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I. INTRODUCTION

The practice of arbitration and, specifically, religious arbitration has recently been attaining special attention in academic literature.[1] Current issued addressed in recent literature include: the choice of parties to be bound by religious arbitration, the enforceability of arbitration awards in American courts, and the effects of permitting religious arbitration tribunals to continue.[2] Supporters of religious arbitration argue that it promotes cultural diversity and respect for religion, provided it is accompanied by greater safeguards of public policy through education about legal rights and greater regulation in general.[3] Many point to the benefits of multiculturalism created by religious arbitration and argue that banning

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1. *See* Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157 (2012).

2. *See id.*; *see* e.g.., Raquel J. Greenberg, *TzedekTzedekTirdofi: How Female Religious Court Advocates can Mitigate a Lack of Judicial Review of The American Beth Din System*, 19 CARDOZO J.L. & GENDER 635 (2013); Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice*? 28 WIS. INT'L L.J. 108 (2010); Martha F. Davis and Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1 (2011).

3. *See* Caryn Litt Wolfe, *Faith-based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427 (2006) (noting that a refusal by civil courts to enforce religious arbitration awards would seriously weaken the power of religious tribunals). *See also* Michael C. Grossman, *Is This Arbitration? Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 170 (2007) (arguing for review of religious tribunals based on neutral principles, and brings focus to the limitations of Federal Arbitration Act).

procedurally fair arbitration tribunals is unjustifiable.[4] Critics argue against the expansive freedom of religious tribunals.[5] They argue that religious arbitration does not follow the "uniform system of laws," and that some religious arbitration contracts are against public policy and unconscionable.[6]

At the heart of the debate, the right to religious dispute resolution focuses on the discussions of "old multiculturalism" versus "new multiculturalism."[7] "[W]ithin multiculturalism's framework lies a recent trend towards a 'new multiculturalism,' which focuses not simply on principles of recognition and inclusion, but on broader principles of group autonomy and self-governance."[8] Professor Michael Helfand, defines old multiculturalism as focused on the recognition and integration of minority groups into the public sphere, and new multiculturalism as emphasizing group autonomy as opposed to recognition.[9] Succinctly put, "[N]ew multiculturalism looks less for symbolic integration and more for jurisdictional differentiation."[10] Under new multiculturalism, proponents argue that it creates better opportunities for communities,[11] but ethnic groups have been criticized for clinging to old values.[12] Promoting religious accommodation is also associated with hindering gender inequality.[13]

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4. Wolfe, *supra* note 3, at 466-67.

5. *See* Evan M. Lowry, *Where Angels Fear to Tread: Islamic Arbitration in Probate and Family Law, a Practical Perspective*, 46 SUFFOLK U. L. REV. 159 (2013) (arguing for restrictive use or religious law, especially under the realms of family law, noting, "[W]hen arbitration, a system ordered around freedom of contract, allows the application of Shari'a at the expense of American substantive law, inequitable and irreconcilable results can easily follow." *Id.* at 183.).

6. *Id.* at 179-81. *See* Greenberg, *supra* note 2, at 635.

7. *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U.L. Rev. 1231, 1234 (2011).

8. *See id.*

9. *Id.*

10. *Id.* at 1235.

11.

> Citing a number of recent studies that show a connection between immigration, diversity and entrepreneurship, Andrés Rodríguez-Pose and Daniel Hardy of the London School of Economics recently warned that this year's hard anti-immigrant turn in Britain would have negative consequences: 'Recent legislation by the U.K. Home Office to restrict migration is likely to lead to a serious dent in entrepreneurship, affecting in turn the potential for employment generation and economic growth.

Chrystia Freeland, *Bilingual Nationhood, Canadian-Style: Commentary*, N.Y. TIMES (Dec. 26, 2014), http://www.nytimes.com/2014/12/26/opinion/bilingual-nationhood-canadian-style.html?_r=0.

12. *See* Sarfraz Manzoor, *The England That Is Forever: Pakistan-Multiculturalism and Rape in Rotherham*, N.Y. Times (Sept. 16, 2014), http://www.nytimes.com/2014/09/16/opinion/multiculturalism-and-rape-in-rotherham.html. "Britain's Pakistani community often seems frozen in time; it has progressed little and remains strikingly impoverished. The unemployment rate for the

Discussions of in-group cultural identity and out-of-group identity are also in the forefront of religious arbitration debate.[14] An example of out-of-group cultural identity is from November 2, 2010, when Oklahoma voters approved a proposed constitutional amendment that would prevent Oklahoma state courts from considering or using Sharia Law.[15] Here, before the amendment could become effective, the federal district court granted an injunction to prevent the courts from certifying the result.[16] When a Muslim

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least educated young Muslims is close to [40%], and more than two-thirds of Pakistani households are below the poverty line." *Id.*

13. Ayelet Sachar critiques the new multiculturalism model, calling it "insufficient for understanding the controversies at heart of the new cultural wars." Ayelet Shachar, *Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49 (2005) (arguing that internal transformation must occur in the traditional citizenship model to allow for the right balance between interests of state and religion).

14. The trend of privatizing diversity—where citizens take their disputes away from public courts towards private settlement or to customary sources of law and authority—has led to both in-group and out of group controversies. For example, Ayelet Shachar discusses this dichotomy by considering the issues that women in some groups face. She notes, "Women's legal dilemmas often arise . . . from their allegiance to various overlapping systems of identification, authority and belief, in this case, those arising from religious and secular law." Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573-607 (2008).

15. Erik Eckholm, *Oklahoma: Court Upholds Blocking of Amendment Against Shariah Law*, N.Y. TIMES (Jan. 10, 2012), http://www.nytimes.com/2012/01/11/us/oklahoma-court-upholds-blocking-of-amendment-against-shariah-law.html?_r=0 (discussing the court's approval of blocking of the amendment against Sharia Law).

> Shariah means "the way to the watering hole." It is Islam's road map for living morally and achieving salvation. Drawing on the Koran and the sunnah—the sayings and traditions of the prophet Muhammad—Islamic law reflects what scholars describe as the attempt, over centuries, to translate God's will into a system of required beliefs and actions.

Andrea Elliot, *The Man Behind the Anti-Sharia Movement*, N.Y. TIMES (July 31, 2011), http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all.

> Early versions of the law, which passed in Tennessee and then Louisiana, made no mention of Shariah, which was necessary to pass constitutional muster, Mr. Yerushalmi said. But as the movement spread, state lawmakers began tweaking the legislation to refer to Shariah and other religious laws or systems—including, in one ill-fated proposal in Arizona, "karma." *Id.* By last fall, the anti-Shariah movement had gained new prominence. ACT for America spent $60,000 promoting the Oklahoma initiative, a campaign that included 600,000 robocalls featuring Mr. Woolsey, the former C.I.A. director. Mr. Gingrich called for a federal law banning courts from using Shariah in place of American law, and Sarah Palin warned that if Shariah law "were to be adopted, allowed to govern in our country, it will be the downfall of America.

Id.

16. Awad v. Ziriax, 670 F. 3d 1111, 1111 (10th Cir. 2012). The court noted:

> On May 25, 2010, the Oklahoma House of Representatives and Senate passed House Joint Resolution 1056 (HJR 1056). The resolution directed "the Secretary of State to refer to the people for their approval or rejection a proposed amendment to Section 1 of Article VII of the [Oklahoma] Constitution . . . [known as] the Save Our State Amendment."

Id. at 1117.

citizen challenged the amendment,[17] the court declared that Mr. Muneer Awad had standing for his claim[18] and upheld his claim of discrimination under the Establishment Clause.[19]

However, the use of Sharia Law in private settings, specifically regarding situations of potential religious arbitrations, inadvertently attracted

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On November 2, 2010, Oklahoma voters approved a proposed state constitutional amendment preventing Oklahoma state courts from considering or using Sharia law. Seventy percent of Oklahoma voters approved SQ 755. On November 4, Mr. Muneer Awad sued the Oklahoma Election Board members to prevent the certification of the SQ 755 election results. The proposed amendment states:

> The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.

Id. at 1118.

17. The original ballot was under the name "House Joint Resolution HJR 1056," and the revised ballot was under the name "State Question 755" (SQ 755). Mr. Awad alleged that the Save Our State Amendment violated his rights under both the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution. As per Mr. Awad, his religion was singled out for negative treatment and that such implementation would have multiple adverse consequences, including, "disabling a court from probating his last will and testament (which contains references to Sharia law), limiting the relief Muslims can obtain from Oklahoma state courts, and fostering excessive entanglement between the government and his religion." *Id.* at 1111.

18. *Id.*; *See also* O'Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005). Where a college faculty member and a student claimed their unwelcome exposure to a statute on their campus was hostile to their religion (Catholicism), and violated the Establishment Clause. The 10th Circuit held that "standing is clearly conferred by non-economic religious values . . . . Plaintiffs alleging non-economic injury must be 'directly affected by the laws and practices against which their complaints are directed.'" The Court concluded that "allegations of personal contact with a state-sponsored religious image suffice to demonstrate this kind of direct injury." 416 F.3d at 1223.

19. Appellants argued that there was no discrimination in this case as the amendment banned all religious laws from Oklahoma courts and Sharia law was used only as an example. In response, the Court noted:

> The amendment bans only one form of religious law—Sharia Law. Even if we accept Appellants' argument that we should interpret "cultures" to include "religions," the text does not ban all religious laws . . . the word "other" implies that whatever religions the legislature considered to be part of domestic or Oklahoma culture would not have their legal precepts prohibited from consideration, while all others would.

416 F.3d at 1240.

fears of the "other."[20] What Oklahoma and several other states across United States are trying to do is stop the use of Sharia Law, or stop the use of "foreign law"—a term that several legislators have used to describe Sharia Law—in American courts.[21] However, the use of Sharia Law is already present, mostly within the realms of private dispute resolution, including arbitration and mediation.[22]

This treatment of *us vs. them* is not new.[23] Other religious laws have faced the criticism of Sharia Law as "foreign law" as well.[24] In 1963, Jewish law faced similar backlash, though primarily by courts.[25] The Beth Din of America—the most prominent American Jewish arbitration tribunal—faced such struggles in its infancy.[26] However, over the years, the American civil courts have accepted Beth Din as a valid religious dispute resolution body.[27]

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> The representative, a former fighter pilot named Rick Womick, said he had been studying the Koran. He declared that Shariah, the Islamic code that guides Muslim beliefs and actions, is not just an expression of faith but a political and legal system that seeks world domination. "Folks," Mr. Womick, 53, said with a sudden pause, "this is not what I call 'Do unto others what you'd have them do unto you."

Elliot, *supra* note 15.

21. Bill Raftery, *Bans on Court Use of Sharia/International Law: Pennsylvannia Bill Introduced*, GAVEL TO GAVEL, http://gaveltogavel.us/2011/11/28/bans-on-court-use-of-shariainternational-law-pennsylvania-bill-introduced/ (last visited Feb. 24, 2015) (providing a brief review of state legislation against "religious law").

22. For general dispute resolution practices within North American Muslim couples, see JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI'A PATH IN A SECULAR SOCIETY (OXFORD UNIV. PRESS 2012).

23. The term "us and them" is borrowed from David Berreby. *See generally* DAVID BERREBY, US AND THEM: THE SCIENCE OF IDENTITY (Univ. Chicago Press 2008) (explaining the fundamental human urge to classify and identify with human kind and the reasoning behind such "us" and "them" classification).

24. *See e.g.*, Kupperman v. Congregation Nusach Sfard, 240 N.Y.S.2d 315 (1963).

25. *Id.* at 321-22 (declining to uphold a Beth Din's decision regarding an employment contract by deferring the decision to a State civil law). Discussing the reason for the success of the Beth Din, Michael J. Broyde, who was member of Beth Din of America, notes the six pillars of the revised Jewish arbitration process:

> (1) the BDA issued and publicized detailed and standardized rules of procedure; (2) in addition to its arbitration services, the BDA developed an internal appellate process; (3) the BDA provided choice-of-law provisions to facilitate accommodation of both Jewish and secular law where possible; (4) in addition to Jewish scholars, the BDA employed, as arbitrators, skilled lawyers and professionals who could provide expertise in the areas of secular law and contemporary commercial practices; (5) to ensure the effective resolution of commercial arbitrations, the BDA gleaned and abided by common commercial customs to the extent permitted by Jewish law; and (6) the BDA accepted that an aggregate of individual arbitrations gave rise to an active role in communal governance.

Michael J. Broyde, *Jewish Law Courts in American: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 N.Y.L. SCH. L. REV. 287, 288-89 (2013).

26. *See id.* at 288.

27. The U.S. Supreme Court has said, "[A party] could claim impedance of the practice of religion or creation of an unjust bias against religion, thereby depriving a [party] of its free exercise

This Article contributes to the growing religious arbitration literature by specifically identifying the judicial response to religious arbitral award review and by proposing changes to the Federal Arbitration Act of 1925 (FAA).

Part II of this article provides a brief historical and legal framework of arbitration in the United States. It discusses how American courts provided more power to arbitral tribunals when, in the early 1800's, courts became the only institutions that were available to adjudicate a dispute.[28]

Part III provides background to the two well-established religious arbitration tribunals in the U.S.: Christian and Jewish arbitration tribunals. It then introduces the attempts by the American Muslim community to establish an Islamic Arbitration Tribunal and its struggles.

Part IV discusses constitutional law and the emergence of the "religious question doctrine." It provides a framework in which the Supreme Court created the "neutral principles of law" approach. This part concludes with cases that supported and solidified the doctrine.

Part V discusses religious arbitration from a freedom of contract lens. It shares courts' present practice with respect to religious arbitration award enforcement and concludes with discussion of FAA and UAA as it applies to religious tribunals.

Part VI aims at two goals: First, it introduces specific concerns with (a) Islamic Arbitration Tribunals, (b) Jewish arbitration tribunals, (c) community pressure, and (d) finality of arbitration awards. Second, it proposes specific judicial guidelines and additions to the FAA.

Part VII concludes by arguing for greater acceptance of religious arbitration as a process of promoting cultural diversity and respect for religion, but with higher safeguards of public policy through education and greater regulation of religious arbitration.[29]

This article reflects on the argument that multiculturalism created by religious arbitration is beneficial, though it cannot be left unchecked, and

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rights." Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (finding the "[r]efusal to enforce the parties arbitration agreement could itself arguably constitute an impermissible entanglement").

28. Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 511 (citing WILLIAM E. NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS 44 (Univ. N.C. Press 1981).

29. *See* Wolfe, *supra* note 3, at 427. Wolfe notes that a refusal by civil courts to enforce religious arbitration awards would seriously weaken the power of religious tribunals. *See also* Grossman, *supra* note 3, at 170.

that banning procedurally fair arbitration tribunals is unjustifiable, however should be allowed in rare instances.[30]

II. THE AMERICAN ARBITRATION SYSTEM

The phrase "alternative dispute resolution" is revealing. The word "alternative" implies exceptional or secondary or even deviant in contrast to something that is normal or standard or ordinary. But, alternative to what? To Litigation? Hardly – for some of the standard alternatives such as negotiation, compromise, and mediation regularly feature such phases *within* litigation. To adjudication? If so, it is not just our theorists who are obsessed with the atypical: rather, court-centered thinking and discourses are deeply ingrained in our legal culture.[31]

However, commentators have placed limitations on the broad benefits of "ADR." As per one, "First, we should consider whether an ADR mechanism is being proposed to facilitate existing court procedures, or as an alternative wholly separate from the established systems. Second we must consider whether the disputes that will be resolved pursuant to an ADR system will involve significant public rights and duties."[32] ADR refers to all methods of resolving disputes in ways other than litigation.[33] Although arbitration falls within the definition of ADR, religious arbitration is said to be an alternative to ordinary ADR.[34]

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30. Wolfe, *supra* note 3, at 466.

31. William Twining, *Alternatives to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 MOD. L. REV. 380, 383 (1993).

32. Harry T. Edwards, *Alternative Dispute Resolutions: Panacea or Anathema?*, 99 Harv. L. Rev. 668 (1986).

33. ABRAHAM P. ORDOVER & ANDREA DONEFF, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 5 (2d ed. 2002).

34. *See* Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583 (1999) (describing history of Christian Conciliation Services). ADR is defined as:

> [A] set of practices and techniques that aim (a) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (b) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (c) to prevent legal disputes that would otherwise likely be brought to the courts.

William E. Craco, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 Fordam L. Rev. 483, 483 (1988); *see* Henrey & Leiberman, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 424-26 (1986). A newer term, "appropriate," is used in the absence of "alternative" to signify a preference towards the field of dispute resolution as a more appropriate field of resolving conflicts. Some scholars have analyzed the term "alternative." *See e.g.*, Twining, *supra* note 31, at 380-83.

Religious arbitration, for the purposes of this article, is defined as a dispute resolution process conducted according to religious principles.[35] Such religious arbitration predates the United States of America.[36] In 1635, a Boston town laid down an ordinance that a congregation member must arbitrate a dispute before litigation.[37] In Anglo-American legal history, the strong influence of religious law is readily apparent, dating from the eleventh century to the founding of the United States and beyond.[38] In Colonial British America, religious justice was commingled with civil justice.[39]

In 1789, after the founding of the United States, Congress began separating civil and religious justice by proposing to the states the First Amendment.[40] By the early 1800s, courts became the only institutions that

35. Although the focus of this article is not defining religion, it must be mentioned that many scholars have written about the impossibility of defining religion as "almost an article of methodological dogma." Brian C. Wilson, *From the Lexical to the Polythetic: A Brief History of the Definition of Religion, in* BRILL, WHAT IS RELIGION? ORIGINS, DEFINITIONS, AND EXPLANATIONS 141 (Thomas A Idinopulos and Brian C. Wilson eds., 1998) (as quoted in W. COLE DURHAM AND BRETT G. SCHARFFS, LAW AND RELIGION, NATIONAL, INTERNATIONAL AND COMPARATIVE PERSPECTIVES 40 (2010)). "Some reject the term as too vague and ambiguous. Others point out that religion is a Western concept derived from European experience and argue that applying it to phenomena from other cultures necessarily misrepresents them." *Id.* at 40. For a general discussion on challenges of defining religion, see *id.* at 39-47.

36. *See* Walter, *supra* note 28, at 505-11 (discussing history of religious dispute resolution and arbitration). Walter argues that Divine and secular law were more intertwined than today. For example, he quotes, "In 1489, the English Chancellor, ruling in a trust dispute, held that 'each Law is or ought to be, in accordance with the Law of God.' For much of English history, church and state were mixed, and law was infused with religious principles." *Id.* at 505. As per Walter, "[E]ven though law and religion were interconnected, it is possible to trace the origins of religious arbitration back to pre-modern England and France." *Id.*

37. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 23 (Oxford Univ. Press 1983).

38. BRIAN TIERNEY, RELIGIOUS RIGHTS: A HISTORICAL PERSPECTIVE, IN RELIGIOUS LIBERTY IN WESTERN THOUGHT 43-44 (Noel B. Reynolds and W. Cole Durham, Jr., eds., 1996).

39. *See* Walter, *supra* note 28, at 510. A distinct feature of Christianity, particularly in the West, is that "neither church nor state could ever totally subordinate the other." *Id* at 10. Brian Tierney has described the situation as this:

> Because neither side could make good its more extreme claims, a dualism of church and state persisted in mediaeval society and eventually it was rationalized and justified in many world of political theory. The French theologian John of Paris, . . . assigning to each power its proper function[,] [wrote in 1302,] "The priest is greater than the prince in spiritual affairs . . . and, on the other hand, the prince is greater in temporal affairs.

TIERNEY, supra note 38, at 36.

40. 1 Stat. 97 (1789).

were available to adjudicate disputes.[41] In the late nineteenth century, the courts believed arbitration usurped their jurisdiction because people could make their own law and even disregard the judicial process.[42] In many ways, courts took the jurisdiction away from arbitration tribunals and expanded the review of arbitration awards.[43]

However, by the early twentieth century, the business community, which used arbitration for commercial disputes, asked the American Congress to enact a law that initiated full support for arbitration.[44] In 1925, isolated in time and purpose from judicial enforcement of religious arbitration awards, the Federal Arbitration Act was enacted.[45] The primary groups in support of its passage were legal and commercial groups.[46] Given the proponents of the Act, the legislative history, and other factors, there is strong support for the argument that modern applications of the FAA have gone far beyond what was envisioned by the Congress that enacted it.[47]

A. Pro-Arbitration Law

In the 1960s, the U.S Supreme Court gave its support to the institution of arbitration by supporting the FAA; Congress created an unmistakably clear congressional intention for speedy justice. The majority rejected the argument that arbitration provides for unqualified neutrals to rule on legal issues.[48] Article 2 of the FAA provides:

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41. Walter, *supra* note 24, at 512 (citing WILLIAM E. NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825 44 (1981).

42. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 222-33 (2004).

43. Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 (1985) ("Judicial doctrine rejecting enforcement of contracts to arbitration became so entrenched that even critics felt powerless to defy precedent").

44. *See* Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 638, 644-45 (1996) (claiming that Supreme Court is leading the liberal federal policy towards arbitration: "[T]he Supreme Court itself is leading the revolutionary transition from litigation to mandatory binding private arbitration, proclaiming federal policy favors arbitration, over litigation").

45. Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 399 (1998).

46. *Id.* at 431.

47. *See e.g.*, Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095 (1993); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. DISP. RESOL. 267 (1995). *See also id.* at 400; Sternlight, *supra* note 26, at 644-66.

48. *Prima Paint Corporation. v. Flood and Conklin Manufacturing Corporation*, 388 U.S. 395, 396-97 (1967).

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[49]

This section of the FAA is interpreted to capture the commercial aspect of the Act—that this is the standard practice in which the actors in the business community deal with one another.[50] The Court expanded the application of the section to state cases involving interstate commerce.[51] Section 2 works in conjunction with Section 4 of the FAA to provide for the enforcement by specific performance of arbitration agreements.[52]

When the court is satisfied that the agreement to arbitrate, or the failure to comply therewith, is not at issue, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[53] In the 1980s, the Supreme Court took the next step in strengthening the establishment of arbitration as an institution.[54] It declared

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49. 9 U.S.C. § 2 (Validity, irrevocability, and enforcement of agreements to arbitrate).

50. *See* Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947, 1951 (1996).

51. *Prima Paint Corp.*, 388 U.S. at 404.

52.

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 4 (2012).

53. *Id.*

54. 460 U.S. at 24-25.

that sections 2 and 3 of FAA manifest a "liberal federal policy favoring arbitration agreements,"[55] compelled arbitration of a securities dispute in *Dean Witter Reynolds v. Byrd*,[56] and compelled arbitration to facilitate Congress's vision of the FAA in *Moses H. Cone. Memorial Hospital v. Mercury Construction Corp*.[57] In *Southland Corporation v. Keating*,[58] the Court added that in suits involving interstate commerce, the FAA preempts state statutes that restrict arbitration and contradict congressional intent, creating a duty on both state and federal courts to apply the FAA.[59]

Continuing its policy to favor arbitration, in *Gilmer v. Interstate/Johnson Lane Corp.*,[60] the Supreme Court upheld mandatory arbitration of an employee's suit under federal age discrimination law even though discovery provided in arbitration was more limited than that available in court.[61] However, it was not until 1995 that the Court gave the FAA its broadest interpretation in *Allied Bruce Terminix, Inc. v. Dobson*,[62] ruling that section 2 of the FAA should be read broadly, extending the Act's reach to the limits of Congress's Commerce Clause power. The Court noted that the primary purpose for the enactment of the FAA in 1925 was to purge the judiciary of its anti-arbitration bias, stating, "the FAA's protection of arbitration from judicial prejudice applies wherever federal law can reach."[63] In particular, federal courts must apply the provisions of the FAA even when

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55. *Id.* at 24.

56. 470 U.S. 213 (1985).

57. 460 U.S. 1, 24-25 (1983).

58. Southland Corp. v. Keating, 465 U.S. 1 (1984).

59. *Id.* at 15-16.

60. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). "Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.* at 24. While dissenting, Justice Stevens questioned whether FAA even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue. He notes:

> In my opinion, arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA, and for that reason respondent Interstate/Johnson Lane Corporation cannot, pursuant to the FAA, compel petitioner to submit his claims arising under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*, to binding arbitration.

Id. at 36; *see* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 (1985).

61. *Gilmer*, 500 U.S. at 23.

62. Allied-Bruce Terminix Co., Inc. v. G. Michael Dobson, 513 U.S. 265, 278 (1995). ("[W]hen Congress passed the Arbitration Act in 1925, it was 'motivated, first and foremost, by a . . . desire' to change this antiarbitration rule...It intended courts to 'enforce [arbitration]agreements into which parties had entered' . . . and to 'place such agreements 'upon the same footing as other contracts'").

63. THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 202 (5th ed. 2007).

they exercise diversity jurisdiction over state litigation.[64] State courts also must apply the FAA whenever a basis for applying federal law can be found, even in cases where the merits are otherwise governed by state law.[65] A similar decision was reached in *Volt Info. Sciences v. Board of Trustees*.[66]

In 1995, the Court decided *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[67] holding that parties to arbitration agreements may determine whether or not they wish to provide arbitrators with power to award punitive damages.[68] In *Lapine Technology Corp. v. Kyocera Corporation*,[69] the Ninth Circuit held that mere inclusion of a generic choice-of-law in the contract was not sufficient basis for requiring the application of the chosen state law as to the scope of review of arbitral awards.[70] This view aligns with the Supreme Court's view in another case, where the Court pronounced

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64. *Id.* at 203. *See Terminix*, 513 at 272 ("The legal background demonstrates that the Act has the basic purpose of overcoming judicial hostility to arbitration agreements and applied in both federal diversity cases and state court, where it pre-empts state statutes invalidating such agreements.").

65. *See* Volt Info. Sciences v. Board of Trustees, 489 U.S. 468 (1989).

66. 489 U.S. at 478-79.

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA preempts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Southland Corp. v. Keating, 465 U.S. 1, 465 U.S. 10 (1984) . . . but it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . , so too may they specify by contract the rules under which that arbitration will be conducted.

67. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 56 (1995).

68. *Id.* at 52.

69. LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (While ruling in favor of expansive judicial review of the agreement by the parties to arbitration, the court ruled that when Kyocera and LaPine agreed to submit disputes to arbitration, they did so on the condition that the deferral district court would review the arbitrator's decision for errors of fact and law. They did not agree to abide by an arbitration tribunal's erroneous decision. The FAA does not prohibit that kind of agreement; it encourages it).

70. The primary question raised here deals with choice of law. Can the parties to an arbitration award with mutual agreement expand the arbitration award's scope of review as provided under the FAA? The court in Kyocera looked at the Supreme Court's decisions applying and interpreting the FAA and held that such Supreme Court decisions make it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreements' terms, however, private parties lack the power to dictate a broad standard of review when Congress has specifically prescribed a narrower standard.

that in almost any dispute, arbitration meets the parties' needs just as well as a court would.[71]

The efficiency of the arbitration system has contributed to the current policy favoring arbitration to the extent that arbitration seems to be favored over litigation.[72] However, some of the reliance on arbitration seems to be misplaced. Scholars have termed this over-reliance as Court's "favorite myth" that "courts should favor arbitration over litigation."[73]

B. Federal Legislation

In the 1960s, the U.S. Supreme Court supported the institution of arbitration and stated so by enacting the FAA. In doing so, Congress created an unmistakably clear congressional intention for speedy justice. The Court rejected the argument that arbitration provides for unqualified neutrals to rule on legal issues.[74] The judiciary has continued to develop an expansive interpretation of the Act.[75] Similarly, the Uniform Arbitration Act (UAA) provides for broad enforcement of arbitration agreements.[76] This is particularly significant because forty-nine States have laws enforcing arbitration agreements, thirty-five of those have adopted the UAA, and an additional fourteen have adopted Acts similar to the UAA.[77] The UAA makes no distinction regarding religious arbitration, providing a statutory support for the enforcement of religious arbitration awards.[78] If the arbitration case involves interstate commerce or maritime transaction, the FAA applies.[79] The cases that have considered the meaning of the phrase

71. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985) (suggesting that a party to an arbitration agreement does not forgo her substantive rights; she only agrees to have such rights arbitrated rather than litigated).

72. Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 17-18 (1997).

73. *Id.* at 17 (stating that Supreme Court is proposing to lower courts to favor arbitration). *See also* Grossman, *supra* note 3.

74. Prima Paint Corp. v. Flood & Conklin Mfg. Corp., 388 U.S. 395, 396-97 (1967).

75. Harding, *supra* note 45, at 402.

76. USS § 1 (2000); RUAA § 6 (2000).

77. Prefatory Note to the RUAA, UNIFORMLAWS.ORG (2000), http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf. *See* Policy Statement Revised Uniform Arbitration Act, UNIFORMLAW.ORG, http://www.uniformlaws.org/shared/docs/arbitration/arbpswr.pdf) (last visited January 11, 2015).

78. *See generally* UAA, AM. ARB. ASS'N UNIV., https://www.aaau.org/media/5046/uniform%20arbitration%20act.pdf (last visited Jan. 11, 2014)(making no mention of religious arbitration).

79. Pennsylvania Eng. Corp. v. Islip Res. Recovery A, 710 F. Supp. 456, 461 (E.D.N.Y. 1989).

"interstate commerce" as required by the FAA, have unilaterally held that very little "interstate" connection is necessary for the FAA to apply.[80]

II. RELIGIOUS ARBITRATION TRIBUNALS

A. Christian Panels

Churches have been centers for dispute resolution for hundreds of years.[81] Peacemaker Ministries, through its division The Institute of Christian Conciliation (ICC), administers cases with the use of mediation, mediation/arbitration, and arbitration.[82] The ICC is the most prominent Christian arbitration tribunal to resolve disputes.[83] During a Christian conciliation, adversaries read biblical passages, which emphasize loving and forgiveness.[84] "They pray and memorize verses such as Ephesians 4:32: 'And be kind to one another, tenderhearted, forgiving one another, as God in Christ forgave you.'"[85] While in the application of law the ICC does not

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80. *Id.* at 757 (shipment of wool within the same state still involved interstate commerce because instructions for shipment came from outside the state); Starr Electric Co. v. Basic Construction Co., 586 F. Supp. 964 (1982) (interstate commerce was involved in a construction contract where building supplies came from out-of-state suppliers).

81. Henry T. King, Jr. & March A. Le Forestier, *Papal Arbitration: How the Early Roman Catholic Church Influenced Modern Dispute Resolution*, 52 DISP. RESOL. J. 1, 74 (1997).

82. Alternative Dispute Resolution, PEACEMAKER MINISTRIES, http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5394441/k.BD56/Home.htm (last visited Mar. 25, 2015). "The [Institute for Christian Conciliation (ICC)] provides highly qualified and experienced mediators and arbitrators who will work with parties and attorneys to resolve a wide range of disputes using an alternate dispute resolution process that is biblically faithful." *Id.*

83. Michael Fitzgerald & Lynne M. L. Fitzgerald, *Mediation: A Systematic Alternative to Litigation for Resolution of Church Employment Disputes*, 5 ST. THOMAS L. REV. 507, 519-22 (1993). An example of a faith based arbitration clause is:

> Any claim or dispute arising from or related to this Agreement shall be settled by mediation and, if necessary, legally binding arbitration, in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation. Such arbitration shall be held in Colorado unless otherwise agreed by both parties. Judgment upon an arbitration award may be entered in any court otherwise having jurisdiction.

84. *See* Tammerlin Frummond, *Clients Turn to Good Book Rather than Law Books: Religion: Christian Conciliation Service Tries to Resolve Conflicts Before They Wind up in Court*, LA TIMES (June 24, 1991), http://articles.latimes.com/1991-06-24/news/mn-967_1_christian-conciliation.

85.

> The thing that's so exciting about Christian conciliation is that many times, people come out friendly with each other and decide that whatever they were fighting about in the first place wasn't that important . . . . That can never happen in litigation where one party wins—usually the lawyers—and the parties are forever hostile to each other.

Id.

claim that its awards will be consistent with secular laws as claimed by BDA, it does state that "conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process."[86] Courts have reviewed religious tribunals by applying UAA-based statues with the FAA and its policies in mind.[87] For example, in *Prescott v. Northlake Christian School*,[88] the court applied Montana UAA standard of review.[89]

Even though the ICC procedures include rules that mirror secular arbitration guidelines (for instance, parties to conciliation have a right to legal counsel,[90] evidence in conciliation,[91] and confidentiality[92]), a sense of compulsion can be read into how involved the church is in the process. Under Rule 17 of the ICC:

> If a party who professes to be a Christian is unwilling to cooperate with the conciliation process or refuses to abide by an agreement reached during mediation, an advisory opinion, or an arbitration decision, the Administrator or the other parties may report the matter to the leaders of that person's church and request that they actively participate in resolving the dispute.[93]

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86. *Rules for Procedure*, Rule 4, INST. CHRISTIAN CONCILIATION, http://peacemaker.net/wp-content/uploads/2015/02/F-GUIDELINES-PART-IV-RULES-OF-PROCEDURE-FOR-CC-V-4.6.pdf (last visited Feb. 28, 2015). Parties can, however, agree to a specific secular law under the terms of their contract. For example, "This agreement shall be governed, construed, and interpreted under the laws of the State of Colorado. Venue on any dispute arising from this Agreement shall be at Arapahoe County, Colorado, unless otherwise agreed by both parties." *See id.*

87. Waddell & Keegan, *supra* note 35, at 593-96.

88. Prescott v. Northlake Christian School, 369 F. 3d 491, 494 (5th Cir. 2004).

89. *Id.* (noting that "in a broad sense" arbitration pursuant to Montana Uniform Arbitration Act "is subject to the FAA").

90. *See Rules for Procedure*, *supra* note 86, at Rule 13 ("Conciliation can affect substantial legal rights and responsibilities. Therefore, parties have the right to be assisted or represented by independent legal counsel throughout the conciliation process").

91. *Id.* at Rule 14.

92. The rule states:

> Because of its biblical nature, Christian conciliation encourages parties to openly and candidly admit their offences in a particular dispute. Thus, conciliation requires an environment where parties may seek freely, without fear without fear that their words may be used against them in a subsequent legal proceeding. Moreover, because conciliation is expressly designed to keep parties out of court, conciliators serving on behalf of the Administrator would not do so if they believed that any party might later try to force them to testify in any legal proceeding regarding a conciliation case. Therefore, all communications that take place during the conciliation process shall be treated as settlement negotiations and shall be strictly confidential and inadmissible for any purpose in a court of law, except as provided in this Rule.

Id. at § 16.

93. *Id.* at § 17.

The overarching principle of Christian panels is that the "resolution should be in accord with Bible."[94]

B. Jewish Arbitral Tribunals

The Jewish arbitration tribunal was created in 1960, and follows a set code of procedures, which were developed over many years.[95] The rules provide for a hierarchy of authority, which is led by Av Beth Din (Chief Justice) who supervises the organization and appoints *dayanim* (arbitrators) to hear disputes.[96] Special rules pertaining to arbitrator bias are included in the Beth Din Rules, which follow the vacature rules provided under FAA Sections 10 and 11.[97] The Beth Din of America claims that it adjudicates disputes in a manner consistent with "secular law requirements for binding arbitration so that resolution will be enforceable in the civil courts of the United States of America, and the various states therein."[98]

Although many in battei din (plural for beth din) incorporate rabbinic court advocates (RCAs),[99] the most prominent beth din, Beth Din of America (BDA) has a strict prohibition.[100] Among other rules, the Beth Din

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94. Waddell & Keegan, *supra* note 35, at 590.

95. *See generally* Beth Din of America, BETH DIN AM., http://www.bethdin.org (last visited Apr. 5, 2016). Although the BDA was founded in 1960 by the Rabbinical Council of America, it became an autonomous organization, headed by independent board of directors in 1994. "It is funded by a combination of fees for services, private donations and support by communal endowments and institutions." *Id.*

96. *The Rules and Procedures of the Beth Din of America*, BETH DIN AM., http://s589827416.onlinehome.us/wp-content/uploads/2015/07/Rules.pdf (last Apr. 5, 2016) [hereinafter Beth Din Rules].

97. *Id.*

98.

> The Beth Din of America provides a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law (Halacha) and with the recognition that many individuals conduct commercial transactions in accordance with the commercial standards of the secular society.

Id. These Rules and Procedures are designed to provide for a process of dispute resolution in a Beth Din, which is in consonance with the demands of Jewish law that one diligently pursue justice, which also recognizing the values of peace and compromise. *See id.*

99. Raquel J. Greenberg, *Tzedek Tzedek Tirdofi: How Female Religious Court Advocates can Mitigate a Lack of Judicial Review of The American Beth Din System*, 19 CARDOZO J. L. & GENDER 635, 641 (2013).

100. *Layman's Guide to Dinei Torah*, BETH DIN AM. 8, http://s589827416.onlinehome.us/wp-content/uploads/2015/07/LaymansGuide.pdf (last visited Apr. 5, 2016); Greenberg, *supra* note 99, at 641 ("Similar to a lawyer in secular court, a toen acts a representative of one of the parties. The Jewish court system does not expect the parties to have such representation, and the Beth Din of

procedures include a provision that when a claim under Beth Din is initiated, the opposing party has an option to opt out of Jewish Law, use another beth din, or find a mutually agreed upon third party. In such instances, as per the rules, the BDA will withdraw.[101]

In many ways, the success of Beth Din can be attributed to the civil procedure-like rules that the BDA laid down. Such rules, in short, provide for a discovery phase, exchange of relevant documents, sharing anticipated witnesses, notice as to the time and place of the hearings, and for a right to representation by counsel at any stage in the arbitration, including the pre-hearing conference.[102] The Rules and Procedures also provide a balanced approach in terms of party fees, where, in the event of extreme hardship on the part of any party, the Beth Din may defer or reduce the administrative fee, including a provision for another arbitration about fees if any party fails to pay fees or expenses to the Beth Din in full.[103]

The success of beth din has not been without its challenges. The system, mainly due to the use of RCAs during adjudication at a beth din, has been criticized as "terrible and ridiculous."[104]

C. Islamic Arbitral Tribunals

As per Ahmed Moussalli, in the Arabian Peninsula, the birthplace of Islam, arbitration dates back centuries to the pre-Islamic societies.[105] The first element that brings attention to Islamic Arbitration is the recent debate on Sharia (meaning path or road) in the western world. In Canada, the debate took prominence after Syed Mumtaz Ali announced in the Canadian media that the Islamic Institute of Civil Justice (IICJ) would start offering

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America disallows such representation except, in certain cases, with the explicit agreement of all parties and the judges").

101. Beth Din Rules, *supra* note 96, at 2. However, it is worth noting that the BDA retains jurisdiction until a "suitable" option is proposed. *See id.*

102. *See id.*

103. In such cases, the Av Beth Din may order the suspension or termination of the proceedings, pending payment in full, and inform the parties that one of them may advance the required payment ("If one party advances the payment owed by a non-paying party, the Av Beth Din or his designee may issue an award, separate from any other award ordered by the Beth Din, ordering the non-paying party to reimburse the other party for advances made on their behalf."). *Id.* at 15.

104. Interview by AMI Magazine with Rav Hershel Schachter on "Terrible" Beth Din System (Oct. 12, 2011). *See* Greenburg, *supra* note 99, at 642 ("Rabbi Shachter describes the present beth din system as 'terrible' and 'ridiculous,' 'a chutzpah (disrespect)' and an overall 'chillul Hashem' (defamation of G-d's name). In his opinion, the beth din's current predicament is 'worse than a crisis' and he attributes much of the problem to RCAs.").

105. Ahmed S. Moussalli, *An Islamic Model for Political Conflict Resolution: Tahkim (Arbitration)*, *in* PEACE AND CONFLICT RESOLUTION IN ISLAM: PRECEPT AND PRACTICE 144-45 (Abdul Aziz Said et al. eds., 2001).

arbitration in family disputes in "accordance with both Islamic legal principles and Ontario's Arbitration Act, 1991."[106] At the conclusion of the debate, all forms of religious arbitration, whether based on Christian, Jewish, Muslim, or other religious principles were excluded from the Act.[107] Sharia is a set of Islamic codified laws. Ever since the announcement of the independent powers of Arbitration center in Canada, Islamic Arbitration has received more politicized attention than perhaps the field demanded.[108] In fact, at least in the field of family law, studies have shown that there is more mediation than arbitration.[109] As per Christopher Cutting,[110] "The majority of clients seeking Muslim civil dispute resolution services in Ontario province are women in need of a religious divorce."[111] Based on empirical research with faith-based groups in southern Ontario from 2007-2009, Mr. Cutting notes that, "In all my research to date I have not found a single instance of formal signed arbitration (faith-based or otherwise) taking place

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106. Anna C. Korteweg, *The Sharia Debate in Ontario,* ISIM REVIEW 18 (2006), https://korteweg.files.wordpress.com/2010/12/isim-review_18-501.pdf.

107.

> A vociferous debate ensued on the introduction of sharia law in Ontario in which the presumed incompatibility of sharia-based family law and women's individual rights took centre stage. This debate reached its conclusion in September 2005 when Ontario Premier Dalton McGuinty announced that he would end all religious arbitration. In February 2006, the Ontario legislature passed amendments to the 1991 Act that allowed family arbitration only if it was based on Ontario or Canadian law, excluding any form of religious arbitration, whether based on Christian, Jewish, Muslim, or other religious principles.

Id.

108. *Id.*

109. Christopher Cutting, *Faith-Based Arbitration or Religious Divorce: What Was the Issue?, in* DEBATING SHARIA: ISLAM, GENDER POLITICS AND FAMILY LAW ARBITRATION (Anna C. Korteweg et al. eds., 2012).

110. Islamic law has developed through the centuries beyond the original revealed text of the Qur'an, covering numerous topics for which revelation did not provide explicit prescriptions. For this reason, there is a distinction in classical Islamic theory between Sharia and fiqh (positive law). Jocelyne Cesari, *Foreword: Sharia and the Future of Western Secularism, in* DEBATING SHARIA: ISLAM, GENDER POLITICS AND FAMILY LAW ARBITRATION (Anna C. Korteweg et al. eds., 2012). Cesari goes on to add that "the principal techniques for *figh* develop rules in the absence of divine edicts in the Qur'an or *hadith*; these techniques include, among others, *qiyas*, or analogical reasoning (applying a rule provided in revelation to a new situation), and *ijma*, or consensus of the scholars." *Id.*

111. In his work Cutting adds, "I found no Muslim leaders or organizations that were anxious to encourage couples or have these issues formally arbitrated, religiously or otherwise. This is not the case because Muslims now imagine faith-based arbitration to be legally forbidden. The demand for desire is simply not there." Cutting, *supra* note 110, at 73.

in Muslim Communities.[112] However, although no one appears to be arbitrating at all in Muslim communities of Ontario, a number of imams are assisting Muslims through faith-based mediation in the formation of separation agreements, wills, and prenuptial agreements."[113]

With respect to the use of Sharia by American Muslims, the practice has received a politicized campaign, where a number of organizations have taken steps to propagate fear against "Islamic Law."[114] As a result, a number of states have taken steps to ban Sharia or "Foreign Law."[115] Even though there have been calls for a nationwide network of Sharia courts, very few have been established.[116] The recent establishment of a Muslim tribunal in Dallas received criticism for fears that it "would open the door to extreme practices and corporal punishment."[117]

Proponents of the application of Islamic ideals of justice state, "As long as religious law does not replace a given country's secular judicial system, Muslims should be allowed and encouraged to develop their own jurisprudence on the application of law to a specific set of matters consistent with the principles of that system."[118] Some argue that religious tribunal's implementation allows for both religious and secular principles of justice to meet, that it does not mean such system will replace the United States secular judicial system.[119]

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112. *Id.* at 92.

113. *Id.* at 92.

114. *See* Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 First Amend. L. Rev. 363, 365 (2012). Noting "organizations include ACT! For America, Stop Islamization of America, and a variety of more general organizations that have echoed their messages." As per the authors, as of June, 2011, forty-seven bills in twenty-one states sought to ban the use of Sharia and/or category of international law. *Id.*

115. As an example, Wyoming "not only seeks to outlaw Sharia law, but also aims to prohibit the judiciary from citing other states that may permit the use of Sharia law." The Wyoming bill states:

> When exercising their judicial authority the courts of this state shall uphold and adhere to the law as provided in the constitution of the United States, the Wyoming constitution, the United States Code and federal regulations promulgated pursuant thereto, laws of this state, established common law as specified by legislative enactment, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law. The courts shall not consider the legal precepts of other nations or cultures including, without limitation, international law and Sharia law.

H.R. 8, 61st Leg. Gen. Sess. (Wyo. 2011).

116. *See* Helfand, *supra* note 7, at 1249-50. *See also* Fiqh Council of North America, FIQH COUNCIL, http://www.fiqhcouncil.org (last visited Mar. 5, 2016) (offering to help Muslims in North America, to live as per Shari'a).

117. Dianne Solis, *Islamic Tribunal in Dallas draws Criticism and Clients*, DALLAS NEWS (Feb. 23, 2015), http://www.dallasnews.com/news/metro/20150223-islamic-tribunal-in-dallas-draws-criticism-and-clients.ece.

118. Rafeeq, *supra* note 2, at 111.

119. *Id.*

IV. U.S CONSTITUTIONAL LAW AND RELIGIOUS ARBITRATION

The regulation of religious actions and manifestations presents several constitutional issues due to the complicated and tense relationship between religion and government in the United States.[120] For example, should a particular religious freedom claim be protected? Or, will countervailing interests result in limitation of the right? This tension also brings out strong opinions as a result of the personal nature of religious beliefs. The combination of personal religious beliefs and constitutional constraints make religious arbitration a controversial and complicated issue.[121]

Proponents of religious arbitration argue for freedom of religion.[122] This freedom is guaranteed in the United States through the Constitution, which states under the First Amendment that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[123] Under this single command, the Free Exercise Clause and the

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120. As early as 1961, the Supreme Court recognized this tension in McGowan v. Maryland, 366 U.S. 420 (1961), noting:

> It is a postulate of American life, reflected specifically in the First Amendment of the Constitution but not there alone, that those beliefs and institutions shall continue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their influences upon men's conduct, free of the dictates and directions of the state. However this freedom does not and cannot furnish adherents of religious creeds entire insulation from every civil obligation. As the state's interest in the individual becomes more comprehensive, its concerns and the concerns of religious perforce overlap. State codes and the dictates of faith touch the same activities. Both aims at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.

Id. at 461.

121. DURHAM & SCHARFFS, *supra* note 35. The authors define the phrase "religious autonomy" in a more specialized sense to refer to the right of religious communities to independently determine their own doctrines and teachings, their missions, their organizational and communal structures, their personnel, their internal normative and administrative structures, and in general, their own authentic natures and aspirations. *See* JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI'A PATH IN A SECULAR SOCIETY (Oxford Univ. Press 2012). Macfarlane states that while she conducted research for her book on Islamic Divorce in North America, she was routinely asked by non-Muslims, "You mean they have divorce?" and often, "Don't they just stone the women?" She noted, "These reactions to my study and to me reflect pervasive public stereotyping of Muslims and largely uninformed public-policy making about the use of Islamic legal processes." *Id.*

122. Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, NY TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html?_r=0.

123. U.S. CONST. amend. I.

Establishment Clause are joined together.[124] The Free Exercise Clause forbids Congress, and the states through incorporation of the Fourteenth Amendment, from discriminating against religion, and "may require affirmative accommodation of free exercise in some contexts."[125]

The Supreme Court has interpreted this to mean that individuals have the right to practice their religion;[126] the Court in *Epperson v. State of Arkansas* opined that the "government in our democracy, state and national, must be neutral in matters or religious theory, doctrine, and practice."[127] As per Professor Esbeck, the establishment clause severs the link between church and state, "but it does not disassociate religion from government.[128] Therein lies the seed of a problem, for in practice it has proven difficult to accomplish the desired separation of church and state without adversely affecting the manner in which religion is permitted to shape democratic government."[129]

According to one school of thought, the Court's insistence on freedom of religion supports the idea that individuals are entitled to have their religious disputes arbitrated using the laws and practices of their chosen religion.[130] The other school of thought suggests it is a limited freedom where individuals are entitled the freedom to make decisions based on their religious doctrine, but such freedom should not interfere with the secular law.[131]

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124. *See id.*

125. Frank S. Ravitch, *Law and Religion, A Reader: Cases, Concepts, and Theory,* (2d ed. 2008).

126. *See e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) ("[T]he Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws.").

127. Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

128. Carl. H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?* 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 513, 513 (1990).

129. *Id.* Professor Esbeck continues to add, "Because the state has no competence in religious matters, government is prohibited from sanctioning any particular religion by codifying its confession of faith into civil law." *Id.*

130. *See generally* Helfand, *supra* note 7 (contending that the current arbitration doctrine can meet the challenges of new multiculturalism).

131. Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 641 (2004) (noting tensions between Establishment Clause and enforcement of Jewish Beth Din awards). *See* Lowry, *supra* note 5 (discussing the differences between Shari'a from American law in the areas of divorce, child custody and probate law and the limitations of the Establishment Clause which "forces a judge to apply only neutral contract principles").

At multiple levels, the question of religious arbitration is a question of religious autonomy.[132] The church-state relations in the United States have been dominated by the meaning of the Establishment Clause.[133] There are two streams of thought, and as eloquently put:

[O]n one side is a separationalist stream, symbolized by Thomas Jefferson's "wall of separation between Church & State." On the other side is an accommodationist stream, illustrated by such texts as early presidential proclamations regarding Thanksgiving holidays, a generally friendly posture toward religion, and the willingness to grant exemptions to account for religious difference.[134]

In 1947, the U.S. Supreme Court decided *Everson v. Board of Education,* in which Justice Black wrote:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religion, or prefer one religion over another.†.†.in the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[135]

He went on to say the "[First] Amendment required the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."[136] In the 1980s, the Court ruled that posting of the Ten Commandments in public schools was a violation of the Establishment Clause.[137]

Critics of religious arbitration argue that the Establishment Clause does not support religious arbitration because allowing courts to evaluate an

132. The term autonomy is synonymous with "liberty" or "freedom." Religious arbitration is a much-discussed topic in the legal and religious world today, and one could argue that the United States Supreme Court has done its part in safeguarding the meaning of the Establishment Clause.

133. Daniel Dreisbach, *The Mythical "Wall of Separation": How a Misused Metaphor Changed Church-State Law, Policy, and Discourse*, HERITIGE.ORG (June 23, 2006), http://www.heritage.org/research/reports/2006/06/the-mythical-wall-of-separation-how-a-misused-metaphor-changed-church-state-law-policy-and-discourse.

134. W. COLE DURHAM & BRETT SCHARFFS, LAW AND RELIGION 133 (2010).

135. Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

136. *Id.*

137. Stone v. Graham, 449 U.S. 39 (1980).

award of a religious tribunal, or be involved in a religious tribunal in any way, would involve the Court in a religious question.[138]

A. Religious Doctrine or Ecclesiastical Polity

An enduring principle of first amendment jurisprudence precludes civil courts from deciding issues of religious doctrine or ecclesiastical polity.[139] As early as 1871, in *Watson v. Jones*, the Supreme Court established the basic tenet that "religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of law and the actions of their members subject to its restraints."[140]

Trying to add more clarity to the principle, the New Jersey Supreme Court in 1991 commented that "courts can and do decide secular legal questions in cases involving some background issues of religious doctrine, so long as the courts do not intrude into the determination of the doctrinal issues"[141] and recognized that religious tribunals were better equipped than civil courts to handle legal disputes involving questions of faith. [142] The position that courts should refrain from engaging in questions of primary religious review was reinforced in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*[143] and *Serbian Eastern Orthodox Diocese v. Milivojevich*.[144] In 1990, Justice Scalia declared in *Employment Division v. Smith* that "no principle of law or logic" could guide courts in determining religious law.[145]

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138. *See generally* Kent Greenawalt, *Hands off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998) (tracing religious question doctrine through its historic evolution in church property dispute context).

139. See Watson v. Jones, 80 U.S. 679, 728-30 (1871) (This decision came "prior to application of the first amendment to the States, but 'nonetheless informed by First Amendment consideration.'"). Presbyterian Church v. Hull Church, 393 U.S. 440, 445 (1969).

140. The Court went on to add that civil courts, to some degree, have a duty to protect state interests in the resolution of disputes over ownership and control of property. 393 U.S. at 714.

141. Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404 (1991). "In such cases courts have arrived at several acceptable means for confining their adjudication to proper civil sphere. In disputes involving a church governed by a hierarchical structure, courts should defer to the result reached by the highest church authority to have considered the religious question at issue." *Watson*, 80 U.S. at 727.

142. *Id.* at 733 (holding further judicial inquiry improper where issues of faith were already answered by highest religious tribunal).

143. Presbyt. Church v. Hull Church, 393 U.S. 440, 450 (1969).

144. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976) ("When . . . ecclesiastical tribunals are created . . . the Constitution requires that civil courts accept their decisions as binding . . . ."). *See also* Tal Tours (1996) Inc. v. Goldstein, 34 A.D.3d 786 (2006).

145. Emp't Div., Dep't Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990).

B. Religious Property Disputes & the Religious Questions Doctrine

In terms of resolution of property disputes by religious bodies, the Court held that the "State has an obvious and legitimate interest in the peaceful resolution of property disputes and in providing a civil forum where the ownership of church property can be determined conclusively."[146]

Under the "neutral principles of law" test,[147] a court must first determine whether property titled to a local church is held in trust for the general church organization with which the local church is affiliated. If it is, then the court will grant the control of the property to the councils of the general church. If the property is not held with the trust, then control of the local congregation is recognized.[148] In the 1970s, the Supreme Court "constitutionalized the religious question doctrine, finding that the First Amendment prohibited courts from examining religious doctrine."[149] Without regard to the governing structure of a particular church, a court may, where appropriate, apply neutral principles of law to determine disputed questions that do not implicate religious doctrine.[150] "Neutral principles are wholly secular legal rules whose application to religious parties or disputes does not entail theological or doctrinal evaluations."[151]

In *Serbian E. Orthodox Diocese v. Milivojevich*,[152] the dispute centered over the control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada.[153] The "Holy Synod" was located in Yugoslavia, and was serving as the sole authority to appoint the governing bishop.[154] The dispute arose as to which bishop—the bishop elected in 1939 or the one appointed in 1963—controlled the property of the church.[155] The

146. Presbyt. Church v. Hull Church, 393 U.S. at 445. In Jewish Ctr. v. Whale, 86 N.J 619 (1981), the New Jersey Supreme Court upheld the rescission of a rabbi's employment contract on the basis of civil principles of fraudulent misrepresentation.

147. *See* Williams v. Bd. of Tr. of Mount Jezreel Baptist Church, 589 A.2d 901 (D.C. 1991) (The Court cited the rules of statutory construction as examples of the objective, well-established, "neutral principles of law" that civil courts may apply, consistent with the First Amendment, in resolving disputes involving religious organizations.).

148. Jones v. Wolf, 443 U.S. 595 (1979).

149. Grossman, *supra* note 3, at 183; *see* 443 U.S. at 602; Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976).

150. 589 2.Ad at 908-09.

151. Elmora Hebrew Ctr. Inc. v. Fishman, 125 N.J. 404, 414-15 (1991).

152. 426 U.S. at 696.

153. *Id.* at 698-99.

154. *Id.* at 699.

155. *Id.* at 702.

Illinois Supreme Court ruled that proceedings of the Church that removed the first bishop were procedurally and substantively defective under the internal regulations of the Church and were therefore arbitrary and invalid.[156] The United States Supreme Court held that the actions of the Illinois Supreme Court constituted improper judicial interference with decision of the highest authorities of a hierarchical church in violation of the First and Fourteenth Amendments.[157] "The fallacy fatal [to the lower court's reasoning] is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals . . . and impermissibly substitutes its own inquiry."[158] Here, even though indirectly, the Court once again acknowledged and relied upon the neutral principles of law.[159]

Finally, courts have recognized that in making a neutral principle of law analysis, it is not sufficient to be able to identify relevant secular rules.[160] It is also necessary to insure that there exist neutral facts to which to apply those rules. For example, in *Avitzur*, the majority upheld the terms of a Ketubah, a Jewish religious marriage contract, finding neutral facts that evidenced the agreement between the parties, to wit, "[D]efendant promised that he would, at plaintiff's request, appear before the [rabbinical tribunal] for the purpose of allowing that tribunal to advise and counsel the parties concerning their marriage.[161] This promise constituted nothing more than "a civil contract to submit a dispute to a non-judicial forum".[162] Neutral facts consist of "evidence from which the court may discern the objective intention of the parties." This includes "the language of the deeds, the terms of [a] local church charter, the State statutes governing the holding of church property, [and the like]"[163] without resorting to matters of doctrine or dogma.[164]

The Supreme Court provided clarity on the neutral-principles approach in *Jones v. Wolf*, a dispute that dealt with a Presbyterian church that had separated from the governing body with which it had affiliated.[165] While reviewing the decision of the Georgia Supreme Court, which—relying on

156. *Id.* at 708.

157. "The First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." *Id.* at 709.

158. *Id.* at 708.

159. *Id.* at 722.

160. *See* Langford v. Roman Catholic Diocese, 271 A.D.2d 494, 501 (App. Div. 2000).

161. Avitzur v. Avitzur, 58 N.Y.2d 108, 113 (1983).

162. *Id.* at 108.

163. First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am., 62 N.Y.2d 110, 121-122 (1984).

164. 58 N.Y.2d at 108.

165. Jones v. Wolf, 443 U.S. 595 (1979).

the deed—awarded the church property to a majority of church members, the United States Supreme Court held that courts try to stay away from ruling on church property disputes if the dispute is doctrinal in nature.[166] The fine line is that the Court can interfere if it is a religious property dispute, but not if it is a religious dispute, the resolution of which is ecclesiastical and not civil.[167] The Court further clarified that courts can, however, look into whether the parties have an enforceable agreement to arbitrate and, if so, whether the underlying dispute between the parties falls within the scope of the agreement.[168] "Even where the civil courts must examine religious documents in reaching their decisions, the 'neutral principles' approach avoids prohibited entanglement in questions of religious doctrine, polity and practice by relying 'exclusively upon objective, well-established concepts' of law that are familiar to lawyers and judges".[169] Further elaborating on the parameters of neutral principles, the Court stated that, alternatively, the lower courts may look at church constitutions, charters, trusts, and even may adopt the stance that a majority always rules voluntary religious associations.[170]

To contrast this principle with other areas of arbitration, a related reasoning was applied in a labor arbitration case, where the Court held that

166. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979). In its ruling, the Supreme Court relied on Maryland & Virginia Churches v. Sharpsburg Church, 245 Md. 254 (1970). "To permit civil courts to probe deeply enough into the application of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine." Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 369 (1970) (Brennan, J., concurring). *But see* Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) (noting civil tribunals may examine allegedly unlawful church rulings).

167. *See* Meshel v. Ohev Sholom Talmud Torah, 869 A. 2d 343, 354 (2005), where the District of Columbia Court of Appeal noted:

> We are fully satisfied that a civil court can resolve appellants' action to compel arbitration according to objective, well-established, neutral principles of law. Although the underlying dispute between the parties goes to the heart of the governing structure of Ohev Sholom and therefore may be beyond the jurisdiction of a civil court, 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 disputes.

168. *See* Carter v. Cathedral Ave. Coop., Inc., 566 A.2d. 716, 717-19 (D.C. 1989). The Court added that each of these determinations is governed by traditional principles of contract law; *see* American Fed'n of Gov't Employees, Local 3721 v. District of Columbia, 563 A. 2d 361, 362 (D.C. 1989); Meshel v. OhevSholom Talmud Torah, 869 A. 2d 343, 354-55 (2005) (noting, "A civil court can adjudicate appellants' action to compel arbitration without having to interpret religious terms such as "Beth Din," "Din Torah," and "Orthodox rabbis.").

169. 443 U.S. at 603.

170. Id. at 607-08.

an arbitrator's award settling a dispute "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice."[171] In another case, the United States Supreme Court added that the arbitrator's "talk is to effectuate the intent of the parties"[172] and he or she does not have the "general authority to invoke public laws that conflict with the bargain between the parties."[173]

The United States Supreme Court set forth its test for the Establishment Clause in *Lemon v. Kurtzman,* stating, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[174] However, the original test has been inverted in significant ways. "Currently, the Supreme Court will invalidate legislation under Lemon's first prong 'only if it is motivated wholly by an impermissible purpose' or when it can be said that the law's 'pre-eminent purpose . . . is plainly religious in nature.'"[175] The practice and use of the Lemon test remains controversial in nature, where, for example, Justice Scalia referred to Lemon test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[176] On the other hand Justice Powell has stated that "respect for stare decisis should require us to follow Lemon."[177]

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171. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987). The Court further held:

> The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decision of lower courts.

Id. at 37-38.

172. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

173. *Id.* at 53.

174. Lemon v. Kurtzman, 403 U.S. 602, 612-13, (1971).

175. *See* Esbeck, *supra* note 129, at 515-16. Professor Esbeck adds:

> Conversely, the Court has said that "a statute that is motivated in part by a religious purpose does not violate the purpose prong (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)), nor is it required that a "law's purpose must be unrelated to religion," for that would require government to "show a callous indifference to religious groups."

Id. (citing Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987)).

176. Justice Scalia continues to note that "[o]ver the years . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . , and a sixth had joined an opinion doing so." Lamb's Chapel v. Center Moriches Union Free Schl Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

177. Wallace v. Jaffree, 472 U.S. 38, 63 n.3 (1985) (Rehnquist, J., dissenting).

As per Richard Garnett, Justice Brennan's warning in the *Presbyterian Church* case, that "[i]f civil courts undertake to resolve [doctrinal] controversies . . . the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern . . . "[178] is "intriguing, elusive, and misleading."[179]

Far from being "purely ecclesiastical concerns," . . . the content of religious doctrine and the trajectory of its development might instead be matters to which even a liberal, secular, and democratic state reasonably could, and perhaps should, attend . . . .

[And so,] Justice Brennan's warning presents "hazards" of its own, and . . . its premises—if uncritically embraced—subtly distort our constitutional discourse. The meaning, movement, and implications of religious teachings are and have been both the subjects and objects of government power and policy. In the end, governments like ours are not, and cannot be, "neutral" with respect to religion's claims. And it is precisely because secular, liberal, democratic governments have an "interest" in the content . . . of religious doctrine—an interest that such governments will, if permitted, quite understandably pursue—that religious freedom is so fragile.[180]

Others argue that using the secular courts to enforce the award of a religious tribunal or involving themselves in the issues surrounding religious tribunals would be considered a violation of the Establishment Clause, since it could be seen as "advancing" or "inhibiting" religion, or as impermissibly entangling the court system with religion.[181]

However, this entanglement argument has been used by courts that support judicial involvement in this area as well. In *Encore Productions, Inc. v. Promise Keepers*, the district court stated that a "refusal to enforce the parties' arbitration agreement could itself arguably constitute an impermissible entanglement."[182] If the government refuses to enforce religious arbitration awards, this inaction could be viewed as deciding that the religious arbitration awards will have less validity than other arbitration awards. Instead of viewing this as the government avoiding involvement in

178. Presbyt. Church v. Mary Elizabeth Blue Hull Mem'l Presbyt. Church, 393 U.S. 440, 449 (1969).

179. Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1647 (2004).

180. *Id.* at 1649-50.

181. Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343. 356 (D.C. 2005).

182. Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999).

religion, others see it as the government making a value judgment about religion and individuals' religious commitments.

As per the Supreme Court, the Establishment Clause and the Free Exercise Clause, severely circumscribe the role that civil courts may play in the resolution of disputes involving religious organizations.[183] The Court reasons that "judicial intrusion in religious disputes can advance religion or otherwise impermissibly entangle the civil courts in ecclesiastical matters."[184] "Refusal to enforce the parties' arbitration agreement could itself arguably constitute an impermissible entanglement."[185] As the Court stated, "a [party] could claim impedance [to] the practice of religion or creation of an unjust bias against religion, thereby depriving a [party] of its free exercise rights."[186]

V. RIGHT TO RELIGIOUS ARBITRATION

A. The Many Faces of Multiculturalism

Multiculturalism is not an easy term to define. It can "refer to a demographic fact, a particular set of philosophical ideas, or a specific orientation by government or institutions towards diverse population."[187] For the purposes of this piece, the term multiculturalism is used as a political philosophy—"a philosophy centered on recognizing, accommodating, and supporting cultural pluralism."[188]

One criticism of this multiculturalism is that multiculturalism, in this form, should not be allowed as parties with less power in traditional religious societies will continue to be less powerful in religious arbitration;[189] if they are already vulnerable, they are at a greater disadvantage in the arbitration process.[190] For example, Sebastian Poulter

183. Lemon v. Kurtzman, 403 U.S. 602 (1971).

184. *Id.* at 612-13.

185. *Encore*, 53 F. Supp. 2d at 1101.

186. Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("It is well settled that judicial inquiry into church doctrine violated the First Amendment."); Grossman, *supra* note 3, at 184; *see* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) ("[T]o permit civil courts to probe . . . religious law would violate First Amendment").

187. Irene Bloemraad, *The Debate Over Multiculturalism: Philosophy, Politics, and Policy*, MIGRATION POL'Y INST. (Sept. 22, 2011), http://www.migrationpolicy.org/article/debate-over-multiculturalism-philosophy-politics-and-policy.

188. *Id.*

189. *See* Ayelet Shachar, *Religion, State and the Problem of Gender: Re-imagining Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49 (2005).

190. *Id.* (criticizing the multicultural citizenship model, and explaining why it is insufficient for understanding the controversies at the heart of the new cultural wars); *see also* Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 542 (2004).

analyzes the Islamic principle that Muslim women are prohibited from marrying non-Muslims, however, Muslim men can marry non-Muslim women.[191] He declares that the purpose of this "differential treatment is to keep children within the Muslim faith, and children are assumed to follow the religion of their fathers."[192] Sachar argues that such substantial inequality for women will continue if the arbitration system and the dispute resolution mechanisms continue to employ the "more rigid and conservative interpretation of the religious law."[193] Another critique is that the "viewpoint, common among traditional cultures, that women are somehow more responsible in transmitting and preserving the culture often works against them—they can be 'subject to heightened control, constrained by rules that entrench their dependence and inequality within the community.'"[194]

The multicultural approach is also criticized for reducing assimilation and hence adding to the gap between different groups.[195] An example of the multiculturalism critique comes from Canada. For example, in Quebec dispute is not over numbers of immigrants, "but how to accommodate them.[196] In the 1970s, Canada "officially adopted the creed of 'multiculturalism,' a murky concept that celebrates cultural differences at the same time as pushing newcomers to integrate."[197] English-speaking Canadians see multiculturalism as central to their national identity, ranking below universal health care and the Canadian flag in a recent survey by Environics, a research firm, but above ice hockey, the Mounties and the Queen."[198]

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191. Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, *in* ISLAMIC FAMILY LAW 147 (Chibli Mallat & Jane Frances Connors eds., 1990).

192. *Id.* Poulter writes that although this aim is legitimate, the method of achieving it is "unreasonable and disproportionate." *Id.* at 160.

193. *See* Ayelet Shachar, Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies, 50 MCGILL L.J. 49 (2005).

194. *See* Wolfe, *supra* note 3, at 461.

195. *See* Shahnaz Kahn, *Canadian Muslim Women and Shari's Law: A Feminist Response to "Oh! Canada!"*, 6 CAN. J. WOMEN & L. 52, 59 (1993).

196. *The More the Merrier*, THE ECONOMIST, http://www.economist.com/news/americas/21594328-debates-over-immigration-are-often-toxic-not-canada-more-merrier (last visited Apr. 2, 2015).

197. *Id.*

198. *Id.*; *see also* Bloemraad, *supra* note 189, in which the author notes:

> Yet concerns over multiculturalism are also part of the political mainstream. In October 2010, German Chancellor Angela Merkel proclaimed that a multicultural approach had "utterly failed" in Germany. In February 2011, French President Nicolas

B. Multiculturalism and Religious Arbitration

Arbitration, be it religious or secular has existed in United States for at least a hundred years.[199]

Community-based religious arbitration has advantages over civil courts: arbitrators act as experts in their area of expertise with a cultural know-how and a religious understanding.[200] Religious arbitration does provide several benefits for people seeking to resolve disputes amicably. For example, parties save on the costs of litigation.[201] If followed and performed within the framework of arbitration, the dispute resolution mechanism is capable of achieving the binding force of state law. Generally speaking, arbitration has six characteristics:

(1) all parties consent to have a dispute resolved by a private third party; (2) the parties select the venue of arbitration, often including the identities of specific arbitrators; (3) the arbitrators conducts proceedings and hears testimony regarding the dispute; (4) the arbitrator resolves the dispute and makes a binding award in favor of the prevailing party; (5) the arbitrator's decision is subjected to minimal judicial review in state or federal court; and (6) the arbitrator's decision is enforced by the court as a final judgment. [202]

The arbitration process is often touted as an inexpensive, speedy, informal, and private alternative to the judicial system.[203] A summarized by Court: "the advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it

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Sarkozy also called multiculturalism a failure, and British Prime Minister David Cameron indicted his country's policy of multiculturalism for failing to promote a sense of common identity and encouraging Muslim segregation and radicalization.

199. R. Seth Shippee, *"Blessed are the Peacemakers": Faith Based Approaches to Dispute Resolution*, 9 ILSA J. INT'L & COMP. L. 237, 238 (2002). Even though, the Faith based faith based dispute resolution has existed for more than a century, such "traditional, faith-based alternatives to the mainstream legal systems are alive and well, and, in many ways, busier and more influential than ever."

200. *Arbitration Religious Restriction is Valid*, THE TIMES (Aug. 4, 2011), http://www.thetimes.co.uk/tto/law/reports/article3111935.ece:

> Here, the judge had found that one of the more significant and characteristic spirits of the Ismaili sect was an enthusiasm for dispute resolution contained within the Ismaili community. His Lordship concluded that the provision that all the arbitrators should be respected members of the Ismaili community was legitimate and justified. The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence.

201. *See* Christopher R. Lepore, *Asserting State Sovereignty Over National Communities of Islam In the United States and Britain: Sharia Courts As A Tool of Muslim Accommodation and Integration*. 11 WASH. U. GLOBAL STUD. L. REV. 669 (2012) (stating that "[a]rbitration, as provided for by the Act, enables parties embroiled in a civil dispute to have their case heard by an impartial tribunal without the costs of litigation.").

202. IAN R. MACNEIL, AMERICAN ARBITRATION LAW 7 (1992).

203. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).

normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties."[204]

On the other hand, religious arbitration is also called unfair and undemocratic.[205] Some criticize the notion that religion deserves special protection or that it gets a preference.[206] Another criticism is that multiculturalism, in this form, should not be allowed because parties with less power in traditional religious societies will continue to be less powerful in religious arbitration; if they are already vulnerable, they are at a greater disadvantage in the arbitration process.[207]

The multicultural approach is also criticized for reducing assimilation and hence adding to the gap between different groups.[208] For instance, traditional religious practices are questioned to favor men. "Women, for instance, are disadvantaged by both religious laws and the cultural views of male-female relationships within the religions."[209] Arbitration, be it religious or secular, has existed in United States for at least a hundred years.[210] Christian Conciliation Services[211] and Beth Din[212] are some of the

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204. *Id.*

205. Grossman, *supra note 3, at* 170.

206. *See, e.g.*, Steven G. Gey, *Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

207. *See* Ayelet Shachar, *Religion, State and the Problem of Gender: Re-imagining Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49 (2005) (criticizing the multicultural citizenship model, and explaining why it is insufficient for understanding the controversies at the heart of the new cultural wars); *see also*, Ann LaquerEstin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 542 (2004).

208. *See* Kahn, *supra* note 197, at 59.

209. Wolfe, *supra* note 3, at 460.

210. R. Seth Shippee, *"Blessed are the Peacemakers": Faith Based Approaches to Dispute Resolution*, 9 ILSA J. INT'L & COMP. L. 237, 238 (2002). Even though, the Faith based faith based dispute resolution has existed for more than a century, such "traditional, faith-based alternatives to the mainstream legal systems are alive and well, and, in many ways, busier and more influential than ever." *Id.*

211. *Id.*; *see also* 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).

212. *See* Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 381-82 (2010) (discussing long-standing history of rabbinic courts in the United States to Muslim religious tribunals).

more historic services, whereas Sikh Arbitration Services is one of the newest.[213]

Religious groups derive their right to private dispute resolution from freedom of contract, similar to an arbitration contract.[214] A religious arbitration, just like secular arbitration, if not challenged by one of the parties to the agreement, may never get questioned in a court of law. Courts have repeatedly emphasized the significance of contract freedom in the U.S. law of arbitration, stating, "arbitration under the Act is a matter of consent, not coercion."[215] Understandably, the contract can be a decisive source of law in the American arbitral practice as the parties can modify terms of the FAA through a written stipulation.[216] In other words, parties to a contract have freedom to agree to a method of resolution of conflict, be it religious or secular.

Once the parties have agreed to submit their disputes to a religious arbitration,[217] courts have upheld that choice to be bound by religious arbitration.[218] For example, in *Elmora Hebrew Center v. Fishman*, when a question was raised as to whether a party was bound by the judgment of the arbitral tribunal, the court held, "it is appropriate that the Elmora Hebrew Ctr., like a party to a civil arbitration should be bound to observe the Beth Din's determination of any issues that the Elmora Hebrew Ctr. agreed to submit to that tribunal."[219] Although the court was quick to point out that it is not proper for a trial court to refer civil issues to a religious tribunals in the first instance.[220]

C. Enforcement of Religious Arbitration Awards

Courts have actively enforced religious arbitral awards.[221] Once a party questions either the binding nature of the religious arbitration award, or the

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213. Initiated in 2010, the Sikh Arbitration Services is proposed by the World Sikh Council. WORLD SIKH COUNCIL – AMERICA REGION, http://www.worldsikhcouncil.org/index.html (last visited Feb. 10, 2015).

214. S*ee id.* at 387-88.

215. Volt Info. Scis, Inc. v. Board of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

216. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (giving parties ability to confer kompetenz-kompetenz authority upon the arbitrators if they agreed to remove contract inarbitrability questions from the jurisdictions of the courts under FAA Section Three).

217. *See* Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404, 417-19 (1991).

218. *Id.* at 418.

219. *Id.*

220. Presbyterian Church, *supra* note 182, at 451 ("The First Amendment prohibits a State from employing religious organizations as an arm of the civil judiciary to perform the function of interpreting and applying state standards"); *see* Elmora Hebrew Ctr., *supra* note 120, at 417.

221. *See generally* Jones v. Wolf, 443 U.S. 595 (1979); Presbyt. Church v. Mary Elizabeth Blue Hull Mem'l Presbyt. Church, 393 U.S. 440 (1969).

arbitration award itself, and brings the dispute to a civil court, the Court may then rule one way or the other, after determining jurisdiction.[222] Courts have granted the right to private dispute resolution to parties in conflict by favoring private dispute resolution of faith-based conflict.[223]

Can a court of law entertain a dispute where the parties decide to resolve a religious dispute through a religious tribunal? In recent times, courts have laid down clear principles that answer this question. As discussed in Part IV, first, it is recognized that "the church is not above the law,"[224] and second, courts have recognized that there are occasions in which civil courts may address the actions of religious organizations without violating the First Amendment.[225] "Specifically, civil courts may resolve disputes involving religious organizations as long as the courts employ 'neutral principles of law' and their decisions are not premised upon their 'consideration of doctrinal matters,' whether the ritual and liturgy of worship or the tenets of faith."[226]

Similarly, on the question of subject matter jurisdiction, the District of Columbia Court of Appeals held that "subject matter jurisdiction was proper where the court could apply well-established, objective, and secular principles, rather than internal religious principles, to resolve the questions of arbitrability and whether the organization was the congregation's alter ego."[227]

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222. *See generally* Serbian E. Orthodox Diocese of the U.S. of Am. and Canada v. Milivojevich, 426 U.S. 696 (1976).

223. In Jones v. Wolf, 443 U.S. 595 (1979), which involved a disagreement within the church about the ownership of some of the church's property, the Court examined whether it is required to give deference to the "authoritative tribunal" of a church. The Court ultimately held that the First Amendment requires deference be given to the determination of the religious commission. *Id.* In Church v. Mary Elizabeth Blue Hull Mem'l Presbyt. Church, 393 U.S. 440 (1969), which involved a dispute between the general church and the two local churches as to who owned the property, the court held that "a civil court cannot make these property determinations that should be based on Church doctrine." *Id.* In Serbian E. Orthodox Diocese of the U.S. of Am. and Canada v. Milivojevich, 426 U.S. 696 (1976), the Court evaluated whether the defrocking of a bishop was proper,"whether the division of the diocese was enforceable, and whether the changes to the diocese's constitution had effect. *Id.* The Court overruled the lower court, and held that religious freedom includes this power for the religions to decide for themselves. *Id.* at 723.

224. United Methodist Church v. White, 571 A. 2d 790, 792 (D.C. 1990).

225. Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D.C. v. Beards, 680 A. 2d 419, 427 (D.C. 1996).

226. Jones v. Wolf, 443, 443 U.S. 595, 602 (1979) (citing Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970)).

227. Meshel v. Ohev Sholom Talmud Torah, 869 A. 2d 343, 354-60 (D.C. 2005).

However, may a secular court review the award resulting from religious arbitration? As Part IV suggests, the judicial review of religious arbitration panels has been limited by a series of court decisions.[228] Taking guidance from the field of secular arbitration, the answer seems to be in the affirmative. Following the Supreme Court's guidance, "the Fifth Circuit has held that federal courts have the authority, and, indeed, the obligation, to conduct heightened judicial review of an arbitration award in accordance with the parties' agreement."[229] However, the Ninth Circuit Court of Appeals sitting *en banc* decided differently.[230] In *LaPine II*, the court held that a federal court may only review an arbitration decision on the grounds set forth in the Federal Arbitration Act.[231]

D. FAA and UAA Requirements

Both the FAA and UAA, despite differences, mandate basic rules of fairness to constitute a valid arbitration. The Court in *Kovacs v. Kovacs*, held that courts would refuse to confirm an award from tribunals whose proceedings lacked basic fairness.[232] The FAA states that "an agreement in writing to submit to arbitration an existing controversy . . . shall be valid irrevocable and enforceable,"[233] a religious agreement that submits disputes to arbitration will fall under the FAA definition.[234]

A party to arbitration can, however, limit the issues that will be arbitrated or the procedures under which arbitration will be conducted; they can do so by electing to govern their contractual arbitration mechanism by the law of a particular state.[235]

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228. *Id.* at 354-60.

229. Gateway Techs., Inc., v. MCI Telecomm. Corp., 64 F.3d 993, 996-97 (5th Cir. 1995).

230. Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 299 F.3d 769 (9th Cir. 2002).

231. 341 F.3d 987, 1000 (9th Cir. 2003).

232. 633 A.2d 425, 433 (Md. Ct. Spec. App. 1993)

233. 9 U.S.C. § 2 (2000). The UAA uses a similar language; *see* UAA § 6 (a), 7 U.L.A. 22 (2000). UAA defines "Arbitration Organization" as "association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator. "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate. UAA § 1, http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf (last visited Feb. 27, 2015).

234. *See* Grossman, *supra* note 3, at 188.

235. If the parties elect to govern their contractual arbitration mechanism by the law of a particular State and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored—as long as the state law principle invoked by the choice of law provision do not conflict with the FAA's prime directive that agreements to arbitrate be enforced. *See e.g.*, ASW Allstate Painting & Constr. Co v Lexington Ins. Co, 188 F. 3d 307, 310 (5th Cir. 1999); Russ Berrie & Co. v. Gantt, 998 S.W. 2d 713, 717 (Tex. Ct. App. 1999).

Since both the BDA and ICC require agreements to be enforceable by courts, such tribunals at "first glance fall within the scope of the FAA."[236] However, it can be argued that religious law governs the agreements that parties sign before a religious tribunal to be bound by the religious arbitration.[237] In *Avitzur v. Avitzur*,[238] the court ruled that a Jewish marriage contract is not secular and is "indisputably in its essence a document prepared and executed under Jewish law and tradition."[239] As per Grossman, in this sense "the contract is like a church charter, which embodies religious provisions that courts resist interpreting."[240]

Other concerns arise around the right to counsel. For example, the ICC reserves the right to exclude attorneys from the mediation/arbitration proceedings.[241] The BDA deems the right to counsel waived if a party appears without representation during proceedings.[242] Knowledge of religion restricts the selection of arbitrators for religious arbitration. Typically, the arbitrator must be a practicing member of the religion, and second, an overwhelming number of the arbitrators are men.[243] When asked about whether women are reluctant to appear before an all-male arbitration panel at the Dallas Islamic Tribunal, the reply was, "women who are reluctant to go to a tribunal of men can meet first with a female counselor. El-Badawi said he would welcome women as a tribunal member if she is trained in Islamic Law."[244] Lastly the due process of the arbitration process can be questioned under religious arbitrations as requirements of who can serve as witness can be inconsistent with secular law, including FAA and UAA. For example, under strict Jewish law, women, non-Jews, and the handicapped cannot act as witnesses.[245]

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236. Grossman, *supra* note 3, at 188.

237. *See supra* Part V.

238. Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983).

239. *Id.* at 139.

240. Grossman, *supra* note 3, at 188.

241. *See* Rules of Procedure, *supra* note 86, at Rule 13(D) (permitting arbitrator to ban all counsel when only one party is represented).

242. Grossman, *supra* note 3, at 189; *see* Beth Din Rules, *supra* note 96, at 108 § 12(b).

243. "The prejudice of traditional religions against women and other minority subgroups has lead some to believe that independent, separate systems of religious arbitration can be harmful. Women, for instance, are disadvantaged by both religious laws and the current views of male-female relationships within the religions." Wolfe, *supra* note 3, at 460.

244. Solis, *supra* note 103.

245. Grossman, *supra* note 3, at 191.

VI. A PROPOSAL FOR JUDICIAL REVIEW

A. Specific Religious Issues

1. With Islamic Arbitration Tribunals

Critics have questioned the use of religious arbitration and especially Sharia law in a formal legal setting. In the United Kingdom, the "civil and religious law" speech by the Archbishop of Canterbury, Rowan Williams, suggested that British Muslims who would like to avail themselves of Islamic law-based arbitration courts should be permitted to do so.[246] After the remarks, Williams' colleagues in the Church of England accused the Archbishop of undermining "Christian law" on which the country was based.[247] The Archbishop made a distinction between religious and cultural needs. In many religious communities, in practice, the lines between religious and cultural practices are blurred. However, while cultural practices are negotiable, religious practices are not.[248] While some argue for the benefits of Islamic arbitration in the U.S.,[249] others have pointed towards the problems that Sharia law poses to women's equality and democratic values.[250] Gender inequality concerns have also been raised against other forms of religious arbitration.[251]

U.S. courts have faced the questions of whether Islamic law is compatible with the secular law when it pertains to family. In *Hosain v.*

246. *See* Rowan Williams, Archbishop of Canterbury, *Civil and Religious Law in England: A religious Perspective*, ARCHBISHOP OF CANTERBURY (Feb. 7, 2008), http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective.

247. Doug Saunders, *Ignore the Archbishop-Religion Should Stay a Private Matter*, GLOBE & MAIL (Feb. 11, 2008), http://www.theglobeandmail.com/opinion/letters/religion-in-public/article667664/.

248. *See* Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 197 n. 53 (2002).

249. *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) (discussing potential advantages of establishing Muslim tribunals in the United States).

250. *See* Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925 (2010) (arguing that sharia courts have inadequate protections for women and children caught in abusive relationships); *see also*, Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should be Non-Binding*, 26 ARIZ. J. INT'L & COMP. L. 739 (2009).

251. Battei Din is the plural of beth din. The U.S. incorporates rabbinic court advocates (RCA's), but there is no female equivalent. Under the Beth Din, the RCA's have been critiqued as the center of the problem.

Malik,[252] a custody order from Pakistan was held valid for considering best interests of child.[253] However, child-custody arbitration is an evolving area of the law, "and the enforceability of such decisions remains in a state of flux."[254]

2. With Jewish Arbitration Tribunals

Critics of BDA argue that Jewish Beth Din is unfair as it relies on patriarchic laws.[255] While speaking about the philosophy of kinyan (from the Hebrew word for acquisition or purchase), one-scholar comments, "[t]he partnership ideal, carried to its logical conclusion, would have meant abrogating the ancient concept of kinyan."[256] The ketubah (marriage contract; Hebrew verb: to write) discusses the wife's entitlements in a Jewish marriage. Under the segment on the husband's obligations, he is to provide clothing for the wife in accordance with her "station" in life, pay her medical bills, ransom her from captivity, and give her a proper burial.[257]

Typically, like in other religions, the stability of marriage is promoted as an element for Jewish survival.[258] By the same criterion, "unendurable" marriages had to be ended because they were "bad for the Jews" as a collectivity.[259] Such "unendurable" conditions are used by Beth Din arbiters to compel the husband to give his wife a get.[260] Among the different powers of a Bet Din, is that it could order the husband to divorce the wife by

252. Hosain v. Malik, 108 Md. App. 284, 671 A.2d 988, 999 (Md. Ct. Spec. App. 1996).

253. *Id.*

254. Lowry, *supra* note 5, at 171 (2013); *see also*, Christina Fox, *Contracting for Arbitration in Custody Disputes: Parental Autonomy vs. State Responsibility*, 12 CARDOZO J. CONFLICT RESOL. 547, 547 (2011).

255. AVIVA CANTOR, JEWISH WOMEN/JEWISH MEN: THE LEGACY OF PATRIARCHY IN JEWISH LIFE 259 (1995).

256. *Id.* at 124. Kinyan defines the initiation and dissolution of a marriage as unilateral transactions by the man and implies absolute power over his wife as his possession. This is obviously incompatible with the partnership ideal, which defined the martial relationship as one of mutuality and interdependence, of "love, peace and companionship."

257. The author adds, "The Talmud stipulates that the wife continue to own any property she brought in to the marriage, but the husband was to manage it as well as her dowry; income from both belonged to him." *Id.* at 128.

258. *Id.* at 133.

259. *Id.*

260. *Id.* ("According to Talmud, if a man did not fulfill certain conditions that made the marriage "viable"—if he refused to fulfill her conjugal rights, was impotent, had a serious disease or a foul smell, did not support her appropriately (later licentious behavior and petty tyrannies were added)—the wife was entitled to a divorce.")

resorting to economic and social sanctions, or as per Talmud and Maimonides, "coercion until he says, 'I am willing.'"[261] On the other hand, a woman whose husband refused to grant a get because he was malicious or insane, or who deserted her or was otherwise missing, became an aguna, "an anchored woman", a woman who cannot remarry under the eyes of Jewish religion.[262]

3. With Community Pressure

Under the FAA and UAA, courts will not enforce an arbitration agreement where a party consented to the agreement under coercion or duress.[263] Indeed, courts have clearly refused to enforce an arbitration agreement even under state law where a party consented to the agreement under coercion or duress.[264] However, parties to a religious arbitration can feel obligated by such compulsions out of religious convictions.[265] Minorities may prefer to settle disputes in their religious group instead of through secular courts.[266] For example, courts consistently "hold that the issuance of a siruv from a beth din does not constitute duress sufficient to warrant vacatur of an arbitration award."[267] In *Lieberman v. Lieberman*, the plaintiff asked the Supreme Court of New York to invalidate an agreement to arbitrate before a beth din because she was coerced to arbitrate by the threat of a "sirov."[268] Here the dispute was adjudicated first before the arbitration panel, beth din, and then before the Supreme Court of New York, Kings County.[269] The court held that when a dispute has been moved to arbitration, the party seeking to vacate the ultimate arbitration award must meet a heavy burden to vacate that award and an arbitrators award will be set aside as being in excess of authority only if it is totally irrational.[270] Even though the court defined a sirov as a "prohibitionary decree that

261. *Id.*

262. There was a practice of "conditional divorces," which would take effect if the husband failed to return from an absence after a certain period of time. The Shulchan Aruch states, "[I]t is permissible for the beth din to desecrate the Shabbat in order to hear the evidence of witnesses and imprison a husband who intends to desert his wife." *Id.*

263. Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 651 (2004) (describing the effect of a sirov).

264. *Id.* at 650.

265. *Id.* at 639.

266. *Id.* (discussing why the members of the minority community may fear the secular courts will discriminate against them and thus prefer disputes to be settled internally by arbitrators who understand and identity with the religious doctrine and communal standards).

267. Baker, *supra* note 1, at 188.

268. Lieberman v. Liberman, 566 N.Y.S.2d 490, 494 (Sup. Ct. 1991).

269. *Id.*

270. *Id.*

subject the recipient to shame, scorn, ridicule and public ostracism by the other members of the Jewish religious community", it concluded, "[w]hile the threat of a [s]irov may constitute pressure, it cannot be said to constitute duress."[271]

4. With Finality

For some Americans, binding religious law in any kind is seen as a threat to the secular state and "as risk to the substantive rights guaranteed by secular law."[272] Seeking review by a secular court may not be as easy as it seems; in *Berman v. Shatnes Lab*,[273] when both parties decided to limit the resolution of their religious dispute by a religious tribunal, with no possibility of an appeal, the court equated the tribunals' decision to the decision of the court in terms of resolution of dispute by ruling, "the determination of the Din Torah was in the nature of a common-law award in arbitration and acts as a bar to re-litigating essentially the same issue that was decided thereby in the guise of the instant libel action."[274] In *Gonzalez v. Archbishop,*[275] the Supreme Court ruled that a decision about appointment to a Roman Catholic chaplaincy must be left to religious authorities even if it had a secondary effect on property rights.[276] However, the court suggested that a civil court may look in to such inquiry if such an appointment is the product of fraud, collusion, or arbitrariness.[277] The ground of arbitrariness was eliminated from the powers of the civil courts in *Serbian Eastern Orthodox Church v. Milivojevich.*[278] Under the current law, a religious arbitration award, if challenged, must be pursued under the current parameters of FAA or UAA. Under the FAA, one option is that the parties

271. *Id.* at 494.

272. Eliyahu Stern, *Don't Fear Islamic Law in America*, N.Y TIMES (Sept. 2, 2011), http://www.nytimes.com/2011/09/03/opinion/dont-fear-islamic-law-in-america.html?_r=0.

273. Berman v. Shatnes Lab., 43 A.D.2d 736, 350 N.Y.S.2d 703 (App. Div. 1973).

274. The court went on to add, "[M]oreover as the parties chose to resolve their differences in an ecclesiastical tribunal, temporal courts should not interfere with the binding results therein." Berman, 43 A.D.2d 736, 350 N.Y.S.2d 703 (citing Rodyk v. Ukrainian Autocephalic Orthodox Church of St. Volodimir, 31 A D 2d 659 (1968), *aff'd*, 29 N.Y. 2d 898 (1972)); United Kosher Butchers Ass'n. v. Associated Synagogues of Greater Boston, 349 Mass. 595, 599 (1965).

275. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929).

276. 280 U.S. at 16.

277. *Id.* at 16.

278. Serbian Eastern Orthodox Diocese for the U.S. of Am. & Can. v. Milivojevich, 426 U.S 696 (1976) (inquiring as to whether decisions of a church tribunal complied with the church's own laws and regulations).

to secular or religious arbitration can challenge the arbitration award if proceedings were not rendered partially.[279] However, in some motions challenging arbitration awards evidentiary hearings are required, which can be costly and time-consuming procedures. Such endeavors can be a deterrent for a litigant who wants to challenge a religious arbitration award under Federal Arbitration Award.[280]

B. Proposed Guidelines

1. Proposed Judicial Guidelines

Based on the discussions under Part II-V, this part proposes a list of recommendations that are geared towards treating religious arbitration on equal footing with secular arbitration. This section addresses the premise that the FAA and UAA standard of review has failed as applied to religious panels. Section 10 of the FAA creates a rebuttable presumption that awards are valid,[281] and strictly limits judicial review.[282]

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279. 9 USCS §10 (2002). With regard to vacation, grounds, and rehearing, the Code states:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
>
> (1)where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) 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.
>
> (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
>
> (c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Id.

280. For example, in Sanko Steamship Co. v. Cook Indus., 495 F. 2d 1260, 1265 (2d Cir. 1973), the Court of Appeals reversed an order confirming an arbitration award. In Totem Marine Tug & Barge, Inc. v. North American Towing, 607 F. 2d 649 (5Cir. 1979), a hearing was held to determine whether arbitrators were involved with prejudicial misbehavior. There the court held that matters of misconduct or bias of the arbitrators cannot be gauged on the face of the arbitral record alone.

281. *See* Brentwood Med. Assoc. v. United Mine Workers, 396 F. 3d 237, 241 (3d Cir. 2005) ("An award is presumed valid unless it is affirmatively shown to be otherwise.")

282. *See* 9 U.S.C. §§ 10-11.

Accordingly, the procedural protections of the FAA may not be waived simply by agreeing to religious arbitration. It is "both unreasonable and unrealistic" to remove them from scope of the arbitration statutes.[283] Specifically, procedural protections of the FAA should extend to all parties to arbitration, regardless of the choice of law provisions in the contract specifying a particular religious doctrine, law, orthodoxy, or school of thought.[284] Like others have argued, courts are capable of reviewing religious questions under the FAA and UAA.[285]

Though an arbitrator/arbitration panel may conduct its own internal procedures regarding how the arbitration takes place and what award is granted, similarly to how a secular arbitrator might, it may not circumscribe the protections of the FAA.[286] For example, in *Kovacs v. Kovacs*,[287] when a party to beth din arbitration claimed that she was not permitted to make opening or closing statements, or cross-examine witnesses, and additionally claimed that the tribunal relied upon evidence which was not introduced in the proceedings, the court rejected her argument for three reasons: First, the court notes, "[T]here was no record produced of what transpired during the beth din proceedings, and thus no evidence of the procedural violations she alleged.[288] It continued, "Second, an arbitration that does not comply with the procedural requirements of the Maryland Uniform Arbitration Act (MUAA) is valid—so long as the litigants voluntarily and knowingly agree to the arbitration procedures."[289] Third, the arbitration proceedings "conformed to notions of basic fairness or due process" in the context of arbitration.[290] In other words, a religious arbitration may not be conducted

283. Grossman, *supra* note 3, at 205.

284. For example, in Lang v. Levi, 16 A. 3d 980 (Md. Ct. Spec. App. 2011), a party petitioned the Court of Special Appeals of Maryland to vacate the award of a beth din on grounds that the arbitrator exceeded his authority by irrationally reducing the final award. The court rejected this argument, holding that where an arbitrator relies on religious principles, a court "cannot delve into whether under Jewish law there is legal support" for arbitrator's decision. *Id.* at 985-86.

285. As per Grossman, the Supreme Court has not held the religious question doctrine a matter of institutional competence, and the "prohibition is [not] based on the incapability of courts to use the same fact-finding techniques they would use in any area where expert testimony is used." Instead, "[c]ourts consider routinely and neutrally whether something is part of religious doctrine, and can use standard fact-finding devices to review whether the arbitrator acted outside of what was standard under the religious procedure." Grossman, *supra* note 3, at 205.

286. *See e.g.*, Kovacs v. Kovacs, 633 A.2d 425 (1993).

287. *Id.* at 432.

288. *Id.*

289. *Id.* at 433.

290. Id. at 432.

in a manner that would not be allowed in a secular arbitration. In other words, a religious arbitration may not be conducted in a manner that would not be allowed in a secular arbitration.

Similar to a secular arbitration, a religious arbitration may not restrict what is considered admissible evidence or who is considered a credible witness based on sex, gender, race, national origin, ethnicity, or religion. While religious law is the basis for the arbitrator's decision, how that is applied must be neutral. Awards in religious arbitration are subject to the same scrutiny as any other arbitration award.[291] All arbitrations are subject to the same review criteria, whether religious or secular.[292] Specifically, a court may review for: (1) whether the award was produced by corruption, fraud, or undue means; (2) whether the arbitrator showed evident partiality or corruption; (3) whether the arbitrator was guilty of misconduct; and (4) whether the arbitrator exceeded his powers.[293]

When reviewing arbitration awards, a court should recognize that pressure applied by a religious community may constitute duress.[294] While it has been recognized that an individual or group may wield influence that may constitute duress, a formal acknowledgement that a religious community may have the same effect is necessary to prevent loss of individual rights through community pressure. No award in religious arbitration should be enforced if it violates any state or federal law.

The following provides a brief summary of the recommended changes:

Proposed Judicial Guidelines:

1) The procedural protections of the FAA may not be waived simply by agreeing to religious arbitration.
   a) Procedural protections of the FAA extend to all parties to arbitration, regardless of the choice of law provisions in the contract specifying a particular religious doctrine, law, orthodoxy, or school of thought.
2) Though an arbitrator/arbitration panel may conduct its own internal procedures regarding how the arbitration takes place and what award is granted similarly to how a secular arbitrator might, it may not circumscribe the protections of the FAA.
   a) A religious arbitration may not be conducted in a manner that would not be allowed in a secular arbitration.

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291. *Id.*
292. *Id.*
293. *See* 9 U.S.C.A. §. 10.
294. *See* Wolfe, *supra* note 3.

b) Specifically, a religious arbitration may not restrict what is considered admissible evidence or who is considered a credible witness based on:
   i) Sex/Gender;
   ii) Race;
   iii) National Origin;
   iv) Ethnicity; or
   v) Religion.
      (1) While religious law is the basis for the arbitrator's decision, how that is applied must be neutral.
      (2) This is not necessarily an exhaustive list.

3) Awards in religious arbitration are subject to the same scrutiny as any other arbitration award.
   a) All arbitrations are subject to the same review criteria, whether religious or secular
   b) Specifically, a court may review for:
      i) Whether the award was produced by corruption, fraud, or undue means;
      ii) Whether the arbitrator showed evident partiality or corruption;
      iii) Whether the arbitrator was guilty of misconduct;
      iv) Whether the arbitrator exceeded his powers;
         (1) *See* 9 U.S.C.A. § 10
4) When reviewing arbitration awards, a court should recognize that pressure applied by a religious community may constitute duress.
   a) While it has been recognized that an individual or group may wield influence that may constitute duress, a formal acknowledgement that a religious community may have the same effect is necessary to prevent loss of individual rights through community pressure.
5) No award in religious arbitration should be enforced if it violates any state or federal law.

2. Proposed Additions to FAA

While a case-by-case approach is valid in some circumstances, growing religious arbitration in the U.S. warrants a modification to the current laws.[295] The following provisions, or some variation upon them, should be added to the FAA:

295. Grossman, *supra* note 3. The author notes:

- A party may not waive their procedural rights guaranteed by the FAA, regardless of the choice of law to be applied in the arbitration; if the arbitration is conducted within the United States, whether or not under religious or any other law, it must be subject to the FAA to be enforceable.[296]
- An arbitrator may not exclude evidence or witnesses on the basis of sex/gender, race, national origin, ethnicity, or religion.[297]
- An arbitration award must be reviewable by secular courts; it must allow access to state and federal courts, as demanded, to review arbitration award for compliance with the FAA.
- Any arbitration award which violates the law (in the broadest sense) of the jurisdiction in which it is sought to be enforced must be vacated.
- Failure to follow these provisions would result in vacatur of the arbitration award.
- These provisions and guidelines endeavor to put a check on the procedural aspects that have been a failing in the review of religious arbitrations, but they do not address the substantive fairness of awards.[298]

VII. CONCLUSION

The recent legislation by numerous states against religious law has raised a question: is there a right to religious arbitration?[299] Even though

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> Courts have been almost correct in asserting that the standards of review in the FAA and UAA and the standard permitted by the religious question doctrine approximate each other. They have failed, however, to understand that when applying arbitration statues to religious tribunals, the standard of review governing intra-church disputes cannot be substituted for what is in practice a broader standard of review created by the federal and state legislatures.

Id. at 208.

296. *See id.*

297. Sachar argues that legal systems that perpetuate this kind of inequality should not be allowed. Sachar, *supra* note 13, at 49.

298. *See* Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.")

299. The idea of right to religious arbitration can fall under the "religious freedom". As the U.N. Human Rights Committee has indicated:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed."

> Article 18 is not limited in its application to traditional religions or to religions and belief with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be subject of hostility by a predominant religious community.

some scholars criticize the notion that a religion should receive special protection or that it should be a preferred freedom,[300] religious arbitration tribunals are here to stay. However, procedural fairness must be accounted for. For example, a court must be able to look to whether the religious arbitration agreement was voluntarily signed.[301] The issues of consent are bound with the questions of due process.[302]

Another approach that the court can take in religious arbitration cases is the case-by-case approach.[303] In this approach, the court will run into the danger of being careful to not interfere with the ecclesiastical polity. One way to avoid this is for the court to define clear guidelines pertaining to religious arbitration in family matters. Of all the controversy surrounding the subject in North America, most scholars agree that religious arbitration in the family sector is the one that needs great attention.[304]

From the perspective of religious arbitration tribunals, religious tribunals can adopt a uniform procedural code, and can define laws of religion and how they apply. Procedural justice and fairness is warranted in the American courts and when the religious tribunals can satisfy the concerns presented in Part VI, such procedural fairness is protected.[305]

Indeed, one of the rights that litigants enjoy when they litigate disputes through a civil justice system in America is the right to procedural fairness. The established canons of statutory as well as common law provide the needed and necessary guidelines to litigants. Many of these procedural matters rely on parties' expectations of the process. Parties to the arbitration

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United National Human Rights Committee, General Comment 22, Article 18 (para. 2) (Forty-eight session, 1993).

300. *See e.g.*, Steven G. Grey, *Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

301. *See* KATHERINE V. W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 715 (Foundation Press 2000).

302. *Id.* ("The more confident the court is that there is genuine consent to arbitration, the less it needs to police the process for due process.").

303. *See* Agur v. Agur, 298 N.Y.S.2d 772, 779 (N.Y. App. Div. 2d. 1969).

304. *Id.* (modifying the trial court's order by striking order to arbitrate in a custody case).

305. "Procedural rules of arbitration project vulnerable parties," Wolfe, *supra* note 3, at 458 (also noting the procedural safeguards that a court looks at to uphold a religious tribunal's decisions include: (1) whether the parties were properly served; (2) whether parties were represented; (3) whether attorneys were impartial; and (4) the parties inability to agree to the unreasonable restriction of their rights to notice and arbitrator disclosure or to waive the right to attorney representation).

process should know what to expect from the process, what procedural safeguards the process provides to them, what options they have to opt out of such process, and when and how they can challenge the outcome of the religious arbitration. Unfortunately, as it currently stands, the American religious arbitration system does not provide that clarity.