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Arbitration's Counter-Narrative: The Religious Arbitration Paradigm

ABSTRACT. Arbitration theory and doctrine are dominated by a narrative conceptualizing arbitration via reflection on the qualities of litigation. Litigation, the thought goes, is more procedurally rigorous, but takes longer and costs more; arbitration, on the other hand, is faster and cheaper, but provides fewer procedural safeguards. Notwithstanding these differences, the standard narrative sees both arbitration and litigation as ultimately serving the same purpose: resolving disputes. This narrative has been pervasive, not only becoming entrenched in recent Supreme Court decisions, but also garnering support from arbitration critics and supporters alike.

However, the exclusive focus on this standard narrative has left unexplored a competing arbitral narrative—a counter-narrative of sorts—that examines the contexts in which arbitration differs from adjudication because it aims to promote an alternative set of values beyond simply resolving disputes. The failure to consider this counter-narrative has prevented legal doctrine from accounting for contexts in which arbitration seeks to amplify the autonomy of parties to pursue shared values by resolving their disputes in the arbitral forum.

This arbitral counter-narrative filters into numerous contexts, but it finds its paradigmatic application in the context of religious arbitration. When parties agree to religious forms of arbitration, they select religious authorities to resolve disputes in accordance with religious law. These forms of arbitration are embraced not solely because they help to resolve disputes, but also because they enable parties to resolve disputes in accordance with shared religious principles and values. If successfully incorporated into current legal doctrine, this arbitral counter-narrative could unlock the transformative potential of arbitration, enabling parties to employ arbitration not simply as an expedient venue for resolving disputes, but also as an alternative forum for breathing life into mutually shared values.

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FEATURE CONTENTS

INTRODUCTION 2996

I. ARBITRATION'S NARRATIVE 3000

II. ARBITRATION'S COUNTER-NARRATIVE 3010

III. THE DOCTRINE OF ARBITRATION'S COUNTER-NARRATIVE 3022

A. Defining Arbitration 3023

1. Arbitrator Immunity 3030
2. Arbitrator Impartiality 3031
3. State Action 3035
4. Public Access to Arbitration 3038

B. Agreeing to Arbitration 3042

CONCLUSION 3051

INTRODUCTION

Arbitration theory and doctrine are dominated by an overarching narrative that conceptualizes arbitration as functionally equivalent to litigation.[1] This narrative views arbitration and litigation as parallel institutions, both providing parties with a method for resolving their dispute. On one side of this equation is litigation, procedurally rigorous but expensive. On the other side is arbitration, faster and cheaper but with fewer procedural safeguards. Both arbitration and litigation, however, ultimately serve the same purpose: dispute resolution.

This standard narrative has been recapitulated repeatedly in a string of recent Supreme Court decisions touting arbitration's streamlined process over the perceived rigors of litigation.[2] And both critics and supporters of arbitration have largely adopted this narrative. Critics bemoan arbitration's failure to provide the procedural safeguards typical of litigation[3] and suggest that the parties' choice to forego litigation often lacks true consent.[4] Supporters of arbitration counter that concerns over consent—or lack thereof—in selecting arbitration over litigation are exaggerated and that parties benefit from arbitration's relative procedural informality, which enables arbitrators to mete out justice faster and more cheaply than courts.[5] Notwithstanding these differences, there is a common thread to these arguments: arbitration and litigation, first and foremost, are both viewed as methods of dispute resolution.

One of the few challenges to this standard narrative suggests that it fails to provide an accurate depiction of litigation. Critics, most famously Owen Fiss and Judith Resnik, have argued that the purpose of litigation is not simply to resolve disputes, but also to promote public values by enabling judges to articulate, interpret, and enforce central legal rules and principles.[6] On this view, however, arbitration is still viewed as merely achieving the more modest objective of resolving disputes between the parties. There is, of course, good reason

1. *See, e.g.*, 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 2.6.2 (1999) ("[T]he purpose of both forms is to obtain justice between the parties."); *see also* Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 431 n.1, 433 (2010) (characterizing this narrative as the "displacement thesis" and collecting examples).

2. *See infra* notes 20-24 and accompanying text (discussing this shift in the Supreme Court's jurisprudence).

3. *See infra* notes 40-43 and accompanying text.

4. *See infra* notes 35-37 and accompanying text.

5. *See infra* notes 45-49 and accompanying text.

6. *See infra* notes 51-55 and accompanying text.

for this. Parties typically consent to arbitration because it provides an efficient and cheaper method for resolving disputes.[7]

But the law has largely failed to account for a competing arbitral narrative, in which arbitration differs from adjudication because *arbitration* aims to promote an alternative set of values beyond simply resolving disputes.[8] Indeed, in a wide range of contexts, arbitration serves a "jurisgenerative" function, amplifying the parties' autonomous ability to pursue shared values in the dispute resolution context.[9] Thus, various groups—such as trade associations, ethnic communities, and families[10]—adopt specific procedures to select arbitrators, choose the governing law, and incorporate community norms in order to ensure that their dispute resolution forum reflects the parties' shared values. While techniques and methods vary, these forms of arbitration share a common feature: they all embrace arbitration at least in part because of the values the selected form of arbitration promotes.

Taken together, these forms of arbitration coalesce into an arbitral counter-narrative. This counter-narrative implicitly critiques debates over arbitration's adequacy as a method of dispute resolution, and it encourages us to account for arbitration's broader social benefits. Focusing only on the standard arbitration

7. *See infra* note 57 and accompanying text.

8. There have been, to be sure, a few scholars who have identified this dynamic. *See* Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123 (2007); E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999) [hereinafter Spitko, *Gone but Not Conforming*]; E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065 (1999) [hereinafter Spitko, *Judge Not*]; *see also* notes 59-75 and accompanying text.

   Others have ventured down this road with more limited aspirations in mind. *See, e.g.*, Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994) (explaining the therapeutic value of arbitration with a particular focus on labor arbitration); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 245-55 (1987) (describing the pragmatic value of arbitration as related to public values). Still others have focused more broadly on the public values enhanced by alternative dispute resolution, extending those insights to arbitration as well. *See, e.g.*, Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997) (articulating a community-enhancing understanding of mediation); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 504-05 (1985) (describing substantive justice arguments for settlement); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (describing the positive aspects of settlement from a public values perspective).

9. The term "jurisgenerative" famously comes from Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

10. *See infra* notes 59-75 and accompanying text.

narrative, which uses litigation as the barometer, misses the transformative purposes around which at least some forms of arbitration are organized. And while most arbitrations fall squarely within the standard arbitral narrative, the failure to account for arbitration's counter-narrative has already led to doctrinal problems—problems that will likely multiply if the exclusive focus on the standard narrative continues. By flattening arbitration doctrine and discounting the contexts in which arbitration is pursued for purposes beyond garden-variety dispute resolution, courts have too frequently, and too unreflectively, adopted the bare equation of litigation and arbitration.[11]

Moreover, even courts that have resisted the bare equation of the purposes of arbitration and litigation have not tried to articulate the ways in which arbitration does differ from litigation. Thus, they have not considered whether there are differences between various forms of arbitration.[12] One of the chief lessons of arbitration's counter-narrative is that arbitration is not monolithic; parties benefit from arbitration when the forum is successful at promoting the unique values shared by the parties. To the extent that courts fail to account for the diversity of arbitration, they also misconstrue the nature of the differences between arbitration and litigation.

All told, then, courts have adopted an either/or strategy: some cases have mistakenly equated arbitration and litigation, while other cases have rejected the equation but without considering the circumstances under which the equation might actually be accurate. In embracing this uniform conceptualization of arbitration, courts have not adequately accounted for either the differences between litigation and arbitration or the internal differences between various forms of arbitration. In short, courts have failed to adequately account for the lessons to be learned from arbitration's counter-narrative.

This failure to consciously consider arbitration in all of its dimensions has led to the development of doctrine that fails to account for the fact that some arbitral fora are geared toward achieving fundamental, transformative objectives that differ from those to which litigation aspires. Courts have become too willing to assume the standard arbitral narrative—that arbitration is simply a method for resolving disputes—and to thereby import rules from the litigation context into the arbitration context. In so doing, courts undermine the ability of various forms of arbitration to promote an alternative set of fundamental values successfully.

In order to correct this narrow focus on the standard arbitral narrative, we must look to the contexts in which arbitration aims to achieve objectives beyond mere dispute resolution—a dynamic perhaps best exemplified in religious

11. *See infra* Part III.A.

12. For an example, see *infra* notes 160-176 and accompanying text.

arbitration. When parties agree to religious forms of arbitration, they select religious authorities to resolve disputes in accordance with religious law. Parties embrace this form of arbitration not solely because it is a useful mechanism for dispute resolution, but because these arbitrations are meant to enable parties to resolve a dispute in accordance with shared religious principles and values. In turn, these principles and values create the framework under which procedural and substantive rules are developed and applied.[13]

These arbitrations are more than expedient attempts to resolve a particular controversy; they are embedded in a much larger communal infrastructure and incorporate shared values into the selected method of dispute resolution.[14] Thus, Owen Fiss's famous argument that a judge has a unique role to play because "he is a public officer; paid for by public funds; chosen not by the parties but by the public or its representatives; and empowered by the political agencies to enforce and create society-wide norms,"[15] has a parallel in religious arbitration: these arbitrators have a unique role to play because they are religious authorities applying religious law and are thereby instructed to elaborate on fundamental religious values shared by the parties.

Identifying the counter-narrative exemplified by religious arbitration provides important lessons for how courts should approach questions of arbitration doctrine more generally. While parties select arbitration largely because it provides a more expedient form of dispute resolution, courts must still recognize that arbitration is not a one-size-fits-all category; this is a conclusion highlighted by, but not exclusive to, religious arbitration. Parties enter arbitral fora hoping to achieve a wide and diverse range of objectives. To properly adjudicate cases, and to encourage new forms of arbitration that similarly promote alternative values, courts must develop doctrine that better reflects arbitration's varied nature.

Accordingly, courts should not continue unreflectively extending rules applicable in litigation to arbitration on the assumption that arbitration is simply, like litigation, a form of judicial proceeding. Rather, courts need to evaluate whether each particular arbitral forum is designed to substitute for litigation or whether it is designed to promote other fundamental values.

Moreover, failing to distinguish between the fundamentally distinct objectives of different forms of arbitration can lead to inadequate protection for parties to the arbitration. Some arbitration agreements—geared towards achieving

13. *See infra* Part II.

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

15. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30-31 (1979).

shared values—are embedded within a larger communal and religious network; in such circumstances, common law contract defenses must account for communal dynamics that can threaten the full exercise of unfettered consent when entering arbitration agreements—otherwise they will leave vulnerable parties without the necessary legal tools to enforce their rights.

In the end, the core lesson of arbitration's counter-narrative is that arbitration can augment a range of values. Recognizing this core lesson is necessary if the law is to secure the best arbitration has to offer while simultaneously protecting those vulnerable to its excesses. The argument that follows will hopefully serve as a corrective, shifting our attention towards arbitration's counter-narrative. It will proceed in three parts. Part I will provide additional background on arbitration's standard narrative. Part II will explore this counter-narrative, using religious arbitration to demonstrate how arbitration can sometimes be organized around an alternative set of objectives. Part III will then consider how judicial focus on the standard narrative has led to doctrinal developments ill-suited to the diversity of values that arbitration promotes, limiting the ability of arbitration to leverage its jurisgenerative potential.

I. ARBITRATION'S NARRATIVE

The standard arbitration narrative, embraced by judges and scholars alike, sees modern arbitration law as trying to answer the following question: when it comes to resolving disputes, can arbitration serve as a viable alternative to litigation?[16]

Prior to the enactment of the Federal Arbitration Act (FAA), courts believed the answer to this question was no, and so they refused to enforce executory arbitration agreements.[17] Even subsequent to the passage of the FAA, the Supreme Court's answer to the question was only a tepid yes. The Court still be-

16. *See* Markovits, *supra* note 1, at 431 n.1, 433.

17. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974) ("English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act."); H.R. REP. NO. 68-96, at 1-2 (1924) ("The need for the law arises from . . . the jealousy of the English courts for their own 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 . . . ."). *But see* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 19 (1992) (arguing that "contrary to modern folklore . . . the premodern statutory law of arbitration was largely supportive of that institution, as was the common law.").

lieved arbitrators, in contrast to judges,[18] were ill-equipped to resolve complex disputes—most notably, those implicating federal statutory claims—and therefore worried that arbitrators would issue final awards that failed to apply the law accurately and could not be corrected by subsequent judicial review.[19]

But over the past three decades, the Supreme Court's answer to this fundamental question has morphed into an unequivocal and emphatic yes. Indeed, the Supreme Court has now wholeheartedly endorsed arbitration, consistently shielding arbitration agreements and awards from innumerable legal challenges. On this new view, arbitrators are no longer seen as less capable of applying complex legal rules than their counterparts in the judiciary.[20] Instead, parties' decision to opt out of the judicial process and select arbitration amounts to a voluntary choice to "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[21] Arbitration serves as a worthy alternative to litigation, on this view, because it provides "efficient" and "streamlined" procedures[22] and thereby reaches far more "expeditious results."[23] Accordingly, "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief values in arbitration."[24]

18. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435 (1953) ("Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings.").

19. *See, e.g.*, *id.* at 435-36 (refusing to enforce an agreement to arbitrate claims under the 1933 Securities Act); *see also* CHRISTOPHER DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 191 n.1 (3d ed. 2013) (collecting federal courts of appeals relying on *Wilko v. Swan*).

20. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) ("[A]rbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision.").

21. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

22. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011).

23. Preston v. Ferrer, 552 U.S. 346, 357 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985))); *see also Concepcion*, 131 S. Ct. at 1749 (noting that, notwithstanding the Supreme Court's decision in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), "encouragement of efficient and speedy dispute resolution" is one the goals of the FAA).

24. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (collecting legislative history).

This new—and far more confident—vision of arbitration has informed the Court's overhaul of its arbitration jurisprudence, leading it to expand the enforceability of arbitration agreements and awards. In contrast with the law under the Court's early decisions,[25] therefore, parties now may submit disputes implicating federal statutory rights to arbitration, even when the underlying statute includes a provision explicitly prohibiting waiver of those rights.[26] Parties can also submit the very enforceability of an arbitration agreement to arbitration, circumventing judicial review of the agreement even when claims that the agreement is unconscionable persist.[27] In fact, the Supreme Court has enforced arbitration agreements that include class arbitration waivers, preempting state court decisions that had invoked the presence of such a waiver to deem the arbitration agreement unconscionable.[28] Moreover, the Court has refused to invalidate arbitration agreements with class action waivers even when those waivers make marshaling evidence to support federal statutory claims economically unfeasible.[29] And in addition to bolstering the enforceability of arbitration agreements, the Court has further narrowed the grounds for vacating arbitration awards, holding that the FAA's statutory grounds provide the exclusive grounds for reversing awards even when parties agree by contract to enlarge that list.[30]

This new vision of arbitration has also led the Court to reconsider its longstanding distinction between commercial arbitration and labor arbitration.[31] In a number of earlier decisions, the Court had emphasized that because collective bargaining agreements inherently entail a "majoritarian process[]," they cannot require employees to arbitrate claims predicated on an individual's

25. *See, e.g.*, Wilko v. Swan, 346 U.S. 427 (1953).

26. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

27. *See* Rent-a-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 (2010). To be sure, questions of enforceability do not include questions about whether the parties in fact consented to the underlying agreement. *See* BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1206 (2014) (describing which questions of arbitrability remain for the court).

28. *Concepcion*, 131 S. Ct. 1740.

29. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

30. Hall St. Assocs., LLC. v. Mattel, Inc., 552 U.S. 576, 584-89 (2008).

31. *See, e.g.*, Allison Anderson, Note, *Labor and Commercial Arbitration: The Court's Misguided Merger*, 36 B.C. INT'L & COMP. L. REV. 1237, 1263 (2013) ("The *Pyett* decision suggests that a merger between labor arbitration law and commercial arbitration law is well underway."). While standard commercial arbitration is governed by the FAA, labor arbitration has historically been governed by the Labor-Management Relations Act (LMRA). *See* Mitchell H. Rubinstein, *Altering Judicial Review of Labor Arbitrations Awards*, 2006 MICH. ST. L. REV. 235, 256-63 (describing the legal development of arbitration under the LMRA).

statutory rights.[32] But this distinction between labor arbitration and commercial arbitration has been largely eliminated as the Court has increasingly conceptualized arbitration as a homogenous dispute resolution mechanism. Thus, in the context of the Age Discrimination in Employment Act, the Court has explained that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."[33] And the Court has further emphasized that concerns over the ability of arbitration—even arbitration conducted pursuant to a collective bargaining agreement—to adequately protect the statutory rights of claimants emanates from an outdated distrust of arbitration that was discarded long ago.[34]

Not surprisingly, the Court's growing confidence in arbitration's ability to serve as an alternative to litigation has triggered vociferous backlash from scholars. At the center of this criticism is a fundamental worry that arbitration agreements often fail to represent a considered decision of both parties to forgo litigation.[35] On this view, some parties find themselves subject to the procedur-

32. *E.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) ("Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities."); *see also* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 737 (1981) ("[D]ifferent considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.").

33. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 258 (2009); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (compelling arbitration of an age discrimination claim pursuant to the terms of an arbitration agreement).

34. *Pyett*, 556 U.S. at 267 ("Indeed, in light of the 'radical change, over two decades, in the Court's receptivity to arbitration,' . . . reliance on any judicial decision similarly littered with *Wilko*'s overt hostility to the enforcement of arbitration agreements would be ill advised." (quoting Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 77 (1998))).

35. *See, e.g.*, Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. L. REV. 415, 447 (2003) ("[C]ustomers do not have a choice about what to do with this information [regarding arbitration] because every brokerage firm requires its customers to sign an arbitration agreement as a condition of opening an account."); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 164 (1997) ("[A]rbitration is sometimes not truly the product of free choice."); Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37, 47 (2007) ("Choice and consent to remedy limitations have become legal fictions in consumer form contracts . . . ."); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 679-80 (1996) (describing how arbitration can be imposed on consumers through form contracts, which serve the interests of companies and give them an unfair advantage). For a discussion of how the rise of boilerplate language in contracts has eroded elements of consent more broadly, see generally Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 189 (Omri Ben-Shahar ed., 2007).

al uncertainties of arbitration without truly waiving their right to pursue litigation. Indeed, those skeptical of whether parties truly consent to arbitration note that an overwhelming majority of arbitrations are conducted pursuant to pre-dispute arbitration provisions.[36] Thus, for example, employees and consumers who sign employment or purchase agreements will often consent to waiving their statutory rights where the prospect of a dispute is sufficiently far off that their concerns over securing the job or purchasing the particular product are significantly more pressing.[37]

The problems of consent are particularly worrisome, according to critics, because arbitration provisions are generally deployed by institutional actors. These institutional actors, the claim goes, are able to leverage their superior bargaining position to insulate themselves from liability by shielding their conduct from meaningful judicial scrutiny and review.[38] Moreover, arbitration

36. *See, e.g.*, Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 TENN. L. REV. 365, 400 (2008) ("The potential for corporate abuse of express, pre-dispute limitations is compounded by the fact that the vast majority of arbitration clauses are contained in contracts of adhesion, which bear little resemblance to the voluntary agreements envisioned when one thinks of 'consent.'" (citation and internal quotation marks omitted)); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649 (2005) ("In short, under most reasonable definitions mandatory arbitration is nonconsensual, given that consumers and employees don't typically read or understand the clauses."); *see also* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 32-33 (1999) (discussing how various companies make pre-dispute arbitration agreements a condition for employment, services, or sale of a good); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1105 (2002) ("[W]hen the opportunity for bargaining is not realistically present . . . the coercive aspect of [pre-litigation agreements] makes them seem less a mechanism for efficient resolution of disputes and more a potential tool for gaining strategic advantage.").

37. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 453 (1996) (arguing that many employees undervalue the presence of arbitration clauses because they underestimate the probability that a dispute will occur); Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 660 (2008) ("[C]ompanies insist on *pre*-dispute arbitration clauses because consumers are unlikely to agree to arbitration after disputes arise due to adversarial postures and growing distrust of arbitration.").

38. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2315 (2013) (Kagan, J., dissenting) ("Applied as our precedents direct, the effective-vindication rule furthers the purposes not just of laws like the Sherman Act, but of the FAA itself. That statute reflects a federal policy favoring actual arbitration—that is, arbitration as a streamlined 'method of resolving disputes,' not as a foolproof way of killing off valid claims. . . . Put otherwise: What the FAA prefers to litigation is arbitration, not *de facto* immunity."); Levin, *supra* note

provisions are sometimes used in tandem with class-arbitration waivers, enabling corporations to kill off class-action lawsuits and thereby ensure that small-money plaintiffs lack the incentives to bring suit for various forms of widespread – but low-cost – malfeasance.[39]

Furthermore, some critics contend that arbitration proceedings themselves are structurally skewed to favor the corporate repeat player who not only holds informational advantages over the one-shot plaintiff,[40] but also implicitly holds

35, at 125-34 (discussing the reluctance of most courts to review arbitration decisions for errors of law).

39. *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v Concepcion, 79 U. CHI. L. REV. 623, 627 (2012) ("And then there is the *coup de grace* administered to consumer class actions by a 5-4 Supreme Court this past term in *AT&T Mobility LLC v. Concepcion*. All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to the game-changing edict that companies . . . may simply opt out of potential liability by incorporating class action waiver language in their standard form contracts with consumers (or employees or others)."); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 133 (2011) ("The providers won the power to impose a mandatory, no-opt-out system in their own private 'courts' designed to preclude aggregate litigation."); Sternlight, *supra* note 35, at 683 ("[C]ompan[ies] might seek to prevent consumers from joining together in a class action, thereby forcing each plaintiff to bear the full burden of litigation costs on her own. Often, suits that cannot be brought as a class action cannot economically be brought at all."); J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1747 (2006) ("[B]y prohibiting class actions in the context of 'negative-value' lawsuits, where the expected recovery is dwarfed by the cost of litigating or arbitrating the claim, individuals are effectively prevented from pursuing their claims. As a result, businesses are able to engage in unchecked market misbehavior that results in small and seemingly insignificant consequences upon individuals, but which leads to sizeable windfalls for the particular corporation in the aggregate."); Bryon Allyn Rice, Comment, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard*, 45 HOUS. L. REV. 215, 250 (2008) ("[A]s most consumer advocates point out, and the courts are beginning to recognize, these class action waivers show up in transactions in which the consumer has no realistic option of turning away.").

40. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238–39 (1998) (discussing statistics showing that repeat players are more successful in arbitration); Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1493 (1996) ("In securities arbitration there is no real consent to arbitrate and, on the part of the typical investor, no understanding of the nature of the arbitral process."); Miller, *supra* note 36, at 400 ("[C]orporations that draft arbitration clauses into their standardized agreements are usually in a position of superior bargaining power, with a wider knowledge of the intricacies of the deal and the potential disputes that might arise."); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 69 ("The parties also have disparate knowledge, because the drafting party understands the nature of potential future disputes and the differences between arbitration and litigation, whereas the adherent does not.").

out the carrot of more business for the arbitrator if the current dispute is resolved in accordance with the corporate defendant's expectations.[41] These asymmetries are particularly troubling, critics argue, given that the Supreme Court has erased nearly all limits on which disputes can be arbitrated.[42] At the same time, arbitration proceedings lack the procedural safeguards of judicial proceedings, further undermining the likelihood of arbitral justice, especially for those unfamiliar with the ins and outs of arbitration.[43] In this way, the decision to embrace the "procedural informality" of arbitration is problematic not only because of the uneven nature of consent, but also because the claimed advantages of arbitration – speed and efficiency – do not actually inure to the benefit of all parties.

To be sure, plenty of arbitration's defenders emphatically reject these characterizations, arguing that arbitration does indeed serve as a viable alternative to litigation.[44] These supporters view arbitration as largely volitional;[45] they

41. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1067 (2000) (suggesting that "self-serving motives, such as greed, can easily be hypothesized" to explain the empirical data showing a favor towards repeat players in arbitration); *see also* Cole, *supra* note 37, at 478 ("Economic coercion clearly plays some role in a system where an arbitrator who regularly finds in favor of complaining employees may expect that the employer will be reluctant to rehire him in the future.").

42. Julie K. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 COLUM. BUS. L. REV. 1, 29 ("[T]he Court is taking the 'federal presumption in favor of arbitration' to its extreme and will broadly construe the FAA to reach virtually all contracts."); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1952 (1996) (describing the Supreme Court's arbitration rulings as a "march toward a wide and boundary-less concept of arbitration"); Schwartz, *supra* note 40, at 36, 81-103 (arguing that "[t]he Supreme Court has created a monster[;] [w]ith the Court's enthusiastic approval, pre-dispute arbitration clauses–agreements to submit *future* disputes to binding arbitration–have increasingly found their way into standard form contracts of adhesion" and discussing the ways in which the Supreme Court's view of the FAA creates a "sphere in which arbitration agreements are almost entirely free from the fairness and public policy limitations placed on adhesion contracts generally").

43. *See, e.g.*, Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 102 (1992) ("The orthodox view holds that parties who consent by contract to arbitration expressly waive their constitutional rights. The parties opt out of the judicial system with its rigid substantive rules. This view relieves the arbitrator of any obligation to consider constitutional assertions in the arbitration proceeding.").

44. *See* Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329 (2005) (arguing that arbitration provides an equitable alternative to the often sclerotic mode of litigation to recover justice, partly because arbitration saves time and money, offers procedural flexibility, substantive flexibility, and sensitivity to community norms, and can be tailored to the specifics of the dispute); Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2008) (criticizing congressional findings that arbitration agreements undermine consumer choice, pressure arbitration com-

provide strong reasons to wonder whether concerns that arbitration is skewed in favor of the repeat player are misguided;[46] they note that the plaintiff's bar has helped counteract the informational imbalance that might otherwise be experienced by one-shot parties to arbitration;[47] and they also highlight the way

panies to favor repeat players, undermine the development of public law, provide a poor recourse for the protection of civil rights, and that arbitrations often are tilted against individuals in favor of corporations).

45. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1 (providing empirical data supporting the proposition that arbitration clauses are generally much more favorable to consumers than their critics make them out to be); Thomas Stipanowich, *Arbitration And Choice: Taking Charge of The "New Litigation,"* 7 DEPAUL BUS. & COMM. L.J. 383, 436 (2009) ("Choice—the opportunity to tailor procedures to business goals and priorities—is the fundamental advantage of arbitration over litigation. The freedom to choose, and key resulting differences between contract-based arbitration and court trial, explain why most business users prefer arbitration when resolving commercial disputes."); Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 40-41 (2003) (criticizing some commentators' decision to refer to pre-dispute arbitration agreements as "mandatory" when the agreements are voluntarily accepted); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 160 (1996) (arguing that commentators' criticism that arbitration agreements in the employment context lack voluntariness are largely overblown and that in the absence of the separability doctrine, duties to arbitrate are, "like all [duties] enforced by contract law," voluntarily assumed).

46. Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1059 (2009) (criticizing a Public Citizen report's claims that the repeat player effect is one of the major problems with arbitration by interpreting available empirical data and concluding that "the data does not necessarily support the Report's strident conclusions"); Rutledge, *supra* note 44, at 268-78; David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557 (2005) (suggesting that various critics' accusation that repeat players have an advantage because they can curry favor as "repeat customers" may incorrectly conceptualize repeat players' advantage and that instead their advantage arises from the fact that the repeat players have greater experience in the arbitration process); Stephen J. Ware, *The Effects of* Gilmer*: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. DISP. RESOL. 735, 751-53 (2001) (reviewing Lisa Bingham's empirical studies on the "repeat player effect" and concluding that once one controls for the merits of the employment dispute, the presence of a repeat player may make no difference at all).

47. *See, e.g.*, Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 751 ("Even for individuals who are not fully informed . . . repeat-player bias may be less of a problem than some critics suggest. Although individuals are not repeat players, their attorneys may well be. Plaintiffs' attorneys may represent numerous employees, franchisees, or consumers against corporate defendants, effectively becoming repeat players."); Samuel Estreicher, *Predispute Agreements To Arbitrate Statutory Claims*, 72 N.Y.U. L. REV. 1344, 1355 (1997) ("Moreover, the real repeat players will be the lawyers for both defense and plaintiff bars in the area . . . who can be counted on to share information within their group about the track records of proposed arbitrators."); William B. Gould, IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 617 (2006) ("The plaintiffs' bar representing employees is emerging as an institutional force with which to be

in which arbitration service providers have created procedural rules to provide for predictability in everything from arbitrator selection to discovery.[48] In sum, arbitration advocates claim that the problems in arbitration are much less dire than they are made to seem and that, in fact, arbitration is appropriately favored because it provides a cheaper, faster, and thus potentially superior alternative to adjudication in court.[49]

But notwithstanding the divide between arbitration's advocates and critics, both groups assess arbitration from a similar vantage point: they evaluate arbitration by determining whether it allows for the fair and equitable resolution of disputes. In this way, advocates and critics focus on the dispute resolution function of arbitration, comparing it—either implicitly or explicitly—to the judicial process. Critics see arbitration as a second-best alternative to litigation, arguing that is plagued by two fundamental flaws: it is often conducted without the true consent of the parties and it fails to live up to the standards of the judicial process. Advocates argue that arbitration provides a fair and equitable alternative to litigation and that, to the extent arbitration provides more limited protections than the judicial process, the speed and efficiency of the arbitration make the trade-off well worth it. But for both, arbitration and judicial

reckoned. In some circumstances, plaintiffs' attorneys have networks rivaling those of labor unions in labor-management arbitration; these networks can provide intelligence on the competence and impartiality of selected neutrals."); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77, 97-99 (1996) ("[A] plaintiffs' bar is the most likely institutional repeat player to balance the employers' presence in arbitration.").

48. Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues*, *in* AAA HANDBOOK ON COMMERCIAL ARBITRATION 83 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., 2006) (explaining the importance of provider institution rules to the arbitration process and the manner in which provider institutions throughout the world have collectively contributed to the development of recognized procedural standards); J. Timothy Eaton & Patricia S. Spratt, *Discovery in Arbitrations*, CBA REC., Nov. 2009, at 34 (arguing that discovery procedures can be built into the arbitration process).

49. *See* Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, CATO INST. 4-5 (2002), http://object.cato.org/sites/cato.org/files/pubs/pdf/pa433.pdf [http://perma.cc/6Q7H-FGUC] ("Parties using arbitration generally find that it saves them time and money in comparison with litigation. Arbitration is typically quick, inexpensive, and confidential. It generally operates in a commonsense way, without all of the legal jargon and procedural maneuvering that go on in court."); *cf.* MACNEIL ET AL., *supra* note 1, § 2.6.2, at 2:41 ("In sum, arbitration is a form of consensual, relatively informal, personalized adjudication where the primary objective is to obtain less expensive justice between the parties. The challenge is to obtain particularized justice in an extra-legal adjudicatory process with potential strengths and weaknesses when compared to civil litigation.").

proceedings fundamentally serve the same primary function: resolving disputes.[50]

This shared conceptual framework has not gone unchallenged. Indeed, a number of scholars have contended that the basic assumption that *courts* are simply intended to resolve disputes misses how courts are also meant to serve as institutions that promote core public values. Thus, these scholars argue, a wholesale movement away from courts and towards arbitration would erode core public values that are advanced by judicial resolution of disputes. On this view—most directly associated with the work of Owen Fiss[51] and Judith Resnik[52]—the encroachment of alternative dispute resolution, including settlement and arbitration proceedings, deprives the public of vital first-order values unrelated to the dispute-resolution objectives of the parties. Thus Fiss has argued that the job of judges "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[53] Similarly, Resnik has lamented the decline of adjudication, which aspired to ensure fairness and impartiality, with disinterested judges providing "reasoned explanations of their decidecisions . . . without concern for the interest of particular constituencies."[54]

On this view, the focus of adjudication is on the public and its relationship to the law—a focus at odds with arbitration's attempt to simply provide the parties with an alternative dispute resolution forum. Indeed, following Fiss and Resnik, others have emphasized that this public-values worry (that is, the need for courts to define, promote, and enhance fundamental legal values through

50. *See, e.g.*, MACNEIL ET AL., *supra* note 1, § 2.6.2, at 2:37-38 ("[T]he purpose of both forms is to obtain justice between the parties through a final decision on the merits by the arbitrator or the judge.").

51. Fiss, *supra* note 15, at 30-31 ("Arbitrators are paid for by the parties; chosen by the parties; and enjoined by a set of practices (such as a reluctance to write opinions or generate precedents) that localizes or privatizes the decision. The function of the arbitrator is to resolve a dispute. The function of the judge, on the other hand, must be understood in wholly different terms: he is a public officer; paid for by public funds; chosen not by the parties but by the public or its representatives; and empowered by the political agencies to enforce and create society-wide norms, and perhaps even to restructure institutions, as a way, I suggest, of giving meaning to our public values.").

52. *See, e.g.*, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 445 (1982) [hereinafter Resnik, *Managerial Judges*].

53. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

54. Resnik, *Managerial Judges*, *supra* note 52, at 445; *see also* Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL L. REV. 1, 4-7 (1987) (discussing the Fiss and Resnik arguments as well as other arguments in a similar vein).

their decisions) has become increasingly acute now that the Supreme Court has allowed a wide range of federal statutory claims to be submitted to arbitration.[55]

But while the public-values critique challenges the standard narrative, it does so by concluding that there is more at stake in *litigation* than mere dispute resolution. The public-values critique does not challenge the fundamental assumption that arbitration is mainly about dispute resolution. In this way, the standard view of arbitration has become entrenched not only in Supreme Court doctrine, but also in the conceptual framework embraced by a wide range of scholars. On these accounts, parties select arbitration for one reason alone: to resolve disputes.

II. ARBITRATION'S COUNTER-NARRATIVE

At the core of the standard arbitration narrative is a vision of arbitration as an alternative method for resolving disputes. The arguments typically marshaled in favor of arbitration therefore focus on the idea that arbitration is efficient, streamlined, and cheaper than litigation.[56] Indeed, none of this is surprising. Surveys of corporations consistently report that saving time and saving money are some of those corporations' most important reasons for choosing arbitration.[57] These considerations appear to have also, in part, motivated Congress to pass the FAA in 1925.[58]

55. *See, e.g.*, Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059 (1987) (criticizing the Supreme Court's arbitrability doctrine for authorizing the arbitration of federal statutory claims aimed to protect public interests).

56. *See supra* notes 21-24.

57. *See, e.g.*, David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, CORNELL/PERC INST. ON CONFLICT RESOL. (1998), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=icrpubs [http://perma.cc/FVT5-6DGL]; Douglas Shontz et al., *Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel*, RAND INST. FOR CIV. JUST. (2011), http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf [http://perma.cc/57YK-RX6K]; *see also* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1 (2014) (using recent survey date to identify new trends in the approach of corporations to arbitration and other methods of alternative dispute resolution).

58. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274 (1995) (citing to portions of the FAA's legislative history); *see also* H.R. REP. NO. 97-542, at 13 (1982) (discussing a proposed patent arbitration scheme and arguing that "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business

But while the standard arbitration narrative has strong foundations, it fails to account for alternative conceptions of the practice—conceptions that coalesce into an arbitral counter-narrative—that aim to achieve a wholly different set of objectives. On this count, the transformative potential of arbitration has been largely underappreciated; arbitration provides a framework within which parties can opt out of the dominant legal system and establish their own rules and procedures to govern the dispute resolution process. And parties can tap into this transformative potential by employing arbitration and choice-of-law provisions that ultimately advance a shared set of objectives and values.

While these values-driven modes of arbitration are undoubtedly used less frequently than standard forms of arbitration, they play a prominent role in a wide range of arbitral fora.[59] In the commercial sphere, a number of industries and trade associations have adopted methods of arbitration that are intended to amplify shared values and relational objectives. Perhaps the most famous example is the diamond industry,[60] but there are numerous others,[61] including the construction industry, where "parties . . . are continually building relationships"[62] and have embraced a dispute resolution system that reflects the shared sense of "inherent duty to abide by their promises and treat one another fairly."[63] Members of these industries, in turn, "generally understand and accept industry norms [and] standards."[64] This emphasis on shared values has also played a prominent role in labor arbitration, where parties have looked to arbi-

dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . .").

59. *See* Markovits, *supra* note 1, at 473.

60. *See, e.g.*, Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383, 407 (2006) (noting that within the diamond industry, parties seek to promote "adherence to values that have religious significance to the community"). On enforcement of community norms in the diamond industry, see generally Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

61. *See* Stephen J. Ware, *Arbitration and Assimilation*, 77 WASH. U. L.Q. 1053, 1057 (1999) (noting that "[c]urrent arbitration can usefully be divided into two types: intra-group arbitration and general arbitration" and providing examples of commercial intra-group arbitration).

62. Schmitz, *supra* note 8, at 158.

63. *Id.* at 155. In this way, the construction industry prizes relational values even where promoting those values might require parties to perform on contracts that they otherwise would disavow. Schmitz identifies sports arbitration as another example of what she describes as "intra communal" arbitration. *See id.* at 149-50.

64. *Id.* at 158.

tration as a process capable of improving the working relationship between labor and management.[65]

The transformative potential of arbitration has been further magnified in the various family law contexts. From division of assets to child custody to wills and trusts, courts and commentators have noted ways in which arbitration can allow parties to select a process of dispute resolution that ensures sensitive decisions reflect personal family values and ideals.[66] Thus, subjecting disputes over a testamentary gift to arbitration can ensure not only the privacy of deeply personal family matters, but it can also provide a degree of "testamentary freedom" to the testator by allowing him to establish a process of dispute resolution that reflects his own personal—even if nonconforming—values.[67] Similarly, some have endorsed arbitrating child custody disputes in particular cases because doing so would allow parties to select a process of dispute resolution reflecting even non-majoritarian family structures. They argue that such a process would allow parties to be more comfortable during the proceeding with a higher likelihood that a decision will ultimately satisfy the parties.[68] And although the legal doctrine addressing the arbitrability of various family law claims is deeply uncertain,[69] it is far from surprising that many

65. *See* Abrams et. al., *supra* note 8, at 1759-60; *see also* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 568 (1960) ("The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. . . . The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." (footnote omitted)).

66. *See* Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 813 (2010) ("Arbitration, like personal law, results in family law pluralism. However, arbitration differs from personal law in that the family law pluralism that results in a personal law system is (arguably) more dependent on, and more the creation of, the state. Arbitration, on the other hand, is imagined as existing 'outside' of the state, and as providing an 'alternative' to the state's monolithic rules. In this way, arbitration potentially allows for even greater family law pluralism than a personal law system does, as the potential variation in family law rules corresponds to the (larger) diversity found amongst cognizable *couples* (as opposed to cognizable *communities*) in society.").

67. Spitko, *Gone But Not Conforming*, *supra* note 8, at 294-97.

68. *See* Spitko, *Judge Not, supra* note 8, at 1081-83. *But see* Burgess C. Bradshaw, Comment, *LGBT Parents—Where Do Their Child Custody Disputes Belong?*, 5 J. AM. ARB. 405 (2006) (arguing that changes in family law in recent years have obviated the need for resorting to ADR).

69. *See* Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009) (describing the wide range of judicial and scholarly views on the arbitrability of child custody disputes and adopting a standard allowing for their arbitrability on the condition that a "record of all documentary evidence adduced during the arbitration proceedings be kept; that testimony be recorded; and that the arbitrator issue findings of fact and conclusions of law in respect of the award of custody and parenting time"); David Horton, *The Federal Arbitration Act and Testamentary Instru-*

scholars have seen arbitration as providing an important dispute resolution alternative for members of the LGBT community[70] who continue to see the dominant legal system as insufficiently attentive to and accommodating of their needs and values.[71]

What these counter-narrative forms of arbitration have in common is that parties select them because the forum promotes the values they share, not because it serves as an expedient alternative to litigation. The origin and nature of the values at stake, of course, vary significantly. They range from commercial norms that have evolved within a particular trade association, to ideological commitments within a particular family, to relational values that protect the interpersonal bonds within a tightly knit industry, to rules that have been adopted by a particular religious community.

To safeguard these values, different groups will employ different methods. Some groups may use arbitrator qualification provisions to ensure that the arbitrator is familiar with the parties' shared values;[72] some may use forum selection clauses to authorize an arbitration employing procedural rules that reflect the parties' commitments;[73] yet others may use choice-of-law provisions to ensure that the arbitration proceedings are conducted in accordance with rules that reflect the parties' shared values.[74] But in all such cases, arbitration is selected for its transformative potential—its ability to serve not as a forum of mere expediency, but rather as a forum that can be infused with the procedures

ments, 90 N.C. L. REV. 1027 (2012) (describing the wide variances in judicial application of state arbitration acts to testamentary instruments).

70. *See, e.g.*, June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49, 53 (noting that "partners could incorporate compulsory arbitration provisions that allow them to select gay-friendly decision-makers to resolve future disputes").

71. *See, e.g.*, Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141 (2007); *see also* Freshman, *supra* note 8, at 1719 ("Many accounts of gay and lesbian couples detail horrible, homophobic-sounding court decisions.").

72. *See* Spitko, *Gone But Not Conforming*, *supra* note 8, at 294-97 (arguing that a testator should select an arbitrator to resolve disputes regarding his estate plan who is familiar with his "values and beliefs" underlying the estate plan); *see also* Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the* Batson *Principle*, 38 GA. L. REV. 1145, 1233-35 (2004) (arguing that selecting an arbitrator who understands the parties' culture is acceptable, particularly when the parties have consented to the selection).

73. *See* Helfand, *supra* note 14, at 1264-66 (discussing procedural rules under Jewish and Islamic law arbitrations).

74. In this way, intra-community dispute resolution can function as a practice that perpetuates communal values. *See generally* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 181-203 (3d ed. 2007) (discussing the interactions between social institutions and practices and the structure of communal values).

and commitments that promote the shared values and aspirations of the parties.[75]

The arbitration framework is particularly important when parties aim to incorporate community or group values into their own dispute resolution process. Arbitration allows parties to make individual decisions regarding the structure of the arbitral forum; they can, as a matter of contract, decide which rules will apply and what type of individuals will be charged with applying those rules. This flexibility operates as an open invitation to bring community and group norms into the dispute resolution forum. This process operates in reverse as well, with the arbitration itself becoming integrated into a group or community's infrastructure. Of course, this remains true only so long as courts vigorously police consent to such agreements, a concern to which we will return below.[76] In sum, these forms of arbitration provide parties with a mechanism to recognize their shared identities and affiliations while, ideally, ensuring that those identities and affiliations are not merely imposed from the outside.[77]

The paradigmatic example of this counter-narrative is religious arbitration,[78] where parties seek not only to resolve a dispute, but also to have that dispute adjudicated in accordance with religious law and to have that law applied by mutually agreed upon religious authorities.[79] To achieve these objec-

75. *Cf.* Spitko, *Gone but Not Conforming*, *supra* note 8, at 275 ("In a variety of contexts, cultural minorities have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel (most notably including judges and jurors)." (footnote omitted)).

76. *See infra* Part III.B.

77. It is for these reasons that I have argued elsewhere for an arbitration-based conceptualization of the "church autonomy" doctrine, which is also consistent with the Supreme Court's initial articulation of the concept. *See* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013).

78. Not surprisingly, there has been a recent increase in scholarly investigation of religious arbitration. *See, e.g.*, Farrah Ahmed & Senwung Luk, *How Religious Arbitration Could Enhance Personal Autonomy*, 1 OXFORD J.L. & RELIGION 424 (2012); Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157 (2012); Helfand, *supra* note 14; Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012); Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169 (2007); Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427 (2006); Yvonne Tew, Arbitrating God (unpublished manuscript), http://www.law.nyu.edu/sites/default/files/upload_documents/Yvonne%20Tew%20-%20Global%20Fellows%20Forum_0.pdf [http://perma.cc/X6BE-XK9B].

79. Helfand, *supra* note 14, at 1243-52 (describing different forms of religious arbitration in the United States).

tives, religious arbitration agreements will typically incorporate choice-of-law provisions alongside arbitration provisions to guarantee that the proceedings are conducted in accordance with the parties' shared religious practices.[80]

In the United States, members of all three primary Abrahamic faith communities employ forms of religious arbitration.[81] Likely the most well-known of the three is the Jewish *beit din* or rabbinical court.[82] The sense of obligation within the Jewish community to resolve disputes before a rabbinical courts stems from prevailing interpretations of Jewish Law. The obligation to submit all disputes before a *beit din* – as opposed to secular courts – is detailed in the Talmud and codified in the Code of Jewish Law.[83] By adhering to this obligation, parties demonstrate their fidelity to the values and principles animating the Jewish legal system; to violate this rule would be "tantamount to a declaration by the litigant that he is amenable to allowing an alien code of law to supersede the law of the Torah."[84]

80. *See, e.g.*, Beth Din Zedek Ecclesiastical Judicature, *Binding Arbitration Agreement*, CHI. RABBINICAL COUNCIL, http://www.crcweb.org/BDA_PS_1_3_%28Prenup%20Standard%29.pdf [http://perma.cc/7CMH-PU6J] ("The decision of the Beth Din shall be made in accordance with Jewish law (*halakha*) or Beth Din ordered settlement in accordance with the principles of Jewish law (peshara krova la-din) . . . . The parties waive their right to contest the jurisdiction or procedures of the Beth Din or the validity of this Agreement in any other rabbinical court or arbitration forum . . . ."); *Forms and Publications*, BETH DIN AM. (2010), http://bethdin.org/forms-publications.asp [http://perma.cc/8WLJ-AWK5] (providing standard forms for arbitration agreements and arbitration provisions in contracts); *Mediation/Arbitration*, PEACEMAKER MINISTRIES (2015), http://peacemaker.net/mediationarbitration [http://perma.cc/FN9D-VAYD] (form arbitration agreement incorporating the Rules of Procedure for Christian Conciliation, which state that "the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process"); *Procedure Rules of Muslim Arbitration Tribunal*, MUSLIM ARB. TRIBUNAL (2015), http://www.matribunal.com/rules.php [http://perma.cc/5A95-G5AT] (stating that disputes are resolved "in accordance with Qur'anic Injunctions and Prophetic Practice as determined by the recognized Schools of Islamic Sacred Law").

81. For a discussion of religious arbitration in the U.S. Jewish and Islamic communities, see Helfand, *supra* note 14, at 1247-52.

82. For a thorough description of the *beit din*, see Ginnine Fried, Comment, *The Collision of Church and State: A Primer to* Beth Din *Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633 (2004).

83. *See* BABYLONIAN TALMUD: TRACTATE GITTIN 88b (interpreting Exodus 21:1); JOSEPH KARO, SHULCHAN ARUCH, CHOSHEN MISHPAT, 26:1; Yaacov Feit, *The Prohibition Against Going to Secular Courts*, 1 J. BETH DIN OF AM. 30 (2012).

84. J. David Bleich, *Survey of Recent Halakhic Periodical Literature: Litigation and Arbitration Before Non-Jews*, 34 TRADITION 58, 63-64 (2000) (characterizing one of two primary views of the rationale behind the requirement); *see also* Yaacov Feit & Michael A. Helfand, *Confirming* Piskei Din *in Secular Court*, 61 J. HALACHA & CONTEMP. SOC'Y 5, 6-9 (2011) (describing the rationale behind Jewish law's prohibition against submitting disputes to secular courts);

As a result of these religious requirements, rabbinical courts have been established across the United States, most frequently in large cities with significant Jewish populations.[85] Moreover, while statistics tracking the frequency of rabbinical court arbitration are typically unavailable, the number of commercial cases filed annually before the Beth Din of America—one of the most prominent rabbinical courts in America—has nearly doubled over the past ten years,[86] providing a limited indication that the use of rabbinical arbitration is on the rise in the United States.

Parallel forms of Islamic arbitration remain in a state of relative flux. Some of the flux appears related to an ongoing debate within Islamic law as to whether and to what extent Islamic law ought to be implemented by Muslim minorities living in non-Muslim states.[87] Notwithstanding this debate, the Qu'ran does provide ample basis for concluding that Muslims ought to submit matters of dispute to religious authorities for adjudication.[88] Indeed, as some have noted, under Islamic Law, "laymen . . . are under the obligation to follow

Michael A. Helfand, Beit Din*'s Gap-Filling Function: Using* Beit Din *To Protect Your Client*, 2 J. BETH DIN OF AM. 31, 31-32 (2014) (same).

85. *See, e.g.*, BETH DIN OF AM. (2010), http://www.bethdin.org [http://perma.cc/6AK3-3YLD] (New York); *CRC Beth Din*, CHI. RABBINICAL COUNCIL (2015), http://www.crcweb.org/bethdin.php [http://perma.cc/22B4-FRUT] (Chicago); *Beth Din*, RABBINICAL COUNCIL CAL. (2006), http://rccvaad.org/bethdin [http://perma.cc/PNH3-NVVE] (Los Angeles).

86. According to Rabbi Shlomo Weissmann, Director of the Beth Din of America, the respective numbers of civil cases filed for the past twelve years have been 56 in 2002, 68 in 2003, 70 in 2004, 85 in 2005, 86 in 2006, 98 in 2007, 110 in 2008, 94 in 2009, 107 in 2010, 118 in 2011 and 95 in 2012, 74 in 2013 and 100 in 2014. E-mail from Shlomo Weismann, Dir., Beth Din of America, to author (Feb. 2, 2015, 12:51 EST) (on file with author) (providing data from 2011-2014); *see also* Helfand, *supra* note 14, at 1249 n.82 (2011) (providing data from 2002-2010).

87. *See* Abdul Wahid Sheikh Osman, *Islamic Arbitration Courts in America & Canada?*, HIIRAAN ONLINE (2005), http://www.hiiraan.com/op/eng/2005/dec/Prof_Abdulwahid211205.htm [http://perma.cc/UT8G-WUCB] ("The answer to the question whether Islam-sanctioned Arbitration tribunals may be established in the West depends on another central question; do the major schools of Sunni Shariah jurisprudence (the *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* schools), as well as the *Shi'ite Jafari* school, actually reject the partial implementation of Islamic law in non-Islamic jurisdiction?"); *see also* Mustafa R.K. Baig, *Operating Islamic Jurisprudence In Non-Muslim Jurisdictions: Traditional Islamic Precepts and Contemporary Controversies in the United States*, 90 CHI.-KENT L. REV. 79 (2015) (exploring the extent to which Islamic law is applicable to Muslims in non-Muslim states); Khaled Abou El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 ISLAMIC L. & SOC'Y 141, 172-81 (1994) (same).

88. *See* THE QUR'AN 4:59; 33:36 (M. A. S. Abdel Haleem trans., 2004); *see also* KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN 30-40 (2001) (discussing the Qur'an's treatment of dispute resolution).

the guidance of the *mujtahids*,"[89] and laymen must adhere to the *mujtahid*'s "authority without questioning either his textual evidence or the line of reasoning he adopted in a particular case."[90]

Given these principles, it is not surprising that there have been a number of attempts within the Muslim community in the past three decades to begin building a larger Islamic arbitral system in the United States.[91] And a number of Islamic organizations have developed protocols, rules, and procedures for use by Islamic arbitration panels in the United States.[92] Importantly, this push for Islamic arbitration in the United States flows from a shared religious belief that Muslims ought to resolve their disputes in accordance with Islamic rules, principles, and values. For example, Muzammil Siddiqi, Chairman of the Fiqh Council of North America's Executive Committee has stated in a *fatwa* that "Muslims must try their utmost to solve all their problems and disputes among themselves and according to the laws of Allah Almighty."[93]

89. WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 122 (1997).

90. WAEL B. HALLAQ, AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW 86 (2001); *see generally id*. at 86-120 (describing the concept of *taqlid*, or acceptance); EL FADL, *supra* note 88.

91. *See, e.g.*, FIQH COUNCIL N. AM., http://www.fiqhcouncil.org [http://perma.cc/E8E4-5267]; *see also* Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 54-58 (2002) (presenting five fiqh methods); Ali Al-Timimi, *Our Need for a Fiqh Suitable to Our Time and Place*, MISSION ISLAM (1997), http://www.missionislam.com/knowledge/needforfiqh.htm [http://perma.cc/TGF9-FVA9] (concluding that "for Muslims to have avenues for arbitration that are recognized by the laws of the country through which disputes regarding marriage and divorce, [and] financial transactions can be solved is something that is necessary [to] establish Islam in the West"); Sheila Musaji, *Islamic Sharia and Jewish Halakha Arbitration Courts*, AM. MUSLIM (May 26, 2012), http://theamericanmuslim.org/tam.php/features/articles/islamic_sharia_and_jewish_halakha_arbitration_courts [http://perma.cc/TR9B-PKRX] ("[I]t would seem that faith based arbitration is an existing part of our legal system, and that considering sharia as somehow less acceptable than halakha . . . has no basis in anything other than prejudice and stereotyping."); Issa Smith, *Native American Courts: Precedent for an Islamic Arbitral System*, AM. MUSLIM (Feb. 15, 2007), http://theamericanmuslim.org/tam.php/features/articles/native_american_courts_precedent_for_an_islamic_arbitral_system/0013143 [http://perma.cc/R36V-7YUF] (urging the Muslim community to create a legal and social network to address issues of Muslim family law "imitat[ing] the paradigm of the tribal court system and its supporting network").

92. *See, e.g.*, Helfand, *supra* note 14, at 1251 n.93 (providing an example).

93. Muzammil Siddiqi, *Taking Disputes to Non-Muslim Courts*, ON ISLAM (May 28, 2014), http://www.onislam.net/english/ask-the-scholar/international-relations-and-jihad/private-international-law/175698-taking-disputes-to-non-muslim-courts.html [http://perma.cc/DB5V-CJ3A]. In reaching this conclusion, Siddiqi cites the verse in the Qur'an which states, "O you who believe, obey Allah and obey the Messenger and those charged with authority from amongst you. If you differ in anything among yourselves, refer it to Allah and His Messenger, if you do believe in Allah and the Last Day. This is best and most suitable for final determination." *Id.* (citing THE QUR'AN 4:59).

In addition to arbitration before Jewish and Islamic arbitration tribunals, members of various Christian communities also make use of Christian forms of alternative dispute resolution.[94] While "Christian forms of dispute resolution are the least formal, and generally range somewhere between negotiation and mediation,"[95] they also include options for binding arbitration.[96] Indeed, members of Christian communities interested in Christian dispute resolution can contact a range of Christian dispute resolution service providers.[97] Among these providers, the most well known is the Institute for Christian Conciliation (ICC), which not only provides a forum for religious arbitration[98] but also trains others to serve as independent arbitrators.[99] The rules for ICC arbitrations are publicly available and include a choice of law provision that requires arbitrators to "take into consideration any state, federal, or local laws that the parties bring to their attention," but still emphasizes that "the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process."[100]

94. The arbitration agreements for Christian forms of arbitration have frequently found their way into U.S. courts and have been almost uniformly upheld. *See, e.g.*, Prescott v. Northlake Christian Sch., 141 Fed. Appx. 263 (5th Cir. 2005); Fardig v. Hobby Lobby Stores, Inc., 2014 U.S. Dist. LEXIS 87284 (C.D. Cal. June 13, 2014); Easterly v. Heritage Christian Schs., Inc., 2009 U.S. Dist. LEXIS 76269 (S.D. Ind. Aug. 26, 2009); Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101 (D. Colo. 1999). *But see* Higher Ground Worship Ctr. v. Arks, Inc., 2011 U.S. Dist. LEXIS 116138, at *9 (D. Idaho Oct. 6, 2011) (holding that an arbitration provision, which required the parties to arbitrate before the ICC, was unconscionable because, among other considerations, it "force[d] the weaker party, i.e., Higher Ground, to arbitrate all its claims while preserving HG Lease's ability to litigate at least some of its claims").

95. R. Seth Shippee, *"Blessed Are the Peacemakers": Faith-Based Approaches to Dispute Resolution*, 9 ILSA J. INT'L & COMP. L. 237, 241 (2002).

96. *See, e.g.*, Grossman, *supra* note 78, at 177-78 (noting the use of arbitration by the Institute for Christian Conciliation).

97. Shippee, *supra* note 95, at 242-45 (describing some of the Christian ADR alternatives available).

98. *Open a Case*, INST. FOR CHRISTIAN CONCILIATION (2015), http://peacemaker.net/open-a-case [http://perma.cc/2P6K-9FQT].

99. *Peacemaker Ministries Certification Program*, INST. FOR CHRISTIAN CONCILIATION (2015), http://www.peacemaker.net/site/c.aqKFLTOBIpH/b.1827011/k.D92/Peacemaker_Ministries_Certification_Program.htm [http://perma.cc/7C5Z-SCE7].

100. *Rules of Procedure*, INST. FOR CHRISTIAN CONCILIATION (2015), http://peacemaker.net/project/rules-of-procedure [http://perma.cc/43WB-KLDS]. For a recent discussion of Christian arbitration in the popular press, see Mark Oppenheimer, *An Argument To Turn to Jesus Before the Bar*, N.Y. TIMES, Feb. 28, 2014, http://www.nytimes.com/2014/03/01/us/before-turning-to-a-judge-an-argument-for-turning-first-to-jesus.html [http://perma.cc/Y2TY-7UNP]; *see also* Shippee, *supra* note 95, at 241 ("Christians draw their traditions of faith-based dispute resolution from the Bible, particularly the teachings of Jesus Christ.").

In sum, while Jewish, Islamic, and Christian forms of arbitration vary, all three seek to establish forms of binding dispute resolution embodying core religious principles. Efficiency and speed are not the primary goals of the procedural and substantive rules employed in religious arbitration. Instead, both the rules and the arbitrators selected by the parties promote religious values embedded within the history of each of these respective faith traditions. Parties look to the Bible or the Qur'an for rules and procedures—and to religious authorities to apply these rules and procedures—not only to ensure that their selected method of dispute resolution is efficient, but also to ensure that it serves a religious purpose. Put differently, parties to religious arbitration are not, in the words of the Supreme Court, simply "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration";[101] rather, they pursue a wholly different set of objectives by submitting their disputes to a forum grounded in shared religious worldview. For this reason, as Daniel Markovits has noted, religious tribunals serve as paradigmatic of arbitration tribunals that provide "arbitral solidarity" to the parties, enabling them to "resolve disputes in tribunals that are more sympathetic to their basic world views than the courts of the dominant culture are prepared to be."[102]

To get a sense of religious arbitration's value-oriented focus, consider what we know about the relative use of pre- and post-dispute arbitration provisions in both standard and religious arbitration. Although statistical studies on these questions have some inherent challenges, they provide an important picture detailing the divergences between the narratives for standard and religious arbitration.

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

102. *See* Markovits, *supra* note 1, at 473. Markovits identifies religious arbitration as a form of "third-party" arbitration possessing "all of the transformative powers associated with the adjudicatory process," with the substantive rules governing the arbitration arising out of the inherent authority of the tribunal rather than the autonomous decisions of the parties. *Id.* at 470. In highlighting religious arbitration, Markovits cites my student work—written with his guidance and support—that was eventually published under a different title. *Id.* at 473 n.111; *see* Helfand, *supra* note 14.

While Markovits and I both see religious arbitration as differing from standard forms of arbitration, we reach opposite conclusions with respect to its relationship to adjudication. Markovits sees religious arbitration as similar to adjudication, arguing that both aim to achieve solidarity between the parties. As a result, the structural similarity that Markovits articulates does not consider the substantively different objectives of civil adjudication and religious arbitration. Emphasizing these substantive differences is vital when determining whether and how to extend legal doctrines governing adjudication to religious arbitration. Emphasizing the structural similarities between religious arbitration and adjudication might lead us to embrace these doctrinal extensions; emphasizing the substantive differences in their objectives would counsel in precisely the opposite direction. *See infra* Part III.A.

Among other attempts to consider this question in the context of standard arbitration,[103] Lewis Maltby's 2003 study analyzing the relative use of pre- and post-dispute arbitration clauses is likely the most instructive.[104] In conducting his study, Maltby examined two years' worth of filings—from 2001 and 2002—in employer-employee and business-to-business arbitrations before the American Arbitration Association (AAA). According to a computerized analysis conducted by the AAA, the percentage of employment disputes filed pursuant to a post-dispute arbitration agreement was 6 percent in 2001 and 2.6 percent in 2002.[105] A similar computerized analysis of business-to-business disputes determined that the percentage of disputes filed pursuant to a post-dispute arbitration agreement was only 1.8 percent.[106] These numbers indicate that parties to employment arbitrations are very reluctant to arbitrate after a dispute arises. Once the facts underlying the dispute are known, both parties make strategic decisions, and it is unlikely that both parties will simultaneously conclude that arbitration will best serve their interests;[107] invariably, arbitration will be seen as preferable for one party or the other—but not both.[108]

103. *See, e.g.*, Linda J. Demaine & Deborah R. Hensler, *"Volunteering" To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55 (2004); Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 346-47 (2012); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008); Rutledge & Drahozal, *supra* note 45; Zachary Gima et al., *Forced Arbitration: Unfair and Everywhere*, PUB. CITIZEN 1 (Sept. 14, 2009), http://www.citizen.org/documents/UnfairAndEverywhere.pdf [http://perma.cc/4XXB-Q2SK].

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

105. *Id.* at 319. It is worth noting that before the AAA had the capability to collect this data electronically, Maltby collected data by hand and found that 21% of the filings were made pursuant to a post-dispute arbitration agreement. *Id.* However, that data set included only 312 files, and Maltby was only able to find information regarding the timing of the arbitration agreement in 73 of those cases. Given these considerations, Maltby concluded that the numbers from the automated data collection were likely more accurate. *Id.* at 319-20.

106. *Id.* at 322. Again Maltby collected data by hand, finding that 9% of disputes in that sample were filed pursuant to a post-dispute arbitration agreement. *Id.* However, similar to the sample described *supra* note 105, the hand-drawn sample size was far smaller, making it likely that the more accurate percentage is closer to 1.8% than 9%. *Id.*

107. *See* Barbara Black, *How To Improve Retail Investor Protection After the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 13 U. PA. J. BUS. L. 59, 105 (2010) ("Once a dispute has arisen, each side will have a view about whether its claim will fare better in court or in arbitration. As a result, the parties are unlikely to agree, post-dispute, on a choice of forum."); Rutledge, *supra* note 44, at 268 ("There simply is no empirical evidence demonstrating the viability of post-dispute arbitration.").

108. A number of scholars have explored this dynamic in the context of employment arbitration. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute*

By contrast, a survey of the pre- to post-dispute agreement ratio in one religious arbitration forum suggests results that are precisely the opposite. Although there are no published studies on the question, according to Beth Din of America records, 96.8 percent of its arbitration proceedings between January 2008 and August 2014 were conducted pursuant to a post-dispute arbitration agreement.[109] And anecdotal evidence suggests that this is a more general feature of religious arbitration; some websites for religious arbitration providers offer boilerplate post-dispute arbitration agreements, but do not include model pre-dispute arbitration provisions.[110]

To be sure, these are only indications.[111] But, at the same time, it does suggest a very different picture of the reasons parties enter religious arbitration. While parties presumably engage in strategic decision making, the broad use of post-dispute arbitration agreements indicates that other considerations — not present in the context of standard arbitration — still drive the parties to mutually agree on arbitration. The fact that various faiths place a high value on reli-

Employment Arbitration Agreements, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87 (2012). In his study, Maltby conducted interviews with management employment attorneys to evaluate the reasons driving the limited use of post-dispute arbitration, identifying various strategic considerations. Maltby, *supra* note 104, at 328 ("Some attorneys were simply adverse to arbitration generally. Virtually all management attorneys we spoke to would not arbitrate where the case could be resolved in court on pre-trial motions. Others refused to arbitrate if they believed the employee could not afford to pursue litigation. And even when the attorney would choose to arbitrate, the client often says no. The end result of changing the law so that only post-dispute agreements to arbitrate are enforceable might well be that most employees with legitimate claims would receive no justice at all.").

109. E-mail from Shlomo Weissmann, Dir., Beth Din of Am., to author (Dec. 2, 2014, 13:30 PM EST) (on file with author). The sample from which this percentage was derived includes all cases for which at least one hearing took place — that is, it does not include cases that were settled or otherwise disposed of prior to the first hearing. In addition, the sample did not include cases that purely focused on disputes revolving around execution of the *get*, the Jewish divorce document. *Id.*

110. *See, e.g.*, *Din Torah-Halachic Arbitration*, CHI. RABBINICAL COUNCIL (2015), http://www.crcweb.org/dintorah.php [http://perma.cc/G49M-BFUP] (providing a post-dispute arbitration agreement, but no pre-dispute boilerplate provision); *Applications and Forms*, RABBINICAL COUNCIL CAL. (2006), http://rccvaad.org/applications-and-forms [http://perma.cc/5DJ4-TG7D] (same).

111. It is worth noting that there may be variations in this trend. For example, Hobby Lobby, an arts and crafts chain with over 13,000 employees, *see* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014), incorporates pre-dispute religious arbitration provisions into at least some of its employment contracts, *see, e.g.*, Ortiz v. Hobby Lobby Stores, Inc., No. 2:13-cv-01619, 2014 U.S. Dist. LEXIS 140552 (E.D. Cal. Sept. 30, 2014); Fardig v. Hobby Lobby Stores, Inc., No. SACV 14-561, 2014 U.S. Dist. LEXIS 87284 (C.D. Cal. June 13, 2014).

gious dispute resolution—precisely because it ensures that religious rules and principles will govern the arbitration—leads parties to submit disputes to religious arbitration tribunals even when one of the parties may see some strategic disadvantages to doing so. Thus, the high rate of post-dispute religious arbitration agreements captures one way in which the unique objectives and aspirations of religious arbitration can drive differences in the practice of arbitration.

Of course, not all forms of arbitration, even those constructed around shared values, will employ post-dispute arbitration agreements with such high regularity. For example, labor arbitrations, which, as noted above, can have social-therapeutic value, are typically conducted pursuant to collective-bargaining agreements, and thus are negotiated far in advance of a particular labor dispute. As a result, the doctrinal consequences of recognizing these counter-narrative forms of arbitration will vary by context, requiring the reviewing court to be sensitive to the particular dynamics within each group or community. The fundamental point, however, is that in all cases of counter-narrative arbitration it is essential to integrate the underlying motivations for the decision to arbitrate into the law's treatment of the proceeding.

Recognizing this counter-narrative is vital if we are to develop a more nuanced body of arbitration doctrine. Unfortunately, as described below, important areas of arbitration doctrine have assumed the standard narrative. Arbitration doctrine has too often equated litigation and arbitration, and has extended rules to arbitration that, by their terms, cover only judicial proceedings. Building arbitration doctrine around the standard narrative raises serious legal problems when the arbitration agreements and forums under consideration are designed to achieve a very different set of objectives, and are embedded within a very different social context, from those imagined by the standard narrative.

III. THE DOCTRINE OF ARBITRATION'S COUNTER-NARRATIVE

Arbitration's counter-narrative requires us to grapple with contexts in which arbitration aspires to promote first-order values different than those inherent to litigation or standard-issue arbitration. Recovering this counter-narrative suggests that we need a more nuanced arbitration doctrine that accounts for the reasons for parties to select the particular forum. The counter-narrative exemplified by, but not exclusive to, religious arbitration therefore requires us to reconsider both how courts define arbitration and how arbitration agreements are enforced.

A. Defining Arbitration

It is far from surprising that debate over the degree to which arbitration can be equated with adjudication continues to animate a wide range of doctrinal questions. The FAA fails to provide a definition for arbitration,[112] and this gap has required courts to fashion their own definitions when the issue arises.[113] When courts have attempted to fill this definitional void, they have at times reflexively reached back to the standard arbitral narrative, concluding that arbitration is functionally equivalent to litigation and therefore qualifies as a "judicial proceeding." And, in the instances where courts have resisted this functional equation between arbitration and litigation, they have gone to the opposite extreme, concluding that arbitration should *never* be equated with litigation.[114]

By contrast, emphasizing arbitration's counter-narrative provides reason to resist these extremes. The fundamental differences motivating parties to enter different arbitral fora require a more context-sensitive approach to the equation of arbitration and litigation. Notably, where parties aspire to infuse the arbitral process with the parties' shared values, applying rules that govern "judicial proceedings" to arbitration creates problems of fit. To see how, consider the following recent example.

In *Bauer v. Bauer*, the Supreme Court of New York evaluated competing motions to confirm and vacate a religious arbitration award issued by a rabbinical tribunal.[115] Among the grounds raised to vacate the award was an allegation that some of the arbitration proceedings were conducted on Sunday.[116] To be sure, none of the statutory grounds for vacating an arbitration award included circumstances where the proceedings took place on Sunday.[117] However, New York's Judiciary Law provides:

> A court shall not be opened, or transact any business on Sunday, nor shall a court transact any business on a Saturday in any case where such day is kept as a holy day by any party to the case, except to receive a verdict or discharge a jury and for the receipt by the criminal court of

112. *See* 9 U.S.C. § 1 (2012) (providing definitions of other terms in the FAA).

113. For a particularly instructive example, see *Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 872-74 (1996).

114. For one example, see *infra* notes 160-177 and accompanying text.

115. *Decisions of Interest:* Ruth Bauer, Petitioner v. Irving Bauer, et al., Respondents, N.Y. L.J., Jun. 26, 2014, at 36 [hereinafter *Bauer v. Bauer*] (providing text of the decision).

116. *Id.*

117. *See* N.Y. C.P.L.R. § 7511 (McKinney 2014) (grounds for vacatur under New York's arbitration act); *see also* 9 U.S.C. § 10 (2012) (grounds for vacating an award under the FAA).

> the city of New York or a court of special sessions of a plea of guilty and the pronouncement of sentence thereon in any case in which such court has jurisdiction.[118]

While this statute does not reference arbitration, the court advanced the following syllogism. A judicial proceeding cannot take place on Sunday. "Arbitration is a judicial proceeding and arbitrators perform a judicial function."[119] Therefore, "the arbitration proceedings and award herein are void upon the ground that at least one hearing was held on a Sunday."[120]

Some have criticized the logic of *Bauer* on constitutional grounds.[121] And a number of other states have reached different conclusions in applying their own no-Sunday rules—with some holding that arbitration cannot be compared to adjudication[122] and others holding that parties to arbitration can contract around no-Sunday prohibitions.[123] But *Bauer v. Bauer* appeared to faithfully follow nearly 200 years of precedent in New York, which had subsumed arbitration—at least for these purposes—under the rubric of adjudication.[124] In *Brody v. Owens*, the New York Appellate Division equated arbitration to adjudication for the purpose of New York's no-Sunday statute, holding that "[t]he statute expresses the public policy of the State, and cannot be waived."[125]

Indeed, *Bauer* is not the only recent decision employing this syllogism. In *Terrace View Estates Homeowners Association v. Bates Drive Condominium III*, another New York Supreme Court addressed a case where a rabbinical arbitration tribunal issued an award after holding arbitration proceedings on Sunday.[126] In deciding the case, the court once again embraced a familiar mantra: "Arbitra-

118. N.Y. JUD. L. § 5 (McKinney 2014).

119. *Bauer v. Bauer*, *supra* note 115.

120. *Id.*

121. *See* Brief for Agudath Israel of Am. as Amicus Curiae, Terrace View Estates Homeowners Assoc. v. Bates Drive Condo. III, No. 2013-07898 (N.Y. App. Div. 2013).

122. *E.g.*, Karapschinsky v. Rothbaum, 177 Mo. App. 91 (Mo. Ct. App. 1914) (declining to apply Missouri's Sunday laws to an arbitral hearing of unsworn statements of the parties held on Sunday because it did not constitute a judicial act of the kind prohibited at common law or statute).

123. *E.g.*, Blood v. Bates, 31 Vt. 147, 150 (1858) ("An award, when made, is more in the nature of a contract than of a judgment; it is but the consummation of the contract of submission, its appropriate and legitimate result.").

124. *See* Story v. Elliot, 8 Cow. 27, 31 (N.Y. Sup. Ct. 1827) (vacating an arbitration award because it was "made and published on Sunday").

125. Brody v. Owens, 259 A.D. 720, 721 (N.Y. App. Div. 1940).

126. Terrace View Homeowners Assoc. v. Bates Drive Condo. III, No. 13-30904 (N.Y. Sup. Ct. June 25, 2013).

tion is a judicial proceeding and arbitrators perform a judicial function and therefore arbitrations are held to the same rule of law as are Courts."[127] Having embraced this mantra, the court reached what it deemed to be an inevitable conclusion—that it "ha[d] no choice but to vacate the Arbitration Award."[128]

While both *Bauer* and *Terrace View* may have been well grounded in New York state precedent, it is hard to justify their methodology. *Bauer* and *Terrace View* embrace the standard arbitral narrative that conceives of arbitration as akin to litigation because both "perform a judicial function."[129] And because both arbitration and litigation provide a method for resolving disputes, they can be equated for the purposes of the no-Sunday rule.[130]

By contrast, viewing *Bauer* and *Terrace View* through the lens of arbitration's counter-narrative yields a very different analysis. Arbitration's counter-narrative highlights the way in which not all arbitrations aim to achieve the same set of purposes. As a result, arbitration and litigation cannot be easily conflated under the single rubric of "judicial proceedings." Judicial consideration of such cases must therefore begin by evaluating the nature of the parties' decision to resolve the dispute before a rabbinical court.

For example, in *Bauer*, the parties to the dispute were all siblings asserting ownership over various assets.[131] The parties signed the agreement post-dispute, having a full sense of what that agreement entailed.[132] The agreement required the arbitrators to resolve the dispute in accordance with either Jewish Law or *p'sharah*[133]—*p'sharah* serving as a form of compromise that Jewish law embraces and, according to some, infuses with theological significance.[134] The parties could have pursued litigation in this matter or chosen another arbitral forum to resolve the dispute. But instead they chose to submit the dispute to a rabbinical tribunal and to have that tribunal apply religious rules in resolving the dispute.

127. *Id.* at 4.

128. *Id.* at 5.

129. *Bauer v. Bauer*, *supra* note 115.

130. Other New York decisions reaching a similar outcome include *Jones v. East Meadow Fire Dist.*, 21 A.D.2d 129, 131 (N.Y. App. Div. 1964); and *Katz v. Uvegi*, 18 Misc. 2d 576, 582 (N.Y. Sup. Ct. 1959).

131. *Bauer v. Bauer*, *supra* note 115.

132. *Id.*

133. *Id.*

134. CHAIM SAIMAN, HALAKHA: THE RABBINIC IDEA OF LAW, at ch. 7 (forthcoming 2015) (on file with author); Haim Shapira, *The Debate Over Compromise and the Goals of the Judicial Process*, 26 DINÉ ISRAEL 183, 199 (2010).

In such circumstances, conflating arbitration with adjudication—on the grounds that both serve judicial functions—is a mistake. The parties in *Bauer* chose their selected forum not simply because it would generate a binding judgment. More important, it was a forum that would resolve their dispute in accordance with religious rules and values that the parties shared. Thus, the *Bauer* parties' chosen process of dispute resolution had what might best be thought of as a theological or ritualistic component.[135] And because the parties all embraced a shared religious worldview, the selected rabbinical tribunal was not simply serving a "judicial function"; it was also serving a religious function, leveraging the shared religious worldview of the parties.[136]

In this way, the religious tribunal provided a degree of "arbitral solidarity" by enabling the parties to "resolve [their] dispute[] in [a] tribunal[] that [was] more sympathetic to their basic world views than the courts of the dominant culture [were] prepared to be."[137] This is particularly true given that the no-Sunday rule at stake has its roots in a Christian tradition that the parties very well may have viewed as at odds with their own worldview.[138] Consequently, conflating arbitration with adjudication in this context directly undermined the goals both the parties and the forum were trying to achieve. Arbitration, as a category, is simply too multifaceted for such a reductive classification.

It is worth noting that at least one New York decision appeared to take the religious function of a rabbinical arbitration tribunal into account when declining to vacate an award for violating the no-Sunday rule. In *Isaacs v. Beth Hamedash Society*,[139] the court considered a case in which a religious dispute was submitted to a rabbinical court with the arbitration proceedings taking place on Sunday. In holding that the Sunday proceedings did not subject the arbitrators' award to vacatur, the court stated the following:

> The defendants having consented to settle by arbitration, at the instance of one of their prominent ministers, a controversy growing out of the wants or requirements of their religious rites, with the special view of preventing its becoming a matter of public litigation, and the parties and witnesses having attended voluntarily for that purpose, on a day evidently the most convenient to them, it would be very much to be

135. *See supra* notes 78-102 and accompanying text.

136. *See* Helfand, *supra* note 14, at 1245-51.

137. *See* Markovits, *supra* note 1, at 473.

138. *See* Story v. Elliot, 8 Cow. 27, 28 (N.Y. Sup. Ct. 1827) (discussing the history of the no-Sunday rule and noting that "*Sunday* is stated in all the books, to be *dies non juridicus*; not made so by the statute; but by a canon of the church, incorporated into the common law").

139. 1 Hilt. 469 (1857).

> regretted if the investigation of the matter on that day should render the subsequent award of the arbitrators of no avail . . . .[140]

Here, the religious nature of the arbitration proceedings and the fact that it conformed to Jewish observances motivated the court to resist vacating the award. In reaching this conclusion, the court observed: that the parties had consented to the proceedings; that the proceedings were meant to resolve a dispute over religious matters; and that the parties wanted to keep their private religious dispute out of public view. By conceptualizing the case in this way, the court in *Isaacs* appeared to recognize that some arbitrations are meant to achieve other purposes, and that those purposes suggest the inapplicability of the no-Sunday rule.

But instead of pursuing and developing this line of reasoning, subsequent New York courts have limited the precedential impact of *Isaacs*. In *Katz v. Uvegi*, the court distinguished *Isaacs* by noting that "the issues submitted for arbitration in the case at bar, did not involve any religious dispute, but was concerned with a dispute over a business transaction."[141] Under this logic, *Isaacs* would ostensibly apply only where the dispute in question involved wholly religious matters.

This distinction, however, grossly misunderstands religious arbitration. Parties select religious arbitration in order to have their disputes governed by shared religious principles and values. They do so in order not only to have those values reflected in their chosen method of dispute resolution, but also to conform their commercial dealings to a shared set of religious values.[142] To limit the insight of *Isaacs* to cases where the *substance* of the dispute is religious is to miss the transformative aspirations of religious arbitration.

There is, to be sure, a temptation to shrug off these no-Sunday arbitration cases as so misguided that they provide little in terms of a lesson for other cases, let alone one sufficient to support a counter-narrative. Some of this intuition may stem from general skepticism of the wisdom—if not the constitutionality[143]—of Sunday-closing laws. As a result, decisions that extend the reach of such laws may seem so deeply wrongheaded that they are best considered unjustifiable, though persistent, judicial mistakes. We might therefore be tempted

140. *Id.* at 473.

141. 18 Misc. 2d 576, 582 (N.Y. Sup. Ct. 1959).

142. For more detail on how certain forms of commerce—"co-religionist commerce"—are geared simultaneously towards both religious and commercial objectives, see Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015).

143. The Supreme Court has held that Sunday closing laws are constitutional. *See* Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).

to dismiss the arbitration-litigation equation as a peculiar feature of a few outdated cases.

Doing so, however, would be a mistake. Indeed, the functional equation between litigation and arbitration on display in *Bauer* and *Terrace View* informs court decision-making in a wide variety of other contexts. Consider *In the Matter of Ismailoff*—a New York Surrogate's Court ruling from 2007. Esther Ismailoff had executed an agreement with her four children to create an irrevocable inter vivos trust.[144] The agreement provided that:

> In the event that any dispute or question arises with respect to this Declaration of Trust, such dispute or question shall be submitted to arbitration before a panel consisting of three persons of the Orthodox Jewish faith, which will enforce the provisions of this Declaration of Trust and give any party the rights he is entitled to under New York law. This Declaration of Trust shall be construed in order to effectuate the intent of the parties and the parties admit that they have performed all the necessary requirements for this Declaration to be valid under Jewish law. The panel will have the authority to file their decision with the Court under the New York Arbitration Law. The parties have made a *Kinyan Siddur* with a garment that may be used for that purpose in order to effectuate this Declaration of Trust.[145]

These provisions, requiring that any dispute regarding the agreement be submitted for arbitration before "three persons of Orthodox Jewish faith"; representing that the parties "have performed all the necessary requirements for this Declaration to be valid under Jewish law"; and stating that the parties had effectuated the transaction via a *kinyan siddur*—a form of acquisition under Jewish law[146]—all indicate that, at the time of execution, compliance with the process and substance of Jewish law was of central importance to the parties.

The parties subsequently disputed the enforceability of the trust and one of the parties sought to initiate arbitration proceedings. However, a New York court concluded that the arbitration provision was unenforceable, holding that the First Amendment, which prohibits courts "from resolving issues concerning religious doctrine and practice,"[147] rendered the provision requiring the selection of three arbitrators of Orthodox Jewish faith unenforceable.[148] To do

144. In the Matter of Ismailoff, No. 342207, slip op. at 1 (N.Y. Sur. Ct. Feb. 1, 2007).

145. *Id.*

146. *See, e.g.*, AARON LEVINE, ECONOMIC MORALITY AND JEWISH LAW 17 (2012) (briefly describing the "*kinyan sudar*").

147. *Ismailoff*, slip op. at 2.

148. *Id.*

otherwise, reasoned the court, would have put the court in the constitutionally untenable position of determining which proposed arbitrators were "Orthodox" and which were not.[149]

This holding presented the court with a choice: should the court invalidate the entirety of the arbitration provision and have the dispute moved to a civil court, or should it simply sever the "Orthodox Jewish faith" provision and require the parties to select arbitrators irrespective of their religious affiliation? Without much reflection, the court chose the latter option. This choice was somewhat curious given well-settled arbitration doctrine, at least under the FAA, that instructs courts to invalidate the entirety of the arbitration agreement "where the designation of the arbitrator was 'integral' to the arbitration provision [and not] merely an ancillary consideration."[150] One would have expected the court in *Ismailoff* to at least consider the degree to which the arbitrator qualification provision — "three persons of the Orthodox Jewish faith" — was integral to the agreement. For instance, the court might have asked whether, bargaining ex ante, the parties would have preferred resolving the dispute before an arbitration panel without the contractual constraint on the religious affiliation of the arbitrators to resolving the dispute before a civil court. The agreement's repeated focus on conforming its provisions with Jewish law gives us good reason to believe the contrary.

The court, however, did not give much consideration to this issue, largely assuming that all arbitrations serve the same ends, and that the provision requiring the panelists all be of the "Orthodox Jewish faith" was not significant enough to warrant invalidating the entire arbitration clause. This assumption might make sense in the context of the dominant arbitration narrative, where arbitration is designed primarily to provide efficient dispute resolution. But it is precisely this type of assumption that the counter-narrative presented here aims to correct. Thus, where the agreement indicates that the parties seek to achieve purposes beyond mere dispute resolution, courts should hesitate before regarding the choice to arbitrate as a mere form of forum selection. The impli-

149. *Id.* ("Written submissions of the parties suggest that the criteria applied to determine whether a proposed arbitrator is 'orthodox' would be in dispute.").

150. *See, e.g.*, Khan v. Dell Inc., 669 F.3d 350, 354 (3d Cir. 2012); *see also* Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000) ("Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern' will the failure of the chosen forum preclude arbitration."); Gutfreund v. Weiner (*In re* Salomon Inc. S'holders' Derivative Litig.), 68 F.3d 554, 561 (2d Cir. 1995) ("[W]here 'it is clear that the failed [forum selection] term is not an ancillary logistical concern but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail.'" (quoting Zechmen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F. Supp. 1359, 1364 (N.D. Ill. 1990))).

cations of this counter-narrative reach a wide range of legal issues—far beyond no-Sunday and severability rules. Consider the following four examples.

1. Arbitrator Immunity

One recurring doctrinal question is whether arbitrators should receive the immunity granted to judges. Courts have uniformly answered this question in the affirmative, analogizing arbitration to adjudication and concluding that "[b]ased primarily on the 'functional comparability' of the arbitrator's role in a contractually agreed upon arbitration proceeding to that of his judicial counterpart, [it is appropriate to] immunize[] arbitrators from civil liability for all acts performed in their arbitral capacity."[151] As a result, arbitrators will not be held liable for a wide range of potentially tortious conduct, including, for example, defamatory statements leveled against either of the parties.[152] Some scholars have criticized this judicial willingness to grant arbitrators absolute immunity, arguing that its premise of a functional equivalence between arbitrators and judges is deeply misguided.[153] Arbitrators, these scholars contend, are not held publicly accountable in the same manner as judges,[154] and, unlike judges, they choose to serve in an arbitral capacity in exchange for significant compensation.[155] Effectively, these critics argue, arbitrators are more like professional service providers—such as architects and lawyers—than judges.

In counter-narrative cases, however, an entirely different dynamic comes to the fore. When arbitrators are not simply tasked with providing dispute resolution services, but also with advancing the shared values of the parties by incorporating rules and norms into the arbitration, the analogy between judges and arbitrators becomes highly fraught. While judges and arbitrators may be granted immunity so that they can impartially and independently resolve a dis-

151. Austern v. Chi. Bd. Options Exch., Inc., 898 F.2d 882, 886 (2d Cir. 1990).

152. *See, e.g.*, Kabia v. Koch, 713 N.Y.S.2d 250 (N.Y. Civ. Ct. 2000) (arbitrator not liable for calling one of the parties a "kidnapper" during the course of a televised arbitration).

153. *See* Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151 (2004); Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449 (2004).

154. Weston, *supra* note 153, at 497-99.

155. *See* Rutledge, *supra* note 153, at 168-69 ("[A]rbitrators generally perform their services in return for a fee paid directly or indirectly by the parties; this fee often is expressly tied to factors such as the arbitrator's background, the amount in controversy, and the complexity of the case. By contrast, judges generally do not (and cannot) receive compensation from the parties for the dispensation of their services." (footnotes omitted)).

pute,[156] arbitrations that fall within the counter-narrative pursue objectives outside mere dispute resolution. In the context of religious arbitration, for instance, arbitrators provide the parties with a method of dispute resolution that delivers religious meaning and implicates the religious standing of the parties within their given religious community. Failure to submit a dispute to religious arbitration—or failure to abide by a religious arbitral award—can trigger significant social sanctions within the religious community,[157] including various forms of ostracism that can have both interpersonal and financial implications.[158] Similarly, the decisions of religious arbitrators, declaring who is in the right and who is in the wrong, can have significant reputational impact, broadening the potential adverse consequences of the arbitrator's conduct.[159] In such circumstances, where arbitral conduct can have an impact well beyond the simple merits of the dispute, a rule providing blanket arbitral immunity seems to go too far. It is one thing to protect arbitrators so that they can resolve disputes independently; it is quite another to provide immunity when the conduct of arbitrators cuts far beyond the immediate context of the dispute itself.

2. *Arbitrator Impartiality*

Context-sensitive application of doctrine is important as well when it comes to assessing the impartiality required of the arbitrators. This question frequently arises when an arbitrator fails to disclose a relationship with one of the parties: when is such a failure sufficient to trigger a presumption of "evident partiality" such that the award is subject to vacatur?[160] In addressing this

156. *See, e.g.*, Corey v. N.Y. Stock Exch., 691 F.2d 1205, 1209 (6th Cir. 1982) ("The rationale behind the Supreme Court decisions is that the independence necessary for principled and fearless decision-making can best be preserved by protecting these persons from bias or intimidation caused by the fear of a lawsuit arising out of the exercise of official functions within their jurisdiction."); Moore v. Conliffe, 871 P.2d 204, 217 (Cal. 1994) ("'Arbitral immunity, like judicial immunity, promotes fearless and independent decisionmaking.'" (quoting Baar v. Tigerman, 211 Cal. Rptr. 426, 428 (Cal. Ct. App. 1983))).

157. *See infra* notes 209-213 and accompanying text.

158. *Id.*

159. *See, e.g.*, Raquel J. Greenberg, Note, *Tzedek Tzedek Tirdof: How Female Religious Court Advocates Can Mitigate the Lack of Judicial Review of the American Beth Din System*, 19 CARDOZO J.L. & GENDER 635, 644 (2013) (describing worries about the American Beth Din system, where religious arbitrators "misemploy their authority by instituting orders of contempt to those who do not deserve to receive such a debilitating decree, thereby defaming the innocent reputations of litigants").

160. *See* 9 U.S.C. § 10(a)(2) (2012) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon

question, the Supreme Court's majority opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.* highlighted the standards of impartiality demanded of judges. The majority emphasized that "a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge"[161] and concluded that "we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings."[162] Accordingly, where arbitrators failed to disclose such relationships, the subsequent award would be subject to vacatur for "evident partiality" because failure to disclose such dealings "might create an impression of possible bias."[163]

However, Justice White took issue with this equation, arguing in a concurring opinion joined by Justice Marshall that the holding in the majority opinion should be construed more narrowly: "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges."[164] In fact, Justice White's opinion expressed an inherent skepticism of the equation between judges and arbitrators: "It is often because [arbitrators] are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."[165]

Because Justices White and Marshall's votes constituted the fifth and sixth votes in *Commonwealth Coatings*, federal courts of appeals have questioned how broadly to read the Court's holding and the extent to which Justice White's position should be taken to weaken the disclosure standard for relationships between an arbitrator and one of the parties.[166] Most courts have followed Justice White's concurrence.[167] These courts have required arbitrators to disclose rela-

the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators, or either of them . . . .").

161. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 148 (1968) (quoting Tumey v. Ohio, 273 U.S. 510, 524 (1927)).

162. *Id.*

163. *Id.* at 149.

164. *Id.* at 150 (White, J., concurring).

165. *Id.*

166. *Compare* Positive Software Solutions, Inc. v. New Century Mortg. Corp., 476 F.3d 278, 283 (5th Cir. 2007) (en banc) (following Justice White's concurrence in *Commonwealth Coatings*), *with* Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) (interpreting Justice White's concurrence so that it does not conflict with the majority opinion). See also *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) ("The ethical obligations of arbitrators can be understood only by reference to the fundamental differences between adjudication by arbitrators and adjudication by judges and jurors.").

167. *See Positive Software Solutions*, 476 F.3d at 283 ("Only the Ninth Circuit has interpreted *Commonwealth Coatings* . . . to de-emphasize Justice White's narrowing language.").

tionships that are "significant"[168] as opposed to "attenuated" or "nonsubstantial,"[169] standards of impartiality far less stringent than those placed on judges. By contrast, the Ninth Circuit has embraced an "appearance of bias" standard for arbitrators, a standard familiar from the judicial context[170] that requires arbitrators to disclose relationships establishing a "reasonable impression of impartiality."[171]

But the core intuition captured in the arbitral counter-narrative counters both of these approaches. It suggests that courts must take note of the particulars of the specific arbitration, rather than incorporating a single standard governing all arbitrations. To see why, consider again the paradigmatic example of the arbitral counter-narrative, religious arbitration. In the context of religious arbitration, arbitrators are often drawn from the ranks of religious community leaders who are selected by the parties precisely because of their intimate knowledge of religious principles and values shared by the parties.[172] As a result, parties will select particular arbitrators precisely because there is a preexisting relationship based upon the joint participation in a given religious community.

And what is true for religious arbitration is true more generally for the various forms of arbitration that aim to advance the set of communal values shared by the parties.[173] As Nancy Welsh has noted, parties in this sort of arbi-

168. *See, e.g.*, Ameser v. Nordstrom, Inc., 442 F. App'x 967, 970 (5th Cir. 2011); Uhl v. Komatsu Forklift Co., 512 F.3d 294, 307 (6th Cir. 2008).

169. *See, e.g.*, ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 499 (4th Cir. 1999).

170. To be sure, the Ninth Circuit has also recognized that implementing an "appearance of bias" standard yields different results for arbitrators than for judges. *See Schmitz*, 20 F.3d at 1046-47 ("Expert arbitrators will nearly always, of necessity, have numerous contacts within their field of expertise. Thus, arbitrators have many more potential conflicts of interest than judges. In arbitration, moreover, only disclosure and not recusal is required. Given these differences, it is clear that the actual standard for arbitrators does differ from that for judges, even though language used to describe both standards may be similar." (citing *Commonwealth Coatings*, 393 U.S. at 150)).

171. *Id.*

172. Having religious communal authorities resolve the dispute is one of the primary motivations behind religious arbitration. *See supra* notes 78-102 and accompanying text.

173. For examples of articles considering the dynamics and consequences of cultural or communal relationships between parties and arbitrators, see Spitko, *Gone But Not Conforming*, *supra* note 8, at 312 ("That the testator shared a common minority culture with the arbitrator, however, should not alone disqualify the arbitrator from adjudicating the will contest. Although such a shared culture can be expected to give rise to greater understanding between the arbitrator and the testator, the arbitrator's interest in the dispute might remain quite attenuated."); Nancy A. Welsh, *What Is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 397-98 (2010) (describing the phenomenon of "embedded neutrals . . . whose involvement [in resolving the dispute] is the result of their association with

tration seek out "embedded neutrals"—that is, arbitrators who are often "wise, respected elder[s] within the community or identity group to which both parties belong."[174] Doing so enables parties to ensure that the arbitrators "share[] the norms that animate both of the disputing parties and can help to resolve their dispute in a manner that both parties are likely to view as principled."[175]

In such cases, courts should be far more reluctant to infer "evident partiality" from the failure of arbitrators to disclose these relationships. Under prevailing doctrine, it is the expectations of the parties that justify inferring partiality from the failure to disclose; where a party would typically expect an arbitrator to disclose a relationship, the failure to do so gives us good reason to believe that the arbitrator's impartiality might be compromised.[176] But when it comes to cases within the arbitral counter-narrative, some such relationships are expected by the parties themselves. Far more than mere non-disclosure should therefore generally be required to trigger vacatur of an award.

To be sure, narrowing the scope of disclosure that would trigger vacatur in counter-narrative cases raises some important concerns. In smaller and more insular communities, the potential for relationships between parties and arbitrators to cloud decision-making looms large. Indeed, as discussed below, that is precisely why courts must remain particularly vigilant when policing the forms of social pressure and communal duress that drive parties to submit disputes for binding arbitration.[177]

That being said, to raise the bar for non-disclosure does not open the door for arbitrators to conduct proceedings with evident partiality. Importantly, conduct that is partial would still trigger vacatur. The only proposal suggested here is to modify the degree of non-disclosure that would constitute a *presumption* of evident partiality—a presumption that is justified by the degree of disclosure expected ex ante by the parties. And where arbitrators and parties all inhabit the same communal space, it seems reasonable to presume that the par-

one or more of the parties involved in the dispute" and noting that "[n]eutrals of this type have long existed to resolve disputes within workplaces, faith communities, or between sophisticated parties who are members of the same trade or profession and have voluntarily chosen to be bound by an arbitrator's decision").

174. Welsh, *supra* note 173, at 398.

175. *Id.*

176. *Compare* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 148 (1968) (describing the majority's approach to the disclosure requirement) *with id.* at 150 (White, J., concurring) (describing Justice White's competing standard). For a related discussion, see Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 492 (1997) ("Where an arbitrator has failed at the outset to disclose a relationship with one of the parties, his failure may well be treated by a court as 'rais[ing] more suspicion' with respect to his impartiality than if the relationship had 'been dealt with openly.'").

177. *See infra* Part III.B.

ties are already fully aware or at least on notice of relationships within their shared community.

Moreover, to the extent a party sought to invoke the parties' shared community in order to shield an award from vacatur, the party would still have to present sufficient evidentiary grounds to justify enforcing the award notwithstanding the arbitrators' failure to disclose a relationship; thus, a party arguing against vacatur would bear the burden of proving that the parties shared the same community, thereby justifying the presumption that the complaining party fully expected some degree of relationship between the arbitrators and the parties. As a result, there may still very well be counter-narrative cases where an undisclosed relationship between an arbitrator and a party will be sufficient to justify vacatur on the grounds of evident partiality—cases where the extent of the relationship went beyond what would be expected or typical within a given community. But those cases would likely be less typical than they are within the context of the standard arbitration narrative. Indeed, when it comes to counter-narrative arbitrations, courts should recognize that parties are typically looking for arbitrators from within their community—arbitrators that understand the full nature of the dispute *because of* their relationships with the parties—who can best leverage the shared communal bonds to provide a resolution not only ending the dispute itself, but doing so in accordance with the parties' shared values and principles.

3. State Action

Similar definitional issues arise in debates over whether arbitrator misconduct can constitute state action. Continued concerns about the lack of procedural protections granted to parties in arbitration have lead critics to propose looking to the Constitution's Due Process protections to modulate the range of acceptable procedures in arbitration.[178] At first glance, importing constitutional requirements into the context of arbitration seems peculiar. Arbitration is a creature of private contract; triggering the constitutional requirements of the Fourteenth Amendment requires state action.[179]

178. *See, e.g.*, Brunet, *supra* note 43; Reuben, *supra* note 41; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

179. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 621 (2000) ("[T]he Fourteenth Amendment, by its very terms, prohibits only state action."); Nat'l Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be."); The Civil Rights Cases, 109 U.S. 3, 11 (1883)

In response to the perceived disconnect between private arbitration and public constitutional rights, some scholars have highlighted ways in which current state-action doctrine might still be interpreted to include conduct by private arbitrators during private arbitration proceedings. The fact that the doctrine remains a fertile ground for interpretation and creativity is far from surprising; scholars continue to echo Charles Black's characterization of the state-action doctrine as "a conceptual disaster area."[180] Indeed, the Supreme Court has noted that it has "articulated a number of different factors or tests in different contexts" when trying to ascertain the presence of state action.[181] Choosing from among these various tests and factors, some scholars have argued that the conduct of arbitrators ought to constitute state action under the

("This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to.").

180. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); *see also* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 504 n.4 (1985) (discussing Judge Friendly's invocation of Black); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (commenting that Black's statement that the "state action cases were a 'conceptual disaster area' . . . would appear even more apt today."); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 303 (1995) ("The state action doctrine, with its intricate mantras and talismanic phrases, has been and remains a dark thicket of constitutional law."); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 817 (2004) ("Black was right to call for the abolition of the state action doctrine in equal protection because its application immunized the exercise of racial power from constitutional review."). For a recent proposal arguing for rethinking state action doctrine as it has grown up around the seminal case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), see Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 U. KAN. L. REV. 61 (1998).

181. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) ("Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here."). The Court in *Lugar* proposed a further framework for evaluating the existence of state action, *see id.* at 937 ("First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor."); *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991) ("Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits . . . whether the actor is performing a traditional governmental function . . . and whether the injury caused is aggravated in a unique way by the incidents of governmental authority . . . ." (citations omitted)).

"public function" framework.[182] Under this test, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[183] Accordingly, arbitration, as one scholar has argued, ought to be considered state action because "[t]he binding resolution of disputes is, of course, a traditionally exclusive public function. Indeed, it is difficult to contemplate a function traditionally more exclusive than . . . 'the State's monopoly over techniques for binding conflict resolution.'"[184]

There are, of course, a wide range of doctrinal rejoinders to this argument.[185] And courts have not been hospitable to claims predicated on finding the conduct of arbitrators to constitute state action; in fact, they have uniform-

182. *See* Reuben, *supra* note 41, at 997-98 (2000). For an alternative view, see Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U. L. REV. 1, 48-49 (discussing the public function test as applied to commercial arbitration).

183. Evans v. Newton, 382 U.S. 296, 299 (1966); *see also* Terry v. Adams, 345 U.S. 461 (1953) (discussing how a private organization took on a public function in the electoral context); Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute.").

184. Reuben, *supra* note 41, at 997-98. Scholars have also contended that arbitration ought to be considered state action because of the degree of the government's support of and entanglement with commercial arbitration. *See, e.g.*, Brunet, *supra* note 43, at 109 ("The FAA makes arbitration clauses efficacious by making valid arbitration clauses enforceable in federal court. . . . The legislation empowers federal courts to force or compel arbitration and to stay pending litigation until arbitration is concluded. It also provides that a court can enforce an award by 'confirming' it. . . . Under the FAA, courts facilitate arbitration by forcing parties to honor arbitration clauses and by making awards equivalent to court judgments."); Reuben, *supra* note 41, at 1006 ("[T]he statutory schemes that establish an intimate involvement between arbitrators and the public courts toward the single end of state-enforced dispute resolution may be seen as establishing an inseverable and indispensable nexus between seemingly private actors and their governmental partners. . . . As such, it would seem that the "private use of [arbitration] with the help of state officials constitutes state action."); Sternlight, *supra* note 178, at 42 ("[T]he FAA and equivalent state statutes allow parties to use court processes to compel arbitration, to confirm the private award as a judgment, and then to appeal the arbitrators' findings. Where parties so use the courts to enforce their private agreement it would seem that state action exists.").

185. For example, the Court subsequently has significantly narrowed the public function test. *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159-60 (1978) (requiring that the function in question be *exclusively* a public function); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974); *see also* Cole, *supra* note 182, at 21 (noting that "[t]he Court's use of 'exclusivity' as a means for determining whether a particular private action is a public function resulted in a test that is very difficult to satisfy").

ly rejected such claims.[186] But it is worth noting that the public function argument simply assumes that arbitration serves a function identical to judicial resolution of disputes. This premise constitutes a wholehearted embrace of the standard narrative by conceptualizing the functions of arbitration and litigation as the same.

The core lesson of the arbitral counter-narrative is that we should push back against this claim. As courts and scholars continue to address arguments contending that arbitrators serve a public function—and therefore can be deemed state actors—the arbitral counter-narrative reminds us that various forms of arbitration are organized to pursue aims and objectives beyond mere dispute resolution. In those circumstances, it is far more difficult to claim that these arbitrations play a role equivalent to that of their litigation counterparts. The fact that some arbitrations aim both to resolve disputes *and* to promote shared values undermines the claims of direct equivalency of function that are predicates for the public function argument and suggests its almost certain inapplicability in counter-narrative cases.

4. Public Access to Arbitration

While the counter-narrative discussed here highlights how parties use arbitration to pursue various first-order values beyond dispute resolution, such values can be introduced into particular arbitration settings in other ways as well. To take a recent and high profile example, consider the Third Circuit's decision addressing the constitutionality of Delaware's attempt to empower the Chancery Court to arbitrate business disputes.[187]

To "preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters,"[188] the legislature authorized the Chancery Court, pursuant to an agreement between parties to a potential suit, to arbitrate disputes, with the parties paying $12,000 to file, plus $6,000 in costs per day after the first day of the of the proceedings.[189] Access to this arbitration option was lim-

186. DRAHOZAL, *supra* note 19, at 18 (noting that "[a]ll federal courts that have addressed the issue have held that commercial arbitration is not 'state action' to which constitutional protections apply").

187. *See* 10 DEL. CODE ANN. tit. 10, § 349 (2009); Del. Ch. R. 96-98. For more on the relationship between this litigation and general trends, see Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Procedure at 75*, 162 U. PA. L. REV. 1793, 1820-22 (2014); Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349 (2013).

188. H.B. 49, 145th Gen. Assemb. (Del. 2009).

189. Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 512 (3d Cir. 2013).

ited: at least one of the parties needed to be a Delaware corporation, organized under Delaware law; neither party could be a consumer; and the amount in controversy needed to be at least $1,000,000.[190] The dispute would be arbitrated by a Chancery Court judge and would take place in a Delaware courthouse during normal business hours.[191] Notably, this legislatively created arbitration system provided that the "[a]rbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal."[192]

A coalition formed to challenge this new system, arguing that the system, for all intents and purposes, transformed judicial proceedings into secret arbitrations shielded from public scrutiny[193] and therefore violated the public's First Amendment right of access to trials.[194] In evaluating this claim, the Third Circuit invoked the "experience and logic" test, which determines whether "[a] proceeding qualifies for the First Amendment right of public access" by evaluating "when 'there has been a tradition of accessibility' to that kind of proceeding, and when 'access plays a significant positive role in the functioning of the particular process in question.'"[195]

The court, however, faced some significant challenges in applying the test. As the court itself noted, it was far from clear which proceedings the court should examine to determine whether there was a "tradition of accessibility."[196] Not surprisingly, the defendants argued that the proper point of comparison was arbitration; the proceedings were, after all, characterized as arbitrations.[197] By contrast, the plaintiffs argued that the proceedings were best compared to civil trials—and that therefore the court should determine whether there was a tradition of public accessibility to civil trials.[198] As the court well understood, the fundamental problem was in determining the baseline: should the court classify Delaware's new dispute resolution system as providing for arbitration, and therefore engage in the First Amendment "tradition of accessibility" inquiry by examining the extent of public access to other forms of arbitration; or

190. *Id.* at 524.

191. *Id.* at 512-13.

192. DEL. CODE ANN. tit. 10, § 349(b) (2009).

193. Brief for Appellee at 19-30, *Strine*, 733 F.3d 510 (No. 12-3859).

194. *Id.* at 12-19.

195. *Strine*, 733 F.3d at 514 (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 10 (1986)).

196. *Id.* at 515.

197. *Id.* ("The litigants in this case disagree over which history is relevant to Delaware's proceedings. The Appellants suggest that we only examine the history of arbitrations, whereas the Coalition suggests we only examine the history of civil trials.").

198. *Id.*

should the court classify Delaware's new dispute resolution system as effecting a system equivalent to the civil trial, and therefore engage in the First Amendment "tradition of accessibility" inquiry by examining the scope of public access to civil trials? In other words, to answer the First Amendment question, the court had to consider the question: to what extent was Delaware's proposed system of arbitration simply a form of civil litigation?[199]

Instead of choosing one option or the other, the court embraced a "broad historical approach" that considered the history of both civil trials and arbitration.[200] Central to the analysis was an emphasis on how arbitration has changed over time: arbitration, the court noted, has not always been shielded from public view.[201] The court therefore concluded that "[t]he history of arbitration thus reveals a mixed record of openness."[202] Describing this "mixed record,"[203] the court explained that the public has generally not had access to private arbitrations—that is, arbitration proceedings organized under the auspices of modern arbitration service providers.[204] By contrast, some earlier forms of arbitration are reported to have actually taken place in public with judges sometimes presiding in an unofficial capacity.[205] Given this historical record, the court characterized the history of public access as follows:

> Proceedings in front of judges in courthouses have been presumptively open to the public for centuries. History teaches us not that all arbitrations must be closed, but that arbitrations with non-state action in private venues tend to be closed to the public. Although Delaware's government-sponsored arbitrations share characteristics such as informality, flexibility, and limited review with private arbitrations, they differ fundamentally from other arbitrations because they are conducted before active judges in a courthouse, because they result in a

199. *Id.* ("If we were to only analyze the history of arbitrations as the Appellants suggest, we would be accepting the state's designation of its proceedings as arbitrations at face value. Uncritical acceptance of state definitions of proceedings would allow governments to prevent the public from accessing a proceeding simply by renaming it. . . . The Coalition's suggestion—that we rely solely on the history of civil trials—is also flawed. Defining Delaware's proceeding as a civil trial at the outset would beg the question at issue here, and elide the differences between Delaware's arbitration proceeding and other civil proceedings.").

200. *Id.* at 516.

201. *Id.* at 517-19.

202. *Id.* at 518.

203. *Id.* at 517-18 (citing, among other sources, Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423, 445-46 (2009)).

204. *Id.* at 518.

205. *Id.* at 516-17.

> binding order of the Chancery Court, and because they allow only a limited right of appeal.[206]

The court's analysis is striking because it does not simply classify the new arbitration system as a system of civil trials masquerading as arbitration. Such an approach, to be sure, would have yielded a similar result—that is, that Delaware's proposed arbitration system violated the First Amendment by failing to afford the public access to the proceedings. Instead, the court highlighted the ways in which the institutional setting of a particular arbitration impacts the character of the first-order values the forum is meant to promote. Thus, the court identified a variety of context-sensitive considerations leading to the conclusion that First Amendment values required providing public access to the arbitration; the fact that the arbitration was to be held in a public courthouse and presided over by a state-court judge meant that the proceedings were sufficiently within the public interest to require public access. In this way, the setting of the arbitration and the identity of the arbitrators transformed the law's conceptualization of the values at stake in the proceedings and led the court to conclude that First Amendment concerns were triggered.

The structural and institutional dimensions of the Delaware arbitrations led the Third Circuit to recognize that the distinct features of the Delaware arbitrations implicated the machinery of government and were, to use the court's language, "government-sponsored" because they were held in courthouses and employed public judges. In this way, rather than conflating different forms of arbitration and then confusing those with adjudication, the court distinguished between forms of arbitration based upon their particular institutional features.[207] While religious arbitration is paradigmatic of cases in which the parties infuse the arbitration with shared values, *Strine* highlights the way in which the institutional dimensions of arbitration can implicate values and interests beyond dispute resolution. Thus, in *Strine*, the setting of the arbitration (the courthouse) and the identity of the arbitrators (judges) required the court to protect other first-order values, specifically the public's First Amendment right to access. In this way, *Strine* further highlights how a wide range of considerations—from the objectives of the parties to the location of the arbitra-

206. *Id.* at 518.

207. Had *Strine* implicated a counter-narrative form of arbitration—as opposed to "government sponsored" arbitration—it might have raised tensions between the public values that Fiss and Resnik have identified in adjudication and the transformative values at stake in counter-narrative forms of arbitration. Identifying a counter-narrative does not, by itself, provide a blueprint for resolving conflicts between these potentially competing first-order values. Resolving such conflicts requires an independent moral or political theory that addresses how and when public values should accommodate the values of particular citizens.

tion—can implicate various values in a particular arbitral forum. And this dynamic once again underscores the fundamental insight of the arbitral counternarrative, which embraces the multifarious nature of arbitration and resists reductive reasoning that either conflates litigation and arbitration or sees all forms of arbitration as fundamentally identical.

B. Agreeing to Arbitration

The lofty aspirations of religious arbitration can at times also emerge as the forum's Achilles heel. Religious arbitration tribunals provide parties with the option to resolve disputes in accordance with shared religious rules and values. But sometimes parties agree to submit disputes to religious arbitration tribunals not because they personally desire to have their dispute resolved in accordance with a particular brand of religious law, but because they find themselves enmeshed in a religious community that expects them to do so. In this way, the fact that religious tribunals serve as extensions of religious communal values is both a strength—it enables parties to incorporate shared religious values into the process of dispute resolution—as well as a weakness: the expectations of religious communities can put pressure on reluctant members to forego access to judicial resolution of disputes in favor of the community's preferred religious tribunal.

Because of religious norms favoring religious dispute resolution within particular communities,[208] a party's refusal to arbitrate before a religious arbitration tribunal can entail social consequences.[209] For example, under Jewish law, an individual who refuses to submit a dispute for arbitration before a rabbinical arbitration tribunal will receive a *seruv* (similar to a contempt order), which conveys strong communal disapproval[210] and can carry significant social sanctions.[211] Therefore, the signing of a religious arbitration agreement could

208. *See supra* notes 78-102 and accompanying text.

209. *See* Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 169-70 (2011) (discussing social sanctions imposed by religious communities for failure to appear before a religious tribunal).

210. *See* Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 470–72 (2009) (discussing sanctions used by religious groups to influence and respond to the choices made by individual group members); Fried, *supra* note 82, at 635–41 (discussing religious judicial action and its consequences on an individual's status in the community); Wolfe, *supra* note 78, at 442 (noting that by seeking religious arbitration members of a religious community are considered to be maintaining togetherness and unity); *see also* Grossman, *supra* note 78, at 197-98 (explaining the direct social consequences of religious arbitration judgments).

211. *See, e.g.*, *In re* Herman Pachman, No. 09-37475, 2010 WL 1489914 (Bankr. S.D.N.Y. Apr. 14, 2010) (alleging that a *seruv*, issued by a rabbinical court, led other members of the religious community to avoid doing business with the petitioner and to refuse marrying their chil-

be seen, in some circumstances, as far from consensual. This has led some to worry about whether religious arbitration tribunals, to the extent the parties submit their disputes because of these communal pressures, can truly claim to operate with the consent of the parties.[212] However, in the few cases where parties have petitioned a court to invalidate a religious arbitration agreement on the grounds of duress, courts have uniformly rejected those claims, instead enforcing the agreements and compelling arbitration.[213]

Of course, duress is only one of many defenses that a party might marshal against a religious arbitration agreement. Unconscionability, for example, is an attractive alternative given its success in the arbitration context.[214] Moreover, unconscionability takes various forms of unfairness into account, focusing both on defects in the process of forming an agreement as well as defects in the substantive impact of the agreement.[215] To raise an unconscionability claim, parties typically must demonstrate the existence of both "procedural" unconscionabil-

dren to petitioner's children); Abdelhak v. Jewish Press Inc., 411 N.J. Super. 211 (N.J. Super. Ct. App. Div. 2009) (alleging that plaintiff lost the patronage of his Orthodox Jewish clientele as a result of a *seruv*).

212. Ayelet Shachar, the preeminent scholar engaging with these questions, has argued that this dynamic can thrust parties before religious tribunals on the horns of a your-culture-or-your-rights dilemma. *See* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 117-45 (2001); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008).

213. *See, e.g.*, Greenberg v. Greenberg, 238 A.D.2d 420, 421 (N.Y. App. Div. 2d Dep't 1997) ("The 'threat' of a siruv, which entails a type of ostracism from the religious community, and which is prescribed as an enforcement mechanism by the religious law to which the petitioner freely adheres, cannot be deemed duress." (citing Lieberman v. Lieberman, 566 N.Y.S.2d 490,494 (N.Y. Sup. Ct. 1991))); Mikel v. Scharf, 432 N.Y.S.2d 602, 606 (N.Y. Sup. Ct. 1980) ("Undoubtedly, pressure was brought to bear to have them participate in the *Din Torah*, but pressure is not duress. Their decision to acquiesce to the rabbinical court's urgings was made without the coercion that would be necessary for the agreement to be void.").

214. For articles discussing the success of unconscionability in the arbitration context, see Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements To Arbitrate*, 2006 J. DISP. RESOL. 469; Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years After* Doctor's Associates, Inc. v. Casarotto, 54 CLEV. ST. L. REV. 249 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004).

215. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4-7, at 168 (5th ed. 2000) ("Most courts take a 'balancing approach' to the unconscionability question, and . . . seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability.").

ity—what Arthur Leff famously referred to as "bargaining naughtiness"[216]—and "substantive" unconscionability, which includes "contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent."[217]

In principle, the dual focus of unconscionability would seem to provide a doctrinal antidote to concerns over the volitional nature of religious arbitration.[218] A court could consider communal pressure exercised by a religious community as constituting procedural unconscionability "preclud[ing] the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract."[219] And where such pressures were exerted in a context in which the religious arbitration tribunal served as a forum fundamentally skewed in favor of one party over the other—a recurring concern of feminist critics worrying that religious tribunals systematically favor men over women[220]—then unconscionability could enable a party to void the agreement.[221]

216. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

217. Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999). For court discussions of the requirement that both procedural and substantive unconscionability be present before a court will refuse to enforce the contract, see Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) ("'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.'" (quoting Stirlen v. Supercuts, Inc., et al., 60 Cal. Rptr. 2d 138, 145 (Cal. Ct. App. 1997))); and State v. Avco Fin. Serv., Inc., 406 N.E.2d 1075, 1078 (N.Y. 1980) ("As a general proposition, unconscionability . . . requires some showing of 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965))).

218. I have elsewhere more fully explored the applicability of the unconscionability doctrine to religious arbitration agreements. *See* Helfand, *supra* note 14, at 1294-1303.

219. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003).

220. In this context one prominent concern is the classical rules in both Jewish and Islamic Law that either prohibit or limit the evidentiary value of female testimony. *See generally* Shimshon Ettinger, *Testimonial Competence of Women in Civil Matters Under Jewish Law,* 20-21 DINÉ ISRAEL 241 (2001); Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT'L J. MIDDLE E. STUD. 185, 185 (1997) (noting how Muslim feminists have argued that a male-dominated interpretation of Islam has prevailed for centuries). However, it is worth noting that the exclusionary approach to female testimony is not always implemented in actual contemporary practice. *See* Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOREIGN AFF. 339, 356 (2000) (noting that, while as a formal matter women cannot serve as witnesses under Jewish law, "rabbinical courts routinely accept women's testimony and practically accord it the same evidentiary weight that is accorded to men's testimony"). The broader issue of asymmetries between the treatment between men and women in the context of religious tribunals has been thoroughly and insightfully explored by Ayelet Shachar.

Thus, for example, if a party executed a religious arbitration agreement under significant pressure from her religious community and then learned in the course of the arbitration proceedings that her star witness would not be allowed to testify because she is female,[222] the party could potentially raise a claim of unconscionability: the communal pressure could constitute procedural unconscionability because it undermined the capacity for meaningful choice, and the religious rule against a female witness might be deemed sufficiently unfair and one-sided to render the arbitration agreement substantively unconscionable. Together, the existence of procedural and substantive unconscionability could serve to void the religious arbitration agreement.[223]

But the promise of unconscionability is severely undermined by the doctrine of waiver, which is a direct consequence of the doctrinal obsession with arbitration's dominant narrative. A party is considered to have waived objections to an arbitration agreement once it participates in arbitration proceedings. The reasoning here is straightforward:

> To the extent that a party is entitled to challenge the validity of an agreement to arbitrate, the time to raise that issue is before the matter goes to arbitration, not after. Otherwise a party could hold back, await the outcome of the arbitration, and then blithely render it null simply by challenging the validity of the proceedings. Failure to challenge arbitrability in timely fashion and participating in the arbitration proceedings, in other words, will result in waiver of the right to object.[224]

See, e.g., SHACHAR, *supra* note 212, at 45-62; Shachar, *supra* note 212; Ayelet Shachar, *Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49 (2005). For examples of other recent discussions, see Marie Ashe & Anissa Helie, *Realities of Religio-Legalism: Religious Courts and Women's Rights in Canada, the United Kingdom, and the United States*, 20 U.C. DAVIS J. INT'L L. & POL'Y 139 (2014); Gila Stopler, *The Challenge of Strong Religion in the Liberal State*, 32 B.U. INT'L L.J. 411 (2014); Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 539-42 (2012) (discussing the question in the context of the debate in Ontario over religious arbitration of family law matters).

221. For examples of substantively unconscionable terms, see Bruhl, *supra* note 214, at 1437-39; and Stempel, *supra* note 214, at 803-07.

222. *See supra* note 220.

223. For my take on the use of unconscionability in the religious arbitration context, see Helfand, *supra* note 14, at 1294-1303. For more on why failure to admit female testimony would likely not subject the subsequent arbitration award to vacatur on account of the arbitrator "refusing to hear evidence pertinent and material to the controversy," 9 U.S.C. § 10(a)(3), see Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141 (2015).

224. Owen-Williams v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 907 F. Supp. 134, 137 (D. Md. 1995).

This mantra that parties waive challenges to an arbitration agreement by participating in arbitration proceedings has been repeatedly recited by courts.[225] And the logic behind waiver always remains the same; the time to challenge an arbitration agreement is before the proceedings begin, not after.[226]

To be sure, courts have tried to calibrate the waiver inquiry, examining a range of considerations before concluding that a party has waived its right to challenge the enforceability of the arbitration agreement. Thus some courts have concluded that participation in various preliminary matters—such as scheduling conferences, arbitrator selection, submission of papers contesting various factual allegations—is insufficient to trigger waiver of the right to challenge the underlying arbitration agreement.[227]

But while courts have embraced a variety of factors as bearing on the waiver inquiry, they remain wedded to the standard picture of arbitration in evaluating waiver claims—a model in which, importantly, the arbitration agreement

225. *See, e.g.*, Herman Miller, Inc. v. Worth Capital, Inc., No. 98-7732, 173 F.3d 844, at *1 (2d Cir. Mar. 9, 1999) ("A party may be found to have waived its objection to arbitrability, however, if it has participated extensively in arbitration proceedings without asserting its objection in timely fashion."); Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1440 (9th Cir. 1994) ("'[I]t would be unreasonable and unjust to allow Daniel to challenge the legitimacy of the arbitration process, in which he had voluntarily participated over a period of several months, shortly before the arbitrator announced her decision.'" (quoting Fortune, Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1357 (9th Cir. 1983) (per curiam))); *Daniel*, 724 F.2d at 1357 ("[A] party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result."); *see also* Eleanor L. Grossman, *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability Under State Law*, 56 A.L.R.5th 757, § 2(a) (2009) ("As a general rule, participation in an arbitration proceeding on the merits of a dispute will result in a waiver of the right to raise the issue of arbitrability.").

226. *See, e.g.*, Ficek v. S. Pac. Co., 338 F.2d 655, 657 (9th Cir. 1964) ("A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act." (citing Wooley v. Eastern Air Lines, Inc., 250 F.2d 86, 91 (5th Cir. 1957))); White v. Kampner, 641 A.2d 1381, 1386 (Conn. 1994) ("Parties may not forego objections to arbitration, gambling upon a favorable result, and when losing raise the procedural defects in a motion to vacate." (citations, ellipsis, and bracketing omitted)).

227. *See, e.g.*, Woodcrest Nursing Home v. Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Union, 788 F.2d 894, 899 (2d Cir. 1986) (ruling minimal participation "amounting for the most part to efforts to postpone or delay arbitration" does not mean that the nursing home waived its right to seek a stay); Pension Plan for Pension Trust Fund for Operating Eng'rs v. Weldway Constr., Inc., 920 F. Supp. 2d 1034, 1048 (N.D. Cal. 2013) (refusing to find waiver despite the fact that the challenging party "participated in selecting an arbitrator, submitted an answering statement with a counterclaim, agreed to wait for the selected arbitrator to be available, submitted a letter addressing incorrect factual allegations made in Defendants answer, and participated in a telephonic case management conference."). *See generally* Grossman, *supra* note 225.

is signed pre-dispute. In such circumstances the logic of the waiver doctrine makes sense. If a party believes an arbitration agreement is invalid, then when the dispute arises that party should challenge the agreement instead of moving forward with arbitration proceedings. Courts reasonably give parties some leeway if they participate in the arbitration proceedings only on a limited basis, but, if a party chooses to proceed with arbitration instead of challenging a pre-dispute arbitration agreement, it might be appropriate to construe that decision as equivalent to a waiver of all claims that the underlying arbitration agreement is invalid. Otherwise, the party should have raised the challenge to the arbitration agreement before participating in the arbitration proceedings.

But the logic of waiver falls woefully short in the context of religious arbitration. As described above, religious arbitration agreements appear to be typically signed post-dispute.[228] Where parties sign post-dispute religious arbitration agreements as a result of communal pressure, with the specter of social sanctions looming in the background, the waiver doctrine can prevent parties from accessing the protections of common law contract defenses. This is because the very same communal dynamics pressuring parties to sign the agreements also induces the parties to participate in the proceedings.

The waiver analysis ought to account for such circumstances. The inquiry should not, as on the standard narrative, focus solely on whether a party's participation has crossed some undefined boundary of involvement; instead, it should consider whether that party's participation was the result of external dynamics limiting the party's freedom to voluntarily object. In counter-narrative cases, the execution of the arbitration agreement and the beginning of the arbitration proceedings can occur simultaneously. In such contexts, inferring waiver merely from participation in the proceedings seems far from justifiable. There is no separate opportunity for a party to challenge the post-dispute religious arbitration agreement prior to the onset of the proceedings, and significant forces can be marshaled to inhibit objection once the parties move into the proceedings themselves.

There are tools internal to waiver doctrine that are useful here. Broadly speaking, we might address this concern with the observation that, to constitute waiver, a party's participation in arbitration proceedings must be voluntary. To the extent that a party's participation is driven by communal pressure—pressure that could qualify as procedural unconscionability—participation might be understood as involuntary. But the doctrine remains wholly undeveloped. The fact that waiver doctrine has not been developed in these contexts is largely tied to the dominance of the standard arbitration narrative and the persistence of the pre-dispute arbitration framework, which

228. *See supra* notes 109-110 and accompanying text.

leads courts to import assumptions without inquiring about the unique features of counter-narrative forms of arbitration.

Indeed, religious arbitration is not the only arbitral context in which unique dynamics related to consent and contract defenses emerge. The Supreme Court's increasing tendency to conflate various categories of arbitration has raised analogous issues in the context of labor arbitration. For a long time the Supreme Court saw commercial arbitration and labor arbitration as two distinct forms of dispute resolution governed by two different statutory schemes.[229] In differentiating between commercial and labor arbitration, the Supreme Court explained that the former "is the substitute for litigation" while the latter "is the substitute for industrial strife."[230] The Court understood labor arbitration as pursuing values beyond mere dispute resolution; indeed, even in cases where labor arbitration proceedings might be deemed frivolous, the Court emphasized the importance of requiring resolution through arbitration because "[t]he processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."[231]

This division had a number of doctrinal implications,[232] including effects on the scope of claims that could properly be submitted to arbitration. Initially, even as the Supreme Court explicitly overruled the line of cases limiting the scope of arbitrable statutory claims,[233] it did so only in the context of commer-

229. MACNEIL ET AL., *supra* note 1, at § 11.3.1 (describing the Supreme Court's labor arbitration jurisprudence). *But see id.* § 11.3.2 (noting far less uniformity regarding the treatment of labor arbitration by the federal courts of appeals); *see also supra* note 31 and accompanying text (discussing the evolution of the historical division between labor and commercial arbitration).

230. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

231. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 568 (1960).

232. *See* Mitchell H. Rubinstein, *Altering Judicial Review of Labor Arbitration Awards*, 2006 MICH. ST. L. REV. 235, 247-253 (discussing how lower courts have articulated the grounds for vacating labor arbitration awards). *See generally* Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 786-826 (2000) (discussing a series of doctrinal implications arising from the division between commercial and labor arbitration).

233. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions."); *see also* Shearson/Am. Express v. McMahon, 482 U.S. 220, 231-32 (1987) ("[T]he reasons given in *Wilko* reflect a general suspicion of the desirability of arbitration and the competence of arbitral tribunals – most apply with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally. It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act.").

cial arbitration. Collective bargaining agreements with arbitration provisions, by contrast, were deemed not to cover a worker's individual statutory claims.[234] As the Supreme Court stated in *Alexander v. Gardner-Denver*:

> It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; *it concerns not majoritarian processes, but an individual's right to equal employment opportunities*.[235]

While the persistence of these restrictions on arbitrability in the labor arbitration context stemmed, in part, from lingering skepticism that arbitrators were capable of resolving statutory claims,[236] they more directly derived from worries about the nature of consent in the labor arbitration context. Accordingly, the line of argument expressed in *Gardner-Denver* reasonably restricted the scope of statutory claims that could be submitted to arbitration pursuant to a collective-bargaining agreement because of the attenuated nature of individual consent to "majoritarian" collective bargaining. As noted by the Court, the "majoritarian" processes in reaching labor agreements can be complex, potentially undermining the adequacy of the consent exercised by individual employees.

However, the "majoritarian" dynamic also captures the counter-narrative impulse of labor arbitration; indeed, labor arbitration—in contrast to generic commercial arbitration—is geared towards achieving therapeutic values as well

234. *See* Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 745 (1981) ("Because Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum, we hold that petitioners' claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-54 (1974).

235. *Gardner-Denver*, 415 U.S. at 51 (emphasis added) (citations omitted).

236. *Id.* at 51-52 (characterizing agreements to arbitrate claims like Title VII as "prospective waiver[s]" of statutory rights, thereby implying that parties would not be afforded their full rights under Title VII if those claims were submitted to arbitration); *see also id.* ("Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.").

as constructing a viable workplace community.[237] Accordingly, the Court highlighted the communal nature of arbitration, the unique objectives labor arbitration is geared to achieve and, in turn, the unique problems that arise when it comes to individual consent. Keeping all these considerations in mind, the Court in *Gardner-Denver* maintained the distinction between labor and other commercial forms of arbitration, protecting employees subject to labor arbitration agreements by deeming certain statutory claims non-arbitrable in the labor arbitration context. Indeed, differentiating between labor arbitration and commercial arbitration for the purposes of arbitrating statutory claims in this way would capture the core intuition of arbitration's counter-narrative, incorporating into doctrine the dynamics of the particular arbitral forum and the mechanisms by which parties contract into it.

The Supreme Court has, however, recently rejected such distinctions between labor and commercial arbitration.[238] In its 2009 decision *14 Penn Plaza LLC v. Pyett*, the Court held that "[t]he decision to fashion a collective-bargaining agreement to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery."[239] The dissent's attempt to defend the distinction between labor and commercial arbitration[240] was discarded as flowing from an outdated skepticism of arbitration.[241] The Court therefore concluded that claims under the Age Discrimination and Employment Act could be submitted to arbitration pursuant to a collective-bargaining agreement.[242]

The Court's decision in *Pyett*, however, fails to account sufficiently for the implications of arbitration's counter-narrative. What meets standards of consent to arbitration in some contexts should not necessarily qualify as consent in other contexts. This is certainly true in the context of religious arbitration, where the vagaries of consent require some rethinking of the standard waiver doctrine. A similar point applies in the context of labor arbitration where the "majoritarian" dynamics at play in the negotiation of a collective-bargaining agreement make the standard contractarian model of consent less than relevant to the question of arbitrability. As a general matter, then, arbitration's counter-

237. *See generally* Abrams et. al., *supra* note 8 (explaining the therapeutic value of arbitration with a particular focus on labor arbitration).

238. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 256 (2009). For discussion of the potential consequences of *Pyett*, see generally Sarah Rudolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861 (2010).

239. *Pyett*, 556 U.S. at 256.

240. *Id.* at 281-85 (Souter, J., dissenting).

241. *Id.* at 256 n.5, 265 (majority opinion).

242. *Id.* at 274.

narrative highlights the need for a more context-sensitive arbitration doctrine—a doctrine that accounts for each party's individual objectives; certainly not one that is one-size-fits-all.

CONCLUSION

To highlight arbitration's counter-narrative is certainly not to claim that most parties select arbitration for reasons beyond dispute resolution. As noted above, statistics demonstrate that, in fact, providing a faster and cheaper method of dispute resolution is consistently the primary reason that parties forego litigation in favor of arbitration.[243]

But focusing on the dominant dispute-resolution rationale and the dominant narrative that it produces prevents legal doctrine from addressing instances where parties select arbitration for other reasons. By conflating all forms of arbitration and then equating arbitration with litigation, courts run the danger of misapplying legal doctrine and thereby undermining the ability of arbitration to serve a unique jurisgenerative function. Indeed, the core lesson of arbitration's counter-narrative is that legal doctrines need to be better calibrated to the range of values a particular arbitration context aims to promote. If successfully grafted onto current legal doctrine, the counter-narrative—exemplified by, but not exclusive to, religious arbitration—holds out to us the hope of unlocking the transformative potential of arbitration, enabling parties to employ arbitration not simply as an efficient venue for resolving disputes, but as an alternative forum that can breathe life into mutually shared values.

243. *See supra* notes 57-58 and accompanying text.