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The Implications of the Neutral Principles of Law Doctrine on Religious Arbitration

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I. Introduction

The Federal Arbitration Act ("FAA"), which governs the process of arbitration, contains no definition of arbitration.[1] Among scholars, arbitration is generally understood to be a form of alternative dispute resolution ("ADR").[2] Although Congress enacted the FAA in 1925,[3] religious arbitration has existed for much longer.[4] Religious arbitration consists of submitting a dispute to a religious tribunal and subsequently seeking enforcement of its award in secular court.[5]

In interpreting and applying the FAA, courts typically find that religious arbitration falls within the scope of general arbitration.[6] Because of this, contract law governs the enforcement of these agreements.[7] However, the Religion Clauses of the First Amendment also apply,[8] meaning issues arise under both areas of law. This paper considers how the inclusion of religious arbitration within the broader secular regulatory scheme produces procedural secularization. This, coupled with the lack of substantive review by courts under the First Amendment, negatively affects some participants and the American legal system.

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[1] Michael A. Helfand, *Arbitration, Transparency, and Privatization: Arbitration's Counter-Narrative: The Religious Aritration. Paradigm*, 124 YALE L. J. 2994, 3023 (2015); *see* 9 U.S.C. §§ 1–16 (2022).

[2] Sukhsimranjit Singh, *Religious Arbitration & its Struggles with American Law & Judicial Review*, 16 PEPPERDINE DISP. RESOL. L. J. 360, 366 (2016). Because the FAA does not provide a definition, courts have varying, and sometimes, conflicting definitions of what arbitration is. Helfand, *supra* note 1, at 3023. However, there are six characteristics that arbitration generally possesses: "(1) all parties consent to have a dispute resolved by a private third party; (2) the parties select the venue of arbitration, often including the identifies of specific arbitrators; (3) the arbitrator conducts proceedings and hears testimony regarding the dispute; (4) the arbitrator resolves the dispute and makes a binding award in favor of the prevailing party; (5) the arbitrator's decision is subjected to minimal judicial review in state or federal court; and (6) the arbitrator's decision is enforced by the court as a final judgment." IAN R. MACNEIL, AMERICAN ARBITRATION LAW 7 (1992).

[3] Singh, *supra* note 2, at 368.

[4] Singh, *supra* note 2, at 367; MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, & CHRISTIAN PANELS 72 (2017).

[5] Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VERMONT L. REV. 157, 157 (2012).

[6] Brian Hutler, *Religious Arbitration & the Establishment Clause*, 33 OHIO STATE J. ON DISP. RESOL. 338, 350 (2018) ("religious arbitration agreements are liberally enforced under the FAA and related state statutes that authorize courts to enforce arbitration agreements generally.").

[7] *See infra* Part IV.B.

[8] *See infra* Part IV.A.

Part II of this paper describes the history and development of arbitration, which dates back to premodern England and France.[9] Part II also discusses the history of religious arbitration within the three dominant Abrahamic faith groups—Christianity, Judaism, and Islam. Part II concludes by providing the history of secular arbitration. It traces how courts' perceptions and treatment of arbitration changed from skepticism to liberal constructions and a presumption of enforceability. Part III continues by describing how modern arbitration works in both secular and religious spheres.

Part IV discusses the constitutional framework applicable to judicial review and enforcement of religious arbitration. It traces the Supreme Court's development of the religious question doctrine through church property dispute cases. It also highlights the Court's recognition and endorsement of the neutral principles of law approach in *Jones v. Wolf*.[10]

Part V contains the three parts that form the analysis. First, Part V.A discusses how characterizing religious arbitration as falling under the scope of the FAA has streamlined religious arbitration procedurally. Part V.B highlights two ways the inclusion of religious arbitration under the FAA results in decreased substantive rights for some parties. Part V.C discusses the impact of the first two sub-sections on the American legal system.

II. Historical Framework and the Development of Arbitration

Religious arbitration is not a new phenomenon.[11] To understand the evolution of our current systems of religious arbitration, it is crucial to know the historical origins of both religious and secular arbitration.[12]

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[9] BROYDE, *supra* note 4, at 73.
[10] *Jones v. Wolf*, 443 U.S. 595 (1979).
[11] BROYDE, *supra* note 4, at 72.
[12] *Id.* ("The history of religious arbitration in Western societies is important because it helps contextualize and explain long-standing social, political, and legal comfort with religious groups engaging in various forms of alternative dispute resolution separate but not entirely outside societal laws.").

A. The Early History of Religious Arbitration

The roots of religious arbitration lead back to pre-modern England and France.[13] English and French authorities made religious arbitration available as an alternative to seeking relief in state courts.[14] However, given the lack of separation of church and state in both England and France, the line between state courts and church courts often became blurred.[15] In England, church courts had power to hear disputes pertaining to religious issues, but also those dealing with secular ones under contract, matrimonial, probate, tithe, and defamation law.[16] English church courts could even hear appeals from common law courts.[17] Religious, or ecclesiastical, courts in France had broad subject-matter jurisdiction to hear criminal and civil cases.[18] Civil cases could involve religious disputes, or secular disputes dealing with family law and contract law.[19] However, beginning in the fourteenth century, religious courts began to lose their power, as they were stripped of jurisdiction and allowed to hear purely religious matters.[20] Notwithstanding their loss of power, many individuals still utilized religious courts.[21]

Settlers in colonial America brought over the idea of utilizing religious forums to resolve disputes with them.[22] There is evidence of using religious institutions as a vehicle for dispute resolution in colonial America.[23] For example, in 1635, Boston adopted an ordinance requiring an attempt at arbitration before being allowed to litigate.[24] However, after the American Revolution,

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[13] *Id.* at 73.
[14] *Id.*
[15] *Id.* at 72–73.
[16] *Id.* at 73–74.
[17] *Id.* at 73.
[18] *Id.* at 74.
[19] *Id.*
[20] *Id.* at 75.
[21] *Id.* at 75–76.
[22] *Id.* at 76.
[23] *Id.* at 76–78.
[24] *Id.*; JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 23 (1983).

religious courts lost "all of their power" to secular courts.[25] After this, the likelihood of a town adopting or implementing religious arbitration was dependent on the town's given level of uniformity in religious beliefs.[26] The more uniform, the likelier a town was to have and compel religious arbitration; the more diverse, the less likely a town was to require its members to seek resolution through religious channels.[27]

B. The Use of Religious Arbitration Among the Abrahamic Faith Groups

1. Christian Arbitration

There is variation as to the extent and ways in which modern religious arbitration is utilized among different denominations within the Christian faith.[28] For example, the Catholic Church permits religious arbitration only for church-related disputes.[29] Other denominations utilize religious arbitration for both church-related and broad substantive secular matters encompassing employment, family, and commercial law.[30]

The Institute for Christian Conciliation (hereinafter "ICC") is a body that provides religious alternative dispute resolution for both religious and secular matters.[31] The ICC utilizes a three-part dispute resolution scheme, whereby parties first submit to counseling, then mediation, and finally arbitration as a last resort.[32]

Christian arbitration is highly comparable to secular arbitration, with two major exceptions.[33] The first way that Christian arbitration differs drastically from secular arbitration is

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[25] BROYDE, *supra* note 4, at 78.
[26] *Id.*
[27] *See id.*
[28] *See* Terrina LaVallee, *The Ethics of Religious Arbitration*, 33 THE GEO. J. OF LEGAL ETHICS 629, 632 (2020).
[29] *Id.*
[30] *Id.*
[31] Baker, *supra* note 5, at 170 ("The ICC arbitrates disputes arising in a wide range of legal areas, including contract, employment, family, personal injury, and landlord-tenant").
[32] *Id.*
[33] *Id.*

in its choice of law provisions.[34] Although arbitrators are allowed to consider state, federal, or local laws, the Bible is to be "the supreme authority governing every aspect of the conciliation process."[35] Secondly, arbitrators have broad discretion to structure remedies "they deem scriptural, just and equitable."[36]

2. Jewish Arbitration

Given its extensive history and development, the Jewish arbitration system in America is highly sophisticated.[37] Jewish arbitration dates as far back as the second century and was eventually brought to the United States.[38] As early as the 1900s, there is evidence of not just Jewish tribunals functioning, but even of state enforcement of judgments rendered by Jewish tribunals.[39] As scholar Michael Broyde writes, "[t]he distinction of being first to perfect religious arbitration in the United States thus belongs not to any Christian denomination, but rather to the Jewish community."[40]

Parties wishing to utilize Jewish arbitration typically submit their claims to a beth din.[41] The Beth Din of America ("BDA") has the most extensive network of Jewish tribunals.[42] The BDA hears both secular and religious disputes.[43] There are three ways an arbitration proceeding before a beth din can arise: (i) by including an arbitration clause agreeing to arbitrate before a beth din in a contract; (ii) by executing an agreement to arbitrate after a controversy arises; or (iii) if a

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[34] *Id.*
[35] *ICC Rules of Procedure for Christian Conciliation* § 4, INST. FOR CHRISTIAN CONCILIATION, https://www.aorhope.org/icc-rules (last visited Nov. 12, 2022).
[36] *ICC Rules of Procedure for Christian Conciliation* § 40.B, INST. FOR CHRISTIAN CONCILIATION, https://www.aorhope.org/icc-rules (last visited Nov. 12, 2022).
[37] LaValle, *supra* note 18, at 631.
[38] Broyde, *supra* note 4, at 80.
[39] *See id.* at 80–81.
[40] *Id.* at 81.
[41] Baker, *supra* note 5, at 166.
[42] *Id.*
[43] *See* Randy L. Sturman, *House of Judgment: Alternate Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417, 418 (2000).

beth din sends an invitation on behalf of a claimant.[44] When arbitrating a dispute, the panel of arbitrators utilizes Jewish law as its baseline, but parties can contract as to the type of Jewish law they would prefer.[45] In disputes concerning commercial matters, parties can agree to allow the beth din to consider the normative industry standard.[46]

Jewish arbitration proceedings conducted by the BDA have similarities to secular arbitration proceedings.[47] For example, parties are entitled to have neutral arbitrators appointed and are given time to challenge the arbitrator selection on the basis of bias.[48] Parties also have a non-waivable right to an attorney.[49] Lastly, although the proceeding does not have to comply with the rules of evidence, parties are permitted to "give a statement clarifying the issues, call witnesses, present evidence, and raise defenses."[50] Given the extent of its formalized proceedings, secular courts often review and enforce the decisions of batei din.[51]

3. Islamic Arbitration

Religious arbitration is also utilized among members of the Islamic community, although not as commonly as it is in the Christian and Jewish traditions.[52] The Muslim community lacks a formal arbitration body like the BDA, but attempts to establish such a body have been made.[53] For example, the Counsel of Masajid attempted to establish Islamic arbitration councils nationwide in 1998.[54] Perhaps because of the absence of a formal arbitration body, Muslim arbitration

[44] Baker, *supra* note 5, at 167.
[45] *Id.* at 168.
[46] *Id.*
[47] LaVallee, *supra* note 28, at 631.
[48] Baker, *supra* note 5, at 168.
[49] *Id.*
[50] *Id.* at 169.
[51] *See id.* at 166.
[52] *See id.* at 170.
[53] Hutler, *supra* note 6, at 344. It is important to note that states and organizations have propagated fear against the use of "Islamic law," but some of these efforts have been stopped by courts. *See* Singh, *supra* note 2, at 378. However, courts have struck down such laws. *See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1128–29 (10th Cir. 2012) (striking down Oklahoma's law on the basis that it violates the Establishment Clause).
[54] Baker, *supra* note 5, at 170.

currently appears to function more at the local level, with some groups developing their own rules and procedures.[55] When implemented, Muslim arbitration typically involves imams applying sharia law to resolve legal disputes between members of the Islamic community.[56]

C. History of Secular Arbitration

Although modern secular arbitration has its roots in the enactment of the FAA in 1925, arbitration was used prior to this time.[57] Despite the utilization of arbitration in the late nineteenth century, courts were initially skeptical, believing that it "usurped their jurisdiction because people could make their own law and even disregard the judicial process."[58] However, in response to requests by commercial and legal groups, Congress enacted the FAA.[59]

Despite the FAA's enactment, courts continued to be wary of arbitration.[60] Courts were concerned that arbitrators would be incapable of resolving complex claims, such as those arising under federal statutes, and that this would render their remedies deficient.[61] But by 1960, the Supreme Court came to endorse arbitration, rejecting the argument that "arbitration provides for unqualified neutrals to rule on legal issues."[62] In the 1980s, the Court's recognition that sections Two[63] and Three[64] of the FAA manifest a "liberal federal policy favoring arbitration

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[55] *Id.* at 171. It seems like the use of arbitration among Muslim communities and the enforcement of such agreements and resulting awards by secular courts are still nascent. As such, "there are currently only a handful of American cases that even reference arbitration before an Islamic tribunal." *Id.*
[56] Hutler, *supra* note 6, at 344.
[57] Shai Silverman, *Before the Godly: Religious Arbitration & the U.S. Legal System*, 65 DRAKE L. REV. 719, 726 (2017).
[58] Singh, *supra* note 2, at 368.
[59] *Id.*; 9 U.S.C. §§ 1–16 (2022).
[60] Helfand, *supra* note 1, at 3000.
[61] *Id.* at 3001.
[62] Singh, *supra* note 2, at 368 (citing *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*, 388 U.S. 396–97 (1967)).
[63] "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4." 9 U.S.C. § 2.
[64] "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that

agreements,"[65] in addition to other pro-arbitration rulings, strengthened arbitration as an institution.[66] As such, the Court now views the decision to arbitrate as 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.'"[67]

With the increased recognition of arbitration in federal court, the Uniform Arbitration Act (UAA) was promulgated in 2000.[68] It provides for broad enforcement of arbitration agreements.[69] Thirty-five states have adopted the UAA; fourteen have adopted statutes similar to the UAA.[70] The adoption of these state analogues to the FAA demonstrates a policy of enforcing arbitration agreements at the state level as well.[71]

III. How Modern Arbitration Works

A. Secular Arbitration

The FAA is founded upon the application of contract law.[72] Through the use of arbitration agreements parties forego resolution via the court system and submit to a third-party's judgment instead.[73] The FAA provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid,

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the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

[65] *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S.1, 24 (1983).

[66] Singh, *supra* note 2, at 369.

[67] Helfand, *supra* note 1, at 3001 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)).

[68] UNIF. ARB. ACT § 6 (UNIF. L. COMM'N 2000).

[69] Singh, *supra* note 2, at 372.

[70] *Id.*

[71] *Id.*

[72] Silverman, *supra* note 57, at 728.

[73] Hutler, *supra* note 6, at 346.

> irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.[74]

The Court expanded the reach of Section Two by holding that cases involving interstate commerce fall under the FAA.[75] In 1989, the Court also held that whenever a basis for applying federal law is present in a case, state courts must apply the FAA.[76] The Supreme Court's liberal construction of the FAA has created a legal presumption in favor of enforcement of arbitration awards.[77]

Under the FAA and similar state statutes, there are generally two means for the judicial enforcement of arbitration agreements.[78] First, a judge can grant a motion to compel arbitration and dismiss the lawsuit at bar where the parties previously agreed to arbitrate.[79] Where a court finds a valid arbitration agreement, it must compel arbitration.[80] Second, a judge can enforce an arbitration award.[81] Both of these means of judicial enforcement are subject to general contract law limits, such as fraud, duress or unconscionability.[82] Additionally, a party who desires for an arbitration award to have binding force must seek confirmation of the award from a court.[83]

A party to an arbitration agreement can seek to vacate the arbitration award, but will face a heavy burden.[84] Pursuant to Section Ten of the FAA, arbitration awards are presumptively valid and judicial vacatur is permissible only if one of the four statutory grounds is met.[85] There are also two court-made vacatur grounds: the public policy ground and the manifest disregard

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[74] 9 U.S.C. § 2.
[75] *Prima Paint*, 388 U.S. at 404.
[76] *See Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468 (1989).
[77] *Id.* at 347.
[78] *Id.*
[79] *Id.*
[80] 9 U.S.C. § 4.
[81] Hutler, *supra* note 6, at 347.
[82] *Id.*
[83] Baker, *supra* note 5, at 162; 9 U.S.C. 9.
[84] *See* Singh, *supra* note 2, at 400.
[85] *Id*; 9 U.S.C. § 10(a).

ground.[86] The public policy ground vacates an agreement or award where it is contrary to public policy.[87] The manifest disregard allows for vacatur when an arbitrator exhibits manifest disregard for applicable law, but this goes beyond simply misunderstanding or misapplying the law.[88]

For some parties, arbitration is preferable over going to court because arbitration minimizes costs, the proceedings can be kept private, and parties can shape the proceedings.[89] The use of arbitration has been on the rise.[90]

B. Religious Arbitration in the FAA Context

A religious arbitration agreement is a "contract or contractual provision according to which parties agree to resolve some of all of their past or future legal disputes through a religiously affiliated arbitrator."[91] Parties may choose to enter into a religious arbitration at one of two phases: before a conflict arises or once a dispute has arisen.[92] There are generally two types of religious arbitration agreements.[93] The first kind has a religious leader conduct the arbitration.[94] The second kind employs a secular arbitrator who applies religious rules in coming to its decision.[95] Although the FAA does not address religious arbitration, this type of arbitration is generally understood to operate under this, and comparable state, statutory frameworks.[96] Despite this, members of religious groups view religious arbitration as an alternative to alternative dispute resolution.[97] This

[86] Silverman, *supra* note 57, at 729.
[87] *Id.*
[88] *Id.* at 730.
[89] Hutler, *supra* note 6, at 346. *See also* Baker, *supra* note 5, at 161 (discussing how the FAA provides little guidance as to the procedural requirements of an arbitration proceeding, allowing parties to decide how formal—or informal—they would like the proceedings to be).
[90] *See* LaVallee, *supra* note 28, at 629.
[91] Hutler, *supra* note 6, at 342.
[92] Silverman, *supra* note 57, at 732.
[93] Hutler, *supra* note 6, at 346.
[94] *Id.*
[95] *Id.*
[96] Singh, *supra* note 2, at 366, 394 ("[A] religious agreement that submits disputes to arbitration will fall under the FAA definition.").
[97] LaVallee, *supra* note 28, at 630.

view is premised on the belief that the American legal system does not reflect the values or interests inherent in their respective religions.[98]

Because religious arbitration is subsumed under the FAA, judicial review, grounds for enforcement, and grounds for vacatur are the same as those for secular arbitration agreements and awards.[99]

IV. Constitutional Framework

What distinguishes religious arbitration from secular arbitration is namely that the parties' substantive and procedural rights are set by religious doctrine, instead of secular law.[100] This means that judges not only look to contract law and principles, but also consider the Religion Clauses of the First Amendment[101] when reviewing these agreements and awards.[102] Courts' approach to judicial review of religious arbitration has been primarily shaped by the religious question doctrine and neutral principles of law approach.[103] The religious question doctrine "states that courts may not resolve questions or controversies about religious doctrine," and should instead "defer to the highest religious authority for a resolution."[104]

A. Religious Question Doctrine

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[98] *Id.*

[99] *See* Hutler, *supra* note 6, at 347–48.

[100] Baker, *supra* note 5, at 165; Helfand, *supra* note 1, at 3019 ("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 . . . [B]oth the rules and the arbitrators selected by the parties promote religious values embedded within the history of each of these respective faith traditions.").

[101] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

[102] Baker, *supra* note 5, at 172. Silverman, *supra* note 57, at 737–38 ("Whatever the underlying dispute, compelling a party to arbitrate before a faith-based tribunal conceptually implicates at least three distinct First Amendment concerns. First, by compelling a party who seeks to adjudicate a dispute in court to instead arbitrate before a faith-based tribunal applying religious law – albeit after having agreed to do so at some point – a court is effectively forcing the party to participate in a religious act against its will. In doing so, the court may violate the party's First Amendment rights under the Free Exercise Clause. Second, in compelling parties to arbitrate before a religious tribunal, a court may be perceived as tacitly endorsing that tribunal as a legitimate arbiter of justice. [. . .] Finally, that same tacit endorsement may present a different Establishment Clause problem under *Lemon v. Kurtzmann*, in that it can be conceived of as excessive entanglement by the government with religious institutions.").

[103] *See* Baker, *supra* note 5, at 172.

[104] Hutler, *supra* note 6, at 366.

The origins of the religious question doctrine can be traced to *Watson v. Jones*,[105] in which the Court recognized that courts should treat disputes with religious content differently.[106] In *Watson*, the Walnut Street Presbyterian Church, which was under the authority of the larger Presbyterian Church, owned a plot of land in Louisville, Kentucky.[107] The aftermath of the Civil War caused the issue of slavery to stir up among the congregation, with a majority of the congregation being anti-slavery and a majority of the local church leadership being pro-slavery.[108] This led the church to split into competing factions and to dispute who was entitled to exclusively use the property on the land.[109] In deciding the case, the Court noted that there were three general types of church property disputes.[110] The Court found that this particular dispute fell within the third type, in which a general church organization has control over a subordinate religious congregation.[111]

In such cases, the Court found that courts must accept the decisions of the larger religious institution "whenever . . . questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided," so as to prevent courts from having to inquire into "the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization."[112] Given that the larger General Assembly of the Presbyterian Church had control over the Walnut Street Church, its decision to allow the anti-slavery members to retain possession of the church was controlling.[113]

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[105] *Watson v. Jones*, 80 U.S. 679 (1871).
[106] Baker, *supra* note 5, at 172.
[107] *Watson*, 80 U.S. at 683.
[108] *Id.* at 684–86.
[109] *Id.* at 692.
[110] *Id.* at 722.
[111] *Id.* at 722–23.
[112] *Id.* at 727, 733.
[113] *Id.* at 727, 735.

In *Kedroff v. St. Nicholas Cathedral*,[114] the Court further reaffirmed its deferential approach to church-body decision-making. *Kedroff* involved a church property dispute with the underlying issue of whether the Patriarch of Moscow or a convention of the American churches, pursuant to New York law, had the authority to choose the head of the Russian Orthodox Church in America.[115] After finding the New York statute unconstitutional because it violated the Free Exercise clause,[116] the Court found that the Moscow branch of the Russian Orthodox Church had not relinquished its power to appoint the head of the American church.[117] Accordingly, the Court vacated the lower court's decision in favor of the American branch.[118] It reasoned that "[e]ven in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls."[119]

In *Serbian Eastern Orthodox Diocese for United States & Canada v. Milivojevich*,[120] the Supreme Court extended this principle of deference beyond the context of religious property disputes. The petitioner, the Serbian Eastern Orthodox Diocese (hereinafter "the Church"), vested the Holy Assembly with the authority to appoint the Diocese's bishop.[121] Respondent Milivojevich was appointed bishop in 1939.[122] The reorganization of the Church led to internal disputes, and ultimately Milivojevich was removed and defrocked in 1963.[123] Milivojevich brought suit, requesting reappointment as the "true Diocesan Bishop."[124] After protracted

[114] *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952).
[115] *Kedroff*, 344 U.S. at 96–97.
[116] *Id.* at 107.
[117] *Id.* at 120.
[118] *Id.* at 121.
[119] *Id.* at 120–21. In *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), the Court affirmed *Kedroff* and again set aside the lower courts' judgments which gave the American churches authority over the church property.
[120] *Serbian Eastern Orthodox Diocese for United States & Canada v. Milivojevich*, 426 U.S. 696 (1976).
[121] *Id.* at 701.
[122] *Id.* at 702.
[123] *Id.* at 705.
[124] *Id.* at 707.

litigation, the Illinois Supreme Court set aside Milivojevich's defrocking for arbitrariness since the internal church procedures "were not conducted to [its] interpretation of the [c]hurch's constitution and penal code."[125] The Supreme Court reversed, finding that the Illinois Supreme Court's "detailed review" and evaluation of the Church's actions were "impermissible" as a matter of First Amendment law.[126] The Supreme Court noted that the Illinois Supreme Court had unconstitutionally engaged in the resolution of "quintessentially religious controversies whose resolution the First Amendment" commits to ecclesiastical determination.[127]

Although the religious question doctrine is highly deferential, it is not boundless. In *Gonzalez v. Roman Catholic Archbishop of Manila*,[128] the Court affirmed the lower court decision that deferred to the Roman Catholic Archbishop of Manila's determination that the petitioner did not meet the requirements to be appointed as a chaplain.[129] The Court found that the Archbishop's determination was unreviewable since it was a function of the church's law.[130] The Court stated: "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."[131]

B. Neutral Principles of Law

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[125] *Id.* at 708.
[126] *Id.* at 718. In coming to this conclusion, the Court did not bar lower courts from reviewing and setting aside church property dispute decisions on arbitrariness grounds. The Court overturned the Illinois Supreme Court's decision finding arbitrariness not because the Illinois Supreme Court couldn't use arbitrariness as a ground, but because in coming to the arbitrariness conclusion, the Illinois Supreme Court improperly delved too deeply in its assessment of how the church had originally come to its defrocking decision. *Id.* In particular, the Court noted how the Illinois Supreme Court's assessment impermissibly weighed witness testimony, ignored procedural decisions made by the Church's highest adjudicatory body, and discounted canon law. *Id.* at 718–19. In essence, the Illinois Supreme Court engaged in "judicial rewriting of church law." *Id.* at 719.
[127] *Id.* at 720.
[128] *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).
[129] *Id.* at. 18.
[130] *Id.* at 16.
[131] *Id.*

The Court's decision in *Jones v. Wolf* marked a shift in the religious question doctrine.[132] *Wolf* involved another church property dispute, this time as a result of a schism within the Vineville Presbyterian Church of Macon, Georgia, which belonged to the Presbyterian Church in the United States ("PCUS").[133] A majority of the Vineville church members decided to separate from PCUS and join the Presbyterian Church in America, but retained and used the Vineville property.[134] The minority of members brought suit, arguing they had the right to exclusive possession.[135] The Georgia trial court utilized the neutral principles approach to hold that the property belonged to the majority member group.[136] The neutral principles of law approach, pursuant to Georgia law, consisted of examining available property deeds, trusts, corporate charter, and legal title to property to resolve disputes.[137]

The Supreme Court held that states could adopt the neutral principles of law approach to resolve church property disputes since this approach did not violate the Religion Clauses of the First Amendment.[138] The Court reasoned that this approach was consistent with the clauses because it promises non-entanglement and neutrality.[139] By relying on concepts familiar to lawyers and judges, civil courts are promised complete freedom from examining questions of "religious doctrine, polity, and practice."[140] The Court also noted that this approach would provide courts with general flexibility to ensure that private rights and obligations ordered reflect the

[132] Baker, *supra* note 5, at 173. The Court had previously mentioned "neutral principles of law" could be used to resolve a church property dispute in cases like *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969), but it was in *Wolf* that this was embraced and allowed as an alternative approach to resolving these disputes.
[133] *Wolf*, 433 U.S. at 597–98.
[134] *Id.* at 598.
[135] *Id.* at 598–99.
[136] *Id.* at 601.
[137] *Id.* at 600–01.
[138] *Id.* at 603–04.
[139] *Id.* at 604 ("[T]he promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application.").
[140] *Id.* at 603.

parties' intentions.[141] So long as courts can properly apply the neutral principles of law approach, avoiding inquiry into religious doctrine, their ruling does not run afoul of the Religion Clauses.[142]

V. Analysis

As a result of *Wolf*, courts now have the freedom to decide whether to apply the neutral principles of law approach or to defer to the religious body's decision.[143] Courts increasingly turn to the neutral principles of law approach when faced with a religious arbitration agreement dispute.[144] When confronted with such a dispute, the court will determine whether traditional principles of contract law can be used without addressing any underlying religious dispute.[145] However, when a religious arbitration agreement contains an ambiguous religious term, courts will not enforce the agreement.[146] They fear that interpreting the meaning of the religious term and deciding which interpretation is correct will constitute an unconstitutional endorsement.[147]

Including religious arbitration within the broader secular regulatory scheme has produced procedural secularization, which, coupled with the lack of substantive review by courts under the Religion Clauses, has negatively affected the American legal system. At first glance, the increase in procedural secularization among religious arbitration could suggest that parties are afforded

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[141] *Id.*

[142] *See id.* at 604–05; Hutler, *supra* note 6, at 367 ("Following *Jones*, some courts have interpreted the neutral principles of law approach to create a requirement that courts resolve civil disputes between coreligionists on the basis of neutral principles whenever possible—including by means of enforcing arbitration agreements.").

[143] Baker, *supra* note 5, at 173.

[144] Baker, *supra* note 5, at 176; Silverman, *supra* note 57, at 739 ("[The neutral principles] doctrine has proven a powerful tool in practice – courts regularly use the doctrine to defend their jurisdiction to decide the validity of religious arbitral agreements in the face of First Amendment challenges.").

[145] Baker, *supra* note 5, at 177. *See, e.g.*, *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354–55 (D.C. 2005) (finding that because the parties did not dispute the meanings of "Beth Din" or "Din Torah," the court could resolve the case by applying contract law principles).

[146] Baker, *supra* note 5, at 177–78. "A civil court's refusal to overturn a religious determination effectively upholds the validity of that determination, but withholds the government's enforcement power. The religious group is left to enforce its own decrees through whatever social pressure it can use against its members." Michael G. Weisberg, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. MICH. J.L. REFORM 955, 972 (1992).

[147] Baker, *supra* note 5, at 177–78. *See, e.g.*, *Sieger v. Sieger*, 747 N.Y.S.2d 102, 103 (N.Y. App. Div. 2002) (refusing to apply the neutral principles of law approach since the phrase "regulations of Speyer, Worms, and Mainz" was ambiguous.).

more rights than if religious procedural law applied. But once increased procedural secularization is coupled with minimal judicial review as a byproduct of the religious question doctrine and neutral principles of law approach, some parties are worse off in religious arbitration than secular arbitration when it comes to certain substantive rights. Being worse off with regards to substantive rights can result in free exercise violations for some parties to a religious arbitration. Some parties are not afforded the remedies they otherwise would have in the civil court system. This demonstrates how religious arbitration creates dual systems of review and enforcement.

A. Increased Procedural Secularization Within Religious Arbitration

The inclusion of religious arbitration within the broader FAA framework produces increased secularization in procedural matters within religious arbitration agreements and proceedings.[148] Increased procedural secularization refers to how religious institutions have streamlined procedural requirements in their agreements and proceedings so that they more closely mirror those in secular arbitration. The increase in procedural secularization is exemplified in four ways.

First, increased secularization in procedure among religious arbitration is demonstrated by the inclusion of women as witnesses in Jewish arbitration proceedings. Under traditional Jewish law, women, minors, handicapped individuals, and non-Jews are not allowed to provide witness testimony.[149] However, evidence suggests that in actual contemporary practice, this is no longer the practice.[150] Second, when contracting for a pre-dispute religious arbitration agreement, the

[148] Silverman, *supra* note 57, at 739 ("The doctrine of neutral principles thus embodies the categorical approach to religious law: it allows courts to place religious legal disputes into familiar and well-established secular legal categories.").
[149] Baker, *supra* note 5, at 187.
[150] *See* Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOREIGN AFF. 339, 356 (2000) ("Under Jewish law, women are not qualified to be witnesses in the manner in which the institute of testimony was conceived by Jewish law. Halakhic authorities throughout the ages, however, have found various solutions and means to accept women's testimony. Hence, rabbinical courts routinely accept women's testimony and practically accord it the same evidentiary weight that is accorded to men's testimony.").

Beth Din of America allows parties to include a choice of law provision.[151] Parties can elect to arbitrate under *din*, a stricter body of law, or *p'shara krova l'din*, a law that "allows arbitrators to consider the relative equities of the parties in determining an award."[152] This suggests that despite having certain laws on the books, in practice Jewish batei din approach procedural rules more liberally in religious arbitration proceedings.

The third example of secularization is shown in the consideration of commercial industry standards in Jewish arbitration proceedings, even when violative of Jewish law.[153] In *Colossal Containers, Inc. v. Exquisite Crafts, Inc.*,[154] a dispute between two business entities over defective plastic bags, the BDA described Jewish law at length, but ultimately stated that if industry custom was contrary, industry custom would override Jewish law.[155] Jewish law, unlike American contract law, does not have an option to cover or a seller's right to cure.[156] Once again, this suggests a willingness to liberally construe choice of law selection, since the BDA is willing to consider secular commercial practices when coming to a determination.

Lastly, the ICC's boilerplate language for arbitration agreements demonstrates how religious bodies have adjusted their agreements to conform to courts' expectations.[157] ICC provides employers with several "copy-and-paste" arbitration provisions for employment

[151] Baker, *supra* note 5, at 168.
[152] *Id.*
[153] *Id.*
[154] *Colossal Containers, Inc. v. Exquisite Crafts, Inc.* (2004), reprinted in 1 THE J. OF THE BETH DIN OF AMERICA 77 (2012), http:www.yutorah.org/lectures/lecture.cfm/774340/beth-din-of-america/journal-of-the-beth-din-of-america-volume-1/.
[155] *Id.* at 78.
[156] Silverman, *supra* note 57, at 757.
[157] Baker, *supra* note 5, at 176; Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 NY.L. SCH. L. REV. 1, 2 (2012).

contracts.[158] Courts have upheld arbitration agreements or awards in a variety of factual scenarios when they included provisions such as, or similar to, the following:[159]

> The parties to this agreement are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian community in conformity with the biblical injunctions of 1 Corinthians 6:1-8, Matthew 5:23-24, and Matthew 18:15-20. Therefore, the parties agree that any claim or dispute arising out of or related to this agreement or to any aspect of the employment relationship, including claims under federal, state, and local statutory or common law, the law of contract, and law of tort, shall be settled by biblically based mediation. If the resolution of the dispute and reconciliation do not result from mediation, the matter shall then be submitted to an independent and objective arbitrator for binding arbitration.[160]

By adapting to courts' expectations, religious bodies or forums for religious arbitration increase the likelihood that their agreement will be recognized, and that arbitration will be compelled even under the neutral principles of law approach. Because there is a valid contractual provision, absent evidence of fraud, duress, or arbitrariness, arbitration will be compelled. However, in determining the existence of fraud, duress, or arbitrariness, courts' usage of the neutral principles of law approach is detrimental to some participants.

B. Decreased Substantive Contractual Rights

1. Duress

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[158] LaVallee, *supra* note 28, at 642.

[159] *See, e.g.*, *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1106 (D. Colo. 1999) (arbitration agreement in contract for audio-visual services referring to Rules for Procedure for Christian Conciliation ("RPCC")); *Prescott v. Northlake Christian Sch.*, 369 F.3d 491 (5th Cir. 2005) (arbitration agreement in employment contract referring to RPCC); *Spivey v. Teen Challenge of Fla. Inc.*, 122 So.3d 986, 988 (Fla. Dist. Ct. App. 2013) (service agreement signed by patient admitted to drug rehabilitation facility providing for binding arbitration in accordance with RPCC); *Higher Ground Worship Ctr., Inc. v. Arks, Inc.*, No. 1:1 1-cv00077-BLW, 2011 WL 4738651, at *1 (D. Idaho Oct. 6, 2011) (arbitration provision in lease-and-purchase agreement providing for arbitration in accordance with the Rules of Procedure for Christian Conciliation and citing to Matthew 18:15-20 and 1 Corinthians 6:1-8); *Gen. Conf. of Evangelical Methodist Church v. Faith Evangelical Methodist Church*, 809 N.W.2d 117 (Iowa Ct. App. 2011) (arbitration agreement between church and governing religious body referring to RPCC).

[160] *Contract Clauses: Employment Conciliation Clause* 1, INST. FOR CHRISTIAN CONCILIATION, https://www.instituteforchristianconciliation.com/clauses/ [https://perma.cc/B629-AVRZ] (last visited Oct. 26, 2022).

The primary demonstration of how the neutral principles of law approach detrimentally affects some parties to a religious arbitration is through courts' failure to find duress, despite the presence of community pressure. Duress is a "neutral principle of law," and yet when a party to a religious arbitration challenges the agreement, courts are not receptive to these arguments.

For example, *Lieberman v. Lieberman*[161] demonstrates the rejection of a duress argument. In that case, the court rejected the argument that the threat of *sirov* amounted to duress.[162] As was discussed in Part II.B.2, one of the ways an arbitration proceeding before a beth din can arise is if the beth din sends an invitation on behalf of a claimant.[163] This invitation is known as a *sirov*.[164] Dependent on the given community, a *sirov* "can amount to a shunning order—an instruction to the Jewish community to turn its back on this party."[165] The *sirov* does not just result in social ostracization, but also "exclusion from religious rites, and [. . .] communal economic sanctions."[166]

In *Lieberman*, the plaintiff wife challenged the defendant husband's motion to confirm their arbitration award on grounds of duress.[167] The wife initially filed for divorce in court, but received an invitation to arbitrate from the Beth Din.[168] Responding to the wife's duress argument,

[161] *Lieberman v. Lieberman*, 566 N.Y.S.2d 490 (N.Y. Sup. Ct. 1991).
[162] *Id.* at 494.
[163] *See* Part II.B.2.
[164] Baker, *supra* note 5, at 167.
[165] *Id.*
[166] Silverman, *supra* note 57, at 744; *see, e.g., Adelhak v. Jewish Press Inc.*, 985 A.2d 197 (N.J. Super. Ct. App. Div. 2009) (boycott of physician's practice). *Cf.* LaVallee, *supra* note 28, at 641 ("Christian communities do not have a formal analog to a seruv but have used 'informal communal pressure to compel members of the faith—as well as those who no longer wish to remain members—to resolve litigious matters internally.'") (quoting BROYDE, *supra* note 4, at 3).
[167] *Lieberman*, 566 N.Y.S.2d at 494; *see also Mikel v. Scharf*, 432 N.Y.S.2d 602, 606 (Sup. Ct. 1980) ("Undoubtedly, pressure was brought to bear to have them participate in the [religious arbitral proceeding], but pressure is not duress. Their decision to acquiesce to the rabbinical court's urgings was made without the coercion that would be necessary for the agreement to be void.").
[168] *Lieberman*, 566 N.Y.S.2d at 492.

the court stated that "[w]hile the threat of a [s]irov may constitute pressure, it cannot be said to constitute duress."[169] As a result, the husband prevailed.[170]

Failing to recognize communal pressure as duress in this context is problematic for two reasons. First, it minimizes the experience of a party who may have been the victim of a *sirov* or similar communal pressure.[171] Second, it produces a contradiction within the neutral principles of law doctrine. Although courts have the ability to look at whether duress is evident, they cannot find community pressure to amount of duress because that would entail accounting for and ascribing religious value to the communal pressure. A court would have to recognize that although the pressure may be insufficient under secular contract law, in the religious context the community pressure carries greater weight. For example, recognizing the importance of the *sirov* in the context of the Jewish community would require courts to consider Jewish religious custom. Such an inquiry would violate the broader religious question doctrine framework the neutral principles of law approach is nestled in.

2. Unconscionability

Another instance of courts misapplying contract law in cases involving religious arbitration occurs when parties raise unconscionability arguments. Courts' deference to the religious arbitrating body's decisions, because of the religious question doctrine, impede them from truly assessing claims of unconscionability when a party seeks to challenge an arbitration award.

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[169] *Id.* at 494.
[170] *Id.* at 496.
[171] *Cf. Helfand*, *supra* note 1, at 3042 ("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.").

To bring an unconscionability claim, parties must demonstrate both procedural and substantive unconscionability.[172] To demonstrate substantive unconscionability, a party may argue that the arbitration procedures were unfair or that the arbitrators were biased in some way.[173] Because arbitrators in the religious context rely on religious law to shape their behavior and considerations, courts take on a deferential approach when assessing substantive unconscionability. They defer to the religious body carrying out the arbitration.

This is exemplified in the case *Garcia v. Church of Scientology Flag Ser. Org., Inc*.[174] Luis and Maria Garcia, former members of the Church of Scientology ("the Church"), brought suit against two nonprofit entities associated with the Church of Scientology, seeking refunds of their donations and payments.[175] The Church leadership had declared the Garcias to be "suppressive persons," as a result of their departure.[176] Throughout the course of their membership, however, the Garcias signed multiple enrollment applications for religious services that contained arbitration agreements.[177] The Garcias argued that they did not receive a fair arbitration proceeding because "Scientology doctrine would compel any Scientologist in good standing to be hostile against them, which would make it impossible for them to receive a fair and neutral arbitration."[178] They presented evidence of their interpretation of the doctrine, but so did the Church.[179] The appellate court affirmed the district court's ruling that it could not entertain the substantive unconscionability argument because the First Amendment prevented it from doing so.[180] The appellate court

[172] Helfand, *supra* note 1, at 3043–3044.
[173] Hutler, *supra* note 6, at 349.
[174] *Garcia v. Church of Scientology Flag Ser. Org., Inc.*, No. 18-13452, 2021 U.S. App. LEXIS 32601 (11th Cir. Nov. 2, 2021).
[175] *Id.* at *3–4.
[176] *Id.*
[177] *Id.* at *6.
[178] *Id.* at *26.
[179] *Id.* at *27.
[180] *Id.*

reasoned: "The First Amendment barred the district court from resolving this underlying controversy about church doctrine. [. . .] To do so would have required it to decide whether the Garcias or [the Church] 'more correctly perceived the commands of the Scientology religion.'"[181] The courts completely disregarded the substantive unconscionability argument.[182]

Once again, this court, like others, was unwilling to consider a substantive unconscionability argument, one of the few arguments available under the neutral principles of law approach. As with duress, this creates a contradiction within this approach. What this contradiction ultimately results in is that the party challenging the agreement, proceeding, or award has no recourse. The neutral principles of law approach is a futile means of challenging the arbitration, and the religious question doctrine prevents courts from inquiring into any matters determined based on doctrine. This leaves some parties to religious arbitration agreements and proceedings worse off vis-à-vis their secular counterparts who choose to enter into an arbitration agreement.

C. The Impact on the American Legal System of Increased Procedural Rights and Decreased Substantive Contractual Rights in Religious Arbitration

The combination of increased secularization of procedural rights with decreased substantive contractual rights has produced two separate systems of dispute resolution, which produce disparate remedies. Since courts are reluctant to review religious arbitration proceedings and awards for fear of violating the Religion Clauses, parties to religious arbitration can receive awards that would be impermissible under analogous federal or state law.

[181] *Id.* at *27–28.
[182] *Id.* at *28 ("Without any other evidence of substantive unconscionability and no degree of procedural unconscionability, the Garcias have not met their burden to prove the arbitration agreements unconscionable.").

The case of *Prescott v. Northlake Christian School*[183] is illustrative. Northlake Christian School ("NCS") fired its principal Pamela Prescott.[184] She brought Title VII and several state law claims, including one for breach of contract.[185] However, NCS successfully moved to compel arbitration according to the Rules of Procedure for Christian Conciliation of the ICC.[186] Prescott's arbitration award consisted of $150,000 in damages.[187] The arbitrator reasoned that "NCS had wrongfully discharged Prescott by failing to follow Biblical precepts, as required in her employment contract; specifically, the conflict resolution process described in Matthew 18."[188] It is important to note that Louisiana law would not permit such a remedy, yet the court confirmed the award and denied NCS's motion for vacatur.[189]

NCS argued that by including a Louisiana choice-of-law provision in the employment contract, Louisiana law governed the employment relationship and limited the damages that could be awarded in arbitration.[190] The court disagreed, finding that neither the employment nor the arbitration agreements expressly addressed this matter.[191] Instead, the references to the ICC's Rules of Procedure provision allowing for "scriptural, just and equitable" relief in both agreements addressed the matter.[192] Because the arbitration award was premised on this provision, the arbitrator's award was rationally derived from the agreements, and vacatur was not in order.[193]

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[183] *Prescott v. Northlake Christian Sch.*, 141 Fed. App'x 263 (5th Cir. 2005).
[184] *Id.* at 265.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 271, 273.
[190] *Id.* at 273.
[191] *Id.*
[192] *Id.* at 273–274.
[193] *Id.* at 274 ("Whether such a contract is sustainable under Louisiana law is not a question for this court: The parties freely and knowingly contracted to have their relationship governed by specified provisions of the Bible and the Rules of the ICC, and the arbitrator's determination that NCS had not acted according to the dictates of Matthew 18 relates to that contract.").

The *Prescott* decision demonstrates how religious arbitration can produce remedies unavailable in analogous federal or state law proceedings. The *Prescott* case may have resulted in a favorable award to the weaker party to the agreement, but this will not always be the case. Such disparate outcomes are problematic because they undermine the protections the law has set in place. Given the body of precedent relating to the enforcement of religious arbitration awards, there is room for a court to enforce an award that allows for discrimination so long as the arbitrator can couch their determination in terms of religious doctrine, for example. A potential solution to this problem, however, could be legislation that regulates religious arbitration awards contrary to public policy. The adoption of such legislation is possible,[194] but implicates other First Amendment concerns.

VI. Conclusion

Religious arbitration is an alternative to ADR whereby parties submit their disputes to arbitration conducted by a religious tribunal or by a lay person. In both instances, religious doctrine or law is considered when fashioning an arbitration award. Religious arbitration falls within the scope of the FAA. In practice, this leads religious tribunals or institutions to adopt language in their agreements that closely mirrors that of secular agreements. This, at times, results in increased procedural rights during the course of religious arbitration proceedings.

Religious arbitration agreements are also subject to the constraints of First Amendment jurisprudence concerning the religion clauses, however. Although the Supreme Court initially relied on a completely deferential approach to church property dispute cases through the consideration of the religious question doctrine, *Jones v. Wolf* introduced the neutral principles of law approach, which is used by many courts today when asked to review a religious arbitration

[194] Courts have recognized public policy exceptions in child custody disputes. *See* Silverman, *supra* note 57, at 749 (discussing vacatur of religious arbitration agreements).

agreement or award. Contrary to what one might assume, the use of neutral principles does not always provide a fairer outcome. As applied to religious arbitration agreements, the neutral principles of law approach produces decreased substantive contractual rights because courts fail to recognize community pressure as duress and a showing of religious bias in arbitration proceedings as substantive unconscionability.

Ultimately, the combination of increased procedural rights and decreased substantive contractual rights produces disparities between religious arbitration awards compared to analogous state or federal law remedies.