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Michael J. Broyde

Alexa J. Windsor

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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In Contracts We Trust (and No One Can Change Their Mind)! There Should Be No Special Treatment for Religious Arbitration

Michael J. Broyde and Alexa J. Windsor*

I. Introduction

The recent article *In God We Trust (Unless We Change Our Mind): How State of Mind Relates to Religious Arbitration* ("*In God We Trust"*) proposes that those who sign arbitration agreements that consent to a religious legal system as the basis of the rules of arbitration be allowed to back out of such agreements based on their constitutional right to free exercise.[1] This article is a response and is divided into two sections. In the first section, we show that such an exemption would violate the Federal Arbitration Act's (FAA) basic rules preventing the states from heightened regulation of arbitration generally and would also run afoul of the constitutional duty—twice reaffirmed

***Michael J. Broyde** is a Professor of Law at Emory University School of Law, and the Berman Projects Director in its Center for the Study of Law and Religion. Thank you to Stanford Law School where Broyde was a Visiting Professor last year for a semester. During the 2018-2019 academic year, he was a Senior Fulbright Scholar at Hebrew University in Israel working on religious arbitration in nations with established churches. Broyde has also served in a variety of rabbinic roles throughout the United States, from synagogue rabbi to dean of an advanced institute of Jewish Law, to the director of a rabbinical court, the Beth Din of America, which is mentioned in this paper. **Alexa J. Windsor** is a J.D. candidate at Emory University School of Law, Class of 2021. She graduated from Colgate University, *cum laude*, in 2013 with B.A.s in German and History.

[1] Skylar Reese Croy, *In God We Trust (Unless We Change Our Mind): How State of Mind Relates to Religious Arbitration,* 20 PEPP. DISP. RESOL. L.J. 120 (2020).

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by the Supreme Court in the last few years—not to treat religious institutions, ideals, and motives differently from their secular counterparts.

In the second section, we argue that even if these objections are overcome by statute or constitutional amendment, creating an exemption to the general contractual obligations of arbitration merely because someone had a change in religious heart is an exceedingly unwise idea and does not further the goals of either religious liberty or arbitration law. Because the stakes are so much higher than mere contract law, the rights protected need greater deference. In contradistinction to *In God We Trust*, the second section argues that the Conscientious Military Objector model is unique and should not be expanded to any civil context exactly because military service is not a contractual model but can produce criminal penalties. Further, we note that problems of excessive entanglement, hinted at by this author and outlined in the article *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, are not serious constitutional matters and hardly justify revising arbitration law in light of them.[2] Indeed, contractually based religious arbitration enhances religious liberty, and any unique treatment would reduce arbitration's developing benefits to religious and secular communities through its choice of law provisions.

II. Exemptions from Religious Arbitration Are Incompatible with American Law

This first section of this article will show that to allow exemptions from faith-based arbitration agreements would violate both the FAA and the First Amendment rights of co-religionists who choose to abide by religious rules in

[2] Sophia Chua-Rubenfeld & Frank J. Costa Jr., *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2087 (2019).

their secular disputes. Arbitration clauses, as allowed by the FAA, must not be sorted into secular and religious; instead, religious liberty rights are best protected by equal enforcement under the law.

A. Treating Religious Arbitration Different from Secular Arbitration Violates the FAA

Arbitration garnered significant respect from most of the legal community within the past century, and today, extrajudicial tribunals are empowered by the FAA in state and federal courts.[3] Arbiters have become more specialized as demand for non-litigative solutions skyrocketed.[4] Where faith norms misalign with modern jurisprudence, religious communities have increasingly turned to arbitration for satisfactory justice.[5] Modern American religious tribunals are not related to the ecclesiastic jurisdiction of medieval Europe.[6] Instead, modern religious arbitration jurisprudence builds directly on the solid foundation of secular arbitration under the FAA and should be treated as such.[7]

i. The Development of the FAA and Arbitration Jurisprudence

Legally enforceable arbitration is a new tool nestled within the old arsenal of settling disputes.[8] Dispute settlement evolved as American jurisprudence shifted away from Traditionalist justice in the nineteenth century which had customarily prioritized litigation under the direct

[3] MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST 5 (Oxford Univ. Press 2017).
[4] Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1306 (1985).
[5] BROYDE, *supra* note 3, at 8, 27.
[6] *Id*. at 7–8.
[7] *Id*. at 22.
[8] *Id*. at 5.

supervision of courts.[9] With Industrialization came the development of a more contextual jurisprudence, demanded by new participants in the legal system.[10] Businesses became more sophisticated, and in response to their evolving concerns, contract law customization proliferated.[11] To structure and meet extralegal expectations, arbitration provisions within contracts are an alternative to the weaknesses of litigation: lengthy and costly process, faulty interpretation of industry customs, and harm to business relationships.[12] With specialized agreements, parties can establish shared expectations on how to meet their contractual obligations beyond what statute or common law requires.[13] However, before the twentieth century, most courts were unwilling to lend their authority to arbiters.[14] When enforcement of arbitration awards were required by wronged parties, judges were unsympathetic.[15]

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[9] *Id*. at 4, 6; for an example of Traditionalism, see the tired dicta found in *Pennoyer v. Neff*, 95 U.S. 714, 722–25 (1878).
[10] BROYDE, *supra* note 3, at 6.
[11] *Id*. at 5–6.
[12] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 119–21, 124–30, 148–51, 157 (1992).
[13] BROYDE, *supra* note 3, at 35–37. For example, *see* section on "Religious Groups Taking Back Control Over Marriage."
[14] *Id*. at 5; *e.g.*, Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) ("[A citizen] cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented. . . . They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.").
[15] An example of judicial antipathy for arbitration is *Hartford Fire Ins. Co. v. Hon*, 92 N.W. 746, 748 (1902);

> An agreement . . . that neither party should maintain an action on a contract either at law or in equity,—any controversy to arise to be referred to arbitration,—cannot be enforced, upon the theory that the powers of all the courts may always be invoked by every citizen for the protection of his rights; that the enforcement of a valid and subsisting cause of action is a substantial right; and that he cannot be held to have bartered that away by any agreement made before it arose.

The cogs of common law move slowly and hesitantly: courts in America were reluctant to embrace arbitration as they perceived the practice as a threat to court access and jurisdiction.[16] While the notoriously libertarian *Lochner*-era Supreme Court jurisprudence (1897‑1937) was expansive in granting unenumerated constitutional rights to individuals,[17] civil courts perceived arbitration as a means by which the uninitiated (i.e., non-lawyers) could practice law.[18] Without legislative legitimacy, an unhappy party to an arbitration clause could petition the court to toss the provision out and litigate the controversy anyway: "the general rule as to arbitrations . . . is that a party may at any time, before award made, revoke the authority of the arbitrators."[19] American courts frequently refused requests to compel arbitration despite explicit contractual language to the contrary.[20] Where arbitration was allowed to occur,

[16] Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 484 (1995) ("[a] dispute settled by an arbitrator could be appealed to an American court and essentially be treated as though it had never been investigated before.").

[17] Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 5 (1991) (Supreme Court *Lochner*-era cases have "long been described (and decried) as attempting to resolve constitutional questions by application of abstract concepts drawn from a blend of natural and common law.").

[18] United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008 (S.D.N.Y. 1915) ("Arbitration may be a condition precedent to suit, and as such valid, if it does not prevent legal action, or seek to determine out of court the general question of liability."); Burchell v. Marsh, 58 U.S. 344, 351 (1854) ("If . . . it appeared that the arbitrators had made a specific allowance of damages for the slanders, . . . it would have been annulled, to that extent at least, as beyond the submission. But it cannot be inferred that the arbitrators went beyond the submission, merely because they may have admitted illegal evidence about the subject-matter of it.").

[19] Pepin v. Societe St. Jean Baptiste, 49 A. 387, 388 (R.I. 1901).

[20] For an excellent article on this issue, see Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L. J. 769, 769–822 (2015) (see section on "The Translation Problem" for more analysis on this problem).

invasive oversight from the courts followed.[21] Cases from America's *fin de siècle* grappled with competing values of contractual customization and whether arbiters could establish liability which was traditionally the court's jurisdiction.[22] At the end of the nineteenth century, the Supreme Court articulated an unwieldly distinction between arbitration clauses after disputes arise and clauses signed prior to a controversy.[23] The Court legitimized only the former method of dispute-settlement.[24]

Following the lead of New York and the extremely well-received New York Arbitration Act of 1920,[25] Congress answered cries against judicial bullishness with enforceable arbitration by legislating the Federal Arbitration Act (FAA) in 1925.[26] The FAA declared "valid, irrevocable, and enforceable" any written arbitration provision regarding "a contract evidencing a transaction involving commerce."[27] Respecting courts' wariness of arbitration, Congress allowed for common law defenses to repudiate such awards and clauses as any contract might allow.[28] The Act also provided an avenue for parties to petition courts for a stay of litigation where an arbitration clause exists so that a conflict did not require full civil adjudication before arbitration begins.[29] But, even so, the *Lochner*-enthralled Supreme Court resisted

[21] *Burchell*, 58 U.S. at 351 ("If [arbiters] have given their honest, incorrupt judgment on the subject-matters submitted to them, after a full and fair hearing of the parties, they are bound by it; and a court of chancery have no right to annul their award because it thinks it could have made a better.").
[22] Broyde, *supra* note 3, at 5.
[23] Supreme Council of Order of Chosen Friends v. Forsinger, 25 N.E. 129, 130 (Ind. 1890) ("It is obvious that there is a distinction between cases where the agreement that the decision of designated persons shall be conclusive is made after a dispute has actually arisen, and cases where it is made prior to the existence of any controversy.").
[24] *Supreme Council of Order of Chosen Friends*, *supra* note 23, at 130.
[25] N.Y. C.P.L.R. §§ 7501–7514 (2012); Hirshman, *supra* note 4, at 1328, 1305.
[26] N.Y. C.P.L.R. §§ 7501–7514 (2012); Hirshman, *supra* note 4, at 1328, 1305.
[27] Arbitration Act, 43 Stat. 883 (1925).
[28] *Id*.
[29] *Id*.

requests to legitimize arbitration. During the height of unions and collective bargaining, courts sometimes read the FAA as narrowly as possible.[30] Where the expansive language of Congress could imply legitimacy to any written arbitration clause by valid contract, courts interpreted the FAA to apply only in federal law, and states were left to their own piecemeal statutory protections for and against arbitration.[31] In cases of fraud, circuits were split on whether arbitration clauses were severable from contracts as a matter of federal law or whether an arbitration provision's survivability depended on a state statute which required litigation—the duplication of the exact effort that the FAA sought to prevent.[32]

The FAA did not unquestionably apply to both states and federal courts until the 1980s.[33] In *Southland Corp. v. Keating*, the Supreme Court finally addressed discrepancies across circuits in arbitration clause enforcement.[34] The Court found that the FAA had mandated

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[30] Hirshman, *supra* note 4, at 1328, 1364.

[31] Bernhardt v. Polygraphic Co. of Am., 122 F. Supp. 733, 734 (D. Vt. 1954) ("There is no statutory law governing arbitration in Vermont; common law rules must, therefore, necessarily apply. The common law rule is that an agreement to submit an issue to arbitration is not binding and is revocable at any time before an award is actually made by arbitrators.").

[32] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (holding that arbitration provisions are severable from the contracts they are contained in under federal law); Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915 (2nd Cir. 1961) (holding that arbitration provisions may be severable under state law).

[33] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[34] For more on this, see *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184 (2021). The conclusion of this article is worth quoting:

> Getting things right matters, but it is not the only aim of a mature and cohesive legal system. For nearly forty years now, Southland and its progeny have endured harsh scholarly and judicial criticism, but to no avail. While a judicial retreat or a strict constructionist approach to interpreting § 2 might have been plausibly defensible at one time, they are no longer so. A substantive FAA is now our law, and state courts remain primarily responsible for applying it. The only remaining question is whether, absent

a national policy in favor of arbitration; indeed, state laws prohibiting arbitration violated the supremacy of the federal government.[35] Where states allow litigation to continue without appeal after an arbitration clause is struck down, the "core purpose of a contract to arbitrate" is defeated.[36] Neither state nor federal government could require a judicial forum to resolve claims where the contracting parties had previously agreed to arbitration after *Southland*.[37] The Supreme Court outlined only two limitations on arbitration enforceability: (1) the arbitration provision must be part of a written contract "evidencing a transaction involving commerce"; and (2) the usual protections for contracts at law and in equity apply.[38] While the FAA narrowed grounds to overturn arbitration provisions or awards,[39] courts may overturn arbitrations awards on public policy or unconscionability.[40]

ii. The History and Re-Emergence of Faith-Based Dispute Settlement

Not all modern religious conflicts involve sacerdotal or ecclesiastical matters of church doctrine and governance.[41] Instead, property, employment, family, torts,

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congressional participation, state courts will accept the lamentable but unavoidable federalization of state contract law.

[35] *Id*. at 10.
[36] *Id*. at 7–8.
[37] *Id*. at 31 (O'Connor, J., dissenting) ("It is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary local procedure.").
[38] *Id*. at 10–11; *see also id*. at 7 ("Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.")
[39] Hirshman, *supra* note 4, at 1308; for more information on religious tribunals *see Abd Alla v. Mourssi*, 680 N.W.2d 569, 572 (Minn. Ct. App. 2004) (holding that that parties must "clearly demonstrate" arbitration process was tainted to overcome federal policy for arbitration deference).
[40] Arbitration Act, 43 Stat. 883.
[41] Broyde, *supra* note 3, at 138–39.

and transactional matters occupy the legal concerns of religious parties especially where they seek to privately solve disputes.[42] Faith-based arbitration has paved the way for religious communities to settle their civil disputes in accord with their beliefs.[43] As co-religionists and others attempt to resolve their mundane disputes using faith-based principles, religious arbitration awards require enforcement from secular courts where necessary.

In James Madison's *Memorial and Remonstrance* (1785), he defined religion as "the duty which we owe to our Creator and the manner of discharging it"—marking the rare moment where a Founder spilled ink on the meaning of religion.[44] Today, religiously observant Americans find that state and federal legal systems sometimes make it difficult to discharge their duties to their God within the dispute-settlement process.[45] Mainstream culture and jurisprudence have followed the majority of Americans into agnostic morality.[46] As Americans have become less religious, both politically and culturally, some of the faithful have become more entrenched in their beliefs.[47] Early Anabaptists chose to completely divorce from secular society to discharge their duty—embracing the wall of separation metaphor from the Old Testament.[48] But in an interconnected economic world, requiring that groups sequester themselves to freely exercise their religion when faith norms are misaligned with civil law

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[42] *Id*. at 157 (illustrating hypothetical differences in tort goals between common and Jewish Law).
[43] Michael A. Helfand, *Litigating Religion*, 93 BOS. UNIV. L. REV. 493, 533–34, 550 (2013).
[44] John Madison, *Memorial and Remonstrance against Religious Assessments* (1785) (cited by JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 34, 35–36 (4th ed 2016).
[45] BROYDE, *supra* note 3, at 41–44 (*see* first section in chapter three *Co-religionist Commerce is Better Adjudicated in Arbitration*).
[46] *Id*. at 37.
[47] *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1992).
[48] BROYDE, *supra* note 3, at 37; *Ephesians* 2:14–16.

is absurd.[49] Instead, these groups have successfully balanced secular and religious laws in their daily lives since America's conception, and their historical and legal experiences have created a desire for faith based forums and private dispute settlement today.[50]

In colonial America, some Protestants were religiously opposed to common law's adversarial practices and leaned into arbitration conducted by church courts.[51] Early American Jewish communities also preferred religious dispute resolution over secular.[52] Similar to Christianity, Judaism requires religious courts, or *batei din*, to resolve disputes.[53] During the 1910s, Jewish communities in New York and Maryland petitioned for legitimization of their

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[49] BROYDE, *supra* note 3, at 9.

[50] Bernstein, *supra* note 12, at 115 ("The diamond industry has systematically rejected state-created law."); BROYDE, *supra* note 3, at 41–45.

[51] The Constitution originally allowed for a synthesized approach to both religious and civil laws in the states. Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 510 (2012). But the First Amendment, and its later incorporation against the states, ended the practice of religious adjudication. U.S. CONST. amend. I; *Walter* at 512. Religious institutions were limited in early enforcement of their justice as their harshest penalty was typically excommunication-oriented. *Id.* Most enforcement of independent religious adjudication evaporated with Industrialization, fueled by the ease with which wrong-doers could relocate without consequence. *Id.* In the late nineteenth century as religious diversity flourished, faith tribunals lacked the community's consent to dispute resolution altogether. *Id.* at 513. Ultimately, religious institutions ceded their jurisdiction over co-religionist issues to civil courts ending the dual jurisdictions of church and state inherited from England. *Id.* at 511. In turn, civil courts tightened their reins on adjudicatory authority. *Id.* at 513. By the late 1800s, colonial style religious arbitration lingered only in minority communities, most notably within Mormonism. *Id.* For historical analysis, see JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 22 (1983) (describing an American town in 1630s with promulgated law that required arbitration before litigation for conflicts between all members of the local congregation) and BROYDE, *supra* note 3, at 7, 78–79.

[52] Rabea Benhalim, *Religious Courts in Secular Jurisdictions,* 84 BROOK. L. REV., 3, 749-50, 758 (2019).

[53] Michael J. Broyde, Ira Bedzow, & Shlomo C. Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 HARV. J. ON RACIAL & ETHNIC JUST. 33, 36 (2014).

tribunals' judgments, and where granted, Jewish tribunals flourished under protections like the Municipal Court Act of 1915 in New York.[54] Community organizations soon developed to arbitrate Jewish conflicts with statutory approval.[55] Within thirty years, New York City had three different iterations of arbitral tribunals for its Orthodox population.[56] The Beth Din of America, established in 1960, developed a network of Jewish Law courts to adjudicate disputes.[57] Similarly, since the millennium, Fiqh, or Islamic dispute resolution tribunals, have taken root in American Muslim communities.[58]

Modern religious arbitration is an American legal reality. "Biblically based" forums designated by arbitration agreements are enforceable when conducted consistent with the FAA.[59] For example, Peacemaker Ministries, the largest Christian arbitration organization in the United States, has been in operation for over thirty years and has assisted over half a million Christians through conflict resolution.[60] The Beth Din of America is a religious arbitration forum that "obtain[s] Jewish divorces, confirm[s] personal status and adjudicate[s] commercial disputes stemming from divorce, business and community issues" and operates in most states.[61] The Beth Din addresses around 400 family law matters per year and around 100 commercial disputes per

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[54] Walter, *supra* note 51, at 514.
[55] *Id*. at 514.
[56] BROYDE, *supra* note 3, at 80.
[57] Broyde, Bedzow, Pill, *supra* note 53, at 36.
[58] *Id*. at 43.
[59] BROYDE, *supra* note 3, at 15–17; *e.g.* Woodlands Christian Academy v. Weibust, No. 09-10-00010-CV (Tex. App. October 7, 2010); Easterly v. Heritage Christian Schools, 107 Fair Empl. Prac. Cas. (BNA) 173 (S.D. Ind. 2009).
[60] BROYDE, *supra* note 3, at 17; *Frequently Asked Questions*, Peacemaker Ministries, https://www.peacemakerministries.org/ (last visited Mar. 2021); Walter, *supra* note 51, at 521.
[61] Abdul Wahid Sheikh Osman, *Islamic Arbitration Courts in America & Canada?*, HIIRAAN ONLINE https://bit.ly/31PwT8Y (last visited Mar. 2021); *see generally* BROYDE, *supra* note 3, at 14–16.

year.[62] The Jewish method of arbitration earned respect from the judiciary despite its procedural differences:[63] the Beth Din "method of arbitration has the imprimatur of our own judicial system, as a useful means of relieving the burdens of the inundated courts dealing with civil matters."[64] Conversely, Islamic dispute resolution operates on a smaller scale because of community structures in America,[65] theological conflicts over whether Shari'a law can operate in non-Islamic jurisdictions,[66] and racism from outside the community.[67] In recent years, Shari'a tribunals have built positive precedential support in civil courts.[68] While Islamic arbitration agreements are a recent development, courts generally respect the mutual consent of the parties to use Islamic principles and institutions in private disputes.[69]

The typical form of religious arbitration generally takes place between co-religionists, where the faithful choose to comingle religious and secular expectations as

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[62] Walter, *supra* note 51, at 521.
[63] *See generally* Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 N.Y. L. SCH. L. REV. 287 (2012–2013).
[64] Mikel v. Scharf, 85 A.D.2d 604 (App. Div. 1981) (affirming reward granted by religious tribunal); Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343 (D.C. 2005) (allowing religious arbitration within Beth Din to continue).
[65] Michael J. Broyde, *Shari'a and Halakha in North America: Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI. KENT L. REV. 111, 113–14 (2015).
[66] BROYDE, *supra* note 3, at 20.
[67] Osman, *supra* note 61.
[68] Jabri v. Qadurra, 108 S.W.3d 404 (Tex. App. 2003); Abd Alla v. Mourssi, 680 N.W.2d 569 (Minn. Ct. App. 2004).
[69] *Compare* CYNTHIA BROUGHER, APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES 3 (2011) ("Though some of the legal ramifications of these Islamic arbitration agreements are still unclear, *courts have in most respects treated them no differently than other arbitration agreements*. Such agreements reflect the mutual consent of the parties to use Islamic principles and institutions in subsequent disputes.") *with* Gregory C. Sisk and Michael Heise, *Muslims and Religious Liberty in the Era of Post 9/11: Empirical Evidence from the Federal Courts*, 98 IA. L. REV. 291 (2012) (finding Muslim free exercise claims disproportionally fail in federal court).

they enter into pragmatic contractual relationships.[70] Co-religionist commerce is a sophisticated practice, and the current legal framework for religious agreements require civil enforcement and contract choice of forum law to direct disputes to religious tribunals.[71] Voluntary agreement between parties is paramount for civil courts to accept faith-based arbitration awards.[72] Both dispute resolution processes, secular and faith-based, have judicial oversight to prevent "bargaining naughtiness."[73] Under the FAA and derivative state laws, the paradigm is procedural due process.[74] Religious arbitration must echo the procedural norms of the secular; otherwise, civil courts will refuse to enforce awards.[75] Though generally deferential to private dispute resolution, courts may overturn awards on grounds of unconscionability or its close cousin, public policy.[76]

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[70] BROYDE, *supra* note 3, at 38; *see generally* Helfand & Richman, *supra* note 20.
[71] Helfand & Richman, *supra* note 20, at 773.
[72] BROYDE, *supra* note 3, at 150.
[73] Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 UNIV. PA. L. REV. 485, 487 (1967).
[74] BROYDE, *supra* note 3, at 145–146, 150 ("Arbitral tribunals must accept that secular courts will be powerless to enforce their awards unless they satisfy the minimal technical requirements set by the secular law arbitration framework.").
[75] For an audacious example of a nullified agreement that mixed civil law and tribal law (which is similar to religious law), see Hayes v. Delbert Services Corporation, 811 F.3d 666, 669 (4th Cir. 2016). A non-Native American entered into a payday loan with a non-Native American business which had already "violated a host of state and federal lending laws." *Id*. at 669. The contract had an arbitration clause requiring adjudication through the Cheyenne River Indian Reservation in South Dakota. *Id*. As the loan contained interest percentages at great disadvantage to the borrower, and the cited Indian Reservation contained no usury statutes, the religious arbitration clause was struck down as pretext to skirt state law. *Id*. at 676. The court recognized that "[t]he FAA confers near plenary authority on an arbitrator to resolve a dispute given to him by an arbitration agreement," but where there is obvious fraud: "The just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce." *Id*. at 671.
[76] There is a dispute as to whether public policy overturning arbitration awards is still valid. However, the close cousin of public policy is unconscionability, and courts seem more comfortable creating contractual limitations through unconscionability rather than public policy. BROYDE, *supra* note 3, at 25; *e.g.*,

A case study by Lisa Bernstein highlights the benefits and pitfalls of commercial extralegal arbitration for the religious: look to the New York Diamond Dealers Club ("DDC").[77] The New York DDC is "a member of the World Federation of Diamond [trading club]" where membership allows access to the global diamond industry.[78] The DDC handles around 80% of rough diamonds entering America.[79] As the organization has a significant ultra-Orthodox Jewish membership, they have created an extralegal process that requires consent to religious arbitration before members may access the association.[80] Where conflicts between members arise, arbitrations occur quickly to mitigate damages to the victim.[81] Without general rules similar to those in civil law to limit overwhelming liability,[82] damage awards are an "uncertain component" to a successful arbitration.[83] There are internal and formal appeals processes for disappointed parties, but no findings of fact and rarely are decisions written in a reasoned way.[84] Within a small, insular

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Easterly v. Heritage Christian Schs., 107 Fair Empl. Prac. Cas. (BNA) 173 (S.D. Ind. 2009); Rabinowitz v. Olewski, 100 A.D.2d 539; 473 N.Y.2d 232 (2d Dept. 1984) (where the court ordered a stay of DDC arbitration and directed the case to be adjudicated by an independent arbiter when a scandalous letter about the plaintiff was discovered to be written by members of the club, creating an "appearance of propriety and specter of bias" among the original religious tribunal); Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (court overturned contract for public policy reasons because the agreement forbid divorce entirely).

[77] Bernstein, *supra* note 12, at 115–157. For a more recent review of this, *see also* Barak D. Richman, *An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange*, 9 J.L. ANALYSIS 247–283 (2017).

[78] *See* BARAK RICHMAN, STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE (Harv. Univ. Press, 2017); Bernstein, *supra* note 12.

[79] Bernstein, *supra* note 12, at 119.

[80] *Id*. at 115.

[81] *Id*. at 126.

[82] University of New Mexico, *Remedies for Breach of Contract*, Judicial Education Center, jec.unm.edu (last viewed Mar. 2021); Bernstein, *supra* note 12, at 120 n.6.

[83] Bernstein, *supra* note 12, at 127.

[84] *Id*.

community, close personal relations foment bias.[85] But the arbiters are experts in industry custom,[86] and most importantly, the dispute resolution process is private—a quality that both members and the association prefer.[87]

B. Treating Religious Arbitration Different from Secular Arbitration Violates the Constitution

The U.S. legal system views disputes among the religious as a Gordian knot—judges are more willing to slash through the issue or forego it altogether rather than untangle it.[88] With confused jurisprudence as a guide, the faithful have navigated a difficult journey when they attempt to enforce their agreements with secular damages.[89] The First Amendment provides that: "Congress shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof [. . .]."[90] But where individuals consent to enshrine religious doctrine within their civil contracts over mundane matters the civil legal system's grounds are unstable, and the faithful find inadequate justice when enforcing their claims.[91] Alternatively, arbitration law has formed a sturdy foundation for private dispute resolution outside the legal system but it requires enforcement and legitimization from courts. Where American jurisprudence is misaligned with religious morality, the faithful may practice their norms in civil disputes through choice-of-forum clauses that identify extralegal religious tribunals as arbiters. To enforce religious arbitration clauses differently

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[85] *Id*. ("Many dealers feel that arbiters have redistributive instincts. . . .").
[86] *Id*. at 134; BROYDE, *supra* note 3, at 6.
[87] Bernstein, *supra* note 12, at 135–138.
[88] *See* Paul Kersey, *Anybody Got a Sword? The Gordian Knot of Binding Arbitration*, MACKINAC CENTER FOR PUB. POL'Y (Jan. 28, 2010), https://www.mackinac.org/12026.
[89] Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 172 (2012).
[90] U.S. CONST. amend. I.
[91] Baker, *supra* note 89, at 172.

than secular is unsupported by the Constitution and would hamper religious liberty.

i. The Establishment Clause Does Not Support Religious Exemptions in Contract

Like all Americans, the faithful engage in mundane commerce within and outside of their communities, and the faithful are often embroiled in disputes over their mundane interpersonal dealings, both commercial and personal.[92] Unlike all Americans, the faithful occupy a unique position in American jurisprudence—the legal system treats religious parties cautiously, and courts are often unwilling to involve themselves in religious disputes.[93] The anthem of separation between church and state is a frequent citation,[94] and as a result, judges have developed the "neutral principles of law" doctrine to justify their tentative hand on religiously influenced disputes.[95] With rulings based on neutral principles, or "objective, well-established concepts of law," the courts soothe their concerns that adjudicating religious disputes "would impermissibly contravene prevailing interpretations of the Establishment Clause."[96] But inconsistent treatment of faith-based tribunals jeopardizes the rights of the co-religionists to the free exercise of religion. Some advocate for contextual resolutions of religious disputes within civil courts,[97] but the reality is this: faith-based arbitration is a powerful venue for reasonably

[92] BROYDE, *supra* note 3, at 42; Helfand & Richman, *supra* note 20, at 771.
[93] Helfand & Richman, *supra* note 20, at 771.
[94] Helfand & Richman, *supra* note 20, at 771 n.10 ("Although the reasons for this constitutional restriction vary, most scholarly treatments contend that the Establishment Clause erects structural or jurisdictional barriers to courts' ability to interfere with the authority of religious institutions to govern religious life.").
[95] Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) ("'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)).
[96] Helfand & Richman, *supra* note 20, at 773.
[97] *Id*.

addressing and resolving conflicts between the religious in accord with their principles and beliefs.[98]

In civil courts, the neutral principles doctrine robs co-religionist parties of the right to settle disputes in line with religious practice even where parties have outlined their expectations explicitly in contract.[99] Courts will not interpret religious doctrine robustly for fear of evoking the religious question doctrine, but if co-religious contracts describe religious terms in excruciating detail, the courts may have Establishment Clause concerns and refuse to adjudicate altogether.[100] Merely transposing religious doctrine into the key of secular language and then playing the translated material for judicial analysis deprives the faithful of their right to contract out expectations and guarantees most courts rule blindly in co-religionist conflicts.[101] Sidestepping the Establishment Clause problems and tying religious doctrine into contracts through reference fails to serve justice. In secular conflicts, courts struggle with whether to include context or parole evidence when interpreting ubiquitous contracts; however, courts nearly always prefer strict textual interpretations of religiously tinged contracts.[102] Ultimately, co-religionists who wish to incorporate religious doctrine into their voluntary contracts are trapped in a lose-lose situation when seeking secular enforcement.

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[98] BROYDE, *supra* note 3, at 22.
[99] *Id*. at 43; Helfand & Richman, *supra* note 20, at 776 ("Parties to co-religionist commercial agreements often lack the flexibility to replace religious terms in their agreements with secular terms, and therefore cannot contract around the Establishment Clause."); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1884–85 (1998) (investigates concerns that the neutral-principles approach may create outcomes that "are likely to diverge from the actual understandings of those concerned.").
[100] BROYDE, *supra* note 3, at 42–44; Helfand & Richman, *supra* note 20, at 773, 779–86 (see section on "The Translation Problem" for more analysis on this problem).
[101] BROYDE, *supra* note 3, at 50.
[102] *Id*. at 43.

Faith-based arbitration is necessary for commerce within some faith communities, and arbitration clauses are signed frequently by co-religionists in commercial contracts.[103] An obvious example is the $12.5 billion kosher-food market in the United States.[104] Jewish Law requires its practitioners consume foods with specific preparations—a near impossibility for consumers to ascertain with contemporary supply chains.[105] In response, rabbinical organizations have created a nonlegal oversight method to certify kosher, or religiously approved, foods.[106] As kosher is defined by the religious laws of Judaism,[107] states seeking to regulate kosher food through statute often lose lawsuits to Establishment Clause claims.[108] Instead, the faithful are left with private law claims against fraudulent sales, but the neutral principles doctrine limit religious restitution in civil awards.[109] Spiritual harms are incalculable and ignored by the courts, while physical damage through consumption of forbidden foods is minimal.[110] Further, the definition of kosher exists within a spectrum of rabbinical authorities.[111] Sophisticated kosher

[103] Helfand & Richman, *supra* note 20, at 783–86 n.53; Michael A. Helfand, *Arbitration, Transparency, and Privatization: Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3016 (2015) (stating the Best Din of America, a rabbinical court in the U.S., has seen a large increase in arbitration cases before it.

[104] Helfand & Richman, *supra* note 20, at 771 ("[I]n the United States . . . a $4.6 billion Christian-products industry, a $12.5 billion kosher-food market, and a growing share of an $800 billion global Sharia-compliant finance market.").

[105] TIMOTHY D. LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD (Harv. Univ. Press, 2013).

[106] *See generally* Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 FLA. ST. UNIV. L. REV. 509 (2004).

[107] KASHRUT.COM, *Kashrus Agencies*, http://www.kashrut.com (last visited Oct. 22, 2020).

[108] LYTTON, *supra* note 105, at 35–69.

[109] *Id*. at 129.

[110] *Id*.

[111] *Id*. at 35–69.

consumers argue about nuances in preparation that,[112] if brought to litigation, would require courts to parse through religious doctrine to rule—another probable violation of the Establishment Clause.[113] Dietary restrictions are nonunique to Judaism; Seventh-Day Adventists, Hindus, and Muslims also follow this practice.[114] However, unlike the Jewish, these groups lack robust supervision and enforcement of their religious dietary practices,[115] and American antipathy towards Islam disincentivizes businesses from collaborating with Muslims in nonlegal certification processes.[116] Where nonlegal regulatory practices fail, the faithful require secular enforcement of contracts that allow for religious tribunals.

Family frequents the intersection between religious and civil law. In America, divorce and marriage have grown more inclusionary throughout the last century but many religions have maintained stricter definitions of family.[117] The modern American family takes many forms, and similarly, religious unions add to that diversity.[118] However, faith norms around marriage and finance may conflict with statutes, common law, or popular culture.[119] While religious groups face discrimination in America, the tragedy of 9/11 and subsequent wars impacted Muslims in unique ways.[120] American attitudes shifted against American Muslims and

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[112] *Id*. at 70–103.
[113] *Id*. at 129; Helfand & Richman, *supra* note 20, at 800–03 (see also "Sabbath Partnership Agreements" section for more analysis).
[114] LYTTON, *supra* note 105, at 155; Sigman, *supra* note 106, at 540–43.
[115] LYTTON, *supra* note 105, at 155.
[116] LYTTON, *supra* note 105, at 155; Sigman, *supra* note 106, at 540–43.
[117] Jamie Alan Aycock, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J.L. & PUB. POL'Y 231, 232 (2006). *See generally* Susan Milligan, *The New Culture Wars*, U.S. NEWS (Sept. 25, 2015); BROYDE, *supra* note 3, at 31.
[118] BROYDE, *supra* note 3, at 29–31.
[119] *Id*. at 22 ("The legal system in America will not honor religious arbitration of family or any other matters unless lawmakers and judges can be confident that religious arbitration is just and proper as understood by secular law and society.").
[120] *Id*. at 25–26; WITTE & NICHOLS, *supra* note 44, at 244.

their culture,[121] and this antipathy is reflected in recent legislation trends towards "anti-Shari'a" laws or the more nebulous bans against "anti-foreign" laws.[123] These laws address redundant fears—"the Supremacy Clause of the United States Constitution, which renders the Constitution as the supreme law of the land and supersedes any other law in conflict, operates as a clear backstop for the wrongful imposition of foreign or religious law."[124] The key phrase within the Supremacy Clause here is *wrongful imposition.*[125] Unfortunately, writers and interpreters of the law are not immune to popular sentiments and bias.[126]

As American judges skew disproportionally to the majority population,[127] minority religious communities are often misunderstood.[128] As is often the case, members of the majority struggle to understand the values and practices of the minority.[129] Political and cultural attitudes have led to unique challenges for Islamic alternative dispute resolution.[130] For example, while prenuptial agreements are

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[121] BROYDE, *supra* note 3, at 25–26; WITTE & NICHOLS, *supra* note 44, at 244.
[123] WITTE & NICHOLS, *supra* note 44, at 245 n.78 (Alabama, Arizona, Florida, Kansas, Louisiana, North Carolina, Oklahoma, South Dakota, Tenenessee andn Washington); *Id*. at 245 n.79 (Arizona, Kansas, Oklahoma, Tennessee, Florida, North Carolina, and South Dakota).
[124] *Id*. at 245.
[125] U.S. CONST. art. VI, para. 2.
[126] BROYDE, *supra* note 3, at 26.
[127] PEW RSCH. CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE (May 12, 2015), https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/; *More Americans than Ever Spurning Religion*, CBS NEWS & ASSOCIATED PRESS (May 12, 2015, 10:50 AM), http://www.cbsnews.com/news/study-number-of-americans-who-spurn-religion-hits-record-high/ (last visited Oct. 2016); Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. UNIV. L. REV. 587 (2011).
[128] Muslim claims for free exercise lose disproportionally to other religions; *see* Sisk & Heise, *supra* note 69, at 291 (2012); Akileh v. Elchahal, 666 So. 2d 246, 248–49 (Fla. Dist. Ct. App. 1996); Katz v. Singerman, 241 La. 103, 118–55 (La. 1961).
[129] Scherer, *supra* note 127, at 587.
[130] Aseel Ah-Ramahi, *Suhl: A Crucial Part of Islamic Arbitration*, LAW, SOCIETY, AND ECONOMY WORKING PAPERS 21–22 (Dec. 2008),

a common practice for secular marriages and many secular prenups include enforceable arbitration provisions,[131] some religious prenuptial agreements with references to Islam are warily scrutinized.[132] The *ketubah* in Judaism serves as both a ritual transaction and as a religious symbol that signing brides and grooms rarely read and do not always intend to be legally binding.[133] Likewise, Islamic *mahr* agreements between a groom and bride require the husband to make timed payments to his wife for specific purposes—sometimes withholding one payment in trust until divorce or death of the husband.[134] The *ketubah* and *mahr* serve similar purposes, but political backlash is predominately preoccupied with the Islamic agreement.[135]

Critics of Shari'a accurately cite to the greater rights afforded to husbands rather than wives under Shari'a law,[136] but to ban the faithful from outlining their personal contracts does not protect women.[137] Both Canada and Great Britain

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https://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-12-Al-Ramahi.pdf.

[131] SAMUEL GREEN & JOHN V. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS § 2.07 (1984 & Supp. 1997).

[132] *Compare* Berg v. Berg, 926 N.Y.S.2d 568, 569–70 (N.Y. App. Div. 2011) (Court enforced award where Jewish arbitrator awarded child support greater than set forth under New York's statute), *with* Soleimani v. Soleimani, No. 11CV4668, 2012 WL 3729939, ¶ 27 (Kan. Dist. Ct. Aug. 28, 2012) ("[Islamic marriage agreements] stem from jurisdictions that do not separate church and state, and may, in fact, embed discrimination through religious doctrine.").

[133] Helfand & Richman, *supra* note 20, at 799–800. Participants in the Jewish faith who want a prenuptial agreement use a religious prenuptial agreement whose text can be found here: https://theprenup.org/. Indeed, the problem of 'stale' religious contracts is an important one—and one Broyde has addressed elsewhere. *See* Michael J. Broyde, *Faith-Based Private Arbitration as A Model For Preserving Rights And Values In A Pluralistic Society*, 90 CHI.-KENT L. REV. 111, 129–133 (2015) (discussing *ketubah*).

[134] Helfand & Richman, *supra* note 20, at 798–99.

[135] Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & REL. 379, 413 (2009).

[136] *Id*.

[137] Osman, *supra* note 61; Party Yards, Inc. v. Templeton, 751 So. 2d 121, 123 (Dist. Ct. App. 2000) ("[a] claim that a contract is illegal and, as in this case, criminal in nature, is not a matter which can be determined by an arbitrator. An

have grappled with Shari'a accommodations in family law, and through a policy of hostility, both nations pushed the faithful to contract in the shadows.[138] Without legal license, women lose access to public policy protections when married like judicial review of contractual consent and remain invisible to civil law.[139] As such, the faithful who wish to enshrine the doctrine within family law face unequal justice and discrimination.

Theological interpretation may be required to understand and enforce civil contracts between co-religionists.[140] However, due to separation of church and state and the neutrality doctrine, American courts treat co-religionist contracts differently to the detriment of co-religionists' practices. [141] As a result, their rights to exercise their religion are violated when co-religionist contracts and religious tribunals are held to unequal standards in secular arbitration.[142] Today, current American jurisprudence has created a space for legitimate religious dispute settlement under contract law.[143]

ii. The Free Exercise Clause Does Not Support Religious Exemptions in Contract

The Founders contemplated liberty of conscience rights and whether to enumerate them within the Free Exercise clause of the Constitution.[144] They agreed that, in

arbitrator cannot order a party to perform an illegal act. Further, the FAA puts arbitration clauses on an equal footing with other clauses in a contract. It does not put such clauses above state law or other contractual provisions.").

[138] Bambach, *supra* note 135.

[139] *See In re Marriage Dajani*, 129 Cal. App. 2d 1387 (1988).

[140] Helfand & Richman, *supra* note 20, at 803.

[141] *Id*. at 803–10.

[142] *Id*. at 809.

[143] *Id*. at 822.

[144] Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, COMMON INTERPRETATION (last visited Oct. 26, 2020), https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265.

order to have religious freedom, liberty of conscience was required so that one could determine their religious conscience and act on it unfettered from government interference.[145] The Founders also agreed that the rights to the free exercise of religious conscience consist of three prongs: (1) *voluntarism*, or "the unencumbered ability to choose and to change one's religious beliefs and adherences, and the unfettered freedom to believe that which is dictated by one's heart and mind;"[146] (2) *nondiscrimination* through prohibitions against penalizing or inducing religious choices;[147] and (3) *exemptions* from majoritarian laws that harmed religious minorities for practicing their beliefs.[148] However, nearly all articulated liberty of conscience rights limit the extent to which one may freely act on the religious dictates of the conscience,[149] and the public peace or private rights of others were prioritized over total free exercise of conscience.[150] Though the conscience language survived several drafts of the First Amendment, it was omitted from the final version of the clause without debate.[151]

Liberty of conscience language vanished from the finalized First Amendment, but its echoes linger as the Supreme Court has selectively read conscience rights into the Free Exercise clause.[152] Case law from the 1940s to the present is messy and presents a confused jurisprudence on

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[145] *Id*.
[146] WITTE & NICHOLS, *supra* note 44, at 42. *See generally* Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744).
[147] WITTE & NICHOLS, *supra* note 44, at 42; *see Id*. at 4–45 for state constitution examples of liberty of conscience claims in the Early Republic.
[148] *Id*. at 43, 138 ("[r]eligious exemptions from majoritarian law, Madison and other founders concluded, are sometimes needed to protect the private rights of conscience of religious minorities, and such exemptions naturally flow from the principle of liberty of conscience.").
[149] *Id*. at 43.
[150] *Id*. at 46.
[151] Harrop A. Freeman, *A Remonstrance for Conscience,* 106 UNIV. PA L. REV. 806, 808–812 (1958). *Compare* Appendix 1 *Drafts of Federal Religion Clauses* (1787–1789) *with* U.S. CONST. amend. I).
[152] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

conscience rights.[153] During the Second World War, the Court upheld a school's decision to expel a Jehovah's Witness student for refusing to salute the American flag or recite the pledge of allegiance.[154] Three years later, the Court reversed and held the opposite: another Jehovah's Witness student was expelled for not saluting the flag nor reciting the pledge despite sincere, faith-based reasons against performing either.[155] Here, the Court upheld the student's free exercise rights, enshrining briefly liberty of conscience within constitutional law: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[156] Despite high praise of free exercise liberties, the Court lost sight of the constitutional constellation and chose to limit free exercise in a series of Sabbath Day cases only twenty years later.[157]

During 1961, three cases held against business owners punished for operating on Sundays—an act in violation of statutes outlawing most commercial, recreational, and other laborious activities on Sunday (traditionally the Christian Sabbath).[158] Two cases related to Jewish plaintiffs observing their own Sabbath on Saturday and opening their shops on Sunday to keep kosher for themselves and their clients.[159] Requiring Jewish shops remain closed for two days a week (the Jewish Sabbath by

[153] *See generally Cantwell*, 310 U.S. (incorporating the Free Exercise Clause against states).
[154] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (holding that the school's policy to promote national unity and loyalty outweighed the Jehovah Witness' fears that to obey would be a false form of worship and a sin).
[155] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[156] *Barnette*, 319 U.S. at 642.
[157] McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961*)*; Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617 (1961).
[158] *McGowan* 366 U.S.; *Braunfeld*, 366 U.S.; *Gallagher*, 366 U.S.
[159] *Braunfeld*, 366 U.S.; *Gallagher*, 366 U.S.

choice and Sunday by law) was effectively a penalty for the shopkeepers in exercising their religious liberty and perhaps even a state establishment of the Christian Sabbath.[160] The Court found otherwise—business closure on Sunday laws did not violate free exercise rights of the Orthodox Jewish shop keepers.[161] Although Sunday closure requirements harmed the Jews commercially for observing the Sabbath, the statutes only regulated a store's hours and not its owner's religious practices.[162]

Swift public backlash to these Sabbath day decisions resulted in a rapid about-face when the next liberty of conscience claim came before the Court.[163] In *Sherbert v. Verner*, the Court found for an employee denied unemployment compensation when fired for not working the Sabbath thereby extending liberty of conscience claims to employees after denying them to shop owners.[164] With momentum from the *Sherbert* decision, Free Exercise Clause support for conscience rights reached their zenith.[165] In *Wisconsin v. Yoder*, the Court held the Old Order Amish could request exemptions for their children from Wisconsin's mandatory school attendance to observe the Sabbath.[166] Unlike the 1961 Sabbath day cases which ruled against shopkeepers harmed from practicing their religion, *Yoder* and its progeny read the Free Exercise Clause widely and fully embraced liberty of conscience.[167]

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[160] *McGowan*, 366 U.S. at 467–68 (Douglas, J., dissenting).
[161] *Braunfeld*, 366 U.S. at 601–02; *Gallagher*, 366 U.S. at 630–31.
[162] *Braunfeld,* 366 U.S. at 606; *see also McGowan*, 366 U.S. at 441–44.
[163] WITTE & NICHOLS, *supra* note 44, at 140 (citing Torcaso v. Watkins, 367 U.S. 488 (1961)).
[164] Sherbert v. Verner, 374 U.S. 398 (1963); followed by Thomas v. Review Board, 450 U.S. 707 (1981) (holding that a Jehovah's Witness adherent could refuse to produce parts for military tanks) and *Frazee v. Illinois*, 480 U.S. 136 (1987) (holding that an employee fired for not working on Sabbath was entitled to unemployment benefits). WITTE & NICHOLS, *supra* note 44, at 123.
[165] *See* Paul Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1220 (1974).
[166] Wisconsin v. Yoder, 406 U.S. 205, 205–06 (1972).
[167] WITTE & NICHOLS, *supra* note 44, at 142 (citing *Yoder*, 406 U.S.).

The allure of the conscience has waned, and the Supreme Court has withdrawn from *Yoder*'s broad embrace of the Free Exercise Clause.[168] Even where sincerely held beliefs are found and a religious claimant suffers harm from practicing their religion, free exercise claims—especially accommodations—are weak.[169] Two cases in particular silenced free exercise claims to the liberty of conscience: *Bowen v. Roy* and *Employment Division v. Smith*.[170] In *Bowen*, the Court found against a man's sincere belief that assigning a social security number to his daughter would violate their religion: "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[171] With *Smith*, an employee was fired and denied unemployment for ingesting peyote as a Native American sacramental rite.[172] Justice Scalia, in his opinion against the Native American employee, found 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 . . . .'"[173] Thus, the neutral principles doctrine reigned against free exercise claims and would do so if allowed into religious arbitration claims.[174]

Special state rules governing religious arbitration would violate the 2001 case, *Good News Club v. Milford Central School*.[175] In *Good News*, the state rented out public

[168] *Id*. at 124 (citing Emp't Div. v. Smith, 494 U.S. 872 (1990)).
[169] *See* United States v. Lee, 455 U.S. 252, 260 (1982) ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax"); Goldman v. Weinberger, 475 U.S. 503, 503 (1986) (holding that a soldier could be prohibited from wearing his yarmulke with his uniform); WITTE & NICHOLS, *supra* note 44, at 142.
[170] *Bowen v. Roy*, 476 U.S. 693 (1986); *Emp. Div. v. Smith*, 494 U.S. 872 (1990).
[171] *Bowen*, 476 U.S. at 699.
[172] *Smith*, 494 U.S. at 872.
[173] *Id*. at 877.
[174] *Id*.
[175] *Good News Club v. Milford Cent. Sch*., 533 U.S. 98 (2001).

school classrooms to all but religious institutions.[176] The Supreme Court held that exclusion of religious groups was unconstitutional discrimination.[177] Rights that are given generally to all—even when statutory and not from the Constitution—must be given to religions and not religious groups equally. [178] The Court affirmed this approach twice in both *Trinity Lutheran Church* and *Espinoza*.[179] Thus, there is ample reason to suspect (and many courts aver) that states cannot ban religious arbitration, neither by attacking Alternative Dispute Resolution under a religious legal system nor by a religious tribunal, while simultaneously permitting secular arbitration.[180] The federal government mandates a policy preference to generally permit arbitration through the FAA; as such, arbitration by religious tribunals and under religious law must also be permitted under the same rules.[181]

Simply put, a legal framework that permits and enforces secular arbitration—while not giving the same benefit to religious dispute resolution—raises concerns about free exercise of religion.[182] Based on the Supreme Court's Establishment Clause jurisprudence, a scheme in which courts were instructed to enforce religious arbitration agreements and awards but not irreligious ones would constitute an unlawful establishment of religion because it

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[176] *Id*. at 102.
[177] *Id*. at 112.
[178] *See Id*. at 120.
[179] Trinity Lutheran Church of Columbia, Inc. v, Comer, 137 S. Ct. 2012, 2020-21 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S.Ct. 2246, 2265 (2020) (Thomas, J., concurring).
[180] Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. UNIV. L. REV. 537, 541 (2016); Erin Sisson, *The Future of Sharia Law in American Arbitration*, 48 VAND. J. TRANSNAT'L L. 891, 898 (2015); James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 739 (2015).
[181] *Southland Corp.*, 465 U.S. at 20.
[182] *See* Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L., ETHICS & PUB. POL'Y 341, 365 (1999).

would endorse and advance religion.[183] But, "if giving special benefits to religion is favoritism, advancement, and endorsement, then discriminating against religion is hostility, inhibition, and disapproval."[184] Therefore, if American law is to permit private arbitration that meets certain qualifications, it cannot categorically refuse to recognize and enforce religious dispute resolution processes that satisfy the same requirements.

What this means practically is clear: parties that want to introduce a law-like structure into their religious contract can do so without difficulty. How? They sign a binding arbitration agreement that introduces a set of legal rules into the end of their contractual relationship.[185] By doing so, the parties, who would otherwise use secular law to regulate their relationship and rely on secular courts to enforce their rights, are able to introduce religious rules to regulate their relationship.[186]

The religious cannot rely on civil adjudication over free exercise claims to enforce their co-religionist contracts.[187] First Amendment jurisprudence has abandoned liberty of conscience claims where the religious are harmed in the exercise of their rights in the face of government action. Even when religious disputes are adjudicated correctly, the whims of the courts are capricious and unreliable.[188] Instead, when legislation suffers under Establishment Clause claims, contract law remains steady.

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[183] *Establishment Clause*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/establishment_clause#:~:text=The%20First.
[184] Volokh, *supra* note 184, at 369–70.
[185] Sisson, *supra* note 182, at 892.
[186] *Id*.
[187] *Id*. at 898.
[188] *See* Rahdert, *supra* note 182, at 554.

III. The "Exit" Problem is not Actually a Problem; Proposed Solutions Would Harm Religious Freedom for Both the Secular and Faithful

First Amendment academics fret over the "Exit" problem: where co-religionists enter into a mutual agreement, but later, one party experiences a religious change of heart that would require a breach of contract to practice.[189] Contract law disincentivizes breach, and penalties for breach may deter a party from acting on their new-found religious conscience.[190] In his article, Skylar Croy argues that "binding religious arbitration agreements are constitutionally problematic because they hinder freedom of religion . . ." by discouraging breach.[191] However, this section argues that "Exit" disputes ought to be treated no differently than secular breach of contract claims. Where the faithful's contracts are treated differently by the U.S. legal system, both the faithful and secular will suffer insufficient justice. Croy's proposal that a military-esque "conscientious objector" status will enhance free exercise of religion falters when examined in depth: simply, military jurisprudence does not translate into contract law.[192] Religious arbitration, treated equally to secular arbitration under the FAA, mitigates any excessive entanglement issues that arise from judicial support of extralegal and religious tribunals.[193]

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[189] *See* Croy, *supra* note 1.
[190] *See Breach of Contract*, JUDICIAL EDUCATION CENTER, http://jec.unm.edu/education/online-training/contract-law-tutorial/breach-of-contract.
[191] Croy, *supra* note 1, at 120.
[192] *See Breach of Contract*, JUDICIAL EDUCATION CENTER, http://jec.unm.edu/education/online-training/contract-law-tutorial/breach-of-contract.
[193] Federal Arbitration Act, 9 U.S.C. § 200 (1925).

A. Conscientious Military Objector Status is Incompatible with Contract Law

Conscientious objector status is not a panacea for the "Exit" problem in contracts between the religious. Historically developed within the military, conscientious objector case law flourished during the twentieth century independent of other free exercise claims.[194] The military is a unique party to a contract, and the military's coercive nature requires some exemptions and exceptions to service.[195] The power between the government and a person drafted into the military and the power between two parties consenting to an agreement are distinguishable; therefore, "[t]he ultimate religious accommodation" is inapplicable to religious arbitration clauses.[196] As religion is a consistent *bête noire* for judges, allowing exemptions for breach of contract beyond FAA or constitutional limitations would delegitimize the religious arbitration precedent that already exists, and a religious sincerity analysis leaves room for error and discrimination.[197] By treating co-religionists contracts differently from secular contracts, the religious are deprived of their First Amendment rights.

Before writing the Constitution, the Founders concerned themselves with a fact pattern: where the faithful are forced to kill in service of the nation and their religion prohibits such killing, can the religious be exempted from military service?[198] Further, while rights are regularly trumped by government policy, can government require an individual to violate a central tenant of their religion?[199] With a long history of drafting citizenry to fight in wars, both

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[194] *See* John H. Matheson, *Conscientious Objection to Military Service*, MIDDLE TENN. STATE UNIV., https://bit.ly/3cRSaoN.
[195] WITTE & NICHOLS, *supra* note 44, at 90–95 (see Founders' discussion of Conscientious Objector exemptions).
[196] Croy, *supra* note 1, at 129.
[197] Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1188–89 (2017).
[198] WITTE & NICHOLS, *supra* note 44, at 92–93.
[199] *Id*.

foreign and local, early courts dealt frequently with these issues.[200] American war efforts in the twentieth century forced Congress to legislate a conscientious military objector exemption to military service where such service contravenes sincere religious beliefs.[201]

Today, conscientious objector status even applies where a current, committed solider has a change of heart and must be discharged from the military to freely exercise their religion.[202] The legal standard for this exemption is high, and as such, it is rarely used.[203] Uniquely, "the current statutory conscientious objector exemption is not necessarily coextensive with the First Amendment's Freedom of Religion Clause"[204] as Supreme Court precedent asserts that free exercise claims are at their weakest for service members.[205] Instead, conscientious objector status relies on military legislation for validity.[206] To conflate First Amendment free exercise in private contract with Conscientious Military Objector jurisprudence is to ignore the unique differences in jurisprudence and the power imbalance between government and citizenry.[207]

Conscientious Military Objector status exempts soldiers from the government's coercive, criminal power; therefore, the jurisprudence inherently weighs parties' rights unequally.[208] A potentially drafted soldier and the government are not equal parties and not part of a mutual agreement unlike in private contract law.[209] In the military

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[200] WITTE & NICHOLS, *supra* note 44, at 101.
[201] *See* Matheson, *supra*, note 196.
[202] U.S. DEP'T OF DEF., DOD INSTRUCTION 1300.06 CONSCIENTIOUS OBJECTORS (2017).
[203] Croy, *supra* note 1, at 136.
[204] Michael S. Satow, *Conscientious Objectors: Their Status, the Law and Its Development*, 3 GEO. MASON CIV. RIGHTS L.J. 113, 138 (1992).
[205] Goldman v. Weinberger, 475 U.S. 503, 503 (1986).
[206] *See* U.S. DEP'T OF DEF., *supra* note 204.
[207] John H. Schlegel, *The Conscientious Objector and The First Amendment: There but for the Grace of God*, 34 UNIV. CHI. L. REV. 79, 79-80 nn.1-9 (1966).
[208] *See* Matheson, *supra*, note 196.
[209] *Id*.

schema, the burden to prove religious sincerity is purposely high for the potential conscientious objector so that the state maintains authority over the individual as government policies against fraud and national defense outweigh freedom from conscription.[210] Croy also suggests a high burden for contract exemption to alleviate unnecessary infringement on the private right to contract.[211] But such a burden is directly opposed to the history of private contract law where statutory and common law impose limits on consequences for breaching.[212] The government has a monopoly on coercive punishment; private contract law has established limits. Croy conflates the severe penalties of military desertion with the economic penalties for a breach of a prior consensual agreement to justify a superfluous exemption.[213] Breaching a previously consented to contract always remains an option regardless of religious disposition.

Even using a religious sincerity analysis for exemptions would establish a new, unprecedented affirmative defense in contract law and undermine enforcement of co-religionists agreements.[214] It would also allow people who enter into secular contracts to assert a change of religious ideas which would enable them to exempt themselves from secular consequences while pointing to their newfangled religious principles.[215] To grant religious exemption from a change of heart, courts would

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[210] *See generally* Anita Browser, *Delimiting Religion in the Constitution: A Classification Problem,* 11, VAL. UNIV. L. REV. 163 (1977).
[211] Croy, *supra* note 1, at 136.
[212] Public-Private-Partnership Legal Resource Center, *Contract Law – Limitations on Freedom of Contract*, WORLD BANK GROUP, (Updated Nov. 2020; last viewed Mar. 2021), https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-environment/contract-law.
[213] *See generally* Croy, *supra* note 1.
[214] *But see* Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ARB. & MEDIATION 45, 64, 67 (2016).
Id. at 64, 67.

also need to grant exemption from secular contracts when a party finds a new faith.[216]

In other realms of contract, parties may waive enumerated constitutional rights, and if such waiver is challenged, it is supported by civil courts: "Free exercise rights are no more jeopardized by enforcing contracts for religious arbitration than contractual waiver of a right to trial by jury endangers jury trial rights."[217] Mutual assent is established at the time of contracting.[218] Allowing an exception to religious arbitration would be akin to an affirmative defense that voids the mutual assent of the party at the time of contract. Such a transformation of mutuality is only reserved for common law contract defenses like duress, unconscionability, mistake, frustration of purpose, etc.: all defenses that the FAA already supplies as tools to defend against pretextual or discriminatory arbitration agreements.[219]

What would we do, one could ask, with a defendant who signed an arbitration agreement mandating religious arbitration, whose own genuine religious beliefs would be violated by attending an arbitration under the auspices of a faith they have now totally abandoned? Aren't their rights to free exercise violated by forcing their attendance? The answer is crucial: Yes, forcing them to attend might be a violation, and no, they need not attend.[220] Any party that has

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[216] Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996) (citing Scheck v. Alberto-Culver Co., 417 U. S. 506, 511 (1974)) (as the FAA precludes states from singling out arbitration provisions for suspect status, such provisions must be placed "upon the same footing as other contracts.").

[217] Examples of such contracts are where one may waive a constitutional right to work as a journalist (First Amendment), to bear arms (Second Amendment), and to a trial by jury (Seventh Amendment). Broyde, *supra* note 133, at 139 n.122.

[218] RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1979) (see comment c: for analysis of manifestation of mutual assent).

[219] *Casarotto*, 517 U.S. at 687 (holding that "[c]ourts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.").

[220] Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2020).

religious objections to performance of any contract they signed can breach instead and pay damages.[221] This is true for a contract of arbitration as well.[222] An arbitration tribunal cannot compel any remedy other than a financial remedy in such a situation.[223] Default and nonappearance are viable options in such a case, and damages for breach of contract will flow from that conduct.[224]

This proposal, to essentially create a new defense in contract law, ensures that American judges will make decisions that fail to reflect the shared intentions of religious or secular parties. Judges are already uncomfortable with religious disputes and suffer from a history of confused rulings—the boogeyman of the religious question doctrine haunts their judicial dreams.[225] By complicating co-religionist contract enforcement, courts are and will become "increasingly reluctant to enforce agreements situated within a religious context."[226] Allowing parties to avoid secular contractual obligations by blaming new principles throws a monkey wrench into secular contract law.[227] A conscientious objector exemption in contract law would leave religious and secular signors "to absorb commercial harms without an avenue for judicial remedy."[228] A breach in military service and a breach in a civil contract are easily distinguishable: one is a breach against coercive authority, and one is a breach against consensual, private agreements.[229] Allowing an exemption from contracts due to change of religion, no matter how profound, is to establish a second tier of jurisprudence for those who opt into religious arbitration.

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[221] Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985).
[222] *Id*.
[223] RESTATEMENT SECOND OF CONTRACTS (AM. L. INST. 1979).
[224] *Lake River Corp.*, 769 F.2d at 1289.
[225] Helfand & Richman, *supra* note 20.
[226] *Id*. at 821.
[227] *Id*.
[228] *Id*.
[229] *See* Satow, *supra* note 206, at 138 for guidance on how to draw this distinction.

iii. Reverse Entanglement is Not a Problem with Religious Arbitration

Separation of church and state serves two purposes: it protects the state from religious interference and protects the religious from state interference.[230] Another article, *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights is Unconstitutional*,[231] proposes that equal enforcement of religious and secular arbitration clauses threatens the Entanglement prong of the *Lemon* test thereby violating the Establishment clause of the First Amendment.[232] This article contemplates overburdening or prohibiting religious arbitration, *dejure* or *defacto*. A read of the article leaves the reader with a dim view of arbitration generally, but it fails to distinguish between problems posed by arbitration law broadly and those unique to religious arbitration.[233] In particular, Chua-Rubenfeld & Costa argue that rights are unconstitutionally limited where American law is subordinated to religious law within faith-based tribunals. The authors seem unbothered by the surrender of constitutional rights within arbitration hearings where a choice of law provision requires adherence to irreligious foreign legal systems. Instead, the article only proposes outlawing religious adjudication in mixed religious-secular dealings.[234]

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[230] Walz v. Tax Comm'r of N.Y., 397 U.S. 664, 669 (1970) (stating that "we will not tolerate either governmentally established religion or government[al] interference with religion").
[231] Chua-Rubenfeld & Costa, Jr., *supra* note 2, at 2087–8.
[232] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[233] *See* Croy, *supra* note 1, at 143 ("Non-legal pressures often make people submit to arbitration agreements. Indeed, even before arbitration was mainstream, merchants would submit to it out of fear that if they did not, it would hurt their reputation."); *see* Chua-Rubenfeld & Costa, Jr., *supra* note 2, at 2094 ("Studies show a systemic failure by arbitrators to protect statutory rights as well as courts do, and the Court's own jurisprudence holds arbitrators to a lower standard than it does judges.").
[234] Chua-Rubenfeld & Costa, Jr., *supra* note 2, at 2087–8.

Ultimately, the problems with arbitration identified in these articles are not limited to the faith-based variety, and by advocating special treatment of co-religionist contracts under the FAA, co-religionists lose the ability to set, meet, and enforce their contractual expectations. Such burdens do not exist for those who have expectations grounded in foreign laws generally.[235] Simply put, current jurisprudence under the FAA allows parties in arbitration to waive many constitutional and statutory rights and allows for arbiters to use rules which may share few basic principles with American law.[236] Arbitrators may impose gag orders, mandate speech, permit drug testing, eliminate the right to a jury, deny a right to appeal and so much more that cannot be permitted in an American courtroom, both as a matter of procedure and substance.[237] Arbitration agreements where parties surrender vast amounts of their federal and state rights, and even contract through choice of law that is deeply foreign to the United States, are all permitted under the FAA.[238]

Why agreeing to Jewish or Islamic law should be more problematic than agreeing to Chinese or Russian law is bewildering to us. All foreign legal systems operate on a set of principles not found in American law, and grant rights unheard of in American law, while depriving parties of rights

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[235] *Id*.
[236] *Id*.
[237] Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 674 (Cal. 2000) (reasoning that "such [rights] claims are in fact arbitrable if the arbitration permits an employee to vindicate his or her statutory rights. . . . the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration").
[238] Baravati v. Josephthal, Lyon & Ross, 28 F.3d 704, 709 (7th Cir. 1994) (holding that parties are free to stipulate to any procedures they choose for the procedures governing the arbitration of their disputes, "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys"). Judge Posner posits that – of course – the parties can agree to a "finder of fact" which would be recused if this were a judicial hearing. Indeed, even a judge who is biased is permitted, he avers.

American law deems fundamental. If we allow people to agree to legal systems other than that of the U.S., there is no reason why religious law ought to be discriminated against. Of course, the United States could easily establish as a rule of law that "no federal rights can be waived" or "no constitutional rights can be waived," or "on matter may be heard in arbitration" but it cannot establish a rule which says "federal rights can be waived for any reason other than a religious reason."[239] As recently as November 25th, 2020, in the case of *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, and again on February 5th, 2021, in the case of *South Bay United Pentecostal Church v. Newsom*, the United States Supreme Court affirmed the basic idea that religious communities cannot be evaluated by a different standard than secular communities. This is a fundamental idea.[240] It is as true in arbitration law as it is in pandemic closings.

There is nothing wrong with the modern political argument that waiver of rights in arbitration has gone too far and needs to be curtailed,[241] but the motives for a religious-only curtailment are constitutionally suspect, not mandated by the *Lemon* test, and discriminatory against religion. Consider a simple example: The Seventh Amendment to the United States Constitution mandates that a jury trial be granted in virtually all civil matters, but consent to arbitration is a waiver of that right.[242] Congress could

[239] Lemon, 403 U.S. at 612-13.
[240] In both *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, (U.S. Nov. 25, 2020) and *S. Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021), the central issue that divided the Court was whether Houses of Worship are best compared to "big box" stores or "concerts and theaters." But what all nine Justices agree to is that religious institutions cannot be treated different from comparable institutions.
[241] *See* Michelle F. Davis, *Warren Tells Dimon to Stop 'Exploiting' With Arbitration,* BLOOMBERG NEWS (Jun. 28, 2019), https://www.bloomberg.com/news/articles/2019-06-28/warren-tells-dimon-to-stop-exploiting-with-forced-arbitration.
[242] U.S. CONST. amend. VII.

prevent that waiver and mandate jury trials in all federal cases.[243] It can prohibit arbitration in any case in which there is a right to a jury trial.[244] But it would be extraordinarily suspect for Congress to prohibit arbitration under a religious legal regimen that does not allow for jury trials for religious reasons while permitting the same arbitration under modern English law—which also lacks jury trials on civil matters.[245]

The Entanglement Doctrine is not relevant where civil courts enforce faith-based arbitration awards; *de minimis* entanglement between church and state is tolerable under the Constitution.[246] Originally, entanglement was a full prong of the *Lemon* test, but now it is combined with the analysis of whether a government action advances religion

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[243] *See* Santiago v. Baker, 135 So. 3d 569, 571–2 (Fla. Dist. Ct. App. 2014) (Altenbernd, J., concurring), where Judge Altenbernd concurs and notes in a case:

> On July 4, 1776, in deciding to declare independence from a king who was regarded as a despot, Thomas Jefferson and John Adams provided a list of grievances that justified the revolutionary decision. One of those grievances stated: "For depriving us in many cases, of the benefits of Trial by Jury." The Declaration of Independence para. 20 (U.S.1776). After a long and painful war for independence, we placed the Seventh Amendment into our federal constitution to assure that in suits at common law with a value exceeding twenty dollars, "the right of trial by jury shall be preserved." U.S. Const. Amend. VII. . . . Juries are not a relic of our history. In both civil and criminal cases, juries serve as a check upon the concentration of power in judges and other members of the political and economic elite. As Floridians, we have constitutionally protected as "inviolate" the right to trial by jury not because it is efficient or tidy, but because the participation of ordinary citizens is essential to a healthy balance of power within a democracy.

[244] *Id*.

[245] Lemon, 403 U.S. at 612-13.

[246] *Id*. at 614 (explaining that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship"); WITTE & NICHOLS, *supra* note 44, at 163.

where entanglement is found.[247] The *Lemon* test, in its new form, allows for a greater cooperation between both political and religious officials when providing social and educational services.[248] In essence, neutrality of legislation is not determinative of an Establishment Clause violation, and instead, to find constitutional violations, the Court has created a variety of inconsistent tests. These range from an endorsement analysis to a coercion analysis to strict neutrality.[249] Equal treatment, a weaker form of strict neutrality, has enthralled the current majority on the Court,[250] and under this formulation, the religious are not "disabled by the First Amendment" from equal participation in government programs when compared to similarly situated non-religious actors.[251]

Instead, the new formulation of the *Lemon* test asks first, whether a statute is religious on its face, and second, whether it is religiously neutral in its application.[252] The second prong is the new entanglement test, and the edits to the *Lemon* test have further weakened Establishment Clause claims against government actions that impact the religious.[253] The Court now allows, without establishment of religion, "religious parties to avail themselves of the same statutory rights and benefits available to everyone else."[254]

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[247] Agostini v. Felton, 521 U.S. 203 (1997); WITTE & NICHOLS, *supra* note 44, at 163.
[248] *Agostini*, 521 U.S. at 203; WITTE & NICHOLS, *supra* note 44, at 165.
[249] *See, e.g.*, Justice O'Connor's opinion in *Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding the constitutionality of the Equal Access Act); Justice Kennedy's opinion in *Lee v. Weisman*, 505 U.S. 577 (1992) and Justice Stevens' opinion in *Santa Fe Indep. School District v. Doe*, 530 U.S. 290 (2000); Justice Souter's opinion in *Board of Education of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994), (calling for a policy of neutrality between religion and non-religion).
[250] WITTE & NICHOLS, *supra* note 44, at 202.
[251] Bowen v. Kendrick, 487 U.S. 589, 609 (1988).
[252] Zelman v. Simmons-Harris, 536 U.S. 639 (2002); WITTE & NICHOLS, *supra* note 44, at 169.
[253] WITTE & NICHOLS, *supra* note 44, at 170.
[254] *Id*. at 202.

While equal treatment for the religious under the FAA may have invoked the Establishment Clause under the original *Lemon* test, current establishment jurisprudence would declare that the government has established secularism where the religious have unequal rights.[255]

IV. Conclusion

This article addressed how contract law and religious arbitration enhance First Amendment rights. Where individuals consent to enshrine religious doctrine within their civil contracts on mundane matters, the civil legal system's free exercise grounds are unstable and the faithful find inadequate justice when enforcing their claims. Instead, religious communities gravitated towards

[255] A frequently cited example for religious exceptions in contract law is Garcia v. Church of Scientology Flag Serv. Org., No. 8:13-cv-220-T-27TBM, 2015 U.S. Dist. LEXIS 178033, at *1 (M.D. Fla. Mar. 13, 2015). However, when viewed closely, Garcia was involved in a normal contract dispute. Throughout his tenure with the Scientologists, Garcia signed approximately 40 contracts over five years, each of which contained an arbitration provision. *Supra.* If the Court accepted Garcia's argument of contractual unconscionability, even in a contract of adhesion, it would have to ignore the multiple times Garcia consented to the contract terms. To treat Garcia's commercial contractual interaction with the Church of Scientology differently from similar secular contracts would counter the federal policy of "plac[ing] arbitration clauses 'on equal footing with other contracts." *Id*. at *8. Neutral principles avoid entanglement issues, and neutral principles would regard Garcia as a willing and consensual participant to the contract with the Church of Scientology. For more on this contract law issue, see Eugene Volokh, Scientology and Arbitration, THE VOLOKH CONSPIRACY (Jan. 23, 2020), https://reason.com/volokh/2020/01/23/scientology-and-arbitration/. This post correctly analyzes the dispute here through the lens of contract law and arbitration law and not through the lenses of religious freedom. Indeed, only the question of whether the provision that "all arbitrators shall be Scientologists in good standing with the Mother Church" needs to be directly addressed constitutionally. For more on this issue, *see also* In the Matter of Esther Ismailoff, respondent; Effie Golan, appellant. (File No. 342207), No. 2007-02638, 2007 WL 1863646 (N.Y. App. Div. May 16, 2007) (court refusing to enforce "three persons of the Orthodox Jewish faith" requirement in arbitration). In fact, as the reader can understand, there are other approaches to this matter besides the one adopted by the Surrogate Court of Nassau County.

arbitration clauses for a mutually satisfying justice.[256] Civil courts can legitimize religious dispute settlement by enforcing the Federal Arbitration Act and maintaining healthy respect for consensual agreements between parties, both secular and religious. To treat religious parties otherwise is unconstitutional.[257]

Arbitration law created a safe harbor for co-religionists to settle disputes in mutually agreed ways.[258] To allow exemptions would threaten the developing jurisprudence that the faithful have built within secular law. Even where an individual, previously committed to a religiously influenced agreement, has a change of heart and must breach to act on their religion, the free exercise of the individual is safe. Arbitrations, as governed by the Federal Arbitration Act, have protections for those who breach and avenues for judicial oversight.[259] To infuse contract law with military-esque conscientious objector jurisprudence would harm the legitimacy of religious arbitration while forcing judges to wrestle with trepidation over religious neutrality and Establishment Clause concerns. For co-religionists to enforce their contracts which comingle the secular and sacred, they should rely on arbitration law as a means to protect their free exercise of religion. To protect free exercise of religion, the U.S. legal system must treat faith-based arbitration as equal to secular arbitration.

[256] Chua-Rubenfeld & Costa, Jr., *supra* note 2.
[257] *Lemon*, 403 U.S. at 602.
[258] Chua-Rubenfeld & Costa, Jr., *supra* note 2.
[259] Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2020).