

## COMMENT

### The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional

#### INTRODUCTION

Imagine you apply to be a cashier at a supermarket. At the beginning of the interview, you sign an employment application. You don't get the job, and your interviewer's remarks make you suspect it's because you are Muslim. You sue in federal court under Title VII of the Civil Rights Act of 1964. The supermarket moves to dismiss the suit because your employment application included an agreement to arbitrate all Title VII disputes. The court dismisses your case and compels arbitration.

You arrive to see that the arbitrator is a pastor. When you protest, the employer reminds you that the agreement specified arbitration by a Christian tribunal. And because the "Rules of Procedure for Christian Conciliation" permit holy scripture to trump federal law, you lose the case.<sup>1</sup> The district court then upholds the arbitrator's decision<sup>2</sup> under the highly deferential standard of review mandated by the Federal Arbitration Act (FAA).<sup>3</sup>

This scenario will likely strike readers as both unfair and implausible. But as this Comment documents, numerous recent cases have compelled religious arbitration of employment disputes, even in cases involving federal civil rights claims. Most strikingly, courts have compelled arbitration even when the arbitration agreement explicitly stated that holy texts would trump federal law.<sup>4</sup>

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1. *Easterly v. Heritage Christian Sch., Inc.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at \*1-3 (S.D. Ind. Aug. 26, 2009).
  2. *Id.* at \*2-4.
  3. 9 U.S.C. §§ 10-11 (2018).
  4. *Maynard v. Valley Christian Acad., Inc.*, No. 5:16-CV-01889, 2017 WL 3594670, at \*5 (N.D. Ohio Aug. 21, 2017); *Easterly*, 2009 WL 2750099, at \*3; *Spivey v. Teen Challenge of Fla., Inc.*, 122 So. 3d 986, 993 (Fla. Dist. Ct. App. 2013); *Woodlands Christian Acad. v. Weibust*, No.

This Comment argues that this practice is unlawful for two reasons. First, the Supreme Court has upheld civil rights arbitration only on the rationale that arbitrators faithfully apply federal law.<sup>5</sup> This is not the case when a tribunal explicitly follows religious rules over federal law. Second, courts violate the Establishment Clause when they enforce arbitral decisions that apply religious principles to secular-law disputes. We argue that the Supreme Court's entanglement jurisprudence is about ensuring secular adjudication of secular disputes and religious adjudication of religious disputes. We therefore articulate a "reverse-entanglement" principle that protects secular law from religious interference. And although discrimination provides the most striking illustration of the stakes of the issue, this constitutional argument extends to religious arbitration of secular disputes more broadly.<sup>6</sup>

The rest of the Comment proceeds as follows: Part I briefly reviews the doctrine and critiques of civil rights arbitration. Part II documents the widespread nature of religious tribunals and shows how they uniquely undermine the Supreme Court's justification for civil rights arbitration. It also explains why litigants have not been able to escape religious arbitration by asserting traditional contract defenses. Finally, Part III contends that allowing religious tribunals to arbitrate secular rights violates the Establishment Clause.

## I. DOCTRINE AND CRITIQUES OF ARBITRATION

This Part provides an overview of civil rights arbitration and surveys common critiques. Section I.A briefly reviews the history of judicial deference to arbitration, recounting its expansion from commercial disputes to those involving statutory rights. Section I.B draws on empirical evidence and case law to cast doubt on the Court's insistence that arbitrators are suitable substitutes for judges in terms of how they apply and uphold the law.

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09-10-00010-CV, 2010 WL 3910366, at \*5 (Tex. App. Oct. 7, 2010); *see also* Prescott v. Northlake Christian Sch., No. CIV.A. 01-475, 2004 WL 2434997, at \*5 (E.D. La. Oct. 29, 2004) (confirming an arbitration award under the Rules of Procedure for Christian Conciliation), *aff'd*, 141 F. App'x 263 (5th Cir. 2005); McCaffrey v. Phila. Montgomery Christian Acad., No. 3511 EDA 2012, 2013 WL 11257191, at \*1 (Pa. Super. Ct. July 9, 2013) (denying an anticipatory request to avoid arbitration under the Rules of Procedure for Christian Coalition).

5. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 255-60 (2009); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-33 (1991).
6. For instance, the reverse-entanglement principle would also limit the extent to which religion can infuse arbitration of family-law, employment-law, and commercial disputes.

A. *Case Law on Arbitration of Civil Rights*

Historically, common law courts were hostile to arbitration agreements.<sup>7</sup> Justice Story called arbitration “defective [and] imperfect,” arguing that arbitrators “are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually.”<sup>8</sup> Justice Story continued:

[A]lthough a party may have entered into an agreement to submit his rights to arbitration, this furnishes no reason for a court of equity to deprive him of the right to withdraw from such agreement . . . and to declare that the common tribunals of the country shall be closed against him.<sup>9</sup>

The Justice concluded that courts generally should not compel specific performance of arbitration agreements.<sup>10</sup>

In 1925, Congress passed the FAA “to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.”<sup>11</sup> American courts gradually began to enforce arbitration agreements in admiralty and commercial contexts.<sup>12</sup> In practice, this means that modern courts facilitate arbitration in two different procedural postures. First, when a plaintiff initiates a federal lawsuit in violation of an agreement to arbitrate, the court will grant a defendant’s motion to dismiss and compel arbitration. Second, after an arbitrator has resolved a dispute, the court will enter a judgment giving legal force to the arbitrator’s award.

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7. See Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1250-51 (2011).

8. *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320-21 (C.C.D. Mass. 1845) (No. 14,065).

9. *Id.* at 1320.

10. *Id.* at 1321-22.

11. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); see also H.R. REP. NO. 68-96, at 1-2 (1924) (“The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . .”).

12. See, e.g., *Kanmak Mills, Inc. v. Soc’y Brand Hat Co.*, 236 F.2d 240, 252 (8th Cir. 1956); *Ky. River Mills v. Jackson*, 206 F.2d 111, 121 (6th Cir. 1953); *In re Util. Oil Corp.*, 69 F.2d 524, 526 (2d Cir. 1934); *The Gerald A. Fagan*, 49 F.2d 215, 218 (2d Cir. 1931), *aff’d sub nom. Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932). Perhaps because the FAA was modeled on the New York Arbitration Act, the Second Circuit warmed to the new liberal view of arbitration before many other courts did. See *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184, 185 (D. Del. 1930) (noting that the FAA was based on the New York Arbitration Act).

From the 1970s onward, the Supreme Court has increasingly permitted arbitration not just over commercial disputes but also in areas of the law that traditionally required adjudication by courts. In particular, although courts had long considered contracts to arbitrate federal statutory rights to be void as against public policy, by the turn of the twenty-first century, courts had held arbitrable nearly all statutory rights<sup>13</sup>—from antitrust<sup>14</sup> to securities.<sup>15</sup> In the early 2000s, the Court took the dramatic additional step of holding that civil rights claims can be subject to arbitration.

Two important cases permitting arbitration of civil rights disputes were *Gilmer v. Interstate/Johnson Lane Corp.*<sup>16</sup> and *Circuit City Stores, Inc. v. Adams*.<sup>17</sup> The Supreme Court approved arbitration under a civil rights statute for the first time in *Gilmer*, when it held that nothing in the text or legislative history of the Age Discrimination in Employment Act (ADEA) evinced congressional intent to shield age-discrimination claims from arbitration. And in *Circuit City*, the Court took no issue with an arbitration clause that swept even Title VII—which some called the “most important section” of the “most important civil rights legislation of the century”—within its reach.<sup>18</sup> Sales counselor Saint Clair Adams sued Circuit City in state court for discrimination under a California civil rights statute, alleging “on-the-job harassment and retaliation based upon his sexual orientation.”<sup>19</sup> But Adams had signed a wide-ranging arbitration agreement in his employment application, which extended to all

claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and [the] law of tort.<sup>20</sup>

Adams’s employer sought a court order to enforce this contract provision and compel arbitration under the FAA. In a 5-4 decision, the Court held that the FAA extended to employment contracts, including those requiring arbitration of dis-

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13. Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 715 (1999).

14. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985).

15. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227-42 (1987).

16. 500 U.S. 20 (1991).

17. 532 U.S. 105 (2001).

18. Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 AM. U. L. REV. 339, 344 (1986).

19. Brief of Respondent at \*1, *Circuit City*, 532 U.S. 105 (2001) (No. 99-1379), 2000 WL 1369473.

20. *Circuit City*, 532 U.S. at 110.

crimination claims. Emphasizing the cost-saving benefits of arbitration, the Court insisted that “arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law.”<sup>21</sup>

In the years since the *Circuit City* decision, the Supreme Court has also upheld the arbitrability of a race-discrimination claim brought by a man passed over for promotion because he was black<sup>22</sup> and age-discrimination claims brought by night watchmen forced out of their positions.<sup>23</sup> Circuit courts have compelled arbitration of sex-discrimination,<sup>24</sup> pregnancy-discrimination,<sup>25</sup> and religious-discrimination claims.<sup>26</sup> In short, it is now settled law that civil rights disputes can be forced out of court and into arbitration.

### *B. Problems with Arbitration: Threats to Substantive Rights*

The Supreme Court’s rationale for allowing civil rights arbitration rests on the dubious legal fiction that arbitrators protect statutory rights as effectively as do judges. In expanding the scope of arbitration, the Court has repeatedly recited a familiar incantation: “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>27</sup> The Court has further stated that “there is no reason to assume at the outset that arbitrators will not follow the law.”<sup>28</sup>

Despite these recitations, it is now well documented that arbitration provides diminished protection for statutory rights. Paul Carrington and Paul Haagen have argued that because arbitrators make a living from continued business with repeat players, they suffer from an “endemic disinclination to enforce legal rights.”<sup>29</sup> Carrington and Haagen note that the FAA “confers a subpoena power

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21. *Id.* at 123.

22. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72-76 (2010).

23. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 255-60 (2009).

24. *See, e.g., Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 85 (4th Cir. 2005).

25. *See, e.g., Panepucci v. Honigman Miller Schwartz & Cohn LLP*, 281 F. App’x 482, 483 (6th Cir. 2008).

26. *See, e.g., Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1262 (11th Cir. 2003).

27. *E.g., 14 Penn Plaza LLC*, 556 U.S. at 266 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (quoting *Gilmer*, 500 U.S. at 26); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Gilmer*, 500 U.S. at 26).

28. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

29. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 346.

on arbitrators, but otherwise makes no provisions for discovery,” which prevents arbitrators from “detecting wrongdoing and enforcing the rights of victims.”<sup>30</sup> They outline a host of other procedural deficiencies in the Act; for example, arbitrators are not required to explain decisions or even to record the evidence that led to them.<sup>31</sup> Carrington and Haagen’s forceful verdict is that “[n]o matter how frequently the Court may insist” that arbitration protects substantive rights, it is “simply false doctrine.”<sup>32</sup>

Empirical studies support Carrington and Haagen’s diagnosis. One survey asked two hundred commercial arbitrators, “Do you always follow the law in formulating your awards?” A full twenty percent responded “No.”<sup>33</sup> Even among those who said “Yes,” several arbitrators explained that they “tempered” their awards “with a concept of ‘equity.’”<sup>34</sup> Another study likewise found that twenty percent of interviewed arbitrators did not agree “that they ought to reach their decisions within the context of the principles of substantive rules of law,” and “almost 90 per cent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing.”<sup>35</sup>

Research has found that arbitration may pose a special threat to substantive rights in the context of employment and labor law. For instance, women are less likely than men to win their claims and to be awarded attorneys’ fees or punitive damages in arbitration disputes that involve claims of Title VII workplace discrimination.<sup>36</sup> Another recent study found that employees are far likelier to lose in mandatory arbitration than in federal or state court; employees win in mandatory arbitration only 21.4% of the time—compared to a 36% win rate in federal court and a 57% win rate in state court.<sup>37</sup> And employees who do prevail in arbitration win a median damages award that is “only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts.”<sup>38</sup>

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30. *Id.* at 348.

31. *Id.* at 347.

32. *Id.* at 349.

33. Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 154 (1994).

34. *Id.* at 155.

35. Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961).

36. Kenneth F. Dunham, *Great Gilmer’s Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases*, 29 AM. J. TRIAL ADVOC. 303, 319 (2005) (citing Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL’Y REV. 573, 576-77 (2005)).

37. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL’Y INST. 20 (Dec. 7, 2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/69BZ-NVGN>].

38. *Id.* at 19.

Parties forced to arbitrate their statutory rights are also denied any opportunity to have a judge review the substance of the arbitrator's decision. Section 10 of the FAA provides only four grounds for vacating an arbitration award: corruption or fraud; partiality; prejudicial misconduct; and exceeding arbitral power or failing to make an award.<sup>39</sup> Section 11 provides similarly narrow grounds for modifying an award, such as "material miscalculation."<sup>40</sup> Notably, the statute does not list legal error as a ground for vacatur. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court suggested in dicta that recognizing even "'manifest disregard of the law' as a further ground for vacatur on top of those listed in § 10" would violate the plain meaning of the FAA.<sup>41</sup> The Court instead argued "that §§ 10 and 11 provide exclusive regimes for the review [of arbitration awards] provided by the statute."<sup>42</sup> The Court added that "'[f]raud' and a mistake of law are not cut from the same cloth."<sup>43</sup> In a later case, the Court further called into question (without ultimately deciding) whether a judicial-review exception for manifest disregard of the law survived *Hall Street*.<sup>44</sup>

In light of Supreme Court precedent, the Fifth, Eighth, and Eleventh Circuits have expressly held that manifest disregard of the law is not a reason to overturn an arbitral decision.<sup>45</sup> In the Seventh Circuit, a jurisdiction where manifest disregard survives as a ground for vacatur, that standard applies only when an arbitrator actually "directs the parties to violate the law."<sup>46</sup> While circuits disagree on manifest disregard, all of them enforce a standard of review for arbitration

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39. 9 U.S.C. § 10(a) (2018).

40. *Id.* § 11(a).

41. 552 U.S. 576, 584-85 (2008).

42. *Id.* at 590.

43. *Id.* at 586.

44. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010).

45. See, e.g., *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010) (holding that "judicially-created bases for vacatur," including "manifest disregard," "are no longer valid in light of *Hall Street*"); *Med. Shoppe Int'l, Inc. v. Turner Investments, Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding in light of *Hall Street* that "an arbitral award may be vacated only for the reasons enumerated in the FAA"); *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) ("We conclude that *Hall Street* restricts the grounds for vacatur to those set forth in § 10 of the Federal Arbitration Act . . . and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA."); see also Stanley A. Leasure, *Arbitration Law in Tension After Hall Street: Accuracy or Finality?*, 39 U. ARK. LITTLE ROCK L. REV. 75, 99 (2016) (citing *Bellantuono v. ICAP Sec. USA, LLC*, 557 F. App'x 168, 173 n.3 (3d Cir. 2014) (surveying other circuit precedent and declining to decide the issue for the Third Circuit)).

46. *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567 (7th Cir. 2015) (citing *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 579-81 (7th Cir. 2001)).

that is far more limited than the de novo review of legal conclusions to which a litigant is entitled when appealing an identical claim from a trial court.

In sum, the Court has interpreted the FAA to compel and enforce arbitration not only in commercial disputes, but also regarding statutory-rights claims. It has recently expanded mandatory arbitration's scope to include civil rights claims, arguing that arbitrators follow the law like judges. But there is considerable reason to doubt the truth of this assertion. Studies show a systemic failure by arbitrators to protect statutory rights as well as courts do, and the Court's own jurisprudence holds arbitrators to a lower standard than it does judges.

## II. THE SPECIAL THREAT OF RELIGIOUS ARBITRATION

This Part argues that religious arbitration poses additional threats to statutory rights by openly subordinating secular law to holy texts.<sup>47</sup> Many religious arbitrators are trained as church leaders. The problem is not that these arbitrators are untrained in law; some of them may in fact be attorneys. Rather, the issue is that these arbitrators might be committed to an entirely different legal tradition—one in which religious principles, not secular statutes, reign supreme. Section II.A documents the pervasiveness of religious arbitration, showing that thousands of Americans of many faiths are forced to participate. Section II.B demonstrates how religious tribunals subordinate secular law to religious law. Section II.C explains why litigants are unlikely to escape religious arbitration by mounting traditional contractual or statutory defenses. Finally, Section II.D discusses how the effective-vindication doctrine might apply to the religious arbitration of statutory rights.

### A. *The Prevalence of Religious Arbitration*

Thousands of Americans submit to religious arbitration every year. In 2012, the Institute of Christian Conciliation (ICC) claimed to conduct around one hundred conciliations annually, with up to fifteen hundred additional religious arbitrations per year carried out by ICC-certified “conciliators” around the country.<sup>48</sup> On top of that, the ICC claimed to make more than one thousand yearly

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47. Religious arbitration institutes often advertise the religious qualifications of their adjudicators. The Institute of Christian Conciliation (ICC) publicizes that its certified arbitrators include “pastors” and “lay leaders in Christian churches.” *Are the Mediators & Arbitrators Qualified?*, INST. FOR CHRISTIAN CONCILIATION, <http://www.iccpeace.com/certification.html> [<https://perma.cc/7T38-KGKS>]. Likewise, the Beth Din of America convenes panels of rabbis to serve as arbitrators. BETH DIN AM., <https://bethdin.org> [<https://perma.cc/DV2H-C5ZF>].

48. See Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 520 & n.130 (2012).



“coaching calls,” in which it encouraged litigants to settle their disputes according to ICC principles.<sup>49</sup> Jewish arbitration is also deeply entrenched. Most major American cities have a standing beth din, or Jewish tribunal. New York City alone has four rabbinic courts.<sup>50</sup> One of these four, the Beth Din of America, hears approximately three hundred divorce cases and one hundred commercial cases per year, in addition to landlord-tenant, wrongful-termination, and other disputes.<sup>51</sup> The number of commercial cases has almost doubled over the past decade, suggesting that Jewish arbitration is “on the rise.”<sup>52</sup> The West Coast Rabbinical Court, one of multiple Jewish tribunals in Los Angeles, arbitrated around sixty-five commercial disputes last year, as well as disputes over divorces and kosher laws.<sup>53</sup> These and many other tribunals advertise that they follow secular law and commercial practices only to the “extent permitted by Jewish Law.”<sup>54</sup> Islamic arbitration arrived in America more recently but is also starting to gain traction.<sup>55</sup> There are already several reported cases of secular courts upholding the arbitral decisions of Sharia tribunals.<sup>56</sup>

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49. *Id.* at 520 n.129.

50. See *New York*, GET RESOURCE CTR., <http://getaget.com/BeitDin.aspx> [<https://perma.cc/C3HF-K6DZ>].

51. *Journal of the Beth Din of America*, J. BETH DIN AM. 7 (2014), <http://bethdin.org/wp-content/uploads/2015/07/JBDAVol2.pdf> [<https://perma.cc/49VQ-H3D6>]; Sukhsimranjit Singh & Michael Avi Helfand, *When Arbitration Goes Religious: A Lawyer's Toolkit for Religious Arbitration*, A.B.A. slide 10 (Sept. 13, 2017), [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/cle\\_and\\_mtg\\_planning\\_board/teleconferences/2017-2018/DR1718\\_materials.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/cle_and_mtg_planning_board/teleconferences/2017-2018/DR1718_materials.pdf) [<https://perma.cc/US97-GFCY>].

52. Michael A. Helfand, *The Future of Religious Arbitration in the United States: Looking Through a Pluralist Lens*, in OXFORD LEGAL HANDBOOK ON GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed., forthcoming 2019) (manuscript at 8), <https://ssrn.com/abstract=3086833>.

53. *Arbitration*, W. COAST RABBINICAL CT., <http://www.beth-din.org/financial-arbitration> [<https://perma.cc/JYQ5-NADG>].

54. *Arbitration at the Beth Din of America*, BETH DIN AM. 3 (2015), <http://bethdin.org/wp-content/uploads/2015/07/ArbBrochure.pdf> [<https://perma.cc/XQ4C-LURL>]; see also *Rules and Procedures of the Beth Din Zedek of the Chicago Rabbinical Council*, CHI. RABBINICAL COUNCIL 4, [http://www.crcweb.org/Beth\\_Din\\_Rules\\_and\\_Procedures.pdf](http://www.crcweb.org/Beth_Din_Rules_and_Procedures.pdf) [<https://perma.cc/4MKK-L4QF>] (“The Beth Din . . . accepts that Jewish law . . . will provide the rules of procedure and rules of decision that govern the functioning of the Beth Din . . .”).

55. See Michael Broyde, *Sharia in America*, WASH. POST (June 30, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/30/sharia-in-america> [<https://perma.cc/UQB8-QG4T>] (“Islamic courts are becoming common in North America.”).

56. See, e.g., *Hamzavi v. Ahmad*, No. 205592, 1999 WL 33452466 (Mich. Ct. App. Mar. 30, 1999); *Abd Alla v. Mourssi*, 680 N.W.2d 569, 574 (Minn. Ct. App. 2004); *Matahen v. Sehwaail*, No. C-7-15, 2016 WL 1136602 (N.J. Super. Ct. App. Div. Mar. 24, 2016); *Jabri v. Qaddura*, 108 S.W.3d 404, 413 (Tex. App. 2003).

*B. When Religious Precepts Conflict with Secular Law*

The idea that religious tribunals prioritize holy law over federal statutory law is not mere speculation. It is explicitly one of the terms for which parties contract when they agree to arbitrate disputes before a religious tribunal. For example, parties who contract for the services of the ICC are bound by the Rules of Procedure for Christian Conciliation (RPCC), which provide:

Rule 4. Conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.<sup>57</sup>

Rule 4 explicitly subordinates American law to religious precepts and openly defies the Supreme Court's instruction that arbitrators should apply substantive law in the same manner that a court would. Under the rationale of cases like *Circuit City*, no arbitrator following this rule should be allowed to adjudicate statutory rights. And yet this clause has been upheld and enforced by at least two state courts and two federal courts.<sup>58</sup>

Courts' attempts to rationalize away the problems with this rule have been unsatisfactory. In *Easterly v. Heritage Christian Schools, Inc.*, the district court compelled a fired schoolteacher to adjudicate her age- and disability-discrimination claims before a Christian tribunal. The plaintiff argued that RPCC Rule 4 made her arbitration contract unenforceable because she would have to "forego vindication of her substantive rights guaranteed by the ADEA and ADA . . . and instead rely on biblical scripture to define her rights."<sup>59</sup> The court was unmoved. Finding comfort in "the provision requir[ing] the arbitrator to take into consideration the applicable law," the court claimed that "the same is essentially true of a federal judge, in light of the fact that a party can waive an argument—e.g. that a particular case or statute applies—by failing to raise it."<sup>60</sup> But this analogy is unpersuasive. Rule 4 allows an arbitrator to decide on the merits that a plaintiff's civil rights have been violated but then merely take that finding "into considera-

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57. *Rules of Procedure*, INST. FOR CHRISTIAN CONCILIATION, <http://www.iccpeace.com/Rules/index.html> [<https://perma.cc/5X7G-AQXG>].

58. See, in addition to the cases discussed below, *Encore Products, Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1119 (D. Colo. 1999), and *Maynard v. Valley Christian Academy, Inc.*, No. 5:16-CV-01889, 2017 WL 3594670, at \*4-11 (N.D. Ohio Aug. 21, 2017), in which the courts rejected a host of contract defenses and compelled religious arbitration.

59. *Easterly v. Heritage Christian Sch., Inc.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at \*3 (S.D. Ind. Aug. 26, 2009).

60. *Id.* at \*3 n.2.

tion”<sup>61</sup> and perhaps hold it outweighed by scriptural commandments. By contrast, if a judge reached the merits of a plaintiff’s civil rights claim and found a violation, the plaintiff would necessarily prevail. And more fundamentally, the Supreme Court has emphasized that arbitration of statutory rights is legitimate precisely because it does not amount to waiver of those rights.<sup>62</sup>

Rule 4 also made an appearance in *Spivey v. Teen Challenge of Florida, Inc.*,<sup>63</sup> in which a mother was forced to arbitrate her son’s wrongful-death claim before a Christian tribunal. Nicklaus Spivey died of a drug overdose after a religious rehabilitation center, following an attempt to “de-gay” him, threw Spivey out “[on]to the streets of Jacksonville” for violating program rules.<sup>64</sup> When his mother objected to Rule 4, the court dismissed her concerns by interpreting the Rule to mean holy scripture would trump secular law only in matters of “process” rather than substance.<sup>65</sup>

However, an examination of the other RPCC rules makes this reading implausible; the rules are procedural in name only. Other rules clarify that scripture can and should guide the arbitrator’s substantive decisions. On the merits, the ICC’s Standard of Conduct for Christian Conciliators instructs that a “Christian conciliator shall encourage and support only scripturally sound decisions and actions (Micah 6:8).”<sup>66</sup> This involves encouraging “repentance, confession, forgiveness, and reconciliation whenever sin has occurred or a relationship has been broken (Luke 17:3; Gal. 6:1; 2 Tim. 4:2).”<sup>67</sup> The arbitrator “shall . . . help the parties to make decisions, to take actions, and to change their lifestyles, habits, and conduct as God has instructed in the Scriptures.”<sup>68</sup> In crafting an arbitral award, arbitrators “may grant any remedy or relief that they deem scriptural, just and equitable, and within the scope of the agreement of the parties.”<sup>69</sup> And perhaps most strikingly, “the Christian conciliator shall respect the legitimate juris-

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61. *Rules of Procedure*, *supra* note 57.

62. *See infra* Section II.D.

63. 122 So. 3d 986 (Fla. Dist. Ct. App. 2013).

64. *Id.* at 989; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES: DEALBOOK (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html> [https://perma.cc/82CB-TCL7].

65. *Spivey*, 122 So. 3d at 993.

66. *Guidelines for Christian Conciliation Version 4.7*, INST. FOR CHRISTIAN CONCILIATION 28, <https://peacemaker.training/wp-content/uploads/2018/04/Guidelines-version-4.7-icc-peace.pdf> [https://perma.cc/7QZF-QC5A].

67. *Id.*

68. *Id.* at 27.

69. *Id.* at 24.

diction of civil authorities and shall cooperate with them as required by law, *unless there is a clear scriptural reason to do otherwise* (Acts 4:19; Rom. 13:1-7).<sup>70</sup>

These rules strongly suggest that Christian Conciliation is not just a matter of process.<sup>71</sup> They seem to instruct arbitrators to steer parties toward a scripturally sanctioned outcome.<sup>72</sup> They appear to give arbitrators permission to craft biblically based remedies. And they make clear that scripture, not the “jurisdiction of civil authorities,” is sacrosanct.<sup>73</sup>

While these examples concern the rules for Christian Conciliation, the religious principles of other faith-based tribunals also come into tension with secular law. For example, under Sharia law, a woman’s testimony may be given half as much evidentiary weight as a man’s.<sup>74</sup> In Britain, where Islamic arbitration is widespread, the Parliament has considered legislation to prevent Sharia panels from treating “the evidence of a man [as] worth more than the evidence of a woman.”<sup>75</sup> Numerous civil rights groups, including the Iranian and Kurdish Women’s Rights Organization, have backed the bill.<sup>76</sup> Some scholars have further argued that Sharia family law may substantively disadvantage women, as discussed in Part III.<sup>77</sup> Similarly, under traditional Jewish law, “women, non-Jews, and the handicapped cannot act as witnesses.”<sup>78</sup>

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70. *Id.* at 28 (emphasis added).

71. If anything, the ICC rules are more deferential to secular procedure than to secular substantive law. *See id.* at 25 (“Should these Rules vary from state or federal *arbitration statutes*, these Rules shall control except where the state or federal rules specifically indicate that they may not be superseded.” (emphasis added)). This Rule, which explicitly allows ICC procedure to be preempted by an arbitration statute, stands in contrast to many of the other rules quoted above, which explicitly allow *scripture* to preempt secular authorities.

72. Although the court ultimately did not rule for this appellant, it is interesting to note the following claim in an appeal following an ICC conciliation: “Appellant also alleged that the ICC placed Appellant under duress by using Christian guilt to deter Appellant from vindicating her legal rights.” *McCaffrey v. Phila. Montgomery Christian Acad.*, No. 3511 EDA 2012, 2013 WL 11257191, at \*2 (Pa. Super. Ct. July 9, 2013).

73. *Guidelines for Christian Conciliation*, *supra* note 66, at 28.

74. *See* Julia Halloran McLaughlin, *Taking Religion out of Civil Divorce*, 65 RUTGERS L. REV. 395, 405 (2013).

75. Arbitration and Mediation Services (Equality) Bill 2016-17, HL Bill [18] cl. 1(2) (Eng. & Wales), <https://publications.parliament.uk/pa/bills/lbill/2016-2017/0018/17018.pdf> [<https://perma.cc/SQG8-X3QZ>].

76. Ashley Nickel, *Abusing the System: Domestic Violence Judgments from Sharia Arbitration Tribunals Create Parallel Legal Structures in the United Kingdom*, 4 ARB. BRIEF 92, 104 (2014).

77. *See infra* Section III.D.

78. Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 191 (2007) (citing 1 EMMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 255-57 (1990)). Whether women may serve as witnesses on matters of Jewish law is a topic of contemporary rabbinic debate. In 2001, the Rabbinical Assembly—an association

To put a point on it: despite protestations of district courts to the contrary, religious tribunals explicitly admit to prioritizing scriptural edicts over substantive secular law. These religious tribunals rule on thousands of disputes every year, and according to the Supreme Court’s scope-of-arbitration jurisprudence, such tribunals can adjudicate issues involving federal statutory rights—including civil rights. Moreover, under the Supreme Court’s narrow reading of the grounds on which an arbitration award can be vacated under the FAA, the fact that a religious tribunal failed to enforce federal rights because of a contrary scriptural commandment might not be enough to overturn an arbitral judgment. The result is that religious arbitrators can explicitly disregard the secular law, and that disregard may be insufficient to warrant review.

### C. Contractual Defenses and Why They Often Fail

Courts have also shown a reluctance to invalidate religious-arbitration clauses under traditional contract-law doctrines. For instance, litigants have not been especially successful in arguing that religious arbitration clauses are unconscionable. In a 2011 article, Michael Helfand hypothesized that unconscionability could provide “a safety net for protecting parties from the potential dangers of religious arbitration.”<sup>79</sup> However, recent precedent shows this has not come to pass. This Section suggests that courts may be disinclined to find procedural unconscionability because federal policy favors arbitration. And courts may be unwilling to even reach the question of substantive unconscionability for fear of embarking on an impermissible analysis of church law. Other contract defenses, like arguments that these arbitration agreements are illusory, fare no better.

Courts will decline to enforce contracts that they find to be unconscionable. The party challenging the contract generally has the burden of proving both sub-

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of rabbis identifying with Conservative, rather than more traditional Orthodox, beliefs—voted to allow female witnesses by a narrow eight-seven margin. See Susan Grossman, *Edut Nashim K’Edut Anashim: The Testimony of Women Is as the Testimony of Men*, COMMITTEE ON JEWISH L. & STANDARDS RABBINICAL ASSEMBLY 1, 15 (Oct. 31, 2001), [https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/grossman\\_womenedut.pdf](https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/grossman_womenedut.pdf) [<https://perma.cc/JVH3-U2Z5>]. At least one Rabbi who voted in favor of the proposal wrote separately to clarify that women still should not serve as witnesses to divorce proceedings, as that “would render that document ineffective for virtually all Orthodox rabbis, and for some Conservative rabbis.” Aaron Mackler, *Edut Nashim K’Edut Anashim: The Testimony of Women Is as the Testimony of Men: A Concurring Opinion*, COMMITTEE ON JEWISH L. & STANDARDS RABBINICAL ASSEMBLY 4 (Oct. 31, 2001), [https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/mackler\\_women\\_witnesses.pdf](https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/mackler_women_witnesses.pdf) [<https://perma.cc/7FE3-NBH9>].

79. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1294 (2011).

stantive and procedural unconscionability.<sup>80</sup> The procedural prong focuses on unequal bargaining power.<sup>81</sup> However, not all contracts of adhesion—that is, contracts drafted by the more powerful party and offered to the weaker party on a “take it or leave it” basis—are unconscionable.<sup>82</sup> A contract of adhesion may indicate, but usually is not dispositive of, procedural unconscionability.<sup>83</sup> And the litigant will also have to prevail on the substantive prong, which focuses on “‘overly harsh’ or ‘one-sided’ results.”<sup>84</sup> The following case study shows how parties defending against religious arbitration have struggled to satisfy both prongs of the unconscionability test.

In 2015, Maria and Luis Garcia sued their local Church of Scientology for fraudulently inducing them to donate nearly four hundred thousand dollars to religious and humanitarian initiatives, for which the funds were not used.<sup>85</sup> The Garcias, both former Scientologists, sought to invalidate on grounds of unconscionability a contractual provision binding them to Scientologist arbitration.<sup>86</sup> Citing the “liberal federal policy favoring arbitration,”<sup>87</sup> the district court compelled arbitration despite strong evidence of unfairness to the plaintiffs.<sup>88</sup> The Garcias presented numerous facts that suggested procedural unconscionability. The arbitration clause was part of a contract of adhesion (the church enrollment application), and the court acknowledged that the Church had failed to establish “particularized rules and procedures for conducting arbitration” and even that “there ha[d] never been an arbitration in the Church” until that point.<sup>89</sup> Nevertheless, the court refused to find the clause procedurally unconscionable because “the Garcias had ‘some idea’ of what disputes were subject to arbitration and the procedures by which the arbitration was to be effected.”<sup>90</sup>

The plaintiffs arguably had an even stronger claim of substantive unconscionability, which the court refused to consider. The Garcias presented evidence

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80. See HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 19:41 (2018); 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 10:2 (2018).

81. See, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011) (interpreting California’s unconscionability doctrine).

82. See, e.g., Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 88 (4th Cir. 2005).

83. See, e.g., Stelluti v. Casapenn Enters., 1 A.3d 678, 687-88 (N.J. 2010).

84. *Concepcion*, 563 U.S. at 340 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)).

85. *Garcia v. Church of Scientology Flag Serv. Org., Inc.*, No. 8:13-cv-220-T-27TBM, 2015 WL 10844160, at \*1 n.2 (M.D. Fla. Mar. 13, 2015).

86. *Id.* at \*1-2.

87. *Id.* at \*3 (quoting *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1349 (11th Cir. 2014)).

88. *Id.* at \*12.

89. *Id.* at \*6-7.

90. *Id.* at \*8.

that, as lapsed members of the faith, the Church had declared them “[s]uppressive.”<sup>91</sup> They further showed that Church doctrine gave suppressive individuals “no rights as Scientologists” and mandated that they were “not eligible for the benefits of the Codes of the Church.”<sup>92</sup> Worse still, Church doctrine prohibited “Scientologists in good standing . . . from communicating with suppressive individuals.”<sup>93</sup> Although the plaintiffs did not allege this, this prohibition could extend even to the arbitrator, a Scientologist in good standing.<sup>94</sup> But the district court refused to hear evidence of substantive unconscionability on grounds that “the First Amendment prohibits consideration of this contention, since it necessarily would require an analysis and interpretation of Scientology doctrine.”<sup>95</sup> (This is a classic entanglement argument—one that the next Part will turn on its head.) In short, the strong presumptions in favor of arbitration and against inquiring into substantive Church law pose obstacles to proving either prong of an unconscionability claim.<sup>96</sup>

Other litigants are likely to fare even worse than did the Garcias. Some courts have been reluctant to declare employment applications—the documents that house many religious arbitration agreements—to be contracts of adhesion. The notion is that because a job applicant is free to seek employment elsewhere and is not forced to sign anything he does not want to, the arbitration agreement is not unconscionable.<sup>97</sup> Also, in contrast to the Church of Scientology, the ICC

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91. *Id.* at \*11.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. For other cases finding religious arbitration agreements not unconscionable or coercive, see *Graves v. George Fox University*, No. CV06-395-S-EJL, 2007 WL 2363372, at \*5-7 (D. Idaho Aug. 16, 2007); *McCaffrey v. Philadelphia Montgomery Christian Academy*, No. 3511 EDA 2012, 2013 WL 11257191, at \*3 (Pa. Super. Ct. July 9, 2013) (“The contract cited the Bible immediately before delineating the requirement for biblically-based mediation . . . . Given the express terms of the employment agreement, which Appellant repeatedly signed over five years, we find that Appellant’s arguments of coercion, duress, impartiality, and lack of notice fail.”); and *Woodlands Christian Academy v. Weibust*, No. 09-10-00010-CV, 2010 WL 3910366, at \*6 (Tex. App. Oct. 7, 2010). Hobby Lobby’s arbitration clause, which offers both secular and religious arbitration options, has similarly been upheld as not unconscionable. *Fardig v. Hobby Lobby Stores Inc.*, No. SACV 14-561 JVS(ANx), 2014 WL 2810025, at \*5-7 (C.D. Cal. June 13, 2014); *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1081 (E.D. Cal. 2014). *But see* *Higher Ground Worship Ctr., Inc. v. Arks, Inc.*, No. 1:11-cv-00077-BLW, 2011 WL 4738651, at \*4 (D. Idaho Oct. 6, 2011) (finding a religious arbitration clause unconscionable but not due to the religiosity of the arbitration).

97. See, e.g., *Maynard v. Valley Christian Acad., Inc.*, No. 5:16-CV-01889, 2017 WL 3594670, at \*8 (N.D. Ohio Aug. 21, 2017) (“Ohio courts have recognized ‘that when a candidate for employment is free to look elsewhere for employment and is not otherwise forced to consent to

and many batei din have well-established and well-publicized rules of procedure,<sup>98</sup> which will undermine a litigant's claim of procedural unconscionability.<sup>99</sup> In *Maynard v. Valley Christian Academy, Inc.*, a district court refused to find unconscionability because the ICC's "website" was a "conventionally convenient avenue of access to the Rules [of Procedure for Christian Conciliation]," and the plaintiff also "could have phoned [the ICC] or even initiated written correspondence to request additional information or an explanation of the Rules."<sup>100</sup> Although few new hires pause to research religious arbitration rules before signing their employment contracts, the accessibility of those rules poses a substantial barrier to unconscionability claims.

The existence of these organizations' concrete and well-publicized rules also undermines a second possible contract defense, namely that a religious arbitration clause constitutes an illusory promise. The *Easterly* court acknowledged that an arbitration agreement may be invalidated as an illusory promise if one of the parties "maintained the right to essentially make up the rules as it went along."<sup>101</sup> But the Rules of Procedure for Christian Conciliation are "promulgated by an uninvolved third party, much like the rules established by the American Arbitration Association."<sup>102</sup> And critically, in the *Maynard* court's words, "the Rules of Christian Conciliation" do not "include any express reservation of indefinite

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the arbitration agreement, the agreement to arbitrate is not unconscionable." (quoting *Short v. Res. Title Agency*, No. 95839, 2011 WL 1203906, at \*4 (Ohio Ct. App. Mar. 31, 2011)); *Rogers v. Brown*, 986 F. Supp. 354, 359 (M.D. La. 1997) (holding that a fast-food job applicant "could have avoided the clause by simply rejecting the employment with the defendant," and noting that the plaintiff "failed to submit any evidence that other similar jobs were not available and thus, she was required to take the KFC job even though she did not approve of the arbitration provision"); *Krusinski v. DaimlerChrysler Corp.*, No. 239873, 2004 WL 315171, at \*3 (Mich. Ct. App. Feb. 19, 2004) (observing that "plaintiff did not feel that she had no choice but to accept defendant's conditions; she was perfectly prepared to turn down a summer job and continue working at her present employment if the proffered job was not to her liking"); *Young v. Prudential Ins. Co. of Am.*, 688 A.2d 1069, 1078 (N.J. App. Div. 1997) (observing that *Gilmer* "obviously contemplated avoidance of the arbitration clause only upon circumstances substantially more egregious than the ordinary economic pressure faced by every employee who needs the job"). *But see* *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002) (holding that Circuit City's employment application constituted an unconscionable contract of adhesion).

98. See *Rules of Procedure*, *supra* note 57; see also *supra* note 54.

99. See, e.g., *Easterly v. Heritage Christian Sch., Inc.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at \*3 (S.D. Ind. Aug. 26, 2009).

100. *Maynard*, 2017 WL 3594670, at \*8.

101. *Easterly*, 2009 WL 2750099, at \*3.

102. *Id.*



power to alter the terms of the agreement as to render [the religious party's] promise 'illusory.'"<sup>103</sup>

Nor, generally, are religious arbitration clauses void for lack of consideration. Where an arbitration clause is "binding on both" parties, the "mutual obligation" will usually constitute sufficient consideration under state law.<sup>104</sup> In *Maynard*, for instance, the court found there was consideration because both the employee and the religious employer were contractually bound to resolve disputes through Christian mediation.<sup>105</sup>

#### *D. Effective Vindication: A Narrow Exception for Statutory Rights*

Litigants might also try to invoke a "judge-made exception to the FAA" that allows courts to "invalidate agreements that prevent the 'effective vindication' of a federal statutory right."<sup>106</sup> In 1985, the Supreme Court suggested it might invalidate "as against public policy" an arbitration agreement that operated as a "prospective waiver of a party's right to pursue statutory remedies."<sup>107</sup> In subsequent cases, though, the Court repeatedly found that arbitral fora *did* provide an adequate opportunity to vindicate statutory rights.<sup>108</sup> The Court, for example, upheld as effectively vindicating rights an agreement requiring small businesses to arbitrate antitrust claims against American Express individually rather than as a class.<sup>109</sup> It even held that a Japanese arbitrator could effectively vindicate an American plaintiff's rights under American antitrust law against a Japanese monopolist.<sup>110</sup>

The Court further clarified that arbitration agreements concerning discrimination claims under civil rights laws warrant no special treatment. In *14 Penn Plaza LLC v. Pyett*, the Court criticized one of its earlier cases because it "erroneously assumed that an agreement to submit statutory discrimination claims to

<sup>103</sup>. *Maynard*, 2017 WL 3594670, at \*4.

<sup>104</sup>. *Id.* at \*9; *see, e.g.*, *Williams-Jackson v. Innovative Senior Care Home Health of Edmond, LLC*, 727 F. App'x. 965, 969 (10th Cir. 2018) ("[B]inding, mutual promises made by an employer and employee to arbitrate supply adequate consideration to support an arbitration agreement."); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734 (7th Cir. 2002) ("An employer's promise to arbitrate in exchange for an employee's promise to do the same constitutes sufficient consideration to support the arbitration agreement.").

<sup>105</sup>. *Maynard*, 2017 WL 3594670, at \*9.

<sup>106</sup>. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

<sup>107</sup>. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

<sup>108</sup>. *See, e.g.*, *Am. Express*, 133 S. Ct. at 2310-11; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

<sup>109</sup>. *Am. Express*, 133 S. Ct. at 2311-12.

<sup>110</sup>. *Mitsubishi*, 473 U.S. at 636-37.

arbitration was tantamount to a waiver of those rights.”<sup>111</sup> It also asserted that an “arbitrator’s capacity to resolve complex questions of fact and law extends with equal force to discrimination claims” as to “contractual disputes.”<sup>112</sup> Thus, without more, the mere fact that a litigant is forced to submit statutory claims—even civil rights claims—to arbitration will not amount to ineffective vindication or prospective waiver.

The Court has, however, acknowledged the possibility that some arbitration clauses, including those “forbidding the assertion of certain statutory rights” in court *or* in arbitration, or those imposing filing fees “so high as to make access to the forum impracticable,” could violate the prospective-waiver rule.<sup>113</sup> Indeed, some lower courts have used the effective-vindication doctrine to invalidate arbitration agreements—for instance, where an arbitration agreement explicitly waived the Title VII right to attorneys’ fees.<sup>114</sup> At the extreme, a religious tribunal that categorically refuses to vindicate a certain federal right on scriptural grounds arguably fails to provide a true right to pursue a statutory remedy. And more broadly, perhaps a religious tribunal that merely “take[s] into consideration” federal law fails to treat federal law as creating binding rights at all. Litigants could argue that such a tribunal provides at most a possibility, but not a right, of pursuing statutory remedies. Religious arbitration of secular statutory rights may well be a rare example of ineffective vindication. But the Supreme Court’s reluctance to expand that doctrine, as well as its unpredictable application in the lower courts, makes it a less-than-ideal tool for litigants seeking to avoid arbitration.

To take stock: litigants challenging a religious-arbitration clause are unlikely to prevail under common law doctrines of unconscionability or illusory promise. Furthermore, courts generally adhere to the fiction that parties do not waive any statutory rights by agreeing to arbitrate. Because courts tend to rest their holdings on federal statutory arbitration policy or the Free Exercise Clause, these litigants need a theory of equal weight. In light of the absence of strong contractual or statutory defenses to religious arbitration, the next Part offers a constitutional solution.

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111. *14 Penn Plaza LLC*, 556 U.S. at 265.

112. *Id.* at 268, 269.

113. *Am. Express*, 133 S. Ct. at 2310-11.

114. See, e.g., *Safranek v. Copart, Inc.*, 379 F. Supp. 2d 927, 931 (N.D. Ill. 2005); *Gambardella v. Pentec, Inc.*, 218 F. Supp. 2d 237, 246-47 (D. Conn. 2002). Where a plaintiff merely argues that arbitration is too expensive, courts may be less sympathetic. One district court found that a plaintiff who couldn’t afford arbitration because she was unemployed, heavily in debt, uninsured, feeding one child and pregnant with another, and supporting family abroad was not exempted from arbitration because it was still possible for her “to obtain gainful employment.” *Koridze v. Fannie Mae Corp.*, 593 F. Supp. 2d 863, 870 (E.D. Va. 2009).

### III. THE REVERSE-ENTANGLEMENT PRINCIPLE

Arbitrators have the power to rule on federal rights, subject to minimal judicial review, and case law in practice allows religious arbitrators to override secular law in favor of religious law. The intersection of these two facts means that a virtually unreviewable religious tribunal can have the final say on whether a citizen's federal rights were violated. Religious arbitration thus has the potential to gravely threaten civil rights. We think most readers, regardless of their feelings about religion or arbitration generally, would have misgivings about a Sharia arbitrator adjudicating gay rights or an Orthodox beth din adjudicating gender-discrimination claims. But this isn't just worrisome – it's unconstitutional.

The remainder of this Comment offers a constitutional solution to protect federal rights from religious interference. Commentators have previously identified a few ways in which religious arbitration implicates the Religion Clauses of the First Amendment. For instance, Jeff Dasteel has argued that courts violate the Free Exercise Clause when they compel the weaker party to a contract of adhesion to participate in religious arbitration.<sup>115</sup> And, as will be discussed below, the Supreme Court has on numerous occasions addressed the Establishment Clause problems that arise when courts encroach on the power of religious tribunals. To date, however, no one has identified the Establishment Clause problem that arises when religious courts pose a threat to secular rights. This Comment argues that courts violate the Establishment Clause when they enforce arbitration that entangles religious principles with secular law. It articulates a reverse-entanglement principle, which provides an alternative theory under which litigants can challenge coercive religious-arbitration clauses.

#### A. “Reverse” Entanglement: A Longstanding Constitutional Principle

At first glance, the Supreme Court's headline-grabbing Establishment Clause precedents may seem largely unrelated to court-church entanglement. Better-known cases tend to arise when the state throws its weight behind a particular religious practice – by displaying a nativity scene, for instance, or by mandating school prayer. In court-church entanglement cases, by contrast, the state is not adopting one religion over another. Thus, the Supreme Court's standard tests for Establishment Clause violations may feel inapposite.<sup>116</sup> For this reason,

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115. Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ON ARB. & MEDIATION 45, 61 (2016) (“When a court orders a party to engage in religious arbitration, the court is requiring the party to participate in religion or its exercise, thereby substantially burdening that person's free exercise of religion.”).

116. *Cf. Newdow v. Roberts*, 603 F.3d 1002, 1017 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (“[T]he Supreme Court's Establishment Clause jurisprudence does not set forth a one-size-

some academics have disparaged the Court's church-state entanglement precedents as archaic.<sup>117</sup> But understanding what is really at stake in these cases can shed light on the mysterious "entanglement" prong in well-known Establishment Clause cases like *Lemon v. Kurtzman*.<sup>118</sup>

A commonly invoked principle for disallowing court-church entanglement is church autonomy.<sup>119</sup> On this view, the Establishment Clause's ban on entanglement protects the freedom of religious organizations to decide religious questions without secular government interference.<sup>120</sup> A problem with this view, however, is that it makes the Establishment Clause's entanglement prohibition superfluous; the Free Exercise Clause already shields religious liberty from state interference. Some courts and commentators have recognized this and have concluded that entanglement is really a Free Exercise Clause issue, not an Establishment Clause one.<sup>121</sup> But that is the wrong conclusion to draw. In addition to threatening individual free exercise, entanglement may pose an additional harm that is at the very heart of the Establishment Clause.

The Constitution states that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>122</sup> These are two separate edicts, which means that an Establishment Clause violation can arise even when no person is deprived of religious liberty. If every single citizen converted to Judaism tomorrow, it would still offend the Constitution for Congress to declare America a Jewish state. It would make no difference if the law coerced no one—or even if every single person *voted* for it.<sup>123</sup> The Constitution independently bars governmental establishment of religion, even if not a single citizen's free exercise is infringed upon. Thus, it must be the case that the entanglement prohibition in the Establishment Clause is not solely concerned with individual rights.

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fits-all test . . . Rather, the Court ordinarily analyzes cases under various issue-specific rules and standards it has devised.").

117. MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 177 (1986); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 50 (1998).

118. 403 U.S. 602 (1971).

119. Esbeck, *supra* note 117, at 44.

120. See *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

121. See Esbeck, *supra* note 117, at 50–51 & n.208 (critiquing courts and scholars for taking this view and arguing that entanglement presents a structural Establishment Clause problem).

122. U.S. CONST. amend. I (emphasis added).

123. While this observation might seem odd, it is what the Amendment says on its face. To be sure, some of the founders like James Madison viewed coercion of religious minorities as the great evil associated with a national religion. See 1 THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 138 (N.Y.C., D. Appleton & Co. 1860).

What, then, does the Establishment Clause protect that other constitutional provisions do not? Simply put, the Establishment Clause’s “wall of separation between church and state” is what keeps religion out of government.<sup>124</sup> Just as the Free Exercise Clause “secure[s] religious liberty from the invasions of the civil authority,” the Establishment Clause “rescue[s] temporal institutions from religious interference.”<sup>125</sup> It gives force to the familiar liberal idea that the moral legitimacy of government action depends on secular reason giving. The state cannot exercise coercive power arbitrarily—it must justify its laws and acts, and it must do so in terms that are meaningful to all citizens.

Political theorists have struggled to define the precise contours of what constitutes a legitimate “public reason” for government action.<sup>126</sup> It simply is not true that secular reasons are acceptable to all whereas religious reasons are only acceptable to a few. “We passed this law because it will drastically redistribute wealth” is a justification as objectionable to a libertarian as “We passed this law because the Koran commands it” is to an atheist. But even if we cannot explain why, most of us instinctively believe—and our Constitution appears to enshrine—the idea that religious ideas are different in kind. A law criminalizing polygamy because it promotes “patriarchal . . . despotism” is constitutional; a law criminalizing polygamy because “Almighty God” condemns it is unconstitutional.<sup>127</sup> In sum, insulating secular law from religious interference is as critical a component of the entanglement prohibition as is the more oft-discussed protection of church autonomy. Call it the reverse-entanglement principle.

*B. The Principle: Secular Interpretation for Secular Law, Religious Interpretation for Religious Law*

The reverse-entanglement argument can be thought of as the inverse of a related Establishment Clause principle long recognized by the Supreme Court. The Court has historically barred the use of secular principles to interpret religious law. In *Serbian Eastern Orthodox Diocese v. Milivojevich*,<sup>128</sup> the Court was asked to determine whether a secular state court could overturn a religious tri-

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124. Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, Danbury Baptist Ass’n (Jan. 1, 1802), <https://www.loc.gov/loc/lcib/9806/danpre.html> [<https://perma.cc/42DE-V7SC>].

125. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (analyzing the Establishment Clause and the Free Exercise Clause as two “complementary,” rather than redundant, provisions).

126. For the broad contours of this debate, see the sources cited in Jonathan Quong, *Public Reason*, STAN. ENCYC. PHIL. (Oct. 24, 2017), <https://plato.stanford.edu/entries/public-reason> [<https://perma.cc/WQC7-WWXP>].

127. *Reynolds v. United States*, 98 U.S. 145, 161, 166 (1879).

128. 426 U.S. 696 (1976).

bunal's decision to defrock a bishop. This was no minor religious dispute: the question of the bishop's legitimacy was part of a broader "American schism" in the Serbian Church, which the Court was in effect asked to adjudicate.<sup>129</sup> Part of the relief sought by the plaintiff was "to have himself declared the true Diocesan Bishop" by a civil court.<sup>130</sup> The state court ultimately rejected the Serbian Holy Assembly's decision on grounds that the tribunal's process was "not conducted according to the Illinois Supreme Court's interpretation of the Church's constitution and penal code."<sup>131</sup>

The U.S. Supreme Court reversed the Supreme Court of Illinois. Justice Brennan held that the Establishment Clause barred a civil court from adjudicating questions of religious doctrine. The Court identified a "substantial danger that the State will become entangled in essentially religious controversies."<sup>132</sup> Specifically, the Court was concerned that civil courts would infringe on religious law by applying secular reasoning. The Justices pointed to fundamental differences between religious and secular legal traditions:

Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.<sup>133</sup>

The Court was concerned about protecting the right of religious tribunals to put faith above all other considerations – even to the point where an outsider might see their decisions as arbitrary or irrational. A court forcing a religious tribunal to comport with secular notions of rationality and objectivity would create a constitutionally impermissible entanglement. The Court held that when religious tribunals decide "purely ecclesiastical" disputes, "the Constitution requires that civil courts accept their decisions as binding upon them."<sup>134</sup>

Importantly, *Serbian* does not stand for the principle that all court involvement with religious tribunals constitutes entanglement. After all, the holding of *Serbian* itself required a court to put the force of law behind a decision of a reli-

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129. Radomir Popovic, *Serbian Church in History: Serbian Church from 1766 to 1920*, SERBICA AMERICANA, <http://www.eserbia.org/sachurch/1105-serbian-church-in-history> [<https://perma.cc/Q32T-TPY5>].

130. *Serbian*, 426 U.S. at 707.

131. *Id.* at 708.

132. *Id.* at 709.

133. *Id.* at 714-15.

134. *Id.* at 725.

gious tribunal. But, crucially, the religious tribunal's decision concerned a purely religious dispute. That is, the Holy Assembly's adjudication did not itself entangle religious principles and secular law. By contrast, in the Court's view, the Illinois court violated the Establishment Clause when it applied "neutral principles" to "an issue at the core of ecclesiastical affairs."<sup>135</sup> In short, the constitutional offense was not opening the courthouse doors to religious disputes but entangling religious and secular legal traditions.

The Court's holding in a subsequent case, *Jones v. Wolf*,<sup>136</sup> revealed the power of this principle. Like *Serbian*, *Jones* concerned a property dispute following a religious schism. But whereas the state court in *Serbian* was asked to determine which side of the schism was the true church under the mother church's constitution, the state court in *Jones* was not called on to resolve any such religious dispute. Instead, it was asked to determine only whether the church's charter contained a trust provision or any other instructions on how to divide up property in the event of a schism. In short, the disputed provision in *Serbian* was of a religious nature, whereas the disputed provision in *Jones* was purely secular.<sup>137</sup>

Recognizing this pivotal difference, the Supreme Court in *Jones* carefully distinguished *Serbian* and reaffirmed the principle that secular and religious law should not be entangled. The Court clarified that "in determining whether the [church] document indicates that the parties have intended to create a trust," a "civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts."<sup>138</sup> That is, secular disputes call for the application of secular legal principles. But where "the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property" and "would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."<sup>139</sup> That is, religious disputes call for the application of religious principles.

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<sup>135.</sup> *Id.* at 721.

<sup>136.</sup> 443 U.S. 595 (1979).

<sup>137.</sup> Technically, the *Jones* Court remanded the decision on a minor point that precisely vindicates this principle. In brief, the lower court properly used neutral principles to determine that the church constitution allocated the property to the "local congregation" rather than the "general church." But the lower court went wrong in making its own assessment of which warring faction constituted the "local congregation" under church doctrine. The Supreme Court remanded the case so that the lower court could defer to a religious tribunal on that issue. *See id.* at 606-10.

<sup>138.</sup> *Id.* at 604.

<sup>139.</sup> *Id.*

FIGURE 1.

	Religious Dispute	Secular Dispute
<b>Religious Principles</b>	Courts must defer to and enforce a religious tribunal's interpretation of religious doctrine. <i>Serbian</i> .	Courts should not enforce arbitrators' religious interpretation of secular law.
<b>Secular Principles</b>	Courts may not do secular interpretation of religious doctrine. <i>Serbian</i> ; <i>Jones</i> .	Courts may do secular interpretation of secular-law disputes involving religious parties. <i>Jones</i> .

The principle undergirding both *Serbian* and *Jones* directly implicates religious arbitration. *Jones* implicitly confirms that the constitutional threat of entanglement runs two ways. As the Court stated in *Lemon v. Kurtzman*, “The objective is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other.”<sup>140</sup> And as *Jones* held, the Establishment Clause bars religious interpretation of secular law as much as it bars secular interpretation of church doctrine. The same factors that made the Illinois court a danger to Serbian Orthodox canon law also make religious arbitrators a danger to federal civil rights law. If religious law is to be shielded from “secular notions of ‘fundamental fairness,’”<sup>141</sup> so too must secular law be shielded from faith-based adjudication. When it comes to the separation of church and court, the Supreme Court has only had occasion to pronounce on cases in which a secular court posed a threat to religious law. Today, religious arbitration poses an equal but opposite threat to secular law. Courts should recognize a corollary to *Serbian* and *Jones*: a reverse-entanglement principle, under which courts should not authorize religion-infused adjudication of secular rights.

This entanglement is “reverse” in the sense that commentators and courts have traditionally worried about protecting religious tribunals from the state, and not the other way around. Here, the entanglement problem is that religious adjudication threatens the integrity of secular law. Of course, the prevailing view is that religious arbitrators are private actors and thus cannot themselves violate the Establishment Clause.<sup>142</sup> But when a secular court puts the force of law be-

140. 403 U.S. 602, 614 (1971).

141. *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 715 (1976).

142. *But see* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 *YALE L.J.* 2994, 3035-38 (2015) (acknowledging but critiquing the fact that courts do not treat arbitration as state action).



hind an arbitral decision applying religious principles to secular law, it impermissibly sanctions an entanglement of church and state in violation of the Constitution.<sup>143</sup> The following Sections delve deeper into this state-action question.

C. *Contrasting the Reverse-Entanglement Principle and a Shelley v. Kraemer State-Action Theory*

Although the Supreme Court has never so held, this Section makes the case that arbitration should be considered state action. Arbitration, legitimized by statute and enforced by courts, is a judicial function “fairly attributable to the [s]tate.”<sup>144</sup> And, as some scholars have observed, there is a case to be made that arbitration satisfies the Supreme Court’s own analytical framework for state action as set forth in *Lugar v. Edmondson Oil Co.*<sup>145</sup> and *Edmonson v. Leesville Concrete Co.*<sup>146</sup>

In *Edmonson v. Leesville Concrete Co.*, the Supreme Court held that a private party who exercised “a traditional function of the government” with “overt, significant assistance of the court” should be treated as a state actor.<sup>147</sup> At issue was whether a litigant’s private attorney who exercised a racially motivated peremptory challenge could be said to violate the Equal Protection Clause. The Court explained that jury selection was a traditional government function. The government is responsible for “locating and summoning” prospective jurors, paying those jurors, and enforcing jury duty through the coercive power of the state.<sup>148</sup> By allowing parties to exercise peremptory strikes, courts “permit litigants to assist the government” in this traditional judicial function.<sup>149</sup> And conversely, a “party who exercises a challenge invokes the formal authority of the court.”<sup>150</sup> If the disqualified juror tries to show up for jury duty the next day, marshals will escort him out. In short, private parties should be treated as state actors when they exercise peremptory strikes because they are acting as an arm of the judiciary.

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<sup>143.</sup> See *infra* Section III.C.

<sup>144.</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

<sup>145.</sup> *Id.*

<sup>146.</sup> 500 U.S. 614 (1991); see, e.g., Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 990-1017 (2000). But see Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 50.

<sup>147.</sup> 500 U.S. at 624.

<sup>148.</sup> *Id.* at 622-23.

<sup>149.</sup> *Id.* at 620.

<sup>150.</sup> *Id.* at 624.

An arbitrator is arguably more of an agent of the state than is a private attorney who exercises a peremptory strike. The arbitrator acts as trier of both fact and law. She holds hearings, weighs evidence, interprets legal authority, and issues judgments—quintessentially adjudicative acts. And these adjudicative acts become enforceable through “the formal authority of the court.”<sup>151</sup> The FAA’s deferential standard of review is another act of “overt, significant” government assistance to arbitrators.<sup>152</sup> Thus, under *Edmonson*, arbitrators should arguably be treated as state actors bound by constitutional constraints when they adjudicate secular law.

This would not, of course, mean that arbitrators must comply with every constitutional stricture imposed on an Article III judge. Many forms of adjudication, from military tribunals to agency benefits determinations, are constitutionally required to provide procedural due process.<sup>153</sup> But the question of how much process is due is a flexible one, and an adjudication may be constitutionally sufficient without providing so much as a hearing.<sup>154</sup> Thus, arbitration could still provide an efficient alternative to a courtroom while satisfying minimal due process thresholds. Indeed, the FAA arguably bakes in certain procedural minimums already.<sup>155</sup> Even if this would be a radical shift in how we think about arbitration, it might be a good one.<sup>156</sup> Considering that Congress has essentially deputized

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151. *Id.*

152. *See supra* Part I.

153. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

154. *See Mathews v. Eldridge*, 424 U.S. 319, 333–34, 349 (1976).

155. *E.g.*, 9 U.S.C. § 10 (2018) (allowing courts to vacate arbitral awards where the arbitrator was biased or prejudiced the “rights of any party”).

156. Indeed, many plaintiffs have tried to bring due process claims against arbitrators over the years. Courts have historically dismissed these claims on grounds that private arbitrators are not state actors. These plaintiffs did not have case law on their side, but it seems they experienced arbitration as an interaction with the state—one in which they felt their constitutional rights ought to apply. *See, e.g.*, *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (“[W]e agree with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases.”); *FDIC v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987) (“The arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator.”); *Elmore v. Chi. & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) (“[T]he fact that a private arbitrator denies the procedural safeguards that are encompassed by the term ‘due process of law’ cannot give rise to a constitutional complaint.”); *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423, 428 (Conn. 2005) (“We conclude that, because an arbitration award does not constitute state action and is not converted into state action by the trial court’s confirmation of that award, an arbitration panel’s award of punitive damages does not implicate the due process clause, regardless of how excessive the award may be.”).

arbitrators to adjudicate disputes with legal force, it might be right to insist that arbitrators abide by basic tenets of the rule of law.<sup>157</sup>

And so long as the arbitration qualifies as state action, when an arbitrator applies religious principles to a secular law, she violates the Establishment Clause's reverse-entanglement principle. Furthermore, it doesn't matter whether she does so because of a clause in the arbitration agreement or because of her own religious fervor. In short, this argument claims that the arbitrator, as a state judicial actor, may not mix religious tenets and secular rights. The argument therefore does not need to go as far as claiming that private parties *may not contract for religious adjudication of secular disputes*. That broader claim would rely on the more familiar state-action theory articulated in *Shelley v. Kraemer*<sup>158</sup> – and this Comment does not rely on it.

The issue in *Shelley* was whether a court could enforce a racially restrictive covenant – a contract by which private parties promised each other they would sell their land only to members of “the Caucasian race.”<sup>159</sup> When one homeowner sold to the Shelleys, a black family, their white neighbors filed a lawsuit to enforce the covenant. After a hearing, the trial court denied relief; on appeal, the Supreme Court of Missouri directed the lower court to issue an order divesting the Shelleys of title.<sup>160</sup> The U.S. Supreme Court, which granted certiorari, wanted to invalidate this lower-court order under the Equal Protection Clause. Clearly, the substance of the order – denying property rights to a black family on the basis of race – “could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance.”<sup>161</sup> But the Court conceded that the Fourteenth Amendment “erects no shield against merely private conduct, however discriminatory or wrongful.”<sup>162</sup> Thus, the Court had to advance a novel theory of state judicial action to strike down the lower court's order.

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157. On the other hand, another way to read *Edmonson* – and even *Shelley v. Kraemer*, 334 U.S. 1 (1948), discussed further below – is that we heighten our sensitivity to state action when civil rights are at stake. The Supreme Court has never articulated why lawyers exercising peremptory strikes should be considered state actors when they threaten to compromise civil rights as opposed to other constitutional rights. But taking this restricted view at face value, arbitrators should come under constitutional scrutiny at least when they are tasked with interpreting civil rights law.

158. 334 U.S. 1.

159. *Id.* at 4-5.

160. *Id.* at 6.

161. *Id.* at 11.

162. *Id.* at 13.

Long before *Shelley*, the law had recognized that judicial action could constitute state action.<sup>163</sup> For example, the Supreme Court held in 1880 that a Virginia judge violated the Fourteenth Amendment by excluding black men from juries.<sup>164</sup> Common misconceptions notwithstanding, *Shelley*'s innovation was not in holding that courts could violate the Constitution. Instead, *Shelley* went further by holding that private parties to a contract had to comply with the constitutional requirements as well, at least if they wanted their contract to be enforceable in court.<sup>165</sup> Thus, *Shelley* would provide a simple avenue for imposing Establishment Clause restrictions on private religious-arbitration contracts. Under *Shelley*'s formulation, the reason parties may not contract for religious adjudication of secular rights is because such a scheme "could not be squared with [the reverse-entanglement principle] if imposed by state statute or local ordinance."<sup>166</sup>

But *Shelley*'s reasoning has not been widely adopted. A number of courts have construed *Shelley* narrowly and rarely apply it outside the context of racial discrimination and racially restrictive covenants.<sup>167</sup> The glaring shortcoming of *Shelley* is that "the decision, on its face, would require all private agreements to satisfy constitutional standards because the enforceability of the covenants almost always depends on state court action."<sup>168</sup> For instance, if *A* hired *B* to cater a fundraising dinner on the condition that *B* not loudly criticize the governor in front of *A*'s dinner guests, the reasoning from *Shelley* might prohibit a court from enforcing that contract based on *B*'s right to free speech. For these reasons, Laurence Tribe has called *Shelley* a "peculiarly unpersuasive" doctrine.<sup>169</sup>

It is therefore important to crystallize the distinction between the *Shelley* state-action argument and the *Edmonson* state-action argument advanced by this Comment. Imagine that two parties contracted for secular arbitration, but the arbitrator, a religious zealot, applied Talmudic law sua sponte against the will of the parties. There would be no *Shelley* state-action problem here—the parties didn't contract for anything impermissible—but the arbitrator nevertheless could be violating the Constitution as a state actor under *Edmonson*.

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163. *Id.* at 14-16.

164. *Id.* at 16 (citing *Ex parte Virginia*, 100 U.S. 339 (1880)).

165. *Id.* at 19-20.

166. *Id.* at 11.

167. Shelley Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 84 (1998).

168. Thomas F. Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421, 443 (1984).

169. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1697 (2d ed. 1988).

Whether *Shelley* was rightly decided is ultimately beyond the scope of this Comment. The key insight is that the reverse-entanglement principle can identify constitutional violations without relying on *Shelley*. This feature makes the reverse-entanglement principle more powerful than Establishment Clause theories advanced by some other scholars. For instance, Brian Hutler has advocated for a religious “non-delegation doctrine” under which courts may not cede “core governmental power” to religious tribunals.<sup>170</sup> Hutler’s theory has less bite than the reverse-entanglement principle because he relies on *Shelley*’s argument that judicial enforcement converts an arbitration contract into “state activity . . . rightly subject to constitutional scrutiny.”<sup>171</sup> Hutler attempts to limit *Shelley*’s problematic reach by asserting that religious-arbitration agreements are “different in kind” from other contracts, but he offers no argument for why this is so.<sup>172</sup> Thus, to a reader or court hesitant to extend *Shelley* to the arbitration context, Hutler’s otherwise-promising argument fails to prove that a constitutional violation has occurred.<sup>173</sup> The reverse-entanglement principle does not need to prove that religious-arbitration agreements are a special form of contract or a bridge too far. Instead, the reverse-entanglement principle can apply to religious arbitration because arbitrators themselves are state actors.

#### D. Contrasting the Reverse-Entanglement Principle and Prior Scholarship

While no one has previously arrived at the reverse-entanglement principle, scholars on both sides of the debate agree that religious arbitration implicates the Establishment Clause. One group of academics has focused on the more apparent entanglement concern, namely that court interference with religious tribunals threatens church autonomy. For example, Michael Helfand argues that the Establishment Clause guarantees church autonomy to conduct religious tri-

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170. His reasoning is more pragmatic than constitutional. Hutler argues that allowing religious arbitrators to meddle in secular rights could lead to “governmental favoritism” or “discriminatory treatment” on the basis of religion, or to “coercing participation in religious institutions” by unwilling citizens. Brian Hutler, *Religious Arbitration and the Establishment Clause*, 33 OHIO ST. J. ON DISP. RESOL. 337, 350-65 (2018).

171. *Id.* at 357.

172. *Id.*

173. Perhaps more problematic is that if one accepts Hutler’s *Shelley* argument, his theory that judicial enforcement converts arbitration into state action seems to generate the outcome that a court or “government agency,” rather than a “board of Orthodox Rabbis,” might have to resolve kosher disputes because “food and liquor regulation” is an “important government power.” *Id.* at 361-62. By contrast, under the reverse-entanglement principle (or traditional entanglement principles), it might actually violate the Establishment Clause for a secular court or agency to apply secular interpretive principles to Jewish food law.

bunals.<sup>174</sup> This may explain why his article on the unconscionability of religious arbitration (discussed in Section II.C) stops short of mounting an Establishment Clause critique. Helfand appropriately recognizes that the Establishment Clause guarantees religious groups some freedom to adjudicate religious matters. He loses sight, however, of the fact that the Establishment Clause also limits this freedom by guaranteeing a competing right of the state to be free of religious influence.<sup>175</sup> In short, Helfand's focus on church autonomy is important, but it leaves the Establishment Clause analysis incomplete.

Critics of religious arbitration also make one-sided arguments. Julia McLaughlin has explored how gendered aspects of Sharia law systemically disadvantage women in Islamic divorce arbitrations. For instance, she observes that women who perform the Hajj without their husbands may forfeit their right to alimony.<sup>176</sup> When it comes to child custody, a father has exclusive legal guardianship over his children.<sup>177</sup> Furthermore, in the arbitration itself, "procedural rules limit the wife's right to testify," and her word "is given only one-half of the weight afforded to the husband's testimony."<sup>178</sup> Alarmed that civil courts will uphold these Sharia principles, McLaughlin makes two Establishment Clause arguments. First, she suggests that "entanglement concerns arise at the moment the issue of enforcing a [religious tribunal award] is presented to the civil court," as the court will be caught between improperly endorsing or improperly rejecting a religious decision.<sup>179</sup> Second, she argues that the Establishment Clause "prohibits the court from becoming an agent of state-sanctioned gender bias" by enforcing religious tribunal awards.<sup>180</sup> McLaughlin's verdict is that secular courts should be prohibited from ever enforcing religious arbitration.<sup>181</sup> This Comment shares her concern that religious arbitration poses a threat to secular rights. Her argument and others like it, however, come at the expense of church autonomy. That is, they go further than the reverse-entanglement principle by barring secular courts from enforcing the judgments of religious tribunals on purely religious matters.

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174. Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1918 (2013).

175. See, e.g., Helfand, *supra* note 79, at 1245 (focusing only on the Establishment Clause issue that courts reviewing a religious arbitration would be threatening *church autonomy* by "impermissibly insinuating themselves into religious disputes").

176. McLaughlin, *supra* note 74, at 404-05.

177. *Id.* at 405.

178. *Id.*

179. *Id.* at 436-37.

180. *Id.* at 444.

181. *Id.* at 446 (calling for a "broad nonenforcement rule applicable to all RTAs [religious tribunal awards]").

Although this Comment has highlighted the dangers of religious arbitration of secular rights, the ability of religious tribunals to adjudicate *religious disputes* is a critical component of freedom of worship. As James Sonne writes of Sharia courts, “[T]hese private tribunals are likely more accessible and sensitive to corresponding matters of language or culture that might differ from the Western mainstream.”<sup>182</sup> It is possible that an Islamic tribunal could be offensive to American feminist scholars yet also vindicate a devout Muslim woman’s desire to live by religious law. In this vein, Daniel Markovits adds that suspicion of religious arbitration is “a paternalistic insult to the persons whose beliefs and sentiments it disrespects as ideological.”<sup>183</sup> In other words, the choice to submit to religious arbitration can be an important act of religious autonomy. Finally, religious tribunals may help religious minorities carve out a place in society. Helfand, for instance, has advocated for a “new multiculturalism” that supports “autonomy and self-governance” by “minority groups.”<sup>184</sup>

The reverse-entanglement principle respects both church and state autonomy. The principle limits the power of religious tribunals to adjudicate secular disputes, but it preserves their autonomy in two important ways. First, it targets the emerging problem of religious tribunals arbitrating federal rights without disturbing other well-settled practices more similar to those upheld in *Serbian* and *Jones*. For instance, the reverse-entanglement principle is not implicated when courts uphold decisions of religious tribunals applying religious law. (This is the upper left quadrant of Figure 1.) Thus, a court could compel specific performance of a contract to deliver kosher meat, as defined by a Jewish beth din, without running afoul of the Establishment Clause. This is important because a more draconian, McLaughlin-style rule barring all court enforcement of religious arbitration could systemically harm religious parties. For example, a court would enforce a supplier’s contractual obligation to deliver non-GMO burgers, where “GMO” was defined by the private Non-GMO Project. Yet, under the draconian rule, a court would refuse to enforce a nearly identical contractual obligation to deliver kosher burgers, where “kosher” was defined by the Beth Din of America. This result would excuse breach against religious parties only, leaving them without the recourse of court protection.

The reverse-entanglement principle also allows courts to apply secular analysis to the secular terms of a contract, even if the contract also contains religious

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182. James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 739 (2015).

183. Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 474 (2010).

184. Helfand, *supra* note 79, at 1274.

terms.<sup>185</sup> (This is the lower right quadrant of Figure 1.) Significantly, it strikes us that a *promise to participate* in religious arbitration of religious matters is one such secular term. A court can determine if someone agreed to show up to a religious tribunal using the same tools of contractual interpretation that it would use to determine if someone agreed to show up to paint a house. The reverse-entanglement principle thus permits courts to thwart a party's bad-faith attempts to breach a contract to participate in religious arbitration of religious law. For example, in many Jewish prenuptial agreements, the husband and wife contract to arbitrate divorce proceedings before a beth din. This is critical because a woman whose husband refuses to grant a divorce in a beth din is classified as *agunah*, or "chained to her husband"; she is in a "dead marriage but nonetheless cannot remarry" (although her ex-husband, meanwhile, can remarry due to a Talmudic loophole allowing men to have multiple wives).<sup>186</sup> An *agunah* who remarries without a valid Jewish divorce, as well as any children she may then bear, will be shunned in the Jewish community.<sup>187</sup> Under the reverse-entanglement principle, a court can compel a vindictive husband to go before the beth din by enforcing the contract like any other prenuptial agreement.<sup>188</sup>

Second, the reverse-entanglement principle does not affect dispute resolution wholly internal to religious communities. Religious-dispute resolution has its virtues, such as honoring deeply held values and beliefs. Some Orthodox Jews believe the Torah prohibits pursuing legal claims in civil court, and studies have found "an increasing feeling among American Muslims of 'individual obligation'

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185. This Comment does not offer a definition or theory of what makes some disputes "secular" as opposed to "religious." As the Court seemed to do in *Jones*, we simply maintain that such a distinction can be drawn, and that such a distinction is meaningful in the Establishment Clause context. See *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (suggesting that "reversionary clauses and trust provisions" contained in church documents lend themselves to secular interpretation). Of course, some contractual disputes will be difficult to categorize as secular or religious. In those cases, the reverse-entanglement principle's verdict turns on how one first characterizes a particular dispute. To give one example of what we see as a hard case, imagine that a Sharia tribunal awarded a woman zero alimony because she performed the Hajj without her husband. On one hand, alimony is traditionally the province of state law, and this looks like an impermissible reverse entanglement of religious principles and secular law. On the other hand, Sharia law contains its own substantive rules about alimony, so this could also be an example of a religious tribunal permissibly interpreting religious doctrine.

186. *Get Refusal Basics*, GET YOUR GET, <http://www.getyourget.com/get-refusal-basics/#whatis> [<https://perma.cc/BK6Z-VBFL>].

187. *Id.*

188. Whether compelling the reluctant husband to go before a beth din would violate the Free Exercise Clause, as opposed to the Establishment Clause, is a separate question that this Comment does not address. For one example of this argument, see Dasteel, *supra* note 115.



to ‘restor[e] Islamic values through creating an Islamic mediation model.’”<sup>189</sup> While courts and law enforcement should not compel or enforce religious adjudication of secular rights, communities are free to use other methods – including social pressure or even excommunication – to promote religious adjudication among their members.

Finally, relying on the reverse-entanglement principle has one more benefit for litigants: structural provisions of the Constitution cannot be waived. A proponent of arbitration might argue that freely contracting parties waive any protections arbitration would compromise. This counterargument could be compelling if religious arbitration only implicated individual rights. Even Dasteel limits his constitutional critique to contracts of adhesion, conceding that “voluntarily” contracting for religious arbitration is “entirely consistent with the free exercise of religion.”<sup>190</sup> However, the Establishment Clause creates not just an individual right, but a limitation on the role of government.<sup>191</sup> Like the separation of powers, the separation of church and state is “not subject to waiver or alienation by any individual.”<sup>192</sup> Indeed, *Serbian* treats entanglement as a bar to subject-matter jurisdiction, reinforcing the idea that the Establishment Clause creates nonwaivable structural constraints.<sup>193</sup> A reverse-entanglement claim could help litigants otherwise held to have consented to religious arbitration.

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189. Helfand, *supra* note 79, at 1248, 1251 (quoting Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in *WOMEN’S RIGHTS & ISLAMIC FAMILY LAW* 177, 216 (Lynn Welchman ed., 2004)).

190. Dasteel, *supra* note 115, at 46.

191. See, e.g., Esbeck, *supra* note 117, at 4.

192. See Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 n.14 (1985).

193. See Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 699 n.175 (2013). *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), doesn’t contradict this. In that case, the Court held the Establishment Clause’s “ministerial exception” (under which Title VII’s provisions, among other laws, do not apply to ministers) did not pose a jurisdictional bar to courts. *Id.* at 196. But the ministerial exception is about Congress regulating churches, not court-church entanglement. The Supreme Court recently denied a petition for certiorari on whether the religious-autonomy doctrine, i.e., the prohibition on secular courts adjudicating matters of faith and doctrine, is jurisdictional or merely an affirmative defense. See *Doe v. First Presbyterian Church U.S.A. of Tulsa*, 421 P.3d 284 (Okla. 2017), *cert. denied*, No. 18-500, 2019 WL 2719666 (mem.) (U.S. Jan. 22, 2019). It strikes us that, under the best reading of *Serbian*, the doctrine is best understood as jurisdictional.

## CONCLUSION

Today, the doctrines of civil rights arbitration and religious arbitration collide in a way that severely threatens parties who have suffered discrimination. Religious arbitration of civil rights is incompatible with the Supreme Court's vision of neutral arbitration. And when a court puts state power behind a tribunal applying religious principles to secular law, it creates an unconstitutional entanglement of church and state. There are strong arguments that every American with a discrimination claim is entitled to a day in court. At the very least, the Establishment Clause protects these citizens from religious adjudication of their basic civil rights.

The problem of religious arbitration of secular rights raises a question at the heart of the Establishment Clause: *why* is it so important to protect the lawmaking process from religious influence? Early statesmen and jurists suggest an answer. James Madison once wrote that “[r]eligion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.”<sup>194</sup> This has the ring of a jurisdictional argument; religion is a realm outside the authority of government, so the state has no power to dictate an individual's beliefs. If a law foists religion on a citizen, the citizen has a trump card: the law is illegitimate, and he does not have to obey it. Thus, the only way to protect the legitimacy of the law – to make law enforceable against all citizens – is to keep religion out of it. Citizens may rebel against state-imposed religion, but they have no analogous right to spurn secular laws. As the Supreme Court has stated, “To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”<sup>195</sup> This, ultimately, is why church-state entanglement has constitutional stakes. Religious laws have no force in the public sphere, and a government wielding these laws has no power over its citizens.

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194. *Everson v. Bd. of Educ.*, 330 U.S. 1, 64 (1947) (quoting 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901)).

195. *Reynolds v. United States*, 98 U.S. 145, 167 (1879).

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