The Future of Religious Arbitration in the United States: Looking Through a Pluralist Lens

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Abstract

In recent years, religious arbitration has received increasing attention both in the American press and academy. For some, this attention is driven by concern that state enforcement of decisions issued by religious tribunals has the power to undermine the objectives of the U.S. legal system. For others, it is driven by a recognition that religious arbitration enables communities to enhance their process of dispute resolution by ensuring that it comports with shared religious principles and values. And, as is often the case, both perspectives contain important elements of truth. As a paradigmatic legal plurality institution, religious arbitration has the capacity to both enhance and undermine the U.S. legal system. But if U.S. law is to capitalize on the growing religious arbitration system within its jurisdiction, it must identify both the range of unique benefits religious tribunals provide as well as the unique challenges they present. This chapter takes a first step in that direction, using legal pluralism as a lens to explore the motivations driving the religious arbitration regime in the United States. In so doing, it considers how both state and non-state law can benefit from the religious arbitration system, and how those dual objectives require U.S. law to tinker with its treatment of religious arbitration so as to unlock its full potential.

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I. INTRODUCTION

In 2015, the New York Times ran a three-part series of articles collectively titled “Beware the Fine Print,” assessing the ways in which arbitration provisions “stack the deck of justice.”1 The first two articles in the series attacked arbitration as undermining the ability of average citizens to pursue their claims against large corporations. The success of this claim-suppression strategy, reported the New York Times, had been galvanized by recent Supreme Court decisions that enforced class action waivers and thereby prevented the aggregation of claims necessary to marshal the incentives and resources to take on corporate defendants. These developments, combined with the confidential nature of arbitration and allegations of procedural irregularities, undermined arbitration as a forum for equitable dispute resolution.

To scholars and practitioners in the field of arbitration, these claims were nothing new. They had been central to debates over the legitimacy of domestic arbitration for decades.2 But in the third installment of the New York Times series, the reporters took on a facet of the arbitration debate that rarely appears in newspaper headlines: religious arbitration. Religious arbitration, as a category, typically refers to the voluntary submission of a dispute to a religious authority for binding resolution in accordance with

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According to the New York Times article, the unique worry that religious arbitration poses is that “religious arbitration may have less to do with honoring a set of beliefs than with controlling legal outcomes.”

And, in turn, the article explored cases emblematic of an ostensibly larger trend where “judges have consistently upheld religious arbitrations over secular objections.”

The article sparked a wave of interest in—and criticism of—religious arbitration, largely tracking the general assessment expressed by the New York Times. For example, critics argued that religious arbitration is a tool for “religious groups have attempted to use the legal system to impose their beliefs on others”; that the religious arbitration system is rigged because “churches use a faith-based system that’s already rigged in their favor”; and that “giving judicial effect to the decision is effectuating a religious pronouncement using the court as a mouthpiece of religion.”

In many ways, this renewed interest in, and criticism of, religious arbitration, touched upon longstanding questions of legal pluralism, a scholarly field dedicated to identifying, exploring and interrogating the relationship between overlapping legal systems. Indeed, religious arbitration has often served as one of the paradigmatic sites of legal pluralist analysis. But this pluralist analysis was of a specific brand—what

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3 See infra notes 27-28 and accompanying text.


numerous scholars have characterized as “weak legal pluralism.” That is, religious arbitration is a paradigmatic pluralist institution that sits “below the state,” where a minority religious entity operates a legal system that is “inferior to and managed by the state.” It is this hierarchical relationship between state and non-state legal systems that raises a series of questions for the state, such as to what extent the state should regulate such forms of religious law and, concomitantly, lend its enforcement power to the decisions of such religious legal systems. In this context, the state must assess whether and to what extent these non-state legal systems either support or undermine the overall objectives of the state.

Thus, viewing contemporary debates over the appropriate role of religious arbitration through a “weak” pluralist lens highlights the distinct and unique values promoted by religious arbitration tribunals in the United States. As described below, these values are two-fold. From the perspective of the state, religious tribunals ensure that certain religious disputes—disputes that courts are constitutionally prohibited from adjudicating—have a forum where they can be heard; and, in turn, by enforcing the awards issued by religious tribunals in those disputes, the state can provide various plaintiffs with access to justice otherwise foreclosed by the United States’ commitment to non-establishment principles. In this way, the state leverages religious tribunals to pursue its already existing commitment to justice without running afoul of First Amendment principles.

From the perspective of the relevant faith communities, religious tribunals not only provide additional access to justice, but they also afford those communities the opportunity to resolve disputes in accordance with deeply held and shared religious values. Accordingly, when the state enforces the decisions of religious tribunals—and thereby incorporates

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11 See John Griffiths, What is Legal Pluralism?, 24 J. LEGAL PLURALISM 1, 7-8 (1986);


14 For the different strategies available to the state when addressing weak forms of legal pluralism, see Ralf Michaels, The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism, 51 WAYNE L. REV. 1209 (2005)
those decisions into its legal system—it provides the legal environment necessary to promote the institutional infrastructure of religious communities seeking to introduce religious rules and principles into their method of dispute resolution.

Given these two values, it is not surprising the religious arbitration has been a feature of dispute resolution in the United States since at least the 19th century, and has also enjoyed significant support from legal scholars. But identifying how the two different perspectives on religious arbitration translate into two different values also exposes some of the fundamental obstacles to capitalizing on those values—obstacles often ignored even by religious arbitration’s critics. While religious arbitration may help fill an adjudicative gap created by non-establishment principles, those same non-establishment principles often prevent the state from regulating the religious procedural rules implemented by religious tribunals, raising concerns about the procedural fairness of such fora. And while religious arbitration may ensure that members of faith communities can resolve disputes in accordance with shared religious rules and values, it also enables religious groups to pressure individuals to forego judicial dispute resolution, raising questions about whether the religious values manifested by such tribunals are truly shared by both parties.

Religious arbitration tribunals, as a paradigm legal pluralist institution, simultaneously promote both the objectives of state and non-state law. But they also raise important questions—questions that must be addressed if religious tribunals are to make good on their pluralist promise to promote the objectives of both state and non-state law. It is to unpacking these benefits and concerns that this chapter is addressed.

II. THE WHAT AND WHY OF RELIGIOUS ARBITRATION

Although it has existed in the United States since at least the 19th century, religious arbitration has become a topic of increased interest in

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15 See, e.g., Isaacs v. Beth Hamedash Society, 1 Hilt. 469 (1857)
17 See supra note 15.
recent years.18 The burst of interest has, to some degree, stemmed from two recent legal developments. The first is the political and legal controversy surrounding anti-Sharia laws in the United States.19 A lynchpin of the anti-Sharia movement has been perpetuating the narrative that Sharia law and Sharia courts present a threat to U.S. law. And in so doing, they have held up Islamic arbitration as emblematic of this threat, thereby bringing religious arbitration into public discussion. This claim has spurred numerous states in the United States to adopt their own anti-Sharia laws even as the entire anti-Sharia movement rests on deeply problematic, and discriminatory, foundations.20

A second, and maybe somewhat surprising trigger for renewed interest in religious arbitration has stemmed from litigation over the Affordable Care Act’s so-called contraception mandate, which required employers to include contraception coverage in employee insurance plans.21 Numerous for-profit organizations filed suit, including the arts and crafts store chain


Hobby Lobby, claiming that this mandate violated their religious liberty rights under the Religious Freedom Restoration Act (RFRA). This claim was ultimately vindicated in the Supreme Court’s landmark decision, Burwell v. Hobby Lobby, granting closely held for-profit companies’ religious liberty protections under RFRA. The litigation, which was closely watched by both legal scholars and the broader public, subjected Hobby Lobby to significant scrutiny, ultimately leading to investigation into Hobby Lobby’s employment agreements, which include a unique religious arbitration provision; disputes between Hobby Lobby and the employee must be submitted for arbitration although the employee can choose either American Arbitration Association or Institute for Christian Conciliation rules and procedures to govern the dispute. Although employees retained the choice over whether to submit the dispute for religious arbitration, some journalists and activists seized on this provision to demonstrate how for-profit corporations, already eligible under the Hobby Lobby decision for religious exemptions from the law, could also opt out of the legal system and subject their employees to a set of faith-based rules to which they did not adhere.

Given this renewed interest, what exactly is religious arbitration? At its core, religious arbitration is a method of dispute resolution where the parties not only agree to submit their disputes for binding resolution to a neutral third party, but where the resolution of the dispute is conducted in accordance with religious law and where the neutral third party or parties are mutually agreed upon religious authorities. Thus, religious arbitration

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23 Id.
agreements typically contain two central provisions: choice-of-law provisions that identify the body of religious law that will govern the dispute and an arbitration provision that identifies the religious institution or religious authorities that will be tasked with applying the relevant body of religious law to the case before them.28

In the United States, the most prominent use of religious arbitration occurs within the three Abrahamic faith communities.29 And of those three, the Jewish beit din or rabbinical court is likely the most prominent.30 Rabbinical courts have been established across the United States, most frequently in large cities with significant Jewish populations.31 Statistics regarding the frequency of case filings at rabbinical courts are generally unavailable. However, it is worth noting that the number of commercial cases filed annually before the Beth Din of America—one of the most prominent rabbinical courts in America—has nearly doubled over the past ten years,32 providing some indication that the use of rabbinical arbitration is on the rise in the United States.

The use of Islamic arbitration in the United States appears far less uniform and prevalent.33 Still, there have been a number of attempts within the Muslim community in the past three decades to begin building a larger

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33 This may be related to an ongoing debate within Islamic law as to whether and to what extent Islamic law ought to be implemented by Muslim minorities living in non-Muslim states. See Michael A. Helfand, Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm, 124 YALE L.J. 2994, 3016 & n.87 (2015).
Islamic arbitral system in the United States. And a number of Islamic organizations have developed protocols, rules and procedures for use by Islamic arbitration panels in the United States.

In addition to arbitration within U.S. Jewish and Islamic communities, a number of Christian communities also make use of religious forms of alternative dispute resolution. While “Christian forms of dispute resolution are the least formal, and generally range somewhere between negotiation and mediation,” they also include options for binding arbitration. Indeed, members of Christian communities interested in Christian dispute resolution can contact a range of Christian dispute resolution service providers. Among these providers, the most well-known is the Institute for Christian Conciliation (ICC), which not only provides a forum for religious arbitration but also trains others to serve as independent arbitrators. The rules for ICC arbitrations are publicly available and include a choice of law provision that requires arbitrators to “take into consideration any state, federal, or local laws that the parties bring to their attention,” but still emphasizes that “the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the

34 See id. at 3017 & n.91.
35 See id at 3017.
39 Shippee, supra note 37, at 242-45 (describing some of the Christian ADR alternatives available).
40 Open a Case, INST. FOR CHRISTIAN CONCILIATION, http://www.peacemaker.net/site/c.nulWL7MOjTe/b.5335909/k.9134/Open_a_Case.htm.
In sum, Jewish, Islamic and Christian communities utilize religious forms of arbitration to resolve disputes. In so doing, they combine choice-of-law and arbitration provisions into agreements that enable the parties to submit disputes to religious authorities for resolution in accordance with religious rules, principles and values. The use of religious arbitration in such communities has the potential, like other forms of arbitration, has the to provide a more expeditious and less costly forum for dispute resolution. But viewing these institutions through the lens of weak legal pluralism—which emphasizes the hierarchical coexistence between the state’s law and legal system on the one hand and the relevant religious non-state law and legal system on the other—highlights two additional and unique purposes driving the use of religious arbitration. The first captures the United States’ unique interest in religious arbitration and its ability to expand access to justice. The second captures the faith communities’ unique interest in religious arbitration and it ability to facilitate dispute resolution in accordance with shared religious principles and values.

A. Providing Access to Justice

One of the primary advantages of religious arbitration is the ability of religious tribunals to provide access to justice in instances where courts cannot. This objective is of particular salience to the state given its primary obligation to provide citizens with a forum that can provide binding resolution to legal disputes. To be sure, this might seem somewhat counterintuitive given that critics of religious arbitration frequently

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42 Rules of Procedure, INST. FOR CHRISTIAN CONCILIATION, http://www.peacemaker.net/site/c.mO7MOHe/b.5378801/k.D71A/Rules_of_Procedure.htm; see also Shippee, supra note 37, at 241 (“Christians draw their traditions of faith-based dispute resolution from the Bible, particularly the teachings of Jesus Christ.”).


44 For a somewhat analogous formulation of this distinction, see Ralf Michaels, Why We Have No Theory of European Private Law Pluralism, in PLURALISM AND EUROPEAN PRIVATE LAW 139, 151 (Leone Niglia ed., 2013) (noting how the state’s external focus on pluralist dilemmas often focuses on party autonomy while members of faith communities perceive such dilemmas from a perspective of conflict because of an internal commitment to two forms of law).
characterize such fora as depriving plaintiffs of their day in court, but the legal realities of the First Amendment often dictate otherwise.

To appreciate why requires considering two related doctrines flowing from the religion clauses of the First Amendment’s religion clauses. The first is what is often referred to as the “church autonomy doctrine,” which prohibits courts resolving cases the raise questions of religious “discipline, or of faith, or ecclesiastical rule, custom, or law.” The church autonomy doctrine derives from the First Amendment, which prohibits government from passing laws “respecting an establishment of religion, or prohibiting the free exercise thereof.” And judicial intervention into questions of religious faith, doctrine or law is seen as contravening both the Establishment Clause—that is, the prohibition against passing laws “respecting an establishment of religion”—as well as the Free Exercise Clause—that is, the prohibition against passing laws that “prohibit the free exercise [of religion].” Accordingly, the Supreme Court has previously described the First Amendment as “radiat[ing] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” More recently, courts have focused on how intervention into the internal matters of religious institutions might violate the Establishment Clause, impermissibly entangling the judiciary in religious matters that are beyond their constitutional purview.

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


47 U.S. Constitution, Amend. I.

48 Hosanna Tabor v. EEOC, 132 S. Ct. 694 (2012). The question of whether the church autonomy doctrine is better understood as stemming from the Free Exercise Clause or the Establishment Clause is a matter of scholarly debate. I have argued elsewhere that it is better understood as deriving from the Free Exercise Clause. See generally Michael A. Helfand, Religious Institutionalism, Implied Consent, and the Value of Voluntarism, 88 S. Cal. L. Rev. 539 (2015); Michael A. Helfand, Implied Consent: A Primer and a Defense, 50 Conn. L. Rev. (forthcoming 2018).


50 See, e.g., McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).
Now, to be sure, the contours of this doctrine are far from settled. But the more a particular case draws a court into the very center of the religious faith and doctrine of a religious institution, the more likely a court is to dismiss the case. The most well-known application of this doctrine has come in the context of hiring and firing ministers as courts have often described the relationship between ministers and religious institutions as the institution’s “lifeblood.”^{51} Known as the “ministerial exception,” federal courts have uniformly held that religious institutions cannot be held liable for violating various anti-discrimination statutes when hiring and firing ministers—a holding reaffirmed by the Supreme Court in 2012.^{52} Accordingly, religious institutions can employ religious principles when hiring and firing ministers even if doing so would otherwise constitute impermissible discrimination. Importantly, the ministerial exception has been applied even to employees of religious institutions that are not themselves ministers so long as their employment duties are sufficiently tied to the religious mission of the institution,^{53} including music directors,^{54} a press secretary,^{55} and a director of a church’s “Worship Arts Department.”^{56}

Somewhat relatedly, courts are also limited in their ability to resolve religious disputes by the “religious question” doctrine because “civil courts cannot adjudicate disputes turning on church policy and administration or

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51 McClure v. Salvation Army, 460 F.2d 553, 558. When discussing “ministers” in this context, courts refer to religious leaders of all religions, including imams and rabbis.

52 42 U.S.C. § 2000e-2; see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705 (2012) (noting the uniform acceptance of the “ministerial exception” among the federal courts of appeals).

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

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

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

on religious doctrine and practice.” When facing such cases, courts must remain “hand’s off”—that is, resist adjudicating the dispute and dismiss the case on First Amendment grounds.

Contemporary advocates have expressed the rationale for this approach in a number of different ways. Maybe most famously, Ira Lupu and Robert Tuttle have argued that the Establishment Clause instructs courts not to interfere in cases implicating religious doctrine or practice because “claims would require courts to answer questions that the state is not competent to address.” The reason why courts cannot decide such cases has nothing to do with grand notions of church autonomy or the constitution’s desire to “systematically protect the interests of certain classes of parties, defined by religious mission.” Instead, the Establishment Clause prohibits courts from interfering in such matters on a theory of “adjudicative disability”—the state simply has “limited jurisprudential competence” to decide such religious matters. As described by Jared Goldstein, this conventional view sees religious questions as different than standard questions of fact: “[i]n contrast to ordinary questions of fact, religious questions are understood to lie beyond judicial competence because they do not depend on the logic of law. Instead, religious questions may be answered on the basis of faith, mystical experiences, miracles, or other nonrational sources.”

Other advocates of this conventional approach have focused less on the inability of courts to penetrate the substance of religious law, but more directly on a different consequence of resolving religious questions: that judicial resolution of such questions will be interpreted as endorsement of one religious view over another—a form of, so to speak, prohibited denominational preference. For example, Laurence Tribe has argued that

57 Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989)
61 Id. at 122.
62 Id. at 123.
64 As the paradigm of denominational preference, see Larson v Valente, 456 US 228, 246 (1982) (“In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”).
the prohibition against “doctrinal entanglement in religious issues” “more deeply [...] reflects the conviction that government—including judicial as well as the legislative and executive branches—must never take sides on religious matters.”65 And similarly, Christopher Eisgruber and Lawrence Sager have argued “[i]f government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby favor some religious persons, sects, and groups over others.”66

But regardless of the theory, courts do not resolve religious questions and therefore will dismiss any case that requires them to do so. An example of this dynamic is in cases where a court must determine whether a party has breached a contract—often an employment contract to perform a particular religious function. One of the more common examples of this dynamic is cases where a minister or rabbi is dismissed for “cause.” Such cases recur with some regularity. And courts uniformly dismiss such cases because determining whether a rabbi or minister has been terminated for cause invariably requires a court to assess what type of religious misconduct is sufficient to trigger a breach of contract. Although such an inquiry merely requires interpreting the text of the agreement between the parties, it still represents an impermissible inquiry into a religious question.

For example, in 2009 the U.S. Court of Appeals for the Second Circuit addressed the lawsuit of a rabbi claiming that she had been wrongfully terminated; the synagogue countered that the rabbi had been justifiably terminated under the terms of the employment agreement for “gross misconduct” and “willful neglect of duty.”67 The federal district court, in hearing the case, had dismissed the rabbi’s lawsuit and the Court of Appeals did the same, explaining “review of Freidlander’s claims in this case would require scrutiny of whether she should have, inter alia, read more extensively from the Torah at certain services, prepared students for their Bar or Bat Mitzvah more adequately, performed certain pastoral services that were not performed, or followed the Temple’s funeral service policies.”68 This, the court noted, “would involve impermissible judicial inquiry into religious matters.”69 And in that way, that court’s tracked the

69 Friedlander v. Port Jewish Ctr., 347 Fed. Appx. 654, 655 (2d Cir. 2009). This outcome is not unique.
standard treatment of such claims in other courts as well.70

A second category of cases implicating religious questions is the sale of religious goods.71 Producers of religious goods advertise, market, and sell to clientele specifically interested in the religious quality of these goods.72 In so doing, these producers often employ religious terminology to describe their goods to attract the interest and earn the trust of interested purchasers. Sales in the United States of religious goods are extremely significant, including an over $4.6 billion Christian products industry,73 and a $24 billion kosher food market that is projected to grow an additional 11.5% by 2025.74 However, courts have limited ability to resolve disputes that arise over agreements to purchase such religious goods and services.

For example, consider the 2012 lawsuit against ConAgra, the parent corporation of the Hebrew National brand. According to a complaint filed in 2012, ConAgra advertises and sells meat products under the Hebrew National label, describing them as “100% kosher” “as defined by the most stringent Jews who follow Orthodox Jewish law.”75 However, the plaintiffs contended that contrary to these representations, Hebrew National meat

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products did not satisfy these kosher standards. As a result, purchasers of Hebrew National meat products overpaid for these products, mistakenly believing them to be “100% kosher.” And having misrepresented the kosher quality of these meat products, they argued that ConAgra should be held liable for damages under various consumer protection laws as well as for breach of contract and negligence.

Not surprisingly, a federal district court dismissed the lawsuit, concluding that “[t]he definition of the word ‘kosher’ is intrinsically religious in nature, and this Court may not entertain a lawsuit that will require it to evaluate the veracity of Defendant's representations that its Hebrew National products meet any such religious standard.” Thus, the court held that the religious question doctrine prohibited judicial consideration of the plaintiffs’ claims. And when the case was remanded to state court for lack of standing, a Minnesota court reached an identical conclusion, holding that “It would be unholy, indeed, for this or any other court to substitute its judgment on this purely religious question.”

Combined, the church autonomy doctrine and the related religious question doctrine place significant subset of cases beyond the reach of courts. The church autonomy doctrine—frequently manifested in cases implicating the ministerial exception—prohibits courts from intervening in the internal decision-making of religious institutions; and the religious question doctrine prohibits courts from addressing questions that require the resolution of questions of religious doctrine or practice. While constitutionally uncontroversial, the problem posed by such dismissals is that they leave parties without judicial recourse for potentially significant harms. The religion clause’s so-called “hand’s off” approach closes the courthouse doors to ministerial employees at religious institutions as well as employees with religious job responsibilities; and, it prevents consumers who have purchased “religious” goods from asserting claims that the products were not as described or advertised. Indeed, the federal district court judge in the Hebrew National litigation emphasized this disconcerting consequence of dismissing the plaintiff’s claims, concluding that

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76 Id. at *17-21.
77 Id. at *64.
78 Id. at *46-64.
80 Wallace v. ConAgra Foods, Inc., 747 F.3d 1025 (8th Cir. 2014).
“[r]egrettably the Court recognizes that its decision likely leaves consumers without a remedy . . . .”

It is this adjudicative gap that highlights how religious arbitration serves to promote increased access to justice. While courts themselves cannot resolve matters that implicate cases regarding ministerial employees or cases turning on religious doctrine or practice, religious arbitration tribunals can. Courts uniformly enforce religious arbitration just like any other arbitration award.\(^8^3\) The reason is because when reviewing the arbitration awards, courts are charged in the first instance with ensuring compliance with statutory procedural requirements;\(^8^4\) the court, with rare exception,\(^8^5\) may not review the merits of an arbitration award.\(^8^6\) As a result, when courts confirm a religious arbitration award, there is no need to consider the very religious matters underlying the award that are beyond the authority of courts to adjudicate.\(^8^7\) For this reason, religious arbitration agreements and awards have been routinely enforced over and above First Amendment objections.\(^8^8\) Moreover, the mere fact that an arbitration award resolves matters deemed constitutionally out-of-bounds for courts to adjudicate does

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\(^{8^3}\) See, e.g., Abd Alla v. Mourssi, 680 N.W.2d 569, 574 (Minn. Ct. App. 2004) (upholding a decision of an Islamic arbitration panel applying Islamic law); Kingsbridge Ctr. of Israel v. Turk, 469 N.Y.S.2d 732, 734 (N.Y. App. Div. 1983) (confirming a Beth Din decision because the parties consented, through written agreement, to have a Beth Din panel adjudicate the matter); Kovacs v. Kovacs, 633 A.2d 425, 433 (Md. Ct. Spec. App. 1993) (confirming a Beth Din award because the parties “knowingly chose” to participate in arbitration).

\(^{8^4}\) See, e.g., 9 U.S.C. §10 (listing the federal statutory grounds for vacatur); see generally Amina Dammann, Note: Vacating Arbitration Awards for Mistakes of Fact, 27 Rev. Litig. 441, 470-75 (2008) (collecting state grounds for vacatur).

\(^{8^5}\) Examples of non-statutory grounds, such as manifest disregard of the law and public policy, where courts do, to some extent, review the substance of an award are extremely limited, rarely invoked and, in some jurisdictions, in doctrinal retreat. For some discussion, see Richard C. Reuben, Personal Autonomy and Vacatur After Hall Street, 113 PENN. ST. L. REV. 1103, 1144-49 (2009).


\(^{8^7}\) See, e.g., Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. Cir. 2005) (holding that granting action to compel arbitration before rabbinical court did not violate First Amendment because “the resolution of appellants’ action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties’ underlying dispute”).

\(^{8^8}\) See, e.g., Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999); Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 731 (N.J. 1991).
not itself render judicial enforcement of that award constitutionally prohibited; courts have uniformly held that judicial enforcement of arbitration awards does not transform the underlying arbitration to state action, thereby ensuring that the arbitration tribunal’s resolution of matters implicating religious questions or internal religious-decision-making is not attributable to the judiciary.

Accordingly, parties with religious disputes that cannot be resolved in court need not simply persist in what amounts to a plaintiff-loses system. They can incorporate religious arbitration provisions into their contracts so that such matters will be resolved by a religious arbitration tribunal, and the tribunal’s binding resolution can then be judicially enforced in court. And in so doing, religious arbitration tribunals can fill the adjudicative gap created by the religion clauses, ensuring that willing parties can have their claims heard by a neutral third-party that can then issue a binding resolution.

This role of religious arbitration is often missed by critics. For example, the recent New York Times article critical of religious arbitration highlighted the case of Pamela Prescott, a principal at Northlake Christian School. Prescott was terminated by her employer and subsequently filed suit alleging Title VII violations as well as other state law claims. Pursuant to her employment agreement, the case was submitted for arbitration, conducted under the Rules and Procedures for Christian Conciliation, where Prescott won approximately $150,000. The New York Times article, in lamenting the outcome, noted that Prescott’s claims for gender discrimination were dismissed, insinuating that this result demonstrated how religious arbitration fails to provide adequate justice; and it then further highlighted that “the case dragged on for four more years,” which was the result of Northlake Christian School unsuccessfully appealing the arbitration award through the judicial system, and ultimately, left Prescott with only $8,000 after paying for all her legal fees.

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89 CHRISTOPHER DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 18 (3d ed. 2013) (noting that “[a]ll federal courts that have addressed the issue have held that commercial arbitration is not ‘state action’ to which constitutional protections apply”).
94 Id.
What the story fails to consider is what might have come of Prescott’s claim in court. Given her position as principal of a religious school, Prescott’s case might very well have been dismissed on ministerial exception grounds. Accordingly, the likelihood is that Prescott would not have received any financial compensation in court predicated on claims of gender discrimination, or reputational damage. Contrary to the overarching narrative in the New York Times article, Prescott’s claim demonstrates how some measure of justice can be achieved in religious arbitration particularly in cases where courts would have been incapable of so doing. Indeed, it is worth noting that for Prescott, it was the endless rounds of subsequent litigation in court, not the proceedings before a religious arbitration tribunal, that depleted her funds.

Prescott’s story, in this way, is emblematic of the type of vulnerable plaintiff that needs a religious arbitral forum in order to have her claims heard. Without religious arbitration, ministerial employees would be without recourse against their employers and consumers would be without recourse against producers of religious products. Religious arbitration allows parties to contract around the restrictions of the First Amendment and identify a forum where their claims can be resolved even if they implicate questions placed beyond the constitutional authority of courts.

B. Advancing Religious Values

While the state—as well as some members of religious communities—may benefit from the ability of religious tribunals to expand access to justice, that benefit is fundamentally external. That is, it views religious tribunals as an institution that provide additional strategic opportunities for individual citizens thereby enabling those otherwise caught in a constitutionally created adjudicative gap to submit disputes to an alternative religious forum. Thus, through a weak pluralism lens, the expanded access to justice is a strong justification for the state to enforce the decisions of religious tribunals.

But from an internal point of view, members of religious communities often do not see the choice between religious tribunals and the state’s courts as part of a broader strategic calculus. Indeed, for many within faith communities it is a sense of religious obligation and commitment to religious values and authority that drives individuals to submit disputes for

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95 Fratello v. Archdiocese of N.Y., 863 F.3d 190 (2017) (affirming application of the ministerial exception to the principal of a Roman Catholic school and thereby dismissing the plaintiff’s Title VII claims).
religious arbitration. For example, this sense of obligation within the Jewish community to resolve disputes before rabbinical courts stems from prevailing interpretations of Jewish Law. The obligation to submit all disputes before a beit din— as opposed to secular courts—is detailed in the Talmud and codified in the Code of Jewish Law. In this way, submitting disputes for religious arbitration before a rabbinical court represents the commitment of the parties to the values and principles animating the Jewish legal system. By contrast, violating this rule would be “tantamount to a declaration by the litigant that he is amenable to allowing an alien code of law to supersede the law of the Torah.”

Similarly, the use of Islamic arbitration also flows from a religious belief that Muslims ought to resolve their disputes before Islamic authorities and in accordance with Islamic rules, principles, and values. This impulse is captured in the Qur’an, which states “O you who believe, obey Allah and obey the Messenger and those charged with authority from amongst you. If you differ in anything among yourselves, refer it to Allah and His Messenger, if you do believe in Allah and the Last Day. This is best and most suitable for final determination.” Indeed, Muzammil Siddiqi, Chairman of the Fiqh Council of North America’s Executive Committee, references the aforementioned verse in a fatwa, explaining that “Muslims must try their utmost to solve all their problems and disputes among themselves and according to the laws of Allah Almighty.”

These notions of religious obligation express how religious forms of arbitration help promote shared religious principles within given faith communities. The arbitrators are selected because of their knowledge and commitment to the relevant religious principles thereby generating what Daniel Markovits has termed “arbitral solidarity”— that is, the desire of some parties to “resolve disputes in tribunals that are more sympathetic to

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96 See Babylonian Talmud: Tractate Gittin 88b (interpreting Exodus 21:1); Joseph Karo, Shulchan Aruch, Choshen Mishpat, 26:1; Yaacov Feit, The Prohibition Against Going to Secular Courts, 1 J. Beth Din of Am. 30 (2012).
98 The Qur’an at 4:59.
their basic world views than the courts of the dominant culture are prepared to be.”

Similarly, the body of law selected by the parties to govern the dispute promotes the religious values embedded within the history of each of these respective faith traditions. Parties look to the Bible or the Qu’ran for rules and procedures to ensure that the substantive justice dispensed by the arbitrators draws from religious principles and values. Accordingly, the parties enter the realm of religious arbitration to pursue religious objectives by submitting their disputes to a forum grounded in a shared religious worldview.

The desire to pursue shared religious objectives can, in a manner of speaking be measured by looking to the relative use of pre- and post-dispute arbitration provisions in both standard and religious arbitration. To be sure, the limited amount of data available makes any conclusions preliminary. But a useful picture emerges nonetheless.

A number of scholars have set out to assess what percentage of commercial arbitrations are conducted pursuant to both pre- and post-dispute arbitration agreements. And among those studies, Lewis Maltby’s 2003 study is likely the most instructive. To conduct his study, Maltby examined two years’ worth of filings—from 2001 and 2002—in employer-employee and business-to-business arbitrations before the American Arbitration Association (AAA). According to a computerized analysis conducted by the AAA, the percentage of employment disputes filed pursuant to a post-dispute arbitration agreement was 6 percent in 2001 and 2.6 percent in 2002. A similar computerized analysis of business-to-business disputes determined that the percentage of disputes filed pursuant

100 See also Daniel Markovits, Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract, 59 DEPAUL L. REV. 431, 473 (2010); see also E. Gary Spitko, Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration, 49 CASE W. RES. L. REV. 275 (1999).


103 Id. at 319.
to a post-dispute arbitration agreement was only 1.8 percent. These numbers indicate that parties to employment arbitrations are very reluctant to arbitrate after a dispute arises, which from the perspective of strategic decision-making is far from surprising. Once the parties both know the facts and relevant legal principles relevant to the dispute, it is unlikely that they both will simultaneously conclude that arbitration will best serve their interests; invariably, arbitration will be seen as preferable for one party or the other—but not both. And so securing both parties’ assent to arbitration post-dispute is an unlikely outcome.

However, according to records from over five years of arbitration proceedings before the Beth Din of America—one of the largest religious arbitration service providers in the United States—96.8 percent of its arbitration proceedings between January 2008 and August 2014 were conducted pursuant to a post-dispute arbitration agreement. And anecdotal evidence suggests that this is a more general feature of religious arbitration; some websites for religious arbitration providers offer boilerplate post-dispute arbitration agreements, but do not include model pre-dispute arbitration provisions. This apparent inversion of the trend from standard arbitration is noteworthy. If representative, it indicates

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104 Id. at 322.
105 See, e.g., Barbara Black, How to Improve Retail Investor Protection After the Dodd-Frank Wall Street Reform and Consumer Protection Act, 13 U. PA. J. BUS. L. 59, 105 (2010) (“Once a dispute has arisen, each side will have a view about whether its claim will fare better in court or in arbitration. As a result, the parties are unlikely to agree, post-dispute, on a choice of forum.”).
107 E-mail from Shlomo Weissmann, Dir., Beth Din of America, to author (Dec. 2, 2014, 13:30 PM PST) (on file with author). The sample from which this percentage was derived includes all cases for which at least one hearing took place—that is, it does not include cases that were settled or otherwise disposed of prior to the first hearing. In addition, the sample did not include cases that purely focused on disputes revolving around execution of the get, the Jewish divorce document. Id.
109 It is worth noting that there are certainly some examples of broad use of pre-dispute religious arbitration agreements. As noted above, Hobby Lobby, an arts and crafts chain with over 13,000 employees, see Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014), incorporates pre-dispute religious arbitration provisions into at least some of its employment contracts. See, e.g., Ortiz v. Hobby Lobby Stores, Inc., No. 2:13-cv-01619,
that while strategic decision-making when it comes to standard commercial arbitration almost eliminates arbitrations conducted pursuant to post-dispute agreements, the same is not true with respect to religious arbitration. Thus, while parties presumably engage in strategic decision-making, the broad use of post-dispute religious arbitration agreements indicates that other considerations—not present in the context of standard arbitration—still drive the parties to mutually agree on arbitration.

It seems fair to surmise that the high value faiths place on religious dispute resolution—precisely because it ensures that religious rules and principles will govern the arbitration—leads parties to submit disputes to religious arbitration tribunals even when one of the parties may see some strategic disadvantages to doing so. Thus, the high rate of post-dispute religious arbitration agreements captures one way in which the pursuit of religious arbitration drive parties to resolve their disputes in this faith-based forum. And in this way, it demonstrates the internal motivation to submit disputes to religious arbitration, capturing the unique value of religious arbitration for those within faith communities and thereby committed to a religious legal system that functions below the state.

III. CHALLENGES OF RELIGIOUS ARBITRATION

Assessing religious arbitration through the prism of weak legal pluralism highlights the interaction between asymmetrically situated legal regimes. Thus, state law and religious law co-exist in the same geographic area and different decision-makers overlap in the adjudication of certain religious disputes. From the perspective of the state, religious arbitration can fill an adjudicative gap create by a constitutional commitment to non-establishment, thereby assisting the state in fulfilling its commitment to provide its citizens with access to justice. From the perspective of faith communities, religious arbitration helps promote shared principles and values, ensuring that disputes can be adjudicated in accordance with religious law. This is the primary value of religious arbitration as perceived from within faith communities.

With these values as background, the state must make decisions about when and how to use its enforcement and regulatory powers to support—or undermine—the religious arbitration enterprise. In so doing, the state surely assesses both the internal and external values promoted by religious arbitration. However, in the weak pluralist framework, the state ultimately

sits above the religious arbitral system within its borders, and therefore chooses the appropriate legal treatment of religious arbitration based upon the external value of religious arbitration to the state—that is, whether in promoting both internal and external values, it ultimately promotes the values of the state.

But while the state ultimately adopts an external perspective in evaluating how to treat the religious arbitral system within its jurisdiction, the weak pluralism lens helps identify two fundamentally distinct challenges to religious arbitration. Indeed, once we take the two perspectives on religious arbitration seriously—both the value from the perspective of the state and the value from within the faith communities—it also becomes clear how each of these values presents different kinds of challenges for the state as it considers to what extent it should enforce and regulate the contemporary religious arbitration regime. On the one hand, religious arbitration may fill an adjudicative gap created by non-establishment principles, but those same non-establishment principles present a challenge when the state attempts to regulate the procedural fairness of religious arbitration. On the other hand, religious arbitration may enable faith communities to ensure that disputes are resolved in accordance with deeply held religious values, but that ability might also enable communities to use various forms of pressure in order to ensure members submit their disputes to religious tribunals even when they prefer otherwise. As described below, it is in these ways that the challenges to the contemporary religious arbitration regime in the United States flow directly from the internal and external values of the system.

A. Policing Procedural Fairness

As noted above, one of the key benefits religious arbitration provides from the perspective of the state is its ability to increase access to justice. This benefit stems from the Establishment Clause of the First Amendment, which courts interpret to prohibit judicial resolution of numerous religious disputes—such as those that implicate both the church autonomy or religious question doctrine. By contrast, religious arbitration tribunals can resolve those disputes and the resulting award can be enforced without triggering Establishment Clause prohibitions. The reason: courts do not police arbitration by revisiting the substantive merits of a dispute, and

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100 See supra Subsection II(a).
111 See, e.g., Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976) (“[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes.”); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960) (“The refusal of courts to review
they therefore can enforce an award without becoming impermissibly entangled with questions of religious theology, doctrine and practice.

However, while courts do not police arbitration by reviewing the substance of award, they do police arbitration by reviewing the process of arbitration to ensure compliance both with the procedures adopted by the parties in their agreement and various mandatory statutory requirements. This review ensures the procedural fairness of arbitration, a necessary precondition to enforcing arbitration awards; without such a check, arbitration tribunals could run roughshod over the rights of the participants, undermining the ability of arbitration tribunals to serve as an alternative forum that increases the available access to justice. As a result, failure to comply with such procedural standards can serve as ground for vacating the arbitration award.114

But courts are somewhat handcuffed in their attempt to police the procedural fairness of arbitrations conducted by religious tribunals. The reason for this is precisely the same reason that they cannot adjudicate many of these cases in the first instance. Because religious tribunals use religious procedural law to govern their proceedings, resolving questions of the appropriate procedure often requires interrogating questions of religious theology, doctrine and practice.

As an example, consider how U.S. law regulates the procedural fairness of arbitration. Pursuant to the Federal Arbitration Act, arbitration

the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.’).

112 See, e.g., J. P. Greathouse Steel Erectors, Inc. v. Blount Bros. Constr. Co., 374 F.2d 324, 325 (D.C. Cir. 1967) (vacating arbitration award where issues in the arbitration included questions of law despite the parties’ agreement limiting the arbitration to questions of fact only); Prudential Sec., Inc. v. Dalton, 929 F. Supp. 1411, 1414–18 (N.D. Okla. 1996) (vacating an arbitration award where the arbitrator had denied the parties a hearing guaranteed to them by their agreement).


114 See id.

115 See for example, the Rules and Procedures provided by the Beth Din of America, which is available at Rules and Procedures, BETH DIN OF AMERICA, http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf (last visited Oct. 7, 2014) (“These Rules of Procedure are designed to provide for a process of dispute resolution in a Beth Din which is in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise.”).
agreements are enforceable only so long as they do not run afoul of “such grounds as exist at law or in equity for the revocation of any contract,”116 such as unconscionability, duress or any other common law contract defenses.117 And the Federal Arbitration Act also allows a court to vacate an arbitration award for various procedural misconduct, including “where the award was procured by corruption, fraud, or undue means, “where there was evident partiality or corruption in the arbitrators,” or “where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”118 Combined, these rules enable courts to police arbitration agreements—by identifying agreements whose terms are unconscionable—as well as police arbitration awards, by enforcing the statutory rules for vacating awards that identify procedural improprieties.

But these mechanisms to police procedure cannot be easily implemented when it comes religious arbitration. Consider the statutory ground for vacatur of “refusing to hear pertinent and material evidence.”119 If a party asserts that a religious tribunal failed to admit such evidence, how would a court evaluate whether specific evidence, under the relevant religious procedural rules, was “pertinent and material” without interrogating religious doctrine that is deemed beyond the constitutional purview of courts?120 The inability to interrogate religious questions could undermine the ability of courts to assess on the back end of the arbitration whether the procedure employed by a religious tribunal complied with procedural safeguards demanded by the law.

Or, consider judicial interpretation and enforcement of religious arbitration agreements on the front end. A component of that judicial enforcement is an assessment that the terms of the agreement are not so unconscionable as to trigger the common law unconscionability defense. But interpreting the agreement itself can embroil the court in religious questions. A 2007 New York Surrogate Court ruling provides an

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117 See, e.g., Doctor's Assoc's v. Casarotto, 517 U.S. 681, 687 (1996) (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.”).
illuminating example. In *Matter of Ismailoff*, the court addressed an executed irrevocable inter vivos trust, which included a provision that:

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

The parties subsequently disputed the enforceability of the trust and one of the parties sought to initiate arbitration proceedings. However, the New York court held that the arbitrator qualification provision was unenforceable, holding that the First Amendment, which prohibits courts “from resolving issues concerning religious doctrine and practice,” rendered the provision requiring the selection of three arbitrators of Orthodox Jewish faith unenforceable.

This constitutional handcuff can become increasingly problematic in cases where courts must evaluate arbitrator qualification provisions to ensure the proceedings will be conducted by a third party that is truly neutral. This challenge came to the fore in recent litigation between the Church of Scientology and Maria and Luis Garcia. The Garcias filed suit, asserting claims of fraud and breach of contract against the Church. The Church, however, argued that all such claims needed to be arbitrated pursuant to an agreement between the parties. The Garcias, for their part, claimed that the agreement was unconscionable because the arbitration agreement required that the arbitrators all be church members “in good standing with the Mother Church.” In light of church doctrine, the Garcia’s contended that the arbitration could not be fair or neutral if the arbitrators themselves were committed members of the Church of Scientology.

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122 Id.
124 Id.
126 Id. at *32-33.
127 For example, the Garcia’s argued that members of they had been deemed “suppressive individuals,” and therefore members in good standing with the church must “disconnect,” and therefore shun, them. Id. at *32.
Neutrality, of course, is a central feature of arbitration. Without it, the enforcement of arbitration proceedings becomes a sham—a method to suppress claims as opposed to expand access to justice. And therefore, the authority of courts to typically consider such claims is vital. Indeed, the vital “safety net” role of such unconscionability claims has been captured in the disproportionate success of such claims in court.

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

In this way, Garcia highlights the push and pull endemic to the capacity of religious arbitration to expand access to justice. On the one hand, it is the twin religious question and church autonomy doctrines that make religious arbitration important from the perspective of the state. And yet at the same time, it is those same doctrines that raise the prospect of procedurally irregular arbitrations. To the extent that the external values of the state are leveraged to justify religious arbitration in the United States, courts will have to develop some set of strategies for addressing the

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130 It is worth noting that the Garcia’s case is not the only one of its kind. See e Order, Schippers v. Church of Scientology Flag Serv. Org., No. 11-11250-CI-21 (Fla. Cir. Ct. Mar. 7, 2012).
132 Id.
potential procedural consequences so as to take advantage of religious arbitration’s ability to provide increased access to justice for citizens that otherwise could not have their claims heard in court.\textsuperscript{133}

B. Community Pressure

As described above, individuals submit disputes to religious arbitration, at least in part, in order to resolve claims in accordance with shared faith-based rules and values. Indeed, that internal value appears to lead parties to submit disputes for religious arbitration even as one of them already knows that their odds of winning the case are better in a judicial forum.

But there’s also a downside to this communal desire to submit disputes in pursuit of religious rules and values. In some circumstances, the push to submit disputes—at times notwithstanding countervailing strategic considerations—does not flow from a party’s desire to resolve claims in accordance with those rules and values. Instead, parties do so because they find themselves enmeshed in a religious community that expects them to do so. In this way, the fact that religious tribunals stand as an institutional manifestation of collective faith commitments—precisely because religious arbitration also promotes not just the state’s external values but also the community’s internal values—can also have negative consequences. The expectations of religious communities can put pressure on reluctant members to forego access to judicial resolution of disputes in favor of the community’s preferred religious tribunal.

From the perspective of the community itself, this might not itself be perceived as a problem. Various forms of social sanctions can enable a faith community to police the conduct of its members and enforce a religious worldview. But while the state may recognize the capacity of religious arbitration to promote the internal values of a faith community, the arbitration framework does so to the extent those internal values are consistent with the state’s external commitment to individual consent.\textsuperscript{134}


\textsuperscript{134} See, \textit{e.g.}, \textit{Volt Info. Scis. v. Bd. of Trs.}, 489 U.S. 468, 479 (1989) (“Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”); Thomas Stipanowich, \textit{Arbitration And Choice: Taking Charge Of The “New Litigation,”} 7 \textit{DePaul Bus. & Comm. L.J.} 383, 436 (2009) (“Choice—the opportunity to tailor procedures to business goals and priorities—is the fundamental advantage of arbitration over litigation. The freedom to choose, and key resulting differences between contract-based arbitration and court trial, explain why most business users prefer arbitration when resolving
Thus, the state might certainly take religious arbitration’s pluralist impulse into account in determining whether it ought to enforce religious arbitration agreements and awards; however, that very pluralist impulse, and the values it promotes within faith communities, runs up against the state’s commitment to individual consent, requiring a reevaluation of when and how the state ought to lend its enforcement power to religious arbitration.

To be sure, arguments that arbitration agreements lack the necessary consent to justify enforcement are quite common in the scholarly literature. But those arguments are fundamentally different than the consent worries prevalent in the religious arbitration context for the very reasons described above. In standard arbitration, the overriding concern is consent in pre-dispute arbitration agreements—that is, where the parties execute agreements with arbitration provisions as part of the terms of the original agreement and long before a dispute between the parties has arisen. Prominent examples of this dynamic include employees and

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136 See, e.g., Meredith R. Miller, Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process, 75 TENN. L. REV. 365, 400 (2008) ("The potential for corporate abuse of express, pre-dispute limitations is compounded by the fact that the vast majority of arbitration clauses are contained in contracts of adhesion, which bear little resemblance to the voluntary agreements envisioned when one thinks of ‘consent.’" (citation and internal quotation marks omitted)); Jean R. Sternlight, Creeping Mandatory Arbitration: Is It Just?, 57 STAN. L. REV. 1631, 1649 (2005) ("In short, under most reasonable definitions mandatory arbitration is nonconsensual, given that consumers and employees don't typically read or understand the clauses."); see also Carrie Menkel-Meadow, Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR, 15 OHIO ST. J. ON DISP. RESOL. 19, 32-33 (1999) (discussing how various companies make pre-dispute arbitration agreements a condition for employment, services, or sale of a good);
consumers who sign employment or purchase agreements which include arbitration provisions—and thereby forgo their right to pursue their claims in court. In such cases, the prospect of a dispute is often sufficiently far off that their concerns over securing the job or purchasing the particular product are significantly more pressing.\(^{137}\) In these cases, scholars wonder whether consent is sufficient to justify enforcing the arbitration.

By contrast, and as noted above, religious arbitration appears to typically take place pursuant to post-dispute arbitration agreements. Thus, parties to religious arbitration agreements avoid the standard consent concerns endemic to pre-dispute agreements. But while they avoid the more familiar pitfalls of consent, they contend with communal pressure to execute agreements requiring submission of disputes to a faith-based forum. And the consequences of resisting communal pressure can be significant, including pervasive social consequences.\(^{138}\) For example, under Jewish law, an individual who refuses to submit a dispute for arbitration before a rabbinical arbitration tribunal will receive a seruv or siruv (similar to a contempt order), which conveys strong communal disapproval\(^{139}\) and can carry significant social sanctions such as the refusal to frequent a person’s business, refusal to marry into someone’s family and refusal to remain a

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client of someone’s company.\textsuperscript{140} This has led some to worry about whether religious arbitration tribunals, to the extent the parties submit their disputes because of these communal pressures, can truly claim to operate with the consent of the parties.\textsuperscript{141}

The problem, however, is that courts have not considered these forms of communal pressure significant enough to give rise to a duress defense. In the few cases where parties have petitioned a court to invalidate a religious arbitration agreement on the grounds of duress, courts have uniformly rejected those claims, instead enforcing the agreements and compelling arbitration.\textsuperscript{142} In the words of one New York court, “[t]he ‘threat’ of a siruv,” cannot be “deemed duress” because it is simply “prescribed as an enforcement mechanism by the religious law to which the petitioner freely adheres.”\textsuperscript{143} Accordingly, there can be no duress where a party where the coercion exercise is no “greater than that which is intrinsic in the case of any member of a religious community who, as a matter of conscience, feels obligated to obey.”\textsuperscript{144}

That courts are dismissive of this form of social coercion is not surprising. Conditioned to consider coercion to arbitration in the terms of standard arbitration—with its attendant focus on the dynamics of pre-dispute contracts of adhesion—courts look to descriptions of pressures

\textsuperscript{140} See, e.g., In re Herman Pachman, No. 09-37475, 2010 WL 1489914 (Bankr. S.D.N.Y. Apr. 14, 2010) (alleging that a servuv, issued by a rabbinical court, led other members of the religious community to avoid doing business with the petitioner and to refuse marrying their children to petitioner’s children); Abdelhak v. Jewish Press Inc., 411 N.J. Super. 211 (N.J. Super. Ct. App. Div. 2009) (alleging that plaintiff lost the patronage of his Orthodox Jewish clientele as a result of a servuv).

\textsuperscript{141} Ayelet Shachar, the preeminent scholar engaging with these questions, has argued that this dynamic can thrust parties before religious tribunals on the horns of a your-culture-or-your-rights dilemma. See AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS 117-45 (2001); Ayelet Shachar, Privatizing Diversity: A Cautionary Tale from Religious Arbitration Family Law, 9 THEORETICAL INQUIRIES IN L. 573 (2008).

\textsuperscript{142} See, e.g., Greenberg v. Greenberg, 238 A.D.2d 420, 421 (N.Y. App. Div. 2d Dep't 1997) (“The ‘threat’ of a siruv, which entails a type of ostracism from the religious community, and which is prescribed as an enforcement mechanism by the religious law to which the petitioner freely adheres, cannot be deemed duress.” (citing Lieberman v. Lieberman, 149 Misc. 2d 983, 987 (N.Y. Sup. Ct. 1991))); Mikel v. Scharf, 105 Misc. 2d 548, 553 (N.Y. Sup. Ct. 1980) (“Undoubtedly, pressure was brought to bear to have them participate in the Din Torah, but pressure is not duress. Their decision to acquiesce to the rabbinical court’s urgings was made without the coercion that would be necessary for the agreement to be void.”).


\textsuperscript{144} Greenberg v. Greenberg, 238 A.D.2d 420, 421 (N.Y. App. Div. 2d Dep’t 1997)
within religious communities as insufficient to invalidate agreements. After all, the parties chose to remain within these communities, rendering the consequences of that choice fundamentally volitional. But the wholesale judicial exclusion of such considerations would seem to discount the challenges posed by those whose identity is bound up with their own faith communities. And given the range of social consequences available within certain faith communities, a more flexible judicial approach to claims of coercion—one that assess the specific circumstances in any given case—would seem more naturally tailored to the unique consent concerns applicable to the religious arbitration context.

IV. CONCLUSION

Religious arbitration has long been viewed as a paradigmatic legal pluralist institution. Using choice of law and arbitration provisions, religious arbitration agreements allow parties to submit their disputes to religious authorities for resolution in accordance with religious law. In this way, parties appear to move out of the state’s legal system and into an alternative legal system.

The picture, however, is somewhat more complicated. Religious arbitration typically functions within a weak legal pluralist framework, where the state ultimately maintains control over the various forms of non-state law within its jurisdiction. This is true for religious arbitration as the state ultimately determines whether to enforce the judgments of religious tribunals and to what extent to regulate their proceedings. But recognizing the hierarchical relationship between the state and religious tribunals also helps identify the different values such tribunals promote. On the one hand, religious tribunals help the state pursue its external objective of providing access to justice, filling an adjudicative gap created in the United States by non-establishment constitutional principles. On the other hand, religious tribunals promote values internal to faith communities, allowing members to resolve disputes in accordance with religious rules and values.

Importantly, the different values promoted by religious arbitration each entail different challenges for the state as it considers how to exercise its authority over religious tribunals. Religious tribunals may increase access to justice, but only to the extent non-establishment principles do not prevent the state from regulating religious arbitral proceedings. And religious tribunals may promote internal community principles and values, but they can sometimes do so at the expense of the state’s core commitment to individual autonomy and consent. In this way, the hierarchical relationship between the state and religious tribunals highlights not only the two unique
objectives promoted by religious arbitration, but also the two chief areas of concern that the state must assess in deciding whether to grant its enforcement power to religious tribunals. All told, religious arbitration holds out the hope of promoting both the objectives of the state and the objectives religious communities. But for the state to succeed in capitalizing on the advantages of religious arbitration, it will have to tinker with the rules governing such tribunals, enabling this paradigmatic pluralist institution to advance the values of both state and non-state law.

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