

LITURGICAL LITIGATION: THE LEGAL BATTLES OF
JESHUAT ISRAEL AND SHERITH ISRAEL

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Touro Synagogue, home of Congregation Jeshuat Israel, in Newport, Rhode Island (photo courtesy of Bob Goldman for Scenic USA)

I. INTRODUCTION

The Touro Synagogue in Newport, Rhode Island is the oldest standing synagogue in the United States. Since its dedication in 1763, Touro Synagogue has served not only as a house of Jewish worship, but also as a monument to the religious freedoms guaranteed by our Constitution. It is a brick-and-mortar manifestation of Roger Williams' vision of the state of Rhode Island as a haven from religious persecution.

However, Jewish history in North America traces back much further than Touro Synagogue. Following the Portuguese takeover of Dutch-controlled Recife, Brazil (bringing with it the Inquisition), twenty-three Jews, mostly of Spanish and Portuguese descent, emigrated from Recife to New York City.¹ Upon their arrival in Lower Manhattan in 1654, these Jews founded Shearith Israel, the first Jewish congregation in North America.²

For a time, both the country's oldest Jewish congregation and the congregation praying in the country's oldest synagogue maintained a relatively harmonious relationship. Shearith Israel, among other congregations, even helped to finance the construction of the building that would come to be known as Touro Synagogue.³ But over the years, this relationship would have its ups-and-downs, ultimately devolving into litigious acrimony.

II. HISTORICAL BACKGROUND

Jewish Immigration to Newport, Rhode Island

In the late 17th and early 18th centuries, many Jews came to Newport to escape the terror of the Inquisition in both Spain and Portugal.⁴ During this time, practicing Judaism in these

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¹ See *Congregational History*, CONGREGATION SHEARITH ISRAEL: AMERICA'S FIRST JEWISH CONGREGATION, <http://www.shearithisrael.org/content/congregational-history>; see also Sharon Otterman, *New York Congregation Owns Oldest Synagogue in the U.S., 180 Miles Away, Court Rules*, THE NEW YORK TIMES (Aug. 3, 2017), https://www.nytimes.com/2017/08/03/nyregion/new-york-congregation-owns-oldest-synagogue-in-the-us-180-miles-away-court-rules.html?_r=0.

² See Otterman, *supra* note, at 1.

³ See *Congregation Jeshuat Israel v. Congregation Shearith Israel*, 186 F.Supp.3d 158, 171 (D.R.I. May 16, 2016), *rev'd*, 866 F.3d 53 (1st Cir. 2017) (citing Morris A. Gutstein, *The Story of the Jews of Newport; Two and a Half Centuries of Judaism, 1658-1908* 90 (1936) [hereinafter: *Gutstein*]).

⁴ Gutstein, *supra* note 3, at 168

countries was forbidden, and those that were caught doing so by the authorities were subjected to gruesome forms of torture, compulsorily baptized, or expelled from their homes.⁵ In the wake of these atrocities, the first Jewish families arrived in Newport in 1658 and “immediately set out to organize their public worship.”⁶ At first, these Jews worshipped in their homes and formed a collective known as “Nefutsé Israel” (the Scattered of Israel).⁷ By the mid-18th century, the Jewish community in Newport had grown larger and wealthier, to the point that it began planning the construction of a synagogue.⁸

The Synagogue

In order to finance the synagogue’s construction, two rounds of fundraising were needed: the first round to buy the requisite land, and the second to build the edifice.⁹ Newport’s Jewish community raised the first round of funds through self-imposed taxation.¹⁰ Despite raising the requisite funds for a land purchase, Newport’s Jews faced another hurdle. At the time, religious congregations could not incorporate as legal entities for the purpose of purchasing land.¹¹ Thus, the community designated three leaders – Jacob Rodrigues Rivera, Moses Levy, and Isaac Hart – to hold title to the land and serve as trustees on behalf of the congregation.¹²

The second round of financing for the actual construction of the synagogue required considerable fundraising efforts. As the local Jews were cash-strapped after being taxed for the land purchase, leaders of Newport’s Jewish community called for outside assistance.¹³ Ultimately, congregations in New York,

⁵ *See Id.*

⁶ *Id.* at 169 (quoting *Gutstein* at 30).

⁷ *See Id.* (citing *Gutstein* at 31, 343 n.9).

⁸ *See Id.* at 169-70 (citing *Gutstein* at 82); *see also* Joseph Jacobs et al., *Newport*, JEWISHENCYCLOPEDIA, <http://www.jewishencyclopedia.com/articles/11510-newport> (listing a number of families within the Newport Jewish community known for their mercantile success).

⁹ *See Congregation Jeshuat Israel*, 186 F.Supp.3d at 170 (citing *Gutstein* at 87-88).

¹⁰ *See Id.*

¹¹ *See Id.* at 170 (citing *Gutstein* at 82).

¹² *See Id.* at 170-71 (citing *Gutstein* at 82-83, 85); *see also Id.* at 171 (“In reality the land and property belonged to the entire Jewish community; legally the title to the land and everything with it, rested with the appointed trustees who purchased the plot as individuals.”).

¹³ *See Id.* at 171 (citing *Gutstein* at 87-88).

Jamaica, Curacao, Surinam, and London all donated.¹⁴ Notably, Shearith Israel in New York “reserved the seventh day of Passover to appeal for contributions for the building of Newport’s Synagogue,” marking an early and significant interaction between the Jewish congregations in Newport and New York.¹⁵

Once the requisite funding was secured, Peter Harrison, a prominent colonial architect who immigrated to Rhode Island in the 1740s, was commissioned to design the synagogue. For this project, Harrison likely drew inspiration from the Bevis Marks Synagogue in London and the Great Portuguese Synagogue of Amsterdam.¹⁶ The synagogue’s construction lasted from August 1, 1759 until 1762, and culminated with a dedication ceremony on December 2, 1763.¹⁷ This dedication ceremony was significant not only for its public celebration among Jews and non-Jews alike, but also because it marked the point at which the Newport Jewish community eschewed the “Scattered of Israel” (Nefutsé Israel) moniker in favor of Yeshuat Israel¹⁸—the Salvation of Israel.¹⁹

The *Rimonim*

Upon completion of the synagogue, members of the Jewish community in Newport and elsewhere bestowed numerous “furnishings and articles of worship” necessary for conducting religious ceremonies.²⁰ Such items included brass candlesticks, a perpetual lamp, a *Hechal* (Torah ark) and *Tebah* (or *Bima*), three Torah scrolls (including a 200-year-old scroll donated by a congregation in Amsterdam), and five candelabra.²¹ Included with these Torahs were accompanying sets of *rimonim*—decorative finial bells that are placed upon the twin shafts of the Torah

¹⁴ See *Id.* (citing *Gutstein* at 88).

¹⁵ See *Id.* (citing *Gutstein* at 90).

¹⁶ See *Id.* at 171 n.19 (citing Melvin I. Urofsky, A GENESIS OF RELIGIOUS FREEDOM: THE STORY OF THE JEWS OF NEWPORT, RI AND Touro SYNAGOGUE 55-57 (George Washington Institute of Religious Freedom, 2013) [hereinafter: *Urofsky*]); see also Geraldine S. Foster et. al., *JEWS OF RHODE ISLAND: 1658-1958* 10 (1998).

¹⁷ See *Id.* at 171.

¹⁸ Upon the synagogue’s construction, the majority of Newport’s Jews was *Sephardic*, but a significant portion of the community was of *Ashkenazic* descent. Due to the *Sephardic* majority (and elevated social status relative to the *Ashkenazim*), religious affairs in the synagogue were governed primarily by *Sephardic* tradition. But still, “harmony and accord” within Congregation Yeshuat Israel “existed at all times.” *Id.* at 172 n.21 (citing *Gutstein* at 115).

¹⁹ See *Id.* at 171-72 (citing *Gutstein* at 98)

²⁰ *Id.* at 173.

²¹ See *Id.* at 173-74.

scroll.²² Myer Myers, New York's foremost silversmith during the late colonial period and a contemporary of Paul Revere, designed one of these sets of *rimonim*.²³ Myers also had strong ties to Newport, despite his New York roots. In fact, while serving as president of Shearith Israel, Myers facilitated donations for Newport's synagogue construction.²⁴ However, the ownership of this exquisite set of *rimonim* would eventually become the center of dispute between the Touro Synagogue congregation and Shearith Israel.

The “Golden Era” and Newport’s Decline

The late 18th century, the period immediately following the synagogue's construction, was the “golden era” for Newport and its Jewish citizens. Newport was a commercial rival of both Boston and New York during these years, and its Jewish community was “the largest and most prosperous in North America.”²⁵ However, this “golden era” proved transitory. By the time the Revolutionary War broke out in 1776 and the British captured the city, the majority of the Newport's Jews had fled.²⁶ Both the Revolutionary War and the War of 1812 wrought havoc on Newport's shipping and trading industries—industries in which Newport's Jews were heavily involved. Consequently, Newport's Jewish community was forced to seek haven elsewhere.²⁷

In the wake of Newport's economic decline came one bright spot for its Jewish community: the famous exchange of letters between Moses Seixas and President George Washington. Upon his visit to Newport on August 17, 1790, President Washington

²² See *Id.* at 164 n.1; see also Shoshana Kordova, *Word of the Day / Rimon: Fruit of the Boom*, HAARETZ (Sep. 4, 2013),

<https://www.haaretz.com/jewish/features/.premium-1.544881> (*Rimon* – the singular of *rimonim* – can refer to pomegranates, Torah scroll ornaments, and grenades.).

²³ See *Congregation Jeshuat Israel*, 186 F.Supp.3d at 174 (citing *Barquist* at 25); see also *Torah Bells Legal Battle Between Touro Synagogue & Congregation Shearith Israel Continues*, HUFFINGTON POST (Aug. 15, 2013),

https://www.huffingtonpost.com/2013/08/15/touro-synagogue-congregation-shearith-israel-torah-bells_n_3755759.html; Michelle R. Smith, *Mediation fails in lawsuits over oldest synagogue*, THE SAN DIEGO UNION-TRIBUNE (Aug. 13, 2013), <http://www.sandiegouniontribune.com/sdut-mediation-fails-in-lawsuits-over-oldest-synagogue-2013aug13-story.html>.

²⁴ See *Congregation Jeshuat Israel*, 186 F.Supp.3d at 174 (citing *Gutstein* at 92).

²⁵ *Id.* at 175 (citing *Gutstein* at 157-58, 174, 176).

²⁶ See *Id.* at 176.

²⁷ See *Id.* (citing *Gutstein* at 190, 225).

responded to a letter from Seixas, then the acting trustee of the synagogue. In his letter, Washington emphasized the United States' dedication to religious freedom, particularly for the Jewish people.²⁸ Judge John J. McConnell, Jr. described this event as the "last hurrah of Newport's original Jewish community."²⁹ Unfortunately, Judge McConnell's words were spot-on.³⁰ Indeed, "[s]ervices ceased ... sometime around the year 1793" and "it appears that no Jews remained in Newport" by 1822.

The Jewish Exodus from Newport

The Jewish community left Newport en masse following the economic downturn in the late 18th century. However, this exodus led to a significant chapter in the relationship between Newport's Jews and Shearith Israel. At this point in time, many of Yeshuat Israel's members relocated to New York, both physically and spiritually, bringing with them a number of religious articles, including Torah scrolls and their accompanying *rimonim*. Furthermore, many of these Yeshuat Israel congregants became members of Shearith Israel. And as a condition of their new membership, these Yeshuat Israel members believed that Shearith Israel had "agreed to keep [the *rimonim*] safe, until Jews were once again worshipping in Newport's Synagogue."³¹ To this end, it was thought that Shearith Israel had become the "custodian" for the *rimonim* (as well as Yeshuat Israel's other religious articles).³²

²⁸ An annual reading of the Washington and Seixas letters is held to commemorate the impact of this exchange as a foundational expression of religious liberty in our nation's history. Both Associate Justice Elena Kagan and former Harvard Law School Dean Martha Minow have been keynote speakers at this event (Kagan in 2013 and Minow in 2017). See Andy Smith, *Newport's Touro Synagogue celebrates its 250th anniversary*, PROVIDENCE J. (Aug. 19, 2013), <http://www.providencejournal.com/breaking-news/content/20130819-newports-touro-synagogue-celebrates-its-250th-anniversary-gallery.ece>; see also Minow: *Nation, President 'need to remember and reclaim the founders' vigilance against bigotry*, HARVARD LAW TODAY (Aug. 21, 2017), <https://today.law.harvard.edu/minow-whole-nation-including-current-president-needs-remember-reclaim-founders-vigilance-bigotry/>.

²⁹ See *Congregation Jeshuat Israel*, 186 F.Supp.3d at 177-78.

³⁰ *Id.* at 176 (citing *Gutstein* at 216, 225).

³¹ *Id.* at 178 (citing *Gutstein* at 216, 263) ("[I]t is likely that the [*r*]imonim were brought to New York for safekeeping sometime" in "[e]ither the 1820s or the 1830s.") (quoting Shearith Israel's ritual director Zachary Edinger); *Id.* at 179 ("...[S]hearith Israel took [the *rimonim*] for safekeeping; and that continued until the early 1880s...") (quoting Shearith Israel's vice president, Michael I. Katz).

³² *Id.* at 179.

Revival of the Newport Synagogue

By 1826, Shearith Israel assumed the role of trustee for the synagogue in Newport, since so many members of the now-defunct Yeshuat Israel had since joined Shearith Israel's ranks. Indeed, the keys to the Newport synagogue were even transferred to Shearith Israel.³³ Despite its role as trustee, Shearith Israel "could not be expected to 'invest thousands and thousands of dollars to restore and maintain [a] building, which was in a state of ruinous disrepair when they first took possession of it, for the possible use of coreligionists who might or might not one day in the distant indefinite future come back to that city and ask for the use of the facility.'"³⁴ In the absence of financial assistance from Shearith Israel, it fell upon two brothers to step up to the plate and ensure the future vitality of Newport's synagogue. These brothers, Abraham and Judah Touro, sons of the synagogue's first rabbi, Isaac Touro, donated considerable amounts to repair the synagogue during its years of disuse and left large sums in their wills to provide for its upkeep.³⁵ In 1834, the Newport Town Council memorialized the Touro brothers' efforts and renamed the street adjacent to the synagogue: "Touro Street." Taking after the street name, in 1893, Rabbi Abraham Pereira Mendes likely bestowed upon the synagogue its now-official title: "Touro Synagogue."³⁶

Revitalization of Jewish Life in Newport

Attracted in part by the now-famous Touro Synagogue, a new wave of Eastern European Jewish immigrants flocked to Newport in the 1870s. These immigrants came from Germany, Austria, Italy, Russia, Romania, and other Eastern European *shtetls*. However, this great revitalization of Newport's Jewish community worried Touro Synagogue's gatekeeper, Shearith Israel. As this new influx of Jews consisted primarily of *Ashkenazim*, Shearith Israel became concerned that this new generation would not use the synagogue in accordance with

³³ *See Id.*

³⁴ *Id.* (quoting Bernard Kusinitz, *How Touro Synagogue Got Its Name* 93 n.7 (Rhode Island Jewish Historical Notes Vol. 9, No. 1 Nov. 1983) [hereinafter: *Kusinitz*]).

³⁵ *See Id.* at 179-182.

³⁶ *See Id.* at 182 n.34 (citing *Kusinitz* at 86, 88-89).

Sephardic customs.³⁷ To ease this concern, Shearith Israel installed one of its own, Rabbi Abraham Pereira Mendes, to lead Newport's new congregation. Subsequently, Rabbi Mendes led the reconsecration of Touro Synagogue on May 25, 1883 – a ceremony evocative of the original dedication in 1763.³⁸ The reconsecration of Touro Synagogue also marked the return to Newport of Yeshuat Israel's *rimonim* and other religious articles after years of safekeeping in New York.³⁹ Despite this brief period of cooperation between Newport and New York, concerns regarding *Sephardic*-style worship in the synagogue had not subsided, and ultimately came to the fore upon Rabbi Mendes' death in 1893.⁴⁰

III. NEWPORT V. NEW YORK: ACT I

Following Rabbi Mendes' death, the Newport congregation "applied for a charter from the Rhode Island legislature under the same name as the old Newport Congregation Yeshuat Israel, except spelling 'Yeshuat' with a 'J' instead of a 'Y.'"⁴¹ This action was vehemently opposed by Shearith Israel, which felt that allowing the new congregation to incorporate under the same name as Newport's original congregation would be tantamount to recognizing the new congregation at Yeshuat Israel's successor. One might wonder why such recognition would be so objectionable. Simply put, due to the *Ashkenazic* makeup of Newport's new congregation, Shearith Israel was concerned that if the congregation received de facto successor recognition, then it would be impossible to ensure continued *Sephardic* practice at Touro Synagogue.⁴² In addition to this faith-based concern, there was also a classist element to Shearith Israel's opposition to the largely *Ashkenazic* newcomers' efforts to continue the legacy of the original, *Sephardic* Yeshuat Israel. Indeed, Shearith Israel petitioned the Rhode Island State Assembly with the following:

[T]hey being of the German or Polish contingent ... and by their action endeavoring to adopt this name, are

³⁷ See *Id.* at 182 (citing *Gutstein* at 271, 275); see also *Kusinitz* at 45 ([T]he newcomers to town, who were *Ashkenazic*, found alien the traditional *Sephardic minhag*, or ritual in use in Touro Synagogue.) (emphasis added).

³⁸ See *Congregation Yeshuat Israel*, 186 F.Supp.3d at 182 (citing *Gutstein* at 261-65).

³⁹ See *Id.* at 183.

⁴⁰ *Id.*

⁴¹ *Id.* (citing *Gutstein* at 271).

⁴² See *Id.* (citing *Gutstein* at 272).

manifestly perpetrating an injury upon the citizens of Newport in attempting to establish a relation between the ancient Congregation and themselves, while as a matter of fact they are totally different in form of worship, *and in societal standing*...⁴³

With tensions between the congregations growing, each side made efforts to shore up its legal interest in the synagogue. Shearith Israel had already drafted “Deeds of Trust” in 1864 and obtained signatures allegedly provided by descendants of the three original trustees of the synagogue, conveying their interests in the synagogue to Shearith Israel. Notably, Shearith Israel made sure to include in these deeds the condition that “Jews practicing in Touro Synagogue must observe the same rituals, rites, and customs of the Orthodox Spanish and Portuguese Jews as practiced and observed by Shearith Israel.”⁴⁴ In this arms race for legal documentation, Jeshuat Israel also prevailed in its effort to receive its charter from the Rhode Island Legislature on June 13, 1894.⁴⁵

To fill the vacancy left after Rabbi Mendes’ passing, Shearith Israel next appointed Rabbi David Baruch to serve as Touro Synagogue’s rabbi. As the new religious leader of Jeshuat Israel, Rabbi Baruch proved rather adept at managing the conflict between Newport and New York. However, after six years of service, Rabbi Baruch’s death on March 30, 1899 sparked “a formal split in Newport’s Jewish community, multiple rounds of litigation, and the temporary closing of [Touro] Synagogue.”⁴⁶ Despite the schism between Newport’s Jews, the community remained united in its hostility toward New York’s Shearith Israel—hostility mainly stemming from the Newport Jewish community’s desire to appoint its own rabbi, as opposed to accepting one chosen by Shearith Israel.⁴⁷ In response to Newport’s defiance, Shearith Israel and its representatives in Newport closed Touro Synagogue on January 1, 1901, leaving the

⁴³ See *Id.* (citing Shearith Israel Petition at 3) (emphasis added).

⁴⁴ See *Congregation Jeshuat Israel*, 186 F. Supp. 3d. at 183-84 (citing *Gutstein* at 272-73).

⁴⁵ See *Id.* at 184.

⁴⁶ *Congregation Jeshuat Israel*, 186 F. Supp. 3d at 184 (citing *Gutstein* at 274-75).

⁴⁷ See *Id.* (citing *Kusinitz* at 54-56).

temple shuttered for more than a year.⁴⁸ However, in a rather remarkable response to Shearith Israel's lockout, a group of Newport Jews broke into the synagogue on April 21, 1902 and, due to a state law prohibiting interference with ongoing religious services, was able to hold continuous services for almost a year.⁴⁹

While the Newport group conducted its sit-in, lawyers from Newport and New York took their dispute to the courts. However, litigation proved unproductive for both sides, and ultimately led all parties involved to reconciliation. Indeed, the schism within Newport's Jewish community was patched up, and Newport's Jews once again united as a single congregation—Jeshuat Israel. Moreover, the failed litigation forced Jeshuat Israel and Shearith Israel to the bargaining table in an effort to formally resolve their disagreements. These efforts resulted in a settlement agreement that would “resolve[] the conflict for the next 100 years.”⁵⁰

Under the terms of this 1903 settlement agreement, the congregations outlined a lease agreement in which Shearith Israel would agree to lease Touro Synagogue to Jeshuat Israel for a nominal one dollar-per-year payment for five years.⁵¹ More substantively, each congregation was able to negotiate meaningful concessions—Jeshuat Israel would be allowed to select its own rabbi, subject to Shearith Israel's approval (as opposed to the previous practice of Shearith Israel's unilateral imposition), but in exchange, Jeshuat Israel agreed to use the synagogue in accordance with *Sephardic* ritual “as practiced by Shearith Israel.”⁵² The 1903 lease agreement (which was renewed a final time in 1908 for another five years) also contained a notable provision, in which Jeshuat Israel agreed to “surrender the possession of the Synagogue building, premises and paraphernalia belonging thereto at Newport, to [Shearith Israel] Trustees, owners of the property,” thus officially ending the sit-in.⁵³

Modern Developments in the Newport-New York Relationship

On November 7, 1945, an agreement was entered into between Jeshuat Israel, Shearith Israel, and the United States

⁴⁸ *See Id.* (citing *Kusinitz* at 53).

⁴⁹ *See Id.* (citing *Kusinitz* at 57).

⁵⁰ *Congregation Jeshuat Israel*, 186 F. Supp. 3d at 184-85 (citing *Kusinitz* at 69).

⁵¹ *Id.* at 185.

⁵² *Id.*

⁵³ *Id.*

government “to protect and preserve Touro Synagogue, and to establish it as a national historic site.”⁵⁴ In the years following, interaction between Jeshuat Israel and Shearith Israel dwindled. An agreement between the congregations was reached at some point that permitted Jeshuat Israel to hire any rabbi from Yeshiva University without Shearith Israel’s approval.⁵⁵ And by 1993, communication between the two congregations had completely ceased.⁵⁶ As such, neither congregation could have reasonably anticipated the next chapter in their relations.

The 2008 global financial crisis rocked Jeshuat Israel, forcing it to adopt a number of austerity measures to stay afloat.⁵⁷ In response to its financial woes, Jeshuat Israel evaluated its assets to determine whether it could sell any of them to “fund an endowment to ensure continued public Jewish worship in Newport.”⁵⁸ Upon evaluation, Jeshuat Israel concluded that it would attempt to sell its Myer Myers *rimonim*. After initially engaging Christie’s to find a buyer, a \$7.4 million offer from the Boston Museum of Fine Arts was eventually negotiated in 2011 and formalized on January 31, 2012.⁵⁹ While Jeshuat Israel viewed this sale as the key to ensuring the continued vitality of its congregation, Shearith Israel saw things differently. Consequently, Shearith Israel fired its shot across the bow by issuing a letter on June 29, 2012, demanding that Jeshuat Israel cease and desist from selling the *rimonim*.⁶⁰

IV. NEWPORT V. NEW YORK: ACT II

The United States District Court for the District of Rhode Island

Jeshuat Israel initially brought its case against Shearith Israel in Rhode Island Superior Court, Newport County, seeking, *inter alia*: (1) a declaratory judgment that Jeshuat Israel was the rightful owner of the *rimonim*, and as such, had the freedom to sell them to the Boston Museum of Fine Arts; (2) an order preventing Shearith Israel from interfering with the planned sale of the

⁵⁴ *Id.*

⁵⁵ *See Id.* at 186 (citing the Testimony of David Bazarsky).

⁵⁶ *See Id.* (citing the Testimony of David Bazarsky) ([W]hen I became president in 1992, nobody knew anything about Shearith Israel. We heard about Shearith Israel. We didn’t know, we didn’t know anything about them.”).

⁵⁷ *See Id.*

⁵⁸ *Id.* at 186-87.

⁵⁹ *See Id.* at 187.

⁶⁰ *See Id.*

rimonim; (3) an order removing Shearith Israel as a trustee for Touro Synagogue and its land; and (4) a declaration of Jeshuat Israel's Board of Trustees as replacement trustee in Shearith Israel's stead.⁶¹

In response, Shearith Israel removed the action to the federal district court in Rhode Island and filed an amended answer, as well as a number of counterclaims against Jeshuat Israel.⁶² In these counterclaims, Shearith Israel sought (1) a declaration that it, in fact, owned the *rimonim*; (2) an injunction against the sale of the *rimonim*, as well as transfer of possession and control of the *rimonim* to Shearith Israel; (3) a declaration that Shearith Israel owned Touro Synagogue, as well as "its lands, and any and all historic personalty used by or for Touro Synagogue"; (4) termination of Jeshuat Israel's lease of Touro Synagogue; and (5) enforcement of Jeshuat Israel's contractual obligations to Shearith Israel.⁶³

From the outset of the dispute, Chief Judge William E. Smith oversaw mediation that lasted for months, but ultimately, an amicable resolution between the congregations could not be reached. Despite Chief Judge Smith's "herculean efforts," it is unclear what caused mediation to fail—neither side would divulge the "sticking points," citing the confidential nature of the talks.⁶⁴ Once mediation efforts failed, litigation resumed in the district court, commencing with a nine-day bench trial on June 1, 2015. This trial produced a 1,850-page transcript and approximately 900 exhibits consisting of thousands of pages. The court also heard from seven live witnesses and admitted twelve depositions consisting of 1,990 pages of transcripts. Further, the parties submitted 895 pages of post-trial briefs and proposed findings of fact after closing arguments were heard on September 18, 2015.⁶⁵ What resulted was an exhaustive, 106-page opinion from Judge John J. McConnell, Jr., declaring victory for Jeshuat Israel.

Issue One: Ownership of Touro Synagogue

Jeshuat Israel argued that Shearith Israel was only the legal owner and trustee for Touro Synagogue, while Shearith Israel contended that it owned the synagogue outright. On this

⁶¹ *See Id.* at 165.

⁶² *See Congregation Jeshuat Israel*, 186 F.Supp.3d at 165.

⁶³ *See Id.*

⁶⁴ *Id.* at 165 n.6; *see also* Smith, *supra* note 109, at 23.

⁶⁵ *See Congregation Jeshuat Israel*, 186 F.Supp.3d at 165-66.

issue, the court found for Jeshuat Israel. In order to determine that Shearith Israel was not Touro Synagogue's outright owner, but rather, that it owned the synagogue "in trust for the purpose of Jewish worship," the court had to find the existence of "a settlor, a trustee, some trust property, and a duty imposed by the settlor on the trustee to use that property for a charitable, educational, or religious purpose."⁶⁶ The court found that Jeshuat Israel satisfied this test by showing that: (1) Touro Synagogue and its lands were the corpus of a trust; (2) the settlor was Yeshuat Israel; (3) the original trustees were Jacob Rodrigues Rivera, Moses Levy, and Isaac Hart, and that the Synagogue continued to be owned in trust by a succession of individuals, leading up to Shearith Israel—its modern day trustee; and (4) the trust had a valid charitable purpose.⁶⁷ Crucial to the court's siding with Jeshuat Israel was its finding that the original Jewish community in Newport intended to establish a trust when listing Rivera, Levy, and Hart on the deed.⁶⁸ In making this finding, the court relied heavily on language in the will of the former leader of Yeshuat Israel and one of the synagogue's original trustees, Jacob Rodrigues Rivera.⁶⁹

The court found that Rivera's will made explicit that he and the other trustees only held legal title to the synagogue and its property for the purpose of preserving public Jewish worship.⁷⁰ While the deed lists only Rivera, Levy, and Hart, this was done as a legal workaround in light of the fact that religious associations could not, at the time of the land purchase, own real estate or act as a trustee. As Rivera's will explains, although the deed lists him and the others as owners, the *intention* was to create a trust for the benefit of "the Jewish Society, in Newport, to be for them reserved as a place of public worship forever."⁷¹

The court then traced back the legal ownership of the synagogue, finding that a number of individuals assumed the role of trustee over the years after the three original trustees passed away. Each of these successor trustees ensured the survival of the synagogue until the Jews returned to Newport in the late 1880s, by which time Shearith Israel was the only remaining trustee for

⁶⁶ *Id.* at 187-88 (citing R.I. Gen. Laws §18-9-4).

⁶⁷ *See Id.* at 188-193.

⁶⁸ *See Id.* at 189.

⁶⁹ *See Id.* at 190 ("Mr. Rivera's will is ... persuasive evidence that the Synagogue was always the object of a charitable trust from the time it was built to the present.").

⁷⁰ *See Id.* at 189-90.

⁷¹ *Id.* at 190.

Touro Synagogue and its lands.⁷² Moreover, the court examined numerous documents that made reference to Shearith Israel as the synagogue's trustee, including deeds from the late 19th century, the 1903 and 1908 lease agreements, and the 1945 agreement between the two congregations and the United States.⁷³ Finally, because Rivera's will explicitly stated that the property would be "reserved as a Place of [Jewish] Public Worship forever," the court reasoned that it had valid charitable purpose.⁷⁴

Shearith Israel put forth a number of counterarguments purporting to explain that no trust existed, and that it owned the legal and equitable title to Touro Synagogue. However, each of these arguments was rejected, and the court found that Shearith Israel "has only ever served as trustee" for the charitable trust that Touro Synagogue and its lands comprised.⁷⁵

Issue Two: Ownership of the *Rimonim*

The court found by a preponderance of the evidence that Yeshuat Israel owned the *rimonim*. A substantial amount of evidence was presented showing that Myer Myers had originally designed the *rimonim* and given them to Newport's original congregation, Yeshuat Israel.⁷⁶ While Shearith Israel took possession of the *rimonim* in the 1820s, when members of Yeshuat Israel left Newport for New York, the court noted that "sometime between then and 1869, [Shearith Israel] engraved the words 'Newport' on [the *rimonim*], to differentiate them from a similar pair that it owned."⁷⁷ The inference made by the court, trial experts, and scholars was that this engraving indicated Shearith Israel's true feelings: that the *rimonim* "belong[ed] to Newport's

⁷² *Id.* at 190-91.

⁷³ *See Id.* at 191-92 (noting that the 1945 agreement incorporated language from Rivera's will, indicating that Shearith Israel had assented to certain trustee obligations).

⁷⁴ *Id.* at 193; *see also* *Buchanan v. McLyman*, 51 R.I. 177, 153 A. 304, 305 (1931) ("It is well established that a trust creating a place for public worship for the benefit of an indefinite number of persons is a good and valid trust to a charitable use.").

⁷⁵ *Id.* at 193-196 ("Shearith Israel never did, nor could it, convert its role as trustee into an equitable title to the Synagogue. Shearith Israel is obligated—just as Messrs. Rivera, Levy, and Hart once were—to preserve the Synagogue for the benefit of public Jewish worship in Newport. The Synagogue itself is the corpus of a charitable trust dedicated to that venerable purpose.").

⁷⁶ *See Id.* at 197.

⁷⁷ *Id.* (citing *Barquist* at 160).

congregation.”⁷⁸ Moreover, the court found that Yeshuat Israel’s religious items, including the *rimonim*, were transported from Newport to New York, and given to Shearith Israel for safekeeping under the condition that Shearith Israel would return these items “when duly required for the use of the Congregation [t]hereafter worshipping in the Synagogue [a]t New Port Rhode Island.”⁷⁹ This condition indicated, in the court’s view, that Shearith Israel had “assumed the obligations of a gratuitous bailee.”⁸⁰ So upon returning the *rimonim* to Newport’s revived Jewish community (i.e., “the congregation thereafter worshipping at Newport Synagogue”), the court found that Shearith Israel had terminated its obligations as bailee, as well as any legal claim it may have had to the *rimonim*.⁸¹ The court also concluded that there was a presumption of ownership favoring Yeshuat Israel based on the length of its uninterrupted possession of the *rimonim*, which had lasted for over one hundred years.⁸²

Shearith Israel again countered with a number of arguments, none of which resonated with the court. The argument that Shearith Israel was, in fact, the original owner of the *rimonim*, as opposed to Yeshuat Israel, was flatly rejected.⁸³ Shearith Israel also argued that by “returning” the *rimonim* to New York in the 1820s, Yeshuat Israel had effectively conceded that it only ever held the *rimonim* on loan from Shearith Israel to begin with. Alternatively, Shearith Israel argued that Yeshuat Israel gifted the *rimonim* to Shearith Israel at this time. These arguments were also rejected because the events that Shearith Israel interpreted as constituting a transfer of ownership were entirely consistent with the court’s prevailing view that Shearith Israel had adopted the role of bailee for the *rimonim*.⁸⁴ Shearith Israel did put forth one seemingly persuasive counterargument, which was drawn from the language of the 1894 deeds. It claimed that references to “appurtenances and paraphernalia” (apparent references to religious items within the synagogue) reinforced its ownership of the *rimonim*.⁸⁵ However, the court found that

⁷⁸ *Id.*

⁷⁹ *Id.* at 198.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See Id.* at 198-200 (“[T]he ‘truism’ that ‘possession is nine-tenths of the law’ is nearly as old as the common law itself.”) (citing *Wilcox v. Stroup*, 467 F.3d 409, 412 (4th Cir. 2006)).

⁸³ *See Id.* at 200-05

⁸⁴ *See Id.* at 205-08.

⁸⁵ *Id.* at 208.

because Shearith Israel never had valid title to the *rimonim* to begin with, these deeds could not “reinforce” such title. Furthermore, because this language did not explicitly refer to the *rimonim*, the court did not believe it was persuasive enough evidence to overcome Jeshuat Israel’s strong presumption of ownership.⁸⁶

Further Actions of the District Court

The court then proceeded to compound Shearith Israel’s loss by removing it as trustee for Touro Synagogue, citing a serious breach of trust by Shearith Israel, lack of cooperation between Shearith Israel as trustee and Jeshuat Israel as beneficiary, and a substantial change in the nature of the congregations’ relationship over time.⁸⁷ Upon removing Shearith Israel as trustee, the court appointed Jeshuat Israel as the new trustee for Touro Synagogue, finding that “[a]ppointing it as the legal owner and trustee for the Synagogue only recognizes in law, that which is already obvious in fact.”⁸⁸

V. NEWPORT V. NEW YORK: ACT III

The United States Court of Appeals for the First Circuit

Following the district court’s ruling in favor of Jeshuat Israel, the New York congregation appealed to the United States Court of Appeals for the First Circuit. Notwithstanding Judge McConnell’s lengthy analysis, the First Circuit made comparatively short shrift of the dispute between the congregations. On August 2, 2017, then-retired Associate Justice David H. Souter, sitting by designation, delivered a brief and unanimous opinion reversing Jeshuat Israel’s lower court victory.⁸⁹

Justice Souter’s opinion expressed some skepticism of the district court’s evaluation of the evidence presented at trial. His rebuke of the lower court was collegial, but he made clear that he disagreed with Judge McConnell’s extensive historical

⁸⁶ *See Id.* at 208-09.

⁸⁷ *See Id.* at 210-17.

⁸⁸ *Id.* at 217-18.

⁸⁹ *See generally* Congregation Jeshuat Israel v. Congregation Shearith Israel, 866 F.3d 53 (1st Cir. 2017).

exploration.⁹⁰ Although Justice Souter commended the district court's "conscientious and exhaustive historical analysis," he distinguished his approach to the dispute, concluding that Judge McConnell was overly concerned with the historical "tension between two congregations that were not doctrinally identical."⁹¹ In contrast, Justice Souter wrote that because of the underlying religious tension in the case, the district court should have relied on the Supreme Court's established practice of "marginal judicial involvement" in disputes between similarly situated religious entities.⁹² This was also the approach endorsed by the Becket Fund for Religious Liberty's amicus brief in support of Shearith Israel, insisting that the court should "do what you would do if there were two bowling leagues who had some contracts with each other."⁹³

In more formalistic terms, Justice Souter opted to apply "neutral principles of law, developed for use in all property disputes," as opposed to becoming unnecessarily entangled "in matters of religious controversy."⁹⁴ Thus, the court looked at a number of contracts to which Jeshuat Israel and Shearith Israel had assented, and drew its conclusions from a textual analysis of these agreements.

Justice Souter first turned to the 1903 settlement agreement, which, *inter alia*, outlined the terms of the lease agreement that was subsequently signed by the parties. In this settlement agreement, Jeshuat Israel agreed to "recognize without qualification the title and ownership [of Shearith Israel] to the synagogue building, premises, and fixtures."⁹⁵ While the settlement agreement did use the word "trustees" in describing the signatories on behalf of Shearith Israel, Justice Souter disagreed with the lower court, finding that it would be "highly unlikely" that the congregations would have understood this reference to

⁹⁰ Judge Sandra Lynch expressed similar skepticism at oral argument, reportedly telling a lawyer for Jeshuat Israel: "You keep going back to history, but we're dubious it has anything to do with this case." *Control over oldest US synagogue and its \$7.4 million silver bells back in court*, JEWISH TELEGRAPHIC AGENCY (Mar. 13, 2017), <https://www.jta.org/2017/03/13/news-opinion/united-states/control-over-touro-synagogue-and-its-7-4-million-silver-bells-back-in-court>.

⁹¹ *Congregation Jeshuat Israel*, 866 F.3d at 57.

⁹² *Id.* (quoting *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969)).

⁹³ Otterman, *supra* note 3, at 1.

⁹⁴ *Jones v. Wolf*, 443 U.S. 595, 608 (1979); *see also Presbyterian Church*, 393 U.S. at 449.

⁹⁵ *Congregation Jeshuat Israel*, 866 F.3d at 58.

create trust obligations for Shearith Israel to Jeshuat Israel.⁹⁶

Next, he turned to the 1903 lease agreement, that was renewed in 1908, finding two provisions especially salient for the purposes of this dispute. First, Justice Souter highlighted that there was no trust obligation mentioned in the terms of the lease.⁹⁷ Second, the lease covered not only the relevant real estate, but also the “paraphernalia belonging thereto.”⁹⁸ While the district court did not consider “paraphernalia” to encompass the *rimonim*, Justice Souter relied on the principle that “[c]ontracts are generally construed in accordance with the common understanding of their terms at the time of the agreement.”⁹⁹ Accordingly, he concluded that “paraphernalia” would have been commonly understood by the congregations in 1903 to include the *rimonim*.¹⁰⁰

While the 1945 agreement between Jeshuat Israel, Shearith Israel, and the United States government made vague reference to some trust obligations of Shearith Israel, Justice Souter dismissed the significance of this reference and rejected the lower court’s finding that it reaffirmed a trust obligation for Shearith Israel to Jeshuat Israel. Since the language in this agreement relied on a flawed deed, Justice Souter found that the “the references to a trust obligation on [Shearith Israel’s] part to the worshippers at Touro were [not] anything more than terms of empty conveyances.”¹⁰¹ As such, he declined to treat this reference as having “legal significance in determining ownership of or authority over either the *rimonim* or the Synagogue.”¹⁰²

Finally, Justice Souter looked to a 2001 agreement between Jeshuat Israel, the Society of Friends of Touro Synagogue,¹⁰³ and the National Trust for Historic Preservation. This agreement was entered into with the purpose of preserving Touro Synagogue and providing education for public visitors.¹⁰⁴ In this agreement, Jeshuat Israel was described as having “possession of the site

⁹⁶ *Id.* at 59.

⁹⁷ *See Id.*

⁹⁸ *Id.* at 59-60.

⁹⁹ *Id.* at 60.

¹⁰⁰ *See Id.* (citing various dictionary definitions of “paraphernalia” from 1903 and earlier).

¹⁰¹ *Id.* at 60-61.

¹⁰² *Id.* at 61.

¹⁰³ *See History of Touro Synagogue Foundation*, TOURO SYNAGOGUE, <http://www.tourosynagogue.org/history-learning/tsf-intro-menu/11-history/3-tsf-history> (describing the history of the Society of Friends of Touro Synagogue, now known as the Touro Synagogue Foundation).

¹⁰⁴ *See Congregation Jeshuat Israel*, 866 F.3d at 61.

through a lease with Congregation Shearith Israel as owner.”¹⁰⁵ However, this provision was not qualified with language indicating any trustee obligation for Shearith Israel, and no other provision of the Agreement implied such a duty.¹⁰⁶ Thus, Justice Souter reasoned that the only relationship that existed between Shearith Israel and Jeshuat Israel was one as lessor and lessee, respectively.¹⁰⁷

Taking into account the totality of the information adduced from the relevant contracts, Justice Souter concluded that: (1) “[Shearith Israel] is fee owner of the Touro Synagogue building, appurtenances, fixtures, and associated land as described in the 1903 lease; (2) likewise [Shearith Israel] is owner of the *rimonim* in issue here; (3) in each case [Shearith Israel’s] ownership is free of any trust or other obligation to [Jeshuat Israel] except as lessor to [Jeshuat Israel] as holdover lessee; and (4) [Jeshuat Israel’s] interest in the Synagogue building and related real property mentioned above is solely that of holdover lessee.”¹⁰⁸ These sweeping conclusions completely erased Judge McConnell’s ruling that Touro Synagogue was owned in trust for the benefit of public worship in Newport, and instead, confirmed Shearith Israel’s title to both the synagogue and its accompanying “paraphernalia”—i.e., the \$7.4 million *rimonim*.

Jeshuat Israel indicated its intention to move for panel or en banc review of the First Circuit’s decision.¹⁰⁹ To this end, the Rhode Island Attorney General filed an amicus brief in support of a rehearing.¹¹⁰ Ultimately, the First Circuit denied Jeshuat Israel’s petition for rehearing or rehearing en banc over a dissent from Judge Ojetta Rogeriee Thompson.¹¹¹ Counsel for Jeshuat Israel appealed the First Circuit’s decision to the Supreme Court

¹⁰⁵ *Id.*

¹⁰⁶ *See Id.*

¹⁰⁷ *See Id.*

¹⁰⁸ *Id.* at 61-62.

¹⁰⁹ *See* Michelle R. Smith, *Newport congregation wants review in fight over Touro Synagogue*, PROVIDENCE J. (Aug. 9, 2017), <http://www.providencejournal.com/news/20170809/newport-congregation-wants-review-in-fight-over-touro-synagogue>.

¹¹⁰ *See* Brief for Rhode Island Attorney General as Amicus Curiae in Support of Appellee’s Petition for Panel Rehearing and Rehearing En Banc, *Congregation Jeshuat Israel v. Congregation Shearith Israel*, (No. 16-1756), 2017 WL 4081953 (1st Cir. 2017).

¹¹¹ *See* *Congregation Jeshuat Israel v. Congregation Shearith Israel*, 892 F.3d 20 (1st Cir. 2018).

of the United States;¹¹² however, the petition for certiorari was denied on March 18, 2019.¹¹³

VI. DISCUSSION

Questionable Appellate Review

Justice Souter's opinion attempts to avoid the "twin risks" of the First Amendment's Free Exercise and Establishment Clauses, i.e., "compromising the guarantee of religious autonomy guaranteed by the former, and placing government in the position of seeming to endorse the religious positions of the winners, forbidden by the latter."¹¹⁴ In doing so, he emphasizes that courts must strive to adhere to "common instruments for establishing ownership and control," including deeds, wills, corporate charters, and other documents.¹¹⁵ Yet it is unclear that Justice Souter truly adheres to this principle in ruling for Shearith Israel.

As law professor Noah Feldman pointed out, "the key to [Judge McConnell's] resolution of the case at trial was the moving last will and testament of Jacob Rodrigues Rivera, dated 1787."¹¹⁶ Indeed, Rivera's will was absolutely critical to the district court's conclusion that the original Newport congregation intended to establish a charitable trust "to ensure a permanent place for public Jewish worship in Newport."¹¹⁷ The Supreme Court has also stated that courts have an "obvious duty" to evaluate wills when applying "neutral principles in ... disputed property claims."¹¹⁸ It is striking, then, that in deciding whether Touro Synagogue was established as a charitable trust, or simply owned outright by Shearith Israel,

¹¹² See Sean Flynn, *Touro Synagogue case heading to U.S. Supreme Court*, NEWPORTRI.COM (Oct. 11, 2018), <http://www.newportri.com/news/20181011/touro-synagogue-case-heading-to-us-supreme-court>.

¹¹³ See Michelle R. Smith, *US Supreme Court won't intervene in Newport synagogue dispute*, BOS. GLOBE (Mar. 18, 2019), <https://www.bostonglobe.com/metro/2019/03/18/supreme-court-won-intervene-newport-synagogue-dispute/UuWAl0rhNEO5mIYIU8HbXI/story.html>.

¹¹⁴ *Congregation Jeshuat Israel*, 866 F.3d at 57-58.

¹¹⁵ *Id.* at 58.

¹¹⁶ Noah Feldman, *The Future Wins in a Battle Over Jewish History*, BLOOMBERG VIEW (May 18, 2016), <https://www.bloomberg.com/view/articles/2016-05-18/the-future-wins-in-a-battle-over-jewish-history>.

¹¹⁷ *Congregation Jeshuat Israel*, 186 F. Supp. 3d at 189.

¹¹⁸ *Congregation Jeshuat Israel*, 866 F.3d at 58; see also *Jones*, 443 U.S. at 603 n. 3 ("[I]t would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership.") (citing *Watson v. Jones*, 80 U.S. 679 (1871)) (emphasis added).

Justice Souter does not make a *single reference* to Rivera's will. Instead, he opts to give more weight to the 1903 and 1908 lease agreements, which he felt did not clearly establish a trust. But such selectivity is troublesome, in that Justice Souter fails to consider the piece of evidence most heavily relied on by the district court in concluding that Touro Synagogue was owned in trust by Shearith Israel—the type of document that Justice Souter himself acknowledges “should be the lodestone of adjudication” in property disputes between religious parties.¹¹⁹

Judge Thompson, in her dissent from the First Circuit's denial of en banc review, further highlights the problems with Justice Souter's selective approach.¹²⁰ Indeed, in eschewing the importance of Rivera's will, which Judge McConnell found was “incontrovertible evidence that Touro Synagogue was owned in trust,”¹²¹ Justice Souter appears to have flouted First Circuit precedent prohibiting dismissal of a trial court's factual finding without demonstrating that the finding was clearly erroneous.¹²² Further, as Judge Thompson points out, “the panel's decision implies that when contracts are available, they should be relied on to the exclusion of other relevant and potentially dispositive evidence such as wills and charters, even though the panel's opinion indicates that these documents can be just as significant as contracts.”¹²³ The likely, and unfortunate, result of this inconsistent and selective review of trial evidence is that future religious entities engaged in property disputes, as well as the courts adjudicating these disputes, will look only to contracts in determining ownership, even if other, more persuasive, secular sources of evidence exist.

It is still possible that, even if Justice Souter had considered Rivera's will in his analysis, he would have concluded that Touro Synagogue was not owned in trust for the benefit of Newport's Jewish congregation. Indeed, his textual analysis of the lease agreements, among other documents, lends support to Shearith Israel's claim to outright ownership of the synagogue, as well as the *rimonim* (i.e., the synagogue's accompanying

¹¹⁹ *Congregation Jeshuat Israel*, 866 F.3d at 58.

¹²⁰ *Id.* at 21.

¹²¹ *Congregation Jeshuat Israel*, 186 F. Supp. 3d at 176.

¹²² See *Kosilek v. Spencer*, 774 F.3d 63, 84 (1st Cir. 2014) (stating that reversal of a district court's factual findings are reversible only for clear error); see also *Id.* at 98 (“[W]e accept the court's factual findings, and the inferences drawn from those facts, unless the evidence compels us to conclude a mistake was made.”).

¹²³ *Congregation Jeshuat Israel*, 892 F.3d at 24 (Thompson, J., dissenting).

“paraphernalia”). Yet at least with respect to the *rimonim*, Judge McConnell found that under Rhode Island law, continuous possession implies a strong presumption of ownership.¹²⁴ Since Jeshuat Israel had possessed the *rimonim* for “over 100 years,” Judge McConnell found that the presumption created by such continuous ownership outweighed the language contained in the lease agreements.¹²⁵ Thus, the First Circuit’s conclusion that Shearith Israel owns the *rimonim* without “concluding that the trial judge clearly erred in his finding or addressing long-standing Rhode Island law that a presumption of ownership arises from continuous possession” demonstrates questionable analysis that likely would have benefited from further appellate review.¹²⁶

Roads Not Taken in Mediation

Another aspect of this case that stands out is the role of mediation and whether this method of alternative dispute resolution could have prevented years of drained judicial resources and countless billable hours. As previously discussed, Chief Judge William E. Smith of the Rhode Island District Court oversaw mediation talks for months before litigation began in earnest.¹²⁷ However, mention of this mediation was relegated to a footnote in the district court’s opinion. And while it is unknown which issue(s) brought mediation to a halt, one has to imagine that there was room for an agreement that could have produced a (relatively) amicable resolution of the dispute.

It is known from the record that the impetus for Jeshuat Israel’s attempted sale of the Myer Myers *rimonim* was to raise capital for an endowment to ensure the long-term viability of Touro Synagogue and Jeshuat Israel. While Jeshuat Israel did not believe this sale violative of its own religious principles, Shearith Israel made clear that it was “contrary to the *Sephardic* tradition as maintained by” its own congregants.¹²⁸ It seems, then, that if Shearith Israel wanted to prevent Jeshuat Israel from conducting

¹²⁴ See *Congregation Jeshuat Israel*, 186 F. Supp. 3d at 198-200.

¹²⁵ *Id.* at 198.

¹²⁶ *Congregation Jeshuat Israel*, 892 F.3d at 24 (Thompson, J., dissenting).

¹²⁷ See Smith, *supra* note 109, at 23.

¹²⁸ *Congregation Jeshuat Israel*, 866 F.3d at 56 (emphasis added); see also Katie Mulvaney, *N.Y. congregation ‘aghast’ over attempted sale of Touro bells*, PROVIDENCE J. (Jun. 8, 2015), <http://www.providencejournal.com/article/20150608/NEWS/150609374> (quoting the trial testimony of Shearith Israel’s vice president, Michael I. Katz: “[W]e do not sell our religious objects ...”).

a sale that would offend its religious tradition, and the sole purpose of Jeshuat Israel's attempted sale was to avert insolvency, a monetary settlement would have been adequate to stave off litigation. It is unclear whether the full \$7.4 million value of the *rimonim* was necessary in order to address Jeshuat Israel's financial woes, and had that been the case, Shearith Israel still likely would have chosen to pursue litigation rather than settle. However, the trial record showed that Jeshuat Israel had repeatedly sought financial assistance from Shearith Israel to no avail in the years leading up to the dispute.¹²⁹ Indeed, when Jeshuat Israel's attorney, Gary Naftalis, questioned Shearith Israel's vice president, Michael I. Katz, at trial whether "Congregation Shearith Israel sen[t] one dime to Touro Synagogue or [Jeshuat Israel]" to assist with the synagogue's restoration, Katz replied: "No."¹³⁰ The likely inference to be made from this exchange is that there was *some* amount of money that would have covered Jeshuat Israel's operational costs so that its members would not have felt compelled to sell the *rimonim*. Had Shearith Israel answered some of Jeshuat Israel's past pleas for financial assistance, or even agreed upon a satisfactory amount during mediation, years of litigation could have been prevented.

At first glance, it might seem unreasonable to expect Shearith Israel, a congregation that had maintained "a sound fiscal position," to bail out another congregation that likely had not managed its money as wisely.¹³¹ However, it was not unreasonable for Jeshuat Israel to expect assistance in maintaining Touro Synagogue from the congregation asserting ownership thereof. Some measure of responsibility should be fairly expected of any property owner, and Shearith Israel's refusal to provide financial assistance of any amount was likely a major factor contributing to the failure of mediation.

It is also important to recognize that this was not a typical civil dispute, but rather, one involving two Jewish congregations that adhere largely to the same set of beliefs and principles—one of these principles being *tzedakah* (the Hebrew word commonly used to signify "charity").¹³² Indeed, the principle of *tzedakah* is

¹²⁹ See Mulvaney, *supra* note, at 129 ("Congregation Jeshuat Israel had repeatedly appealed to Shearith Israel about expensive repairs at Touro and difficulties raising money given a dwindling and aging congregation.").

¹³⁰ *Id.*

¹³¹ Feldman, *supra* note 116, at 117.

¹³² "The word *tzedakah* derives from the Hebrew word *tzedek*, [meaning] 'justice.'" *Charity (Tzedakah): What is Tzedakah?*, JEWISH VIRTUAL LIBRARY,

legislated in both the Torah and the Talmud.¹³³ What is more, “[b]oth ‘Jewish law, and rabbinical literature ... praise ... parties who are able to settle their disputes rather than engage in litigation.’”¹³⁴As such, perhaps Jeshuat Israel could have invoked these Jewish principles and appealed to Shearith Israel’s charitable duty during mediation. Jeshuat Israel might have even pointed out that Shearith Israel’s refusal to provide financial assistance arguably constituted an even greater affront to Jewish and *Sephardic* tradition than the attempted sale of the *rimonim*. While First Amendment concerns prevent even the most observant of litigants from raising this type of faith-based plea in court, mediation could have provided the proper forum to do so.

VII. CONCLUSION

The fact that the oldest synagogue and the oldest Jewish congregation in our nation’s history were mired in bitter litigation is undoubtedly a blemish on American Jewish history. Yet in light of the familiar adage, “two Jews, three opinions,” perhaps it would be foolish to expect two prideful congregations to have reached an amicable agreement concerning such complex issues. While this litigation produced perhaps the greatest judicial exploration of the history of the Jews in North America, the Supreme Court’s denial of certiorari unfortunately leaves unresolved significant questions regarding evidence in cases involving religious entities. With the First Circuit’s decision left intact, the role of mediation and its

<http://www.jewishvirtuallibrary.org/what-is-tzedakah> (citing Joseph Telushkin, *JEWISH LITERACY* (1991)).

¹³³ See *Deuteronomy* 15:8; see also *Leviticus* 19:10; Bava Batra 9b, SEFARIA, https://www.sefaria.org/Bava_Batra.9b?lang=bi; Jerusalem Talmud Pe’ah 1:1, SEFARIA, <https://www.sefaria.org/sheets/115149?lang=bi>; Maimonides, *Mishneh Torah, Gifts to the Poor* 7:5, SEFARIA, https://www.sefaria.org/Mishneh_Torah%2C_Gifts_to_the_Poor.7.1?lang=bi&with=all&lang2=en (.

¹³⁴ Aaron T. Hubbard, *Mediation and Religion: General Attitudes of Three Major Religions in the United States*, 63 LA. B.J. 196, 197 (2015) (citing David Masci and Elizabeth Lawton, *Applying God’s Law: Religious Courts and Mediation in the U.S.*, PEW RES. CTR. (2013), <http://www.pewforum.org/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/>); see also *Id.* (stating that the Torah, Talmud, and other authoritative texts of Judaism “focus ‘on compromise in the context of monetary disputes’ ... and ‘accept[ing] compromise in order to prevent conflict and preserve the peace and welfare of the community.’”) (citing Gerald M. Steinberg, *Conflict Prevention and Mediation in the Jewish Tradition*, 12 JEWISH POL. STUD. REV. 3, 3 (2000), <http://jcpa.org/wp-content/uploads/2000/10/conflict-prevention.pdf>).

advantages uniquely suited to religious entities should not go undervalued. While mediation ultimately proved unsuccessful with respect to these particular congregations, the First Circuit's muddled guidance for prospective jurists and litigants likely makes removing these types of disputes from the courtroom a more attractive option for religious disputants going forward.

Appendix



The Myer Myers *rimonim* on display at the Boston Museum of Fine Arts (photo courtesy of Penny Schwartz for WBUR)