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RELIGIOUS LAW AND CIVIL LAW: USING SECULAR LAW TO ASSURE OBSERVANCE OF PRACTICES WITH RELIGIOUS SIGNIFICANCE

KENT GREENAWALT*

I. INTRODUCTION

Civil law in the United States rarely helps to enforce religious standards or demands that people perform actions whose significance relates to religious obligations. Yet, some American states do have such involvement with certain observances of Orthodox and Conservative Judaism.

Many states enforce *kosher* requirements, to which Orthodox and some Conservative Jews adhere. The laws, which penalize fraud in the labeling of products as *kosher*, serve the secular interest in preventing deception of consumers. However, the laws also force the state to decide when religious regulations have been violated.

Orthodox and Conservative Jewish divorces raise a second kind of involvement. The law pressures people to perform an act whose significance connects with a sense of religious obligation. Jewish law does not permit a woman who is divorced under civil law to remarry unless her husband grants her a *get*. Thus, a husband may obtain a civil divorce which effectively blocks his wife's remarriage. New York has adopted statutes that

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aim to force divorcing husbands to grant *gittin* to their wives, and judicial decisions in other states have a similar effect. These laws and rulings contribute to civil equality of men and women, and they give practical substance to the civil right to remarry. The cost is the state's interference with what is, in a sense, a religious matter. The wife is already free under the civil law to remarry after the civil divorce. Should the state not leave religious performance and ideas of religious obligation to the private realm?

These issues raise deep questions of constitutionality and wisdom. I concentrate on constitutionality, but matters of legislative and judicial wisdom lie in the background.

One reason why these issues warrant discussion is their practical importance. For some Jewish women, obtaining a *get* is vital to their prospects for a fulfilling life after civil divorce. A much larger number of Jews observe *kashrut* (Jewish dietary law).

The questions I consider also have a broader significance. One crucial method to assess the validity of various general approaches to the Free Exercise and Establishment clauses is to examine their application to concrete problems like those raised by *kosher* and *get* laws.

Religion clause law now lies in considerable uncertainty.[1] A brief summary of that law places the problems I discuss here in their doctrinal context. Neither executive government agencies nor courts may resolve debated issues of church doctrine and practice, deciding that some conform with a tradition and that others do not.[2] If a government action is aimed against religious practices[3] or discriminates among religious groups,[4] it is presumptively unconstitutional, subject to a demanding compelling interest test that few governmental measures can survive. According to the controversial 1990 decision of *Employment Division v. Smith*,[5] when a general and valid law forbids behavior, religious believers have no constitutional claim to an exemption. Legislatures may, however, make specific accommodations to religious practices, such as allowing people during worship

1. In Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323 [hereinafter *Quo Vadis*], I explain this uncertainty in more detail. The most significant development since that article has been the invalidation of the Religious Freedom Restoration Act as it applies to state and local governments. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

2. *See, e.g.*, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

3. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

4. *See* Larson v. Valente, 456 U.S. 228 (1982).

5. 494 U.S. 872 (1990).

services to ingest peyote, despite a general prohibition on using that substance.[6]

Congress responded to the basic doctrine of *Smith* with the Religious Freedom Restoration Act.[7] The Act effectively reinstated the former constitutional law, providing that individuals could engage in otherwise forbidden behavior if a law "substantially burden[s]" their exercise of religion and does not further a compelling interest by the least restrictive means. The compelling interest test used in free exercise cases before *Employment Division v. Smith* was less demanding against the government than the compelling interest test of equal protection and free speech cases;[8] courts applying the statute have also used a somewhat more "relaxed" compelling interest test.[9] The Act was challenged as an unjustified exercise of Congressional power under the Fourteenth Amendment and as violating separation of powers (by imposing an unadministrable standard on the courts) and the Establishment Clause. In June 1997, the Supreme Court sustained the Fourteenth Amendment challenge in *City of Boerne v. Flores*,[10] holding that Congress has no power under that amendment's enforcement section to impose new rights against states and localities. The Court's theory of invalidity covers only states and localities, but some of the opinion's language reads as if the Act as a whole is invalid, even as it applies to federal statutes and regulations.[11] The Court's language does not preclude either fresh federal legislation that applies only to the federal government or similar state legislation.[12] Moreover, states remain free to interpret their own free exercise clauses more generously than the Supreme Court's construction of the federal clause in *Smith*.[13]

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6. *See id.* at 892.

7. 107 Stat. 1488 (codified principally at 42 U.S.C. § 2000 bb (Supp. V 1994)).

8. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982).

9. *See, e.g.*, Droz v. Commissioner, 48 F.3d 1120 (9th. Cir. 1994); Steckler v. United States, No. 96-1054, 1998 WL 28235 (E.D. La. Jan. 26, 1998); Bloch v. Word of Life Christian Center, 207 B.R. 944 (D. Colo. 1997).

10. 117 S. Ct. 2157 (1997).

11. *See, e.g., id.* at 2160.

12. I discuss these matters in Kent Greenawalt, *Why Now Is Not the Time for Constitutional Amendment: The Limited Scope of* City of Boerne v. Flores, 39 WM. & MARY L. REV. 689 (1998).

13. *See, e.g.*, Angela Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275; Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017 (1994); Ira Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259; Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747 (1993).

The state of Establishment Clause law is more amorphous. For more than two decades the controlling test was that of *Lemon v. Kurtzman*:[14] An act was valid only if it was backed by a secular purpose, did not have a primary effect that promoted or inhibited religion, and did not unduly entangle the government with religion. Justice O'Connor has suggested that an inquiry about government endorsement of religion is the best method for discerning unacceptable purpose or effect,[15] and a majority of the Court has concentrated on endorsement in cases involving public displays of religious symbols. The Court, as a court, has yet to overthrow the *Lemon* test. However, seven Justices have now either rejected its approach outright or have indicated that, in lieu of a single comprehensive test, more discrete inquiries are called for in establishment cases.[16]

Although *Lemon* as a threefold test for all occasions may be effectively dead, most Supreme Court Justices and other judges seem to believe that results reached under that test remain a substantial guide to how cases should be resolved. When one looks at cases decided under *Lemon*, one is driven to consider the elements of its test, particularly effect and entanglement. Not only have those approaches been used to justify what the Court has done, any defensible approach to the Establishment Clause will also focus on unacceptable effects and improper connections between government and religion.[17] Thus, decisions under *Lemon* by courts at all levels retain more relevance than might be gleaned from a simple statement that the Supreme Court has effectively abandoned the *Lemon* test.

Statutes and cases relating to *kosher* foods and the *get* raise important free exercise questions, but the Establishment Clause looms as more crucial for constitutional evaluation. The particular issues I discuss provide one perspective for assessing what courts may and should do in a post-*Lemon* regime. The inquiry is made more difficult and interesting because the issues differ significantly from subjects the Court has mainly resolved under *Lemon*.

The aspiration of this Article is not to provide a comprehensive approach to the religion clauses, using *kosher* and *get* laws as illustrations.[18] Rather, my positions on how courts should treat these laws highlight im-

14. 403 U.S. 602 (1971).

15. *See* Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

16. *See Quo Vadis*, *supra* note 1, at 325-28.

17. *See id.* at 361-69.

18. An attempt to develop a comprehensive approach would require extensive analysis of other legal problems, ones more typical of free exercise and establishment litigation. In *Quo Vadis*, *supra* note 1, I come much closer to a comprehensive overview that is mainly descriptive but partly normative. In future work, I hope to develop a more comprehensive normative approach.

portant aspects of establishment and free exercise inquiry. The analysis reveals a number of significant questions. One is how much it matters which of various judicial "tests" is employed. For example, will relevant factors be significantly different for a court that asks whether the state has endorsed a religion than for a court that asks whether a religion has been otherwise advanced? A second question concerns special difficulties when one minority religion may be favored over another related minority religion. Should Establishment Clause tests be affected by the minority status of both religions? A connected question concerns denominational preference. What is a court to do if the law actually speaks in terms of one "denomination," but members of other relevant denominations may believe that the law is appropriate? Another narrower question concerns judicial appraisal of the tenets of religious views. When should judges accept the sincere understandings of affected individuals as controlling, and when should they seek to discern dominant understandings of members of a religious group? When should they decline to make such inquiries at all?

II. KOSHER LAWS

Twenty-one states and some cities have laws that are designed to see that those who advertise their products as *kosher* have, in fact, observed *kosher* requirements.[19] Literally, *kosher* means "fit" or, for food, "suitable for consumption." Deriving from biblical passages and rabbinical interpretations, *kosher* requirements concern classes of foods, ritual slaughter, and the handling and preparation of foods. Some animals, such as pigs and shellfish, may not be eaten under any circumstance. An animal that is regarded as clean, or *tahor*,[20] must be slaughtered by a ritual slaughterer according to an approved procedure. Its blood must be immediately drained and the meat soaked and salted to draw out remaining blood. *Kosher* foods must not be stored or prepared with non*kosher* foods; meat and dairy products must be stored apart, prepared with different utensils, and eaten separately.[21]

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19. Judge Lay lists 21 states with such laws. *See* Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337, 1340 n.5 (4th Cir. 1995). These states together have a high percentage of the country's population.

20. Some readers of the Article have told me that *tahor* may refer to an animal that is ritually "pure" for sacrificial purposes or to an animal that may be eaten. Insofar as "cleanliness" or "purity" concerns suitability for sacrifice, a food could be *kosher* and unclean or impure.

21. *See* Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 953-54 (1997); Gerald F. Masoudi, Comment, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 667-71 (1993).

This summary of overarching principles hardly does justice to the complexity of *kosher* requirements, about which, a court said in 1918, "thousands of volumes have been written."[22] For example, the knife with which an animal is slaughtered must be free of nicks or imperfections, and requirements for cleaning animals, and even vegetables, can be highly detailed.[23] As food technology advances, novel determinations must be made, such as whether cheese can be *kosher* if made from an enzyme that is genetically engineered from a pig's gene.[24]

The three main branches of American Judaism, Orthodox, Conservative, and Reform, have different attitudes toward *kashrut*. Orthodox and a minority of Conservatives are observant, though the Orthodox practice is stricter in some respects. Some Reform Jews observe aspects of *kashrut*, but they do not consider the rules binding.[25] Judaism within the United States is not hierarchical. Although broad agreement exists about most aspects of *kosher* practice, no central authority exists to settle disagreements

22. People v. Atlas, 170 N.Y.S. 834, 835 (N.Y. App. Div. 1918). For a detailed account of practical disputes within New York Jewish communities, see HAROLD P. GASTWIRT, FRAUD, CORRUPTION AND HOLINESS: THE CONTROVERSY OVER THE SUPERVISION OF JEWISH DIETARY PRACTICE IN NEW YORK CITY 1881-1940, 1-123 (1974).

23. *See* George Robinson, *Kosher and Halal Food: A Higher Authority*, NEWSDAY, July 26, 1994, at B5. *See, e.g.*, SEYMOUR SIEGAL & DAVID POLLOCK, THE JEWISH DIETARY LAWS 64-75 (1982) (a Conservative perspective); Rabbi Yaakov Weisman, *The Making of an Educated Kashrus Consumer*, THE JEWISH OBSERVER, Apr. 1993, at 4-7; THE JEWISH OBSERVER, June 1993, at 36-39 (responsive correspondence indicating Orthodox perspectives).

24. This and related issues relating to biotechnology are discussed in Kathleen Day, *Modern Science Meets Ancient Ritual; Advances in Biotechnology Raise Issues About What Is Kosher*, WASH. POST, Mar. 26, 1994, at A1.

25. *See* 6 ENCYCLOPEDIA JUDAICA 27 (1971). The basic understanding of Reconstructionist Jews is that *kosher* laws, like other rituals, are cultural practices rather than binding requirements. Mordecai Kaplan refers to them as "folkways," which may be valuable in preserving Jewish culture. *See* MORDECAI KAPLAN, JUDAISM AS A CIVILIZATION: TOWARDS A RECONSTRUCTION OF AMERICAN JEWISH LIFE 433 (Jewish Publication Society and Reconstructionist Press 1981) (1934). With regard to *kashrut* practices, Kaplan writes that even though the requirements cannot be understood as divine ordinances

> [T]he fact remains that because of the dietary inhibitions the Jewish civilization has acquired a high degree of distinction and dignity .... [w]hy then should not the Jews avail themselves of those of their folkways which might energize the deeply ingrained habit of transforming the act of eating, as it were, into a sacrament.

Id. at 440.

In practice, Reconstructionist Jews often follow *kosher* guidelines to some extent for the spiritual values they believe doing so entails. In a 1996 survey commissioned by the Jewish Reconstructionist Federation, 34% of Reconstructionist respondents said that they keep *kosher* as compared to 24% of Conservative Jews who affirmed that position in a recent Conservative movement survey. But even those who keep *kosher* are not as concerned about technicalities as Orthodox people would be. *See Reconstructionist Survey Finds Inclusiveness Attracts*, METROWEST JEWISH NEWS, Dec. 12, 1996, at 8.

that arise. On matters that are disputed, observant Jews follow the judgments of rabbis whom they trust.

Kosher requirements were religious in their origin and retain religious significance. Even if the beginnings of *kashrut* also reflected a concern for physical health,[26] no one who focuses only on physical well-being would arrive at exactly the same standards.

Nonetheless, three main groups of consumers besides religious Jews intentionally buy *kosher* products. One group, including Muslims who do not eat pork, has religious dietary restrictions similar to those of Orthodox Jews. A second group of consumers has no religious motivation but believes that *kosher* products are especially carefully prepared. Vegetarians, for example, may believe that a dairy restaurant that holds itself out as *kosher* is unlikely to have any meat particles in its food. A third group of people has a taste preference for some *kosher* products, such as *kosher* chickens. Other consumers may buy such products without realizing that they are *kosher*.[27] One estimate is that only about one-fourth of those who buy *kosher* products are Jewish.[28]

The market for *kosher* products in the United States is at least $2 billion to $3 billion a year.[29] Since some individuals will buy only *kosher* products, which cost more, sellers have an incentive to claim that non*kosher* products are *kosher*. This incentive creates a considerable potential for fraud.

Much enforcement of *kosher* requirements is private. For example, the Union of Orthodox Jewish Congregations of America inspects and approves manufacturing facilities; manufacturers then advertise the approval with a symbol ⓤ on their products. Local rabbis inspect stores and restaurants and guide followers about which of those observe *kosher* require-

26. Some requirements are susceptible to such an explanation. For example, unrefrigerated meat spoils less quickly if it is salted, and, because dairy products spoil more quickly than salted meat, mixing them could contribute to spoilage of meat.

27. Since *kosher* products generally cost more than alternatives, these unintentional purchasers would usually buy similar non*kosher* foods if they were easily available and the buyers learned they were paying more than necessary.

28. *See* Frank Bruni, *The Brave New World of Kosher; Foods Exert a Growing Appeal That Isn't Just for Jews*, N.Y. TIMES, Nov. 15, 1996, at B1 [hereinafter *The Brave New World*] (estimating Jews account for 29% of the *kosher* market); Stuart Vincent, *Around the Island/Crime and Courts/Suit Says a N.Y. Law Is Simply Too Kosher*, NEWSDAY, Nassau and Suffolk Edition, May 21, 1996, at A27. Such estimates become less illuminating as more and more ordinary products, such as Coca-Cola, are prepared to qualify as *kosher*. *See id.*

29. *See* Masoudi, *supra* note 21, at 667; *The Brave New World*, *supra* note 28. Stephen Rosenthal speaks of the "$35 billion dollar kosher food industry" but indicates that most of this food is purchased by consumers unaware of a product's *kosher* status. Rosenthal, *supra* note 21, at 952.

ments.[30] Such private "enforcement" by itself raises no problem of constitutionality or legislative wisdom. These problems arise only when the state enters the picture.

When regarding the civil law's involvement, one needs to understand the alternatives. The state could back up private enforcement with damages for trademark infringement or penalties for fraudulent claims of approval; or, the state could undertake direct enforcement with inspections and determinations whether practices conform to *kosher* requirements.

An outline of these possibilities quickly reveals three points. *Purely* private enforcement, with no state involvement, may be less effective than desired. Suppose a manufacturer puts pork in its frankfurters but nonetheless uses the © symbol. What could the Union of Orthodox Jewish Congregations do? It would have to rely on publicity directed at stores and consumers. But one can imagine the difficulties if the manufacturer uses new brand names, or the frankfurters are sold through butchers who do not use brand names. Purely private enforcement may be sufficient for highly observant Jews who pay close attention to the guidance of their rabbis, but it works less well for strangers visiting unfamiliar settings and for those who wish to observe *kosher* laws without investing much personal effort.

A second point is that a mix of private and state alternatives is possible. Some matters might be left to private enforcement aided by state penalties when symbols of approving bodies are fraudulently used. Other matters might be subject to direct state enforcement.[31]

The third point is that the methods of direct state enforcement could vary siguificantly. Enforcement officials could be secular administrators or rabbis; the state could decide what counts as *kosher* or accept the determinations of rabbis or Jewish organizations; the law could possibly create a defense for those who sincerely believe their products are *kosher*.[32]

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30. *See* Mark A. Berman, Note, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROB. 1, 12 (1992). For difficulties that once arose when enforcement was exclusively private, see GASTWIRT, *supra* note 22, at 1-123.

31. A possible division would be between production of meat and its subsequent handling. Private agencies may be better equipped to evaluate how animals are slaughtered and meat is initially prepared than to monitor the handling of meat through its distribution to consumers, although much private enforcement now does consist of inspection of individual shops by local rabbis. *See* Weisman, *supra* note 23.

32. The law could penalize on the basis of some intermediate level of culpability, such as recklessness. The level of culpability could also vary with the elements. Insincerity might be the standard if the nature of the food and its preparation are undisputed, and the crucial question is whether such

Constitutional conclusions may depend on the precise scheme the state has chosen. One question under a proper constitutional analysis is whether a scheme with fewer troublesome features can yield adequate enforcement. If constitutionally doubtful aspects are not necessary for enforcement, they may render a scheme impermissible.

My discussion moves from less intrusive state involvements with *kosher* requirements to more intrusive ones. I ask at each stage what values under the Establishment Clause are compromised. As I have said, if *kosher* laws purposefully favor some religions over others[33] (and are not justifiable as a permissible accommodation), they create a suspect classification, are subject to strict scrutiny, and are effectively invalid. Otherwise, *Lemon*'s elements of purpose, effect, and entanglement, as well as the principle that civil courts may not resolve debatable matters of religious doctrine and practice, provide guidance for decision.

A. STATE SUPPORT OF PRIVATE ENFORCEMENT

The most modest state involvement is reinforcing private enforcement of *kosher* rules. Minimally, the state could afford the organizations whose symbols are improperly used ordinary remedies for trademark infringement, or allow them to sue for other economic torts. The state might go further and employ the law of criminal and civil fraud. A company that falsely claims its product has been endorsed as *kosher* would be guilty of fraud. Since the state deals similarly with other fraudulent claims of endorsement, it would neither single out religion for special treatment, nor favor one religion over another.

Does the state's support of private enforcement impermissibly enforce religious law?[34] One possible answer is that *kosher* requirements have become an essentially secular matter: people want to eat *kosher* food

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food is *kosher*. Recklessness might be the standard if the issue is whether the food in question actually conforms to a standard upon which the parties agree.

33. I include here the inquiry whether a religion is purposefully endorsed over others.

34. I do not directly address the practical worry that dealing with fraudulent claims of endorsement may be ineffective because companies could claim their products were *kosher* without enlisting the supposed approval of any recognized body. Since, in this approach, the state would not decide what is *kosher*, it would not regulate simple claims that food is *kosher*. Because many Jews who observe *kosher* laws are highly skeptical of claims that a product is *kosher* when unsupported by a recognized group, the problem with such general assertions is less than might appear. *See, e.g.*, Carole Paquette, *Challenge to Kosher Laws Raises Some Deeper Issues*, N.Y. TIMES, Feb. 25, 1996, at I.

The question whether state involvement limited to false claims of endorsement is effective does not raise constitutional doubts about that approach. *However*, the effectiveness of that approach may bear on the constitutionality of greater involvement.

for all sorts of reasons and we should no longer think of the requirements as primarily religious.[35] However, despite the historic and present health benefits of eating *kosher* food, the amount of *kosher* purchases by non-Jews, and the extent to which some Jews now observe *kosher* standards for cultural reasons, the importance of the standards remains largely religious. They are about ritual observance. In Judaism, culture and religion are intermingled; but the idea that *kosher* requirements have moved, like Santa Claus (St. Nicholas), from being primarily religious to being predominantly secular is specious.

A second response is far more convincing. The state has a legitimate secular interest in preventing fraud, even if people want a specific kind of product for religious reasons. Suppose that someone sold crosses with the claim, "Personally Blessed by the Pope." The state may properly prevent such fraud. No doubt, some claims of religious fraud present grave problems. Officials cannot assess the truth of essentially religious claims, and they should ordinarily not determine the sincerity of people who make claims about their own religious experiences, such as "God has revealed himself to me."[36] But a simple determination that the Pope did not bless particular crosses does not raise such problems,[37] nor does a determination that a seller falsely claimed certain meat was approved by a private *kosher* enforcement organization.[38] These straightforward factual judgments do not demand religious evaluation and are undoubtedly proper for a state to make.

A conceivable constitutional worry exists if a statute specifically forbids fraud about supposed approvals of products as *kosher*, rather than leaving such fraud to be covered by general provisions. Specific prohibitions of false labeling of products as *kosher* might be perceived as in conflict with the Establishment Clause. However, given the wish of many consumers to buy *kosher* products, statutory specification does not amount to an endorsement or advancement of Judaism.

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35. *See* Shelley R. Meacham, Note, *Answering to a Higher Source: Does the Establishment Clause Actually Restrict Kosher Regulations as* Ran-Dav's County Kosher *Proclaims?*, 23 SW. U. L. REV. 639, 648-49 (1994).

36. *See* United States v. Ballard, 322 U.S. 78 (1944) (Jackson, J., dissenting).

37. *See* Marc D. Stern, *Kosher Food and the Law*, 39 JUDAISM 390, 397-98 (1990).

38. It has been estimated that there are now more than 270 organizations certifying products as *kosher* in New York State. *See The Brave New World*, *supra* note 28. Perhaps as much as 80% of certifications are done by "the big four," of which the Union of Orthodox Jewish Congregations is by far the biggest. *See* Paquette, *supra* note 34.

B. DIRECT STATE ENFORCEMENT

Serious constitutional problems arise only when the state's involvement increases. States and cities with laws regulating *kosher* advertising directly enforce *kosher* rules.[39] Under these laws, officials investigate and determine whether *kosher* standards have been violated.

When one considers direct enforcement, it helps to distinguish the bare minimum of any enforcement scheme from complexities that intensify constitutional doubts. The main complexities are (1) use of rabbis as state officials responsible for enforcement, and (2) disagreements about what is *kosher*. Disagreements greatly increase constitutional concerns if defendants may be penalized despite a sincere belief that their products are *kosher*. When judges and advocates have indicated that enforcement of *kosher* laws is unconstitutional, they have not always been clear whether the basic scheme of enforcement is invalid or the complexities make it so.

1. *The Basic Scheme*

A statute makes it illegal to advertise food as *kosher* that one realizes is not *kosher*. New York law, which has served as a model for other states, provides: "A person who, with intent to defraud, sells . . . food . . . [that he] falsely represents . . . to be kosher . . . is guilty of a . . . misdemeanor . . . ."[40] *Kosher* is typically defined as being in accord with "orthodox Hebrew religious requirements,"[41] although some laws do not make explicit reference to Orthodox Judaism.[42] Is such a law constitutional?

The circumstances most favorable to that conclusion would be if enforcement were by ordinary officials and applications of the concept of *kosher* were easy and undisputed. Everyone agrees that pork is unacceptable according to traditional Jewish standards. A seller who falsely claims that meat containing pork is *kosher* violates the law. Does it raise problems when the state imposes penalties for this behavior? Two possible objections are that the state decides whether someone has violated religious law

39. One exception is New Jersey, where the state legislature acted after the state supreme court held a scheme of direct enforcement invalid. *See infra* notes 54-64 and accompanying text.

40. N.Y. AGRIC. & MKTS. LAW § 201-a (McKinney 1991).

41. *Id.*

42. *See* Masoudi, *supra* note 21, at 672-73. If enforcement officials in states where the statutes and regulations do not refer directly to Orthodox standards rely on those standards, the constitutional analysis differs little from that for states whose laws explicitly refer to Orthodox standards.

and that it favors or endorses one religion over other religions, and possibly over nonreligious views.[43]

The state *does* determine that someone has violated religious law (or mixed religious law and cultural practice), but it refrains from any judgment about what is religiously correct and from any debatable judgment about how religious precepts should be understood and applied. Many Jews and others believe one should not eat pork for (at least partly) religious reasons. The state aids them in avoiding deception. It does not say people should follow *kosher* requirements; it merely assists those who have this belief in fulfilling it. A judgment that Jewish tradition treats pork as unacceptable is grounded on precepts that derive from religion. However, since the determination is not debatable, the government does not intermingle in doctrine or practice as it would by taking sides on arguable issues for which it lacks competence.[44]

Does the state favor or endorse one religion to the disadvantage of other religions or nonreligion? One can examine this question in terms of actual present discrimination or potential discrimination. Whether there is some form of present favoritism turns on whether competing versions of *kosher* are unprotected and on whether other similar desires to be free of fraudulent representations are unsatisfied. Suppose that each major branch of the Jewish faith had its own *kosher* standards, and the state chose to enforce only Orthodox Jewish requirements. Such a law would favor Orthodox Judaism over other branches of Judaism and would reasonably be viewed as an endorsement of Orthodox Judaism in comparison with them (although not in comparison with Christianity or other religions). Such a law would probably be unconstitutional as a suspect classification. In any event, it would unacceptably endorse or advance one branch of Judaism in relation to others.[45]

The analysis is quite different if the standards of other Jews who observe *kosher* are very closely tied to Orthodox standards—if all Jews accept the Orthodox tradition as providing the measure for whether foods are

43. In earlier consideration of state support of private enforcement, the possible complaint that the state should not forbid fraud when the reason for consumer choice is religious was rejected.

44. The same analysis applies to a determination of whether a slaughter is a ritual slaughter *if* the manner in which that designation is made is straightforward.

45. Even if other branches of Judaism had distinctly different *kosher* standards, one *might* defend using Orthodox requirements in the law if they are the most strict, and other Jews could satisfy their own ideas of *kosher* by buying products that meet Orthodox standards. I shall explain in the next section the flaws with this possible defense.

kosher.[46] On this assumption, *kosher* laws would not impermissibly favor the Orthodox over other Jews. However, a question remains whether *kosher* laws effectively establish an existing religious view to the exclusion of one that might emerge as religious understandings shift. Here is an artificially stark illustration. Suppose a leader arose who claimed that Jews should evolve a new understanding of *kosher* and that any food can be *kosher* if produced in the right spiritual environment. The leader has created a farming and meat-producing community, in which pigs are raised and pork is used in frankfurters. The community wishes to use the label *kosher* for its frankfurters, because they have been made in the right spiritual conditions. When the law forbids this labeling, does that mean it establishes the religious view with a traditional understanding of *kosher* in preference to the novel understanding?

Kosher laws are not invalid on this basis. The vast majority of consumers have a particular idea of what food is *kosher*; the label "*kosher*" is for them a shorthand for "acceptable according to traditional Jewish standards." If the community's frankfurters were labeled *kosher*, without more, that would deceive many consumers.[47] The honest desire of the leader to usher in a new understanding of *kosher* does not give him a right to mislead people who assume that a label represents the nearly universal present understanding of what the term covers. Although a state would violate the Free Speech Clause and both religion clauses if it tried to restrict all utterances using the term "*kosher*," the requirement that product representations conform with consumers' understandings, even when these track a particular religious view, is constitutionally permissible. One might respond that the meaning of *kosher* depends on the understanding of individual adherents and that dominant views, therefore, should not be privileged over dissenting views. However, so long as products are placed in markets to which all people have access, it is appropriate to have label-

46. On this view, other Jews may be less rigorous in their *observance* of *kosher* requirements than Orthodox Jews, but lack (for the most part) independent standards of what counts as *kosher*. *See* Judge Lay's opinion in *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1341 & n.9 (4th Cir. 1995), which quotes from an amicus brief of the New Jersey Association of Reform Rabbis et al. (representing the entire spectrum of Jewish practice) in *Ran-Dav's County Kosher, Inc. v. New Jersey*, 608 A.2d 1353 (N.J. Super. 1992). *See also* Rosenthal, *supra* note 21, at 964. Another variation on this possibility is that standards of different groups coincide. Orthodox standards would then reflect the standards of other groups, but not because those groups accept Orthodox standards *per se* as the measure.

47. Though some consumers of *kosher* products may read labels for nutritional values or ingredients due to health reasons, such as heart conditions or diabetes, many consumers would not read labels to verify a product's status as *kosher*. Instead, they are likely to rely solely on the term "*kosher*" on the label and assume the product corresponds with their own ideas of what food is *kosher*.

ing that accords with heavily dominant views, if these can be identified, to provide the greatest protection from fraud.

Do *kosher* laws aid or endorse Judaism over other groups because they provide a special protection? That depends on whether any nonJewish groups have similar needs that are disregarded. If the *kosher* laws gave Jews protection not afforded other religious groups who sought similar protection, one might reasonably speak of discrimination and a forbidden aid to one religion in relation to another. Further, if the state failed to assist a secular group wanting similar protection against fraud, such as strict vegetarians, one might worry about its protecting religious needs in comparison with analogous nonreligious ones.[48]

The day may come when a legislature's failure to protect followers of Islam in adhering to their dietary restrictions amounts to unacceptable discrimination.[49] Thus far, however, neither Muslims nor any other sizable group (religious or secular) has sought and failed to receive the kind of protection afforded by the *kosher* laws. So long as this is true, basic *kosher* laws do not presently favor or endorse Judaism.

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48. A counter to this worry might be that people are especially concerned about not eating food they believe is unacceptable for religious reasons, and, therefore, the state may concentrate efforts against fraud as to that. Federal and state governments require accuracy about ingredients that tie directly to physical well-being, but these do not bear directly on the appropriateness of enforcing *kosher* laws.

49. Muslims have dietary requirements to eat foods that are *halal* (lawful or permitted). The main restrictions concern meats, although alcohol and other intoxicants are prohibited. The intricacy of restrictions governing meat resembles that found in *kosher* practices, with detailed analysis of the acceptability of gelatin and of meat from animals slaughtered by Jews and Christians ("people of the Books"). *Kosher* standards do not track exactly the standards of *halal*, and Muslims could benefit from clearer labeling of what conforms to their standards. *See generally* Muhammad Munir Chandry, *Islamic Food Laws: Philosophical Basis and Practical Implications*, FOOD TECH., Oct. 1992, at 92, 92-93; THE ISLAMIC PERSPECTIVE (The Islamic Food and Nutrition Council of America, Bedford Park, Ill.) Spring 1993, at 1; *id.*, Autumn 1993, at 1; and *id.*, Summer 1994, at 1.

Although the precise number is disputed, there are now approximately as many Muslims as Jews within the United States. *See* John Dart, *New Survey Documents Muslim Population*, DALLAS MORNING NEWS, June 24, 1995, at G3. According to one account, 16% of Jewish households follow *kosher* guidelines, but 75% of Muslims in the United States "follow Halal guidelines in one form or other." *See* Mazhar Hussani, *Dare to Speak*, THE ISLAMIC PERSPECTIVE, *supra*, Spring 1993, at 10. If, within a state, as many or more Muslims follow *halal* as Jews follow *kosher*, and Muslims need the kind of protection *kosher* laws provide for observant Jews, the potential for a claim of discrimination exists.

However, one cannot fault state legislatures for failing to provide equal treatment at this point in time. The population of Muslims has increased greatly in recent years. So far the main efforts in regard to *halal* have been to get some manufacturers to observe its standards and provide appropriate labeling, but not to get state governments to set up regimes of enforcement. For an overview of these efforts, see *id.*, at 1-12; *id.*, Autumn 1993, at 1-12; *id.*, Summer 1994, at 1-12.

Someone might argue that the very singling out of *kosher* requirements for enforcement creates a severe constitutional difficulty.[50] According to this view, the state may treat blatant lies about whether food is *kosher* under general fraud provisions (declining to prosecute if it is unclear or debated whether *kosher* standards have been met). But creating special statutory provisions, regulations, and enforcement divisions devoted to *kosher* observance is inappropriate. Such treatment of *kosher* standards, so the argument goes, provides a distinctive aid to religion and seems to endorse the understanding that fraud about religious standards is uniquely important. This argument against distinctive *kosher* laws has some force, but if *kosher* observance involves dietary requirements of great importance to many citizens, then the government may single them out, even if the category it thus recoguizes is one that connects to religious practice.

What is the constitutional relevance of potential discrimination? In one recent Supreme Court case, *Kiryas Joel Village School District v. Grumet*, five Justices suggested that a potential for subsequent discrimination was one reason to invalidate the legislative creation of a special school district for a village made up entirely of members of the Satmar Hasidic sect of Judaism.[51] According to the Court and Justice O'Connor, if a legislature affords such a special benefit to one religious group, there is no assurance it has afforded or will afford the same benefit to other similar groups. Because a failure to grant a benefit is not reviewable, the courts are not in a position to prevent legislative favoritism along religious lines, and the existing benefit therefore is not neutral in the sense required under the Establishment Clause.

If this theory prevails in future cases and is given a generous extension, it could threaten *kosher* laws. Even if no present favoritism exists, who can be sure what legislatures will do when other similar groups press for equal treatment? Their possible future failure to treat groups equally may mean that the present law lacks adequate neutrality.

Strong reasons exist for supposing that this theory will not be an important basis for undermining *kosher* laws. As Justice Kennedy's concurrence and Justice Scalia's dissent in *Kiryas Joel* point out, many specific legislative concessions have been granted, and the Supreme Court has approved such concessions in principle.[52] Courts have not supposed that the

50. *See Barghout*, 66 F.3d at 1345.

51. *See* 512 U.S. 687, 702-05 (1994). *See also id.* at 716-17 (O'Connor, J., concurring).

52. *See id.* at 725-27 (Kennedy, J., concurring). *See also id.* at 745-48 (Scalia, J., dissenting). For a thoughtful and more extended discussion, see Rosenthal, *supra* note 21, at 968-72. *See also* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 67-68 (1996).

possibility of some future discrimination makes such exceptions invalid; rather they have supposed that claims of uufair treatment between groups may be measured by courts when such claims arise. The need for legislative decisions to accommodate religious claims is all the greater because the Supreme Court restricted constitutional free exercise rights so severely in *Employment Division v. Smith.*

Typically, courts can determine claims that treatment is comparatively unfair according to equal protection and establishment criteria. They can then extend the legislatively granted benefit to a similar group or hold the original benefit invalid.[53] Perhaps in some narrow range of circumstances, courts will be unable to identify similar groups who should receive equal treatment, and it may be that the Justices regarded the privilege of a special school district as falling into that category. This problem of identification, however, is usually manageable, and it should be so in respect to restrictions on fraud about food. In summary, the mere possibility of some future legislative discrimination should not (and probably would not) make *kosher* laws presently unconstitutional.

2. *Troubling Complexities*

Disagreements over what food is *kosher* and the state's reliance on religious leaders for enforcement complicate constitutional analysis of *kosher* laws. Both factors influenced the New Jersey Supreme Court[54] and the Fourth Circuit Court of Appeals[55] to hold *kosher* enforcement laws invalid. Using the *Lemon* test, the New Jersey court determined that the state's regulations unduly entangled the government with religion and also had a principal or primary effect of advancing religion.[56] It said, "Our primary ground for [holding the regulations invalid] is that [they] impose substantive religious standards for the *kosher*-products industry and authorize civil enforcement of these religious standards with the assistance of clergy, directly and substantially entangling government in religious matters."[57] Although some language suggested that enforcement would be

53. *See, e.g.*, Olsen v. Lawn, 878 F.2d 1458 (D.C. Cir. 1989). Judge Ginsburg suggested that it may not always be simple to decide what to do about a benefit that is granted in an unconstitutionally restrictive manner.

54. *See, e.g., Ran Dav's County Kosher*, 608 A.2d 1353.

55. *See, e.g., Barghout*, 66 F.3d 1337.

56. *See Ran Dav's County Kosher*, 608 A.2d at 1364-65. The court suggested that perhaps the regulations constituted a suspect classification involving a deliberate distinction between different religious organizations, but it "decline[d] to invoke that standard." *Id.* at 1359.

57. *Id.* at 1355. The regulations could not be justified as an accommodation to religion, as the dissent proposed, because they responded to no burden on religious exercise.

impermissible, even where the content of *kosher* laws was undisputed,[58] the court emphasized disagreement about the interpretation of laws of *kashrut* within Orthodox Judaism and between it and other branches of Judaism. Even if such disagreements may occur infrequently, "when they do, they are ineluctably religious in tenor and content."[59] The state would be "one of the disputants, seeking to impose and enforce its own interpretation of Orthodox Jewish doctrine," and courts resolving such disputes would have to apply and interpret Jewish law.[60]

For the court, the religious qualifications of enforcement officials confirmed that "the regulations themselves have a principally religious meaning."[61] The Chief of the Bureau of Enforcement was an Orthodox rabbi, and an Advisory Committee, which consisted of nine Orthodox rabbis and one Conservative rabbi, "was constituted as it was precisely because rabbis have the expertise, education, training, and religious authority to interpret, apply, and enforce the regulations."[62]

The dissenters urged that all branches of Judaism recoguize Orthodox Judaism as setting the standards for what is *kosher*, and that "the record does not indicate whether the areas of disagreement are so substantial as to render enforcement constitutionally infirm in all or substantially all instances."[63] "[T]o the extent the New Jersey regulations refer to commer-

58. According to Judge Handler's opinion, "the State's adoption and enforcement of the substantive standards of the laws of kashrut is precisely what makes the regulations religious, and is fatal to the scheme." *Id.* at 1360. "Under the Establishment Clause, the State can neither impose religious rules nor endorse religious norms." *Id.* The dissent responded, "The record contains minimal evidence regarding whether the regulations' reference to Orthodox Judaism imposes a religious standard or whether it refers, in most instances, to a uniform, objective, and therefore secular standard for kosher food-processing." *Id.* at 1368-69. This sentence misleads in treating a simple, objective standard as itself secular, but it rightly implies that the crucial issue is whether application of the standard demands a religiously informed judgment.

59. *Id.* at 1362.

60. *Id.* at 1364.

61. *Id.* at 1361.

62. *Id.*

63. *Id.* at 1369. The dissenters argued that a statute or regulation is facially unconstitutional "only if the constitution is necessarily violated every time the law is enforced." *Id.* at 1370. The dissent quotes Supreme Court language that a law is invalid on its face only if every application is invalid. This is not an inaccurate statement of the law, but it is somewhat confusing. Suppose a statute were invalid in 90% of its potential applications, but that 10% of the applications, viewed alone, raised no constitutional problem. The general thrust of the law would be invalid, and the difficulty of sorting out constitutional from unconstitutional applications would itself almost certainly raise constitutional difficulties. (It would be highly unusual that the 10% would constitute a clear, distinguishable class of situations.) Such a law would be invalid on its face. *Therefore*, its application would be unconstitutional even as to the otherwise regulable 10%. *See generally* HENRY P. MONAGHAN, OVERBREADTH, THE SUPREME COURT REVIEW 1 (Philip B. Kurland, Gerhard Casper & Dennis J. Hutchinson eds., 1981); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN.

cially-recognized and sufficiently-definite standards, they are facially valid" and do not unacceptably entangle the state in "monitoring religious practices."[64] The dissent regarded the composition of the State Kosher Advisory Committee as irrelevant, because the committee was established by executive order and not required by the regulations. Given the prevention of consumer fraud, the dissenters did not think the regnlations advanced Orthodox Judaism or created a symbolic union of government and religion.

In a 1995 decision, three Fourth Circuit judges unanimously held Baltimore's ordinance enforcing *kosher* laws to be unconstitutional.[65] Two judges adopted different theories of unconstitutionality and the third judge embraced both. Judge Luttig, in a concurring opinion, said that the ordinance was an impermissible discrimination in favor of Orthodox Judaism: "The various branches of Judaism define kosher differently . . . and . . . these differences are significant to adherents of the various sects of the faith."[66] The ordinance, by defining *kosher* according to "orthodox Hebrew religious" standards, "has unquestionably expressed an impermissible intrafaith denominational preference for Orthodox Judaism."[67]

Judge Lay disagreed, reasoning that "all of the various sects of the Jewish faith agree that kosher standards are determined by reference to Orthodox Jewish law."[68] Thus, the ordinance did not embody a denominational preference requiring strict scrutiny. Judge Lay proceeded to apply

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L. REV. 235 (1994). The fact that some instances of *kosher* enforcement might be all right should not by itself save regulations from the sort of attack mounted in New Jersey.

This conclusion is straightforward for free speech and free press cases. A law that is substantially overbroad, reaching many constitutionally protected instances of speech, is invalid altogether, despite the unprotected character of much of the speech it regulates. Something like the free speech, free press overbreadth approach would be relevant here. If, in a high percentage of instances, application would violate religion clause guarantees, the overall effect of a law would be to advance (or inhibit) religion or unduly entangle the state in religion, or both. The law would therefore be invalid in all applications.

64. *Ran Dav's County Kosher*, 608 A.2d at 1375. The regulations focused mainly on display, identification, and verification requirements, and neither the record nor secondary sources "establish that those disputes [over *kosher* food preparation] are so pervasive and substantial as to engender a dispute over religious doctrine in the routine enforcement actions contemplated by the regulations." *Id.* at 1373-74. Stephen Rosenthal argues strongly that disputes over *kosher* standards are relatively few and that standards of compliance are typically straightforward. *See* Rosenthal, *supra* note 21, at 963-65.

65. *See* Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995).

66. *Id.* at 1347.

67. *Id.* at 1348.

68. *Id.* at 1341 n.9. "The mere fact that various sects may have different interpretations does not create an intra-faith dispute as to the basic meaning of what is and is not kosher." *Id.*

the *Lemon* test.[69] The ordinance itself required that the Bureau of Kosher Meat and Food Control consist of three Orthodox Rabbis and three laymen chosen from a list supplied by two Orthodox associations. This was an impermissible employment of religious officials to exercise secular power, an unacceptable entanglement of religion and government.[70] The ordinance could not have been cured by giving secular officials the power to determine *kosher* violations, because such officials may not decide matters of religious significance.[71] Judge Lay also concluded that the ordinance, separate from general provisions on fraud and with its own enforcement mechanism,[72] had a primary effect of advancing or endorsing religion because "the incorporation of the Orthodox standard creates an impermissible symbolic union of church and state."[73]

The New Jersey and Baltimore cases are complex. When people challenge an entire scheme of regulation, judges need to assess the presence of clerical enforcement officials and the importance of disputes over *kosher* rules, including the relevance of a possible sincerity defense.

a. *Rabbinical involvement*: When the crucial state officials are rabbis, and particularly when the law requires this, the state is dangerously entangled with religion. This is partly because administrative judgments are likely to be made directly on the basis of the rabbis' own religious understandings, and because the appearance that judgments are made on this basis is important, regardless of how the judgments are actually made. The problem is that the state not only seems to be performing a religious function, but it also employs religious leaders to make governmental determinations.[74] That is inappropriate, as shown by the Supreme Court's ruling that churches may not veto liquor licenses.[75]

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69. He did not mention the extent to which the Supreme Court had abandoned the test. *See supra* notes 14-17 and accompanying text.

70. For Judge Lay, what the ordinance required was similar to the Massachusetts law struck down in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), which permitted churches to veto the issuance of liquor licenses within 500 feet of their buildings.

71. *See Barghout*, 66 F.3d at 1344.

72. *See id.* at 1346.

73. *See id.* at 1345.

74. It might be countered that rabbis simply happen to be trained experts about *kosher* requirements. However, the fact that rabbis are the trained experts seems to show that the objects of interpretation are essentially matters of religious law. (In all probability, the result should be the same if the state appoints lay experts as officials who are trained in a religious tradition to make determinations about the rules of the tradition.)

75. *See Larkin*, 459 U.S. 116; Rosenthal, *supra* note 21, at 990-98 (defending most forms of rabbinical involvement as officials).

Because a large aspect of practical compliance with *kosher* requirements involves submitting to rabbinical supervision, clerics are inextricably involved. But just as secular officials are capable of identifying whether someone who asserts the priest-penitent privilege has been ordained, secular officials should be able to determine whether rabbinical supervision has occurred. This determination by secular officials is not itself a constitutional problem. However, when rabbis as rabbis are the state officials who directly determine if *kosher* rules have been observed or assess whether adequate rabbinical supervision has taken place, the situation is different. Such enforcement signals that lay people may be incapable of making the civil legal judgment. If lay people are incapable of deciding whether *kosher* requirements have been observed or whether adequate rabbinical supervision has occurred, the determinations themselves look fundamentally religious, and therefore lie outside the domain of state authority.

b. *Disagreements about kosher standards*: The crucial questions about disagreements are more complicated. Their frequency and significance, their correlation with distinct groups, and the state's response to them are important. Many violations of *kosher* laws are clearly agreed upon, but some issues, such as the status of sturgeon and pheasant, are disputed. State resolution of these disputes may be in statutory formulations and regulations, as well as through individual administrative determinations. Officials may implicitly take sides by their enforcement activities, even if these fall short of formal decision.

Any statute (or regulation) that refers explicitly to Orthodox understanding appears to align the state with Orthodox positions against competing nonOrthodox views. I shall initially assume that a state carries out such language in its literal sense, treating as non*kosher* products that Orthodox Jews generally believe are not *kosher* but which most Conservatives accept as *kosher*, such as sturgeon and pheasant.

If the state takes a position on such issues in dispute, does it not make an essentially religious judgment? One way to avoid this conclusion would be to say instead that the state rests on consumer understanding of what counts as *kosher*, an idea used in response to the earlier example of a reformer's revolutionary new conception of *kosher*. If Conservatives are less observant in some respects than Orthodox, but accept Orthodox standards for what counts as *kosher*, using Orthodox standards of what is *kosher* could fit broad consumer understanding. If this were true, then the state would not be making any religious judgment in following the Ortho-

dox position.[76] Difficulties arise when Conservatives have a different understanding of whether something really is *kosher* than the Orthodox and conceive their understanding as conforming with that of many consumers. When Conservatives have this attitude about their own standards, the state's adoption of Orthodox standards would be one-sided and, depending on the number of Conservatives who observe *kosher* standards, might be impossible to justify[77] in existing consumer assumptions.[78]

Why is state endorsement of Orthodox views troubling when Orthodox and Conservative Jews disagree? The most stark conflict is not involved. Conservatives do not find food that meets Orthodox standards unacceptable to eat. They can buy products meeting Orthodox requirements and be safe. For matters like wine, Conservatives can disregard *kosher* labeling, since they believe all wines are suitable to drink.

The problem is that Conservatives may observe some restrictions while wanting to use a broader range of products than Orthodox find acceptable.[79] But the state gives them no help in drawing their line between *kosher* and non*kosher* when it differs from that of the Orthodox. With the benefit of a similar process of state certification, Conservatives might

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76. This conclusion might also hold if Conservatives saw themselves as proposing novel views about *kashrut* (less drastic but conceptually similar to the hypothetical reformer's view that pork is acceptable).

77. In JACK WERTHEIMER, A PEOPLE DIVIDED: JUDAISM IN CONTEMPORARY AMERICA 162-67 (1993), a 1990 study indicates that among American Jews, 38% identified themselves as Reform, 35% as Conservative, 6% as Orthodox, and 1% as Reconstructionist. Many Conservative Jews, however, do not observe *kosher* standards.

78. There is a more complicated argument for such a basis. Suppose Conservative Jews broadly conceive independent standards of *kosher* but recognize as consumers that the civil laws are keyed to Orthodox positions. Thus, the state might claim that its standards do fit consumer understanding, and its choice of the Orthodox approach does not represent an intrinsically religious judgment. The flaw with this argument, however, is its circularity. Here, consumer understanding (I am assuming) is based on what the state has chosen to enforce in the past, not some independent understanding of what constitutes *kosher* observance. The state's initial choice to enforce Orthodox views of *kosher* laws is not rendered nonreligious simply because nonOrthodox consumers learn what the state is doing and take it for granted.

One possible response is that when a particular *kosher* law was adopted, the Orthodox view was dominant, and the basis for consumer understanding of state labeling was set before Conservatives were such a large group. If the factual conditions for this response could be met, the response should nevertheless fail. The state should not be able to enforce the practices of one group indefinitely because the group was dominant when enforcement began. However, since the law could enforce accurate labeling that indicates *kosher* compliance by Conservative as well as Orthodox standards, it is arguable that the state is justified in continuing existing enforcement practices until Conservatives press for parallel enforcement of their own standards.

79. A Conservative reader has suggested that different attitudes toward mingling with nonJews are tied to disagreements over the stringency of *kosher* laws, with Conservative Jews preferring more contact than Orthodox Jews.

achieve stricter observance of their more permissive standards.[80] The state's adherence to Orthodox standards may discourage the development of a Conservative tradition in which members would strictly observe their own standards. The state, in effect, gives Orthodox Jews assistance it fails to give Conservatives.

How does one evaluate this problem under the Supreme Court's wider doctrinal approaches? Substantial promotion of one religion at the expense of another is unconstitutional. Whether the issue is conceived as denominational preference (calling forth strict scrutiny) or impermissible advancement of Orthodox Judaism (the second strand of the old *Lemon* test), the concern is that Orthodox Judaism receives too much support under typical *kosher* laws. Reform Jews might complain that *kosher* laws accord recognition and prestige to Orthodox Judaism in comparison with their branch, but since they accept no dietary requirements, any disadvantage they suffer is too slight and oblique to matter constitutionally.[81] Conservative Jews who are observant have the distinctive, more powerful objection that they do not receive assistance for their own variant *kosher* standards similar to that the state gives Orthodox Jews.

The intensity of comparative disadvantage for Conservatives who disagree with Orthodox standards depends on three factors, at least two of which civil courts may determine. The first factor involves the relevant standards of Conservatives. Where Orthodox have *kosher* standards and Conservatives do not, Conservatives suffer no disadvantage. For example, Conservatives have no difficulty following their own standards for wines, because all wines are acceptable. The disadvantage arises when Conservatives, accepting some products Orthodox regard as non*kosher* but rejecting other related ones, do not receive the help the state gives the Orthodox. Thus, if the Orthodox regard all sturgeon as non*kosher* and the law follows Orthodox standards, Conservatives will lack guidance for which sturgeon are prepared and handled in a manner they regard as *kosher*.

The second factor is the practicality of giving similar aid to Conservatives. Are Conservative standards sufficiently stable for a regime of en-

80. The state's reliance on Orthodox standards may tend to reinforce the view that the basic standards of *kosher* are Orthodox and that Conservatives differ only by a less rigorous observance. I am assuming that any likely costs to manufacturers, retailers, consumers, and state enforcement agencies of having standards of *kosher* for Conservative Jews would not justify refusing to provide that protection.

81. Conservative Jews, whether or not they observe *kosher* rules, can share this complaint of Reform Jews.

forcement? If not, Conservatives themselves may prefer enforcement of Orthodox standards rather than no enforcement at all.

The third factor is more amorphous. How do Conservatives regard themselves in respect to *kashrut*? *If* they see themselves either as outright innovators or as followers of Orthodox practice with minor deviations, then they may not perceive *kosher* enforcement of Orthodox standards as advancing Orthodoxy. Judges could assess this third factor only by appraising understandings of Conservative Jews. If these understandings differ, judges would have to determine which views are dominant among Conservatives who observe *kosher* standards. A particular difficulty here may be that official Conservative leaders are significantly more observant than most members of Conservative synagogues. Discerning the dominant views of a group of religious adherents is not always futile, but it hovers uncomfortably close to making forbidden judgments about which religious doctrines and practices are true to a tradition. For this reason, Conservative perspectives on the nature of *kosher* rules should play a small role, if any, in constitutional evaluation.

One technique for understanding whether a religion is impermissibly advanced is to ask if it is endorsed by the state. Since Christians dominate state legislatures and lack similar dietary requirements, Christians cannot reasonably take *kosher* laws as endorsing Judaism over Christianity. The real question about endorsement is whether the state endorses Orthodox Judaism over Conservative Judaism. So far, Justice O'Connor, the main proponent of endorsement analysis, has opted for a test that relies on a reasonable observer with no specific religious affiliation.[82] Most nonJews are substantially ignorant about *kosher* enforcement. However, with study, a reasonable observer might be led to consider the effect of existing *kosher* laws on Conservative Jews and to wonder[83] how they regard those laws. If Conservatives reasonably feel that *kosher* laws represent a public statement that the authentic Judaism is Orthodox Judaism, then, especially if the Orthodox share this view, the "observer" should reach the same conclusion.

In this context, endorsement might be viewed as a matter of degree. Suppose most Conservatives on close examination took the following position: "We believe *kosher* enforcement does slightly endorse Orthodox Judaism, but it helps us practically. On balance, we do not mind enforcement of Orthodox standards." If most Conservatives held this position, en-

82. For an appraisal of her position, see *Quo Vadis*, *supra* note 1, at 370-75.

83. As my study of this subject has led me to this question.

forcement should not be viewed as substantially endorsing Orthodox Judaism.

My analysis suggests more generally that when the issue is the possible endorsement of one minority group over another, the reasonable reactions of members of those groups should be of overarching significance. But endorsement inquiries present the same difficulty that Conservatives' attitudes toward their own *kosher* standards do. If reactions are substantially divided, a court may find it hard to achieve resolution. Outsiders can learn how particular Conservative leaders regard *kosher* enforcement, but with only a superficial knowledge of Conservative Judaism, they will have trouble judging how most Conservative Jews who care about *kosher* rules view enforcement of Orthodox standards. Still, assessment of whether people perceive existing *kosher* laws as endorsing a religion other than their own is somewhat less difficult than ascertaining their positions on more theoretical issues.

For constitutional review of *kosher* regulations, the incidence of disputes may matter, both in respect to advancement of religion and the state's entanglement in making religious determinations. Suppose 99.9% of instances of argnable violations of *kosher* requirements raise simple factual issues about undisputed standards (such as not having pork in meat). If I am correct that a basic scheme of enforcement is constitutional, marginal worries in rare cases should not alter that judgment. On the other hand, if 25% of instances of arguable violations of *kosher* requirements concern substantive disputes between Orthodox and Conservatives, a major component of enforcement efforts would involve taking sides. This defect would render the scheme, as a whole, unconstitutional.

Just how should judges calculate the relevant percentages of disputes about the content of *kosher* requirements? The crucial disagreements are over what food is *kosher* when enforcement of Orthodox standards leaves Conservatives without help in enforcing their own variant standards. Judges might estimate the percentage of these disagreements, relative to the overall use of *kosher* symbols. They instead might assess instances of such disputed standards as a percentage of cases in which many people believe that those who manufacture and sell food have claimed to conform to *kosher* requirements but have failed to do so. Finally, judges might determine the frequency with which disputes over standards arise in enforcement.

All these approaches are relevant. The "actual enforcement" approach is simplest and reflects practical difficulties of administration. However, enforcement officials may steer away from disputed standards.[84] A scheme that puts the state in the business of resolving debated religious matters is troubling, and is not rendered innocuous by officials who sidestep most controversial applications. Further, enforcement of a law embodying Orthodox standards might not reveal most disputes that exist because other Jews accept different standards. For both these reasons, a court should not stop at actual enforcement, but should also inquire how far disputes over standards figure in patterns of *kosher* observance and instances of claimed violations.

These percentages of disputed instances are a central issue as to the permissibility of laws that enforce Orthodox standards to the exclusion of Conservative ones. Are disputed instances substantial, taking into account the range of use of *kosher* symbols, the behavior of those who deal with food, and instances of actual enforcement? If the disputed instances are substantial, the New Jersey Supreme Court and the Fourth Circuit were rightly troubled by enforcement of Orthodox standards of *kosher*.

My conclusions about laws that enforce Orthodox standards to the exclusion of Conservative ones involve stating an assumption, rejecting a somewhat plausible option, and distinguishing among forms of legal challenge. The assumption is that it is possible to enforce both Orthodox and Conservative standards when these differ. One method is for the state to employ the option left open by the two courts that have invalidated schemes of *kosher* regulation—that is, state prosecution for false claims of private approval. If the state backs up private enforcement, sellers and buyers of *kosher* food will rely on the certifications of private enforcement agencies. These groups will hold themselves out as applying particular standards of judgment; consumers will know whether approval is according to Orthodox or Conservative standards. Another approach is for the state to require labeling that indicates whether food is *kosher* under stricter Orthodox standards or more lenient Conservative ones. Finally, state enforcement officials might decide to accept claims that food is kosher when those claims have substantial Conservative support, even if the state statute is cast in terms of Orthodox requirements.[85]

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84. One reason officials may do this is precisely because they do not want the scheme of *kosher* regulation to be vulnerable to constitutional attack.

85. If an easily identifiable product, such as swordfish, is labeled *kosher*, Orthodox consumers who do not believe it to be *kosher* will not be confused. However, if the questionable product is mixed in other food, as is gelatin, nonenforcement of stricter standards could leave Orthodox consumers without reliable guidance, except that provided by private labeling.

Although a state might treat Orthodox and Conservative standards similarly, there is an argument that a failure to do so does not constitute present discrimination. The position of observant Conservatives who do not receive enforcement of their distinctive standards might be seen analogous to that of followers of Islam. The law does not monitor claims about Muslim dietary standards, and it could do so, but Muslims have not pressed for such help. *Kosher* enforcement does not presently discriminate against Muslims. The law similarly does not enforce Conservative Jewish standards at variance with Orthodox standards, but if Conservatives have not made a serious effort to get this assistance, perhaps they have weaker standing to complain that the present law unfairly assists Orthodoxy. The difficulty with this position is that the law explicitly, and perhaps unnecessarily, enforces only Orthodox requirements of *kashrut*; the preference for Orthodox Judaism over Conservativism is much more direct than any preference over Islam.

When thinking about constitutionality, one needs to distinguish between a general challenge to the law and a challenge to the law as it applies to a seller who has self-consciously conformed to Conservative standards of *kosher* while violating Orthodox standards. The seller's individual challenge should definitely succeed. It is unconstitutional for the state to convict those who sincerely follow widespread Conservative understandings of *kosher* observance. As Marc Stern has written, "[T]he State could not invoke the kosher food laws against someone who, in good faith reliance on the decision of the Conservative rabbinate, sold swordfish or gelatin as kosher."[86]

Whether a general challenge should succeed, as it did in the New Jersey Supreme Court and the Fourth Circuit, is a closer question. However, I believe that any scheme that unambiguously involves enforcement of Orthodox requirements to the exclusion of Conservative ones should fail, since a legislature can accomplish its legitimate objectives without that differentiation.[87]

Patterns of actual enforcement suggest that in some states the focus on Orthodox requirements is much less insistent than one might gather from the statutory language. What if the statute or regulations lack any

86. Stern, *supra* note 37, at 399. *See also* Rosenthal, *supra* note 21, at 981-83.

87. *See* Masoudi, *supra* note 21, at 675-78. Another author, Abner S. Greene, has suggested that the crucial question in a religion clause case should be whether government action advances or inhibits religious pluralism. *See* Abner S. Greene, *The Irreducible Constitution*, 7 J. CONTEMP. LEGAL ISSUES 295, 303 (1996). Promotion of pluralism vis-à-vis the dominant religion of Christianity cannot justify preferences for one branch of a minority religion over another.

reference to Orthodoxy, or despite such a reference, enforcement officials generally accept claims of *kosher* grounded in compliance with the standards of Conservative rabbis, even when these clearly diverge from Orthodox practice? Despite the statutory language, the chief enforcement official in New York, the state with the most extensive history of enforcement,[88] has suggested that distinctive Orthodox standards do not play a crucial role in the statute's application. According to one article, he "acknowledges that state law cites 'Orthodox' standards but said that has never been a consideration in enforcement."[89]

When one evaluates nonenforcement against those who conform with Conservative standards, it helps to distinguish a "sincerity defense" from what we may call equal treatment. The theory of a "sincerity defense" is that a seller has failed to adhere to statutory standards, but is not guilty of fraud because he believed he was complying.[90]

Such a defense would mitigate, but not eliminate, the problem generated by a state preference for Orthodox requirements. The defense would operate when disagreement does not concern the qualities of food or its handling,[91] but rather whether food of a certain character is *kosher*.[92] A defendant would be immunized from liability if he sincerely thought his food was *kosher* and believed that his position would receive fair support

88. *See* Vincent, *supra* note 28. *See also* Masoudi, *supra* note 21, at 671-72.

89. *See* Vincent, *supra* note 28.

90. One might say that a seller who knows he is complying with Conservative standards but not Orthodox ones cannot sincerely believe he is satisfying Orthodox requirements. However, the defense would be based on the assumption that the relevant state of mind is whether he thinks his product is *kosher* in a sense that will be relevant for many consumers.

91. In some circumstances, there may be no dispute about what constitutes compliance with some *kosher* requirement. S, a seller, believes that the food he sells complies. However, officials are sure he is mistaken and that either the manufacturer or the seller himself has done something to render the food non*kosher*. The question whether to provide a "sincere belief" defense for these situations is *not* a problem of constitutional dimension; the question is no different from general questions about fraud, false advertising, mislabeling, and misrepresentation.

92. In *Ran-Dav's County Kosher*, the majority assumed that a sincere belief that food was *kosher* was not a defense if the state determined that the food was not *kosher*. *See* Ran Dav's County Kosher, Inc. v. New Jersey, 608 A.2d 1353 (N.J. Super. 1992). It relied on an apparent shift in the position of the state attorney general about the possibility of such a defense. The dissenters wrote as if good-faith reliance on the representations of suppliers would be a defense. *See id.* at 1367. The Fourth Circuit in *Barghout* apparently accepted the construction of the Maryland Court of Appeals that persons were not guilty under the Baltimore ordinance "who sincerely believe their food products are kosher." Barghout v. Bureau of Kosher Meat and Food Controls, 66 F.3d 1344 (4th Cir. 1995). Marc Stern describes a number of cases in which courts have considered it important that statutes did not apply to those with a belief that their products were *kosher*. *See* Stern, *supra* note 37, at 391-96. Stern regards it essential for constitutional validity that enforcement officials not proceed against people whose reasonable beliefs they conclude are mistaken. *See id.* at 399. *See also* Rosenthal, *supra* note 21, at 983-90.

among rabbis.[93] A seller with the required belief would not be liable, although officials might decide his food was non*kosher*.

The argument that a "sincere belief" standard obviates constitutional difficulties is this: "If no one is punished for selling what he or she believes is *kosher*, the state is not enforcing one view to the detriment of another." Three remaining difficulties, however, establish that the constitutional concern of uneven enforcement is not eliminated.

The first difficulty is that officials may initially resolve whether basic requirements have been met. If they decide S is selling *kosher* food, he will not need to show his sincerity. If they decide S's food is not *kosher*, S will then be forced to persuade someone that he is sincere. Further, the group opposing S's position on what *kosher* is will receive endorsement of its view. A second related difficulty is that S's efforts to convince others that he is not lying may entail an expensive process with an uncertain end. The third difficulty concerns the weight to be afforded state enforcement officials' determination of *kosher* status on subsequent occasions. Must S accept the state's determination once it has been rendered? Obviously S's freedom of conviction is diminished if he must adhere to state agencies' prior determinations of what is *kosher*. These difficulties reveal why a sincerity defense does not remove constitutional problems if state determinations of what counts as *kosher* follow Orthodox requirements.[94]

An "equal treatment" approach is more promising. Under this approach, all claims of *kosher* with significant rabbinical support would be treated as valid. It is worth pausing to emphasize that this is the approach enforcement agencies must apply to conflicting claims among Orthodox rabbis given a statute like New York's. Disagreement among Orthodox Jews about *kosher* requirements is a fact of life. Some groups are stricter than others, and no centralized authority exists to resolve disagreements. When Orthodox Jews differ about *kosher* requirements, states cannot declare one position to be valid to the exclusion of another.[95] That course is

93. Otherwise, he would not sincerely believe the food was *kosher* in a sense relevant to knowledgeable consumers.

94. The Fourth Circuit concluded that a sincerity defense would not save an otherwise invalid law. *See Barghout*, 66 F.3d at 1344. When courts rejected early challenges to *kosher* laws, they assumed that a defense of sincerity would apply. *See* Hygrade Provisions Co., Inc. v. Sherman, 266 U.S. 497 (1925). *See also* Stern, *supra* note 37.

95. A group that is self-consciously stricter than the great majority of Orthodox Jews could protect themselves by having an approving organization with its own symbol that applies the stricter standard. For a brief summary of some major lines of division among Jewish communities, see Maimon Schwarzschild, *Pluralist Interpretation: From Religion to the First Amendment*, 7 J. CONTEMP. LEGAL ISSUES 447, 456-57 (1996).

barred by the line of cases forbidding states from deciding which among competing factions is true to a religious tradition.[96]

The "equal treatment" approach extends state neutrality to disagreements that fall mainly along Orthodox-Conservative lines. Such equal treatment would eliminate any problem of preference, except for two possible wrinkles. The first wrinkle concerns the statutory language itself. Does reference to Orthodox requirements itself endorse and advance Orthodox Judaism? If enforcement is even-handed, the impact of the bare statutory language is minimal. Moreover, the state may argue that "Orthodox" here means only "traditional," not Orthodox as contrasted with Conservative. These points should blunt any concern with the bare statutory language.[97]

The second wrinkle is more troublesome. For merchants, the process of enforcement matters as much as the outcomes at the end of the day. Someone who is being investigated not only bears expense and inconvenience, but may also lose the confidence of customers.[98] If many investigations are aimed against those who follow Conservative standards but fail to conform to Orthodox ones, the law in practice can effectively discriminate against Conservatives though courts and high enforcement officials ultimately may treat differing Orthodox and Conservative standards as equally authoritative. Of course, assessing the effect of enforcement practices in this light is difficult for judges considering a constitutional challenge. However, a court should be open to the argument that discriminatory actions by enforcement officials undermine assertions that variant *kosher* standards are treated equally.

C. CONCLUSION ABOUT *KOSHER* LAWS

The best approach to *kosher* rules involves state enforcement at all feasible levels against fraudulent assertions of approval of private organizations and individual rabbis.[99] This basic scheme of direct state enforce-

96. *See* Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

97. A court conceivably may strike a phrase like "Orthodox requirements" from a statute or regulation.

98. *See* Commack Self-Service Kosher Meats, Inc. v. Rubin, 170 F.R.D. 93 (E.D.N.Y. 1996); Vincent, *supra* note 28. The claims in *Commack* challenging the New York law are instructive. The family owners of Commack Kosher Meats said they were harassed because neither they nor their supervising rabbi was Orthodox. They were assessed a fine for violating New York *kosher* laws, which was published in the Jewish press. Although the fine was later withdrawn, the publicity seriously harmed their business.

99. *See* Masoudi, *supra* note 21, at 693-96.

ment should also be constitutionally permissible if the necessary conditions for it exist. However, if a significant number of argnable violations of *kosher* rules involve disagreements about standards between Orthodox and Conservative Jews, and the law embodies only Orthodox standards, direct state enforcement should be regarded as unconstitutional. Such unequal treatment should be regarded as denominational preference. In any event, such treatment unjustifiably promotes Orthodox Judaism at the expense of Conservatism. Unconstitutionality is more straightforward when clergy have heavy direct involvement in state *kosher* enforcement, impermissibly entangling civil government with religious authority.

III. THE *GET*

A. INTRODUCTION

Traditional Jewish divorce law can be seriously unfair to women and is decidedly out of step with modern notions of equality. Should civil judges intervene to combat unfairness or decline to intrude on the religious life of citizens? Whatever its wisdom, is civil involvement unconstitutional?

Under Jewish law (*halachah*), a marriage may be dissolved if the husband signs and delivers to his wife a bill of divorce, or *get*.[100] Because the procedures are complicated, the aid of a rabbinical court, or *beth din*, is usually needed in practice. Typically, the *get* is invalid if the husband signs under duress.

The choice whether to divorce is not exclusively a husband's.[101] In some circumstances, wives have a right to divorce and their assent is now

100. See IRVING A. BREITOWITZ, BETWEEN CIVIL LAW AND RELIGIOUS LAW 5-40 (1993); ELLIOT DORFF & ARTHUR ROSETT, A LIVING TREE 512-65 (1988). Professor Breitowitz's book is a comprehensive and careful study of the *get* problem; it treats in detail not only civil cases but also the complex issues of Jewish religious law. Breitowitz has also written an article, *The Plight of the Agunah: A Study in Halacha, Contract, and The First Amendment*, 57 MD. L. REV. 312 (1992), which covers most of the same subjects in shorter compass.

A typical *get* written in Aramaic, says: "I release and set aside, you, my wife, in order that you may have authority over yourself to marry any man you desire.... You are permitted to every man.... This shall be for you a bill of dismissal, a letter of release, a *get* of freedom...." *See* Blu Greenberg, *Jewish Divorce Law. If We Must Part, Let's Part As Equals*, LILITH, Summer 1977, at 26-27.

101. *See* BREITOWITZ, *supra* note 100, at 10-11 (explaining that the major shift toward equality was under Rabbi Gershon in the tenth century). *See also* DAVID WERNER AMRAM, THE JEWISH LAW OF DIVORCE IN THE BIBLE AND TALMUD (1968); ELIEZER BERKOVITS, NOT IN HEAVEN: THE NATURE AND FUNCTION OF HALAKHA 32-45 (1983); ZE'EV FALK, DIVORCE ACTION BY THE WIFE IN THE

necessary for divorce. The involvement of the *beth din* may put substantial pressure on husbands.[102] Thus, traditional Jewish law for divorce affords some protection to wives,[103] but a wife is still much more vulnerable than a husband because a failure to divorce carries uneven consequences.

Because Jewish law does not recognize civil divorce, one spouse's refusal to participate in a religious divorce prevents the other from marrying within the Orthodox and Conservative faiths.[104] However, a husband's refusal impacts much more severely on a wife than her refusal affects him. For example, if a husband leaves his wife and cohabits with an unmarried woman, he violates Jewish law against polygamy,[105] and children of the new union do not have a reduced status. Once he divorces under Jewish law, he may marry that partner. A wife, on the other hand, who is divorced under civil law but has not received a *get* is considered an *agunah*, or chained (anchored) woman. If she cohabits with a man, she will be guilty of the very serious offense of adultery; she may not marry that man when she later receives a *get*. Children born of that union are deemed *mamzerim*, a stigma indicating that they were born within an incestuous or adulterous relationship. These children may not marry other Jews, except for converts and other *mamzerim*. Thus, the wife who has not received a *get* must either refrain from sexual involvement or commit a grave violation of Jewish law that carries a stigma for herself and any new children. These realities create a serious problem when a husband chooses not to grant a *get* to his wife or uses the power to withhold a *get* as a bargain-

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MIDDLE AGES (1973); BLU GREENBERG, ON WOMEN AND JUDAISM: A VIEW FROM TRADITION 125-45 (1981).

102. In some instances even physical compulsion has been regarded as an appropriate technique to force husbands to agree to comply with an order of a *beth din*. Moses Maimonides explained that physical compulsion is applied to force the husband to do what he truly desires—to comply with Jewish law. *See* BREITOWITZ, *supra* note 100, at 34-35. On the conditions that are needed for such pressure, see *id.* at 20-40, 103. On difficulties with the composition and power of a *beth din* in many circumstances, see *id.* at 14-17.

103. The inability of modern religious tribunals to employ some forms of pressure, most notably physical force, contributes to the difficulties wives face. For a sketch of some methods of pressure still available to the Jewish community, see Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703, 710-17 (1995).

104. However, there is an extraordinary procedure by which husbands are sometimes permitted to remarry, though their wives have not consented to a divorce. *See* BREITOWITZ, *supra* note 100, at 13; DORFF & ROSETT, *supra* note 100, at 525; Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L.J. 131, 141-42 (1995). Reconstructionist Jews maintain a *get* practice but one in which the spouses are treated equally and a wife may initiate her own divorce if a husband does not cooperate. *See* WERTHEIMER, *supra* note 77, at 164.

105. The husband is not guilty of the "capital" crime of adultery. Polygamy, a less serious offense, was lawful in the Bible and was not forbidden until about 1000 C.E. *See* Schwarzschild, *supra* note 95, at 454-55 (explaining the attenuated sense in which crimes were "capital" at the time of the Talmud).

ing chip in negotiations over property and child custody. Estimates vary wildly, but one suggests that 15,000 Orthodox and Conservative Jewish women are *agunot* in New York State.[106] The social problem is substantial where the Orthodox and Conservative Jewish communities are large. The husband's power to restrict the wife's freedom by refusing to grant a religious divorce is especially troubling when the wife is a victim of physical abuse.[107] Some observers regard inequities that are embodied in *get* practice as symptomatic of the "exclusion of women from power and authority in traditional Judaism."[108]

In various ways, civil judges and legislators have tried to induce husbands to give *gittin* to their Orthodox and Conservative wives. Except for two difficulties, these inducements are appropriate and beneficial. One potential difficulty is that civil force might render a *get* invalid as a product of duress, thus defeating the purpose of intervention.[109] The second potential difficulty, related to the constitutional focus of this Article, is that civil law may trespass on religious liberty and unacceptably involve the state in religious matters.

In discussing civil involvement in the granting of a *get*, I will consider contractual enforcement, statutory protection, and judicial doctrines of equity and tort. Although I briefly will mention some efforts to achieve fairness for wives in Orthodox and Conservative Judaism, I will not evaluate the merits or prospects of internal reform.

B. THE NATURE OF A *GET*

Is granting a *get* a secular or religious matter? On this delicate point, achieving sound judgment and choosing apt terms are difficult. Testimony by rabbis persuaded a New Jersey judge that Jewish divorce proceedings

106. *See* BREITOWITZ, *supra* note 100, at 2 & n.4 (showing just how unreliable any estimate is); Finkelman, *supra* note 104, at 144; Zornberg, *supra* note 103, at 717-18. Part of the disagreement is over who qualifies as an *agunah*. Perhaps the crucial number is women who seriously want a *get* and do not receive one in due course.

107. *See* Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 192-203 (1995).

108. Judith Plaskow, *Jewish Feminism, The Year of the Agunah*, TIKKUN, Sept.-Oct. 1993, at 52.

109. The magnitude of this difficulty depends on the particular view within the Jewish community about the boundaries of acceptable pressure (and acceptable pressure from sources outside the community). According to Breitowitz, outside pressure is acceptable when the *beth din* has issued a mandate and pressure from within the community is acceptable. As he explains throughout his book, identifying which pressure is acceptable and under what circumstances is complicated and controversial, and depends in part on the grounds for divorce. *See* BREITOWITZ, *supra* note 100, at 35-37. *See also* Finkelman, *supra* note 104, at 167-68.

are not essentially religious,[110] and some scholars also have urged that position.[111] No doubt, a system of law parallel to the law of the state could conceivably be cultural and not religious.[112] If so, our Constitution's religion clauses would permit the civil law to forestall untoward consequences.[113] For some individuals, the *get* may be cultural in this way. However, the great majority of Jews who regard divorce requirements as important understand them as related to religious practice and belief. The requirements they follow for substantially religious reasons are mandated by Jewish law.[114] For Orthodox and Conservatives, the Jewish law of divorce, like *kashrut*, does have cultural aspects but these are deeply intertwined with religion. Even conceiving a line between religion and culture is hard, since Jewish religion is so tied to cultural observance. Further, the tribunal that typically assists in the divorce consists of rabbis or includes a rabbi;[115] this gives the tribunal at least a quasi-religious status. As Lawrence Marshall proposes, the *get* procedure is religious according to a test that asks whether it has "any rational justification other than the significance that some religion puts on it."[116]

Imagine someone resisting the conclusion that delivery of the *get* concerns religious practice in the following way:

> Jewish law was developed to regulate the whole life of Jewish communities. Although all of the law was believed to derive from divine revelation, one could perceive a rough division of religious from secular subjects. Marriage and divorce were essentially secular, rabbis having authority to marry and divorce, just as clerics have authority in common

110. *See* Minkin v. Minkin, 434 A.2d 665 (N.J. Super. 1981).

111. *See, e.g.*, J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 202, 243-44 (1984).

112. Members of a cultural group might believe that norms of the group require a certain kind of divorce, and a failure to obtain that divorce could have consequences within the group.

113. Constitutional protection might be claimed as an aspect of freedom of association, but such a claim would not be likely to succeed.

114. Breitowitz suggests that the classical division in *halacha* of commandments "between man and God" and commandments "between man and man" is not, from the standpoint of Judaism, a distinction between "secular" and "religious" components of law. The obligatory nature of all law derives from Divine revelation. BREITOWITZ, *supra* note 100, at 87-88.

Many people in the United States who consider themselves to be Jewish do not regard receipt of a *get* as personally important. This group includes nonreligious persons and also Reform Jews. *See* DORFF & ROSETT, *supra* note 100, at 527, 539. Some women who do not directly care about the *get* may wish to receive one in order to avoid problems with people who do care, including potential husbands.

115. A *beth din* is sometimes composed of one rabbi and two lay persons. *See* BREITOWITZ, *supra* note 100, at 14.

116. Lawrence C. Marshall, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 219 (1985).

> law countries to perform marriages with civil validity. Within Jewish law, marriage and divorce are not essentially religious; and divorce remains an essentially secular concern.

This neat argument is confused. What might be an appropriate conceptual division within a society governed by Jewish law is not a defensible perspective in societies whose separate secular law governs the marriages and divorces of all people. In contrast to societies that leave marriage and divorce to be controlled by various religious communities, such as modern Israel, the old Ottoman Empire, and many European countries before the Enlightenment,[117] Jewish law by itself in the United States has no civil consequences. A wife who does not receive a *get* is harmed only because she and others have a religious and cultural sense that the *get* is important. For those within the United States who care whether a wife has obtained one, the *get*'s significance is largely religious.

This conclusion about the significance of the *get* does not settle how husbands regard the act of granting or withholding one. Do husbands see their behavior as religious, either in the sense of being governed by spiritual or ecclesiastical considerations, or in some other sense? In certain circumstances, when Jewish law requires a husband to grant a *get*, many husbands will feel obligated to comply, especially if a *beth din* tells them it is their duty. A husband's sense of obligation connects to his religious identity and practice. But, for our purposes, a sense of religious obligation to grant a *get* is not very important.[118] Since the state will intervene only to encourage, not discourage, the granting of a *get*, the critical question about the feelings of husbands concerns those who refuse to give their wives religious divorces.

If a husband heading for civil divorce feels a religious obligation not to submit the possibility of divorce to a *beth din* or not to give a *get* after a *beth din* has instructed him to do so, then the state's interference would intrude on his religious conscience. For example, a man who once was an Orthodox Jew and who has since become an evangelical Christian might regard any participation that recoguizes the authority of Orthodox Jewish

117. *See* DORFF & ROSETT, *supra* note 100, at 518 ("Until the end of the eighteenth century most countries in which Jews lived placed the authority for governing Jews and for settling their disputes in the hands of Jewish institutions.").

118. When the husband feels obligated to grant a *get*, state pressure in the same direction creates no conflict. However, it is a kind of mild interference for the state to provide secular encouragements to perform perceived religious obligations. So long as the state has adequate, secular reasons for encouraging the behavior, its involvement raises no serious constitutional problem.

practices as violative of his religious conscience.[119] Still, the delivery of the *get* requires no affirmation of faith or religious ceremony. Neither cases, other published materials, nor discussion with persons familiar with Jewish divorce practice suggest that many husbands have this kind of religious objection to the involvement of a *beth din* or to granting a *get*.[120] Though one atypical husband claimed that giving a *get* would compromise his present religious beliefs, his offer to deliver the *get* if his wife invested $25,000 in an irrevocable trust gave the court a basis not to believe him.[121]

The inquiry of whether a sense of religious obligation motivates a husband's decision not to grant a *get* may be too narrow. Lacking such a sense, a husband might nevertheless believe his refusal is part of the practice of his religion (or nonreligion) tied to his identity. That identity might be as a Reform Jew, a Christian, or an atheist. The possibility of such an attitude shows that a husband might have a serious religious problem[122] with submitting to a *beth din* even though he does not feel that refusal to give a *get* is a religious obligation. Paul Finkelman has suggested that this attitude will most commonly arise when a husband has shifted away from Orthodoxy or Conservatism during his years of marriage, or when a wife has shifted toward such traditional practice.[123] In either circumstance, a husband whose wife regards having the *get* as vitally important may wish not to participate in a procedure in which Orthodox or Conservative rabbis have significant authority.

In summary, the acts of granting and receiving a *get* are not distinctively religious acts, like prayer and communal worship. Most husbands who withhold *gittin* do so for nonreligious reasons. Forcing husbands to grant a *get* rarely violates anyone's sense of religious obligation; it usually

119. Any situation in which a wife was forced to receive a *get* she did not want for reasons of religious conscience would be parallel.

120. Husbands who have earlier agreed to execute a *get* or submit to rabbinic jurisdiction "rarely, if ever, have a theological belief that is offended by their participation." BREITOWITZ, *supra* note 100, at 98.

121. *See* Burns v. Burns, 538 A.2d 438 (N.J. Super. 1987).

122. It might be questioned whether an atheist with no religious affiliation could have such a problem. *Compare* John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 273, 276 (1996) ("Rejecting religion is an exercise of freedom, but it is not an exercise of religion."), *with* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 326-37 (1996) (asserting that religion under the Constitution includes any set of answers to religious questions). I assume that it counts as a violation of religious conscience if an atheist is compelled to participate in a genuine religious ceremony. Such compulsion would violate the Free Exercise Clause or the Establishment Clause, or both.

123. *See* Finkelman, *supra* note 104, at 146-52. Finkelman says of the husband in *In re Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990), "He had not been married in an Orthodox ceremony and he truly despised Orthodox rituals and beliefs." *Id.* at 148.

does not offend religious sensibilities. However, the act of granting a *get* holds significance within a distinctively religious system of law (as that system exists in the United States), *and* the act removes what is primarily a perceived religious impediment to remarriage and bearing children. This fundamental religious significance alone is enough to make state intrusion a matter of concern under the religion clauses. The concern increases if the husband has some significant religious objection.

The following discussion examines various legal bases for civil involvement in *get* practice. The analysis moves from contractual bases (the easiest grounds to defend as constitutional) to statutory provisions, and then to common law bases other than contract.

C. CONTRACTUAL ENFORCEMENT

Wives sometimes rely on premarital agreements by husbands to provide *gittin* should their marriage end in civil divorce, or on agreements reached during separation or civil divorce proceedings.[124] I shall concentrate on agreements made at the time of the marriage; if these are appropriately enforceable, then so also are agreements made when a couple has decided to separate or divorce. "Agreements" made at the time of marriage differ in specificity and apparent force, and in the degree to which the parties are aware of them.

1. *Highly Specific Agreements*

At one end of the spectrum lie agreements like that drafted in the 1970's by a commission of the Rabbinical Council of America (the major Orthodox rabbinical group) and later withdrawn. Under a prenuptial agreement that was a separate civil agreement, a husband and wife agreed to give and receive a *get* within thirty days of civil divorce and to allow an Orthodox *beth din* to arbitrate any disputes about whether they had fully performed.[125] The sanction for nonperformance was daily liquidated dam-

124. For a case involving a wife who refused a *get* as she had undertaken in an agreement, see *Rubin v. Rubin*, 348 N.Y.S.2d 61 (Fam. Ct. 1973). *See also* BREITOWITZ, *supra* note 100, at 78. In *Scholl v. Scholl*, 621 A.2d 808 (Del. Fam. Ct. 1992), a family court in Delaware enforced a Stipulation of Settlement under which the husband was to cooperate with the wife in obtaining a *get*. The husband obtained a *get* from a Conservative rabbinical court. This was unsatisfactory for his Orthodox Jewish wife, since the Conservative *get* would not render her free to remarry under the Orthodox faith. The court decided that the husband, well aware of his wife's convictions, had failed to cooperate with her when he obtained a *get* that was not of the kind she needed.

125. *See* Debbie Eis Sreter, *Nothing To Lose But Their Chains: A Survey of the* Aguna *Problem in American Law*, 28 J. FAM. L. 703, 722-24 (1989-90). *See also* DORFF & ROSETT, *supra* note 100, at 538 (discussing an ante-nuptial agreement that renders a marriage void if the husband does not

ages, a consequence intended to fall short of duress that would make performance invalid.[126] This highly specific agreement was designed for civil enforcement, and couples would be aware of its basic terms. Is there any constitutional objection to civil enforcement of such an agreement?

In recognizing the authority of a *beth din*, a court need not resolve any disputed questions of Jewish law. Given that Orthodox wives will not otherwise feel free to marry, and will not be regarded as divorced by the Orthodox men they would want to marry, the husband's performance of the agreement bears on the practical value of the wife's civil right to remarry after a civil divorce. That constitutes a sufficient secular interest in enforcing the agreement, and establishes that enforcement does not promote religion inappropriately. So long as enforcement is straightforward, a court need not go beyond the "neutral principles of law" the Supreme Court has said may resolve disputes about church governance.[127]

Yet, a question about ordering specific performance remains. The state should not compel intrinsically religious acts, even if people have agreed to perform them. Imagine that H plans to sue G, for hitting him, but their minister persuades H to forego the suit if G will confess to the entire congregation that he committed a serious wrong against H. G and H sign an agreement to that effect that includes a promise by G to confess within three weeks. A court would not order G to confess publicly in a worship service, though it would deny him the benefits of the agreement if he does not confess.[128]

Is specific performance beyond the pale for agreements to submit to a *beth din*? Appearing before a *beth din* and even granting a *get* are not intrinsically religious for most recalcitrant husbands; civil courts may com-

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grant the wife a religious divorce after a civil divorce). Since most Orthodox couples have not signed such explicit civil agreements, the potential enforcement of such agreements does not eliminate the *agunot* problem for Orthodox wives. Some of the problems under Jewish law with the enforcement of agreements are explained in BREITOWITZ, *supra* note 100, at 77-86, 93-96.

126. *See* BREITOWITZ, *supra* note 100, at 145-50 (outlining the possible invalidity under civil and Jewish law of "liquidated damages" and the further concern that a *get* that is granted to avoid such damages may not be relevantly free).

127. *See* Jones v. Wolf, 443 U.S. 595 (1979). I discuss the range of possibilities in Kent Greenawalt, *Hands Off: Civil Courts and Religious Property*, 98 COLUM. L. REV. (forthcoming Dec. 1998).

128. Even if granting a *get*, or appearing before a *beth din*, was as religious as making the public confession, a court should not allow benefits of an agreement to someone who has reneged on his promise to grant a *get* or appear. Some courts that have been hesitant to order specific performance have withheld benefits from the recalcitrant spouse. *See, e.g.*, Margulies v. Margulies, 344 N.Y.S.2d 482 (App. Div. 1973); *Rubin*, 348 N.Y.S.2d 61.

pel those acts without violating constitutional principle.[129] Courts order people to donate money to churches if they have made legal agreements to do so. Courts also may order parents to take children of divorce to worship services of a particular faith. These acts have religious significance, but they are not as dominantly religious as confessing in a worship service. One who appears before a *beth din* in connection with a divorce and executes a *get* need make no religious commitment or statement of faith.[130] Courts should regard themselves as competent to order such an appearance. When spouses have agreed to be bound by the decision of a *beth din*, civil courts should also be ready to enforce what the *beth din* directs if necessary.[131]

Shifts in a husband's religious beliefs could raise a greater concern with specific performance. Suppose he (sincerely) says, "My religious views have altered since my marriage agreement. Participating in a Jewish divorce would now offend my religious conscience." Whether a court should still order him to appear before a *beth din* or grant a *get* is debatable. Nevertheless, because the husband need not affirm beliefs or participate in typical religious acts to deliver a *get*, a court appropriately would enforce a clear civil contract, making the husband do what his earlier convictions led him to agree to do.[132]

2. *Vague, General Understandings*

At the other end of the spectrum of specificity of agreements is the general *ketubah*, a part of all Orthodox and Conservative wedding ceremonies that lack a more complicated undertaking.[133] This is usually written and read in Aramaic.

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129. *See e.g.*, Waxstein v. Waxstein, 394 N.Y.S.2d 253 (App. Div. 1977); Koeppel v. Koeppel, 138 N.Y.S.2d 366 (Sup. Ct. 1954); Shanah D. Glick, *The Agunah in the American Legal System: Problems and Solutions*, 31 U. LOUISVILLE J. FAM. L. 885, 895-96 (1992). *But see* Turner v. Turner, 192 So.2d 787 (Fla. Dist. Ct. App. 1966); Pal v. Pal, 356 N.Y.S.2d 672 (App. Div. 1974).

130. *See* BREITOWITZ, *supra* note 100, at 89, 195.

131. *See* Jennifer A. Hardin, *Religious Postmarital Dispute Resolution: Jewish Marriage Contracts and Civil Courts*, 4 OHIO ST. J. ON DISP. RESOL. 97, 105-06 (1988). However, a court must be wary whether its order may render the *get* that follows invalid under Jewish law. *See* BREITOWITZ, *supra* note 100, at 18, 93-95. Even from the point of view of constitutional law, ordering the granting of a *get* approaches somewhat more closely to an impermissible ordering of a religious act than ordering submission to a *beth din*.

132. It is relevant that husbands do not commonly have genuine objections of religious conscience to fulfilling these agreements. The difficulties courts may have sifting out the genuine objections is one reason why a court may require performance when a husband interposes a possibly genuine claim.

133. *See* Breitowitz, *supra* note 100, at 85, 283-85.

Spouses who utter a general *ketubah* at their marriage should not ordinarily be understood to have agreed to provide a religious divorce or submit to a *beth din.*[134] This is especially true when a couple cannot reasonably be supposed to be aware of that potential significance.[135] The Court of Appeals for Arizona considered a general *ketubah* under which the husband agreed to fulfill obligations to cherish and support his wife under the "laws of Moses and Israel."[136] Starting from the premise that "[p]rovisions of an antenuptial agreement must be sufficiently specific to be enforceable,"[137] the court said that "[s]uch a vague provision has no specific terms describing a mutual understanding that husband would secure a Jewish divorce."[138] It continued, "If this court were to rule on whether the ketubah, given its indefinite langnage, includes an unwritten mandate that a husband under these circumstances is required to grant his wife a get, we would be overstepping our authority and assuming the role of a religious court."[139]

Even if a court concluded that the husband and wife agreed to civil law consequences, what exactly the husband must do remains a question of the predominantly religious Jewish law. Although the usual requisites of delivering a *get* are straightforward, a civil court may sometimes have trouble deciding if a husband has fulfilled all his obligations under Jewish law. The cases on church governance teach that secular courts should not try to resolve difficult questions of religious law. This potential difficulty for civil courts strengthens the conclusion that general language in a *ketubah*, like that in the Arizona case, should not be construed as a civilly enforceable agreement by the husband to deliver a *get.*[140]

3. *Intermediate Specificity*

The genuinely debatable cases arise when the *ketubah* is much more concrete, but lacks both the detail and the explicit reliance on civil law found in the agreement drafted by the commission of the Rabbinical Council of America. Many Conservative marriages are performed with

134. *See id.* at 81-86, 90-91; Jodi Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493, 531-33 (1966).

135. Nonetheless some courts have found such an obligation. *See* In re Marriage of Goldman, 554 N.E.2d 1016 (Ill. App. Ct. 1990); Burns v. Burns, 538 A.2d 438 (N.J. Super. 1987).

136. *See* Victor v. Victor, 866 P.2d 899 (Ariz. Ct. App. 1993).

137. *Id.* at 901.

138. *Id.* at 902.

139. *Id.*

140. Indeed, one can understand courts reaching a contrary conclusion only because they are influenced by the secular public policy favoring completion of the religious divorce when civil divorce occurs.

ketubahs that fit this description.[141] The New York Court of Appeals considered one of them in *Avitzur v. Avitzur*.[142] At their marriage, the Avitzurs signed a Hebrew/Aramaic ketubah, declaring their "'desire to . . . live in accordance with the Jewish law of marriage throughout [their] lifetime'" and further agreeing "'to recognize the beth din of the Rabbinical Assembly and the Jewish Theological Seminary of America'" (a Conservative seminary) or its representatives

> as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, 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. We authorize the beth din to impose such terms of compensation as it may see fit for failure to respond to its summons or carry out its decision.[143]

A majority of the Court of Appeals rejected the Appellate Division's view that the agreement prior to the marriage was unenforceable because the state had no further interest in the marital status of the Avitzurs after a civil divorce. The court treated the object of the lawsuit as getting Mr. Avitzur to appear before the *beth din*. The agreement was similar to other agreements to submit disputes to a nonjudicial forum.[144] The case could be decided by neutral principles, "without reference to any religious principle." Perhaps some of the *ketubah's* provisions might not be judicially enforced, but a court may nonetheless enforce a promise to refer a dispute to a nonjudicial forum. "In short," a court could "compel a defendant to perform a secular obligation to which he contractually bound himself."[145]

The three dissenters took a sharply different view. They regarded the attempt to obtain a religious divorce as "a matter well beyond the authority of any civil court."[146] They noted that the complaint contained no allegation that the *ketubah* would have legal significance independent of the religious ceremony (the marriage) of which it was a part. They also argned that a definition of the wife's rights under the *ketubah* required "an examination into the principles and practice of the Jewish religion." Although

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141. *See* GREENBERG, *supra* note 101, at 136-37 (discussing the Lieberman *ketubah*).

142. 446 N.E.2d 136 (N.Y. 1983). The case and its implications are discussed illuminatingly in BREITOWITZ, *supra* note 100, at 361-70, and Finkelman, *supra* note 104, at 156-58.

143. *Avitzur*, 446 N.E. 2d at 137.

144. In response to the claim that the obligation imposed by the *ketubah* arises solely from Jewish religious law, the court said, "Granting the religious character of the *Ketubah*, it does not necessarily follow that any recognition of its obligations is foreclosed to the courts." *Id.* at 138.

145. *Id.* at 139.

146. *Id.* at 142.

the document reads as if the summons to appear must come from the *beth din,* the wife argued for a construction that the husband must appear upon her summons. The husband, in turn, claimed that he had no obligation to appear because his earlier request for a convocation of such a body was refused.[147] The dissenters concluded, partly from the witnesses the wife planned to offer at trial, that a court would need to delve into Jewish law to some degree to decide whether the husband would actually have to appear before the *beth din.* It therefore rejected the majority's position that the case could be resolved on the basis of neutral principles of law.

Avitzur is a close case, as the 4-3 division reflects. The dissenters are mistaken that procuring a religious divorce is necessarily beyond the authority of a civil court, and their doubts that the agreement used in many Conservative services was meant to be civilly enforceable were not well grounded. The most disturbing point in the dissent is that civil courts may have to interpret Jewish law even to determine whether a defendant must appear before a *beth din.* The sounder view is that civil judges can enforce a clear obligation to appear, even if they must make some reference to religious law. After all, when civil courts give effect to decisions of authoritative religious tribunals, they must determine which religious tribunals have the authority to make decisions within religious legal systems. Determining when religious tribunals have clear authority over parties is not a notably greater level of involvement in religious law than determining which religious tribunals are the ultimate decision-makers within religious systems of law.

When a husband's duty to appear is debatable, civil courts face a genuine dilemma.[148] Suppose the question of Mr. Avitzur's appearance was troublesome under Jewish law. A civil court might declare that, since it should not resolve debatable issues of religious procedure, it should not enforce obligations that demand resolution of such matters. Alternatively, the court might apply a general, neutral principle of law that favors initial submission to an "arbitrator" when the arbitrator's jurisdiction is disputed,[149] leaving it to the arbitrator initially to resolve the dispute about

147. The husband did not argue that the agreement made no reference to divorce, but rather that the agreement made reference only to the obligations of a continuing marriage. Although the bare language of the agreement does not explicitly include divorce, couples are aware that one important purpose of the agreement is to deal with divorce.

148. Since *Avitzur* overturned a motion to dismiss, a stage at which everything contained in a complaint is assumed to be true, the case does not finally decide that once testimony is given the husband will necessarily be forced to submit to the *beth din.*

149. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995); William W. Park, *The Arbitrability Dicta in* First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz Has*

jurisdiction in light of the body of law that applies. Probably the latter course makes more sense here. The civil court could order a husband to submit to *beth din* in some conditional way, leaving it to the *beth din* to determine whether he must submit to full proceedings regarding his divorce. With this understanding, the majority has the better argument in *Avitzur*.[150]

D. STATUTORY PROTECTION

To date, only New York has passed legislation focused on the *get*. Given the large number of Orthodox and Conservative Jews that live within the state, the statutes have a practical importance that far exceeds New York's status as one among fifty states. The statutory provisions also sharply pose some constitutional issues that are closely similar to those generated by judicial reliance on equity and tort doctrines, a reliance that may occur in any state.

New York has adopted two measures to induce husbands to grant *gittin* to their wives.[151] A 1983 statute provides that if a cleric solemnized the marriage, a person seeking divorce must allege that he or she has taken or will take "all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce."[152] Before a court will grant a final divorce, the plaintiff must swear that he has removed all barriers. In consent divorces both parties must file statements to that effect.[153] If the cleric who married the couple certifies that the plaintiff has not taken all steps to remove barriers, the court may not enter a final divorce. The statute also provides that it does not "authorize any court to determine any ecclesiastical or religious issue."[154]

Crossed the Atlantic?, 11 NO. 10 MEALEY'S INT'L ARB. REP. 28 (1996). *See generally* Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981) (stating that arbitration clauses should not be enforced where the underlying principle at issue has aims other than promoting justice between the two parties, or where one party is peculiarly subject to imposition by the other).

150. This conclusion is reinforced by a public policy that favors freedom of remarriage for divorced people. Of course, forcing the husband to submit to the *beth din* is no assurance he will comply with its order. *See* BREITOWITZ, *supra* note 100, at 106.

151. The laws can require behavior of a wife as well as of a husband. However since wives refusing to receive *gittin* have generated little difficulty, the main force of both laws is to motivate husbands and to offset the imbalance of power.

152. N.Y. DOM. REL. LAW § 253(2)(i) (McKinney 1986). For one of the decisions enforcing the law, see *Friedenberg v. Friedenberg*, 523 N.Y.S.2d 578, 581 (App. Div. 1988).

153. These are called conversion divorces based on the spouses living apart for at least a year pursuant to a separation agreement.

154. N.Y. Dom. Rel. Law § 253(9) (McKinney Supp. 1997).

In 1992, New York amended its equitable distribution law in order to cover gaps left by the original statute.[155] The 1992 law provides that courts "shall, where appropriate" take into account barriers to remarriage when they decide the distribution of marital property, and the amount and duration of maintenance. Although the judicial actions this law authorizes may already have been covered by more general "catch-all" provisions, the legislature strongly signaled its view that a husband's persistent refusal to obtain a *get* is relevant to property distribution and maintenance.[156] Because the constitutional questions the two acts raise are basically the same, this analysis concentrates on the first law, and then turns to separate questions about the 1992 amendments.

1. *New York's Precondition for Acquiring a Civil Divorce*

The 1983 *get* law, by making the granting of a *get* a condition of receiving a civil divorce, ingeniously avoids the worry that a *get* obtained under duress may be invalid under Jewish law.[157] But the device of conditioning a benefit does not obviate constitutional problems. The state cannot ordinarily condition a benefit as important as a divorce on behavior that the state could not compel.[158]

The constitutional problems would be minimal if the law were essentially secular, with some applications happening to involve religious institutions. This statute cannot be so viewed. True, the main part of the law does not sound particularly religious, as it refers generally to removing barriers to remarriage.[159] The law as written however, does not apply to conceivable secular barriers to remarriage. It is limited to religious marriages, and specific authority is given to the clerics who performed the

155. *See* N.Y. DOM. REL. LAW § 236 B(5)(h), (6)(d) (McKinney Supp. 1997).

156. Adoption of the statute closely followed a decision in *Schwartz v. Schwartz*, 583 N.Y.S.2d 716 (Sup. Ct. 1992), in which the court took a failure to grant a *get* into consideration as "any other factor which the court shall expressly find to be just and proper." *See* Zornberg, *supra* note 103, at 734-35. The statute also gives some support to the conclusion that courts giving this effect to barriers to remarriage are not behaving unconstitutionally.

157. The law does not directly force anyone to do anything. It withholds a potential benefit rather than imposing a penalty. A husband who obtains a *get* in order to acquire a civil divorce apparently has not been subject to duress according to Jewish law. For a brief description of the steps leading to the enactment of the 1983 law, see Zornberg, *supra* note 103, at 728-30.

158. The Supreme Court spoke of divorce as a "right" in *Boddie v. Connecticut*, 401 U.S. 371 (1970).

159. One effect of such general language could be that if some other religious or cultural group should happen to develop divorce procedures internal to the group that are very much like the *get* procedure, that procedure would receive equal treatment (so long as the marriage had been by religious ceremony). Such coverage would negate worries about potential discrimination among essentially identical procedures.

ceremonies. Barriers to remarriage are defined as those that exist "under the principles held by the clergyman . . . who has solemnized the marriage."[160]

Presently no group besides Orthodox and Conservative Jews has relevant barriers. The only barriers the statute covers derive from Jewish law. Probably the basic language of the statute does not apply to Roman Catholics.[161] Any uncertainties on that score are removed by a section that explicitly provides, "'All steps solely within his or her power' shall not be construed to include application to a marriage tribunal or other similar organization . . . of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination."[162] As the governor's signing message shows,[163] the aim of the statute was to cover the Jewish *get*.

Exactly when courts should cut through general statutory language to identify narrower aims is debatable. But when a statute in fact covers religious divorce proceedings of only one religion,[164] when it deals with marriages entered by religious ceremonies, assigns direct authority to the marrying cleric, and has as its undoubted impetus a concern about the power to refrain from religious divorce within the one religion the law covers, a court must treat the law as dealing with simply that subject. Courts must view the 1983 law as attacking impediments to remarriage within Jewish law.

As with *kosher* laws, it is helpful to consider first a minimal "basic statutory scheme," and then investigate features that raise further complexities. The basic scheme here is that an Orthodox or Conservative Jewish husband receives a civil divorce only if he conveys a *get* to his

160. N.Y. DOM. REL. LAW § 253(6) (McKinney 1987).

161. Roman Catholics may suffer an impediment to remarriage that in some ways resembles the problem with the *get*, except that the impediment works equally for men and women and does not depend alone on the voluntary choice of either spouse. Traditional Roman Catholics believe that marriage is always for life. The Roman Catholic Church will not recognize a marriage following a civil divorce unless the first marriage is annulled by Church authority. The request for an annulment may come from either party, and an annulment may be granted even if the other party refuses to participate. Thus, the refusal of one spouse to seek an annulment would not prevent the other from acquiring an annulment. This is true not only for defects like failures to consummate, but also when the reason for an annulment is some fundamental lie of the party who seeks the annulment.

The statute's main provision, standing alone, might cover noncooperation in annulment proceedings that causes procedural delay.

162. N.Y. DOM. REL. LAW § 253(6) (McKinney 1987).

163. *See* Edward S. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 71 n.134 (1993).

164. Two religions, if one counts Orthodox and Conservative Judaism separately.

wife.[165] Assuming that a civil court may make any necessary determinations without religious judgment, would the purpose and effects of such a law be secular or religious? If religious, would they be permissibly or inappropriately so? Relatedly, does the law endorse any religion?

The vast majority of adults marry, and most of those who are divorced want to remarry and do.[166] Children of divorce may fare better if the spouses remarry. Certainly children denominated *mamzerim* suffer restrictions among Orthodox and Conservative Jews in relation to their own future marriages.[167] This combination of strong individual wishes to remarry and the possible welfare of children forms a sufficient secular basis for the state to want people who are civilly divorced to feel free to remarry and to be regarded as free by prospective partners.[168] But that does not end matters. The barrier to remarriage comes from people's sense of religious obligation and their wish to be accepted within a religious community. If the state attends to that, does that make a statute's purpose or effects inappropriate?

About purpose, the state can respond: "We would want to eliminate such barriers wherever they appear, especially when inequality systematically favors husbands and the barriers become bargaining chips in civil divorces. Our aim does not concern religion." This argument easily establishes a secular purpose.[169]

The possibility of improper religious effects is more serious. Indisputably, the law affects whether wives and potential marriage partners feel an obligation not to marry based on their religious identity and practice. Undoubtedly the law has some effect on religious practice. However, this effect alone does not really advance or inhibit religion.

Against the concern that the law harms Orthodox and Conservative forms of Judaism by interfering with their internal legal regimes, it is at least a partial answer that most Orthodox and Conservative rabbis and members want the state to encourage recalcitrant husbands to grant religious divorces, and the law was adopted in response to urgings from the

165. As I have said, the law also applies to a Jewish wife who adamantly refuses to receive a *get*. The inclusion of those infrequent situations does not alter this analysis.

166. *See* ARTHUR J. NORTON & LOUISA F. MILLER, MARRIAGE, DIVORCE AND REMARRIAGE IN THE 1990'S (1992).

167. See *supra* note 105 and accompanying text.

168. *Cf.* Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating state law that conditioned remarriage on payment of alimony and child support obligations).

169. The argument is closely analogous to the one that establishes a secular purpose for *kosher* laws.

Orthodox community.[170] The law's attention to practices of Orthodox and Conservative Jews does not itself prefer or endorse those religions, since only they raise this divorce problem.[171]

A more troubling question about endorsement is one we might label "condemnation." Without doubt, "condemnation" has a constitutional status similar to "endorsement." Cases in which Supreme Court opinions have discussed endorsement have been ones in which a religious understanding or practice has arguably been preferred, such as a crèche or cross on public property arguably prefers Christianity.[172] Justice O'Connor, the primary proponent of endorsement analysis, has said that the government may not send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders."[173] Condemnation of the views of a minority, say by a public display that portrays a faith as primitive or degrading, will send the forbidden message even more directly than the more benign endorsement of the majority's position. Condemnation definitely can "inhibit" the religion that it targets. One issue for a *get* law is whether it impermissibly condemns traditional Jewish practice by sending the message that the husband's power to withhold a *get*, and the consequences that flow from that power, are unjust.

A *get* law is not an impermissible condemnation for three reasons. First, implicitly labeling one practice as unfortunate because of undesirable secular effects is within the range of what the government may do. Ordinary criminal laws reach some practices of some religions. Effective condemnation of particular practices is an inevitable, and therefore acceptable, aspect of government regulation. The *get* law is pointed more directly at one (or two) religions, but that is because only they raise the problem the law covers. Second, if most Orthodox and Conservative Jews welcome the state's intervention, it is hard to conclude that the law significantly condemns their faith in some symbolic way. Third, one may view the state's involvement as compensating for power it has removed from religious tribunals. In countries in which religious courts controlled marriage and divorce, religious courts could employ coercion that is not available to them in modern, liberal democracies. The situation that the state now intervenes to stop—unfettered discretion of divorcing husbands to deny *gittin*—is one

170. *See* BREITOWITZ, *supra* note 100, at 179.

171. This conclusion is similar to the one we reached about enforcement of *kosher* laws.

172. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Allegheny County v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

173. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

generated partly by the shift to divorce by civil authorities. Thus, what the law mostly condemns,[174] if it condemns anything, is the regrettable consequence of religious law in combination with a diminution of authority for religious courts. For all three reasons, the *get* law does not condemn Orthodox and Conservative Judaism.

Two considerations complicate the questions whether the *get* law "advances," "inhibits," or endorses, religion. First, the statute may involve a very subtle promotion of Orthodox and Conservative Judaism over Reform Judaism. Most Reform Jews reject the whole notion of separate Jewish divorces. The statute implicitly treats that procedure as important by inducing husbands to grant *gittin*. Absent state interference, the injustice of traditional *get* practice might generate greater discontent among Orthodox and Conservative Jews, especially women.[175] To put the point starkly, the government, by making a practice of Orthodox and Conservative Judaism more palatable, may afford indirect support to these branches against the main branch that challenges religious divorces—Reform Judaism.[176]

Second, the law is bound to influence Orthodox and Conservative Judaism to some degree. Most obviously, the law reinforces what is often felt as a religious obligation. According to traditional understanding (to oversimplify), a husband should submit to a *beth din* and follow instructions. The state provides extra muscle to lead the husband to grant a *get*, exactly what a *beth din* directs when a marriage is destined for civil divorce. By pushing people to perform their responsibilities within a system of religious law, the state may aid a religion. The law may have a deeper effect on Orthodox and Conservative Judaism. For modern sensibilities, the plight of the *agunah* is a cause for concern, or even outrage. Were the state not to involve itself at all, the pressure for reform within the more

174. I say "mostly" because even if the religious tribunals had all the power they once had, there would still be some injustices to wives according to modern secular values.

175. I do not mean that many people on this basis alone would reject these more traditional forms of Judaism, but discontent with the inequities of traditional divorce practice might have an influence on people shifting to Reform Judaism as a preferable alternative. One widely accepted assumption about religion clause law is that the government should not create incentives for people to belong to one religion or another. *See* Laycock, *supra* note 122, at 319. With some stretch, the *get* law could be viewed as reducing the impact of internal practice that could otherwise be a disincentive for some people to adhere to Orthodox or Conservative Judaism. The government thus affects what is the "market" for choice.

176. One might respond that state involvement with the *get* is no different from its involvement with *kashrut*: It helps people who want to observe religious requirements to do so. The difference is that this law forces the husband to perform an act under religious law, which goes well beyond requirements that those who make and sell food not engage in fraud.

traditional branches of Judaism might increase.[177] If state influence successfully combats the injustice of their present practice, Orthodox and Conservative Judaism may have less need to change. Thus, by encouraging Orthodox and Conservative husbands to grant *gittin*, the state may indirectly affect developments within those branches of Judaism.[178]

When one compares these subtle influences on religion to the secular interest in having civilly divorced women feel free to remarry, the religious effects of the law, rather than being "primary" or "direct and immediate,"[179] are minor enough to be regarded as what the Supreme Court has called "incidental." They should not render the law invalid.[180] Similarly, if attention to the *get* represents a slight "favoring" of traditional branches of Judaism, it is far from amounting to an endorsement.

In respect to effects (and purpose), a defender of the law has another string to his bow, claiming that if the effects are primarily religious, they represent an acceptable accommodation to the religious exercise of the wife.[181] To be acceptable on this basis, the law must accommodate the wife's religious exercise and impose appropriately on the husband.[182] Doubts about the interference with the husband are misplaced. One commentator has argued that the law indirectly coerces the husband, and that the Supreme Court's accommodation cases do not support coercion, or coercion of religious practices.[183] The distinction between coercion and coercion of religious practices is crucial. No accommodation case supports coercion of genuinely religious acts, but some coercion of private individuals and enterprises has been regarded as acceptable. Strong pressure

177. One writer has suggested that all branches of Judaism should seek a common approach to Jewish divorce. *See* GREENBERG, *supra* note 101, at 140-41.

178. There is an analogy here to a point that the Supreme Court has mentioned in cases involving aid to parochial schools. Although the religious schools themselves welcomed aid that was to be limited to secular purposes, the Supreme Court expressed concern that the religious quality of the schools might be unduly affected by close government supervision. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985).

Because Conservative Judaism has made more considerable efforts to counter the inequitable power of the divorcing husband, its need for further development may be less than that of Orthodox Judaism.

179. The "direct and immediate" language was first used by the Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.39 (1973).

180. The analysis might change if one characterized the husband's choice not to obtain a *get* as often a matter of religious conviction. Cases of men objecting to obtaining *gittin* as a matter of religious conscience raise further problems. But such cases are unusual enough that courts should not view the law *in general* as interfering with acts of religious conviction.

181. *See* Bleich, *supra* note 111, at 277-86.

182. For some citations and my own analysis of accommodation, see *Quo Vadis*, *supra* note 1, at 385-88.

183. *See* Nadel, *supra* note 163, at 88.

on the typical husband is similar to coercing employers to make reasonable accommodations to the religious requirements of employees, which the Supreme Court has indicated is appropriate.[184] Since the typical husband's refusal to grant a *get* is not a matter of religious obligation or serious religious concern for him, the state's "encouragement" of the grant is within the permissible range of what an accommodation may require.

Whether the law appropriately accommodates the wife's religious exercise is more complicated. One question is whether the law aids the wife's religious exercise. Another question is whether the law properly responds to some impediment to her religious exercise. The law helps remove a barrier that her religious sense (and that of potential husbands) imposes on her, but does this removal really increase her ability to exercise her religion? She can adhere to her religion whether she refrains from remarriage because of her sense of religious obligation or undertakes marriage because she is free to do so. It is true that a wife without a *get* may be tempted to remarry, and the law that pressures her husband to grant a *get* transforms an attractive illegal act (under Jewish law) into one that is permitted. That shift alone might be said to assist religious exercise by eliminating a conflict of desire and obligation.[185] Nevertheless, the fact remains that the wife can observe her obligations under Jewish law by remaining married (under that law). One writer has urged a more powerful argument that the *get* law aids religious exercise:

> In Judaism, marriage is central to religious life. Significant religious obligations that are fulfilled within the domestic sphere devolve upon the observant Jewish woman. Because freedom to enter into a Jewish marriage is important to a Jewish woman's religious observance, it falls within the protection of the free exercise clause.[186]

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184. *See* T.W.A. v. Hardison, 432 U.S. 63 (1977). The employers' acts differ from that of a husband granting a *get* in that they have no religious significance for the employers and do not alter anyone's religious obligations. However, these differences are not critical to whether the actor is coerced unacceptably.

185. *See* Zornberg, *supra* note 103, at 739-40.

186. Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1165-66 (1987) (citation omitted).

A court, of course, cannot decide what is really central to Jewish religious life, but it can accept a plausible claim that, for many traditional Jewish women, a family is significantly part of that life. For such a woman whose prior family is being broken by civil divorce, the opportunity to remarry is an opportunity to participate importantly in religious life.

The accommodations that are easiest to justify are those in which the state tries to compensate for some impediment it has caused.[187] Thus, a military draft is an impediment to the practice of pacifist beliefs, and an exemption for conscientious objectors is an appropriate accommodation. Similarly, legislative permission to ingest peyote during worship services is an appropriate accommodation in response to criminalization of the use of peyote.

The source of the *get* problem is debated. On the one hand, it is said that the problem arises from the combination of Jewish law with the civil law of divorce.[188] On this account, the state's adoption of a uniform civil law of divorce has generated the plight of the *agunah*. Others counter that the basic problem already exists within Jewish law, as evidenced by the extent of identical difficulties in Israel, which lacks civil divorce.[189] A balanced assessment indicates that the rules of Jewish law themselves may give rise to injustice (according to modern secular standards) when husbands refuse to divorce wives,[190] but that the state exacerbates the difficulties by allowing a civil divorce separate from a religious divorce and by disallowing some forms of pressure religious communities historically have employed against recalcitrant husbands.[191] Thus, one might view the *get* law as responding to the contribution the civil law makes to the problem.

More importantly perhaps, not all accommodations need respond to state-imposed impediments.[192] As I have already mentioned, employers are required to make accommodations to the religious needs of employees. These are accommodations to general rules of the workplace set by employers and not responses to what the government has done. Thus, the legitimacy of accommodation does not depend on casting the state as the

187. *See* Greene, *supra* note 87, at 306.

188. *See* BREITOWITZ, *supra* note 100, at 277.

189. *See* Finkelman, *supra* note 104, at 134.

190. Of course, without civil divorce the husband is not free to remarry either, but he can leave his wife.

191. *See* Zornberg, *supra* note 103, at 739-40.

192. *See Quo Vadis*, *supra* note 1, at 385-86.

main source of the difficulties facing Jewish wives who are civilly, but not religiously, divorced.

One can view a basic *get* law as making an appropriate accommodation to the wife's religious exercise and putting acceptable pressure on most husbands who wish not to grant a *get* or not to appear before a *beth din*. Nevertheless, the argument that the law serves secular objectives and that all relevant religious effects are incidental may be simpler and more decisive than the argument that the law properly accommodates religious exercise.

The uncommon situation in which the husband has a genuine religious sentiment that he should not give a *get* to his wife presents a special issue for the statute's application, since the statute would directly interfere with religious liberty. For such a case, it might be argued that under *Employment Division v. Smith*[193] the husband has no special privilege based on his religious claim.[194] But that case, which deals with a secular neutral statute prohibiting behavior, should not be regarded as applicable to statutes that require an act of predominantly religious siguificance. Moreover, New York courts (and those of other states) may employ the compelling interest standard under their state constitution.[195] For husbands with sub-

193. 494 U.S. 872 (1990).

194. *See also* City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (holding the Religious Freedom Restoration Act invalid as it applies to states and localities).

195. *See* Rourke v. New York State Dep't of Correctional Servs., 603 N.Y.S.2d 647 (Sup. Ct. 1993), *aff'd*, 615 N.Y.S.2d 470 (App. Div. 1994) (using strict scrutiny under state law after *Smith* and before the Religious Freedom Restoration Act went into effect). *See also supra* note 13 and accompanying text.

stantial claims of religious conscience,[196] some version of the compelling interest standard should apply.[197]

Does the state have a compelling interest to override the husband's claim? This is a delicate judgment. One may argue that the state has a very strong interest in assuring equality for wives,[198] in protecting the right to remarriage,[199] and in meeting serious dangers of fraud.[200] But elimination of a barrier to remarriage that arises only out of a sense of religious tradition and obligation should not be regarded as compelling enough to require acts that offend a person's religious identity.

When we move beyond the "basic scheme" to New York's actual statute, we find religious elements that create extra constitutional vulnerabilities. Even apart from the law's failure to assist wives who sue husbands for divorce, the statute benefits only some wives who need a *get*. The law applies only to people who have had religious marriages, and the

196. As I indicate in Kent Greenawalt, *Five Questions About Religion Judges Are Afraid to Ask*, *in* LAW AND RELIGION: THE OBLIGATIONS OF CITIZENSHIP AND THE DEMANDS OF FAITH, (Nancy Rosenblum ed., forthcoming 1999), a claim must be sincere and qualify as "religious," and the burden on religious exercise must pass some threshold of substantiality.

One can imagine a case where a husband who sues for a civil divorce based on fault or consents to a civil divorce wishes to have his marriage continue according to religious law. He has no interest in remarrying, or in having sexual relations with anyone else. Since he is willing to observe the same constraints that religious law imposes on his wife, he does not regard his failure to give her a *get* as unfair in any respect. His sense of wanting the religious marriage to continue is tied to his sense of Jewish identity. This husband's wish to decline to grant a *get* presents a more sympathetic case than that of the typical husband who seeks a divorce, but without a claim of religious conscience. For such a claim, a husband would have to believe that granting a *get* would be seriously wrong for him from a religious point of view. Given the role of the *beth din* in the Orthodox and Conservative communities, it seems unlikely that a husband who continues in those traditions would feel that submitting to a *beth din* and complying with its directions would be seriously wrong from a religious point of view.

197. As I argue briefly in *Quo Vadis*, *supra* note 1, *Smith* was wrongly decided, and a state should use the compelling interest test for its state constitution. Given the result in *City of Boerne v. Flores*, I now favor state legislation similar to the Religious Freedom Restoration Act.

198. *See* Solovy, *supra* note 134, at 533.

199. *See id.* at 514-15.

200. The relation between individual acts (or refusals) based on religious sensibility and the entire statute may affect this conclusion. If one thought that in a high percentage of instances, husbands refuse to grant *gittin* from religious conviction, the entire provision might properly be declared invalid. The more realistic appraisal is that instances of genuine conviction are uncommon, but that in some larger class of cases husbands may claim religious conviction *and* courts will not be able to discern with confidence which claims are sincere. The manner in which courts have actually applied the compelling interest test in the free exercise area is to reject claims of religious conscience when the dangers of fraud are significant. Under that approach, a court might reasonably conclude that the compelling test is satisfied if the dangers of fraud appear very high. For comment on the dangers of acceding to self-interested claims of exemption, see Laycock, *supra* note 122, at 350; Ira G. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 380 (1996). For this purpose, spite, as well as bargaining advantage, would count as self-interest.

definition of barriers is cast in terms of principles of the marrying cleric. What of a conple who has a Reform marriage (for which the tradition of *get* is not important) and then becomes Orthodox or Conservative before the husband seeks a civil divorce? No barriers would exist according to the principles of the rabbi who performed the marriage.[201] How the statute applies if the marrying rabbi has shifted his religious allegiance between the marriage and the divorce is not clear. Presumably his principles at the time of marriage control (at least if the couple has not also shifted their allegiance).[202] It is doubtful how the law applies to couples married in a civil ceremony who then become Orthodox or Conservative and go through an appropriate marriage ceremony.[203] The statute covers marriages "solemnized" by a cleric. For the state, the crucial marriage is the initial civil marriage, not the subsequent religious marriage. Nevertheless, a generous interpretation would include a marriage "solemnized" by a cleric after a valid civil ceremony.[204] The failure of the law as written to protect some women who require a *get* and to settle important matters of detail is troubling, but should not undermine the statute's constitutionality.

The provision granting the marrying rabbi authority to prevent a civil divorce by certifying that the husband has not taken all steps to remove barriers is more intractable. The drafters probably assumed that the husband's having or not having taken necessary steps was a simple matter of fact, with the marrying rabbi a neutral figure well placed to make the determination. However, they may also have wanted to eliminate worries that state courts would have to discern Jewish law to see if a husband has taken necessary steps. State courts cannot permissibly make that determination in seriously debatable cases.

Nevertheless, the statute's "solution" is inadequate. The less serious difficulty is that, when the marrying rabbi has died or is unavailable, the court will have to either accept at face value the husband's affidavit that he

201. Nevertheless, a New York court decided that the 1983 law applied even when the couple had been married by a Reform Jewish rabbi, so long as the wife perceived herself as needing a *get* to remarry. *See* Megibow v. Megibow, 612 N.Y.S.2d 758 (Sup. Ct. 1994).

The language of the statute appears to require that no barriers to remarriage exist, whether or not either spouse cares about remarriage. In the instance of a couple who has completely left Orthodox and Conservative Judaism, the wife usually may not care about her status under Jewish law, but there is still a barrier under the principles of the marrying rabbi. In any event, the defendant in the divorce can waive the statutory requirement. *See* N.Y. DOM. REL. LAW § 253(3), (4) (McKinney 1988).

202. *See* Finkelman, *supra* note 104, at 169-70.

203. On the attitude toward civil marriages, see DORFF & ROSETT, *supra* note 100, at 540.

204. On the alternative reading, the law would not protect people who subsequently become Orthodox or Conservative and then have a religious ceremony.

has eliminated any barriers to remarriage,[205] or make its own determination. Second and more fatally, the statute appears to give the rabbi absolute authority to block the civil divorce, which is unconstitutional.

On behalf of the provision, it may be claimed that judicial deference to the rabbi resembles civil courts deferring to decisions of religious tribunals when property or other matters of civil consequence turn on the outcome. But no case has allowed a religious authority to prevent someone from obtaining a basic civil right, such as a divorce. Here, the state assigns the rabbi public authority to determine whether a court should grant a civil divorce. This allocation of authority cannot be granted, even if the issue to which the rabbi speaks is almost always a simple factual one.[206] This feature does not undermine the whole scheme, but is itself unconstitutional.

How should a court correct this provision? The certification of the rabbi should be given presumptive weight but not final authority. Husbands will rarely have strong arguments that they have removed obstacles if rabbis say otherwise. When husbands do contradict rabbis, courts can accept a rabbi's judgment on debatable questions.[207] Thus, courts should be able to proceed without assigning rabbis final authority and without themselves trying to resolve debatable matters of religious law.

One other complication alters the "basic scheme." Taken together, the law's provisions either (1) treat affidavits by husbands as conclusively accurate, capable of being trumped only by denials of marrying rabbis, or (2) call on courts to make decisions about the removal of barriers to remarriage. When such decisions are difficult, they would entangle the state with religion more than would straightforward factual determinations. Deference to the marrying rabbi's determination is one acceptable way to avoid difficult decisions. When the marrying rabbi is unavailable, a court should be able to reject a husband's affidavit if it is patently false.

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205. The language of the statute suggests that the only challenge to the truthfulness of an affidavit can be in a prosecution for making a false sworn statement. *See* BREITOWITZ, *supra* note 100, at 183.

206. Breitowitz defends the provision for a clergy "veto" after having first indicated doubt about what a court is supposed to do under the statute if the husband's and rabbi's affidavits conflict. *See id.* at 196-97.

207. An alternative resolution would be for a court to accept a husband's assertions that he has complied with the statute by taking all steps if his claim can be defeated only by a debatable interpretation of Jewish law. This may seem like the best way the court can avoid inappropriate decisions about religious governance without granting too much civil authority to the marrying rabbi. But courts do give religious tribunals nearly determinative authority to decide matters that essentially settle claims of church property. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). Deferring to a rabbi's judgment on debatable matters is probably acceptable.

2. *The Equitable Distribution Law*

The equitable distribution law of 1992 avoids the possibly arbitrary limitation to religious marriages and the assignment of civil authority to rabbis, but one of its features raises a problem not present in the 1983 statute. From the standpoint of Jewish law, enforcement of the 1992 law may involve unacceptable duress by imposing a loss,[208] and this creates a potential constitutional issue. If the alternative to an invalid *get* is no *get* at all, the civil law has done no harm. But perhaps a husband would have given a *get* without civil duress. It is even arguable that if a civil statute specifies coercive consequences for a category of circumstances, all *gittin* granted in those circumstances would be invalid (under Jewish law) because duress looms in the background and its actual effect cannot be gauged.[209] Were the civil law to end up rendering a large percentage of *gittin* (religiously) invalid, the law would be amazingly counterproductive, with a powerful negative effect on religion.

How serious is this concern? Given the intricacies regarding the appropriateness of serious pressure on husbands and the disagreements among Orthodox and Conservative Jews about the limits of acceptable pressure, an assessment is not easy.[210] A court should consider the claim that a statute undermines religious law in this way, but it cannot enter the thicket of debatable issues of Jewish law. Even if it discerns that substantial groups believe a statutory scheme undermines *gittin* that might have been granted in the absence of civil pressure, it should not strike down the provision on this ground if opinion within the Orthodox and Conservative communities is divided.[211]

For standard civil constitutional analysis, the other issues concerning interference with religion are similar in the new and old statutes. In certain applications, the equitable distribution provision is easier to defend. Insofar as the inability to remarry affects a wife's prospective financial status, courts appropriately take her failure to obtain a *get* as bearing on her financial future.[212] That rationale does not cover a court's responding puni-

208. If civil law imposes unacceptable duress, then from a religious viewpoint, the *get* a husband grants will be invalid. *See* BREITOWITZ, *supra* note 100, at 212-19.

209. *See* Nadel, *supra* note 163, at 97; Zornberg, *supra* note 103, at 757-58 (reporting a telephone interview with Rabbi J. David Bleich).

210. *See* BREITOWITZ, *supra* note 100; Zornberg, *supra* note 103, at 756-59.

211. *See* Becher v. Becher, 667 N.Y.S.2d 50 (App. Div. 1997); Cerisse Anderson, *Consideration of Religious Divorce Upheld*, N.Y. L. J., March 18, 1997, at 1.

212. *See* Zornberg, *supra* note 103, at 734 (stating that "the policy underlying the 1992 amendment is that, in order for courts equitably to divide marital assets and set maintenance, they must be able to consider the financial implications of one party's inability to remarry").

tively to a husband's unfairness or its employing the lever that it will impose an unfavorable settlement unless a husband grants a *get*. When a court acts for these reasons, the constitutional problems of affecting religion are at least as great as they are for the earlier statute.[213]

In summary, statutes designed to induce husbands to go through Jewish divorces do present serious constitutional issues, but the basic features of those statutes should be accepted.[214] Some details raise further problems, and the assignment of final authority to marrying rabbis in the 1983 law should be regarded as constitutionally impermissible.

E. EQUITY

When courts act on their own motion, the constitutional issues are closely similar to those generated by legislation. In some cases, courts have invoked equitable principles effectively to preclude a husband's achieving an unfair advantage by refusing to grant a *get*. A New Jersey court, reviewing an unfavorable settlement that a wife signed to obtain her husband's consent to a *get*, held the settlement invalid as a consequence of duress.[215] A New York court refused to grant a husband equitable distribution of property because he had "unclean hands"; his "unclean hands" consisted of misusing his differential power by refusing to grant a *get*.[216] The court subsequently gave the husband a smaller share of the marital wealth because he continued to refuse to grant a *get*.[217] An earlier Appellate Division case held that a husband's oppressive misuse of his power to

213. As I discuss in connection with common law equity, perhaps a defendant who resists a civil divorce has a stronger argument against being pressured than a plaintiff who wants one. In New York, in contrast with virtually every other state, the only grounds for *unilateral* divorce involve fault. Thus, the defendant husband resisting a divorce sought by his wife will have committed some fault if his wife is to succeed. His fault (according to civil law) may reduce the attractiveness of his claim that he should not be pressured into giving a *get*. (As note 196, *supra*, suggests, a plaintiff seeking a civil divorce but genuinely wishing to remain married under religious law also has some claim that pressure is improper.) The fact that other states allow unilateral divorce without fault might make legislatures hesitant to adopt a statute that covers defendants in the way the 1992 provision does.

214. For a recent case accepting the 1992 provision, see *Becher*, 667 N.Y.S.2d 50, decided below by a judge who said that he has seen the coercive withholding of a *get* on occasions "'too numerous to count.'" *See* Anderson, *supra* note 211, at 4. In one case, a branch of the New York Supreme Court held the 1983 law invalid as a violation of the Obligations of Contracts Clause as applied to a separation agreement entered into *before* the law was passed. *See* Chambers v. Chambers, 471 N.Y.S.2d 958 (Super. Ct. 1983).

215. *See* Segal v. Segal, 650 A.2d 996 (N.J. Super. Ct. 1994).

216. Schwartz v. Schwartz, 583 N.Y.S.2d 716 (1992).

217. *See Blocking a Religious Divorce Proves Costly*, N.Y. TIMES, Oct. 5, 1994, at B4. For a comparable British case, see *Brett v. Brett*, I All E.R. 1007 (C.A. 1969). *See also Segal*, 650 A.2d at 998-99; *Schwartz*, 583 N.Y.S.2d at 719.

withhold a *get* subjected the bargain that followed to potential revision.[218] (The same court declined to hold that withholding a religious divorce constituted a tort.)

Generalizing about these kinds of cases is hard, because so much depends on particular circumstances. The argument for equitable relief from an agreed settlement is strongest when husbands have explicitly bargained with their power to withhold a *get* in order to obtain more favorable terms. Perhaps a secular state should have no policy about imbalances of power for religious divorces viewed in isolation; but the state rightly determines that the leverage provided by an imbalance should not benefit the stronger party in the civil divorce settlement.[219]

Whether equitable relief should be given if the husband has never agreed to obtain a *get* and has never bargained about it is more difficult. When a husband simply refuses to provide a *get*, should the state treat his wife more generously than it otherwise would? As I noted in respect to New York's 1992 statute, such treatment is undoubtedly proper insofar as it is based on the wife's having bleaker financial prospects. The serious questions arise when the court goes further to pressure the husband to grant a *get* or to penalize him for failing to do so. If the husband himself seeks a civil divorce, the constitutional issues about judicial use of equity are the same as under the New York statutes. A defendant husband who resists a divorce has a somewhat stronger argument that the state should not indirectly coerce him to give a *get* by diminishing his share of the settlement. Since, unlike New York, other states permit unilateral divorce without fault, courts will sometimes deal with faultless husband-defendants. Such defendants have the strongest appeal against being coerced into contributing to a religious divorce they do not want. Nevertheless, on balance, the constitutionality of civil law prodding to grant a *get* should not depend on whether the husband is a plaintiff or defendant, or on whether he is found to be "at fault."[220]

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218. *See* Perl v. Perl, 512 N.Y.S.2d 372 (App. Div. 1987).

219. Whatever conceivable claim a husband may have to religious liberty dissipates if he trades off his ability to withhold a *get* for a bigger share of the marital property.

220. Pressuring a party who actually does not want a civil divorce, especially if be is not at fault, may be a greater impairment than pressuring someone who seeks a divorce. However, the status of parties in modern divorce practice and the content of what is alleged as fault, is often too contingent on nonessentials for these variations to make a crucial constitutional difference.

F. TORT

Another way in which civil courts might act on their own is to allow a wife recovery in tort law for a husband's refusal to grant a *get*. The most apt form of action is the tort called the intentional infliction of emotional distress.[221] This involves the intentional or reckless causing of severe emotional suffering by outrageous conduct. Many wives who are divorced civilly but denied a religious divorce undoubtedly suffer greatly. Some husbands may actually wish to impose such suffering. Even those who do not are probably aware that suffering is substantially likely, and this awareness is sufficient to support a finding of recklessness.[222] Is the behavior outrageous? That is the most troublesome question. If the husband acts purely from spite, one could comfortably conclude that his effort to prevent a remarriage for his wife and to cause her acute distress is outrageous.[223] If the husband has a genuine religious objection to the *get* procedure or some other conviction that he should not participate, his conduct should not be treated as outrageous.

The most difficult case is one in which a husband withholds a *get* in order to get a better bargain in the civil divorce. Bitter negotiations are a common, if unfortunate, element of many modern divorces. Might one say it is outrageous to use as a bargaining chip something one does not personally care about, such as withholding a *get*? It is not unusual for spouses to claim they want something (such as custody of children) that they really do not, in order to be able to "concede" this in return for something they do want.

If such bargaining were often treated as raising claims of intentional infliction of emotional distress, divorcing couples might "up the ante" in conflicts already full of emotional hostility. Should courts make a judgment that bargaining about the *get* is especially unfair, and therefore outrageous? Although this is a possible outcome, I do not think bargaining tactics employing the *get* should be given this special status for purposes of tort law. Thus, I am inclined to believe that tort recovery should be limited to circumstances in which the husband's motivations are clearly spiteful.

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221. *See* BREITOWITZ, *supra* note 100, at 239-49; Glick, *supra* note 129, at 906-13; Zornberg, *supra* note 103, at 726-27.

222. The recklessness of an act depends not only on the risk of harm but also on a lack of justification for the act. A husband with a strong objection to granting a *get* might claim that he was aware of the risk to the wife but was not reckless. In any instance, however, in which the husband's behavior was outrageous, he would lack such a justification.

223. I put aside the possibility that the husband may claim that his actions may be a justified response to his wife's malicious behavior towards him.

G. CONCLUSION ABOUT CIVIL PRESSURE TO GRANT A *GET*

Although the constitutional issues are difficult, I conclude that states may appropriately aim to encourage recalcitrant husbands to give wives the *gittin* necessary for remarriage within Orthodox and Conservative religious communities. The state's secular interest in freedom to remarry and its interest in accommodating religious exercise are strong enough to support such encouragement. However, these interests probably do not override a husband's claim of religious exercise in the unusual instance when a husband has a genuine opposition of religious conscience to submitting to a *beth din* or providing a *get*. Whether a state should take the step of adopting a statute or remain within the limits of common law and equity will depend on the capacity of courts to address the problem within the constraints of judge-made law. One straightforward mode of judicial involvement is enforcement of prior agreements. When husbands have clearly agreed to civil law enforcement of a promise to submit to a *beth din*, courts should regard themselves as free to compel performance so long as they need not resolve any debated issues of Jewish law.

IV. GENERAL CONCLUSIONS

Drawing together the threads of this analysis helps reveal the broader lessons to be learned from this close study of two problems about civil law and Jewish law. Those lessons are highly relevant to the free exercise and establishment principles the Supreme Court should build from the residue of existing doctrines about rights to religious exercise, unconstitutional effects on religion, and unacceptable connections of secular and clerical authority.

A. SPECIFIC DOCTRINAL CONCLUSIONS

1. Civil determination of debatable issues of religious law is generally unacceptable;[224] but straightforward determinations of religious requirements by civil courts may be appropriate if these determinations serve secular interests. Just as the priest-penitent privilege and civil deference to religious tribunals demand some recognition of religious law, so also do typical *kosher* laws and civil pressure in regard to *gittin*. But recognition of religious law does not by itself render these civil involvements unconstitutional.

224. *See* Jones v. Wolf, 443 U.S. 595 (1979).

2. Similarly, civil pressure to perform acts of religious obligation may be permissible so long as secular reasons exist for performance of the acts (reasons other than the social desirability of people practicing religions). Thus, the fact that a husband may feel some religious obligation to grant a *get* once ordered to do so by a *beth din* does not make civil pressure on him to grant the *get* unconstitutional.

3. The strict compelling interest test, applicable when there is a direct attack on a religion or conscious discrimination among religions, is probably not applicable when the government promotes a secular interest in a manner that may cause some religion comparative disadvantage.[225] These situations should be dealt with under other Establishment Clause principles.

4. In determining whether a religion is impermissibly assisted, a court should ask whether other groups have similar needs that are unmet. Thus, *kosher* and *get* laws do not aid Orthodox Jews impermissibly against Reform Jews, who do not observe *kosher* standards or engage in religious divorces.

5. Ordinarily, despite some language in Supreme Court opinions, a possibility of a future failure to extend the same benefit to another similar group should not render a benefit unconstitutional. One can never be sure what legislatures will do or what claims religious groups may develop. Thus, if the legislature confers a benefit, such as the protection against fraud that *kosher* laws provide, it is always conceivable that a similar group will arise and not be similarly treated. If that possibility were alone sufficient to render the initial benefit unconstitutional, legislatures could not act to give benefits[226]—even essentially secular benefits—that are focused on any particular religious community. Such benefits are not always invalid.

If, in contrast, such focused laws are unconstitutional, legislatures could respond by adopting generally worded laws, such as the New York *get* provisions, that would cover other similarly situated groups as they arise. With ingenuity, a legislative drafter could find general language to cover food requirements of various religions, leaving it to administrators to concentrate on *kosher* requirements.

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225. However, if a state prefers Orthodox views of *kosher* over Conservative ones, that preference probably does amount to conscious discrimination.

226. More strictly, they could not give benefits that were not already required by the Constitution or by a generally worded statute like the Religious Freedom Restoration Act.

6. In an Establishment Clause analysis of whether effects are acceptable, the feasibility of alternative schemes that generate fewer negative effects should be relevant. "Least restrictive means" was a familiar component of free exercise analysis before *Employment Division v. Smith* and is an aspect of the Religious Freedom Restoration Act. Alternative means should also make a difference when courts review Establishment Clause challenges. This point is strikingly illustrated with respect to *kosher* enforcement. Civil determinations of *kosher* requirements present definite constitutional difficulties. Whether these difficulties should be swallowed depends partly on whether civil enforcement of fraud related to product certification by private groups will provide consumers adequate protection. A court's confidence that state support of private enforcement will work effectively is one reason to hold that more extensive state involvement is unconstitutional. A scheme with a sincerity defense accommodates diverse religious views better than one without the defense, but it does not wholly eliminate the difficulties with state determination of what is *kosher*.

7. A plain effect within religious law could bear on constitutionality under civil law. Notably, if state pressure on husbands to grant *gittin* plainly rendered their acts ineffective under Jewish law, a strong ground would exist for concluding that the law is in paradoxical opposition to its aim and "inhibits" religion unacceptably.

8. For most free exercise purposes, the religious views that count are those of the person or persons advancing the free exercise claim, regardless of whether those views are widely shared by others.[227] Thus, a husband could raise a serious free exercise objection to being pressured to grant a *get* if doing so would violate his religious conscience. However, if only a very small percentage of persons in a regulated class have sincere religious objections, and determining sincerity is very difficult when members of the class have a substantial incentive to claim such objections falsely, courts might reasonably decide not to accede to such objections. They might conclude instead that the government has a compelling interest in not making any exceptions.

9. For establishment purposes, it is the views of people more generally that matter. This is true whether one asks about advancing or inhibiting religion, or endorsement. If a court asks whether *kosher* laws aid or endorse Orthodox Judaism in comparison with Conservative Judaism, the

227. However, if someone objects to government activity that reduces the religious value of a site (such as a sacred mountain), one individual's sincere feelings on that score will not be very important if most members of his religious group see things differently.

views of most Conservative Jews rather than those of isolated individuals matter. If the great majority of Conservatives who observe *kosher* actually welcome enforcement of Orthodox standards, such enforcement may be concluded not to unacceptably disadvantage Conservative practice. Similarly, if most Orthodox and Conservative Jews want the state to pressure husbands to grant *gittin*, that is evidence that the law does not "inhibit" those religions. No doubt, courts are not well suited to figure out exactly how many members of a religion take particular positions, but they should be able to discern existing heavily dominant opinion on these subjects.

10. For endorsement analysis, the relevant comparison may concern the relative position of two minority religions (or two branches of one minority religion). It is a stretch to think of *kosher* or *get* laws as having much, if anything, to do with the place of Christians in relation to Jews. If any endorsement (or condemnation) exists, it is of one branch of Judaism vis-à-vis another. Such an endorsement is undoubtedly possible—a legislature that is mostly Christian might effectively endorse some branch of another religious tradition as authoritative. The major opinions employing endorsement analysis have thus far proceeded as if the views of a hypothetical reasonable person of no distinct religious understanding determine whether a law, in purpose or effect, endorses a religion. If that approach is applied to the problems I have discussed, the relevant reasonable person would need to evaluate how members of the minority religions would likely react to the legislature's actions. It is difficult to envision this without inquiry into how actual members of those religions do react. A non-Jewish judge who tries to replicate the reasonable observer will be hard pressed to assess how a reasonable Conservative Jew who observes *kosher* requirements will regard enforcement of Orthodox standards without some knowledge of the position of Conservative Jews.[228]

11. Endorsement analysis sometimes seems very close to more general analysis of advancements of religion, but this is not invariably so. If one asks whether typical *kosher* laws aid Orthodoxy over Conservatism, one will look to their effect on Conservative practice and perhaps at how Conservative Jews regard the laws. These factors will also bear on whether the state has endorsed Orthodoxy. On the other hand, the argument that the *get* law impermissibly aids Orthodoxy by moderating the harsh effects of one of its practices seems to have little bearing on en-

228. I am contending implicitly that reflective Christians will have a *better* sense of how Christians and others will react to a cross in a courthouse than of how members of branches of nonChristian religions regard subjects unfamiliar to Christians. (I, in fact, doubt that most Christians have an adequate sense of how Christian symbols affect members of other religions.)

dorsement. For areas of establishment law other than public symbols (for which endorsement is already the dominant approach), it remains an open question how significant a role endorsement analysis will play. As this question is addressed, courts need to think carefully about when endorsement terminology is closely similar to other inquiries about aid and when the questions are genuinely different.

12. Reliance on decisions of rabbis about matters of Jewish law is a reasonable response to the difficulty of ordinary civil officials making decisions about Jewish law and to the unconstitutionality of such officials resolving debatable questions of religious law. But it is not permissible for rabbis, as clergy, to be the public officials who make final determinations for the state under *kosher* enforcement laws. Nor may the state assign private rabbis unreviewable authority over whether people can acquire civil divorces, or other fundamental legal privileges. The way to avoid this dilemma is for civil officials to defer to the decisions of religious authorities (including individual rabbis) on subjects of religious law, but not to confer ultimate civil authority upon them. Among the various ways this can be done, a court can treat a *beth din* as it might some other civil arbitrator, accepting its judgments about the Jewish law of divorce.

B. OVERALL SUMMARY

These individual conclusions illustrate the complexity of considerations that bear on how civil law should permissibly involve itself in matters of religious significance. The aspiratiou for simple approaches is either deluded or badly misgnided. It is deluded if a proponent believes simple approaches will yield results sensitive to the nuances of our religious and social life. It is misguided if a proponent recognizes the Procrustean quality of simple approaches, but thinks their clarity and determinacy are worth the price of unhappy outcomes.