The View from the Outside: Beth Din and the American Legal System

Michael A. Helfand, Esq.
Adina Levine, Esq.
Chaim Saiman, Esq.

Michael A. Helfand

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‘The Peculiar Genius of Private-Law Systems': Making Room for Religious Commerce

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‘THE PECULIAR GENIUS OF PRIVATE-LAW SYSTEMS: MAKING ROOM FOR RELIGIOUS COMMERCE

*Michael A. Helfand**

ABSTRACT

Religious commerce has long sat uncomfortably at the nexus of public law and private law. On the one hand, such transactions invariably have garden-variety commercial objectives, which are best achieved and regulated through the law of tort, contract and property. And yet the intermingled religious aspirations of the parties often inject constitutional concerns that muddy the waters. To navigate these challenges, the Supreme Court famously embraced the neutral principles of law framework, which encouraged parties to draft private law agreements using secular terminology. Thus, while the Establishment Clause provided the outer boundaries for what was legally possible, the neutral principles of law framework made space for religion under the umbrella of private law.

This equilibrium between public and private law, however, has become increasingly unsettled. As the permutations of contracting for religion have proliferated, courts and scholars have searched for tools to regulate what they view as problematic outcomes. At the core of such criticisms is an instinct that judicial enforcement of privatized religious obligation undermines a principled commitment to separation of church and state. In turn, courts and scholars have reached into their constitutional toolboxes, searching for legal doctrines that might eliminate the kinds of outcomes they view as offending fundamental constitutional principles.

The goal of this article is to argue that this public law instinct—the notion that regulating the field of religion and private law is best achieved through the expansion of constitutional prohibitions—is deeply misguided. Ultimately, successfully merging religion and private law requires promoting doctrines that, on the one hand, address legitimate concerns, but do so without eliminating the very legal terrain made possible by the neutral principles of law framework. Failure to do so—and reflexively reaching into our constitutional toolbox—leaves both courts and scholars without the tools they need to meet these legal challenges.

* Associate Dean for Faculty and Research, Professor of Law, and Interim Director of the Nootbaar Institute on Law, Religion and Ethics at Pepperdine University School of Law; Visiting Professor, Yale Law School.

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I. INTRODUCTION

As the saying goes, when you are a hammer, everything looks like a nail. Unfortunately, what is true of carpentry is also becoming increasingly true of the law and religion field. For lawyers and scholars alike, questions of law and religion are viewed through the prism of public law—and even more specifically, the religion clauses of the First Amendment. And this, to be sure, is quite natural. The Free Exercise and Establishment Clauses provide the dominant framework for regulating the relationship between church and state.

But this constitutional focus, ultimately, neglects the ever-increasing subset of private law cases and questions that stand at the crossroads between religion and commerce.[1] In such cases, parties enter a bargained for exchange where one of the agreed performances is, by its terms, religious. Thus, whether it is a pastor's employment contract, the purchase of kosher food, or a religious arbitration agreement, parties can choose to protect their religious expectations not through the demands of public law, but through the instruments of private law.

The challenge in such circumstances is ensuring that such agreements avoid the constitutional pitfalls that often lead to nonenforcement. Notable among such pitfalls is the Establishment Clause's religious question doctrine which prohibits courts from resolving cases where there is an "underlying controversy over religious doctrine or practice."[2] Accordingly, courts must "avoid . . . incursions into religious questions that would be impermissible under the first amendment,"[3] including "interpret[ing] ambiguous religious law and usage."[4]

As an antidote to the religious question doctrine, the Supreme Court

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[1] *See generally* Michael A. Helfand and Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 Duke L.J. 769 (2015).

[2] *See, e.g.*, Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 31 (D.D.C. 1990).

[3] *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) ("[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity"); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989) ("[C]ivil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice."); Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 31 (D.D.C. 1990) (holding that court may not adjudicate a dispute that requires resolving an "underlying controversy over religious doctrine or practice"); Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404, 415 (N.J. 1991).

[4] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708 (1976)

famously embraced the neutral principles of law framework, which "relies exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges."[5] At its core, this approach encourages parties to draft private law agreements using secular terminology, thereby allowing courts to resolve disputes implicating such agreements without threatening Establishment Clause principles.[6] In this way, the neutral principles of law provides parties seeking to protect their religious expectations through private agreement with a clear option for ordering their affairs going forward. By taking advantage of "the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties"[7]—parties could draft secular provisions that would be interpreted and enforced in court. Thus, while the strictures of the Establishment Clause provided the outer boundaries for what was legally possible, the neutral principles of law framework made space for religion under the umbrella of private law.

This equilibrium between public and private law, however, has become increasingly unsettled. As the permutations of contracting for religion have proliferated,[8] courts and scholars have searched for tools to regulate what they view as problematic outcomes. At the core of such criticisms is an instinct that judicial enforcement of privatized religious obligation—even where such obligations are mutually agreed upon—undermines a principled commitment to separation of church and state. In turn, courts and scholars have reached into their constitutional toolboxes, searching for legal doctrines that might eliminate the kinds of outcomes they view as offending fundamental constitutional principles.

The goal of this article is to argue that this public law instinct—the notion that regulating the field of religion and commerce is best achieved through the expansion of constitutional prohibitions—is deeply misguided. Ultimately, successfully merging religion and private law requires promoting doctrines that, on the one hand, address legitimate concerns, but do so without eliminating the very legal terrain made possible by the neutral principles of law framework. Failure to do so—and reflexively reaching into our constitutional toolbox—leaves both courts and scholars without the

[5] Jones v. Wolf, 443 U.S. 595, 603 (1979).

[6] *See, e.g.*, Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("[T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.").

[7] Jones v. Wolf, 443 U.S. 595, 603 (1979).

[8] *See supra* note 1.

tools they need to meet these legal challenges.

This Article expands on this central theme, providing examples of where courts and scholars would do well to refocus on private law. It begins, in Part II, by describing the neutral principles of law framework and how the Court embraced this framework so as to make space for religious commerce. Part III then considers how courts should leverage private law techniques to interpret and enforce a wider range of claims implicating religious forms of commerce. This turn to private law would, thereby, stave off attempts to expand the scope of constitutional limitations on religious adjudication. Part IV then explores how the religious commerce safety valve—religious arbitration—has been increasingly beset by scholarly criticism that advocates for expanding the constitutional constraints of public law so as to restrict parties' ability to submit disputes for privatized religious adjudication. In so doing, these critics not only underestimate the ability of private law doctrines to police the procedural and substantive fairness of religious arbitration, but they also proffer alternative public law 'solutions' that are likely to do damage to the aspirations of parties in the religious commercial marketplace.

II. WHAT'S AT STAKE?

When we talk about how the law protects religious liberty, we naturally think, first and foremost, about the First Amendment.[9] Accordingly, determining the scope of legally enforceable religious rights requires resort to judicial interpretation of the religion clauses. And, as judicial views as to the rights afforded by the religion clauses ebb and flow, so does the range of protections granted various religious practices.

But wholesale reliance on public law to protect and circumscribe religious rights neglects the various ways in which parties might make recourse to private law as a method to ensure that the law protects religious

[9] *See Religious Freedom Index: American Perspectives on the First Amendment*, THE BECKET FUND at 7 (Nov. 2019), https://s3.amazonaws.com/becketnewsite/2019-Religious-Freedom-Index.pdf ("The Religious Freedom Index is designed to give a 30,000-foot view of changes in American attitudes on religious liberty by surveying a nationally representative sample of 1,000 American adults. Rather than focus on the most hot-button issues dominating the news cycle, questions asked in the Index cover a wide spectrum of religious liberty protections under the *First Amendment*." (emphasis added)); *The 2019 State of the First Amendment*, FREEDOM FORUM INSTITUTE (2019), https://www.freedomforuminstitute.org/wp-content/uploads/2019/06/SOFAreport2019.pdf (finding that 29% of Americans recalled that the First Amendment protected religious liberty).

objectives and aspirations. In this way, private law—which might be broadly defined as "the substantive law which establishes legal rights and duties between and among private entities"[10]—holds the potential to empower private parties to generate legal obligations with respect to religious aspirations in ways beyond what public law—which tracks "the substantive law defining the legal obligations of private individuals or entities to the government"[11]—might otherwise afford.

The intersection of private law and religion covers a range of cases, including contracts, property and tort.[12] In such cases, private parties enter into legal transactions or incur legal obligations that ultimately incorporate both commercial and religious objectives. Thus, for example, when parties enter into a religious contract, they seek to secure a contractual right to either a product or a service that includes some sort of religious requirement or performance. Because these requirements, obligations or performances are—in part—religious, the most natural mechanism to memorialize them in a contract or other commercial instrument is through religious terminology. However, incorporating religious terminology into contracts raises an important constitutional conundrum.

Pursuant to the Establishment Clause, "civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice."[13] This doctrine—typically referred to as the "religious question doctrine"—is generally understood to prohibit courts from resolving cases where there is an "underlying controversy over religious doctrine or practice."[14] Accordingly, courts must "avoid . . . incursions into religious questions that would be impermissible under the first amendment."[15] And in turn, they cannot "interpret[] ambiguous

[10] Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671,688 (1973).

[11] Id. (describing the core areas of private law); *see supra* note 1.

[12] Id. at 687.

[13] Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989). For more on the religious question doctrine, see Christopher C. Lund, *Rethinking the "Religious Question" Doctrine*, 41 PEPP. L. REV. 1013 (2014); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005).

[14] *See, e.g.*, Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 31 (D.D.C. 1990).

[15] *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989); Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 31 (D.D.C. 1990).

religious law and usage"[16] or resolve "controversies over religious doctrine and practice."[17]

Scholars have long debated the underlying rationale behind the religious question doctrine.[18] For some, the religious question doctrine is a recognition that courts lack the constitutional competence to address claims that revolve around questions of faith. As described by the Supreme Court, "[r]eligious experiences . . . may be incomprehensible to others" and therefore "beyond the ken of mortals;"[19] accordingly, "[c]ourts are not arbiters of scriptural interpretation."[20] Or, in the words of Ira Lupu and Robert Tuttle, the most prominent advocates of the "adjudicate disability" approach, 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."[2122] All told, these accounts view the state simply as simply "limited jurisprudential competence" to decide such religious matters.[23]

Others have adopted a different approach that focuses less on the inability of courts to penetrate the substance of religious law, but more directly on a different consequence of resolving religious questions: that choosing a side in a religious-question dispute would constitute an impermissible endorsement of one religious view over another. For example, Laurence Tribe has argued that the prohibition against "doctrinal entanglement in religious issues" "more deeply [] reflects the conviction

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[16] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708 (1976)

[17] Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969).

[18] For my part, I have argued that much of the religious question doctrine stems from doctrinal errors. *See* Michael A. Helfand, *Litigating Religion*, 92 B.U. L. REV. 493 (2013).

[19] United States v Ballard, 322 U.S. 78, 86–7 (1944).

[20] Thomas v. Review Board, 450 U.S. 707 (1981).

[21] 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, 138 (2007).

[22] In a somewhat parallel vein, Andrew Koppelman has argued that"[t]he legitimate authority of the state does not extend to religious questions" because adjudication of such questions would lead to the "corruption of religion"—that is, "[r]eligious teachings are likely to be altered, in a pernicious way, if the teachers are agents of the state." Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, WM. & MARY L. REV. 1831, 1897-98 (2009).

[23] 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, 123 (2007); *see also* Jared A. Goldstein, *Is There a Religious Question Doctrine?: Judicial Authority to Examine Religious Practices and Belief*, 54 CATH. U. L. REV. 497, 536 (2005).

that government—including judicial as well as the legislative and executive branches—must never take sides on religious matters."[24] Similarly, Christopher Eisgruber and Lawrence Sager have argued "[i]f government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby favor some religious persons, sects, and groups over others."[25] And Kent Greenawalt has raised a similar concern, worrying that judicial resolution of inter-denominational disputes may be perceived as "the possible endorsement of one minority group."[26]

Regardless of account, the religious question doctrine presents a formidable challenge to religious commerce. If courts cannot resolve religious questions, how can courts enforce religious commercial agreements that facilitate the exchange of religious goods and services? To address this challenge, the Supreme Court famously embraced the neutral principles of law framework, which "relies exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges."[27] At its core, this approach seeks to disentangle religious disputes from religious questions, thereby allowing courts to resolve such disputes without threatening Establishment Clause principles.[28] Accordingly, while courts may not resolve "controversies over religious doctrine and practice"[29] and must "avoid . . . incursions into religious questions,"[30] courts can resolve religious disputes so long as the contracts and documents at the heart of dispute employ secular—as opposed to religious—terminology.

In turn, the Court's neutral principles of law framework, provided religious entities with a clear option for ordering their affairs going forward, which it expressed in the context of disputes over church property:

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[24] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1231 (2d ed. 1988).

[25] Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 812 (2009).

[26] Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 804 (1998) (describing the endorsement concern implicated by various state kosher laws).

[27] Id. at 603.

[28] *See, e.g.*, Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("[T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.").

[29] 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.").

[30] Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404, 415 (1991).

"Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy."[31] In turn, this focus on neutral principles would "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[32] Put differently, the Court encouraged private parties to take advantage of "the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations."[33] By memorializing religious commitments in secular terminology, parties could ensure that courts would enforce their religious commercial agreements in a manner that "reflect[ed] the intentions of the parties."[34] Where parties have employed secular terminology, courts would not need to dismiss claims on First Amendment grounds; to the contrary, the neutral principles of law approach enables lower courts to resolve disputes without getting mired in constitutional objections.

However, while the neutral principles doctrine may have opened a door for religiously motivated private parties to use private law, the encroachment of public law enthusiasts has, over time, threatened to slam that door shut.

III. ENFORCING RELIGIOUS COMMERCE

The primary challenge to implementing the neutral principles approach to religious forms of commerce is, what Barak Richman and I have called elsewhere, the "translation problem"—that is, many religious objectives cannot be captured in alternative secular terminology, and thus religious terminology cannot always be translated into secular analogs.[35] Thus, when parties seek to purchase "religious" goods or "religious" services, drafting contract terms that describe the intentions of the parties invariably

[31] Id. at 603.

[32] *Id.* To be sure, both of these commitments have been contested since the moment the Court announced its decision in *Jones v. Wolf*. *See* Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 969 (1991); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1884-85 (1998) (worrying that the neutral principles approach can lead to outcomes that "are likely to diverge from the actual understandings of those concerned."); Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378, 1409-10 (1981) (arguing that the neutral principles approach limits judicial inquiry in ways that undermines a court's ability to reach a justifiable outcome).

[33] Jones v. Wolf, 443 U.S. 595, 603 (1979).

[34] Jones v. Wolf, 443 U.S. 595, 604 (1979).

[35] Michael A. Helfand and Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 Duke L.J. 769, 779-86 (2015).

necessitate incorporating religious terminology.

Consider a few examples. Maybe the classic example of a commercial transaction for a religious good is the purchase of kosher food.[36] As "defined" by the Encyclopedia Judaica, kosher is the "collective term for the Jewish laws and customs pertaining to the types of food permitted for consumption and their preparation."[37] Importantly, the worldwide kosher food market is far from trivial; estimates value it at $24 billion and projections anticipate it growing an additional 11.5% by 2025.[38] The challenge with incorporating the term kosher into any commercial contract is precisely because it, by definition, incorporates by reference all the "Jewish laws and customs" relevant to the food creation process—from ingredients to preparation to delivery—rendering the term a complex religious term that cannot be translated into some sort of secular analog.

This translation problem has undermined the ability of parties to kosher commercial transactions from exercising their rights. For example, in 2012, eleven plaintiffs filed suit—on behalf of themselves and all others similarly situated—against ConAgra, the parent corporation of the Hebrew National brand.[39] Hebrew National has long been famous in the United States for its "kosher" hotdogs, which it advertises as being of exceedingly high quality because the company "answers to a higher authority."[40] The plaintiffs highlighted these advertising claims of ConAgra, emphasizing that the company advertises its meat products as "100% kosher" "as defined by the most stringent Jews who follow Orthodox Jewish law."[41]

However, the plaintiffs contended that contrary to these representations, Hebrew National meat products did not satisfy these kosher standards.[42] Indeed, according to the complaint, employees informed the kosher certification companies that Hebrew National procedures had "rendered the

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[36] For my extended consideration of kosher regulation, see Michael A. Helfand, *When Judges Are Theologians: Adjudicating Religious Questions*, *in* RESEARCH HANDBOOK ON LAW & RELIGION 262 (Rex Ahdar ed. 2018).

[37] "Dietary Laws," 5 ENCYCLOPAEDIA JUDAICA 650 (2d. ed. 2003).

[38] *See* Jon Springer, *Kosher Food Market Set to Grow*, SUPERMARKET NEWS (Sept 1, 2017), http://www.supermarketnews.com/consumer-trends/kosher-food-market-set-grow-research-shows.

[39] Wallace v. ConAgra, Complaint, 0:12-cv-01354-DWF-TNL (D. Minn. June 6, 2012).

[40] Id. at *24; *see also* https://en.wikipedia.org/wiki/We_answer_to_a_higher_authority.

[41] Wallace v. ConAgra, Complaint, 0:12-cv-01354-DWF-TNL, at *3 (D. Minn. June 6, 2012).

[42] Id. at *17-21.

meat being processed not kosher" and instead of acting on this information, "little or nothing" was done to correct these kosher violations.[43] As a result, the complaint alleged that purchasers of Hebrew National meat products overpaid for these products, mistakenly believing them to be "100% kosher."[44] In turn, the complaint stated that ConAgra should be held liable for these misrepresentations regarding the kosher quality of these meat products under various consumer protection laws as well as for breach of contract and negligence.[45]

As its defense, ConAgra asserted that the religious question doctrine prohibited a court from adjudicating the plaintiff's claims: "Under the First Amendment to the United States Constitution, federal courts may not adjudicate disputes that turn on religious teachings, doctrine, and practice."[46] And, as argued by ConAgra, "[w]hether or not something is 'kosher' is exclusively a matter of Jewish religious doctrine."[47] The district court adopted ConAgra's view almost verbatim, dismissing the plaintiffs' claims: "[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."[48] And while the Eighth Circuit reversed the district court's decision for lack of standing—and remanded the case to state court[49]—a Minnesota state court reached an identical conclusion, holding that "It would be unholy, indeed, for this or any other court to substitute its judgment on this purely religious question."[50]

In this way, kosher food transactions represent the prototypical challenge to the neutral principles of law framework. While the neutral principles approach is intended to allow the "peculiar genius of private-law systems" to make room for parties to fashion religious commercial transactions in accordance with their shared intentions, the fact that many religious terms cannot be translated into secular analogs means that the public law demands of the religious question doctrine can threaten to

[43] Id. at *21.

[44] Id. at *39-40.

[45] Id. at *46-64.

[46] Defendant's Memorandum in Support of Motion to Dismiss, Wallace v. ConAgra, 0:12-cv-01354-DWF-TNL, at *1 (D. Minn. July, 26, 2012).

[47] Id.

[48] Wallace v. Conagra Foods, Inc., 920 F. Supp. 2d 995, 999 (D. Minn. 2013).

[49] Wallace v. ConAgra Foods, Inc., 747 F.3d 1025 (8th Cir. 2014).

[50] Wallace. v. ConAgra Foods, Inc., 19HA-CV-12-3237 (Minn. First Judicial District Oct. 6, 2014).

foreclose the possibilities afforded by private law. Indeed, this is the knee-jerk reaction of courts when encountering religious terminology; because the Establishment Clause prohibits judicial resolution of claims implicating religious questions, courts dismiss claims implicating religious commercial transactions.[51]

The problem with this judicial instinct is that it is often misguided—or, at a minimum, triggered far too hastily. In a variety of circumstances, private law tools provide ready alternatives for courts to resolve religious disputes over religious commercial transactions without triggering the constitutional prohibitions of the Establishment clause. For example, with respect to kosher claims, courts can use alternative forms of evidence to determine what the parties' shared understand of what kosher means without plumbing depths of religious doctrine. Thus, in the Hebrew National litigation, the court might have considered the use of the term "kosher" in light of various contractual aids of interpretation. It could have considered the consistency of Hebrew National's implementation of its kosher standards under the course of dealing rubric for contract interpretation[52]—a point made by the plaintiffs in their brief on the motion to dismiss.[53] And, maybe most material, the court might have considered the commercial standards for kosher certification under the rubric of trade usage—standards that have become relatively uniform as a result of various market pressures.[54] Each of these options would have allowed the court to use private law techniques to address the plaintiffs' claims without simply closing up shop in light of public law's looming demands.

And what is true for kosher litigation is true in other contexts of religious commerce. Consider houses of worship—and, in particular, Orthodox Jewish synagogues—which have repeatedly provided additional examples of this potential, but all-too often neglected, private law

[51] Barak Richman and I have previously discussed this trend, which we refer to as Establishment Clause creep. Michael A. Helfand and Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 Duke L.J. 769, 803-10 (2015).

[52] *See* TIMOTHY D. LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD 81-84 (2013) (describing why the kosher certification adopted by Hebrew National has become an industry outsider).

[53] *See* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Wallace v. ConAgra, 0:12-cv-01354-DWF-TNL, at *16-19 (D. Minn. Oct. 1, 2012).

[54] For the commercial reasons for uniformity of standards in the kosher certification market, see TIMOTHY D. LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD 132-34 (2013) (explaining how the interdependence of the kosher certification market has led to the creation of increasingly uniform certification standards).

methodology.

Traditionally, Orthodox Jewish synagogues have maintained separate sex seating during prayer services with a partition—or *mechitzah*—dividing the sanctuary into different sections for men and women.[55] However, over the course of the 20th century, a variety of synagogues altered this practice, integrating the sanctuary to allow for "mixed seating"—that is, allowing men and women to sit together.[56] This shift in practice, not surprisingly, led to some backlash from traditionalists who objected to these changes. What is noteworthy, for our purposes, is that these theological battles spilled over into the courtroom on a number of occasions. In the most frequent fact-pattern, a minority of congregants filed lawsuits seeking to enjoin the synagogue from implementing these sanctuary seating changes.[57]

One can see how, at first glance, this sort of case would appear outside the range of cases that civil courts, under the religious question doctrine, ought to address. How can a state court address the legality of a synagogue altering its prayer practices? Surely entering any sort of judgment would run afoul of the religious question doctrine.

And yet, courts engaged this question on private law grounds, resisting the impulse to foreclose these claims because of lurking public law concerns. Thus, in *Davis v. Scher,* the Supreme Court of Michigan found in favor of congregants objecting to the sanctuary seating change because, in its view, "[t]he conveyance of the land to the original trustees and to the congregation conveyed the land in trust for the purposes for which the congregation was formed."[58] To establish the existence of an implied trust, the plaintiffs presented evidence regarding the synagogue's record of past practice as an "Orthodox synagogue" all the way back to the drafting of the initial synagogue constitution.[59] Of course, using private law techniques—by looking to historical evidence as opposed to theological evidence—to

[55] Norma Baumel Joseph, *Mehitzah: Halakhic Decisions and Political Consequences*, *in* DAUGHTERS OF THE KING: WOMEN AND THE SYNAGOGUE 117, 128 (Susan Grossman & Rivka Haut eds. 1992) ("For the past 150 years, all Orthodox responsa have consistently maintained the mehitzah requirement."); *see generally* Jonathan Sarna, *The Debate over Mixed Seating in the American Synagogue*, *in* THE AMERICAN SYNAGOGUE: A SANCTUARY TRANSFORMED 363 (Jack Wertheimer ed. 1987).

[56] Id. ("It was not until the 1950s that the debate became a central focus of the denominational divisions, and stands that were taken became frozen principles of faith.)"

[57] *See, e.g.*, Davis v. Scher, 97 N.W.2d 137 (Mich. 1959); Katz v. Singerman, 241 La. 103 (La. 1961).

[58] Davis v. Scher, 97 N.W.2d 137, 143 (Mich. 1959).

[59] Id. at 140.

support the existence of an implied trust for an "Orthodox synagogue" still left a religious question before the court; does functioning as an "Orthodox synagogue" allow mixed seating? However, in *Davis*, the defendants refused to submit any evidence supporting the view that Orthodox Judaism permitted integrating the sanctuary. This left the plaintiffs' assertion that Orthodox Judaism required separate seating uncontroverted.[60] As a result, the court could find in favor of the plaintiffs without choosing one interpretation of religious doctrine over the other. In turn, because the synagogue had been held in an implied trust as an Orthodox synagogue, private law required the congregation to maintain prayer services in accordance with the terms of that implied trust.

Addressing similar circumstances, the Supreme Court of Louisiana—also focusing on private law considerations—reached a different outcome in *Katz v. Singerman*. In *Katz*, the court also faced dueling claims over the legality of an Orthodox Jewish synagogue changing its practice from separate seating to mixed seating. The first key difference in *Katz* was that there existed an express, as opposed to implied, trust. The original grantor, Benjamin Rosenberg, donated property to the Chevra Thilim Congregation on condition that, among other things, the building would "only be used as a place of Jewish worship according to the strict ancient and orthodox forms and ceremonies."[61] The Board of Directors, accepting the donation from Rosenberg, did so on condition that, among other things, the building would be used "for the worship of God according to the Orthodox Polish Jewish Ritual."[62] When the congregation considered passing a resolution to permit mixed seating, the plaintiffs sought an injunction, arguing that such a practice would fail to qualify as "worship according to the strict ancient and orthodox forms" and "Orthodox Polish Jewish Ritual" and thus would violate the conditions of the donation.

While the court refused to enjoin the resolution, its focus was—like in *Davis*—on private law considerations. Thus, instead of focusing on theology in the abstract, the court focused on the donor's presumable original intent in making his donation to the synagogue. In turn, and in light of conflicting testimony as to whether Orthodox Judaism permitted mixed synagogue seating,[63] the court concluded that the original donor agreement

[60] Id. at 141.
[61] Katz v. Singerman, 241 La. 103, 109 (La. 1961).
[62] Id. at 110.
[63] Id. at 149.

was insufficiently definite, clear or specific to prevent the proposed seating changes to the sanctuary.[64]

Now the court might have done well to take this private law inquiry one step further. It might have inquired as to the actual donor's intent with respect to what he intended as opposed to what the court could "reasonabl[y] *presume*" about the donor's intent.[65] Regardless, the court's overall inquiry focused on donor intent—and not theology—when determining whether or not to enforce the donor agreement so as to prevent changes to seating in the synagogue sanctuary.[66]

This judicial willingness to leave space for private law exploration of terms like "Orthodox Jewish" practice have not been merely relegated to church property cases. For example, in *Fisher v. Congregation B'Nai Yitzchok*, a Jewish congregation and Herman Fisher entered into a contract whereby Fisher would officiate at the synagogue as a cantor.[67] However, subsequent to the execution of the agreement, the synagogue—described, in its charter as worshiping in accordance with the "faith, discipline, forms and rites of the orthodox Jewish religion"[68]—modified, in part, its practice of separate seating, allowing both men and women to sit together in all but the first eight rows of the sanctuary.[69] Upon learning of this change, Fisher—an Orthodox Jewish cantor—informed the synagogue he could not officiate during their services because doing so would violate his religious commitments.[70] Because he learned of this shortly before the 1950 Jewish holiday season, Fisher was unable to find other comparable work and therefore filed suit against the synagogue to recoup his lost wages.

Like in *Davis* and *Katz*, the court in *Fisher* could have conflated the contract dispute with the underlying religious question as to what types of seating arrangements were theological possible under an Orthodox Jewish umbrella. But instead, the court in *Fisher* focused on the subjective intent of the parties, noting that the rabbi of the congregation had reaffirmed to Fischer at the time they entered the agreement the synagogue's status as an

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[64] Katz v. Singerman, 241 La. 103, 150 (La. 1961).

[65] Katz v. Singerman, 241 La. 103, 151-52.

[66] For other analogous instances where courts made recourse to private law doctrines in order to adjudicate claims related to the meaning of Orthodox Judaism, see *Wolf v. Rose Hill Cemetery Association*, 832 P.2d 1007 (1991); Park Slope Jewish Ctr. v. Stern, 128 Misc. 2d 909 (1985).

[67] Fisher v. Congregation B'Nai Yitzhok, 177 Pa. Super. 359 (1955).

[68] Id. at 361.

[69] Id. at 361-62.

[70] Id. at 362.

Orthodox Jewish synagogue, that the synagogue had always maintained separate seating, and that this policy would continue in the future.[71] This evidence allowed the court to find in favor of Fisher, concluding that the synagogue had breached the agreement because it violated a shared understanding of the agreement "in the light of custom or immemorial and invariable usage."[72] Here, again, a court side-stepped the religious question doctrine by relying on evidence and testimony that spoke to the intent of the parties and the contracting context. And in so doing, it leveraged private law to make space for commercial arrangements without simply dismissing the case on public law grounds.

The fundamental problem, as cases like *ConAgra* demonstrate, is that the judicial willingness to rely on private law alternatives is far too uneven. Indeed, in the extreme, courts will refuse to adjudicate cases at the nexus of religion and private law even where there is no actual dispute as to the meaning of the underlying theological terms. As a prime example, consider *Abdelhak v. Jewish Press*.[73] In *Abdelhak*, the plaintiff was an Orthodox Jewish doctor, specializing in high-risk obstetrics, who sued a Jewish newspaper for defamation, stemming from the publishing of his name on a list of individuals against whom a rabbinical court had issued a *seruv*[74]—that is, a rabbinic contempt order. According to the listing in the newspaper, the *seruv* was issued against the plaintiff for his failure to divorce his wife in accordance with Jewish Law.[75]

However, as both parties agreed, including the plaintiff's name on the list was a mistake and was based upon misinformation provided by the rabbinical court.[76] This error was particularly damaging to the plaintiff because his patients were "almost without exception, women of the Orthodox Jewish faith."[77] As a result, the plaintiff alleged that his reputation within the religious community—and, in turn, his medical practice—was severely damaged by the newspaper's erroneous report of his religious misdeeds.[78]

The court, however, still held that adjudicating the plaintiff's claim

[71] Id. at 364.
[72] Id. at 365.
[73] Abdelhak v. Jewish Press Inc., 411 N.J. Super. 211 (N.J. Super. Ct. App. Div. 2009).
[74] *Id.* at 217-20.
[75] *Id.* at 219-20.
[76] *Id.* at 220.
[77] *Id.* at 217.
[78] *Id.* at 228-31.

would violate the Establishment Clause.[79] This outcome can best be described as bizarre given that the court did not need, under the circumstances, to consider the truth or falsity of the published statement as all parties agreed that the defamatory statement was, in fact, false.[80] Thus, the typical obstacle present in cases of religious defamation—the truth or falsity of the allegedly defamatory claim—did not apply in *Abdelhak*. That notwithstanding, the court quoted from *Klagsbrun v. Va'ad Harabonim*—yet another religious defamation case—where a federal court concluded that there need not be "competing theological propositions" in order to trigger the religious question doctrine.[81] Applying this logic in *Abdelhak*, however, generate the unfortunate result that the shared factual understanding of the parties was rendered insufficient in order to enable the court to resolve the private law tort claim. In this way, *Abdelhak* stands in stark contrast to cases such as *Davis*, where the lack of competing evidence as to the requirements of Orthodox Judaism enabled the court to interpret the content of an implied trust that might otherwise have been beyond its enforcement power.

All told, in a variety of circumstances, courts might interrogate the intentions of the parties, their shared understandings, or the relevant commercial context to adjudicate cases at the intersection of religion and commerce. This approach could cover a range of commercial cases—purchases of religious goods and services, liability for torts within religious commercial relationships, and religious property restrictions. In such cases, courts should make recourse to their private law toolkit—examining industry practices, shared commercial understandings, and subjective intent of key parties—so as to avoid unreflective application of public law's religious question doctrine. To be sure, this does not mean that courts will be able to adjudicate all claims of religious commerce. But without

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[79] Id. at 230 (holding that adjudicating the defamation claim would require the "jury . . . to develop a keen understanding of how an Orthodox Jew would view each such event. Such an undertaking exemplifies the excessive involvement in matters of 'faith . . . or ecclesiastical . . . custom' that the [New Jersey Supreme] Court prohibited in *McKelvey v. Pierce*.").

[80] *Id.* at 223.

[81] Klagsbrun v. Va'ad Harabonim, 53 F. Supp. 2d 732, 742 (D.N.J. 1999). In *Klagsbrun*, the court appeared convinced that adjudicating the underlying claims would, in fact, require resolving religious questions and appears to have rejected the "no competing theological propositions" claim as an alternative argument. Id. at 742. ("Simply because, for example, the question of whether Seymour Klagsbrun actually engaged in bigamy is factual in nature in no way diminishes the need for this court to delve into religious doctrine. As noted above, the issue, using just one example, is whether Seymour Klagsbrun engaged in bigamy *within the meaning of the Orthodox Jewish faith*, which by its very nature necessitates an inquiry into religious doctrine.").

exploring what private law can allow, public law's prohibitions will short circuit too many cases where courts could have played the role for which they were intended—to provide victims of legal wrongs with appropriate legal remedies.

IV. ARBITRATING RELIGIOUS COMMERCE

That courts overestimate the demands of public law does not mean that all is lost. Private law does, in principle, afford those pursuing religious forms of commerce with an alternative to avoid the encroachment of Establishment Clause constraints.[82] When entering contracts for religious commerce, parties can include religious arbitration provisions and religious choice-of-law provisions in religious commercial contracts to ensure that any disputes are resolved by a religious tribunal in accordance with religious law. Although it is by no means a panacea,[83] parties can thereby submit disputes before a religious tribunal that might have otherwise been erroneously dismissed in court on constitutional grounds—and the award of the tribunal would be legally enforceable like any other arbitration award. Given these advantages—and the overall pro-arbitration stance of the Supreme Court[84]—it is not surprising that courts have uniformly rejected claims that legal enforcement of religious arbitration agreements and awards violate the First Amendment. Thus, courts have largely regulated arbitration through private law mechanisms just like all other forms of arbitration. However, recent years have seen rising discontent among scholars regarding the potential consequences of religious arbitration. In turn, there is a growing body of literature arguing that courts should

[82] *See* Michael A. Helfand, Beit Din*'s Gap-Filling Function: Using* Beit Din *To Protect Your Client*, 2 J. BETH DIN OF AM. 31 (2014).

[83] In a series of articles, I have considered the various advantages and disadvantage of religious arbitration, proposing a variety of legal reforms along the way. *See* Michael A. Helfand, *The Future of Religious Arbitration in the United States: Looking Through A Pluralist Lens*, OXFORD LEGAL HANDBOOK ON GLOBAL LEGAL PLURALISM (Paul Schiff Berman, ed. forthcoming 2019); Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994 (2015); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011); Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141 (2015) Yaacov Feit & Michael A. Helfand, *Confirming* Piskei Din *in Secular Court*, 61 J. HALACHA & CONTEMP. SOC'Y 5 (2011); Michael A. Helfand, *From Public Law to Private Law Through Contract: Promoting Religious Values Through Religious Dispute Resolution*, CHRISTIANITY AND PRIVATE LAW (Robert Cochran & Michael Moreland eds. forthcoming 2020).

[84] For a brief summary, see Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3001-02 (2015).

leverage public law mechanisms—flowing from the religion clauses of the First Amendment—to regulate religious forms of arbitration. Like the impulse with respect to religious contracts generally, this turn from private law to public law would be a mistake.

Current arbitration doctrine allows judicial intervention in the arbitral system at two primary stages. At the first stage, courts interpret arbitration agreements to determine whether it must compel parties to submit a dispute to the mutually agreed upon arbitration tribunal.[85] According to the Federal Arbitration Act, arbitration agreements are only unenforceable on "such grounds as exist at law or in equity for the revocation of any contract,"[86] such as unconscionability, duress or any other common law contract defenses.[87] In this way, the method for states to regulate arbitration agreements is via "general contract law principles."[88] Conversely, "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."[89] Put differently, arbitration provisions must be placed on "the same footing as other contracts"[90] whereby invalidating such provisions can only be done by identifying one of the standard private law defenses available under state contract doctrine. In turn, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."[91]

At the second stage, courts are sometimes asked to either confirm an arbitral award—and thereby render the award legally enforceable[92]—or alternatively vacate the award—and thereby reject the tribunal's decision.[93] Courts may only vacate awards based upon the grounds provided by the Federal Arbitration Act.[94] These grounds primarily focus on ensuring that the arbitral process is fundamentally fair; accordingly, awards must be vacated where the court can identify some sort of corruption, fraud, bias or

[85] 9 U.S.C. §2.

[86] Id.

[87] *See, e.g.*, Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.").

[88] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995).

[89] Id.

[90] Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (citing H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

[91] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985).

[92] 9 U.S.C. §9.

[93] 9 U.S.C. 10.

[94] Hall St. Assocs., LLC. v. Mattel, Inc., 552 U.S. 576, 584-89 (2008).

misconduct on the part of the arbitrators—or where the arbitrators exceeded their powers in rendering the award.[95] This review ensures that the arbitration proceedings both meet the contractual expectations of the parties and adhere to the legally mandated procedural standards.

The limited nature of the twin judicial inquiries with respect to enforcing arbitration—both enforcing agreements and confirming awards—is why courts have uniformly held that enforcing religious forms of arbitration do not trigger First Amendment concerns. On the front end, when courts determine whether or not to compel arbitration, the calculus avoids any constitutionally prohibited inquiries; all courts must do is ask "whether the parties have an enforceable agreement to arbitrate and, if so, whether the underlying dispute between the parties falls within the scope of the agreement."[96] Thus, "[o]rdinary contract principles determine who is bound by written arbitration provisions."[97] These sorts of threshold questions ensure that a court, in assessing whether parties have previously agreed to submit a dispute to binding arbitration, need not "determine, or even address, any aspect of the parties' underlying dispute."[98] And by avoiding the underlying merits of the dispute, courts ensure that they can compel religious forms of arbitration without adjudicating prohibited religious questions.

The same generally holds true when courts decide whether or not to confirm an arbitration award. In such circumstances, courts are charged in the first instance with ensuring compliance with statutory procedural requirements;[99] the court, with rare exception,[100] may not review the merits of an arbitration award.[101] As a result, when courts confirm a religious

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[95] 9 U.S.C. §10; *see generally* Amina Dammann, *Note: Vacating Arbitration Awards for Mistakes of Fact*, 27 Rev. Litig. 441, 470-75 (2008) (collecting state grounds for vacatur).

[96] Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. Ct. App. 2005).

[97] Encore Productions, Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1112, 1999 U.S. Dist. LEXIS 10024, *22

[98] Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354, 2005 D.C. App. LEXIS 49, *26

[99] *See, e.g.*, 9 U.S.C. §10 (listing the federal statutory grounds for vacatur); *see generally* Amina Dammann, *Note: Vacating Arbitration Awards for Mistakes of Fact*, 27 Rev. Litig. 441, 470-75 (2008) (collecting state grounds for vacatur).

[100] Examples of non-statutory grounds, such as manifest disregard of the law and public policy, where courts do, to some extent, review the substance of an award are extremely limited, rarely invoked and, in some jurisdictions, in doctrinal retreat. For discussion, see Richard C. Reuben, *Personal Autonomy and Vacatur After* Hall Street, 113 PENN. ST. L. REV. 1103, 1144-49 (2009).

[101] *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976); TC

arbitration award, there is no need to consider the religious matters underlying the award that are beyond the authority of courts to adjudicate.[102] Thus, courts regulate religious arbitration—like all other forms of arbitration—via the mechanisms laid out by the Federal Arbitration Act.

In recent years, however, journalists and commentators have criticized this uniform judicial enforcement of religious arbitration, arguing that the system lacks sufficient safeguards against abuse. In one of the most prominent critiques of religious arbitration, a New York Times article presented a harsh assessment of why religious institutions make use of religious arbitration: "religious arbitration may have less to do with honoring a set of beliefs than with controlling legal outcomes."[103] And, in turn, the article explored cases emblematic of an ostensibly larger trend where "judges have consistently upheld religious arbitrations over secular objections."[104] Other similar critical assessments followed. For example, critics argued that religious arbitration is a tool for "religious groups have attempted to use the legal system to impose their beliefs on others";[105] that the religious arbitration system is rigged because "churches use a faith-based system that's already rigged in their favor";[106] and that "giving judicial effect to the decision is effectuating a religious pronouncement using the court as a mouthpiece of religion."[107]

Contr., Inc. v. 72-02 N. Blvd. Realty Corp., 39 A.D.3d 762, 763 (2d Dep't 2007); N.Y. State Corr. Officers & Police Benevolent Ass'n v. State, 94 N.Y.2d 321, 326 (1999).

[102] *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"); *see also 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).

[103] Jessica Silver-Greenberg & Michael Corkery, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015).

[104] Id.

[105] Alex J. Luchenitser, *Making 'Biblical Justice' Mandatory: the Growth of Religious Arbitration Clauses*, ACS BLOG (Nov. 4, 2015).

[106] Hemant Mehta, *New York Times Reveals How Religious Arbitration Cases Work Against the Powerless*, PATHEOS (Nov. 3, 2015), *available at* http://www.patheos.com/blogs/friendlyatheist/2015/11/03/new-york-times-reveals-how-religious-arbitration-cases-work-against-the-powerless/#zGC9c5d2JTKqdqpA.99.

[107] Nate Burcham, *Losing Faith in Religious Arbitration*, AMICUS BLOG: HARV. CR-CL L. REV. (Nov. 21, 2015), *available at* http://harvardcrcl.org/losing-faith-in-religious-arbitration/.

These criticisms have, subsequently, made their way into the legal literature, with authors arguing that that the private law mechanisms incorporated into current arbitration doctrine provide insufficient protections when parties enter the religious arbitration system. At bottom, these authors argue that religious arbitration represents an adjudicative regime where arbitrators enforce religious legal rules that, at times, conflict with state and federal law. Importantly, these authors contend that existing private law protections are inadequate to protect parties to religious arbitration. The reason: enforcing those protections invariable requires courts to address prohibited religious questions.

As the primary example, these authors identify the manner in which the unconscionability doctrine is defanged when deployed in the context of religious arbitration. Thus, Jeff Dasteel has argued that parties subjected to contracts of adhesion—already in a weaker bargaining position—cannot access the standard protections afforded by the unconscionability doctrine.[108] This is because assessing the existence of substantive unconscionability will, invariably, require interrogation of religious questions in violation of the First Amendment.[109] Similarly, Sophia Chua-Rubenfeld and Frank Costa, have argued that "the strong presumptions in favor of arbitration and against inquiring into substantive Church law pose obstacles to proving either prong of an unconscionability claim."[110]

To see how this dynamic works, Dasteel as well as Chua-Rubenfeld and Costa cite *Garcia v. Church of Scientology*—a lawsuit filed by Maria and Luis Garcia, alleging fraud and breach of contract claims against the Church of Scientology.[111] The church, however, argued that all such claims needed to be arbitrated pursuant to an agreement between the parties. The Garcias, for their part, claimed that the agreement was unconscionable because the arbitration agreement required that the arbitrators all be church members "in good standing with the Mother Church."[112] In light of church doctrine,[113]

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[108] Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ARB. & MEDIATION 45, 51 (2016).

[109] Id. at 63.

[110] Sophia Chua-Rubenfeld & Frank Costa, *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2087, 2101 (2019).

[111] Garcia v. Church of Scientology Flag Serv. Org., 2015 U.S. Dist. LEXIS 178033 (2015).

[112] Id. at *32-33.

[113] For example, the Garcia's argued that members of they had been deemed "suppressive individuals," and therefore members in good standing with the church must "disconnect," and therefore shun, them. Id. at *32.

the Garcia's contended that the arbitration could not be fair or neutral if the arbitrators themselves were committed members of the Church of Scientology.

But in *Garcia v. Church of Scientology*,[114] a Florida federal district court held that it could not address the Garcia's claim of unconscionability because "it necessarily would require an analysis and interpretation of Scientology doctrine. That would constitute a prohibited intrusion into religious doctrine, discipline, faith, and ecclesiastical rule, custom, or law by the court."[115] And because the court deemed evaluating the claim to be constitutionally prohibited, it was required to enforce the agreement notwithstanding the potential consequences for an inherently biased arbitration. In the words of the court, it had to enforce the agreement, regardless of how "compelling . . . Plaintiffs' argument might otherwise be."[116]

Critics have taken this case to expose the fundamental failings of religious arbitration.[117] But much of the case's outcome is the result of misapplication of current arbitration doctrine. Under current doctrine, arbitrator neutrality is part of the very definition of arbitration.[118] Without it, the enforcement of arbitration proceedings becomes a sham—a method to suppress claims as opposed to expand access to justice.

Courts police this requirement in multiple ways. First, lack of neutral arbitrators can invalidate an arbitration agreement: "a third party decision maker and some decree of impartiality must exist for a dispute resolution mechanism to constitute arbitration."[119] Accordingly, failure of an arbitrator-selection process to ensure neutrality would constitute "a[n employer's] complete default of its contractual obligation to draft

[114] It is worth noting that the Garcia's case is not the only one of its kind. *See e.g.*, Order, Schippers v. Church of Scientology Flag Serv. Org., No. 11-11250-CI-21 (Fla. Cir. Ct. Mar. 7, 2012).

[115] Garcia v. Church of Scientology Flag Serv. Org., 2015 U.S. Dist. LEXIS 178033, at *33 (2015).

[116] Id.

[117] Sophia Chua-Rubenfeld & Frank Costa, *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2087, 2100-01 (2019); Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ARB. & MEDIATION 45, 56-58 (2016); Jessica Silver-Greenberg & Michael Corkery, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015) (discussing the *Garcia* case).

[118] Black's Law Dictionary (6th ed. 1990) p. 105, col. 1.

[119] Cheng-Canindin v. Renaissance Hotel Associates, 50 Cal. App. 4th 676, 687 (1996) (collecting cases).

arbitration rules and to do so in good faith."[120] In addition, the lack of neutral arbitrators can also support a court's refusal to enforce an arbitration provision on unconscionability grounds.[121] Indeed, this is one of the many way that unconscionability plays a vital "safety net" role,[122] leading to the disproportionate success of such claims in court.[123] Finally, courts can vacate an arbitration award "where there was evident partiality or corruption in the arbitrators or either of them."[124]

Garcia, critics argue, presents a problem because a court would not have been able to assess the neutrality of the selected arbitrators without making a constitutionally prohibited inquiry into religious doctrine. But this conclusion—one advanced by the court in *Garcia*—reverses the presumptions of the doctrine as applied to arbitrator selection. To see how, a 2007 New York Surrogate Court *Matter of Ismailoff*, where the court addressed an executed irrevocable inter vivos trust[125] that included the following arbitration provision:

> In the event that any dispute or question arises with respect to this Declaration of Trust, such dispute or question shall be submitted to arbitration before a panel consisting of three persons of the Orthodox Jewish faith, which will enforce the provisions of this Declaration of Trust and give any party the rights he is entitled to under New York law.[126]

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[120] Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (1999).

[121] *See, e.g.*, Velasquez v. S.B. Rest. Co., 2010 U.S. Dist. LEXIS 124453, *7-8 (2010); Littlejohn v. Timberquest Park at Magic, LLC, 116 F. Supp. 3d 422 (2015).

[122] *See* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006).

[123] For articles discussing the success of unconscionability in the arbitration context, see Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements To Arbitrate*, 2006 J. DISP. RESOL. 469; Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008); Sandra F. Gavin, *Unconscionability Found: A Look at Pre-dispute Mandatory Arbitration Agreements 10 Years After* Doctor's Associates, Inc. v. Casarotto, 54 CLEV. ST. L. REV. 249 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004).

[124] 9 U.S.C. 10(a)(1) & (2).

[125] In the Matter of Ismailoff, No. 342207, slip op. at 1 (N.Y. Sur. Ct. Feb. 1, 2007).

[126] *Id.*

The parties subsequently disputed the enforceability of the trust and one of the parties sought to initiate arbitration proceedings. However, the New York court held that the arbitrator qualification provision was unenforceable, holding that the First Amendment, which prohibits courts "from resolving issues concerning religious doctrine and practice,"[127] rendered the provision requiring the selection of three arbitrators of Orthodox Jewish faith unenforceable.[128] On this basis, the court deemed the arbitrator qualification provision unenforceable. Because the First Amendment prohibits inquiry into religious questions, the court simply could not enforce the arbitrator qualification clause; doing so would have ultimately required judicial analysis over which prospective arbitrators were "of the Orthodox Jewish faith."

This analysis ought to have controlled the outcome in *Garcia*. Determining which prospective arbitrators were "in good standing with the Mother Church"[129] presumably would require interrogation of religious doctrine, given that it seems most likely that interpreting and applying that standard both entails identifying what religious behaviors are necessary for good standing and then applying those religious standard to prospective arbitrators. As a result, it would be unconstitutional to enforce the arbitrator qualification clause—just as it was in *Matter of Ismailoff*.[130]

One can, of course, imagine the church responding that "good standing" is not a religious requirement, but simply denotes actual membership in the church. But if that were true, the arbitrator qualification provision would run afoul of a different doctrinal pitfall; by requiring members of the church to adjudicate a claim against the church, the arbitrator qualification clause would be unenforceable because the selected arbitrators would be non-neutral.[131] Indeed, it is precisely for this reason that parties to religious

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[127] *In the Matter of Ismailoff*, slip op. at 2.

[128] *Id.*

[129] Id. at *32-33.

[130] One can imagine the following counter-argument: the arbitrator qualification provision in *Garcia* does not require adjudication of a religious question, but simply asking the church whether the proposed arbitrators satisfied the theological requirements of good standing.

The problem with this argument is that it would empower one party to determine which prospective arbitrators were, and which were not, eligible to serve as members of the arbitral tribunal. Giving one party such authority would itself render the arbitration agreement unconscionable. *See* Zabrowski v. MHN Gov't Servs., 601 F. App'x 461, 463 (9th Cir. 2014); Dasteel, at 58 (discussing the holding of *Zabrowski*).

[131] *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 939 (1999); Cheng-Canindin v. Renaissance Hotel Associates, 50 Cal. App. 4th 676, 688 (1996).

arbitration submit disputes to a third-party religious dispute resolution providers; doing so avoids these twin challenges to arbitrator qualification provisions.

But the force of this argument goes one step further. Once a court has invalidated an arbitrator qualification or selection provision, there remains a question of remedy: should the court invalidate the entirety of the arbitration provision and have the dispute moved to a civil court, or should it simply sever the arbitrator qualification provision and use standard statutory procedures for judicial appointment of alternative arbitrators. The court in *Matter of Ismailoff* chose the latter option although that likely was an error.[132] Well-settled arbitration doctrine, at least under the FAA, instructs courts to invalidate the entirety of the arbitration agreement "where the designation of the arbitrator was 'integral' to the arbitration provision [and not] merely an ancillary consideration."[133] In cases of religious arbitration, it is quite likely that the arbitrator qualification provision is integral to the agreement given the *ex ante* preferences of the parties. Thus, in *Garcia*, there is good reason to think correct application of current arbitration doctrine should have led the court to invalidate the entire arbitration agreement. The court, however, did otherwise; unfortunately, incorrect application of the law often leads to dangerous consequences.[134]

Of course, *Garcia* is just one example—even if it is the recurring and favorite example of religious arbitration critics. Critics also argue that already existing private law defenses remain inadequate because a religious arbitration tribunal might apply religious law in a manner that would contravene the very substantive and procedural protections that civil law provides.

This worry plays out in a couple of different ways. First, with respect to

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[132] For an extended discussion of this argument, see Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3028-30 (2015).

[133] *See, e.g.*, Khan v. Dell Inc., 669 F.3d 350, 354 (3d Cir. 2012); *see also* Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000); Gutfreund v. Weiner (In re Salomon Inc. Shareholders' Derivative Litig.), 68 F.3d 554, 561 (2d Cir. 1995).

[134] In this context, Chua-Rubenfeld and Costa also worry that "[o]ther litigants are likely to fare even worse than did the Garcias" because many religious tribunals "have well-established and well-publicized rules of procedure, which will undermine a litigant's claim of procedural unconscionability" and illusory promise. Chua-Rubenfeld & Costa, at 2101-02. It is far from clear, however, that parties to religious arbitration agreements would be worse off because of these developments. Creating clear and well-established rules of procedure would appear to be a positive development—precisely the types of steps the law ought to incentivize in order to ensure a predictable and transparent arbitral process.

substantive law, religious arbitrators might fail to apply the applicable substantive legal rules to the dispute before them. This worry, in and of itself, is not unique to religious arbitration.[135] But the unique version of the worry flows from the fact that religious arbitration, by its very definition, requires arbitrators to "prioritize holy law over federal statutory law."[136] Indeed, many choice of law provisions explicitly require religious arbitrators to apply religious law to the submitted dispute.[137] This possibility, argue critics, is most "striking" in the context of "discrimination"[138] because "the doctrines of civil rights arbitration and religious arbitration collide in a way that severely threatens parties who have suffered discrimination."[139]

Two primary doctrines protect against arbitrators applying contractual choice of law provisions and thereby ignoring vital substantive legal rules. First, courts will not enforce choice of law provisions "if the substituted law . . . contradicts the public policy of the forum state."[140] Second, a court cannot compel arbitration of claims implicating federal statutory claims

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[135] *See generally* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961) (providing empirical evidence that the overwhelming majority of arbitrators believe they have authority to deviate from what the applicable legal rules).

[136] Chua-Rubenfeld & Costa, at 2096.

[137] *See, e.g.*, *Rules and Procedures*, Rule 3(a) BETH DIN AM., *available at* https://bethdin.org/wp-content/uploads/2019/08/RulesandProcedures.pdf ("In the absence of an agreement by the parties, arbitration by the Beth Din shall take the form of compromise or settlement related to Jewish law (p'shara krova l'din), in each case as determined by a majority of the panel designated by the Beth Din, unless the parties in writing select an alternative Jewish law process of resolution."); *Rules of Procedure for Christian Conciliation*, Rule 4, INST. CHRISTIAN CONCILIATION, *available at* https://www.instituteforchristianconciliation.com/ICC_Rules_v2019Jan.pdf. According to its rule, the Beth Din of America will typically enforce choice-of-law provisions identifying state law as governing a dispute. *See Rules and Procedures*, Rule 3(d) BETH DIN AM. ("[T]he Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law"); *see also Yona Reiss, Matneh Al Mah She'Katuv Ba'Torah Bi'Davar She'Bimammon*, 4 SHA'AREI TZEDEK 288, 295 (2003); Yaacov Feit, *The Prohibition Against Going to Secular Court*, 1 J. BETH DIN AM. 30, 41 (2012).

[138] Chua-Rubenfeld & Costa, at 2088.

[139] Id. at 2120.

[140] *See* 15 CORBIN ON CONTRACTS §79.7 & n.1 (collecting cases); §83.9 & n.2 (same). The use of the public policy exception to invalidate a choice of law provision in an arbitration agreement is fundamentally different than using public policy to invalidate an arbitration award. Most notably, it is not subject—to the extent it applies to public policy—to the Supreme Court's holding in *Hall Street Associates v. Mattel* that courts may only vacate awards on statutory grounds. *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

where it concludes that one of the parties will not be able to "effectively . . . vindicate its statutory cause of action in the arbitral forum."[141] Thus, courts will not enforce arbitration agreements which include a choice of law provision where "choice-of-forum and choice-of-law clauses operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies."[142] It is true that these two doctrines would be difficult to apply in the context of religious arbitration. Ultimately, to invalidate a religious choice of law provision on either public policy grounds or because, in tandem with an arbitration provision, it prevented the effective vindication of federal statutory rights would require a judicial determination as to the content of the religious law in question. Where a party sought to compel arbitration based upon an agreement that required arbitrators to apply religious law, a court would typically be unable to evaluate prior to arbitration proceedings whether the religious law in question violated state public policy or prevented effective vindication of federal statutory rights without resolving a constitutionally prohibited religious question.[143]

Second, with respect to procedural law, the religious question doctrine threatens to leave courts unable to enforce the typical procedural protections available to parties in religious arbitration. Or, put in more extreme terms, "religious arbitrations are all but unreviewable under the Federal Arbitration Act because courts will not review ecclesiastic rules or procedures for fairness."[144] Most concerning to critics is the possibility that the religious question would handcuff courts in their application of the unconscionability doctrine[145]—a doctrine that has ensured arbitral rules and procedures accord with general conceptions of arbitral justice.[146] This challenges stems from

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[141] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985); *see also Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 89-90 (reiterating the "effective vindication" doctrine, but finding it inapplicable given the underlying facts before the Court); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (same); *see generally* Thomas J. Lilly Jr., *The Use of Arbitration Agreements to Defeat Statutory Rights: What Remains of the Effective Vindication Doctrine After* American Express v. Italian Colors Restaurant, 61 WAYNE L. REV. 301 (2016);

[142] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

[143] Oddly enough, Chua-Rubenfeld and Costa remain open to the possibility that "Religious arbitration of secular statutory rights may well be a rare example of ineffective vindication" without considering the impact of the religious question doctrine on the scope of its applicability. *See* Chua-Rubenfeld & Costa, at 2104.

[144] Dasteel, 51.

[145] Dasteel, XX; Chua-Rubenfeld & Costa, XX.

[146] *See generally* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 Ala. L. Rev. 73 (2006). As a number of scholars have demonstrated, courts have been particularly keen on deploying the unconscionability doctrine in the context of

the structure of unconscionability doctrine;[147] courts applying unconscionability doctrine require parties to demonstrate both "procedural unconscionability"—that is, unconscionability that flows from the bargaining process[148]—and "substantive unconscionability"—that is contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent."[149] While courts, when asked to compel arbitration, can evaluate whether a religious arbitration agreement is procedurally unconscionable by simply assessing the existence of failures in the bargaining process, judicial application of substantive unconscionability presents a more formidable problem; in the words of one critic, "[b]ecause [a] court could not (and should not) become entangled in the religious doctrines . . . [a] court could make no ruling on whether the [arbitral] procedures are substantively unconscionable."[150] In this way, as with doctrines policing the substance of choice of law provisions, the

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arbitration. *See, e.g.*, Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1440–41 (2008) (describing statistical data on rise in application of unconscionability doctrine in arbitration cases); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194-96 (2004) (summarizing statistics on increase in use of unconscionability doctrine in arbitration cases).

[147] Worldwide Underwriters Ins. v. Brady, 973 F.2d 192, 196 (3d Cir. 1992). ("Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions."); *see generally* Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (providing this two-track framework for the unconscionability doctrine).

[148] Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999) (defining procedural unconscionability as "pertain[ing] to the process by which parties reach an agreement, as well as the form of an agreement, including the use of fine print or convoluted language."); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003) (citation omitted) (describing procedural unconscionability as encompassing inequalities in bargaining power or "hidden" contractual provisions which "preclude[] the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract"). One consideration courts often take into account when assessing procedural unconscionability is whether the agreement in question is a contract of adhesion. *See Armendariz v. Foundation Health Psychcare Services*, 24 Cal.4th 83, 113 (Cal. 2000).

[149] *Harris*, 183 F.3d at 181 (citation omitted). Courts have identified a wide-range of substantive unconscionable terms. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1437-39 (2008) (listing examples of substantively unconscionable contractual terms); *see also* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 Ohio St. J. on Disp. Resol. 757, 803-07 (2004) (listing specific traits that may brand arbitration agreements as unconscionable).

[150] Dasteel, at 57.

religious question doctrine presents an obstacle to courts when determining whether or not to enforce an arbitration agreement precisely because it requires inquiry into the content of religious law; without evaluating the content of religious law, there would be no way to determine whether its provisions are sufficiently one-sided to trigger an unconscionability defense.

No doubt these criticisms present an important challenge to the vitality of religious arbitration. But by adapting current private law doctrine to these unique conditions, courts can leverage existing doctrinal tools to plug legal holes generated by public law. Indeed, while these criticisms—both with respect to substantive as well as procedural protections—are accurate when a court first evaluates the enforceability of an arbitration agreement, they fail to provide a complete picture of how private law protections might become available later in the arbitration proceedings. While a court may not—prior to the onset of arbitration proceedings—be in a position to determine whether religious law will violate public policy, prevent the effective vindication of federal statutory rules or render a substantively unconscionable result, the *application* of religious law will ultimately expose any such failings. Indeed, once the arbitral tribunal applies religious law to the facts of the case, its decisions—both its intermediate determinations during the proceedings and its final judgment reflected in its award—will demonstrate whether the religious law, as applied, violated public policy, frustrated federal statutory rights or generated a one-sided result. In turn, during the course of the proceedings, a party will be able to gather the information it needs in order to substantiate the very claims previously foreclosed by the religious question doctrine.

Such back-end legal protections simply require mining current private law doctrines with respect to waiver.[151] Generally, parties cannot challenge the enforceability of an arbitration agreement once they have begun participating in arbitration proceedings addressing the merits of the underlying dispute.[152] Accordingly, courts require parties to "timely object" to the enforceability of an arbitration agreement; failure to do so would render any claims against the enforceability of the arbitration agreement

[151] I have explored this argument previously in the context of unconscionability. *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1301-03 (2011).

[152] *See* Azcon Constr. Co. v. Golden Hills Resort, 498 N.W.2d 630, 632, 1993 S.D. LEXIS 32, *6 (outlining the various judicial approaches to the waiver doctrine); *see generally* Eleanor Grossman, *Participation in arbitration proceedings as waiver of objections to arbitrability under state law*, 56 A.L.R. 5th 757 (2019). It is worth noting that states vary in terms of precisely at what point the waiver doctrine is triggered. *See* id. ¶ 2b.

waived.[153] In the typical case, the logic is quite understandable:

> A person objecting to arbitration must timely raise the objection so a party seeking arbitration can make an informed choice whether to pursue arbitration with the risk that the dispute would be found nonarbitrable or to abandon arbitration and pursue other remedies. To allow a claim of no agreement to arbitrate after the hearing is over results in a waste of time and money.[154]

Accordingly, to avoid the waiver doctrine, "[a]n objection should occur 'at the earliest possible moment' to save the time and expense of a possibly unwarranted arbitration.[155]

But religious arbitration is far from typical precisely because, prior to the arbitration proceedings, courts lack the constitutional capacity to assess certain challenges to the religious arbitration agreement's enforceability. Indeed, in the context of religious arbitration, the 'earliest possible moment' may often not be prior to the onset of arbitration proceedings; given the religious question doctrine, parties may not be able to substantiate their claims of substantive unconscionability, frustration of federal statutory rights or violation of public policy until well into the arbitration proceedings.[156] In such circumstances, courts ought to apply the waiver doctrine in a manner that takes the constitutional limitations into account and deem objections to be timely so long as they are made as soon as judicially cognizable evidence becomes available.[157]

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[153] *See infra* note 156.

[154] Helmerichs v. Bank of Minneapolis & Trust Co., 349 N.W.2d 326, 328, 1984 Minn. App. LEXIS 3203, *5 (1984).

[155] First Health Group Corp. v. Ruddick, 911 N.E.2d 1201, 1210 (Ill. App. Ct. 2009).

[156] *See, e.g.*, Salsitz v. Kreiss, 761 N.E.2d 724, 733 (Ill. 2001) ("A timely objection preserves the right to challenge an award, even where the parties participate in the arbitration proceedings."**)**; Marino v. Writers Guild of Am., E., Inc., 992 F.2d 1480, 1484 (9th Cir. 1993) (noting that "a party *may not sit idle* through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse" (emphasis added)).

[157] *Cf.* Houston Vill. Builders v. Falbaum, 105 S.W.3d 28, 35 (Tex. App. 2003) (holding that appellee's failure to investigate is not waiver of claim for evident partiality); Britz, Inc. v. Alfa-Laval Food & Dairy Co., 34 Cal. App. 4th 1085, 1097 (Cal. App. 5th Dist. 1995) (no waiver of claim for evident partiality based upon facts only discovered after participating in arbitration); *see also* Ossman v. Ossman, 560 N.Y.S.2d 557, 558 (N.Y. App. Div. 1990) (finding that claims of partiality were not waived because petitioner discovered relationship only after arbitration had begun); Middlesex Mut. Ins. Co. v.

Unfortunately, critics of religious arbitration—instead of exploring private law mechanisms to protect parties to religious arbitration—have gone in the opposite direction. In so doing, they have advocated for expanding contemporary constitutional restrictions in order to limit or prohibit judicial enforcement of religious arbitration awards. Each such argument relies on a novel reinterpretation of the state action theory[158]—without such an argument, no claim that religious arbitration violates constitutional prohibitions could get out of the gate.[159] And although courts have uniformly rejected such arguments,[160] plenty of scholars continue pressing arguments that the enforcement of arbitration awards constitutes state action.[161] Critics of religious arbitration, however, have taken these arguments one step further, merging these arguments with First Amendment claims that generate not only controversial, but also dangerous outcomes threatening the very possibility of religious commerce. As a result, instead of alleviating the concerns facing parties to religious arbitration agreements, their proposals inject additional uncertainty into religious commercial markets generally and thereby undermine many of the very interests they seek to protect.

Levine, 675 F.2d 1197, 1204 (11th Cir. 1982) (holding that insurers did not waive their right to contest alleged impartiality of neutral arbitrator by participating in arbitration "because the insurers did not discover evidence of partiality prior to arbitration").

[158] Brian Hutler, *Religious Arbitration and the Establishment Clause*, 33 OHIO ST. J. ON DISP. RESOL. 337, 350-65 (2018);Sophia Chua-Rubenfeld & Nicholas Costa, *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2086, 2111-15 (2019); Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ARB. & MEDIATION 45, 60-61 (2016).

[159] *See, e.g.*, Genas v. Dep't of Corr. Servs., 75 F.3d 825, 831 (1996) ("To prevail on [a] Free Exercise claim, [a party] must first show that a state action sufficiently burdened his exercise of religion." (citing Sherbert v. Verner, 374 U.S. 398, 403 (1963)).

[160] CHRISTOPHER DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 18 (3d ed. 2013) (noting that "[a]ll federal courts that have addressed the issue have held that commercial arbitration is not 'state action' to which constitutional protections apply").

[161] *See, e.g.*, Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1067 (2000); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 42 (1997); Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U. L REV. 1, 48-49 (discussing the public function test as applied to commercial arbitration).

I have elsewhere argued that even if one were inclined to embrace an argument that enforcement of arbitration awards constituted state action, there are reasons to reject such an argument in the context of religious arbitration. *See* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3035-38 (2015).

A. *Nondelegation and Legal Sophistication*

To start, consider Brian Hutler's article, *Religious Arbitration and the Establishment Clause*.[162] Hutler contends that "enforcement of religious arbitration agreements may be an impermissible delegation under the Establishment Clause nondelegation doctrine."[163] As Hutler notes, the Supreme Court articulated the nondelegation doctrine in the 1980s, most notably in two seminal cases. The first, *Larkin v. Grendel's Den*,[164] invalidated on Establishment Clause grounds a Massachusetts statute that allowed schools and churches to veto applications for a liquor license within 500 feet of their premises. The second, *Kiryas Joel v. Grumet*,[165] struck down a New York state statute creating a public-school district geographically designed specifically for a particular religious community. In both instances, the Supreme Court concluded that the respective legislation created a "'fusion of governmental and religious functions' by delegating 'important, discretionary governmental powers' to religious bodies, thus impermissibly entangling government and religion."[166] At bottom, the Court concluded that a state "may not delegate its civic authority to a group chosen according to a religious criterion."[167]

Hutler merges this constitutional principle with *Shelley v. Kraemer*, the Court's decision prohibiting, on equal protection grounds, judicial enforcement of racially discriminatory restrictive covenants.[168] *Shelley* is regarded as the high watermark for the state action doctrine; even though the racially restrictive covenant was an element of a private agreement, the Court held that judicial enforcement of those private agreements constituted state action.[169] However, courts have generally refused to apply *Shelley* outside its context.[170] Indeed, when addressing claims that arbitration constitutes state action, courts have responded by emphasizing the differences between the facts of *Shelley* and the enforcement of arbitration

[162] Brian Hutler, *Religious Arbitration and the Establishment Clause*, 33 OHIO ST. J. DISP. RESOL. 337 (2018).

[163] Id. at 353.

[164] 459 U.S. 116, 126 (1982).

[165] 512 U.S. 687 (1994).

[166] Kiryas Joel v. Grumet, 512 U.S. 687, 696-97 (1994) (quoting Larkin v. Grendel's Den, 459 at 126, 127).

[167] Id. at 698.

[168] Shelley v. Kraemer, 334 U.S. 1 (1948).

[169] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

[170] *See* Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 84 (1998).

awards.[171]

Hutler, however, sees utility in the analogy for a number of reasons,[172] including the following:

> Judicial enforcement of religious arbitration agreements may also result in patterns of governmental favoritism toward certain religious groups, since some religious groups may be less sophisticated than others in drafting the agreements or in seeking their enforcement by courts, leaving them disadvantaged relative to other groups who have the requisite legal experience to execute the agreements.[173]

In this way, Hutler argues, judicial enforcement of religious arbitration agreements qualifies as constitutionally impermissible state action under *Kiryas Joel* because it constitutes a "religious-specific delegation."[174]

It is worth noting that any argument building on the *Kiryas Joel* interpretation of nondelegation is likely to be inherently fraught. The decision itself argued that New York State's delegation was constitutionally problematic, in part, because it had "no assurance that the next similarly situated group seeking a school district of its own will receive one."[175] Of course, it was never clear why the Court simply could not have remedied this apparent concern if, in the future, a similarly situated group were denied the very benefit Kiryas Joel received.[176]

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[171] *See, e.g.*, Smith v. American Arbitration Ass'n, 233 F.3d 502, 507 (2000) (Posner, J.).

[172] Hutler at 357 ("Enforcement of religious arbitration agreements may impact the legal rights of individual litigants, especially if the parties' respective religious beliefs or affiliations may affect the outcome of the arbitration. In addition, by analogy with redlining, consistent judicial enforcement of religious arbitration agreements may result in the fracturing of the legal landscape, whereby religious and nonreligious citizens adjudicate their private law disputes in separate legal venues.").

[173] Id.

[174] Hutler separately explores precisely which forms of religious arbitration institutions, on his view, might qualify as religious institutions for the purposes the nondelegation doctrine. Id. at 358-61.

[175] Kiryas Joel v. Grumet, 512 U.S. 687, 703 (1994).

[176] Kiryas Joel v. Grumet, 512 U.S. 687, 727 (1994) (Kennedy, J., concurring) ("Nor is it true that New York's failure to accommodate another religious community facing similar burdens would be insulated from challenge in the courts. The burdened community could sue the State of New York, contending that New York's discriminatory treatment of the two religious communities violated the Establishment Clause."); Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 60 (1996) ("The Court offered no

But Hutler's argument takes *Kiryas Joel* one step further. On his argument, even though the law currently provides an assurance that all forms of arbitration agreements will, in fact, be enforced—the very assurance that was purportedly missing in *Kiryas Joel*—the logic of *Kiryas Joel* still ought to apply. And the reason why the current arbitral regime still constitutes constitutionally prohibited favoritism is because the varying degrees of contractual sophistication developed within different faith communities creates asymmetries prohibited by the First Amendment.

If judicial enforcement of religious agreements is constitutionally prohibited because of asymmetries in contract drafting, then Hutler's argument would appear equally applicable to all forms of religious commerce. Markets for religious goods and services are, all told, predicated on contractual arrangements that are enforced under the neutral-principles framework embraced by the Supreme Court.[177] But, if Hutler is correct, judicial enforcement of those agreements may violate the Establishment Clause, bringing those commercial markets to a screeching halt.

Indeed, it is worth pausing over this conclusion. In adopting the neutral-principles framework, the Court encouraged parties entering religious commercial agreements to leverage "the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties."[178] Accordingly, increasingly sophisticated drafting was precisely what the Court identified as the way forward for religious commerce. And yet it is exactly that "genius of private-law systems" the Hutler holds against religious commerce; because different faith communities may adapt to the religious commercial marketplace at varying levels of sophistication, the legal rules affording all parties access to judicial enforcement ought to be construed as so asymmetrical as to trigger a constitutional prohibition. Indeed, by expanding the scope of public law's constitutional prohibitions, Hutler's argument threatens to undermine the very private law foundations that not only make religious arbitration possible, but make the entire religious commercial marketplace possible as well.

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response to Kennedy's argument, because (I think it fair to say) there is no response. Although it might be difficult to show, in a future case, that the legislature should have granted a school district just as it did to the Satmars, this evidentiary problem is merely difficult - the Court writes as if it is insurmountable.").

[177] *See supra* Part II(a).

[178] Jones v. Wolf, 443 U.S. 595, 603 (1979).

B. *Substantial Burdens and Freedom of Contract*

Critics of religious arbitration not only attack religious arbitration from the Establishment Clause side of the religion-clause divide; some have argued that religious arbitration undermines religious liberty and thereby violates free exercise prohibitions.

The earliest version of this argument, advanced by Nicholas Walter, contends that enforcing religious arbitration agreements and awards violates the Free Exercise Clause.[179] According to Walter, the problem presented by religious arbitration is that a party may be perfectly willing to enter a religious arbitration agreement; but by the time arbitration proceedings actually begin—which can take place many years later—that party may no longer have the same faith commitments. As a result, enforcing religious arbitration agreements and awards undermines an individual's right to "change one's beliefs."[180]

Walter's argument suffers from two initial problems. First, Walter fails to advance a theory of state action so as to convert judicial enforcement of a private agreement into a viable constitutional claim. In addition, as Walter notes, under prevailing doctrine, laws that are neutral and generally applicable do not violate the Free Exercise Clause. In turn, it seems extremely unlikely to view the enforcement of religious arbitration agreements and awards in the same manner as their secular counterparts as violating the Free Exercise Clause.[181]

These failings, however, have been addressed more recently by Jeff Dasteel, who has argued that enforcement of religious arbitration provisions in contracts of adhesion violate the Religious Freedom Restoration Act (RFRA).[182] Pursuant to RFRA, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless that government imposition of a substantial burden can satisfy strict scrutiny.[183] Dasteel's primary target is

[179] *See* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012).

[180] Walter, at 549.

[181] Walter at 565 (describing this second rejoinder as "probably the strongest that can be made in defense of religious arbitration" and providing a response).

[182] Dasteel at 58-65.

[183] 42 U.S.C. §2000b-1(a) & (b). To be sure, I have elsewhere argued that courts would do well to construe RFRA's strict scrutiny as imposing a somewhat lower standard that strict scrutiny in other contexts. *See* Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539 (2015).

contracts of adhesion.[184] And, as noted above, his concern is that the religious question doctrine prevents courts from adequately assessing whether religious arbitration provisions in contracts of adhesion are, in fact, truly voluntary.[185] Accordingly, Dasteel argues that the "weaker party" should be able to assert a RFRA defense in order to avoid enforcement of religious arbitration provisions "included in contracts of adhesion when there is a disparity in bargaining power."[186] Under such circumstances, the reluctant party may be forced to participate in religious arbitration proceedings that make use of religious rules not in keeping with its religious commitments. Such circumstances—being forced to participate in such religious proceedings—could "substantial[ly] burden" a reluctant and "weaker" party's religious exercise.[187]

There are a number of reasons to be dubious of Dasteel's creative extension of RFRA. The idea that judicial enforcement of a private agreement renders the impact of the agreement as attributable to the state is unlikely.[188] And, as described above, private law can still avoid the consequences of the religious question doctrine and provide adequate opportunities for parties to raise standard contract law defenses to enforcement of religious arbitration agreements.[189]

But Dasteel's argument is problematic for another reason—the strange fit between the perceived problem and the proposed remedy. Dasteel is emphatic that RFRA ought not apply where the parties enter into the religious arbitration agreement voluntarily;[190] however, it is only where

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[184] Dasteel, at 60-61.

[185] Id. at 61 ("The unconscionability defense under Section 2 of the FAA does not work for religious objections to religious arbitration agreements because the non-interference doctrine largely disables the objecting party from showing substantive unconscionability to religious arbitration. Thus, even where the indicia of consent are weak, under existing case law courts nonetheless have forced parties to engage in religious arbitration.").

[186] Dasteel, at 46.

[187] Id.

[188] This is the analog to the state action doctrine discussed above. *See supra* XX. RFRA incorporates the state action requirement into its text by only prohibiting *government* burdens on religious exercise. 42 U.S.C. §2000b-1(a); *see also* Elane Photography, LLC v. Willock, 284 P.3d 428, 444-45 (2012) (holding the New Mexico Religious Freedom Restoration Act to be "applicable only in cases that involve a government agency as an adverse party in the litigation" and therefore did not apply in a suit between private parties).

[189] *See supra* Part II(a).

[190] *See* Dasteel at 46 ("For parties who knowingly and voluntarily enter into religious arbitration agreements, the adjudication of both religious and secular disputes using religious principles and sectarian arbitrators is entirely consistent with the free exercise of

parties involuntarily entered such agreements—where they have been "coerced" into participating—that RFRA ought to apply. But Dasteel fails to provide any explanation as to how a court might determine whether the parties entered into the agreement volitionally. Indeed, the entire problem he ostensibly identifies is that courts cannot police volition because the religious question doctrine prohibits courts from assessing substantive unconscionability. Adding a RFRA layer to that analysis fails to solve that problem. Dasteel's proposal to limit RFRA defenses to involuntary agreements would encounter the same problem; a court would be unable to determine whether RFRA ought to apply because it still would be prohibited from assessing substantive unconscionability on account of the religious question doctrine.

Indeed, Dasteel further exacerbates this problem in an attempt to explain the potential applicability of RFRA to *Garcia*. On his account, the Garcias could have made use of RFRA as a defense to judicial enforcement of the religious arbitration provision in their contract with the Church of Scientology.[191] But this is far from obvious given that, when the Garcias executed the arbitration provision, they were committed Scientologists;[192] in turn, there appears to be good reasons to assume that *ex anta* their initial agreement to arbitrate future disputes with the Church of Scientology was wholly volitional.

In response, Dasteel makes a textual argument: "RFRA does not on its face require consideration of whether government action would have burdened religion at some time in the past. It appears to inquire only whether government action (here, compelling arbitration) would burden the exercise of religion now."[193] Accordingly, Dasteel claims that courts need not inquire whether the *execution* of an arbitration agreement substantially burdened a party's religion, only whether the *enforcement* of the arbitration agreement burdens a party's religion.

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religion, and the courts should continue to enforce the resulting religious arbitration awards under the Federal Arbitration Act and analogue state arbitration acts."); id. at 66 ("Application of the RFRA to religious arbitration agreements under the FAA also does not affect the right of parties to voluntarily submit their disputes to religious arbitration. Voluntary religious arbitration agreements should be enforced under Section 2 of the FAA even though the grounds to review any arbitral award may be narrower than for secular arbitration agreements.").

[191] Dasteel, at 64 ("Had the RFRA been interposed as a defense, the outcomes of cases with facts similar to . . . *Garcia v. Scientology* might have come out differently, depending on the applicable state law of procedural unconscionability.").

[192] *See* Garcia v. Church of Scientology Flag Serv. Org., 2015 U.S. Dist. LEXIS 178033, *2-*4 (2015).

[193] Id. at 65 n.100.

This is a bait-and-switch. Dasteel seeks to limit RFRA to agreements that were volitional *at the time of execution*. But when it comes to considering whether a party's religious affiliation and faith commitment indicate that the execution of an agreement was voluntary, Dasteel dismisses those considerations as irrelevant to a RFRA inquiry; RFRA, he tells us, only cares about the nature of the substantial burden *at the time of enforcement*. It is hard to see how he can have it both ways. It is only where there is no consent at the time of execution that compelling arbitration constitutes a *government imposition* of a *substantial burden* on religious exercise; it is only in such a case that the neutral principles "run[s] roughshod over the objecting parties' freedom of religion"[194] because the weaker party is being "coerced" to participate involuntarily in religious proceedings.[195] However, if there was consent at the time of execution, there would be no substantial burden (it would flow from the free choice at the time of execution) and it certainly would not be a government imposition of a substantial burden (it would be result of the parties' choice to execute the agreement).

Moreover, this inconsistency would place courts in an impossible position when applying RFRA. Not only would the religious question doctrine undermine the ability of courts to assess whether the parties entered a religious arbitration agreement voluntarily—and therefore whether RFRA ought to apply—but Dasteel's reading of RFRA would further disable courts from leveraging contextual information—like religious affiliation and faith commitment—to inform an already challenging inquiry into the voluntary nature of the agreement. This double disability cements the failure of Dasteel's theory. If courts cannot determine whether the parties voluntarily entered into the religious arbitration agreement, then there is no way to determine whether there is a viable RFRA challenge.

Of course, maybe this simply means that, irrespective of the degree of consent at the time of execution, RFRA should prohibit courts from requiring a party to participate in religious arbitration proceedings where that party no longer believes in the relevant religious principles—indeed, finds imposition of those religious principles a substantial burden on its present form of religious exercise. While clearly not quite what Dasteel has in mind, this would bring his argument in line with Walter's argument by

[194] Id. at 59.

[195] Id. at 62; *see also* id. ("*Absent consent of the parties*, there can be little doubt that a court could not order objecting parties to engage in religious arbitration." (emphasis added)).

simply updating Walter's proposed free exercise claim with a RFRA claim; accordingly, enforcement of religious arbitration agreements would present a threat to religious liberty because it prevents parties from fully changing the nature of their religious commitments.[196] But that argument, at bottom, is not just about religious arbitration; it is a frontal attack on the very possibility of religious commerce because any religious commercial agreement might, in the future, prevent a party from changing its religious commitments. Agreements to, in the future, sell kosher products or employ a pastor could—in principle—serve to restrict someone's religious choices in the future. A party who willingly entered such agreements—or any agreement that integrated both commercial and religious elements—might find the required performance religiously objectionable when it came time for enforcement. In turn, if enforcement of religious arbitration agreements can violate principles of religious liberty, then so can any agreement to enter religious commercial transactions. And a party seeking to assert such a defense would simply have to demonstrate a change in religious views subsequent to contract execution, wreaking havoc on the religious commercial marketplace.

This is precisely why private law has imposed such strict limitations on contract doctrines that allow parties to avoid contract enforcement based upon changed circumstances.[197] Maybe most notable among such doctrines is contract impracticablity, which allows parties to discharge their duties based upon the "the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made."[198] But the litany doctrinal limitations on this defense have made its application extremely rare[199]—and with good reason; expansive application of contract defenses predicated on post-execution changes in circumstances would threaten the predictability of commercial transactions and undermine the ability of contracts to play their risk-allocation function.[200] Attempts to aggressively extend the reach of public law—via religious liberty defenses—beyond

[196] Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 549-52 (2012).

[197] *See generally* Deborah F. Buckman, *Construction and Application of Restatement Second, Contracts § 261: Discharge by Supervening Impracticability*, 104 A.L.R. 6th 303 (XXXX).

[198] RESTATEMENT (SECOND) OF CONTRACTS §261.

[199] *See* Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 382 n.261 (noting that "[t]here is a 'defense' of impossibility or impracticability, but these cases are rare").

[200] *See generally* John D. Wladis, Impracticability as Risk Allocation: The Effect of Changed Circumstances Upon Contract Obligations for the Sale of Goods, 22 GA. L. REV. 503 (1988).

what private law defenses allow would therefore do well to think twice; not only are the underlying concerns for such doctrinal innovations misguided, but they would serve to undermine the ability of parties to enter predictable and enforceable agreements that stand at the crossroads of religion and commerce.

C. *Reverse Entanglement and Identifying Religious Commerce*

Maybe the most thoughtful attempt to leverage constitutional constraints to regulate religious arbitration comes from Sophia Chua-Rubenfeld and Nicholas Costa.[201] As described above, Chua-Rubenfeld and Costa are concerned that courts cannot adequately regulate religious arbitration through private law mechanisms.[202] I have tried to explain why I believe these misgivings are at best overblown and at worst misguided.[203]

But the argument pressed by Chua-Rubenfeld and Costa goes beyond criticism of the available private law doctrines. It also sees religious arbitration as violating core disestablishment concerns, specifically what they term the "reverse-entanglement principle."[204] Boiled down to its essentials, the principle is intended to ensure that courts "insulat[e] secular law from religious interference."[205] In this way, it is the "reverse in the sense that commentators and courts have traditionally worried about protecting religious tribunals from the state, and not the other way around. Here, the entanglement problem is that religious adjudication threatens the integrity of secular law." [206]

In so doing, Chua-Rubenfeld and Costa improve on prior constitutional criticism of religious arbitration. First, they argue for a narrower vision of state action, avoiding the attendant pitfalls of hitching their argument to *Shelley v. Kraemer.*[207] Second, they expressly recognize the importance of limiting the reverse entanglement principle so as to allow for the continued functioning of various forms of religious commerce.[208] But notwithstanding these aspirations, the fundamental problem with the reverse-entanglement

[201] Sophia Chua-Rubenfeld & Nicholas Costa, *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2086 (2019).
[202] Id. at 2099-2113.
[203] *See supra* XX-XX.
[204] Id. at 2105.
[205] Id. at 2107.
[206] Id. at 2107-11.
[207] Id. at 2111-15.
[208] Id. at 2117-19.

principle is that it fails to provide adequate guidance as to which disputes can be arbitrated and which disputes can be resolved in court. In turn, it is likely to leave parties without any certainty as to the enforceability of their agreements; indeed, it may in fact leave many religious commercial agreements without any forum for interpretation and enforcement.

This consequence of the reverse-entanglement principle flows directly from its reinterpretation of the underlying Supreme Court doctrine. According to Chua-Rubenfeld and Costa, the reverse-entanglement principle derives from the distinction drawn in two of the Court's church property cases, *Serbian Eastern Orthodox Diocese v. Milivojevich* and *Jones v. Wolf*.[209] In *Serbian*, the Court overturned a decision of the Illinois Supreme Court, concluding that the decision violated the First Amendment by injecting itself into a dispute over who was the true Diocesan Bishop.[210] By contrast, in *Jones*, the Court affirmed the Georgia Supreme Court's use of the neutral principles of law framework when determining ownership of the Vineville Church.[211]

Reading these two cases together, Chua-Rubenfeld and Costa conclude that "[t]he principle undergirding both *Serbian* and *Jones* directly implicates religious arbitration" because, on their reading of *Jones*, "the Establishment Clause bars religious interpretation of secular law as much as it bars secular interpretation of church doctrine."[212] In turn, the difference between the two cases is that "the disputed provision in *Serbian* was of a religious nature, whereas the disputed provision in *Jones* was purely secular."[213] It is for this reason that in *Serbian*, the Court concluded that adjudicating the claim violated the Establishment Clause; by applying secular rules to a religious dispute, the Illinois Supreme Court had impermissibly "entangle[ed] religious and secular legal traditions."[214]

By contrast, Chua-Rubenfeld and Costa interpret the Court in *Jones* to have determined that the underlying case was secular in nature and therefore authorized the use of the neutral principles. Put succinctly, "secular disputes call for the application of secular legal principles" whereas

[209] Id. at 2107-2111.

[210] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

[211] Jones v. Wolf, 443 U.S. 595 (1979).

[212] Sophia Chua-Rubenfeld & Nicholas Costa, *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2086, 2107-2111 (2019).

[213] Id. at 2109.

[214] Id.

"religious disputes call for the application of religious principles."[215] Accordingly, the Court approved of the Georgia Supreme Court's attempt to use neutral principles of law to resolve the underlying dispute.

The fundamental problem, however, with this interpretation is that it misconstrues the distinction at the center of the Court's church property cases. In justifying their reading of *Jones* as supporting the proposition that "secular disputes call for the application of secular legal principles," Chua-Rubenfeld and Costa cite the *Jones* Court's statement that "'in determining whether the [church] document indicates that the parties have intended to create a trust,' a 'civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts.'"[216] But read in context, this sentence is not about a broad entanglement prohibition against 'applying religious legal principles' to 'secular disputes.' It is a prohibition against civil adjudication of religious questions.[217] This point is clear from the immediately preceding paragraph that identifies the benefits of the neutral principles of law framework in its ability "to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[218] It is also clear from the sentences that immediately follow, which emphasize that the problem the Court seeks to avoid is "the interpretation of the instruments of ownership" by a "civil court to resolve a religious controversy."[219] And it is also clear from the subsequent paragraph where the *Jones* Court once again applauds the neutral principles of law framework because it allows "States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."[220] In this way, the Court is not concerned about whether the underlying dispute is *religious* or *secular*. The Court is concerned whether adjudication the dispute requires resolving a *religious question*.

This subtle category shift underlying the reverse-entanglement principle is not merely a mistaken interpretation of the case law. It introduces categories—"religious dispute" and "secular dispute"—that, by their nature, threaten to unsettle the possibility of predictable and enforceable religious commerce. To see why, we need to remember that in order to argue that religious arbitration can violate the Establishment Clause, Chua-Rubenfeld

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[215] Id.

[216] Id. at 2109.

[217] For more on the evolution of this doctrine, see Michael A. Helfand, *Litigating Religion*, 92 B.U. L. REV. 493 (2013).

[218] Jones v. Wolf, 443 U.S. 595, 603 (1979).

[219] Id. at 604.

[220] Id. (citation omitted).

and Costa contend that religious adjudication of secular disputes constitute prohibited entanglement. But the converse is also true on their account. The reverse-entanglement principle would not only prohibit religious adjudication of secular disputes, but secular adjudication of religious disputes. However, this category of religious disputes—one that never actually existed in *Jones*—lacks any meaningful definition.

For their part, Chua-Rubenfeld and Costa flag the lack of definition: "This Comment does not offer a definition or theory of what makes some disputes 'secular' as opposed to 'religious.'" [221] They take solace, however, in the claim that "As the Court seemed to do in Jones, we simply maintain that such a distinction can be drawn, and that such a distinction is meaningful in the Establishment Clause context. See Jones v. Wolf, 443 U.S. 595, 603 (1979) (suggesting that "reversionary clauses and trust provisions" contained in church documents lend themselves to secular interpretation)."[222] But this reference to *Jones* once again misses the mark. The quoted sentence from *Jones* simply reinforces the fact that what the Court sought to prohibit is the civil adjudication of religious questions—paving the way for civil adjudication of clauses and provisions that do not require religious interpretation. The Court did not seek to prohibit the secular adjudication of "religious disputes"; indeed, it never conjured up the category of a "religious dispute" as a legally relevant category.

But once saddled with these artificial categories of "religious" and "secular" disputes, the reverse-entanglement principle threatens the ability of courts to enforce any religious commerce; any enforcement of an agreement that has a religious component—whatever that might be—could potentially be prohibited under the reverse-entanglement principle. As Chua-Rubenfeld and Costa note, "some contractual disputes will be difficult to categorize as secular or religious. In those cases, the reverse-entanglement principle's verdict turns on how one first characterizes a particular dispute."[223] The idea that the enforceability of religious commerce would turn on "how one first characterizes a dispute" would, no doubt, unsettle the religious commercial marketplace. No two parties could have confidence that any given religious commercial agreement would be enforceable because they would lack the requisite confidence, *ex ante*, as to how a particular agreement that mixed both religious and commercial aspirations would be classified by even the most well-meaning court.

[221] Id. at 2118 n.185.
[222] Id.
[223] Id. at 2118 n.185.

Chua-Rubenfeld and Costa certainly attempt to flesh out how a court might, in some circumstances, determine whether a particular dispute is either religious or secular. Thus, for example, they conclude that the reverse-entanglement principle is not implicated "when courts uphold decisions of religious tribunals applying religious law" and therefore "a court could compel specific performance of a contract to deliver kosher meat, as defined by a Jewish beth din, without running afoul of the Establishment Clause."[224] And they rightfully applaud this conclusion because any other "result would excuse breach against religious parties only, leaving them without the recourse of court protection."[225] But selecting the right result does not quite explain that result. It is hard to see why, for example, the enforcement of a contract for food certified by a particular private kosher certification agency would not qualify as the application of secular principles to a religious dispute—a category of cases that the reverse entanglement principle deems beyond the adjudicative authority of civil courts. In this way, and once again, the attempt to regulate religious arbitration through public law mechanisms not only misconstrues the inadequacy of private law protections, but in its attempt to compensate, it introduces categories and mechanisms that further undermine the very system it seeks to protect.

V. CONCLUSION

The constitutional constraints of public law can, in principle, play an important function when it comes to religious commerce. At the extremes, they can prevent courts from wading so deeply into theological matters that adjudication veers into the territory of prohibited denominational preference. But in the main, regulating religious commerce can be done effectively and responsibly through thoughtful and, at times, creative application of private law. Mining private law, as opposed to public law, to regulate religious commerce is out best hope to both promote the predictability and enforceability of voluntary transactions while still providing doctrinal tools for those in need of the law's protection. The current trend to view religious commerce through the prism of public law threatens the viability of this vibrant marketplace; ultimately, critics who seek to expand the constitutional constraints on religious commercial instruments both underestimate the ability of private law to police the religious marketplace, and overestimate the ability of public law to play this role effectively. Whether with respect to religious contracts, religious torts or religious arbitration, courts and scholars would be better serves exploring

[224] Id. at 2117.
[225] Id.

how private law can meet the need of religious commerce. In the end, for the religious commerce to survive, we would do best to remember what the Supreme Court recognized long ago—that the marketplace will thrive to the extent makes recourse to the "peculiar genius of private-law systems."

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