Beit Din's Gap-Filling Function: Using *Beit Din* to Protect Your Client

By Michael A. Helfand

Introduction

In recent years, scholars, courts, and practitioners[1] have all become increasingly interested in religious forms of arbitration.[2] Not only does resolving a dispute through religious arbitration enable parties to avoid the lengthy judicial process, but it also speaks to the religious objectives of many parties; by signing religious arbitration contracts, parties can agree to have disputes resolved in accordance with a shared corpus of religious law and for that law to be applied by mutually agreed upon religious authorities. In so doing, the parties ensure that their dispute's resolution conforms to a set of shared religious principles and values. For this reason, many see religious arbitration as enhancing the religious liberty of the participants, providing access to legally enforceable methods of dispute resolution that speak to the religious affiliations of the participants.[3]

This narrative – the religious value of religious arbitration – tracks the long-standing centrality that religious arbitration has played within Jewish legal doctrine. Thus, Jewish law requires litigants to submit their disputes to a *beit din* for resolution in accordance with Jewish law. By adhering to this rule – that is, submitting disputes to be resolved by a rabbinical and not secular court – litigants can demonstrate their fidelity to value system embodied by Jewish law; accordingly,

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1 For recent articles addressing the topic, see Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 New York University Law Review 1231 (2011); Nicholas Walter, *The Status of Religious Arbitration in the United States and Canada*, 52 Santa Clara Law Review 501 (2012); Farrah Ahmed & Senwung Luk, *How Religious Arbitration Could Enhance Personal Autonomy*, 1 Oxford Journal of Law and Religion 424 (2012); Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 Vermont Law Review 157 (2012).

2 For a recent discussion of this phenomenon in the Christian context, see Mark Oppenheimer, *An Argument to Turn to Jesus Before the Bar*, New York Times (Feb. 28, 2014), *available at* http://www.nytimes.com/2014/03/01/us/before-turning-to-a-judge-an-argument-for-turning-first-to-jesus.html?_r=0.

3 *See* Helfand, *supra* note 1 at 1240-41 ("[R]eligious arbitration courts serve particular religious communities by enabling them to resolve disputes in accordance with their shared religious values and obligations."); Ahmed & Luk, *supra* note 1 at 427 ("[R]eligious arbitration could enhance autonomy by facilitating the option of religious practice.").

to violate this rule, would be "tantamount to a declaration by the litigant that he is amenable to allowing an alien code of law to supersede the law of the Torah."[4]

But beyond the core *halachic* imperative to submit a dispute before a *beit din*, there are also other important and practical reasons for a Jewish litigant to submit disputes to a *beit din*. Under current U.S. constitutional doctrine, civil courts are prohibited from resolving disputes that either interfere with the internal decision-making of religious institutions or require the court to resolve "religious question." These twin limitations on judicial authority – respectively referred to as the "church autonomy" and "religious question" doctrines – prohibit courts from adjudicating a wide range of religious disputes, including interfering in the hiring and firing of ministers or interpreting religious terminology in a contract. In such circumstances, a court will simply dismiss the case, leaving the parties – and the assets in question – wherever it found them.

The "church autonomy" and "religious question" doctrines have wide-ranging applications when it comes to common disputes with Jewish communal and institutional life. In many circumstances, it will require a court to dismiss claims without providing any sort of remedy. As described below, prominent examples of this phenomenon include cases where a rabbi challenges his termination for cause or where a consumer complains that his purchase of a religious item – for example, kosher food products – failed to comply with agreed upon religious standards. In each of these circumstances, courts will refuse to address a plaintiff's claims, leaving the plaintiff without a legal remedy in court.

It is in this context where *battei din* serve their central "gap-filling" function. In cases where courts are constitutionally prohibited from engaging in religious adjudication, *battei din* can provide a forum for the parties to resolve their disputes. Parties can submit disputes to a *beit din* that turn on the resolution of religious questions – from determining whether a rabbi was justifiably terminated for cause to whether delivered food was kosher – and the *beit din* can issue a decision that is legally enforceable in court. Indeed, the interaction between constitutional law and arbitration doctrine in the United States allows a court to enforce the decision

[4] J. David Bleich, *Litigation and Arbitration Before Non-Jews*, 34:3 Tradition 58, 63-64 (2000) (characterizing one of two primary views of the rationale behind the requirement). For further discussion on this point, see Yaacov Feit & Michael A. Helfand, *Confirming Piskei Din in Secular Court*, 61 Journal of Halacha and Contemporary Society 5, 6-9 (2011); Simcha Krauss, *Litigation in Secular Courts*, 2 Journal of Halacha and Contemporary Society 35 (1982).

of a *beit din* even though the court would be constitutionally prohibited from adjudicating that very matter on its own. In this way, *battei din* ensure that individuals with a certain subset of religious claims can secure legally enforceable judgments – and this highlights how *battei din* not only advance core *halachic* principles, but also protect individuals from suffering unaddressed legal harms.

This article proceeds in two parts. Part I considers the "church autonomy" and "religious question" doctrines as well as their applications to religious disputes in the United States. Part II then considers this dynamic in the context of typical Jewish communal and institutional disputes, explaining how *battei din* can play an important "gap-filling" function and thereby protect parties from suffering otherwise unaddressed legal harms.

I. Resolving Religious Disputes in U.S. Courts

Consider the following case. A synagogue hires a rabbi. They first enter a contract for two years and then, when the two years elapse, they sign a contract for five additional years. As the five-year contract draws to a close, the rabbi and synagogue begin contract negotiations for a long term deal. The synagogue is quite happy with the rabbi's performance and the rabbi both enjoys his congregation and is interested in the stability that a long term contract provides. And so the two parties enter a lifetime contract that can be terminated by the congregation only for "cause." Such contracts are relatively common in the synagogue industry and provide the rabbi with the security to make ideological decisions that conform to his *halachic* worldview.

As years pass, the rabbi becomes increasingly bold in his decision-making. His sermons become increasingly aggressive, he stops attending daily *minyan* consistently because, in his view, the atmosphere distracts him from properly concentrating on his prayers, and he begins using the synagogue's discretionary fund for projects that, while undeniably religious, offend many of his congregants. Despite interventions by many of the synagogue's most senior members, the rabbi persists in his conduct. Lamenting the growing divide between the synagogue and the rabbi – and its detrimental impact on the congregation – the synagogue board and general membership vote to terminate the rabbi for cause.

If the rabbi were to file suit for breach of contract in civil court, what would be the likely outcome? On the one hand, the rabbi might claim that his conduct did not amount to sufficient "cause" to justify termination. On the other

hand, the synagogue would presumably disagree. But a court would never consider these opposing arguments and instead would dismiss the case before it got started. To understand why requires understanding the limitations placed by the U.S. Constitution on judicial resolution of religious disputes.

A. The Church Autonomy Doctrine

Parties have long attempted to draw U.S. courts into various religious disputes in the hopes of using government's authority to secure a beneficial outcome.[5] But judicial intervention in religious disputes raises two related types of constitutional worries.

The first is what is often referred to as the "church autonomy doctrine,"[6] which prohibits courts from resolving cases that raise questions of religious "discipline, or of faith, or ecclesiastical rule, custom, or law."[7] The church autonomy doctrine derives from the First Amendment, which prohibits government from passing laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[8] And judicial intervention into questions of religious faith, doctrine or law is seen as contravening both the Establishment Clause – that is, the prohibition against passing laws "respecting an establishment of religion" – as well as the Free Exercise Clause – that is, the prohibition against passing laws that "prohibit the free exercise [of religion]."

Along these lines, the Supreme Court has explained that the First Amendment "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[9] Thus, courts have understood that the "wall of separation" between

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5 One of the first church property disputes heard by the Supreme Court dates back to 1872. *See* Watson v. Jones, 80 U.S. 679 (1872).

6 To be sure, the term church, when deployed in the context of First Amendment doctrine, refers not only to churches, but to all houses of worship.

7 Ogle v. Hocker, 279 Fed. Appx. 391, 395 (6th Cir. 2008) (quoting Watson v. Jones, 80 U.S. 679, 727, 20 L. Ed. 666 (1872)); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002) ("This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity."); *see also* Minker v. Balt. Annual Conference of the United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990); Rweyemamu v. Cote, 520 F.3d 198, 205 (2d Cir. 2008).

8 U.S. Constitution, Amend. I.

9 Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952).

church and state frequently requires that courts avoid interfering in the internal religious decision-making of religious institutions.[10]

Now, to be sure, the contours of this doctrine are far from settled. It is surely not the case that religious institutions have free reign to engage in whatever conduct they so choose without fear of any legal ramifications.[11] Indeed, the limits of these principles have been hotly contested for some time.[12] But the more a particular case draws a court into the very center of the religious faith and doctrine of a religious institution, the more likely a court is to dismiss the case. Thus, for example, courts have generally dismissed claims of clergy malpractice – allegations that a clergyman's failure to act in accordance with the due standard of care for clergy caused harm to one of his parishioners – because doing so would require a court to determine to impose an appropriate standard of care for clergymen.[13] And to do so, in the words of one court, "would certainly be impractical, and quite possibly unconstitutional" because "[s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity."[14]

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10 *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).

11 *See, e.g.*, F.G. v. MacDonell, 150 N.J. 550, 560 (N.J. 1997) (noting that "courts have recognized claims for intentional torts against clergymen [such as] fraud . . . sexual assault . . . unlawful imprisonment . . . alienation of affections . . . and for sexual harassment, intentional infliction of emotional distress, and defamation").

12 *See, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa Law Review 1 (1998); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 Georgetown Journal of Law and Public Policy 119, 122 (2007); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Columbia Law Review 1373 (1981); Thomas Berg, Kimberlee Wood Colby, Carl H. Esbeck, and Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Northwestern University Law Review Colloquy 175 (2011); Marci A. Hamilton, *Religious Institutions, The No-Harm Doctrine, and the Public Good*, 2004 Brigham Young University Law Review 1099 (2004); Paul Horwitz, *Act III of the Ministerial Exception*, 106 Northwestern University Law Review Colloquy 156, 161-62 (2011); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 Fordham Law Review 1965 (2007); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 North Carolina Law Review 1, 58 (2011).

13 *See, e.g.*, Wisniewski v. Diocese of Belleville, 406 Ill. App. 3d 1119, 1158 (Ill. App. Ct. 2011); White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990); Nally v. Grace Community Church, 47 Cal. 3d 278 (Cal. 1988); Jones v. Trane, 153 Misc. 2d 822, 827 (N.Y. Sup. Ct. 1992); Schmidt v. Bishop, 779 F. Supp. 321, 327 (S.D.N.Y. 1991); H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995); F.G. v. MacDonell, 696 A.2d 697, 703 (N.J. 1997).

14 Nally v. Grace Community Church, 47 Cal. 3d 278, 299 (Cal. 1988)

The most significant and widespread application of this doctrine has come in the context of hiring and firing ministers.[15] Known as the "ministerial exception," federal courts have uniformly held[16] that religious institutions cannot be held liable for violating various anti-discrimination statutes when hiring and firing ministers – such as Title VII, which prohibits discrimination in employment on the basis of race and sex;[17] the American with Disabilities Act, which prohibits discrimination in employment on the basis of disability;[18] and the Age Discrimination in Employment Act, which prohibits discrimination in employment on the basis of age.[19] The Supreme Court recently affirmed the ministerial exception, explaining:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[20]

Accordingly, religious institutions can employ religious principles when hiring and firing ministers even if doing so would otherwise constitute impermissible discrimination.[21] And the ministerial exception has been applied even to employees of religious institutions that are not ministers, but so long as their employment

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15 When discussing "ministers" in this context, courts refer to religious leaders of all religions, including imams and rabbis.

16 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705 (2012) (noting the uniform acceptance of the "ministerial exception" among the federal courts of appeals).

17 42 U.S.C. § 2000e-2.

18 42 U.S.C. § 12112(a).

19 29 U.S.C. § 623(a).

20 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

21 There does remain a question as to whether a court can intervene in such cases where the plaintiff claims that the alleged religious grounds for his or her dismissal were pretextual. For discussion of this point, see Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 Minnesota Law Review 1891, 1957-60 (2013).

duties are sufficiently tied to the religious mission of the institution,[22] including music directors,[23] a press secretary,[24] and a director of a church's "Worship Arts Department."[25]

B. The Religious Question Doctrine

In addition to the restrictions of the church autonomy doctrine, courts are also limited in their ability to resolve religious disputes by the "religious question" doctrine. This religious question doctrine became of increasing importance to the Supreme Court in the latter half of the 20th century, as the Supreme Court held that lower courts could resolve religious disputes so long as they did so only with reference to "neutral principles of law" – that is, only by relying upon "objective, well-established concepts of . . . law familiar to lawyers and judges."[26] On this approach, while courts may not resolve "controversies over religious doctrine and practice"[27] and must "avoid . . . incursions into religious questions,"[28] courts can resolve religious disputes so long as the contracts and documents at the heart of the dispute employ secular – as opposed to religious – terminology. Where parties employ secular terminology, courts need not dismiss claims on First Amendment grounds; instead, the neutral principles of law approach allows lower courts to

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22 *See, e.g.*, Ross v. Metro. Church of God, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007) ("[T]here can be little doubt that Plaintiff's position as the director of the Worship Arts Department of the Metropolitan Church falls within the ambit of the ministerial exception. It is clear from Plaintiff's Complaint that his position as Pastor of Worship Services is important to the spiritual and pastoral mission of the church.") (internal quotation marks and citation omitted).

23 *See* EEOC v. Roman Catholic Diocese, 213 F.3d 795, 802-03 (4th Cir. 2000) ("Music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions."); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir. Ill. 2006) (emphasizing the vital discretionary role played by the plaintiff, a music director, in the religious life of the church); Starkman v. Evans, 198 F.3d 173, 177 (5th Cir. La. 1999) (noting that the plaintiff conceded that "for her and her congregation, music constitutes a form of prayer that is an integral part of worship services and Scripture readings.").

24 Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 704 (7th Cir. Ill. 2003) (holding that "[t]he role of the press secretary is critical in message dissemination, and a church's message, of course, is of singular importance.").

25 Ross v. Metro. Church of God, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007).

26 Id. at 603.

27 Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449-50 (1969) ("But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").

28 Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404, 415 (1991).

resolve religious disputes where they can do so by focusing exclusively on the secular elements of the case.

This "neutral principles of law" framework emerges from the "religious question" doctrine, which understands the First Amendment as prohibiting judicial resolution of religious questions.[29] Commentators have debated the principle behind the "religious question" doctrine.[30] For some, the constitutional bar against judicial intervention in religious disputes draws directly from the church autonomy doctrine, which grants religious institutions the authority to direct their own internal affairs free from government interference.[31] Yet others have interpreted the religious question doctrine as protecting against governmental endorsement of one religious view over another.[32] Still others have contended that courts are

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[29] Jones v. Wolf, 443 U.S. 595, 603 (1979) (noting that the neutral principles of law approach "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice"); Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."). *But see* Michael A. Helfand, *Litigating Religion*, 93 Boston University Law Review 493 (2013) (arguing that the "religious question" doctrine stems from a misunderstanding of Establishment Clause principles).

[30] While as a matter of legal doctrine, courts continue to uniformly apply this doctrine, it has endured significant criticism from a number of scholars. *See, e.g.*, Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 Fordham Urban Law Journal 85 (1997); Jared A. Goldstein, *Is There a Religious Question Doctrine?: Judicial Authority to Examine Religious Practices and Belief*, 54 Catholic University Law Review 497 (2005); Helfand, *supra* note 29.

[31] *See, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa Law Review 1 (1998); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harvard Civil Rights-Civil Liberties Law Review 79, 87 (2009); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 Villanova Law Review 273, 288 (2008); Berg et. al, *supra* note 12; Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 William & Mary Bill of Rights Journal 43, 48-49 (2008); Horwitz, *supra* note 12 at 161-62; Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 Georgetown Journal of Law and Public Policy 165, 177 (2009); Nelson Tebbe, *Nonbelievers*, 97 Virginia Law Review 1111, 1167 (2010).

Andrew Koppelman has provided a somewhat different take on this general argument, suggesting that government intervention in religious questions is problematic because governmental involvement degrades and corrupts religion. *See,* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 William and Mary Law Review 1831 (2009).

[32] *See, e.g.* Laurence H. Tribe, American Constitutional Law § 14-11, at 1231 (2d ed. 1988) (noting that the prohibition against "doctrinal entanglement in religious issues" "more deeply [] reflects the conviction that government – including judicial as well as the legislative and executive branches – must never take sides on religious matters"); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 Notre Dame Law Review 807, 812 (2009) ("If government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby favor

constitutionally barred from resolving claims that turn on religious doctrine or practice because they lack the adjudicative capacity to address religious questions.[33]

But regardless of the theory, courts do not resolve religious questions and therefore will dismiss any case that requires them to do so. It is only where courts can avoid religious questions – and focus solely on secular inquiries – where they will resolve religious disputes. Examples of cases where courts encounter religious questions are manifold, but two particular categories of cases are worth noting in this context.

The first is the sale of religious goods.[34] Producers of religious goods advertise, market, and sell to clientele specifically interested in the religious quality of these goods.[35] In so doing, these producers often employ religious terminology to describe their goods to attract the interest and earn the trust of interested purchasers. Sales in the United States of religious goods are extremely significant, including a $4.6 billion Christian products industry,[36] and a $12.5 billion kosher food market.[37] However, courts have limited ability to resolve disputes that arise over agreements to purchase such religious goods and services.

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some religious persons, sects, and groups over others."); *see also* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 Southern Carolifornia Law Review 781, 804 (1998) (arguing in the context of state kosher laws that judicial resolution of inter-denominational disputes may be perceived as "the possible endorsement of one minority group").

33 *See* Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 Geo. J.L. & Pub Pol'y 119, 122 (2007) (arguing that the Establishment Clause instructs courts not to interfere in cases implicating religious doctrine or practice because such "claims would require courts to answer questions that the state is not competent to address").

34 Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law*, 51 Buffalo Law Review 127, 180-83 (2003); *see generally* R. Laurence Moore, *Selling God: American Religion in the Marketplace of Culture* (1994).

35 *See, e.g.*, Andrew Stone Mayo, Comment: *For God and Money: The Place of the Megachurch Within the Bankruptcy Code*, 27 Emory Bankruptcy Developments Journal 609, 620-22 (2011) (describing the market for "quasi-religious products and services" and noting the $4.6 billion Christian products industry). For some examples of companies marketing Christian goods and services, see Christian Retailing, www.christianretailing.com (last visited Dec. 3, 2013); Faith Centered Resources, www.faithcenteredresources.com (last visited, Dec. 3, 2013).

36 *See, e.g.*, Jay Reeves, *Some in $4.6B Christian Industry Copy Designs, Logos*, USA Today (Dec. 18, 2009), *available at* http://usatoday30.usatoday.com/news/religion/2009-12-18-christian-copyright_N.htm; *Christian Product Sales Put at $4 Billion Plus*, Los Angeles Times (July 7, 2001), *available at* http://articles.latimes.com/2001/jul/07/local/me-19488; *see also Andrew* Stone Mayo, Comment: *For God and Money: The Place of the Megachurch Within the Bankruptcy Code*, 27 Emory Bankruptcy Developments Journal 609, 620-22 (2011) (describing the market for "quasi-religious products and services" and noting the $4.6 billion Christian products industry).

37 *See* KosherFest: The Business of Kosher Food and Beverage, *at* http://www.kosherfest.com/about-kosher.

For example, consider the recently dismissed class action lawsuit against ConAgra, the parent corporation of the Hebrew National brand. According to a complaint filed in 2012, ConAgra advertises and sells meat products under the Hebrew National label, describing them as "100% kosher" "as defined by the most stringent Jews who follow Orthodox Jewish law."[38] However, the plaintiffs contended that contrary to these representations, Hebrew National meat products did not satisfy these kosher standards.[39] As a result, purchasers of Hebrew National meat products overpaid for these products, mistakenly believing them to be "100% kosher."[40] And having misrepresented the kosher quality of these meat products, ConAgra should be held liable for damages under various consumer protection laws as well as for breach of contract and negligence.[41]

Not surprisingly, a federal district court dismissed the lawsuit, concluding that "[t]he definition of the word 'kosher' is intrinsically religious in nature, and this Court may not entertain a lawsuit that will require it to evaluate the veracity of Defendant's representations that its Hebrew National products meet any such religious standard."[42] Thus, the court held that the religious question doctrine prohibited judicial consideration of the plaintiffs' claims.

Another example of the impact of the religious question doctrine is where courts are asked to determine whether a party has breached a contract to perform a particular religious function. One of the more common examples of this dynamic is cases – like the hypothetical described at the outset of Part I – where a minister or rabbi is dismissed for "cause." Such cases recur with some regularity. And courts uniformly dismiss such cases because determining whether a rabbi or minister has been terminated for cause invariably requires a court to assess what type of religious misconduct is sufficient to trigger a breach of contract. Although such an inquiry merely requires interpreting the text of the agreement between the parties, it still clearly represents an impermissible inquiry into a religious question.

For example, in 2009 the U.S. Court of Appeals for the Second Circuit addressed the lawsuit of a rabbi claiming wrongful termination; the synagogue countered

38 Wallace v. ConAgra, Complaint, 0:12-cv-01354-DWF-TNL, at *3 (D. Minn. June 6, 2012).
39 Id. at * 17-21.
40 Id. at *64.
41 Id. at *46-64.
42 Wallace v. Conagra Foods, Inc., 920 F. Supp. 2d 995, 999 (D. Minn. 2013), *rev'd on other grounds,* Wallace v. ConAgra Foods, Inc., No. 13-1485, 2014 U.S. App. LEXIS 6230 (8th Cir. Apr. 4, 2014).

that the rabbi had been justifiably terminated under the terms of the employment agreement for "gross misconduct" and "willful neglect of duty."[43] The federal district court, in hearing the case, had dismissed the rabbi's lawsuit and the Court of Appeals did the same. Explaining its reasoning, the Court of Appeals noted:

> [R]eview of Freidlander's claims in this case would require scrutiny of whether she should have, *inter alia*, read more extensively from the Torah at certain services, prepared students for their Bar or Bat Mitzvah more adequately, performed certain pastoral services that were not performed, or followed the Temple's funeral service policies. . . . We agree with the district court that such review would involve impermissible judicial inquiry into religious matters.[44]

This outcome is far from unique. In 2007, a federal court in Iowa dismissed a similar lawsuit from a rabbi claiming wrongful termination. The court dismissed the lawsuit on First Amendment grounds, noting that at "[t]he heart of Defendants' alleged justification for terminating Rabbi Leavy's employment is the board and congregation's dissatisfaction with her level of attentiveness and general suitability for the needs of the congregation."[45] Accordingly, the court could not resolve the dispute without impermissibly resolving a religious question.[46]

Together, the church autonomy and religious question doctrines limit the ability of courts to resolve religious disputes. Under the religious question doctrine, courts cannot intervene in the internal religious decision-making process of religious institutions; and under the religious question doctrine, courts cannot adjudicate claims that require resolving religious questions. These two related doctrines have significant impact in a wide range of cases. And, as a result, they also help highlight the importance of *battei din* for securing final and enforceable judgments in many Jewish communal and institutional disputes.

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43 Friedlander v. Port Jewish Ctr., 347 Fed. Appx. 654 (2d Cir. 2009).

44 Id.

45 Leavy v. Congregation Beth Shalom, 490 F. Supp. 2d 1011, 1026 (N.D. Iowa 2007).

46 Id.; *see also* Kraft v. Rector, Churchwardens & Vestry of Grace Church, 2004 U.S. Dist. LEXIS 4234, 22-23 (S.D.N.Y. Mar. 15, 2004) (dismissing a priest's lawsuit because evaluating the grounds for the dismissal would have required impermissible inquiry into Canon law).

II. How *Beit Din* Arbitration Can Protect Your Client

Current constitutional doctrine prohibits courts from resolving a wide range of religious disputes. From disputes over the hiring and firing of ministers to disputes over the kosher status of various food products, the First Amendment prohibits courts from resolving religious disputes that lead the court to trespass on the autonomy of religious institutions or draw the court into debates over religious questions. And without more, that would mean plaintiffs in a wide range of circumstances – plaintiffs wrongfully terminated for cause or wrongfully denied truly kosher food products – would not be able to secure compensation for legal harms they had endured.

But courts are not the only institutions that can provide final and enforceable legal judgments. In the United States, *battei din* function as arbitration panels. And, under current arbitration doctrine in the United States, the decisions of arbitrators are final and enforceable so long as rendered pursuant to a duly signed arbitration agreement. Moreover, *beit din* arbitration panels have the authority to resolve disputes that entail religious questions or intrude on religious autonomy – and those decisions can be enforced by the very same courts that would be prohibited by the First Amendment from hearing those cases in the first instance.

A. *Battei Din* as Arbitration Tribunals

In the United States, parties to a dispute can forego their right to pursue their claims in court; instead, they can choose to sign an arbitration agreement and thereby submit their dispute to a neutral third-party for binding resolution.[47] Indeed, pursuant to the Federal Arbitration Act, arbitration agreements are placed "on equal footing with all other contracts," ensuring that courts enforce them according their terms.[48] Accordingly, the mechanism to have a claim arbitrated by a *beit din* is the same as it is for standard arbitration courts; the parties must either sign an arbitration agreement to have a religious arbitral panel resolve the relevant dispute or include such an arbitration clause in a signed contract.[49] In so doing,

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47 9 U.S.C. § 2.

48 First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 54 (1995) (internal citations omitted)).

49 Tal Tours v. Goldstein, 808 N.Y.S.2d 920, 920 (2005) ("An agreement to proceed before a bet din is treated as an agreement to arbitrate."); see also Ginnine Fried, Comment, "The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts," *Fordham Urban Law Journal*, 31: 633-655 (2004).

parties consent to exit the realm of standard legal adjudication and enter into binding arbitration.[50]

Once submitted via a binding arbitration agreement, a *beit din* has the authority to conduct proceedings, hear testimony and admit evidence.[51] When the proceedings are complete, the *beit din* issues an award that provides a judgment on the submitted claims.[52]

The victorious party can then petition the relevant court to "confirm" the award, beginning the process to render the *beit din*'s award legally enforceable just like any other court judgment.[53] Upon receiving such a motion, a court must confirm the award – thereby making it enforceable like any other legal judgment – unless there exists some reason to vacate – that is, reject – the arbitration award. A court can only vacate a *psak din* under very limited circumstances. As a general matter, such circumstances typically include, among others, "corruption, fraud or misconduct in procuring the award" or "partiality of an arbitrator appointed as a neutral . . . ."[54] Accordingly, courts will refuse to confirm an arbitration award where the award fails to represent the decision of a neutral arbitrator freely chosen by the parties.

Importantly, such grounds for vacating a *psak din* do not allow a court to revisit the merits of the underlying dispute when considering whether or not to confirm an award.[55] Thus, "[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one."[56] Furthermore, "[c]ourts are bound by an

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50 Kingsbridge Center v. Turk, 469 N.Y.S.2d 732 (1983) (confirming the beth din decision because the parties consented, through a written agreement, to have the beth din panel adjudicate the matter); Kovacs v. Kovacs, 633 A.2d 425 (Md. Ct. Spec. App. 1993) (confirming beth din award because parties "knowingly chose" to participate in the arbitration).

51 *See, e.g.* 9 U.S.C. § 7.

52 Arbitrators, however, are not required to provide a written explanation of their award. *See, e.g.*, United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."); Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (clarifying that arbitrators have no general obligation to explain their awards in writing).

53 *See, e.g.*, 9 U.S.C. § 9.

54 CPLR §7511(1) (listing the statutory grounds for vacatur in New York); see generally Amina Dammann, *Note: Vacating Arbitration Awards for Mistakes of Fact*, 27 The Review of Litigation 441, 470-75 (2008) (collecting state grounds for vacatur).

55 See, e.g., Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976) ("[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes.").

56 TC Contr., Inc. v. 72-02 N. Blvd. Realty Corp., 39 A.D.3d 762, 763 (2d Dep't 2007).

arbitrator's factual findings, interpretation of the contract and judgment concerning remedies."[57] In fact, "even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice."[58] In this way, the decisions of *battei din* – like all other arbitration tribunals – are afforded wide deference. And this deference has important ramifications for the "gap-filling" role that *battei din* can play.

B. The Gap-Filling Role of *Battei Din*

As discussed above, courts cannot resolve religious questions nor can they interfere with the core decision-making of religious institutions. When a plaintiff files a claim that requires a court to violate either of these constitutional principles, the court will simply dismiss the case.

However, when courts review the arbitration awards of *battei din*, courts will not investigate the merits of the decision. This is because *battei din* – like all arbitration tribunals – are granted deference regarding the substance of their decisions. Courts cannot second-guess the decisions of arbitrators.

As a result, a court can confirm a decision of a *beit din* – even if the *beit din* addressed religious questions in their decision – without violating any constitutional principles. Indeed, courts routinely confirm awards issued in cases turning on religious questions – just as they would any other arbitration award – and have consistently done so over and above any First Amendment objections.[59] Enforcing such awards avoids inquiry into any religious questions because the courts, when enforcing arbitration awards, are instructed not to investigate the merits of the dispute between the parties.[60] Instead, when reviewing arbitration awards, courts

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57 N.Y. State Corr. Officers & Police Benevolent Ass'n v. State, 94 N.Y.2d 321, 326 (1999).

58 Id. There are other potential non-statutory grounds for vacating an arbitration award, such as "manifest disregard of the law" and public policy, although such grounds have been brought into some doubt by the Supreme Court's decision in Hall Street Associates v. Mattel, Inc., 552 U.S. 576 (2008).

59 *See, e.g.*, Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999); Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 731 (N.J. 1991). *See generally* Walter, *supra* note 1 at 522-25 (discussing general enforcement of religious arbitration awards over First Amendment objections).

60 *See, e.g.*, Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. Cir. 2005) (holding that granting action to compel arbitration before rabbinical court did not violate First Amendment because "the resolution of appellants' action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties' underlying dispute").

must simply ensure that the arbitrators' decision was issued pursuant to an arbitration agreement between the parties and that the arbitrators complied with the statutorily mandated procedural requirements.

By contrast, were the parties to have submitted those very same claims in court – instead of submitting them for *beit din* arbitration – courts would dismiss the case where resolving the claims would entail an impermissible inquiry into religious question or impermissible trespass on an institution's religious autonomy. In this way, filtering such claims through *beit din* provides the parties with access to enforcement power of the judicial system while avoiding these constitutional prohibitions.

To appreciate the impact of this dynamic, consider again our opening hypothetical about the terminated rabbi. Recall that the rabbi and the synagogue signed an agreement whereby the rabbi could only be terminated for cause. And the synagogue – upset with the rabbi's increasingly aggressive sermons, inconsistent *minyan* attendance and offensive use of his discretionary fund – voted to terminate the contract on the grounds that the rabbi's conduct constituted "cause."

In such a case, the rabbi could, of course, file suit in civil court for breach of contract. But the court would have to dismiss the case because resolving the dispute would require the court to determine what a sermon is supposed to say, how often a rabbi should attend *minyan*, and what type of charities a rabbi should support out of his discretionary fund. These types of inquiries not only interfere in the internal decision-making process of a religious institution, but clearly entail providing answers to inherently religious questions.

By contrast, a *beit din* could resolve such a case; there would be nothing problematic with a *beit din* passing judgment on a rabbi's sermons, *minyan* attendance and philanthropic choices.[61] All of those are precisely the types of questions a *beit din* is well-suited to consider. More importantly, once a *beit din* rendered a decision in such a case, the winning party could petition a court to confirm the award. And a court would be able to do so – thereby rendering the *beit din*'s judgment legally enforceable – without running afoul of any constitutional objections. This is because, as noted above, a court would not have to review the substance of the

[61] For an example of a case where a court enforced a *beit din* decision regarding "cause" for terminating a rabbi, see Brisman v. Hebrew Acad. of Five Towns & Rockaway, 895 N.Y.S.2d 482 (App. Div. 2010).

beit din's decision, only that the decision was issued pursuant to a duly executed arbitration agreement and that the *beit din* abided by the statutorily required procedural rules that ensure the fairness of the hearings.[62]

This same dynamic would be true for breach of contract claims related to the alleged failure of one party to deliver products that conform to an agreed upon religious standard. As noted above, kosher food is a classic example. If a plaintiff filed suit for breach of contract, claiming that the defendant failed to provide him with food that was "truly kosher," a court would have to dismiss the case. However, a *beit din* could easily hear the case and a court could enforce whatever award the *beit din* issued.

This dynamic holds an important lesson for attorneys and potential litigants. Individuals who plan on entering agreements with Jewish institutions – such as Jewish schools or synagogues – or are entering agreement for religious products – such as kosher food – have a strong incentive to ensure that such agreements contain *beit din* arbitration provisions. Such provisions would ensure that any disputes arising under the relevant contracts would be submitted to *beit din*. Without such a provision, employees or consumers would have no way of ensuring that the institution or producer would agree to go to *beit din*. And if a dispute arose regarding the employees' religious conduct or the religious quality of the delivered goods in, the defendant would have a strong incentive not to go to *beit din*; if submitted to a court, the case would be dismissed on First Amendment grounds.

Of course, one would expect a Jewish institution or individual to willingly submit their disputes to a *beit din* given the unequivocal *halachic* requirement to do so.[63] But the financial incentives to avoid doing so are strong – sometimes too strong to ignore. By incorporating *beit din* arbitration provisions into the original agreements, parties can avoid any uncertainties and ensure that their claims do not go unheard.

Conclusion

The purpose of this article has been to explore the "gap-filling" function of *beit din* arbitration. Beyond the central *halachic* values embodied in the requirement to submit disputes to *beit din*, parties to religious agreements – from a rabbi signing

[62] 9 U.S.C. § 10.
[63] *See supra* note 4.

his contract to a store purchasing ostensibly kosher food – have significant incentives to ensure that any disputes arising under such agreements are submitted to a *beit din* for binding resolution. Without an agreement to submit such disputes to a *beit din*, parties would be unable to have their case heard in court because their claims would invariably require the court to either impermissibly trespass on the constitutionally protected authority of a religious institution – like a synagogue – or resolve a substantive religious question – like what qualifies as kosher. In all such instances, the U.S. Constitution instructs courts to dismiss the case, leaving the plaintiff with no option for recourse in the judicial system.

By contrast, *battei din* have the ability not only to resolve those disputes, but to have their awards enforced in court. As a result, they fill the gap created by current constitutional doctrine and ensure that parties have access to a forum where their claims can be heard and their damages compensated.

Michael A. Helfand is Associate Professor of Law at Pepperdine University School of Law, Associate Director of the Diane and Guilford Glazer Institute for Jewish Studies, a member of the faculty of the Straus Institute for Dispute Resolution, and serves as a dayan for the Beth Din of America.

Proceedings of the Beth Din of America

This section of *The Journal of the Beth Din of America* contains actual *piskei din* (arbitration decisions) delivered in *din torah* (arbitration) proceedings before the Beth Din of America. These decisions are presented as part of an effort to raise awareness of the substantive work of the Beth Din of America, and to familiarize litigants and their attorneys with the types of decisions typically rendered in cases heard by the Beth Din of America.

Consistent with the confidentiality policies of the Beth Din of America, the names of the parties, dates and other identifying information contained in the following decisions have been changed. In addition, the parties to the cases have consented to their publication.