation matters by examining New York statutory and case law.

II. Judicial Interpretation of Religion Clauses: An Overview

In analyzing the prohibitions contained in the First Amendment, courts have traditionally distinguished the two clauses within the Amendment: the Establishment Clause and the Free Exercise Clause.[7] The United States Supreme Court has determined that the Establishment Clause prohibits civil courts from resolving "controversies over religious doctrines and practice," because of the inherent danger of involving government in "excessive entanglements with religion."[8] The Free Exercise Clause, on the other hand, assures the right of an individual to exercise or not exercise his or her religious prerog-

4. It is interesting to note that the Preamble to the New York State Constitution, which sets the tone and establishes the nature of the substance of the state's legislative scheme with respect to separation of church and state, apparently bridges the gap. It reads, "WE, THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION . . . ." *See* N.Y. CONST. PREAMBLE (McKinney's 1994).

5. *See* N.Y. DOM. REL. LAW § 253 (McKinney 1986) and N.Y. DOM. REL. LAW § 236 (B)(5)(h), (6)(d) (McKinney Supp. 1993) which add "the effect of a barrier to remarriage" to the State's Equitable Distribution Law's thirteen factors considered in the distribution of marital property upon dissolution of a marriage and to the eleven factors considered in determining the amount and duration of maintenance, respectively, in a divorce action.

6. N.Y. FAM. CT. ACT § 116(a-f) (McKinney 1994); *see also* N.Y. SOC. SERV. § 373 (1-6) (McKinney 1994). (The term "when practicable" allows a flexible approach to the religious matching statutes).

7. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

8. *Id.*

atives, and also guarantees that an individual will not be forced to participate in religious practice.[9] In other words, the Free Exercise Clause requires the accommodation of religious beliefs in order to prevent the imposition of undue burdens on individuals and/or religious groups. There are cases when the two religion clauses overlap or conflict. However, combined, the clauses provide the standard which determines what is permissible, impermissible, or required of government in areas of religious concern. Defining establishment as "sponsorship, financial support, and active involvement of the sovereign in religious activity," the Supreme Court in the seminal case of *Lemon v. Kurtzman*, articulated a three pronged test for determining whether federal or state action constitutes establishment: When state action (1) lacks a secular purpose; or (2) has a primary purpose of advancing or inhibiting religion; or (3) constitutes excessive government entanglement with religion, that action is constitutionally prohibited.[10]

The third prong of this test has been the most difficult to employ in cases in which secular courts are asked to enforce religious law. Although the Supreme Court has asserted that the *Lemon* test "provides 'no more than a helpful signpost' in dealing with Establishment Clause challenges,"[11] it has applied the test in almost every Establishment Clause case decided over the past twenty-five years.[12]

However, in recent years several Supreme Court justices have expressed dissatisfaction with the *Lemon* test. For example, Justice O'Connor would replace the "purpose" prong by asking "whether government intends to convey a message of endorsement or disapproval of religion."[13] She would also substitute the "effect" prong by determining whether the government action has "the effect of communicating a message of government endorsement or the disapproval of religion."[14] In addition, she has articulated her disenchantment

9. Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Mem'l Church, 393 U.S. 440 (1969).

10. Lemon, 403 U.S. at 602.

11. Mueller v. Allen, 463 U.S. 388, 394 (1983) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

12. Among the exceptions, *see* Lee v. Weissman, 505 U.S. 577 (1992) (invalidating the practice of including non-denominational prayer at a public high school graduation because coercive participation in religious activity resulted from student attendance at this important event); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding a Nebraska statute which provided for legislative chaplains, on the basis of legislative practice).

13. Lynch v. Donnelly, 465 U.S. 668, 691 (1984).

14. *Id.* at 692.

with the entanglement prong of the test.[15] Chief Justice Rehnquist has also expressed displeasure with the *Lemon* test, but for somewhat different reasons.[16] He instead advocates the view that government may advance religious goals or religion so long as it demonstrates no preference among different religions.[17] He and former Justice White have joined with Justices Kennedy and Scalia, by individually and collectively expressing their wish to abandon the three part *Lemon* test.[18] They would ask, rather, whether government is directly supporting religious activity or coercing persons to engage in religious activity.[19] In actuality, the "endorsement" approach has been approved by a majority of the Supreme Court's justices, but never in a manner that explicitly rejected the *Lemon* test.[20] Thus, notwithstanding the fact that its future is in doubt,[21] the *Lemon* test is still good law.

First Amendment cases decided by the Supreme Court have primarily involved intrachurch property disputes,[22] state mandated aid to religious organizations,[23] attempts to conduct religious training or hold religious meetings in public schools[24] and government sponsored religious displays.[25] Deferring to church polity,[26] testing a dispute against statutory law,[27] and balancing the relevant religious and societal interests[28] are among the most utilized strategies that the Court has employed in determining the outcome of these disputes. The church-property cases are illustrative of the utilization of the excessive entan-

15. Aguilar v. Felton, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting) (questioning "the utility of entanglement as a separate Establishment Clause standard in most cases.").

16. Wallace v. Jaffree, 472 U.S. 38, 108 (1988) (Rehnquist, J. dissenting).

17. *Id.*

18. *See* Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

19. *See, e.g., id.* at 260; County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989).

20. Allegheny, 492 U.S. at 573 (holding that the display of a creche was violative of the Establishment Clause, but the display of a *menorah* next to a Christmas tree was held not to violate the Establishment Clause because the effect of the two symbol exhibit did not constitute an endorsement of either the Christian or Jewish beliefs).

21. *See* Lee v. Weissman, 505 U.S. 577, 587 (1992) (declining to reject the *Lemon* test, the Court stated "we do not accept the invitation of petitioners and *amicus*, the United States, to reconsider our decision in *Lemon v. Kurtzman.*").

22. *See, e.g.,* Serbian Eastern Orthodox Diocese v. Milovojevich, 426 U.S. 696 (1976).

23. *See, e.g.,* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

24. Engle v. Vitale, 370 U.S. 421 (1963).

25. *See, e.g.,* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

26. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

27. Jones v. Wolf, 443 U.S. 595 (1979).

28. Wisconsin v. Yoder, 406 U.S. 205 (1972).

glement prong of the *Lemon* test, notwithstanding the fact that these cases predated *Lemon.*

III. Judicial Interpretation of Religion Clauses Vis à Vis Intrachurch Property Disputes

The Supreme Court's application of the Establishment Clause's prohibition against resolving "controversies over religious doctrine and practice" precludes civil courts from permitting excessive government entanglement with religion.[29] Thus, judicial interpretation of or involvement with a religious law, doctrine, contract, or precept would constitute a First Amendment violation.

A well-established strategy which satisfies both the Establishment Clause mandate and *Lemon* requisites is the "neutral principles of law" approach which has been utilized by the Supreme Court in intrachurch property disputes:

> The neutral-principles method . . . requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the [document] incorporates religious concepts in the provisions relating to the ownership of property. If, in such a case, the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.[30]

This method employs objective standards of law in order to maintain a neutrality or detachment from religious beliefs or practices, which according to the Court, is mandated by the Establishment Clause.[31]

Standards to determine the scope of the First Amendment Religion Clauses were initially set forth by the United States Supreme Court over one hundred years ago. In *Watson v. Jones*,[32] the Court was asked to resolve an intrachurch property dispute between two fac-

29. Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Mem'l Church, 393 U.S. 440 (1969).

30. *See* Jones v. Wolf, 443 U.S. 595, 604 (1979) (describing Georgia's neutral principle of law approach).

31. *Id.*

32. 80 U.S. (13 Wall) 679 (1872).

tions of a local congregation. Relief was denied because intervention by a civil court would constitute a violation of the First Amendment's guarantee of religious liberty, free from government interference.[33] The Court reasoned that the members of the congregation had implicitly consented to be bound by the church governing body when the church was established.[34] It further noted that both the congregation's consent and the church's ability to structure its own government would be meaningless if rulings by the church were undermined by secular courts.[35] The Court therefore concluded that legal tribunals must accept a church's determination as definitive and irrevocable,[36] and that deference must always be given to church decision makers. Thus, the initial standard to determine whether a secular court could adjudicate an intrachurch dispute was a rigid one, and secular courts could in no way interfere with established church polity.

A similar issue was considered by the Supreme Court almost one hundred years later. In *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Memorial Church*,[37] First Amendment principles were again applied to an intrachurch dispute. In this case, the Court addressed the question of whether a state court, pursuant to state law, could determine if one faction of a church had abandoned established tenets of faith, thereby justifying possession of church property by the other faction. In reaching its decision that a civil court is prohibited from assessing aspects of church doctrine, the Court asserted that the Georgia law, which required a civil court to base its decision on the court's own interpretation of church doctrine and determination of the significance of that doctrine, was unconstitutional.[38] In effect, the Court recognized the state's interests in resolving property disputes, but at the same time reaffirmed the principle that secular courts must defer to church polity.[39]

Writing for the Court, Justice Brennan maintained that *Watson* permitted the Court no role in determining the ecclesiastical questions presented in the case.[40] However, he did assert that "there are neu-

33. *Id.* at 727-29.
34. *Id.* at 729.
35. *Id.* at 727-29.
36. *Id.* at 727.
37. 393 U.S. 440 (1969).
38. *Id.* at 445-46.
39. *See* Watson v. Jones, 80 U.S. (13 Wall) 679 (1872) (establishing that secular courts must defer to church polity).
40. Presbyterian Church v. Mary Elizabeth Hull Presbyterian Mem'l Church, 393 U.S. 440 (1969).

tral principles of law, developed for use in all property cases, which can be applied without 'establishing' churches to which property is awarded."[41] He further declared that an "exception" existed whereby "the narrowest kind of review of a specific church decision — i.e., whether that decision resulted from fraud, collusion or arbitrariness"— was allowed because it did not involve the Court in church doctrine.[42] According to the majority opinion, limited scrutiny of this nature would constitute an appropriate means of resolving these disputes so long as there is little or no entanglement in religious matters.[43]

The introduction of the "neutral principles of law" approach for resolving intrachurch property issues was carefully distinguished from litigation requiring courts to resolve controversies over religious doctrine and practice, which is implicitly prohibited by the First Amendment.[44] The resolution of this dispute adhered to the precepts established in *Watson,* and in doing so, reaffirmed the "neutral principles of law" rationale for adjudicating intrachurch property controversies, which could be utilized only in clearly defined circumstances.[45]

In 1979, the Supreme Court in *Jones v. Wolf* was again faced with a problem involving ownership of church property which arose following a schism in a local church.[46] In a five to four decision, the Court affirmed the Georgia Supreme Court's utilization of the "neutral principles of law" approach in resolving the dispute.[47] Writing for the majority, Justice Blackmun noted that a state court was free to resolve church property disputes as long as the court's review did not involve consideration of rituals, tenets of faith or doctrinal matters.[48] The Supreme Court in *Jones* extended the approach used in *Hull Church* by requiring deference to ecclesiastic tribunals with regard to cases involving religious doctrine or practice.[49]

In *Jones*, Justice Blackmun reasoned that the "neutrality principle" is completely secular in operation because it relies on objective concepts of property law.[50] He further hypothesized that by delineat-

41. *Id.* at 449.
42. *Id.* at 451.
43. *Id.*
44. *Id.*
45. *Id.*
46. 443 U.S. 595 (1979).
47. *Id.* at 602-04.
48. *Id.*
49. *Id.* at 603.
50. *Id.*

ing private rights and obligations, judicial decisions would merely reflect the parties' intentions.[51] Although the Court cautioned that a document containing religious concepts requiring interpretation must be made by an authoritative religious body, it simultaneously found that an evaluation of an ecclesiastical document is appropriate if it can be accomplished solely on secular terms.[52]

However, Justice Powell, writing for the dissent, expressed concern that the majority's neutral principle approach would bring about courts' increased involvement in church controversies,[53] and at the same time minimize constitutionally mandated deference to church bodies.[54]

The decision reached in *Jones* reflects the final stage in the evolution of the neutral principles of law concept. The Supreme Court determined that an intrachurch property dispute that was capable of being resolved by applying secular property law should be resolved as long as a court's review does not create involvement with prohibited religious matters.[55] Moreover, the Court held that this type of review does not result in a violation of the Establishment Clause.[56] Thus, the neutral principles of law approach emerged as a standard to be utilized in resolving intrachurch property controversies.

The exception first articulated in *Hull Church* and then extended in *Jones*, was later utilized in a breach of contract case. In *United Methodist Church v. Superior Court of California*,[57] the Court declined to expand the scope of First Amendment protections to a religious organization for a breach of contract in its management of retirement homes. In finding that a church was subject to the tradi-

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51. *Id.*

52. *Id.* at 603-04.

53. *Id.* at 614-17. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (providing a three prong test to determine if a statute is in violation of the Establishment Clause); *see also* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). In utilizing the three pronged test established in *Lemon*, Chief Justice Burger concluded that a statute mandating state financial aid to parochial schools fostered excessive entanglement between church and state and that the primary effect of the statute was to advance religion by directly subsidizing religious activities of parochial schools. *Id.* at 780, 798. *But see* Widmar v. Vincent, 454 U.S. 263, 273 n.13 (1983), where the Supreme Court held that when a state university makes its facilities generally available for student activities, it must also make them available to students who wish to engage in religious worship and teaching. The Court held that the Free Speech and Free Exercise Clauses required this result, even though the Establishment Clause must be taken into account. *Id.* at 273 n.13.

54. *Jones*, 443 U.S. at 614-17.

55. *Id.*

56. *Id.*

57. United Methodist Church v. Superior Court of California, 439 U.S. 1369 (1978).

tional minimum contacts analysis in determining the existence of personal jurisdiction, Justice Rehnquist refused to recognize the danger of judicial support of a religious belief where fraud or breach of contract was alleged.[58] In *United Methodist Church,* the Court again employed a neutral principles of law approach to a contract dispute and applied contract law theories rather than religious doctrine to resolve the conflict. Clearly, principles of secular law rather than religious law were applied to reach this decision.

Likewise, state courts have had to address questions of law regarding property, contracts, and arbitration between and among religious institutions and private parties. In adjudicating these disputes, many courts been guided by the Supreme Court's adherence to the neutral principles of law approach.

IV. New York State Enforcement of Religious Marriage Contracts: Intersection of Secular and Religious Law

Similar to federal courts, state civil courts, in the context of enforcing contracts, are called upon to apply and at times interpret laws established by religious entities.[59] Contracts, particularly prenuptial

58. *Id.* at 1372-73. *See* Ira M. Ellman, *Driven from the Tribunal: Judicial Resolution of Church Disputes*, 69 CAL. L. REV. 1378, 1382 (1981) (commenting that some internal religious disputes such as contract disputes may be secular in nature).

59. Note, *Enforceability of Religious Law in Secular Court—It's Kosher, But Is It Constitutional?* 71 MICH. L. REV. 1641 (1973). There are many examples of the utilization of ecclesiastic or Jewish Law to resolve disputes in secular courts. *See, e.g., In re* Juan R., 374 N.Y.S.2d 541, 547-48 (N.Y. Fam. Ct. 1975) (relying upon a Talmudic principle of construction to conclude that a statute which empowered the court to award custody, implicitly included the power to award visitation rights to a putative father who was not seeking custody of his child. "[T]he right to adjudicate and award custody must certainly include the right to independently adjudicate visitation without the pendency of a prime proceeding for custody."): *see also* Garrity v. New Jersey, 385 U.S. 494, 497-98 n.5 (1967) (using a reference to a Halakhic ruling that "discards confessions in toto . . . because of its psychological insight and its concern for saving man from his own destructive inclinations" to interpret the privilege against self-incrimination); Miranda v. Arizona, 384 U.S. 436, 458 n.27 (1966) (observing that the "roots" of the privilege against self-incrimination "go back to ancient times" and noting that the Maimonides discovered an analogue to the privilege grounded in the Bible); *In re* Mary Agosto, 553 F. Supp. 1298, 1305 (D. Nev. 1983) (holding that the child of a reputed mobster was immune from testifying about his father's activities based upon a Biblical proscription against hearing testimony adverse to a kinsman); Wilson v. Beame, 380 F. Supp. 1232, 1239 (E.D.N.Y. 1974) (utilizing Talmudic law in its ruling that to require prisoners to pray alone when communal prayers were available was effectively a serious deprivation of religious freedom: "It is a principle of Talmudic law that it is preferable to pray communally rather than alone .... '[A] person should associate himself with the congregation and never recite his prayers in private when he is able to pray with the congregation.'") (citation omitted). *See generally* Laurence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From* Avitzur *To the Get Statute*, 50 BROOK. L. REV. 229 (1984) (discussing one state's interpretation of laws established by religious entities concerning marriage).

agreements, often include references to religious law or require implementation of secular laws which use religious terminology. One particular type of issue which has been focused upon by New York courts is the enforceability of *Ketubot*; Jewish marriage contracts. Although disputes arising from these religious antenuptial agreements are not exclusively secular in nature, these agreements have been enforced and implemented by the state's courts. Similar to the Supreme Court's decision in *United Methodist Church*, courts' adjudication of these types of disputes have been based upon the secular aspects of the contracts. Moreover, with few exceptions, the issues concerning *Ketubot* and ecclesiastical divorces or *Gets* have been raised almost exclusively in New York.[60]

The *Ketubah* (singular of *Ketubot*) or Jewish marriage contract, a religious prenuptial agreement, serves to delineate the obligation of parties to a marriage for the duration of that marriage.[61] It was instituted during Talmudic times for the purpose of protecting a woman from the inequities of the law. In ancient days, women were considered to be property or chattel, and marriage constituted a form of barter between the bride's family and the groom.[62] A sum of money was usually provided for in the *Ketubah* to be given to the wife in case the marriage resulted in a divorce.[63] The marriage contract also included a listing of procedures to protect the wife from the possibility of her husband obtaining a unilateral divorce.[64]

Talmudic divorce law was, and is, more favorable to a husband. As a result, *Ketubot* often contain provisions whereby both parties to a marriage agree to bring any marital dispute before a Jewish tribunal known as a *Bet Din*. The need for this type of safeguard becomes apparent when one learns that only a husband may grant a *Get*, an ecclesiastical divorce, under Orthodox Jewish Law.[65] Even if a couple obtains a civil divorce, a religious divorce is not permitted unless the husband willingly gives his consent.[66] If the husband refuses to submit marital disputes to the authority of a *Bet Din* or does not consent to a

60. Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From* Avitzur *to the* Get *Statute*, 50 BROOK. L. REV. 229, 234 n.16 (1983).

61. 2 ENCYCLOPEDIA JUDAICA 432 (1971); 11 ENCYCLOPEDIA JUDAICA 840 (1971).

62. IRWIN H. HAUT, DIVORCE IN JEWISH LAW AND LIFE 18 (1983).

63. *Id.*

64. *Id.*

65. 6 ENCYCLOPEDIA JUDAICA 130 (1971).

66. If consent is not given willingly, the *Get* is not considered valid. Therefore, *Gets* acquired in New York are not always recognized as valid by Halakhic authorities. *See* HAUT, *supra* note 62, at 19, 24 (1983).

religious divorce, a wife is not free to remarry.[67] She is considered an *Agunah*, which means she is neither married nor divorced.[68]

The harshness of Talmudic laws governing rights relating to a woman's marriage clearly accounts for the phenomenon of civil courts being presented with disputes involving enforcement of the terms of a Jewish marriage contract. Without the assistance of secular courts, a devout Orthodox or Conservative Jewish woman, who is recognized as an *Agunah* or who is considered to have achieved the status of *Agunah* by her denomination's rabbinic authorities, is not free to remarry or bear children legitimately.[69]

By virtue of her religious beliefs, as well as the circumstances in which she finds herself, an *Agunah* is in limbo. Rights which would otherwise be guaranteed by both federal and state constitutions are not available to her.[70] Moreover, application of secular law would reflect that not only has she been deprived of her right to freely exercise her beliefs, but she has also been deprived of her freedom of association, right to privacy, right to raise her children in the manner she sees fit, and right to the equal protection of the law.[71] It is therefore not surprising that a woman faced with these deprivations should seek to vindicate her rights by appealing to secular courts. This is particularly true in cases where a woman's inherent rights and freedoms have been guaranteed by both parties to a contract, even if that contract is in the form of a *Ketubah.*

To determine whether New York courts have correctly decided cases that involve or rely upon Jewish Law for their resolution, the mandates of the Free Exercise and Establishment Clauses must be applied. Prior to the clear articulation of judicial policy regarding the enforcement of Jewish marriage contracts by the New York Court of Appeals in 1983,[72] two contrasting approaches were employed by the state's courts. The first approach utilized in adjudicating these types of religious issues was based upon the state's statutory scheme.[73] However, the second approach was premised upon secular courts' in-

67. *Id.* at 18

68. *Id.*

69. *Id.* Orthodox Jews as well as many Conservative Jews adhere strictly to Orthodox Jewish Law—*Halacha.*

70. *Id.*

71. *Id.*

72. *See* Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983).

73. *Id.*

terpretation of religious doctrine and law.[74] This section will trace the development of these two methodologies in terms of controversies which have arisen and the means used to resolve them.

In 1926 the Appellate Division of the New York Supreme Court recognized a *Ketubah* to be a civilly enforceable contract.[75] The court in *Hurwitz v. Hurwitz* distinguished those provisions in the *Ketubah* that referred to the laws of Moses and Israel from those entitling a widow to possession of the marital residence.[76] In upholding the validity of the marital contract, the court instructed the Special Term[77] to utilize state law to test provisions of the *Ketubah* relating to the widow's property rights.[78] If the provisions were found to be consistent with the law, then the intentions of the parties to the contract were to be enforced. The *Hurwitz* court considered the *Ketubah* to be a "simple agreement or contract . . . made and executed in the State of New York,"[79] which was therefore subject, as are all such contracts, to the laws of the state. In *Hurwitz*, there was no attempt to determine issues which arose from the religious provisions of the contract.

Application of the *Lemon* test for the purpose of evaluating the *Hurwitz* technique of applying contract law principle to resolve the dispute reveals that there was no attempt to advance or inhibit religion or religious practice, no judicial entanglement with religion or religious doctrine, and therefore no violation of the Establishment Clause. Thus, the *Hurwitz* decision reflected the first approach discussed in this section, whereby a state court applies secular law to determine the outcome. However, this type of approach was not always used by the state's judiciary.

Almost fifty years later, the New York Supreme Court, in *Wener v. Wener*,[80] had to decide whether to award child support payments in a divorce action between a husband and wife. In *Wener*, the couple's marriage had been solemnized in an Orthodox Jewish ceremony which included the signing of a *Ketubah*.[81] Subsequently, they lived

74. *Id.*

75. *See* Hurwitz v. Hurwitz, 215 N.Y.S. 184 (App. Div. 1926).

76. *Id.*

77. Special Term is the lower intermediate New York court from which this case was appealed.

78. *Hurwitz*, 215 N.Y.S. 184 (N.Y. App. Div. 1926).

79. *Id.* at 188.

80. Wener v. Wener, 301 N.Y.S.2d 237 (N.Y. Sup. Ct. 1969), *aff'd*, 312 N.Y.S.2d 815 (N.Y. App. Div. 1970).

81. *Id.*

together for six years before deciding to adopt a child.[82] Prior to their separation, the child resided with the couple for thirteen months.[83] However, adoption arrangements had not been completed in accordance with the usual requirements of New York law.[84] Based on the unique circumstances of the case, the court found that the husband was required to support the child.[85]

The award of child support to the wife was premised on two alternative theories. First, the court determined that, based on the couple's conduct, an implied agreement to adopt the child existed and the court was therefore "required" to find that the husband had the primary duty to provide support.[86] In the alternative, the court determined that the *Ketubah* bound the husband to support the child, regardless of whether or not there was an agreement to adopt.[87] In its decision, the court noted that the *Ketubah*, written in Hebrew and English "betrothed the parties according to the laws of Moses and Israel," and accordingly the husband made himself "responsible for all those obligations as prescribed by . . . religious statutes."[88] Relying solely on Jewish legal and Biblical sources, the court stated that "[u]nder the laws of Moses and Israel, the head of every household who takes a child into his household . . . is as liable for the support of such infant as though it were his own."[89]

The Appellate Division affirmed the trial court's holding, solely on implied contract and equitable estoppel grounds,[90] declaring that

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82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 241-42 (reflecting the doctrine of virtual adoption which is currently recognized in New York).
87. *Id.* at 240.
88. *Id.*
89. Id. at 240. *See* THE TALMUD. The Jewish legal and Biblical sources referred to by Judge Multer in his decision included a passage from the Book of Ruth: "We are told that Ruth bore a son and that Naomi brought him up and he was called after her name and forever after he was known as Naomi's son." (IV:17). The Talmud was cited for the principle that: "Whoever brings up an orphan in his home, scripture ascribes it to him as though he had begotten the child." (Sanhedrin, p. 19).

The Court also referred to the Book of Psalms for the fact that the sons of Jacob were sustained by Joseph and therefore they were called after his name, that is Joseph's, and were thereafter known as the sons of Jacob and Joseph (LXXVI:16), and to Maimonides for the proposition that, "Even if a child is a pagan, he is a member of the family with the rights and duties pertaining to such membership." (M.T. Inheritance II:14).

Finally, the Book of Leviticus was quoted for the passage: "A stranger that sojourneth with you shall be as the home-born among you and thou shalt love him as thyself." (19:34). *See also* Allan J. Topol, *Jewish Law: A Misapplication in New York?*, 4 ISRAEL L. REV. 578 (1969).
90. *Wener*, 312 N.Y.S.2d at 818.

"New York cannot apply one law to Jewish residents and another law to all others."[91] The appellate court reasoned that the lower court's opinion raised problems regarding separation of church and state matters as well as equal protection issues.[92]

The *Wener* trial court's interpretation of and reliance on Jewish Law is, without question, adverse to the neutral principles of law approach established by the Supreme Court. Applying the test set forth in *Lemon v. Kurtzman*,[93] to evaluate the separation of church and state issues raised by *Wener*, one could argue that the trial court simply intended to effectuate the parties' contractual promises, a purely secular purpose. It might, therefore, be concluded that the first two prongs of the *Lemon* test for establishment of religion were not met because the court's action neither advanced nor inhibited religion. But, the third prong of the test was clearly satisfied. There is no doubt, as was made clear by the trial court's articulation of its reasoning and the appellate court's rejection of that reasoning and affirmance, that by delving into and applying Jewish Law, the lower court became excessively entangled in Jewish practice and doctrine,[94] thereby violating the third prong of the *Lemon* test. However, it is also obvious that the appellate court in its affirmance, firmly placed its stamp of disapproval on the lower court's breach of First Amendment principles. In its ruling the Appellate Division explicitly demonstrated its intention to adhere to the constitutional standards which would ultimately be known as the *Lemon* test.[95]

For the next several years, New York State courts continued to enforce religious marital agreements by using principles of contract law to resolve controversies arising from *Ketubot*. For the most part, the cases followed a similar pattern with little variation, and thus averted constitutional violations. For example, shortly after a decision was rendered in the *Wener* case, the Appellate Division adjudicated a dispute involving a husband's breach of promise to obtain a Jewish

91. *Id.* at 819; *see also* Topol, *supra* note 89.

92. *Wener*, 312 N.Y.S.2d at 819; *see also* Topol, *supra* note 89. The author attempted to dispel the Appellate Division's concerns relating to a violation of the Equal Protection Clause: "the *Ketubah* . . . was not imposed by New York law on all of the State's Jewish residents, nor did New York law make it impermissible for 'all others' to employ it. The trial court did not rule 'that a non-Jew who entered into a similar contract would not be bound by the substantive provisions referring to Jewish Law." Meislin, *Jewish Divorce in American Courts*, 16 J. FAM. L. 19, 33 (1977-78).

93. Lemon v. Kurtzman, 463 U.S. 602 (1971).

94. *Wener*, 312 N.Y.S.2d at 818.

95. *Id.*

divorce. In *Margulies v. Margulies*,[96] the court held that the husband's incarceration for contempt of court for failure to comply with a stipulation to obtain a *Get* during a civil divorce action was invalid. However, the court approved the imposition of fines for the husband's continued refusal to honor the stipulation.[97] Both the majority and dissent acknowledged that a Jewish divorce could be granted only if it had been willingly given.[98] In the case at bar, the husband had agreed to give his wife the *Get* in the event of dissolution of the marriage.[99]

Relying on principles of contract law in reaching its decision, the *Margulies* court implicitly compelled specific performance by giving the husband the option to pay a fine or comply with the stipulation to obtain a *Get*.[100] However, notwithstanding the court's disclaimer that it was merely enforcing a contractual promise, it was also involved in interpreting and possibly advancing Jewish Law, thus fulfilling the third prong of the *Lemon* test. In addition, the penalty to which the husband was subjected, at the very least, had a chilling effect on his Free Exercise rights. On the other hand, taken at face value, the court's ruling reflected the neutral principles of contract law.

Similarly, the New York Family Court in *Rubin v. Rubin*,[101] held that a promise to obtain a *Get* that had been incorporated into a separation agreement made the wife's consent to a religious divorce a condition precedent to her receiving support and alimony payments.[102] As a result of the wife's noncompliance with the contractual language, the court permitted the husband to withhold support payments until his estranged wife consented to secure a *Get*.[103] In its opinion the court painstakingly detailed the history and religious significance of both the *Ketubah* and *Get*, but maintained that its utilization of religious documents did not constitute a violation of the First Amendment's Religion Clauses.[104] The *Rubin* court distinguished its holding from the Supreme Court's ruling in *Watson v. Jones*,[105] noting that its

96. Margulies v. Margulies, 344 N.Y.S.2d 282 (N.Y. App. Div. 1973).
97. *Id.*
98. *Id.* at 284-85.
99. *Id.*
100. *Id.*
101. Rubin v. Rubin, 348 N.Y.S.2d 61 (N.Y. Fam. Ct. 1973).
102. *Id.*
103. *Id.* at 68. *But see* Margulies v. Margulies, 344 N.Y.S.2d 282 (N.Y. App. Div. 1973) (stating that Jewish divorce can only be granted upon the representation that it is sought by the husband of his own free will).
104. *Rubin*, 348 N.Y.S.2d at 68.
105. *Id.*

decision was merely a recognition of the parties' intentions and expectations under a separation agreement, rather than interference with a decision reached by a religious tribunal.[106]

In *Waxstein v. Waxstein*,[107] the Special Term reached a similar result in enforcing a promise contained in a separation agreement to compel a husband to grant his wife a *Get.* In reaching its conclusion, the court reasoned that the agreement was a lawful contract and therefore should be enforced to carry out the intentions of the parties.[108] The opinion also pointed out that specific performance was appropriate if the remedy at law for breach of contract was inadequate.[109]

Rubin, Margulies, and *Waxstein* exemplify the approach New York State courts applied to the enforcement of *Ketubot* in the early 1970's. The essence of the approach was to avoid obvious excessive entanglement in religious doctrine, but nevertheless adjudicate disputes by relying on the neutral principles of law concept first articulated in *Hull Church* and then expanded and refined in *Jones*. In this way, the courts were able to preserve the mandated neutrality of the First Amendment's Religion Clauses as well as ensure the rights guaranteed by that amendment.

However, in 1976 the Special Term, presented with a unique set of *Ketubot*-related issues, chose to interpret and rely upon *Halakhic* law to reach a decision rather than use the heretofore established "neutral" approach. In *Schwartzman v. Schwartzman*,[110] a former husband sued his ex-wife who had been awarded custody of the couple's four children. The ex-husband sought to enjoin his former spouse from attempting to change the religion of the couple's offspring and require her to provide a Jewish religious education for the three oldest children.[111]

In *Schwartzman*, the wife, who had been raised as a Roman Catholic, married a Jewish man during the early stages of her pregnancy.[112] At the time of the marriage, the woman agreed to and did convert to

106. *Id.*

107. Waxstein v. Waxstein, 395 N.Y.S.2d 877 (N.Y. Sup. Ct. 1976), *aff'd*, 394 N.Y.S.2d 253 (N.Y. App. Div. 1977).

108. *Id.* at 879-81.

109. *Id.* at 881.

110. Schwartzman v. Schwartzman, 388 N.Y.S.2d 993 (N.Y. Sup. Ct. 1976).

111. *Id.* at 994.

112. *Id.* at 995.

Judaism.[113] The conversion, which had been performed by a Reform Jewish Rabbi, conformed to Reform Judaism's conversion requirements.[114] Following the divorce, the former wife remarried a Roman Catholic man, disavowed Judaism, and readopted Catholicism.[115]

Utilizing traditional Orthodox Jewish Law to reach its decision, the *Schwartzman* court determined that the husband could not claim a Jewish birthright for his children.[116] According to the court's interpretation of *Halachah*, a child's religion follows that of his mother.[117] The court further determined that Jewish Law requires that a person first undergo immersion in the *Mikvah*, a ritual bath, in order to effectuate the conversion to Judaism.[118] Referring to and applying *Halachah*, the body of Jewish Law adhered to by the Orthodox branch of Judaism, the court determined that Mrs. Schwartzman had "never attained the status of a Jewish woman which would entitle her progeny to claim a Jewish heritage by birth."[119] As a result, the court held that the mother was not required to raise the children in the Jewish faith.[120]

Prior to *Schwartzman*, most courts asserted that agreements entered into with the consent of the parties or in accordance with principles of secular law were binding upon the parties. That is to say, an agreement entered into freely and willingly was considered to be an enforceable contract. However, according to *Schwartzman*, "great concern" for the children's welfare was the rationale for utilizing so unusual an approach to settle the dispute between private parties,[121] rather than applying well established constitutional precedents.

In actuality, issues relating to religious conversion, the subject addressed and interpreted by the court, are by no means easily resolved. Unlike the Orthodox branch of Judaism which determines that a

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113. *Id.*
114. *Id.*
115. *Id.* at 995.
116. *Id.* at 996.
117. *Id.* Notwithstanding that Mrs. Schwartzman's conversion conformed to Reform Jewish requirements, was performed by a Reform Rabbi, and Reform Judaism acknowledges that patrilineal descent is a valid means of determining a child's religion, the court relied upon Orthodox Jewish Law in its opinion. *Id.*
118. *Id.* at 994-96.
119. Schwartzman v. Schwartzman, 388 N.Y.S. 2d. 993, 996 (N.Y. App. Div. 1992) (noting that rabbinic authority supports the proposition that a bad faith conversion is a nullity).
120. *Id.* at 999-1000.
121. *Id.* at 996 (stating that the court was compelled to seek the guidance of religious authorities "not for the purpose of disposing of the issues . . . which are wholly secular, but rather for the determination of the validity of the children's rights.").

child's religion is ascertained by its mother, the Reform branch recognizes both patrilineal and matrilineal descent and relaxes the requirement of ritual immersion.[122] The Conservative and Reconstructionist branches of Judaism are currently reevaluating their respective policies with regard to this sensitive area. Overstepping its bounds and discounting intradenominational differences, the *Schwartzman* court stated that Orthodox law or *Halachah* takes precedence over Reform law. This assumption was based on the premise that Reform Jewish authorities "follow the spirit of *Halakhic* Law," but have no comparable body of formal law.[123]

In *Schwartzman*, the issue was whether it was constitutionally permissible for a judge to interpret the elements or nature of *Halakhic* precepts, or, whether this type of judicial activism violated Establishment Clause principles. Again, employing the *Lemon* test, it can be demonstrated that by failing to show deference to a religious tribunal and impermissibly interfering with the function and jurisdiction of a religious tribunal, the *Schwartzman* court violated well-established First Amendment principles. Despite the court's statement that it was required to ensure the welfare of the couple's children and that it was acting in their best interests, the *Schwartzman* decision relied on the court's interpretation of Jewish Law rather than on the language and terms of the marriage contract.

It is inexplicable that a court would choose to utilize Jewish Law in the manner in which the *Schwartzman* court did. There is little question that the decision violated at least two prongs of the *Lemon* test for establishment and probably a third prong as well — that of having the primary effect of advancing the doctrine of one denomination at the expense of another, that of achieving no legitimate secular purpose, and that of becoming impermissibly involved with religion by deciding a doctrinal dispute within Judaism. It appears that the *Schwartzman* court's reasoning was violative of both the *Lemon* and endorsement tests, contrary to the neutral principles of law approach, and antithetical to the First Amendment's religion clauses.

The *Wener* and *Schwartzman* opinions represent the extremes to which the courts would go to enforce agreements. In contrast, the precedent setting *Hurwitz* approach — which was followed by *Rubin*, *Margulies*, and *Waxstein* — viewed the *Ketubah* as a civilly enforcea-

122. *Id.*
123. *Id.*

ble contract and accordingly applied secular laws and principles to determine the validity of an agreement.

Until the early eighties, these two distinct and conflicting approaches were applied by New York courts to enforce Jewish marital contracts. Thus, the dilemma faced by the New York Court of Appeals, the only state court of last resort to have rendered a decision in this area of law,[124] was perhaps best expressed in *Rubin v. Rubin*.[125] In that case, the court acknowledged that although most secular courts would be reluctant "to delve into religious law to which there is no definitive guide in the usual legal sources," some secular "courts have not hesitated to enforce the rights of religious groups."[126]

The New York Court of Appeals, cognizant of the First Amendment principles established by the Supreme Court in *Lemon* and *Jones* and aware of the duality of the state judiciary's approach to these issues, formulated definitive guidelines for the purpose of providing the state's judiciary with acceptable constitutional parameters for enforcing religious agreements. The *Avitzur* court, employing principles of contract law, compelled the specific performance of a promise to appear before a religious tribunal which was included in a Jewish marriage contract.[127] Judge Sol Wachtler, then Chief Judge, stated that he had reached this conclusion by applying neutral principles of law, and interpreting the promise to participate in the religious judicial proceeding to be nothing but a "secular obligation" to which the defendant was "contractually bound."[128] The court found that no interference with religious authority would result and that no doctrinal issue required resolution or adjudication as a consequence of its enforcement of a *Ketubah* inasmuch as it was accomplished in purely secular terms.[129]

Avitzur involved a woman who had obtained a civil divorce and was seeking an order to compel her former husband to appear before a Jewish religious tribunal which was empowered to issue a Jewish divorce decree.[130] The wife and husband had been married in a Con-

124. Lower state courts have ruled that enforcement of marital contracts would not violate First Amendment rights. *See, e.g.*, Scholl v. Scholl, 621 A.2d 808 (Del. Fam. Ct. 1992); *In re* Goldman, 554 N.E.2d 1016 (Ill. App. Ct. 1990); Minkin v. Minkin, 434 A.2d 665 (N.J. Super. 1981).

125. 348 N.Y.S. 2d 61 (N.Y. Fam. Ct. 1973).

126. *Id.*

127. Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983).

128. *Id.* at 139.

129. *Id.*

130. *Avitzur,* 446 N.E.2d at 136.

servative Jewish ceremony.[131] Prior to their marriage, both parties had signed a *Ketubah* providing that either party would appear before a *Bet Din* at the request of the other for the purpose of being advised and counseled in matters concerning their marriage, including the granting of a *Get*.[132] The defendant husband had filed and received a civil divorce.[133] However, his former wife claimed that the civil divorce was not sufficient to allow her to remarry because, according to traditional Orthodox Jewish Law, she could not do so until a *Get* was granted by the *Bet Din*.[134] Mrs. Avitzur asked the court for relief in the form of a declaratory judgment and an order to compel her former husband to appear before the religious tribunal, as he had promised he would do.[135] On the other hand, Mr. Avitzur argued that the court lacked subject matter jurisdiction because any grant of relief would effectuate a constitutionally impermissible entanglement with religious matters.[136]

New York's Special Term rejected the defendant husband's argument, noting that the plaintiff wife sought only to enforce the defendant's promise to appear before the *Bet Din* and therefore the grant of relief did not constitute excessive judicial and religious entanglement.[137] The Appellate Division modified the ruling, holding that liturgical agreements are unenforceable where the state, having granted a civil divorce, has no further interest in the marital status.[138] However, the New York Court of Appeals, in a four to three decision, reversed the Appellate Division and held that nothing in the law or public policy prevents judicial recognition and enforcement of the secular terms of a religious marriage agreement.[139]

Judge Wachtler, writing for the majority, reasoned that the parties, in signing a *Ketubah,* entered into a contract which formed the

131. *Id.* at 137.

132. *Id.* A Hebrew/Aramaic version and an English version of the *Ketubah* were signed. According to the English version the parties agreed as follows: "[W]e, the bride and bridegroom . . . hereby agree to recognize the *Beth Din* of Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition . . . and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish Law of marriage throughout his or her lifetime . . . ." *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 140.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 138. The Special Term also denied the plaintiff's motion for summary judgment because the *Ketubah* raised factual issues which required a plenary trial. *Id.* at 137.

basis of their marriage.[140] Commenting that agreements which refer marital matters to arbitration are not inherently invalid, he analogized the contractual obligations contained in the *Ketubah* to a secular antenuptial agreement clause calling for arbitration of a dispute.[141]

Furthermore, the *Avitzur* court denied that the religious character of a *Ketubah* was a constitutional barrier to the court's ability to grant the relief requested by the plaintiff.[142] In granting the remedy requested, the court relied upon the Supreme Court's rationale in *Jones v. Wolf*, holding that any resolution of religious disputes may be adopted if it applied neutral principles of law consistent with constitutional limitations.[143] Concluding that no consideration of religious doctrine was required in *Avitzur*, the court held that enforcement of the marriage contract was not violative of the Constitution.[144]

In contrast, the *Avitzur* dissent asserted that a *Ketubah* is "indisputably in its essence a document prepared and executed under Jewish Law and tradition."[145] Disagreeing with the majority opinion that one or more "discrete secular obligations" may be "fractured out of the [*Ketubah*],"[146] the dissent contended that the respective parties to the *Ketubah* interpreted its terms and enforceability differently, and that resolution of the relevant issues arising from these differences would "necessarily entail examination of Jewish Law and tradition."[147] Determining that "the grant of relief to the plaintiff was in violation of the constitutional prohibitions against entanglement of secular courts in matters of religious and ecclesiastical content,"[148] the dissent asserted that the fine line between church and state had been crossed.

Avitzur unquestionably established that the neutral principles of law approach to the enforcement of Jewish marriage contracts is the constitutionally appropriate and viable standard for review. The majority opinion viewed this standard as a simple adaptation and application of the First Amendment principles set forth by the Supreme Court. By employing this approach, the Court of Appeals effectively

140. *Id.*
141. *Id.* at 138-39.
142. *Id.* at 139.
143. *Id.*
144. *Id.*
145. *Id.* at 140.
146. *Id.*
147. *Id.*
148. *Id.*

rejected the extensive reliance on religious law reflected in the *Wener* and *Schwartzman* decisions. The rationale also represented a rejection of the *Avitzur* dissent's perspective that judicial review of a religious document was impermissible because it constitutes excessive entanglement between church and state.[149]

Although the dissent's concerns regarding the third prong of the *Lemon* test may have some validity, these concerns are arguably invalid with regard to a court's directing a defendant to honor an obligation that had previously been accepted. In *Avitzur*, the decision was a narrow one and merely required enforcement of a contractual obligation. It did not appear to involve consideration of issues arising from religious doctrine. Clearly, the *Avitzur* decision established the authority of state civil courts to enforce, at a minimum, the secular portions of a religious contact.

Similarly, in applying the endorsement test to *Avitzur*, one would safely conclude that the utilization of objective principles of contract law by the *Avitzur* court neither communicated nor effectuated endorsement of religious doctrine or practice.

V. Analysis of the New York Approach

The New York judiciary has, for all intents and purposes, discounted the argument that a grant of relief which compels a spouse to grant or accept a *Get* is violative of the Free Exercise and Establishment Clauses of the First Amendment. However, courts have been very cautious to clearly articulate neutral principles of law to avoid the appearance of excessive entanglement in religious matters.[150]

Violations of the Free Exercise Clause have rarely been alluded to in enforcing religious marital agreements. The prevailing view is that a court order compelling specific performance of previously agreed-to provisions of a contract merely requires an individual to perform that which had been willingly agreed to. A court issuing an order of this type would neither be forcing a person to exercise or forego the exercise of his or her religious beliefs, nor be coercing participation in any religious practice.

Parties to a *Ketubah* are considered parties to a contract who have entered into an agreement freely and willingly; and as with secu-

149. Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983), *cert. denied*, 464 U.S. 813 (1983).

150. Excessive entanglement is prohibited by the third prong of the *Lemon* test. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

lar contracts, mutual consent is required in *Ketubot.* A positive way of looking at the effect of the enforcement of these agreements is that a spouse who seeks court assistance in securing a *Get,* and obtains that assistance, is actually being given the opportunity to freely exercise his or her religious beliefs.

Get cases, as evidenced by the previously discussed opinions and dissents, are likely to create Establishment Clause rather than Free Exercise Clause problems. The proscription of secular court involvement in religious doctrinal issues, exemplified by the church-property cases discussed in Section II, does not allow courts to intrude upon the function or jurisdiction of a religious tribunal. However, a secular court can apply neutral principles of law to resolve disputes so long as the court's review does not involve consideration of doctrinal matters, rituals, or tenets of faith.[151]

In the precedent setting case of *Avitzur v. Avitzur,*[152] the New York Court of Appeals held that according to the criteria established by the Supreme Court of the United States, judicial enforcement of a *Ketubah* was permitted to the extent that it could be accomplished in purely secular terms.[153] Though appealed to the United States Supreme Court, *certiorari* was denied and the *Avitzur* decision remains intact.[154]

The concepts espoused in *Avitzur* are, in actuality, a consolidation of the approaches utilized in several lower courts' decisions. Two glaring exceptions to this statement are the *Wener* and *Schwartzman* opinions, which were implicitly condemned by the *Avitzur* court. Both decisions referred to Jewish Law and improperly relied on *Halakhic* principles in determining the rights of each of the parties involved in the respective disputes.[155] However, the *Wener* holding was affirmed only on implied contract and equitable estoppel grounds.[156] Moreover, in affirming the decision, the appellate court expressed strong disapproval of the lower court's encroachment on religious doctrinal

151. Jones v. Wolf, 443 U.S. 595, 602 (1979); *see also* United Methodist Church v. Superior Court of California, 439 U.S. 1369 (1978) (Rehnquist, J.) (commenting that it may also be appropriate for a secular court to resolve religious issues where fraud or breach of contract is alleged).

152. 446 N.E.2d 136 (N.Y. 1983).

153. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

154. *Avitzur,* 446 N.E.2d at 136.

155. *Id.*

156. *Id.*

matters.[157] The *Schwartzman* case, in contrast, was not appealed and therefore never reviewed.

Subsequent to *Avitzur*, New York's judiciary adhered to the objective approach established by the New York Court of Appeals when addressing religion based issues, particularly those faced by Orthodox Jewish women upon dissolution of their marriages.[158] However, twenty five years after *Avitzur* was decided, an intermediate appellate court affirmed the trial court's decision in *Schwartz v. Schwartz*,[159] granting the plaintiff wife a civil divorce despite the fact that her defendant husband was not obligated under the state's Domestic Relations Law to give his former wife a *Get*.[160] The *Schwartz* court reasoned that in ascertaining distribution of marital property, the husband's refusal to grant a *Get* should be considered as one of the thirteen factors weighed in a determination of equitable relief.[161] Alluding to the "power differential" created by a husband's withholding of a religious divorce or refusal to appear before a religious tribunal, both the trial and appellate courts in *Schwartz* concluded that the resulting unequal bargaining power should be taken into account.[162]

Almost eighteen months later, after a hearing was held to review economic issues, the same court found that the husband had forfeited his claim to any share of the appreciation of the wife's stock in a family held business because of his earlier refusal to grant his wife a *Get*.[163] Asserting that this decision was based on the husband's "obstinacy and pressure to extract financial concessions"[164] from his wife rather than on religious factors, the judge relied on secular contract principles in asserting that it was obvious that the defendant had come to court with "unclean hands."[165]

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157. *Id.*

158. *See* Golding v. Golding, 581 N.Y.S.2d 4 (App. Div. 1992) (invalidating separation agreement because husband's invocation of power to grant wife *Get* resulted in an unfair agreement which was reached through his exploitation of power differential); Perl v. Perl, 512 N.Y.S.2d 372 (App. Div. 1987) (holding that where either spouse invokes an oppressive misuse of the religious power, the economic bargain which follows is subject to review and revision); Tal v. Tal, 601 N.Y.S.2d 530 (Sup. Ct. 1993) (holding that notwithstanding the court's obligation to refuse to resolve controversies touching upon religious concerns, a separation agreement was invalid because it was fraudulent in its inception).

159. 1652 N.Y.S.2d 616 (App. Div. 1997).

160. *See* N.Y. DOM. REL. LAW § 253(6). This subsection requires only the plaintiff to file a removal of barriers statement. It does not impose the same requirement on the defendant. *Id.*

161. Schwartz v. Schwartz, 583 N.Y.S.2d 716 (Sup. Ct. 1992).

162. *Id.* at 719.

163. *Id.*

164. *Id.* at 717.

165. *Id.* at 719.

It is highly unlikely that the *Schwartz* decision can survive either the *Lemon* or endorsement test. By interpreting the catch-all clause of the Equitable Distribution Law[166] to include the withholding of a *Get* or failure to appear before a *Bet Din*, the *Schwartz* court established precedent for decreasing a husband's share of marital assets, and/or increasing the amount of maintenance he must pay, based on his refusal to grant his wife a *Get*. Application of the catch-all clause, as interpreted by *Schwartz*, has the potential to implicitly coerce a defendant husband to grant his former wife a *Get*.[167] Although the *Schwartz* court would assert that it was merely applying contract law in order to equalize the parties' bargaining power, the penalty it imposed upon the husband constituted an impermissible advancement of, and excessive entanglement with, religious practice and thereby violated the second and third prongs of the *Lemon* test. The ruling also communicated and probably effectuated endorsement of a particular religious practice. Furthermore, the *Schwartz* court's attempt to resolve religious matters was probably an impermissible intrusion in religious matters by the government. There is also a distinct possibility that a husband's First Amendment right to freely exercise his religious beliefs would be impaired by the imposition of coercive economic sanctions.

VI. New York's "*Get*" Statutes

Later in the same year that *Avitzur* was decided, and perhaps as a reaction to the concerns raised by that case, the New York State legislature attempted to alleviate the social and religious problems faced by individual Jewish women whose husbands refuse to grant them religious divorces or vindictively use the promise of religious divorces or *Gets* as a form of economic coercion. The New York State Legislature's alternative secular solution to the *Get* problem was the enactment of N.Y. DOM. REL. LAW § 253(2) (McKinney Supp. 1983), better known as the *Get* Statute.[168] The statute, the first of its kind in

166. N.Y. DOM. REL. LAW § 236 B(5)(d)(13) (McKinney 1986) (including any other factor which the court shall expressly find to be just and proper).

167. Because of the involuntary nature of the *Get*, it would probably be considered an invalid *Get* under Jewish Law.

168. The concentration of Jewish voters in New York State is obviously one of the primary reasons that the state's legislature is sensitive to and responsive to Jewish issues and concerns. *See* Barry A. Kosmin et al., HIGHLIGHTS OF THE CJF 1990 NATIONAL JEWISH POPULATION SURVEY (New York Council of Jewish Federations 1991); *see also* David Singer, 95 AMERICAN JEWISH YEAR BOOK 181-186 (1995) (estimating size of the American Jewish community in 1994 at 5,900,000; approximately one third of the nation's Jewish population (1,937,000) lives in the "tri-

this country,[169] essentially requires the giving of a religious divorce as a condition precedent to obtaining a secular divorce.[170]

Amended in 1984, the statute applies only to marriages solemnized by a cleric, minister, or ethical society leader,[171] and requires the party seeking an annulment or divorce to provide the court with a sworn statement that he or she has taken or will take all steps solely within his or her power to remove any barrier to the defendant spouse's remarriage following an annulment or divorce.[172] A "barrier to remarriage" is defined by the statute to include "any religious or conscientious restraint or inhibition imposed on a party to a marriage, under the principles of the denomination of the clergyman or minister who has solemnized the marriage."[173]

The *Get* Statute makes it virtually impossible for a New York State civil court to enter a final judgment for divorce unless the plaintiff has filed a sworn statement that he or she has removed all barriers to the defendant's remarriage or that the defendant has waived, in writing, the statute's requirements.[174] Moreover, in the case of a conversion divorce,[175] both parties are required to file the "removal of barriers" sworn statement.[176]

In other words, New York law does not permit a civil divorce unless a religious divorce has been granted by a husband to his wife. The purpose of this facially neutral statute was best explained by the written memorandum of the then Governor, Mario Cuomo, which accompanied the signing of the statute, stating, "[t]he bill solves a problem created by the interrelation of Jewish Law and New York Civil Law. Traditional Jewish Law does not recognize a secular divorce as sufficient to dissolve a marriage, but rather requires that the husband

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state" New York-Northern New Jersey-Long Island metropolitan area; in 1994, the total population of the State of New York was 18,197,000—1,645,000 of the total population (nine percent) of New York's residents were Jewish).

169. Madeline Kochen, *Constitutional Implications of New York's "Get" Statute*, N.Y. L.J. Oct. 27, 1983 at 1.

170. *Id.*

171. N.Y. DOM. REL. LAW § 253 (McKinney 1986).

172. *Id.*

173. *Id.* at § 253(6).

174. *Id.* at § 253(2).

175. A conversion divorce is based upon a separation agreement, which after being in effect for a period of one year converts to a divorce agreement. Once the appropriate forms are filed with the New York State Supreme Court, the separation turned divorce agreement becomes the basis for the court's order granting a divorce.

176. The Domestic Relations Law was amended to include this clause in 1984. *See* N.Y. DOM. REL. LAW § 253(2) (McKinney 1986).

give the wife a . . . '[G]*et*'."[177] In 1992, the New York State Legislature added two amendments to its equitable distribution law[178] in an attempt to further alleviate the dilemma resulting from the inequity in Jewish divorce law[179] faced by Jewish female residents of the state. The amendments, which effectively codify the *Schwartz* decision, provide that "the court shall, where appropriate, consider the effect a barrier to remarriage," as defined in the *Get* Statute,[180] has on the thirteen factors considered in making an equitable distribution of marital property[181] and on the eleven factors that require consideration in determining the amount and duration of maintenance in a divorce action.[182]

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177. Governor's Memorandum of Approval of Act of Aug. 8, 1983, ch. 979, 1983 N.Y. LAWS 1904 (Aug. 8, 1983), *reprinted in* 1983 N.Y. LAWS 2818-19; *see* N.Y. DOM. REL. LAW § 253(2) (McKinney 1986).

178. N.Y. DOM. REL. LAW § 236(B)(5)(h), (6)(d) (McKinney Supp. 1993).

179. Madeline Kochen, *Constitutional Implications of New York's "*Get*" Statute*, N.Y. L.J. Oct. 27, 1983 at 1.

180. N.Y. DOM. REL. LAW § 253(6) (McKinney 1986).

181. The thirteen factors to be considered under § 236 B(5)(d)(1)-(13) are:

> (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action; (2) the duration of the marriage and the age and health of both parties; (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects; (4) the loss of inheritance and pension rights upon dissolution of the marriage as of date of dissolution; any award of maintenance under subdivisions as of the date of dissolution; (5) any award of maintenance under subsection six of this part; (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditure and contributions and services as a spouse, parent, wage earner and homemaker, and to the career of career potential of the other party; (7) the liquid or non-liquid character of all marital property; (8) the probable future financial circumstances of each party; (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation, or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party; (10) the tax consequences to each party; (11) the wasteful dissipation of assets by either spouse; (12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; (13) any other factor which the court shall expressly find to be just and proper.

Id. at § 236(B)(5)(d)(1)-(13).

182. The eleven factors which require consideration in determining maintenance issues in a divorce action under § 236(B)(6)(a)(1)-(11) are:

> (1) The income and property of the respective parties including marital property distributed pursuant to subdivision five of this part; (2) the duration of the marriage and the age and health of both parties; (3) the present and future earning powers of both parties; (4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor; (5) reduced or lost lifetime earning capacity as a result of having foregone or delayed education, training, employment or career opportunities during the marriage; (6) the presence of children of the marriage in the respective homes of the parties; (7) the tax consequences to each party; (8) contributions and service of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (9) the wasteful dissipation of marital property by either spouse; (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; (11) any other factor which the court shall expressly find to be just and proper.

Id. at § 236(B)(6)(a)(1)-(11).

These amendments serve to supplement the original *Get* Statute in that they apply to both plaintiffs and defendants in divorce actions regardless of whether the couple was married in a religious ceremony. In addition, they provide a genuine incentive to equalize the parties' bargaining power.

VII. Constitutional Implications of New York's *Get* Statutes

When measured against the standards for establishment articulated in *Lemon v. Kurtzman,* [183] the original *Get* statute appears to be violative of all three prongs of the test.[184] Although the secular purpose prong seems to be met by New York's desire to encourage remarriage, except in the case of the Jewish woman who requires a religious divorce in order to remarry, a civil divorce achieves the state's goal. In effect, the *Get* Statute incorporates into civil law[185] a religious requirement which has no clearly identifiable secular purpose by premising a secular divorce on the grant of a religious divorce.[186]

The second prong of the *Lemon* test, that the primary effect of the statute impermissibly advances religion, may also be implicated because the statute, at its inception, was acknowledged to be an at-

183. 403 U.S. 602 (1971) (holding that there are three tests for Establishment Clause compliance).

184. *See* Edward S. Nadel, Note, *New York's* Get *Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 73 (1993). In addition to its constitutional problems, the *Get* Statute is underinclusive because it does not apply to spouses who have already obtained a civil divorce, and with the exception of uncontested conversion divorces, it requires a removal of barriers statement only from a plaintiff. *Id.* Also, the statute applies exclusively to couples originally married in a religious ceremony, not to those who become religious in later years. *Id.*

Moreover, by defining "barriers to remarriage" as barriers existing "under the principles held by the clergyman or minister who has solemnized the marriage," the statute is restricted to couples married in an Orthodox or Conservative Jewish ceremony. *See* N.Y. DOM. REL. LAW § 253(6) (McKinney 1986); *see also* Nadel at 73-74. Members of the Reform Clergy would not consider refusal to grant a *Get* to be a "barrier to remarriage."

185. Nadel, *supra* note 184, at 83.

186. In *Chambers v. Chambers*, the only case to address the *Get* statute's constitutionality, a part of the Statute was determined to be unconstitutional as applied. The court determined that to deny a wife a divorce, when the separation agreement had been formulated before the passage of the *Get* Statute and where the wife had no way to force her husband to file a removal of barriers statement, would be an unconstitutional impairment of contract and void under the Contracts Clause. Chambers v. Chambers, 471 N.Y.S.2d 958, 960 (App. Div 1983); *see* Kaplinsky v. Kaplinsky, 603 N.Y.S.2d 574 (App. Div. 1993) (holding that the constitutional issue was preserved).

tempt to alleviate the plight faced by Jewish women whose husbands refused to grant them religious divorces.[187]

Moreover, the statute applies only to couples whose marriage ceremonies were performed by ministers or clerics. Pursuant to the statute, members of the clergy are directed to file a sworn statement describing the religious nature of the marriage ceremony and acknowledging the removal of barriers to remarriage.[188] This requirement may constitute a violation of the third prong of the *Lemon* test, that of excessive governmental interference in religious matters, in that the actual delegation of power to religious authorities to veto a civil divorce constitutes excessive governmental entanglement.[189]

In contrast, it can be asserted that the clergy member's sworn statement excuses courts from enmeshing themselves in religious matters. In other words, under the *Get* Statute, the judiciary is never required to resolve religious disputes arising from either a religious antenuptial agreement or from a religious divorce. However, it is indisputable that the statute mandates the necessity of involving clergy in the secular dissolution of a marriage, a clear violation of First Amendment constitutional principles.

Thus, whether employing the *Lemon* test or the endorsement test, the *Get* Statute violates the First Amendment. Not only does it lack a secular purpose, have the primary effect of advancing religion, and possibly create excessive governmental entanglement in religious matters, it also communicates endorsement of, and effectively endorses specific religious doctrine.

In applying the first prong of the *Lemon* test to the more recently enacted Equitable Distribution Amendments, it can be argued that the purpose of the amendments is to promote equitable distribution of marital property. However, an individual's inability to remarry results from an inequity of Jewish Law, not civil law. Therefore, again, the

187. Lemon v. Kurtzman, 403 U.S. 602 (1971); *see* Governor's Memorandum of Approval of Act of Aug. 8, 1983, ch. 979, 1983 N.Y. Laws 1904 (Aug. 8, 1983), *reprinted in* 1983 N.Y. Laws 2818-19.

188. *Id.*

189. *See* Nadel, *supra* note 184 at 83 ("the *Get* statute fails all three prongs of the *Lemon* test"); Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 380 (1992) (discussing the "serious constitutional problems under the First Amendment" posed by New York's *Get* Law); Madeline Kochen, *Constitutional Implications of New York's "*Get*" Statute*, N.Y. L.J. Oct. 27, 1983 at 1 (predicting that the New York *Get* statute "would lead to the disintegration of the protective wall of separation between church and state").

clear purpose of the statute is obviously religious and not secular in nature.

Application of the second prong of the *Lemon* test produces a similar result. The express purpose of the amendments is to accommodate a Jewish woman's free exercise of religous rights and equalize the power differential between parties rather than advance religion.[190] However, by accommodating a wife, the husband's free exercise rights are violated as he is given little choice but to grant his wife a religious divorce. Moreover, the amendments to the *Get* Statute, though facially neutral, advance Judaism over other religions; and advance Judaism through economic coercion.

The amendments may also be violative of the third prong of the *Lemon* test in that courts will have to determine whether barriers to remarriage exist. In order to make that determination they will have to look into whether a valid *Get* has been granted, an inquiry which could arguably require extensive involvement in religious matters. Furthermore, both the amendments and the statute have the potential to cause political divisiveness in a family, community, and/or religious group.[191] Friction of this type constitutes another rationale for assuming that there is a violation of the entanglement prong of the *Lemon* test.

Applying the First Amendment's Free Exercise Clause, which prohibits the government from interfering with an individual's religious practice or refusal to practice religion, results in a similar conclusion.[192] The concepts of free will, autonomy, and independence of conscience are the essence of this constitutional provision. The *Get* statute and its amendments appear to impermissibly coerce compliance with religious law regardless of an individual's convictions or beliefs. The application of these laws by New York State's judiciary effectively forces individuals to fulfill the requirements of Jewish divorce law by withholding secular divorces and imposing economic penalties until such time as a religious divorce is granted by a recalci-

190. *See* N.Y. DOM. REL. LAW § 253 (McKinney 1986).

191. Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) (Burger, C.J.) (commenting on the type of religious lobbying and pressure used to pass the *Get* Statute through the New York State legislature and stating "[i]t conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislators and in our electors that they could divert attention from the myriad of issues and problems that confront every level of government").

192. *See* Employment Div. v. Smith, 485 U.S. 660 (1990) (referring to "[t]he protection that the First Amendment provides to the free exercise of religion.").

trant spouse. Although these statutes may be facially neutral, they are not in fact objective, but violate both the Free Exercise and Establishment Clauses of the First Amendment.[193]

VIII. New York's "Religious Matching" Placement Statutes

New York State's child custody law, like the custody and adoption laws of many other states, finds its roots in the English Common Law,[194] which, by the conclusion of the eighteenth century, had evolved from almost absolute deference to paternal rights to preference for a child's welfare.[195] The plain language of the state's placement statutes clearly dictates that the "best interests of the child" standard be utilized rather than that preferential treatment be given to parents or parental rights.[196] However, notwithstanding the "where practicable" and "best interests" qualifiers of New York's custody law, the constitutional issues raised by the "religious matching" statutes require consideration.[197] The state's placement statutes provide that, "when practicable,"[198] the religion of prospective adoptive or custodial persons be of the same "religious faith"[199] of the child they seek to adopt so long as that placement is "consistent with the best interests of the child."[200]

In practice, the task of accomplishing the goal of New York's custody law, to match adoptive children with parents or persons of the

193. It should be noted that the *Get* Statutes may also be violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment in that Jewish men may be deprived of access to the state's courts and the state protects Jewish women to a greater degree than it protects others. For example, the statute effectively precludes a Jewish husband from legally disputing whether or not he is required to grant his wife a *Get*. A Jewish wife, unlike any other citizen, is protected in several ways from becoming dependent on her husband's grant of a *Get*. *But see* Becher v. Becher, N.Y. L.J. Mar. 18, 1997 at 1 (Sup. Ct. 1997).

194. Douglas R. Rendelman, Parens Patriae*: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 203 (1971).

195. *Id. See generally* Guardianship of Minors Act 1971, 41 HALSBURY'S STATUTES OF ENGLAND 761(3d ed. 1972). It should be noted that the English Common Law evolved from the historical Roman rule of *patriae potesta*, pursuant to which the father possessed absolute authority over his legitimate child, to the current best interest of the child standard.

196. N.Y. JUD. LAW § 116(a-g) (McKinney 1983); N.Y. SOC. SERV. LAW § 373(1-7) (McKinney 1992).

197. N.Y. JUD. LAW § 116(a-g) (McKinney 1983); N.Y. SOC. SERV. LAW § 373(1-7) (McKinney 1992).

198. N.Y. JUD. LAW § 116(a-g) (McKinney 1983); N.Y. SOC. SERV. LAW § 373 (1-7) (McKinney 1992). The term "when practicable" allows a flexible approach to the religious matching statues.

199. *Id.*

200. N.Y. JUD. LAW § 116(g) (McKinney 1983); N.Y. SOC. SERV. LAW § 373(7) (McKinney 1992). The term "best interests" has also allowed courts to consider "the religious wishes of the parents of the child," no matter what those wishes may be, as desirable rather than mandatory.

same faith, arises in two contexts. The first, where the biological or natural parents have expressly requested that their child be placed in a specific religious environment, poses difficulty only when the child's parents have made separate and conflicting requests. The second context arises when the natural parents are either unknown or have indicated no religious preference. In these circumstances, the state is mandated to investigate the child's religious background,[201] and if nothing is learned about the child's heritage, the state may arbitrarily assign a religion to that child.[202] The resulting religious designation, whether by heritage or assignment, may be considered imputation of religion since it is the State of New York rather than the natural parents which classifies the child within a particular religious denomination.[203]

Despite the obvious distinctions between matching by preference and matching by imputation,[204] the two are often treated in the same manner by New York's courts and legislature. For example, the custody statutes provide that "[i]n the absence of expressed religious wishes," defined as "those which have been set forth as a writing, . . . if there is no evidence to the contrary, it shall be presumed that the parent wishes the child to be reared in the RELIGION of the parent."[205] In effect, a nonexistent parental desire is often assumed and the matching of a child's religion to that of the parents could possibly take place despite parental desires to the contrary.

On their face, New York's matching statutes appear to be violative of the second and third prongs of the *Lemon* test for establishment. The act of investigating parents' religious beliefs obviously has the potential to involve the state in religion, and thus be precluded by

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201. *See, e.g.*, N.Y. JUD. LAW § 116(g) (McKinney 1992); N.Y. SOC. SERV. LAW § 373(7) (McKinney 1992).

202. *Id.*

203. *Id.*

204. Although matching by preference normally presents few problems, both methods of state imputation create considerable difficulties. Imputation by arbitrary assignment raises the danger of benefiting the major religions at the expense of smaller, less well-known denominations. Imputation by heritage can create problems of proof, particularly if the child has received the admission of sacraments of more than one sect. *See* Matter of Galvas, 121 N.Y.S.2d 12, 15 (Dom. Rel. Ct. 1953) (holding that a child was Jewish where a Jewish mother had her child circumcised eight days after birth and the father unbeknownst to the mother had the child baptized a Roman Catholic when the child was four years old). *Id.* at 19.

205. N.Y. JUD. LAW § 116(a-g) (McKinney 1983); N.Y. SOC. SERV. LAW § 373 (1-7) (McKinney 1992). Both statutes also state that "[r]eligious wishes of a parent shall include wishes that the child be placed in the same RELIGION as the parent or in a different RELIGION from parent or with indifference to RELIGION or with RELIGION a subordinate consideration." *Id.* at (7).

Lemon standards. The option of imputing religion to a child which requires the state to: advance religion, demonstrate preference for one particular religion over another, or choose religion over irreligion also has constitutional implications.[206] Employing Justice O'Connor's alternative endorsement approach would probably bring about the same conclusion. It can be argued that New York's matching statutes, which utilize religion as a factor in determining custody, either intentionally endorse or create the perception of endorsing religion, as opposed to atheism or irreligion, and are therefore violative of the Constitution's Establishment Clause.

On the other hand, inasmuch as New York's "religious matching" statutes require placement of a child with parents or persons of the same faith only "when practicable" so long as the placement is "consistent with the best interests of the child,"[207] it is possible that there is no establishment of religion because religion is but one factor among many that contribute to the determination of adoption and custody matters. Moreover, the secular purpose of the statute is arguably to implement the best possible placement for a child in a setting where that child's physical, spiritual, moral, and emotional needs will be best satisfied. In that case, it would appear that neither the *Lemon* test nor the endorsement test would be problematic.

To determine which of these views of New York's "religious matching" statutes is preferable, it is important to examine the constitutional ramifications of the law as well as to consider the ways in which the state's courts have balanced countervailing rights and inter-

206. In addition, attempting to preserve the natural parents' faith for their child reduces the pool of potential adoptive parents or placement agencies for any given child, and may require the state to reject better qualified adoptive parents of faiths different from that of the child. *See* Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988) (stating that New York city must first take into account the parents' religious preference when attempting to place a child for adoption); Wilder v. Sugarman, 385 F. Supp. 1013, 1025-26 (S.D.N.Y. 1974) (noting that the state of New York acts as both a surrogate parent and a government obligated to refrain from use of its powers to further or inhibit religion). *But see* Ernesto v. Dickens, 281 N.E.2d 153 (N.Y. 1972), *cert. denied,* 407 U.S. 917 (1972) (holding that legislation providing for the placement of a child with adoptive parents of the same religion "so far as consistent with the best interest of the child, and where practicable": fulfills a secular legislative purpose, reflects and preserves a benevolent neutrality toward religion, and does not foster an excessive government entanglement with church interests); Orzechowski v. Perales, 582 N.Y.S.2d 341 (Sup. Ct. 1992) (looking to a prior decision and noting that although religious preference of the biological parent was a "relevant consideration" in making adoption placements, it is only one of many factors).

207. N.Y. JUD. LAW. § 116(a-g) (McKinney 1983); N.Y. SOC. SERV. LAW § 373(1-7) (McKinney 1992).

preted and applied the law to the different settings identified by the statute.[208]

IX. Constitutional Implications of the New York Judiciary's Interpretation of the "Religious Matching Statutes"

Notwithstanding the evolution of custody law, and the undisputed priority given to the welfare of a child, courts are often compelled to balance well established constitutional rights with the best interests of the child standard.[209] Over the past thirty years family rights have received increasing protection and scrutiny under various constitutional docrines.[210]

In *Griswold v. Connecticut*,[211] and *Roe v. Wade*,[212] the United States Supreme Court expanded the constitutional limitations on states' regulation of private, personal, and family matters. In *Griswold*, a majority of the Supreme Court's justices recognized that marital privacy is protected by the Constitution's Due Process Clause.[213] Likewise, in *Roe*, the majority again utilized the Due Process Clause to uphold a woman's right to choose abortion.[214] Equal Protection arguments have also prevailed in overturning state intrusion in family matters.[215]

In cases in which family rights and religious beliefs have been protected against state intervention, both the Free Exercise and Es-

208. The statutes refer to situations where the parent(s) make(s) their explicit wishes known through a writing and the parents agree or disagree as to the child's religion, or where there is no explicit desire or the parents are unknown. In the latter instances, the state investigates the child's heritage and, where possible, imputes a religion to the child.

209. In the state of New York, religion is but one factor among many that comprises "the best interest of the child" and contributes to the determination of adoption and custody matters.

210. More than half a century earlier, the Supreme Court held that certain governmental deprivations of liberty are violative of the Constitution regardless of the adequacies of procedures followed. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that certain governmental deprivations of liberty are violative of the Constitution regardless of the adequacies of procedures followed. The Court stated that certain liberties are guaranteed by the Fourteenth Amendment including the "right to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience . . . ."). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that the right of a parent to control the education of the child could not be overridden by the state's interest in standardizing children's education). Here the Court stated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

211. 381 U.S. 479 (1965).

212. 410 U.S. 113 (1973).

213. 381 U.S. at 486, 499, 502.

214. 410 U.S. at 153.

215. *See* Orr v. Orr, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944).

tablishment Clauses have been employed. For example, in *Wisconsin v. Yoder*,[216] a case which centered on free exercise of religion issues, the Court deferred to family autonomy by invalidating the state's compulsory education law which violated the fundamental right of Amish parents to educate their children in a religious environment.[217] Focusing on the Constitution's Religion Clauses, the Court asserted that in order to uphold the statute the state would have to engage in a delicate balancing test proving a "state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[218]

However, in response to a recent free exercise challenge, the Supreme Court in *Employment Division v. Smith*,[219] held that a state may deny unemployment benefits to persons dismissed from their jobs for the illegal use of a drug, even if the drug was used in a religious sacramental ceremony.[220] In reaching its decision, the Court asserted that a person's religious belief does not excuse him from compliance with a valid state law.[221] Concluding that generally applicable religion-neutral laws that burden a particular religious practice need not be subjected to a governmental compelling interest test,[222] the majority opinion appeared to dramatically change well established free exercise jurisprudence.

The decision in *Smith* was sharply criticized by groups ordinarily on opposite ends of the theological and political spectrum; religious and political liberals and conservatives alike faulted the opinion.[223] As a result of the strongly negative response, Congress passed the Religious Freedom Restoration Act of 1993,[224] which effectively overruled *Smith* by restoring the compelling interest balancing test in all

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216. 406 U.S. 205 (1972).
217. *Id.* at 214.
218. *Id.*
219. 494 U.S. 872 (1990).
220. *Id.*
221. *Employment Div.*, 494 U.S. at 884 (remanded to the Oregon state courts for a determination of whether sacramental use of peyote was in fact prohibited by the state's controlled-substance law). *See* Employment Div. v. Smith, 485 U.S. 660, 674 (1990). The Oregon Supreme Court held that the religiously inspired use of the drug did fall within the proscription of the state's statute and use of peyote, even in a religious ceremony, was illegal. Employment Div. v. Smith, 763 P.2d. 146 (Or. 1990). However, one year later the Oregon legislature voted to change the law so that persons such as the plaintiffs in the *Smith* case, who used peyote in a religious rite, were exempt from the law proscribing use of the drug and would therefore be eligible for unemployment benefits. OR. REV. STAT. § 475.992 (1995).
222. *Employment Div.*, 494 U.S. at 888.
223. TERRY EASTLAND, RELIGIOUS LIBERTY IN THE SUPREME COURT 396-97 (1993).
224. Pub. L. No. 103-141, § 1, 107 Stat. 1488 (1993).

cases where free exercise of religion rights are substantially burdened by government.[225] But, in response to what it considered an impermissible and excessive exercise of congressional authority, the Supreme Court in *City of Boerne v. Flores*, invalidated the Religious Freedom Restoration Act.[226] Notwithstanding this decision, it is unclear that *Smith* will constitute binding precedent. *Smith* specifically applied to the competing free exercise interests of the plaintiffs as opposed to the then-existing Oregon statute which criminalized peyote. However, prior to the United States Supreme Court decision, the Oregon legislature voted to exempt Native Americans who participate in religious rights from the reach of the criminal statute.[227]

In assessing constitutional implications articulated by the Constitution's other Religion Clause (the Establishment Clause), New York courts have traditionally utilized the *Lemon* test and more recently the endorsement approach suggested by Justice O'Connor.[228] Inasmuch as the New York Court of Appeals employs a neutral principles analysis, to resolve a family dispute centering on a religious marriage contract,[229] this approach should also be applied to determine the constitutionality of the religious matching provisions of New York's placement statutes. Decisions interpreting theses provisions should also utilize the *Lemon* criteria.

In New York State, adoption and custody cases are primarily disposed of by agencies and trial judges.[230] As a result, appellate courts are rarely called upon to interpret the provisions of religious matching statutes. However, there are several notable exceptions which help to define the meaning of the matching provisions.

In *Dickens v. Ernesto*, a case decided more than two decades ago, the New York Court of Appeals upheld the state's adoption and cus-

225. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); *see also* Employment Div. v. Smith, 763 P.2d 146 (Or. 1990), a narrowly tailored decision which relied on a criminal statute which, in relevant part, was later nullified by the Oregon legislature.

226. City of Boerne v. Flores, No. 95-2074, 1997 U.S. WL 345322, at *1 (June 25, 1997).

227. OR. REV. STAT. § 475.992 (1995).

228. The purpose of the *Lemon* test is to uphold or invalidate laws based on a determination of whether a statute has a secular purpose, advances or inhibits religion, or causes government to become excessively entangled in religious matters. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also* Epperson v. Arkansas, 393 U.S. 97 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). The endorsement test, on the other hand, considers whether a statute or governmental action intentionally conveys a perception of endorsement or disapproval of religion, or actually communicates governmental endorsement or disapproval of religion. Lynch v. Donnelly, 465 U.S. 668, 690-92 (1984).

229. *See* Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983), *cert. denied*, 464 U.S. 817 (1983).

230. *See* Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988); Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1986).

tody statutes against a constitutional challenge.[231] The court interpreted the matching provisions to mean "that religion is but one of many factors in the placement of a child for adoption and, . . . placement in conformity with 'the religious wishes of the parents of the child,' though desirable, is not mandatory."[232] Asserting that "no perfect or absolute separation (of government and religion) is really possible; [and] the very existence of the Religion Clauses is an involvement of sorts,"[233] the court simply stated that each aspect of the *Lemon* test was met:

> Legislation which provides for the placement of a child with adoptive parents of the same religion 'so far as consistent with the best interests of the child, and where practicable,' undoubtedly fulfills a 'secular legislative purpose' and certainly reflects and preserves a 'benevolent neutrality' toward religion. And, just as clearly, the matching provisions neither have the 'primary effect' of advancing or inhibiting religion, nor foster an 'excessive government entanglement' with church interests.[234]

Despite the court's protestations to the contrary, its analysis of the religious matching statutes, in light of the *Lemon* test or neutral principles of law approach, was not comprehensive. Although a court could probably find that the matching provisions have a secular purpose, as did the court in *Dickens v. Ernesto*,[235] the state's imputation of a religious faith based on its investigation of a child's heritage certainly appears to be violative of both the primary effect and excessive entanglement prongs of the *Lemon* test.

Adoption and custody laws achieve the secular purpose of providing care for parentless children. However, the purpose of religious matching provisions contained within those laws is not as obvious. One may argue that religion assists in a child's moral development, so that providing a religion for a child is, in effect, satisfying the secular purpose prong of the *Lemon* test. Nevertheless, matching provisions also advance religion. Whether this advancement is direct and immediate (and therefore violative of the Establishment Clause) or merely incidental to the secular purpose of the law, may depend on whether

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231. Dickens v. Ernesto, 281 N.E.2d 153, 155, *cert. denied*, 407 U.S. 917 (1972).

232. *Id.* (Fuld, C.J.) Except for dismissing the appeal, the Supreme Court has not ruled on this issue.

233. *Id.* (quoting Waltz v. Tax Commissioner, 397 U.S. 664, 670 (1970)).

234. *Dickens*, 281 N.E.2d at 156.

235. *Id.* at 157.

the matching results from the state's imputation or from the parent's request.[236]

By assigning a specific religion to a child who might otherwise be brought up without religion or in a different religious faith, the state is apparently advancing religion over irreligion and benefiting one religious group at the expense of another; clearly a violation of the second prong of the *Lemon* test. Furthermore, whether intended or not, it is possible that the religious matching provisions of New York's adoption and custody laws violate the excessive entanglement prong of the *Lemon* test in the simple, yet far reaching, act of assigning a particular religion to a child.

The neutral principles of law analysis articulated in *Hull Church*[237] is virtually ignored in the religious matching statutes. In *Hull Church*, a case decided by the Supreme Court, it was established that a court is permitted no role in addressing religious issues unless a limited probe which employs neutral principles will resolve the matter.[238] When courts are forced to determine the religious background of a child for the purpose of imputation matching, they are required to give preference to one religion over another after they have delved into a family's religious practices and beliefs, thus advancing religion and causing the second *Lemon* requisite to be met. Furthermore, this type of investigation might very well satisfy the third prong of the *Lemon* test because it creates excessive and impermissible governmental entanglement in religious matters.

In 1992, exactly twenty years after *Dickens* was decided,[239] the New York Supreme Court in *Orzechowski v. Perales*,[240] held that a Catholic couple who challenged the constitutionality of the state's adoption and custody laws had standing to bring an action based on the claim that the New York State Department of Social Services violated their Free Exercise rights when it refused to permit them to adopt a Jewish child.[241] The *Orzechowski* court ruled that the parents had stated a claim with respect to the Establishment Clause because

236. The direct effect of religious matching to abide by a parental request is to maintain a child within the parents' religion. The effect is secular in that it carries out the parents' desires for their child's future development. It should be noted that the New York placement laws allow a parent to choose religion or irreligion.

237. 93 U.S. 440 (1969).

238. *Id.* at 440.

239. 281 N.E.2d 153 (N.Y. App. Div 1972).

240. 582 N.Y.S.2d 341 (Sup. Ct. 1992).

241. *Id.*

the Department's determination, that the child's placement with the plaintiffs was not in the youngster's best interests, had been premised solely on religion.[242]

The Orzechowskis, who were Catholic, wanted to adopt a four year old child who was disfigured and suffered from spina bifida and other infirmities.[243] At the time the child's parents surrendered her for adoption, they stated that they preferred that she be raised in a "home of the Jewish (non-Hasidic) religion."[244] Unfortunately, after initially encouraging the Orzechowski family to adopt the child, the hospital staff discovered its error in assuming that no religious preference had been stated by the parents.[245] Without delay, adoption arrangements were halted and the child was immediately placed with a Jewish foster family.[246]

The trial court distinguished this case from *Dickens* because, unlike *Dickens,* which relied upon many factors in its placement decision which was based on the secular purpose of the matching provisions, religion was the sole factor for the agency's determination in the Orzechowski case.[247] Had the *Orzechowski* court ruled in any other manner, it would clearly have violated First Amendment constitutional precepts.

Several foster care cases have also helped to clarify the meaning of the state's religious matching statutes.[248] Although there are critical distinctions between foster care and adoption,[249] the analysis em-

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242. *Id.* at 343.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 343-44. The Foundling Hospital had written to the potential adoptive parents informing them that they were terminating their interaction with the child, stating that: "[s]ave for the issue of religion, we have no objection to placing Nelli in your home . . . [y]ou had impressed us as caring, concerned individuals who are ready to provide a loving home for a child." *Id.* at 344.
247. *Id.* at 347.
248. *See* Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988); Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y 1986); Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974).
249. A child who is in foster care is, for all intents and purposes, caught in the middle. *See* Martin Guggenheim, *State Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children.* 56 BROOK. L. REV. 603 (1990). Although the child is not in the parent's custody, the bond between parent and child is only temporarily cut. Usually children are placed in foster care for a brief period of time and then returned to their natural parents. In such cases, the state functions as the parents' agent and its responsibility is to act in the best interests of the child. In order to accomplish this, the state is mandated to follow the parent's express desires, and preserves the parent's value systems and beliefs. In cases where a child is left in foster care for a substantial length of time, parental rights may terminate and it may no longer be in the child's best interests to adhere to the natural parent's requests. It should be noted that foster care requires a great deal of funding and adop-

ployed in *Wilder v. Sugarman* (*Wilder I*) and *Wilder v. Bernstein* (*Wilder II* and *Wilder III*)[250] regarding religious matching in New York City's Foster Care system can readily be analogized to the state's adoption and custody statutes.[251]

Unlike the *Dickens* decision, the *Wilder* opinions went beyond a simple declaration that religious matching statutes do not violate the Establishment Clause. Instead, the first *Wilder* court[252] in upholding the constitutionality of the legislation, acknowledged that the matching provisions probably would not pass constitutional muster under the then prevailing Establishment Clause approach,[253] but at the same time recognized the Free Exercise Clause implications of the statutory scheme.[254]

In *Wilder I*, an action was brought by the *guardians ad litem* (law guardians) for six children seeking a declaratory judgment.[255] It was contended that the New York constitutional and statutory religious matching provisions for child placement violated the federal Constitution's First Amendment on the ground that they discriminated against Black and Protestant children.[256] At the inception of *Wilder I*, the number of Jewish and Catholic placements in the city exceeded the number of Protestant placements, and as a result Protestant children were sent to out-of-religion agencies.[257] The children's law guardians argued that their clients were being discriminated against because the best facilities in the city were either Catholic or Jewish.[258] They fur-

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tion does not. Adoption unlike foster care, is permanent. When a child is adopted all of the rights of the natural parents are terminated. Once this happens, the child is in the state's custody, and it is the responsibility of the state to care for that child until placement with adopting parents has been implemented. *Id.* at 610-12.

250. *Id.* at 604. *Wilder I, Wilder II,* and *Wilder III* are the abbreviated names by which these cases are known.

251. *Id.*

252. *Wilder I*, 385 F. Supp. at 1024.

253. *Id.* at 1018.

254. *Id.*

255. *Id.*

256. *Id.*

257. *See* Guggenheim, *supra* note 249, at 610-12. In the early 1970's, when the first *Wilder* lawsuit was brought, the overwhelming majority of New York city's children in need of foster care were Protestant. However, at that time the number of foster care facilities maintained by the city's Jewish and Catholic agencies exceeded the number of Jewish and Catholic children in the foster care population. As a result the Jewish and Catholic agencies were able to accommodate all of the Jewish and Catholic children in need of care. In contrast, the city's Protestant agencies did not have enough beds for all the Protestant children in the city and the Protestant children who were not accepted were sent to out-of-religion placements. The *guardian ad litems* who brought *Wilder I* contended that the best facilities in the city were Catholic or Jewish run and their clients were being discriminated against based on their religion. *Id.* at 604, 610-12.

258. *Wilder I*, 385 F.Supp at 1029.

ther contended that their clients' placements, based on religion, at the limited number of Protestant facilities located in New York City, were inferior.[259] The federal district court in *Wilder I* limited its consideration to the single issue of whether the constitutional and statutory provisions violated the Establishment Clause, and ruled that the provisions were facially constitutional because they represented a fair and reasonable accommodation between establishment and free exercise claims.[260]

In upholding the validity of the statutes, the court alluded to a "room for play in the joints" rationale between the First Amendment's Free Exercise and Establishment Clauses, and determined that the free exercise claims outweighed the establishment arguments.[261] However, the *Wilder I* court failed to make the distinction between matching by parental request and matching by state imputation.[262] Therefore, it is unclear whether the free exercise rights involved belonged to the natural parents who gave their child up for adoption, or to the child. In either situation, it may be assumed that when a party's free exercise rights are involved to the degree to which they are in an adoption or custody case, those rights outweigh the risk of government involvement in the process.

In *Wilder II*, a certified class of black Protestant children challenged New York City's statutory scheme for placement of children in foster care homes on a first-come, first-served basis.[263] The challenge failed.[264] On appeal, in *Wilder III*, the circuit court affirmed the district court's decision and endorsed a settlement between the parties, holding that the city's placement policy did not violate either New York State's constitutional or statutory provisions for religious matching.[265] In its affirmance, the Court of Appeals for the Second Circuit averred that the city's policies neither infringed upon the free exercise of religion rights of the parents or children, nor violated the Establishment Clause inasmuch as the state would no longer substitute its perceptions for the parents' judgments.[266]

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259. *Id.*
260. *Id.*
261. *Id.* at 1026.
262. *Id.*
263. *See* Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986) (proposing a settlement on behalf of the plaintiff class, but some foster care agencies objected and ultimately appealed in *Wilder III*).
264. *Id.*
265. Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988).
266. *Id.*

Using *Dickens* as the authoritative standard for interpreting New York's child placement statutory and constitutional scheme,[267] the Second Circuit asserted that the principle purpose of New York's custody and adoption statutes is to further the children's best interests, rather than to match their parents' religious faiths.[268] In reaching its decision, the court acknowledged that New York State law had in the past been interpreted to mean that a parent's religious preference, whether imputed or stated, would be honored.[269]

Notwithstanding this interpretation, the appellate court in *Wilder III* endorsed the previously agreed upon settlement of the parties which allowed in-religion placements only when a parent specifically expressed his or her religious priority.[270] Judge Newman, author of the majority opinion, stressed that the settlement did not violate New York law because, as in *Dickens v. Ernesto*,[271] "parents' preference for a religious placement must be honored unless that placement is detrimental to the child's needs or the agency has no opening."[272]

In other words, according to *Wilder III*, the City of New York was no longer permitted to impute to children the religion of their parents if the parents did not state a religious preference. Furthermore, the court declared that parental desires were to be honored only if those desires were in the best interests of the children.[273] The most obvious result of the decision is that more children are placed in out-of-religion facilities and fewer in in-religion facilities. In addition, foster care agencies are not allowed to reject children on the basis of their religious heritage.

In order to determine whether New York's religious matching statutes, as interpreted by *Wilder II* and *III*, are potentially violative of either the Constitution's Establishment or Free Exercise Clause (or both) depends upon whether one accepts the plain meaning of the statutes or the courts' interpretation of the statutory language. The goal or secular purpose of the statutory scheme, as applied to New York's foster care system, is to find an appropriate facility or foster

267. Dickens v. Ernesto, 281 N.E.2d 153 (N.Y. 1972).
268. *Wilder III*, 848 F.2d at 1338.
269. *Dickens*, 281 N.E.2d at 154-55.
270. *See* Wilder v. Bernstein, 645 F. Supp. 1292, 1324 (S.D.N.Y. 1986).
271. *Dickens*, 281 N.E.2d at 155.
272. Wilder v. Bernstein, 848 F.2d 1338, 1346 (2d Cir. 1988).
273. *Id.* at 1341-42; *see also In re* Elianne, 592 N.Y.S.2d 296 (1992) (granting a Jewish mother's request that her daughter be transferred from a "Christian" foster care facility to a Jewish facility because the child's faith was not being preserved).

care home for a child as quickly as possible. Yet, the statutes as applied, prior to *Wilder II*, clearly required the state to impute a specific religion to a child whose religion was unknown. This is no longer true.

Unlike *Dickens* and *Wilder I*, which were facial challenges to New York's regulatory placement scheme,[274] *Wilder II* and *Wilder III* addressed and assessed the actual impact of placement practices on the children of the state. Finally, after many years of litigation, the court in *Wilder III* determined that the state's religious matching placement laws, as clarified and somewhat modified, were constitutional. This conclusion was possible only after months of negotiations which permitted a comprehensive evaluation of New York City's matching laws and religion-based policies and practices as they impacted upon the city's foster care system.

Under the precedent established by *Wilder III*, religion is but one of several factors to be considered when determining the best interests of a child.[275] There is no attempt to promote one religion over another, religion over irreligion, or cause the government to become excessively involved with religious principles or practices.

The result is similar when employing Justice O'Connor's endorsement approach. With the exception of granting specific parental requests for placement based on religion matching, the city's selection of foster care facilities is based on availability rather than on the nature of the family's religious beliefs. In addition, the statutes create no perception of endorsement or apparent danger of rejection or political divisiveness based on religious beliefs or customs. Likewise, the application of a neutral principles of law analysis reflects that there is little or no need for the government to become impermissibly involved in religious doctrine.

New York's statutory scheme recognizes that parents have constitutional rights which are not extinguished by their children's temporary placement in foster care and that their requests regarding religious preference for their children simply constitute the free exercise of those rights. Thus, it appears that many of the constitutional infirmities that existed prior to *Wilder I, II,* and *III* have been cured by

274. The New York religious matching statutory scheme withstood challenges in both *Dickens* and *Wilder I*. Therefore, the concept of religious preference is considered facially constitutional. However, as demonstrated by *Wilder II* and *III*, a state may prefer one religion over another only when there is a specific parental request that it must do so. *Wilder II*, 645 F.Supp. at 1324; *Wilder III*, 848 F.2d at 1344.

275. *Wilder III*, 848 F.2d at 1342.

the respective *Wilder* courts' articulation of the manner in which the statutes shall be applied.[276] That is to say, as interpreted by the state's courts, New York's religious matching provisions permit the exercise of parental rights without violating the Establishment Clause.[277] *Wilder III* appears to walk the delicate balance between the two religion clauses and thus passes constitutional muster.

X. The Establishment and Free Exercise Implications of the Best Interests of the Child Standard Regarding Custody and Visitation Issues between Parents

In post-divorce visitation and custody cases, parental religious preference is only one factor among many in determining the best interests of a child.[278] However, it is extremely difficult to ascertain what is best for a child when parents disagree as to what type of religious upbringing will promote the child's welfare.

When courts are thrust into the position of having to determine which parent will provide a better religious environment, Establishment Clause entanglement problems can arise even when both parents adhere to the same or similar religious beliefs. Moreover, when the parents are adherents of different faiths, and courts are asked to determine which parent and/or which of their respective religions or religious practices is in the best interests of the child, the first prong of the *Lemon* test (that of promoting a particular religious belief or doctrine) comes into play. In addition, the third prong (that of excessive government entanglement) may also be implicated. Finally, free exercise rights may be restricted when parents live apart or are divorced and their child is being raised in accordance with the precepts of one parent's religion while the other parent, with whom the child visits or resides, wishes to practice his or her religious beliefs in the child's presence.

276. *See* Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988); Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986); Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974).

277. This analysis of New York's foster care system is equally applicable to New York's custody and adoption laws. However, in adoption cases, parents who have abrogated their parental responsibilities probably have relinquished their free exercise rights with regard to the upbringing of their children.

278. *See* DeLuca v. DeLuca, 609 N.Y.S.2d 80 (N.Y. App. Div. 1994); Dickens v. Ernesto, 281 N.E.2d 53 (N.Y. 1972).

Preservation of the "best interests of the child" is considered a compelling governmental interest.[279] However, courts are required to determine the degree to which one parent's free exercise of religion rights can be impinged, and the extent to which the other parent's rights can be favored. In New York, courts rather than the legislature have traditionally upheld the rights of a custodial parent to determine the religious upbringing of a child,[280] absent an agreement to the contrary.[281] However, New York's judiciary has often permitted noncustodial parents to practice the religion of their choice to the extent that there will be no harm to the child.[282] The state's policy was clearly articulated in *Bentley v. Bentley*:[283]

> As a general rule, it is the custodial parent who is the appropriate person for determining the religious upbringing of children. We conclude that the court would be intruding on [a] petitioner's First Amendment rights were it to enjoin the noncustodial parent from discussing religion with his child absent a showing that the child will

279. *See* Donald L. Beshchle, *God Bless the Child? The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383 (1989). *But see Employment Div. v. Smith*, 494 U.S. 872 (1990), where the Supreme Court for all intents and purposes eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion. The Religious Freedom Restoration Act, which was recently invalidated, reinstated the compelling state interest standard set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In its opinion, the Supreme Court disagreed with the Fifth Circuit and agreed with the United States District Court for the District of Maryland which held that Congress exceeded it powers, and the 1993 Act is an invalid exercise of Congress' power and violates the separation of powers doctrine. City of Boerne v. Flores, No. 95-2074, 1997 U.S. WL 345322 (June 25, 1997); *see also* 42 U.S.C. § 2000bb.

280. Weiss v. Weiss, 418 N.E.2d 377, 381 (N.Y. 1981) (Meyer, J., concurring) ("[I]t is the right of the custodial parent . . . to determine the child's religious education program."). Unlike New York, many states have codified this rule of law. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-338(A) (1991); COLO. REV. STAT. § 14-10-130 (West 1987); MINN. STAT. ANN. 518.003 (West 1993); MO. ANN. STAT. § 452.405(1) (West 1986); MONT. CODE ANN. § 40-4-218(1) (1993); 23 TEX. FAM. CODE ANN. § 12.04 § 14.02 (West 1993); VT. STAT. ANN. tit. 15 § 664 (1) (A) (1989); WASH. REV. CODE ANN. § 26.09.184(4A), § 26.10.170 (West Supp. 1993); WISC. STAT. ANN. § 767.001(2)(A)(2m) (West 1993).

281. *See* McFarlane v. McFarlane, 539 N.Y.S.2d 55 (N.Y. App. Div. 1989) (The court amended a visitation order to reflect the full extent of the parties' original agreement that the children would not visit their father on Sundays and religious holidays and that the children would not be taken to the father's place of worship was proper.); Duffy v. Duffy, 534 N.Y.S.2d 971 (N.Y. App. Div. 1988) (A separation agreement gave the defendant the right to veto a school teaching one religion to the exclusion of others.); Bentley v. Bentley, 448 N.Y.S.2d 559 (N.Y. App. Div. 1982) (stating that "[a]s a general rule, it is the custodial parent who is the appropriate person for determining the religious upbringing of the children.").

282. *See, e.g.*, Lebovich v. Wilson, 547 N.Y.S.2d 24 (N.Y. App. Div. 1989) (limiting child's participation in religion of non-custodial father was supported by evidence that child was placed under emotional strain). Kadin v. Kadin, 515 N.Y.S.2d 868 (N.Y. App. Div. 1982) (asserting that best interests of the children took precedence over non-custodial parents free exercise rights). Bentley v. Bentley, 448 N.Y.S.2d 559 (N.Y. App Div. 1982) (holding that best interests of the child dictated that they be reared in only one religion).

283. 448 N.Y.S.2d 559 (N.Y. App. Div. 1982).

> thereby be harmed. . . . The "best interests" of the children is the threshold consideration in a custody proceeding.[284]

Members of New York's judiciary have attempted to avoid both Establishment Clause and Free Exercise Clause problems by utilizing a neutral principles of law approach to visitation issues. The application of the best interests of the child standard and evaluation of each case on its merits has, for the most part, enabled the state's judges to navigate a constitutionally viable course. This strategy impinges on the religious beliefs or practices of parents only to the extent necessary to ensure their child's welfare. On the surface, this approach obviates the need for judicial interference in parental disputes and enables trial courts to remain objective and free from involvement in the religious practices or beliefs of either or both parents. On the other hand, there are judges who believe that unqualified application of the "religion follows custody"[285] rule may not always be in the best interests of the child.

For example, in *Romano v. Romano*,[286] in determining the best interests of the child, a mother's award of custody was premised on her promise that she raise her children in accordance with the Catholic faith.[287] She was not permitted to take the children to any Jehovah's Witness meetings or teach them the tenets of that faith.[288] Similarly, in *Robert O. v. Judy E.*, the trial court determined that church attendance was in the child's best interests, notwithstanding the mother's abhorrence of organized religion.[289]

In a more recent case, a trial judge disregarded the neutral principles of law approach and ruled that a mother was prohibited from attending religious meetings, worship services or participating in any religious practices associated with Jehovah's Witnesses, her religion of choice.[290] In *DeLuca v. DeLuca*,[291] a post-divorce case in which the parties had no agreement concerning religious training, the noncustodial parent petitioned the court for custody of the children because he was concerned that his former wife's religion would not allow his

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284. *Id.* at 560.

285. *See* Bentley v. Bentley, 448 N.Y.S.2d 559 (App. Div. 1982).

286. 283 N.Y.S.2d 813 (Fam. Ct. 1967).

287. *Id.* (Originally Catholic, Mrs. Romano, at the time of the custody proceeding, was a practicing Jehovah's Witness.)

288. *Id.*

289. 395 N.Y.S.2d 351 (Fam. Ct. 1977).

290. DeLuca v. DeLuca, 609 N.Y.S.2d 80 (App. Div. 1994).

291. *Id.*

children to receive proper medical attention or religious training.[292] Not only did the trial court restrict the children's religious activities, but it also directed that all decisions concerning medical treatment for the children be made jointly between the parents and the children's maternal and paternal grandparents.[293]

On appeal, the court modified the order of the lower court asserting that a noncustodial parent should be allowed to expose the children to his religious beliefs and practices during visitation periods.[294] Furthermore, the appellate court stated that "only when moral, mental, and physical conditions are so bad that they seriously affect the health or morals of the children should the court be called upon to act with respect to the disagreement between parents . . . ."[295] Balancing the state's interests in the protection of children with the parent's rights to direct the education and training of their children, and the children's right to receive training from their parents, the appeals court held that the trial court's restrictions were unjustified because the record failed to reveal potential or real harm to the children.[296] In *DeLuca*, the Second Department employed the neutral secular legal standards necessary to determine the best interests of the child and as a result avoided the perception or reality of governmental establishment of religion or abridgment of free exercise rights.[297] Thus, one can conclude that similar to the approach utilized in *Get* cases and intrachurch property disputes, the New York judiciary's neutral principle of law approach to custody and visitation issues fully complies with the Constitution's Establishment and Free Exercise Clause mandates.

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292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 81. *See also* Marjorie G. v. Stephen G., 592 N.Y.S.2d 209 (Sup. Ct. 1992). In this case the mother, who is the custodial parent, placed her six year old twin sons in a Reform Jewish School. The father, however, wanted the boys exposed to the tradition of Conservative Judaism. Declining to restrict the noncustodial parent from involving the boys in religious activities and worship services at the Conservative synagogue during visitation periods, the trial judge determined that the difference between the two branches of Judaism was "merely a sectarian dispute between the two most corresponding branches of the same religion." *Marjorie G.*, 592 N.Y.S.2d at 212.
296. *DeLuca*, 609 N.Y.S.2d at 81.
297. *Id.*

XI. Conclusion

It is evident that portions of New York's statutory family law scheme violate the federal Constitution. It is also clear that the state's judiciary recognizes the Constitution's strictures regarding separation of church and state and has attempted to interpret the laws in ways which help them to conform to constitutional mandates.

The New York judiciary's approach to the enforcement of Jewish marriage contracts, articulated by the state's highest court in *Avitzur v. Avitzur*, appears to be fully consistent with constitutional standards established by the Supreme Court of the United States. By prohibiting excessive state entanglement with religious doctrinal matters and requiring the application of neutral principles of law, the state's courts have appropriately decided cases which required interpretation of the secular portions of religious marriage contracts.

Likewise, New York courts' noninterference approach to religious issues, which arises with respect to visitation, clearly passes the *Lemon* and endorsement tests, utilizes neutral principles of law, and curtails the free exercise rights of the non-custodial parent only to the extent necessary to ensure the "best interests of a child."

In contrast, notwithstanding the noble intentions of the drafters of the *Get* Statutes, this body of legislation is not likely to survive constitutional muster. The *Get* Statutes fail to satisfy the *Lemon* and endorsement tests for establishment. Moreover, they do not conform to the objective principles of law approach. Although the *Get* Statute and Equitable Distribution Law amendments are facially neutral, they obviously have the potential to chill the free exercise rights of a Jewish husband who, rather than incur severe economic penalties or forego a civil divorce, may be coerced into giving his wife a *Get*.

Similarly, the plain language of the state's religious matching placement statutes, without judicial clarification, creates insurmountable First Amendment problems. The last two prongs of the *Lemon* test are implicated, in that religion is certainly favored over irreligion, and state delineation or imputation of a child's religious heritage involves extensive governmental involvement in religious matters. In addition, the statutory scheme creates a perception of endorsement of religion, and actually communicates endorsement of religion when the state assigns a specific religious affiliation to a child.

Like the relationship between the legislature and judiciary, with regard to the state's divorce laws, New York's courts have interpreted

the religious matching placement statutes in a manner that appears to resolve some of the constitutional problems contained in the legislation. However, the judiciary has only been able to accomplish this feat by eliminating important elements of the religious matching provisions, including the assignment of a specific religion to children whose religion or religious heritage is unknown.

Despite the judiciary's consistent efforts to cure the infirmities of the state's statutory scheme, the *Get* Statute in combination with its Equitable Distribution Law amendments are violative of the First Amendment. Moreover, the Religious Matching provisions of the Domestic Relations Law and Social Service Law, as written, fail both the *Lemon* and endorsement tests for the establishment of religion and curtail free exercise rights as well.