A Higher Authority: Judicial Review of Religious Tribunals

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ABSTRACT

Religious diversity within a secular state raises a host of issues, not least the question of how to resolve a conflict between obligations of citizenship and demands of faith. Nowhere is this question more visible than in the ongoing debate over the rights of citizens to submit their disputes to religious tribunals and have the resulting decision enforced by a civil court. This Article surveys the right of an individual to civil enforcement of religious arbitration decisions. In particular, it focuses on the level of judicial review courts apply to religious arbitration awards compared to the awards of secular arbitration. It argues that the current standard for judicial review of religious arbitration decisions is flawed for three reasons. First, religious tribunals are subject to less judicial review than secular tribunals due to judicial assumptions regarding the reach of the First Amendment Religious Clauses. As a result, parties to religious arbitration are denied the full breath 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. This Article thus suggests a new framework for the judicial review of religious arbitration decisions—in the form of judicial guidelines and legislative amendments to arbitration statutes—that will allow an individual to live according to the dictates of her faith without sacrificing the protections of the secular state.
INTRODUCTION

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

However, the current debates regarding the rights of religious citizens show an unfortunate shift away from mutual negotiation and towards 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.² These efforts reflect fears that religious citizens will choose subject themselves to religious law rather than the law of the secular state. Similarly, the United States Supreme Court recently indicated that religious organizations do indeed have a constitutional right to avoid the imposition of certain federal laws to preserve their right to self-governance. In Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, the Court held that religious organizations are constitutionally immune to employment discrimination suits by certain

¹ See supra section IV.B.

categories of employees. These two developments highlight a tension that is ripe for resolution: Where is the boundary of the right of the faithful to be beholden to religious, as opposed to secular, law?

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

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 process.


4 See infra Part II.


system as well as those before secular tribunals. Rather, due to judicial fears of addressing religious questions in violation of the first amendment; the incorporation of religious procedural law; and the refusal of courts to recognize the coercive power of communal religious pressure, courts can essentially rubber-stamp decisions of religious tribunals, even when the tribunal fails to provide the procedural protections mandated by state and federal arbitration law. In response to this inequity—and in anticipation of the imminent growth of religious arbitration in the Muslim community—this Article presents a new set of guidelines for the judicial review of religious arbitration decisions, capable of ensuring 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 the inability of the current scheme of judicial review to protect individuals who chose to submit to religious arbitration to the same extent as those who submit to secular arbitration. In particular, it demonstrates how current religion clause jurisprudence restricts courts from applying the full panoply of procedural protections of state and federal arbitration law; the heightened risk of procedural unfairness due to the incorporation of religious procedural law which may not align with standard conceptions of fairness; and the risk that a court will compel arbitration, even where a party initially consented under duress, due to the courts’ underestimation of the power of communal religious pressure. Part V then suggests a new framework for the judicial review of religious arbitration decisions—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 the 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. Thus arbitration provides parties with an alternative means of dispute resolution that has an outcome of the same strength and finality as traditional litigation.

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8 Id.

9 Id.

10 Id.

11 Id.

12 Id.

13 Id.
Twenty-first-century courts have welcomed arbitration with open arms, holding that almost any transaction can be subject to resolution by arbitration. 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 state analogues, all of which impose only minimal regulations on arbitration proceedings. This Part will delineate 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. Arbitration agreements can be executed in two ways. First, parties to a contract can include a written provision agreeing to settle any controversy that arises from the contract by arbitration. Such arbitration clauses are common in commercial agreements, employment contracts, and so forth.

14 See Grossman, supra note 6, at 175. While the FAA restricts arbitration to disputes arising from contracts or transactions “involving commerce,” courts have held that any transaction can be subject to arbitration. Grossman, supra note 6, at 175.

15 Federal Arbitration Act 9 U.S.C. §§ 1-16 (2006). Each state has its own version of the FAA based on the Uniform Arbitration Act. 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 176.

16 Federal Arbitration Act §§ 1-16.

17 Id. § 2.

18 Id. § 2.
prenuptial agreements. Second, parties can execute a written agreement to submit an existing controversy to arbitration.20

A valid arbitration agreement strips civil courts of their jurisdiction to hear any issue contemplated for resolution by arbitration in the agreement.21 Thus if a party to 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.22

If a party refuses to comply with an arbitration agreement, the other may petition the court to enforce the agreement and compel the parties to arbitration.23 In this procedural posture, 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 enforceable.24 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.25

19 ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 32 (Edward Brunet et al. eds., 2006).
20 Federal Arbitration Act § 2.
21 Id. § 3.
22 Id. § 3.
23 Id. § 4.
24 Id. § 2.
25 Id. § 4.
B. Arbitration Proceedings

The actual structure of arbitration proceedings varies dramatically, as the FAA provides little guidance regarding the procedural requirements for enforcement.\textsuperscript{26} Arbitration usually proceeds without formal procedural rules or with ‘boilerplate procedural rules incorporated by the drafting party.’\textsuperscript{27} 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.\textsuperscript{28} As a result, it is possible for an arbitration panel to function as a mini-court, emulating the formal procedures of a courtroom.\textsuperscript{29} 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.\textsuperscript{30}

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\textsuperscript{26} 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. Federal Arbitration Act § 5. If the agreement is silent as to the identity of the arbitrators, the court will appoint a single arbitrator for the dispute. Id.


\textsuperscript{28} Helfand, supra note 27, at 1263.

\textsuperscript{29} See Grossman, supra note 6, at 176–77 (“[A]rbitration varies between what is in effect private litigation or as different from litigation in a court as possible”) (citations omitted) (internal quotations omitted).

\textsuperscript{30} See Grossman, supra note 6, at 176–77.
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While the panels that conduct arbitration are private entities, the FAA imbues them with the ability to call witnesses backed by the force of the state.\textsuperscript{31} Arbitrators can summon in writing any person before them with information or materials relevant to the controversy.\textsuperscript{32} 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.\textsuperscript{33}

C. \textit{Enforcing Arbitration Decisions}

Regardless of the particular form of the arbitration, it concludes with the arbitrator resolving the dispute and issuing an award in favor of the prevailing party.\textsuperscript{34} If the parties do not want recognition of the award 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 state law, they must petition for confirmation of the award and submit to judicial review in civil court within one year of the award.\textsuperscript{35} A court must confirm an arbitration award unless it finds the award must be vacated, modified, or corrected.\textsuperscript{36} If the court confirms the arbitration award, it must enter judgment on it.\textsuperscript{37} The significance of entering judgment on an arbitration award cannot be overstated: The judgment makes all issues contained in the

\begin{itemize}
\item \textsuperscript{31} See id. § 7.
\item \textsuperscript{32} Id. § 7.
\item \textsuperscript{33} Id. § 7.
\item \textsuperscript{34} MACNEIL, supra note 7, at 7.
\item \textsuperscript{35} Federal Arbitration Act § 9.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id.
\end{itemize}
arbitration award res judicata, precluding the parties from ever arbitrating or litigating the merits of the dispute in civil court.  

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: First, Congress intended for arbitration to be “speedy and not subject to delay and obstruction in the courts.” 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. Thus, the scope of judicial review of arbitration decisions has been categorized as “among the narrowest known to law.” 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.

38 Grossman, supra note 6, at 209; see e.g., Dial 800 v. Fesbinder, 12 Cal. Rptr. 3d 711, 724 (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.”).

39 Wolfe, supra note 6, at 444.


41 See Grossman, supra note 6, at 172.

42 Steven C. Bennett, Enforceability of Religious Arbitration Agreements and Awards, 64 DISP. RESOL. J. 24, 26 (2010) (citing Dominion Video Satellite, Inc. v. Ecbostar Satellite L.L.C., 430 F.3d 1269 (10th Cir. 2005)).
1. **Statutory Vacatur Scheme**

According to the FAA, a court may vacate an award where (1) the award was produced by corruption, fraud, or undue means;\(^4\) (2) there was evident partiality or corruption in the arbitrators;\(^4\) (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;\(^4\) 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.\(^4\)

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.”\(^4\) Professor Michael A. Helfand explains that the 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.”\(^4\) Helfand points to an arbitration award which violates the Sherman Antitrust Act as demonstrative: Antitrust laws are intended to

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\(^4\) Federal Arbitration Act § 10 (a) (1).

\(^4\) Id. § 10 (a) (2).

\(^4\) Id. § 10 (a) (3).

\(^4\) Id. § 10 (a) (4).


\(^4\) Helfand, *supra* note 27, at 1254.
deter anti-competitive behavior and protect the public’s interest in a fair market economy. Thus where parties to an 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.”

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.’” It is arguable that the reach 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.

However courts remain split as to 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. Other

49 Helfand, supra note 27, at 1254.
50 Helfand, supra note 27, at 1258.
51 W.R. Grace and Co., 461 U.S. at 767 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).
52 See E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 63 (2000) (“We agree, in principle, that court’s authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.”).
53 See, e.g., Berg v. Berg, 873 N.Y.S.2d 231 (Sup. Ct. 2008) (vacating arbitration award pertaining to child custody and visitation because such topics can not be subject to arbitration on public policy grounds); Rakoszynski v. Rakoszynski, 663 N.Y.S.2d 957 (Sup. Ct. 1997) (holding
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.\textsuperscript{54}

Furthermore, courts have recognized that public policy is not stagnant, and thus the reach of the public policy exception will change as public policy evolves.\textsuperscript{55} For instance, in 1988 a California court refused, on public policy grounds, to enforce a prenuptial contact provision, by which the wife would be entitled to a prearranged monetary settlement upon divorce. The court reasoned that because the woman would only be entitled to the dowry upon divorce, the contract encouraged divorce and was thus contrary to the public policy of sustaining marriage.\textsuperscript{56} However, in 2003, the same court rejected the principle that prenuptial agreements were categorically contrary to public policy and enforced such an agreement.\textsuperscript{57}

\textsuperscript{54} See \textit{Rakoszynski}, 663 N.Y.S.2d at 959 (rejecting a categorical prohibition on arbitrating child support, yet vacating arbitration award that failed to reflect public policy of state child support statutes).

\textsuperscript{55} See, \textit{e.g.}, \textit{Rakoszynski}, 663 N.Y.S.2d 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.”).

\textsuperscript{56} \textit{In re} Marriage of Dajani, 204 Cal. App. 3d 1387, 1389 (Ct. App. 1988).

\textsuperscript{57} \textit{In re} Marriage of Bellio, 105 Cal. App. 4th 630, 635 (Ct. App. 2003).
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 private citizens of the same faith community.\(^{58}\) 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.\(^{59}\) While the exact form of religious tribunals defies description due to the variety spawned in the United States alone,\(^{60}\) there is one constant feature: substantive and procedural rights of parties are derived from religious doctrine as opposed to secular law.\(^{61}\)

The FAA does not explicitly address arbitration conducted in a religious tribunal.\(^{62}\) However, courts routinely enforce the decisions of religious tribunals under the general authority of civil arbitration law.\(^{63}\) The underlying assumption behind such enforcement is that religious

\(^{58}\) See Brief of Religious Tribunal Experts as Amici Curiae in Support of Petitioner, supra note 5.


\(^{60}\) See e.g., Brief of Religious Tribunal Experts as Amici Curiae in Support of Petitioner, supra note 5.

\(^{61}\) See Brief of Religious Tribunal Experts as Amici Curiae in Support of Petitioner, supra note 5.


\(^{63}\) See Grossman, supra note 6, at 169-70; see e.g., Dial 800 v. Fesbinder, 118 Cal. App. 4th 32,
tribunals are “nothing more than private arbitration” tribunals, and deserve analogous treatment regardless of their religious character.\textsuperscript{64}

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.\textsuperscript{65} There are three components of the religious arbitration process which makes 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.\textsuperscript{66} Second, arbitrators on a religious tribunal may apply religious law instead of, or along side, the substantive secular law of the jurisdiction.\textsuperscript{67} Furthermore religious law may itself require arbitration be structured according to religious

\textsuperscript{50} (2004) (“As note[d] previously, American courts routinely enforce money judgments and other orders by \textit{beth din} panels.”); Berg, 926 N.Y.S.2d 568 (“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’”).


\textsuperscript{65} Grossman, supra note 6, at 169 (“[R]eligious issues permeate the entirety of religious tribunal proceedings.”).

\textsuperscript{66} \textit{See, e.g.}, infra note 78.

\textsuperscript{67} \textit{See, e.g.}, infra notes 90-91.
procedural requirements.\textsuperscript{68} Third, the arbitration awards might have a religious character, with remedies that could not be awarded by a secular court.\textsuperscript{69}

This Part will illustrate the functioning of religious arbitration though a survey of how Jewish, Christian, and Muslim communities use American arbitration law to secure civil enforcement of their religious tribunals’ decisions.

A. \textit{Jewish Arbitration}

In the United States, religious arbitration is most commonly used by Orthodox Jewish communities.\textsuperscript{70} Parties submit their claims to a Jewish law court called a beth din\textsuperscript{71} and petition civil courts to enforce the beth din’s decision as though it were a private arbitration under the FAA. \textsuperscript{72} The Beth Din of America (BDA) is the most extensive network of batei din in the United States and frequently have their decisions reviewed and enforced by secular courts.\textsuperscript{73}

The BDA is the most formalized and procedurally rigorous example of Jewish arbitration specifically, and religious arbitration generally.\textsuperscript{74} This section will outline the functioning of a typical BDA tribunal by highlighting three aspects of the process that mimic the secular

\begin{itemize}
\item \textsuperscript{68} See, e.g., infra note 75.
\item \textsuperscript{69} See, e.g., infra note 99.
\item \textsuperscript{71} Alternative spellings include “bet din” and “beit din”. The plural form is “batei din”.
\item \textsuperscript{72} See supra note 63.
\item \textsuperscript{73} Michael J. Broyde, \textit{Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent} (Forthcoming 2012) (manuscript at 1) (on file with author).
\item \textsuperscript{74} Broyde, \textit{supra} note 73, at 1.
\end{itemize}
arbitration process: (1) the agreement to submit a dispute to the BDA, (2) the form of the proceedings, and (3) the final remedy awarded.

1. **Jewish Arbitration Agreements**

Arbitration before a beth din can arise in three ways, with 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 of 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.\(^{75}\)

Second, parties can execute an agreement to arbitrate before a beth din after a controversy has arisen. 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.\(^{76}\)


Third, a beth din can send an invitation to arbitrate in the Beth Din on behalf of a claimant.\textsuperscript{77} If the individual to whom the invitation is sent does not accept, the beth din may issue a \textit{sirov}, or document noting that an individual has refused to participate.\textsuperscript{78} A \textit{sirov} will have varying affect due to the particular community, but it can amount to a shunning order—an instruction to the Jewish community to turn its back on this party.\textsuperscript{79}

2. \textit{Proceedings of a Beth Din}

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.\textsuperscript{80} The Rules and Procedures include requirements pertaining to arbitrator selection, applicable law, and the general proceedings of a hearing.\textsuperscript{81}

After parties have agreed to arbitrate, the supervisor of the beth din, called an Av Beth Din, appoints neutral arbitrators to hear the dispute.\textsuperscript{82} At least one arbitrator must be a rabbi, and up to two others can be religiously observant individuals with expertise relevant to the dispute.\textsuperscript{83}

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\textsuperscript{78} Rules and Procedures of the Beth Din of America, supra note 77, at 3.
\textsuperscript{79} 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); Wolfe, supra note 6, at 464.
\textsuperscript{80} See supra notes 75-76.
\textsuperscript{81} See Rules and Procedures of the Beth Din of America, supra note 77.
\textsuperscript{82} Rules and Procedures of the Beth Din of America, supra note 77, at 1.
\textsuperscript{83} Rules and Procedures of the Beth Din of America, supra note 77, at 1.
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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 contactor.  

Furthermore, at least one arbitrator is almost always a “well-trained lawyer who is comfortable in both American and Jewish law.” Parties to the dispute are given a period of time in which they may challenge the selection of arbitrators on grounds of bias.

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.” 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). Parties are also entitled to include choice of law provisions or agree to accept the common commercial practice of a trade. In both instances, the beth din will allow each source of law to provide the rules of decision, insofar as they don’t conflict with Jewish law.

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84 Broyde, supra note 73, at 17–18.

85 Broyde, supra note 73, at 17.

86 Rules and Procedures of the Beth Din of America, supra note 77, at 15.

87 Rules and Procedures of the Beth Din of America, supra note 77, at 14.

88 Rules and Procedures of the Beth Din of America, supra note 77, at 3.

89 Rules and Procedures of the Beth Din of America, supra note 77, at 4.

90 Rules and Procedures of the Beth Din of America, supra note 77, at 4.
The remainder of the Rules and Procedures outline the rights of the parties and the form of the proceedings. All proceedings are in English unless the parties consent to the use of another language (often Yiddish\(^91\)).\(^92\) Any party has a non-waivable right to an attorney.\(^93\) During the proceeding, each party is entitled to give a statement clarifying the issues, call witnesses, present evidence, and raise defenses.\(^94\) 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.\(^95\) Notably, conformity to the rules of evidence is not required and the beth din is the judge of materiality or relevancy of evidence.\(^96\)

3. **Beth Din 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.\(^97\) The BDA claims broad discretion as to the form of the remedy, 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.”\(^98\) The BDA also has procedures for

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\(^91\) *See e.g.*, Lieberman v. Lieberman, 566 N.Y.S.2d 490, 494 (Sup. Ct. 1991) (Beth Din arbitration proceedings conducted in Yiddish).

\(^92\) *Rules and Procedures of the Beth Din of America, supra* note 77, at 6.

\(^93\) *Rules and Procedures of the Beth Din of America, supra* note 77, at 6.

\(^94\) *Rules and Procedures of the Beth Din of America, supra* note 77, at 7.

\(^95\) *Rules and Procedures of the Beth Din of America, supra* note 77, at 7.

\(^96\) *Rules and Procedures of the Beth Din of America, supra* note 77, at 7.

\(^97\) *Rules and Procedures of the Beth Din of America, supra* note 77, at 9.

\(^98\) *Rules and Procedures of the Beth Din of America, supra* note 77, at 9.
B. Christian Arbitration

While Christian arbitration is less developed and widespread than its Jewish counterpart, it has surfaced in a variety of forms and received favorable treatment in civil courts. 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.”

Christian conciliation is provided by bodies such as The Institute for Christian Conciliation, a division of Peacemaker Ministries. The ICC arbitrates disputes arising in a wide range of legal areas, including contract, employment, family, personal injury, and landlord/tenant. However, they will not arbitrate disputes over legal issues which courts bar from arbitration on public policy grounds, such as child custody and visitation.

100 See Grossman, supra note 6, at 177.
103 Grossman, supra note 6, at 178.
104 Frequently Asked Questions, supra note 59.
105 Frequently Asked Questions, supra note 59.
Unlike the more strict arbitration model of the BDA, the ICC favors the application of a three-part dispute resolution scheme. First, once parties submit their dispute to the ICC, they undergo individual counseling. Second, if the counseling fails to resolve the dispute, the parties submit to mediation. Third, if the mediation fails to produce a resolution, the parties undergo binding arbitration.

Commentators have noted that Christian Conciliation does not differ dramatically from secular alternative dispute resolution, with two caveats. 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.” 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.”

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106 Waddell, supra note 105, at 590.

107 Id.

108 Id.

109 Id.

110 See, e.g., Waddell, supra note 105, at 590.

111 Rules of Procedure, supra note 106.

112 Rules of Procedure, supra note 106.
C. *Muslim Arbitration*

The Muslim community currently lacks a formal arbitration body the size of its Jewish and Christian counterparts.\(^{113}\) In 1988, the Counsel of Masajid of the United States resolved to establish Islamic arbitration councils across the country,\(^{114}\) however a structure of this magnitude has yet to be seen.\(^{115}\) As opposed to the sizeable body of American case law pertaining to Jewish arbitration before a beth din,\(^{116}\) there are currently only a handful of American cases that even make reference to arbitration before an Islamic tribunal.\(^{117}\)

\(^{113}\) See Helfand, *supra* note 27, at 1249.

\(^{114}\) See Bambach, *supra* note 70, at 387.

\(^{115}\) Helfand, *supra* note 27, at 1250.

\(^{116}\) See *supra* Part III.

\(^{117}\) For examples of Islamic arbitration in the United States, see Abd Alla v. Mourssi, 680 N.W.2d 569 (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, 205592, 1999 WL 33452466 (Mich. Ct. App. Mar. 30, 1999) (determining the scope of an Islamic arbitration agreement); In the interest of N.Q. and F.Q., 2010 Tex. App. Lexit 5634 (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 (Tex. App. 2003) (enforcing Islamic arbitration agreement because neither the intent of the parties nor the scope of issues to be arbitrated was ambiguous).
Though the available ethnographic evidence is sparse, Muslim arbitration seems to function on a more localized level,\(^{118}\) though organizations like the Texas Islamic Court,\(^{119}\) or private consulting firms offering mediation, arbitration, and adjudication in accordance with Islamic law.\(^{120}\) The consistent thread is the explicit choice of law provisions in arbitration agreements. An agreement to arbitrate before the Texas Islamic Court includes: “The Parties agree to arbitrate all existing issues among them . . . according to the Islamic rules of law by Texas Islamic Court.”\(^{121}\) 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.”\(^{122}\) Recently, Muslim organizations have also outlined rules and procedures to govern Islamic arbitration in the United States.\(^ {123}\)

### III. Judicial Review of Religious Arbitration

There is currently a well-settled and relatively stable body of law governing the judicial review of the arbitration agreements themselves.\(^ {124}\) However, there is much uncertainty about

\(^{118}\) Bambach, *supra* note 70, at 387.

\(^{119}\) *Jabri*, 108 S.W.3d at 406 (arbitration agreement required arbitration before the Texas Islamic Court).


\(^{121}\) *Jabri*, 108 S.W. 3d at 408.

\(^{122}\) *Binding Arbitration Agreement, supra* note 120.

\(^{123}\) See Helfand, *supra* note 27, at 1250.

\(^{124}\) See infra Part III.B.
how strictly judges can or should review the internal proceedings\textsuperscript{125} and resulting awards\textsuperscript{126} 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 religion clause jurisprudence.\textsuperscript{127}

This Part first shows how courts feel constrained by the First Amendment religion clauses when reviewing the decisions of religious tribunals. Then it examines the three elements of a religious arbitration a judge must look at 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.  \textit{The Religious Question Constraint}

The religion clauses are generally perceived as creating a dual prohibition: Government may not “establish” religion, nor “prohibit the free exercise thereof.”\textsuperscript{128} 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.\textsuperscript{129} This

\textsuperscript{125} See infra Part III.C.

\textsuperscript{126} See infra Part III.D.

\textsuperscript{127} See, e.g., Grossman, supra note 6, at 182.

\textsuperscript{128} U.S. CONST. amend. I.

\textsuperscript{129} 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.”).
religious question constraint, often also referred to as the church autonomy doctrine, had gained traction in the religious arbitration debates and dramatically limits the extent to which courts will review the decisions of religious tribunals.\footnote{See Parts III.B and III.C.} However, the constraint developed in two issue specific venues: disputes over ownership of religious property and the rights of religious organizations in employment discrimination suits.

1. \textit{Religious Property Disputes}

In 1871, in \textit{Watson v. Jones}, the Supreme Court first recognized that disputes with religious content may require different treatment by the courts.\footnote{See \textit{Witte}, supra note 129, at 247 (noting that the Court recognized that “religion is special and courts must have distinct methods of dispute resolution to prevent them from delving into religious doctrine.”).} \textit{Watson} began when a single church divided into competing factions over the issue of slavery.\footnote{\textit{Watson} v. \textit{Jones}, 80 U.S. 679, 692 (1871).} Both factions claimed to be the “true church,” and thus entitled to the exclusive use of church property.\footnote{\textit{Id.}} When the pro-slavery faction sued in federal court, the Supreme Court held that because the church had a hierarchical structure, the decision of the highest ruling body of the church was binding on all civil courts.\footnote{\textit{Id.} at 727. (“[W]henever the question of discipline, or of faith or of ecclesiastical rule, custom, or law have bee decided by the highest of these church judicatories to which the manner has been carried, the legal tribunals must accept such decisions as final and binding on them.”).} Part of the reason for such deference was a concern for competence: civil courts

\begin{footnotesize}
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\footnotetext{130}{See Parts III.B and III.C.}
\footnotetext{131}{See \textit{Witte}, supra note 129, at 247 (noting that the Court recognized that “religion is special and courts must have distinct methods of dispute resolution to prevent them from delving into religious doctrine.”).}
\footnotetext{132}{\textit{Watson} v. \textit{Jones}, 80 U.S. 679, 692 (1871).}
\footnotetext{133}{\textit{Id.}}
\footnotetext{134}{\textit{Id.} at 727. (“[W]henever the question of discipline, or of faith or of ecclesiastical rule, custom, or law have bee decided by the highest of these church judicatories to which the manner has been carried, the legal tribunals must accept such decisions as final and binding on them.”).}
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were in no way competent to second guess the decision of a religious body on a matter of religious law.\textsuperscript{135}

Following \textit{Watson}, the Court continued to pay deference to the final decisions of religious bodies, adding limitations and deriving constitutional principles along the way. In \textit{Gonzales v. Roman Catholic Archbishop}, the Court held that such deference could only be breached where there was “fraud, collusions, or arbitrariness.”\textsuperscript{136} In \textit{Kedroff v. Saint Nicholas Cathedral}, the Court grounded the principle of deferring to the highest authority of a church structure in the First Amendment.\textsuperscript{137} In 1976, in \textit{Serbian Orthodox Diocese v. Milivojevich}, the Court added a much larger caveat to the principle of deference. In \textit{Milivojevich}, a church defrocked a bishop, who then claimed the church failed to follow its own procedures for defrocking, thus acting arbitrarily as defined in \textit{Gonzales}. The Court rejected this argument, holding that a secular court cannot determine whether a church complied with its own procedures. However, the Court added another caveat to the prohibition: Such inquiry into religious procedure 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.”\textsuperscript{138}

\textsuperscript{135} \textit{Id.} at 729.

\textsuperscript{136} \textit{Gonzales v. Roman Catholic Archbishop of Manila}, 280 U.S. 1, 7 (1929).

\textsuperscript{137} \textit{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 . . . have federal constitutional protection as a part of the free exercise of religion against state interference.”).

\textsuperscript{138} \textit{Serbian Orthodox Diocese v. Milivojevich}, 426 U.S. 696, 709 (1976).
On the heals of *Milivojevich*, the Court made a dramatic shift with its decision in *Jones v. Wolf* in 1979. 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.\(^{139}\) 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. In line with its new methodology, the Court held that lower courts were now 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.\(^{140}\)

According to Professor John Witte Jr., these cases highlight the Court’s current priorities when resolving disputes with religious content: The Court’s prohibition on “deciding matters of religious doctrine seems geared towards protecting the civil courts from becoming entangled in religious affairs,” as opposed to protecting the rights of religious organizations and individuals themselves.\(^{141}\)

2. *The Ministerial Exception*

The Religious question doctrine has also found traction in debates over the existence of a “ministerial exception” to federal employment discrimination law. The ministerial exception protects religious organizations from employment discrimination lawsuits pertaining to certain categories of employees.


\(^{140}\) *Id.*

\(^{141}\) *See Witte, supra* note 129, at 253.
In *Presiding Bishop v. Amos*, the Court was asked to evaluate the ministerial exception codified in Title VII, allowing religious organizations to discriminate in their employment decisions on the basis of religion. At issue was whether the Latter-Day Saints Church could fire a building engineer, solely because he was not qualified to be a member of the church. The Court upheld the Church’s decision, holding religious entities have the right to hire exclusively members of their own faith for both secular and religious jobs.

The most recent case showing the Courts deference to the decisions of religious bodies is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. The facts are as follows: Cheryl Perich, a commissioned minister, was a teacher at a Lutheran school. Her duties consisted primarily of teaching secular subjects, though she also taught one religion class and led her students in daily prayer and devotional exercise. In 2004, Perich was diagnosed with narcolepsy and forced to take disability leave. When Perich notified the school that she was ready to resume teaching, the school requested she resign from her duties. Perich refused to resign and threatened to take legal action against the school for discriminatory employment

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143 *Id.*

144 *Id.* at 339.


146 *Id.* at 700.

147 *Id.*

148 *Id.*

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practices.\textsuperscript{149} The school then fired Perich, citing violation of the Lutheran church’s commitment to internal dispute resolution.\textsuperscript{150} Perich filed a claim with the EEOC on the grounds that she was fired in violation of the Americans with Disabilities Act.\textsuperscript{151} The EEOC brought suit against Hosanna-Tabor, which claimed it was immune from such suit under the ministerial exception.\textsuperscript{152} Specifically, Hosanna-Tabor asserted that the First Amendment bars claims “concern[ing] the employment relationship between a religious institution and one of its ministers.”\textsuperscript{153}

When the case reached the Supreme Court, there were two fundamental questions to be resolved: First, was there a constitutional ministerial exception, grounded in the religion clauses? Second, if there was a ministerial exception, did Perich qualify a minister within the meaning of the exception? The Court answered both questions in the affirmative, holding that the First Amendment required dismissal of the employment discrimination suit against Hosanna-Tabor.

First, the Court found 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.”\textsuperscript{154} Such interference infringes on free exercise rights, which protect “a

\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 701.
\textsuperscript{153} Id. at 701.
\textsuperscript{154} Id. at 706.
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.”

Second, the Court held that Perich was a “minister” as contemplated by the ministerial exception. Rejecting any dispositive test to determine if an employee was encompassed by the ministerial exception, the court noted four factors requiring the conclusion that Perich was a minister.

The EEOC, Perich, and several amici argued that there must be a third component of the analysis: 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. The majority dismissed this point in three sentences, holding that it “misses the point

155 Id.
156 Id. at 707.
157 Id. at 707-08. The court concluded Perich was a minister because (1) Hosanna-Tabor “held Perich out as a minister”; (2) Perich’s title required significant religious training to achieve; (3) Perich “held herself out as a minister,” claiming the special housing allowance on taxes available only to those in the ministry and vocalizing her desire to “be in the teaching ministry against soon;” and (4) Perich’s job duties “reflected a role in conveying the Church’s message and carrying out its mission.” Id.
of the ministerial exception.”\textsuperscript{159} The constitutional ministerial exception is not narrowly confined to employment decisions made for religious reasons, like the statutory exception. Rather the exception is intended to provide complete deference to religious authorities in the purely ecclesiastical decision of “who will minister to the faithful.”\textsuperscript{160}

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.\textsuperscript{161} 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.”\textsuperscript{162} 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.”\textsuperscript{163}

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 \textit{Jones}, evaluating an agreement to arbitrate in a


\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.} at 715 (Alito, J., concurring).

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id.}
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.\(^{164}\) 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. **Neutral Principles of Law Approach**

There is one critical distinction between an agreement to arbitrate in a religious forum as opposed to 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.\(^{165}\) Early courts considered this distinction crucial, and would frequently refuse to enforce arbitration agreements with religious content.\(^{166}\) These courts believed that to enforce such an agreement required judicial interpretation of religious terms, in violation of the First Amendment Religion Clauses.\(^{167}\)

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\(^{164}\) See Broyde, *supra* note 73.

\(^{165}\) See *e.g.*, *supra* notes 75-76.

\(^{166}\) 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.”).

\(^{167}\) *Id.*
However, modern courts have glossed over the difference between religious and secular arbitration agreements though application of the neutral principles of law approach.\textsuperscript{168} A court may review a religious arbitration agreement—without running afoul of the Religion Clauses—if it applies traditional principles of contract law without addressing any underlying religious dispute.\textsuperscript{169}

For example, in \textit{Meshel v. Ohev Sholom Talmud Torah}, appellants sought to enforce arbitration before a Jewish law court to resolve a membership dispute.\textsuperscript{170} 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.”\textsuperscript{171} 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 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.”\textsuperscript{172} The court noted that the parties did not dispute the meaning of “Beth Din” or “Din Torah” as used in the

\begin{itemize}
\item \textsuperscript{168} See, e.g., \textit{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.”).
\item \textsuperscript{169} See, e.g., \textit{id.} at 354.
\item \textsuperscript{170} \textit{Id.} at 351.
\item \textsuperscript{171} \textit{Id.} at 348. (emphasis added).
\item \textsuperscript{172} \textit{Id.} at 357.
\end{itemize}
agreement. In fact, both parties appeared to contemplate that the clause referred to a particular Jewish law court in Washington, D.C. This explicit and implicit agreement further diminished the possibility that the court would be forced to choose between competing interpretations of religious terms. 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.

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 ‘regulation of Speyer, Worms, and Mainz.’” While the appellant claimed that the provision referred to a rabbinical court, the court refused to defer to his interpretation and compel arbitration. It held that the ambiguity of

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173 Id. at 354–55 (“There is not 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.”).

174 Id.

175 Id.

176 Id. at 360–63


178 Id. at 36.
the actual contract language precluded the application of neutral principles of contract law, and thus enforcement by a civil court would violate the religion clauses.\textsuperscript{179}

2. \textit{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, there is a scenario that arises in the judicial review of agreements to arbitrate in a religious forum that neutral principles do not address. It is well established that courts will not enforce an arbitration agreement where parties consented to the agreement under coercion or duress.\textsuperscript{180} But while courts will generally investigate the circumstances surrounding a contract for signs of duress,\textsuperscript{181} this investigation becomes thinner when potential coercion takes a religious form.

For example, in \textit{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 \textquotedblleft sirov\textquotedblright.\textsuperscript{182} A sirov is a public document issued by a beth din in order to compel unwilling parties to appear before them and document the parties\textquoteright refusal to submit to their authority.\textsuperscript{183} The effect of a sirov will vary immensely depending on the community in

\textsuperscript{179} \textit{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. \textit{See, e.g.,} \textit{Jabri}, 108 S.W.3d at 407 (2003) (quoting an agreement to arbitrate in the “Texas Islamic Court, 888 s. Greenville Ave., suite 188, Richardson, Texas . . .”).

\textsuperscript{180} \textit{See} Grossman, \textit{supra} note 6, at 197.

\textsuperscript{181} \textit{See} Grossman, \textit{supra} note 6, at 197.

\textsuperscript{182} \textit{Lieberman}, 566 N.Y.S.2d at 494.

\textsuperscript{183} \textit{Rules and Procedures of the Beth Din of America, supra} note 77.
which it is released, but it will commonly be perceived as indicating that a member is disloyal to their community, with the result of ostracism from the community and loss of business.\textsuperscript{184} The Lieberman court defined a sirov as a “prohibitionary decree that subjects the recipient to shame, scorn, ridicule and public ostracism by other members of the Jewish religious community.”\textsuperscript{185} However, regardless of the recognized effect of a sirov on the recipient, the court concluded that [w]hile the threat of a Sirov may constitute pressure, it cannot be said to constitute duress.”\textsuperscript{186}

C. Judicial Review of Internal Procedures of Religious Panels

If a judge finds there was 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 proceedings 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 the religious question constraint.

1. Review of Application of Governing Law

Courts generally refuse to evaluate the legal reasoning of a religious tribunal to the same extent as their secular analogues.\textsuperscript{187} This restraint is somewhat attributable to the Congressional policy favoring arbitration, requiring courts to defer to the wisdom of arbitrators to the greatest

\textsuperscript{184} Wolfe, \textit{supra} note 6, at 464.

\textsuperscript{185} Lieberman, 566 N.Y.S.2d at 494.

\textsuperscript{186} \textit{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).

\textsuperscript{187} See Grossman, \textit{supra} note 6.
However, the true culprit of the expanded deference is the judicial fear of violating the religious question constraint: Religious panels often base their decisions on religious—as opposed to state or federal—law. Judges thus fear that were they to judge the application of religious law, they would run the risk of violating the First Amendment by inquiring into religious questions.\(^\text{189}\)

For instance in \textit{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 was a violation of Jewish law.\(^\text{190}\) 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.”\(^\text{191}\) Similarly, in \textit{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.\(^\text{192}\) However, the court rejected this argument, 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.\(^\text{193}\)

2. \textit{Review of Procedures}

As explained above, the FAA provides a barebones outline of the procedural requirements an arbitration panel must meet for the civil courts to enforce its awards. However,

\(^{188}\) See supra notes 48-49.

\(^{189}\) See supra Part III.A.


\(^{191}\) Id. (citations omitted).


\(^{193}\) Id. at 170.
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.\textsuperscript{194}

For example, in \textit{Kovacs v. Kovacs}, a party to beth din arbitration petitioned the Court of Special Appeals of Maryland to vacate the beth din’s award because the proceedings were not in accordance with the Maryland Uniform Arbitration Act (MUAA).\textsuperscript{195} Specifically, she claimed she was not permitted to make opening or closing statements nor cross examine witnesses, and that the beth din relied on evidence not introduced during the proceeding.\textsuperscript{196} 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.\textsuperscript{197} 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.”\textsuperscript{198} Third, the arbitration proceedings “conform[ed] to notions of basic fairness or due process.”\textsuperscript{199} It is important to note that nowhere does the court define the boundaries of “basic fairness or due process” in the context of arbitration.


\textsuperscript{195} \textit{Kovacs}, 98 Md. App. at 302.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.} at 303.

\textsuperscript{198} \textit{Id.} at 304.

\textsuperscript{199} \textit{Id.} at 304–05.
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.\textsuperscript{200} Courts accepting this proposition reason that when a party agrees to arbitration under religious substantive and procedural law, they expressly waive the application of state and federal law.\textsuperscript{201} Oddly enough, this waiver even extends to the procedural elements of the arbitration acts that provide the basis for enforcement of the arbitration award by civil authorities.\textsuperscript{202}

Even in jurisdictions where courts do not interpret consenting to an arbitration to be an express waiver of statutory procedural rights, they will still conclude that a party has waived claims related to procedure by proceeding with the arbitration after learning of the defect.\textsuperscript{203}

\textit{D. Judicial Review of Final Award of Religious Panel}

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 which conflict with state and federal law. However, there are also glimpses of a limit to the judicial deference

\textsuperscript{200} Id. at 305.

\textsuperscript{201} Id.

\textsuperscript{202} 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.”).

\textsuperscript{203} See, e.g., 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).
generally paid to the awards of religious tribunals, specifically where courts refuse to enforce awards which 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.\(^{204}\) 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.\(^{205}\) 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.\(^{206}\) Thus, the argument goes, 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.

For instance, in *Prescott v. Northlake Christian School*, a terminated principal and his prior employer agreed to arbitrate their employment dispute before the Institute for Christian Conciliation (ICC).\(^{207}\) The arbitrator awarded $150,000 in damages to the terminated principal, even though Louisiana employment law would not allow for such a remedy.\(^{208}\) The United States

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\(^{204}\) See, e.g., Prescott v. Northlake Christian Sch., 141 F. App’x 263, 265 (5th Cir. 2005).

\(^{205}\) See *Rules and Procedures of the Beth Din of America, supra* note 77.

\(^{206}\) See *Rules and Procedures of the Beth Din of America, supra* note 77; *Rules of Procedure, supra* note 102.

\(^{207}\) Prescott, 141 F. App’x at 265 (5th Cir. 2005).

\(^{208}\) Id. at 271.
Court of Appeals for the Fifth Circuit upheld the award—regardless of the fact that it wasn’t available under state law—because the parties’ arbitration agreement incorporated the ICC’s Rules and Procedures.\textsuperscript{209} 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 agreement of the parties.”\textsuperscript{210} 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.\textsuperscript{211} 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.\textsuperscript{212}

2. \textit{Limits to Deference to Religious Arbitration Awards}

Courts have reigned 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

\textsuperscript{209} \textit{Id.} at 274 (5th Cir. 2005).

\textsuperscript{210} \textit{Id.} at 273 (5th Cir. 2005) (quoting ICC Rule 40(b). The Beth Din of America include 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.” \textit{See, e.g.,} Lang, 198 Md. App. at 160 n.4.

\textsuperscript{211} Prescott, 141 F. App’x at 274.

\textsuperscript{212} \textit{Id.}
redress or protection in the future under civil law.”213 In Rakoszynski v. Rakoszynski, the beth din announced an arbitration award requiring 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;” prohibiting the parties from slandering each other; and requiring parties to return to the beth din if future issues arise between them.214 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.215

Second, in accordance with the 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.216 This formulation amounts to the possibility that an

213 See, e.g., Rakoszynski, 663 N.Y.S.2d at 961.

214 Id.

215 Id. at 959.

216 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, 707 N.Y.S.2d at 758 (Sup. Ct. 1999) (refusing to confirm 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
award can be vacated on public policy grounds if it violates the substantive law of the jurisdiction. For instance, in *Rakoszynski v. Rakoszynski*, parties disputed the validity of a beth din award of child support.\(^\text{217}\) 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.\(^\text{218}\) Specifically, the New York law required parties to consider a list of statutory factors and computation methods, with the legislative goal of creating consistent state child support structure.\(^\text{219}\) 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.\(^\text{220}\)

*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 confirmation of child support awards made through an arbitration process, which does not employee the principles established in [the New York Domestic Relations Law], has been

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\(^{217}\) *Rakoszynski*, 663 N.Y.S.2d at 957.

\(^{218}\) *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.

\(^{219}\) *Id.*

\(^{220}\) *Id.*
eroded, if not supplanted, by the strong public policy of this state set forth in that statute.”

Thus there is room for the evolution of public policy in the context of judicial review of religious tribunals.

IV. **EMERGING PROBLEMS**

While it might not be immediately apparent from the limited body of case law, the current scheme of judicial review of 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 civil state in an attempt to live according with the dictates of their faith. This Part begins by highlighting how 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. It concludes by demonstrating that this inequity is a result of a fundamental misunderstanding about the proper relationship between religious arbitration and religious pluralism.

A. **Inadequate Procedural Protections**

As demonstrated above, limitations on acceptable forms of arbitration are minimal and generally restricted to instances where first parties to the agreement are harmed or taken advantage of. If harm to a party to an arbitration agreement trumps the policy favoring arbitration, it follows that religious arbitration tribunals—when they seek enforcement in secular courts—must sufficiently protect the rights of the individuals involved.

This section will highlight three ways in which the current scheme of judicial review of religious arbitration fails to do just that. First, religious tribunals are subject to less judicial

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221 *Id.*

222 *See supra* Parts II & III.
review than secular tribunals due to the religious question constraint. As a result, parties to religious arbitration are denied the full breath 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.

1. Restriction of Statutory Procedural Rights

Regardless of the general applicability of the FAA, parties to arbitration before a religious tribunal will frequently find 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 will declare they cannot review particular aspects of religious arbitration, lest they unconstitutionally rule on religious doctrine. However, in allowing the religious question doctrine to trump American arbitration law, judges are precluding parties to religious arbitration from the level of protection 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 than a court can vacate an arbitration award where the arbitrator exceeded his authority. However, the scope of authority of an arbitrator is usually governed by

223 See supra Part III.A.

religious law incorporated into the arbitration agreement.\textsuperscript{225} For example, an agreement to arbitrate in the Beth Din of America often states that a dispute will be resolved according to compromise (p’hsara) as opposed to pure Jewish law (din),\textsuperscript{226} while the Rules and Procedures of the ICC often call for a decision in line with “Biblical precepts.”\textsuperscript{227} 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.\textsuperscript{228} Such inquiry may run a foul of the religious question doctrine, as it would require judges to interpret and apply religious authority.\textsuperscript{229} This was precisely the restriction at work in \textit{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 out review is concerned, this is an area where treading lightly is not enough. He we cannot tread at all.”\textsuperscript{230}

\textsuperscript{225} See supra Part II.A.1

\textsuperscript{226} See Rules and Procedures of the Beth Din of America, supra note 77.

\textsuperscript{227} See Rules of Procedure, supra note 102.

\textsuperscript{228} See supra, Grossman, note 6, at 196-197.

\textsuperscript{229} See, e.g., Lang, 198 Md. App. at 170 (2011) (holding that where an arbitrator relies on religious principles, the court cannot decide if there was legal support for the arbitrator’s decision).

\textsuperscript{230} Id. at 170-71.
Second, the FAA mandates that a court may vacate an award where the arbitrator excluded “material evidence.”\textsuperscript{231} But just as the authority of arbitrators is governed by religious law, so too is the materiality of evidence.\textsuperscript{232} 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.\textsuperscript{233}

2. \textit{Heightened Risk of Unfairness}

Religious arbitration presents a heightened risk of procedural unfairness due to the incorporation of religious procedural law.\textsuperscript{234} Regardless of the law applied in arbitration, courts generally require the proceedings to “conform to notions of fairness or due process.”\textsuperscript{235} 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.”\textsuperscript{236}


\textsuperscript{232} \textit{See Rules and Procedures of the Beth Din of America, supra} note 77.

\textsuperscript{233} According to Michael C. 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. \textit{See} Grossman, \textit{supra} note 6, at 198.

\textsuperscript{234} \textit{See} Helfand, \textit{supra} note 27, at 1260-68.

\textsuperscript{235} \textit{Kovacs, 98 Md. App.} at 304-05.

\textsuperscript{236} Helfand, \textit{supra} note 27, at 1260.
One significant difference between religious and secular arbitration is the source of the rules and procedures guiding the proceedings. In secular arbitration—since the FAA provides very little in the way of procedural requirements for binding arbitration—parties have the right to contract for the exact procedures that will govern the proceedings. In the absence of agreement between the parties, the arbitrators themselves have wide discretion to establish the procedural rules.

However, this expansive freedom is generally not one enjoyed by the parties or arbitrators in religious arbitration because the rules of procedure are derived from religious law. Thus the procedural rules governing religious arbitration are usually established by a communal religious body and subsequently incorporated into all arbitration agreements. 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.

While one effect of religious procedural law is to remove information asymmetries and the repeat player advantage of traditional arbitration, Professor Helfand has noted that it “does not necessarily advance standard conceptions of equity,” and may indeed “undermine rather than

237 See supra Part I.B.
238 Helfand, supra note 27, at 1260.
239 Helfand, supra note 27, at 1260.
240 Helfand, supra note 27, at 1263.
241 See supra notes 75-76 and accompanying text.
242 Helfand, supra note 27, at 1264.
243 Helfand, supra note 27, at 1263.
advance the principles of arbitral justice.”

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. For example, traditional Jewish law bars witness testimony by women, minors, handicapped individuals, and non-Jews. Similarly, a traditional Islamic legal rule requires oral testimony by two witnesses, who must be adult Muslim males. In some schools, 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.” 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. Thus if statutory

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244 Helfand, supra note 27, at 1267.

245 Helfand, supra note 27, at 1267.

246 Grossman, supra note 6, at 181; See Rules and Procedures of the Beth Din of America, supra note 80 (noting in traditional Jewish law, witnesses must be observant males over age 13).

247 Bambach, supra note 70, at 409.


249 See supra Part III.C.2.
procedural law can be easily waved in favor of religious procedural law which 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 the product of unfair procedures.

3. **Failure to Identify Duress**

It is well established that courts will not enforce an arbitration agreement where a party consented to the agreement under coercion or duress. 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. This test is currently being misapplied in the context of religious arbitration, which creates a heightened risk that courts will compel arbitration, even where 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. 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.”

However, this reasoning is the product of an incomplete understanding of the nature of a siruv, if not a meager understanding of religious identify more generally. As explained by Ginnine Fried, a siruv can have “potentially tragic effects on a person’s social life, her

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250 Fried, supra note 79, at 660.

251 Fried, supra note 79, at 660.

252 See supra Part III.B.2.

253 Fried, supra note 79, at 652.
livelihood, and that of her family’s.” 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 community where the beth din sits, resulting is both loss of business and ostracism from the community. Thus if the test for the presence of 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 chose 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.”

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.” There are two factors at work which 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. 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. Furthermore, family law is also traditionally an area

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259 Shachar, *supra* note 257, at 121.
in which women have been treated as unequal and lack leverage.\textsuperscript{260} The combined effect of a desire to belong to a particular religious community and the reality of family law as a tool of informal membership demarcation thus questions the traditional manifestations of duress: Has a woman who consents to arbitration before a religious tribunal for the sake of her religious identity truly made a voluntary choice?

If courts are unwilling to broach the question of whether the intersection of individual, communal, and religious identity precluded true consent to the jurisdiction of a religious tribunal, judicial review of religious arbitration will be insufficient to protect vulnerable individuals from being coerced into consenting to an agreement that is contrary to their best interests.

B. \textit{Theoretical Heritage of Religious Arbitration}

Several scholars have noted that binding arbitration by religious tribunals, particularly when enforced by the secular courts, presents dangers for vulnerable parties in insular religious communities.\textsuperscript{261} A few have even connected the resulting dearth of protection to the judicial review scheme implemented by secular courts.\textsuperscript{262} Yet no one has attempted to articulate the philosophical or theoretical root of the deficiencies of judicial review of religious arbitration by American courts.

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

\textsuperscript{260} Shachar, \textit{supra} note 257, at 121.

\textsuperscript{261} See, \textit{e.g.}, Grossman, \textit{supra} note 6; Wolfe, \textit{supra} note 6; Bambach, \textit{supra} note 70; Helfand, \textit{supra} note 27.

\textsuperscript{262} See, \textit{e.g.}, Grossman, \textit{supra} note 6.
1. **Models of Religious Pluralism**

The starting point for any discussion about the proper relationship between religious communities and a secular state is the “fact of reasonable pluralism”:263 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. Rather the crucial issue is how a secular state should react to the fact of reasonable pluralism. Scholars generally embrace an answer from two regimes: Normative pluralism and legal pluralism.264

a. **Normative Pluralism**

Normative pluralism is grounded in the belief that in face of diversity, minority cultures should not only be recognized and tolerated by the majority, but also incorporated into public institutions.265 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.”266 Such a system is respectful and cognizant of the diversity of authorities an individual is bound to as a result of national, cultural, and religious identities, but stops short of giving the norms supporting those identities the force of state law.267

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265 See Helfand, supra note 27, at 1269-74.

266 An-Na’im, supra note 264, at 790–91.

267 An-Na’im, supra note 264, at 795.
Professor Abdullahi Ahmed An-Naim’s argument for normative pluralism is 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. An 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 the values and interests, which will be defined by the political and cultural majorities. 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.

Despite the absence of formal state enforcement and calls for adaptation, normative pluralism nonetheless has mechanisms ensuring the dynamic survival of communities bound by normative systems not represented in the law. Specifically, among those who call for minority cultures to adapt to majority norms, is a corresponding call for minority cultures to work to influence public policy. In other words, minority cultures should work to incorporate their

268 An-Na’im, supra note 264, at 798–99.

269 Jeremy Waldron, Questions about the Reasonable Accommodation of Minorities, in SHARI’A IN THE WEST 103, 105 (Rex Ahdar & Nicholas Aroney, eds., 2010); An-Na’im, supra note 267, at 798.

270 See John Witte, Jr., The Future of Muslim Family Law in Western Democracies, in SHARI’A IN THE WEST 279 (Rex Ahdar & Nicholas Aroney, eds., 2010)

271 See, e.g., An-Na’im, supra note 264, 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 269; Jean-Francois Gaudreault-DesBiens, Religious Courts’
own norms into the unitary legal system of the majority as opposed to asking for distinct legal enforcement.\textsuperscript{272} Thus normative pluralism require a political system under which cultural and religious minorities have a reasonable chance to shape the public policy they are being asked to adapt to.\textsuperscript{273}

b.  \textit{Legal Pluralism}

Legal pluralism is grounded in the philosophy that the highest respect for diversity in a pluralistic society entails communal autonomy\textsuperscript{274} and “consensual exclusion from society,”\textsuperscript{275} as opposed to inclusion in public life. Also implicit in the foundations of legal pluralism is the belief 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.”\textsuperscript{276}

Thus 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 chose which legal system should apply to their lives.\textsuperscript{277} These non-state legal systems can have a variety of sources, including national, ethnic, or religious norms. However, in such a system of parallel legal

\textit{Recognition Claims: Two Qualitatively Distinct Narratives, in SHARI’A IN THE WEST} 59 (Rex Ahdar & Nicholas Aroney, eds., 2010).

\textsuperscript{272} An-Na’im, \textit{supra} note 264, at 789

\textsuperscript{273} See Waldron, \textit{supra} note 269; Gaudreault-DesBiens, \textit{supra} note 271.

\textsuperscript{274} See Helfand, \textit{supra} note 27, at 1274–82.

\textsuperscript{275} Shachar, \textit{supra} note 257, at 124.

\textsuperscript{276} Helfand, \textit{supra} note 27, at 1275.

systems, it is conceivable that the legal system of a religious community may conflict with the laws of the state.\textsuperscript{278} Thus to strong supporters of legal pluralism, the state should sometimes cede to religious norms, even where the result is a violation of state law.\textsuperscript{279}

Legal pluralism is a live trend in American religion jurisprudence. It is seen 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.\textsuperscript{280} Most recently, glimpses of legal pluralism were visible in the Court’s opinion in \textit{Hosanna-Tabor}, which confirmed the principle that in the context of employment decisions, religious organizations can abide by their own judgments, even when their actions may violate federal law.\textsuperscript{281}

2. \textit{Religious Pluralism and Religious Arbitration}

It has been suggested that the civil enforcement of religious arbitration decisions is the pinnacle of legal pluralism.\textsuperscript{282} 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.”\textsuperscript{283} However, the reality of religious arbitration is more nuanced, with different aspects of the process reflecting both legal and normative models of religious pluralism.

\begin{enumerate}
\item \textsuperscript{278} Helfand, \textit{supra} note 27, at 1276.
\item \textsuperscript{279} Helfand, \textit{supra} note 27, at 1277.
\item \textsuperscript{280} \textit{See supra} Part III.A.1.
\item \textsuperscript{281} \textit{See supra} Part III.A.2.
\item \textsuperscript{282} Helfand, \textit{supra} note 27, at 1281.
\item \textsuperscript{283} \textit{See} Helfand, \textit{supra} note 27, at 1281.
\end{enumerate}
a. Influence 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 when judges review agreements to arbitrate before a religious tribunal, they apply neutral principles of contract law to discern if the parties did indeed have the intent to submit to the jurisdiction of a religious authority. 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 their application of contract law principles. 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.

And as the case law demonstrates, religious tribunals have received the message and draft their agreements with increasing specificity and reference to secular contract norms. In fact though Muslim arbitration in the United States is in its infancy, it is instructive that in 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

284 See supra, Part III.B.1.

285 See supra, Part III.B.1

286 See Sieger, 297 A.D.2d at 36.

287 See, e.g., Meshel, 869 A.2d at 348.
Court, including a street address. The agreement was thus drafted with enough specificity, and according to secular contract norms, so as to allow enforcement by the Court of Appeals of Texas.

Second, courts have routinely noted that while arbitration awards will be vacated where they conflict with “public policy,” that public policy evolves. 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. The use of democratic apparatuses, instead of autonomous legal systems, to accommodate a pluralistic society is a defining feature of normative pluralism highlighted above.

b. **Influence of Legal Pluralism**

The extreme deference that secular courts pay to religious tribunals suggests that there are also strands of legal pluralism informing their reasoning. There are two manifestations of this deference that particularly highlight the effect of legal pluralism.

First, recall that courts have refused to review whether an arbitrator exceeded his authority if the arbitrator applied religious law. 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

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288 *Jabri*, 108 S.W.3d at 407.

289 *Id.*

290 *See, e.g.*, *Rakoszynski*, 663 N.Y.S.2d at 960.

291 *See supra* notes 277-79 and accompanying text.

292 *See, e.g.*, Lang, 198 Md. App. at 165-66.
tribunals to a lower standard, in essence endorsing the existence of multiple review mechanisms 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 procedural law. 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.

It is instructive that the two elements of religious arbitration which most reflect legal pluralism are also those which create the greatest risks to individuals who chose 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 which most reflect normative pluralism—the application of neutral principles of contract interpretation and the public policy vacatur—have proved successful at protecting the rights of citizens without completely restricting their access to a religious venue. It thus follows that any corrective measure aimed at minimizing the risk to—and ensuring equal rights for—parties to religious arbitration should be grounded in the spirit of normative pluralism.

V. A NEW FRAMEWORK FOR JUDICIAL REVIEW

The scheme of judicial review of religious arbitration decisions 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

293 Kovacs, 98 Md. App. at 302.
arbitration, it is worth revising the structure of judicial review of religious arbitration to better reflect normative pluralism.

The Beth Din of America (BDA) had proved adept at making accommodations that do just that. However, the BDA has also received criticism within the Jewish community for their adaptations to American legal norms, and there is no guarantee that other religious tribunals will be as willing to take a similar tactic. Thus what is needed is a set of guidelines that courts can apply to religious tribunals seeking enforcement of their arbitration awards in secular courts.

Thus section A presents the Beth Din of America as an example of a successful religious arbitration scheme that reflects the values of normative pluralism. Section B then suggests a new framework for the judicial review of religious arbitration decisions—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.

A. Beth Din of America: A Sustainable Model of Religious Arbitration

The Beth Din of America (BDA) is a shining example of a religious tribunal that seeks enforcement of its decision 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. The BDA has gained “widespread acceptance among America’s secular courts,” and has never had one of its decision overturned. 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.”

294 Broyde, supra note 73, at 1.
295 Broyde, supra note 73, at 1.
296 Broyde, supra note 73, at 2.
Professor Michael Broyde identifies a group adaptations made by the BDA in service of this goal.\textsuperscript{297} Broyde notes that while each adaptation is “ultimately consistent with Jewish law, it also represents a departure from the traditional practice thereof.”\textsuperscript{298} 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 which are applied uniformly across all BDA proceedings.\textsuperscript{299} 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.\textsuperscript{300} In addition, the BDA developed an internal appellate process, even though Jewish law does not require an appeals process.\textsuperscript{301}

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.\textsuperscript{302} 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.\textsuperscript{303} This principle extends to the substance of the remedies awarded, as Broyde concludes that “to appease secular courts and

\begin{itemize}
\item \textsuperscript{297} Broyde, supra note 73, at 2.
\item \textsuperscript{298} Broyde, supra note 73, at 2.
\item \textsuperscript{299} Broyde, supra note 73, at 4.
\item \textsuperscript{300} Broyde, supra note 73, at 5.
\item \textsuperscript{301} Broyde, supra note 73, at 8–9.
\item \textsuperscript{302} Broyde, supra note 73, at 11.
\item \textsuperscript{303} Broyde, supra note 73, at 11.
\end{itemize}
litigants, the BDA must not only talk the talk by issuing decisions in ‘legalese,’ but also be prepared to walk the walk by issuing decisions in accordance with secular law.”

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. The BDA would be doing a disservice to its community if it issued decisions that would be ignored by secular courts. 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.”

B. New Guidelines

It is unlikely that all religious tribunals will be as willing as the Beth Din of America to adapt their procedures so as to explicitly correspond with American legal norms. Thus, it is the responsibility of American courts and legislatures to ensure that religious arbitration, as enforced in secular courts, adequately preserves both the right to be bound by religious obligations and the protections of citizenship.

This section will propose two complementary methods of achieving that goal. 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 Federal Arbitration Act and its state analogues.

304 Broyde, supra note 73, at 11.
305 Broyde, supra note 73, at 12.
306 Broyde, supra note 73, at 12.
307 Broyde, supra note 73, at 16.
1. Judicial Guidelines

First, parties should not be able to waive the procedural protections of the FAA. 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. 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 that with protecting the parties implicated in the disputes.\textsuperscript{308} However, just as the policy goals of arbitration give way where they result in insufficient protection for parties to arbitration,\textsuperscript{309} 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 religion content, such as refusing to grant a religious divorce, there is

\textsuperscript{308} See Witte, supra note 129, at 253.

\textsuperscript{309} See Federal Arbitration Act § 10.
sufficient duress to invalidate the resulting agreement.\textsuperscript{310} Since courts already recognize that a party’s withholding a religious good can be 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 panel 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 it has been applied in the evaluation of foreign divorce provisions. For example, in \textit{Aleem v. Aleem}, the Court of Appeals of Maryland refused to enforce a foreign divorce proceeding that utilized the Muslim \textit{talaq}, due to the gender inequity imbedded in the process.\textsuperscript{311} Under Islamic law, a husband – though not a wife – has a right to \textit{talaq}, which is the divorce mechanism requiring only that the husband recite, “I divorce thee” three times.\textsuperscript{312} The court found the \textit{talaq} to violate this public policy because it could only be exercised unilaterally by men, and thus refused to enforce resulting divorce.\textsuperscript{313} 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.\textsuperscript{314} As above, this standard has not been robustly enforced in the context of

\textsuperscript{310} Fried, \textit{supra} note 79, at 651.

\textsuperscript{311} 404 Md. 404 (2008).

\textsuperscript{312} \textit{Aleem}, 404 Md. at 406, n.1.

\textsuperscript{313} \textit{Id.} at 422–23.

\textsuperscript{314} See Rakoszynski, 663 N.Y.S.2d 957.
arbitration, but does have traction in the evaluation of foreign divorce decrees. For example, in Aleem the court noted that Maryland state law mandated “the property interests of the spouses should be adjusted fairly and equitably.” However, under Pakistani Law – the law under which the talaq provision was written – there was no equitable division of marital property unless stated in the marriage contract. Thus the court refused to recognize the divorce and resulting property distribution because it contrived the statutory law of the state.

Sixth, an arbitration decision cannot include provisions which restrict the parties’ access to the civil courts. Religious tribunals are entitled to resolve those disputes which individuals submit to them, but they cannot claim exclusive jurisdiction over the parties in the context of future disputes.

2. Legislative Amendments

It has been well documented that legal issues pertaining to the relationship between religious individuals and the state are better resolved by legislatures than courts. Legislatures are better suited to carve out narrow exceptions from general laws that accommodate the specific

315 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.

316 Aleem, 404 Md. at 421.

317 Id. at 422.

318 Id.

319 See Rakoszynski, 663 N.Y.S.2d 957.

needs of religious citizens in particular areas. However, 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 which would impose a burden not felt by secular arbitration panels, is unlikely to survive constitutional scrutiny. Thus the following amendments address the shortcomings of judicial review of religious arbitration in a manner that could be applied to secular arbitration as well. Because the amendments are constrained by the median, as opposed to narrowly tailored the unique problems of religious arbitration, they may not completely address the shortcomings identified in this Article. Despite this shortcoming, they can still serve a valuable corrective function.

321 See Ryan, supra note 322.

Section 10 of the FAA currently lists four scenarios in which a court may vacate an arbitration award. Adding the following four non-discretionary grounds for vacatur would further ensure that parties to religious arbitration remain privity to the projections 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 these revised judicial and legislative standards 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 law and procedures to American legal norms, 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 than a party to secular arbitration of having their rights to protection under American arbitration law violated. 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 scheme of judicial review of religious arbitration, one that allows for individuals to subject themselves to religious law without the risk of sacrificing the protections of the secular state, by requiring the secular state and religious communities to engage with each other.

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 the religious citizen in a secular state to be beholden to religious law. 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 to conflicting legal orders, neither of which has the 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. Hopefully this Article shows that when religious communities and secular states focus entirely on protecting themselves, there is no one to protect the faithful individual.