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# BEFORE THE GODLY: RELIGIOUS ARBITRATION AND THE U.S. LEGAL SYSTEM

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## ABSTRACT

*The U.S. judiciary is famously and expressly secular. Why, then, should the U.S. legal system continue to tolerate, and even encourage, religious arbitration? In attempting to answer this question, scholars have tended to focus on religious communities themselves, pointing to values of legal pluralism and multiculturalism to explain religious arbitration's importance. This Article takes a different approach: it assesses the utility of faith-based arbitration for the U.S. legal system itself. What value does religious arbitration have, not just for religious communities, but for the U.S. legal regime as a whole?*

*This Article suggests an answer. Religious arbitration is valuable to U.S. law because, by applying alien—and explicitly religious—legal doctrines and values, faith-based tribunals produce insights that would otherwise be unavailable to the U.S. legal tradition. In their interactions with religious arbitration, civil courts are capable of inculcating these religious legal insights—and can learn something new about their own law along the way. But these insights do not come free. Because faith-based arbitration is emphatically religious, its continued existence also poses risks to the U.S. legal tradition's authority claims. In other words, enforcing arbitral agreements and awards that are explicitly based on religious law requires the U.S. legal system to pay a price. When interacting with faith-based tribunals, civil courts ought to balance these costs and benefits in determining whether to enforce or vacate religious arbitration agreements and awards.*

*That is not what courts actually do, however. Instead, they tend to employ what this Article calls the categorical approach: stripping religious arbitration of its religiosity so that it may be placed into preexisting and well-defined legal categories. This approach is flawed in a number of ways: it results in the misapplication of law, leads to manifestly unjust outcomes, and prevents courts*

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*from accessing the unique legal insights that religious arbitration can offer. The U.S. legal system as it stands is thus paying the cost for enabling religious tribunals, but it is not reaping the rewards. It is only by moving away from categories and towards substantive engagement that U.S. courts will be able to learn the lessons religious arbitration can teach.*

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#### I. INTRODUCTION

It is axiomatic at all times and in all jurisdictions that a U.S. court of law may not render a decision on the basis of explicitly religious precepts.<sup>1</sup>

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1. Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976) (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 369 (1970) (Brennan, J., concurring)) (“To permit civil courts to probe” into “religious law . . . would violate the First Amendment . . .”); Lemon v. Kurtzman, 403

Indeed, the judiciary's express secularity is an essential feature of that famous and foundational aspect of the U.S. project: the continued "building of a wall of separation between Church and State."<sup>2</sup> And yet, U.S. courts regularly enforce arbitration agreements and awards reached by tribunals whose *raison d'être* is the application of religious law.<sup>3</sup> The phenomenon of faith-based arbitration is thus a surprising anomaly within the U.S. judicial landscape: A uniquely religious space in an otherwise secular legal universe. The systemic and institutional questions religious arbitration raises are made even more complicated by the fact that the religious legal doctrine applied by faith-based arbitral panels is often quite different from—and in tension with—U.S. secular law.<sup>4</sup> By allowing, and in many ways encouraging, the existence of religious arbitration, the U.S. legal system lends its imprimatur to juridical processes grounded in legal maxims that can and sometimes do undermine the legal system's own conceptions of procedural fairness and

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U.S. 602, 643 (1971) (Brennan, J., concurring) (quoting *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 680 (1970) (Brennan, J., concurring)) (stating that the Establishment Clause forbids "those involvements of religious with secular institutions which . . . employ the organs of government for essentially religious purposes"); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring).

2. Letter from Thomas Jefferson to a Comm. of the Danbury Baptist Ass'n in the State of Conn. (Jan. 1, 1802), in 16 WRITINGS OF THOMAS JEFFERSON 113 (Albert Ellery Bergh ed. 1907).

3. See Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 163 (2011) [hereinafter Helfand, *Debtor's Soul*] ("Most notable among religious alternatives to the mainstream legal system is the growing network of religious arbitration tribunals in the United States."); R. Seth Shippee, Note, "Blessed Are the Peacemakers": *Faith-Based Approaches to Dispute Resolution*, 9 ILSA J. INT'L & COMP. L. 237, 238 (2002) ("[T]raditional, faith-based alternatives to the mainstream legal system are alive and well, and, in many ways, busier and more influential than ever.").

4. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1276 (2011) [hereinafter Helfand, *Multiculturalism*] ("The rules and practices of marginalized religious and cultural groups may, at times, conflict with the laws of the state. Thus, to allow minority groups to retain some sphere of autonomy can give rise to conflicts between group rules and state law." (footnote omitted)); Amanda M. Baker, Note, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 166 (2012) ("[A]rbitrators on a religious tribunal may apply religious law instead of . . . the substantive secular law of the jurisdiction."); Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 182 (2007) ("Although [religious arbitral] panels may consider secular law, contradictory religious tenets may override civil law, which is a principle itself derived from religious doctrine.").

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substantive legal values.<sup>5</sup> Religious arbitration thus poses a double challenge: It chips away at the dominant legal regime's carefully preserved secularity, and it weakens that regime's claim to be the exclusive source of judicial authority.

Why, then, should the U.S. legal system continue to enforce religious arbitration agreements and awards when doing so seems, at least at first glance, so manifestly disadvantageous to its own identity and authority claims? This question is not primarily focused on why religious arbitration is important to religious communities—although answering it will require investigating that issue as well—but rather why it is valuable for U.S. law as a whole. What, in short, is the meaning of religious arbitration *for the U.S. legal system itself*?

This Article offers one answer: Because religious arbitration manifests and applies explicitly religious doctrines and values that are not otherwise within the secular legal regime's purview, the mechanism of religious arbitration necessarily produces legal insights that would not otherwise be available to the U.S. legal tradition.<sup>6</sup> By allowing faith-based tribunals to balance and manifest religious legal values in the dynamic present, the U.S. legal system ensures the continued production and refinement of those otherwise alien legal insights. And by engaging with the procedure and substance of religious arbitration, civil courts can, under the right conditions, inculcate those insights.<sup>7</sup> In this way, by allowing for religious arbitration, the U.S. legal tradition itself becomes wiser and more insightful. Simply put, religious arbitration can help the U.S. legal tradition *learn*.

But the insights gained come at a price. To understand the cost and how it is paid, it is necessary first to appreciate the importance of systemic continuity.<sup>8</sup> The U.S. legal tradition, grounded as it is in a written text as the source of its authority, faces a serious and persistent problem in the form of

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5. Helfand, *Multiculturalism*, *supra* note 4, at 1276 (“[B]y ceding law-like power to religious or cultural authorities over constituent group members, the state runs the risk that such authority will be exercised in a manner that undermines individual group members’ fundamental rights . . . . Power becomes a zero-sum game: The more power a government grants to religious and cultural groups, the more difficult it will be for an individual religionist to access the fundamental rights granted by the state.”). For an extended examination of the mechanisms of statist enforcement and their impact on communities of law, see Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 *passim* (1986) [hereinafter Cover, *Violence*].

6. See *infra* Part IV.A.

7. See *infra* Part IV.B.

8. See *infra* Part V.

what this Article calls the “authority paradox.” The Constitution calls out for interpretation. But as that interpretation accumulates, the gap between the Constitution itself and the law on the ground widens, making the legal system’s authority claims weaker over time.<sup>9</sup> Thus, by doing what it is supposed to do, the legal system undermines its own authority.<sup>10</sup> One powerful way of mitigating this paradox is through the concept of tradition. By positioning itself as part of a continuous interpretive chain sourced in the Constitution, today’s law can claim to be a genuine part of an ongoing tradition.<sup>11</sup> Continuity, consequently, is one of a constitutional legal system’s most acute needs.<sup>12</sup> But because religious arbitration requires courts to enforce arbitral agreements and awards reached through application of procedural and substantive law that is emphatically *not* within the constitutional tradition, it imposes continuity costs.<sup>13</sup> It becomes harder for the U.S. legal system of today to claim it is part of the longstanding constitutional tradition when it acts to enforce religious arbitration agreements and awards reached on grounds otherwise entirely anathematic to that same tradition.

In order to evaluate the utility of religious arbitration for the U.S. legal tradition, it is necessary to account for both costs and benefits. Only after properly assessing both is it possible to make prescriptive suggestions as to when and how the U.S. legal tradition ought to interact with religious arbitration. By substantively balancing the insights gained against continuity lost, the U.S. judiciary can better appreciate what is at stake for itself when encountering religious law.<sup>14</sup>

As a descriptive matter, however, courts do not engage in this kind of substantive cost–benefit analysis. Instead, courts have tended to force religious arbitration into preexisting legal categories.<sup>15</sup> Generally speaking,

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9. “Indeed, the longer the constitutional system continues, and the longer people build on existing . . . precedents . . . it becomes increasingly hard to explain or defend current practices . . .” JACK M. BALKIN, *LIVING ORIGINALISM* 110–11 (2011). For more, see *infra* Part V and accompanying notes.

10. For a more thorough explication of the authority paradox, see *infra* Part V.

11. See BALKIN, *supra* note 9, at 85.

12. For additional scholarly accounts of the importance of continuity, see *infra* Part V and accompanying notes.

13. For one example of a religious doctrine that is alien to the U.S. legal tradition, see discussion *infra* Part IV.A (discussing *hasagath gevul*).

14. See *infra* Part V.

15. See *infra* Part III. I refer to this analytical mode throughout as the “categorical approach.” In so doing I do not mean to implicate similarly described legal concepts outside

case law attempts to shoehorn religious arbitration into one of two such categories: (1) religious arbitration as a subspecies of conventional arbitration—i.e., a sub-subspecies of contract law—and therefore legitimate for the same reasons and to the same extent;<sup>16</sup> and (2) judicial review of religious arbitration as presenting Establishment and Free Exercise issues under the First Amendment, often leading to judicial abstention when asked to review the procedure and legal substance underlying a religious arbitral award.<sup>17</sup>

This categorical approach has certain salutary effects. Most obviously, it enables courts to analogize religious arbitration to other areas of the law, allowing them to borrow the mature doctrinal thinking already developed elsewhere.<sup>18</sup> In forcing religious arbitral questions into preexisting legal categories, courts seek to avoid addressing any unique challenges religious arbitration might pose.

But the categorical approach has serious drawbacks as well. This Article focuses on two. First, religious arbitration is unique, and it *does* present special legal questions and challenges not easily answered by borrowing from elsewhere in the law.<sup>19</sup> Courts often avoid this fact by describing religious arbitration in emphatically secular legal terms, taken primarily from contract law.<sup>20</sup> But this means denuding religious arbitration of its *religiosity*. And that denial of the religious character of the thing blinds courts to the special set of insights that are only available to them precisely *because* faith-based arbitration is religious.<sup>21</sup> The categorical approach thus prevents courts from gleaning the benefits religious arbitration would otherwise provide.

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of the religious arbitration arena. *See, e.g., Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (discussing the categorical approach in the criminal sentencing context).

16. *See, e.g., Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) (“[C]ourts have the power to enforce secular contract rights, despite the fact that one of the contracting parties may base their rights on religious affiliations.”); *see also infra* Part III.A and accompanying notes.

17. *See infra* Part III.B and accompanying notes.

18. Most obviously, courts regularly borrow from conventional contract law in analyzing religious arbitration agreements and awards. *See infra* Part III.

19. *See infra* Part II.B.

20. *See, e.g., Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (N.Y. 1983) (describing a religious arbitration agreement as comparable to “any other civil contract”).

21. *See* discussion *infra* Part IV (discussing how the application of religious law generates legal insights).

This Article is not the first to critique courts' overly rigid focus on doctrinal categories in the faith-based arbitration context. Scholars have repeatedly criticized the analytical models courts employ when dealing with religious law on a number of fronts.<sup>22</sup> Some have stressed that, because religious arbitration is not simply a subspecies of conventional arbitration, elements of the statutory and common law schemes that animate and regulate conventional arbitration either do not apply or apply differently to religious tribunals.<sup>23</sup> Some have also argued that existing First Amendment jurisprudence is ill-fitted to handle religious arbitration, particularly when disputes arise out of commonplace issues of family or commercial law.<sup>24</sup> Still others have focused on the procedural inequities that can often be found in religious arbitral hearings and the ways in which courts are prevented from properly addressing them.<sup>25</sup> Finally, some scholars have tackled the more philosophical questions religious arbitration poses, considering the implications along numerous axes including legal pluralism, cultural relativism, and others.<sup>26</sup>

These various scholarly critiques, while often different in target and scope, tend to focus exclusively on religious communities themselves when

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22. See, e.g., Helfand, *Multiculturalism*, *supra* note 4, *passim*; Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Analysis*, 34 *ISR. L. REV.* 170, *passim* (2000); Grossman, *supra* note 4, *passim*.

23. See, e.g., Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 *CHI.-KENT L. REV.* 141, 155 (2015) [hereinafter Helfand, *Between Law and Religion*] (noting that the manifest disregard ground for vacatur does not apply to religious arbitration in the way it would to conventional arbitration); see also *infra* Part III.B. It is also worth noting that some scholars in fact agree with this assessment of religious arbitration. See, e.g., Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 *FORDHAM L. REV.* 427, 442 (2006) (“[F]aith-based arbitration is merely a subcategory of arbitration in general . . .”).

24. See, e.g., Helfand, *Debtor's Soul*, *supra* note 3, at 162 (noting, in the context of religious commercial law, “that reconciling . . . tensions endemic to religious commercial conduct cannot be solved by either reflexively refusing to adjudicate the case on Establishment Clause grounds or marginalizing the religious features of the case and seeking refuge in ‘neutral principles of law’”).

25. See, e.g., Stone, *supra* note 22, at 195; Wolfe, *supra* note 23, at 447–48 (“There are certain dangers of [religious] arbitration . . . because issues of marriage and divorce are likely to come within their ambit, yet the religious doctrines used to resolve these issues are viewed by some as antiquated and prejudiced against women.”).

26. See, e.g., Helfand, *Multiculturalism*, *supra* note 4, at 1268–89; Maimon Schwarzschild, *How Much Autonomy Do You Want?*, 51 *SAN DIEGO L. REV.* 1105, 1119 (2014); Stone, *supra* note 22, at 180.

assessing the importance of faith-based arbitration.<sup>27</sup> Any consideration of how interaction with religious arbitration might benefit the U.S. legal system as a whole is largely restricted to general comments on the value of multiculturalism or maximizing religious freedom writ large.<sup>28</sup> What is lacking is a systematic attempt to articulate ways in which the U.S. legal landscape is itself improved through its encounters with religious arbitration and, on the flip side of the equation, a cohesive analytical account of the various costs the U.S. legal system bears for enforcing religious arbitration agreements and awards.

This Article suggests an alternative analytical model, one that approaches the issue of religious arbitration's meaning from the perspective of the U.S. legal system itself. By balancing the insights gained against the continuity lost, courts and scholars alike can begin assessing the relative utility of religious arbitration.<sup>29</sup> This is certainly not the only balance necessary to assess the value of religious arbitration for the dominant legal regime, but it is a significant one. And, by rethinking the ways in which they assess religious arbitration from the dominant regime's perspective, judges and scholars alike will be able to offer others as well. It is my hope that this Article will catalyze more comprehensive prescriptive accounts as to when courts ought to enforce or vacate religious arbitration agreements and awards, focusing on the risks and benefits to the U.S. legal system *as a whole*.

## II. FAITH-BASED ARBITRATION: A UNIQUELY RELIGIOUS LEGAL SPACE

### A. Arbitration in the United States

The birth of the modern U.S. arbitration regime can be traced to the passage of the Federal Arbitration Act (FAA) in 1925.<sup>30</sup> Although

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27. See, e.g., Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI.-KENT L. REV. 111, 134 (2015) [hereinafter Broyde, *Model*] (discussing benefits of religious arbitration for religious communities).

28. See, e.g., Helfand, *Multiculturalism*, *supra* note 4, at 1247 (alteration in original) ("By enabling religionists to fulfill their own perceived obligations, religious arbitration courts play a freedom-enhancing role, 'contribut[ing] to . . . the reality of religious freedom under law' by serving as part of the infrastructure that makes religious freedom possible." (quoting Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 294–95 (2008))); Wolfe, *supra* note 23, at 466 ("Enhancing the appreciation of the diversity of cultures is a positive goal . . .").

29. See *infra* Parts IV, V.

30. Federal Arbitration Act of 1925, Pub. L. No. 401, 43 Stat. 883–86, §§ 1–15 (codified

arbitration existed in the United States for centuries prior,<sup>31</sup> the judiciary had been consistently skeptical, if not downright dismissive.<sup>32</sup> Judges viewed arbitration not as a healthy alternative to traditional litigation, but as an insidious means for commoners to subvert judicial jurisdiction.<sup>33</sup> Congress enacted the FAA in part to counteract this judicial hostility.<sup>34</sup> The FAA declared written arbitration agreements “valid, irrevocable, and enforceable,” and restricted courts reviewing arbitration agreements and awards to four grounds for vacatur.<sup>35</sup> While courts initially tended to interpret the FAA narrowly,<sup>36</sup> by the 1980s the Supreme Court had completed a total reverse, declaring that the FAA manifests “a liberal federal policy favoring arbitration.”<sup>37</sup> A similar trend towards an increased

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as amended at 9 U.S.C. §§ 1–16 (2012)).

31. Wolfe, *supra* note 23, at 432 (“The first permanent arbitration board was established by the New York Chamber of Commerce in 1768, and the securities industry had included an arbitration clause in its constitution by 1817.”).

32. See, e.g., *Tobey v. Cty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065) (“[A]rbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses . . . They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is *rusticum iudicium*.” (emphasis added)).

33. Grossman, *supra* note 4, at 172 (“Early courts believed arbitration usurped their jurisdiction and viewed arbitration as a threat because ‘ordinary citizens . . . [made] their own law and disregard[ed] the judicial process.’” (alterations in original) (quoting Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996))); see, e.g., *Tobey*, 23 F. Cas. at 1320–21 (questioning whether arbitral “tribunals possess adequate means of giving redress” and stating that arbitration “close[d] . . . the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs”).

34. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (describing the “unmistakably clear congressional purpose that . . . arbitration . . . be speedy and not subject to delay and obstruction”).

35. 9 U.S.C. §§ 2, 10.

36. See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (narrowly construing the types of contracts covered under sections two and three of the FAA); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (holding that controversies arising under the Securities Act of 1933 are not arbitrable), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

37. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). The Court further stressed that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.* at 24–25. The Court continued to expand the scope of the FAA throughout the 1980s. See, e.g., *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (stating that the “preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that

comfort with arbitration is generally observable at the state level as well, beginning with the Uniform Arbitration Act of 1955 and culminating more recently in the drafting of the Revised Uniform Arbitration Act (RUAA) in 2000.<sup>38</sup>

The doctrinal foundation of the FAA is contract law. The FAA treats arbitration agreements like standard contracts, to be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>39</sup> Consequently, when a party seeks to avoid arbitration, a reviewing court’s first order of business is to apply conventional contract principles in determining if the challenged agreement is valid.<sup>40</sup> If a court determines that the agreement is valid, it must compel the parties into arbitration provided that no standard contract law defense—unconscionability, adhesion, etc.—applies.<sup>41</sup>

Once arbitration is complete and a final award is rendered, either party may petition a court to vacate or enforce the award.<sup>42</sup> The FAA provides four narrow statutory grounds for vacatur: (1) “the award was procured by corruption, fraud, or undue means”; (2) the arbitrators were evidently

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[courts] rigorously enforce agreements to arbitrate”); *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) (holding that in any cases involving interstate commerce, the FAA preempts state statutes seeking to limit the scope of arbitration); *see also* Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 532–34 (2014).

38. ARBITRATION ACT (UNIF. LAW COMM’N 2000); UNIF. LAW COMM’N, [http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000)) (last visited June 27, 2017); *see also* Nicholas Walter, Note, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 518 (2012); Wolfe, *supra* note 23, at 442.

39. 9 U.S.C. § 2; *see Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

40. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985) (explaining that “the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute,” which, in turn, requires a court to “remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract’”).

41. *See, e.g., Broemmer v. Abortion Servs. of Phx., Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992) (en banc) (finding an arbitration clause in an adhesion contract unenforceable); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) (“Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement . . .”), *overruled by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). For an argument that courts should more robustly apply the unconscionability doctrine to religious arbitral awards specifically, *see Helfand, Multiculturalism*, *supra* note 4, at 1294–1303.

42. 9 U.S.C. § 10(a).

partial or corrupt; (3) the arbitrators were guilty of misconduct, for example, by refusing to postpone a hearing upon sufficient cause shown or in refusing to consider material evidence or testimony, or “any other misbehavior by which the rights of any party have been prejudiced”; or (4) the arbitrators exceeded or “imperfectly executed” their powers such that no “mutual, final, and definite award” was made.<sup>43</sup>

In addition to these four statutory grounds, two additional court-made grounds for vacatur have developed over time.<sup>44</sup> First, courts borrow the general doctrine that a contract violative of public policy may not be enforced and apply it to arbitral awards, vacating those that are contrary to clearly defined public policy.<sup>45</sup> The Supreme Court has characterized the function of the public policy grounds for vacatur as a means of protecting “the public’s interests in confining the scope of private agreements to which it is not a party” which would otherwise “go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.”<sup>46</sup> The public policy ground for vacatur is explored in greater depth below.<sup>47</sup>

The second extrastatutory ground for vacatur applies when arbitrators exhibit “manifest disregard” for applicable law.<sup>48</sup> Manifest disregard is a

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43. *Id.*

44. The Court’s more recent decision in *Hall Street Associates v. Mattel, Inc.* has called the nonstatutory grounds for vacatur into question by holding that the only acceptable grounds for vacatur are those articulated in the FAA. 552 U.S. 576, 578 (2008). Nevertheless, the bulk of ensuing lower court case law indicates that courts continue to apply public policy as a grounds for vacating arbitral awards. See Helfand, *Multiculturalism, supra* note 4, at 1256–57 and accompanying notes (assembling cases and making a persuasive argument that public policy is still a viable legal ground for vacating arbitral awards).

45. See, e.g., *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (defending the public policy for grounds for vacatur as a manifestation of “the more general doctrine, . . . that a court may refuse to enforce contracts that violate law or public policy”); *W.R. Grace & Co. v. Local Union 759, Int’l Union of the United Rubber, Cork, Linoleum, & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983) (“As with any contract, . . . a court may not enforce a[n] . . . agreement that is contrary to public policy.”).

46. *United Paperworkers Int’l Union, AFL-CIO*, 484 U.S. at 42; see also *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (explaining that the public policy doctrine helps the state protect its “obvious and legitimate interest[s]” along a number of fronts); Helfand, *Multiculturalism, supra* note 4, at 1254 (“[C]ourts typically employ public policy to protect third-party interests by requiring courts to void any agreement, including an arbitration agreement, in which a private party waives rights that are intended to protect the public generally.”).

47. See *infra* Part III.B.1.

48. There is also some question as to the impact of *Hall Street Associates* on manifest

somewhat slippery standard; no unanimity exists as to its precise contours. Courts are in agreement, however, that it means more than a simple misunderstanding or misapplication of law and “is something extreme and difficult to prove,”<sup>49</sup> although there is continued disagreement as to precisely what a party must show in order to do so.<sup>50</sup> Whatever its specific elements, manifest disregard applies only in those rare instances when a party can sufficiently prove an arbitrator failed to apply an agreed-upon doctrine that was on all fours with the issue at hand, and did so not out of simple ignorance or mere error.<sup>51</sup>

Arbitration takes many forms; explicating them all is unnecessary here. For present purposes, two things will be necessary to remember going forward. First, arbitration gives parties extraordinary freedom to mold adjudication to their specific needs by allowing them to manipulate choice

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disregard as a grounds for vacatur. *See supra* note 44. Circuits are split on the issue. *See Coffee Beanery, Ltd. v. WW, LLC*, 300 F. App'x 415, 418 (6th Cir. 2008) (holding that courts may vacate arbitral awards if the awards are “found to be in manifest disregard of the law”); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93–95 (2d Cir. 2008) (describing the manifest disregard standard), *rev'd and remanded by* 559 U.S. 662 (2010). *But see* *Citigroup Glob. Mkts. Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (holding that manifest disregard no longer applies as “a basis for vacating awards under the FAA” after *Hall Street Associates*); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008). The Supreme Court has not clarified the matter. *Stolt-Nielsen SA*, 559 U.S. at 672 n.3 (“We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street . . .*”). There is good reason to view manifest disregard as surviving *Hall Street Associates*, by viewing it as a logical extension of the FAA’s fourth statutory ground for vacatur—namely, that arbitrators exceeded their authority. *See Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (quoting *Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 997 (9th Cir. 2003)) (holding that manifest disregard falls within the statutory grounds for vacatur when “the arbitrators exceeded their powers”).

49. Wolfe, *supra* note 23, at 444.

50. The Second Circuit, for example, has held that the challenging party must establish “both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.” *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000) (internal quotations and alterations omitted) (quoting *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997)), *overruled by* *Doscher v. Sea Port Sec., LLC*, 832 F.3d 372 (2d Cir. 2016). The Seventh Circuit, by contrast, has explained that manifest disregard “refers to either an arbitration award that requires the parties to violate the law or an award that does not adhere to the legal principles specified by contract.” Wolfe, *supra* note 23, at 444–45 (describing *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580–81 (7th Cir. 2001)).

51. For more on the manifest disregard standard as applied to religious arbitration, see Helfand, *Between Law and Religion*, *supra* note 23, at 155; *infra* Part III.B.

of law provisions, discovery limitations, venue and jurisdiction, rules of evidence, and other rules of procedure.<sup>52</sup> Second, interaction between arbitration and civil courts generally takes place at two distinct stages. Parties can ask courts to review an arbitration agreement, applying standard contract law to determine if it is valid and enforceable.<sup>53</sup> Parties can also ask courts to review arbitral awards, although substantive review is severely circumscribed by the six narrow grounds listed above, as well as by certain First Amendment limitations discussed below.<sup>54</sup>

### B. *Religious Arbitration—How It Works*

Religious arbitration has existed in the United States in one form or another since the Colonial Era.<sup>55</sup> Today, a variety of religious communities in the United States use religious arbitration to adjudicate many different kinds of disputes.<sup>56</sup> Faith-based tribunals decide issues of ecclesiastical management and doctrine, as well as many otherwise secular legal disputes including family law, real estate, contracts, and others.<sup>57</sup> Throughout, the defining feature of religious arbitration is that tribunals apply emphatically religious legal principles in reaching a decision.<sup>58</sup> There are many religious arbitral tribunals in the United States representing different faiths,<sup>59</sup> and the number of disputes brought before religious tribunals in the United States is

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52. *ITT Educ. Servs. Inc. v. Arce*, 533 F.3d 342, 346 (5th Cir. 2008) (“[P]rocedural requirements—such as adopting the rules of an arbitration association, choice of law provisions, confidentiality requirements, and rules governing discovery—can be part of an arbitration clause.”).

53. *See supra* Part III.A.

54. *See infra* Part III.B.

55. Walter, *supra* note 38, at 510–14 (noting that “religious arbitration flourished in colonial and early independent North America.”).

56. *Id.* at 516–27; Helfand, *Multiculturalism*, *supra* note 4, at 1243–52; Baker, *supra* note 4, at 164–71; Grossman, *supra* note 4, at 177–82; Shippee, *supra* note 3, at 237; Wolfe, *supra* note 23, at 436–42.

57. For a sampling of the variety of cases encountered by faith-based tribunals, see generally *THE JOURNAL OF THE BETH DIN OF AMERICA* (Yaacov Feit & Shlomo Weissmann eds., 2012) (containing published opinions from one of the most sophisticated U.S. religious arbitral houses).

58. “While the exact form of a religious tribunal defies description due to the variety spawned in the United States alone, there is one constant feature: Substantive and procedural rights of parties are derived from religious doctrine as opposed to secular law.” Baker, *supra* note 4, at 165.

59. *See* *THE JOURNAL OF THE BETH DIN OF AMERICA*, *supra* note 57, at 9–10.

steadily increasing.<sup>60</sup>

It is worth noting here that this Article focuses primarily on Jewish religious arbitration. This is not because the analysis does not apply to religious arbitration in other faiths, but rather because Jewish arbitration is perhaps the best developed and most accessible form of faith-based arbitration in the United States.<sup>61</sup> The case law is ample, and the policies and procedures of the most sophisticated Jewish arbitral houses are readily available, which makes scholarly analysis more effective.<sup>62</sup> But the conclusions drawn throughout are applicable to the ever-growing number of faith-based tribunals applying Christian, Muslim, and other religious laws as well.<sup>63</sup>

When it comes to Jewish religious arbitration, parties normally enter into religious arbitration agreements at one of two points. First, they can agree to arbitrate before any conflict arises.<sup>64</sup> This option is most often used in the context of religious prenuptial agreements such as the Jewish *ketubah*.<sup>65</sup> Second, and more common in commercial contexts, parties can

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60. Helfand, *Multiculturalism*, *supra* note 4, at 1248–49 (noting that, over the last decade, “the number of civil cases submitted for adjudication before the Beth Din of America . . . has nearly doubled”); Shippee, *supra* note 3, at 238 (“[T]raditional, faith-based alternatives to the mainstream legal system are alive and well, and, in many ways, busier and more influential than ever.”).

61. Michael J. Broyde, *Multicultural ADR and Family Law: A Brief Introduction to the Complexities of Religious Arbitration*, 17 CARDOZO J. CONFLICT RESOL. 793, 803 (2016) [hereinafter Broyde, *ADR*] (noting that “Judaism has been a trailblazer in the area of religious arbitration in the United States”); Baker, *supra* note 4, at 166 (“In the United States, religious arbitration is most commonly used by Orthodox Jewish communities.”).

62. For example, this Article references the Beth Din of America’s Rules and Procedures. *See infra* note 66 and accompanying text.

63. For a survey of how different religions employ faith-based arbitration in America, see Broyde, *ADR*, *supra* note 61, at 802–10; Helfand, *Multiculturalism*, *supra* note 4, at 1243–52; Baker, *supra* note 4, at 165–71.

64. Baker, *supra* note 4, at 167.

65. *See* Evan M. Lowry, Note, *Where Angels Fear to Tread: Islamic Arbitration in Probate and Family Law*, 46 SUFFOLK U. L. REV. 159, 164 (2013). For more on the form and history of the *ketubah* generally, see Ben-Zion Schereschewsky et al., *Ketubbah*, in 12 ENCYCLOPAEDIA JUDAICA 93–97 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007), [http://go.galegroup.com/ps/pdfViewer?docId=GALE%7CCX2587511073&userGroupName=drake\\_main&inPS=true&contentSegment=&prodId=GVRL&isETOC=true&accesslevel=FULLTEXT&c2c=true#content](http://go.galegroup.com/ps/pdfViewer?docId=GALE%7CCX2587511073&userGroupName=drake_main&inPS=true&contentSegment=&prodId=GVRL&isETOC=true&accesslevel=FULLTEXT&c2c=true#content). For more on how religious arbitration impacts religious prenuptial agreements, see generally Susan Metzger Weiss, *Sign at Your Own Risk: The “RCA” Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement*, 6 CARDOZO WOMEN’S L.J. 49 (1999).

agree to bring an already existing dispute before the religious tribunal (in Hebrew, *beth din*).<sup>66</sup> In the case of the Beth Din of America (BDA), perhaps the most sophisticated religious arbitral house in the United States,<sup>67</sup> a party seeking to arbitrate may attempt to compel a recalcitrant party into a religious arbitration agreement by imploring the BDA to first order arbitration and, should the second party refuse, to issue a *siruv*, or religious edict of condemnation.<sup>68</sup> The *siruv* is discussed in greater depth below.<sup>69</sup>

Once parties agree to arbitrate, their dispute goes before a faith-based tribunal.<sup>70</sup> Some religious arbitrators function more like mediators than judges.<sup>71</sup> Others attempt to mimic the civil court environment, but only in a rudimentary fashion.<sup>72</sup> Some religious arbitral houses are quite sophisticated, however, publishing comprehensive rules of evidence and complex rules of procedure.<sup>73</sup> While these rules and procedures may vary a great deal as to how to approach a given dispute, it is ultimately religious law, as interpreted by the arbitrators, that governs the proceedings.<sup>74</sup> As an illustration, the BDA provides that, “[i]n situations where the parties to a dispute explicitly adopt a ‘choice of law’ clause . . . the Beth Din will accept such a choice of law clause as . . . governing the decision of the panel *to the fullest extent permitted by Jewish Law*.”<sup>75</sup> Thus, before the BDA, it is Jewish law that prevails, even in cases where the parties express an interest in

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66. Baker, *supra* note 4, at 167. The Beth Din of America’s rules in fact provide a mechanism for a party to a dispute to attempt to compel its opposition into religious arbitration, on pain of a *siruv*. Also spelled “seruv” or “sirov.” BETH DIN OF AMERICA: RULES AND PROCEDURES, § 2(b)–(j) (2013) [hereinafter BDA RULES & PROC.], <http://s589827416.onlinehome.us/wp-content/uploads/2015/07/Rules.pdf>.

67. Baker, *supra* note 4, at 166 (“The BDA is the most formalized and procedurally rigorous example of . . . religious arbitration . . .”).

68. *Id.* at 159–64.

69. *See infra* Part III.A.

70. For a useful survey of various religious arbitration mechanisms in the United States, see Broyde, *ADR*, *supra* note 61, at 800–10; Grossman, *supra* note 4, at 177–82.

71. Shippee, *supra* note 3, at 249–50.

72. *Id.* at 253. For an extended examination of the implications of religious arbitral procedural choices, see generally Broyde, *Model*, *supra* note 27.

73. The BDA is a good example. It provides a comprehensive set of rules, as well as forms and templates for parties. BDA RULES & PROC., *supra* note 66.

74. Helfand, *Multiculturalism*, *supra* note 4, at 1245–46 (“Religious arbitration courts are unique because, rather than merely adjudicating claims based on an arbitrator’s understanding of U.S. law and principles of equity, they render decisions based upon a selected body of religious law.”).

75. BDA RULES & PROC., *supra* note 66, § 3(d) (emphasis added).

privileging some other source of law.<sup>76</sup>

Religious law may also shape the composition of the tribunal itself. Faith-based tribunals often consist of clergy or lay leaders of the religious community who, while likely knowledgeable in the applicable religious law, may be relative novices when it comes to U.S. jurisprudence.<sup>77</sup> In some instances, religious legal requirements to serve as an arbitrator may be in direct tension with traditional U.S. conceptions of fundamental fairness and due process.<sup>78</sup> In certain communities, for example, women are categorically prohibited from serving on religious tribunals.<sup>79</sup>

### C. *Compelling Arbitration and Enforcing Awards*

Before turning to a more detailed account of the relationship between courts and religious tribunals, it will be helpful to provide a brief overview of the doctrinal scheme governing civil enforcement of religious arbitral agreements and awards.

When a party seeks to compel arbitration pursuant to a religious arbitration agreement in civil court, courts rely on the doctrine of “neutral principles” to avoid any perceived First Amendment issues.<sup>80</sup> The doctrine of neutral principles is the focus of Part III below; it suffices for now simply to note that courts consider the determination of an agreement’s validity as

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76. See *id.* In practice, BDA arbitrators do not always carefully abide by these rules. See discussion of industry custom and the BDA *infra* Part IV.A.1.

77. See Ginnine Fried, Note, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 634 (2004) (“One heralded benefit of arbitration is that an arbitrator can be selected based upon his specialized knowledge in a subject area, and can accordingly make an educated determination of the dispute. In *beth din* proceedings, the specialized knowledge possessed by the arbitrator is knowledge of [Jewish law].”). For a discussion of the benefits of arbitrators who are fluent in both religious and secular law, see Broyde, *Model*, *supra* note 27, at 125–33.

78. See Walter, *supra* note 38, at 543.

79. See *infra* Part V.

80. See *Jones v. Wolf*, 443 U.S. 595, 602 (1979); see, e.g., *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) (“[B]y employing neutral principles, courts can review decision of religious bodies within permissible constitutional boundaries.”); *Garcia v. Church of Scientology Flag Serv. Org.*, No. 8:13-cv-220-T-27TBM, 2015 WL 10844160, at \*4 (M.D. Fla. Mar. 13, 2015) (quoting *Jones*, 443 U.S. at 602) (“[C]ivil courts have jurisdiction to resolve disputes involving religious organizations so long as ‘neutral principles of law’ are applied and the judicial decision is not based on ‘consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.’”).

implicating no expressly religious principles or issues.<sup>81</sup> That is, courts generally view the question as to whether the agreement is valid as being dependent only on the application of standard contract law principles—entirely independent of religious law.<sup>82</sup>

Once religious arbitration is complete, an award is rendered.<sup>83</sup> If the losing party does not wish to comply, then either the losing party may go to court to seek vacatur, or the winning party may go to seek enforcement.<sup>84</sup> As noted above, the grounds for vacatur are narrow, and courts are generally reluctant to vacate.<sup>85</sup> This is especially true in the religious arbitration context, because courts are sensitive to First Amendment concerns that might arise out of any attempt to engage with the religious principles underlying faith-based awards.<sup>86</sup> In practice, this means courts are exceedingly hesitant to review religious arbitration awards for substance.<sup>87</sup> Combined, the liberal enforcement of religious arbitration agreements and hesitance to review the resulting awards leads to a dynamic of significant empowerment for faith-based tribunals.<sup>88</sup>

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81. See *infra* Part III.A; see, e.g., *Encore Prods., Inc.*, 53 F. Supp. 2d at 1112 (citations omitted) (“A court can, and should, apply neutral principals of law to determine disputed questions that do not implicate religious doctrine.”); *Elmora Hebrew Ctr. v. Fishman*, 593 A.2d 725, 729–30 (N.J. 1991) (citations omitted) (“[A] court may, where appropriate, apply neutral principles of law to determine disputed questions that do not implicate religious doctrine.”); *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197, 204 (N.J. Super. Ct. App. Div. 2009) (citations omitted) (“Neutral principles ‘are wholly secular legal rules whose application to religious parties or disputes does not entail theological or doctrinal evaluations.’”).

82. See, e.g., *Encore Prods., Inc.*, 53 F. Supp. 2d at 1112 (“District courts have the power to enforce secular contract rights, despite the fact that one of the contracting parties may base their rights on religious affiliations.”).

83. Baker, *supra* note 4, at 169.

84. *Id.* at 162.

85. See *supra* Part III.A.

86. Grossman, *supra* note 4, at 198 (noting that, because religious arbitration agreements “are formed under religious law, which dictates arbitrator conduct and procedure . . . review can thus require inquiry into religious law to which neutral principles may not apply. In that scenario, courts may refuse review of the question altogether . . .”).

87. See, e.g., *Elmora Hebrew Ctr. v. Fishman*, 593 A.2d 725, 730 (N.J. 1991) (“[C]ivil adjudications by deference to authoritative decisions by church officials . . . must always be circumscribed carefully to avoid courts’ incursions into religious questions that would be impermissible under the first amendment.”).

88. For more on this dynamic, see *supra* Part III.

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### III. THE FLAWED STATUS QUO: RETREAT TO CATEGORIES

Contrary to how it is often described in scholarly literature, the relationship between religious arbitration and the U.S. legal system can be two-directional.<sup>89</sup> In their interaction, courts and faith-based tribunals can act as legal counterparts through which religious communities and statist law influence one another.<sup>90</sup> It is possible, therefore, to evaluate the risks and benefits of religious arbitration from either point of view. In practice, however, when civil courts encounter religious arbitration, they do not generally engage in any substantive analysis or assessment. Instead, courts often approach faith-based arbitration by refusing to acknowledge anything unique about it.<sup>91</sup> In the language they use and legal principles they apply, judges are motivated to secularize religious arbitration, so that it can fit more easily into preexisting legal categories.

But this categorical approach creates at least two blind spots in the case law. First, because courts generally refuse to engage in any substantive evaluation of religious arbitration as a legal phenomenon, courts are generally incapable of understanding what religious arbitration means for religious communities.<sup>92</sup> This inability to empathize with religious practitioners is not just unfortunate in an emotional or social sense; it also results in practical misapplication of legal doctrine.<sup>93</sup>

Lack of empathy is not the essence of this Article's critique, however. The focus will be on a different blind spot. As explained below, courts in their interactions with religious arbitration take one of two approaches.<sup>94</sup> First, they attempt to denude faith-based agreements and awards of any emphatically religious features so that secular legal doctrines might be more comfortably applied.<sup>95</sup> Second, where the religious elements of the matter

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89. See *supra* Part II; *infra* Parts IV.A, IV.B.

90. For an example of the U.S. legal system influencing religious arbitral procedure, see *infra* text accompanying note 190; see also, Fried, *supra* note 77, at 644–47.

91. See, e.g., *Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (N.Y. 1983) (describing a religious arbitration agreement as being effectively identical to “any other civil contract”).

92. For more on the sometimes vital importance of religious arbitration for religious communities themselves, see Helfand, *Debtor's Soul*, *supra* note 3, at 163–71; Fried, *supra* note 77, at 635–41.

93. See *supra* Part III.A.

94. See *supra* Parts IIIA, III.B.

95. See, e.g., *Garcia v. Church of Scientology Flag Serv. Org.*, No. 8:13-cv-220-T-27TBM, 2015 WL 10844160, at \*3–5 (M.D. Fla. Mar. 13, 2015) (describing how religious arbitration agreements can be analyzed using general contract principles such as unconscionability and

are unavoidable, the categorical impulse compels courts to use First Amendment principles as a means of abdicating responsibility for the substantive and procedural review of religious arbitral awards altogether.<sup>96</sup> Combined, these doctrinal mechanisms leave no way to evaluate the legal insights generated by application of religious law in the changing present. Thus, by adopting the categorical approach, the U.S. legal system robs itself of one key benefit religious arbitration might be able to offer.

Before setting out to critique the categorical approach, however, it is necessary first to encounter it on its own terms. By examining the doctrines and legal principles at play in depth, it will be possible first to establish the status quo as a descriptive matter and also to illuminate certain unique and important characteristics of religious arbitration. The following analysis is divided chronologically: it begins by addressing the categorical approach as it is applied to religious arbitration *agreements*, and then examines it as applied to religious arbitration *awards*.

#### *A. Neutral Principles? Enforcing Religious Arbitration Agreements*

Courts are regularly asked to enforce or vacate agreements to arbitrate before faith-based tribunals. Challenges to such agreements can be generally grouped into one of two categories. A party seeking to vacate an agreement either uses conventional contract principles—fraud, duress, unconscionability, etc.—to argue that the agreement was invalid at inception,<sup>97</sup> or argues that enforcing the agreement and compelling religious arbitration would violate the First Amendment.<sup>98</sup> A party may also make both arguments.<sup>99</sup>

Whatever the underlying dispute, compelling a party to arbitrate before a faith-based tribunal conceptually implicates at least three distinct First Amendment concerns. First, by compelling a party who seeks to adjudicate a dispute in court to instead arbitrate before a faith-based tribunal applying religious law—albeit after having agreed to do so at some

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duress).

96. *See, e.g., id.* at \*11 (discussing how substantive evaluation of religious arbitrators' neutrality pursuant to church doctrine is not permitted by the First Amendment).

97. *See, e.g.,* *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1108 (D. Colo. 1999) (demonstrating a party to a religious arbitration agreement challenging "the existence of a valid arbitration clause").

98. *See, e.g.,* *Elmora Hebrew Ctr. v. Fishman*, 593 A.2d 725, 728 (N.J. 1991) (arguing a court's referral of a case to a religious tribunal violated a party's free exercise rights).

99. *See, e.g., Garcia*, 2015 WL 10844160, at \*4–6.

point—a court is effectively forcing the party to participate in a religious act against its will. In so doing, the court may violate the party’s First Amendment rights under the Free Exercise Clause.<sup>100</sup> Second, in compelling parties to arbitrate before a religious tribunal, a court may be perceived as tacitly endorsing that tribunal as a legitimate arbiter of justice. Lending the imprimatur of the state to an emphatically religious institution in this way may fail Justice Sandra Day O’Connor’s “endorsement test,” which asks whether a government act impermissibly endorses or conveys disapproval of religious faith in violation of the Establishment Clause.<sup>101</sup> Finally, that same tacit endorsement may present a different Establishment Clause problem under *Lemon v. Kurtzman*, in that it can be conceived of as excessive entanglement by the government with religious institutions.<sup>102</sup>

These three First Amendment issues are distinct, in that they each arise out of different jurisprudential histories and implicate somewhat different doctrinal analyses. But all three are ultimately sourced in the same discomfort: that in enforcing or voiding religious arbitration agreements, courts may be opining in some way on the validity of religious choices. That is, all three manifest constitutional concern with government actors making any subjective evaluation of the legitimacy of religious faith and commitments.<sup>103</sup>

The doctrine of neutral principles is the U.S. judiciary’s approach to mitigating these concerns.<sup>104</sup> Neutral principles include those “secular legal rules whose application to religious parties or disputes do not entail theological or religious evaluations.”<sup>105</sup> The doctrine helps civil courts avoid First Amendment concerns by stripping religious legal issues of their

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100. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

101. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); Wolfe, *supra* note 23, at 446; see U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

102. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)) (explaining that the Establishment Clause prohibits “an excessive government entanglement with religion”).

103. See *Garcia*, 2015 WL 10844160, at \*11 (“[T]he First Amendment prohibits consideration of . . . religious doctrine, . . . faith, . . . ecclesiastical rule, custom, or law by the court.”).

104. *Id.* at \*4 (explaining that applying “neutral principles of law” ensures that “the judicial decision is not based on consideration of doctrinal matters” in violation of the First Amendment) (quoting *Jones v. Wolf*, 443 U.S. 595, 602 (1979)).

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

religiosity, allowing courts to apply conventional legal analysis.<sup>106</sup> Indeed, the Supreme Court lauded the doctrine of neutral principles' ability to secularize religiously infused legal questions in its discussion in *Jones v. Wolf*.<sup>107</sup> As the Court explained, "The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. . . . [and] thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."<sup>108</sup>

As applied to religious arbitration, the doctrine stands for the notion that courts may apply "well-established, neutral principles of contract law . . . to determine whether . . . [there] is an enforceable arbitration agreement and, if so, whether the parties' dispute falls within its scope."<sup>109</sup> Courts invoke the doctrine of neutral principles as a means of avoiding the religious character of faith-based arbitration agreements, enabling them to apply run-of-the-mill contract principles.<sup>110</sup> The doctrine of neutral principles thus embodies the categorical approach to religious law: it allows courts to place religious legal disputes into familiar and well-established secular legal categories. This doctrine has proven a powerful tool in practice—courts regularly use the doctrine to defend their jurisdiction to decide the validity of religious arbitral agreements in the face of First Amendment challenges.<sup>111</sup>

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106. Elizabeth Ehrlich, *Taking the Religion Out of Church Property Disputes*, 46 B.C. L. REV. 1069, 1075 (2005) (explaining how neutral principles of law effectively strip religiosity by "allow[ing] courts to apply secular legal theories, such as property or contract law, to disputes involving religious organizations without violating the First Amendment"); Helfand, *Debtor's Soul*, *supra* note 3, at 159–60 ("[S]ome courts embrace adjudication of disputes implicating religious commercial conduct by pushing the religious undercurrents of the case to the margins and focusing instead on the familiar, secular features of the case. By so doing, courts can enforce religious agreements and resolve religious disputes under the umbrella of the neutral-principles doctrine . . .").

107. *Jones*, 443 U.S. at 603.

108. *Id.*

109. *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 346 (D.C. 2005).

110. *Id.* at 354.

111. *See, e.g., id.*; *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999); *Odatalla v. Odatalla*, 810 A.2d 93, 95–96 (N.J. Super. Ct. Ch. Div. 2002); *but see Aflalo v. Aflalo*, 685 A.2d 523, 541 (N.J. Super. Ct. Ch. Div. 1996) (refusing to enforce an agreement to arbitrate a religious divorce dispute before a *beth din* because doing so would "inappropriately entangle[] the civil court in the wife's attempts to obtain a religious divorce").

### 1. *The Doctrine of Neutral Principles Critiqued*

The effectiveness of the doctrinal mechanism of neutral principles is necessarily reliant on the presumption that, properly denuded of its religious overtones, an agreement to arbitrate before a faith-based tribunal is just like any other contract.<sup>112</sup> By challenging this presumption, the inherent weaknesses of the categorical approach in the faith-based arbitration context become apparent. Religious arbitration agreements are *not* conventional contracts, and their unique qualities present special analytical challenges. The application of ostensibly neutral principles of conventional contract law to religious arbitration agreements despite these distinct qualities can produce faulty legal reasoning.<sup>113</sup> Furthermore, by refusing to acknowledge the special quality of religious arbitration as an emphatically religious legal space, courts blind themselves to the substantive impact religious arbitration can have on the U.S. legal system itself.<sup>114</sup>

The following discussion presents two ways in which applying the doctrine of neutral principles to religious arbitration agreements can lead to mistaken conclusions. Both underscore different ways in which agreements to arbitrate before a religious tribunal present legal and analytical challenges that are necessarily distinct from those presented in other conventional contract contexts. These examples show why and how the attempt to make religious arbitration agreements fit into standard legal categories is doomed to fail.

The first problem arises from the fact that faith is not immutable—one's relationship to God and one's religious community can change drastically over time. A party may agree to arbitrate future disputes before a faith-based tribunal at one point and then, decades later, when a conflict does arise, seek to avoid religious arbitration and adjudicate the dispute before a civil court.<sup>115</sup> This poses no problem to a court applying the doctrine

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112. This is so because, were it not the case that the religious contract in question is otherwise identical to a conventional contract, the argument from neutral principles would have no content—there would be no neutral principles to apply. *See Jones*, 443 U.S. at 603–04.

113. For argument on the pros, cons, and First Amendment concerns implicated in enforcing faith-based arbitration agreements and awards, particularly in the context of marital law, see Julia Halloran McLaughlin, *Taking Religion Out of Civil Divorce*, 65 RUTGERS L. REV. 395, 426–43 (2013).

114. *See Helfand, Multiculturalism*, *supra* note 4, at 1245–47.

115. A good example is the plaintiff in *Garcia v. Church of Scientology Flag Serv. Org.*, No. 8:13-cv-220-T-27TBM, 2015 WL 10844160, at \*1–2 (M.D. Fla. Mar. 13, 2015), a long-time

of neutral principles: a party who enters a contract for future performance is generally bound to honor that commitment.<sup>116</sup> Indeed, in a conventional contract context, requiring parties to fulfill the promises they made in the past is a foundational purpose of the law, manifesting values of efficiency, truthfulness, and accountability.<sup>117</sup> In the special case of a contract to bring future disputes before a faith-based tribunal, however, enforcing the initial promise requires holding a party accountable for an explicitly religious choice that may no longer reflect their current religious beliefs. In this way, the doctrine of neutral principles may not effectively moot certain Free Exercise concerns in the religious arbitration context.<sup>118</sup>

The religious prenuptial agreement (*ketubah*) customarily entered into by the groom's and bride's families at many Jewish weddings furnishes a useful example.<sup>119</sup> The traditional *ketubah* language, which dates back millennia, describes the obligations the husband and wife promise to fulfill for one another during the life of the marriage and contractually obligates the husband to provide his (ex)wife with various forms of financial support in the event of a divorce.<sup>120</sup> Recently, it has become popular in certain Jewish circles to either include a religious arbitration clause in the *ketubah* or sign one in addition to the traditional prenuptial agreement.<sup>121</sup> These clauses are primarily intended as a means of mitigating the *agunah* problem.<sup>122</sup> An

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member of the church of scientology who left the church but was nevertheless compelled to arbitrate his claim that the church had defrauded him before a panel of church members.

116. See, e.g., U.C.C. § 2-609 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

117. At least some of these general aspirational goals necessarily underlie contract law, whichever "contract theory" one ascribes to. For a helpful summary of various contract theories, see Daniel P. O'Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 149–76 (2012).

118. For a particularly unfortunate case of this dynamic playing out, see *Garcia*, 2015 WL 10844160, at \*4.

119. See Schereschewsky et al., *supra* note 65; Lara Traum, Note, *Involved, Empowered and Inspired: How Mediating Halakhic Prenuptial Agreements Honors Jewish and American Law and Builds Happy Families*, 17 CARDOZO J. CONFLICT RESOL. 179, 182 (2015).

120. Schereschewsky et al., *supra* note 65 (describing a *ketubah* as a "marriage contract, containing among other things the settlement on the wife of a certain amount payable at her husband's death or on her being divorced").

121. Traum, *supra* note 119, at 201–05.

122. See Traum, *supra* note 119, at 202–04; Ben-Zion Schereschewsky & Menachem Elon, *Agunah*, in 1 ENCYCLOPAEDIA JUDAICA 510 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007), [http://go.galegroup.com/ps/pdfViewer?docId=GALE%7CCX2587500557&userGroupName=drakeu\\_main&inPS=true&contentSegment=&prodId=GVRL&isETOC=true&accesslevel=FULLTEXT&c2c=true#content](http://go.galegroup.com/ps/pdfViewer?docId=GALE%7CCX2587500557&userGroupName=drakeu_main&inPS=true&contentSegment=&prodId=GVRL&isETOC=true&accesslevel=FULLTEXT&c2c=true#content) (defining *agunah*).

*agunah*, or “chained woman,” is a woman whose husband refuses to grant her a Jewish religious bill of divorce (*get*).<sup>123</sup> In traditional Jewish law, only the husband has the legal right to dissolve a marriage by granting a *get*.<sup>124</sup> A woman who does not receive a *get* is not considered divorced as a matter of religious law and, therefore, cannot remarry in the faith.<sup>125</sup> The religious arbitration clause allows a woman seeking a *get* to compel her recalcitrant husband before the *beth din*, as stipulated in the *ketubah*, and the *beth din* may then render an arbitral award requiring him to provide the *get* or else pay her heavy fines.<sup>126</sup>

Given this background, consider the hypothetical case of a husband who, at the time of his wedding, is a devout Jew.<sup>127</sup> His bride is, as well. He agrees to include a religious arbitration clause in their *ketubah*, because he believes doing so manifests the religious Jewish values in which he believes. For him, it is emphatically a question of religious faith and law. Over time, the husband loses his faith in God and becomes a staunch atheist. He refuses to participate in religious ritual or to endorse religious faith in any way. He and his wife now get divorced. He signs all the civil legal paperwork without objection but refuses to give his wife a *get*, because he believes doing so would constitute an endorsement of religious authority in direct contravention of his current beliefs. His ex-wife under civil law, still a believer, seeks to compel religious arbitration before the *beth din* so that it might compel him to give her a *get* on pain of stiff financial penalties.<sup>128</sup>

A civil court encountering the religious arbitration agreement embedded in the *ketubah* would, employing the doctrine of neutral principles, strip away the religious context of the agreement and treat it as a

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123. *United States v. Epstein*, 91 F. Supp. 3d 573, 579 (D.N.J. 2015) (“A woman whose husband will not give her a *get* is known as an ‘*agunah*’ (‘*agunot*’ in plural), a chained woman who cannot remarry.” (citation omitted)).

124. Traum, *supra* note 119, at 185; Solomon Schechter & Julius H. Greenstone, *GET* (“*Bill of Divorce*”), JEWISH ENCYCLOPEDIA, [HTTP://WWW.JEWISHENCYCLOPEDIA.COM/articles/6643-get](http://www.jewishencyclopedia.com/articles/6643-get) (last visited Apr. 18, 2017).

125. Traum, *supra* note 119, at 186.

126. *Epstein*, 91 F. Supp. 3d at 579 (“If a husband refuses to give his wife a *get*, the wife may sue for divorce in a *beth din*, which may order the husband to issue the *get*. If the husband does not comply, he may be subjected to various penalties pressuring him into consenting to the divorce.” (citation omitted)).

127. For an actual case that parallels this hypothetical in important ways, see *Garcia v. Church of Scientology Flag Serv. Org.*, No. 8:13-cv-220-T-27TBM, 2015 WL 10844160 *passim* (M.D. Fla. Mar. 13, 2015).

128. See Traum, *supra* note 119, at 186.

conventional contract.<sup>129</sup> The court would likely compel arbitration; in practice, U.S. courts do generally enforce religious arbitration clauses in a *ketubah*.<sup>130</sup> But by compelling arbitration, a court acts as an arm of the state when it requires the husband to abide by an expressly religious choice that no longer comports with his current beliefs.<sup>131</sup> Can there be a more quintessential Free Exercise problem than an individual being compelled to participate in a religious rite that contravenes his beliefs?<sup>132</sup> Of course, the court might respond that it was the husband's choice to agree to the arbitration clause in the first place.<sup>133</sup> But that retort only further highlights the pitfalls of the categorical approach in the religious arbitration context because it ignores the simple fact that the choice to include the religious arbitration clause in the *ketubah* at the outset was itself *a religious choice*.<sup>134</sup> The doctrine of neutral principles simply cannot successfully denude the religious arbitration agreement of its religiosity without ignoring the very essence of the agreement.

Even accepting the doctrine of neutral principles on its face, it is still the case that religious arbitration agreements cannot be effectively analogized to conventional contracts without misapplying contract law itself.<sup>135</sup> Consider, for example, one of the most basic defenses against enforcement of a contract: duress.<sup>136</sup> A party who is forced to enter into a

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129. See, e.g., *Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (N.Y. 1983) (citing *Jones v. Wolf*, 443 U.S. 595, 602, 603 (1979)).

130. See, e.g., *id.*; cf. *Garcia*, 2015 WL 10844160, at \*12 (granting a motion to compel arbitration before a Church of Scientology arbitration panel to resolve fraud allegations brought by former member of the Scientology Church against subdivisions of the church).

131. See *Avitzur*, 446 N.E.2d at 138.

132. See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (2012)); *Parker v. Hurley*, 514 F.3d 87, 103 (1st Cir. 2008) ("[T]he government may not . . . compel affirmation of religious beliefs . . .").

133. See, e.g., *Aflalo v. Aflalo*, 685 A.2d 523, 531 (N.J. Super. Ct. Ch. Div. 1996) ("It may seem 'unfair' that [husband] may ultimately refuse to provide a 'get.' But the unfairness comes from [wife's] own sincerely-held religious beliefs. When she entered into the 'ketubah' she agreed to be obligated by the laws of Moses and Israel . . . . That was [her] choice and one which can hardly be remedied by this court." (footnote omitted)).

134. See *supra* note 118 and accompanying text.

135. For an additional example, see Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ON ARB. & MEDIATION 45 *passim* (2016).

136. "It is basic that duress in the execution of a contract renders the contract

contract against its will is entitled to void the contract at its discretion.<sup>137</sup> At common law, duress was construed narrowly.<sup>138</sup> Over time, however, duress has expanded to include not only physical coercion, but also certain forms of economic pressure.<sup>139</sup> In the context of religious arbitration, the mechanisms of coercion can take on somewhat more nuanced features. In certain religious communities, for example, the pressure to avoid civil courts and to adjudicate disputes before religious tribunals comes in the form of dire social consequences.<sup>140</sup>

The *siruv* is a good illustration. In some Jewish communities, if a party refuses to arbitrate a given dispute before the *beth din*, the *beth din* may issue a *siruv*.<sup>141</sup> A *siruv* is an official condemnation that may result in total social ostracization, exclusion from religious rites, and—most salient to the duress analysis—communal economic sanctions, including organized boycott.<sup>142</sup>

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voidable . . .” Lewis v. Gilchrist, 198 F. Supp. 239, 242 (N.D. Ala. 1961).

137. RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b (AM. LAW INST. 1981) (“Typical instances of voidable contracts are those . . . where the contract was induced by . . . duress . . .”).

138. “At the common law duress meant duress only of person, and nothing short of a reasonable apprehension of imminent danger to life, limb, or liberty sufficed as a basis for an action to recover money paid.” Ill. Merchs. Tr. Co. v. Harvey, 167 N.E. 69, 71 (Ill. 1929), *overruled on other grounds by* Kanter & Eisenberg v. Madison Assocs., 508 N.E.2d 1053 (Ill. 1987).

139. “The evolving common law . . . recognizes the expansion of the doctrine of duress, and acknowledges economic duress/business compulsion as a species of duress . . .” Centric Corp. v. Morrison-Knudsen Co., 731 P.2d 411, 415 (Okla. 1986) (footnote omitted); *see also* Annotation, *Doctrine of “Business Compulsion”*, 79 A.L.R. 655 *passim* (1932), Westlaw (assembling cases).

140. Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3042 (2015) [hereinafter Helfand, *Counter-Narrative*] (“Because of religious norms favoring religious dispute resolution within particular communities, a party’s refusal to arbitrate before a religious arbitration tribunal can entail social consequences.” (footnote omitted)); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration Family Law*, 9 THEORETICAL INQUIRIES L. 573, 588 (2008); Baker, *supra* note 4, at 178; Fried, *supra* note 77, at 638 (explaining that a Jewish party who attempts to go to civil court instead of before a *beth din* may be punished with excommunication (*cherem*), “one of the most severe punishments the *beth din* could impose”).

141. Fried, *supra* note 77, at 651–53.

142. Helfand, *Counter-Narrative*, *supra* note 140, at 3042; Helfand, *Debtor’s Soul*, *supra* note 3, at 169–70; Grossman, *supra* note 4, at 197–98; *see, e.g.*, Abdelhak v. Jewish Press Inc., 985 A.2d 197, 203 (N.J. Super. Ct. App. Div. 2009) (demonstrating how issuance of *siruv* led to boycott of physician’s practice); *In re Pachman*, No. 09-37475, 2010 WL 1489914, at \*1 (Bankr. S.D.N.Y. Apr. 14, 2010) (noting that *siruv* led to “ostracism by other members of the

Courts have been asked repeatedly to vacate religious arbitration agreements entered into under implied or express threat of *siruv*, but have refused to do so.<sup>143</sup> Courts generally decline to view the *siruv* as a form of duress, on the theory that the party ostensibly chose voluntarily to associate with the religious community in the first place.<sup>144</sup> The *siruv* would have no coercive power, so the argument goes, if the party did not freely choose to be a member of the religious community.<sup>145</sup> This argument reflects a deep ignorance of the pressures at play when it comes to an individual's place within a religious community.<sup>146</sup> A comprehensive analysis of those pressures is beyond the scope of this Article.<sup>147</sup> It suffices to note that any suggestion that continued membership in a religious community on which, in some cases, an individual's entire social, familial, and economic existence depends is a voluntary choice akin to signing a run-of-the-mill contract is suspect on its face.<sup>148</sup> That courts have effectively made precisely this argument in the *siruv* context highlights how the forced analogy between religious arbitration and conventional contract law leads to misapplication of contract law itself.

This Part has shown how courts use the categorical approach at the threshold stage, when they are asked to vacate or enforce religious arbitration agreements. At this first point of interaction with religious arbitration, the doctrine of neutral principles ostensibly allows courts to

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Jewish community”).

143. See, e.g., *Berg v. Berg*, 926 N.Y.S.2d 568, 570 (App. Div. 2011) (“The threat of a ‘siruv’ . . . cannot be deemed duress.”); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 494 (Sup. Ct. 1991) (explaining that threat of a *siruv* “may constitute pressure, . . . [but] cannot be said to constitute duress”); *Mikel v. Scharf*, 432 N.Y.S.2d 602, 606 (Sup. Ct. 1980) (“Undoubtedly, pressure was brought to bear to have them participate in the [religious arbitral proceeding], but pressure is not duress. Their decision to acquiesce to the rabbinical court’s urgings was made without the coercion that would be necessary for the agreement to be void.”).

144. See, e.g., *Berg*, 926 N.Y.S.2d at 570.

145. See *supra* note 118 and accompanying text.

146. *Baker*, *supra* note 4, at 188 (describing court’s reasoning in finding that a *siruv* is not duress as “the product of an incomplete understanding of the nature of a *siruv*, if not a meager understanding of religious identity more generally”).

147. For a more thorough investigation of the social pressures at play in religious communities surrounding marriage and divorce, see generally *Stone*, *supra* note 22.

148. *Helfand*, *Multiculturalism*, *supra* note 4, at 1286 (noting that the choice to proceed before a religious arbitral tribunal may not be “volitional in practice. This is particularly true of religious arbitration courts, which function not simply as adjudicatory institutions, but also as communal institutions. As a result, an individual’s decision to forgo arbitration in a religious court entails social and religious consequences.”); *Fried*, *supra* note 77, at 635–41 (discussing some social consequences within Jewish communities for bringing claims before secular courts); *Wolfe*, *supra* note 23, at 442.

overcome First Amendment concerns by stripping religious arbitration of its unique religiosity.<sup>149</sup> But this approach also leads courts astray in important ways. The next Part examines and critiques the judicial retreat to categories at the second stage of interaction with faith-based arbitration: reviewing religious arbitration awards.

### B. *Self-Imposed Ignorance: Judicial Review of Faith-Based Awards*

Courts are regularly asked to enforce or vacate awards rendered once faith-based arbitration is complete.<sup>150</sup> In employing the categorical approach at the award stage, courts generally do two things: (1) apply the well-established policy favoring arbitration awards to religious arbitration awards, putting a heavy thumb on the scale favoring enforcement over vacatur,<sup>151</sup> and (2) limit themselves to the narrow grounds for vacatur that apply to standard arbitral awards.<sup>152</sup>

The same First Amendment challenges that beset courts faced with religious arbitration agreements are present when reviewing faith-based awards, but with considerably more force. At the agreement stage, the doctrine of neutral principles operates by separating the contractual form from the religious substance, and then applying conventional rules to the formal elements of the agreement. But when it comes to religious arbitral awards, there can be no such separation.<sup>153</sup> By definition, religious tribunals apply religious procedure and substantive law when adjudicating disputes.<sup>154</sup> That is, both the *form* and *content* of a faith-based arbitral proceeding are informed by religious beliefs and values.<sup>155</sup> Consequently, faith-based

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149. See *supra* note 106 and accompanying text.

150. See, e.g., *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 727 (N.J. 1991); *Glauber v. Glauber*, 600 N.Y.S.2d 740, 740 (App. Div. 1993); *Snowwhite v. Ashkenazi*, No. 7671/11, 2012 WL 4477614, at \*1 (N.Y. Sup. Ct. 2012); *Rakozynski v. Rakoszynski*, 663 N.Y.S.2d 957, 958 (Sup. Ct. 1997); *In re Jacobovitz*, 295 N.Y.S.2d 527, 528 (Sup. Ct. 1968).

151. See, e.g., *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1108–09 (D. Colo. 1999) (noting the “strong federal policy favoring arbitration” and applying that policy to enforce a faith-based arbitration agreement).

152. See, e.g., *Elmora Hebrew Ctr.*, 593 A.2d at 731 (describing the “analogy” between religious arbitration and common law arbitration as “apt” and noting that “still viable grounds” for reviewing religious arbitration “parallel the extremely limited basis on which courts will review the results of conventional arbitrations”).

153. See Helfand, *Multiculturalism*, *supra* note 4, at 1245–47.

154. *Id.* at 1245–46.

155. For more on how religious arbitral procedure can be shaped by religious legal precepts, see Broyde, *Model*, *supra* note 27, at 123–25; Fried, *supra* note 77, at 635–41.

awards are necessarily manifestations of explicitly religious legal analysis in their entirety.<sup>156</sup> The doctrine of neutral principles is therefore impotent in the face of religious arbitral awards, because taking the religion out of a faith-based award leaves no remainder.

Stripped of their neutral principles armor, courts employing the categorical approach to faith-based awards have little choice but to abstain from any substantive review.<sup>157</sup> Substantive review of the procedure or reasoning underlying a faith-based award would almost certainly run afoul of the First Amendment, because it would: (1) require the court to make value judgments about expressly religious choices; and (2) require the parties to put on evidence supporting their respective interpretations of religious law. As one court put it when faced with a Jewish arbitration award, “we are prohibited under the First Amendment from interpreting any substantive or procedural Jewish law . . . . [T]he only [institution] authorized to explain the substance of Jewish law . . . was the Beth Din.”<sup>158</sup> Even review of the procedures used by the tribunal is generally off limits, because the “First Amendment prohibit[s] judicial review of [a religious tribunal’s] procedures and methodology.”<sup>159</sup> In practice, the obstacles to substantive review of faith-based awards have proven largely insurmountable.<sup>160</sup> Courts rarely even attempt to apply the conventional grounds for vacatur to

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156. Helfand, *Multiculturalism*, *supra* note 4, at 1245–47. Because a faith-based tribunal’s structure and the procedural requirements it imposes on parties are also shaped by religious precepts, this will be true even in cases where the tribunal applies nonreligious law (such as when the BDA rules require application of industry custom, see *infra* Part IV.A.1).

157. See *Garcia v. Church of Scientology Flag Serv. Org.*, No. 8:13-cv-220-T-27TBM, 2015 WL 10844160, at \*11 (M.D. Fla. Mar. 13, 2015); *Elmora Hebrew Ctr.*, 593 A.2d at 730 (noting that, when reviewing religious arbitration awards, “[T]here are many cases in which court intervention is simply inappropriate because judicial scrutiny cannot help but violate the first amendment.”).

158. *Lang v. Levi*, 16 A.3d 980, 991 (Md. Ct. Spec. App. 2011); see also *In re Va’ad Hakahol Deschunas Crown Heights*, No. 8548/11, 2013 WL 5878176, at \*9 (N.Y. Sup. Ct. Oct. 17, 2013) (holding that where BDA had confirmed a specific rabbi’s credentials, any substantive review “would infringe upon a religious community’s independence from secular control or manipulation”); *Nachum v. Ezagui*, No. 996/07, 2009 WL 2997904, at \*2 n.6 (N.Y. Sup. Ct. Sept. 21, 2009) (declining to engage in substantive review as it would constitute “an infringement upon a religious community’s independence from secular control or manipulation” (citations omitted)).

159. *New Eagle Inc. v. H.R. Neumann Assocs., Inc.*, No. 4694/04, 2004 WL 1609174, at \*1 (N.Y. Sup. Ct. July 1, 2004) (citing *Sieger v. Union of Orthodox Rabbis of the U.S. & Can., Inc.*, 1 A.D.3d 180, 181–82 (N.Y. App. Div. 2003)).

160. See Helfand, *Multiculturalism*, *supra* note 4, at 1245.

religious arbitral awards, choosing instead to forego any real review on First Amendment grounds.<sup>161</sup>

Leaving aside the categorical approach's impotence in the face of faith-based awards due to the unavailability of the doctrine of neutral principles, applying the conventional grounds for vacatur in practice reveals an additional mismatch between religious and conventional arbitration. Certain traditional grounds for vacatur are, as a structural matter, simply off limits in the religious arbitration context, because applying them would *necessarily* violate the First Amendment.<sup>162</sup> Consider, for example, the manifest disregard ground for vacatur.<sup>163</sup> A necessary logical assumption underlying manifest disregard is that a reviewing court will be competent and constitutionally permitted to assess the legal analysis employed by arbitrators, in order to determine whether they have disregarded applicable law.<sup>164</sup> In the special case of religious arbitration, however, reviewing courts are unlikely to be knowledgeable evaluators of religious legal doctrine or procedure.<sup>165</sup> Furthermore,

The court would have to determine what the religious law in question required before it could determine whether the arbitrators ignored that requirement. And determining what religious law requires as a matter of evidentiary law falls squarely under the "religious question doctrine"—that is, the constitutional prohibition against courts resolving claims that turn on disputes over religious doctrine or practice.<sup>166</sup>

Manifest disregard is thus inapplicable to religious arbitral awards, both because courts are not competent to determine deficiencies in an arbitrator's religious legal reasoning, and because substantive application of the doctrine would necessarily violate the First Amendment.<sup>167</sup>

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161. *Id.* at 1244–45. The most significant exceptions are cases in which courts apply the public policy grounds for vacatur. For more, see *infra*, Part III.B.1.

162. See *supra* Part III.B.1.

163. Manifest disregard is considered by some to be a judge-made supplement to the FAA's enumerated grounds for vacatur, and by others as simply an organic expansion of the statutory categories. This has been a recent topic of controversy after the Supreme Court's decision in *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008). See *supra* notes 44, 48 and accompanying text.

164. Helfand, *Between Law and Religion*, *supra* note 23, at 155.

165. See Wolfe, *supra* note 23, at 451.

166. Helfand, *Between Law and Religion*, *supra* note 23, at 155.

167. For more on the application of manifest disregard to religious arbitration, see *id.* at

In combination, the judiciary's willingness to liberally enforce religious arbitral agreements through application of the doctrine of neutral principles and its inability to substantively review faith-based awards without running into intractable constitutional challenges acts to strongly empower religious tribunals. The dynamic effectively imbues religious arbitration panels with the force of law, but undermines the traditional mechanisms of judicial review.<sup>168</sup> The categorical approach has another inimical consequence as well. Abstention at the awards stage means that courts are not able to access the special legal insights that are unique to religious legal thinking.<sup>169</sup> In other words, commitment to the categorical approach means courts cannot capture the possible utility of religious arbitration for the U.S. legal system as a whole—a utility that is generated precisely because religious arbitration does not fit into conventional legal categories.

There is, however, one doctrinal tool available to courts that, if used properly, could allow courts to break out of their shell at the awards stage and encounter religious arbitration within a substantive, values-oriented analytical mode. That tool is the public policy grounds for vacatur.

### *1. Public Policy: An Opportunity Missed*

The public policy grounds for vacatur are different in kind from the others. Where the other grounds implicate an analysis of arbitral method and procedure, public policy requires an analysis of the substantive *content* of the award in question.<sup>170</sup> As applied to faith-based arbitration, then, the analytical mode necessary to make the public policy evaluation does not require forcing it into preexisting legal categories. Public policy is also distinct in that it is not focused on the religious law or values upon which religious awards are based.<sup>171</sup> Rather, public policy is focused on assessing

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153–55; Grossman, *supra* note 4, at 196.

168. See *Elmora Hebrew Ctr. v. Fishman*, 593 A.2d 725, 730 (N.J. 1991) (noting that, in “many cases[,] . . . court intervention is simply inappropriate because judicial scrutiny cannot help but violate the first amendment”). One exception is in cases of explicit fraud or collusion. *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) (quoting *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 447 (1969)) (“Civil courts have only ‘marginal review’ power over the decisions of arbitral bodies, secular and religious. For example, inquiry into a religious determination may implicate fraud and collusion.”).

169. See Helfand, *Between Law and Religion*, *supra* note 23, at 143.

170. See, e.g., *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1947).

171. See *id.*

and balancing the dominant legal system's *own* interests implicated in a given arbitral proceeding.<sup>172</sup> Thus, at least on its face, the public policy analysis is most conducive to the sort of substantive assessment of religious arbitration's impact on the U.S. legal system itself for which this Article argues. The public policy analysis, rightly applied, could allow courts to learn insights from religious law, while simultaneously protecting the U.S. legal tradition from the negative consequences that might otherwise arise if it enforced manifestly unjust religious arbitration awards.

For their part, scholars generally analyze the public policy grounds for vacatur as: (1) a means of protecting vulnerable members of religious communities;<sup>173</sup> (2) a way to enable the faithful to manifest their religious values in a limited fashion;<sup>174</sup> or (3) a method of reinforcing general values of religious freedom and tolerance.<sup>175</sup> Scholarship thus generally assesses the public policy analysis from the point of view of religious communities and practitioners themselves. By taking this approach, scholars have often missed important elements of public policy as a prime legal mechanism for understanding how to balance the risks and benefits of religious arbitration for the U.S. legal system as a whole.

In practice, however, courts are hesitant to take advantage of the

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172. *See id.*

173. *See, e.g.,* Helfand, *Multiculturalism*, *supra* note 4, at 1293 (“At times, courts use public policy to protect the interests of vulnerable individuals . . . .”); Fried, *supra* note 77, at 647–50 (describing the use of public policy vacatur to help address inequalities in Jewish marital law); Wolfe, *supra* note 23, at 447–48 (describing “certain dangers of arbitration that are unique to family law contexts” and the ways the public policy grounds for vacatur can be used to ameliorate those dangers); *but see* Helfand, *Between Law and Religion*, *supra* note 23, at 150–51 (expressing skepticism that, in the context of inequities embedded within arbitral procedure, “the public policy exception has the doctrinal wherewithal to provide courts to vacate” the resulting awards).

174. *See, e.g.,* Jeffrey Haberman, *Child Custody: Don't Worry, A Bet Din Can Get It Right*, 11 CARDOZO J. CONFLICT RESOL. 613, 623–37 (2010) (defending application of religious arbitration to child custody as a mechanism of manifesting religious values, even though resolving custody disputes is a matter entrenched in public policy); Helfand, *Multiculturalism*, *supra* note 4, at 1293 (noting that proper application of public policy as a grounds for vacatur can ensure “that co-religionists have access to adjudicatory fora that can issue final and enforceable decisions in line with their shared values and norms”).

175. *See, e.g.,* Helfand, *Multiculturalism*, *supra* note 4, at 1292 (elaborating on how public policy in the context of religious arbitration “expands the scope of religious freedom”); *but see* Schwarzschild, *supra* note 26, *passim* (arguing throughout for greater restriction of religious autonomy); Grossman, *supra* note 4, at 194–98 (arguing that the grounds for vacatur, including public policy, do not do enough to restrict religious autonomy).

opportunity public policy presents to make any substantive assessment of the meaning of religious arbitration. Instead, when deciding whether to vacate faith-based awards on public policy grounds, courts again retreat back to categories.<sup>176</sup> This approach lends itself well to line-drawing and an emphasis on mechanical doctrine, but offers no means of genuinely balancing the interests of the dominant legal system with those of religious communities in a way that produces new and important insights. Consider, for example, this explanation from the Supreme Court:

A court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.<sup>177</sup>

The Court recognizes that state interests are necessarily implicated in the public policy analysis, but then restricts that analysis to drawing the line between private and public agreements as a formal matter.<sup>178</sup> It further acknowledges that substantive questions of values and morality are also involved but offers no blueprint for how such a substantive assessment might operate in practice.<sup>179</sup> Indeed, the Court has subsequently all but proscribed substantive interest-balancing when making the public policy determination, noting that any public policy used to vacate an arbitral award must be “explicit, well-defined, and dominant,” and must be ascertained “by reference to positive law and *not from general considerations of supposed public interests*[.]”<sup>180</sup> Thus, for the Court, the public policy analysis does not entail substantive evaluation of values; it is yet another exercise in the

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176. Baker, *supra* note 4, at 164 (“[P]articular legal issues, such as child custody and visitation rights in domestic disputes, are categorically precluded from arbitration on public policy grounds.”); Fried, *supra* note 77, at 648 (noting that, “[b]ased on public policy grounds,” some categories of disputes “may not be definitively decided by a *beth din*”).

177. *United Paperworkers Int'l Union, AFL-CIO*, 484 U.S. at 42 (citations omitted).

178. *Id.*

179. *Id.*

180. *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 63 (2000) (emphasis added) (citation omitted).

systematic application of preexisting legal categories.<sup>181</sup>

Lower federal and state courts have largely followed the Supreme Court's lead. Rather than engaging in individualized, substantive interest-balancing analyses when reviewing religious arbitration awards, courts have instead identified specific categories of faith-based awards that violate public policy almost by default—and have generally refused to vacate awards that fall outside of those categories on public policy grounds.<sup>182</sup> Some courts have, for example, categorically refused to enforce religious arbitral awards determining child custody and visitation rights.<sup>183</sup> This categorical approach to public policy analysis has the same consequences it has on the judiciary's other interactions with faith-based arbitration agreements and awards: it makes it impossible for courts, as an analytical matter, to cognize the special insights unique to religious legal analysis.<sup>184</sup>

This Part has focused on the existing status quo, highlighting deficiencies in the categorical approach courts currently use when encountering religious arbitration. The argument throughout has been that, in addition to its other failures, the categorical approach is especially problematic because it prevents courts from accessing the unique insights religious arbitration generates. In the next Part the analysis shifts gears, offering an alternative vision of the relationship between civil courts and religious arbitration—one that catalyzes insight generation and allows civil courts to learn the lessons that religious arbitration can teach.

#### IV. THE VALUE OF FAITH-BASED ARBITRATION

Because religious arbitration balances and manifests a set of legal values that are, by definition, different from those embodied in U.S. law, it

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181. *See id.*

182. *See infra* notes 185–87 (collecting scholarship).

183. *See, e.g.,* *Glauber v. Glauber*, 600 N.Y.S.2d 740, 743 (App. Div. 1993) (“[W]e hold that the issues of custody and visitation must be put before the court for determination and may not be submitted to arbitration.”); *Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957, 960 (Sup. Ct. 1997) (New York courts have “closed the door on arbitration relating to custody and visitation with children”); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 495 (Sup. Ct. 1991) (describing a religious arbitration award of child custody as a “nullity”). *But see* *Haberman*, *supra* note 174, *passim* (arguing throughout that child custody should be arbitrated before faith-based tribunals).

184. *See* the discussion regarding how the public policy grounds for vacatur could be better used as a mechanism for substantive engagement with religious legal insights, *supra* Part III.B.

necessarily produces a set of legal insights that would not otherwise be available to the U.S. legal tradition as a whole. Of course, the simple fact of difference does not make these religious legal insights good per se. Indeed, many may prove utterly abhorrent to dominant sensibilities.<sup>185</sup> But whether the insights embedded in a given faith-based award are useful to the U.S. legal system because they teach it something it did not already know, or because they reinforce what it did already know, it is nevertheless true that they are different in kind from those manufactured by statist legal processes.<sup>186</sup> Religious arbitration thus produces a well of insights from which U.S. law would otherwise be cut off, and which can be of significant utility to the U.S. legal tradition itself.

Religious arbitration catalyzes the creation of legal insights in two ways. First, it allows religious legal traditions to continue to exist and evolve, adapting and balancing their unique values in the changing present.<sup>187</sup> Second, religious arbitration facilitates civil courts' inculcation of these unique insights directly by forcing them to encounter religious legal thinking.<sup>188</sup> The need for judicial review of religious arbitration agreements and awards, in other words, exposes the U.S. legal tradition to the procedure

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185. Helfand, *Multiculturalism*, *supra* note 4, at 1276 (“The rules and practices of marginalized religious and cultural groups may, at times, conflict with the laws of the state.”); Michael A. Helfand, *When Religious Practices Become Legal Obligations: Extending the Foreign Compulsion Defense*, 23 J.L. & RELIGION 535, 569 (2008). See generally AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* 88–116 (2001) (discussing joint governance to help resolve conflicts between religion and law).

186. See Helfand, *Multiculturalism*, *supra* note 4, at 1245–47.

187. Broyde, *Model*, *supra* note 27, at 123–24 (describing the importance of a functioning legal system in Judaism and Islam specifically); Helfand, *Multiculturalism*, *supra* note 4, at 1235 (“[F]or minority communities to maintain their identity, they must also find a way to retain authority over the interpretation, application, and enforcement of communal rules within their membership.”); Stone, *supra* note 22, at 197 (“[I]nterferences with the indigenous system of [Jewish law], and especially the system of rabbinical dispute resolution—which historically has played a central role in Jewish life and to which the parties first turned—has the capacity to narrow a significant feature of Jewish identity and of Jewish communal existence.”); Wolfe, *supra* note 23, at 457 (“[L]etting a religious group function on its own with its own internal methods of dispute resolution could be very important in preserving the culture and values of the religious group.”).

188. *Encounter* in the juridical sense, as when courts are asked to enforce or vacate arbitration agreements and awards. Of course individual judges may be exposed to religious legal thinking in their lives outside the courtroom; that exposure does not represent the kind of learning of legal insights suggested in this Article, as it happens outside the formal boundaries of the U.S. legal system itself.

and substance of religious law. As a descriptive matter, however, the categorical approach described above limits the value of this exposure—indeed, it is designed to do just that.<sup>189</sup> This Part argues that, devoid of the categorical approach, interaction between religious arbitration and civil courts *could*, as a prescriptive matter, operate as a direct conduit for the exchange of legal insights.<sup>190</sup>

### A. *Generating Religious Legal Insights*

For certain religious communities, a robust, comprehensive, and vibrant legal tradition is an essential ingredient for religious health.<sup>191</sup> And one fundamental component of a vibrant legal tradition is a formalized adjudicatory mechanism allowing constituents to reify legal values.<sup>192</sup> For these religious communities, a formal mechanism for religious dispute resolution allows their animating legal traditions to continue to operate and flourish.<sup>193</sup> A religious adjudicatory space is not able to fully serve that function, however, absent some means of enforcement. If compliance is based solely on the possibility of forced exit without more, community members may not be able to invest in the tribunal as genuinely meting out religious justice.<sup>194</sup> In the context of a secular state with a total monopoly over the means of legal enforcement, then, it is necessary for the state to

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189. See *supra* Part III.

190. This exchange of insights also impacts and changes religious arbitration. The introduction of readily available legal counsel in BDA proceedings is one good example. See Fried, *supra* note 77, at 645–56 (citations omitted) (noting that, while the BDA allows for available legal counsel, “[n]o lawyers existed in the *batei din* of ancient Israel”). The focus in this Article, however, is on the other side of the equation: how religious arbitration can affect the dominant legal tradition.

191. Broyde, *Model*, *supra* note 27, at 123–25 (discussing the importance of law as a defining feature of certain religious faiths); Helfand, *Multiculturalism*, *supra* note 4, at 1247 (“By enabling religionists to fulfill their own perceived obligations, religious arbitration courts play a freedom-enhancing role, ‘contribut[ing] to . . . the reality of religious freedom under law’ by serving as part of the infrastructure that makes religious freedom possible.” (alteration in original) (quoting Garnett, *supra* note 28, at 294–95)).

192. Helfand, *Multiculturalism*, *supra* note 4, at 1247.

193. *Id.* (“This freedom-enhancing role is most pronounced in what we might call religious legal communities, in which members perceive community norms as primarily legal in nature. Because such members typically experience religious obligations through the prism of legal rules, interpretation and application of obligations become necessary elements of religious adherence.”).

194. As Robert Cover famously put it, all genuine legal interpretation necessarily “takes place in a field of pain and death.” Cover, *Violence*, *supra* note 5, at 1601.

relinquish some part of that monopoly in order to enable religious tribunals to manifest the legal values they embody.<sup>195</sup> Faith-based tribunals can only catalyze the continued evolution of religious legal traditions if they are allowed to apply religious law when there is something genuinely at stake.<sup>196</sup> Religious arbitration in the United States can be such an adjudicatory mechanism, providing religious communities a space in which to use their own unique legal processes to manifest religious values, knowing that the ensuing decisions will carry genuine consequences.<sup>197</sup> Faith-based arbitration thus enables religious communities to go beyond the mere maintenance of a legal status quo—it allows religious legal traditions to evolve.<sup>198</sup> And the ongoing evolution of religious legal traditions is itself a boon for the U.S. legal system, because it allows for the continued generation of new religious legal insights.<sup>199</sup>

What follows are two brief case studies of BDA published decisions, illustrating how religious arbitration enables the Jewish legal tradition to encounter the dynamic present in a way that compels religious legal evolution.

### 1. *Industry Custom and the BDA*

A good illustration of how faith-based arbitration catalyzes religious legal evolution by forcing religious law to encounter the changing present is observable in the way the BDA treats industry custom. The BDA's rules provide, "In situations where the parties to a dispute . . . accept the common commercial practices of any particular trade, profession, or community . . . the Beth Din will accept such common commercial practices as . . . governing the decision of the panel to the fullest extent permitted by Jewish Law."<sup>200</sup>

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195. See Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 30 (1983) [hereinafter Cover, *Nomos*] ("The self-referential supremacy of each system is, of course, mitigated by the partly principled, partly prudential rules of deference that each manifests in relation to the other.").

196. See *id.* at 40 ("But the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion.").

197. For a discussion of the importance of religious arbitration for the continued evolution of religious law, see Broyde, *ADR*, *supra* note 61, at 813–20; Broyde, *Model*, *supra* note 27, at 124–25, 134–39.

198. Broyde, *Model*, *supra* note 27, at 134–35; see Stone, *supra* note 22, at 206–10 (comparing and contrasting "cultural perpetuation" and "cultural evolution").

199. See Broyde, *Model*, *supra* note 27, at 134–35.

200. BDA RULES & PROC., *supra* note 66, § 3(e); see also U.C.C. § 1-303(c)–(d) (AM. LAW

In principle, this rule provides that usage of trade will not be allowed to undermine settled Jewish legal doctrine.<sup>201</sup> In practice, however, the BDA has applied industry custom even in cases where it might conflict with Jewish law.<sup>202</sup>

Consider, for example, a 2004 BDA decision titled *Colossal Containers, Inc. v. Exquisite Crafts, Inc.*<sup>203</sup> In *Colossal Containers, Inc.*, a *beth din* panel considered a dispute between a plastic-bag wholesaler and a supplier.<sup>204</sup> Exquisite, the wholesaler, ordered plastic bags from Colossal, the supplier, which were intended for one of Exquisite's grocery store clients.<sup>205</sup> The bags were evidently defective, although Colossal did deliver, and Exquisite's client did ultimately use some of them.<sup>206</sup> After detailing the facts of the case, the tribunal offered a key passage on the applicable law:

According to principles of Jewish law, if merchandise is defective, the purchaser has the option of returning the merchandise and receiving a full refund of the purchase price . . . . As a general rule, if the purchaser is aware of the defects and chooses to use the merchandise anyway, he may not receive a credit for the used merchandise. However, where there is an understanding that the merchandise will be sent to a customer of the purchaser so that the purchaser does not have the ability to return the merchandise at will, this rule does not apply . . . . Similarly, if the defect is only discovered upon use of the merchandise so that the merchandise can no longer be returned after the defect is discovered, the purchaser may still receive credit for the decreased value of such merchandise. *If there is a clear custom in the industry which differs from these principles, the custom would override usual principles of Jewish*

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INST. & UNIF. LAW COMM'N 1977) ("A 'usage of trade' is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question . . . . [U]sage of trade . . . is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.").

201. See BDA RULES & PROC., *supra* note 66, § 3(e).

202. See, e.g., *Colossal Containers, Inc. v. Exquisite Crafts, Inc.* (2004), reprinted in 1 THE JOURNAL OF THE BETH DIN OF AMERICA 77, 80 (2012), <http://www.yutorah.org/lectures/lecture.cfm/774340/beth-din-of-america/journal-of-the-beth-din-of-america-volume-1/> [hereinafter *Colossal Containers, Inc.*].

203. *Id.* at 77–81.

204. *Id.* at 77.

205. *Id.*

206. *Id.* at 77–78.

law.<sup>207</sup>

The panel describes in relative detail the Jewish law governing enforcement and cancellation of a contract for goods when delivery is defective.<sup>208</sup> Jewish law is different from U.S. contract law; there is no option to cover, no seller's right to cure, etc.<sup>209</sup> Most importantly for present purposes, the BDA explicitly notes that industry custom may directly override tenets of Jewish law when it comes to establishing the governing norms in a given case.<sup>210</sup> Of course, industry custom in the world of plastic bags—and most other industries—is unlikely to be shaped by Jewish legal values or doctrine. And yet, the BDA acknowledges that this external source of legal insight can be safely allowed to inform Jewish legal value balances when they are applied in practice.<sup>211</sup> This conceptual flexibility allows for the possibility that the old and venerable Jewish legal tradition can actually *learn* from a given industry in the present. In other words, by accepting the premise that industry custom in the here and now can inform millennia-old Jewish contracts doctrine, the BDA has enabled the possibility of legal evolution.<sup>212</sup>

## 2. Competitive Markets and Jewish Law

A second BDA decision, *Delicious Foods v. Good Chocolates*, will be helpful to further illustrate how these mechanisms of legal insight and evolution actually function.<sup>213</sup> To situate this case properly, it is necessary to introduce a Jewish legal concept that may seem foreign to readers

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207. *Id.* at 79 (emphasis added).

208. *Id.*

209. Compare *id.*, with U.C.C. §§ 2-508, 2-712 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

210. BDA RULES & PROC., *supra* note 66, § 3(e). In this particular case, “[t]he Beth Din d[id] not find the industry custom in the case vis-à-vis the relationship between Colossal and Exquisite to be clearly contrary to normal principles of Jewish law.” *Colossal Containers, Inc.*, *supra* note 202, at 80. In other words, the BDA found that it did not need to go outside Jewish legal norms to resolve the specific dispute. *Id.* This fact does not undermine the point, however: the BDA does allow for the possibility that current industry custom could trump Jewish law, thus enabling that law to evolve. See BDA RULES & PROC., *supra* note 66, § 3(e).

211. See BDA RULES & PROC., *supra* note 66, § 3(e).

212. See *id.*

213. *Delicious Foods v. Good Chocolates* (2005), reprinted in 1 THE JOURNAL OF THE BETH DIN OF AMERICA 82, 82–88 (2012), <http://www.yutorah.org/lectures/lecture.cfm/774340/beth-din-of-america/journal-of-the-beth-din-of-america-volume-1/> [hereinafter *Delicious Foods*].

accustomed to the capitalist principles that undergird much of U.S. law: *hasagath gevul*.<sup>214</sup>

Based on a verse in the Bible, the Jewish law principle of *hasagath gevul* (literally “encroaching the border”) has long proscribed certain types of unduly competitive business practices. Most notably, the principle . . . prohibits . . . any situation in which definite damage would be financially ruinous to an already established business.

Thus, Jewish law provides businessmen with a substantive right that protects their businesses from would-be competitors if such competition would clearly be ruinous.<sup>215</sup>

As a legal doctrine, *hasagath gevul* reflects an attempt within Jewish law to balance the value of efficient competitive markets on the communal level against the human suffering such competition can cause at an individual level.<sup>216</sup> That process of value-balancing and the variety of opinions it produces is the essential insight-generating mechanism of law. *Delicious Foods* illustrates this process in action.<sup>217</sup>

Delicious Foods (DF) was a kosher-certified retail outlet selling sweets in Georgia.<sup>218</sup> Good Chocolates (GC), another kosher-certified chocolatier, opened across the street from DF.<sup>219</sup> DF alleged that GC’s opening created the possibility of ruinous competition prohibited by *hasagath gevul*.<sup>220</sup> DF “requested that [the] Beth Din protect the entity that began its operations first (DF), and award DF the necessary monopoly to protect its business.”<sup>221</sup>

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214. For a more detailed analysis of the Jewish texts describing this doctrine, see Rabbi Chaim Jachter, *Hasagat Gevul: Economic Competition in Jewish Law*, JEWISH LAW, <http://www.jlaw.com/Articles/hasagatgevul.html> (last visited May 22, 2017).

215. Helfand, *Multiculturalism*, *supra* note 4, at 1258–59 (footnotes omitted).

216. *See id.* For a history of the development of *hasagath gevul* as a doctrine and the social, cultural, and economic impetus behind its extension over time into traditional competitive markets, see Menachem Elon, *Hassagat Gevul*, in 8 ENCYCLOPAEDIA JUDAICA 448–53 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007) [hereinafter Elon, *Hassagat Gevul*], [http://go.galegroup.com/ps/pdfViewer?docId=GALE%7CCX2587508514&userGroupName=drakeu\\_main&inPS=true&contentSegment=&prodId=GVRL&isETOC=true&accesslevel=FULLTEXT&c2c=true#content](http://go.galegroup.com/ps/pdfViewer?docId=GALE%7CCX2587508514&userGroupName=drakeu_main&inPS=true&contentSegment=&prodId=GVRL&isETOC=true&accesslevel=FULLTEXT&c2c=true#content).

217. *Delicious Foods*, *supra* note 213, at 82–88.

218. *Id.* at 82.

219. *Id.* at 83.

220. *Id.* at 83–84.

221. *Id.* at 84.

The BDA ultimately denied DF the sought-after relief.<sup>222</sup>

In reaching its conclusion, the BDA offered a careful analysis of the different value balances underlying varying conceptions of *hasagath gevul* as an evolving legal principle.<sup>223</sup> The panel began by recording the ancient originating precedent for the doctrine—a debate between two rabbis in the Babylonian Talmud.<sup>224</sup> The first rabbi embraces protectionism, “assert[ing] that the owner of the first business may prevent the newcomer from setting up shop, as the newcomer will interfere with the first inhabitant’s livelihood.”<sup>225</sup> The second rabbi, by contrast, supports a deregulated competitive marketplace, arguing that “the competitor may claim, ‘Whoever will come to me, will come to me, and whoever will come to you, will come to you.’”<sup>226</sup> Nearly 2,000 years later, a U.S. Jewish legal luminary, Rabbi Moshe Feinstein, adopted the protectionist point of view, insisting that “new entrants should be enjoined in certain circumstances.”<sup>227</sup> Indeed, Feinstein expanded the scope of *hasagath gevul*, ruling “that a loss of livelihood is not defined by a loss of one’s home or his ability to put food on the table, but rather, one has effectively lost his livelihood if he can no longer afford what he used to be able to afford.”<sup>228</sup> DF argued that Feinstein’s conception of *hasagath gevul*, expanding on the first rabbi’s position in the Talmud, should have applied to bar GC from entering the kosher chocolate market.<sup>229</sup>

The dynamic of religious legal insight generation is observable at this moment: a religious tribunal (the BDA) applies a longstanding and complex religious legal doctrine (*hasagath gevul*) to a present-day scenario (two chocolatiers in Georgia).<sup>230</sup> This process of application, which requires a balance of religious legal values, refines the doctrine and pushes religious legal evolution onwards. In DF’s case, the BDA rejected GC’s claims,

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222. *Id.* at 88.

223. *Id.* at 85–86.

224. *Id.* at 85. A great deal has been written on the Babylonian Talmud. For useful introductions, see LOUIS JACOBS, STRUCTURE AND FORM IN THE BABYLONIAN TALMUD (1991); HERMANN L. STRACK, INTRODUCTION TO THE TALMUD AND MIDRASH (1959).

225. *Delicious Foods*, *supra* note 213, at 85.

226. *Id.*

227. *Id.* For more on Feinstein, see *Feinstein, Rav Moshe*, ORTHODOX UNION (June 14, 2006), <https://www.ou.org/judaism-101/bios/leaders-in-the-diaspora/rav-moshe-feinstein/>.

228. *Delicious Foods*, *supra* note 213, at 86.

229. *Id.*

230. *Id.* at 85.

holding that *hasagath gevul* did not apply for a number of reasons.<sup>231</sup> New legal insights are observable in at least two of the BDA's given reasons for refusing to apply the doctrine.<sup>232</sup>

First, the BDA qualified and distinguished the Feinsein precedent, noting that his "directives specifically concern a situation where the existing, threatened business is the primary income of the incumbent firm, and its diminution is therefore a threat to the owner's socioeconomic status."<sup>233</sup> The BDA thus recasts *hasagath gevul* not as a doctrine of market regulation motivated by economic ideals, but rather as an essentially humanist rule, meant to protect families from financial disaster.<sup>234</sup> Here, faith-based arbitration compels religious legal thinkers to reconsider ancient doctrines in the present, thus producing new and distinct insights.

The second insight inherent in the BDA's holding was far more radical and distinctly modern.<sup>235</sup> The BDA, in explaining why *hasagath gevul* did not govern, wrote, "[T]he various differences that will always stand between the shops have allowed Defendant to attract a new audience to his store without detracting from Plaintiff's business. It may also be that the presence of two candy shops in close proximity has brought more customers to the area."<sup>236</sup> This notion, reflecting familiarity with modern theories of "economies of agglomeration," is in tension with the fundamental underpinnings of *hasagath gevul* as a legal doctrine.<sup>237</sup> After all, if two comparable stores competing with one another in fact increases the revenue for both, then it becomes less likely that, in a given case, a competitor's entry into a market will be the direct cause of a business's eventual failure.<sup>238</sup> The BDA thus not only refuses to apply a specific doctrine in this case, but by engaging in the process of adjudication, qualifies and recasts the doctrine as a whole.<sup>239</sup> As

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231. *Id.* at 87.

232. *See id.*

233. *Id.* at 86.

234. *Id.*

235. *See id.* at 87.

236. *Id.*

237. Compare *id.*, with *Elon, Hassagat Gevul*, *supra* note 216, at 448–53. For more on agglomeration economics, see *AGGLOMERATION ECONOMICS* (Edward L. Glaeser ed. 2010).

238. *See Delicious Foods*, *supra* note 213, at 86–87.

239. *Id.* Of course, as is often the case in legal traditions bound with some conception of *stare decisis*, it is possible that the arbitrators may not have seen themselves as making so radical a change, but rather simply extending the evolution of the doctrine to the present. That, too, is a source of legal insight generation.

that happens, the ancient Jewish legal tradition gains insights into its own values and doctrines as they operate in the dynamic present.

### B. *Learning from Religious Arbitration*

The preceding Part described how faith-based arbitration, by enabling religious communities to engage in the formal processes of adjudication with something genuinely at stake, produces new religious legal insights.<sup>240</sup> That can be a boon for the U.S. legal tradition because, when encountering religious arbitration, civil courts can gain access to those insights that would otherwise be unavailable to them.<sup>241</sup> In some cases it is possible to observe the U.S. legal system formally altering itself after interacting with religious law. In others, the process of legal innovation is triggered by the simple fact that, when encountering religious arbitration, the U.S. system is forced to consider *its own* values in contrast to religious law.

It is difficult in practice to isolate such moments of learning, however, because—as explained above—when interacting with religious tribunals, civil courts employ an approach specifically designed to avoid facing the special challenges of faith-based arbitration.<sup>242</sup> The categorical approach largely prevents the U.S. legal tradition from learning what it otherwise might from faith-based tribunals. Nevertheless, it is still possible to observe the U.S. legal system gaining insights from religious arbitration in certain instances. By examining two such moments, the following subpart highlights how, despite their use of the categorical approach, civil courts can and do learn from religious arbitration.<sup>243</sup>

#### 1. *An Enhanced Understanding of Neutral Principles*

Part III above analyzed in detail how courts, when faced with religious arbitration agreements, employ the doctrine of neutral principles to avoid First Amendment issues when determining enforceability.<sup>244</sup> The analysis described one common case: that of a spouse seeking to enforce an arbitration provision in a religious prenuptial agreement.<sup>245</sup> Generally, courts do enforce such agreements, on the grounds that they can do so by

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240. *See supra* Part IV.A.

241. *See supra* Part III.

242. *See supra* Part III.

243. *See infra* Parts IV.B.1, IV.B.2.

244. *See supra* Part III.A.

245. *See supra* Part III.A.1 and accompanying notes.

applying strictly neutral contract principles.<sup>246</sup>

There is another subset of pertinent cases, however: ones in which a wife requests that a civil court compel her husband to provide a *get* directly, without going before a religious tribunal. Many courts faced with this type of case have found that doing so would run afoul of the First Amendment.<sup>247</sup> By comparing one case from each type, it is possible to see how interaction with religious arbitration has helped the U.S. legal system delineate the boundaries of its own doctrines.<sup>248</sup>

In *Avitzur v. Avitzur*, the New York Court of Appeals was asked to enforce a religious arbitration provision embedded in a couple's *ketubah*.<sup>249</sup> The wife sought to compel the husband "before the Beth Din for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a *Get*."<sup>250</sup> The court stressed that "plaintiff is not attempting to . . . enforce a religious practice arising solely out of principles of religious law . . . . [T]he provisions of the *Ketubah* relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum."<sup>251</sup> Unsurprisingly, the husband challenged that characterization, arguing instead that "the obligations imposed by the *Ketubah* arise solely from Jewish religious law and can be interpreted only with reference to religious dogma."<sup>252</sup>

The court first acknowledged that "courts should not resolve . . . controversies in a manner requiring consideration of religious doctrine."<sup>253</sup> Then, true to the categorical approach, it turned to the doctrine of neutral principles for cover.<sup>254</sup> The court explained:

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246. See *supra* Part III.A.1.

247. See the discussion of *Aflalo v. Aflalo*, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996) below.

248. For an in-depth analysis of the relationship between legal pluralism, the First Amendment, and Jewish divorce, see generally Stone, *supra* note 22; see also McLaughlin, *supra* note 113, at 418–22.

249. *Avitzur v. Avitzur*, 446 N.E.2d 136, 136–37 (N.Y. 1983) (finding "nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of" the *ketubah*).

250. *Id.* at 138.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

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The present case can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle. Consequently, defendant's objections to enforcement of his promise to appear before the Beth Din, based as they are upon the religious origin of the agreement, pose no constitutional barrier to the relief sought by plaintiff. The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable . . . Similarly, that the obligations undertaken by the parties to the Ketubah are grounded in religious belief and practice does not preclude enforcement of its secular terms.<sup>255</sup>

The key analytical move was to divorce the text of the arbitration agreement from its social and cultural context.<sup>256</sup> By stripping the agreement of its express religiosity, the court was able to analogize it to a conventional contract.<sup>257</sup> Indeed, the court went so far as to hold that the motivating intent of the parties—their faith—was irrelevant.<sup>258</sup> Having thus transformed the *ketubah* into a conventional contract, the court easily concluded that “the relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself.”<sup>259</sup> In this way, the categorical approach allowed the court to reject the husband's objections, grounded as they were in the religiosity of the document, while simultaneously stripping the document of that selfsame religiosity.<sup>260</sup>

In *Aflalo v. Aflalo*, a New Jersey court was again asked to settle a divorce dispute between religious Jewish parties.<sup>261</sup> Unlike *Avitzur*, however, the wife in *Aflalo* did not seek to compel religious arbitration; the husband did, seeking reconciliation, not divorce.<sup>262</sup> Rather than go before the BDA, the wife asked the court to include within its civil order of divorce a requirement that the husband provide her with a *get*.<sup>263</sup> After laying out First Amendment doctrine in relative detail and then describing the form

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255. *Id.* at 138–39.

256. *See id.*

257. *See id.*

258. *Id.* at 139.

259. *Id.*

260. *See id.* at 139–40.

261. *Aflalo v. Aflalo*, 685 A.2d 523, 524 (N.J. Super. Ct. Ch. Div. 1996).

262. *Id.* (explaining that the husband had “taken action with . . . (the ‘Beth Din’) to have a hearing on his attempts at reconciliation”).

263. *Id.* at 525 (“[Wife] claims that this court, as part of the judgment of divorce which may eventually be entered in this matter, may and should order [Husband] to cooperate with the obtaining of a Jewish divorce upon pain of . . . coercive means.”).

and function of a *get* in Jewish law, the court then turned to the pressing question: would granting the *get* directly violate the First Amendment?<sup>264</sup> The court ultimately concluded it would.<sup>265</sup>

For present purposes, three features of the court's analysis are most intriguing. First, in explaining why a previous New Jersey court had erred in granting a *get* directly, the court emphasized that "the conclusion that [the previous] order [granting a *get*] concerned purely civil issues is . . . unconvincing."<sup>266</sup> Where *Avitzur* was able to remove the *ketubah* agreement from its religious context, *Aflalo* was not able to do the same with the *get* itself.<sup>267</sup> Because the *get* "empower[s] the wife to remarry in accordance with her religious beliefs," it was simply not possible to conclude that directly granting a *get* would not "affect[] the religious beliefs of the parties."<sup>268</sup> Indeed, the court expressly rejected not only the possibility of stripping a *get* of its religious context, but returned to first principles, concluding that certain features of "religion" as a concept made the supposed distinction between "civil" and "religious" law unavailing when the legal acts in question are motivated by faith.<sup>269</sup> The court explained:

The concept of "religion" certainly does have reference to one's relation to the creator but it also has relation to one's obedience to the will of the creator. In one's pursuit to comply with the creator's will one is certainly engaged in religious activity. While engaging in such conduct, one may also be subjected to civil authority *but that does not remove the conduct from the scope of religious activity.*<sup>270</sup>

This line of reasoning problematizes the very foundations of the doctrine of neutral principles. If, as the *Aflalo* court maintained, the faith-based context of a given legal action imbues that action with a religiosity that cannot be avoided, then the categorical approach is suspect on its face.<sup>271</sup>

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264. *Id.* at 526–31.

265. *Id.* at 531. Much of the court's opinion is devoted to explaining why a previous New Jersey court erred in granting a divorce settlement that required the husband to grant a *get*. *Id.* at 527–30 (citing *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981)).

266. *Aflalo*, 685 A.2d at 529.

267. Compare *Avitzur v. Avitzur*, 446 N.E.2d 136, 138–39 (N.Y. 1983), with *Aflalo*, 685 A.2d at 529.

268. *Aflalo*, 685 A.2d at 529.

269. *Id.*

270. *Id.* (emphasis added).

271. See *id.* at 528. That is, because the doctrine of neutral principles depends on the notion that it is possible to isolate the religious elements of an agreement from the

A second important legal insight is observable when the *Aflalo* court turned to *Avitzur* in considering whether sending the *get* issue for adjudication before a religious tribunal might offer an alternative means of avoiding First Amendment concerns.<sup>272</sup> The *Aflalo* court emphasized that the *Avitzur* court “was careful in recognizing that it was not called upon to order the husband to provide a ‘get’ . . . or to enforce a religious practice arising solely out of principles of religious law.”<sup>273</sup> The court in *Aflalo* was not convinced, however, that it is possible to conceptually distinguish between the secular impulse to enforce an arbitration agreement and the fact of faith-based arbitration, concluding that “even the limited relief . . . required ‘inquiry into and resolution of questions of Jewish religious law and tradition’ and thus inappropriately entangled the civil court in the wife’s attempts to obtain a religious divorce.”<sup>274</sup> The religious context of a *beth din* would pervade even the enforcement of an otherwise ostensibly neutral contract provision, rendering the act of compelling an unwilling party before the faith-based tribunal constitutionally impermissible at the outset.<sup>275</sup> For the *Aflalo* court, then, the doctrine of neutral principles was unavailing when it came to religious arbitration agreements.<sup>276</sup> The result was total abstention.<sup>277</sup>

The third and final passage of note in *Aflalo* highlights certain features of the categorical approach described above.<sup>278</sup> In addressing the seeming injustice of the *agunah* who cannot remarry because her husband refuses to

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nonreligious, any argument that such isolation is as a practical matter impossible calls into question the efficacy of the doctrine. In concluding that the *ketubah* cannot be divorced from its religious context, the *Aflalo* court is making precisely that claim. *Id.* at 528. The categorical approach cannot survive such a contention, because, if accepted, the *Aflalo* court’s position would make it impossible to strip away religiosity, which is precisely what the categorical approach attempts to do. *See id.* at 528.

272. *Id.* at 530 (citing *Avitzur*, 446 N.E.2d at 138).

273. *Id.* (quoting *Avitzur*, 446 N.E.2d at 138).

274. *Id.* (quoting *Avitzur*, 446 N.E.2d at 141–42).

275. *See id.* at 531. This conclusion undermines not only the categorical approach, but can be read as a direct challenge to religious arbitration itself. *See id.* If a *beth din* is, by definition, so thoroughly religious a context that any agreement to participate therein is necessarily tainted by religiosity, then it will never be permissible for a court to compel a recalcitrant party to go before a *beth din* without violating the First Amendment.

276. *Id.*

277. *Id.* As the court explained, “To engage even in a ‘well-intentioned’ resolution of a religious dispute requires the making of a choice which accommodates one view and suppresses another.” *Id.*

278. *Id.*; *see supra* Part III.

grant a *get*, the court wrote:

It may seem 'unfair' that [husband] may ultimately refuse to provide a 'get'. But the unfairness comes from [wife's] own sincerely-held religious beliefs. When she entered into the 'ketubah' she agreed to be obligated to the laws of Moses and Israel. Those laws apparently include the tenet that if [husband] does not provide her with a 'get' she must remain an 'agunah'. That was [wife's] choice and one which can hardly be remedied by this court. This court has no authority—were it willing—to choose for these parties which aspects of their religion may be embraced and which must be rejected.<sup>279</sup>

The court used the supposed voluntariness of religious choices to avoid responsibility for any real-world injustices that followed from its own holding.<sup>280</sup> If it turns out, however, that, as noted above, membership in religious communities is sometimes largely involuntary—if not outright coerced—then this argument loses much of its force.<sup>281</sup> And, even if the choice to enter into the *ketubah* was entirely voluntary when it was made, it does not guarantee that choice will continue to reflect the spouse's religious faith at the moment of enforcement—i.e., divorce.<sup>282</sup>

The *get* issue is an especially useful illustration of how the dominant legal regime learned from its encounters with religious arbitration, because it not only spurred legal insight in the case law—it also led to formal statutory changes.<sup>283</sup> Following *Avitzur*, the New York state legislature enacted New York Domestic Relations Law section 253, known as the “*get* statute.”<sup>284</sup> The law requires any party seeking a civil divorce to affirm that he or she “will take, prior to the entry of [the divorce], all steps solely within his or her power to remove any barrier to the defendant's remarriage following the . . . divorce . . . .”<sup>285</sup> The statute explains that “‘barrier to remarriage’ includes, without limitation, any religious . . . restraint or

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279. *Aflalo*, 685 A.2d at 531 (footnote omitted).

280. *Id.*; see *supra* Part III (discussing why and how the conception that religious choices are voluntary does not absolve courts of responsibility for outcomes arising out of the categorical approach).

281. See discussion of *siruv supra* Part III.

282. For a discussion of the First Amendment implications of requiring a spouse to honor a religious choice that no longer comports with his or her faith, see *supra* Part III.

283. For a critique of New York law governing Jewish marriage and its evolution over time, see Traum, *supra* note 119, at 189–94; see also Fried, *supra* note 77, at 647–53.

284. See N.Y. DOM. REL. LAW § 253 (McKinney 1983).

285. *Id.* § 253(2).

inhibition . . . under the principles held by the clergyman or minister who has solemnized the marriage . . . .”<sup>286</sup> Practice commentaries stress that “[a]lthough the statute is phrased in ostensibly neutral language, its avowed purpose is to curb . . . the ‘tragically unfair’ situation presented where a Jewish husband refuses to sign [a *get*].”<sup>287</sup> A full analysis of the *get* statute is not necessary here.<sup>288</sup> It will suffice simply to recognize that the statute exemplifies a moment when the state of New York actually altered its own law in part because of its interaction with religious arbitration.<sup>289</sup>

## 2. Public Policy and Child Support

Another good example of the U.S. legal system learning from religious arbitration can be seen in the way New York courts have related to religious arbitration awards determining child support obligations (as distinct from child custody and visitation rights).<sup>290</sup>

Over approximately a decade in the 1990s, New York case law addressing whether a *beth din* may decide matters of child support evolved in a way clearly reflecting civil courts grappling with and learning more about how to apply New York law,<sup>291</sup> beginning in 1991 with *Lieberman v. Lieberman*.<sup>292</sup> The BDA rendered an award covering a number of issues arising out of the couple’s divorce, including both child custody and child

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286. *Id.* § 253(6).

287. Alan D. Scheinkman, Practice Cmt., C253:1, *construed in* N.Y. DOM. REL. LAW § 253 (McKinney 1983).

288. For more on the New York *get* statute, see generally Edward S. Nadel, *New York’s Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55 (1993); Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147 (1987); Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 BROOK. L. REV. 229 (1984); Traum, *supra* note 119, at 189–97.

289. Scheinkman, Practice Cmt., C253:1.

290. See, e.g., *Glauber v. Glauber*, 600 N.Y.S.2d 740, 742–43 (App. Div. 1993) (citations omitted) (“The best interests standard will be applied to modifications as well as to the original custody determination at all stages of judicial proceedings . . . . A court cannot be bound by an agreement as to custody and visitation, or either custody or visitation, and simultaneously act as *parens patriae* on behalf of the child.”). For an argument that New York state courts are wrong not to allow arbitration of child custody disputes, see Haberman, *supra* note 174, at 619–37.

291. There are many cases that could be addressed here; this analysis is restricted to four for brevity’s sake. For scholarship on this doctrinal evolution with greater detail on additional cases, see *infra* note 300.

292. *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 490 (Sup. Ct. 1991).

support.<sup>293</sup> The court refused to enforce the BDA's child custody determination on the grounds that it violated public policy and was not in the best interests of the child.<sup>294</sup> When it came to the child support issue, however, the court wrote:

While the best interest of the children assures the court a perpetual role in an infant's welfare, a dispute over child support is one between the custodial and noncustodial parent and can be agreed upon contractually or by arbitration . . . . Therefore, the award of child support by the Beth Din is confirmed.<sup>295</sup>

*Lieberman* thus made two important points. First, allowing a *beth din* to determine child support does not violate public policy.<sup>296</sup> Second, the determination of child support is not a matter of the best interests of the child—it is a contractual matter to be hashed out amongst the parents.<sup>297</sup>

Two years later, in *Glauber v. Glauber*, a New York court again reiterated the points made in *Lieberman*.<sup>298</sup> The court emphasized that a *beth din* “may properly address certain issues arising under a separation agreement, *for example child support and spousal maintenance.*”<sup>299</sup> For *Glauber*, child support is clearly within the purview of religious arbitration.<sup>300</sup> The court further reiterated that child support emphatically does not implicate the best-interests-of-the-child calculus.<sup>301</sup> This point is made clear by the court's explanation of why child *custody* issues are not arbitrable, namely, because “determining which living arrangements are in the best interests of the children” is a task “courts alone must undertake.”<sup>302</sup> For the court in *Glauber*, child custody implicates best interests; child support does

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293. *Id.* at 985–86.

294. *Id.* at 989 (citing *Nestel v. Nestel*, 38 A.D.2d 942 (N.Y. App. Div. 1972)) (“[U]pon showing that a provision of an award might be *adverse* to the best interest of a child . . . the court may intervene.”); *Agur v. Agur*, 32 A.D.2d 16, (N.Y. App. Div. 1969)).

295. *Id.* at 989–90 (citations omitted).

296. *Id.*

297. *Id.* For scholarship on the best interests standard, see Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, n.1 (2009) (assembling scholarship).

298. *Glauber v. Glauber*, 600 N.Y.S.2d 740, 741 (App. Div. 1993); *Lieberman*, 566 N.Y.S.2d at 495–96.

299. *Glauber*, 600 N.Y.S.2d at 742–43 (emphasis added).

300. *Id.* at 98.

301. *Id.*

302. *Id.* at 99.

not.<sup>303</sup>

Thus, in the early 1990s, multiple New York state courts, when faced with *beth din* awards determining child custody and child support, drew a distinction between the two.<sup>304</sup> Child custody, according to those courts, necessarily requires a determination of the best interests of the child.<sup>305</sup> And, because courts must protect those interests, it is contrary to public policy for parents to contract to have a faith-based tribunal make that determination.<sup>306</sup> In the case of child support, by contrast, the issue is emphatically not one of the child's best interests.<sup>307</sup> Child support is, rather, an economic and contractual issue between parents.<sup>308</sup> Consequently, those parents are free to choose to arbitrate the issue before a *beth din*.<sup>309</sup>

A few years later, things changed. In *Rakoszynski v. Rakoszynski*, a New York court again was asked to enforce a *beth din* child support award.<sup>310</sup> After acknowledging that previous precedents supported enforcing the award, the court then turned a critical eye to the public policy calculus underlying those precedents, writing that “[t]he issue of the arbitrability of child support should now be revisited.”<sup>311</sup> Pointing to the New York Child Support Standards Act, the court held that there existed “a strong public policy in New York State with respect to a minimum and adequate level of support for children.”<sup>312</sup> The court was especially perturbed by the fact that the *beth din* award in question provided little detail as to how the tribunal reached its decision, explaining that “[t]he very paucity of the arbitration decision with respect to child support in this case argues in favor of adding child support [to the list of] issues not subject to arbitration.”<sup>313</sup>

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303. *Id.* at 98.

304. *See, e.g., id.* at 98–99; *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 495–96 (Sup. Ct. 1991).

305. *See, e.g., Glauber*, 600 N.Y.S.2d at 742 (“The court . . . may award custody to one parent in the face of an agreement granting custody to the other if the best interests of the child require[] it.” (citing *Eschbach v. Eschbach*, 436 N.E.2d, 1260, 1263 (N.Y. 1982); *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 769 (N.Y. 1982))0.

306. *Glauber*, 600 N.Y.S.2d at 743.

307. *Lieberman*, 566 N.Y.S.2d at 495.

308. *Id.* (“[A] dispute over child support is one between the . . . parent[s] and can be agreed upon contractually or by arbitration.”).

309. *Id.*

310. *Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957, 958–59 (Sup. Ct. 1997).

311. *Id.* at 960.

312. *Id.* (citing N.Y. DOM. REL. LAW § 240 (McKinney 1983)).

313. *Id.*

Of course, the simple fact that there is a public policy favoring well-supported children does not, in and of itself, necessarily mean that religious arbitral panels are incapable of manifesting that policy. It is only possible to reach the conclusion that child support should not be arbitrated as a doctrinal matter if child support implicates the special interest courts have in ensuring the best interests of the child.<sup>314</sup> But previous precedents emphatically refused to apply the best interests standard to child support.<sup>315</sup> In order to reach its ultimate conclusion, the *Rakoszynski* court had to blur the distinction between “best interests” as a descriptive doctrinal standard on the one hand, and general public policy interests regarding well-articulated child support awards on the other.<sup>316</sup> That is precisely what it did, writing:

[T]he historical authority for confirmation of child support awards made through an arbitration process, . . . has been eroded, if not supplanted, by the strong public policy of this State . . . . Confirmation is therefore denied upon the ground that the child support award in this case, which fails to provide any information whatsoever as to how the amount was arrived at, is not in the best interests of the children and does not comply with current public policy.<sup>317</sup>

Ultimately, the *Rakoszynski* court did not make child support agreements off limits to arbitrators altogether, but it did hold that arbitral agreements as to child support must comport with the statutory requirements and be in the best interests of the child.<sup>318</sup> In this way, the court transformed faith-based awards regarding child support from the consensual and enforceable contract between parents described in *Lieberman* and *Glauber* to one that is—like child custody arrangements—primarily governed by the best-interests-of-the-child standard.<sup>319</sup> It is also worth noting

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314. *See id.* at 960–61.

315. *E.g.*, *Glauber v. Glauber*, 600 N.Y.S.2d 740, 743 (App. Div. 1993); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 495 (Sup. Ct. 1991).

316. *See Rakoszynski*, 663 N.Y.S.2d at 960.

317. *Id.* at 960–61.

318. *Id.* at 961 (“That is not to say that arbitration of all child support is precluded; rather that an arbitration award for basic child support, if it is to be confirmed, must demonstrate at least minimal recognition of, and compliance with, [the Child Support Standards Act].”).

319. *Id.* at 960–61 (“Confirmation is therefore denied upon the ground that the child support award in this case, which fails to provide any information whatsoever as to how the amount was arrived at, is *not in the best interests of the children* and does not comply with current public policy.” (emphasis added)).

that this transformation was lasting. In *Hirsch v. Hirsch*, for example, another New York state court reviewing a *beth din* award years later wrote, “Although the issue of child support is subject to arbitration, an award may be vacated on public policy grounds if it . . . is not in the best interests of the children.”<sup>320</sup>

Tracing this series of cases shows how, in one particular corner of the legal landscape, New York courts gained new insights into their own doctrine because of religious arbitration. The repeated interaction between New York state courts and *beth din* awards pertaining to child support catalyzed a change in the way those courts perceived the form and function of child support agreements. New York courts *learned*, over time, that the analogy between child support and spousal maintenance is a poor one, because it ignores the fact that child support implicates the interests of an innocent third party—the child. Through their interactions with *beth din* awards, courts came to understand that child support agreements are better analogized to child custody decisions, and so began applying the best interests standard to support agreements, as well.<sup>321</sup> In this way, because it encountered religious arbitration, one part of the U.S. legal system gained some insight into itself that it did not already have.

This Article has argued throughout that, by interacting with adjudicatory mechanisms that balance expressly religious values, the secular judiciary is able to inculcate insights that would otherwise be unavailable to it.<sup>322</sup> But courts have tended to adopt an approach to religious arbitration that—because it relies on stripping faith-based arbitration of its uniquely religious essence—prevents them from actually accessing those insights.<sup>323</sup> It is not surprising, then, that it is difficult to find examples in practice where courts clearly learn something from their interactions with religious arbitration; it is the categorical approach which prevents that from happening. Nevertheless, this Part has highlighted two corners of the law in which courts have gained insights into their own doctrines by virtue of interaction with religious arbitration. When it comes both to the more nuanced understanding of the doctrine of neutral principles as applied to *get* provisions and to the doctrinal status of child support agreements and the best interests standard, civil courts learned something new about themselves—an education catalyzed by religious arbitration.

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320. *Hirsch v. Hirsch*, 4 A.D.3d 451, 452–53 (N.Y. App. Div. 2004).

321. *See, e.g., Rakoszynski*, 663 N.Y.S.2d at 961.

322. *See supra* Introduction, Part III.

323. *See supra* Part III.

But these insights do not come free of cost. Along with the benefits it offers, religious arbitration also poses risks to the U.S. legal tradition as a whole. The following Part addresses this other side of the equation.

#### V. PAYING THE CONTINUITY PRICE

Religious arbitration, and its empowerment by the doctrinal dynamics described above, poses certain risks to the U.S. legal tradition. Some of these are fairly obvious. Enforcing religious arbitral agreements and awards, for example, entails the statist judiciary relinquishing some of its jurisdiction and results in the diminishment of the state's monopoly over the means of juridical enforcement.<sup>324</sup> Similarly, allowing faith-based tribunals to manifest religious law that is not identical to dominant legal values may result in a weakening of those values.<sup>325</sup> At its core, in short, religious arbitration reflects an act of letting go on the part of the state, and that act carries with it certain consequences—for religious communities *and* for the state.<sup>326</sup> Scholars of religious arbitration have explored these consequences in the context of multiculturalist legal theory.<sup>327</sup> Rather than venture down these well-trodden paths, this Article instead focuses on a somewhat more subtle risk religious arbitration poses to the U.S. legal tradition. To do so, however, it will be necessary to take a brief step back and examine the fundamental structure of the U.S. legal system's basic authority claims. This brief examination is not meant to be comprehensive; it will rather focus on one key ingredient for the maintenance of the regime's authority over time: continuity.

A persistent and disconcerting tension underlies the very foundation of the U.S. legal system. The U.S. Constitution, the supreme law legitimated by an act of We the People, is the original source of all legal authority.<sup>328</sup>

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324. For an extended investigation of the legal and moral ramifications of this willingness on the part of the dominant legal regime to allow alternative sources of legal meaning to flourish, see generally Cover, *Nomos*, *supra* note 195.

325. *Id.* at 42–44.

326. Helfand, *Multiculturalism*, *supra* note 4, at 1276 (“[T]o allow minority groups to retain some sphere of autonomy can give rise to conflicts between group rules and state law. Also, by ceding law-like power to religious or cultural authorities over constituent group members, the state runs the risk that such authority will be exercised in a manner that undermines individual group members’ fundamental rights . . . . The more power a government grants to religious and cultural groups, the more difficult it will be for an individual religionist to access fundamental rights granted by the state.” (footnotes omitted)).

327. See, e.g., *id.* at 1268–82.

328. “This Constitution, and the Laws of the United States which shall be made in

Ultimately, the law must at every moment be capable of believably grounding itself in the Constitution's text, structure, history, etc., lest it be accused of illegitimacy. Yet in many cases, the Constitution itself provides only a broad institutional outline or general expressive sentiment.<sup>329</sup> Exercising constitutional authority therefore nearly always necessitates iterative acts of interpretation so that the text might embody the flexibility necessary for proper application in the ever-changing present.<sup>330</sup> Interpretation is the lifeblood of a legal tradition whose authority is grounded in a written text—without it, the law risks fading into obsolescence in the face of changing realities on the ground.<sup>331</sup> As layers of interpretation accumulate over time, however, the willing suspension of disbelief necessary to commit to the existing legal tradition as a legitimate and organic outgrowth of the Constitution itself—in other words, to call it “constitutional”—may become prohibitively substantial.<sup>332</sup> Left unabated,

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Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

329. As Chief Justice John Marshall famously wrote,

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit . . . would partake of the prolixity of a legal code . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

McCulloch v. Maryland, 17 U.S. 316, 407 (1819), *superseded by constitutional amendment*, U.S. CONST. amend. XVI.

330. Alexander Bickel explained,

It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve . . . certain enduring values. . . . But such values do not present themselves ready-made. They have a past always, to be sure, *but they must be continually derived, enunciated, and seen in relevant application.*

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 24 (1962) (emphasis added). *See also* *Cohens v. Virginia*, 19 U.S. 264, 387 (1821) (“[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it.”).

331. *See Cohens*, 19 U.S. at 387. I stress that in making this point I take no position on the ongoing debate between originalists and living constitutionalists as to *how* constitutional interpretation should take place. The key here is simply to recognize that interpretation, in whatever form, is necessary.

332. BALKIN, *supra* note 9, at 110–11 (“Indeed, the longer the constitutional system

this dynamic will bring about a destabilizing authority paradox; by engaging in the type of interpretation necessary to manifest constitutional values in the dynamic present, the law may distance itself too far from constitutional authority.<sup>333</sup>

A constitutional system can mitigate the authority paradox by satisfying its most acutely felt need: continuity.<sup>334</sup> If today's law is to credibly claim constitutional authority, it is imperative that it plausibly situate itself within a broader legal *tradition*—one stretching back to the moment of ratification and stretching forward into the future. If the constitutional tradition is to be sustainable, it is imperative that constituents believe the law they obey is the most recent incarnation of a unique legal tradition, one that has existed more or less continuously since the moment of ratification.<sup>335</sup>

Because the perceived continuity of the U.S. legal tradition is so essential to its authority, anything that might undermine the tradition's continuity necessarily poses some threat. Any statute, judicial opinion, policy, or other manifestation of legal values that makes it more difficult for constituents to invest in today's law as part of an ongoing tradition thus imposes a continuity cost.<sup>336</sup> When, for example, a court contravenes existing precedent or adopts reasoning that is not in line with the system's well-established legal values, that act incurs a continuity cost.<sup>337</sup> Of course, it is possible that the continuity price is worth paying in the interests of justice, but it is a cost nonetheless. And, if the constitutional tradition as a whole undermines its continuity claims too often, then it will undermine its

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continues, and the longer people build on existing . . . precedents (and create still others), the more the Constitution-in-practice will likely depart from one based on . . . original meaning . . . and it becomes increasingly hard to explain or defend current practices.”).

333. *Id.* at 111.

334. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 38 (2010). A number of scholars have noted the importance of continuity to the constitutional tradition's authority claims. See, e.g., *id.* (“Legal rules that have been worked out over an extended period can claim obedience for that reason alone . . . . Present-day interpreters may contribute to the evolution—but only by continuing the evolution, not by ignoring what exists and starting anew.”).

335. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 22 (1991) (“[T]he Constitution is best understood as a historically rooted tradition of theory and practice.”); BALKIN, *supra* note 9, at 85 (“[C]itizens must be able to see themselves as part of a larger political project that extends over time and of which they form a part.”).

336. See BALKIN, *supra* note 9, at 85. Of course, there are also ways a constitutional legal tradition can mitigate continuity costs and positively generate continuity capital within the system. An examination of these is beyond the scope of this Article, however.

337. See *id.*

authority claims as well.

Religious arbitration poses risks to the U.S. legal tradition's continuity claims in a number of ways. Some of these are related to the form and function of religious arbitration at a general level, and others are caused by civil courts enforcing specific religious arbitral awards that do not comport with the U.S. legal system's values. One such continuity cost arises because faith-based tribunals do not only embody religious law in the legal decisions they make, but also in the form they take.<sup>338</sup> Turn again, for example, to the BDA. The BDA's rules provide that one supervisor, the *Av Beth Din*, is tasked with creating a list of authorized arbitrators.<sup>339</sup> Some of these will be eligible to serve as lone arbitrators, while others will only be eligible to participate as members of three-arbitrator panels.<sup>340</sup> The rules require that those who are eligible to serve as lone arbitrators "shall be rabbis."<sup>341</sup> According to Orthodox Jewish law, only men may become rabbis.<sup>342</sup> Thus, the BDA's rules effectively disqualify women from serving as lone arbitrators.<sup>343</sup> Inasmuch as constituents of the present U.S. legal system would view legislation categorically banning women from being judges in certain cases as a discontinuous break from the legal tradition as it has evolved over the last century, when civil courts enforce BDA awards, the concomitant endorsement of the BDA as juridically viable may also incur a continuity price.<sup>344</sup> In short, because religious arbitration's form and procedure are also governed by religious legal values, and because those values are not always in harmony with those of the U.S. legal tradition, the act of enforcing a faith-based award necessarily carries with it the risk of some discontinuity.

The continuity price the U.S. legal system pays for allowing religious

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338. See Broyde, *Model*, *supra* note 27, at 810–12.

339. BDA RULES & PROC., *supra* note 66, § 1(c).

340. *Id.*

341. *Id.*

342. For example, one of the organizations that sponsors the BDA, the Rabbinical Council of America (RCA), recently issued a statement condemning the ordination of female rabbis. *2015 Resolution: RCA Policy Concerning Women Rabbis*, RABBINICAL COUNS. AM. (Oct. 31, 2015), <http://www.rabbis.org/news/article.cfm?id=105835>.

343. See *id.*; BDA RULES & PROC., *supra* note 66, § 1(c).

344. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) (striking down as unconstitutional laws preventing women from sitting on juries); Walter, *supra* note 38, at 543 (“[T]he composition of religious tribunals themselves is problematic. Under Jewish law, for example, women cannot serve as judges . . . . Under American law, of course, sexual discrimination in the selection of judges is forbidden . . . .”).

arbitration is also observable when courts enforce an arbitral agreement or award manifesting specific religious legal principles that are in tension with or contradict those of the U.S. tradition. Return, for example, to the *Delicious Foods* case described above.<sup>345</sup> Imagine that, instead of denying the plaintiff's *hasagath gevul* claims, the *beth din* had instead granted the claims and ordered Good Chocolates to close down. Good Chocolates goes to civil court seeking vacatur of the award. There can be no doubt that, as a matter of first principles, the doctrine of *hasagath gevul* conflicts with the basic assumptions underlying the U.S. legal system's conception of a healthy relationship between legal regulation and efficient markets.<sup>346</sup> Were *Delicious Foods* to bring the same claims it brought before the *beth din* before a civil court in the first instance, they would never have survived a motion to dismiss. But now the Jewish legal principles underlying those claims have been reified by the adjudicatory mechanism of religious arbitration, and so the civil court is faced with a weightier choice: enforce or vacate. Understanding what is at stake in that choice is essential to the central thesis of this Article.

Should the court vacate the award, that decision would in some way undermine the legitimacy of religious arbitration. Every time a faith-based award is vacated, the ability of religious practitioners to commit to religious arbitration as a genuine mechanism of adjudication is weakened incrementally. And if religious arbitration is weakened, then it will be less capable of producing the unique legal insights that can prove helpful to the U.S. legal system itself. So by vacating the *beth din*'s award, the civil court incrementally lessens its ability to learn from religious arbitration.<sup>347</sup>

The choice to enforce the *beth din*'s award also carries with it risks, however. As the Supreme Court has noted, U.S. law posits a "national interest in a competitive economy."<sup>348</sup> Indeed, the Court has gone so far as to note that the "regime of the antitrust laws" is "fundamental[ly]

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345. *Delicious Foods*, *supra* note 213, at 82–88; *see supra* Part IV.A.2.

346. *See*, Schwarzschild, *supra* note 26, at 1114 ("Divergences from liberal norms can arise in religious commercial law and in other areas as well. For example, it may conflict with federal and state antitrust laws in the United States for . . . rabbinic arbitration tribunals to enforce . . . *hasagath gevul* . . .").

347. This is not to say that the act of vacating a faith-based award is not also capable of teaching the U.S. legal system something—it is. But doing so makes it marginally less likely it will learn additional insights going forward.

348. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (quoting *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)).

importan[t] to American democratic capitalism.”<sup>349</sup> U.S. law holds that “‘cutthroat competition’ is a term of praise rather than condemnation . . . . [C]onsumers gain when firms try to ‘kill’ the competition and take as much business as they can.”<sup>350</sup> The notion that honest-yet-fierce economic competition is honorable and good is thus a source of continuity within the U.S. system. That is, a law or judicial decision can boost its authority claims by situating itself within this ongoing tradition of capitalist legal values. The Jewish legal doctrine of *hasagath gevul*, by contrast, considers the damage done to economic losers too great a price to pay for the benefit of efficient markets.<sup>351</sup> Thus, should a civil court choose to enforce a *beth din* award endorsing the values of *hasagath gevul* and thus undermine capitalist legal values to some extent, that choice will require the U.S. legal system to pay some marginal continuity price. It will be incrementally harder for the dominant legal regime to claim an ongoing legal tradition that values competition if it is simultaneously enforcing faith-based awards that do just the opposite.

A court that avoids the categorical approach and, instead, substantively engages with this hypothetical *beth din* award would, thus, need to strike a balance between an incremental loss of the religious legal insights generated through religious arbitration on the one hand, and the risk of discontinuity by enforcing an award that is in tension with the U.S. legal system’s own values on the other. In other words, substantive engagement with religious arbitration as a civil court requires a risk–benefit assessment. Because every religious arbitration award reflects a religious community’s adjudicatory mechanism in action, each necessarily poses some marginal risk to the U.S. tradition and presents some incremental benefit as well. This Article has focused primarily on one type of benefit and risk, respectively: religious legal insights and discontinuity. There are no doubt others; a conscientious court would consider as many as possible in making its decision to vacate or enforce.<sup>352</sup> But a court cannot do so if it consistently retreats to categories. The calculus must be motivated by a desire to substantively assess religious arbitration’s meaning for the U.S. legal tradition itself.

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349. *Id.* at 634.

350. *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper*, 462 F.3d 690, 696 (7th Cir. 2006).

351. *See supra* Part IV.A.2 and accompanying notes.

352. Indeed, it is my hope that this Article will spur scholars to consider other possible risks and benefits of religious arbitration for the U.S. legal tradition, without getting distracted by categorical questions of legality as a formal matter.

## VI. CONCLUSION

Within the U.S. legal universe, religious arbitration is extraordinary: a uniquely religious space in an otherwise secular landscape. Religious arbitrators explicitly and emphatically see themselves as doing God's will.<sup>353</sup> The legal values they balance, the doctrines they apply, and the procedures they employ all are direct or indirect manifestations of religious faith statements.<sup>354</sup> Inasmuch as they perceive it as God's will to pursue justice, that is what faith-based tribunals seek to do as well.<sup>355</sup> But there are times when religious perceptions of justice do not align with those of the secular state. Indeed, as has been noted throughout, religious legal values are often in tension with key tenets of the U.S. legal tradition.<sup>356</sup> By enforcing religious arbitration agreements and awards, then, the U.S. legal system engages in a twofold self-sacrifice: it relinquishes its monopoly over both the means of juridical enforcement and the defined set of acceptable legal values. In short, the U.S. legal system as a whole pays a price for enforcing religious arbitration. Why should it pay?

This Article has presented one answer: The U.S. legal tradition should tolerate the costs of religious arbitration because religious arbitration offers benefits that outweigh its risks. Because faith-based arbitration relies on legal traditions that are different in kind from the U.S. legal system, it produces legal insights that would otherwise be unavailable to the U.S. tradition.<sup>357</sup> Lending faith-based tribunals the force of law enhances these insight-generating mechanisms and allows civil courts to capture some of the resulting insights.<sup>358</sup> In this way, the U.S. legal tradition becomes wiser for having encountered religious arbitration.<sup>359</sup>

But religious arbitration poses some risks as well. By enforcing religious arbitration awards that are in tension with the U.S. legal system's

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353. Fried, *supra* note 77, at 635–41 (describing the history and evolution of the Jewish commitment to religious courts as the proper venue to mete out religious justice).

354. Helfand, *Multiculturalism*, *supra* note 4, at 1256–68 (describing how religious law impacts both substance and procedure of religious arbitration, and how each impacts judicial review of religious arbitration agreements and awards).

355. See, e.g., *Deuteronomy* 16:20 (The Complete Jewish Bible), [www.biblestudytools.com/cjb/deuteronomy/16.html](http://www.biblestudytools.com/cjb/deuteronomy/16.html) (“Justice, only justice, you must pursue . . .”).

356. See, e.g., *supra* Part IV.A.2 (discussing the Jewish legal concept of *hasagath gevul*).

357. See *supra* Part IV.

358. See *supra* Part IV.A.

359. See *supra* Part IV.B.

own legal values, the U.S. tradition incurs some continuity costs.<sup>360</sup> The legal insights gained will not always outweigh the costs of enforcing a religious arbitration award; in these cases vacatur is the appropriate response.<sup>361</sup> To decide when to enforce and when to vacate, then, a court should substantively engage with the costs and benefits of the religious arbitral agreement or award in question. What will the U.S. legal system gain by enforcement? What will it risk? These are the questions a conscientious court should ask.

As a descriptive matter, however, that is not what courts do. Instead, courts have almost universally adopted the categorical approach to religious arbitration.<sup>362</sup> Rather than face the unique religiosity of the thing head on, civil courts, instead, attempt to dodge the substantive challenges by stripping religious arbitration of its special characteristics.<sup>363</sup> In other words, courts treat religious arbitration as just one subspecies of conventional arbitration and therefore use conventional contract law to govern it in most instances.<sup>364</sup> This choice leads courts astray as a doctrinal and practical matter, resulting in misapplied law and unjust outcomes.<sup>365</sup> More importantly for present purposes, the categorical approach blinds courts to the substance of the thing. A court cannot learn religious arbitration's unique insights if it is trying to establish that religious arbitration is not, in fact, unique.<sup>366</sup>

This is a mistake. Religious arbitration presents special advantages and special challenges for the U.S. legal tradition itself. Recognizing this fact and engaging in a substantive examination of the unique risks and benefits religious arbitration poses will help the U.S. legal tradition become wiser and more nuanced. Religious arbitration has something to teach; the U.S. legal system must be ready to *learn*.

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360. See *supra* pp. 157–59; see also *supra* Part V.

361. See, e.g., *supra* pp. 150–51.

362. See *supra* Part III.

363. See *supra* notes 87, 91 and accompanying text.

364. See *supra* notes 101–07 and accompanying text.

365. See *supra* Parts III.A.1, III.B.

366. In other words, in using the categorical approach, courts refuse to acknowledge the ways in which religious arbitration is special. But it is that distinctiveness that generates the possible benefits of religious arbitration for the U.S. legal tradition in the first place. See *supra* Part IV.B. Thus, it will only be by acknowledging the substantive uniqueness of faith-based arbitration as a legal phenomenon that civil courts will be able to inculcate the lessons it is capable of teaching.