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Between Law and Religion: Procedural Challenges to Religious Arbitration Awards

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BETWEEN LAW AND RELIGION:
PROCEDURAL CHALLENGES TO RELIGIOUS ARBITRATION
AWARDS

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INTRODUCTION

At the height of the recent wave of anti-sharia initiatives, the press in Florida declared that a Florida state court had decided to enforce “Sharia law.”¹ One headline read, “Judge Orders use of ‘Sharia’ in Suit,”² with another article describing a Florida state court judge as having issued a decision “to apply Islamic law instead of state or federal statutes.”³ Instantaneously, Florida became the focus of a national crusade to pass laws prohibiting state courts from considering “sharia law” in their decisions.⁴ In

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1. See, e.g., Tom Tillison, *Sharia Law has come to Florida*, FLA. POL. PRESS (Mar. 20, 2011, 7:40 PM), <http://www.redstate.com/diary/tomtflorida/2011/03/20/sharia-law-has-come-to-florida/> (the original Florida Political Press website is no longer active).

2. William R. Levesque, *Judge Orders Use of Islamic Law in Tampa Lawsuit Over Mosque Leadership*, TAMPA BAY TIMES, Mar. 22, 2011, <http://www.tampabay.com/news/courts/civil/judge-orders-use-of-islamic-law-in-tampa-lawsuit-over-mosque-leadership/1158818>.

3. *Florida Judge Defends Decision to Apply Islamic Law in Tampa Case*, FOX NEWS, Mar. 23, 2011, <http://www.foxnews.com/us/2011/03/23/florida-judge-defends-decision-apply-islamic-law-tampa-case/>.

4. See William R. Levesque, *Appeals Court Won't Stop Hillsborough Judge from Considering Islamic Law*, TAMPA BAY TIMES, Oct. 25, 2011, <http://www.tampabay.com/news/courts/civil/appeals-court-wont-stop-hillsborough-judge-from-considering-islamic-law/1198321> (“At the time of [the

fact, the extraordinary backlash against the Florida court decision even led the judge to issue a supplemental opinion for the sole purpose of explaining the original ruling in an apparent attempt to allay public fears of the supposed encroachment of Sharia Law.⁵

In one sense, the press's accusations about Sharia law were correct. In the case at the center of the media firestorm—*Mansour v. Islamic Education Center of Tampa, Inc.*—a state court judge issued an order, requiring the case to “proceed under Ecclesiastical Islamic Law.”⁶ But, notwithstanding some inflammatory characterizations to the contrary,⁷ the court did not issue the order because it sought to impose Islamic Law. Rather, the court's decision—issued in response to an “Emergency Motion to Enforce Arbitrator's Award”⁸—was simply an order to enforce the arbitration agreement between the parties, in which they had agreed to have their dispute resolved in accordance with Islamic Law.⁹ For the court to enforce the arbitrator's award, it had to assure that the arbitration proceedings conformed to the rules adopted by the parties in their arbitration agreement—in this case Islamic procedural rules.¹⁰

While *Mansour* received public scrutiny for all the wrong reasons, the case does raise some important questions, not only about judicial oversight of religious arbitration, but also about how the U.S. legal system conceptualizes religious law. Indeed, *Mansour* is not the only case where courts have been tasked with resolving procedural challenges to religious arbitration awards.¹¹

For example, recent litigation between the Church of Scientology and some former members similarly hinged on whether the arbitration agree-

original decision, the political atmosphere was already charged with debate that Islamic law had gained a toehold in U.S. courts.”).

5. *Mansour v. Islamic Educ. Ctr. of Tampa, Inc.*, No. 08-CA-3497 (Fla Cir. Ct. Mar. 22, 2011) (“The purpose of this opinion is to discuss the facts, procedural history and analysis relating to the court's ‘Order in Connection with Plaintiffs’ Emergency Motion to Enforce Arbitrator's Award’ dated March 3, 2011.”).

6. Order in Connection with Plaintiff's Emergency Motion to Enforce Arbitrator's Award at 1, *Mansour v. Islamic Educ. Ctr. of Tampa, Inc.*, No. 08-CA-3497 (Fla. Cir. Ct. Mar. 3, 2011).

7. For an extreme example, see *Florida Judge Orders Muslims to Follow Sharia Law, Against Their Will*, CREEPING SHARIA (Mar. 9, 2011), <http://creepingsharia.wordpress.com/2011/03/19/florida-judge-orders-muslims-to-follow-sharia-law-against-their-will/>.

8. Order, *supra* note 6.

9. *Mansour*, No. 08-CA-3497, at 4.

10. *Id.* at 3.

11. See, e.g., *Kahan v. Rosner*, 889 N.Y.S. 2d 839, 842–43 (N.Y. Sup. Ct. 2009) (vacating a rabbinical arbitration award on the grounds that one of the parties was not granted the right to his attorney of choice); *Beth Jacob Teachers Seminary, Inc. v. Le'Bunos*, No. 12218/08, 2009 WL 782549, at *3 (N.Y. Sup. Ct. Mar. 24, 2009) (vacating a rabbinical arbitration award on grounds of partiality).

ment complies with required procedural standards.¹² The agreement at issue required all disputes between the Church of Scientology and its members to be arbitrated by church members “in good standing with the Mother Church.”¹³ Not surprisingly, the plaintiffs suing the Church of Scientology claimed that such a proceeding is inherently biased, rendering the agreement void.¹⁴

In such cases, courts are thrust into a complex role. Parties submit disputes to religious arbitration tribunals for resolution in accordance with religious law.¹⁵ While courts cannot review a tribunal’s application of religious law, they have no need for such inquiries in the context of reviewing religious arbitration awards. Like any other arbitration award, courts do not review the substantive merits of the award, deferring instead to the judgment of the religious arbitration tribunal as a matter of arbitration doctrine.¹⁶

However, courts are required to review the *process* of arbitration to ensure compliance both with the procedures adopted by the parties in their agreement¹⁷ and various mandatory statutory requirements.¹⁸ This review

12. See Order, *Schippers v. Church of Scientology Flag Serv. Org.*, No. 11-11250-CI-21 (Fla. Cir. Ct. Mar. 7, 2012).

13. Appellant’s Initial Brief at 2–3, *Schippers v. Church of Scientology Flag Serv. Org., Inc.*, No. 2D12-1995 (Fla. Dist. Ct. App. May 18, 2012).

14. *Id.* at 13–14.

15. See, for example, the Standard Binding Arbitration Agreement provided by the Beth Din of America, which is available at *Forms and Publications*, BETH DIN OF AMERICA, <http://bethdin.org/forms-publications.asp> (last visited Nov. 30, 2014) (“The parties acknowledge that the arbitrators may resolve this controversy in accordance with Jewish law (*din*) or through court ordered settlement in accordance with Jewish law (*p’shara krova l’din*)), and the Agreement to Mediation/Arbitration provided by the Chicago Rabbinical Council, which is available at *Din Torah-Halachic Arbitration*, CHI. RABBINICAL COUNCIL, <http://www.crcweb.org/AGREEMENT%20TO%20MEDIATION.pdf> (last visited Nov. 30, 2014) (“The parties acknowledge that the arbitrator(s) may resolve this controversy in accordance with Jewish law (*din*) and/or the general principles of arbitration and equity customarily employed by the Chicago Rabbinical Council.”).

16. See, e.g., *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976) (“[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes.”); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (“The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.”).

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

18. See, e.g., Federal Arbitration Act, 9 U.S.C.A. § 10 (West 2009 & Supp. 2014) (providing grounds for vacatur of arbitration awards under federal law); N.Y. C.P.L.R. § 7506 (McKinney 2013) (providing limited procedural requirements for arbitration); N.Y. C.P.L.R. § 7511 (McKinney 2013) (providing grounds for vacatur under New York law); UNIF. ARBITRATION ACT § 4 (2000) (detailing both default and mandatory procedural requirements for arbitration).

ensures that the arbitration proceedings meet the contractual expectations of the parties and adhere to the legally mandated procedural standards. Failure to comply with such standards can serve as grounds for vacating the arbitration award.¹⁹

Courts face a number of challenges when evaluating motions seeking to vacate religious arbitration awards on procedural grounds. The core problem is that religious arbitration agreements require religious tribunals to resolve disputes not only in accordance with religious substantive law, but also in accordance with religious procedural rules.²⁰ Thus, when courts address claims that religious tribunals failed to follow the contractually required procedural rules, they are often thrust into debates over the application and enforcement of religious doctrine. This leads to two types of problems.

First, resolving procedural challenges to religious arbitration awards often requires defining grounds for vacatur in light of the specific rules and principles of the contractually incorporated body of religious law. For example, the religious procedural rules of a particular religious arbitration system—and the parties submitting a dispute for resolution in accordance with those rules—may have different definitions of key statutory terms that figure into vacatur analysis.²¹ As in the example discussed at length below,²² arbitrators may not exclude evidence that is “pertinent” or “material.”²³ But the very definition of what evidence is pertinent and material may be circumscribed by the rules of evidence employed by the procedural rules of a particular religious legal system.²⁴

Second, judicial review of religious arbitration procedure frequently forces courts to confront questions of religious doctrine and practice—questions that courts are generally understood as being constitutionally prohibited from resolving.²⁵ As a result, this “religious question doctrine”

19. *Id.*

20. See for example, the Rules and Procedures provided by the Beth Din of America, which are available at *Rules and Procedures*, BETH DIN OF AMERICA, http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf (last visited Nov. 30, 2014) (“These Rules of Procedure are designed to provide for a process of dispute resolution in a Beth Din which is in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise.”).

21. See Federal Arbitration Act § 10.

22. See *infra* Part I.

23. See Federal Arbitration Act § 10(a)(3).

24. See *infra* pp. 146–52.

25. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (“[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity”); *Natal v. Chris-*

prevents courts from evaluating whether religious arbitration tribunals complied with various procedural rules, thereby undermining the ability of courts to evaluate whether religious arbitration awards met the contractual expectations of the parties as well as the legally mandated rules that ensure the fairness of the proceedings.

These two related worries not only raise important questions about judicial review of procedural challenges to religious arbitration awards, but they also bring into focus broader questions as to the way in which U.S. law conceptualizes and engages religious law. Indeed, the inherent complexities encountered by courts when evaluating religious procedural challenges are emblematic of the hybridity of religious law, which is simultaneously viewed by U.S. law as both a form of law and a type of religion. Thus, from one perspective, religious law functions like other forms of law, susceptible to incorporation via choice-of-law provisions in a variety of commercial settings. On the other hand, constitutional doctrine continues to subsume religious law within the larger framework of religion, thereby preventing courts from resolving claims that turn on questions of religious legal doctrine. In this way, religious law stands between law and religion, complicating the ability of co-religionists to enter agreements and resolve disputes in accordance with mutually shared religious principles.

As an example of this dynamic, this Article applies arbitration and constitutional doctrine to a paradigmatic procedural challenge to a religious arbitration award: failure to admit testimony on the ground that the witness is female.²⁶ While such a practice appears to be rare in contemporary religious arbitration,²⁷ it serves as an important case study that highlights the twin obstacles to judicial review of procedural challenges to religious arbi-

tian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989) (“[C]ivil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice.”); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 31 (D.D.C. 1990) (stating that court should not adjudicate a dispute that requires resolving an “underlying controversy over religious doctrine or practice”); see also *Lang v. Levi*, 16 A.3d 980, 989 (Md. Ct. Spec. App. 2011) (“The Supreme Court has held that both the Free Exercise and Establishment Clauses of the First Amendment prohibit judicial review of religious questions.”); *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 730 (N.J. 1991).

26. The focus in this article will be on instances where a rabbinical court applies Jewish law’s rule prohibiting female testimony. See generally Shimshon Ettinger, *Testimonial Competence of Women in Civil Matters under Jewish Law*, 21 DINEI ISRAEL 241 (2000). However, on some accounts, Islamic Law discounts the evidentiary value of female testimony as well. See Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT’L J. MIDDLE EAST STUD. 185 (1997) (discussing various approaches to the testimony of women in Islamic jurisprudence).

27. See Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT’L L. & FOREIGN AFF. 339, 356 (2000) (noting that, while as a formal matter women cannot serve as witnesses under Jewish law, “rabbinical courts routinely accept women’s testimony and practically accord it the same evidentiary weight that is accorded to men’s testimony”). For a discussion of the various exceptions to the formal rule, see I EMMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 276–295 (1990); Ettinger, *supra* note 26.

tration. In this context, courts are called upon to interpret arbitral procedural requirements on the basis of the legal rules imposed by religious law; and yet, at the same time, courts are instructed to avoid any interrogation or interpretation of those legal rules because resolving such religious questions stands beyond their constitutionally circumscribed jurisdiction.

In response to this conundrum, this Article briefly considers three approaches to navigating the relationship between U.S. law and religious law: (1) rejection, (2) deference/autonomy, and (3) de-mystification. In so doing, this Article advances a modest argument in favor of de-mystifying religious law to conceptualize it as more like law than religion. This approach opens the possibility that courts can better enforce contractually selected forms of religious law to ensure that judicial outcomes more adequately protect parties to religious agreements from various forms of misconduct.

This Article proceeds in two parts. Part I describes how courts ought to address a challenge to a religious arbitration award that is predicated on the failure of a rabbinic court to admit female testimony. In so doing, this Article will consider the way current arbitration and constitutional doctrine combine to require courts to treat religious law as both law and religion, thereby insulating religious arbitration awards from various forms of judicial review. Part II builds upon the particular case of such religious procedural challenges, considering the various ways U.S. law might interact with religious law, and arguing that U.S. law should de-mystify religious law by treating it more like law than religion.

I. ANATOMY OF A CASE

Consider the following case: Two parties submit a dispute for arbitration before a rabbinical arbitration tribunal. Like many religious arbitration agreements,²⁸ the parties' arbitration agreement is signed post-dispute out of the parties' shared desire to have their dispute resolved by religious authorities and in accordance with religious law.²⁹ The arbitration agreement, like many boilerplate rabbinical arbitration agreements, includes a choice-of-law provision, which requires the arbitrators to resolve the dispute in accordance with Jewish Law.³⁰

28. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1301 (2011).

29. *Id.* at 1243–52.

30. *See supra* note 15.

During the proceedings, Party A calls its star witness to the stand—a witness who happens to be female. Over strenuous objections, the arbitrators inform Party A that according to their interpretation of Jewish Law, the female witness’s testimony cannot be admitted into evidence. At the end of the proceedings, the arbitrators find in favor of Party B, awarding Party B some sum of money. Party A believes that the arbitration award should be invalidated because the arbitrators failed to consider the testimony of his female witness. Does Party A have any legal grounds to assert such a claim in court?

Resolving such a claim requires asking two related questions. First, how should courts treat religious procedural rules for the purpose of enforcing arbitration agreements? Second, to what extent can courts evaluate the application of religious procedural rules by religious arbitration tribunals? As discussed below, answering these questions tests to what extent we believe courts should see religious law as simultaneously law and religion.

A. Religious Law as Law

One response to the above hypothetical fact-pattern might be to argue that Party A could seek to have a court vacate the arbitration award on the ground that the arbitrators “refus[ed] to hear evidence pertinent and material to the controversy.”³¹ Courts apply this statutory ground for vacatur where the “arbitrator’s refusal to hear pertinent and material evidence prejudiced the rights of the parties to the arbitration proceedings”³² and thereby “deprive[d] a party to the proceeding of a fundamentally fair hearing.”³³ In our hypothetical case, there may be good reason to believe that the arbitrator’s refusal to admit the female witness’s testimony prejudiced Party A’s rights. Although instances where religious arbitration tribunals refuse to admit female testimony are rare,³⁴ the typical reaction of attorneys³⁵ in such

31. See Federal Arbitration Act, 9 U.S.C.A. § 10(a)(3) (West 2009 & Supp. 2014). Examples of courts employing this standard to invalidate an arbitration award include *Cofinco, Inc. v. Bakrie & Bros., N. V.*, 395 F. Supp. 613, 615 (S.D.N.Y. 1975) and *Teamsters, Local Union No. 506 v. E.D. Clapp Corp.*, 551 F. Supp. 570, 577–78 (N.D.N.Y. 1982).

32. *Aviles v. Charles Schwab & Co.*, No. 10-12216, 2011 U.S. App. LEXIS 14846, at *7 (11th Cir. July 20, 2011); see, e.g., *Harvey Aluminum, Inc. v. United Steelworkers of Am.*, 263 F. Supp. 488, 493 (C.D. Cal. 1967) (granting vacatur on the grounds that pertinent and material evidence had been improperly withheld from the arbitrator, when he excluded an eyewitness); see also *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007) (“A federal court may vacate an arbitrator’s award only if the arbitrator’s refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings.”) (quoting *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985)).

33. *Three S. Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 531 (4th Cir. 2007).

34. See Halperin-Kaddari, *supra* note 27, at 356.

cases is that subsequent arbitration awards predicated on such refusals are subject to vacatur under the “material and pertinent evidence” standard.

However, applying such a ground for vacatur would be a mistake. Consider the following alternative hypothetical fact-pattern. Imagine an arbitration agreement that contains a provision stating that the rules of evidence of a particular foreign country shall apply to the arbitration. Now imagine that the rules of evidence in the country prohibit the admission of video evidence on the grounds that such evidence is highly susceptible to manipulation or fabrication.³⁶ Under such circumstances, were a party to present video evidence to the arbitration tribunal, we would expect the tribunal to refuse to admit the evidence in accordance with the agreed upon evidentiary rules.³⁷ And, as a corollary, a court should not vacate an award issued by the tribunal because it failed to admit “material and pertinent evidence.” The mutually agreed upon rules of evidence render the video evidence “immaterial.”³⁸

This would seem to be the right framework for evaluating similar claims in the context of religious arbitration. Religious arbitration agreements generally incorporate choice-of-law provisions that require the tribu-

35. In my experience, this has been the first reaction of lawyers considering how to attack decisions based on the application of religious rules to exclude important testimony.

36. Foreign rules of evidence may vary widely from the rules of evidence in the United States. See, e.g., EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* 1705 (2d ed. 2009) (“As a general rule, French courts do not recognize exclusionary rules of evidence.”); Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises*, 2001 U. ILL. L. REV. 791, 831 (“There are virtually no U.S.-style rules of evidence in a French trial. All sorts of evidence comes in, including hearsay.”); John E.B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps toward a Child Witness Code*, 28 PAC. L.J. 169, 204 (1996) (“There is . . . no authority for the proposition that a constitutional right of physical confrontation exists in Ireland.”).

37. See *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 564 (7th Cir. 2008) (“Ignoring a choice of law provision in an arbitration agreement exceeds the arbitrator’s power since the arbitrator’s power is borne from that arbitration agreement.”); see also *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (“Parties could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.”) (emphasis in original); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010) (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989)) (reaffirming that arbitration agreements are enforced according to their terms); *Southwire Co. v. Am. Arbitration Ass’n.*, 545 S.E.2d 681, 684 (Ga. App. 2001) (“the arbitrator may not ignore the plain language of the parties’ contract.”).

38. See, e.g., *Professional Staff Congress/City Univ. of N.Y. v. Bd. of Higher Ed. of N.Y.*, 347 N.E.2d 918, 920 (N.Y. 1976) (refusing to grant vacatur where an arbitrator did not hear material evidence excluded by the agreement itself, since parties may determine for themselves the scope of evidence admissible in arbitration through their agreement); Paul M. Cotloff et al., Annotation, *Refusal of Arbitrators to Receive Evidence, or to Permit Briefs or Arguments, on Particular Issues as Grounds for Relief From Award*, 75 A.L.R.3d 132 (2014) (“[P]arties may, by their agreement to arbitrate, broaden or narrow [the] scope [of what evidence is material]”).

nal to apply a particular set of religious procedural rules.³⁹ This incorporated choice-of-law provision is key to the arbitration agreement because it ensures that the dispute is resolved in accordance with shared religious rules and values—one of the primary motivations behind parties submitting disputes for religious arbitration.⁴⁰ Accordingly, where religious evidentiary rules require deeming particular evidence inadmissible, such evidence should be deemed “immaterial” under the terms of the arbitration agreement. Indeed, some courts have noted that an arbitration tribunal’s failure to hear testimony serves as a ground for vacatur only where the failure amounts to “misconduct.”⁴¹ A religious tribunal’s good-faith application of the parties’ selected religious law to exclude evidence would hardly seem to qualify as misconduct.

To be sure, there might still be reasons why the application of such religious evidentiary rules would render the arbitration agreement unenforceable. One option in such cases is to rely on the public policy exception to vacate awards.⁴² The challenge here is that courts apply the public policy exception to the enforcement of arbitration awards in extremely limited circumstances.⁴³ Indeed, the Supreme Court has noted that attempts to vacate an arbitration award on the grounds of public policy must demonstrate that the arbitration award “run[s] contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.”⁴⁴

39. See, for example, the Standard Binding Arbitration Agreement provided by the Beth Din of America, which is available at *Forms and Publications*, *supra* note 15 (providing that the dispute between the parties shall be resolved in accordance with the Beth Din of America’s Rules and Procedures, and stating that “[t]he parties acknowledge that the arbitrators may resolve this controversy in accordance with Jewish law (*din*) or through court ordered settlement in accordance with Jewish law (*p’shara krova l’din*)), and the Rules and Procedures provided by the Beth Din of America, which are available at *Rules and Procedures*, *supra* note 20 (“These Rules of Procedure are designed to provide for a process of dispute resolution in a Beth Din which are in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise.”).

40. See generally Helfand, *supra* note 28.

41. *Century Indem. Co. v. Certain Underwriters at Lloyd’s, London*, 584 F.3d 513, 557 (3d Cir. 2009) (emphasizing that not every failure to hear pertinent and material evidence constitutes misconduct).

42. For my views on applying the public policy in the context of religious arbitration, see Helfand, *supra* note 28, at 1288–94.

43. See, e.g., David M. Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards*, 16 OHIO ST. J. ON DISP. RESOL. 297, 302 (2001) (“Vacatur of a labor arbitration award on public policy grounds is very unlikely given the narrow scope of this exception in *post Misco* jurisprudence. It is even less likely when courts review commercial arbitration awards.”).

44. *S.E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 63 (2000); see also *Sea-Land Serv., Inc. v. Int’l Longshoremen’s Ass’n. of N.Y.*, 625 F.2d 38, 42 (5th Cir. 1980) (“[A]rbitral awards may be judicially vacated on such grounds as . . . public policy . . .”); *Dep’t of Cent. Mgmt. Servs. v. Am. Fed’n of State, Cnty. & Mun. Emps. (AFSCME)*, 614 N.E.2d 513, 519–20 (Ill. App. Ct. 1993) (ruling an arbitration award violated public policy favoring protection of children,

There are, of course, state and federal statutes⁴⁵—along with constitutional provisions⁴⁶—that prohibit discrimination on the basis of sex, which might bolster a court’s decision to vacate an award where the panel refused to admit testimony because the witness was female. But there are still some significant hurdles to employing the public policy exception in this context. To vacate an award on public policy grounds, courts often require that the public policy violation appear on the “face” of the award,⁴⁷ and a tribunal’s refusal to admit female testimony would be unlikely to satisfy rigorous enforcement of this standard.⁴⁸ Moreover, to the extent courts focus narrowly on the “positive law” requirement⁴⁹—that is, the “strong and well-defined” policy “embodied in constitutional, statutory[,] or common law”⁵⁰—it may be difficult to invoke the public policy exception, given that there is no specific positive law that prohibits discrimination on the basis of sex when admitting testimony before arbitrators. Furthermore, asserting the public policy exception to vacate such an arbitration award has become even more difficult in light of the Supreme Court’s 2007 decision in *Hall*

where the award reinstated an investigator who had been discharged for falsifying information about child abuse in his investigation report).

45. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012) (prohibiting discrimination based on sex in the context of employment). State statutes prohibiting sex discrimination include statutes addressing such discrimination in the context of employment and public accommodations. See, e.g., N.Y. EXEC. LAW § 296 (McKinney 2014) (prohibiting discrimination based on sex in the employment and public accommodations contexts). See generally Alan J. Hoff, Note, *A Proposed Analysis for Gender-Based Practices and State Public Accommodations Laws*, 16 U. MICH. J.L. REFORM 135 (1982).

46. See, e.g., U.S. CONST. amend. XIV, § 1 (Equal Protection Clause); see also *Craig v. Boren*, 429 U.S. 190 (1976) (adopting intermediate scrutiny for evaluating sex-based classifications).

47. See, e.g., *Bd. of Educ. of New York v. Hershkowitz*, 764 N.Y.S.2d 254, 256 (N.Y. App. Div. 2003) (“To invoke the [public policy] exception, the court must be able to examine an arbitration agreement or an award on its face, and conclude that public policy considerations, embodied in either statute or decisional law, prohibit (1) arbitration of the particular matters to be decided, or (2) certain relief being granted.”).

48. To be sure, New York courts have indicated a willingness to go beyond the “face” of the award so long as they would not have to engage in “extended fact-finding,” leaving the possibility open that a court may be willing to apply the public policy exception after limited inquiry into whether a witness was prohibited from testifying because she was female. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Savino*, No. 06 Civ. 868 (LAP), 2007 U.S. Dist. LEXIS 23126, at *48 (S.D.N.Y. Mar. 23, 2007) (quoting *Cohoes Police Officers Union, Local 756 ex rel. Westfall v. City of Cohoes*, 692 N.Y.S.2d 796, 798 (N.Y. App. Div. 1999) (internal quotation marks omitted)) (“[B]efore a court may intervene with an arbitration award on policy grounds, it must be able to examine an arbitration agreement or an award on its face, without engaging in extended fact-finding or legal analysis, and conclude that public policy precludes its enforcement.”).

49. See *supra* note 44.

50. *New York State Corr. Officers & Police Benevolent Ass’n, Inc. v. State*, 726 N.E.2d 462, 466 (1999); see also *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (“Such a public policy, however, must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

Street Associates v. Mattel, where the Court held that the grounds for vacatur listed in the Federal Arbitration Act (FAA) are exclusive.⁵¹ This has led some federal courts to question whether public policy—a ground not listed in the FAA—remains a valid basis for vacating an arbitration award at all.⁵²

Now none of these individual worries about applying the public policy exception to cases where an arbitration tribunal refuses to admit female testimony is decisive; but collectively they do offer good reason to be skeptical as to whether the public policy exception has the doctrinal wherewithal to provide courts with grounds to vacate awards in cases where the arbitrator refuses to admit female testimony.⁵³ Therefore, there seems to be good reason to think that the application of religious evidentiary rules to exclude female testimony would not typically subject a subsequent arbitration award to vacatur. While somewhat counterintuitive, this conclusion is noteworthy because it exemplifies how, in some circumstances, religious law is treated like any other form of law. Religious law can provide parties to a dispute with evidentiary rules that circumscribe the scope of material and pertinent evidence. The fact that a tribunal applies religious law to exclude evidence—as opposed to some other non-religious body of law—should not authorize a court to deem that evidence “pertinent and material,” and thereby empower the court to vacate the award.

The intuition that the “pertinent and material” ground for vacatur should apply in these cases appears to be predicated on the view that religious evidentiary rules—especially when based on gender-biased criteria⁵⁴—cannot provide sufficient justification for excluding evidence because they fail to explain why the evidence is not probative of the dispute between the parties. But the underlying rationale for the evidentiary rule excluding female witnesses does not provide a basis for treating it differently than any other mutually agreed upon rules of evidence. Parties have

51. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (“We now hold that §§ 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.”).

52. *Compare*, *Rogers v. KBR Tech. Servs., Inc.*, No. 08-20036, 2008 WL 2337184, at *2 (5th Cir. June 9, 2008) (stating that *Hall Street Associates* “calls into doubt the non-statutory grounds [for vacatur]”) with *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1283, 1290 (9th Cir. 2009) (holding that *Hall Street Associates* did not foreclose either the manifest disregard of the law or public policy grounds for vacating an arbitration award). The Supreme Court itself has explicitly declined to clarify its position. *See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 689 n.3 (2010).

53. I have elsewhere proposed that unconscionability might also provide a basis in some cases for avoiding awards where the arbitrators have refused to admit female testimony by allowing the parties to challenge the validity of the agreement. *See Helfand, supra* note 28, at 1294–1303. Of course, to retroactively attack the validity of an arbitration agreement after commencement of the arbitration proceedings requires addressing difficult questions of waiver. *See id.* at 1301–03.

54. *See Ettinger, supra* note 26, at 245–50 (discussing the origin of and rationale behind Jewish law’s general rule excluding female testimony).

the undeniable autonomy to specify rules of evidence to govern the adjudication of their dispute.⁵⁵ Thus, where parties adopt a set of religious rules to govern arbitration proceedings, those rules must be given effect unless some other ground for vacatur applies. Neither arbitration doctrine nor constitutional doctrine⁵⁶ empowers courts to single out religious law for different status when it comes to applying the statutory grounds for vacating arbitration awards. The origin of, or rationale behind, religious law does not alter the equation. Religious law must be placed on par with any other law the parties choose. Religious law, from this vantage point, must be treated as law.

B. Religious Law as Religion

While the application of religious evidentiary rules might demonstrate how religious law is treated as law, it is only half the story. It is true that where parties have incorporated religious procedural law into their arbitration agreement, courts should not vacate awards premised on the application of such religious evidentiary rules. However, parties often disagree about what it is that religious procedural rules require. Consider our female witness hypothetical again; there is significant dispute over whether and to what extent Jewish law prohibits a rabbinical tribunal from refusing to hear female testimony.⁵⁷ Indeed, the current trend is to allow the evidence to be admitted for consideration by the rabbinical tribunal.⁵⁸ As a result, if a rabbinical tribunal refused to allow testimony because the witness was female, the party presenting the testimony would likely challenge the ruling on *religious* grounds.

Moreover, not only would the party likely raise this objection during the arbitration, but it would also raise the objection in a motion to vacate the award. Thus, the challenge to the award would not simply be based on a generic refusal to admit “pertinent and material evidence,” but on a claim that the *mis*application of religious rules led the tribunal to refuse to admit “pertinent and material evidence.” Put differently, the failure of the tribunal

55. Cf. *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (“Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.”) (emphasis in original).

56. Cf. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (holding that the Free Exercise Clause prohibits government from singling out religion for worse treatment).

57. See *QUINT*, *supra* note 27, at 290; *Ettinger*, *supra* note 26.

58. See *Halperin-Kaddari*, *supra* note 27; see also *QUINT*, *supra* note 27; *Ettinger*, *supra* note 26.

to hear the pertinent and material evidence stems from the fact that the tribunal incorrectly interpreted the relevant religious legal rules.⁵⁹

If such an objection came up in the context of some other body of law—for example, a choice of law provision incorporating the law of a particular country—then a court would presumably apply the FAA’s statutory grounds for vacatur to determine whether misapplication of the chosen law provided grounds for refusing to enforce the award.⁶⁰ Thus, to use our previous hypothetical regarding video testimony, if an arbitrator interpreted the rules of evidence of the selected legal system as excluding video testimony, a party disputing that interpretation might later look to the statutory grounds for vacatur in order to challenge the arbitration award.

Most notably, while an arbitrator would be afforded wide deference in such matters,⁶¹ a party might still raise a challenge to the arbitrator’s interpretation of the rules of evidence incorporated via the choice-of-law provision under the “manifest disregard of the law” standard.⁶² Under this standard, a court can vacate an award where the arbitrator ignored governing law that “‘was well defined, explicit, and clearly applicable,’ and ‘the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it.’”⁶³ To apply the manifest disregard of the law

59. See Federal Arbitration Act, 9 U.S.C. § 10 (West 2009 & Supp. 2014) (providing the statutory grounds for vacatur under the Federal Arbitration Act).

60. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584 (2008).

61. Giller v. Oracle USA, Inc., 512 F. App’x 71, 73 (2d Cir. 2013) (describing the “exceedingly heavy burden” that a party must satisfy to have an award vacated under the manifest disregard of the law standard).

62. See, e.g., Kashner Davidson Sec. Corp. v. Mscisz, 531 F.3d 68, 70–71 (1st Cir. 2008); Nat’l Ass’n. of Gov’t Emps., Local R1-200 v. City of Bridgeport, 912 A.2d 539, 542 (Conn. App. Ct. 2007) (“[A]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to § 52-418(a)(4) because the arbitrator has exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. We emphasize, however, that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator’s extraordinary lack of fidelity to established legal principles.”).

63. NGC Network Asia, L.L.C. v. PAC Pac. Group Int’l, Inc., 511 F. App’x 86, 89 (2d Cir. 2013) (quoting Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121 n.1 (2d Cir. 2011)); see also Lagstein v. Certain Underwriters at Lloyd’s, London, 607 F.3d 634, 641 (9th Cir. 2010) (“‘Manifest disregard of the law’ means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law.”) (quoting Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 832 (9th Cir. 1995)).

Although the Supreme Court did question the viability of the “manifest disregard of the law” standard in *Hall Street Associates*, most federal courts of appeals continue to apply the standard as a more limited application of the statutory ground for vacatur that prohibits arbitrators from “exceed[ing] their powers.” Federal Arbitration Act § 10. See Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009) (holding that the “manifest disregard” standard falls within the statutory grounds, “where the arbitrators exceeded their powers” as set forth by the FAA); Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App’x 415, 418 (6th Cir. 2008) (stating that in addition to the statutory grounds outlined in the FAA, courts may vacate arbitration awards if they are “found to be in manifest disregard of the law.”); Stolt-Nielsen SA v. AnimalFeeds Int’l Corp., 548 F.3d 85, 93–95 (2d Cir. 2008) (outlin-

standard, a court must first determine precisely what the mutually selected law required, and then determine whether the arbitrator knowingly ignored the law.⁶⁴

Satisfying the manifest disregard of the law standard in this context is difficult, given that arbitration awards cannot be vacated for an error of law.⁶⁵ Thus, an erroneous application of evidentiary rules would only serve as a ground for vacatur if the party challenging the award could prove that the rules of evidence were intentionally misapplied, notwithstanding the arbitrator's knowledge of the law.⁶⁶ However, the manifest disregard of the law standard still allows courts to police arbitrators who choose to ignore mutually agreed upon choice-of-law provisions by evaluating what precisely the selected body of law requires in a given circumstance and then comparing that requirement with the decision of the arbitrator. To use our video evidence hypothetical, a court would determine what the selected body of law required regarding the admission of video evidence, and then compare

ing three components of the "manifest disregard" standard), *rev'd on other grounds*, 559 U.S. 662 (2010). *But see* Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 355 (5th Cir. 2009) (holding that manifest disregard is no longer a valid ground for vacatur post-*Hall Street*); Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008) (describing the Supreme Court as having held in *Hall Street* "that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act").

64. *See, e.g., Kashner Davidson*, 531 F.3d at 70–71 (reversing the district court's confirmation of an arbitration award after finding the "[arbitration] panel manifestly disregarded the law by dismissing appellants' counterclaims and third-party claims as a sanction in contravention of the explicit terms of the [NASD] Code . . ."); *Metro. Waste Control Comm'n v. City of Minnetonka*, 242 N.W.2d 830, 832–33 (Minn. 1976) (vacating award because the panel was aware that the agreement limited the arbitration to interpreting and implementing the Service Availability Charge (SAC) rules, and instead "impose[d] their own notions of equity."); *cf. Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989) (affirming vacatur on grounds that "arbitral action contrary to express contractual provisions will not be respected."); *Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987) (affirming vacatur, stating, "[w]hile reliance on [past practices of the parties] is appropriate to interpret ambiguous contract terms, such as the definition of 'month' and the duration of the probationary period in the case at hand, [past practices of the parties] cannot be relied upon to modify clear and unambiguous provisions.").

65. *See George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 579 (7th Cir. 2001) ("[T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.") (quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1194–95 (7th Cir. 1987)).

66. *See Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991) ("[M]anifest disregard will be found where an 'arbitrator understood and correctly stated the law but proceeded to ignore it.") (quoting *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 893 (2d Cir. 1985)) (internal quotation marks omitted); *see also Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234, 240 (1st Cir. 1995) ("In order to demonstrate that the arbitrator both recognized and ignored the applicable law, 'there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.") (citation omitted) (quoting *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9–10 (1st Cir. 1990)).

that requirement against the decision of the arbitrator to determine whether the arbitrator was aware of and ignored a clear application of the incorporated choice-of-law provision.⁶⁷

By contrast, such limited judicial review is not available in the religious arbitration context, as parties are foreclosed from challenging a religious arbitration award under the manifest disregard of the law standard. Indeed, if a party sought vacatur of a religious arbitration award—claiming that the arbitrators ignored religious law in excluding evidence—the court would be constitutionally disabled from considering the petition for vacatur. That court would have to determine what the religious law in question required before it could determine whether the arbitrators ignored that requirement. And determining what religious law requires as a matter of evidentiary law falls squarely under the “religious question doctrine”—that is, the constitutional prohibition against courts resolving claims that turn on disputes over religious doctrine or practice.⁶⁸ Accordingly, a court could not determine whether or not religious law required excluding female testimony; in turn, a court could not evaluate whether excluding specific female testimony constituted a manifest disregard of the law.⁶⁹

A court’s inability to properly consider such a challenge to a religious arbitration award does not end the inquiry. From the vantage point of constitutional law, there is no reason to conclude that the award should be enforced simply because a court cannot properly evaluate a claimed ground for vacatur. Indeed, as a purely abstract matter, we might conclude the precise opposite: because a court is constitutionally barred from engaging in the inquiry necessary to evaluate the claimed ground for vacatur, the arbitration award should be presumed invalid.

But what could be true as a matter of constitutional law is foreclosed by the text of the FAA. According to the Act, “any party to the arbitration may apply . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”⁷⁰ As a result, unless the party seeking to invalidate the award can successfully demonstrate that an award should be vacated, the court *must* grant an order to confirm the award.⁷¹ In turn, the fact that a court is constitutionally disabled from eval-

67. See *supra* note 64.

68. See *supra* note 25.

69. See *Lang v. Levi*, 16 A. 3d 980, 989 (Md. Ct. Spec. App. 2011) (noting that the “religious context” of the rabbinical arbitration award “further narrows the standard [of review]” so as “to make [the court’s] intervention nearly impossible”).

70. Federal Arbitration Act, 9 U.S.C.A. § 9 (West 2009 & Supp. 2014).

71. *Id.*

uating a particular motion to vacate an award means that the award must be confirmed.⁷²

Taken together, these constitutional constraints and statutory requirements insulate religious arbitration awards from attack on procedural grounds where the claims would require resolution of religious questions.⁷³ This type of insulation goes beyond the typical deference afforded other arbitration awards, short-circuiting the manifest disregard of the law inquiry before it even begins. The justification for this outcome lies in the generally held view that courts lack the institutional competence⁷⁴ and constitutional authority⁷⁵ to resolve religious questions combined with the FAA's insistence on judicial enforcement of arbitration awards absent any affirmative showing justifying a contrary outcome. In this way, the Constitution requires that we treat religious law as a black box. And it thereby views religious law more like mysterious religious doctrine that is "beyond

72. A somewhat analogous issue comes up in the context of claims for vacatur that are filed after the three-month statute of limitations has run on motion to vacate. See Federal Arbitration Act § 12 (providing a three-month statute of limitations for providing notice of a motion to vacate an award). In contrast to a motion to vacate, a motion to confirm an award may be filed within one year of when the award was "made." *Id.* § 9. A party who files a motion to confirm an award more than three months after the award was made thus avoids the possibility of the other party countering such a motion with a motion to vacate the award. See *id.* However, the fact that the losing party can no longer pursue a motion to vacate an award is not generally held to prevent the winning party from confirming the award. See, e.g., *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 172 (2d Cir. 1984). Of course, a losing party may bring a motion to vacate an award within the first three months after an award even if no motion to confirm the award is made. But absent doing so, the fact that a party moves to confirm an award after the three month period does not re-open the door for a party to make a motion to vacate an award.

73. This is not to say that religious arbitration awards are immune from attack on procedural grounds—only procedural challenges that implicate religious questions. Other procedural challenges can invalidate religious arbitration awards as they would any other arbitration award. See *supra* note 11.

74. Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 138 (2009) (arguing that the Establishment Clause instructs courts not to interfere in cases implicating religious doctrine or practice because such "claims would require courts to answer questions that the state is not competent to address"); see also Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 391 (1984) (describing the Supreme Court's holding in *Watson v. Jones* as standing for the proposition that "civil judges are incompetent to resolve questions concerning religious doctrine"). I have criticized these justifications for the religious question doctrine elsewhere. See Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013).

75. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11, at 1231 (2d ed. 1988) (noting that the prohibition against doctrinal entanglement in religious issues "[m]ore deeply, [] reflects the conviction that government—including judicial as well as the legislative and executive branches—must never take sides on religious matters,"); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 812 (2009) ("If government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby favor some religious persons, sects, and groups over others."); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 804 (1998) (expressing the concern that judicial resolution of inter-denominational disputes may be perceived as "the possible endorsement of one minority group");

the ken of mortals”⁷⁶ and less like a legal regime susceptible to judicial analysis and inquiry. Put differently, this outcome exemplifies the way religious law is, at times, treated far more like religion than like law.

II. THE CONUNDRUM OF RELIGIOUS LAW

The core conundrum of religious law is that U.S. law both gives it the status of law, but also prevents it from being interrogated like other forms of law. In so doing, religious law becomes a unique hybrid, inhabiting the space between law and religion. As explored in the previous section, this unique treatment significantly impacts how courts interface with religious tribunals—limiting the ability of courts to withhold confirmation of arbitration awards issued pursuant to religious arbitration proceedings and in accordance with religious law. In this way, our hypothetical raises the question of whether this hybrid treatment is the best way for U.S. law to conceptualize and treat religious law. Consider the following alternatives.

One option is to simply close the courthouse doors completely to religious law. We might charitably attribute this motivation to the advocates of anti-Sharia legislation, although such advocates may be more directly motivated by constitutionally prohibited forms of anti-Muslim animus.⁷⁷ While their impact is far from clear, the anti-Sharia laws generally prohibit courts from enforcing any decision that considers, relies upon, or is based upon religious law.⁷⁸ Such provisions would ostensibly prevent courts from confirming religious arbitration awards and thereby avoid all the problems associated with reviewing procedural challenges to religious arbitration awards.

However, such a dogmatic approach throws out the proverbial “baby with the bathwater,” especially given the vital role religious arbitration plays in the resolution of religious disputes. First, religious arbitration enhances the experience of religious freedom experienced within a wide range of religious communities by enabling co-religionists to resolve dis-

76. *United States v. Ballard*, 322 U.S. 78, 87 (1944).

77. *See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1128–29 (10th Cir. 2012) (holding that Oklahoma’s Anti-Sharia Amendment discriminated among religions in violation of First Amendment); *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010) (holding that Oklahoma’s Anti-Sharia Amendment appeared to single out religion and was therefore not facially neutral).

78. For a collection of recent legislative developments regarding anti-Sharia initiatives, see Bill Raftery, *Bans on Court Use of Sharia/International Law: Introduced in Georgia UPDATED*, GAVEL TO GAVEL (Feb. 5, 2014), <http://gaveltogavel.us/2014/02/05/bans-on-court-use-of-shariainternational-law-4th-year-in-a-row-mississippi-doesnt-advance-a-single-bill-introduced-in-georgia/>. Alabama became the latest state to pass such a bill. *See* Liz Farmer, *Alabama Joins Wave of States Banning Foreign Laws*, GOVERNING, Nov. 4, 2014, <http://www.governing.com/topics/elections/gov-alabama-foreign-law-courts-amendment.html>.

putes in accordance with shared religious precepts and values.⁷⁹ Thus, to discard religious arbitration would strike a significant blow to the infrastructure of religious freedom. And beyond enhancing this experience of religious freedom, religious arbitration plays an important gap-filling role, ensuring that co-religionists can resolve disputes that would otherwise be beyond the authority of courts to resolve.⁸⁰ Indeed, the religious question doctrine prevents courts from adjudicating a wide range of religious disputes that turn on religious doctrine and practice; these disputes include, for example, breach of contract cases turning on interpretation of religious terms⁸¹ and defamation claims turning on the truth or falsity of religious statements.⁸² Religious arbitration provides the only forum for resolving many of these claims; parties can submit these disputes to arbitration and then the arbitrators' award can be confirmed in court, giving it the power of an enforceable judgment. Without religious arbitration, these claims would go unresolved, as courts would have to dismiss such cases because of the religious question doctrine. In sum, responding to the conundrum of religious law by casting religious law out of the courthouse causes far more problems than it solves.

A second option is to embrace the constitutionally mandated insulation of religious arbitration awards. There is much to commend with this approach, which fits with the growing "religious institutionalism" literature.⁸³ On such an account, courts should not second-guess the decisions of religious institutions; rather religious institutions are best understood as standing beyond the jurisdiction of the state, retaining the autonomy to make decisions and resolve disputes in accordance with their religious rules, doctrine, and practices.⁸⁴ Typically, claims of religious institutional

79. Helfand, *supra* note 28, at 1243–52.

80. For a discussion of religion's gap-filling function, see Helfand, *supra* note 74, at 509.

81. See, e.g., *Sieger v. Sieger*, 747 N.Y.S.2d 102 (N.Y. App. Div. 2002); *Zummo v. Zummo*, 574 A.2d 1130, 1146 (Pa. Super. Ct. 1990).

82. See, e.g., *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732 (D. N.J. 1999); *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1289 (D. Minn. 1993); *Goodman v. Temple Shir Ami, Inc.*, 712 So. 2d 775 (Fla. Dist. Ct. App. 1998); *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808, 813 (Md. Ct. Spec. App. 1996); *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197 (N.J. Super. Ct. App. Div. 2009).

83. Prominent examples of this approach include Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 288 (2008); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 43 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 79, 87 (2009); Steven D. Smith, *Freedom of Religion or Freedom of the Church*, in UNIV. OF SAN DIEGO LEGAL STUDIES RESEARCH SERIES 2011 (Research Paper No. 11-061, Aug. 2011), available at <http://ssrn.com/abstract=1911412>.

84. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 55 (1998) ("If the law is to order two entities ('separation of church and state'), the law must first recognize the existence of both entities. The juridical consequence is that the status of religious entities is acknowledged by the Establishment Clause, and a sphere is reserved in which

autonomy require courts to abstain from any form of intervention in religious disputes.⁸⁵ Applying this approach in the context of religious arbitration would require courts not to simply abstain from the dispute's resolution, but to enforce the award under the rubric of arbitration without interrogating the internal decision-making process of the arbitration tribunal. Still, a strong commitment to institutional autonomy might encourage judicial avoidance of religious questions generally and religious procedural challenges to arbitration awards specifically. Thus, the fact that current doctrine requires courts to confirm a religious arbitration award— notwithstanding the unaddressed claim for vacatur on religious procedural grounds—might be seen as a positive outcome, because it represents the further entrenchment of religious institutional autonomy by enforcing the decisions of religious arbitrators without second-guessing the religious decision-making process.

The challenge, however, with providing such extraordinary insulation of religious arbitration awards is that it opens the door for some significant abuse of the arbitral process. Parties incorporate religious choice-of-law provisions into their agreements in order to ensure that both the substance and process of the arbitration conforms to a mutually shared sense of religious obligation and commitment.⁸⁶ Without any judicial oversight over claims of religious procedural misconduct, there is no way to ensure that the parties will get what they bargained for. Indeed, the lack of oversight

religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission.”); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156, 161–62 (2011) (“[C]ourts, and the state itself, are simply not authorized to intervene in life at the heart of churches. At a deep level, these questions lie beyond the reach of the state altogether. The two kingdoms of temporal and spiritual authority, of church and state, constitute two separate sovereigns.”); Horwitz, *supra* note 83, at 114 (concluding that under “a sphere sovereignty approach to religious entities,” religious institutions “would coexist alongside the state . . . serving a vital role in furthering self-fulfillment, the development of a religious community, and the development of public discourse.”); Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 91–96 (2008) (describing how conceptualizing the ministerial exception as jurisdictional reaffirms the “penultimacy of the state”); Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 94 (1953) (interpreting the Supreme Court’s church property cases and concluding that “the Court may have been persuaded that a church must enjoy prerogatives of sovereignty which are not to be conceded to other social groups.”).

85. This approach has been characterized by Kent Greenawalt as the “hands off” approach to religious disputes. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998); see also Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 837 (2009); Samuel J. Levine, *Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 87–88 (1997); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 867 (2009); Samuel J. Levine, *The Supreme Court’s Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793, 794 (2009).

86. See Helfand, *supra* note 28.

might actually worry parties who seek religious arbitration, making it a less attractive alternative, because claims that the arbitrator ignored certain religious procedural and evidentiary rules may be left unaddressed. And such festering concerns could eat away at the very infrastructure of religious freedom that religious arbitration is intended to provide.

There remains a third alternative. Instead of unequivocally rejecting or embracing religious law, we might begin the process of de-mystifying religious law. As I have argued elsewhere,⁸⁷ we might reimagine the role of courts in the resolution of disputes that turn on religious doctrine or practice. Indeed, the Supreme Court's early approach to religious disputes authorized courts to address claims that a religious institution failed to adhere to its internal religious rules in its own decision-making process.⁸⁸ In so doing, courts were able to ensure that the decisions of religious institutions were subject to the institution's own internal religious procedural safeguards.⁸⁹ Adopting such an approach in the context of arbitration would enable courts to vacate awards predicated on a religious arbitration tribunal's willful failure to apply religious procedural and evidentiary rules.

Of course, this does not mean that courts should have free rein to inject themselves into religious arbitration proceedings, undermining the ability of religious tribunals to provide final and enforceable judgments in accordance with the shared expectations of the parties. Indeed, even under the manifest disregard of the law standard, arbitrators are afforded extremely wide deference to the point where marshaling a successful challenge to the award on manifest disregard grounds seems extremely unlikely.⁹⁰ Accordingly, in cases where there is some dispute as to what the religious

87. See generally Helfand, *supra* note 74; see also Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013).

88. The most prominent Supreme Court case expressing this view was *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 17 (1929), where the court held that the decisions of "the proper church tribunals" would be deemed "conclusive" only in the absence of "fraud, collusion, or arbitrariness." This standard was widely adopted by lower courts in the early half of the 20th century. See Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1118, 1122 (1965) (further explaining that "courts began to demand from the church tribunals adherence to some rudimentary notions of fairness" such that they "would only defer to a church tribunal which had followed its own procedural rules."); see also *Bouldin v. Alexander*, 82 U.S. 131, 140 (1872) (holding that the majority of a congregational church is considered to represent the church "if they adhere to the organization and the doctrines"); *Brundage v. Deardorf*, 55 F. 839, 847–48 (C.C.N.D. Ohio 1893) ("Certainly, the effect of *Watson v. Jones* cannot be extended beyond the principle that a bona fide decision of the fundamental law of the church must be recognized as conclusive by civil courts. Clearly, it was not the intention of the court to recognize as legitimate the revolutionary action of a majority of a supreme judicatory, in fraud of the rights of a minority seeking to maintain the integrity of the original compact."). For my extended discussion of this point, see Helfand, *supra* note 74, at 519–41.

89. *Id.*

90. See *supra* notes 61–67 (discussing the manifest disregard of the law standard).

procedural rules require, religious arbitration awards are already insulated from vacatur based on standard rules of arbitration law; that is, any arbitration award—religious or secular—will not be vacated on account of an error of law. But de-mystifying religious law in this context would ensure that courts retain the ability to step in and uphold religious procedural rules where religious tribunals intentionally ignore clear and definite religious procedural requirements. Treating religious law like any other law provides co-religionists with an important mechanism to avoid an arbitrator's blatant disregard of the religious law incorporated into the arbitration agreement. In this way, seeing religious law as more like law than religion can help protect the institutional infrastructure that makes religious freedom possible.

CONCLUSION

This Article has explored the inherent hybridity of religious law as a category somewhere between law and religion. To do so, the Article presented a case study, which exemplifies the hybrid status of religious law: procedural challenges to religious arbitration awards. When courts consider such challenges, they find themselves vacillating between these two categories—at times treating religious law as law while at other times treating religious law as religion. This inherent tension in the conceptualization of religious law has important practical implications. The combined impact of current arbitration and constitutional doctrine insulates religious law from certain forms of judicial review. Religious law can be given legal effect when incorporated into a contract between two parties, but courts are constitutionally prohibited from ensuring that the application of this mutually selected body of law is true to the underlying religious doctrine.

Recognizing the unique status of religious law enables us to question whether the current state of affairs is the preferred framework for interaction between secular and religious law. For some, this unique status is cause for concern, because it could justify banning religious law altogether from the courthouse. For others, the insulation of religious law from certain forms of judicial review is an outcome to be celebrated, as it further provides religious institutions with constitutionally mandated autonomy, free from government interference. But there remains a third option for engaging religious law—one that both embraces the applicability of religious law in U.S. courts, and seeks to de-mystify religious law by treating it more like law than religion. Treating religious law more like law would enable courts, for example, to ensure that arbitrators—tasked by parties to apply religious law—do not simply disregard the contractually incorporated reli-

gious rules in issuing awards. It would allow courts to serve as a backstop for intentionally misguided application of religious procedural rules and safeguards, and in so doing, would ensure that religious arbitration can serve as part of the religious institutional infrastructure that makes religious freedom possible.