

# NEW YORK UNIVERSITY LAW REVIEW

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VOLUME 86

NOVEMBER 2011

NUMBER 5

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## ARTICLES

### RELIGIOUS ARBITRATION AND THE NEW MULTICULTURALISM: NEGOTIATING CONFLICTING LEGAL ORDERS

MICHAEL A. HELFAND\*

*This Article considers a trend toward what I have termed the “new multiculturalism,” in which conflicts between law and religion are less about recognition and symbolism and more about conflicting legal orders. Nothing typifies this trend more than the increased visibility of religious arbitration, whereby religious groups use current arbitration doctrine to adjudicate their disputes not in U.S. courts and under U.S. law, but before religious courts and under religious law. This dynamic has pushed the following question to the forefront of the multicultural agenda: Under what circumstances should U.S. courts enforce arbitration awards issued by religious courts in accordance with religious law? Indeed, with growing skepticism regarding the oppressive potential of religious majorities, critics have questioned whether religious arbitration has any place in a regime dedicated to individual liberties. By contrast, this Article contends that current arbitration doctrine can meet the challenges of the new multiculturalism. To do so, this Article makes two concrete policy recommendations: (1) courts should redefine the scope of enforceability of religious arbitration awards by limiting the application of public policy to*

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\* Copyright © 2011 by Michael A. Helfand, Associate Professor of Law, Pepperdine University School of Law; Associate Director of the Diane and Guilford Glazer Institute for Jewish Studies; J.D., Yale Law School, 2007; Ph.D., Yale Political Science Department, 2009. I would like to thank the participants at the Religious Legal Theory: State of the Field Conference at Seton Hall University School of Law as well as members of the faculty at both the University of St. Thomas School of Law and the University of Mississippi School of Law for helpful comments and feedback on presentations of earlier drafts of this Article. In addition, I would like to thank Ali Assareh, Seyla Benhabib, Sonali Chakravarti, Jonathon Cherne, Donald Earl Childress III, Christopher Drahozal, Sarah Emerson, Mohammad Fadel, Richard Garnett, Bryan Garsten, Haider Hamoudi, Anthony Kronman, Barry MacDonald, Andrew March, Daniel Markovits, Ralf Michaels, Joel Nichols, Bob Pushaw, Alan Rau, Gidon Rothstein, Sarah Rudolph Cole, Amy Schmitz, Marc Stern, and Stephen Ware for their extraordinarily helpful and insightful comments on earlier versions of this Article.

*vacate religious arbitration awards; and (2) courts should expand the application of the unconscionability doctrine to void religious arbitration agreements.*

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## INTRODUCTION

Multiculturalism has long served as a principle unifying various philosophical, political, and sociological programs that place a high value on culture and cultural groups.<sup>1</sup> Yet within multiculturalism's framework lies a recent trend toward a "new multiculturalism," which focuses not simply on principles of recognition and inclusion, but on broader principles of group autonomy and self-governance.<sup>2</sup> However, as the claims of new multiculturalism have evolved, so has there

<sup>1</sup> See Sarah Song, *Multiculturalism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), <http://plato.stanford.edu/entries/multiculturalism>.

<sup>2</sup> See *infra* Part III.B.

emerged a growing resistance to the possibility of ceding authority and autonomy to cultural groups.

Indeed, in a November 2010 referendum, the Oklahoma electorate passed an amendment to the State Constitution that prohibited state courts from “look[ing] to the legal precepts of other nations or cultures,” and then specifically noted that “the courts shall not consider Sharia Law.”<sup>3</sup> Moreover, this year, state legislatures across the country will have considered similar, and more far-reaching, legislative initiatives aimed at foreclosing the use of private agreements to promote the autonomy and self-governance principles of the new multiculturalism.<sup>4</sup>

Of course, for there to be a “new” multiculturalism, there must also be an “old” multiculturalism. The “old” multiculturalism largely

<sup>3</sup> H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010). A federal court has blocked the election results’ certification in response to a suit alleging that the law is unconstitutional. *See* *Awad v. Ziriya*, No. CIV-10-1186-M, 2010 WL 4814077 (W.D. Okla. Nov. 29, 2010) (granting preliminary injunction).

<sup>4</sup> Many such initiatives prohibit courts from enforcing, considering, or relying upon any form of religious or cultural law. *E.g.*, S. 62, 2011 Leg., Reg. Sess. (Ala. 2011) (“Specifically, the courts shall not consider international law or Sharia.”); H.R.J. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011) (“A court of this state may not enforce, consider, or apply any religious or cultural law.”); H.R.J. Res. 0008, 61st Leg., Gen. Sess. (Wyo. 2011) (“The courts shall not consider . . . international law and Sharia Law.”); H.R.J. Res. 1004, 2011 Leg., 86th Sess. (S.D. 2011) (“No . . . court may apply . . . any foreign religious or moral code with the force of law in the adjudication of any case under its jurisdiction.”); H.R. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (“A court shall not use, implement, refer to or incorporate a tenet of any body of religious sectarian law into any decision, finding or opinion as controlling or influential authority.”); S.J. Res. 1387, 118th Sess. (S.C. 2010) (“Specifically, the courts shall not consider Sharia Law . . .”). In addition, numerous states have proposed legislation voiding any decision issued by a court, arbitration, tribunal, or administrative agency if such a decision is based upon any law, legal code, or system that fails to grant parties the same fundamental rights assured under state and federal constitutions. *E.g.*, H.R. 88, 27th Leg., 1st Sess. (Alaska 2011) (precluding courts, arbitrators, mediators, and administrative agencies from applying foreign law if its application would violate an individual right guaranteed under the state or federal constitutions); S. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011) (rendering void and unenforceable any court, arbitration, or agency ruling, which is based on a law, code, or legal system that would not grant the parties the same rights and privileges available under the state or federal constitutions); H.R. 2087, 84th Leg., Reg. Sess. (Kan. 2011) (same); L. 647, 102d Leg., 1st Sess. (Neb. 2011) (same); H.R. 1552, 53d Leg., 1st Sess. (Okla. 2011) (same); S. 3740, 106th Gen. Assemb., Reg. Sess. (Tenn. 2010) (same); H.R. 45, 2011 Leg. (Ga. 2011) (precluding courts, arbitrators, and administrative agencies from enforcing foreign law or forum contract provisions that would not grant the parties the same rights and privileges available under the state and federal constitutions); H.R. 301, 2011 Reg. Sess. (Miss. 2011) (defining “Foreign Law” as including “Sharia Law,” and precluding courts, arbitrators, and administrative agencies from enforcing foreign law or forum contract provisions that would not grant the parties the same rights and privileges available under the state and federal constitutions); S.J. Res. 16, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011) (precluding courts from enforcing foreign law or forum contract provisions that violate rights protected by the state and federal constitutions).

focused on the recognition of previously marginalized minority groups as an essential feature of liberalism's dedication to the principles of equal respect and equal dignity.<sup>5</sup> In turn, the political agenda of the old multiculturalism looked to increase minority representation in the public sphere and incorporate minority symbols and language into the public consciousness.<sup>6</sup> Thus, the great multicultural debates of the late twentieth century—and even in the early twenty-first century—followed this same script, centering on such questions as minority representation in higher education,<sup>7</sup> the constitutionality of prayer in public schools,<sup>8</sup> the incorporation of religious views into public discourse,<sup>9</sup> and permitting religious symbols on government property.<sup>10</sup> In this way, the old multiculturalism focused on the recognition and integration of minority groups into the public sphere.

Increasingly, however, these debates are becoming secondary to a “new” multiculturalism. In the “new” multiculturalism, minority groups—especially religious minority groups—are less concerned with receiving recognition and more concerned with maintaining group autonomy.<sup>11</sup> Philosophically, the new multiculturalism conceives of minority identity as embodied not only in symbols and histories, but

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<sup>5</sup> See *infra* Part III.A.

<sup>6</sup> See *infra* notes 175–79 and accompanying text.

<sup>7</sup> *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that a university's consideration of race violated the Equal Protection Clause); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that a law school's consideration of race and ethnicity in admissions decisions did not violate the Equal Protection Clause).

<sup>8</sup> See, *e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301–17 (2000) (holding that a school district's policy of allowing student-led prayer at football games violated the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 597–99 (1992) (holding that a public high school's inclusion of prayer at a graduation ceremony violated the Establishment Clause).

<sup>9</sup> See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 783–84 (1997) (arguing that “reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion” as long as “political reasons—and not reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support”). For a selection of responses to Rawls, see generally Robert Audi, *Religious Values, Political Action, and Civic Discourse*, 75 IND. L.J. 273, 289 (2000); Andrew R. Murphy, *Rawls and a Shrinking Liberty of Conscience*, 60 REV. POL. 247 (1998); Jeremy Waldron, *Religious Contribution in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 824–25, 837–41, 848 (1993).

<sup>10</sup> See, *e.g.*, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 872 (2005) (discussing the constitutionality of public religious displays under the Establishment Clause); *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (holding that a Ten Commandments monument on the grounds of the Texas Capitol did not violate the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (summarizing the Supreme Court's approach to Establishment Clause issues); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 613–19 (1989) (holding that display of a menorah in front of a government building did not violate the Establishment Clause).

<sup>11</sup> See *infra* Part III.B.

also in rules and practices that often constitute an independent legal order.<sup>12</sup> And for minority communities to maintain their identity, they must also find a way to retain authority over the interpretation, application, and enforcement of communal rules within their membership.<sup>13</sup> Accordingly, the new multiculturalism looks less for symbolic integration and more for jurisdictional differentiation. Put differently, if in the past we debated multicultural dilemmas, we now find ourselves increasingly forced to navigate multilegal conflicts.<sup>14</sup>

Not surprisingly, the great debates of the “new multiculturalism” have quite a different flavor. Such debates—and litigation—revolve around attempts of minority communities to become, to paraphrase the Supreme Court’s words in *Employment Division v. Smith*, “laws unto themselves.”<sup>15</sup> Thus, the new wave of multicultural controversies focuses on accommodation of minority practices that conflict with

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<sup>12</sup> See, e.g., AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS 2 (2001) (discussing *nomoi* groups, which refer to “religiously defined groups of people that ‘share a comprehensive world view that extends to creating a law for the community’” (quoting Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 4 (1996))); Michael A. Helfand, *When Religious Practices Become Legal Obligations: Extending the Foreign Compulsion Defense*, 23 J.L. & RELIGION 535, 567–69 (2008) (contending that certain religious communities function as legal communities); Mark L. Movsesian, *Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence*, 40 SETON HALL L. REV. 861, 866 (2010) (describing the relative place of religious law in both Christianity and Islam); Chaim Saiman, *Jesus’ Legal Theory: A Rabbinic Interpretation*, 23 J.L. & RELIGION 97 (2007) (exploring jurisprudential assumptions embedded in both the Gospels and the Talmud).

<sup>13</sup> See, e.g., SHACHAR, *supra* note 12, at 8 (arguing for a new approach to accommodating differences and respecting rights in a multicultural age by expanding the “jurisdictional autonomy” of religious and cultural minorities); Ayelet Shachar, *Faith in Law? Diffusing Tensions Between Diversity and Equality*, 36 PHIL. & SOC. CRITICISM 395, 401–02 (2010) (proposing “regulated interaction” between religious and secular law).

<sup>14</sup> Recognition of the existence of overlapping and multiple legal communities is one of the key insights of the legal pluralism literature. See, e.g., Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Nomos and Narrative*] (describing “jurisgenerative” and “jurispathic” responses to competing legal narratives); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986) (describing the contestation over interpretive authority within the law); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1981) (exploring legal centralism and the implication of abandoning it as a paradigm for policy); John Griffiths, *What is Legal Pluralism*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986) (defining legal pluralism); Nomi Maya Stolzenberg & David N. Myers, *Community, Constitution, and Culture: The Case of the Jewish Kehilah*, 25 U. MICH. J.L. REFORM 633, 636–40 (1992) (examining the transformation of the Jewish Kehilah from an autonomous social, religious, and legal entity to a distinct, collective entity existing within and relating to a sovereign host while preserving Jewish faith and law within an alien religious culture).

<sup>15</sup> 494 U.S. 872, 885 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

state law;<sup>16</sup> the permissibility of sectarian groups and clubs to govern themselves in accordance with sectarian values, even when doing so conflicts with U.S. law;<sup>17</sup> and, most prominently, the legal enforceability of religious arbitration awards—that is, arbitration awards issued by religious authorities in accordance with religious law.<sup>18</sup>

In contrast to the relative success of the old multiculturalism,<sup>19</sup> the philosophy and politics of the new multiculturalism have not fared well. Just recently, David Cameron, Prime Minister of England, declared his belief that the new multiculturalism has failed,<sup>20</sup> lamenting that “[u]nder the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream.”<sup>21</sup> Both French President Nicholas Sarkozy and German Chancellor Angela Merkel have also proclaimed, of late, the new multiculturalism a failure.<sup>22</sup>

The Supreme Court has echoed similar sentiments in recent constitutional controversies. The Court has met claims—from the free exercise claims of Native Americans<sup>23</sup> to the associational claims of the Christian Legal Society<sup>24</sup>—with strong skepticism, largely

<sup>16</sup> See, e.g., *id.* (holding that the Free Exercise Clause did not protect ritual smoking of peyote from state law prohibiting smoking of peyote).

<sup>17</sup> See *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2978 (2010) (discussing whether a public school may require a religion-based student group to admit nonadherents of a particular religion); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649–61 (2000) (holding that the freedom of association protected the Boy Scouts of America’s right to condition membership on adherence to a moral code by those in the organization); see also *Bd. of Educ. v. Grumet*, 512 U.S. 687, 690–93 (1994) (holding that a statute creating a special school district that would exclude all but practitioners of a particular religion is unconstitutional).

<sup>18</sup> See *infra* notes 222–23 and accompanying text (examining the recent attacks on the enforceability of religious arbitration awards within the context of a growing resistance to the new multiculturalism).

<sup>19</sup> See *infra* Part III.A (describing the old multiculturalism).

<sup>20</sup> See John F. Burns, *Cameron Criticizes ‘Multiculturalism’ in Britain*, N.Y. TIMES (Feb. 5, 2011), [http://www.nytimes.com/2011/02/06/world/europe/06britain.html?\\_r=1&src=twrhp](http://www.nytimes.com/2011/02/06/world/europe/06britain.html?_r=1&src=twrhp) (stating that multiculturalism has led to segregation, which has allowed Islamic extremism to thrive); *State Multiculturalism Has Failed, Says David Cameron*, BBC NEWS (Feb. 5, 2011), <http://www.bbc.co.uk/news/uk-politics-12371994> (same).

<sup>21</sup> David Cameron, Speech at Munich Security Conference (Feb. 5, 2011), available at <http://www.number10.gov.uk/news/speeches-and-transcripts/2011/02/pms-speech-at-munich-security-conference-60293>.

<sup>22</sup> Ruadhan Mac Cormaic, *Sarkozy Denounces Multiculturalism as ‘a Failure,’* IRISH TIMES, Feb. 12, 2011, at 11.

<sup>23</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 878 (1990) (rejecting the claim that the Free Exercise Clause should protect ritual smoking of peyote from a state law prohibiting such conduct).

<sup>24</sup> *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2978 (2010) (rejecting the claim that a state-funded law school policy denying funding to religiously discriminating organization violated an organization’s First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion).

unwilling to grant religious and cultural groups increased autonomy and self-governance rights.<sup>25</sup>

However, while public law has not embraced the new multiculturalism, private law undoubtedly has. Indeed, for the better part of a century, courts have allowed minority groups—most notably religious groups—to piggyback on the arbitration system in order to legally enforce religious arbitration awards in U.S. courts.<sup>26</sup> As a result, as long as an arbitration is conducted pursuant to a valid agreement, parties of the same religion can have religious authorities resolve their disputes in accordance with religious law, and that resolution can have the binding force of U.S. law. In this way, religious arbitration courts<sup>27</sup> serve as the quintessential institution of the new multiculturalism, providing religious groups with the law-like autonomy that has been withheld under public law.<sup>28</sup>

Abroad, religious arbitration has not received a hospitable reception. For example, on September 11, 2005, the Premier of Ontario, Dalton McGuinty, announced that his government would pursue legislation to outlaw faith-based family law arbitration in his jurisdiction.<sup>29</sup> Responding to requests from the Muslim community to allow Sharia courts to render binding family law decisions, McGuinty proclaimed, “There will be no religious arbitration in Ontario. There will be one law for all Ontarians.”<sup>30</sup> In England, when the Archbishop of

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<sup>25</sup> See *infra* notes 201–19 and accompanying text (discussing the Court’s reluctance to accept principles of the new multiculturalism).

<sup>26</sup> See *infra* notes 60–65 and accompanying text.

<sup>27</sup> I refer to these institutions as religious arbitration courts, as opposed to tribunals or panels, as per common reference to such institutions as “rabbinical courts” or “Sharia courts.” Such terminology may stem from the perceived inherent legitimacy of such religious arbitration courts by their respective communities. Indeed, in some religious communities, rulings issued by religious arbitration courts have inherent legitimacy irrespective of whether or not the parties have agreed to submit their dispute for resolution via an arbitration agreement. The clearest indication of such a perspective can be seen in prohibitions under Jewish and Islamic law against submitting disputes to adjudicative bodies other than the respective religious arbitration court. See *generally infra* Part I.A–B (discussing Jewish and Islamic arbitration courts within the United States).

<sup>28</sup> See *infra* Part I.A–B.

<sup>29</sup> Associated Press, *Ontario Will Ban Shariah Arbitrations*, N.Y. TIMES (Late Edition), Sept. 12, 2005, at A6.

<sup>30</sup> *Id.* McGuinty was in fact successful. The Ontario legislature passed the Family Statute Law Amendment Act in February of 2006. Press Release, Ministry of the Att’y Gen., Ontario Passes Family Statute Law Amendment Act (Feb. 15, 2006), [http://newsarchive.ontario.ca/ontario/GPOE/2006/02/15/c288197cd.html?lmatch=&lang=\\_e.html](http://newsarchive.ontario.ca/ontario/GPOE/2006/02/15/c288197cd.html?lmatch=&lang=_e.html); see also Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, OTTAWA L. REV. (40TH ANNIV. ED.) 67, 80 (2006) (noting that while passage of the Family Statute Law Amendment Act does not prevent religionists from seeking religious arbitration, such arbitral decisions will no longer be enforced by state courts). See *generally* Donald Brown, *A Destruction of Muslim Identity: Ontario’s Decision to Stop Shari’a-based Arbitration*, 32

Canterbury, Rowan Williams, called for the integration of Sharia law into the British legal system, politicians and pundits on both sides of the Atlantic decried the suggestion, mocking the Archbishop and calling for his resignation.<sup>31</sup>

Until recently, this type of backlash against religious arbitration was largely absent in the United States, and courts routinely enforced religious arbitration awards without much media fanfare.<sup>32</sup> However, the attack on religious arbitration has now reached the shores of the United States. This attack, which began with questions about the procedural safeguards in religious arbitration,<sup>33</sup> has slowly morphed into a national movement unwilling to cede any jurisdictional authority to religious tribunals.<sup>34</sup>

Indeed, in explaining one of the primary motivations behind Oklahoma's amendment prohibiting courts from "look[ing] to the

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N.C.J. INT'L L. & COM. REG. 495 (2007) (arguing against Canada's ban on judicially enforced religious arbitration).

<sup>31</sup> See, e.g., Anne Applebaum, *A Craven Canterbury Tale*, WASH. POST, Feb. 12, 2008, at A19; Jonathan Petre, *Williams Faces Calls To Resign*, DAILY TELEGRAPH, Feb. 9, 2008, at 1, available at <http://www.telegraph.co.uk/news/uknews/1578118/Rowan-Williams-faces-calls-to-resign.html>; David Wooding, *Arch Enemy: Bash the Bishop*, SUN, Feb. 9, 2008, at 4, available at <http://www.thesun.co.uk/sol/homepage/news/article782629.ece>; Matthew d'Ancona, *Britain Must Reject Craven Counsel of Despair*, TELEGRAPH (Feb. 9, 2008, 12:01 AM), <http://www.telegraph.co.uk/news/uknews/1578213/Britain-must-reject-craven-counsel-of-despair.html>.

<sup>32</sup> See *infra* notes 53–64 and accompanying text. Concerns regarding the enforceability of religious arbitration awards recently surfaced in New York. The New York Supreme Court of Kings County issued a decision vacating a religious arbitration award on the grounds of, inter alia, irrationality and public policy. *Brisman v. Hebrew Acad. of the Five Towns & Rockaway*, 887 N.Y.S.2d 414, 418–19 (Sup. Ct. 2008). However, a unanimous panel of the Appellate Division reversed the Supreme Court's decision and confirmed the award. *Brisman v. Hebrew Acad. of Five Towns & Rockaway*, 895 N.Y.S.2d 482, 483 (App. Div. 2010).

<sup>33</sup> See generally Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169 (2007) (noting the variety of procedures used by different religious tribunals across the United States and potential due process concerns); Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427 (2006) (advocating heightened oversight of religious arbitration courts).

<sup>34</sup> See Marc Ambinder, *Oklahoma's Preemptive Strike Against Sharia Law*, ATLANTIC (Oct. 25, 2010, 10:10AM), <http://www.theatlantic.com/politics/archive/2010/10/oklahomas-preemptive-strike-against-sharia-law/65081> (warning that "[i]f this initiative over-performs in November, look for a potential wave of 'preemptive strikes' against Sharia law in the years ahead"); Bill Raftery, *An Examination of 2011 Sharia Law and International Law Bans Before State Legislatures*, GAVEL TO GAVEL (Jan. 27, 2011), <http://gaveltogavel.us/site/2011/01/27/an-examination-of-2011-sharia-law-international-law-bans-before-state-legislatures/> (collecting state legislative initiatives aimed at banning Sharia and international law).

legal precepts of other nations or cultures,”<sup>35</sup> Rex Duncan, one of the amendment’s sponsors, stated:

[P]arties would come to the court and say we want to be bound by Islamic law and then ask the courts to enforce those agreements. That is a backdoor way to get Shariah Law in the courts. Now, there . . . have been some efforts I believe to explore bringing that to America. . . . And it’s dangerous.<sup>36</sup>

And Oklahoma is just one of many states to consider such legislation. For example, the legislatures in Alabama, Arizona, South Carolina, South Dakota, Texas, and Wyoming have all proposed similar bills that aim to prohibit courts from relying on, considering, or even referring to any form of religious law.<sup>37</sup> By prohibiting the enforceability of religious arbitration awards in state courts,<sup>38</sup> such legislative initiatives seek to undermine the ability of groups to serve as competing and independent legal orders, thereby striking at the very heart of the new multiculturalism.<sup>39</sup>

<sup>35</sup> H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010).

<sup>36</sup> Interview by Sean Hannity with Rex Duncan (June 21, 2010), available at <http://www.foxnews.com/story/0,2933,595026,00.html>; see also Michael A. Helfand, Op-Ed., *A Law We Don’t Need*, L.A. TIMES, NOV. 10, 2010, at A19 (noting that such initiatives are, in part, aimed at restricting the enforceability of religious arbitration awards); Gary Born, *Oklahoma’s “Save Our State Amendment” and Related Legislative Developments in the United States*, KLUWER ARBITRATION BLOG (June 25, 2010), <http://kluwerarbitrationblog.com/blog/2010/06/25/oklahoma%E2%80%99s-%E2%80%9Csave-our-state-amendment%E2%80%9D-and-related-legislative-developments-in-the-united-states/> (same).

<sup>37</sup> See *supra* note 4 (presenting examples of states considering legislation aimed at limiting or eliminating the influence of religious law in courts).

<sup>38</sup> Notwithstanding attempts by various legislators and legislatures, it is possible that courts will not interpret some or all of such legislation to prohibit religious arbitration. While no court has yet addressed the issue, a court seeking to enforce a religious arbitration award may not be “relying on,” “interpreting,” or “considering” the law under which the award was issued by the arbitrators.

<sup>39</sup> Most recently, a state court in Florida enforced an arbitration agreement requiring the arbitrator to employ Islamic dispute resolution procedures. *Mansour v. Islamic Educ. Ctr. of Tampa, Inc.*, 08-CA-3497 (Fl. Cir. Ct. Mar. 3, 2011); *Mansour v. Islamic Educ. Ctr. of Tampa, Inc.*, 08-CA-3497 (Fl. Cir. Ct. Mar. 22, 2011) (decision further clarifying prior ruling). Public outrage ensued. See William R. Levesque, *Judge Orders Use of ‘Sharia’ in Suit: Tampa Mosque Sued by Ex-trustees Doesn’t Want Islamic Law Cited*, ST. PETERSBURG TIMES, Mar. 22, 2011, at A1 (quoting discontented members of public). While the bill’s introduction preceded the decision, various political activists applauded a bill introduced in the Florida legislature outlawing the use of “foreign law” to prevent courts from issuing such decisions in the future. Tom Tillison, *Sharia Law Has Come to Florida*, FLA. POL. PRESS (Mar. 19, 2011), <http://www.floridapoliticalpress.com/2011/03/19/sharia-law-has-come-to-florida/> (describing the court’s decision in *Mansour* as “the best indication yet of just how important such legislation is to this country”); see also Nicholas Riccardi, *Oklahoma May Ban Islamic Law; Backers Say It Isn’t a Problem—But ‘Why Wait?’ Muslims Call the Bid a ‘Scare Tactic.’* L.A. TIMES, Oct. 29, 2010, at A6 (noting that supporters of the bill in Oklahoma are concerned with the possibility of Sharia courts functioning in the United States); Paul Horwitz, *Alabama Voices: Bogus Message*, MONTGOMERY ADVERTISER (Mar. 27, 2011), <http://www.montgomeryadvertiser.com/print/article/201103>

It is unsurprising that attempts to formally introduce religious arbitration into state legal systems have met such ferocious resistance. Religious arbitration courts are perceived as challenging the nation-state's status as the exclusive source of legitimate law.<sup>40</sup> Indeed, political philosophers since Thomas Hobbes have argued that the state is defined by its ability to monopolize the exercise of coercive legal power,<sup>41</sup> and religious arbitration courts continue to be characterized as challenging this primary function of the nation-state.<sup>42</sup> This is because such arbitration courts, at the request of the parties, explicitly adjudicate conflicts by applying a particular brand of religious law instead of state law.<sup>43</sup>

This Article seeks to reconsider the purpose and structure of religious arbitration courts in order to meet the challenges of the new multiculturalism. At their core, religious arbitration courts are unique because, by definition, they apply religious substantive and procedural law in adjudicating submitted disputes. This dynamic has two divergent implications. On one hand, religious arbitration courts serve particular religious communities by enabling them to resolve disputes in

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27/OPINION0101/103260302/Alabama-Voices-Bogus-message (noting that the synopsis of the Alabama bill clearly indicates it is “directed at Sharia” and that “American courts generally look to Sharia for one reason, and one reason only: because private parties have consented to privately arbitrate a contract or dispute by its terms”).

<sup>40</sup> See, e.g., Stanley Fish, *Serving Two Masters: Shariah Law and the Secular State*, N.Y. TIMES OPINIONATOR BLOG (Oct. 25, 2010, 7:00 PM), <http://opinionator.blogs.nytimes.com/2010/10/25/serving-two-masters-shariah-law-and-the-secular-state/> (exploring the difficulty of resolving the conflict between religious and secular imperatives); *Sense About Sharia: Islamic Law and Democracy*, ECONOMIST, Oct. 16, 2010, at 16, available at [http://www.economist.com/node/17251830?story\\_id=17251830](http://www.economist.com/node/17251830?story_id=17251830) (discussing and attempting to assuage exaggerated public concern over Islamic law's recognition by government); *Whose Law Counts Most: Sharia in the West*, ECONOMIST, Oct. 16, 2010, at 71, available at [http://www.economist.com/node/17249634?story\\_id=17249634](http://www.economist.com/node/17249634?story_id=17249634) (distinguishing between the implications of Sharia law for family legal matters and Sharia law's criminal punishments, upon which much public distrust seems to be based).

<sup>41</sup> THOMAS HOBBS, *LEVIATHAN* \*85–88 (1651); see also MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., Galaxy Book 1958) (1946) (describing the state as an institution “that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory”); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 17 (1974) (arguing that competition to provide protective services would, by nature, give rise to a virtual monopoly).

<sup>42</sup> See *supra* notes 36–39 and accompanying text; see also Editorial, *Archbishop's Big Blunder*, CANBERRA TIMES, Feb. 13, 2008, at A12 (“In a liberal and open society all citizens must be equal before the laws of the nation. There can be no laws which apply only to certain religious or cultural groups. . . . [A] unified legal system is what underpins our freedoms.”); *The Archbishop's Words Were Well Understood*, DAILY TELEGRAPH (London), Feb. 12, 2008, at 21 (“There are two quite separate points of legitimate concern. One is that the archbishop—who heads a national institution with a constitutional function—explicitly called into question the most fundamental principle of British justice: that we have a single system of law that applies equally to everyone.”).

<sup>43</sup> See *infra* Part I (describing Jewish and Islamic arbitration courts).

accordance with their own shared religious values and obligations.<sup>44</sup> Thus, enforcing religious arbitration awards does more than simply enhance individual freedom of contract by allowing parties to resolve disputes within the parameters of their own agreements; it enables individuals to use arbitration agreements as a mechanism to ensure access to adjudication in accordance with shared religious beliefs and practices.

On the other hand, if the advantages of religious arbitration courts lie, in part, in their application of complete systems of procedural and substantive law, then so do their potential drawbacks. While some critics of arbitration might welcome the existence of an arbitral forum that applies mandatory procedural law,<sup>45</sup> religious law lends itself to the application of procedures that are potentially discriminatory. Indeed, many of the latent concerns regarding the enforceability of religious arbitral awards stem from the possibility that religious arbitration courts will apply rules that make the resulting judgments deeply unfair.<sup>46</sup> Moreover, critics wonder whether participation in religious arbitration proceedings can be viewed as truly volitional, given the specter of communal pressure to submit disputes for resolution in accordance with communal norms and values.<sup>47</sup>

To account for these divergent implications, this Article argues that courts should reconsider the application of two important doctrinal checks on arbitral power in the religious arbitration context: public policy and unconscionability. On one hand, courts should avoid mechanically using public policy as grounds to vacate religious arbitration awards. Instead, courts should adopt a balancing approach to the public policy ground for vacatur—an approach adopted in the international arbitration context—to account for the central institutional role played by religious arbitration in advancing the value of multiculturalism.

On the other hand, courts should vigorously apply the unconscionability doctrine to void arbitration agreements that are signed under extreme forms of communal pressure and that incorporate religious rules that are subversive to arbitral justice. Indeed, despite recent crit-

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<sup>44</sup> See *infra* Part I (describing Jewish and Islamic arbitration courts).

<sup>45</sup> See *infra* notes 127–52 and accompanying text (contrasting the mandatory procedures of religious arbitration with the dearth of procedures in secular arbitration).

<sup>46</sup> See, e.g., Grossman, *supra* note 33, at 205–08 (insisting that courts be allowed to engage in some level of religious question review in order to ensure fairness in the application of religious law); Wolfe, *supra* note 33, at 463–65 (warning of the potential for injustice if religious arbitration is enforced without adequate procedural protections).

<sup>47</sup> See *infra* notes 240–42 and accompanying text (describing communal pressure in religious communities to submit disputes before a religious arbitration court).

icism,<sup>48</sup> the unconscionability doctrine is particularly well suited to police religious arbitration awards, since it requires courts to consider principles of both volition and fairness in evaluating the enforceability of arbitration agreements.<sup>49</sup>

In reconsidering the application of the public policy and unconscionability doctrines, this Article emphasizes the unique institutional role religious arbitration courts play by providing an institutional solution to the new multiculturalism: They enable citizens with secondary commitments to adhere to the strictures of U.S. law without sacrificing their commitment to their religious practices.<sup>50</sup> Religious arbitration courts, when properly absorbed into the United States' arbitration regime, hold out the possibility of accomplishing these goals. As a result, they serve as important religious and cultural institutions, which can potentially expand the scope of religious freedom and successfully advance the freedom-enhancing aims of the new multiculturalism.<sup>51</sup>

In Part I of this Article, I examine the deferential treatment U.S. courts afford to religious arbitration awards and the institutional role religious arbitration plays in religious communities. In Part II, I describe the twofold consequences of conducting arbitration in accordance with mandatory religious law. First, I explain how substantive religious law can conflict with U.S. law and how that conflict plays itself out in the arbitration context. Second, I consider the benefits and risks of mandatory procedural law in the religious arbitration context. In Part III, I situate the challenge of religious arbitration within the larger multicultural narrative. In so doing, I sketch the contours of

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<sup>48</sup> See generally Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006) (arguing that California courts improperly apply lower standards of unconscionability in determining the enforceability of arbitration agreements than in resolving other contractual issues); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469 (arguing that many courts favor litigation over arbitration by erroneously applying the unconscionability doctrine to strike down arbitration agreements); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761 (2003) (arguing against attempts to broadly apply the unconscionability doctrine to arbitration agreements).

<sup>49</sup> See *infra* Part V.B (arguing that the unconscionability doctrine can serve as a safety net against potentially negative aspects of religious arbitration).

<sup>50</sup> See *infra* Part III.B (describing the new multiculturalism and the role of religious arbitration).

<sup>51</sup> See, e.g., Richard W. Garnett, *Do Churches Matter? Toward an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 294–95 (2008) (arguing that religious institutions are important because they “contribute to . . . the reality of religious freedom under law” by serving as part of the infrastructure that makes religious freedom possible).

the old multiculturalism, describing both its philosophical origins and political applications; and I contrast the old multiculturalism with the emerging new multiculturalism, which emphasizes the values of autonomy and self-governance. In Part IV, I discuss religious arbitration as an opt-in regime and examine the extent to which this opt-in structure ameliorates some of the problems that result from multiple competing legal systems. In turn, I focus on both the possibility of opt-in mechanisms and the social pressures that undermine this opt-in structure. Finally, in Part V, I recommend a context-sensitive application of the public policy and unconscionability doctrines to religious arbitration courts in order to address the benefits and risks of the new multiculturalism.

## I

### RELIGIOUS ARBITRATION, OBLIGATION, AND INSTITUTIONALISM

In the words of one author, “traditional, faith-based alternatives to the mainstream legal system are alive and well, and, in many ways, busier and more influential than ever.”<sup>52</sup> While the Beth Din, or Jewish rabbinical arbitration court, is the most common religious arbitration institution in the United States, Islamic and Christian institutions also provide fora for religious arbitration.<sup>53</sup>

The mechanism to have a claim arbitrated by a religious arbitration court is the same as it is for standard arbitration courts: The parties must either sign an arbitration agreement to have a religious arbitral panel resolve the relevant dispute or include such an arbitration clause in a signed contract.<sup>54</sup> In so doing, parties demonstrate their consent to exit the realm of standard legal adjudication and opt

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<sup>52</sup> R. Seth Shippee, “*Blessed Are the Peacemakers*”: *Faith-Based Approaches to Dispute Resolution*, 9 ILSA J. INT’L & COMP. L. 237, 238 (2002).

<sup>53</sup> *Id.*; see also Meshel v. Ohev Shalom Talmud Torah, 869 A.2d 343, 364 (D.C. Cir. 2005) (reversing a trial court’s dismissal of the case and compelling arbitration before a Beth Din); *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1108–09 (D. Colo. 1999) (applying a strong federal policy favoring arbitration to a decision of the Christian Conciliation panel); *Abd Alla v. Mourssi*, 680 N.W.2d 569, 574 (Minn. Ct. App. 2004) (upholding a decision of an Islamic arbitration panel applying Islamic law); Grossman, *supra* note 33, at 177–82 (describing the current state of Christian, Muslim, and Jewish arbitration courts in the United States). See generally Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to “Ordinary” ADR*, 29 CUMB. L. REV. 583 (1999) (discussing Christian arbitration).

<sup>54</sup> *Tal Tours (1996), Inc. v. Goldstein*, 808 N.Y.S.2d 920, 920 (Sup. Ct. 2005) (“An agreement to proceed before a *bet din* is treated as an agreement to arbitrate.”); see also Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 642 (2004) (explaining that a Beth Din arbitration agreement must state the parties’ express intent to submit to a Beth Din).

into binding arbitration.<sup>55</sup> Awards issued by religious arbitration courts, like those of standard arbitration tribunals, are subject to the statutory grounds for vacatur.<sup>56</sup> Thus, consent to their proceedings cannot be coerced;<sup>57</sup> arbitrators must remain objective and disclose any relationship with the parties standing before them,<sup>58</sup> and they cannot modify the terms of the underlying contract.<sup>59</sup> As long as no such grounds exist, U.S. courts will consistently enforce religious arbitration awards.<sup>60</sup>

While some have argued that enforcing religious arbitration awards violates the Establishment Clause, courts have ruled otherwise by finding that enforcing a religious arbitration award does not require them to address the merits of the underlying dispute.<sup>61</sup>

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<sup>55</sup> *Kingsbridge Ctr. of Israel v. Turk*, 469 N.Y.S.2d 732, 734 (App. Div. 1983) (confirming a Beth Din decision because the parties consented, through written agreement, to have a Beth Din panel adjudicate the matter); *Kovacs v. Kovacs*, 633 A.2d 425, 433 (Md. Ct. Spec. App. 1993) (confirming a Beth Din award because the parties “knowingly chose” to participate in arbitration); see also *infra* notes 236–39 and accompanying text (explaining that when enforcing religious arbitration agreements, courts require demonstration of explicit intent by the parties to enter a religious arbitration forum).

<sup>56</sup> See 9 U.S.C. § 10 (2006) (listing statutory grounds for vacatur); Amina Dammann, Note, *Vacating Arbitration Awards for Mistakes of Fact*, 27 REV. LITIG. 441, 470–75 (2008) (collecting state grounds for vacatur of arbitration awards).

<sup>57</sup> See *In re Marriage of Popack*, 998 P.2d 464, 468 (Colo. App. 2000) (holding that an arbitration agreement must be entered into voluntarily to be valid); *Segal v. Segal*, 650 A.2d 996, 998–1000 (N.J. Super. Ct. App. Div. 1994) (invalidating a marriage settlement agreement produced in the course of religious arbitration due to a finding that the wife entered into it under duress); *Golding v. Golding*, 581 N.Y.S.2d 4, 6 (App. Div. 1992) (“[I]t is evident that plaintiff did not freely and voluntarily enter into the subject agreement . . . .”); see also 9 U.S.C. § 2 (2006) (noting that arbitration agreements are valid “save upon such grounds as exist at law or in equity for the revocation of any contract”).

<sup>58</sup> See 9 U.S.C. § 10(a)(2) (naming “evident partiality or corruption in the arbitrators” as grounds for vacation of an award); see also *Segal*, 650 A.2d at 998 (suggesting that a rabbinical panel had acted unfairly in favor of the husband).

<sup>59</sup> See 9 U.S.C. § 10(a)(4) (stating that vacatur is appropriate “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”); see also *Kingsbridge*, 469 N.Y.S.2d at 734 (“[I]n the absence of an agreement to the contrary, an arbitrator may not modify the terms of the contract between the parties and . . . where the arbitrator purports to do so, he acts in excess of his authority.”).

<sup>60</sup> See *Dial 800 v. Fesbinder*, 12 Cal. Rptr. 3d 711, 724 (Cal. Ct. App. 2004) (“American courts routinely enforce money judgments and other orders by *beth din* panels.”); *Ghertner v. Solaimani*, 563 S.E.2d 878, 880 (Ga. Ct. App. 2002) (“[T]he results of a Bet Din, conducted pursuant to the Georgia Arbitration Act, are enforceable pursuant to that Act.”); e.g., *Abd Alla v. Mourssi*, 680 N.W.2d 569, 574 (Minn. Ct. App. 2004) (upholding the decision of an Islamic arbitration panel applying Islamic law).

<sup>61</sup> See, e.g., *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. Cir. 2005) (holding that granting action to compel arbitration before a rabbinical court did not violate the First Amendment because “the resolution of appellants’ action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties’ underlying dispute”); *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999) (“Impermissible First Amendment entanglement is speculative at this junct-

Accordingly, courts can avoid impermissibly insinuating themselves into religious disputes. In this way, U.S. courts treat religious arbitration courts as they treat any other arbitration panel.<sup>62</sup> The existence of a religious arbitration agreement deprives a court of subject matter jurisdiction, just as any other arbitration agreement does.<sup>63</sup> And the policy favoring arbitration applies to religious and secular arbitration alike.<sup>64</sup> Indeed, parties voluntarily comply with most religious arbitration agreements and awards without court intervention, just as they do with secular arbitration agreements and awards.<sup>65</sup>

This, however, is not to say that religious arbitration courts function like all other arbitration courts—far from it. Religious arbitration

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ture. Indeed, refusal to enforce the parties' arbitration agreement could itself arguably constitute an impermissible entanglement."); *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 731 (N.J. 1991) ("[T]he EHC's consent to proceedings before the Beth Din precludes its later [First Amendment] challenges to the results of those proceedings."); See generally Nicholas Walter, *The Status of Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. (forthcoming 2012) (manuscript at 15–19), available at <http://ssrn.com/abstract=1801103> (discussing the general enforcement of religious arbitration awards over First Amendment objections). This is not to say that civil courts do not, at times, encounter Establishment Clause problems in the process of reviewing and enforcing a religious arbitration award. Such problems occur most frequently when particular contractual provisions cannot be interpreted by "neutral principles of contract law," but instead require interpretation of religious doctrine. See, e.g., *Sieger v. Sieger*, 747 N.Y.S.2d 102, 103–04 (App. Div. 2002) (finding that interpreting a contractual provision that required the parties to resolve their disputes "in accordance with the regulations of Speyer, Worms, and Mainz" would require the court to make a determination regarding religious doctrine and was therefore prohibited under the Establishment Clause).

<sup>62</sup> See *Easterly v. Heritage Christian Schs., Inc.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at \*3 n.3 (S.D. Ind. Aug. 26, 2009) (stating that reviewing an arbitration award issued by Christian arbitrators would not violate the First Amendment because the award would be "subject to judicial review the same as if it had been conducted pursuant to the American Arbitration Association's procedural rules or any other set of secular procedures"); *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 731 (N.J. 1991) ("These natural analogs to arbitration suggest that it is appropriate that the EHC, like a party to a civil arbitration, should be bound to observe the Beth Din's determination of any issues that the EHC agreed to submit to that tribunal.").

<sup>63</sup> *In re Marriage of Popack*, 998 P.2d 464, 468 (Colo. App. 2000) (noting in its analysis of an award granted by a Beth Din that, "[g]enerally, a valid and enforceable arbitration agreement divests the courts of jurisdiction over all disputes to be arbitrated pending the conclusion of arbitration").

<sup>64</sup> Compare, e.g., *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1108–09 (D. Colo. 1999) (applying a strong federal policy favoring arbitration to the Christian Conciliation), and *Jabri v. Qaddura*, 108 S.W.3d 404, 410 (Tex. Ct. App. 2003) (applying a policy favoring arbitration to an agreement to arbitrate before the Texas Islamic Court), with *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (applying a policy favoring arbitration to an arbitration clause in a consumer contract).

<sup>65</sup> For a discussion of this phenomenon in the secular arbitration context, see Richard W. Naimark & Stephanie E. Keer, *Post-Award Experience in International Commercial Arbitration*, in *TOWARD A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 269, 270–71 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

courts are unique because, rather than merely adjudicating claims based on an arbitrator's understanding of U.S. law<sup>66</sup> and principles of equity,<sup>67</sup> they render decisions based upon a selected body of religious law. Thus, religious arbitration agreements contain choice of law provisions<sup>68</sup> that require an arbitration panel to adopt and apply selected religious rules.<sup>69</sup> Accordingly, religious arbitration courts employ both

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<sup>66</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

<sup>67</sup> See, e.g., *Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) (“Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate.”); *Konkar Mar. Enters., S.A. v. Compagnie Belge D’Affretement*, 668 F. Supp. 267, 271 (S.D.N.Y. 1987) (“Arbitrators have broad discretion in fashioning remedies and ‘may grant equitable relief that a Court could not.’” (quoting *Compania Chilena de Navegacion Interoceanica v. Norton, Lilly & Co.*, 652 F. Supp. 1512, 1516 (S.D.N.Y. 1987))).

<sup>68</sup> This Article addresses “religious arbitration courts,” which apply religious law in adjudicating disputes submitted by two parties. Analyzing this limited set of institutions captures circumstances where individuals are opting into a defined alternative legal system with its own set of rules and procedures. In this way, this Article is more limited in scope than some of the literature on minority-culture arbitration. See E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 275 n.1 (1999) (defining “culture” as “a set of shared values and beliefs” and defining a “cultural minority member” as “an individual whose core religious, political or social values and beliefs differ meaningfully and substantially from majoritarian norms”); see also Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 1037 (1999) (“Rather than attempting to flee the court system, cultural minorities should attempt to secure meaningful reforms that lead to a higher degree of confidence in the basic fairness and reliability of these institutions.”); E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1065 (1999) (defending minority-culture arbitration as a “safe harbor from majoritarian bias [and] . . . as an instrument of systemic change”); Stephen J. Ware, *Arbitration and Assimilation*, 77 WASH. U. L.Q. 1053, 1056–63 (1999) (arguing for privatizing law through arbitration). The emphasis of this Article is more on religious law than on moral values or shared beliefs.

<sup>69</sup> See, e.g., *Agreement to Arbitrate*, BETH DIN OF AM., [http://www.bethdin.org/docs/PDF3-Binding\\_Arbitration\\_Agreement.pdf](http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf) (last visited Sept. 21, 2011) (“The parties acknowledge that the arbitrator may resolve this controversy in accordance with Jewish law (*‘din’*) or through court ordered settlement in accordance with Jewish law (*‘p’shara krova l’din’*).”); *Agreement to Mediation/Arbitration*, CHI. RABBINICAL COUNCIL, <http://www.crcweb.org/AGREEMENT%20TO%20MEDIATION.pdf> (last visited Sept. 21, 2011) (“The parties acknowledge that the arbitrator(s) may resolve this controversy in accordance with Jewish law (*‘din’*) and/or the general principles of arbitration and equity customarily employed by the Chicago Rabbinical Council.”); *Rules of Procedure*, THE INST. FOR CHRISTIAN CONCILIATION, [http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules\\_of\\_Procedure.htm](http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules_of_Procedure.htm) (last visited Sept. 21, 2011) (“[T]he Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.”); *Procedure Rules of Muslim Arbitration Tribunal*, MUSLIM ARBITRATION TRIBUNAL, [http://www.matribunal.com/procedure\\_rules.html](http://www.matribunal.com/procedure_rules.html) (last visited Sept. 21, 2011)

the substantive and procedural machinery of an entirely different legal system.

Indeed, religious arbitration courts play a central institutional role, in large part, because of the importance a number of religions place on adjudicating disputes in accordance with religious law. By enabling religionists to fulfill their own perceived obligations, religious arbitration courts play a freedom-enhancing role, “contribut[ing] to . . . the reality of religious freedom under law” by serving as part of the infrastructure that makes religious freedom possible.<sup>70</sup> This freedom-enhancing role is most pronounced in what we might call religious legal communities, in which members perceive community norms as primarily legal in nature.<sup>71</sup> Because such members typically experience religious obligations through the prism of legal rules, interpretation and application of obligations become necessary elements of religious adherence. Thus, by recognizing how religious arbitration courts allow people to pursue their own religious obligations, we can appreciate how the enforceability of religious arbitration awards expands religious liberty. To better understand this dynamic, I consider the jurisprudence regarding religious arbitration in two paradigmatic examples of religious legal communities—Judaism and Islam.<sup>72</sup>

### A. Jewish Law

The Bible states that God commanded Moses: “These are the rules that you shall set before them.”<sup>73</sup> The Talmud deduces from the verse that Jews, when faced with pending litigation, must present such claims “before them”—that is, before a rabbinical court—and not before a secular court.<sup>74</sup> This interpretation is the prevailing view,

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(stating that disputes are resolved “in accordance with Qur’anic Injunctions and Prophetic Practice as determined by the recognized Schools of Islamic Sacred Law”).

<sup>70</sup> Garnett, *supra* note 51, at 294–95.

<sup>71</sup> For further explanation of what differentiates religious legal communities, see *supra* note 12.

<sup>72</sup> I do not here focus on Christian arbitration because “Christian forms of dispute resolution are the least formal, and generally range somewhere between negotiation and mediation.” Shippee, *supra* note 52, at 241; see also Grossman, *supra* note 33, at 177–78 (noting that Peacemaker Ministries, the most prominent of current Christian dispute resolution organizations, uses mediation by default and employs arbitration only absent resolution through mediation). This phenomenon is likely related to the fact that Christian doctrine is not typically expressed in legal norms; thus, there are limited procedural and substantive laws relevant to dispute resolution. See, e.g., Movsesian, *supra* note 12, at 862–64 (noting that “Christianity does not express its faith through a body of law” and that this lack of emphasis on law “is reflected in contemporary [Christian] attitudes toward religious tribunals,” where “a desire for religious tribunals does not loom large”).

<sup>73</sup> *Exodus* 21:1.

<sup>74</sup> Babylonian Talmud, Tractate Gittin 88b. The qualifications required of those serving on the panel of rabbinical decision makers is a more complicated matter. See J. David

codified in the *Shulhan Arukh* (“Code of Jewish Law”), the preeminent and definitive Jewish legal code.<sup>75</sup> As a result, Orthodox Jews believe they are obligated to pursue their legal claims before a rabbinical court. Indeed, to pursue them before a U.S. court would violate a biblical prohibition, incurring religious sanctions and the possible loss of important Jewish legal rights.<sup>76</sup>

The early development of the jurisprudence surrounding this perceived obligation is linked to the development of Jewish law when Jewish communities were subject to the laws of host countries.<sup>77</sup> Jewish communities have long contended with questions of jurisdiction and enforceability despite their lack of sovereignty.<sup>78</sup> It is therefore not surprising that there is an extensive network of rabbinical arbitration courts around the United States, each providing Jewish communities in different regions with arbitral fora in which to present their legal disputes. Permanent rabbinical arbitration courts—often referred to as a Beth Din or Beit Din—can typically be found in metropolitan centers, such as New York,<sup>79</sup> Chicago,<sup>80</sup> and Los Angeles,<sup>81</sup> where they serve large Jewish communities. In smaller communities without a standing Beth Din, parties can hire arbitrators to conduct hearings locally to ensure the convenience of the forum for all parties. Indeed, while national data is not available, the number of civil cases submitted for adjudication before the Beth Din of America—one of

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Bleich, *Litigation and Arbitration Before Non-Jews*, 34.3 TRADITION 58, 62–63 (2000) (describing the doctrinal origin and evolution of qualifications for serving on a Beth Din).

<sup>75</sup> JOSEPH KARO, CODE OF JEWISH LAW: LAWS OF JUDGES 26:1 (El Hamekoroth 1955) (1565).

<sup>76</sup> See Michael A. Helfand & Yaacov Feit, *Confirming Piskei Din as Arbitration Awards*, 61 J. HALACHA & CONTEMPORARY SOC’Y 5 (2011) (describing the parameters of the biblical prohibition on submitting disputes to secular courts); JOSEPH KARO, CODE OF JEWISH LAW: YOREH DE’AH 334 (El Hamekoroth 1955) (1565) (stating that litigating before a non-Jewish court is grounds for excommunication and listing the rights forfeited by one placed under such religious ban); see also Bleich, *supra* note 74, at 75–76 (explaining that a party can be found in contempt of court for failure to appear and describing the rationale in Jewish law for such contempt orders).

<sup>77</sup> See Stolzenberg & Myers, *supra* note 14, at 636–40 (noting that Jewish communal structure and many political-legal doctrines developed in response to the Jewish community’s relationship with its host country).

<sup>78</sup> See generally JACOB KATZ, EXCLUSIVENESS AND TOLERANCE 48–63 (1961) (describing the development of Jewish law and politics in response to the diaspora experience).

<sup>79</sup> See, e.g., BETH DIN OF AM., <http://www.bethdin.org> (last visited Sept. 21, 2011).

<sup>80</sup> See, e.g., cRc: Beth Din, CHI. RABBINICAL COUNCIL, <http://www.crcweb.org/bethdin.php> (last visited Sept. 21, 2011).

<sup>81</sup> See, e.g., Beth Din, RABBINICAL COUNCIL OF CAL., <http://www.rccvaad.org/beth.html> (last visited Sept. 21, 2011).

the most prominent rabbinical arbitration courts in the United States—has nearly doubled over the past eight years.<sup>82</sup>

### B. Islamic Law

In contrast to arbitration within the Jewish community, Islamic arbitration in the United States is in a state of significant flux. Muslim communal groups have recently begun pursuing initiatives to institute a network of Islamic arbitration courts around the United States;<sup>83</sup> however, no such network currently exists.<sup>84</sup>

While a complete historical analysis of this discrepancy is beyond the scope of our current investigation, the lag of Islamic arbitration is likely related to disputes among Islamic jurists about whether Islamic law applies to Muslims living as minorities in non-Muslim states.<sup>85</sup> As an ideal, Islam anticipates Muslims living in Muslim states; in turn, according to some schools of Islamic jurisprudence, Islamic law does not apply in non-Muslim states.<sup>86</sup> It is therefore not surprising that, in contrast to Jewish arbitration courts, Islamic arbitration courts are less prevalent in the United States.

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<sup>82</sup> The Beth Din of America is just one of many standing rabbinical courts in the United States. It is thus difficult to glean any general trends from the upward trend at the Beth Din of America. Still, it seems worthwhile to note that according to Rabbi Shlomo Weissmann, Director of the Beth Din of America, the respective number of civil cases filed for the past seven years have been: 56 in 2002, 68 in 2003, 70 in 2004, 85 in 2005, 86 in 2006, 98 in 2007, 110 in 2008, 94 in 2009, and 107 in 2010. Interview with Shlomo Weissmann, Dir., Beth Din of Am., in New York, N.Y. (Feb. 11, 2011).

<sup>83</sup> See, e.g., Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 1 J. ISLAMIC L. 1, 54–60 (1996) (describing initiatives aimed at providing North American Muslims with increased access to Islamic Law rulings, including Sharia arbitration tribunals).

<sup>84</sup> See Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 177 (Lynn Welchman ed., 2004), available at <http://www.law.wisc.edu/faculty/download.php?iID=176> (discussing the potential advantages of establishing Muslim tribunals in the United States).

<sup>85</sup> The fact that Islam, as an ideal, anticipates Muslims living in a Muslim state may have slowed the development of legal doctrine addressing issues related to minority status. For a consideration of Muslim minorities in Islamic Law, see generally Khaled Abou El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 ISLAMIC L. & SOC'Y 141 (1994). See also Andrew F. March, *Are Secularism and Neutrality Attractive to Religious Minorities? Islamic Discussions of Western Secularism in the "Jurisprudence of Muslim Minorities"* (*Fiqh Al-Aqalliyat*) Discourse, 30 CARDOZO L. REV. 2821, 2824–25 (2009) (exploring the challenges of observant Muslims living as minorities in Western liberal democracies).

<sup>86</sup> El Fadl, *supra* note 85, at 172–74. See generally Khaled Abou El Fadl, *Legal Debates on Muslim Minorities: Between Rejection and Accommodation*, 22 J. RELIGIOUS ETHICS 127 (1994) (examining various historical positions taken regarding the religious and political status of Muslim minorities).

Nevertheless, in the past thirty years, there have been calls within the Islamic community to establish Islamic arbitration courts, enabling Muslims to bring their disputes before qualified panels of Muslim adjudicators. One notable initiative created the Fiqh Council of North America, which provides counsel and renders determinations regarding Islamic legal issues.<sup>87</sup> According to its bylaws, the Fiqh Council is responsible for “advis[ing] in the appointment of arbiters, and review[ing] arbitration proceedings and decisions for their consistency with Islamic legal principles.”<sup>88</sup> In 1988, the Council of Masajid of the United States sponsored two conferences dedicated to finding ways to provide Muslims access to Islamic family law rulings.<sup>89</sup> These conferences ultimately resolved to establish Islamic arbitration councils in numerous large metropolitan areas in the United States.<sup>90</sup> This comprehensive goal, however, has not yet been realized.<sup>91</sup>

Since these initial resolutions, other leaders in the Islamic community have similarly pushed to establish Islamic arbitration courts in the United States.<sup>92</sup> Moreover, a number of groups and individuals

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<sup>87</sup> Fiqh Council of N. Am., <http://www.fiqhcouncil.org> (last visited Sept. 21, 2011); see also Abdal-Haqq, *supra* note 83, at 54–55 (describing the origin of the Fiqh Council of North America).

<sup>88</sup> Abdal-Haqq, *supra* note 83, at 56.

<sup>89</sup> *Id.* at 57.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; see also Quraishi & Syeed-Miller, *supra* note 84, at 215 (“Muslims in the United States have begun to discuss the possibility of establishing such tribunals.”) (emphasis added).

<sup>92</sup> See, e.g., Issa Smith, *Native American Courts: Precedent for an Islamic Arbitral System*, AMERICAN MUSLIM (Feb. 15, 2007), [http://theamericanmuslim.org/tam.php/features/articles/native\\_american\\_courts\\_precedent\\_for\\_an\\_islamic\\_arbitral\\_system/0013143](http://theamericanmuslim.org/tam.php/features/articles/native_american_courts_precedent_for_an_islamic_arbitral_system/0013143) (urging the Muslim community to create a legal and social network to address issues of Muslim family law, “imitat[ing] the paradigm of the tribal court system and its supporting network”); Sheikh Ali al-Timimi, Address at the 1997 JIMAS Conference: Establishing Islam in the West (Aug. 2007), available at [http://www.missionislam.com/knowledge/need\\_forfiqh.htm](http://www.missionislam.com/knowledge/need_forfiqh.htm) (“[F]or Muslims to have avenues for arbitration that are recognized by the laws of the country through which disputes regarding marriage and divorce, financial transactions can be solved is something that is necessary for establish [sic] Islam in the West.”); Sheila Musaji, *Islamic Sharia and Jewish Halakha Arbitration Courts*, THE AMERICAN MUSLIM (June 11, 2011), [http://theamericanmuslim.org/tam.php/features/articles/islamic\\_sharia\\_and\\_jewish\\_halakha\\_arbitration\\_courts/](http://theamericanmuslim.org/tam.php/features/articles/islamic_sharia_and_jewish_halakha_arbitration_courts/) (“[I]t would seem that faith based arbitration is an existing part of our legal system, and that considering sharia as somehow less acceptable than halakha . . . has no basis in anything other than prejudice and stereotyping.”); see also Quraishi & Syeed-Miller, *supra* note 84, at 215 (noting that the Islamic community has “helpful precedent . . . in the experience of the Jewish community, which has already established an alternative dispute-resolution faith-based system”). Indeed, in England the Islamic Sharia Council met with leaders of the Federation of Synagogue’s Beth Din in an attempt to learn about the beth din structure. Marc Shoffman, *Muslims Seeking Beth Din Advice*, TOTALLY JEWISH (Feb. 14, 2008), <http://www.totallyjewish.com/news/national/c-8348/muslims-seeking-beth-din-advice/>.

have developed rules and procedures for use by Islamic arbitration panels in the United States.<sup>93</sup>

Indeed, these calls to establish a network of Islamic arbitration panels are more than mere policy initiatives; they represent an understanding of the legal obligations of American Muslims under Islamic law.<sup>94</sup> For example, in a recent *fatwa*—a religious decree—Muzammil Siddiqi, Chairman of the Fiqh Council’s Executive Committee, stated that “Muslims must try their utmost to solve all their problems and disputes among themselves and according to the laws of Allah Almighty.”<sup>95</sup> In fact, Asifa Quraishi and Najeeba Syeed-Miller report that there is an increasing feeling among American Muslims of “individual obligation” to “restor[e] Islamic values through creating an Islamic mediation model.”<sup>96</sup> Thus, interest in Islamic arbitration, like

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<sup>93</sup> For example, the Islamic Society of North America holds yearly conferences on dispute resolution and has developed a set of procedures for Islamic arbitration panels. *Arbitration Panels and Grievance Procedures*, ISLAMIC SOC’Y OF N. AM., <http://www.isna.net/assets/ildc/documents/arbitrationpanelsandgrievanceprocedures.doc> (last visited Sept. 21, 2011). In addition, the Muslim Arbitration Tribunal in England has established rules of procedure for Islamic arbitration courts. *Procedure Rules of Muslim Arbitration Tribunal*, *supra* note 69; see also Amr Abdalla, *Principles of Islamic Interpersonal Conflict Intervention: A Search Within Islam and Western Literature*, 15 J.L. & RELIGION 151, 153 (2000) (suggesting three principles to guide Islamic conflict intervention); Quraishi & Syeed-Miller, *supra* note 84, at 215 (discussing the use of Abdalla’s framework).

<sup>94</sup> The fact that the development of Islamic rules and procedures is linked to the initiatives to create Islamic arbitration panels is far from surprising. See, e.g., Wael B. Hallaq, *Model Shurut Works and the Dialectic of Doctrine and Practice*, 2 ISLAMIC L. & SOC’Y 109, 132–34 (1995) (arguing that a strong dialectical link exists between Islamic legal doctrine and judicial practice).

<sup>95</sup> Muzammil Siddiqi, *Taking Disputes to Non-Muslim Courts*, ONISLAM (May 15, 2005), <http://www.onislam.net/english/ask-the-scholar/international-relations-and-jihad/private-international-law/175698>. In reaching this conclusion, Siddiqi cites to the verse in the Qur’an that states,

O you who believe, obey Allah and obey the Messenger and those charged with authority from amongst you. If you differ in anything amongst yourselves, refer it to Allah and His Messenger, if you do believe in Allah and the Last Day. This is best and most suitable for final determination.

*Id.* (quoting Qur’an, 4:59 (internal quotation marks omitted)).

<sup>96</sup> Quraishi & Syeed-Miller, *supra* note 84, at 216. It is not surprising that there is a perceived obligation to use mechanisms of alternative dispute resolution to restore Islamic values. A number of verses in the Qur’an instruct Muslims to submit matters of dispute to religious authorities for adjudication. See, e.g., The Qur’an, 4:59, 16:43, 33:36 (M.A.S. Abdel Haleem trans., Oxford Univ. Press 2005); see also KHALED ABOU EL FADL, *SPEAKING IN GOD’S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN* 25–30 (2001) (exploring the role of humans in administering justice in Islam). Moreover, as a general matter, “laymen . . . are under the obligation to follow the guidance of the *mujtahids*.” Wael B. Hallaq, *A HISTORY OF ISLAMIC LEGAL THEORIES* 122 (1997). This notion—captured in the obligation of *Taqlid*—requires, on the part of the layman, adherence to the *mujtahid*’s (Islamic jurist’s) “authority without questioning either his textual evidence or the line of reasoning he adopted in a particular case.” Wael B. Hallaq, *AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW* 86 (2001). See generally *id.* at 86–120 (2001)

interest in Jewish arbitration, stems from Muslims' perception of an obligation to adjudicate their disputes in accordance with Islamic rules and principles. Current U.S. arbitration doctrine provides a hospitable framework for such religious arbitration, allowing the parties to craft agreements that entrust the adjudication of their disputes to religious authorities in accordance with religious law.

## II

### THE IMPACT OF RELIGIOUS CHOICE OF LAW PROVISIONS ON THE ENFORCEABILITY OF RELIGIOUS ARBITRAL AWARDS

As already emphasized, two legal mechanisms typify religious arbitration. First, religious arbitration, like other forms of arbitration, entails adjudicating a dispute outside the confines of the judicial system. Second, religious arbitration entails adjudicating a dispute pursuant to a chosen body of religious law. Thus, religious arbitration agreements employ both arbitration clauses and choice of law provisions, which together enable participants to opt out of the judicial system and into an alternative religious arbitration system. In this way, religious arbitration courts serve as the quintessential institution of the new multiculturalism.

In empowering individuals to opt out of the judicial system and into an adjudicative forum tailored to their needs, arbitration doctrine has increasingly shifted toward a contract-based understanding of arbitration.<sup>97</sup> As such, the Supreme Court has made it clear that "Section 2 [of the Federal Arbitration Act] embodies the national policy

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(outlining the dynamics of *Taqlid*); EL FADL, *supra*, at 9–69 (examining sources of authority in Islam).

The issue of whether Islamic law requires Muslims living as a minority in a non-Islamic state to submit civil disputes to a panel of recognized Islamic arbitrators, however, does not necessarily flow from these obligations. As noted above, whether and to what degree Islamic law applies in non-Muslim countries has been a matter of dispute. See El Fadl, *supra* note 85, at 172–81 (examining the duties of Muslim minorities under Islamic law). Furthermore, whether the obligation to follow the guidance of *mujtahids* translates into an obligation to submit disputes to Islamic arbitral panels is an evolving debate.

<sup>97</sup> Kenneth R. Davis, *A Model for Arbitration: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB. L.J. 167, 169 (1999) ("Once arbitration proceeds, the state's only role should be to assure that the arbitrator effectuated the contractual intent of the parties to the arbitration agreement."); Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 101 (1997) (describing the cornerstone of arbitration policy as "the intent of the parties to the arbitration agreement"). But see Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 61 DUKE L.J. (forthcoming 2011) (arguing that current Supreme Court arbitration doctrine does not truly adhere to standard contract principles and noting, for example, that it fails to give effect to the intention of parties).

favoring arbitration and places arbitration agreements on equal footing with all other contracts.”<sup>98</sup> Put differently, the purpose of arbitration is “to ensure that commercial arbitration agreements, like other contracts, ‘are enforced according to their terms’ and according to the intentions of the parties.”<sup>99</sup> In turn, the Court has stated that “[t]he arbitrator’s ‘task is to effectuate the intent of the parties.’”<sup>100</sup> This emphasis promotes the interests of the parties to the arbitration—what we might term first-party interests—by enabling them to fashion contractually their own forum for binding dispute resolution.<sup>101</sup> Indeed, this contract-based understanding of the Federal Arbitration Act (FAA) owes much to the Act’s legislative history, a fact not lost upon the Court.<sup>102</sup>

Religious arbitration takes advantage of this general trend. Religionists are able to structure the terms that will adjudicate their claims, choosing to resolve a dispute in accordance with religious law. Courts, in an effort to put arbitration agreements on equal footing with other contracts, enforce religious arbitration agreements and awards to advance the interests of the parties in having binding religious arbitration.

However, the first-party interests advanced through religious arbitration go beyond effectuating the intent of the contracting parties. Religious arbitration also enables religionists to adjudicate their disputes in accordance with their religious beliefs and practices.<sup>103</sup> Indeed, as described above, many religionists understand their obligations to include the submission of disputes for religious—and not

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<sup>98</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

<sup>99</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995) (internal citations omitted)).

<sup>100</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 (1991) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

<sup>101</sup> See generally Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996) (discussing the Supreme Court’s contract-based approach to arbitration law).

<sup>102</sup> See, e.g., *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (“The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate.”); see also H.R. REP. NO. 96, 68th Cong., 1st Sess., 1–2 (1924) (“Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement . . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs.”); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 85 (1999) (“The theme of upholding the intent of the parties resounds throughout the legislative history of the FAA.”).

<sup>103</sup> See *supra* notes 70–71 and accompanying text (describing the religious freedom-enhancing role of religious arbitration courts).

secular—adjudication.<sup>104</sup> As a result, when courts enforce religious arbitration awards, not only do they advance the first-party interests at stake in arbitration generally, but they also protect the unique first-party interests at stake in religious arbitration.<sup>105</sup>

However, prioritizing first-party interests and enabling religionists to submit disputes for religious adjudication poses a number of challenges to standard arbitration doctrine. Much of the complex dynamic between religious arbitration and general arbitration doctrine stems from the underlying premise that religious arbitration entails the application of religious law.

On one hand, applying religious substantive law can undermine the enforceability of religious arbitration awards in circumstances where religious law and U.S. law conflict—most notably when a religious arbitration award is subject to the public policy ground for vacatur.<sup>106</sup> Indeed, courts typically employ public policy to protect third-party interests by requiring courts to void any agreement, including an arbitration agreement, in which a private party waives rights that are intended to protect the public generally.<sup>107</sup> For example, by pursuing rights under the Sherman Antitrust Act, parties play the role of “private attorneys general,” deterring anticompetitive behavior through potential damages from civil suits.<sup>108</sup> Therefore, if a party signs an arbitration agreement which uses a choice of law provision to apply rules conflicting with the Sherman Antitrust Act, a court will vacate any resulting arbitration award on public policy grounds.<sup>109</sup>

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<sup>104</sup> See *supra* notes 74–76 and accompanying text (describing the religious obligation felt within some Jewish communities to submit their disputes before a Jewish arbitration court); *supra* notes 94–96 and accompanying text (describing the religious obligation felt within some Muslim communities to submit their disputes before a Muslim arbitration court).

<sup>105</sup> See *supra* Part I (describing the institutional role that religious arbitration plays in religious communities and using Jewish and Muslim arbitration as examples).

<sup>106</sup> See *infra* notes 119–26 and accompanying text (noting the conflict between Jewish law and U.S. antitrust law).

<sup>107</sup> See *infra* Part II.A.

<sup>108</sup> Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 *YALE J. INT'L L.* 219, 222–23 (2001); Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 *S. CAL. L. REV.* 353, 354–55 (1988) (evaluating the institution of the private attorney general); William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 *VAND. L. REV.* 2129, 2130–31 (2004) (defining “private attorney general” and describing its use in courts).

<sup>109</sup> See, e.g., *George Fischer Foundry Sys., Inc. v. Adolph H. Hottinger Maschinenbau*, 55 F.3d 1206, 1210 (6th Cir. 1995) (“[I]f any part of a contract, including a choice-of-law provision, waives a party’s right to collect damages for antitrust violations, the provision is void for public policy reasons.”); see also *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 467 (S.D.N.Y. 1997) (same).

Accordingly, if a religious choice of law provision applies rules in conflict with important protected public policies, a court will likely vacate the religious arbitration award.<sup>110</sup> In this way, conflicts between religious and secular law can undermine the enforceability of religious arbitration awards, requiring courts to override the unique first-party interests at stake when they clash with protected third-party interests.

On the other hand, the application of mandatory religious procedural law by religious arbitration courts allows religious arbitration to avoid, to a degree, some of the standard critiques leveled against secular arbitration for being procedurally lawless.<sup>111</sup> Indeed, because religious arbitration courts—in contrast to their secular counterparts—employ mandatory procedural law, they may be better able to protect first-party interests by providing important procedural protections. Notwithstanding this potential advantage, the existence of mandatory procedural law does not, on its own, guarantee protection of first-party interests; the mere fact that such procedural rules are mandatory does not ensure that they will accord with standard conceptions of fairness. In this way, the existence of mandatory religious procedural law requires us to take a different approach in addressing the procedural pitfalls in the religious arbitral context. We must consider both the potential advantage of mandatory procedure and the potential disadvantage of procedural rules that do not accord with standard conceptions of fairness.

Below, I consider the unique impact of religious arbitration courts' use of mandatory substantive and procedural rules. Doing so will enable us to appreciate both the network of interests at stake in the enforcement of religious arbitration awards and the unique problems religious arbitration poses to standard arbitration doctrine. By exploring this dynamic, we can begin building the groundwork for potential solutions to these problems.

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<sup>110</sup> For a recent example of a religious arbitration award vacated, in part, on public policy grounds to protect third parties, see *Brisman v. Hebrew Acad. of the Five Towns & Rockaway*, 887 N.Y.S.2d 414, 416, 418–19 (Sup. Ct. 2008), *rev'd sub nom.* *Brisman v. Hebrew Acad. of Five Towns & Rockaway*, 895 N.Y.S.2d 482, 483–84 (App. Div. 2010).

<sup>111</sup> See, e.g., Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1958 (1996) (“The Court’s willingness to curtail major constitutional and political interests—such as . . . due process guarantees—to bolster arbitration benefits neither the legal culture nor, in the long run, the institution of arbitration itself.”).

### A. *Conflicts in Substantive Law and the Public Policy Ground for Vacatur*

Although, as a general matter, courts do not review arbitration awards to ensure compliance with substantive law,<sup>112</sup> courts can vacate arbitration awards when the substance of the relief they require is “contrary to public policy.”<sup>113</sup> The Supreme Court

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<sup>112</sup> See, e.g., *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976) (“[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes.”); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (“The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.”). In fact, arbitrators are empowered to resolve disputes equitably, fashioning results to address the fact-based circumstances before them. See, e.g., *Reliastar Life Ins. Co. v. EMC Nat’l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) (“Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate.”); *Konkar Mar. Enter., S.A. v. Compagnie Belge D’Affretement*, 668 F. Supp. 267, 271 (S.D.N.Y. 1987) (recognizing the broad discretion arbitrators have in determining remedies and equitable relief).

<sup>113</sup> *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000) (pointing to the legal exception wherein an agreement will be held unenforceable if it violates public policy); *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (“As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy.”); see also *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 42 (1987) (“A court’s refusal to enforce an arbitrator’s award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.”).

Some courts have recently concluded that the Supreme Court’s holding in *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008)—that 9 U.S.C. § 10 provides an exclusive list of grounds for vacating arbitration awards—eliminates public policy as a ground for vacating arbitration awards. See, e.g., *DCR Constr., Inc. v. Delta-T Corp.*, No. 8.09-CV-741-T-27AEP, 2009 WL 5173520, at \*6 (M.D. Fla. Dec. 30, 2009) (“[P]ublic policy is no longer a viable ground for vacatur where, as here, the parties seek judicial review of an arbitration award pursuant [sic] section 9 or section 10 of the FAA.”); *Lefoumba v. Legend Classic Homes, Ltd.*, No. 14-08-00243-CV, 2009 Tex. App. LEXIS 7573, at \*6 (Tex. App. Sept. 17, 2009) (overruling a complaint based on public policy on the grounds that the argument is no longer viable under section 10(a) of the FAA); see also Sarah Rudolph Cole, *Additional Thoughts on Hall Street v. Mattel—Whither Manifest Disregard?*, ADR PROF. BLOG (Mar. 26, 2008), <http://www.indisputably.org/?p=93> (“Moreover, I believe the decision raises questions about the viability of other judicially-created standards of review such as . . . ‘public policy’ . . . .”); Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597 (2009) (arguing that courts should adopt the public policy exception as one ground for vacatur in spite of its displacement by *Hall Street*).

However, the Court’s opinion in *Hall Street* does contemplate the possibility that some non-statutory grounds for vacatur may yet survive as incorporated into the statutory grounds for vacatur enumerated in 9 U.S.C. § 10(a)(3) or § 10(a)(4). See 552 U.S. at 585 (“Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively . . . .”). Indeed, a majority of circuits addressing the issue have held that “manifest disregard” remains a valid ground for vacatur even post-*Hall Street*, notwithstanding the fact that it had previously been characterized as a non-statutory ground for vacatur. See *Comedy Club, Inc. v. Improv West*

succinctly explained why arbitration awards that violate public policy are void: “[T]he public’s interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.”<sup>114</sup> In this way, courts void contracts that

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Assoc., 553 F.3d 1277, 1290 (9th Cir. 2009) (holding that the “manifest disregard” standard falls within the statutory grounds, “where the arbitrators exceeded their powers” as set forth by the FAA); *Coffee Beanery, Ltd. v. WW, LLC*, 300 Fed. App’x 415, 418 (6th Cir. 2008) (stating that in addition to the statutory grounds outlined in the FAA, courts may vacate arbitration awards if they are “found to be in manifest disregard of the law”); *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 93–95 (2d Cir. 2008) (outlining three components of the “manifest disregard” standard), *rev’d on other grounds*, 130 S. Ct. 1758 (2010). *But see* *Citigroup Global Mkts. Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (holding that manifest disregard is no longer a valid ground for vacatur post-*Hall Street*); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (describing the Supreme Court as having held in *Hall Street* “that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act”). The Supreme Court itself has explicitly declined to clarify its position. *See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1768 n.3 (2010) (“We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.”). Accordingly, there is good reason to believe that *Hall Street* does not preclude the application of the public policy ground for vacating arbitration awards. *See, e.g.*, *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 351 (Sup. Ct. 2008) (“Assuming that [public policy cases] may be viewed merely as judicial interpretations of section 10(a)(4) of the FAA . . . and not as establishing any additional common law grounds for vacation of arbitral awards, they would retain vitality for analysis post-*Hall Street*.”); *see also* Alan Scott Rau, *Fear of Freedom*, 19 AM. REV. INT’L ARB. 469, 501 (2008) (arguing that the public policy ground for vacatur must survive *Hall Street* because external social effects “necessarily limit every exercise of contractual autonomy, [such that] vacatur for violation of ‘public policy’ is a necessary fail safe, universally understood in every existing legal system as a ground . . . for refusing to honor an award”).

Despite this analysis, I argue below that religious arbitral awards should be enforced even when they violate public policy. *See infra* notes 245–64 and accompanying text.

<sup>114</sup> *Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 42 (1987). The Court was also quick to limit this rule: “Such a public policy, however, must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’” *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)); *see also Misco*, 484 U.S. at 43 (noting that the decision in *Grace*, 461 U.S. at 766, did not “sanction a broad judicial power to set aside arbitration awards as against public policy”).

The Supreme Court, in *Eastern Associated Coal Corp. v. Mine Workers*, indicated a willingness to expand the scope of the public policy ground for vacatur, noting that “courts’ authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.” 531 U.S. 57, 63 (2000). Justice Scalia took strong exception to this willingness to expand the scope of the public policy ground for vacatur in his concurrence:

No case is cited to support that proposition, and none could be. There is not a single decision, since this Court washed its hands of general common-law-making authority [in *Erie*, where] we have refused to enforce on ‘public policy’ grounds an agreement that did not violate, or provide for the violation of, some positive law.

violate public policy to protect third-party interests.<sup>115</sup> Accordingly, courts must examine the substance of arbitration awards to ensure that their terms do not contravene long-standing public policies intended to protect third-party interests.

In this way, the public policy ground for vacatur could serve as an important constraint on the ability of religious arbitration courts to adjudicate disputes in accordance with substantive religious law.<sup>116</sup> In fact, a court recently vacated a rabbinical court's arbitration award on public policy grounds.<sup>117</sup> Indeed, it is precisely because of potential conflicts between public policy and religious arbitration that various state legislatures have proposed bills reiterating that arbitration awards based on alternative legal systems—including religious legal systems—are void.<sup>118</sup> To appreciate the potential for conflict, consider the following tension between U.S. antitrust law and certain anti-competitive rules applied by rabbinical arbitration courts pursuant to Jewish law.

Based on a verse in the Bible,<sup>119</sup> the Jewish law principle of *Hasagath Gevul* (literally “encroaching on the border”) has long

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*Id.* at 68 (Scalia, J. concurring) (citation omitted).

This expansion comes despite the fact that a number of commentators view the public policy ground for vacatur as undermining the typical deference afforded arbitrators, which is necessary to ensure that arbitration remains “efficient, fair, and relatively inexpensive.” Joan Parker, *Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception*, 4 *LAB. LAW.* 683, 711 (1988); see also Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between Public Policy and the Duty to Bargain*, 64 *CHI-KENT L. REV.* 3, 34 (1988) (concluding that the public policy ground for vacatur will significantly reduce arbitral finality); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 *GA. L. REV.* 731, 823 (1996) (arguing that broadly construing the public policy ground for vacatur will lead courts to “trespass[] into the merits of the underlying dispute”).

<sup>115</sup> Courts sometimes use the language of “public policy” when vacating awards to protect first-party interests. See *infra* notes 260–64 and accompanying text.

<sup>116</sup> For example, one potential source of conflict stems from the applicability of the Bankruptcy Code's automatic stay, 11 U.S.C. § 362 (2006), to proceedings before a religious arbitration panel. While no such case has been explicitly decided, a recent decision, which awarded a debtor costs associated with proceedings initiated after an automatic stay, indicates that this conflict is undoubtedly on the horizon. See *In re Herman Pachman*, No. 09-37475, 2010 WL 1489914, at \*2–3 (Bankr. S.D.N.Y. Apr. 14, 2010) (awarding attorneys' fees as damages for a defendant's willful violation of the automatic stay provided by Bankruptcy Code § 301). For an extended discussion of how courts might treat conflicts between religious arbitration in the bankruptcy context and the protections of the First Amendment, see Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 *GEO. MASON L. REV.* (forthcoming 2011), available at <http://ssrn.com/abstract=1701475>.

<sup>117</sup> See *supra* note 32. As noted above, the decision was subsequently reversed on appeal. *Brisman v. Hebrew Acad. of Five Towns & Rockaway*, 895 N.Y.S.2d 482, 483 (App. Div. 2010).

<sup>118</sup> See *supra* note 4 and accompanying text.

<sup>119</sup> *Deuteronomy* 19:14 (“You shall not move your countryman's landmarks . . .”).

proscribed certain types of unduly competitive business practices.<sup>120</sup> Most notably, the principle of *Hasagath Gevul* prohibits an individual from opening a second business identical to an existing business in such close proximity that doing so would lead to the financial ruin of the existing business.<sup>121</sup> Contemporary interpretations have expanded this rule to prohibit not only geographical proximity, but also any situation in which definite damage would be financially ruinous to an already established business.<sup>122</sup> Rabbinical courts continue to apply this principle of definite damage.<sup>123</sup>

Thus, Jewish law provides businessmen with a substantive right that protects their businesses from would-be competitors if such competition would clearly be ruinous. This right reflects the fear of catastrophic losses for individuals who have invested significantly in businesses. To knowingly interfere with such businesses, albeit through fair competition, violates the core value underlying *Hasagath Gevul*, which condemns those who encroach on their neighbors' borders.

The problem with United States rabbinical courts deciding such encroachment cases is that substantive Jewish rights afforded to businesspersons may conflict with state and federal antitrust statutes.<sup>124</sup> Consequently, many applications of the principle of "encroachment" would violate either federal or state statutes.<sup>125</sup>

<sup>120</sup> For a summary of this principle, see generally Simcha Krauss, *Hasagath Gvul*, 29 J. HALACHA & CONTEMP. SOC'Y 5, 8–10 (Spring 1995).

<sup>121</sup> Mordekhai b. Hillel, Commentary to Bava Batra 516 (Moznaim 2008) (13th century); Rabbi Moses Isserles, Responsa Rema, 10 (Warsaw 1883) (16th century). There are some caveats to this position, which are not relevant to our current discussion. See Babylonian Talmud, Tractate Bava Bathra 21b (stating that if the first business can alter its practices to maintain competitiveness, the new business cannot be enjoined from operating).

<sup>122</sup> AARON LEVINE, FREE ENTERPRISE AND JEWISH LAW: ASPECTS OF JEWISH BUSINESS ETHICS 24–25 (1980); Krauss, *supra* note 120, at 15–16. See generally CHAIM JACHTER, GRAY MATTER: DISCOURSES IN CONTEMPORARY HALACHAH 107–18 (2000) (describing and analyzing the contours of the prohibition).

<sup>123</sup> See JACHTER, *supra* note 122, at 107 ("In the past few years, many accusations of *hasagat gevul* have been brought before *batei din*."). See generally Krauss, *supra* note 120, at 15–29 (collecting and summarizing contemporary rabbinic responsa applying "*Hasagath Gevul*"); LEVINE, *supra* note 122 (same).

<sup>124</sup> See, e.g., 15 U.S.C. § 2 (2006) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."); Donnelly Act, N.Y. GEN. BUS. LAW § 340 (McKinney 1999) ("[U]nlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.").

<sup>125</sup> For an articulation of the United States' strong public policy of enforcing antitrust statutes, see *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

As earlier noted, the fact that the substantive rights afforded under Jewish Law violate statutory provisions poses a serious problem for rabbinical courts functioning as arbitration courts. Because U.S. courts cannot enforce arbitration awards that violate public policy, state and federal courts are unlikely to countenance attempts by rabbinical arbitration courts to apply Jewish law's principle of *Hasagath Gevul*.<sup>126</sup> Under current doctrine, the third-party interests protected by antitrust statutes would trump the first-party interests at stake in the enforcement of religious arbitration awards.

### B. Mandated Procedural Law: Benefits and Concerns

The application of mandatory procedural law by religious arbitration courts is a double-edged sword. Mandatory procedural law provides an advantage for religious arbitration by ensuring that there is a body of rules governing the arbitral process. In contrast, unless the parties agree otherwise, no mandatory procedural rules govern standard secular arbitration. However, the mere existence of mandatory religious procedural law does not ensure that those rules will accord with standard conceptions of fairness. Thus, while religious arbitration fills much of the procedural vacuum with mandatory rules, there is no guarantee that such rules will promote the interests of justice.

To appreciate the advantages of mandatory procedural law, one need only consider how the lack of mandatory procedural rules in arbitration generally has led to significant criticism. Critiques often focus on the lack of due process within the arbitral system,<sup>127</sup> the

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<sup>126</sup> According to Jonathan Reiss, former director of the Beth Din of America, such difficulties require rabbinical courts to exercise special care in adjudicating claims of *Hasagath Gevul*. Interview with Jonathan Reiss, Former Dir., Beth Din of Am., in New York, N.Y. (Dec. 15, 2005); see also JACHTER, *supra* note 122, at 107 ("In the past few years, many accusations of *hasagat gevul* have been brought before *batei din*. These cases often arouse much controversy, especially since the Halachah is sometimes at odds with American society's tendency to favor unrestricted competition.").

<sup>127</sup> See, e.g., Carbonneau, *supra* note 111, at 1958 ("The Court's willingness to curtail major constitutional and political interests—such as . . . due process guarantees—to bolster arbitration benefits neither the legal culture nor, in the long run, the institution of arbitration itself."); Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution To Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1 (1994) (arguing that a lack of resources and biased arbitrators doom claims of employees in arbitration courts); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 685 (1996) (arguing that "arbitrators may be consciously or unconsciously influenced by the fact that the company, rather than the consumer, is a potential source of repeat business"). See generally Colin P. Johnson, *Has Arbitration Become a Wolf in Sheep's Clothing?: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 HAMLINE L. REV. 511, 530–31 (2000) (analyzing problems with arbitration agreements in employment contracts).

adhesive nature of arbitration clauses—especially in the employment and consumer contexts<sup>128</sup>—and the fact that courts routinely enforce such clauses.<sup>129</sup> This legal reality leaves, for example, many potential employees with a choice between unemployment or opting out of the standard legal forum and into an arbitration regime.<sup>130</sup>

Moreover, once in the arbitral system, parties must contend with significant procedural uncertainties. Arbitrators exercise wide discretion in crafting their own procedural rules,<sup>131</sup> specifically regarding discovery.<sup>132</sup> Furthermore, in crafting arbitration clauses, large

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<sup>128</sup> See, e.g., Margaret M. Harding, *The Redefinition of Arbitration By Those With Superior Bargaining Power*, 1999 UTAH L. REV. 857, 864 (“Arbitration has been corrupted; it has been used by the more economically powerful party to extract, often in an underhanded manner, unfair advantages and important substantive rights from the unwitting economically weaker party.”); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 164–65 (1997) (demonstrating that arbitration is not always entered into by free choice); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 55–56 (1997) (describing how drafters of adhesion contracts can use their superior bargaining power and knowledge to take advantage of weaker parties).

For this reason, it is not surprising that the most recent arbitration reform bill introduced in the Senate would require arbitration agreements to provide consumers and employees with a source to collect additional information regarding, inter alia, the costs and fees of arbitration, as well as forms and procedures necessary for effective participation in arbitration. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (seeking to provide protections to those who enter into arbitration agreements as the weaker party); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009) (same).

<sup>129</sup> See Sternlight, *supra* note 127, at 647–51 (criticizing courts for enforcing arbitration agreements against consumer consumers, against employees, and in other circumstances of asymmetrical bargaining power).

<sup>130</sup> Despite this dynamic, the Supreme Court has explicitly upheld the applicability of the FAA to employment contracts. See *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) (“We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.”).

<sup>131</sup> See, e.g., *Finley Lines Joint Protective Bd. Unit 200 v. Norfolk & S. Ry.*, 312 F.3d 943, 947 (8th Cir. 2002) (“Arbitrators have broad procedural discretion.” (citing *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257, 262–63 (1965))); *Nordahl Dev. Corp. v. Salomon Smith Barney*, 309 F. Supp. 2d 1257, 1265 (D. Or. 2004) (same); see also Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. L. REV. 415, 433 (2003) (“Arbitrators have broad discretion in managing the arbitration process, and procedural defects are not grounds for vacating an award so long as the arbitration process was ‘fundamentally fair.’”).

<sup>132</sup> Indeed, “[l]imitations on discovery, particularly judicially initiated discovery, remain one of the hallmarks of American commercial arbitration.” IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 34.1 (1994). This is true even when parties incorporate procedural rules recommended by arbitration organizations, such as the American Arbitration Association, the National Arbitration Forum, or the Judicial Arbitration and Mediation Service. Such rules leave discovery decisions largely to the arbitrator’s discretion. See, e.g., AMERICAN ARBITRATION ASS’N, *EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES* R. 9, at 23 (2010), available at <http://www.adr.org/si.asp?id=6450> (“The arbitrator shall have the authority to order such

corporations can choose procedural rules that best accommodate their own litigation strategies.<sup>133</sup> Indeed, corporate repeat players typically use the same arbitration rules and arbitrators frequently, giving them an informational advantage as a result of their experience in presenting cases before arbitration panels.<sup>134</sup> This problem—often

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discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.”); AMERICAN ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, at 11 (2010), available at <http://www.adr.org/si.asp?id=6447> (noting that one “key feature” of these rules includes “broad arbitrator authority to order and control discovery, including depositions”).

This lack of certainty regarding discovery poses significant problems to plaintiffs who often need to conduct discovery in order to prove elements of their cases. See, e.g., Julie K. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 COLUM. BUS. L. REV. 1, 3 (noting that limited discovery “hinders a party’s ability to develop facts,” which becomes even more problematic because of bias in favor of repeat players); Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 287 n.52 (1984) (discussing the limits to arbitrators’ authority related to traditional discovery devices); Schwartz, *supra* note 128, at 47 n.34 (“[D]efendants . . . [are] in a far better position than in civil litigation to resist discovery and conceal relevant evidence.”); see also Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUSINESSWEEK, June 16, 2008, at 72, available at [http://www.businessweek.com/print/magazine/content/08\\_24/b4088072611398.htm](http://www.businessweek.com/print/magazine/content/08_24/b4088072611398.htm) (detailing the overwhelming bias of a dominant credit card arbitration firm in favor of banks).

The most recent bill introduced in Congress to reform the Federal Arbitration Act also suggests a lack of mandatory discovery rules. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009).

<sup>133</sup> See Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37, 41–44 (2007) (arguing that corporations are generally at an advantage over consumers because corporations draft arbitration clauses and, in doing so, choose which procedural rules to include).

<sup>134</sup> See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 96 (2000) (Ginsburg, J., dissenting) (noting the advantages of repeat players, including knowledge of the arbitration process); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452 (1996) (outlining a variety of potential asymmetries in arbitration between repeat players and one-shot players); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 103–04 (1974) (theorizing that repeat players have an advantage in arbitration and are able to prevent serious rule change); Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 32–34 (1999) (arguing that repeat players have a clear advantage over one-shot players). A number of empirical studies appear to confirm this repeat-player effect. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238–39 (1998); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 212–15 (1997). However, it is not clear whether the repeat-player effect stems from arbitrator bias in favor of repeat players or from repeat players settling meritorious claims. See David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1571–72 (2005) (suggesting that repeat players’ advantage may be the result of process experience—especially in cases where the repeat-player corporation maintained an

referred to as the repeat player problem—points to a structural asymmetry underlying many arbitration proceedings.<sup>135</sup>

At the core of these concerns stands a fundamental problem. In standard arbitration, forum selection does not entail the selection of procedural rules. Instead, arbitration functions either without procedural rules or with only boilerplate procedural rules incorporated by the drafting party. The self-selection of procedural rules appears to provide significant advantages to repeat players, especially given the discretion such rules often afford arbitrators.<sup>136</sup> This dynamic is further exacerbated by the vagueness of procedural rules; for example, the American Arbitration Association adopts rules that fail to provide

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internal dispute resolution program—rather than bias on the part of arbitrators); *see also* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843, 846 (2010) (presenting empirical data showing no statistical repeat-player effect under a traditional definition of repeat player, and only some evidence under an alternative definition of repeat player, suggesting the effect may result more from repeat players' experience than bias on the part of arbitrators); *cf.* Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 757 (2001) (“Empirical studies are vulnerable to the possibility that the studied cases going to arbitration are systematically different from the studied cases going to litigation.”). In addition, the emergence of the plaintiffs' bar as an “institutional force” may also mitigate the effect of the theorized repeat-player problem. William B. Gould, IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 617 (2006) (“[T]he plaintiffs' bar representing employees is emerging as an institutional force with which to be reckoned. In some circumstances, plaintiffs' attorneys have networks rivaling those of labor unions in labor-management arbitration; these networks can provide intelligence on the competence and impartiality of selected neutrals.”).

<sup>135</sup> *See* Jack Joseph, *Courting ADR*, CHICAGO B. ASS'N REC., Jan. 1994, at 14, 16 (discussing stronger and weaker parties in an arbitration proceeding); William A. Gregory & William J. Schneider, *Securities Arbitration: A Need for Continued Reform*, 17 NOVA L. REV. 1223, 1241–42 (1993) (providing statistical analysis of winners and losers in securities arbitration proceedings); Shelly R. James, *Arbitration in the Securities Field: Does the Present System of Arbitration Between Small Investors and Brokerage Firms Really Protect Anyone?*, 21 J. CORP. L. 363, 388–89 (1996) (concluding that the arbitration process is unbiased, but flawed).

Such asymmetries are further exacerbated by the fact that arbitrators are not required to write publishable opinions. *See, e.g.*, *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (clarifying that arbitrators have no general obligation to explain their awards in writing). This leaves first-time players with limited access to the procedures and considerations typically employed in arbitration. *See* Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1188 (2004) (noting that “arbitrators rarely publish their opinions and are not obligated to follow precedent”); Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2278 (2007) (noting that “results of arbitration are frequently kept confidential”); *see also* Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required To Issue Written, Publishable Opinions*, 4 EMP. RTS. & EMP. POL'Y J. 285, 287 (2000) (proposing that public law arbitrators be required to publish written opinions).

<sup>136</sup> *See supra* note 133.

clear guidance on key issues such as discovery.<sup>137</sup> Together, these two dynamics—the manipulability and vagueness of arbitration rules—can make arbitration procedurally inhospitable to one-time players.

In contrast, parties do not choose the procedural rules in religious arbitration. Religious procedural law is developed within the confines of the respective religious communities and is incorporated into religious arbitration agreements through choice of law provisions. In this way, religious procedural law is mandatory: Religious arbitration courts must employ these rules, and the parties to religious arbitration have limited ability to tinker with them.<sup>138</sup> Moreover, instead of granting wide discretion to arbitrators, these rules provide procedural mechanisms for addressing central issues such as discovery.

For example, the procedural law employed by rabbinical arbitration courts has been collected in treatises<sup>139</sup> and is provided to parties prior to their signing of arbitration agreements.<sup>140</sup> U.S. courts have been able to use these procedural guidelines to review and uphold the decisions of rabbinical arbitration courts.<sup>141</sup> There is also significant literature developing Islamic procedural law.<sup>142</sup>

Indeed, the impact of mandatory procedural law can change the asymmetrical dynamics that animate standard arbitration. To illustrate, consider the critique that standard arbitration proceedings heavily favor large corporations, especially in the employment context, because of the lack of mandatory discovery rules.<sup>143</sup> At times,

<sup>137</sup> See *supra* note 132 (describing the broad discretion of arbitrators as to discovery).

<sup>138</sup> The inability of parties to manipulate the religious arbitration rules stems from the very nature of these proceedings. Any attempt to modify religious rules would be tantamount to impugning the religious origin of the rules. For an example of how this principle operates, see Yona Reiss, *Matneh Al Mah She'Katuv Ba'Torah Bi'Davar She'Bimammon*, 4 SHA'AREI TZEDEK 288, 295 (2003).

<sup>139</sup> E.g., ELIAV SHOCHETMAN, *SEDER HA-DIN* (1998) (collecting rabbinic procedural law).

<sup>140</sup> See, e.g., *Rules and Procedures of the Beth Din of America*, BETH DIN OF AMERICA, [http://www.bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf) (last visited June 22, 2011); *Rules of Procedure*, *supra* note 69.

<sup>141</sup> See, e.g., *Tal Tours (1996), Inc. v. Goldstein*, No. 5510-05, 2005 N.Y. Misc. LEXIS 2226808, at \*4-5 (N.Y. Sup. Ct. Oct. 7, 2005) (finding that the rabbinical court in question followed its own published rules and procedures in deciding on a mechanism for constituting a panel of arbitrators).

<sup>142</sup> See, e.g., *Arbitration Panels and Grievance Procedures*, *supra* note 93 (providing rules and guidelines for resolution of disputes in accordance with Islamic law). For a comprehensive collection of Islamic law regarding evidence and procedure, see generally ABDUR RAHIM, *THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE: ACCORDING TO THE HANAFI, MALIKI, SAHFI' AND HANBALI SCHOOLS* 364-82 (1911) (collecting Islamic procedural and evidentiary rules); Mohammad Fadel, *Adjudication in the Maliki Madhab: A Study in Legal Process in Medieval Islamic Law* (Dec. 1995) (unpublished Ph.D. dissertation, University of Chicago) (on file with the *New York University Law Review*).

<sup>143</sup> See *supra* note 132.

such conditions prevent aggrieved employees from producing the evidence necessary to prove their claims because the requisite documents are typically housed with their former employers. Thus, employees are unable to satisfy their burden of proof, leading to dismissal. Again, this problem stems from the lack of mandated procedural rules in standard arbitration proceedings, which leave issues such as discovery up to arbitrators' discretion.

In contrast, religious arbitration courts employ a set of mandatory religious procedural rules that parties have limited ability to modify. In the discovery context, Jewish procedural law inverts this evidentiary procedure in an important way. For example, where a former employee sues his former employer for back wages, Talmudic law and subsequent legal analyses have crafted shifting evidentiary burdens. To take advantage of such burden-shifting, a former employee must demonstrate the existence of the underlying employment relationship, at which point the burden of proof shifts to the former employer.<sup>144</sup> Where a former employee successfully demonstrates that he did, in fact, work for the former employer, the former employer can only avoid liability by producing evidence that he had indeed paid the former employee in full.<sup>145</sup> Thus, once a former employee demonstrates the existence of an employment relationship, the former employer can only avoid liability by producing evidence to substantiate his claim, such as logs with the number of hours the employee worked and receipts proving that the employee was paid for all of his work.

Islamic law has similarly developed its own burden-shifting process. At the heart of this approach stands the "most basic function of adjudication": to distinguish the claimant from the defendant.<sup>146</sup> In Islamic jurisprudence, the claimant is not necessarily the party who initiated the proceedings. Instead, the claimant is the party whose claim is deemed weaker and who needs to present additional evidence to support his case.<sup>147</sup> The party who is deemed the defendant—that

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<sup>144</sup> JOSEPH KARO, CODE OF JEWISH LAW, HOSHEN MISHPAT 89:2–3 (El Hamekoroht 1955) (1565); *see also id.* at 75:9 (concluding that once a party admits the existence of financial liability, he cannot then claim ignorance of whether he disposed of that liability because the evidentiary burden shifts as result of his admission). Indeed, the Talmud assumes that when an employee claims he has not been paid, even if the employer claims he has paid the employee, the court rules in favor of the employee because the employer "is burdened" with multiple employees and is presumably confused. Babylonian Talmud, Tractate Shavuot 45a.

<sup>145</sup> *Cf.* KARO, *supra* note 144, at 89:2–3 (holding that a defendant-employer is not believed in the absence of evidence that he has paid his employee in full).

<sup>146</sup> Fadel, *supra* note 142, at 143.

<sup>147</sup> *Id.* at 143–50; *see also* RAHIM, *supra* note 142, at 366 ("According to other definitions the claimant is the party who cannot succeed without proving his allegation and the

is, the party with the stronger claim—often has secured this status by either presenting evidence to support his claim or by arguing that his claim should be granted a default presumption of correctness.<sup>148</sup> Parties can jockey for position at the initial stages of litigation, each hoping to secure defendant status.<sup>149</sup> Importantly, the actual plaintiffs in a case do not need to produce all relevant evidence in order to satisfy a *prima facie* standard. In contrast to the default in standard arbitration, the Islamic evidentiary system allows the plaintiff to shift the burden onto the defendant, forcing the hand of what might otherwise be a complacent corporation.<sup>150</sup>

Importantly, such discovery rules are emblematic of a larger dynamic at work in religious arbitration. In religious arbitration, a self-standing body of rules governs procedural issues such as discovery. The drafting party does not craft these rules; instead, religious procedural law is mandatory in that it must be applied by the religious arbitration court. This ensures that repeat players have limited ability, through creative drafting, to secure favorable procedural rules. Indeed, many of these mandatory procedural rules are detailed in the collections of religious decisions and rulings compiled within the various religious communities, instead of simply leaving arbitrators with wide discretion over important procedural events.<sup>151</sup> Members of religious communities can access these types of rules by reviewing the relevant law in order to better understand their rights and liabilities.<sup>152</sup> Thus, the fact that religious arbitrators work within systems of procedural law limits repeat players' informational advantage.

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defendant is the party who may have a decision in his favour without adducing evidence . . . .”).

<sup>148</sup> Fadel, *supra* note 142, at 143–50.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Of course, any given religious arbitration court might interpret these rules differently. However, the key is that the parties do not craft the rules governing such procedural issues; instead, they are based on the rules developed by the legal system.

<sup>152</sup> For example, [www.amjaonline.com](http://www.amjaonline.com) provides a *fatwa* bank and an opportunity to pose questions to Islamic law scholars. *Fatwa Bank*, ASSEMBLY OF MUSLIM JURISTS OF AMERICA, [http://www.amjaonline.com/en\\_f\\_bank.php](http://www.amjaonline.com/en_f_bank.php) (last visited Sept. 21, 2011). Similarly, the website *Jewish Law*, [www.jlaw.com](http://www.jlaw.com), provides access to and explanations of Jewish law issues to the public. See *About Jewish Law*, JEWISH LAW, <http://www.jlaw.com/About/> (last visited Sept. 21, 2011). Several Jewish and Islamic lawyer organizations provide legal assistance for members of their respective communities. *E.g.*, *About Us*, MUSLIM ADVOCATES, <http://www.muslimadvocates.org/about/main.html> (last visited Sept. 21, 2011); *About*, KARAMAH, [www.karamah.org/ABOUT/tabid/76/language/en-US/Default.aspx](http://www.karamah.org/ABOUT/tabid/76/language/en-US/Default.aspx) (last visited Sept. 21, 2011); *About Us*, RABBINICAL COUNCIL OF AMERICA, [www.rabbis.org/about\\_us.cfm](http://www.rabbis.org/about_us.cfm) (last visited Sept. 21, 2011). Indeed, one can even find licensed attorneys advertising expertise in religious arbitration. *E.g.*, *Beth Din Litigation*, ROBERT W. HIRSH & ASSOCIATES, [www.hirshlaw.com/Beis\\_Din\\_Litigation.html](http://www.hirshlaw.com/Beis_Din_Litigation.html) (last visited Sept. 21, 2011).

To be sure, given the complexity of these legal systems, laypeople face significant obstacles to understanding the nature and implications of the various procedural mechanisms employed by religious arbitration courts. Indeed, such obstacles are similar to those faced by laypeople entering the judicial arena in the United States. Thus, more knowledgeable or sophisticated parties have an advantage when pursuing claims in religious arbitration courts. However, similar to litigants in the judicial arena, unsophisticated religionists can hire representation. For example, the Beth Din of America<sup>153</sup> specifically notifies prospective litigants about the availability of legal representation in all proceedings before a rabbinical panel of arbitrators.<sup>154</sup> Furthermore, a list of attorneys familiar with both United States and religious law can often be accessed via the Internet, by consultation with other members of the given religious community, or simply by inquiry with law clerks at the relevant religious arbitration court.<sup>155</sup> Consequently, even those with minimal knowledge of internal practices can, as in United States courts, hire representation to ensure procedural protection. Put differently, despite some of these obstacles, parties in an arbitral forum with some mandatory procedures are better positioned than those in an arbitral forum with no mandatory procedures or with procedures that afford wide discretion to arbitrators.

As noted above, however, there is an important flip-side to the existence of mandatory procedural law in religious arbitration. Applying mandatory procedural law does not necessarily advance standard conceptions of equity. In fact, much of the skepticism of religious arbitration stems from a strong sense that the types of procedures employed by religious arbitration courts will undermine rather than advance the principles of arbitral justice. Examples of such procedural abuse include restrictions on admissible testimony before

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<sup>153</sup> See Grossman, *supra* note 33, at 181 (citing the Beth Din of America as one of two Jewish arbitral panels).

<sup>154</sup> *Rules and Procedures of the Beth Din of America*, *supra* note 140, § 12. Indeed, some religious arbitration courts only allow legal representatives who are members of a state bar to serve as legal counsel. Yona Reiss, *Zechuyot Ba'alim, Toanim, Orchei Din, Vi'Yoatzim*, 2 SHA'AREI TZEDEK 193, 201 (1997) (describing the practice of the Beth Din of America). This ensures that the relevant bar association ethics committees can address any ethics violations.

<sup>155</sup> The increased mobilization of the Islamic community to create a network of Islamic arbitration courts has also led to the formation of a series of groups dedicated to representing individuals who find themselves before such arbitral panels. See Quraishi & Syeed-Miller, *supra* note 84, at 216 (discussing the formation and purpose of the National Association of Muslim Lawyers). On a personal note, when I served as a clerk at a religious arbitration court, it was often my task to discuss with potential parties the need for and availability of legal representation.

religious arbitral panels—specifically prohibitions against women testifying.<sup>156</sup> Applying such rules raises significant concerns; thus, the mere fact that religious arbitral courts employ mandatory procedural rules does not mean that they are procedurally superior.

But, noting this problem also crystallizes the procedural differences between religious arbitration and standard arbitration. If standard arbitration suffers from a lack of well-defined procedure, then religious arbitration might be characterized as having too much procedure. By diagnosing the unique type of procedural challenge religious arbitration poses, we can begin to formulate a solution. At bottom, protecting parties to religious arbitration from procedural abuse requires a doctrine that enables reviewing courts to capitalize on advantageous religious procedural rules while weeding out those rules that are problematic.

### III

#### RELIGIOUS ARBITRATION IN AN AGE OF MULTICULTURALISM

Both the benefits and costs of religious arbitration flow from its implementation of religious law. Religious law offers increased procedural regularity and substantive predictability for parties submitting their dispute to arbitration. Moreover, in applying religious law, religious arbitrators are able to provide parties with binding adjudication in accordance with shared norms, values, and rules. However, applying religious law raises the specter of procedural rules that fail to accord with standard conceptions of fairness and of substantive rules that conflict with U.S. law. Navigating these competing concerns exemplifies the core challenge of what I have termed the “new multiculturalism”: simultaneously providing religious groups with space to promote shared communal values without exposing individuals to the risks of potential coercion and oppression. Indeed, the unique challenges of religious arbitration in an age of the new multiculturalism highlight how the multicultural agenda has taken a turn, focusing less

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<sup>156</sup> See, e.g., Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT'L J. MIDDLE EAST STUD. 185 (1997) (discussing varied approaches to the testimony of women in Islamic jurisprudence); Grossman, *supra* note 33, at 181 (describing how Jewish law can conflict with secular law and noting, by way of example, that “strict Jewish law categorically excludes women from serving as judges, and, along with the handicapped, minors, and others, excludes women from testifying as witnesses”); Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOREIGN AFF. 339, 356 (2001) (noting that, while as a formal matter women cannot serve as witnesses under Jewish law, “rabbinical courts routinely accept women’s testimony and practically accord it the same evidentiary weight that is accorded to men’s testimony”).

on the principles of recognition and inclusion and more on the principles of autonomy and self-government.

### A. *The Old Multiculturalism: Recognition and Inclusion*

The term “multiculturalism” encompasses a wide range of philosophical theories, political policies, and contemporary perspectives, all of which emphasize the importance of culture to both individual identity and political society.<sup>157</sup> In many ways, multiculturalism was born out of concerns that some minority religions, cultures, and ethnicities had become increasingly marginalized within civil society.<sup>158</sup> Liberalism’s attempts to rectify the consequences of this increasing marginalization focused too much on the redistribution of wealth<sup>159</sup> without addressing the underlying causes of inequality.<sup>160</sup>

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<sup>157</sup> See, e.g., Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUM. RTS. L. REV. 589, 593 (2004) (noting that multiculturalism “does not readily lend itself to definition”). See generally Paul Kelly, *Introduction: Between Culture and Equality*, in MULTICULTURALISM RECONSIDERED 1, 1–15 (Paul Kelly ed. 2002) (surveying trends and definitions of multiculturalism); Joseph Raz, *Multiculturalism*, 11 RATIO JURIS 193 (1998) (discussing definitions and implications of the concept of multiculturalism); Ayelet Shachar, *Two Critiques of Multiculturalism*, 23 CARDOZO L. REV. 253 (2001) (outlining the intellectual history of and critical perspectives on multiculturalism).

<sup>158</sup> Concern regarding the marginalization and misrecognition of minority groups represents the core focus of the multiculturalism literature. See generally SEYLA BENHABIB, *THE CLAIMS OF CULTURE* 49–81 (2002); RAINER FORST, *CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM* 275–92 (John M.M. Farrell trans., Univ. of Cal. 1994); AMY GUTMANN, *IDENTITY IN DEMOCRACY* 192–211 (2003); AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (Joel Anderson trans., 1995); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995); BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* 239–61 (2000); MICHAEL WALZER, *SPHERES OF JUSTICE* 249–80 (1983); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 39–65 (1990); Robert Gooding-Williams, *Race, Multiculturalism and Democracy*, 5 CONSTELLATIONS 18 (1998); Jurgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 203 (Ciaran Cronin & Pablo De Greiff eds., Shierry Weber Nicholsen trans., MIT Press 1998); Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann, ed., 1994).

<sup>159</sup> For examples of political theories focused on the redistributive paradigm, see generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971); NOZICK, *supra* note 41; Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

<sup>160</sup> See YOUNG, *supra* note 158, at 15–38 (arguing that the redistributive paradigm fails to address structural problems of power and oppression); Taylor, *supra* note 158, at 43–44 (arguing that the impulse for government to remain blind to differences stands in tension with the politics of recognition). Of course, this is not to say that multiculturalism was not also a reaction to assimilationism, which downplayed the importance of cultural difference and viewed the melting-pot ideology as an aspirational ideal. See, e.g., John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1471 (1997) (sketching the genealogy of multiculturalism); see also Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1, 4–9 (2001) (contrasting assimilationism and pluralism). However,

In its initial iteration—what I’ve termed the “old multiculturalism”—multiculturalism contended that withholding recognition from marginalized cultures undermined their ability to participate fully and equally in public life.<sup>161</sup> Equating multiculturalism with a “politics of recognition,” theorists frequently focused on two types of economic and political impact flowing from withholding recognition from minority groups and cultures.<sup>162</sup>

First, marginalization in the classroom, workplace, and legislature imposed structural limitations on the ability of minority-group members to achieve financial prosperity and to secure long-term political power.<sup>163</sup> Second, withholding recognition of a person’s culture was psychologically devastating, creating “a loss of self-respect, of the ability to relate to oneself as a legally equal interaction partner with all fellow human beings.”<sup>164</sup> In this way, liberalism’s redistributive paradigm focused too much on redistributing material goods and not enough on allocating recognition within the public sphere.

Liberalism, as a political philosophy, was relatively adept at meeting the challenges of the old multiculturalism. While some raised concerns that multiculturalism’s commitment to difference-sensitivity conflicted with liberalism’s core commitment to “difference-

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multiculturalism’s focus on the relationship between recognition and power largely emerges as a critique of the redistributive paradigm and its focus on equality solely in terms of socioeconomic metrics. See generally NANCY FRASER & AXEL HONNETH, *REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE* (2003) (debating the relative merits of redistributive and recognition paradigms).

<sup>161</sup> See, e.g., Taylor, *supra* note 158, at 25 (“The thesis is that our identity is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.”).

<sup>162</sup> See, e.g., sources cited *supra* note 158.

<sup>163</sup> See, e.g., GUTMANN, *supra* note 158, at 192–211 (arguing that majority cultures can limit the ability of minority groups to be heard within a democratic regime); KYMLICKA, *supra* note 158, at 176–81 (arguing that failure to provide group-differentiated political rights inhibits the inclusion of minority groups into political culture); WALZER, *supra* note 158, at 227–42 (arguing that social and cultural institutions, such as family, marriage, and other gendered concepts, impact redistribution of wealth); YOUNG, *supra* note 158, at 192–223 (arguing that the current power structures reinforce race, gender, and class hierarchies in the employment market through “myth of merit”).

<sup>164</sup> HONNETH, *supra* note 158, at 134; see KYMLICKA, *supra* note 158, at 89 (“If a culture is not generally respected, then the dignity and self-respect of its members will also be threatened.”); see also Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 *SOC. RES.* 491, 505 (1994) (arguing that individuals have a right to culture because “every person has an overriding interest in his personality identity”).

blindness,”<sup>165</sup> a number of liberal multiculturalists emphasized various ways multicultural initiatives actually advance liberalism’s primary aims.<sup>166</sup>

First, liberal multiculturalists argued that recognizing and including minority cultures—the core of the old multiculturalism—enhances liberalism’s commitment to freedom of choice by providing individuals with a “range of life options.”<sup>167</sup> Thus, multiculturalism is justified in attaching value to minority cultures because “[o]nly through being socialized in a culture can one tap the options that give life a meaning.”<sup>168</sup> In this way, notwithstanding the tension between liberalism’s emphasis on the individual and multiculturalism’s emphasis on the collective, multiculturalism provides the cultural horizon necessary for individuals to successfully exercise their right to freely choose a conception of the good life.

Second, by highlighting the economic impact of *misrecognition* and exclusion, the old multiculturalism provided an important update to redistributive theories of liberalism.<sup>169</sup> Without adequately addressing the social distribution of power, equitable allocation of primary goods would simply revert back to inequalities along cultural lines.<sup>170</sup> Thus, liberal theories of redistribution incorporated the multicultural insight that society must redistribute not only material

<sup>165</sup> Taylor, *supra* note 158, at 43–44. See generally BRIAN BARRY, CULTURE AND EQUALITY (2001) (arguing that the multicultural agenda undermines liberalism’s core commitment to equality).

<sup>166</sup> See, e.g., KYMLICKA, *supra* note 158, at 82–84 (arguing that cultures provide a “[c]ontext of [c]hoice,” thereby promoting liberalism’s commitment to allowing individuals to select and revise their own conception of the good life); WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 165–66 (1989) (“[I]t’s only through having a rich and secure cultural structure that people can become aware . . . of the options available to them . . .”).

<sup>167</sup> Joseph Raz, *Multiculturalism: A Liberal Perspective*, DISSENT, Winter 1994, at 67, 71.

<sup>168</sup> *Id.* For a more complete version of Raz’s arguments, albeit not applied directly to the multicultural issue, see JOSEPH RAZ, THE MORALITY OF FREEDOM 400–29 (2d ed. 1989).

<sup>169</sup> See, e.g., KYMLICKA, *supra* note 166, at 162–81 (contending that cultural membership should be considered the primary good with which justice is concerned).

<sup>170</sup> See, e.g., NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 29 (1997) (“Leaving intact the deep structures that generate gender disadvantage, [affirmative redistribution] must make surface reallocations again and again.”); YOUNG, *supra* note 158, at 205–25 (arguing that the current hierarchical structures of power reinforce inequalities in the labor market); Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, 29 WORLD POL. 343, 364–66 (1977) (arguing that a lack of group rights leaves minority cultures without access to educational and governmental institutions); cf. Vernon Van Dyke, *Justice as Fairness for Groups?*, 69 AM. POL. SCI. REV. 607, 607–09 (1975) (arguing that Rawls fails to address the needs of cultural groups because “he tends to conceive individuals in their separate personal capacities rather than in their capacity as members of ethnic and national groups”).

goods, but also the cultural and social goods necessary for equal educational, employment, and financial opportunities.

Not surprisingly, the legal debates of the old multiculturalism focused on the inclusion of marginalized group members and group symbols within the public sphere. The most notable example is the debate over affirmative action and the Supreme Court's holding that "student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>171</sup> Indeed, in explaining its holding, the Court explicitly emphasized the importance of inclusion: "Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."<sup>172</sup>

These same issues of inclusion and recognition were also front and center in the legal debates over the National Endowment for the Arts's (NEA) allocation of funds. The Court upheld the constitutionality of the NEA's discretionary funding, approving the NEA's express multicultural purpose because "[i]t is vital to a democracy to honor and preserve its multicultural artistic heritage."<sup>173</sup> Accordingly, the Court applauded the NEA for "tak[ing] diversity into account, giving special consideration to 'projects and productions . . . that reach, or reflect the culture of, a minority, inner city, rural, or tribal community,' as well as projects that generally emphasize 'cultural diversity.'"<sup>174</sup>

The same focus on recognition and inclusion—the cornerstones of the old multiculturalism—played a prominent role in Establishment Clause debates over religious symbols on government property. The Supreme Court has captured these core concerns of the old multiculturalism in the endorsement test, emphasizing that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>175</sup> Put another way, religious displays on government

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<sup>171</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

<sup>172</sup> *Id.* at 332–33.

<sup>173</sup> *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584–85 (1998) (internal quotation marks omitted) (quoting 20 U.S.C. § 951(10) (1994)).

<sup>174</sup> *Id.* at 585 (quoting 20 U.S.C. § 954(c)(1), (4) (1994) (citations omitted)).

<sup>175</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see also* *McCreary Cty. v. ACLU*, 545 U.S. 844, 860–61 (2005) (explaining that the government's *apparent* purpose of endorsement of religious symbols may have a more significant impact than that result expressly decreed); *Van Orden v. Perry*, 545 U.S. 677, 682–83 (2005) (affirming that "a reasonable observer, mindful of the history, purpose, and context,"

property satisfy the Establishment Clause's requirements only if viewers would perceive them as sufficiently multicultural.<sup>176</sup>

Other prominent old multiculturalism debates include hot-button issues such as public school curricula<sup>177</sup> and language rights of minority groups.<sup>178</sup> These debates centered on whether and to what extent the views, traditions, and practices of minority religions and cultures are represented within the larger public sphere.

Indeed, the debates of the old multiculturalism followed a common pattern, centering on the incorporation—and, in turn, recognition—of minority cultures' members and symbols within larger public institutions. By including minority group members in higher education, minority religious symbols on government property, and minority views in public school curricula, the old multiculturalism focused on moving minority groups from the margins of society to the very center of the public sphere. In so doing, the old multiculturalism

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would not conclude that a monument inscribed with the Ten Commandments located on the grounds of the Texas State Capitol conveyed a message that the State was seeking to endorse religion); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 613 (1989) (emphasizing that the display of religious symbols afforded “respect for religious diversity that the Constitution requires”).

<sup>176</sup> See, e.g., James L. Underwood, *The Proper Role of Religion in the Public Schools: Equal Access Instead of Official Indoctrination*, 46 VILL. L. REV. 487, 499 (2001) (“The cases reveal that . . . what the courts are likely to approve is a bland multicultural display incorporating the Ten Commandments as part of a larger tapestry.”); see also Lisa Shaw Roy, *Can the Accommodationist Achieve Pluralism?*, 32 SEATTLE U. L. REV. 361, 363–64 (2009) (“[T]he multiculturalist’s concerns are reflected in the doctrinal skepticism about the compatibility of accommodation and pluralism. . . . While attempting to showcase religious diversity is one way to solve the problem, it is not always feasible in every public setting to include many different religious symbols.”); Benjamin I. Sachs, Case Note, *Whose Reasonableness Counts?*, 107 YALE L.J. 1523, 1527–28 (1998) (noting the “nearly impossible task of giving content to the hypothetical reasonable observer in our multicultural society”).

<sup>177</sup> See generally Sanford Levinson, *Some Reflections on Multiculturalism, “Equal Concern and Respect,” and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989 (1993) (offering reflections on the implications of religious multiculturalism in the context of school curriculum); Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have To Say?*, 1991 U. CHI. LEGAL F. 123 (advocating for multicultural approach to education based on parental choice and control).

<sup>178</sup> See generally Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719 (2001) (outlining challenges faced by multi-lingual societies and advocating for “critical pluralism” as a means to resolve tensions between linguistic diversity and interethnic community); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993) (addressing the flaws of Euro-immigrationist and assimilationist positions and suggesting a pluralistic, core values–based response to multiculturalism); Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006) (proposing a theory based on participatory values to accommodate growing American multilingualism).

sought to recognize publicly the value of minority cultures, thereby attacking the power structures that had prevented minority group members from fully participating in civil society.<sup>179</sup>

### B. *The New Multiculturalism: Autonomy and Self-Governance*

If the old multiculturalism fought to incorporate marginalized groups into the public sphere, the new multiculturalism encapsulates attempts by minority groups to exit the public sphere. Thus, in advancing claims of the new multiculturalism, minority groups typically focus on their ability to preserve the integrity of communal rules and obligations even as they clash with majoritarian norms.<sup>180</sup> Indeed, such groups see promoting communal rules and obligations as necessary to maintain group identity in the face of competing conceptions of law and morality that inhabit the surrounding society.<sup>181</sup> Accordingly, many minority groups are decreasingly concerned with integrating into civil society and increasingly concerned with securing their own law-like autonomy.

The new multiculturalism's claims are built, in an important way, on the foundations of the old multiculturalism. If cultures provide group members with both the psychological capacity to participate in civil society and meaningful options for choosing a conception of the good life, then accommodating cultural collectivities should also advance the core liberal value of individualism.

However, the shift from the old multiculturalism to the new multiculturalism represents an important change in how the state conceptualizes marginalized cultural and religious groups. From the perspective of the old multiculturalism, marginalized cultures and religions provide horizons of meaning embedded in symbols, language, and history.<sup>182</sup> Incorporating such meaning into the liberal nation-state's pantheon enhances freedom and equality; it enlarges freedom

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<sup>179</sup> To be sure, the old multiculturalism has itself faced some significant resistance. For example, Kenji Yoshino has recently described an increasing sense of "pluralism anxiety" that has led the Court to limit protections afforded many groups under the Equal Protection Clause. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751–76 (2011). However, Yoshino himself notes that such anxiety is heightened where there is a perception of "balkanization"—as opposed to claims for "integration." *Id.* at 748. One might read Yoshino's analysis as supporting the conclusion that the trend toward the new multiculturalism has fed this ever-growing sense of pluralism anxiety.

<sup>180</sup> See, e.g., *supra* notes 15–18 and accompanying text.

<sup>181</sup> See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 181–225 (2d ed. 1984) (arguing that social collectives establish and promote virtues that advance shared values); SHACHAR, *supra* note 12, at 45–61 (explaining how groups use family law in order to maintain collective identities).

<sup>182</sup> See *supra* notes 157–70 and accompanying text (discussing the role recognition and inclusion of marginalized groups played in the old multiculturalism).

of choice and levels the financial, educational, and political playing fields.<sup>183</sup> In this way, cultures are seen as providing meaning, self-respect, and identity.<sup>184</sup>

But, to the new multiculturalism, cultures and religions are not simply collectivities that provide meaning. They also function as independent legal orders with their own sets of rules and practices.<sup>185</sup> Cultures and religions play a freedom-enhancing role by embedding shared values and interests into a series of rules and obligations. And, by building institutions to govern and maintain these rules, cultures and religions create communities that promote the core values shared by their membership.<sup>186</sup>

This is particularly true for religious communities that function as legal communities—that is, where group members experience their own religious obligations through the prism of legal norms.<sup>187</sup> Membership in such cultures often requires adherence to a robust system of rules and practices that are meant to advance important shared values.<sup>188</sup> In these communities, institutions tasked with interpretation and application of religious obligations are a necessary element of religious adherence. Accordingly, to the extent the new multiculturalism seeks to provide autonomy and self-governance to minority communities, it can expand the scope of liberty enjoyed by the group's members.<sup>189</sup>

However, conceptualized in this way, the new multiculturalism represents a more serious challenge for liberalism as minority groups

<sup>183</sup> Cf. *supra* note 163 (describing the opposite result, which comes from marginalizing cultural groups).

<sup>184</sup> See *supra* Part III.A (describing the old multiculturalism).

<sup>185</sup> See Cover, *Nomos and Narrative*, *supra* note 14, at 11–40 (describing the law's jurisgenerative principle by which legal meaning proliferates in multiple communities); Galanter, *supra* note 14, at 17 (contending that “indigenous law” exists in a multiplicity of contexts outside “official justice-dispensing institutions”); Griffiths, *supra* note 14, at 1, 38 (defining legal pluralism as “presence in a social field of more than one legal order” where law is defined as “the self-regulation of a ‘semi-autonomous social field’” (citations omitted)); see also Ralf Michaels, *The Mirage of Non-State Governance*, 2010 *UTAH L. REV.* 31, 45 (arguing for a conception of governance “beyond the state”).

<sup>186</sup> See Garnett, *supra* note 51, at 292–93 (highlighting the importance of religious groups' ability to “govern themselves in accord with their own norms”).

<sup>187</sup> See, e.g., SHACHAR, *supra* note 12, at 2 (describing *nomoi* groups); Helfand, *supra* note 12, at 567–69 (arguing that certain religious and cultural communities experience their internal group norms as legal norms); Movsesian, *supra* note 12, at 866 (describing Islam as having “develop[ed] a comprehensive legal system to guide believers' daily lives”); Saiman, *supra* note 12, at 105–06 (sketching how legal reasoning and legal rules animate notions of obligation in Judaism).

<sup>188</sup> See generally MACINTYRE, *supra* note 181, at 181–225 (arguing that human social practices advance the development of virtues aimed at achieving shared values).

<sup>189</sup> See *supra* note 51 and accompanying text (arguing that religious institutions provide a forum for exercising religious liberties).

seek to share law-making authority with the nation-state. The rules and practices of marginalized religious and cultural groups may, at times, conflict with the laws of the state.<sup>190</sup> Thus, to allow minority groups to retain some sphere of autonomy can give rise to conflicts between group rules and state law.<sup>191</sup> Also, by ceding law-like power to religious or cultural authorities over constituent group members, the state runs the risk that such authority will be exercised in a manner that undermines individual group members' fundamental rights.<sup>192</sup> In this way, too strong an emphasis on promoting religion and culture can lead to oppression of individual group members. Power becomes a zero-sum game: The more power a government grants to religious and cultural groups, the more difficult it will be for an individual religionist to access fundamental rights granted by the state.<sup>193</sup> For these reasons, many advocates of the old multiculturalism are increasingly concerned about the new multiculturalism's implications for individual freedoms.<sup>194</sup>

As a result, the new multiculturalism represents a tension between law and culture. When religious and cultural rules, norms, and practices impose duties on group members that conflict with legal requirements, the state must choose between two competing values. On one hand, accommodating cultural practices further allows religious communities to promote and protect core religious traditions and

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<sup>190</sup> See, e.g., SHACHAR, *supra* note 12, at 397–98 (considering how government should address tensions between state law and religious tribunals); Paul Schiff Berman, *Toward a Jurisprudence of Hybridity*, 2010 UTAH L. REV. 11, 24–28 (analyzing conflicts between religious practice and state law through the prism of conflicts-of-law jurisprudence); Helfand, *supra* note 12, at 569 (arguing that clashes between state law and religious practices often mirror conflicts of law).

<sup>191</sup> See Helfand, *supra* note 12, at 569 (“[A]dherents may sometimes stand face to face with an intractable law-versus-law conflict.”).

<sup>192</sup> See Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 51–55 (illustrating the paradox in which groups, left unrestrained by the state, can both allow for greater exercise of individual rights and infringe upon the exercise of individual rights); Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1551–55 (1991) (discussing the way in which group autonomy might threaten human rights).

<sup>193</sup> See Gedicks, *supra* note 192, at 51–55 (“Groups . . . often operate internally in violation of social norms embodied in laws designed to protect individual liberty, and they can threaten the efficacy of the liberal democratic state.”); see also BENHABIB, *supra* note 158, at 82–104 (considering the potential negative impact of multiculturalism on women); SHACHAR, *supra* note 12, at 81–85 (arguing that providing groups with expansive autonomy or self-governance can lead to the disadvantage and exploitation of women); Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7, 17–24 (Joshua Cohen et al. eds., 1999) (arguing that providing cultural rights to groups can endanger individual rights of women).

<sup>194</sup> See, e.g., BENHABIB, *supra* note 158, at 82–104; SHACHAR, *supra* note 12, at 78–87; Okin, *supra* note 193, at 17–24.

values, thereby providing the meaning and freedom associated with inclusion and recognition. However, the new multiculturalism seeks such accommodation at the potential cost of non-compliance with state law. This tension is heightened when religious norms undermine fundamental individual rights.<sup>195</sup> Navigating these competing claims to autonomy, self-governance, and law is the dilemma that stands at the heart of the new multiculturalism.

Unsurprisingly, liberal multiculturalists have struggled to address the dilemmas of the new multiculturalism, trying simultaneously to promote some degree of autonomy for religious and cultural groups without threatening the fundamental rights of group members. In addressing the dilemma of the new multiculturalism, some scholars have suggested that the “right to culture” does not extend to granting groups law-like autonomy, as doing so would lead to oppression of individual group members.<sup>196</sup> Others have argued that such law-like autonomy should be granted, but only up to the point where the secular rights of individual group members are actually threatened.<sup>197</sup> Still others have expressed a willingness to cede such law-like autonomy, hoping to use other, more informal methods to combat the potential oppression associated with the claims of the new multiculturalism.<sup>198</sup>

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<sup>195</sup> See sources cited *supra* notes 192–93.

<sup>196</sup> See, e.g., BARRY, *supra* note 165, at 12 (arguing that “introducing group-differentiated rights based on membership in cultural groups” is a “departure[ ] from equal liberty”). See generally Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992) (arguing against a group right to culture).

<sup>197</sup> See, e.g., JACOB T. LEVY, *THE MULTICULTURALISM OF FEAR* 194–96 (2000) (arguing that recognition of indigenous law and self-government should be governed by the need to prevent internal cruelty and abuses of power); Raz, *supra* note 167, at 75 (“[Cultures] can be supported only to the degree that it is possible to neutralize their oppressive aspects . . . .”). This perspective has deep roots in the liberal tradition, tracing back to John Stuart Mill’s no-harm principle. See JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND UTILITARIANISM* 5, 12 (1992) (“[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others.”); Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POL. STUD. 410, 414–16 (1987) (discussing Mill’s ethical confrontation argument).

<sup>198</sup> For example, see KYMLICKA, *supra* note 158, at 167–68, who argues that there is “relatively little scope for legitimate coercive interference” in practices of illiberal national minorities, but qualifies his view by arguing that this “does not mean that liberals should stand by and do nothing.” *Id.* Kymlicka further notes,

Liberals have a right, and a responsibility, to speak out against such injustice. Hence liberal reformers inside the culture should seek to promote their liberal principles, through reason or example, and liberals outside should lend their support to any efforts the group makes to liberalize their culture.

*Id.*

However, even advocates of the new multiculturalism have struggled to find concrete policies institutionalizing such initiatives.<sup>199</sup> Indeed, building institutions embodying the principles of the new multiculturalism is particularly difficult given that ceding autonomy to religious and cultural communities raises the specter of such autonomy being used to impose conformity and undermine individual liberties.<sup>200</sup> In turn, theoretical gestures in the direction of group autonomy do little to address these fears.

Given its lack of concrete proposals,<sup>201</sup> it is far from surprising that the new multiculturalism has not fared well in recent constitutional controversies. Indeed, no Supreme Court statement captures judicial reaction to the new multiculturalism as succinctly as the Court's statement in its 1990 decision in *Employment Division v. Smith*.<sup>202</sup> In *Smith*, the Court considered whether the Free Exercise Clause permitted Native Americans to smoke ceremonial peyote in contravention of drug laws.<sup>203</sup> Writing for the majority, Justice Scalia unequivocally stated that the Free Exercise Clause simply does not protect against facially neutral and generally applicable laws.<sup>204</sup> In so doing, the Court took direct aim at the new multiculturalism: "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs . . . permitting him, by virtue of his beliefs, 'to become a law unto himself,' contradicts both constitutional tradition and common sense."<sup>205</sup>

The Court's attack on the new multiculturalism continued in *Board of Education v. Grumet*.<sup>206</sup> In *Grumet*, the Court addressed whether the redrawing of a school district to encompass only members of the Satmar Jewish community violated the Establishment Clause.<sup>207</sup> The Court's majority held in the affirmative, explaining that "a State may not delegate its civic authority to a group chosen according to a

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<sup>199</sup> See, e.g., Berman, *supra* note 190, at 29 (noting that adopting a "jurisprudence of hybridity" would not "make it any easier to reach actual decisions in individual cases"); Steiner, *supra* note 192, at 1559–60 (arguing that questions regarding recognition of group autonomy claims must be "rigorously explored").

<sup>200</sup> See, e.g., Gedicks, *supra* note 192, at 51–55; Steiner, *supra* note 192, at 1559–60 (detailing questions which must be explored in developing norms for autonomy schemes).

<sup>201</sup> As an exception, see generally SHACHAR, *supra* note 12, whose proposal I discuss in more detail below, *infra* notes 224–35 and accompanying text.

<sup>202</sup> *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

<sup>203</sup> *Id.* at 874–76.

<sup>204</sup> *Id.* at 878–80.

<sup>205</sup> *Id.* at 885 (citation omitted) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

<sup>206</sup> *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994).

<sup>207</sup> *Id.* at 690–96.

religious criterion.”<sup>208</sup> In so doing, the Court expressly rejected the core principles of the new multiculturalism: “Authority over public schools belongs to the State and cannot be delegated to a local school district defined by the State *in order to grant political control to a religious group*.”<sup>209</sup> Indeed, behind the Court’s Establishment Clause analysis stood an express unwillingness to accommodate religious autonomy within the Satmar community:

[T]he State responded with a solution that affirmatively supports a religious sect’s interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children . . . increased the likelihood that they would remain within the fold, faithful adherents of their parents’ religious faith. By creating a school district that is specifically intended to shield children from contact with others who have “different ways,” the State provided official support to cement the attachment of young adherents to a particular faith.<sup>210</sup>

Under the Court’s analysis, passing legislation expressly aimed at providing autonomy and self-governance runs counter to Establishment Clause principles.

The new multiculturalism did receive some significant support in the Supreme Court’s subsequent decision in *Boy Scouts v. Dale*, which held that New Jersey’s public accommodations law violated the Boy Scouts’ freedom of association.<sup>211</sup> The Court held that the Boy Scouts could revoke membership on the basis of sexual orientation, in contravention of New Jersey’s public accommodations law.<sup>212</sup> Indeed, the Court’s holding in *Dale* pushed back at the very notion that a group member cannot become, in the language of *Smith*, a “law unto himself”—a tension not lost upon any number of scholars.<sup>213</sup>

However, the Court’s recent decision in *Christian Legal Society v. Martinez* has scaled back the new multiculturalism’s gains under

<sup>208</sup> *Id.* at 698.

<sup>209</sup> *Id.* (emphasis added) (citation omitted).

<sup>210</sup> *Id.* at 711 (Stevens, J., concurring). Justice Kennedy expressed his own surprise at the carve-out by noting, “This is an unusual action, for it is rare to see a State exert such documented care to carve out territory for people of a particular religious faith.” *Id.* at 730 (Kennedy, J., concurring).

<sup>211</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656–61 (2000).

<sup>212</sup> *Id.*

<sup>213</sup> See, e.g., Stephen Clark, *Judicially Straight? Boy Scouts v. Dale and the Missing Scalia Dissent*, 76 S. CAL. L. REV. 521, 524 (2003) (alleging disharmony between Justice Scalia’s vote in *Boy Scouts* and his *Smith* jurisprudence); Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 650 (2001) (noting the tension between *Smith* and *Dale*).

*Dale*.<sup>214</sup> In *Martinez*, the Court held that the Hastings College of Law could withhold recognition from the Christian Legal Society (“CLS”) student group—and the funding that comes with such recognition—on the ground that the CLS student group violated the school’s non-discrimination policy.<sup>215</sup> In reaching this holding, the Court folded CLS’s freedom of expressive association claim into the line of limited public forum cases.<sup>216</sup> In so doing, the Court seriously limited the *Dale* Court’s holding, concluding that freedom of expressive association will not provide groups with expanded protections if free speech jurisprudence allows institutions to regulate group conduct.<sup>217</sup> The consequences of this analytical move were not lost on the dissent, which highlighted the effects of this decision on the new multiculturalism.<sup>218</sup> By restricting associational rights, the Court provided limited options for groups with rules and practices at odds with prevailing anti-discrimination norms: “There are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization.”<sup>219</sup>

But public law’s cold acceptance of the new multiculturalism is only half the story. While the principles of group autonomy and self-government have not found much of a home in constitutional doctrine,<sup>220</sup> until recently, creative private law mechanisms have

<sup>214</sup> The Christian Legal Society refused to accept members who did not share the group’s core beliefs on matters of religion and sexual orientation. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2980 (2010).

<sup>215</sup> *Id.* at 2978.

<sup>216</sup> *See id.* at 2985–86 (“[T]his case fits comfortably within the limited-public-forum category . . .”). Under the Court’s limited-public-forum jurisprudence, “a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Pleasant Grove v. Sumnum*, 129 S. Ct. 1125, 1132 (2009). In such limited public fora, “a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral.” *Id.*

<sup>217</sup> *Martinez*, 130 S. Ct. at 2985 (“[I]t would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association.”).

<sup>218</sup> *See id.* at 3019 (Alito, J., dissenting) (“A true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses.”).

<sup>219</sup> *Id.*

<sup>220</sup> A notable exception to this characterization is the “church autonomy doctrine,” which instructs courts not to intervene in cases or controversies “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by . . . church judicatories.” *Ogle v. Hocker*, 279 Fed. App’x 391, 395 (6th Cir. 2008) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) (“This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity.”). *See generally* Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to*

promoted them.<sup>221</sup> Indeed, no institution has better captured the trend toward the new multiculturalism than religious arbitration. Through arbitration, members of religious groups can submit disputes to religious authorities for resolution in accordance with religious law. Such decisions—fashioned as arbitration awards—can be rendered legally enforceable in court. In this way, by embedding religious adjudication within the arbitration regime, religious groups have been able to secure the new multiculturalism’s aims of enhancing the autonomy and self-governance of their own religious authorities. Accordingly, religious groups have deployed private law to share the law-making authority typically reserved for government.

To critics of the new multiculturalism, the enforceability of religious law through religious arbitration has not gone unnoticed. And, as noted above, the enforceability of religious law in state courts has become a national issue. Numerous state legislatures are considering bills that take direct aim at religious arbitration because it provides religious groups with some degree of autonomy and self-governance.<sup>222</sup>

By prohibiting courts from using religious law—and thereby undermining the enforceability of religious arbitration awards—these legislative initiatives seek to prevent groups from serving as com-

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*Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). However, consistent with the resistance to the new multiculturalism, critics have wondered whether the church autonomy doctrine threatens individual liberties. See, e.g., Marci A. Hamilton, *Religious Institutions, The No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1110 (arguing against “church autonomy” because it “permit[s] religious entities to avoid being legally accountable for the harm they have caused”). Indeed, the Supreme Court recently granted certiorari in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, where it will decide to what degree the church autonomy doctrine still survives. 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (2011); see also Lauren P. Heller, Note, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN’S L. REV. 663, 691–93 (2007) (collecting cases post-*Smith* and noting a lack of direction from the Supreme Court on the viability of the church autonomy doctrine).

<sup>221</sup> Such private law mechanisms include the use of contracts to promote and protect traditional religious practices. See, e.g., Nathan B. Oman, *Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 588–99 (2010) (describing Islamic *mahr* agreements and their enforcement in U.S. courts); Steven H. Resnicoff, *A Commercial Conundrum: Does Prudence Permit the Jewish “Permissible Venture”?*, 20 SETON HALL L. REV. 77 (1989) (analyzing Jewish law’s *heter iska* (permissible venture) agreements and considering their interpretation and enforceability in U.S. courts); Brian H. Bix, *Mahr Agreements: Contracting in the Shadow of Family Law (and Religious Law)—A Comment on Oman* (Univ. of Minn. Law Sch. Legal Studies Research Paper Series, Research Paper No. 11-15, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1752289](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1752289) (critiquing Oman’s analysis of Islamic *mahr* agreements).

<sup>222</sup> See *supra* note 4 and accompanying text.

peting independent legal orders. In so doing, states have launched a “preemptive strike” against the new multiculturalism.<sup>223</sup> These initiatives reflect the fear that embracing the new multiculturalism threatens the rights of individual group members.

But we need not throw out the proverbial baby with the bathwater. Instead of adopting such extreme initiatives, we can meet the new multiculturalism’s challenges by mining our current legal doctrines to create space for religious autonomy and self-governance without undermining protections afforded individual liberties. Indeed, in order for the new multiculturalism to survive, it must construct institutions embodying autonomy and self-governance, while still providing concrete protections for individual group members. Thus, as the quintessential institution of the new multiculturalism, religious arbitration will survive if we can articulate concrete proposals for protecting dissident group members from potential group oppression, while still providing an opportunity to adjudicate disputes in accordance with shared religious rules and values. Indeed, given these countervailing considerations, the viability of religious arbitration hinges largely on the ability of religious group members to exercise their most powerful expression of dissatisfaction with a particular community’s authority structure: the ability to exit.

#### IV

#### THE THEORY AND PRACTICE OF EXIT

The new multiculturalism puts governments in a difficult bind. While promoting cultural initiatives is often necessary to address the needs of various cultural groups, too strong an emphasis on promoting culture could lead to oppression of individual group members.<sup>224</sup> Accordingly, the recognition and enforcement of religious law poses a threat to individual liberties primarily because it gives power to relig-

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<sup>223</sup> See Robert Boczkiewicz, *State’s Shariah Law Ban Faces Tough Questions in Appeals Court; One Judge Asks About the Law Applying to Only One Religion*, TULSA WORLD, Sept. 13, 2011, at A1 (“The measure’s principal author, former state Rep. Rex Duncan, R-Sand Springs, called it a pre-emptive strike, due to a growing threat from Islam, to keep liberal state judges from considering Sharia.”).

<sup>224</sup> See, e.g., BENHABIB, *supra* note 158, at 82–104 (considering the potential negative impact of multiculturalism on women); SHACHAR, *supra* note 12, at 81–85 (arguing that providing groups with expansive autonomy or self-governance can lead to the disadvantage and exploitation of women); Gedicks, *supra* note 192, at 51 (“[S]tate recognition of the autonomy or privacy of groups often leaves groups free to act on their members in ways that the state otherwise would not permit, as when religious or other groups are exempted from antidiscrimination laws.”); Okin, *supra* note 193, at 17–24 (arguing that providing cultural rights to groups can endanger the individual rights of women); Steiner, *supra* note 192, at 1551–55 (discussing the way in which group autonomy might threaten human rights).

ious communities over their members.<sup>225</sup> The more power government grants to religious jurisdictions, the more difficult it will be for an individual religionist to access secular jurisdiction. In particular, as a religious community becomes more powerful, individuals may be less able to exit the religious community. When individuals, by default, remain under the influence and power of religious communities, such fears are well founded.

In many ways, this fear drives the proposals of Ayelet Shachar, whose *Multicultural Jurisdictions*<sup>226</sup> is the most comprehensive treatment of the jurisdictional challenges at the core of the new multiculturalism. As the title indicates, Shachar hopes to find a new legal answer to the way we handle conflicts between state law and cultural practices.<sup>227</sup> In so doing, she seeks to avoid the “either/or” framework of choosing between individual liberties and cultural integrity.<sup>228</sup> According to Shachar, merely securing the standard list of personal liberties does not allow individuals to “maintain their cultural identity”; however, requiring the state to sit on the sidelines amounts to allowing the dominant forces within cultures to perpetrate human rights violations with limited hope of reform.<sup>229</sup>

Attempts to find a legal solution to this dilemma face many pitfalls. According to Shachar, the trend toward privileging secular state law does nothing to “encourage the preservation of *nomoi* groups.”<sup>230</sup> However, allowing groups to enforce their own law systems “can result in a kind of interpretive ‘freeze’ in the group’s *nomos* because it permits leaders in the group to construe all ‘alternative’ suggestions for reform as signs of cultural decay and corrupting outside infiltration.”<sup>231</sup>

In response to these competing concerns, Shachar proposes a model of “transformative accommodation,” which seeks to ensure the “circulation of power between authorities” by enabling multiple authorities to contribute to a single case’s adjudication.<sup>232</sup> To facilitate her model, Shachar advocates establishing clearly delineated exit

<sup>225</sup> SHACHAR, *supra* note 12, at 85.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 117–45.

<sup>228</sup> *Id.* at 70–71.

<sup>229</sup> *Id.* at 68–87.

<sup>230</sup> *Id.* at 73. For Shachar, the term “*nomoi* groups” refers to “religiously defined groups of people that ‘share a comprehensive world view that extends to creating [a] law for the community.’” *Id.* at 2 n.5 (quoting Abner S. Greene, Kiryas Joel and Two Mistakes About Equality, 96 COLUM. L. REV. 1, 4 (1996)). The term builds off of Robert Cover’s use of the term “*nomos*,” which captures “the normative universe in which law and cultural narrative are inseparably related.” *Id.* at 2.

<sup>231</sup> *Id.* at 85.

<sup>232</sup> *Id.* at 119–20.

options for group-affiliated members. This places pressure on various cultural and religious authorities to address the concerns of vulnerable group members, since these members can opt out “if the jurisdiction power-holders fail to effectively respond to constituent needs.”<sup>233</sup>

Shachar’s novel legal approach is laudable, but it lacks the specificity required to be a viable option for adjudicating multicultural dilemmas. Most notably, when two parties have agreed to submit a case to group authorities, each party can determine that these authorities have “failed” to address his needs. In this way, Shachar’s system enables individual parties to switch jurisdictions when they deem it in their best interests. This result makes it unlikely that any legal proceeding can reach a meaningful conclusion.

Shachar recognizes this problem and imposes a limitation: “Opting out is justified only when the relevant power-holder has failed to provide remedies to the plight of the individual . . . .”<sup>234</sup> But this qualification only serves to further obscure the legal opt-out mechanism. Nowhere does Shachar explain how to apply the “plight of the individual” criterion, and allowing the losing party to opt out because he believes a jurisdiction failed to “remedy” his “plight” would obviously deprive legal decisions of finality and enforceability.

Instead, Shachar would presumably leave such evaluations up to the competing jurisdictions. This interpretation comports with her attempt to use competing jurisdictions as checks on each other.<sup>235</sup> But this would simply enable a U.S. court to decide whether particular religious authorities have failed to address the “plight of the individual.” Such unbridled discretion eliminates respect for religious arbitration courts. Thus, if Shachar’s theory allows state law to determine when cultural law has failed, it elevates personal liberties—as framed by state law—as criteria for navigating these complex dilemmas.

However, the alternative to sacrificing religious law in order to protect individual rights is sacrificing individual protections in order to give religious law free reign. In this way, Shachar appears to emphasize the need for the state to retain authority over individual liberties even if doing so allows the state to intrude into the limited jurisdictional autonomy granted to religious communities.

The current religious arbitration court system is unique in that it uses default jurisdictional rules to address these same concerns, largely avoiding state intrusion. Religious authorities can enforce their

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<sup>233</sup> *Id.* at 122.

<sup>234</sup> *Id.* at 123.

<sup>235</sup> *See id.* at 122–24 (describing how competing jurisdictions of state and group power can serve as checks on one another).

decisions only if the parties before them formally agree to submit their claims.<sup>236</sup> At the same time, parties desiring legally binding decisions, as mandated by their own religious beliefs, have such an opportunity. They must simply sign the relevant arbitration agreements to enjoy free entry into an alternative religious legal system. These two characteristics of the religious arbitral system—the opportunity to refuse the religious majority and the capacity to embrace religious tradition—can protect the difference-blind liberties at stake in religious arbitration while still embracing the difference-sensitive needs of religious and cultural communities.<sup>237</sup>

Indeed, by beginning from a default presumption that all individuals stand outside the relevant religious arbitration court's jurisdiction, the current arbitration structure captures the emphasis on intent central to the Supreme Court's expansion of the scope of enforceable arbitration awards.<sup>238</sup> Each individual, in order to be subject to a religious arbitral forum, must demonstrate his explicit intent to do so with clear evidence, a standard evaluated by a U.S. court.<sup>239</sup> In this way,

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<sup>236</sup> Indeed, in line with the emphasis on volition, courts should refuse to enforce decisions of religious panels on the grounds of comity. Such a case recently arose in Maryland, where a husband hoped to use his performance of *talaq*—a method of divorce under Islamic law—before the Pakistan embassy in Washington, D.C., to deprive any U.S. court of jurisdiction over his wife's suit for a limited divorce. *Aleem v. Aleem*, 947 A.2d 489, 490 (Md. 2008). The Maryland Court of Appeals refused to recognize the divorce despite the comity argument advanced by the husband. *Id.* at 502. This Article's analysis thus far entails such a disposition: Determinations by religious tribunals should only receive legal weight when both parties have clearly and unmistakably chosen to adjudicate their claims in an alternative forum.

<sup>237</sup> The key here is that a U.S. court will only enforce the decision of a religious arbitration court if the parties signed arbitration agreements asking the religious arbitration court to adjudicate the given conflict. Religious arbitration courts can, of course, try to exert their own power and jurisdiction in other cases, but they cannot then make use of the judicial system's enforcement power, which remains solely under the control of the U.S. government. Only valid entrance into the religious arbitral regime enables the religious arbitration court to seek enforcement of its decisions by government courts. Without such enforcement, the decisions of religious arbitration courts simply state the opinion of particular religious authorities. Because of the default in favor of exit (or non-entrance), individuals are free to consider and adhere to such opinions as desired.

<sup>238</sup> See generally Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Assocs., Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996) (explaining the contractual approach to the unconscionability doctrine used in arbitration contexts); Ware, *supra* note 101 (emphasizing the importance of voluntary consent in employment and securities arbitration).

<sup>239</sup> See, e.g., *Bennett v. Leas*, No. 13-06-469-CV, 2008 Tex. App. LEXIS 4817, at \*7 (Tex. App. June 26, 2008) ("Although courts generally enforce arbitration agreements, a court may not order arbitration in the absence of such an agreement. The parties' agreement to arbitrate must be clear."); *Red Springs Presbyterian Church v. Terminix Co. of N.C.*, 458 S.E.2d 270, 273 (N.C. Ct. App. 1995) (stating that an arbitration agreement must be "interpret[ed] . . . as written" "[w]here the contract's language is clear and unambiguous"); *Jacob v. Seaboard, Inc.*, 610 A.2d 189, 191 (Conn. App. Ct. 1992) ("The intent of the parties that

individual rights are protected because, by default, all individuals remain under the jurisdiction of U.S. courts. However, individuals remain free to enter alternative religious fora as long as U.S. courts can find clear and unmistakable evidence of intent. Indeed, by emphasizing the need for volition while still providing religionists access to their adjudicative institutions, religious arbitration can serve as a viable representative institution of the new multiculturalism.

However, we must be cautious in our endorsement of this opt-in structure. To say that opt-in is volitional in theory is not to say that it is volitional in practice. This is particularly true of religious arbitration courts, which function not simply as adjudicatory institutions, but also as communal institutions.<sup>240</sup> As a result, an individual's decision to forgo arbitration in a religious court entails social and religious consequences. For example, under Jewish law, an individual who refuses to submit a dispute for arbitration before a rabbinical panel will receive a *sh'tar* or *k'sav seruv*, a document of refusal conveying, at a minimum, a strong statement of communal disapproval.<sup>241</sup> Thus, decisions to submit disputes to religious arbitration courts are often fraught with social and communal pressures that undermine the freedom associated with opting into an arbitral forum.

Courts, in considering these pressures, have concluded that they do not constitute coercion and have therefore refused to void religious arbitration agreements despite their presence.<sup>242</sup> However, the fact

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arbitration be the exclusive method for the settlement of disputes arising under the contract must be clearly manifested. This express intent by both parties to enter into the arbitration agreement is essential to its existence. . . . An agreement to arbitrate must be clear and direct and not depend on implication." (quoting *Harry Skolnick & Sons v. Heyman*, 508 A.2d 64, 66–67 (Conn. App. Ct. 1986) (internal quotation marks omitted)); *Gangel v. DeGroot*, 362 N.E.2d 249, 250 (N.Y. 1977) ("The agreement to arbitrate must be express, direct, and unequivocal as to the issues or disputes to be submitted to arbitration. But, once there is agreement or submission to arbitration, the scope of the arbitrators is unlimited and, with very limited exceptions, unreviewable.").

<sup>240</sup> See Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 470–72 (2009) (discussing competing adjudicatory fora available to religionists for family law–related issues and the pressures that exist in religious communities against exiting a religious adjudicatory forum); Fried, *supra* note 54, at 635–41 (discussing the interrelation between religious judicial action and its consequences on an individual's status in the community); Wolfe, *supra* note 33, at 442 (noting that by seeking religious arbitration, members are considered to be maintaining togetherness and unity in their community). See generally Grossman, *supra* note 33 (explaining the direct social consequences of religious arbitration judgments).

<sup>241</sup> The use of the *sh'tar seruv* and the associated social and communal pressures have been the focus of some litigation. See *infra* note 242.

<sup>242</sup> See, e.g., *Greenberg v. Greenberg*, 656 N.Y.S.2d 369, 370 (App. Div. 1997) ("The 'threat' of a *seruv*, which entails a type of ostracism from the religious community, and which is prescribed as an enforcement mechanism by the religious law to which the petitioner freely adheres, cannot be deemed duress."); *Lieberman v. Lieberman*, 566 N.Y.S.2d

that social and communal pressures do not constitute legal coercion does not render them irrelevant. While the opt-in theory of religious arbitration may provide a reason to enforce religious arbitral awards, the potential for pressured assent may provide a reason to pause. As discussed below, defining the scope of enforceability for religious arbitration awards exemplifies the two sides of opting in: the need for volitional assent in theory and the potential for pressured assent in practice.

## V

### MEETING THE CHALLENGE OF THE NEW MULTICULTURALISM: ENFORCING RELIGIOUS ARBITRATION AWARDS

As noted, religious arbitration courts function differently from standard arbitration courts. Religious arbitration courts employ legal systems with their own procedural and substantive legal rules. These religious legal systems are incorporated into the arbitration process through choice of law provisions in arbitration agreements. For example, agreeing to arbitrate a case before an Islamic court involves an agreement to adopt Sharia as the law governing the dispute, accept the authority of Islamic judges in rendering the arbitral award, and apply a body of mandatory Islamic procedures.<sup>243</sup>

In deciding the scope of enforceability of religious arbitration awards, courts must balance first-party interests in religious and contractual freedoms against third-party interests. Courts must also contend with the unique procedural rules employed by religious arbitration courts. While mandatory religious procedural rules appear to offer an improvement over standard arbitration's procedural vagueness, religious procedural rules do not always accord with standard conceptions of fairness.<sup>244</sup>

To address these competing interests and concerns, this Article recommends reconsidering two doctrinal checks on arbitral power: public policy and unconscionability. Tailoring these doctrines to the religious arbitration context provides a blueprint for enforcing

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490, 494 (Sup. Ct. 1991) ("While the threat of a Sirov may constitute pressure, it cannot be said to constitute duress."); *Mikel v. Scharf*, 432 N.Y.S.2d 602, 606 (Sup. Ct. 1980) ("Undoubtedly, pressure was brought to bear to have them participate in the Din Torah, but pressure is not duress. Their decision to acquiesce to the rabbinical court's urgings was made without the coercion that would be necessary for the agreement to be void.").

<sup>243</sup> See, e.g., *Abd Alla v. Mourssi*, 680 N.W.2d 569, 570 (Minn. Ct. App. 2004) (affirming a religious arbitration award issued pursuant to an arbitration agreement which provided for "arbitration before the Arbitration Court of an Islamic Mosque located in the State of Minnesota pursuant to the laws of Islam").

<sup>244</sup> See *supra* Part II.B (illustrating the costs and benefits of religious procedural rules).

religious arbitration awards that challenge standard conceptions of arbitral justice.

The legal reform suggested in this Article is twofold. On one hand, this Article contends that courts should consider enforcing the decisions of religious arbitration courts even when they violate public policy. In so doing, courts should balance the various interests at stake in any particular arbitration, taking seriously the freedom-enhancing value of enforcing religious arbitration awards. On the other hand, courts should evaluate religious arbitration awards with an eye toward potentially unconscionable rules that religious arbitration courts may have employed. Only by meeting these dual objectives can religious arbitration courts serve as viable institutions of the new multiculturalism.

*A. Limiting the Application of Public Policy To Vacate Religious Arbitration Awards*

As noted above, courts typically employ public policy to review the substance of arbitration awards and protect third-party interests.<sup>245</sup> Public policy considerations require courts to void all agreements in which private litigants seek to abdicate their responsibilities as “private attorney[s] general.”<sup>246</sup> The public policy ground for vacatur also requires courts to vacate arbitration awards when they contravene protected third-party interests. As a result, when religious arbitration courts apply religious law in contravention of protected public policies, courts vacate such awards despite resulting harm to unique first-party interests.<sup>247</sup>

However, this potential clash between public policy and religious arbitration—frequently a clash between first-party and third-party interests—need not always be resolved in favor of the public interest. Indeed, upon encountering important first-party interests in the

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<sup>245</sup> See *supra* notes 107–15 and accompanying text.

<sup>246</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (“A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public’s interest.” (quoting *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)) (internal quotation marks omitted)); *George Fischer Foundry Sys., Inc. v. Adolph H. Hottinger Maschinenbau*, 55 F.3d 1206, 1210 (6th Cir. 1995) (“[I]f any part of a contract, including a choice-of-law provision, waives a party’s right to collect damages for antitrust violations, the provision is void for public policy reasons.”); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 467 (S.D.N.Y. 1997) (same). See generally Buxbaum, *supra* note 108, at 220 (using the “role of the private attorney general to examine the growing inconsistency in judicial evaluations of the public interests at stake in regulatory disputes”).

<sup>247</sup> See *supra* note 110 (analyzing public policy as a ground for vacatur).

international arbitration context, courts have adopted a balancing approach to public policy, elevating unique first-party interests in favor of enforcing agreements even when doing so threatens important third-party interests.

In fact, in a series of cases stemming from alleged securities violations committed by Lloyd's of London, the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits all upheld the enforceability of both forum selection and choice of law clauses, even though doing so waived parties' rights under state and federal securities laws.<sup>248</sup> In turn, the circuit courts required parties to litigate their securities disputes in English courts under English law.<sup>249</sup>

These cases reflect a view that in the international arbitration context, the importance of enforcing joint arbitration and choice of law provisions should win out over countervailing public policy considerations because of the need to safeguard "the orderliness and

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<sup>248</sup> *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360–61 (2d Cir. 1993); *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996); *Haynsworth v. Corp.*, 121 F.3d 956, 969 (5th Cir. 1997); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229–32 (6th Cir. 1995); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 159–62 (7th Cir. 1993); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294–95 (9th Cir. 1998); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294–95 (11th Cir. 1998). For factual background and analysis of the Lloyd's of London cases, see generally Courtland H. Peterson, *Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases*, 60 LA. L. REV. 1259 (2000).

The various Courts of Appeals reached this conclusion despite the fact that the Supreme Court had previously expressed some concern over the combined effects of forum selection and choice of law provisions used in tandem: "We . . . note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19. In addressing this statement, the Circuit Courts universally emphasized its irrelevance. Some focused on the important policy of enforcing international agreements. See *Lipcon*, 148 F.3d at 1294 ("[T]he Court consistently has treated 'truly international agreements' differently than domestic transactions, which indisputably are subject to the anti-waiver provisions of the securities laws." (citation omitted) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515 (1974))); *Riley*, 969 F.2d at 957 (referring to *Mitsubishi's* "isolated sentence in a footnote"). Others noted that the footnote was merely dicta. See *Richards*, 135 F.3d at 1295 ("[W]e do not believe dictum in a footnote regarding antitrust law outweighs the extended discussion and holding in *Scherk* on the validity of clauses specifying the forum and applicable law."); *Haynsworth*, 121 F.3d at 968 (noting that *Mitsubishi* applies only in the antitrust context); *Shell*, 55 F.3d at 1230 (acknowledging the footnote's presence, but explicitly stating that the "Court did not decide whether the choice of law clause . . . should be upheld"); *Roby*, 996 F.2d at 1364 (referencing dicta in *Mitsubishi*, but nevertheless upholding forum selection and choice of law clauses as they do not "subvert a strong national policy").

<sup>249</sup> For examples, see cases cited *supra* note 248.

predictability essential to any international business transaction.”<sup>250</sup> The Eleventh Circuit, exemplifying this logic,<sup>251</sup> emphasized the “*sui generis*” nature of international agreements, which require an especially strong presumption in favor of enforcing choice of law and forum selection clauses.<sup>252</sup>

As a result, the Lloyd’s of London cases balanced the importance of enforcing international business agreements against the plaintiffs’ concerns that such agreements violated the anti-waiver provisions of the 1934 Securities Act.<sup>253</sup> The courts considered public policy concerns as part of a balancing test in which the advantages of

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<sup>250</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); *see also* *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”). For more on the Lloyd’s of London cases, *see* Buxbaum, *supra* note 108, at 242–44 (discussing the Lloyd’s of London cases in order to highlight instances of party autonomy prevailing over regulatory interests); Philip J. McConaughay, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT’L L. 595, 624–25 (2001) (providing an overview of the appellate cases involving Lloyd’s of London).

<sup>251</sup> *See, e.g., Richards*, 135 F.3d at 1293 (“[C]ourts should enforce choice of law and choice of forum clauses in cases of ‘freely negotiated private international agreement[s].’” (quoting *Bremen*, 407 U.S. at 12)); *Haynsworth*, 121 F.3d at 967 (stating that the court was “[b]eginning with the presumption that the [forum selection/choice of law] clause is binding”); *Allen*, 94 F.3d at 928 (reaffirming the presumption of validity established in *Bremen*); *Shell*, 55 F.3d at 1229–30 (noting that forum selection clauses in international agreements are controlling absent a strong showing to the contrary); *Bonny v. Soc’y of Lloyd’s*, 3 F.3d 156, 159–60 (7th Cir. 1993) (assuming prima facie validity of an international agreement’s forum selection clause in the absence of unreasonableness); *Roby*, 996 F.2d at 1362–63 (“The Supreme Court certainly has indicated that forum selection and choice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character.”); *Riley*, 969 F.2d at 958 (“Only a showing of inconvenience so serious as to foreclose a remedy . . . would be sufficient to defeat a contractual forum selection clause.”).

<sup>252</sup> *Lipcon*, 148 F.3d at 1294–95. The Eleventh Circuit further emphasized the international nature of the agreements by distinguishing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). *Id.* at 1294. In *McMahon*, the Supreme Court enforced an arbitration agreement only because the agreement did not violate the anti-waiver provision of the Securities Exchange Act of 1934. 482 U.S. at 238. According to the Eleventh Circuit, *McMahon* was not relevant to its analysis of an international agreement because “*McMahon* . . . involved the enforceability of an arbitration clause in a domestic securities agreement. Although appellants contend that *McMahon* makes clear the Court’s categorical unwillingness to permit waiver of the substantive remedies of the securities laws . . . the Court consistently has treated truly international agreements differently than domestic transactions . . .” *Lipcon*, 148 F.3d at 1294 (citation omitted) (quoting *Scherk*, 417 U.S. at 515); *see also* *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1308 (N.D. Ga. 2006) (distinguishing *McMahon* as addressing a domestic securities agreement).

<sup>253</sup> Indeed, the Sixth Circuit was most explicit in the balancing nature of its approach to public policy, stating that “under *Bremen*, plaintiffs must show that . . . public policy outweighs the policies behind ‘supporting the integrity of international agreements.’” *Shell*, 55 F.3d at 1231 (quoting *Shell v. R.W. Sturge Ltd.*, 850 F. Supp. 620, 630 (S.D. Ohio 1993)).

enforcement—protecting orderly and predictable business arrangements—could outweigh the potential negative impact on the plaintiffs’ statutorily-protected claims. Thus, the mere fact that a choice of law provision in a contract stands in tension with public policy is not enough to invalidate the provision. Instead, courts look to whether general public policy in favor of enforcing the provision is simply more important than the localized concerns of the particular case.<sup>254</sup>

The balancing approach employed in the Lloyd’s of London cases helps frame how courts might consider clashes between religious arbitration awards and protected public policies. To override a well-established public policy, the arbitration agreement must advance a countervailing public policy that is not simply important but *sui generis*.<sup>255</sup> Such *sui generis* policy initiatives enhance party autonomy by highlighting the consequences of non-enforcement for the contracting parties. In the Lloyd’s of London cases, failing to enforce the choice of law provisions would have injected uncertainty into international business arrangements, severely hampering the parties’ ability to maintain international business relationships. Only when the contracting parties’ needs rise to such a level should courts, in balancing the competing interests at stake, consider not applying public policy to vacate arbitration awards.

More fundamentally, the Lloyd’s of London cases tell us something about balancing different types of public policy concerns. *Sui generis* public policy initiatives—like international business—pit first-party interests against third-party interests. When parties, through choice of law and arbitration clauses, fail to play their role as private

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<sup>254</sup> Other cases have reaffirmed this context-sensitive approach to prospective waivers. *See, e.g.*, *Todd v. S.S. Mut. Underwriting Ass’n*, No. 08-1195, 2011 U.S. Dist. LEXIS 38638, at \*15 (E.D. La. Mar. 28, 2011) (balancing public policy interests in favor of enforcing choice of law provisions); *Suzlon Infrastructure, Ltd. v. Pulk*, No. H-09-2206, 2010 U.S. Dist. LEXIS 94413, at \*28–32 (S.D. Tex. Sept. 10, 2010) (refusing to invalidate a choice of forum clause merely because the contractually-chosen forum was less favorable than U.S. courts); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999) (compelling international arbitration); *Liles v. Ginn-La West End, Ltd.*, 631 F.3d 1242, 1257 (11th Cir. 2011) (Appendix) (upholding a forum selection clause to “honor [their] bargains”); *see also Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 520 (5th Cir. 2006) (relying on the “presumption that federal courts must enforce forum selection clauses in international transactions” (internal quotation marks and citation omitted)); *J.B. Harris, Inc. v. Razei Bar Indus., Ltd.*, No. 98-9191, 1999 U.S. App. LEXIS 8577, at \*2 (2d Cir. May 4, 1999) (“For reasons of international commerce, comity, and general principles of contract law, forum selection clauses are presumptively valid.”).

<sup>255</sup> *Lipcon*, 148 F.3d at 1293; *see also Goshawk*, 466 F. Supp. at 1309–10 (“[T]he Supreme Court has repeatedly held that the importance of international comity and ensuring predictability and orderliness in international commerce warrant the enforcement of international agreements to arbitrate, even in contexts where a similar agreement would be unenforceable in the domestic context.”).

attorneys general, they endanger third-party interests. Although courts typically void agreements that threaten statutorily protected third-parties, the Lloyd's of London cases illustrate an important exception. When enforcing an arbitration agreement protects first-party interests that are sufficiently unique so as to require a context-sensitive framework, such policies can become more important than those protecting third-party interests.

Applying these two balancing principles to religious arbitration, courts should consider enforcing religious arbitral awards even when they would typically be void as against public policy.<sup>256</sup> First, as argued above, religious arbitration courts provide an opportunity to advance a unique public policy concern: providing religionists with an adjudicative forum that can render final and enforceable decisions in keeping with the parties' religious faith. Like promoting predictability in international agreements, promoting finality and enforceability in the context of religious arbitration is necessary to the proper functioning of religious arbitration courts. This, in turn, expands the scope of religious freedom.<sup>257</sup>

Second, as described above, the clash of public policies in the religious arbitration context frequently pits societal concerns—for example, antitrust or securities concerns—against the needs of the contracting parties to access religious arbitral fora that can render enforceable decisions. In these limited circumstances, third-party interests should cede to first-party interests.

To return to our example in Part II.A, courts should consider enforcing rabbinical court awards that prohibit business owners from inflicting “definite damage” on already existing businesses<sup>258</sup>—even if enforcement would conflict with state and federal antitrust statutes. While enforcement would negatively impact societal third-party

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<sup>256</sup> It is important to note that the Lloyd's of London cases addressed “prospective waivers.” *Lipcon*, 148 F.3d at 1293. Accordingly, the court addressed whether they should enforce the arbitration *agreement* even though it appeared that the terms of the agreement would lead to an award that violated public policy. *Id.* at 1295. By contrast, I here propose extending the rationale of the Lloyd's of London cases to the enforcement of arbitration *awards*, as long as, on balance, the interests advanced by enforcing a particular award outweigh the interests militating in favor of vacating that award on public policy grounds.

This extension, however, merely constitutes an extension of the underlying rationale. The Lloyd's of London decisions represent a willingness—after balancing the competing interests—to enforce arbitration agreements even when courts believe doing so would lead to awards that contravene public policy. My proposal applies an identical approach to circumstances not only where we *believe* the award will contravene public policy, but also where it actually has.

<sup>257</sup> See Garnett, *supra* note 51, at 288 (arguing that religious institutions have the ability to expand the scope of religious freedom).

<sup>258</sup> See *supra* notes 119–26 and accompanying text (illustrating the conflict between U.S. law and the Jewish principle of *Hasagath Gevul*).

antitrust interests, courts should balance such interests against the interests of parties to religious arbitration. This balance should tilt in favor of enforcing such awards in order to promote the finality and enforceability of religious arbitration. Such an approach ensures that co-religionists have access to adjudicatory fora that can issue final and enforceable decisions in line with their shared values and norms. In balancing policy concerns accordingly, courts can create space for “a framework designed specifically” for religious arbitration and aimed at advancing first-party interests by expanding the scope of religious freedom in this *sui generis* context.<sup>259</sup>

To be sure, courts do not always deploy public policy to protect societal third-party interests. At times, courts use public policy to protect the interests of vulnerable individuals whose interests are to be directly adjudicated in arbitration proceedings. For example, courts can marshal public policy to vacate arbitration awards that undermine protections afforded by statutes such as Title VII,<sup>260</sup> to adjudicate child custody matters,<sup>261</sup> or to determine the rights of incapacitated individuals.<sup>262</sup> In such circumstances, our heavy emphasis on first-party interests would invariably tilt the balance in favor of vacating arbitration awards even when issued by religious arbitration courts.<sup>263</sup>

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<sup>259</sup> See *Lipcon*, 148 F.3d at 1294 (applying a context-sensitive approach to international business arrangements).

<sup>260</sup> See, e.g., *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (vacating arbitration on the grounds that an attorney’s fee award is “one of the principal remedies afforded by Title VII, and one of the chief statutory mechanisms designed to effectuate Congress’s policy goals of enforcement and deterrence”); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (“[I]n a subsequent suit by the employee raising a viable [Title VII] claim of racial discrimination or sexual harassment, it would be no defense that the employee had signed a contract giving up her right to be free from discrimination.”).

<sup>261</sup> See, e.g., *In re Susquehanna Valley Cent. Sch. Dist.*, 339 N.E.2d 132, 133 (N.Y. 1975) (noting that public policy may restrict the freedom to arbitrate in child custody matters); *Schneider v. Schneider*, 216 N.E.2d 318, 321 (N.Y. 1966) (holding that an arbitration award in a child custody matter may not be given *res judicata* consequences against a child who was not a party to the arbitration). *But see Fawzy v. Fawzy*, 973 A.2d 347, 360 (N.J. 2009) (“[T]he constitutionally protected right to parental autonomy includes the right to submit any family controversy, including one regarding child custody and parenting time, to a decision maker chosen by the parents.”).

<sup>262</sup> See *In re Meisels*, 807 N.Y.S.2d 268, 271–72 (Sup. Ct. 2005) (explaining that the public policy interest implicated is meant to protect the incapacitated individual).

<sup>263</sup> This is because in such cases the public policy ground for vacatur is intended to protect particular individuals whose specific rights and liabilities are implicated in the arbitration. Therefore, although in some cases the individual whose rights and liabilities are at issue is not technically a “party,” the structure of these cases does not mirror the third-party versus first-party dynamic highlighted thus far in the Article. The distinction between first-party and third-party interests tracks the distinction between the “generalized other” and the “concrete other,” where the first-party interests ripe for heightened protection are not merely generalized societal interests but particular concrete interests. See Seyla

In these cases, enforcing the arbitration awards would undermine important first-party interests and prevent the court from playing its *parens patriae* role.<sup>264</sup> While lessons from international arbitration may counsel in favor of enforcing religious arbitration awards despite negative impacts on third-party interests, these lessons do not obtain when public policy serves to protect important first-party interests.

### B. *Unconscionability as a Safety Net for Protecting Parties from the Potential Dangers of Religious Arbitration*

To supplement our balancing approach to the public policy ground for vacatur, our emphasis on first-party interests also requires expanding the unconscionability doctrine's role in the religious arbitration context. As noted above, the existence of mandatory procedural law in religious arbitration courts provides a structural reason why such courts are likely to provide litigants with more protections than standard arbitral fora. However, mandatory procedural law can also raise fairness concerns; on this count, critics frequently point to rules precluding testimony of women in some religious arbitral contexts.<sup>265</sup>

The potential application of grossly unfair laws in the religious arbitral context is troubling due to the communal nature of religious arbitration courts.<sup>266</sup> Members of given religious communities often face a variety of pressures when deciding whether to bring their claims before the judicial system or before a religious arbitration court.<sup>267</sup> Courts have concluded that these pressures do not constitute legal duress for the purpose of voiding any resulting arbitration agreement.<sup>268</sup> Thus, reviewing courts might enforce religious arbitration awards despite the existence of both communal pressure and grossly unfair rules; a court might determine that there was not quite enough coercion or quite enough unfairness to void the arbitration agreement.

Unconscionability is a doctrine well-suited to addressing this problem because it considers both whether parties are pressured into

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Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in *FEMINISM AS CRITIQUE* 1, 77, 86–91 (Seyla Benhabib & Drucilla Cornell eds., 1987).

<sup>264</sup> See, e.g., *Hirsch v. Hirsch*, 774 N.Y.S.2d 48, 49 (App. Div. 2004) (“Disputes concerning child custody and visitation are not subject to arbitration as ‘the court’s role as *parens patriae* must not be usurped.’” (citation omitted)).

<sup>265</sup> See *supra* note 156 and accompanying text.

<sup>266</sup> See *supra* notes 240–41 and accompanying text (noting that in some Jewish communities, individuals who refuse to submit a dispute before a rabbinical panel could receive a strong statement of communal disapproval or be ostracized from the community).

<sup>267</sup> See *supra* notes 241–42 and accompanying text.

<sup>268</sup> See *supra* note 242.

arbitration and whether the applied rules accord with general conceptions of arbitral justice.<sup>269</sup> Although unconscionability is generally a losing argument, it has had a remarkable resurgence in the arbitration context.<sup>270</sup> In fact, a number of recent statistical studies have demonstrated that courts employ the unconscionability doctrine in arbitration cases at a rate significantly higher than in other contract cases.<sup>271</sup> Indeed, given recent developments in arbitration law, the unconscionability doctrine may serve as the preferred ground to vacate awards

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<sup>269</sup> See generally Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (exploring the unconscionability doctrine's role as a "flexible safety net for catching contractual unfairness").

<sup>270</sup> See generally Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008) (using case law to highlight the role of the unconscionability doctrine in striking down arbitration agreements); Burton, *supra* note 48 (arguing that many courts favor litigation over arbitration by erroneously applying the unconscionability doctrine to strike down arbitration agreements); Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years After Doctor's Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 271 (2006) (explaining how the unconscionability doctrine has proven to be "flexible, empowering, and well suited for policing mandatory pre-dispute arbitration contracts for overall fairness"); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (suggesting that the resurgence of the unconscionability doctrine stems from judicial hostility toward arbitration); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004) (recognizing the unconscionability doctrine's resurgence as an important shift from the Supreme Court's pro-arbitration jurisprudence).

<sup>271</sup> See, e.g., Bruhl, *supra* note 270, at 1440–41 (describing statistical data on the rise in the application of the unconscionability doctrine in arbitration cases); Randall, *supra* note 270, at 194–96 (summarizing statistics on the increase in the use of the unconscionability doctrine in arbitration cases). Whether or not this trend will continue is up for debate. Recently, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court struck down the so-called "Discover Bank rule"—"California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." 131 S. Ct. 1740, 1746 (2011). According to the Court, the FAA preempted this rule because it was too broad. The rule provided plaintiffs too much leeway to void otherwise valid arbitration agreements simply because they contained a class-action waiver, even without considering pro-consumer provisions in the same agreement. *Id.* at 1750–51. The Court referenced the various statistical studies which demonstrated that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Id.* at 1747. This critique of judicial trends in applying the unconscionability doctrine to arbitration, however, is premised on a concern for adopting blanket rules regarding how and when to apply the unconscionability doctrine. This Article contends that courts must remain context-sensitive when applying the unconscionability doctrine, taking various social dynamics and considerations of arbitral justice into account. In this way, this Article's proposals are consistent with the Court's holding in *AT&T Mobility*.

for judges looking to push back against the perceived inadequacies of arbitral justice.<sup>272</sup>

To successfully advance a claim of unconscionability, most courts require parties to demonstrate both “procedural unconscionability” and “substantive unconscionability.”<sup>273</sup> “Procedural unconscionability pertains to the process by which parties reach an agreement, as well as the form of the agreement, including the use of fine print or convoluted language.”<sup>274</sup> In analyzing procedural unconscionability, courts consider inequalities in bargaining power or “hidden” contractual provisions which “preclude[] the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract.”<sup>275</sup>

In contrast, “[s]ubstantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to

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<sup>272</sup> See Bruhl, *supra* note 270, at 1436–43 (describing how the unconscionability doctrine has increasingly served as a safety valve for judges seeking to undermine the enforceability of arbitration agreements).

<sup>273</sup> Arthur A. Leff first developed this distinction in *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967), and courts have subsequently adopted it around the country. *E.g.*, *Tillman v. Commercial Credit Loans, Inc.*, 655 So. 2d 362, 370 (N.C. 2008) (“A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability.” (citation omitted)); *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So. 2d 1077, 1087 (Ala. 2005) (“To avoid an arbitration provision on the ground of unconscionability, the party objecting to arbitration must show both procedural and substantive unconscionability.”); *Murphy v. Mid-West Nat’l Life Ins. Co.*, 78 P.3d 766, 768 (Idaho 2003) (noting that “for a contract or contractual provision to be voided as unconscionable, it must be both procedurally and substantively unconscionable” (internal quotation marks and citations omitted)); *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (“The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.” (internal quotation marks and citation omitted)); *State v. Avco Fin. Serv., Inc.*, 406 N.E.2d 1075, 1078 (N.Y. 1980) (“As a general proposition, unconscionability . . . requires some showing of ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’” (citation omitted)); *Shotts v. OP Winter Haven, Inc.*, 988 So. 2d 639, 641 (Fla. Dist. Ct. App. 2008) (“In order to succeed on a claim of unconscionability, a party must establish both procedural and substantive unconscionability.” (citation omitted)); *Doyle v. Fin. Am., LLC*, 918 A.2d 1266, 1274 (Md. Ct. Spec. App. 2007) (“The doctrine of unconscionability contains two components, substantive and procedural aspects.”); see also JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4-7, at 168 (5th ed. 2000) (“Most courts take a ‘balancing approach’ to the unconscionability question, and . . . seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability.”). *But see, e.g.*, *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 263 (Ill. 2006) (“A finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both.”).

<sup>274</sup> *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999).

<sup>275</sup> *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003) (citation omitted).

which the disfavored party does not assent.”<sup>276</sup> Examples of such terms<sup>277</sup> include provisions limiting the type of relief an arbitrator can award;<sup>278</sup> non-mutual arbitration clauses that only require one of the parties to submit their claims to arbitration;<sup>279</sup> provisions that require the arbitration to take place in a grossly inconvenient forum for one of the parties;<sup>280</sup> and clauses that provide for unreasonable limitations on discovery in the arbitral forum.<sup>281</sup>

Courts generally consider both elements of unconscionability—procedural and substantive—on a “sliding scale”: “[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”<sup>282</sup> Thus, “[u]nconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the pro-

<sup>276</sup> *Harris*, 183 F.3d at 181 (citation omitted).

<sup>277</sup> See Bruhl, *supra* note 270, at 1437–39 (listing examples of substantively unconscionable contractual terms); Stempel, *supra* note 270, at 803–07 (listing specific traits that may brand arbitration agreements as unconscionable).

<sup>278</sup> See, e.g., *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 670–71 (S.C. 2007) (finding limitations on statutorily-established damages to be oppressive and one-sided and therefore unconscionable); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 277–80 (W. Va. 2002) (holding limitations on punitive damages and class action relief unconscionable).

<sup>279</sup> See, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 169–70 (5th Cir. 2004) (holding an arbitration clause unconscionable because it was one-sided, requiring the customer but not the provider to arbitrate every dispute); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 160 (Wis. 2006) (“[B]road, one-sided, unfair ‘save and except’ parenthetical in the arbitration provision of the loan agreement allowing Wisconsin Auto Title Loans full access to the courts, free of arbitration, while limiting the borrower to arbitration, renders the arbitration provision substantively unconscionable.”).

<sup>280</sup> See, e.g., *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1289 (9th Cir. 2006) (en banc) (finding unconscionable “a forum selection clause that places venue . . . only a few miles away from [defendant’s] headquarters . . . but three thousand miles away from [plaintiff’s] home”); *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1244–46 (Mont. 1998) (invalidating a provision requiring a Montana resident to arbitrate a contract dispute outside the state, when performance of the contract was to occur in Montana).

<sup>281</sup> See, e.g., *Domingo v. Ameriquest Mortg. Co.*, 70 Fed. App’x 919, 920–21 (9th Cir. 2003) (finding an arbitration agreement’s discovery provisions unconscionable, specifically those provisions limiting depositions); *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 546 (E.D. Pa. 2006) (noting that “courts have found arbitration provisions substantively unconscionable in part because of limitations on discovery”); *Hoffman v. Cargill, Inc.*, 968 F. Supp. 465, 475 (N.D. Iowa 1997) (“Although arbitration proceedings may, and often do, provide much more limited discovery procedures than is common in regular court proceedings, a party must be provided a fair opportunity to present its claims.” (citation omitted)).

<sup>282</sup> *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 690 (Cal. 2000); see *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (App. Div. 1983) (“[P]rocedural and substantive unconscionability operate on a ‘sliding scale’; the more questionable the meaningfulness of choice, the less imbalance in a contract’s terms should be tolerated and vice versa . . .”).

visions.”<sup>283</sup> As a result, the unconscionability doctrine has become a prominent tool for courts to void arbitration agreements that, instead of representing mutually beneficial mechanisms for adjudicating disputes, simply impose grossly unreasonable terms that, in reality, never were bargained for. In this way, the unconscionability doctrine is the paradigmatic protector of first-party interests.<sup>284</sup>

The unconscionability doctrine is able to address the nexus of coercion and unfairness directly<sup>285</sup> because the “sliding scale” approach adopted by many courts looks to both procedural and substantive unconscionability in determining whether to void an arbitration agreement. If courts are concerned about the voluntary nature of a religious arbitration agreement or about whether the applied law seems deeply unfair, they can void the arbitration agreement on unconscionability grounds.<sup>286</sup>

Take for example a case where a religious arbitration court has deemed testimony inadmissible because it is to be given by a woman. If both parties agreed without reservation to submit their dispute to the religious arbitration court, a court is likely to enforce the award because there is no procedural unconscionability.<sup>287</sup> This conclusion comports with the overall emphasis that arbitration doctrine places on intent.<sup>288</sup>

Now, there may be a temptation to conclude that failure to allow testimony of women in this context would serve as grounds to vacate any subsequent arbitration award as a “refus[al] to hear evidence

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<sup>283</sup> *Worldwide Underwriters Ins. v. Brady*, 973 F.2d 192, 196 (3d Cir. 1992).

<sup>284</sup> *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1180 (Ohio Ct. App. 2004) (distinguishing the refusal to enforce a contract on grounds of public policy, which focuses on the impact upon society as a whole, from unconscionability, which focuses on the relationship of the parties and the effect of the agreement on the parties). For the historical and philosophical foundation underlying the unconscionability doctrine, see generally Schmitz, *supra* note 269.

<sup>285</sup> This is particularly true according to scholars who emphasize the efficiency of using the unconscionability doctrine to police cases of “quasi-duress.” See, e.g., Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 *HASTINGS L.J.* 459, 474–75 (1994) (noting that the form of procedural unconscionability established through surprise and unintelligible terms has “antecedents in the policing doctrines of duress, misrepresentation, and mistake”); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. ECON.* 293, 301–06 (1975) (arguing that the ideal application of the unconscionability doctrine is to cases akin to duress).

<sup>286</sup> See, e.g., *In re Marriage of Popack*, 998 P.2d 464, 468 (Colo. App. 2000) (remanding the case to the trial court to determine whether a religious arbitration agreement was conscionable and voluntary).

<sup>287</sup> See *supra* note 273 and accompanying text (discussing the importance of procedural and substantive unconscionability in the case law).

<sup>288</sup> See *supra* notes 238–39 and accompanying text (noting that, for individuals to be subject to a religious arbitral forum, they must demonstrate an explicit intent to do so).

pertinent and material to the controversy.”<sup>289</sup> However, if an arbitrator excluded the testimony of a woman based on an interpretation of the law selected by the parties, it is unlikely that doing so would constitute a ground for vacatur for refusal to hear evidence. As a number of courts have noted, the text of the FAA requires vacatur of an award for refusal to hear evidence only if it amounts to “misconduct.”<sup>290</sup> While no court has directly addressed the issue, a court is unlikely to find that an arbitrator engaged in misconduct in applying the law selected by the parties to exclude testimony.

By contrast, the unconscionability doctrine could provide an option for voiding an arbitration agreement that allowed an arbitrator to refuse to hear the testimony of a woman. For example, consider a case where one party agreed to submit a dispute to religious arbitration only after facing significant pressure from the relevant religious community. In such a case, if the religious arbitration court were to deem the testimony submitted by the reluctant party inadmissible because the witness was female, then the reluctant party would have a strong claim for unconscionability. First, the communal pressure could satisfy procedural unconscionability, since it undermines the party’s ability to freely choose whether to enter the agreement. Second, interpreting the arbitration agreement to preclude the testimony of the reluctant party’s female witness could constitute substantive unconscionability, since it applies the terms of the agreement in a manner that strongly disfavors the reluctant party.

In this way, the utility of the unconscionability doctrine lies in its sensitivity to forms of pressure that do not register when analyzed under classic contract doctrines like duress.<sup>291</sup> Indeed, while some courts have demonstrated willingness to consider surrounding circumstances in invalidating religious agreements, results have been, at best, uneven.<sup>292</sup> In contrast, procedural unconscionability accounts for communal dynamics that pressure individuals into granting jurisdiction to

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<sup>289</sup> 9 U.S.C. § 10(a)(3) (2006).

<sup>290</sup> *Id.* (requiring vacatur “where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy”); see also *Century Indem. Co. v. Underwriters, Lloyd’s*, 584 F.3d 513, 557 (3d Cir. 2009) (emphasizing that not every failure to hear material and pertinent evidence constitutes misconduct).

<sup>291</sup> See *supra* notes 240–42 and accompanying text (discussing social and communal pressure associated with religious arbitration, which does not rise to the level of coercion).

<sup>292</sup> Compare *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, ¶¶ 20–23, at \*5–6 (Ohio Ct. App. July 10, 2008) (holding that the *mahr* provision of an Islamic marriage contract was void because the parties did not discuss it until the day of the marriage and the hurried negotiation conditions gave the lower court good reason to invalidate the agreement), with *Odatalla v. Odatalla*, 810 A.2d 93, 95, 98 (N.J. Super. Ct. Ch. Div. 2002) (concluding that a *mahr* agreement was not invalid simply because it was entered into at the marriage ceremony).

a religious arbitration court.<sup>293</sup> Accordingly, the unconscionability doctrine is sensitive to more nuanced forms of communal pressure and intolerant of grossly unfair arbitral procedures.<sup>294</sup>

Moreover, by using the unconscionability doctrine, courts can signal, to both religious arbitration courts and potential parties to religious arbitration, the types of circumstances that can and cannot give rise to legitimate arbitration proceedings. This incentivizes religious arbitration courts to monitor the consensual nature of submitted disputes, empowering religious arbitration courts that do confirm intent.<sup>295</sup> In this way, the unconscionability doctrine can function as a judicial “safety net,” providing important first-party protections in the religious arbitral context.<sup>296</sup>

However, the type of pressure brought to bear in the religious arbitration context creates a problem with deploying unconscionability, which serves as a ground for voiding an arbitration agreement but not vacating an arbitration award. Most standard arbitration

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<sup>293</sup> Schmitz, for example, emphasizes how the unconscionability inquiry is context-sensitive by noting that “[p]laying nice . . . means different things in different neighborhoods.” Schmitz, *supra* note 269, at 103. In pushing this conception of unconscionability, Schmitz relies heavily on relational contracts theory, emphasizing how the “histories and circumstances” between parties change the applicable obligations they owe each other. *Id.*

This Article’s discussion of the unconscionability doctrine does not assume normative versions of relational contract theory, although it is not inconsistent with them. Instead, the context-sensitivity of the unconscionability doctrine emphasized here stems more from a recognition that communal dynamics can, in fact, lead to sufficient pressure to trigger a finding of procedural unconscionability. It is not intended to advance a view that these communal dynamics can trigger enforceable contractual obligations. See Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 653–72 (2010) (differentiating between empirical and normative claims of relational contract theory).

<sup>294</sup> In this way, applying the standard rules of arbitration to religious arbitration might avoid many of the problems predicted by Shachar. See generally Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008) (outlining religious and secular legal dilemmas faced by women). Although Shachar argues that arbitration is too hands-off to protect parties to religious arbitration agreements, courts can use the unconscionability doctrine to review whether communal pressure, combined with grossly unfair rules, should render the underlying arbitration agreement void. In such circumstances, courts retain their gate-keeping role, ensuring that those who have entered a non-judicial forum have in fact chosen to do so. See, e.g., *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (noting that where “a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before [compelling arbitration]”).

<sup>295</sup> Cf. Anver Emon, *A Mistake To Ban Sharia*, GLOBE & MAIL, Sept. 13, 2005, at A21 (“Would a regulated arbitration regime be perfect? Perhaps not. But it would have been better than the informal, back-alley Islamic mediations that are in place now.”).

<sup>296</sup> See generally Schmitz, *supra* note 269 (arguing for the unconscionability doctrine’s “safety net” function).

agreements are drafted pre-dispute.<sup>297</sup> As a result, parties complaining of procedural unconscionability in the standard arbitration context—often related to the adhesive nature of the arbitration agreement—can raise their claims prior to participating in the arbitration proceedings, most likely in response to a motion to compel arbitration.

The fact that parties in the standard arbitration context can raise these claims prior to participating in arbitration proceedings allows them to avoid issues of waiver. Under the FAA, unconscionability is a ground for voiding the arbitration agreement—not for vacating the arbitration award.<sup>298</sup> As a general rule, unless a party raises a timely objection during the arbitration proceedings, a party waives claims regarding the enforceability of the arbitration agreement by participating in the arbitration proceedings.<sup>299</sup> In turn, parties wishing to raise the issue of unconscionability cannot do so *after* an arbitrator issues an award.

Waiver rules could, at first glance, preclude parties pressured into religious arbitration from raising unconscionability, because religious arbitration agreements are typically signed post-dispute.<sup>300</sup> This practice is linked to the underlying purpose of religious arbitration: Parties submit disputes to religious arbitration courts in accordance with religious laws that require disputes between co-religionists to be adjudicated in accordance with religious rules and principles. Thus, the pressure to sign religious arbitration agreements also arises post-dispute. As a result, the pressure to sign religious arbitration agreements not only enables parties to potentially strong-arm others into

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<sup>297</sup> Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003).

<sup>298</sup> *Compare Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2.”), *with* 9 U.S.C. § 10 (2006) (listing statutory grounds for vacating arbitration awards).

<sup>299</sup> *See Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 368 (2d Cir. 2003) (“[I]f a party participates in arbitration proceedings without making a timely objection to the submission of the dispute to arbitration, that party may be found to have waived its right to object.”); *Conntech Dev. Co. v. Univ. of Conn. Educ. Props.*, Inc. 102 F.3d 677, 685 (2d Cir. 1996) (“An objection to the arbitrability of a claim must be made on a timely basis, or it is waived.”); *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983) (stating that “a party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result”); *cf.* Eleanor L. Grossman, *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability Under State Law*, 56 A.L.R.5th 757, § 2[a] (1998) (“A party to an arbitration proceeding may preserve this right to raise an objection to arbitrability by making a timely objection to arbitrability.”).

<sup>300</sup> As an indication, consider the boilerplate agreement of the Beth Din of America, which requires the parties to describe the dispute they are submitting to arbitration. *Agreement to Arbitrate*, *supra* note 69.

signing the agreement, but ensures that parties do not raise issues related to procedural unconscionability until after the arbitration proceedings are well underway.

Of course, procedural unconscionability is only half of the unconscionability equation. As noted above, to establish a claim of unconscionability, courts typically require both a procedural and substantive element.<sup>301</sup> In the religious arbitration context, parties may not be aware of substantive unconscionability until issues arise during the arbitration proceedings. For example, consider again the concern that certain religious arbitration courts will discount the testimony of women. A party may grudgingly agree to submit to religious arbitration, knowing that he has a female witness who can corroborate his version of the events. When the time comes to present the testimony, the religious arbitration panel informs the party that it will not hear the testimony of the witness because she is a woman. At this point, a party may, for the first time, be able to establish a claim for unconscionability. Specifically, the pressure experienced by the party in signing the arbitration agreement combined with the effect of the religious choice of law provision, which substantially limits the evidence he can present, might be sufficient to satisfy both the procedural and substantive elements of the unconscionability inquiry.

In these circumstances, much will hinge on whether the party was aware of how the religious rules employed by the religious arbitration court were, in application, substantively unconscionable. As federal courts require individuals to “timely object” to the enforceability of an arbitration agreement, if a party wishes to avoid waiving any such defenses it should raise issues with enforceability once they become apparent.<sup>302</sup> In the unique circumstances raised in the religious arbitration context, the unconscionable nature of the religious arbitration agreement may only become evident during the proceedings themselves. In such circumstances, courts should focus their inquiry on whether the complaining party made a timely objection.<sup>303</sup> If a party is

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<sup>301</sup> See *supra* note 273 and accompanying text.

<sup>302</sup> See *supra* note 299.

<sup>303</sup> See *First Health Grp. Corp. v. Ruddick*, 911 N.E.2d 1201, 1210 (Ill. App. Ct. 2009) (“An objection should occur ‘at the earliest possible moment’ to save the time and expense of a possibly unwarranted arbitration.” (citation omitted)); see, e.g., *Houston Vill. Builders v. Falbaum*, 105 S.W.3d 28, 35 (Tex. App. 2003) (holding that the appellee’s failure to investigate was not waiver of a claim for evident partiality); *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 1097 (App. 5th Dist. 1995) (holding that there was no waiver of a claim for evident partiality based upon facts only discovered after participating in an arbitration); *Ossman v. Ossman*, 560 N.Y.S.2d 557, 558 (App. Div. 1990) (finding that claims of partiality were not waived because the petitioner discovered the relationship only after arbitration had begun).

able to establish a claim of procedural unconscionability, courts should not apply waiver rules in the religious arbitration context—despite the party’s participation in some of the proceedings—as long as the party objected to the substantively unconscionable conduct as soon as practicable.<sup>304</sup> Under such circumstances, objections in the middle of proceedings should be deemed timely.<sup>305</sup>

### CONCLUSION

This Article poses the following question: When should courts enforce the awards of religious arbitration courts adjudicating disputes in accordance with religious law? At the heart of this question is a debate about whether the trend toward the new multiculturalism—emphasizing the desire of communities to secure some degree of autonomy and self-governance—can be embodied in concrete institutions without threatening fundamental individual liberties. In line with recent scholarship emphasizing the importance of First Amendment institutions,<sup>306</sup> this Article argues that religious arbitration courts serve the freedom-enhancing role of the new multiculturalism by providing religionists with a forum to adjudicate disputes in accordance with their own religious beliefs and practices. In this way, religious arbitration courts “contribute to . . . the reality of religious freedom under law” by serving as part of the infrastructure that makes religious freedom possible.<sup>307</sup>

But enforcing religious arbitration awards also implicates and threatens the interests of two other significant constituencies. On one hand, enforcing religious arbitration awards can negatively impact the interests of society generally. This happens most frequently when religious law contravenes U.S. laws that embody important and non-waivable public policies. On the other hand, enforcing awards rendered by religious arbitration courts potentially threatens individual members of religious communities by enhancing the authority of relig-

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<sup>304</sup> See, e.g., *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982) (holding that insurers did not waive their right to contest the alleged impartiality of a neutral arbitrator by participating in the arbitration “because the insurers did not discover evidence of partiality prior to arbitration”); *Salsitz v. Kreiss*, 761 N.E.2d 724, 733 (Ill. 2001) (“A timely objection preserves the right to challenge an award, even where the parties participate in the arbitration proceedings.”).

<sup>305</sup> See, e.g., *Marino v. Writers Guild of Am., E., Inc.*, 992 F.2d 1480, 1484–85 (9th Cir. 1993) (noting that “a party *may not sit idle* through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse” (emphasis added)).

<sup>306</sup> E.g., Garnett, *supra* note 51, at 294–95 (arguing that religious institutions are important because they “contribute to . . . the reality of religious freedom under law” by serving as part of the infrastructure that makes religious freedom possible).

<sup>307</sup> *Id.*

ious leaders. Indeed, by further empowering religious authorities, enforcing religious arbitration awards could potentially escalate the pressures within religious communities toward doctrinal conformity.

To determine the appropriate scope of enforceability of religious arbitration awards, one must carefully calibrate these competing interests. In trying to strike the right balance, this Article suggests prioritizing first-party interests over third-party interests. This suggested priority builds off of current arbitration doctrine, which has emphasized the importance of *sui generis* first-party interests—like the interests of parties in the orderly enforcement of their international business arrangements—even when doing so might require overriding public policies that typically require the voiding of any underlying arbitration agreements. Similarly, this Article suggests that the freedom-enhancing feature of religious arbitration courts should counsel in favor of enforcing religious arbitration awards even when such awards violate public policies intended to protect third-party interests.

However, emphasizing the importance of first-party interests also requires striking a delicate balance between advancing the interests of the parties by having religious arbitration awards enforced and protecting the interests of the parties when they have been pressured into a religious arbitral forum that imposes grossly unfair rules and procedures. This conflict—a conflict between competing first-party interests—can be navigated by a heightened use of the unconscionability doctrine. Because the unconscionability inquiry is context-sensitive, it allows courts to consider varied forms of communal pressure together with grossly unfair religious rules as grounds for voiding religious arbitration agreements. In this way, expanding the use of the unconscionability doctrine in the review of religious arbitration agreements could provide a doctrinal mechanism to protect religionists from the freedom-restricting qualities of religious arbitration.

This is a short recapitulation of the argument presented above. But there is one more point to make. Understandably, we live in an age that is skeptical of the new multiculturalism and the powerful force wielded by religious authorities. We are concerned that, left unchecked, granting increased autonomy to religious communities can threaten individual liberties. It is therefore not surprising that recent legislative initiatives across the nation attack not religion, but religious law;<sup>308</sup> attempts by religious communities to stake claim to law-like authority drive the critics of the new multiculturalism. Indeed, some have already suggested that these initiatives may be just the beginning

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<sup>308</sup> See *supra* note 4 and accompanying text.

of a wave of legal reforms further isolating religious arbitration and, in turn, the new multiculturalism.<sup>309</sup>

However, instead of simply reinforcing the fortifications around individual liberties, this Article suggests concrete ways to protect individual rights while remaining sensitive to the religious and cultural differences that inhabit the public square.<sup>310</sup> When such a unique opportunity presents itself—such as the empowerment of religious arbitration courts—the new multiculturalism exhorts us not to cry out, “There will be one law for us all.”<sup>311</sup> To the contrary, we should mine the intricacies of our own legal horizons to find flexibility in providing meaningful opportunities to religious communities.

In the immortal words ending Robert Cover’s essay *Nomos and Narrative*, “Legal meaning is a challenging enrichment of social life, a potential restraint of arbitrary power and violence. We ought to stop circumscribing the *nomos*; we ought to invite new worlds.”<sup>312</sup>

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<sup>309</sup> See *supra* note 34.

<sup>310</sup> See generally Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Analysis*, 34 *ISR. L. REV.* 170, 210 (2000) (calling for “heightened judicial sensitivity to claims of groups and a willingness to interpret existing legal doctrines and fundamental rights, including religious liberty, in light of the goal of cultural diversity so as to maximize group survival”).

<sup>311</sup> See *supra* note 30 and accompanying text.

<sup>312</sup> Cover, *Nomos and Narrative*, *supra* note 14, at 68.