

# A HIGHER AUTHORITY: JUDICIAL REVIEW OF RELIGIOUS ARBITRATION

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## INTRODUCTION

Religious diversity within a secular state raises a host of issues, not least of which is the question of how to resolve a conflict between obligations of citizenship and demands of faith. In the United States, this conflict has often been resolved with an eye towards accommodation: Religious citizens ask the secular government to carve out narrow exceptions to laws they cannot obey in good conscience, and the secular government asks religious citizens to adapt as much as possible to American legal norms without violating central religious beliefs.<sup>1</sup>

However, the current debates regarding the rights of religious citizens show an unfortunate shift away from mutual negotiation, and toward conflicting categorical prohibitions. In the past two years, for instance, at least ten states have introduced legislation barring judges from considering religious law, many of which target Shari'a law in particular.<sup>2</sup> These efforts reflect fears that religious citizens will choose to subject themselves to religious law rather than the law of the secular state. Similarly, the United States Supreme Court recently held that religious organizations have a constitutional right to self-governance that allows them to evade the reach of certain federal employment laws.<sup>3</sup> These two developments highlight a tension that is ripe for resolution: To what extent may a citizen adhere to religious obligation instead of the laws of the state?

Nowhere is this question more visible than in the ongoing debate over religious arbitration. Religious arbitration is a method of alternative dispute resolution whereby citizens submit a dispute to a religious tribunal and subsequently seek enforcement of the tribunal's decision in secular court.<sup>4</sup>

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1. See *infra* Part IV. B.

2. Bill Raferty, *Bans on Court Use of Sharia/International Law*, GAVEL TO GAVEL, <http://gaveltogavel.us/site/2011/11/28/bans-on-court-use-of-shariainternational-law-pennsylvania-bill-introduced/> (last visited Nov. 11, 2012).

3. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694, 706 (2012).

4. See *infra* Part II.

The current and continued existence of religious arbitration in the United States is not disputed, as it has been utilized for decades within a variety of religious communities.<sup>5</sup> Rather, the current conversation centers on the extent to which civil courts can and must review decisions produced by religious arbitration before bestowing upon them the binding force of the state.<sup>6</sup>

This Article demonstrates that the current scheme of judicial review of religious arbitration fails to ensure that religious citizens are protected from abuses of the arbitration system as well as individuals before secular tribunals. Specifically, it argues that three factors converge to create a two-tiered review scheme by which courts can essentially rubber-stamp the decisions of religious tribunals, often to the detriment of the parties. First, judges fear that addressing any element of an arbitration with religious content will be construed as a First Amendment violation, and thus refuse to review those elements. Second, courts often defer to a tribunal's application of religious procedural law, even when the tribunal fails to provide the procedural protections mandated by state and federal arbitration law. Third, courts refuse to recognize the coercive power of communal religious pressure, and enforce religious arbitration agreements that may have been consented to under duress. In response to this inequity—and in anticipation of the imminent growth of religious arbitration in the Muslim community—this Article presents a new framework for judicial review of religious arbitration decisions. These guidelines ensure both the protections of secular citizenship and the right to be bound by religious obligation.

Part I of this Article briefly explains the mechanics of American arbitration law, focusing on the structure of judicial review. Part II demonstrates how secular courts enforce the decisions of religious tribunals by bringing them within the scope of state and federal arbitration statutes. Part III surveys the current scheme of judicial review of religious arbitration decisions. Part IV demonstrates how the current scheme of judicial review fails to protect individuals who choose to submit to religious arbitration to the same extent as those who submit to secular arbitration. In particular, it

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5. See Brief of Religious Tribunal Experts as Amici Curiae in Support of Petitioner at 3–4, *Hosanna-Tabor*, 132 S.Ct. 694 (No. 10-553) [hereinafter Brief of Religious Tribunal Experts] (arguing that many religious organizations have a long history of using religious courts to resolve disputes between members).

6. See, e.g., Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 208 (2007) (arguing that religious arbitration is subject to a more narrow standard of judicial review than secular arbitration); Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 430 (2006) (arguing for more court oversight of religious arbitration).

demonstrates how current religion clause jurisprudence restricts courts from applying the full panoply of procedural protections provided by state and federal arbitration law; the heightened risk of procedural unfairness due to the incorporation of religious procedural law that may not align with standard conceptions of fairness; and the risk that a court will compel arbitration where a party initially consented under duress, due to the court's underestimation of the power of communal religious pressure. Part V articulates the theoretical root of the deficiencies in the current judicial review scheme as applied to religious arbitration. Specifically, it presents the two conflicting theories most embedded in the religious arbitration debate—legal pluralism and normative pluralism—and mines them for guidance regarding the proper bounds of judicial review of religious arbitration. Part VI then suggests a new framework for judicial review of religious arbitration—in the form of judicial guidelines and legislative amendments to arbitration statutes—that will allow individuals to live according to the dictates of their faith without sacrificing the protections of the secular state.

#### I. THE AMERICAN ARBITRATION REGIME

Arbitration is a means of private dispute resolution, capable of achieving the binding force of state law. While arbitration defies more precise definition due to the multitude of forms it can take, it generally has six characteristics: (1) all parties consent to have a dispute resolved by a private third party; (2) the parties select the venue of arbitration, often including the identities of specific arbitrators; (3) the arbitrator conducts proceedings and hears testimony regarding the dispute; (4) the arbitrator resolves the dispute and makes a binding award in favor of the prevailing party; (5) the arbitrator's decision is subjected to minimal judicial review in state or federal court; and (6) the arbitrator's decision is enforced by the court as a final judgment.<sup>7</sup> Thus, arbitration provides parties with an alternative means of dispute resolution that has an outcome of the same strength and finality as traditional litigation.

Twentieth-century courts have welcomed arbitration with open arms, holding that almost any transaction can be resolved through arbitration.<sup>8</sup> To secure enforcement in civil court, arbitration must be conducted according to the statutory scheme of the Federal Arbitration Act (FAA) or one of its

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7. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 7 (1992).

8. See Grossman, *supra* note 6, at 175 (noting that while the FAA restricts arbitration to disputes arising from contracts or transactions "commerce in fact," courts have held that any transaction can be subject to arbitration).

state analogues<sup>9</sup>—all of which impose only minimal regulations on arbitration proceedings.<sup>10</sup> This Part delineates the three aspects of the arbitration process subject to the most significant directives: (1) the agreement to arbitrate; (2) the procedures governing the arbitration proceeding; and (3) the extent to which a civil court can review an arbitration award when deciding whether to enforce it.

### A. Arbitration Agreements

The first condition of arbitration is a valid agreement to arbitrate between the parties.<sup>11</sup> Arbitration agreements can be executed in two ways. First, parties to a contract can include a written provision agreeing to arbitrate controversies arising from the contract.<sup>12</sup> Such arbitration clauses are common in commercial agreements, employment contracts, and prenuptial agreements.<sup>13</sup> Second, parties can execute a written agreement to submit an existing controversy to arbitration.<sup>14</sup>

A valid arbitration agreement strips civil courts of their jurisdiction to hear any issue contemplated for resolution by arbitration in the agreement.<sup>15</sup> Thus, if a party to a valid arbitration agreement files suit in civil court pertaining to an issue included in the arbitration agreement, the court must stay the judicial proceeding until the arbitration has been completed.<sup>16</sup>

If one party refuses to comply with an arbitration agreement, the other party may petition the court to enforce the agreement and compel the parties to arbitrate.<sup>17</sup> In such proceedings, courts view arbitration agreements as nothing more than a contract, and apply the standard principles of contract interpretation to determine if the arbitration agreement is valid and

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9. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006). Each state also has an arbitration statute. EDWARD BRUNET ET AL., *ARBITRATION IN AMERICAN LAW: A CRITICAL ASSESSMENT* 56 (2006). These state analogues are constructively identical to the FAA. Furthermore, the FAA has been interpreted to preempt all state arbitration statutes. See Grossman, *supra* note 6, at 169–70.

10. 9 U.S.C. §§ 1–16.

11. *Id.* § 2.

12. *Id.*

13. See James B. Boskey, *ADR Can Help Ease Unique Problems Inherent in Transnational Family Disputes*, DISP. RESOL. MAG., Spring 1998, at 13, 15 (discussing the validity of subjecting “specific disputes” to arbitration in addition to the enforceability of prenuptial agreements through arbitration).

14. 9 U.S.C. § 2.

15. *Id.* § 3.

16. *Id.*

17. *Id.* § 4.

enforceable.<sup>18</sup> If the court finds that there is a valid arbitration agreement, the court *must* order the parties to arbitrate the dispute based on the terms of the agreement.<sup>19</sup>

### B. Arbitration Proceedings

The actual structure of arbitration proceedings varies dramatically because the FAA provides little guidance regarding the procedural requirements for enforcement.<sup>20</sup> Arbitration usually proceeds without formal procedural rules or with “boilerplate procedural rules incorporated by the drafting party.”<sup>21</sup> Thus, both parties, at the time of the agreement—and the arbitrator, at the moment of arbitration—have great discretion in designing the procedures of arbitration.<sup>22</sup> As a result, it is possible for an arbitration panel to function as a “mini-court,” emulating the formal procedures of a courtroom.<sup>23</sup> It is equally possible for an arbitration panel to operate in an informal manner where the arbitrator entertains each party’s story and comes to a decision.<sup>24</sup>

While the panels that conduct arbitration are private entities, the FAA imbues them with the ability, backed by the force of the state, to call witnesses.<sup>25</sup> Arbitrators can summon before them any person with information or materials relevant to the controversy.<sup>26</sup> If the witness refuses to comply, a civil court can compel the witness to appear before the arbitrator or punish the witness for contempt as though they had refused to appear in a civil court.<sup>27</sup>

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18. *Id.* § 2; Steven C. Bennett, *Enforceability of Religious Arbitration Agreements and Awards*, 64 DISP. RESOL. J. 24, 26 (2010) (noting courts will uphold an arbitration agreement unless it would fail as a contract).

19. 9 U.S.C. § 4.

20. *Id.* §§ 9–10 (listing the grounds for vacatur of arbitration award). The actual arbitrator is determined by the parties as memorialized in the arbitration agreement. *Id.* § 5. If the agreement is silent as to the identity of the arbitrators, the court will appoint a single arbitrator for the dispute. *Id.*

21. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1262–64 (2012) (highlighting “the manipulability and vagueness of arbitration rules”).

22. *Id.* at 1263 (noting the “manipulability and vagueness of arbitration rules”).

23. See Grossman, *supra* note 6, at 177 (“[A]rbitration varies between what is ‘in effect private litigation’ or as ‘different from litigation in a court as possible.’”) (quoting Paul H. Haagen, *New Wineskins for Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1054–55 (1998)).

24. *Id.* at 176–77.

25. 9 U.S.C. § 7.

26. *Id.*

27. *Id.*

*C. Enforcement of Arbitration Decisions*

Regardless of the particular form, arbitration concludes with the arbitrator resolving the dispute and issuing an award in favor of the prevailing party.<sup>28</sup> If the parties do not want the award recognized in civil court, the adventure ends here and there is no further opportunity for civil court involvement. However, if the parties want the arbitration award to have the binding force of state law, they must petition a civil court for confirmation of the award, and submit to judicial review in that court within one year of the award.<sup>29</sup> A court must confirm an arbitration award unless it finds the award must be vacated, modified, or corrected to conform to the FAA.<sup>30</sup> If the court confirms the arbitration award, it must enter judgment on it.<sup>31</sup> The significance of entering judgment on an arbitration award cannot be overstated: The judgment makes all issues contained in the arbitration award *res judicata*, precluding the parties from ever arbitrating or litigating the merits of the dispute in civil court.<sup>32</sup>

Courts have interpreted the acceptable bounds of judicial review of arbitration awards very narrowly as a result of the two policy goals that arbitration is intended to effectuate.<sup>33</sup> First, Congress intended for arbitration to be “speedy and not subject to delay and obstruction in the courts.”<sup>34</sup> Second, courts have interpreted the FAA to represent “unequivocally strong congressional intent to mandate arbitration” and are thus reluctant to embark on review that would subvert that intent.<sup>35</sup> Thus, the scope of judicial review of arbitration decisions has been categorized as “among the narrowest known to law.”<sup>36</sup> Despite the policies favoring limited court interference, there are statutory and common law schemes governing the extent to which a court must review a private arbitration before enforcement or vacatur.

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28. MACNEIL, *supra* note 7, at 176–77.

29. 9 U.S.C. § 9.

30. *Id.*

31. *Id.*

32. Grossman, *supra* note 6, at 171 n.16; *see, e.g.*, Dial 800 v. Fesbinder, 12 Cal. Rptr. 3d 711, 724 (Cal. Ct. App. 2004) (“As a general matter, an arbitration award is the equivalent of a final judgment which renders all factual and legal matters in the award *res judicata*.”).

33. Wolfe, *supra* note 6, at 144.

34. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (limiting the scope of judicial review of an arbitration award in line with the “plain meaning” of the FAA and Congressional intent).

35. Grossman, *supra* note 6, at 174.

36. Bennett, *supra* note 18, at 26 (quoting Dominion Video Satellite, Inc. v. Ecobstar Satellite LLC, 430 F.3d 1269, 1275 (10th Cir. 2005)).

### 1. Statutory Vacatur

According to the FAA, a court may vacate an award where: (1) the award was produced by corruption, fraud, or undue means; (2) “there was evident partiality or corruption in the arbitrators”; (3) the arbitrators were guilty of misconduct in: (a) “refusing to postpone the hearing, upon sufficient cause shown,” or (b) “refusing to hear evidence pertinent and material to the controversy,” or (c) “of any other misbehavior by which the rights of any party have been prejudiced”; or (4) “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”<sup>37</sup>

### 2. Public Policy Vacatur

In addition to the above statutory vacatur scheme, courts have long exercised the right to vacate an arbitration award when the substance of the remedy is contrary to “public policy.”<sup>38</sup> Michael A. Helfand explains that public policy vacatur is intended to “protect third-party interests by requiring courts to void any agreement . . . in which a private party waives rights that are intended to protect the public generally.”<sup>39</sup> Helfand points to an arbitration award which violates the Sherman Antitrust Act as demonstrative: Antitrust laws are intended to deter anti-competitive behavior and protect the public’s interest in a fair market economy.<sup>40</sup> Thus, where parties to arbitration waive their rights under antitrust laws, courts will vacate the award because it “contravene[s] long-standing public policies intended to protect third-party interests.”<sup>41</sup>

But what public policies are sufficiently strong or important to warrant interference with private contract rights? The Supreme Court defines public policy as a policy that is “well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”<sup>42</sup> Arguably, the reach

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37. Federal Arbitration Act, 9 U.S.C. § 10(a) (2006).

38. Grossman, *supra* note 6, at 195; *see, e.g.*, *United Paperworks Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (grounding courts’ ability to vacate an arbitration award that is contrary to public policy in “the more general doctrine . . . that a court may refuse to enforce contracts that violate law or public policy”); *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (“As with any contract, however, a Court may not enforce a collective bargaining agreement that is contrary to public policy.”).

39. Helfand, *supra* note 21, at 1254.

40. *Id.*

41. *Id.* at 1258.

42. *W.R. Grace & Co.*, 461 U.S. at 767 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

of the public policy exception has been expanded, as the Supreme Court recently held that an arbitration award need not violate positive law to be considered contrary to public policy.<sup>43</sup>

Courts remain split, however, as to the proper illustration of an arbitration award that violates public policy. Some hold that particular legal issues, such as child custody and visitation rights in domestic disputes, are categorically precluded from arbitration on public policy grounds.<sup>44</sup> Other courts acknowledge the potential for public policy violations that certain legal issues create, yet confirm arbitration awards if the substance of the particular award reflects the current public policy on the subject.<sup>45</sup>

Furthermore, courts have recognized that this standard is not stagnant, and thus the reach of the public policy exception will change as public policy itself evolves.<sup>46</sup> For instance, in 1988 a California court refused, on public policy grounds, to enforce a prenuptial contract provision by which the wife would be entitled to a prearranged monetary settlement upon divorce.<sup>47</sup> The court reasoned that because the woman would be entitled to the dowry upon divorce, the contract encouraged divorce and was thus contrary to the public policy of sustaining marriage.<sup>48</sup> However, in 2003, the same court rejected the principle that prenuptial agreements were categorically contrary to public policy and enforced such an agreement.<sup>49</sup>

## II. RELIGIOUS ARBITRATION

The United States is home to a wide array of religious courts and tribunals, established to hear disputes pertaining to management of religious organizations, answer doctrinal questions, and resolve disputes between

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43. See *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 63 (2000) (“We agree, in principle, that courts’ authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.”).

44. See, e.g., *Berg v. Berg*, No. 25099/05, 2008 WL 4155652, at \*11 (N.Y. Sup. Ct. Sept. 8, 2008) (vacating arbitration award pertaining to child custody and visitation because such topics cannot be subject to arbitration on public policy grounds); *aff’d*, 926 N.Y.S.2d 568 (N.Y. App. Div. 2d Dept. 2011); *Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957 (Sup. Ct. 1997) (holding custody and visitation dispute was not subject to arbitration).

45. See *Rakoszynski*, 663 N.Y.S.2d at 959, 961 (rejecting a categorical prohibition on arbitrating child support, yet vacating arbitration award that failed to reflect public policy of state child support statutes).

46. See *id.* at 960 (“The court concludes that the historical authority for confirmation of child support awards made through an arbitration process, which does not employ the principles established in [the new] Domestic Relations Law § 240(1-b), has been eroded, if not supplanted, by the strong public policy of this state set forth in that statute.”).

47. *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872–73 (Cal. Ct. App. 1988).

48. *Id.*

49. *In re Marriage of Bellio*, 129 Cal. Rptr. 2d 556, 560 (Cal. Ct. App. 2003).



private citizens of the same faith community.<sup>50</sup> Thus, religious tribunals often function as—or analogously to—secular arbitration panels, resolving disputes pertaining to commercial transactions, breach of contract, employment, domestic status, personal injury, and real estate.<sup>51</sup> While the exact form of a religious tribunal defies description due to the variety spawned in the United States alone,<sup>52</sup> there is one constant feature: Substantive and procedural rights of parties are derived from religious doctrine as opposed to secular law.<sup>53</sup>

The FAA does not explicitly address arbitration conducted in a religious tribunal.<sup>54</sup> However, courts routinely enforce the decisions of religious tribunals under the general authority of civil arbitration law.<sup>55</sup> The underlying assumption behind such enforcement is that religious tribunals are “nothing more than private arbitration” tribunals, and deserve analogous treatment regardless of their religious character.<sup>56</sup>

However, as noted above, there is one obvious pragmatic distinction between secular arbitration and the proceedings of a religious tribunal that challenges the parallel: Arbitration before a religious tribunal is imbued with a distinctly religious character.<sup>57</sup> There are three components of the religious arbitration process that make this distinction abundantly clear. First, a religious arbitration agreement may refer to a religious venue or use religious language to explain the terms of the arbitration proceedings.<sup>58</sup>

50. See Brief of Religious Tribunal Experts, *supra* note 5, at 3 (describing several religious institutions that use religious courts).

51. See, e.g., *Frequently Asked Questions*, INSTITUTE FOR CHRISTIAN CONCILIATION, <http://www.peacemaker.net/site/?c=nuIWL7MOJtE&b=5392247> (last visited Nov. 11, 2012) (listing services the ICC provides); *Arbitration and Mediation*, BETH DIN OF AMERICA, <http://www.bethdin.org/arbitration-mediation.asp> (last visited Nov. 11, 2012); *Services*, DAR UL HIKMAH CONSULTING, <http://www.darulhikmah.org/#!/services> (last visited Nov. 11, 2012).

52. See, e.g., Brief of Religious Tribunal Experts, *supra* note 5, at 6 (stating “[r]eligious court systems can be quite varied”).

53. *Id.*

54. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

55. See Grossman, *supra* note 6, at 169–70 (stating courts enforce decisions of religious tribunals under the FAA or the UAA); see, e.g., *Dial 800 v. Fesbinder*, 12 Cal. Rptr. 3d 711, 824 (Cal. Ct. App. 2004) (“As note[d] previously, American courts routinely enforce money judgments and other orders by *beth din* panels.”); *Berg*, No. 25099/05, 2008 WL 4155652, at \*4 (“Accordingly, the Court of Appeals has affirmed an arbitration award rendered in an arbitration proceeding in which ‘the parties undertook to fulfill the judgment to be granted by the Beth Din either by judgment or by settlement according to Jewish law, as the said judges will see fit.’”) (quoting *Meisels v. Uhr*, 593 N.E.2d 1359, 1361 (N.Y. 1992)).

56. Grossman, *supra* note 6, at 182 (quoting Yechiel (Gene C.) Colman, Ensuring Enforceability of Beis Din’s Judgments, Address Before the First Annual Comparative Law Conference on Justice & Jewish Law (May 3, 1998), available at <http://www.jlaw.com/Articles/Beisdin1.html>).

57. Grossman, *supra* note 6, at 169 (“[R]eligious issues permeate the entirety of religious tribunal proceedings.”).

58. BETH DIN OF AMERICA, RULES AND PROCEDURES OF THE BETH DIN OF AMERICA 4, available at [http://www.bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf) (last visited Nov. 11, 2012).

Second, arbitrators on a religious tribunal may apply religious law instead of, or alongside, the substantive secular law of the jurisdiction.<sup>59</sup> Furthermore, religious law may itself require arbitration or be structured according to religious procedural requirements.<sup>60</sup> Third, the arbitration awards might have a religious character, with remedies that could not be awarded by a secular court.<sup>61</sup>

This Part will illustrate how religious arbitration functions through a survey of how Jewish, Christian, and Muslim communities use American arbitration law to secure civil enforcement of their religious tribunals' decisions.

### A. Jewish Arbitration

In the United States, religious arbitration is most commonly used by Orthodox Jewish communities.<sup>62</sup> Parties submit their claims to a Jewish law court called a beth din<sup>63</sup> and petition civil courts to enforce the beth din's decision as though it were a private arbitration under the FAA.<sup>64</sup> The Beth Din of America (BDA) is the most extensive network of batei din in the United States, and frequently has its decisions reviewed and enforced by secular courts.<sup>65</sup>

The BDA is the most formalized and procedurally rigorous example of Jewish arbitration specifically, and religious arbitration generally.<sup>66</sup> This section will outline how a typical BDA tribunal functions by highlighting three aspects of the process that mimic the secular arbitration process: (1) the agreement to submit a dispute to the BDA; (2) the form of the proceedings; and (3) the final remedy awarded.

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59. *Id.* at 4.

60. *Id.* at 1.

61. *Id.* at 9 (“The Beth Din may grant any remedy or relief that it deems just and equitable and within the scope of the agreement of the parties . . .”).

62. See Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 383 (2009) (“Today [Jewish law courts] can be found throughout the United States, wherever there is a Jewish community.”).

63. Wolfe, *supra* note 6, at 438. Alternative spellings include “bet din” and “beit din”. The plural form is “batei din.” *Id.*

64. See *supra* note 55.

65. Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 NY.L. SCH. L. REV. 1 (forthcoming 2012) (on file with author).

66. *Id.*

### 1. Arbitration Agreements

Arbitration before a beth din can arise in three ways—the first two paralleling the process of secular arbitration. First, parties can include an arbitration clause in a contract, agreeing to arbitrate any claim arising from the contract in a beth din. The following is the Sample Arbitration Provision provided by the BDA:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration by the Beth Din of America, Inc. . . . in accordance with the Rules and Procedures of the Beth Din of America, and having judgment upon the award rendered by the Beth Din of America may be entered in any court having jurisdiction thereof.<sup>67</sup>

Second, parties can execute an agreement to arbitrate before a beth din after a controversy arises. Such an arbitration agreement will have language to the effect of:

For the purposes of satisfactorily adjudicating [above] differences and disputes, it has been agreed by the said parties that the matters in dispute between them be submitted to the arbitration of the Beth Din of America, which shall resolve the matter in accordance with its rules and procedures. Said parties agree that they have selected the aforesaid Beth Din to resolve their disputes, and shall accept the ruling of the arbitrator or arbitrators appointed by that organization as a binding decision.<sup>68</sup>

Third, a beth din can send an invitation to arbitrate in the beth din on behalf of a claimant.<sup>69</sup> If the individual to whom the invitation is sent does not accept, the beth din may issue a *sirov*, or document noting that an individual has refused to participate.<sup>70</sup> A *sirov* will have varying effects depending on the particular community, but it can amount to a shunning order—an instruction to the Jewish community to turn its back on this party.<sup>71</sup>

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67. BETH DIN OF AM., SAMPLE ARBITRATION PROVISION, available at [http://www.bethdin.org/docs/PDF5-Sample\\_Arbitration\\_Clause.pdf](http://www.bethdin.org/docs/PDF5-Sample_Arbitration_Clause.pdf) (last visited Nov. 11, 2012).

68. BETH DIN OF AM., AGREEMENT TO ARBITRATE, available at [http://www.bethdin.org/docs/PDF3-Binding\\_Arbitration\\_Agreement.pdf](http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf) (last visited Nov. 11, 2012).

69. RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58, at 2.

70. *Id.* at 3.

71. See Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 651 (2004), (describing the effect of a *sirov*); Wolfe, *supra* note 6, at 464.

## 2. Proceedings

As stated explicitly in the arbitration agreements above, any agreement to arbitrate in a BDA tribunal incorporates the Rules and Procedures of the Beth Din of America.<sup>72</sup> The Rules and Procedures include requirements pertaining to arbitrator selection, applicable law, and the general proceedings of a hearing.<sup>73</sup>

After parties have agreed to arbitrate, the supervisor of the beth din, called an Av Beth Din, appoints neutral arbitrators to hear the dispute.<sup>74</sup> At least one arbitrator must be a rabbi, and up to two others can be religiously observant individuals with expertise relevant to the dispute.<sup>75</sup> For instance, in a child custody proceeding, one of the arbitrators will often be a religiously observant child psychologist, while a panel for a construction dispute will include a Jewish contractor.<sup>76</sup> Furthermore, at least one arbitrator is almost always a “well-trained lawyer who is comfortable in both American and Jewish law.”<sup>77</sup> Parties to the dispute are given a period of time in which they may challenge the selection of arbitrators on grounds of bias.<sup>78</sup>

Arbitration in a beth din is governed by Jewish law, subject to the choice of law provisions executed by the parties. As a baseline in the BDA, “Jewish law as understood [by the] Beth Din will provide the rules of decision and rules of procedure that govern the functioning of the Beth Din or any of its panels.”<sup>79</sup> Parties are also entitled to contract for the type of Jewish law they would like applied. The BDA encourages parties to select arbitration in the form of compromise or settlement related to Jewish law (*p’shara krova l’din*), which allows arbitrators to consider the relative equities of the parties in determining an award, as opposed to stricter Jewish law (*din*).<sup>80</sup> Parties are also entitled to include choice of law provisions or agree to accept the common commercial practice of a trade.<sup>81</sup> In both instances, the beth din allows each source of law to provide the rules of decision, insofar as they don’t conflict with Jewish law.<sup>82</sup>

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72. See, e.g., SAMPLE ARBITRATION PROVISION, *supra* note 67 (prescribing that arbitration will be conducted in accordance with the rules and procedures of the BDA); AGREEMENT TO ARBITRATE, *supra* note 68, at 2.

73. RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58.

74. *Id.* at 1.

75. *Id.*

76. Broyde, *supra* note 65, at 18–19.

77. *Id.* at 18.

78. RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58, at 5.

79. *Id.* at 4.

80. *Id.* at 3–4.

81. *Id.* at 4.

82. *Id.*

The remainder of the Rules and Procedures outlines the rights of the parties and the form of the proceedings. All proceedings are in English unless the parties consent to use another language (often Yiddish<sup>83</sup>).<sup>84</sup> Parties also have a non-waivable right to an attorney.<sup>85</sup> During the proceeding, each party is entitled to give a statement clarifying the issues, call witnesses, present evidence, and raise defenses.<sup>86</sup> A beth din can subpoena witnesses under the FAA and will do so based on its own judgment or at the request of a party.<sup>87</sup> Notably, conformity to the rules of evidence is not required and the beth din is the judge of materiality and relevancy of evidence.<sup>88</sup>

### 3. Remedies

Following a proceeding before a beth din, the arbitrators are required to issue an award in the manner required by the law of the relevant civil jurisdiction.<sup>89</sup> The BDA claims broad discretion over types of remedies, and may “grant any remedy or relief that it deems just and equitable and within the scope of the agreement of the parties, including, without limitation, specific performance of a contract and injunctive relief.”<sup>90</sup> The BDA also has procedures for internal modification or appeal of the award, should it, among other things, be found contrary to Jewish Law.<sup>91</sup>

#### *B. Christian Arbitration*

While Christian arbitration is less developed and widespread than its Jewish counterpart, it has surfaced in a variety of forms<sup>92</sup> and received favorable treatment in civil courts.<sup>93</sup> The most prominent form is Christian conciliation, defined as “the voluntary submission of a dispute for biblically-based conflict counseling/coaching, mediation, arbitration, or mediation/arbitration.”<sup>94</sup>

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83. *See e.g.*, *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 494 (Sup. Ct. 1991) (reviewing a Beth Din arbitration proceedings conducted in Yiddish).

84. RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58, at 6.

85. *Id.*

86. *Id.* at 7.

87. *Id.*

88. *Id.*

89. *Id.* at 9.

90. RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58, at 9.

91. *Id.*

92. *See* Grossman, *supra* note 6, at 177–78, 180–81 (discussing Christian and Jewish arbitrations).

93. Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to “Ordinary” ADR*, 29 CUMB. L. REV. 583, 593–94 (1998).

94. *Rules of Procedure*, INST. FOR CHRISTIAN CONCILIATION, [http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules\\_of\\_Procedure.htm](http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules_of_Procedure.htm) (last visited Nov. 11, 2012).

Bodies such as The Institute for Christian Conciliation (ICC), a division of Peacemaker Ministries, provide Christian conciliation.<sup>95</sup> The ICC arbitrates disputes arising in a wide range of legal areas, including contract, employment, family, personal injury, and landlord–tenant.<sup>96</sup> However, it will not arbitrate disputes over legal issues that courts bar from arbitration on public policy grounds, such as child custody and visitation.<sup>97</sup>

Unlike the stricter arbitration model of the BDA, the ICC favors the application of a three-part dispute resolution scheme.<sup>98</sup> First, once parties submit their dispute to the ICC, they undergo individual counseling.<sup>99</sup> Second, if the counseling fails to resolve the dispute, the parties submit to mediation.<sup>100</sup> Third, if the mediation fails to produce a resolution, the parties undergo binding arbitration.<sup>101</sup>

Commentators have noted that Christian conciliation does not differ dramatically from secular alternative dispute resolution, with two caveats.<sup>102</sup> First is the distinct choice of law provision: “Conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.”<sup>103</sup> Second is the broad discretion retained by arbitrators to structure remedies: “The arbitrators may grant any remedy or relief that they deem scriptural, just and equitable, and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.”<sup>104</sup>

### C. Islamic Arbitration

The Muslim community currently lacks a formal arbitration body the size of its Jewish and Christian counterparts.<sup>105</sup> In 1988, the Council of Masajid of the United States resolved to establish Islamic arbitration councils across the country;<sup>106</sup> however, a structure of this magnitude has

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95. Grossman, *supra* note 6, at 178.

96. *Frequently Asked Questions*, *supra* note 51, at 1.

97. *Id.*

98. Waddell & Keegan, *supra* note 93, at 590.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* (opining that Christian conciliation is very similar to common ADR practice).

103. *Rules of Procedure*, *supra* note 94.

104. *Id.*

105. See Helfand, *supra* note 21, at 1249 (noting there is not yet a network of Islamic arbitration courts in the United States).

106. Bambach, *supra* note 62, at 387.

yet to be seen.<sup>107</sup> As opposed to the sizeable body of American case law pertaining to Jewish arbitration before a beth din,<sup>108</sup> there are currently only a handful of American cases that even reference arbitration before an Islamic tribunal.<sup>109</sup>

Though the available ethnographic evidence is sparse, Muslim arbitration seems to function on a more localized level,<sup>110</sup> through organizations like the Texas Islamic Court,<sup>111</sup> or private consulting firms offering mediation, arbitration, and adjudication in accordance with Islamic law.<sup>112</sup> The consistent thread is the explicit choice of law provisions in arbitration agreements. An agreement to arbitrate before the Texas Islamic Court includes the provision: “The Parties agree to arbitrate all existing issues among them . . . according to the Islamic rules of law by Texas Islamic Court.”<sup>113</sup> The binding arbitration agreement of Dar ul Hikmah Consulting states: “I . . . have agreed to appoint Dr. Mohamad A. El-Sheikh . . . to investigate, mediate, arbitrate or adjudicate my current dispute with my opponent(s) in accordance with his understanding of the Islamic Shariah law.”<sup>114</sup> Recently, Muslim organizations have also outlined rules and procedures to govern Islamic arbitration in the United States.<sup>115</sup>

### III. JUDICIAL REVIEW OF RELIGIOUS ARBITRATION

There is currently a well-settled and relatively stable body of law governing the judicial review of religious arbitration agreements.<sup>116</sup>

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107. Helfand, *supra* note 21, at 1250.

108. *See infra* Part III.

109. *See, e.g.*, Abd Alla v. Mourssi, 680 N.W.2d 569, 573–74 (Minn. Ct. App. 2004) (confirming arbitration award from the Arbitration Court of an Islamic Mosque because appeal was not brought within statutorily mandated period and there was no evidence of fraud, corruption, or undue means); Hamzavi v. Ahmad, No. 205592, 1999 WL 33452466, at \*2 (Mich. Ct. App. Mar. 30, 1999) (determining the scope of an Islamic arbitration agreement); *In re* N.Q. and F.Q., No. 2-09-159-CV, 2010 WL 2813425 at \*1, \*2 (Tex. App. July 15, 2010) (affirming revocation of Islamic arbitration agreement because party failed to make a timely appeal); Jabri v. Qaddura, 108 S.W.3d 404, 413–14 (Tex. App. 2003) (enforcing Islamic arbitration agreement because neither the intent of the parties nor the scope of issues to be arbitrated was ambiguous).

110. Bambach, *supra* note 62, at 387.

111. *Jabri*, 108 S.W.3d at 407 (holding that arbitration agreement required arbitration before the Texas Islamic Court).

112. *Services*, DAR UL HIKMAH CONSULTING, <http://www.darulhikmah.org/#services> (last visited Oct 28, 2012).

113. *Jabri*, 108 S.W. 3d at 408.

114. *Binding Arbitration Agreement*, DAR UL HIKMAH CONSULTING, <http://www.darulhikmah.org/#policy> (last visited Oct 28, 2012).

115. *See* Helfand, *supra* note 21, at 1250–51 (noting that “a number of groups and individuals have developed rules and procedures for use by Islamic arbitration panels in the United States”).

116. *See infra* Part III.B.

However, there is much uncertainty about how strictly judges can or should review the internal proceedings<sup>117</sup> and resulting awards<sup>118</sup> of religious tribunals. Much of the instability in this realm has a readily identifiable source: Judicial review of arbitration before a religious panel is not only governed by secular arbitration statutes, but also constrained by a vast and precarious body of First Amendment Religion Clause jurisprudence.<sup>119</sup>

This Part first shows how courts reviewing decisions of religious tribunals feel constrained by religion clause jurisprudence. Then it examines the three elements of a religious arbitration a judge must review to decide whether to enforce or vacate the resulting award: (1) the arbitration agreement; (2) any procedural defects of the arbitration proceeding; and (3) the final remedy awarded by the panel.

#### A. *The Religious Question Constraint*

The Religion Clauses of the First Amendment are generally perceived as creating a dual prohibition: Government may not “establish” religion, nor “prohibit the free exercise thereof.”<sup>120</sup> However, there is a third principle, often considered to be a derivative of both clauses that currently occupies the spotlight of religion clause jurisprudence: Religious organizations have the right to a certain level of autonomy, which precludes courts from adjudicating questions of religious doctrine.<sup>121</sup> This religious question constraint, often also referred to as the “church autonomy doctrine,” has gained traction in debates over religious arbitration and dramatically limits the extent to which courts will review the decisions of religious tribunals.<sup>122</sup>

In 1871, the Supreme Court first recognized that disputes with religious content might require different treatment by courts in *Watson v. Jones*.<sup>123</sup> *Watson* concerned a single church divided into competing factions over the issue of slavery.<sup>124</sup> Both factions claimed to be the “true church,” and thus

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117. See *infra* Part III.C.

118. See *infra* Part III.D.

119. See Grossman, *supra* note 6, at 182–87 (outlining the role of the Religious Question constraint).

120. U.S. CONST. amend. I.

121. See JOHN WITTE JR., & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 241 (3d ed. 2010) (“The third area [of constitutional investigation] is less explicitly textual but historically and structurally quite plain: the notion that there must be space between religious *organizations* and the civil government.”).

122. See *infra* Parts III.B and III.C.

123. See WITTE, *supra* note 121, at 247 (noting that the Court recognized that “religion is special, and courts must develop distinct methods of dispute resolution that keep them from delving into religious doctrine”).

124. *Watson v. Jones*, 80 U.S. 679, 692 (1871).



entitled to the exclusive use of church property.<sup>125</sup> When the pro-slavery faction sued in federal court, the Court held that it must defer to the decision of the highest ruling body of the church, regardless of any conflicting American legal principles.<sup>126</sup> Part of the reason for such deference was a concern for competence: Civil courts were in no way competent to second guess the decision of a religious body on a matter of religious law.<sup>127</sup> In 1952, the Court grounded this principle of deferring to the highest authority of a church structure in the First Amendment.<sup>128</sup>

Following *Watson*, the Court continued to pay deference to the final decisions of religious bodies, though adding narrow limitations to that deference. In *Gonzales v. Roman Catholic Archbishop*, the Court held that deference to orders of religious bodies could only be breached where there was “fraud, collusion, or arbitrariness.”<sup>129</sup> In *Serbian Orthodox Diocese v. Milivojevich*,<sup>130</sup> the Court added another caveat to the principle of deference. In *Milivojevich*, a church defrocked a bishop who claimed the church failed to follow its own procedures for defrocking, thus acting arbitrarily as defined in *Gonzales*.<sup>131</sup> The Court rejected this argument, holding that a secular court cannot determine whether a church complied with its own procedures.<sup>132</sup> Such inquiry into religious procedure, the Court held, is prohibited not categorically, but only “where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity.”<sup>133</sup>

The Court made a dramatic shift with its decision in *Jones v. Wolf* in 1979 by giving courts expansive freedom to decide whether to even apply its scheme of deference.<sup>134</sup> Faced with another internal church property dispute, the Court held that it need not defer to the highest body of the religious organization if it was capable of applying “neutral principles of law” to the facts of the case without inquiring into religious doctrine.<sup>135</sup>

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125. *Id.*

126. *Id.* at 727.

127. *Id.* at 729.

128. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (holding that religious bodies have the “power to decide for themselves, free from state interference, matters of church governance as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven . . . to have federal constitutional protection as a part of the free exercise of religion against state interference.”).

129. *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929).

130. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 712–13 (1976).

131. *Id.*

132. *Id.* at 713.

133. *Id.* at 709.

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

135. *Id.* at 602–03.

Thus, the Court awarded the property right at issue to the majority faction of the church, based solely on analysis of the relevant property deeds.<sup>136</sup> In line with its new methodology, the Court held that lower courts were entitled to either defer to the highest religious body, as had been done in the past, or to apply “neutral principles of law,” so long as courts did not resolve matters of religious doctrine.<sup>137</sup>

The most recent case showing the Court’s deference to the decisions of religious bodies is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. Cheryl Perich, a commissioned minister, was a teacher at a Lutheran school.<sup>138</sup> In 2004, Perich was diagnosed with narcolepsy and forced to take disability leave.<sup>139</sup> When Perich notified the school that she was ready to resume teaching, the school requested she resign from her duties.<sup>140</sup> Perich refused to resign and threatened to take legal action against the school for discriminatory employment practices.<sup>141</sup> The school then fired Perich. As she had threatened, Perich filed a claim with the Equal Employment Opportunity Commission (EEOC) on the grounds that she was fired in violation of the Americans with Disabilities Act.<sup>142</sup> *Hosanna-Tabor* claimed it was immune from such a suit due to the “ministerial exception” to federal employment discrimination law. Specifically, it argued that the First Amendment bars claims “concern[ing] the employment relationship between a religious institution and one of its ministers.”<sup>143</sup>

The Court found that there was a ministerial exception, reasoning that to interfere with the employment decision of a religious institution amounts to “interfer[ing] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”<sup>144</sup> Such interference infringes on free exercise rights, which protect “a religious group’s right to shape its own faith and mission through its appointments,” and the establishment clause, “which prohibits government involvement in [] ecclesiastical decisions.”<sup>145</sup> Thus, the First Amendment required dismissal of the employment discrimination suit against *Hosanna-Tabor*.<sup>146</sup>

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136. *Id.* at 607.

137. *Id.* at 604.

138. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S.Ct. 694, 700 (2012).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 701.

143. *Id.*

144. *Id.* at 706.

145. *Id.*

146. *Id.*

The EEOC, Perich, and several amici objected to the application of the ministerial exception to this case. The ministerial exception should not apply, they argued, where the religious justification asserted for the employment decision is simply pretext for a secular discriminatory purpose.<sup>147</sup> The majority dismissed this point in three sentences, holding that it “misses the point of the ministerial exception.”<sup>148</sup> The constitutional ministerial exception is not narrowly confined to employment decisions made for religious reasons.<sup>149</sup> Rather, the exception is intended to provide complete *deference* to religious authorities in the purely ecclesiastical decision of “who will minister to the faithful.”<sup>150</sup>

Justice Alito’s concurrence, joined by his infrequent ally, Justice Kagan, dismissed any inquiry into pretextual decision making as a violation of the religious question constraint.<sup>151</sup> To engage in a pretext inquiry, they argued, “a civil court—and perhaps a jury—would be required to make a judgment about church doctrine.”<sup>152</sup> To hunt for pretext in this case, for instance, would require the fact finder to evaluate whether internal dispute resolution was indeed central to the Lutheran faith, “the mere adjudication of [which fact] would pose grave problems for religious autonomy.”<sup>153</sup> *Hosanna-Tabor* thus reaffirmed the Supreme Court’s deference to religious authorities when the heart of the dispute concerns ecclesiastical decisions.

These cases do more than provide the legal standard for courts resolving disputes with religious content. They highlight the underlying priority guiding the Court’s jurisprudence in this area. The Court appears more concerned with “protecting the civil courts from becoming entangled in religious affairs,” than protecting the rights of religious organizations and individuals themselves.<sup>154</sup> As demonstrated below, this priority remains ever visible when courts are asked to review religious arbitration.

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147. *Id.* at 709; *see, e.g.*, Brief of Americans United for Separation of Church and State, et al. as Amici Curiae in Support of Respondent at 10–11, *Hosanna-Tabor*, 132 S.Ct. 694 (No. 10-553); Brief of Law and Religion Professors as Amici Curiae in Support of Respondent, *Hosanna-Tabor*, 132 S.Ct. 694 (No. 10-553); Brief of People For the American Way Foundation as Amicus Curiae Supporting Respondent, *Hosanna-Tabor*, 132 S.Ct. 694 (No. 10-553).

148. *Hosanna-Tabor*, 132 S.Ct. at 709.

149. *Id.*

150. *Id.*

151. *Id.* at 715 (Alito, J., concurring).

152. *Id.*

153. *Id.*

154. WITTE, *supra* note 121, at 253.

### B. Judicial Review of Religious Arbitration Agreements

The first question before a judge reviewing the actions of a religious tribunal is whether there was a valid agreement to arbitrate. The overwhelming majority of courts apply the neutral principles of law approach as announced in *Jones*, evaluating an agreement to arbitrate in a religious forum in the same fashion as any contract. This method has proved workable, in large part because religious panels have adjusted the language of their arbitration agreements to conform to the method of review employed by the civil courts.<sup>155</sup> However, there is one issue particular to religious arbitration that the neutral principles approach fails to resolve: When does communal pressure from a religious community constitute a form of duress sufficient to invalidate an agreement to arbitrate before a religious panel?

#### 1. The Neutral Principles of Law Approach

There is one critical distinction between an agreement to arbitrate in a religious forum and an agreement to arbitrate in a secular forum: An agreement to arbitrate before a religious tribunal will often use religious language or terms that do not have clear secular analogies.<sup>156</sup> Early courts considered this distinction crucial, and would frequently refuse to enforce arbitration agreements with religious content.<sup>157</sup> These courts believed that to enforce such an agreement would require judicial interpretation of religious terms, thereby violating the First Amendment Religion Clauses.<sup>158</sup> However, modern courts have glossed over the difference between religious and secular arbitration agreements through the application of the neutral principles of law approach, developed in the context of church property disputes.<sup>159</sup> Thus, courts hold they may review a religious arbitration agreement—without running afoul of the Religion Clauses—if they can do

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155. See Broyde, *supra* note 65, at 2 (explaining that the Beth Din of America has gained acceptance by civil courts largely by conforming to the FAA).

156. See, e.g., *supra* notes 57–58 (delineating the components of religious arbitration agreements that distinguish them from secular arbitration agreements).

157. See, e.g., *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 353 (D.C. Cir. 2005) (“The trial court stated that it could not determine whether the Beth Din provision in the bylaws is an enforceable arbitration agreement without . . . determining the proper definition of a Beth Din, and otherwise interpreting Orthodox Jewish law. The trial court accordingly concluded that it was barred by the First Amendment from asserting jurisdiction, and it dismissed the case without reaching the merits of appellants’ motion to compel arbitration.”).

158. *Id.*

159. See, e.g., *id.* at 354 (“We are fully satisfied that a civil court can resolve appellants’ action to compel arbitration according to objective, well-established, neutral principles of law.”).

so by applying traditional principles of contract law and without addressing any underlying religious dispute.<sup>160</sup>

For example, in *Meshel v. Ohev Sholom Talmud Torah*, the court was asked to enforce the following arbitration clause contained in a Jewish organization's bylaws: "Any claim of a member against the Congregation which cannot be resolved amicably shall be referred to a Beth Din of Orthodox Rabbis for a Din Torah."<sup>161</sup> "Beth din" is a generic term for a Jewish law court.<sup>162</sup> The Court of Appeals for the D.C. Circuit enforced the agreement, holding that while the arbitration clause has "religious terms that lend the case a certain surface feel of ecclesiastical content . . . [the case] turns not on ecclesiastical matters but on questions of contract interpretation that can be answered exclusively through the objective application of well-established, neutral principles of law."<sup>163</sup> The court noted that the parties did not dispute the meaning of "Beth Din" or "Din Torah" as used in the agreement.<sup>164</sup> In fact, both parties appeared to contemplate that the clause referred to a particular Jewish law court in Washington, D.C.<sup>165</sup> This explicit and implicit agreement further diminished the possibility that the court would be forced to choose between competing interpretations of religious terms.<sup>166</sup> Thus, the court enforced the arbitration clause using neutral principles of contract law, inferring the intent and scope of the agreement without reference to the religious context of the dispute.<sup>167</sup>

By contrast, where an arbitration agreement includes religious terms open to interpretation, courts will refuse to enforce it. For example, in *Sieger v. Sieger*, the Supreme Court of New York was asked to interpret a clause in a marriage contract requiring that any dispute between the couple be settled "in accordance with the 'regulations of Speyer, Worms, and Mainz.'"<sup>168</sup> While the appellant claimed that the provision referred to a rabbinical court, the court refused to defer to his interpretation and compel arbitration.<sup>169</sup> It held that the ambiguity of the actual contract language

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160. *See, e.g., id.*

161. *Id.* at 348 (emphasis added).

162. Fried, *supra* note 71, at 633.

163. *Meshel*, 869 A.2d at 357.

164. *Id.* at 354–55 ("There is no material dispute between the parties over the meaning of any of these terms, and it is apparent from the record that all of the parties well understand that a Beth Din of Orthodox rabbis is a panel of Orthodox Jewish rabbis that sits without a jury and renders decisions—known as Din Torahs—in private disputes through the application of Jewish law.").

165. *Id.*

166. *Id.*

167. *Id.* at 360–63.

168. *Sieger v. Sieger*, 747 N.Y.S.2d 102, 103 (N.Y. App. Div. 2002).

169. *Id.* at 104.

precluded the application of neutral principles of contract law, and thus enforcement by a civil court would violate the Religion Clauses.<sup>170</sup>

## 2. Religious Duress

The neutral principles of law approach has generally been an effective tool for judicial review of agreements to arbitrate before a religious panel. However, a scenario arises in the judicial review of religious arbitration agreements that neutral principles do not address: Courts will not enforce an arbitration agreement where parties consented to the agreement under coercion or duress.<sup>171</sup> But while courts will generally investigate the circumstances surrounding a contract for signs of duress,<sup>172</sup> this investigation becomes thinner when alleged coercion takes a religious form.

For example, in *Lieberman v. Lieberman*, the plaintiff asked the Supreme Court of New York to invalidate an agreement to arbitrate before a beth din because she was coerced to arbitrate by the threat of a “*sirov*.”<sup>173</sup> A *sirov* is a public document issued by a beth din in order to compel unwilling parties to appear before them and to document the parties’ refusal to submit to its authority.<sup>174</sup> The effect of a *sirov* will vary immensely depending on the community in which it is released, but it will commonly be perceived as indicating that an individual is disloyal to their community, with the result of ostracism from the community and loss of business.<sup>175</sup> For example, the *Lieberman* court defined a *sirov* as a “prohibitory decree that subjects the recipient to shame, scorn, ridicule and public ostracism by other members of the Jewish religious community.”<sup>176</sup> However, regardless of the recognized effect of a *sirov* on the recipient, the court concluded that “[w]hile the threat of a [s]irov may constitute pressure, it cannot be said to constitute duress.”<sup>177</sup>

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170. *Id.* Agreements to arbitrate before a religious panel now commonly include references not only to a particular religious panel, but the address of the particular forum to avoid critiques of ambiguity. *See, e.g.*, *Jabri v. Qaddura*, 108 S.W.3d 404, 407 (Tex. App. 2003) (quoting an agreement to arbitrate in the “Texas Islamic Court, 888 S. Greenville Ave., suite 188, Richardson, Texas.”).

171. *See* Grossman, *supra* note 6, at 197 (noting that in contract law, agreements will be invalidated if procured under duress).

172. *Id.*

173. *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 494 (Sup. Ct. 1991).

174. RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58, at 3.

175. Wolfe, *supra* note 6, at 464.

176. *Lieberman*, 566 N.Y.S.2d at 494.

177. *Id.*; *see also*, *Berg v. Berg*, 926 N.Y.S.2d 568, 570 (2011) (holding that a *sirov* does not negate the otherwise voluntary consent to the jurisdiction of a beth din).

### C. Judicial Review of Internal Procedures of Religious Tribunals

If a judge finds there is a valid agreement to arbitrate before a religious panel, the inquiry shifts to whether there is a defect in the actual proceedings sufficient to require vacatur of the award. There are two elements of the arbitration proceeding that are subject to this level of judicial review: (1) the application of the governing law by the arbitrator, and (2) the internal procedures governing the dispute resolution process. Judges confronted with religious arbitration decisions have narrowed the scope of their review in both of these areas due to fears of violating the First Amendment prohibition against adjudicating questions of religious doctrine.

#### 1. Application of Governing Law

Courts generally refuse to evaluate the legal reasoning of a religious tribunal to the same extent as their secular analogues.<sup>178</sup> This restraint is somewhat attributable to the congressional policy favoring arbitration, requiring courts to defer to the wisdom of arbitrators to the greatest extent possible.<sup>179</sup> However, the true culprit of the expanded deference to religious arbitration is the judicial fear of violating the religious question constraint: Religious panels often base their decisions on religious doctrine as opposed to state or federal law. Judges thus fear that if they evaluate the application of religious law, they will run the risk of violating the First Amendment by inquiring into religious questions.<sup>180</sup>

For instance, in *Berg v. Berg*, a party asked the New York Supreme Court to vacate an award of a beth din because the arbitrator predetermined the award, which violates Jewish law.<sup>181</sup> However, the court refused to vacate the award based on a misapplication of Jewish law because the First Amendment precludes courts from “deciding whether religious law has been violated.”<sup>182</sup> Similarly, in *Lang v. Levi*, a party petitioned the Court of Special Appeals of Maryland to vacate the award of a beth din on grounds that the arbitrator exceeded his authority by irrationally reducing the final award.<sup>183</sup> However, the court rejected this argument, holding that where an

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178. See Grossman, *supra* note 6, at 186–87 (noting that First Amendment principles have “evidentiary consequences . . . that limit court review” of religious arbitration).

179. See *supra* Part I.C (explaining the federal policy in favor of arbitration).

180. See *supra* Part III.A (explaining why courts feel constrained by the religion clauses when reviewing decisions of religious tribunals).

181. *Berg v. Berg*, 25099/05, 2008 WL 415562, at \*9 (N.Y. Sup. Ct. Sept. 8, 2008).

182. *Id.* (citations omitted).

183. *Lang v. Levi*, 16 A.3d 980, 985–86 (Md. Ct. Spec. App. 2011).

arbitrator relies on religious principles, a court “cannot delve into whether under Jewish law there is legal support” for the arbitrator’s decision.<sup>184</sup>

## 2. Procedures

As explained above, the FAA provides a bare bones outline of the procedural requirements an arbitration panel must meet for the civil courts to enforce its awards. However, some courts dramatically limit this prong of review where the parties are considered to have waived their rights to the statutory protections of the FAA.<sup>185</sup>

For example, in *Kovacs v. Kovacs*, a party to a beth din arbitration petitioned the Court of Special Appeals of Maryland to vacate the beth din’s award because the proceedings were not conducted according to the Maryland Uniform Arbitration Act (MUAA).<sup>186</sup> Specifically, she claimed that she was not permitted to make opening or closing statements, or cross-examine witnesses, and that the beth din relied on evidence not introduced during the proceeding.<sup>187</sup> The court rejected her argument for three reasons. First, there was no record produced of what transpired during the beth din proceedings, and thus no evidence of the procedural violations she alleged.<sup>188</sup> Second, an arbitration that does not comply with the procedural requirements of the MUAA is valid “so long as the litigants voluntarily and knowingly agree to the arbitration procedures.”<sup>189</sup> Third, the arbitration proceedings “conform[ed] to notions of basic fairness or due process.”<sup>190</sup> It is important to note that nowhere does the court define the boundaries of “basic fairness or due process” in the context of arbitration.

The court’s holding in *Kovacs* amounts to the following proposition: Parties can waive their rights under arbitration statutes and submit to arbitration proceedings that fail to meet the statutory requirements.<sup>191</sup> Courts accepting this proposition reason that when a party agrees to arbitration under religious substantive and procedural law, it expressly waives the application of state and federal law.<sup>192</sup> Oddly enough, this waiver even extends to the procedural elements of the arbitration statutes

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184. *Id.* at 987.

185. *See, e.g., id.*; *Kovacs v. Kovacs*, 633 A.2d 425, 433 (Md. Ct. Spec. App. 1933). *Contra* Stein v. Stein, 707 N.Y.S.2d 754 (Sup.Ct. 1999) (vacating a beth din arbitration award because the procedural safeguards of the state arbitration statute were not met).

186. *Kovacs*, 633 A.2d at 432.

187. *Id.*

188. *Id.*

189. *Id.* at 433.

190. *Id.*

191. *Id.*

192. *Id.*



that provide the basis for enforcement of the arbitration award by civil authorities.<sup>193</sup>

Even in jurisdictions where courts do not interpret consenting to an arbitration to be an express waiver of statutory procedural rights, courts will still conclude that a party has waived claims related to procedure by proceeding with the arbitration after learning of the defect.<sup>194</sup>

#### *D. Judicial Review of Final Awards of Religious Tribunals*

The final area in which a court can exercise judicial review of religious arbitration is the ultimate remedy awarded by the tribunal. In line with the pattern established above, courts are extremely deferential to the final decision of a tribunal, allowing for remedies that conflict with state and federal law. However, there are also glimpses of a limit to the deference generally paid to the awards of religious tribunals, specifically where courts refuse to enforce awards that restrict access to the civil courts or violate public policy.

##### 1. Deferential Tendencies

That a remedy ordered by a religious arbitration panel is inconsistent with state law is not grounds for vacatur by a civil court.<sup>195</sup> The rationale for this type of deference is purely contractual: Upon agreeing to arbitrate their claims before a religious panel, parties generally sign arbitration agreements that incorporate detailed rules and procedures, often dictated by religious law.<sup>196</sup> These rules and procedures often give broad discretion to arbitrators to fashion any remedy required by the religious or secular law incorporated into the agreement.<sup>197</sup> Thus, a court can uphold any remedy awarded, so long as it does not controvert the intent of the parties as memorialized in the arbitration agreement and incorporated procedures. This contract-based logic provides no basis to vacate a remedy that conflicts with secular law, so long as the remedy is derived from the authority given to the arbitrators.

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193. *See id.* (“The parties expressly waived application of Maryland law and the procedural aspects of the [MUAA] when they agreed to arbitration under Jewish substantive and procedural law.”).

194. *See, e.g., In re Glatzer v. Glatzer*, 905 N.Y.S.2d 607, 609 (2010) (rejecting a claim for vacatur on grounds of bias of arbitrator because complaining party continued arbitration after learning of the alleged bias).

195. *See, e.g., Prescott v. Northlake Christian Sch.*, 141 F. App’x 263, 272 (5th Cir. 2005) (upholding a Christian arbitrator’s remedy, even though state law did not allow for such a remedy).

196. *See* RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58.

197. *Id.* at 3–4; *Rules of Procedure*, *supra* note 94 (“Conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.”).

For instance, in *Prescott v. Northlake Christian School*, a terminated principal and his former employer agreed to arbitrate their employment dispute before the Institute for Christian Conciliation (ICC).<sup>198</sup> The arbitrator awarded \$150,000 in damages to the terminated principal, even though Louisiana employment law would not allow such a remedy.<sup>199</sup> The Fifth Circuit upheld the award—regardless of the fact that it was not available under state law—because the parties’ arbitration agreement incorporated the ICC’s Rules and Procedures.<sup>200</sup> The Rules of the ICC specify that arbitrators may award “any remedy or relief that they deem scriptural, just and equitable, and within the scope of the agreement of the parties.”<sup>201</sup> By submitting to the jurisdiction of the ICC—with knowledge of the broad discretion afforded to the ICC in determining the appropriate remedy—the parties waived any right to vacatur based on the final remedy awarded.<sup>202</sup> Thus, the court confirmed that an arbitrator’s award of damages is not subject to vacatur simply because the remedy would not be available under the law of the state where the arbitration award is being disputed.<sup>203</sup>

## 2. Limits on Judicial Deference

Courts have reined in the deference paid to religious tribunals with two narrow, but potentially effective, review mechanisms. First, courts will not enforce religious arbitration awards that deprive parties of access to the secular courts. Second, courts will not enforce decisions of a religious tribunal where the remedy is contrary to public policy.

First, courts have expanded their judicial review of religious arbitration decisions where the religious tribunal directs acts that would “deprive parties of their constitutional right to seek redress or protection in the future under civil law.”<sup>204</sup> In *Rakoszynski v. Rakoszynski*, a beth din announced an arbitration award requiring the plaintiff to withdraw all civil court proceedings; prohibiting parties from “informing on the other party to the authorities, in any way whatsoever, such as child protective services, social services, legal courts, etc. without written permission by the Beth Din”;

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198. *Prescott*, 141 F. App’x at 265.

199. *Id.* at 271.

200. *Id.* at 273–74.

201. *Id.* at 273. The Beth Din of America includes a similarly broad clause in their Rules and Procedures: “Beth Din may grant any remedy or relief it deems just and equitable and within the scope of the agreement of the parties.” RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58; *see, e.g.*, *Lang v. Levi*, 16 A.3d 980, 983 n.4 (Md. Ct. Spec. App. 2011) (upholding an arbitration decision made in accordance with Section 28 of the Rules and Procedures of the Beth Din of America).

202. *Prescott*, 141 F. App’x at 274.

203. *Id.*

204. *See, e.g.*, *Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957, 961 (Sup. Ct. 1997).

prohibiting the parties from slandering each other; and requiring parties to return to the beth din if future issues arise between them.<sup>205</sup> The Supreme Court of New York refused to confirm the arbitration award because these provisions limited the parties' access to the civil courts, and thus violated their constitutional rights.<sup>206</sup>

Second, in accordance with public policy vacatur, some courts find that if there is a statutory structure in place governing the form of an award, an arbitration award that diverges from that scheme is subject to vacatur.<sup>207</sup> This formulation amounts to the possibility that an award can be vacated on public policy grounds if it violates the substantive law of the jurisdiction. For instance, in *Rakoszynski*, the parties disputed the validity of a beth din award of child support.<sup>208</sup> The Supreme Court of New York vacated the child support award because the final amount awarded did not comply with the New York Domestic Relations Law governing child support.<sup>209</sup> Specifically, the New York law required parties to consider a list of statutory factors and computation methods, with the legislative goal of creating a consistent state child support structure.<sup>210</sup> The court vacated the beth din's award of child support because it was "devoid of any detail regarding how the arbitrator's decision was reached," and thus could not be considered to comply with the statute.<sup>211</sup>

*Rakoszynski* is also instructive because it reiterates the principle of secular arbitration that public policy—in the context of judicial review of arbitration—evolves. The *Rakoszynski* court noted that while child support had in the past been subject to arbitration, the "historical authority for

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205. *Id.*

206. *Id.*

207. As with secular arbitration, courts have vacated the decisions of religious tribunals where the remedy is of a form that categorically violates public policy, such as a child custody award. *See, e.g., Stein v. Stein*, 707 N.Y.S.2d 754, 758 (Sup. Ct. 1999) (refusing to confirm a portion of a beth din decision pertaining to custody and visitation because "[c]ustody of children, once a proper subject for arbitration, is no longer subject to arbitration based upon the public policy of this state"); *Rakoszynski*, 663 N.Y.S.2d at 958 ("Despite the existence of the agreement between the parties to arbitrate these issues, disputes over custody and visitation are not subject to arbitration and will not be confirmed . . ."). Even courts that do not categorically ban the arbitration of issues relating to children following a divorce matter apply a heightened standard of judicial review to awards pertaining to custody and visitation. For instance, the Colorado Court of Appeals held that issues relating to children in a divorce proceeding may be arbitrated, but any remedy relating to children can be reviewed de novo by a civil court on the request of either party. *In re Marriage of Popack*, 998 P.2d 464, 469 (Colo. Ct. App. 2000).

208. *Rakoszynski*, 663 N.Y.S.2d at 958.

209. *Id.* at 960. The court held that parties provided no guidance as to how the amount awarded by the beth din was calculated, and was not in the best interest of the child. *Id.* at 960–61.

210. *Id.*

211. *Id.*

confirmation of child support awards made through an arbitration process, which does not employ the principles established in [the New York Domestic Relations Law], has been eroded, if not supplanted, by the strong public policy of this state set forth in that statute.”<sup>212</sup> Thus, there is room for the evolution of public policy in the context of judicial review of religious arbitration.

#### IV. EMERGING PROBLEMS

While it might not be immediately apparent from the limited body of case law, the current scheme of judicial review of religious arbitration leaves parties to religious arbitration in a vulnerable position. It is a position in which religious citizens are required to sacrifice the protections of the state to live according to the dictates of their faith. Specifically, the current scheme of judicial review of religious arbitration fails to ensure that religious citizens are protected from abuses of the arbitration system as well as their secular counterparts are protected. This Part highlights three ways in which the current scheme of judicial review of religious arbitration creates a vacuum of protection. First, religious tribunals are subject to less judicial review than secular tribunals, due to the religious question constraint. As a result, parties to religious arbitration are denied the full breadth of procedural protections of state and federal arbitration statutes. Second, there is a heightened risk of procedural unfairness due to the incorporation of—and deference to—religious procedural law that may not align with standard notions of fairness. Third, there is a greater risk that an agreement will be enforced where a party consented to the agreement under duress, as courts refuse to consider the true weight of communal religious pressure on individual decision making.

##### A. Restriction of Statutory Procedural Rights

Regardless of the general applicability of the FAA, parties to arbitration before a religious tribunal will frequently find that the statutory protections they can request from a court are thinner than those received by their secular counterparts. This asymmetrical scheme of protections for arbitration before religious and secular panels is a result of the religious question constraint, under which courts declare that they cannot review particular aspects of religious arbitration, lest they unconstitutionally rule on religious doctrine.<sup>213</sup> However, in allowing the religious question

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212. *Id.*

213. *See supra* Part III.A (examining the religious question constraint).

constraint to trump American arbitration law, judges preclude parties to religious arbitration from the level of protection that they are statutorily entitled to. The limitation of the religious question constraint on the rights of parties is most clearly seen where a court is statutorily required to review whether: (1) an arbitrator exceeded his authority, and (2) whether material evidence was excluded from the proceedings.

First, the FAA mandates that a court can vacate an arbitration award where the arbitrator exceeded his authority.<sup>214</sup> However, religious law incorporated into the arbitration agreement usually governs the arbitrator's scope of authority.<sup>215</sup> For example, an agreement to arbitrate in the BDA often states that a dispute will be resolved according to compromise (p'shara) as opposed to pure Jewish law (din),<sup>216</sup> while the Rules and Procedures of the ICC often call for a decision consistent with Biblical precepts.<sup>217</sup> In these instances, Jewish law and Biblical precepts, respectively, dictate the scope of an arbitrator's authority. Thus if a party were to petition a secular court for vacatur on grounds that the arbitrator exceeded his authority, the judge would be required to study the religious principles delineating the bounds of authority.<sup>218</sup> Such inquiry may run afoul of the religious question doctrine, as it would require judges to interpret and apply religious authority.<sup>219</sup> This was precisely the restriction at work in *Lang*: Rather than determine whether the arbitrator exceeded his authority, as mandated by the relevant arbitration statute, the court noted the prohibition on answering religious questions. “[W]e cannot delve into whether under Jewish law there is legal support for Rabbi Willig’s reversal. . . . As far as the rigor of our review is concerned, this is an area where treading lightly is not enough. Here we cannot tread at all.”<sup>220</sup>

Second, the FAA mandates that a court may vacate an award where the arbitrator excluded material evidence.<sup>221</sup> But just as the authority of arbitrators is governed by religious law, so too is the materiality of

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214. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

215. See *supra* Part II.A.1 (providing examples of Jewish arbitration agreements).

216. See RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58.

217. See *Rules of Procedure*, *supra* note 94 (noting the Holy Scripture is the “supreme authority” and arbitrators may grant any relief that they deem “scriptural”).

218. See Grossman, *supra* note 6, at 196–97 (explaining that a court would not be able to “decide the scope of an ‘orthodox Rabbi’ in a religious arbitration” without delving into religious doctrine”).

219. See, e.g., *Lang v. Levi*, 16 A.3d 980, 989 (Md. Ct. Spec. App. 2011) (holding that where an arbitrator relies on religious principles, the court cannot decide if there was legal support for the arbitrator’s decision).

220. *Id.*

221. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

evidence.<sup>222</sup> Thus, to make a materiality determination, a judge would have to interpret the definition of materiality in the context of the relevant religious law, which could potentially violate the prohibition on judges addressing religious questions.<sup>223</sup>

### B. Heightened Risk of Unfairness

Religious arbitration presents a heightened risk of procedural unfairness due to the incorporation of religious procedural law.<sup>224</sup> Regardless of the law applied in arbitration, courts generally require the proceedings to “conform to notions of fairness or due process.”<sup>225</sup> However, in the context of religious arbitration, the courts have not defined the boundaries of basic fairness in any substantive way. Thus, individuals have few, if any, cards to play in support of an argument that they were denied procedural fairness. This problem is further compounded by the fact that agreements to arbitrate before a religious tribunal often incorporate religious procedural law that may not “accord with standard conceptions of fairness.”<sup>226</sup>

One significant difference between religious and secular arbitration is the source of the rules and procedures that guide the proceedings. In secular arbitration—since the FAA provides very little by way of procedural requirements for binding arbitration<sup>227</sup>—parties have the right to contract for the exact procedures that will govern the proceedings.<sup>228</sup> In the absence of agreement between the parties, the arbitrators themselves have wide discretion to establish the procedural rules.<sup>229</sup>

However, this expansive freedom is generally not enjoyed by the parties or arbitrators in religious arbitration because the rules of procedure are derived from religious law.<sup>230</sup> Thus, the procedural rules governing religious arbitration are usually established by a communal religious body

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222. See RULES AND PROCEDURES OF THE BETH DIN OF AMERICA, *supra* note 58, at 7 (outlining the rules governing evidence in Jewish arbitration proceedings conducted by the BDA).

223. See Grossman, *supra* note 6, at 199–205. According to Grossman, the limited judicial review applied to religious tribunals amounts to a procedural due process violation: Courts exercising judicial review of religious arbitration awards are state actors, withholding the statutory right to judicial review of arbitration decisions mandated by state and federal law. *Id.*

224. See Helfand, *supra* note 21, at 1260, 1267–68 (noting “mandatory procedures employed by religious arbitration courts will undermine rather than advance the principles of arbitral justice,” such as “prohibitions against women testifying”).

225. Kovacs v. Kovacs, 633 A.2d 425, 433 (Md. Ct. Spec. App. 1993).

226. Helfand, *supra* note 21, at 1260.

227. See *supra* Part I.B (discussing procedural requirements for binding arbitration under the FAA).

228. Helfand, *supra* note 21, at 1260.

229. *Id.* at 1263.

230. *Id.* at 1264.

and subsequently incorporated into all arbitration agreements.<sup>231</sup> As a result, the parties, and to a certain extent the arbitrators, are bound by religious procedural law—which they do not have the religious authority to amend—at the execution of the arbitration agreement.<sup>232</sup>

While one effect of religious procedural law is to remove information asymmetries and the repeat-player advantage of traditional arbitration,<sup>233</sup> Helfand notes that it “does not necessarily advance standard conceptions of equity,” and may indeed “undermine rather than advance the principles of arbitral justice.”<sup>234</sup> These concerns for fairness arise from the reality that certain aspects of religious procedural law are explicitly discriminatory against women and members of different faiths.<sup>235</sup> For example, traditional Jewish law bars witness testimony by women, minors, handicapped individuals, and non-Jews.<sup>236</sup> Similarly, a traditional Islamic legal rule requires oral testimony by two witnesses who must be adult Muslim males.<sup>237</sup> In some schools of Islamic legal interpretation, where two men are not available as witnesses, a man and two women will suffice, “thus indicating that the word of two women is equal to the word of one man.”<sup>238</sup> These discriminatory categorical prior restraints may undermine the fairness of an arbitration proceeding where a material witness is barred from testifying due to her gender or faith.

This risk of procedural unfairness due to religious procedural law is further compounded by the ease with which courts have held that parties waived the procedural rights of federal and state arbitration statutes. Recall that courts have held that parties to arbitration before a religious tribunal can waive statutory procedural rights by consenting to the application of religious law, or continuing with the arbitration after learning of a procedural defect.<sup>239</sup> Thus, if statutory procedural law can be easily waived in favor of religious procedural law that may not accord with standard conceptions of fairness, parties to arbitration before a religious panel have an increased risk of being bound by decisions that are products of unfair procedures.

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231. See *supra* notes 59–60 and accompanying text (discussing the application of religious procedural law by religious tribunals).

232. Helfand, *supra* note 21, at 1264.

233. *Id.* at 1262–63.

234. *Id.* at 1267.

235. *Id.* at 1267–68.

236. Grossman, *supra* note 6, at 181.

237. Bambach, *supra* note 62, at 409–10.

238. Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 197 n.53 (2002).

239. See *supra* Part III.C.2 (discussing waiver of statutory procedural rights in religious arbitration proceedings).

### C. Failure to Identify Duress

Courts will not enforce an arbitration agreement where a party consented to the agreement under coercion or duress.<sup>240</sup> The test for identifying duress is whether the pressure imposed by a party leaves the victim with “no reasonable alternative” but to consent to the agreement.<sup>241</sup> This test is currently misapplied in the context of religious arbitration, which creates a heightened risk that courts will compel arbitration when a party initially consented under duress.

Recall that courts consistently hold that the issuance of a *siruv* from a beth din does not constitute duress sufficient to warrant vacatur of an arbitration award.<sup>242</sup> This conclusion is based on the logic that communal pressure does not constitute duress. Rather, courts reason, “if a religious body applies religious pressure on an individual to do something, it is not duress because that individual can reasonably refuse and abstain from religious pressure to do an act.”<sup>243</sup>

However, this reasoning is the product of an incomplete understanding of the nature of a *siruv*, if not a meager understanding of religious identity more generally. As explained by Ginnine Fried, a *siruv* can have “potentially tragic effects on a person’s social life, her livelihood, and that of her family’s.”<sup>244</sup> While the effect of a *siruv* will vary dramatically depending on the community in which it is released, it can be perceived as indicating that a member is disloyal to the community where the beth din sits, resulting in both loss of business and ostracism from the community.<sup>245</sup> Thus, if the test for duress or coercion is that a reasonable person would feel no choice but to consent, courts should recognize that it is *not* reasonable that “an individual would choose to forgo signing a decree if it meant that they will be cut off entirely from the only life they have ever known in a tight-knit community.”<sup>246</sup>

Ayelet Shachar further demonstrates the need for a robust interrogation of whether parties to arbitration voluntarily consented to the alternative jurisdiction. Specifically, she notes that in the context of family law, “serious communal pressure [can make] ‘free consent’ to alternative dispute resolution a code name for thinly veiled coercion.”<sup>247</sup> There are two factors

240. Fried, *supra* note 71, at 650.

241. *Id.*

242. See *supra* Part III.B.2 (discussing vacatur of arbitration awards due to duress).

243. Fried, *supra* note 71, at 652.

244. *Id.*

245. Wolfe, *supra* note 6, at 464; Fried, *supra* note 71, at 651.

246. Fried, *supra* note 71, at 652.

247. Ayelet Shachar, *State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation*, in SHARI’A IN THE WEST 115, 125 (Rex Ahdar & Nicholas Aroney, eds., 2010).



at work that inform her conclusion. First, women belonging to minority religious communities have a strong dual source of obligation, feeling bound to both the religious authority of the community and the secular requirements of the state.<sup>248</sup> Second, because minority religious communities do not have authority to formally regulate membership, family law often becomes the tool used by the community to demarcate membership.<sup>249</sup> Furthermore, family law is also traditionally an area in which women have been treated unequally and lacked leverage.<sup>250</sup> The combined effect of a desire to belong to a particular religious community and the reality of family law as a tool to demarcate informal membership questions the traditional manifestations of duress: Does a woman truly make a voluntary choice when she consents to arbitration before a religious tribunal for the sake of her religious identity?

If courts are unwilling to broach the question of whether the intersection of individual, communal, and religious identity preclude true consent to the jurisdiction of a religious tribunal, judicial review of religious arbitration will be insufficient to protect vulnerable individuals who were coerced into consenting to an agreement.

#### V. THEORETICAL HERITAGE OF RELIGIOUS ARBITRATION

Several scholars have noted that binding arbitration by religious tribunals, particularly when enforced by secular courts, presents dangers for vulnerable parties in insular religious communities.<sup>251</sup> A few have even connected the resulting dearth of protection to the judicial review scheme implemented by secular courts.<sup>252</sup> Yet no one has attempted to articulate the theoretical root of the deficiencies of judicial review of religious arbitration.

This Part presents the two conflicting theoretical models most embedded in debates over religious arbitration—legal pluralism and normative pluralism—and mines them for guidance regarding the proper bounds of judicial review of religious arbitration.

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248. *Id.* at 123–24.

249. *Id.* at 121.

250. *Id.*

251. *See, e.g.*, Grossman, *supra* note 6, at 171; Wolfe, *supra* note 6, at 428–29; Bambach, *supra* note 62, at 406; Helfand, *supra* note 21, at 1294.

252. *See, e.g.*, Grossman, *supra* note 6, at 171 (arguing that courts' failure to adequately review religious tribunal decisions may give rise to due process violations of the parties to religious arbitration).

### A. Theories of Pluralism

The starting point for any discussion about the proper relationship between religious communities and a secular state is the “fact of reasonable pluralism.”<sup>253</sup> The United States is marked by a level of unparalleled religious diversity, with citizens representing an extraordinary number of faiths, displayed in an even greater number of manifestations. This fact is not debated. The crucial issue is how a secular state should react to the fact of reasonable pluralism. Scholars generally embrace an answer from two regimes: legal pluralism and normative pluralism.<sup>254</sup>

#### 1. Legal Pluralism

Legal pluralism is the notion that multiple legal systems exist alongside state law on equal footing, and that citizens of the state have a wide amount of discretion to choose which legal system should apply to their lives.<sup>255</sup> These non-state legal systems can have a variety of sources, including national, ethnic, or religious norms. In this regime of parallel legal systems, it is conceivable that the legal system of a particular community may conflict with the laws of the state.<sup>256</sup> Thus, to strong supporters of legal pluralism, the state should sometimes cede to ethnic or religious norms, even when the result violates state law.<sup>257</sup>

The philosophy undergirding legal pluralism is that cultures and religions are not simply sources of meaning for individuals to draw upon in their private lives. Rather, religions can “function as independent legal orders with their own sets of rules and practices.”<sup>258</sup> Thus, the highest respect for diversity in a pluralistic society entails communal autonomy<sup>259</sup> and consensual exclusion from society,<sup>260</sup> as opposed to mandatory inclusion in majority structures.

A frequently cited example of legal pluralism is the Millet system of the Ottoman Empire. Under the Millet system, while Islamic civil law

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253. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 40 (Erin Kelly ed., Harvard University Press 2001).

254. Abdullahi Ahmed An-Na'im, *Religious Norms and Family Law: Is it Legal or Normative Pluralism?*, 25 EMORY INT'L L. REV. 785, 790–91 (2011).

255. Natan Lerner, *Group Rights and Legal Pluralism*, 25 EMORY INT'L L. REV. 829, 836 (2011).

256. Helfand, *supra* note 21, at 1276.

257. *Id.* at 1277.

258. *Id.* at 1275.

259. *See id.* at 1274–82 (describing a “new multiculturalism [that] encapsulates attempts by minority groups to exit the public sphere”).

260. Shachar, *supra* note 247, at 124.

governed family law issues of Muslims,<sup>261</sup> non-Muslim religious communities were permitted to have their own autonomous courts—completely distinct from the structures of the Empire—to rule on family law matters in accordance with their particular religious doctrines.<sup>262</sup> Legal pluralism is also a live trend in American religion jurisprudence. It arises most frequently in the Court’s religious question jurisprudence, which assumes the right of religious organizations to govern themselves according to the dictates of their faith and without government interference.<sup>263</sup> Most recently, glimpses of legal pluralism were visible in the Court’s opinion in *Hosanna-Tabor*, which confirmed the principle that religious organizations can abide by their own judgments, even when their actions may violate federal employment discrimination law.<sup>264</sup>

## 2. Normative Pluralism

Normative pluralism begins with the same assumption as legal pluralism: An individual is bound to a diverse array of authorities as a result of national, cultural, and religious identities. But while a legal pluralist is willing to put the coercive force of state law behind norms supporting individual identities, a normative pluralist—though respectful and cognizant of the diversity of norms binding an individual—stops short of giving those norms the force of state law.<sup>265</sup> Rather, according to normative pluralism, courts should be limited to applying only state law, leaving the application of religious and cultural norms to the communities that accept them.<sup>266</sup> Thus, the legal regime of normative pluralism preserves “the integrity and uniformity of state legal systems” while reflecting the “reality and appreciation of normative diversity.”<sup>267</sup>

One alleged justification for the superiority of normative pluralism over legal pluralism is that only normative pluralism properly conceives of the relationship between the authority of the state and normative legal systems. Abdullahi Ahmed An-Naim explains the distinction:

“[S]tate law is *made and enforced* by the state, founded on civic reason, and binding on the generality of the population regardless

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261. Lerner, *supra* note 255, at 846.

262. *Id.*

263. *See supra* Part III.A.1 (explaining the Court’s interpretation of the rights of religious entities under the First Amendment’s religion clauses).

264. *See supra* Part III.A.2.

265. An-Na’im, *supra* note 254, at 797.

266. *Id.*

267. *Id.* at 790–91.

of its conformity or nonconformity with any religious norm. Religious norms are derived by believers from their religion's sources, are binding only on believers, and tend to lose their religious value when coercively enforced."<sup>268</sup>

Law, he argues, by definition, is coercively enforced, while religious norms can only be voluntarily observed.<sup>269</sup> An-Naim's argument for normative pluralism is also derived in part from a theory of competence: State judges and officials are unlikely to have the competence, let alone the religious or cultural authority, to interpret and apply non-state legal norms.<sup>270</sup> A further argument for normative pluralism is that in a system of legal pluralism, the only theory of justice is a thin one, based in the rights of contract. However, many scholars argue that there must be a deeper theory of justice behind the law that reflects core values and interests, which will be defined by political and cultural majorities.<sup>271</sup> Preservation of these values requires minority cultures to seek accommodation of their distinct norms through a process of assimilation and adaptation consistent with the values of the majority.<sup>272</sup>

Despite the absence of formal state enforcement and calls for adaptation, normative pluralism has mechanisms to ensure the dynamic survival of communities bound by normative systems not represented in the law. Specifically, among calls for minority cultures to adapt to majority norms is a corresponding call for those cultures to work to influence public policy.<sup>273</sup> In other words, minority cultures should work to incorporate their own norms into the unitary legal system of the majority, as opposed to asking for distinct legal enforcement.<sup>274</sup> Thus, a successful manifestation of normative pluralism requires a political system under which cultural and

268. *Id.* at 808.

269. *Id.* at 797.

270. *Id.* at 798–99.

271. Jeremy Waldron, *Questions about the Reasonable Accommodation of Minorities*, in SHARI'A IN THE WEST 103, 112 (Rex Ahdar & Nicholas Aroney, eds., 2010); An-Na'im, *supra* note 254, at 789.

272. See John Witte, Jr., *The Future of Muslim Family Law in Western Democracies*, in SHARI'A IN THE WEST 279, 289–90 (Rex Ahdar & Nicholas Aroney, eds., 2010) (“[I]t takes flexibility and innovation on the part of a religious community to win accommodations from secular laws and cultures.”).

273. See, e.g., An-Na'im, *supra* note 254, at 789 (“Religious communities have the right to organize and act collectively to contribute to public policy determinations and legislation the best they can.”); Waldron, *supra* note 271, at 104 (“[I]n a democracy. . . the minority [should] put forward their views about the criminal law, or about marriage, to the polity at large in a debate about how the polity should shape its general laws.”); Jean-Francois Gaudreault-DesBiens, *Religious Courts' Recognition Claims: Two Qualitatively Distinct Narratives*, in SHARI'A IN THE WEST 59, 59 (Rex Ahdar & Nicholas Aroney, eds., 2010) (discussing how democracies earn more legitimacy when “citizens [or members of a particular group] conceive of themselves as the authors of the legislation they must obey”).

274. An-Na'im, *supra* note 254, at 789–90.

religious minorities have a reasonable chance to shape the public policy to which they are being asked to adapt.<sup>275</sup>

## B. The Operation of Theories of Pluralism

One could argue that the civil enforcement of religious arbitration decisions is the pinnacle of legal pluralism.<sup>276</sup> Such characterization is due to the belief that religious arbitration allows religious communities to “enhance[] the autonomy and self-governance of their own religious authorities” by employing “private law to share the law-making authority typically reserved for government.”<sup>277</sup> However, the reality of religious arbitration is more nuanced, with different aspects of the process reflecting both legal and normative models of pluralism.

### 1. Operation of Legal Pluralism

The extreme deference that secular courts pay to religious tribunals is a hallmark of legal pluralism, as it constructively allows religious citizens to live according to the dictates of a legal system alongside that of the state. There are two manifestations of this deference that particularly highlight the influence of legal pluralism in judicial review of religious arbitration.

First, recall that courts have refused to review whether an arbitrator exceeded his authority if the arbitrator applied religious law.<sup>278</sup> While courts are mandated by statute to embark on this inquiry, they restrain this analysis in religious arbitration for fear of unconstitutionally answering religious questions. In doing so, courts hold religious arbitration tribunals to a lower standard—in essence endorsing the existence of multiple review mechanisms or legal standards according to the venue in which an individual chooses to arbitrate.

Second, recall that parties to religious arbitration can waive the procedural protections of state and federal arbitration statutes in favor of religious

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275. See Waldron, *supra* note 271, at 112 (discussing the idea that having members of the minority put forth their view on certain subjects to the majority is “surely the thing to do in a democracy”); Gaudreault-DesBiens, *supra* note 273, at 59 (“[T]he actual or perceived exclusion of a particular group, religious or otherwise, becomes an important issue from the standpoint of legitimacy and democracy.”).

276. See, e.g., Helfand, *supra* note 21, at 1281 (noting that religious arbitration reflects the goal of respecting diversity by promoting community autonomy).

277. *Id.*

278. See, e.g., *Lang v. Levi*, 16 A.3d 980, 989 (Md. Ct. Spec. App. 2011) (holding that where an arbitrator relies on religious principles, a court “cannot delve into whether under Jewish law there is legal support” for the arbitrator’s decision).

procedural law.<sup>279</sup> In allowing for such waiver, courts are in effect permitting individuals to opt out of the secular legal system for the purpose of dispute resolution, only to briefly opt in when they seek state enforcement of the result.

## 2. Operation of Normative Pluralism

Two particular elements of judicial review of religious arbitration reflect normative pluralism: (1) the application of neutral principles of law to agreements to arbitrate before a religious tribunal; and (2) the application of an evolving public policy *vacatur* standard.

First, recall that when judges review agreements to arbitrate before a religious tribunal, they apply neutral principles of contract law to discern if the parties intended to submit to the jurisdiction of a religious authority.<sup>280</sup> In doing so, courts routinely ignore the presence of religious language or identifications of religious forums, so long as they are expressed in such a way as to allow the court to derive the information necessary for the application of contract law principles.<sup>281</sup> Thus, where parties have used imprecise religious language, courts have refused to enforce the agreement, sending a strong signal to religious tribunals that enforcement of their agreements requires adaptation to American contract principles.<sup>282</sup>

As case law demonstrates, religious tribunals have received the message and draft their agreements with increasing specificity and reference to secular contract norms.<sup>283</sup> In fact, though Muslim arbitration in the United States is in its infancy, it is instructive to examine one of the first Islamic arbitration agreements to reach a secular court. The agreement included both a list of the particular issues in dispute and a reference to the forum of arbitration, the Texas Islamic Court, including a street address.<sup>284</sup> The agreement was thus drafted with enough specificity—and according to secular contract norms—to allow enforcement by the Court of Appeals of Texas.<sup>285</sup>

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279. *Kovacs v. Kovacs*, 633 A.2d 425, 433 (Md. Ct. Spec. App. 1993).

280. *See supra*, Part III.B.1 (discussing judicial review of religious arbitration agreements).

281. *See supra*, Part III.B.1 (explaining how courts treat religious terminology upon review of religious arbitration agreements).

282. *See Sieger v. Sieger*, 747 N.Y.S.2d 102, 104 (N.Y. App. Div. 2002) (refusing to enforce an arbitration agreement with ambiguous religious terms).

283. *See, e.g., Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 345 (D.C. Cir. 2005) (upholding the following arbitration agreement: “Any claim of a member against the Congregation which cannot be resolved amicably shall be referred to a Beth Din of Orthodox Rabbis for a Din Torah. The decision of the Beth Din shall be binding on the member and the Congregation. Failure to comply with this provision shall be grounds for disciplinary action.”).

284. *Jabri v. Qaddura*, 108 S.W.3d 404, 407 (Tex. App. 2003).

285. *Id.*

Thus, there is a distinct parallel between normative pluralism and the neutral principles of law approach as applied to religious arbitration: Normative pluralism respects normative diversity, so long as there is legal uniformity. The neutral principles of law approach, as applied to religious arbitration agreements, allows for the operation of authoritative religious systems, so long as they are willing to adapt the structure of their agreements to meet the uniform requirements of the state.

Second, courts have routinely noted that while arbitration awards will be vacated where they conflict with “public policy,” that public policy evolves.<sup>286</sup> Thus, awards that are contrary to public policy today due to majority norms may come to reflect public policy tomorrow if minorities are successful in utilizing the political process to shift public policy. This use of democratic apparatuses, instead of autonomous legal systems, to accommodate a pluralistic society is a defining feature of normative pluralism.<sup>287</sup>

It is instructive that the elements of religious arbitration that most reflect normative pluralism have proven more successful at protecting the rights of parties to religious arbitration than those elements of the process influenced by legal pluralism. For example, the two elements of religious arbitration that most reflect legal pluralism are also those that create the greatest risks to individuals who choose to arbitrate before a religious tribunal. The existence of multiple review schemes creates the risk that individuals will be denied the full panoply of statutory review, and allowing parties to selectively opt out of the legal system creates the risk of unintentional waiver of procedural protections. Conversely, the elements of religious arbitration that most reflect normative pluralism—the application of neutral principles of contract interpretation, the public policy vacatur, and adaptations to secular legal apparatuses—have proven successful at protecting the rights of citizens without completely restricting their access to a religious venue. It follows that any revisions to the structure of judicial review of religious arbitration should be grounded in the ideals of normative pluralism.

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286. *See, e.g., Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957, 960–61 (Sup. Ct. 1997) (noting that the “historical authority for confirmation of child support awards made through an arbitration process, which does not employ the principles established in [the New York Domestic Relations Law], has been eroded, if not supplanted, by the strong public policy of this state set forth in that statute”).

287. *See supra* notes 277–79 and accompanying text.

C. *A Model of Normative Pluralism: Arbitration in the Beth Din of America*

The BDA is an example of a religious tribunal that seeks enforcement of its decisions in secular courts in a manner consistent with normative pluralism. The BDA has established a network of Jewish law courts functioning as arbitration panels under the FAA.<sup>288</sup> The BDA has gained “widespread acceptance among America’s secular courts,” and has never had one of its decisions overturned.<sup>289</sup> The reason for such success is a deliberate effort by the board of directors to establish a system that “secular courts would feel comfortable upholding.”<sup>290</sup>

Michael Broyde identifies a group of adaptations made by the BDA in service of this goal.<sup>291</sup> Broyde notes that while each adaptation is “ultimately consistent with Jewish law, each also represents a departure from the traditional practice thereof.”<sup>292</sup> Out of this group of adaptations, two in particular highlight the philosophy of normative pluralism, showing a will to adapt Jewish law courts to gain acceptance by the American legal system.

First, the BDA, sensitive to the “secular focus on procedural fairness,” issued detailed rules of procedure that are applied uniformly across all BDA proceedings.<sup>293</sup> The Rules and Procedures of the BDA incorporate many of the procedural guarantees of secular courts and are written in “lawyer’s English” for the benefit of judges only familiar with American civil procedure.<sup>294</sup> In addition, the BDA developed an internal appellate process, even though Jewish law does not require an appeals process.<sup>295</sup>

Second, the BDA actively cultivates arbitrators who are fluent in both Jewish and American law to further ensure enforcement of their awards in secular courts.<sup>296</sup> Broyde highlights that secular judges are more likely to enforce decisions from religious arbitrators when they are expressed in terms of familiar American legal doctrines.<sup>297</sup> This principle extends to the substance of the remedies awarded, as Broyde concludes that “to appease secular courts and litigants, the BDA must not only talk the talk by issuing

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288. Broyde, *supra* note 65, at 1–2.

289. *Id.* at 1.

290. *Id.* at 2.

291. *Id.*

292. *Id.* at 2–3.

293. *Id.* at 4.

294. *Id.* at 6.

295. *Id.* at 9.

296. *Id.* at 12.

297. *Id.*



decisions in ‘legalese,’ but also be prepared to walk the walk by issuing decisions in accordance with secular law.”<sup>298</sup>

Amidst criticism that the religious forum of the BDA is “so beholden to secular law,” Broyde makes his philosophy clear: Religiously devout individuals in a secular state cannot escape the need for a civil legal system.<sup>299</sup> The BDA would be doing a disservice to its community if it issued decisions that would be ignored by secular courts.<sup>300</sup> Thus, the BDA has adapted Jewish law and procedure not in a desire to assimilate to majority norms, but rather to “maximize the [BDA’s] potential for secular court affirmation.”<sup>301</sup>

#### VI. A NEW FRAMEWORK FOR JUDICIAL REVIEW OF RELIGIOUS ARBITRATION

The scheme of judicial review of religious arbitration is responsible for balancing the protections of the secular state with the right to live in accordance with one’s faith. Because a scheme grounded in legal pluralism is incapable of protecting parties to religious arbitration, it is worth revising the structure of judicial review of religious arbitration to better reflect the ideals of normative pluralism. Furthermore, it is unlikely that all religious tribunals will be as willing as the BDA to adapt their procedures to explicitly correspond with American legal norms. Thus, it is the responsibility of the state to ensure that religious arbitration adequately preserves both the right to be bound by religious obligation and the protections of citizenship.

As will be shown below, any single state-imposed solution will be inherently incomplete due to the nature of the problem. Thus, any restructuring of judicial review of religious arbitration must occur on two fronts: internally from the courts and externally from the legislatures.

The courts would seem the most natural venue for revising judicial review of religious arbitration, since they are responsible for the task. But it is well documented that legal issues pertaining to the relationship between religious individuals and the state are better resolved by legislatures than courts.<sup>302</sup> Legislatures are better suited to carve out narrow exceptions from general laws that accommodate the specific needs of religious citizens in particular areas.<sup>303</sup>

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298. *Id.*

299. *Id.* at 17.

300. *Id.*

301. *Id.*

302. See, e.g., James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413 (1992) (arguing that “religious groups and individuals fared better in the legislatures than in the courts”).

303. *Id.* at 1446.

Here, however, a complete legislative solution is impossible. In the case of arbitration, the pressing need is not accommodation, but rather accountability: Religious tribunals must be subject to a level of review stringent enough to ensure that parties are not denied their statutory right to protection. Yet, a statute targeting only religious arbitration—particularly one imposing a burden not felt by secular arbitration panels—is unlikely to survive constitutional scrutiny. This is because it is generally considered unconstitutional to explicitly force a religious citizen to carry an additional burden by virtue of being religious.<sup>304</sup> Thus, any legislative solution must be directed at all arbitration—as opposed to religious arbitration in particular—and is thus unlikely to completely address the specific needs of parties to religious arbitration. As a result, a comprehensive solution also requires courts to prudentially craft and apply correctives specific to religious arbitration, which they can do without fear of the type of constitutional scrutiny imposed on legislatures.

Accordingly, this Part proposes two complementary methods of restructuring judicial review of religious arbitration in the spirit of normative pluralism. First is a set of prudential guidelines for judges to consider when they are confronted with the task of reviewing the decision of a religious tribunal. Second is a set of amendments to the FAA and its state analogues. While there is some redundancy between the content of each method, such overlap is inevitable due to the inherent shortcomings of both methods that necessitate a multi-front solution.

#### A. *Judicial Guidelines*

This section proposes a group of prudential guidelines for judges to consider when asked to review the behavior of a religious tribunal. Each guideline addresses a particular shortcoming of the current scheme of judicial review described in Part IV. Furthermore, each guideline takes seriously the notion that judicial review of religious arbitration must be based in the logic of normative pluralism if the institution is to be productive, dependable, and sustainable.

First, a court should never hold that parties waived the procedural protections of the FAA simply by virtue of agreeing to religious

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304. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 57 (1989) (suggesting that where religious citizens are forced to carry a larger burden by virtue only of being religious, the religion clauses are violated).

arbitration.<sup>305</sup> This inability of waiver must apply even where the choice of law provisions incorporated into the arbitration agreement require the application of religious law, which does not recognize the FAA. Religious tribunals derive the possibility of enforcement of their awards in secular court from the FAA.<sup>306</sup> It is thus reasonable that the tribunal should be bound by the entirety of the statute, and not be permitted to benefit from it without the corresponding procedural costs.

Second, if a religious tribunal seeks enforcement of its awards under the FAA, it must be subject to the same level of inquiry into their proceedings as comparable secular panels. Judicial fear of broaching religious questions should not limit courts' review of religious tribunals to a lower standard than that applied to secular arbitration. The religious question constraint has resulted in a religion clause jurisprudence more concerned with protecting judges from answering difficult questions than with protecting the parties implicated in the disputes.<sup>307</sup> However, just as the policy goals of arbitration give way where they result in insufficient protection for parties to arbitration,<sup>308</sup> so too must both judicial discomfort with religion and institutional autonomy no longer drive the analysis where they result in insufficient protections for religious citizens.

Third, judges must recognize that communal religious pressure can be duress sufficient to warrant voiding an arbitration agreement. Courts already hold that when a party to an agreement wields pressure with religious content, such as refusing to grant a religious divorce, there is sufficient duress to invalidate the resulting agreement.<sup>309</sup> Since courts already recognize that a party's withholding of a religious good can constitute duress, it is not an unreasonable jump to recognize the power of the religious community itself to leverage the same religious goods, resulting in illegal coercion.

Fourth, the procedures utilized by the religious tribunal cannot violate the principle of equality of all individuals before the law, regardless of religious procedural law to the contrary. Thus, there can be no restriction on admissible evidence or credible witnesses on account of gender, race, ethnicity, or religion. While this standard has not been enforced in the context of arbitration, courts have applied it to the evaluation of foreign

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305. See *Kovacs v. Kovacs*, 633 A.2d 425, 433 (Md. Ct. Spec. App. 1993) (refusing to vacate an arbitration award even though the arbitration process violated the Maryland Uniform Arbitration Act because the litigants voluntarily and knowingly agreed to the process).

306. See *supra* note 55 and accompanying text.

307. See WITTE, *supra* note 121, at 253.

308. See Federal Arbitration Act, 9 U.S.C. § 10 (2006) (allowing for an arbitration award to be vacated if the arbitrators were partial, corrupt, or guilty of misconduct).

309. Fried, *supra* note 71, at 651.

divorce provisions. For example, in *Aleem v. Aleem*, the Court of Appeals of Maryland refused to enforce a foreign divorce proceeding that utilized the Muslim *talaq*, due to the gender inequity imbedded in the process.<sup>310</sup> Under Islamic law, a husband—though not a wife—has a right to *talaq*, which is the divorce mechanism requiring only that the husband recite, “I divorce thee” three times.<sup>311</sup> The court found the *talaq* to violate the public policy favoring gender equality—because it could only be exercised unilaterally by men—and thus refused to enforce the resulting divorce.<sup>312</sup> Similar prohibitions on unequal treatment must be established in the context of religious arbitration.

Fifth, a secular court should not enforce an award that violates the statutory law of the jurisdiction.<sup>313</sup> This standard has not been robustly enforced in the context of arbitration, but does have traction in the evaluation of foreign divorce decrees.<sup>314</sup> For example, in *Aleem* the court noted that Maryland state law mandated “the property interests of the spouses should be adjusted fairly and equitably.”<sup>315</sup> However, under Pakistani law—the law under which the marriage contract at issue was written—there was no equitable division of marital property unless stated in the marriage contract.<sup>316</sup> Thus, the court refused to recognize the divorce and resulting property distribution because it contravened the statutory law of the state.<sup>317</sup> Judges should extend this principle to their review of religious arbitration.

### B. Legislative Amendments

This section proposes four amendments to the FAA that address the shortcomings of judicial review of religious arbitration. As explained above, any legislative solution must be drafted to apply to both religious and secular arbitration to survive constitutional scrutiny. Thus, each amendment is broadly drafted to meet this requirement.

Section 10 of the FAA currently lists four scenarios in which a court *may* vacate an arbitration award: (1) the award was produced by corruption;

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310. 404 Md. 404 (2008).

311. *Id.* at 406 n.1.

312. *Id.* at 422–23.

313. See *Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957, 960 (Sup. Ct. 1997) (refusing to enforce a Beth Din arbitration award because it violated a state statute).

314. The court in *Rakoszynski* applied a variation of this standard, vacating a beth din child support award because the calculations did not reflect the standards required by the state domestic law governing child support. *Id.*

315. *Aleem*, 404 Md. at 421.

316. *Id.* at 422.

317. *Id.*

(2) the arbitrators showed evident partiality; (3) the arbitrator was guilty of misconduct; and (4) the arbitrator exceeded his powers.<sup>318</sup> Adding the following four *non-discretionary* grounds for vacatur would further ensure that parties to religious arbitration have access to the protections of the secular state:

- No party may waive the procedural rights guaranteed by the FAA, regardless of whether the law applied in the underlying arbitration proceeding recognizes the statute.
- Arbitrators may not exclude material witness testimony due to the gender, race, or religion of the witness.
- An arbitration award that restricts the parties' later access to state or federal courts must be vacated.
- An arbitration award that violates the statutory law of the jurisdiction in which parties seek enforcement must be vacated.

Applying this revised framework for judicial review will help ensure that parties to religious arbitration are not forced to waive the protections of the secular state. While they require some adaptation of religious norms and procedures to American legal principles, such adaptation is the price one pays for living in a state devoted to normative pluralism and the equal protection of all citizens.

#### CONCLUSION

This Article sets forth the argument that the current scheme of judicial review of religious arbitration creates a two-tiered system of review, wherein citizens who submit their disputes to a religious tribunal are at a greater risk of having their statutory rights violated than parties that submit to secular arbitration. This inequality is due to judicial hesitance to broach religious questions; the ease with which statutory protections can be waived and replaced by potentially discriminatory religious procedural law; and a general refusal among courts to consider religious communal pressure as a source of duress. The solution proposed is an overhaul of the current

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318. Federal Arbitration Act, 9 U.S.C. § 10(a) (2006).

scheme of judicial review of religious arbitration—one that lets individuals adhere to religious obligation without sacrificing the protections of the secular state, and does so by requiring the state and religious communities to actively balance each other's needs.

However, balancing acts of this nature should not be restricted to discussions of religious arbitration alone, as each time the scale finally lays still, a principle is revealed that can be applied to the next dispute over the rights of religious citizens in a secular state to live in accordance with their faith. The lesson from this experiment is that a relationship between religion and the state governed by categorical prohibitions, as opposed to mutual negotiation, is not productive. When courts refuse to engage religion—and when religious communities refuse to engage with the courts—the result is the same: Religious citizens are left to negotiate two conflicting legal orders, neither of which has the full resources to protect them. Modern religion clause jurisprudence is based on the principle that religious communities need to be protected from the courts, and the courts need to be protected from unconstitutionally answering religious questions. What this Article shows, however, is that when religious communities and secular states focus entirely on protecting themselves, there is no one to protect the religious citizen.