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RELIGIOUS ARBITRATION IN THE UNITED STATES AND CANADA

Nicholas Walter*

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INTRODUCTION

This Article discusses the judicial status of religious tribunals in the United States and Canada. The constitutions of both countries provide for freedom of religion. The First Amendment of the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof”¹ North of the border, the Canadian Charter of Rights and Freedoms, part of the Canadian Constitution, establishes the “fundamental freedom” of “conscience and religion,” and states that no one may be discriminated against on account of religion.² The American and Canadian constitutions differ in their treatment of the divine: the U.S. Constitution is free of any reference to God,³ whereas the Canadian Charter notes in its Preamble that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”⁴ Nevertheless, both countries have secular judicial systems: divine involvement in the judicial process appears to be limited to judges’ oaths.⁵

God and law do, however, intersect in both countries—in the form of religious arbitration. Religious arbitration, for the purposes of this Article, is defined as a voluntary dispute resolution process, conducted according to religious

1. U.S. CONST. amend. I.

2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, §§ 2, 15 (U.K.) [hereinafter *Charter*].

3. Article VI explicitly prevents the United States from employing a religious test for office. U.S. CONST. art. VI (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”). The only direct reference to God in the U.S. Constitution is found at the very end, in the Attestation Clause: “Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.” For a discussion of the “Sunday exception” in Article II, see Jaynie Randall, *Sundays Excepted*, 59 ALA. L. REV. 507 (2008) (arguing that the “Sunday exception” did not reflect a view of the United States as a Christian nation, but rather that it was designed to accommodate different state approaches to Sabbath observance).

4. *Charter*, *supra* note 2, at pmbl.

5. For the federal judicial oath in the United States, see 28 U.S.C. § 453 (2006). The oath that must be sworn is: “I, __, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as __ under the Constitution and laws of the United States. So help me God.” *Id.* The invocation “so help me God” is a standard formula, also found in the oaths taken by federal legislators and officers. See 5 U.S.C. § 3331 (2006). The U.S. Supreme Court famously opens its sessions with the invocation “God Save the United States and this Honorable Court.” See *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). “So help me God” is found also in Canadian judicial oaths. See, e.g., Supreme Court Act, R.S.C. 1985, c. S-26, § 10 (Can.) (stipulating oath of office for supreme court justices in Canada).

principles.⁶ Such arbitration often serves as a substitute for proceedings in civil court.⁷ At present, in the United States, agreements to arbitrate a dispute before a religious tribunal are generally enforceable in civil courts, as are awards made by religious arbitral tribunals.⁸ In Canada, religious arbitration agreements and awards are also usually enforceable in courts, with the exception of family disputes in the provinces of Ontario and Québec.⁹

This Article questions this approach. It argues that holding religious arbitration agreements and awards binding in cases where civil courts are able to handle the dispute poses problems for religious freedom. Constitutional law in the United States and Canada points towards holding such agreements and awards unenforceable. At the same time, this Article recognizes that certain types of agreements can only be settled by religious tribunals; in these cases, religious arbitration promotes, rather than hinders, religious freedom.

Part I of this Article traces religious dispute resolution to its origins in England and France, before looking at how it was received in colonial America, the early United States, and Canada. Part II looks at the current status of religious arbitration in the United States and Canada, and discusses questions about its enforceability. Part III examines arguments that have traditionally been made against religious arbitration, and demonstrates why these arguments do not prove that enforceable religious arbitral agreements and awards are troublesome from a constitutional perspective. Part III then considers the question raised by this Article against the judicial enforcement of religious arbitration awards and agreements: that it violates parties' right to freedom of religion. It argues that the enforcement of

6. Arbitration has many possible definitions. It can refer to processes that are binding, or non-binding; to actions that are highly formal, or highly informal; and to processes that are intended to serve as a prelude to court action, a partial substitute for court action, or a complete substitute. NAT'L INST. OF DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION app. 2 (1983). For example, "court-annexed" arbitration is a form of arbitration widely used in administrative law, whereby civil suits are first referred to arbitrators who render non-binding decisions; these decisions can be reviewed by the courts later, if required. *Id.* at 36.

7. *Id.*

8. See *infra* Part II.A.

9. See *infra* Part II.B.

agreements and awards stemming from entirely secular disputes is constitutionally problematic. Part IV considers responses that may be made to the arguments in Part III.

I. HISTORY OF RELIGIOUS ARBITRATION

A. *Religious Modes of Dispute Resolution in England and France*

God and law were intertwined in medieval Europe. The English legal textbook known as Bracton, written about 1230, stated that there could be no king “where will rules, rather than law,” and that the king was the “vicar of God” and therefore answerable to Him.¹⁰ Bracton summed up the whole thus: “The king should not be beneath man but beneath God and the law.”¹¹ Divine and secular law were not always easily distinguishable. In 1489, the English Chancellor, ruling in a trust dispute, held that “each Law is, or ought to be, in accordance with the Law of God.”¹² For much of English history, church and state were mixed, and law was infused with religious principles.

A similar situation existed in France. Although France had known no English-style Reformation, it moved toward greater state control of religion in the seventeenth century: the *Déclaration du Clergé de France* (1682) established Gallicanism in France and the revocation of the Edict of Nantes followed three years later, expelling Protestants.¹³ Through the king, religion and law were inextricably linked: *une foi, une loi, un roi*.¹⁴

Even though law and religion were interconnected, it is possible to trace the origins of religious arbitration back to pre-modern England and France. The English and French religious authorities frequently provided routes to justice that were an alternative to the state courts. Unlike modern arbitration, the religious courts exercised compulsory jurisdiction; however, they are like modern religious arbitral

10. HENRICUS DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE*, Bk 1:8 (photo. reprint 2009) (London, Flesher & Young, 1640).

11. *Id.*

12. JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 313–14 (2009).

13. PHILIPPE SUEUR, *2 HISTOIRE DU DROIT PUBLIC FRANÇAIS 477–78* (1989).

14. *Id.* at 476 (“One faith, one law, one king.”).

tribunals to some extent, in that they competed directly with civil courts.

1. *England*

Church law can be seen as an early forerunner of religious arbitration in England. By the fourteenth century, the church courts had adopted the practice of hearing appeals from the common-law courts, and the monarch was obliged to enact a statute to prevent it.¹⁵ Up to the eve of the Reformation, the church still exercised jurisdiction over what we would today regard as quintessentially secular contract law.¹⁶ Although this business disappeared, the church courts retained active dockets: the sixteenth and seventeenth century church courts heard matrimonial, probate, tithe, and defamation cases.¹⁷ Whereas the first category was comparatively rare,¹⁸ the second category grew increasingly important as a greater and greater proportion of the population made wills.¹⁹ Between the mid-sixteenth and mid-seventeenth centuries, slander cases exploded in the church courts,²⁰ and the population as a whole had to pay tithes, which were a constant source of litigation.²¹ Although the

15. First Statute of Praemunire, 27 Edw. 3, stat. 1, c. 1 (1353). The statute noted that “the judgments rendered in the [king’s] court are being impeached in the court of another, to the prejudice and disherison of our lord the king.” LANGBEIN, *supra* note 12, at 331. It provided that anyone who sought to annul a common law verdict by travelling to Rome would have to appear before the king’s council to justify his actions. *See id.* at 331–32. It was strengthened by the Second (Great) Statute of Praemunire of 1393, which stated that the ecclesiastics had to enforce the judgments of the king’s courts, and also provided that anyone who purchased a legal instrument from Rome that was “inimical to the [king], his crown, his regality, or his aforesaid kingdom” was to be outlawed. 16 Rich. 2, c. 5 (1393). *See* W.T. Waugh, *The Great Statute of Praemunire*, 37 ENG. HIST. REV. 173 (1922).

16. R.B. OUTHWAITE, *THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS 1500-1860*, at 15 (2006). The church exercised its jurisdiction through the doctrine of *fidei laesio*, or breach of faith. *Id.* at 15–16. A litigant could claim ecclesiastical jurisdiction over a contract dispute by alleging not that his counterparty had failed to perform, but that he had breached his oath to perform. *Id.* These suits disappeared in the sixteenth century as the common law courts found ways of exercising jurisdiction over these disputes. *Id.* at 19–20; *see also* LANGBEIN, *supra* note 12, at 131–32.

17. OUTHWAITE, *supra* note 16, at 20.

18. *Id.* at 51.

19. *Id.* at 33–39.

20. *Id.* at 41.

21. *Id.* at 23–24.

church courts were dealt a heavy blow to their jurisdiction in the English Revolution,²² they survived with jurisdiction over matrimonial and probate disputes until 1857, when they finally surrendered control over all that is now considered “secular.”²³

Not all of this can be considered “arbitration” in the sense defined earlier. In the case of probate disputes before 1857, for example, only the church courts had jurisdiction over grants of probate.²⁴ However, in various instances—for example, contract disputes—the church courts were in direct competition with the royal courts.²⁵

2. France

France became a centralized nation-state later than England,²⁶ but nevertheless demonstrates the same pattern by which church courts competed with royal courts, and gradually lost influence to them. By the thirteenth century, jurisdiction in France was shared between a wide variety of courts—royal, seigneurial, ecclesiastical, municipal.²⁷ Medieval ecclesiastical justice was administered via *officialités*, organized by the bishop of each diocese.²⁸ These *officialités* heard cases where they could exercise either personal jurisdiction or subject matter jurisdiction.²⁹ Personal jurisdiction could be established if a party was either a regular or secular clerk.³⁰ The church’s jurisdiction extended to both civil and criminal cases: in the latter cases,

22. *Id.* at 78.

23. LANGBEIN, *supra* note 12, at 355.

24. 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 605–06, 686–89 (3d reprinted 1977).

25. *Id.* at 131 (“The willingness of the church courts to take jurisdiction in cases involving oaths led to a quasi-arbitral jurisdiction in contract matters.”).

26. The French royal writ in the eleventh and twelfth centuries hardly ran beyond the central domain of Ile-de-France. See ALBERT RIGAUDIÈRE, HISTOIRE DU DROIT ET DES INSTITUTIONS DANS LA FRANCE MÉDÉVALE ET MODERNE 245 (4th ed. 2010). From the end of the twelfth century to the end of the fifteenth century, royal power reasserted itself. *Id.* at 309. By contrast, England became a centralized nation-state much earlier. See generally R. C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 85–110 (2d ed. 1988) (comparing early rise of English legal system with later development in France and on the European continent).

27. RIGAUDIÈRE, *supra* note 26, at 350.

28. *Id.* at 356.

29. *Id.* at 357–58.

30. *Id.* at 357.

the church could inflict any punishment known to the civil courts, with the exception of death.³¹ The church claimed subject matter jurisdiction over matters of faith, such as heresy and blasphemy; it also dealt with family law and marriage, and claimed a wide jurisdiction over disputes that had a “mixed” religious and secular character, such as contracts made under oath.³² Any “grave transgression” against public morality could be tried in church court.³³

The church courts reached the zenith of their power in the twelfth and thirteenth centuries.³⁴ The royal courts sought to squeeze out this ecclesiastical competition. From the fourteenth century onwards, royal courts established jurisdiction over cases involving church officials that involved serious crimes against the public order.³⁵ They also established appellate jurisdiction over the church courts in cases where the church courts overstepped the bounds of their jurisdiction; in the fifteenth century, this became a general appellate jurisdiction.³⁶ In 1539, ecclesiastical jurisdiction was dramatically curtailed by François I with the *Ordonnance de Villers-Cotterêts*, which provided that ecclesiastical judges could not hear “actions pures personnelles,” and left them with competence only over “purely religious matters.”³⁷ In 1695, such ecclesiastical jurisdiction was placed under royal supervision by Louis XIV.³⁸

31. *Id.* at 358. “It was a principle of the Canon law that the Church could not shed blood” A. ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE: WITH SPECIAL REFERENCE TO FRANCE* 50 (photo. reprint 2000) (John Simpson trans., 4th ed. 1913). However, being tried in a Church court would not necessarily save a wrongdoer’s life: if it was felt that the death penalty was merited, the Church would hand over the guilty individual to the secular authorities for execution. *Id.*

32. RIGAUDIERE, *supra* note 26, at 359.

33. *Id.*

34. BRIGITTE BASDEVANT-GAUDEMET & JEAN GAUDEMET, *INTRODUCTION HISTORIQUE AU DROIT XIII^e-XX^e SIECLES* 175 (2000).

35. RIGAUDIERE, *supra* note 26, at 360.

36. *Id.* at 361.

37. *See Ordonnance d’Août 1539 Prise par le Roi François I*, ASSEMBLEE NATIONALE, <http://www.assemblee-nationale.fr/histoire/villers-cotterets.asp> (last visited Oct. 26, 2011); *see also* BASDEVANT-GAUDEMET, *supra* note 34, at 176 (noting that François I had “reduced in six lines [of statute] ecclesiastical jurisdiction to the very limit of reason” (author trans., quotation marks and citation omitted)).

38. BASDEVANT-GAUDEMET, *supra* note 34, at 176.

As in England, there were not always civil alternatives to church dispute resolution. However, the church directly competed with secular courts in some areas.³⁹ This competition between state- and church-sponsored dispute resolution was found also among the English and French settlers in North America, which is the subject of the next section.

B. Religious Arbitration in North America

The relationship between church and state was very different in colonial and post-colonial North America from the relationship seen in England and France. In colonial America, various colonies had established churches.⁴⁰ In 1789 the First Congress of the United States proposed to the states the First Amendment, which prevented an established church from reaching the same position in national American life as it had in Britain.⁴¹ State established churches continued in existence until 1833, at which point Massachusetts repealed its church taxes and there was no longer any established church in the country.⁴²

North of the border in Canada, a different state of affairs prevailed. If British emigration to the New World was driven by religious dissenters, French emigration was decidedly conformist: in 1629, an edict was passed stating that only Roman Catholics could settle in "New France."⁴³ In the mid-eighteenth century, the bishop of Québec "was in effect an officer of the [French] crown."⁴⁴ The British colonies in Canada also created bonds between church and state. Nova Scotia, conquered by Britain in 1710, established the Church of England in 1758.⁴⁵ The Quebec Act of 1774 granted tolerance to Catholics in the province, but Anglicanism was

39. RIGAUDIERE, *supra* note 26, at 359 ("All areas of law [other than religious law, marriage law, and law concerning church property] were subject to a concurrent jurisdiction. It often gave rise to a lively competition and offered a true choice to the litigant." (author trans.)).

40. See RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA 189–90 (James H. Hutson ed., 2000).

41. 1 Stat. 97 (1789).

42. RELIGION AND THE NEW REPUBLIC, *supra* note 40, at 196.

43. *Id.* at 75.

44. ROBERT CHOQUETTE, CANADA'S RELIGIONS: AN HISTORICAL INTRODUCTION 141 (2004).

45. *Id.* at 163.

established as the province's religion shortly afterwards.⁴⁶ By 1800 all of Canada's provinces or territories favored the Church of England, either officially or unofficially.⁴⁷ The Church was however swiftly disestablished: by the early nineteenth century in the maritime provinces, and by 1854, in the rest of the country.⁴⁸

Despite this fluctuating relationship between church and state, religious arbitration flourished in colonial and early independent North America. The next sections describe some of the religious arbitration processes employed by the European settlers. The descriptions are indicative, and do not present a comprehensive account of religious arbitration in North America in this period: as one scholar has written, "[t]he shadowy and unsystematic documentary record of [these] processes poses particular challenges for those wishing to study them."⁴⁹ However, they demonstrate that religious arbitration in North America is not simply a modern phenomenon.

1. *Religious Arbitration in Colonial British America*

The functioning of religious arbitration in colonial America can be seen particularly clearly in Massachusetts. Church was at the center of life for the Puritans, and their church courts had powers that outstripped their English counterparts. Civil and religious justice were thoroughly mixed. Even criminal cases could end up in a church court,⁵⁰ whereas the civil courts exercised jurisdiction over offenses that were purely religious—such as failure to attend church.⁵¹

Churches often functioned as the only available courts.⁵² However, we see from an early time what can be described as "arbitration." The Massachusetts colony encouraged the settlement of disputes outside of the "legal" framework. A Boston town in 1635 laid down an ordinance that no

46. *Id.* at 165.

47. *Id.* at 205.

48. *Id.* at 222.

49. Philip Girard, *Taking Litigation Seriously: The Market Wharf Controversy at Halifax, 1785–1820*, in 8 *ESSAYS IN THE HISTORY OF CANADIAN LAW: IN HONOUR OF R.C.B. RISK* 213, 235 n.3 (G. Blaine Baker & Jim Phillips eds., 1981).

50. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 22 (1983).

51. *Id.*

52. *Id.* at 23.

congregation members could litigate unless there had been a prior effort at arbitration.⁵³ A case from 1640 describes arbitration between a prominent lady and a carpenter.⁵⁴ The church sponsored arbitration—twice—which the lady refused to abide by.⁵⁵ The dispute then went into a church, which enforced it: not by seizing her property, which it could not do,⁵⁶ but by excommunicating her.⁵⁷

Church courts in Massachusetts could only exercise jurisdiction in disputes where the parties were of the same congregation.⁵⁸ However, these courts could have certain advantages. Churches met all year round; the civil courts of first instance, on the other hand, sat only four times a year, and in the county seat.⁵⁹ Furthermore, the church was less formal, and there was no need to go to the expense of hiring a lawyer.⁶⁰ Religious arbitration was also divinely sanctioned: St. Paul exhorted the believers to settle disputes among themselves, urging them not to take cases to the courts of the “unbelievers.”⁶¹ The civil courts functioned as a “back-up” when the civil power was needed—for example, to arrest persons and attach property.⁶² The parallel jurisdiction of the civil and church courts is a feature of modern-day arbitration, and it is not surprising that the other characteristics that we often associate with modern arbitration—speed, informality and inexpensiveness—were present in religious arbitration before American independence.

53. *Id.*

54. *Id.* at 23–24.

55. *Id.* at 23.

56. Even in the theocracy that was seventeenth-century Massachusetts, there was a divide between civil judicial power and the church. The Massachusetts Body of Liberties of 1641 stated that “[c]ivill Authoritie hath power and libertie to deale with any Church member in a way of Civill Justice, notwithstanding any Church relation, office, or interest,” and churches could not interfere with civil offices. However, any church had the “libertie to deale with any of their members in a church way that are in the hand of Justice.” See WILLIAM H. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686, at 47–57 (photo. reprint 2006) (Boston 1890).

57. AUERBACH, *supra* note 50, at 23–24.

58. WILLIAM E. NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725–1825, at 43 (1981).

59. *Id.* at 44.

60. *Id.*

61. 1 *Corinthians* 6:6.

62. NELSON, *supra* note 58, at 44.

2. *Religious Arbitration in the Early United States*

The success of colonial-era religious arbitration did not survive into the post-Revolutionary era. By the early years of the nineteenth century, the courts had effectively become “the only institution that was available to adjudicate a dispute.”⁶³ The ultimate sanction of the church courts was excommunication, which increasingly lost its bite. It was no longer nearly as common in the nineteenth century for every member of a community to attend the same Congregationalist church.⁶⁴ Isolated instances remained: for example, a church in Middleboro, Massachusetts in 1826 handled a dispute between two members concerning a dam.⁶⁵ But religious arbitration could not compete with the secular system without adopting a secular enforcement mechanism.

Outside of New England, religious arbitration survived among various groups during the nineteenth century. The Utopian Christian communities sought to internalize their disputes and avoid the courts. John Humphrey Noyes wrote that the Oneida community in New York, a society of Christian Perfectionists, was “very averse to litigation and intended . . . to preclude the possibility of it.”⁶⁶ A Christian Utopian community made up of German immigrants in Aurora, Oregon, allegedly went nineteen years without recourse to the courts.⁶⁷

The most successful Utopian community by far was the Mormons in Utah territory.⁶⁸ The Mormons shunned “gentile” justice and lawyers.⁶⁹ Brigham Young summed up their views in 1857: “There is not a righteous person, in this community, who will have difficulties that cannot be settled by arbitrators”⁷⁰ He argued that civil courts wasted time and “destroyed the best interests of the community,” colorfully adding that courts were a “kitchen of the devil,

63. *Id.* at 76.

64. *Id.* at 147.

65. NELSON, *supra* note 58, at 198 n.62.

66. AUERBACH, *supra* note 50, at 51.

67. *Id.*

68. *Id.* at 54.

69. C. Paul Dredge, *Dispute Settlement in the Mormon Community: The Operation of Ecclesiastical Courts in Utah*, in 4 ACCESS TO JUSTICE: THE ANTHROPOLOGICAL PERSPECTIVE 191, 198 (Klaus-Friedrich Koch ed., 1979).

70. *Id.*

prepared for hell” and that lawyers were a “stink in the nostrils” of every Latter-Day Saint.⁷¹ However, despite the Mormon migration to an area of the West that was largely unpopulated—and so where they might be able to form a community in peace⁷²—they still had to compete with civil justice.⁷³ Utah was incorporated as a territory in 1850, four years after the Latter-Day Saints traveled to the region, and with territorial status came federal judges.⁷⁴

The Mormons had never sought complete judicial autonomy: following a revelation, Joseph Smith had established in 1831 that crimes such as murder and robbery were to be tried in civil courts by the “law of the land.”⁷⁵ But even after federal judges began administering justice in the territory, the Mormon community generally preferred to deal with intra-community disputes themselves.⁷⁶ What eventually weakened the strength of the Mormon ecclesiastical justice system was not the pressures of civil justice or the federal government; it was the growth of religious diversity. Like all other religious arbitral tribunals, the Mormons could only claim jurisdiction by consent of the parties, and as the territory (and later state) became more religiously diverse, the power of the religious courts weakened.⁷⁷

All of the Christian communities mentioned above felt that they were obeying St. Paul’s commandment to settle disputes among themselves.⁷⁸ But other religious communities too preferred to avoid the secular courts. The Jewish population had historically retained dispute resolution within their communities: this tradition dates to the second century, when the Roman administration in

71. *Id.* at 199.

72. TODD M. KERSTETTER, *GOD’S COUNTRY, UNCLE SAM’S LAND: FAITH AND CONFLICT IN THE AMERICAN WEST* 40 (2006). The Saints intended to “abandon the United States to found Zion outside its borders.” *Id.*

73. Dredge, *supra* note 69, at 198.

74. *Id.*

75. *Id.* at 194.

76. *Id.* at 198. This was often easy: lower courts in the Territory were controlled by Mormons, who would allow litigants to choose what mode of adjudication they wanted. *Id.*

77. *Id.* at 214.

78. *See supra* note 61 and accompanying text.

Palestine abolished official Jewish courts.⁷⁹ In Europe, Jewish communities had adopted *Batei Din* to avoid their disabilities in civic life, which sometimes prevented them even from testifying in court,⁸⁰ yet in any case, there was a general prohibition against settling disputes in gentile courts.⁸¹ Shortly after the turn of the twentieth century, the New York Jewish community adopted a mode of arbitration under the auspices of the *Kehillah*, a newly-created community organization.⁸² *Kehillah* tribunals settled both commercial and non-commercial disputes.⁸³ Although they faded after World War I, other arbitral tribunals arose to take their place. The Jewish Arbitration Court was created in 1929; within a year, it had a rival, the Jewish Conciliation Court of America.⁸⁴ In New York, Jewish tribunals were given a lease of life by the passage of the Municipal Court Act of 1915, which made their judgments legally binding.⁸⁵ Similar measures were adopted elsewhere: for example, Maryland courts enforced judgments from tribunals where both parties had agreed to be bound, which made it possible for a Jewish tribunal to begin operating there in 1912.⁸⁶

3. *Religious Arbitration in Colonial Canada*

Religion permeated colonial Canadian society just as it did in America. As noted above, it was established in 1629 that only Catholics could emigrate to New France.⁸⁷ Protestants were banished in the 1640s,⁸⁸ and colonial legislation was heavily influenced by the state Catholicism.⁸⁹ Québécois courts were modeled on the French system, and the Church courts exercised a jurisdiction in Québec similar

79. AUERBACH, *supra* note 50, at 77.

80. *Id.*

81. This prohibition remains, according to some scholars. 1 EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 174 (1990).

82. AUERBACH, *supra* note 50, at 79.

83. *Id.*

84. *Id.* at 83–84.

85. *Id.* at 160 n.20.

86. B.H. Hartogensis, *A Successful Community Court*, 12 J. AM. JUD. SOC. 183, 183 (1929).

87. *See supra* note 43 and accompanying text.

88. MARC DURAND, HISTOIRE DU QUÉBEC 17 (1999).

89. JOHN DICKINSON & BRIAN YOUNG, A SHORT HISTORY OF QUÉBEC 37 (4th ed. 2008) (observing that Québec was regulated by the Custom of Paris, which was “influenced by a religious and state ideology”).

to that which they retained in France.⁹⁰ As a result, there was little overlap between the church and state system. However, religious diversity increased as Protestant denominations made themselves at home in other parts of British North America and, following the Treaty of Paris of 1763, in New France itself. These communities sought to resolve disputes among themselves, particularly in frontier territories where lawyers were too expensive or courts too distant.⁹¹

Anglophone Baptists in Nova Scotia in the nineteenth century held that “Bretheren in christ [sic] . . . ought not to go to law with one another; but all their Differences ought to be Decided by the Brethren.”⁹² Quakers were opposed to testifying on oath, and thus were generally prevented from suing in state courts; they set up alternative processes of mediation for their disputes.⁹³ The Mennonites, for their part, had emerged in Europe as the “most separated brethren” of the Protestant Reformation and sought to retain their way of life and culture in Canada.⁹⁴ They were frequently in conflict with secular laws,⁹⁵ and Mennonite churches would exercise a disciplinary function among their members (and even non-members).⁹⁶

Following the British conquest, Catholics also preferred to resolve disputes among themselves: Acadians in New Brunswick in the early nineteenth century, linguistically and geographically isolated, often chose to put their disputes to

90. CHARLES LINDSEY, *ROME IN CANADA: THE ULTRAMONTANE STRUGGLE FOR SUPREMACY OVER THE CIVIL AUTHORITY* 78 (Toronto, Lovells Bros. 1877) (noting that “the Gallican liberties were introduced into Canada by France,” although reserving the question of whether the “whole body of the *droit gallican*” was in force in New France).

91. See, e.g., D.G. Bell, *Maritime Legal Institutions Under the Ancien Régime 1710–1850*, 23 *MANITOBA L.J.* 103, 115–16 (1995) (noting that “much emphasis was placed on resolving quarrels privately,” because of the costs of the legal system); FRANK H. EPP, *MENNONITES IN CANADA, 1786-1920*, at 113 (1974) (“The importance of the clergyman and the church congregation as keepers of the peace . . . on the frontiers of Upper Canada [can be] inferred.”).

92. Bell, *supra* note 91, at 116.

93. Albert Schrauwers, *The Politics of Schism: The Separation of the Children of Peace, 1812*, in *FAITH, FRIENDS AND FRAGMENTATION: ESSAYS ON NINETEENTH CENTURY QUAKERISM IN CANADA* 69, 71–72 (Albert Schrauwers ed., 1995).

94. EPP, *supra* note 91, at 23, 54.

95. *Id.* at 114.

96. *Id.* at 127.

a local Catholic priest rather than deal with the secular courts.⁹⁷ There was in fact no Acadian lawyer from New Brunswick until 1870.⁹⁸ Unsurprisingly, early Jewish communities adopted their own dispute resolution procedures: the elders of the original Sephardic congregation in Montréal constituted a kind of *Beth Din* which could command any member of the community to appear before them, and impose penalties for any misdemeanor.⁹⁹ This form of arbitration was no doubt made more appealing by the fact that Jews labored under civil disabilities until the 1830s, and were blocked from participating in public life by the need to swear on explicitly Christian oaths.¹⁰⁰

As the above discussion shows, religious arbitration in North America is nothing new. The next Part discusses religious arbitration in modern-day United States and Canada.

II. RELIGIOUS ARBITRATION TODAY IN THE UNITED STATES AND CANADA

A. *United States*

This section discusses religious arbitration in the United States. The first subsection examines the framework in which religious arbitration is conducted today. The following subsections describe the operation of religious arbitration in the United States and the obstacles to binding religious arbitration.

It should be observed from the outset that there are no remarkable differences between the states in their enforcement of religious arbitral awards. This is because of the dominance of the Federal Arbitration Act and the Uniform Arbitration Act in this area.¹⁰¹ This situation may change, however: Oklahoma in 2010 amended its constitution to prevent judges from considering sharia law in their

97. See D.G. Bell, *A Perspective on Legal Pluralism in 19th-Century New Brunswick*, 37 U. NEW BRUNSWICK L.J. 86 (1988).

98. *Id.* at 89.

99. BENJAMIN G. SACK, *HISTORY OF THE JEWS IN CANADA* 52–53 (Ralph Novek trans., 1965).

100. GERALD TULCHINSKY, *CANADA'S JEWS: A PEOPLE'S JOURNEY* 27–29 (2008).

101. See *infra* Part II.A.1.

decisions.¹⁰² This provision, which was made the subject of a preliminary injunction by a federal judge, would have the effect of making judgments by Islamic tribunals unenforceable.¹⁰³ Other states are considering similar bans on use of religious law.¹⁰⁴ For the purposes of arbitration, however, the states will be considered as a unitary whole.

1. *Framework of Religious Arbitration*

Arbitration in the United States today is governed largely by the Federal Arbitration Act (FAA) and the Uniform Arbitration Act (UAA). The FAA was enacted in 1925 and was the fruit of lobbying to make arbitration clauses in contracts enforceable.¹⁰⁵ Arbitration is encouraged at the federal level. In 1983, the Court declared that there was a federal policy “favoring” the enforceability of arbitration agreements;¹⁰⁶ this decision was followed the next year by *Southland Corp. v. Keating*, in which the Court reiterated the “national policy favoring arbitration”¹⁰⁷ and held that the FAA, which was enacted under Congress’s Commerce Clause powers,¹⁰⁸ governed commercial contracts that were executed under state law.¹⁰⁹ This ruling had the effect of preempting state laws restricting the enforceability of agreements to arbitrate in commercial disputes.¹¹⁰

102. *Awad v. Zirriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

103. *Awad*, 754 F. Supp. 2d 1298; see also Michael A. Helfand, *Oklahoma Panics over Islamic Law*, STAR TRIBUNE, Nov. 14, 2010, at A5, available at <http://www.startribune.com/opinion/commentary/107585918.html>. The Tenth Circuit recently heard oral arguments in an appeal against the preliminary injunction. Robyn Hagan Cain, *Tenth Circuit to Hear Arguments in Anti-Sharia Law Case*, FINDLAW: U.S. TENTH CIRCUIT (Sept. 12, 2011, 3:05 PM), http://blogs.findlaw.com/tenth_circuit/2011/09/tenth-circuit-to-hear-arguments-in-anti-sharia-law-case.html.

104. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1239 (2011); Donna Leinwand, *States Enter Debate on Sharia Law*, U.S.A. TODAY, Dec. 9, 2010, at 3A.

105. Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 430 (1998). Up to this point, agreements to arbitrate were not enforceable at common law. *Id.* at 431.

106. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

107. 465 U.S. 1, 10 (1984).

108. *Id.* at 11.

109. *Id.* at 16.

110. See Harding, *supra* note 105, at 468–69.

The Uniform Arbitration Act, for its part, was promulgated by the National Conference of Commissioners on Uniform State Laws in 1955.¹¹¹ It has been adopted by thirty-five jurisdictions, and another fourteen have substantially similar legislation.¹¹² At the time of its promulgation, state law was often hostile to arbitration agreements.¹¹³ This has largely been changed, and under the UAA courts now generally enforce arbitral awards.¹¹⁴ Under the UAA, a court may overturn an award for procedural defects, such as bias or lack of notice to the parties.¹¹⁵ It may also vacate an award if the arbitrators have overstepped their powers and may “correct an award” where there has been an “evident mistake.”¹¹⁶

Neither the FAA nor the UAA provide that courts may overturn awards that disregard constitutional rights—for example, the right to be free of sexual discrimination. However, courts may vacate awards given under federal or state law on the grounds that they violate “public policy” or show “manifest disregard for the law.”¹¹⁷ This enables courts to vacate awards that clash with certain federal or state constitutional rights.

Agreements to arbitrate, as distinct from arbitration awards, can also only be overturned by courts in limited circumstances. In *Perry v. Thomas*, the Court stated that “[a]n agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, ‘save upon such grounds as exist at law or in equity for the revocation of any contract.’”¹¹⁸ All arbitration agreements *prima facie* breach

111. Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 1 (2001).

112. *Id.*

113. *Id.*

114. *Id.* (“The intent of the UAA to overcome courts’ adverse common-law attitudes has been accomplished.”)

115. UNIF. ARBITRATION ACT § 26, 7 U.L.A. 77–78 (2000).

116. *Id.* at §§ 12–13.

117. See, e.g., Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597 (2009). But see *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (holding that the “manifest disregard for the law” standard may be encapsulated within section 10 of the FAA, which provides statutory grounds for overturning of arbitral awards).

118. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (citation omitted).

the right to a jury trial enshrined in the Seventh Amendment.¹¹⁹ as a result, courts have held that this right can be waived when a party “knowingly and intelligently” enters into an arbitration agreement.¹²⁰ In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that civil rights claims can be subjected to compulsory arbitration.¹²¹ Because of the federal policy in favor of arbitration, some state courts have adopted unconscionability doctrine as a way of rendering arbitration agreements unenforceable.¹²² However, unconscionability is “generally a loser of an argument,” and arbitration agreements are typically enforced.¹²³

2. Description of Religious Arbitration

Christian arbitration still exists in the United States, although it has attracted less media attention than religious tribunals of other religions.¹²⁴ The largest Christian arbitration service in the United States is Peacemaker Ministries.¹²⁵ Through its affiliate, the Institute for Christian Conciliation, it offers non-binding conciliation and mediation services, and—if those fail—legally binding arbitration

119. U.S. CONST. amend. VII (providing that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”).

120. Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 24–25 (2003).

121. 500 U.S. 20, 23 (1991).

122. See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008).

123. *Id.* at 1442. For a recent defeat of an unconscionability argument in the Supreme Court, see *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

124. This may be because there has been an assumption that Christian principles have influenced the secular legal system, and so explicitly “Christian” arbitration need not be radically different from civil justice. In 1892, for example, Justice Brewer averred that the United States “is a Christian nation.” *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892). Justice Brewer was a committed Christian. See EDWARD A. PURCELL JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 46 (2000). He affirmed his views, qualifying them only slightly, in his later tract, *The United States: A Christian Nation* (1905). See Daniel L. Dreisbach, *The United States: A Christian Nation*, 39 J. CHURCH & ST. 607 (1997) (book review).

125. R. Seth Shippee, *Peacemaking: Applying Faith to Conflict Resolution*, 10 DISP. RESOL. MAG. 3, 4 (2004).

services.¹²⁶ Any one of these may involve the use of Biblical scripture as a guide to decision-making;¹²⁷ the professed aim of the religious procedure is to “glorify God by helping people to resolve disputes,” and its rules of arbitration are interpreted in accordance with this mission.¹²⁸ Peacemaker Ministries conducts about 100 “conciliations” each year, which include mediations, arbitrations, and church interventions.¹²⁹ It also certifies about 150 conciliators around the country, who each perform conciliations.¹³⁰ Some of these dispute resolutions might otherwise end up in the secular court system.

Islamic dispute resolution services are also available, and may take the form of either mediation or arbitration.¹³¹ Although mediation is more informal, courts may be more likely to enforce an agreement arrived at through mediation, since arbitrated agreements are sometimes seen as incompatible with local laws;¹³² it has been reported that even mediated awards often fail of enforcement.¹³³ As indicated above, the *Batei Din* continue their role in society. One such organization, Beth Din of America, was founded in 1960 and offers resolution of both commercial and family disputes.¹³⁴ Like the Institute for Christian Conciliation, it gives those using its services the option of binding arbitration.¹³⁵ The

126. *Rules of Procedure*, INST. OF CHRISTIAN CONCILIATION, http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules_of_Procedure.htm (last visited Oct. 26, 2011).

127. For example, the rules of procedure state that “arbitrators may request or consider briefs or position papers that set forth the parties’ understandings of the legal, factual, or scriptural issues.” *Id.* § 38.

128. *Id.* § 1.

129. E-mail from Peacemaker Ministries to author (Oct. 26, 2011) (on file with author). In addition, Peacemaker Ministries conducts about 1,000 “coaching” calls each year, in which it attempts to help people find ways to settle disputes on their own.

130. *Id.* The conciliators might carry out up to ten conciliations per year each.

131. See Shippee, *supra* note 125, at 4–5.

132. *Id.*

133. Abdul Wahid Sheikh Osman, *Islamic Arbitration Courts in America & Canada?* (2005), http://www.hiraan.com/op/eng/2005/dec/Prof_Abdulwahid211205.htm.

134. See *Organizations and Affiliations*, BETH DIN OF AMERICA, <http://www.bethdin.org/organization-affiliations.asp> (last visited Oct. 26, 2011).

135. The arbitration agreement for parties using Beth Din of America’s services provides that “[t]he parties agree that the judgment may be entered on the award in any court of competent jurisdiction in the State of New Jersey and

Beth Din of America conducts about 400 “family” matters each year—probate matters, divorces, and status determinations—and 100 commercial matters.¹³⁶ Not all of these commercial matters go to arbitration; however, some of them would be heard in secular court, if not for the availability of the *Beth Din* as an alternative forum.

There is no need here to reference all of the various religious arbitration services available in the United States; rather, it is enough to acknowledge their existence. Their success, in large part, has been down to the willingness of secular courts to enforce awards that they hand down. The enforceability of these awards is dealt with in the next subsection.

3. *Enforceability of Awards of Religious Tribunals*

Various courts have considered the enforceability of religious arbitration proceedings. In general, courts have ruled that they are enforceable in civil courts. In *Prescott v. Northlake Christian School*, the Fifth Circuit upheld a Christian arbitration clause between an elementary school and a teacher alleging discrimination and breach of contract.¹³⁷ The arbitrator granted damages to the teacher on the grounds that the school had breached its contractual commitment to “resolve all differences, including those not submitted to arbitration, according to biblical principles.”¹³⁸ The Fifth Circuit upheld the award even though damages on such grounds would not have been available under any state’s law.¹³⁹

The court noted that the scope of the civil courts to review the arbitration award was extremely limited.¹⁴⁰ The arbitration agreement was governed by Montanan law, which was “substantially identical” to federal law when providing

the State of New York.” *Agreement to Arbitrate*, BETH DIN OF AMERICA, http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf (last visited Oct. 26, 2011).

136. Interview with Beth Din of America (Oct. 26, 2011) (notes on file with author). Most of the family matters do not involve arbitration, although they may have legal effect.

137. 141 F. App’x 263 (5th Cir. 2005).

138. *Id.* at 274.

139. *Id.*

140. *Id.* at 270.

grounds for review.¹⁴¹ Accordingly, judicial review could only be granted if the award was procured by corruption, fraud or other means; if there was evident partiality on the part of a neutral arbitrator; if any of the arbitrators showed evidence of corruption or misconduct; or if the arbitrators exceeded their powers.¹⁴² None of these grounds for review was present.

Other cases involving religious arbitration have likewise enforced the awards or the agreement to submit the dispute to arbitration, on the grounds that arbitration is favored under state and federal policy. In *Abd Alla v. Mourrsi*, the Minnesota Court of Appeals noted that an allegation of fraud or corruption in an arbitration process would have to “clearly demonstrate” that the award was tainted in order to overcome the presumption in favor of the award.¹⁴³ The presumption in favor of the validity of a religious arbitral award does not prevent a court from overturning it, however. The New York Supreme Court noted in *Berg v. Berg* that an arbitral award could be overturned on public policy grounds if a provision of it violated a state statute or regulation.¹⁴⁴ In this regard, however, religious arbitral awards are simply like secular arbitral awards.

Some courts have, however, considered a First Amendment obstacle to enforcing arbitral awards: the “religious question” doctrine, which aims to prevent “entanglement” of church and state.¹⁴⁵ This doctrine is considered in the following subsection.

4. *The “Religious Question” Problem and Challenge to Arbitration*

It is a tenet of American jurisprudence that civil courts should attempt to avoid “religious questions,” which instead

141. *Id.* at 271.

142. *Id.*

143. 680 N.W.2d 569, 573 (Minn. Ct. App. 2004).

144. No. 25099/05, 2008 WL 4155652, at *12 (N.Y. Sup. Ct. Sept. 8, 2008). A married couple submitted their divorce to dispute to arbitration at a *Beth Din*. *Id.* at *1. The arbitrator awarded child support that greatly exceeded what could have been given under New York’s statute. *Id.* at *11–14.

145. The aim of preventing “entanglement” is “to prevent, as far as possible, the intrusion of [Church or state] into the precincts of the other.” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). As such, it forms one of the three prongs of the “*Lemon* test.” See *id.* at 612–13.

should be left to the competent religious authorities. However, the definition of what is a “religious question” has shifted over the years. In 1871, the Court decided *Watson v. Jones*,¹⁴⁶ which arose out of a dispute between a Presbyterian congregation in Kentucky and the General Assembly of the Presbyterian Church. The General Assembly had consistently supported the Union side in the civil war, and expressed views “adverse to the institution of slavery.”¹⁴⁷ In 1865 it decreed that any person who had aided the Confederate side in the war should “repent and forsake [his] sins” before he could be employed by the church.¹⁴⁸ The Presbytery of Louisville, Kentucky, denounced the decree of the General Assembly, and the congregation of one of the churches in its jurisdiction split over the issue. Each side of the former congregation then claimed to be the owner of the church. After conducting an “elaborate examination of the principles of Presbyterian church government,” the Kentucky Court of Appeals (the highest Kentucky court at that time) ruled that the church belonged to the pro-slavery faction, and thereby overruled the determination of the General Assembly of the Presbyterian Church.¹⁴⁹ The anti-slavery faction then moved for an injunction in federal court, which was granted, and affirmed by the Supreme Court.¹⁵⁰ The Court noted that the Kentucky Court of Appeals had erred in its ruling since it had inquired into a matter “purely ecclesiastical in its character.”¹⁵¹

The Court reiterated the need to avoid “religious questions” in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*. In this case, the Court heard an appeal from the national Presbyterian Church against a Georgia Supreme Court ruling that had given control of two Presbyterian church buildings to local congregations.¹⁵² The Georgia Supreme Court had ruled for the local churches on

146. 80 U.S. (13 Wall.) 679 (1871).

147. *Id.* at 691.

148. *Id.*

149. *Id.* at 734.

150. *Id.* at 735. The Court upheld the hearing of the suit on the grounds that the issue being litigated was different from that in the state courts, there was a different named plaintiff, and different rights and remedies were being claimed. *Id.* at 715.

151. *Id.* at 733. This was dictum, since the ruling did not rely on it.

152. 393 U.S. 440, 441 (1969).

the “departure from doctrine” theory. This stated that local church property was held in trust for the benefit of a general church “on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches.”¹⁵³ The Court reversed, holding that, because of the First Amendment, no court could make the determination of doctrinal questions required in the “departure from doctrine” theory.¹⁵⁴

The religious question doctrine was considered in the context of arbitration by a Colorado district court in *Encore Productions v. Promise Keepers*.¹⁵⁵ The plaintiff, Encore, was a provider of meeting services, and the defendant was a Christian organization that conducted “meetings and conferences for men” in venues throughout the United States.¹⁵⁶ The contract between the parties stipulated that “[a]ny claim or dispute arising from or related to this Agreement shall be settled by mediation and, if necessary, legally binding arbitration, in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation.”¹⁵⁷ When the agreement between the parties broke down, the plaintiff sued in district court for breach of contract, and the defendant moved to dismiss, citing the arbitration clause.¹⁵⁸ In response, the plaintiff challenged the validity of the contractual provision for Christian arbitration services.¹⁵⁹

The court rejected the plaintiff’s claims. It first noted the religious question doctrine, but held that it could avoid adjudicating religious matters by using “neutral principles,” as laid down by the Court in *Jones v. Wolf*.¹⁶⁰ These neutral principles were “secular legal rules whose application to religious parties or disputes do not entail theological or

153. *Id.* at 443.

154. *Id.* at 449–50.

155. 53 F. Supp. 2d 1101 (D. Colo. 1999).

156. *Id.* at 1106.

157. *Id.*

158. *Id.* at 1107.

159. *Id.* at 1112. The plaintiff also challenged the validity of the arbitration clause on the grounds that the contract containing the clause had been superseded by another contract that lacked it. *Id.* at 1108.

160. *Id.* at 1112 (“‘Neutral principles’ are secular legal rules whose application to religious parties or disputes do not entail theological or religious evaluations.” (citing *Jones v. Wolf*, 443 U.S. 595 (1979))).

religious evaluations.”¹⁶¹ It then observed that it had only “marginal review” over the decisions of religious arbitral tribunals, citing *Presbyterian Church*.¹⁶² An agreement to arbitrate, the court held, was a secular contractual matter—and not a question of religious doctrine.¹⁶³ Therefore, the parties should arbitrate, and any problems arising out of the arbitration could be reviewed in court later.¹⁶⁴

The decision of the *Encore* court to dispatch the religious question problem is consistent with that of other courts. In *Meshel v. Ohev Sholom Talmud Torah*, the District of Columbia Court of Appeals rejected the argument that compelling religious arbitration before a *Beth Din* would violate the religious question doctrine.¹⁶⁵ Under the terms of a Washington synagogue’s by-laws, a congregation member could make a claim against the congregation as a whole to be determined by a *Beth Din*.¹⁶⁶ The congregation resisted arbitration on the grounds that it would lead to a civil court making determinations about religious matters.¹⁶⁷ This argument was rejected by the court, which said that it was “fully satisfied that a civil court can resolve appellants’ action to compel arbitration according to objective, well-established, neutral principles of law.”¹⁶⁸ The court distinguished between the underlying dispute to be arbitrated—which was a religious matter over which it did not have competence—from the agreement to arbitrate itself.¹⁶⁹

5. Other Challenges to Religious Arbitration

Courts have considered, and rejected, other challenges to religious arbitration. In *Encore*, the plaintiff argued that the use of religious arbitration would “violate their agents’ and employees’ rights to the free exercise of their religion under the First Amendment.”¹⁷⁰ *Encore* did not claim that its own

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. 869 A.2d 343 (D.C. 2005).

166. *Id.* at 346.

167. *Id.* at 353.

168. *Id.* at 354.

169. *Id.*

170. *Encore Prod., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999).

First Amendment rights had been violated, though it might have.¹⁷¹ Instead, it claimed that the arbitration agreement it had executed was a legal nullity since it forced its employees to take part “in proceedings of a religious nature.”¹⁷² The court had little time for this argument. It noted that the contract had been executed not by the corporation itself but by employees on behalf of the corporation—and so the corporation could not now claim that those employees were being bound against their will. “The arbitration process . . . contemplates participation by [employees].”¹⁷³

Attacks based on the remedies that religious tribunals may grant have fared little better. *Woodlands Christian Academy v. Weibust* was the case of a teacher who took action against her former employer, a school, for constructive dismissal.¹⁷⁴ The teacher argued that since the conciliation provision in the arbitration clause stated, that “the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process,”¹⁷⁵ this constituted an “unconscionable limitation” on the remedies that she should be able to obtain from the Texas Commission on Human Rights.¹⁷⁶ The appeals court rejected this argument, noting first that the conciliation procedure (as opposed to the arbitration procedure) was not binding, and second that the arbitration agreement clearly stated that the terms of any award were unenforceable if they conflicted with state or federal law.¹⁷⁷ The court therefore upheld the enforceability of the arbitration provision.

A federal district court arrived at a similar result in *Easterly v. Heritage Christian Schools*.¹⁷⁸ The court rejected the argument of the plaintiff, a former teacher, that upholding a Christian conciliation provision would lead to a

171. See *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (“The Court has recognized that First Amendment protection extends to corporations.” (citations omitted)).

172. 53 F. Supp. 2d at 1112.

173. *Id.*

174. No. 09-10-00010-CV, 2010 WL 3910366, at *1 (Tex. Ct. App. Oct. 7, 2010).

175. *Id.* at *5.

176. *Id.*

177. *Id.*

178. No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099 (S.D. Ind. Aug. 26, 2009).

forfeiture of her “substantive rights.”¹⁷⁹ Even though the terms of the conciliation process stated that the Bible was to be the “supreme authority” that would govern the proceedings, it was sufficient that the terms also obliged the conciliators to “take into consideration” secular law.¹⁸⁰ The plaintiff also failed to show how her procedural rights would be impugned by the Christian provision.¹⁸¹ Therefore, the court enforced the religious conciliation provision.

Courts have also been skeptical of arguments that claim that religious arbitration has been forced on one party through duress. In *Berg v. Berg*, a husband in a divorce case claimed that he was forced to go to Jewish arbitration by his wife since otherwise he would face a *siruv*, a finding of contempt by his rabbi that would entail a “type of ostracism” from the religious community.¹⁸² The court, citing precedent, dismissed this claim.¹⁸³ In *Graves v. George Fox University*, a court dismissed a claim that a Christian arbitration agreement between an employee, an admissions counselor at a university, and his employer was procedurally unconscionable.¹⁸⁴ It stated that there had been no “stark inequity” in bargaining power as the plaintiff had alleged, and therefore upheld the arbitration agreement.¹⁸⁵

American courts, so far as possible, treat challenges to religious arbitration exactly as they would challenges to secular arbitration—and exercise the same “presumption . . . in favor of arbitration,” even in family law disputes.¹⁸⁶ The situation is somewhat more complex north of the border, as will be shown in the next section.

B. Canada

This section examines the status of religious arbitration in Canada as a whole. Following the model of the previous section, it examines first the framework for arbitration

179. *Id.* at *3.

180. *Id.*

181. *Id.*

182. No. 25099/05, 2008 WL 4155652, at *5 (N.Y. Sup. Ct. Sept. 8, 2008).

183. *Id.* (citing *Greenberg v. Greenberg*, 656 N.Y.S.2d 369, 370 (App. Div. 1997); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 494 (Sup. Ct. 1991)).

184. No. CV06-395-S-EJL, 2007 WL 2363372, at *5 (D. Idaho Aug. 16, 2007).

185. *Id.*

186. *See, e.g., Jabri v. Qaddura*, 108 S.W.3d 404, 410 (Tex. Ct. App. 2003).

generally before addressing religious arbitration specifically. As noted previously, family law arbitration in Ontario and Québec forms an exception to the general principle in Canada that religious arbitration should be enforceable, and will be dealt with in the following section.

1. *Framework of Arbitration in Canada*

Until about twenty-five years ago, all arbitration in Canada was based on English statutes that dated back to the nineteenth century.¹⁸⁷ The 1980s, however, saw a broad movement to make Canada more attractive to business by providing suitable fora for alternative dispute resolution.¹⁸⁸ In 1985, the United Nations Commission on International Trade Law (UNCITRAL) promulgated the Model Law on International Commercial Arbitration (Model Law).¹⁸⁹ The following year, Canada became a signatory to the New York Convention,¹⁹⁰ which requires courts in contracting countries to give binding effect to private agreements to arbitrate and enforce arbitration awards made in other contracting states.¹⁹¹ The enactment of this legislation required provincial and federal coordination: while the New York Convention binds states, the subject matter of commercial arbitration is, under Canadian law, largely a provincial

187. J. BRIAN CASEY & JANET MILLS, *ARBITRATION LAW OF CANADA: PRACTICE AND PROCEDURE* 3 (2005).

188. See Randy A. Pepper, *Why Arbitrate?: Ontario's Recent Experience with Commercial Arbitration*, 36 *OSGOODE HALL L.J.* 807, 808–11 (1998).

189. *Id.* at 811. The Model Law was adopted by the United Nations General Assembly in 1985. G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985).

190. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 U.S.T. 2517 (entered into force June 7, 1959). Canada acceded to the Convention on May 12, 1986, and the Convention entered force on August 10, 1986. See Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 26, 2011). Canada became the sixty-seventh signatory to the Convention, behind San Marino, the Central African Republic and the Holy See. See *id.*

191. Article I provides that “[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the State where the recognition of such awards are sought” Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 190, at 49. Article III provides that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon” *Id.*

affair.¹⁹² As a result, each province, save Québec, enacted an International Arbitration Act based on the UNCITRAL Model Law.¹⁹³

These International Arbitration Acts were applicable to arbitrations that were “inherently commercial in nature and ‘international’ in scope.”¹⁹⁴ They did not, therefore, cover domestic disputes, although domestic parties could agree to be bound by them.¹⁹⁵ When the acts were passed, many provinces felt the need to provide a domestic counterpart.¹⁹⁶ The existing arbitration acts, based on the English Arbitration Act of 1889, made no distinction between domestic and international disputes, and the international acts seemed inappropriate for various domestic disputes.¹⁹⁷ Under the international acts, there were very few situations in which a court could intervene, and there was no appeal to a court unless it was already agreed in the arbitration contract.¹⁹⁸ While this might be suitable for sophisticated international parties, it was generally considered less appropriate for domestic parties.¹⁹⁹ Many provinces therefore decided to adopt domestic arbitration acts in the late eighties and early nineties to govern these disputes.²⁰⁰

192. See William C. Graham, *International Commercial Arbitration: The Developing Canadian Profile*, in UNCITRAL ARBITRATION MODEL IN CANADA: CANADIAN INTERNATIONAL COMMERCIAL ARBITRATION LEGISLATION 93–99 (Robert K. Paterson & Bonita J. Thompson eds., 1987).

193. CASEY & MILLS, *supra* note 187, at 21. Québec’s arbitration provisions are similar, and are found at Code of Civil Procedure, R.S.Q., c. C-25, arts. 940–951.2 (Can.).

194. CASEY & MILLS, *supra* note 187, at 21.

195. United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, U.N. Docs A/40/17 annex 1 & A/61/17 annex 1, 2 (2008), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_EBOOK.pdf (“An arbitration is international if . . . the parties have expressly agreed that the subject matter of the arbitration dispute relates to more than one country.”).

196. CASEY & MILLS, *supra* note 187, at 23.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 21. New domestic arbitration acts were passed by Alberta, British Columbia, Manitoba, New Brunswick, Ontario, Nova Scotia, Québec and Saskatchewan. The remaining two provinces—Newfoundland and Labrador, and Prince Edward Island—still use arbitration statutes based on the English act of 1889.

The passage of the international arbitration acts led to a definite shift in favor of arbitration in Canada.²⁰¹ Both arbitration agreements and awards can only be reviewed by courts in limited circumstances. Under Ontario's International Arbitration Act, for example, an arbitration agreement may be set aside if one party entered into the agreement while under a legal incapacity, the agreement is "invalid," the subject matter of the dispute cannot be resolved by arbitration under Ontario law, or the arbitration agreement does not apply to the dispute.²⁰² Once an arbitration has taken place, a party appealing to overturn the award may attempt to argue that the arbitration agreement itself was defective, or may show fraud or a procedural defect.²⁰³

Religious arbitration agreements are *prima facie* enforceable in Canada. In *Popack v. Lipszyc*, for example, two Ontario businessmen had agreed to submit a property dispute to arbitration at a *Beth Din*, pursuant to the International Arbitration Act.²⁰⁴ The plaintiff then brought an action in civil court, arguing that the tribunal did not have jurisdiction over the dispute and could not grant all of the relief sought.²⁰⁵ The judge held that the burden was on the plaintiff to prove that the arbitration could not be performed by the *Beth Din*, and that he had failed to do so.²⁰⁶

In *Grunbaum v. Grunbaum*, a Québec court was asked to enforce a judgment handed down by a *Beth Din* concerning the use of an apartment in Jerusalem.²⁰⁷ The *Beth Din* had given an initial judgment, but then, having heard new evidence, announced that the judges were "resign[ing] from the case and [did] not wish to continue presiding over this case."²⁰⁸ They urged the parties to go to "another rabbinical court in another jurisdiction" to resolve the matter.²⁰⁹ The Québec court refused to enforce this award, on the grounds

201. See *Ontario v. Abilities Frontier Co-operative Homes Inc.*, 1996 CarswellOnt 2720, para. 27 (Can. Ont. C.J.) (WL).

202. International Arbitration Act, S.O. 1991, c. 17, § 48 (Can.).

203. *Id.* § 46.

204. 2008 CarswellOnt 5184, para. 3 (Can. Ont. S.C.J.) (WL).

205. *Id.* at para. 1.

206. *Id.* at paras. 33–34.

207. 2002 CarswellQue 729 (Can. C.S. Qué.) (WL).

208. *Id.* at para. 5.

209. *Id.*

that it was not a judgment susceptible of enforcement.²¹⁰ However, the court acknowledged that, in theory, religious arbitral awards could be enforced just like any other arbitral awards.²¹¹

2. Challenges to Religious Arbitration in Canada

Canadian courts, like their American counterparts, acknowledge a “religious question” doctrine—a desire to leave religious matters to the religious authorities. As a leading commentator has said, courts in Canada “will not consider matters that are strictly spiritual or narrowly doctrinal in nature.”²¹² The application of this principle can be seen in the case of *Reed v. Regina*.²¹³ In *Reed*, the plaintiff, a Jehovah’s Witness, was aggrieved at the practice of the congregation to which he belonged of holding disciplinary proceedings *in camera*, and he asked the court to declare that holding these proceedings in private violated the right to freedom of religion that was enshrined in Canada’s Charter of Fundamental Rights and Freedoms.²¹⁴ The court rejected the claim. It noted that, on the contrary, to interfere in the affairs of the religious tribunals of the Jehovah’s Witnesses would harm, not protect, freedom of religion—and so the plaintiff’s claim was not justiciable.²¹⁵

However, courts will intervene to protect property, contract or civil rights when the subject matter happens to be religious in nature.²¹⁶ In *McCaw v. United Church of*

210. *Id.* at para. 14.

211. The court discussed the principles of *homologation*, the French term for finalizing an arbitral decree before a court. It treated the award simply as a *sentence arbitrale*. *Id.* at para. 10. It did not consider that it had any special status by being a religious award.

212. M.H. OGLIVIE, RELIGIOUS INSTITUTIONS AND THE LAW IN CANADA 218 (2d ed. 2003).

213. [1989] 3 F.C. 259 (Fed. Ct.) (Can.).

214. *Id.* at para. 2.

215. *Id.* at para. 10.

216. *See, e.g., Ukrainian Greek Orthodox Church v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586, para. 591 (Can.) (“[I]t is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order.”). Civil courts can enforce contract rights in addition to civil or property rights, if the contract right is deemed sufficiently important. *See, e.g., Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 (Can.).

Canada, an Ontario court was asked to rule on whether a pastor who had been sacked from his church had a valid employment claim against the church.²¹⁷ The crux of the pastor's claim was that the church had not adhered to the "law of the church" as laid out in the church's "manual."²¹⁸ Nevertheless, the court felt free to interpret the manual, and thus hold that the church had acted wrongly in sacking the pastor.

Another example of Canadian courts' willingness to intervene in religious disputes to protect parties' civil or property rights can be found in *Lakeside Colony of Hutterian Brethren v. Hofer*.²¹⁹ A Hutterite colony had expelled four members of the colony, and attempted to obtain a court order to enforce that expulsion.²²⁰ Because Hutterite colonies practice communal ownership of property, expulsion effectively stripped them of all their worldly goods.²²¹ The colony members resisted expulsion on the grounds that the manner of the expulsion denied them "the right of natural justice."²²² The Canadian Supreme Court, reversing the decision of the lower courts, held that the colony members' rights of "natural justice" had been denied since they were not given the chance to defend themselves at the meeting at which they were expelled.²²³

Cases involving requirements to appear before religious tribunals are naturally rarer than religious question cases. The leading case that deals with such a requirement is *Marcovitz v. Bruker*, where the Canadian Supreme Court was asked to rule on an agreement between two individuals to appear before a *Beth Din* to obtain a *get*, a Jewish divorce.²²⁴ The plaintiff and defendant were observant Jews who had been married for eleven years before beginning divorce proceedings in 1980.²²⁵ Under the terms of the civil divorce

217. [1991] 4 O.R. (3d) 481 (Can. Ont. C.A.).

218. *Id.* at para. 11.

219. *Lakeside Colony of Hutterian Brethren*, 3 S.C.R. 165.

220. *Id.* at para. 3–4. Three other defendants had also been expelled, but, being young persons who had not yet been baptized, they were not considered members of the colony. *Id.* at para. 3.

221. *Id.* at para. 23.

222. [1989] 62 Man. R. (2d) 194, para. 28 (Can.).

223. 3 S.C.R. 165 at para. 81.

224. [2007] 3 S.C.R. 607 (Can.).

225. *Id.* at paras. 21–23.

agreement that they signed, the husband, Marcovitz, was obliged to appear before a *Beth Din* to obtain the *get*.²²⁶ However, he refused.

After nine years of waiting, Bruker began proceedings in Québec court for breach of the divorce agreement.²²⁷ She did not sue to obtain the *get*, but for damages for breach of the agreement, which had prevented her from entering into a new religious marriage.²²⁸ Marcovitz demurred.²²⁹ Six years later, however—and fifteen years after the civil divorce—he granted Bruker the *get*.²³⁰ Bruker nevertheless continued in her claim for damages.²³¹ The trial court found that although the granting or otherwise of the *get* was a religious matter, the fact that the husband had agreed to grant the *get* as part of a civil divorce contract “‘moved [the case] into the realm of the civil courts.’”²³² The judge stated that the “pith and essence” of what was being demanded in the case was not religious, and so the court could adjudicate the matter without examining “principles of Jewish law . . . in depth.”²³³ The court awarded Bruker CAD 47,500 in damages (rather than the CAD 500,000 that she had sought).²³⁴

The court of appeals came to the opposite conclusion.²³⁵ For the appellate court, “the substance of the . . . obligation [was] moral in nature, irrespective of the form in which the obligation [was] stated.”²³⁶ The court held that if the plaintiff was forced to pay damages for not granting the *get*, this would interfere with his right to exercise his religion as he saw fit.²³⁷

The Canadian Supreme Court reversed. It held, over a vigorous dissent, that failure to grant a *get* was a justiciable

226. *Id.* at paras. 23–24. Under Jewish law, a woman cannot obtain a *get* on her own. *Id.* at para. 16.

227. *Id.* at para. 26.

228. *Id.*

229. *Id.* at para. 27.

230. *Id.* at para. 29.

231. *Id.*

232. *Id.* at para. 31 (quoting *Marcovitz v. Bruker*, [2003] R.J.Q. 1189, para. 19 (Qué. S.C.) (Can.)).

233. *Id.* at para. 31 (quoting *Marcovitz*, R.J.Q. 1189 at para. 30).

234. *Id.* at para. 33.

235. *Marcovitz v. Bruker*, [2005] R.J.Q. 2482 (Qué. C.A.) (Can.).

236. *Id.* at para. 76.

237. *Id.* at para. 77 (“[W]ho is this Court to tell [Marcovitz] that he had a civil duty to perform irrespective of the rights he might have according to his religious beliefs?”).

matter.²³⁸ The court considered that Marcovitz's right of freedom of religion had to be balanced with the harm that, under Jewish law, was caused to his wife by his not granting the *get*—in particular, the fact that she could not remarry under Jewish law and her children would be illegitimate.²³⁹ The court looked to the legislative history of the federal Divorce Act in making its judgment, and observed that the Act specifically aimed to protect Jewish women.²⁴⁰

Marcovitz can be read as disposing of one principal objection that may be made to religious arbitration—namely, that agreements to appear before religious tribunals are not justiciable in civil court. The court held that the agreement to appear before the *Beth Din* was a secular contractual matter that it was permitted to adjudicate. However, *Marcovitz* is less clear on whether forcing someone to attend a religious tribunal would in fact be a violation of that person's rights. The court was only faced with the issue of damages: the husband had already granted the *get*, and so there was no question of attempting to enforce his agreement to appear before the *Beth Din*. One commentator has surmised that an attempt to force the husband to appear before the *Beth Din* “would have likely been rendered by the Court as an impermissible breach of the husband's constitutionally protected freedom of religion.”²⁴¹

3. *Family Arbitration in Ontario and Québec*

As noted above, the rules governing religious arbitration of family matters in Ontario and Québec are different from those governing arbitration of non-family matters in those provinces, and also from the rules governing family arbitration in other Canadian provinces.²⁴²

238. *Marcovitz*, 3 S.C.R. 607, paras. 39–47 (Can.).

239. *Id.* at para. 4.

240. *Id.* at para. 7.

241. Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQ. L. 573, 595 n.52 (2008).

242. This Article does not attempt to provide a detailed overview of every Canadian province. However, for the sake of completeness, a brief overview of the laws in British Columbia and Alberta, the next two provinces by size of population after Ontario and Québec, is given here. These provinces do not have laws that single out religious arbitration, or arbitration in family matters. Religious arbitration is treated equally in British Columbia with all other types of arbitration. The Commercial Arbitration Act governs all domestic

i. Ontario's Arbitration Act of 1991

Ontario responded to the need for new domestic arbitration legislation with its Arbitration Act of 1991. The Act made binding and enforceable all arbitrations within Ontario, unless they were commercial disputes between international parties, and thus preempted by the International Commercial Arbitration Act, or they fell within discrete areas of law that were outside the scope of arbitration.²⁴³ Courts had more discretion to set aside awards than they would under the New York Convention—for example, they could intervene merely “to prevent unfair or unequal treatment of parties”—but arbitration was still a largely independent affair.²⁴⁴ The Arbitration Act provided for binding domestic arbitration within the province with

arbitrations. R.S.B.C. 2011, c.55 (Can.) (originally enacted as S.B.C. 1986, c.3 (Can.)). Despite its name, the Act states that it applies not only to arbitration agreements in commercial settings, but also to “any other arbitration agreement.” *Id.* § 2(1)(c). Courts may set aside an award in order to “prevent a miscarriage of justice.” *Id.* § 31(2)(a). Unlike Québec and Ontario, there is no statute that bars the use of arbitration in family contexts. However, the use of arbitration in family disputes is extremely rare—possibly because there is uncertainty as to whether non-commercial disputes can be covered in a “commercial arbitration” act. See CATHERINE MORRIS, ARBITRATION OF FAMILY LAW DISPUTES IN BRITISH COLUMBIA 10–11 (Jul. 7, 2004), available at http://www.bcjusticereview.org/working_groups/family_justice/paper_07_07_04.pdf. A government review has proposed amending the law to bring family disputes definitively within the scope of arbitration. MINISTRY OF ATTORNEY GENERAL, WHITE PAPER ON FAMILY RELATIONS ACT REFORM 18 (July 2010), available at <http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf>. However, British Columbia has seen little of the controversy over religious arbitration that affected Ontario and to a lesser degree Québec. The status of religious arbitration in Alberta is similar to that in British Columbia. The Arbitration Act governs all arbitrations unless they are covered by the International Commercial Arbitration Act, the arbitration is excluded by law, or the parties exclude the application of the act. R.S.A. 2000, c. A-43, § 2(1) (Can.). The exclusions by law cover areas such as labor relations and collective bargaining—where provisions for arbitration are laid down in separate codes. *Id.* at § 2(3). For the separate provisions for arbitration, see, for example, Labour Relations Code, R.S.A. 2000, c. L-1, §§ 93–104 (Can.); Police Officers Collective Bargaining Act, R.S.A. 2000, c. P-18, §§ 9–19 (Can.). Courts may, as in British Columbia, overturn arbitral awards. However, review is very limited. If parties have referred a question of law to the tribunal, this cannot be reviewed by a court. R.S.A. 2000, c. A-43, § 44(3). Awards may also be reviewed if one party has been treated “manifestly unfairly and unequally.” *Id.* § 45(1)(f). However, there has been little or no controversy about religious arbitration in Alberta, and it is sanctioned in all circumstances by law.

243. S.O. 1991, c. 17, § 2(1) (Can.).

244. S.O. 1991, c. 17, § 6 (Can.).

“anyone as an arbitrator and any law as the criterion for resolution.”²⁴⁵

Importantly, family law arbitrations fell within the scope of the 1991 Act. Ontario’s pre-existing arbitration law had not prevented this: private religious tribunals could give binding judgments, so long as their judgments did not contradict Canadian law.²⁴⁶ However, the requirement that judgments conform to Canadian law was missing from the Arbitration Act.²⁴⁷ For the first time, it seemed possible for religious tribunals to make binding decisions in divorce and inheritance cases that favored one party on grounds of sex, seniority of birth, or other characteristics that would not be judicially recognized under secular Canadian law.

For the first dozen years of the Act, there was no controversy. Ontario’s Jewish community had *Batei Din*, which operated for many years without attracting unwanted attention.²⁴⁸ Prior to 1991, these had served their own religious communities, handing down judgments based on religious principles but without enjoying automatic state enforcement. For example, the *Halakhah* (Jewish law) does not lay down rules for the division of a couple’s assets in divorce, instead allowing the divorce to take place according to the terms of the *ketubah* (marriage contract).²⁴⁹ The *ketubah* may simply state that the husband is to return the dowry that the wife has brought to the marriage, and any concomitant gifts.²⁵⁰ On the other hand, under Ontarian law, a spouse in a divorce is entitled to half of the increase in

245. Shelley McGill, *Religious Tribunals and the Ontario Arbitration Act, 1991: The Catalyst for Change*, 20 J. L. & SOC. POLY 53, 54 (2005).

246. R.S.O. 1980, c. 25 (Can.).

247. S.O. 1991, c. 17, § 32(1) (Can.) (“In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances.”).

248. Both Toronto and Ottawa have *Batei Din*. See *Beth Din Orthodox, Toronto*, JEWISH IN TORONTO, <http://www.jewishinto.com/Beth-Din-Orthodox.html> (last visited Oct. 26, 2011); Reb Arie, *Courting Public Opinion*, TIKKUN DAILY (Aug. 14, 2009), <http://www.tikkun.org/tikkundaily/2009/08/14/courting-public-opinion>; see also Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 449 (2006) (noting presence of Jewish and Christian arbitration services in Ontario prior to 1991).

249. See LOUIS M. EPSTEIN, *THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW* 207–23 (photo. reprint 1973) (1927).

250. *Id.*

value of the assets of the couple during the marriage.²⁵¹ Similarly, Jewish inheritance law may frequently conflict with secular Ontarian law. Under the *Halakhah*, if there are both sons and daughters, the daughters will receive nothing from an estate, except, under certain conditions, their wedding expenses.²⁵² However, if an individual dies intestate in Ontario, his or her children inherit equally regardless of sex;²⁵³ even in the case of testate succession, a party who has been neglected can challenge a will.²⁵⁴

Before 1991, the possibility of *Beth Din* judgments that violated these laws was not considered problematic since an aggrieved party would always have recourse to the civil courts. Post-1991, the Orthodox Jewish *Beth Din* of Toronto responded to the change by asking the parties to any dispute in family matters to sign an agreement that any award that would be enforceable in court “must be made in accordance with the civil requirements of Canada’s national and provincial family legislation.”²⁵⁵ By voluntarily complying with secular norms, the Toronto *Beth Din* succeeded in averting a clash with civil courts.²⁵⁶

ii. *The Controversy in Ontario over Religious Arbitral Tribunals*

The situation changed in 2003 when the Canadian Society of Muslims founded the Islamic Institute of Civil Justice to serve as a binding arbitration board for Muslims, including in family disputes.²⁵⁷ Islamic family law contains features that cannot be reconciled with Western civil justice systems. Under Islamic law, a male inherits twice as much as

251. Family Law Act R.S.O. 1990, c. F.3, § 5(1). “Equalization” of net family properties is defined as the value of property owned by each party on the date of divorce, minus the value of the property that that party owned on the date of marriage. *Id.* § 4(1).

252. Benjamin C. Wolf, Note, *Resolving the Conflict Between Jewish and Secular Estate Law*, 37 HOFSTRA L. REV. 1171, 1176–77 (2009).

253. Succession Law Reform Act, R.S.O. 1990, c. S.26, § 44.

254. *Id.* § 60.

255. Shachar, *supra* note 241, at 603.

256. *Id.*

257. Judy Van Rhijn, *First Steps Taken for Islamic Arbitration Board (Canada)*, LAW TIMES NEWS (Nov. 25, 2003, 1:37 PM), <http://www.freerepublic.com/focus/f-news/1028843/posts>.

a female.²⁵⁸ Since this is a Qur'anic injunction, and not a legal ruling by scholars, it cannot be ignored.²⁵⁹ In divorce cases, a man is bound to give his wife the amount of money (*mahr*) agreed in the marriage contract; this amount may sometimes be symbolic.²⁶⁰ Although these provisions have elements in common with Jewish law, the possibility that Islamic arbitration awards might be enforceable in secular courts spooked the Ontario public and politicians and led to a backlash.²⁶¹

The following year, the Ontarian government asked the former Ontario Attorney General Marion Boyd to review the 1991 Arbitration Act and religious tribunals operating pursuant to it.²⁶² Noting that "religious arbitration is already being conducted by several different faiths," she recommended that arbitration be permitted to continue, subject to certain safeguards.²⁶³ These safeguards included greater judicial review: a court would be permitted to set aside an arbitral award on grounds of unconscionability if it did not adequately protect the rights of children or if it had infringed rights to "fair and equal treatment."²⁶⁴ Furthermore, parties to arbitration would have to sign an agreement before the arbitration stating that they were aware under what law the arbitration was being conducted, and that they were aware it was voluntary.²⁶⁵

258. Qur'an 4:12 ("Allah commands you regarding your children: a male shall have as much as the share of two females." (2 THE HOLY QUR'AN 501, Hazrat Mirza Tahir Ahmad trans., Islam Int'l Publications 1988)).

259. *Id.* ("This fixing of portions is from Allah.").

260. RAFFIA ARSHAD, ISLAMIC FAMILY LAW 133 (2010).

261. The relatively swift increase in the Muslim population of Ontario in the 1990s may have contributed to a greater sensitivity among Ontarians about making Islamic law binding. In 1991, almost 146,000 Ontarians identified as Muslims; by 2001, this had more than doubled to about 353,000, 3% of the population. *Canada Census: Major Religious Denominations, Ontario, 1991 and 2001*, <http://www12.statcan.ca/english/census01/Products/Analytic/companion/rel/tables/provs/onmajor.cfm> (last visited Oct. 26, 2011). On the other hand, the numbers of Christians and Jews increased slightly, but in line with general population growth, remaining at around 80% and 2% of the population respectively. *Id.*

262. MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 1 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf>.

263. *Id.* at 3.

264. *Id.* at 4–5.

265. *Id.* at 4.

These protections did not satisfy the critics of the provision.²⁶⁶ The political pressure led to Ontario Premier Dalton McGuinty announcing in September 2005 that all religious arbitration would be banned.²⁶⁷ He announced in uncompromising language: “There will be no shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.”²⁶⁸ The Family Law Amendment Act, enacted in 2006, defined “family arbitration” as being “conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction.”²⁶⁹

*iii. The Rationale for the Prohibition of Arbitration
in Family Disputes in Ontario*

The decision to ban religious tribunals in Ontario was taken in response to political pressure that resulted in demonstrations outside Canadian embassies and consulates in cities around the world.²⁷⁰ Both women’s and Muslim groups objected to the existence of binding religious arbitration. For example, the Muslim Canadian Congress argued that the religious arbitration law would permit “religious clerics . . . to turn back the clock and use the judicial system to enforce their waning authority over vulnerable communities.”²⁷¹ The Canadian Council of Muslim Women commissioned a study on the issue²⁷² and castigated Marion Boyd for overlooking the “impending negative impact on vulnerable women and children of government-sanctioned establishment of ‘Sharia’ tribunals in Ontario.”²⁷³ The

266. See *Religious Law in Canada; Catholics and Mission*, THE RELIGION REPORT (Sept. 21, 2005), <http://www.abc.net.au/radionational/programs/religionreport/religious-law-in-canadacatholics-and-mission/3364436>.

267. *Ontario Will Ban Shariah Arbitrations*, N.Y. TIMES (Sept. 12, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9904E4DB1031F931A2575AC0A9639C8B63>.

268. *Id.*

269. S.O. 1991, c. 1, § 1(1) (Can.).

270. See, e.g., *Sharia Move in Canada Draws Anger*, BBC NEWS (Sept. 8, 2005), <http://news.bbc.co.uk/2/hi/4226758.stm>.

271. Press Release, Muslim Canadian Congress, MCC Welcomes Government Bill to End Religious Arbitration (Nov. 15, 2005), available at <http://www.muslimcanadiancongress.org/20051115.pdf>.

272. Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and Its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. 1, 2 (2004).

273. Press Release, Canadian Council of Muslim Women, Initial Response to

Canadian Federation of University Women said that making religious arbitration binding would lead to a “two-tier system of law that [would] discriminate against women, particularly minority and immigrant women.”²⁷⁴ The National Association of Women and the Law claimed that “most religions can be interpreted as endorsing male domination and female inferiority” and so the government sanction of “religious decision-making as part of the legal order would very often condone the commission or the perpetuation of potential discriminations.”²⁷⁵ A total of fifty-three organizations put their names to a declaration stating that the Boyd Report would “sanction the erosion of women’s equality rights under the laws of Ontario.”²⁷⁶

The exact reason for the decision to back away from religious tribunals in Ontario is unclear.²⁷⁷ Dalton McGuinty, Ontario’s premier, spoke of the use of religious law in binding arbitration as “threaten[ing] our common ground.”²⁷⁸ The overwhelming pressure for the ban came from “well-organized, politically savvy women’s groups . . . who framed the issue in terms of women’s equality rights being violated by a multiculturalism gone mad.”²⁷⁹ One commentator has described the decision as being informed by “the prospect of tension, if not a direct clash, between religious and secular norms governing the family—and the fear that women’s hard-won equal rights would be the main casualties of such a showdown.”²⁸⁰

Marion Boyd’s Report on the Arbitration Act (Dec. 20, 2004), available at http://www.ccmw.com/press/press_room_2004.html.

274. ONTARIO COUNCIL OF CANADIAN FEDERATION OF UNIVERSITY WOMEN, COMMENTS ON THE BOYD REVIEW AND THE ARBITRATION ACT 3 (2005), available at <http://www.cfuwontcouncil.ca/Reports/boyd.pdf>.

275. Andrée Côté, *An Open Letter Opposing the Use of Arbitration and Faith-Based Tribunals in Family Law in Ontario*, 23 JURISFEMME 3 (Feb. 24, 2005), available at <http://www.nawl.ca/en/newlibrarypage/jurisfemme/64-jfvolume232005/230-an-open-letter-opposing-the-use-of-arbitration-a-faith-based-tribunals-in-family-law-in-ontario>.

276. *Declaration on Religious Arbitration in Family Law*, YWCA CANADA, <http://ywcacanada.ca/data/publications/00000019.pdf> (last visited Oct. 26, 2011).

277. Harvey Simmons, *One Law for All Ontarians*, TORONTO STAR, Sep. 14, 2010, at A21.

278. *Sharia Law Move Quashed in Canada*, BBC NEWS (Sept. 12, 2005), <http://news.bbc.co.uk/2/hi/americas/4236762.stm>.

279. Simmons, *supra* note 277, at A1.

280. Shachar, *supra* note 241, at 584.

Legal analysis largely focused on those provisions of the Canadian Charter of Rights and Freedom that could be used to protect women's rights.²⁸¹ Section 15(1) of the Charter states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on . . . sex."²⁸² Section 28 emphasizes the commitment to sex equality, providing that "all the freedoms referred to in [the Charter] are guaranteed equally to male and female persons."²⁸³ These provisions could be used in a challenge arguing that "the lack of limits in the Arbitration Act permitting family law matters to be arbitrated upon using an alternative legal framework to Ontario's family law regime is discriminatory because of its adverse impact on women."²⁸⁴

A second legal argument against binding religious arbitration focused not on the risk of sex discrimination, but on freedom of religion, the topic of this Article. The argument suggested that religious arbitration might be inconsistent with freedom of religion, since it could infringe "individual liberty and subjective choice in the interpretation of religious norms."²⁸⁵ Since each person has the right to interpret a religious precept as he or she chooses, giving a religious order legal effect "could force an individual to act contrary to her belief."²⁸⁶ A legal challenge to the Arbitration Act never materialized, however, and arguments based on religious freedom were secondary to arguments focused on equality and women's rights.

iv. Religious Arbitration in Québec

The status of religious arbitration in Québec is similar to that in Ontario: it may not be used for "family" disputes, but is otherwise permitted. Québec's arbitration laws are embedded in the Québec civil code.²⁸⁷ The code explicitly provides that "[d]isputes over the status and capacity of

281. See Bakht, *supra* note 272.

282. *Charter, supra* note 2, § 15(1).

283. *Id.* § 28.

284. Bakht, *supra* note 272, at 20.

285. See Côté, *supra* note 275.

286. *Id.*

287. Civil Code of Québec, S.Q. 1991, c.64, arts. 2638–2643.

persons, family matters or other matters of public order may not be submitted to arbitration.”²⁸⁸ That did not stop the Assemblée Nationale of Québec from unanimously adopting a motion in 2005 that there should be no religious arbitration in family matters in Québec—and in the rest of Canada for good measure.²⁸⁹ The proponent of the motion, Fatima Houda-Pepin, cited Article 15 of the Canadian Charter of Rights and Freedoms, and asserted bluntly: “Les victims de la charia ont un visage humain, et ce sont les femmes musulmanes.”²⁹⁰

However, there is no provision that states that religious arbitration may not be used for commercial matters. In fact, Québec gives great deference to arbitral awards. Domestic arbitral awards can only be overturned in court for the same reasons as international awards—namely, certain procedural defaults.²⁹¹ A court is not permitted to enquire into the merits of the case. Therefore, religious arbitration in Québec is entirely possible and is treated equally with non-religious arbitration.

III. ARGUMENTS AGAINST RELIGIOUS ARBITRATION

This Part discusses arguments that may be made against religious arbitration. It first considers the arguments that have traditionally been made against religious arbitration. These are the lack of substantive protections for certain parties, particularly women, and the lack of procedural protections (for example, the dangers of arbitral bias). It shows why these arguments are not legally sufficient to undermine the status of religious arbitration in either the United States or Canada. It then suggests a stronger argument against religious arbitration, based on the constitutional right—in both the United States and Canada—to the free exercise of religion. It argues that religious arbitration has the effect of limiting freedom of religion, and therefore it should be used only when the dispute has a religious subject matter that civil courts are not equipped to

288. *Id.* at art. 2639.

289. MICHEL VENNE, *L'ANNUAIRE DU QUEBEC* 2006 at 212–13 (2007).

290. *Id.* at 214 (“The victims of Sharia have a human face, and are Muslim women.”).

291. CASEY & MILLS, *supra* note 187, at 30.

handle.

A. *Traditional Arguments Against Religious Arbitration*

1. *United States*

The arguments that are made against religious arbitration concerning women's rights are inherently attractive. As noted in Part II.C, religious codes frequently contain provisions that discriminate against females. Furthermore, the composition of religious tribunals themselves is problematic. Under Jewish law, for example, women cannot serve as judges.²⁹² The same generally applies to Islamic tribunals.²⁹³ Under American law, of course, sexual discrimination in the selection of judges is forbidden—and juries must contain a “fair cross-section” of society.²⁹⁴ Hence, these might appear to be two reasons why binding religious arbitration risks being unlawful.

However, neither reason is sufficient to make religious arbitration generally unconstitutional. In the United States, religious arbitration is only enforceable in court if it does not conflict with secular law. The Supreme Court recently restated the principle that “a substantive waiver of federal civil rights will not be upheld” in an arbitration agreement.²⁹⁵ However, courts are reluctant to interfere with arbitration on procedural grounds alone.²⁹⁶ If one party believes that there

292. QUINT, *supra* note 81, at 52 (noting, however, that a woman can be a judge if the litigants have asked her to be).

293. See, e.g., MAI YAMANI, FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 211 (1996) (reporting Speaker of Iranian Parliament saying that judges must be male). *But see* Ilene R. Prusher, *New Female Judge Transforms Islamic Court*, CHRISTIAN SCIENCE MONITOR (May 13, 2009), <http://www.csmonitor.com/World/Middle-East/2009/0513/p06s20-wome.html> (describing appointment of first two female judges to Islamic court in West Bank); Vaudine England, *Malaysian Groups Welcome First Islamic Women Judges*, BBC NEWS (July 9, 2010), <http://www.bbc.co.uk/news/10567857> (describing appointment of first female judges to Islamic courts in Malaysia).

294. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). *Taylor* held that a state law that provided that women could only serve as jurors if they had opted in to the jury pool was unconstitutional. *Id.* at 530–31.

295. 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456, 1474 (2009). In *Easterly v. Heritage Christian Schools*, the judge noted that the correct remedy for a waiver of rights was *after* the arbitration act had taken place, not before. No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at *3 n.3 (S.D. Ind. Aug. 26, 2009).

296. See, e.g., *Penn v. Ryan's Family of Steak Houses, Inc.*, 269 F.3d 753, 758 (7th Cir. 2001) (“The Supreme Court has repeatedly counseled that the FAA

is a procedural defect in the arbitration that has weakened its rights, the party needs to clearly demonstrate this in order to obtain relief. Courts do not like “speculating” about the potential procedural defects.²⁹⁷ Nor do they entertain presumptions that an arbitral panel will be biased.²⁹⁸ As noted earlier, the consistent policy of courts has been to construe arbitration provisions “liberally.”²⁹⁹ Therefore, the arguments advanced by the opponents of religious arbitration are legally inadequate in the United States. Awards that clash with “public policy” or show “manifest disregard for the law,” as noted above, will not be enforced—but this is not sufficient legally to ban religious arbitration *ex ante*.

2. Canada

This subsection will deal first with substantive protections for arbitration in Canada generally, and will then focus on specific substantive protections that apply to family law in Ontario.

Under Canadian law, arbitration proceedings that violate the Canadian Charter of Rights and Freedoms may be appealed in a civil court. In the early 1990s, the Canadian Supreme Court established the proposition that arbitral tribunals had a duty to abide by, and interpret, the Charter. In *Douglas/Kwantlen Faculty Ass'n v. Douglas College*, the court held that “there cannot be a Constitution for arbitrators and another for the courts.”³⁰⁰ The court has more recently held that any arbitral tribunal that is competent to interpret law is obligated to consider the Charter.³⁰¹ Lower provincial courts have followed suit in interpreting the Charter in considering arbitration awards. In 2004, an Ontario trial

leaves no room for judicial hostility to arbitration proceedings and that courts should not presume, absent concrete proof to the contrary, that arbitration systems will be unfair or biased.”)

297. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000).

298. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (“[W]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985))).

299. *Mitsubishi Motors Corp.*, 473 U.S. at 627.

300. [1990] 3 S.C.R. 570, para. 76 (Can.).

301. *Martin v. Nova Scotia (Workers' Comp. Bd.)*, [2003] 2 S.C.R. 504, paras. 35–37 (Can.).

court quashed a ruling of an arbitral tribunal that had denied severance payment to a hospital employee who left her work after a long period of sick leave.³⁰² The court cited Subsection 15(1) of the Charter, which prohibits discrimination on grounds of disability.³⁰³

Given this, there seems little reason to be concerned that religious arbitration in Canada would lead to grave injustices: awards that seem unconstitutional can be appealed in a civil court. These protections apply both to family and non-family arbitration, as will be discussed now with reference to the case of Ontario. A core feature of Ontario's 1991 Arbitration Act, as noted above, is that it was possible for the parties to choose religious law for binding non-commercial arbitration. However, the argument of the opponents of the law—that this would lead to outcomes that were unjust—was not well-founded.

Under Section 6(a) of the Act, courts were permitted to intervene “to prevent unequal or unfair treatment of parties to arbitration agreements.”³⁰⁴ Section 6(a) was waivable, according to Section 3, which concerned the rights of parties to opt out of agreements.³⁰⁵ Parties were permitted to exclude almost all of the “default” provisions of the Arbitration Act. However, Section 3 specifically barred parties from excluding from their arbitration contract Section 19 of the Act—which states that “[i]n an arbitration, the parties shall be treated equally and fairly.”³⁰⁶

This provision was not a dead letter. In 2001, the Ontario Superior Court held in *Hercus v. Hercus* that the notion of equality and fairness was not limited to “procedural fairness,” and that a case should be remanded for trial when the arbitrator appeared biased to one party.³⁰⁷ In *Hercus*, a divorced couple had agreed to undertake binding arbitration to resolve issues of custody and access rights to their two children. The court considered that the arbitrator had favored the father of the children by concealing information from the mother, and so breached her rights under Section 19

302. Ontario Nurses' Ass'n v. Mount Sinai Hosp., [2004] 69 O.R. (3d) 267.

303. *Id.* at para. 20.

304. S.O. 1991, c. 17, § 6(a).

305. *Id.* § 3.

306. *Id.* § 19.

307. 2001 CarswellOnt 452, paras. 75, 99 (Can. Ont. S. Ct J.) (WL).

of the Act.³⁰⁸

In addition, the *Hercus* court suggested that a further reason to overturn an apparently binding award might be that it involved family law. The court noted the deference that should be given to arbitration agreements, but then observed that the Act “governs all kinds of disputes, typically but not exclusively, commercial. Its terms about enforcing arbitration clauses and awards are not framed particularly for family law and still less are they drawn for custody and access matters.”³⁰⁹ The court then stated that, in custody matters, it would permit itself to overturn a binding award to serve “the best interests of a child.”³¹⁰

Hercus relied in part on *Duguay v. Thompson-Duguay*, another Ontario case, where a judge overturned an arbitration award between a divorced couple that was the result of unjust arbitration proceedings.³¹¹ The couple had, as in *Hercus*, entered arbitration to resolve access rights to their children—although the mother had not signed the arbitration agreement, and had entered the process unwillingly.³¹² *Duguay* did not rely on Section 19 of the Arbitration Act, although the court noted its counterpart, Section 6, which gives a court the right to intervene “to prevent unfair or unequal treatment of parties.”³¹³

Duguay and *Hercus* together show that Ontario courts were prepared to use their inherent *parens patriae* power, and the powers given to them under the Arbitration Act, to enjoin “unfair and unequal” treatment and prevent unjust outcomes to minors in the arbitration process. It is unlikely that this power would not have been extended to cover women generally if, as planned, Islamic arbitration tribunals had been set up and rendered judgments that were considered biased towards men.

Furthermore, it is unlikely that there would have been any procedural defects based on the sole use of male arbitrators that would have rendered the judgments unenforceable. The Canadian Supreme Court has held that

308. *Id.* at paras. 128–42.

309. *Id.* at para. 76.

310. *Id.*

311. 2000 CarswellOnt 1462 (Can.) (WL).

312. *Id.* at paras. 39–40.

313. *Id.* at para. 28.

the perception of bias is sufficient to invalidate the choice of an arbitrator.³¹⁴ However, no Canadian case has dealt with bias simply on account of an arbitrator's sex—and any presumptive challenge to an arbitrator simply on account of his sex would be extremely difficult.³¹⁵ Furthermore, as noted above, binding religious arbitration had been practiced successfully for twelve years by *Batei Din* before the outcry over Islamic arbitration, and no complaints about procedural defects had been made.

B. Freedom of Religion and the Enforceability of Religious Arbitration in the United States and Canada

This section considers a new argument against the enforceability of religious arbitration: that it infringes the free exercise rights of those who are bound by religious arbitration agreements or awards. The following sections set out the problems, from a free exercise perspective, with applying religious substantive or procedural law to resolving disputes.

1. United States

i. The First Amendment Right to Freedom of Religion

The Free Exercise Clause of the First Amendment provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].”³¹⁶ As stated above, the interpretation of the Free Exercise Clause has evolved over the years, and there is no reason to believe that it will not continue to do so.³¹⁷ However, one definite marker can be laid down: no person may be obliged to believe in any faith, or not to believe in any faith. This point was made most famously in the *Memorial and Remonstrance Against Religious Assessments* of James Madison: “The Religion then of every man must be left to the conviction and conscience of every

314. Newfoundland Tel. Co. v. Newfoundland, [1992] 1. S.C.R. 623, para. 23 (Can.).

315. Canada's Charter of Rights and Freedoms prohibits discrimination on grounds of sex. *Charter*, *supra* note 2, §§ 15(1), 28.

316. U.S. CONST. amend. I.

317. DAVID O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 4 (2d ed. 2009).

man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.”³¹⁸ These words have been cited on numerous occasions by the Supreme Court.³¹⁹

There are, generally speaking, few rights that are truly “inalienable.” The right to have a nationality is a plausible contender.³²⁰ The right to vote is a right that may not be sold, but which the state can alienate.³²¹ The Declaration of Independence names “Life, Liberty and the Pursuit of Happiness” as inalienable rights—but courts have the power to infringe these rights.³²² However, Madison was at pains to explain why the right to religion was inalienable. It was inalienable both because “the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men;” and because it is the “duty of every man to render to the Creator such homage, and such

318. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: A DOCUMENTARY HISTORY 48, 50 (John J. Patrick & Gerald P. Long eds., 1999).

319. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 53 n.38 (1985) (striking down Alabama statute authorizing period of silence in public schools for meditation or prayer); *Walz v. Tax Comm'n*, 397 U.S. 664, 705 & App. II (1970) (Douglas, J., dissenting) (upholding property tax exemption for religious properties); *Everson v. Board of Educ.*, 330 U.S. 1, 12 (1947) (prohibiting use of public funds to pay for transport of children to Catholic schools); *id.* at 37 & App. (Rutledge, J., dissenting).

320. In *Perez v. Brownell*, Chief Justice Warren wrote that “[c]itizenship is man’s basic right, for it is nothing less than the right to have rights.” 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). Warren’s views did not carry the day, and it was ruled that the petitioner could be stripped of his U.S. citizenship. *Id.* at 62. However, he was not rendered stateless, since he also had Mexican citizenship. *Id.* at 46. The majority was therefore not troubled by the fact that he could be left without any nationality, and it was only Chief Justice Warren’s dissent that was concerned with the question of statelessness in general. *Id.* at 64.

321. As of March 2010, forty-nine states denied the right to vote to incarcerated felons; thirty-five states, to paroled felons; thirty states, to felons on probation; and two states, to all felons. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (Mar. 2011), available at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf. Felon disenfranchisement laws have been upheld as constitutional, provided that they do not have a discriminatory motive and impact. See *Hunter v. Underwood*, 471 U.S. 222 (1985); *Richardson v. Ramirez*, 418 U.S. 24 (1974).

322. See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (“The Declaration of Independence . . . is not a legal prescription conferring powers upon the courts.”).

only, as he believes to be acceptable to him.”³²³ No American court has ever suggested that any person might be coerced into believing in a faith in which he or she does not wish to believe.

The right to believe, or not to believe, in any religion has a necessary corollary: the right to change one’s beliefs. It is this right that is endangered in court enforcement of religious arbitration orders.

ii. The Right to Change Religious Beliefs and Enforceable Religious Arbitration

American courts have consistently upheld the enforceability of religious arbitration agreements if the agreements were entered into voluntarily.³²⁴ On account of state and federal policies favoring arbitration, the burden on proving lack of voluntariness is on the part of the person seeking to exit the agreement.³²⁵ Courts do not look for such evidence themselves. Therefore, a court would not seek proof that someone who had agreed to enter into Christian arbitration, was, in fact, a Christian. In any case, such an inquiry—determining the status of a party’s religion—would likely contravene the religious question doctrine.

Many religious arbitrations are predicated on the assumption that the parties are, however, of a certain faith. For example, a *Beth Din* will only sit in judgment between two Jewish parties.³²⁶ A *ketubah* stating that any divorce will be arbitrated by a rabbinical court necessarily presupposes that the parties are Jewish.³²⁷

No court, however, has considered an obvious question: what if a party was happy to agree a religious arbitration contract, but then wishes to change religion before the contract is arbitrated? This is not an extreme hypothetical. Cases of parties attempting to overturn an arbitration ruling

323. Madison, *supra* note 318.

324. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005).

325. *Id.* at 1655–56.

326. See, e.g., RONALD L. EISENBERG, THE JPS GUIDE TO JEWISH TRADITIONS 568 (2004) (describing how *Batei Din* in Israel exercise “complete jurisdiction over the Jewish population” in personal matters).

327. See, e.g., Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 579–83 (2004) (describing use of *ketubot* among Jewish communities).

because of religious differences with the arbitrators have come before the courts. One such case, *Encore Productions v. Promise Keepers*, was noted earlier.³²⁸ The *Encore* court held that “[a]lthough it may not be proper for a district court to refer civil issues to a religious tribunal in the first instance, if the parties agree to do so, it is proper for a district court to enforce their contract.”³²⁹ The court took the view that the agreement to undergo religious arbitration was a question of civil contract law, so a court could enforce it.

Encore is troublesome. There was no underlying religious issue that a court could not adjudicate—for example, an issue that would pose a “religious question.” The dispute was a purely commercial one relating to the termination of a contract. Nevertheless, the court held, following established doctrine, that voluntary consent to take a dispute to arbitration was all that mattered. In effect, the court held that a party could alienate its rights to religious freedom, by having a religious procedural law imposed on it through arbitration.

Encore was wrongly decided. Religious arbitration of non-religious issues should not be binding on parties through the civil courts, because it risks infringing their right to religious freedom. The problematic nature of this kind of issue can be brought out by another example. Suppose that an individual signing an employment contract with a Christian school agrees to Christian dispute resolution in the case of conflict. This contract may contain a clause obliging her, before moving to binding arbitration, to attempt a conciliation session according to Biblical principles.³³⁰ In order to take part in the conciliation, the party will need to act in a “Christian” fashion. Her religious rights have been alienated by the contract.

Of course, it is possible for religion to form an *element* of a contract. The same teacher may, under the terms of her contract, agree that she will remain a member of a church, for example.³³¹ However, in such a case the teacher has not

328. 53 F. Supp. 2d 1101 (D. Colo. 1999).

329. *Id.* at 1112–13.

330. For a discussion of Biblical principles in conflict resolution, see KEN SANDE, *THE PEACEMAKER: A BIBLICAL GUIDE TO RESOLVING PERSONAL CONFLICT* (2004).

331. *See, e.g.*, *Little v. Wuerl*, 929 F.2d 944, 945 (3d Cir. 1991) (upholding

alienated her right to religious freedom. She may always choose to cease teaching at the same time as stopping going to church. Suppose, however, that she ceased to go to church and the school then began proceedings against her for breach of contract. If the school then compelled her to go to religious arbitration, this would constitute a denial of religious freedom, and her right to religious freedom would have been alienated.³³² If the school took action before a secular tribunal, however, there would be no alienation of the right to religious freedom. The teacher had exercised her free right to change religion; it merely happened that her employment contract was conditional on her not doing so.

The risk of alienation of religious rights is most clear in cases where one participant openly wishes to change religion. However, it can also be seen in cases where no party expresses a wish to change religion. This is because religious arbitrations have a deterrent effect on people changing faith—and this deterrence works a form of alienation. Take, for example, an employee who works at a Christian school, and who has a Christian arbitration clause in her employment contract. When she signed the contract, she self-identified as a Christian. The employee may now have a grievance against the school and wish to have this grievance adjudicated. At the same time, she no longer wishes to identify as Christian, and would like to take steps that symbolize that she is no longer a Christian—for example, ceasing to attend her church. However, because she knows that she will have to take her dispute with the school to a Christian dispute resolution panel, she is reluctant to do so.

contract under which “[t]eacher recognizes the religious nature of the Catholic School and agrees that Employer has the right to dismiss a teacher for serious public immorality, public scandal, or public rejection of the official teachings, doctrine or laws of the Roman Catholic Church.”); *see also* Prescott v. Northlake Christian Sch., 141 F. App’x 263, 274 (5th Cir. 2005) (describing school employment contract in which teacher promises to “attend and financially support a local church with fundamental beliefs that are in agreement with the doctrinal statement of [the school]”).

332. One potential response is that the teacher might preserve her right to religious freedom by simply acceding to the school’s demands in the religious arbitration, and thereby avoiding an appearance before the religious tribunal. However, this course of action would automatically lead to a financial penalty (a default judgment against her). Leaving her job, on the other hand, would not lead to such a penalty, because she would have the option of finding other employment.

Her free exercise of religion has been constrained by the religious arbitration contract.

This argument applies with the same force to the enforcement of religious arbitration awards as it does to the enforcement of arbitration proceedings. Even if a party to a religious arbitration contract, after a dispute has arisen, consents to go to arbitration, there is an inevitable delay between this consent and the actual arbitration proceedings. It is during this period of delay that free exercise rights are again endangered. Therefore, religious arbitral awards from proceedings that parties have consented to should be as unenforceable as the actual proceedings.³³³

Some scholars have argued that religious arbitration increases religious freedom by providing a measure of “group autonomy”: persons of the same religion are able to group together to adjudicate their disputes according to the laws of their community.³³⁴ It is easy to appreciate the benefits of such procedures that give rise to cohesion within a community. It is less clear, however, that such procedures should be binding when they govern purely secular disputes that would be justiciable in a civil court. First, as noted above, these procedures have consequences for religious freedom, even if no party to the arbitration contract objects to the arbitration or the award. Second, if one person attempts to avoid enforcement of the arbitration agreement or the award, and does not comply with them voluntarily, the community cohesion that the procedure is attempting to promote may already be lacking—and it is far from obvious that the state should step in to create it.

On the other hand, agreements to arbitrate disputes that would *not* be justiciable in a civil court should be binding, as should be the awards therefrom. This argument is made in the next subsection.

333. See *infra* Part IV.D concerning an immediate agreement to arbitrate.

334. See, e.g., Michael A. Helfand, *When Religious Practices Become Legal Obligations: Extending the Foreign Compulsion Defense*, 23 J.L. & RELIGION 535 (2008); Helfand, *supra* note 104, at 1274 (“[M]any minority groups are becoming decreasingly concerned with their integration into civil society and increasingly concerned with securing their own law-like autonomy.”).

iii. Religious Arbitration on Religious Matters

Religious arbitration on matters that involve “religious questions” should be binding in civil court. As discussed above in Parts II.A.4 and II.B.2, these questions cannot be solved in a civil court. If religious arbitration were *not* binding, these questions would have no possible judicial resolution.

For example, a church might employ a priest on condition that he followed certain doctrine. If a dispute arose as to whether he had followed the doctrine, no court would be able to resolve it, since it would be a quintessential religious question. The only way in which it could be settled would be for a religious tribunal to adjudicate it.

A court should then enforce the judgment of the tribunal, subject to the “public policy” and “disregard for the law” doctrines described above. The alternative is clear: otherwise any such contract would be unenforceable, which would make it extremely difficult to run a church. (Presumably, priests would need to be employed on an at-will basis, and would only be able to have very limited contractual rights—which could make them almost impossible to find.) In this case, the restraint on religious freedom imposed by making the religious arbitration contract enforceable is outweighed by the gains to religious freedom by making it possible to run the church. As one scholar has noted, “religious freedom . . . requires an infrastructure.”³³⁵ Religious arbitration on religious matters is a component of this infrastructure, in a way that religious arbitration on secular matters is not.

Religious arbitration proceedings were found binding for much this reason in the case of *Elmora Hebrew Center v. Fishman*.³³⁶ In *Fishman*, the Supreme Court of New Jersey enforced a religious award made by a *Beth Din* against a synagogue. The court disregarded the argument made by the synagogue that it did not recognize the religious authority of the *Beth Din*, and that to enforce the award would violate its free exercise rights.³³⁷ The court warned that a trial court could not send civil issues to a religious authority for

335. Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008).

336. 593 A.2d 725 (N.J. 1991).

337. *Id.* at 731.

adjudication; but it endorsed sending religious issues to the same.³³⁸ This was a correct decision; otherwise, no resolution of the dispute would have been possible.

2. *Canada*

The arguments for making religious arbitration unenforceable in Canada are similar to those that justify making religious arbitration unenforceable in the United States. Canadians' rights to the free exercise of religion are arguably even more sweeping than Americans'. Furthermore, Canadians also have an absolute right to change religion. Therefore, religious arbitration on secular matters should be unenforceable.

i. The Right of Free Exercise of Religion Under the Canadian Constitution

The right of free exercise of religion is guaranteed by Section 2 of the Canadian Charter of Rights and Freedoms, enacted in 1982.³³⁹ This defines four "fundamental freedoms," first among which is "freedom of conscience and religion."³⁴⁰ The Canadian Supreme Court considered the meaning of freedom of religion under the Charter for the first time in *Regina v. Big M Drug Mart Ltd.* in 1985.³⁴¹ At issue was Alberta's "Lord's Day Act," which prohibited trading on a Sunday.³⁴² The court ruled that the Act infringed Canadians' right to freedom of religion. The court defined freedom of religion as "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."³⁴³ This freedom, said the court, could "primarily be characterized by the absence of coercion or restraint."³⁴⁴ The Canadian Supreme Court held that the

338. *Id.* at 732.

339. *Charter*, *supra* note 2, § 2 (providing that "[e]veryone has . . . freedom of conscience and belief").

340. *Id.*

341. [1985] 1 S.C.R. 295 (Can.). Freedom of religion had previously been treated as part of the "federal legislative competence." *Id.* at para. 3.

342. *Id.* at para. 5.

343. *Id.* at para. 94.

344. *Id.* at para. 95.

Lord's Day Act worked a "form of coercion" by "bind[ing] all to a sectarian Christian ideal."³⁴⁵

The *Big M Drug Mart* decision was particularly striking since it adopted a broader conception of religious freedom than that found in American jurisprudence. The Canadian Supreme Court specifically noted that the U.S. Supreme Court had, four times, upheld Sunday closing laws on the grounds that they now had a secular purpose and effect.³⁴⁶ The Canadian court observed that its U.S. counterpart had found that although the Sunday closing laws had a "clear origin in the religiously coercive statutes of Stuart England," they had since evolved to become "purely secular labour legislation."³⁴⁷ The *Big M Drug Mart* court, however, refused to find that Alberta's Sunday closing law had a "secular purpose," and denied an attempt by the appellants to argue that even if there was a religious purpose to the litigation, it had a secular effect.³⁴⁸

ii. The Right to Change Religion Under the Canadian Constitution

As noted above, the right freely to exercise religion necessarily implies the right to change religion. This right has been explicitly noticed in Canadian law. In *Syndicat Northcrest v. Amselem*, the Canadian Supreme Court was asked to rule whether an Orthodox Jew had the right to build a *sukkah* on the balcony of his apartment in Québec.³⁴⁹ A clause in Amselem's condominium contract

345. *Id.* at para. 97.

346. *Id.* at para. 89. The Canadian Supreme Court cited *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Market of Mass., Inc.*, 366 U.S. 617 (1961); and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

347. *Big M Drug Mart*, 1 S.C.R. 295 at para. 74.

348. *Id.* The *Big M Drug Mart* ruling was also notable for its discussion of the First Amendment's Establishment Clause. The Canadian Supreme Court observed that the U.S. Supreme Court had noted that Sunday closing laws in America were a "potential violation of the 'anti-establishment' principle." *Id.* at para. 106. Yet the Canadian court rejected the appellants' contention that the absence of an Establishment Clause in the Canadian Charter should be considered evidence in favor of the constitutionality of the Sunday closing laws. *Id.* at para. 108. The unconstitutionality of the Lord's Day Act, rather, depended on Section Two of the Charter alone. *Id.*

349. [2004] 2 S.C.R. 551 (Can.).

banned exterior “constructions of any kind whatsoever.”³⁵⁰ The court noted the argument, accepted by the trial court, that the ban on constructions on balconies was “neutral”: it affected all constructions on balconies equally.³⁵¹ Other items that the housing association had requested removed from balconies included emphatically secular satellite dishes and trellis.³⁵² However, it held that the neutrality of the rule at issue did not matter in a case where rights to freedom of religion were “significantly impaired.”³⁵³ What mattered to the court was that the appellants (of whom Amselem was the named party) had a sincere religious belief that they should build *sukkot*.³⁵⁴ Once the court had established the sincerity of this belief, it was wrong to go further and attempt to decide whether this sincere belief was theologically correct, which the trial court had done.³⁵⁵ Instead the court cited both Canadian and American decisions that stand for the proposition that courts should be deferential to personal views of religious obligation.³⁵⁶

In order to determine “sincerity” of belief, the trial judge had taken account of whether the appellants had built *sukkot* in the past.³⁵⁷ As a result of this, he determined that some of them had a “sincere” belief, but others did not. The Canadian Supreme Court rejected this approach. It held that a court could not “conclude that a person’s current religious belief is not sincere simply because he or she previously celebrated a religious holiday differently.”³⁵⁸ It expressly noted: “Beliefs and observances evolve and change over time.”³⁵⁹ The court

350. *Id.* at para. 9.

351. *Id.* at para. 29.

352. *Id.* at para. 111 (Bastarache J, dissenting).

353. *Id.* at para. 64.

354. *Id.* at para. 46 (“[O]ur Court’s past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith . . .”).

355. *Id.* at para. 66.

356. *Id.* at paras. 43–46 (citing *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829 (1989); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707 (1981); *R. v. Videoflicks*, [1986] 2 S.C.R. 713 (Can.); *R. v. Jones*, [1986] 2 S.C.R. 284 (Can.)).

357. *Id.* at para. 71.

358. *Id.*

359. *Id.*

made clear that it would not place a party under a disability because of a change of beliefs; all that was necessary was that the change should be sincere.

iii. Religious Arbitration of Secular Issues Under the Canadian Constitution

The above discussion shows that all the same protections for freedom of religion—and the right to change religion—exist under Canadian law as under American law. *A fortiori*, the same basic arguments apply as to why religious arbitration of non-religious issues should be unenforceable under Canadian law.

However, the Canadian constitutional right to freedom of religion is even stronger than its American counterpart. Notably, the Canadian Supreme Court in *Amselem* rejected two arguments, discussed in more detail below, why religious arbitration might be held enforceable in the United States. First, the court specifically rejected the argument that the housing association's rule against exterior construction was simply a "neutral" regulation that affected all apartment owners equally.³⁶⁰ In the United States, under *Employment Division v. Smith*, such a regulation might well be held constitutional on the grounds that it was a "neutral law of general applicability."³⁶¹

Second, the court also rejected the argument that contracts are inherently secular matters that cannot be overturned for religious reasons, as American courts have held.³⁶² The dissent in *Amselem* argued that the case should be decided on grounds of contract rights. Justice Binnie stressed the weight he placed on "the private contract voluntarily made among the parties to govern their mutual rights and obligations."³⁶³ The appellants, he noted, "undertook by contract to the owners of *this* building to abide by the rules of *this* building," and therefore should not be permitted to build their *sukkah*.³⁶⁴ The Canadian Supreme Court, in rejecting this reasoning, held that freedom of

360. *Id.* at para. 29.

361. 494 U.S. 872, 879 n.3 (1990). See *infra* note 396 and accompanying text.

362. See *supra* note 163 and accompanying text.

363. *Amselem*, 2 S.C.R. 551, at para. 184 (Binnie J, dissenting).

364. *Id.* at para. 185.

religion trumps freedom of contract. In doing so, they implicitly rejected the reasoning of American courts that have forced parties to accept religious arbitration against their will.

iv. Religious Arbitration of Religious Issues

As in America, however, religious arbitration should be enforceable when it concerns religious issues that cannot be resolved by a civil court. When a party can only resolve a dispute by appearing before a religious tribunal, and refuses to do so despite his prior agreement, a civil court should be able to penalize him for this. This is illustrated well by the precedent of *Marcovitz v. Bruker*,³⁶⁵ the Canadian Supreme Court case discussed above.³⁶⁶

In *Marcovitz*, the court signaled its desire to help Jewish women obtain religious divorces by punishing a husband for the breach of his contractual duty to grant a religious divorce from a *Beth Din*.³⁶⁷ The court specifically noted that Canada's Divorce Act had been amended simply to make it possible to oblige men to grant *gittin* from *Batei Din*.³⁶⁸ It compared the Canadian law with that of other jurisdictions, and noted that New York had amended its divorce law so that the party instigating the divorce had to certify that there were no barriers to the remarriage of either party, and so that judges could take account of any barriers when dividing up assets.³⁶⁹ The court also noted how Jewish women—unlike Jewish men, and unlike Christian women, Muslim women or women of other faiths—alone suffered from a peculiar disability in depending on their husbands to obtain a religiously valid divorce.³⁷⁰

Marcovitz was decided correctly. By granting damages, the Canadian Supreme Court signaled its willingness to enforce a contractual agreement to appear before a *Beth Din*.³⁷¹ The religious nature of the *get* is such that only a *Beth Din* can grant it; a civil body is entirely powerless in this

365. *Marcovitz v. Bruker*, [2007] 3 S.C.R. 607 (Can.).

366. See *supra* note 224 and accompanying text.

367. *Marcovitz*, 3 S.C.R. 607 at paras. 93–95.

368. *Id.* at paras. 7–8.

369. *Id.* at paras. 134–53.

370. *Id.* at para. 7.

371. *Id.* at paras. 94–100.

area. The court observed the case involved a clash of rights: “the claim to religious protection is balanced against competing interests.”³⁷² On the one hand was husband’s right to exercise his religion as he saw fit; on the other hand was the wife’s right to be free to remarry according to the laws of her religion. The Québec *Charter of Human Rights and Freedoms* in fact mandates a balancing between fundamental rights, such as the free exercise of religion, and a regard for “democratic values.”³⁷³ The court found for the wife, although, as previously noted, it was not faced with the question of whether it should force the husband to appear at the *Beth Din*.

The principle of *Marcovitz* can be extended to any instance where a dispute can only be settled by religious authorities: in such cases, it is freedom-enhancing, not freedom-limiting, to enforce religious arbitral awards and agreements.³⁷⁴ The next Part considers responses to the argument put forward in this Part.

IV. COUNTERARGUMENTS IN FAVOR OF RELIGIOUS ARBITRATION

The argument above is novel, and open to counter-arguments. Four potential responses will be dealt with in this Part.

A. *Freedom of Contract*

One response to the argument in Part III is that, under the doctrine of freedom of contract, parties should have the right to enter into any contract they choose—including one that contains a religious arbitration clause.³⁷⁵ In such a contract, it is easy to discern the tension between freedom of contract and freedom of religion. Under principles of freedom of contract, the contract should be enforceable. Under principles of freedom of religion, it should not, since it restricts one’s choice of religion later.

372. *Id.* at para. 20.

373. *Id.* at para. 15. The court considered the Québec *Charter* in greater depth than the Canadian *Charter of Rights and Freedoms*.

374. See Garnett, *supra* note 335.

375. See, e.g., Helfand, *supra* note 104, at 1241.

This distinction can be termed one of *ex ante* and *ex post* liberty. *Ex ante* liberty is a liberty where a subject is “free to be forced”: she can enter into contracts that in some way constrain her rights later.³⁷⁶ *Ex post* liberty is a “Rousseauian” liberty: the subject is “forced to be free,” and cannot enter into contracts that later constrain her rights.³⁷⁷ *Ex ante* and *ex post* liberty are necessarily in tension with each other. Economists defend *ex ante* liberty, even in areas that are removed from traditional areas of economic focus, such as marriage.³⁷⁸

To prevent parties from entering into religious arbitration contracts is a restriction of *ex ante* liberty. However, courts have frequently upheld restrictions on *ex ante* liberty. In the United States, for example, employees can only waive their right to sue under the Age Discrimination Employment Act in limited circumstances.³⁷⁹ The Sixth Amendment right to counsel in criminal proceedings can only be waived in a “knowing and voluntary” manner.³⁸⁰ Courts strike down contracts that harm a person’s ability to make a living or practice a trade.³⁸¹ Canadian courts in Canada also restrict *ex ante* liberty in various circumstances.³⁸²

Courts scrutinize contracts that involve waivers of rights for evidence of substantive or procedural unconscionability.³⁸³

376. F. H. Buckley, *Introduction to The FALL AND RISE OF FREEDOM OF CONTRACT 1*, 17 (F.H. Buckley ed., 1999).

377. *Id.*

378. See, e.g., Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225 (1998) (defending Louisiana’s Covenant Marriage Act, under which parties who agree to have a “covenant marriage” must wait for two years if they wish to obtain a no-fault divorce). John Witte and Joel Nichols have explored the use of binding religious law in marriage contracts. See John Witte Jr. & Joel A. Nichols, *Faith-Based Family Law in Western Democracies?*, in FIDES ET LIBERTAS 122 (2010), available at <http://www.irla.org/assets/files/Fides/Fides2010.pdf>.

379. See *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998).

380. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2086 (2009).

381. See, e.g., *Woodward v. Cadillac Overall Supply Co.*, 240 N.W. 2d 710 (Mich. 1976).

382. See, e.g., *R. v. Clarkson*, [1986] 1 S.C.R. 383, para. 26 (Can.) (holding that waiver of right to counsel in trial “must be premised on a true appreciation of the consequences of giving up the right”); *Bryant v. R.*, [1984] 6 O.A.C. 118 (Can. Ont. C.A.) (holding that waiver of jury trial is valid only if it is made with a full understanding of what is involved).

383. See, e.g., Kenneth R. Davis, *The Arbitration Claws: Unconscionability in*

However, some rights cannot be waived at all; or they can be waived very easily. The right to vote is one such right: some economists have suggested that the right should be sellable, although this is of course illegal.³⁸⁴ There is, at the same time, no right to sell oneself into slavery—as various philosophers have noted.³⁸⁵ The right to freedom of speech, on the other hand, can be waived very easily: it is regularly waived by millions of Americans each day who, while at work, agree not to engage in activities that are unrelated to their employment.³⁸⁶

The right to freedom of religion falls in the former category. Two arguments can be made in support of this contention. The first has historical roots: in the eighteenth century, as noted above, Jefferson argued that the right of religious freedom was “inalienable.” This was not a uniquely American sentiment: in the United Kingdom at the same time, Richard Price wrote that “no people can lawfully surrender their religious liberty by giving up their right of judging for themselves in religion, or by allowing any human beings to prescribe to them what faith they shall embrace.”³⁸⁷

The second argument is more modern, and is founded in discrimination doctrine. Religion, like race and sex, has come to be considered as a protected category in Western jurisprudence.³⁸⁸ This is because it has long been a source of discrimination in society;³⁸⁹ protections against religious

the Securities Industry, 78 B.U. L. REV. 255 (1988).

384. See Ryan Hagen, *Is it Smarter to Sell Your Vote or to Cast it?*, FREAKONOMICS (Nov. 16, 2007), <http://freakonomics.blogs.nytimes.com/2007/11/16/is-it-smarter-to-sell-your-vote-or-to-cast-it/>.

385. See, e.g., Andrew Sneddon, *What's Wrong with Selling Yourself into Slavery? Paternalism and Deep Autonomy*, 33 CRÍTICA: REVISTA HISPANOAMERICANA DE FILOSOFÍA 97 (2001).

386. See, e.g., *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517–18 (Mass. 1892) (“There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.” (Holmes, J.)).

387. RICHARD PRICE AND THE ETHICAL FOUNDATIONS OF THE AMERICAN REVOLUTION: SELECTIONS FROM HIS PAMPHLETS 78–79 (Bernard Peach ed., 1979).

388. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (prohibiting employment discrimination on grounds of “race, color, religion, sex, or national origin”).

389. See, e.g., Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 491–92 (1994) (“Perhaps

discrimination, just like sexual and racial discrimination, are built into modern constitutions and codes. It is very hard for a person to enter into a contract that discriminates against another party on grounds of race or sex: except in certain circumstances, such a contract would be unenforceable.³⁹⁰

By the same token, it should not be possible for a person to enter into a contract that could lead to discrimination against another party on grounds of religion. Binding religious arbitration contracts have this potentially discriminatory effect. A person who is bound by the procedural law of a certain religion against his will may not be able to participate fully in the arbitral proceedings and may thus suffer discrimination. Therefore—unless there is no other way in which the dispute may be settled, as in “religious question” cases—these proceedings should not be enforceable at law.³⁹¹

the strongest justification for strict judicial scrutiny of any official attempt to accord persons less than equal respect and dignity either because of their religious beliefs or race rests in the fact that throughout history such efforts have been similarly rooted in hate, prejudice, vengeance, and hostility.” (citation omitted)).

390. To enter into a contract that apparently discriminates on grounds of a protected category such as race or sex, an employer must be able to show that the characteristic sought is a “bona fide occupational quality.” 42 U.S.C. § 2000e-2(e)(1) (2006). Courts do not permit such discrimination easily. *See, e.g., Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (“The BFOQ defense is written narrowly, and this Court has read it narrowly.”). In the seminal case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court held that a racially discriminatory contract could not be enforced against the target of the discrimination; this holding was extended in *Barrows v. Jackson*, 346 U.S. 249 (1953), to prevent enforcement of a racially discriminatory agreement to the detriment of a party who was not the target of the discrimination.

391. Probate cases are an interesting example of when courts have upheld legal provisions that apparently infringe on individuals’ religious freedom. In *Gordon v. Gordon*, 124 N.E.2d 228, 234 (Mass. 1955), the Massachusetts Supreme Court upheld a provision of a will that stripped the inheritance rights of a beneficiary who married outside the Jewish faith. However, cases such as these are distinguishable from the arbitration cases discussed in this Article. In the case of testamentary restrictions, the right of the beneficiary to receive a gift is subject to that person behaving in a certain (religious) way. In the examples of religious arbitration that this Article considers problematic, the litigants are not attempting to obtain a gift, but to vindicate their contractual rights. *See supra* note 331 and accompanying text (discussing religious enforcement of secular employment contracts).

B. *Freedom of Religion*

Another response to the argument that enforceable religious arbitration clauses infringe freedom of religion is that such clauses are in fact a *manifestation* of freedom of religion.³⁹² Under this argument, the right to enter into such agreements is a form of religious freedom, which courts should uphold. However, this argument reflects a misconception of religious arbitration and of religious freedom.

First, under the argument above, parties who wish to enter into religious arbitration on secular matters are still entirely free to do so. While it would likely constitute an infringement of religious freedom to shut down a center or institution that operated such services, it does not constitute an infringement of religious freedom to refuse to honor an agreement or award in court. The parties to such a religious arbitration contract are still perfectly free to abide by the terms of the contract themselves. If the parties do not wish voluntarily to abide by the terms, this may in fact be a sign that the benefits to religious freedom from promoting this agreement are relatively limited.³⁹³

Second, religious freedom is not construed as the ability to have secular courts recognize religious arbitration agreements or awards on secular matters. For example, the Hudson Institute's Center for Religious Freedom ranks countries by their religious freedom, on a scale of 1 to 7.³⁹⁴ The rankings are based on the results of checklists sent to experts in each country. While the checklists contained a host of different variables, from the predictable (for example, "Do citizens have the right to change religion or belief?" to the complex (for example, "Do communities of believers, different groups within religions, atheistic groups, and institutions enjoy the same rights in access to various public methods of social communication?"), not one of them implicates the right to have religious agreements or rulings honored in secular

392. See, e.g., Zohra Moosa, *Balancing Women's Rights with Freedom of Religion: The Case Against Parallel Legal Systems for Muslim Women in the UK*, in STATE OF THE WORLD'S MINORITIES AND INDIGENOUS PEOPLES 2010, at 42 (2010).

393. See *supra* note 335.

394. See RELIGIOUS FREEDOM IN THE WORLD (Paul A. Marshall ed., 2008).

courts.³⁹⁵ Similarly, a report sponsored by the Pew Charitable Trust lists various factors that are implicated in religious freedom, “including the right not to have personal religious beliefs eroded by the requirements of religious law or custom”—but it contains no reference to whether religious judgments should be enforceable in secular courts.³⁹⁶ While there are, as noted above, “infrastructural” benefits to binding religious arbitration on *religious* matters, as noted above, these benefits are not secured by enforcing religious tribunals’ judgments on purely secular disputes.

C. *Discrimination Against Religion*

A related response to that in Part IV.B above is that refusal to honor religious judgments in secular court constitutes discrimination against religion. This is, on its face, a plausible argument. If two parties can contract to arbitrate their dispute according to the laws of another jurisdiction, it might seem that there is no reason why they should not be able to contract to use the laws of a religion.

American and Canadian courts have both considered laws that ostensibly discriminate not against one particular religion, but against all religions. In the United States, the Court has noted that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”³⁹⁷ The case, *Employment Division v. Smith*, involved two individuals who had ingested peyote, a psychoactive drug, as part of a religious ceremony,

395. *Id.* at 451–76. The only mention of the court system is a question “Do believers of different religions, different groups within religions, and atheists enjoy the same rights . . . before the courts?” *Id.* at 464.

396. FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 8 (Kevin Boyle & Juliet Sheen eds., 1997); see also Audrey Macklin, *Performing Citizenship: Encultured Women’s Articulation of Claims in the Public Sphere*, in MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS AND GENDER 285 (Seyla Benhabib & Judith Resnik eds., 2009) (noting that the Ontario legislation making religious arbitration unenforceable in civil courts was “probably secure from the complaint that it discriminates against religious law,” since it “denie[d] recognition to all legal orders external to Canadian law.”).

397. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

and were fired.³⁹⁸ The possession of peyote was a crime in Oregon, and the intent to use the drug for religious purposes was not accepted as an affirmative defense by the Oregon courts.³⁹⁹ The Court noted that the law banning peyote possession was a typical anti-narcotic statute that had an apparently secular purpose, and compared it with laws obliging shops to close on Sunday, statutes banning polygamy, and a regulation compelling the Amish to pay social security taxes contrary to their religious belief.⁴⁰⁰

It seems clear, following *Smith*, that a prohibition against judicial recognition of arbitral agreements or awards would not violate the U.S. Constitution, since it would be a neutral law that would affect all religions equally. However, this argument has an inevitable rejoinder. If it is “neutral” (and hence constitutional) to prohibit judicial recognition of religious arbitral agreements and awards, it is surely equally “neutral” to permit judicial recognition of such agreements and awards. Furthermore, the *Smith* Court rejected any heightened level of judicial scrutiny for rules that may infringe freedom of religion.⁴⁰¹ Therefore, even though religious arbitration may restrict freedom of religion, the state should still have the right to enforce religious arbitral agreements and awards.⁴⁰²

This argument is probably the strongest that can be made in defense of religious arbitration, but is still rebuttable. There is a fundamental difference between the right to have a court enforce a religious arbitration agreement or award, and the regulations cited as “neutral” in *Smith*. All of the regulations cited as “neutral” in *Smith* affect how an individual may practice his or her religion. For example, the injunction against polygamy prevents a person for whom polygamy is a religious tenet from practicing this aspect of his religion.⁴⁰³ However, it does not deter an individual from exercising her right to change religion: it does not force a

398. *Id.* at 874.

399. *Id.* at 875.

400. *Id.* at 879–80 (citing *Lee*, 455 U.S. at 263 n.3; *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

401. *Id.* at 885–89.

402. *See id.* at 890 (stating that it is the responsibility of the legislature to determine what laws may infringe freedom of religion).

403. *See, e.g., Reynolds*, 98 U.S. at 161–65.

person to appear before a religious tribunal and participate in religiously based arbitral proceedings.

Furthermore, the *Smith* Court also reaffirmed the core meaning of the Free Exercise Clause, as described above. Justice Scalia wrote “[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires The government may not compel affirmation of religious belief”⁴⁰⁴ As this Article has argued, forcing a party to go to religious arbitration when it is unnecessary to do so runs directly counter to “the right . . . to profess whatever religious doctrine one desires.” Therefore, a defense of the enforceability of religious arbitration based on *Smith* cannot be successful.

Canadian courts do not have a doctrine of neutrality such as that followed by the U.S. Supreme Court in *Smith*. However, there is a firm policy that public institutions are permitted to bar their doors to religion, so long as they do so in an even-handed fashion. In *Bal v. Ontario*, parents sought permission to establish alternative “opt-in” religious schools within Ontario’s secular school system.⁴⁰⁵ Such religious schools had been permitted while Ontario had a Christian public school system, but following the secularization of the system (which itself was the result of court cases), “opt-in” schools had been banned.⁴⁰⁶ The court held that the law prohibiting such schools did not violate freedom of religion.⁴⁰⁷

The public school system is secular, it does not present the opportunity for education in any particular denomination or faith. The objective is to provide non-denominational education. Should parents desire that their children have a religious education they must assume the cost. This does not mean that there is adverse effect discrimination. The government prohibition is just, fair and constitutional.

Canadian courts have in fact been criticized for “jump[ing] to the conclusion that the Charter mandates a secular society in which public institutions must be free from

404. *Smith*, 494 U.S. at 877.

405. [1994] 21 O.R. 3d 681 (Can. Ont. Gen. Div.), *aff'd*, *Bal v. Ontario*, [1997] 101 O.A.C. 219 (Can. Ont. C.A.).

406. *Id.* at para. 10.

407. *Id.* at para. 118.

any religious taint.”⁴⁰⁸ Other commentators have noted that the courts simply seek to “ensure that all individuals are . . . treated by the state with equal respect, whatever their religious beliefs and practices.”⁴⁰⁹ Regardless of how the position of the courts is characterized, it seems clear that “neutral” laws affecting the exercise of religion do not infringe constitutional rights in Canada.

Therefore, it would not be unconstitutional to bar courts from recognizing religious arbitral awards and agreements. However, as in the case of the discussion of American law, the reverse question is appropriate: is it constitutional to permit religious arbitral awards to be enforced simply because all religion is treated in an equal manner? The answer is “no.” Unlike its American counterpart, the Canadian Supreme Court has not held that laws of neutral application affecting religious belief are constitutional, per *Employment Division v. Smith*.⁴¹⁰ Therefore, it is not possible to advance a “neutrality” argument simply to justify the judicial recognition of religious arbitral awards and agreements.⁴¹¹

D. An Immediate Agreement to Arbitrate

If it is accepted that a religious arbitration agreement cannot be enforced because it infringes an individual’s right

408. David M. Brown, *Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights*, 33 U. BRIT. COLUM. L. REV. 551 (2000).

409. Richard Moon, *Liberty, Neutrality and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms*, 41 BRANDEIS L.J. 563, 564 (2003).

410. 494 U.S. 872 (1990). *Employment Division v. Smith* has never been cited with approval by the Canadian Supreme Court. It was referred to by the dissent in *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para. 189 (Can.) (Binnie J, dissenting).

411. Rather, the Canadian Supreme Court, when examining facially neutral laws to determine whether they infringe freedom of religion, investigates whether they adversely affect a particular subgroup. In *Multani v. Marguerite-Bourgeois*, for example, the Canadian Supreme Court was asked to consider the constitutionality of a school rule that prevented a Sikh boy from carrying a ceremonial dagger, or *kirpan*, to school. [2006] 1 S.C.R. 256 (Can.). The majority noted that there is a “duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face.” *Id.* at para. 53. In the case of arbitration, individuals who cannot enforce religious arbitral awards or agreements in a secular court are not “adversely affected” by the inability to do so—since they have the option of litigating the matter, if necessary, in a civil court.

to change religion, a final objection is possible. Why should courts refuse to honor an arbitral award when the arbitration is carried immediately? Two parties could agree to take a dispute to religious arbitration, and have it settled on the spot, before either party had the time to consider changing religion. In such cases, there would seem to be little risk of infringement of free exercise rights.⁴¹²

However, there is a difficulty with a secular court's enforcement of a religious arbitration award in such a situation: it is impossible for a court to determine whether a religious arbitration has taken place quickly enough to justify the enforcement of the award. An immediate resolution by a religious tribunal would seem acceptable. However, the question is more complex if the mediation started immediately, and lasted several days, or even weeks. There would in that case be a period of time in which someone might reconsider his or her beliefs, and wish to exit the process. Similarly, the situation would be more complicated if the dispute resolution process started two days after the parties agreed to submit their dispute to a religious arbiter. A court would need to decide on a bright-line that would be completely arbitrary—and unworkable. It would be impossible for a court to hold that if a dispute was resolved within x days of agreeing to submit to religious arbitration, the award could be enforced in secular court, but not if it was resolved within $x + 1$ days. Therefore, the only solution for the courts is to refuse to enforce religious arbitration awards on secular matters, regardless of when the arbitral agreement was signed.⁴¹³

CONCLUSION

This Article has argued that religious arbitration on secular matters should be non-binding in both the United States and Canada. Americans' free exercise rights are

412. See *supra* note 334 and accompanying text.

413. Courts do, of course, set down apparently arbitrary temporal lines to use as judicial rules. In the United States, the most famous example may be the trimester framework for abortion laid down in *Roe v. Wade*, 410 U.S. 113, 164–65 (1973). Such lines are, of course, easily open to attack. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992) (overturning the trimester framework of *Roe*, and noting that “[a]ny judicial act of line-drawing may seem somewhat arbitrary”).

jeopardized by the current practice in the United States. In Ontario, the government took the right decision to make religious arbitration non-binding in matters of family law in 2006. However, other forms of religious arbitration on non-religious matters remain binding, and these should also become non-binding, both in Ontario and the rest of Canada.

Legislators should be sure to stress that religious arbitration remains a favored mode of dispute resolution. An act making religious arbitral agreements or awards unenforceable would face far less resistance if it was at the same time recognized that such tribunals can play a valuable role in society. Parties should still feel free to settle their disputes out of the court system, just as now. An act that renders religious arbitration awards and agreements unenforceable should not be interpreted as an attack on religious arbitration *per se*. With care, legislators will be arrive at a result that preserves the constitutional right to freedom of religion but is not perceived as being an attack on a religious communities.

A further implication of the argument in this Article is that religious arbitration on secular matters may be constitutionally suspect in many jurisdictions outside North America. Even though the United States and Canada have different jurisprudence on the free exercise of religion, enforceable religious arbitration can be seen to be problematic in both countries. It therefore does not seem unreasonable to surmise that the arguments in this Article may also be extended to other countries: this is an interesting hypothesis, and one that is worthy of research, given that other Western nations, such as the United Kingdom, have also had vocal debates about the status of religious arbitration within their borders.⁴¹⁴ This Article thus provides grounds for challenging the status of religious arbitration in North America, and furthers the discussion over the status of religious arbitration elsewhere in the world.

414. For the debate that has taken place in the United Kingdom, see, for example, Riazat Butt, *Archbishop Backs Sharia Law for British Muslims*, GUARDIAN (London), Feb. 7, 2008, <http://www.guardian.co.uk/uk/2008/feb/07/religion.world>; Afua Hirsch, *Dozens of Sharia Courts Are Giving Illegal Advice, Claims Civitas Report*, GUARDIAN (London), June 29, 2009, <http://www.guardian.co.uk/uk/2009/jun/29/sharia-courts-illegal-advice-claims>.