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## **\*17 CONTRACT LAW SHOULD BE FAITH NEUTRAL: REVERSE ENTANGLEMENT WOULD BE STRANGLEMENT FOR RELIGIOUS ARBITRATION**

### **INTRODUCTION**

For nearly a century, the sunlight of the Federal Arbitration Act (FAA) has encouraged the growth of religious alternative dispute resolution. However, many scholars and politicians take offense to the existence and authority of religious tribunals under the FAA paradigm. The recent decision in *Bixler v. Scientology* is the culmination of decades of antipathy towards religious tribunals, and we argue that it was wrongly decided.<sup>1</sup> Here, the Church of Scientology demanded that harassment lawsuits filed against it by former members be resolved in accord with Scientologist law and within a Scientologist tribunal.<sup>2</sup> The California Court of Appeals struck down the arbitration agreement on First Amendment grounds.<sup>3</sup> By forcing the former Scientologists to adhere to a contract which abridged the free exercise of their new, non-Scientology conscience, the arbitration clause was in violation of the right to conversion--their First Amendment right to change their faith.<sup>4</sup> \*18 Essentially, the *Bixler* court has created a new exit right to contracts and a new doctrine in federal arbitration law, only applicable where an arbitration clause delegates dispute resolution through religious avenues.

We have written on the merits of religious arbitration previously: in our recent article, *In Contracts We Trust (And No One Can Change Their Mind!)*, we advocated against exceptions for change-of-religion parties to contracts with faith-based requirements and arbitration clauses.<sup>5</sup> Here, we extend this general argument to rebut the California court: although genuine problems exist within the wide expanse of choice of law and forum clauses in arbitration, treating religious arbitration clauses differently than similar secular arbitration clauses would violate the free exercise rights of the faithful and dramatically change contract law. Arbitration reform is needed, but focusing on religious arbitration alone is an act of misdirection and is detrimental to diverse minority communities--and not only religious ones. To the extent that arbitration can be used as a cudgel for abuse, application of unconscionability defenses can spare weaker parties to arbitration agreements while maintaining a popular avenue for religious free exercise as well as other rules we will develop in this Article.

The first section of this Article will outline the ways in which communities-- religious and other groups, including the LGBTQ+ community--have used and continue to use private law to achieve meaningful dispute resolution. By diminishing the role of civil courts to review arbitrations, parties may tailor their resolutions to prioritize community values that may be misaligned with secular society. Outside of historical religious usage, private law offers a field ripe for jurisprudential growth. Through alternative dispute resolution, affinity-based minority groups can pave an avenue towards justice which accurately reflects the unique values of their lived experiences.

The second section will provide a direct examination of two legal doctrines proffered by opponents of religious arbitration: the *Bixler* religious exit right to contract and the expansion of the state action doctrine through the Reverse Entanglement principle. Both solutions are meant to protect against the unwitting waiver of state and federal rights of weaker parties to

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contract,<sup>6</sup> but both would \*19 effectively abolish religious dispute resolution within the United States. Such rights waivers exist in the commercial arbitration context generally and also involve relationships with inherent power imbalances: consumer and company, employee and employer, etc. There are serious problems with abuse under arbitration law,<sup>7</sup> but we argue that the solutions to those problems reside outside constitutional First Amendment jurisprudence. Furthermore, allowing exit from contracts on First Amendment grounds is a radical change in contract law with countless implications outside of arbitration.<sup>8</sup>

Instead, we propose that unconscionability be used more frequently against abusive arbitration clauses, be they secular or religious in nature. This doctrine is the workhorse of contract law's defenses and offers a thoroughly faith-neutral way of determining bargaining naughtiness. Further, we propose expanding unconscionability through the state action doctrine. There should be a lower standard of unconscionability based on the old doctrine of privity, where arbitration clauses impact non-parties to an agreement.

The *Bixler* religious exit right and the proposed Reverse-Entanglement principle represent a conflation between secular traditions: it proposes a French *laïcité* solution (which aims to keep religion out of public life) to an American religion pluralist problem (which allows religion to participate on the same terms as all other customs). To us, establishment of secularism is another form of religious establishment, and prohibiting the blossoming use of contract law within faith-based minority communities will not solve the culture wars or bolster contract defenses. We propose allowing both secularism and religion access to the public sphere, and we believe that faith-based extrajudicial tribunals create the path for true American pluralism.

### I. AMERICAN PLURALISM THROUGH PRIVATE LAW

To understand the necessity of religion-neutral contract law, let's entertain a hypothetical.

Say, you pay a hefty deposit to a photographer for your wedding. The photographer performs an engagement shoot for you as part of the wedding package you purchased. A month before the wedding, the photographer calls to announce that they recently underwent a personal religious revival, and a tenet of that religion \*20 requires a permanent pilgrimage to another state--immediately. In fact, the photographer tells you that they have already skedaddled and kept the whole deposit. You protest, and the photographer points to the Act of God Clause in your contract. All further requests and demands for performance or refund are met with a childish "so, sue me!"

So, you sue the photographer. Clearly, the equitable solution here would be to ignore the pesky personality of the photographer, award the photographer payment for the engagement photoshoot, and have the rest of the deposit returned to you. However, if there is the creation of a religious exit right to contract, there is no saving the partial performance--to recognize the legitimacy of the breach would touch on the sincerity of the instantaneous pilgrimage, something judges are hesitant to do already.<sup>9</sup> With regard to whether to honor an arbitration clause, there is no way to equitably split the baby--either the arbitration is allowed or it is not allowed. While law requires a complicated balance of claims and legal rights, a religious exit right to contract tips the scale heavily towards the supremacy of First Amendment rights over contract law.<sup>10</sup>

In a situation where the contract is legitimate and not void nor voidable for abuse or error, we believe this result runs counter to a variety of American legal tenets. Be it an interest secular or religious, contractually created liberties require enforcement of party expectations from when the agreement was signed; to disallow preconflict consensus for the religious would undermine the ability of the faithful to work out their disputes in advance.

Uniquely, private law charts a steady course of progress and development--in contrast to messy and difficult to predict constitutional law. Industry leaders of the early 20th century sought alternative ways to meet and enforce expectations of their deals when their disputes were fumbled by civil court judges who lacked the business knowledge and trade expertise necessary.<sup>11</sup> Similarly, throughout the past century, faith communities have increasingly adopted \*21 choice of law and choice of forum clauses within their contracts. Religious minorities who seek to comingle commerce with religion face an uphill battle when enforcing their agreements: their values are not reflected within civil courts' adversarial decision-making process, and courts are uncomfortable handling religious commerce claims.<sup>12</sup> Instead, religionists have entered the house of private law

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for stability against the storm of political whim and unreliable constitutional protection.<sup>13</sup> American extrajudicial religious tribunals are as old as the FAA, and their use is only becoming more widespread as FAA deference expands.<sup>14</sup> Alternative dispute resolution allows those with alternative legal frameworks bound up with their beliefs to define and enforce their own expectations for their agreements. This benefit is not limited to industry or religious minorities, and we argue that other affinity-based minority communities ought to take advantage of consensus customization within contracts.

Faith-based tribunals hold particular significance for some religious minority communities, and the first section of this Article will trace the rise of religious arbitration throughout the past century. Religious communities, whose free exercise of religion may require followers to arrange their secular matters along faith-based guidelines, utilize arbitration to organize their agreements beyond the reach of the political instability inherent within constitutional jurisprudence. As American culture slips further and further away from Protestant Christianity's hold on justice and morality,<sup>15</sup> faith-based tribunals will only become more important to these communities. Private law has become a secure method to embrace diverse views of values, procedures, and justice.

Private law pluralism can be tailored for a variety of lived experiences, whether dominated by political ideas from the Left, Right, or Center. In the final part of this section, we will forecast the ways that nontraditional communities could learn from and potentially employ choice of forum and law clauses to better support their rights. Specifically, the LGBTQ community would benefit greatly from wresting dispute resolution from unversed and unsympathetic civil courts.

**\*22 A. Co-Affinity Group Commerce and Religious Arbitration**

Like all Americans, the faithful engage in mundane commerce within and outside of their communities; like all Americans, the faithful are often embroiled in disputes over their mundane interpersonal dealings.<sup>16</sup> Unlike all Americans, the faithful occupy a unique position in American jurisprudence--the legal system treats religious parties cautiously, and courts are often unwilling to, or incapable of, involving themselves in religious disputes.<sup>17</sup> The anthem of separation between church and state is a frequent citation,<sup>18</sup> and as a result, judges have developed the “neutral principals of law” doctrine to justify their tentative hand on religiously influenced disputes.<sup>19</sup> With civil rulings based on neutral principles, or “objective, well-established concepts of law,” the courts can soothe their concerns that adjudicating religious disputes “would impermissibly contravene prevailing interpretations of the Establishment Clause.”<sup>20</sup> But inconsistent treatment of faithbased tribunals jeopardizes the rights of the co-religionists<sup>21</sup> to the free exercise of religion. Sometimes, relationships between people are messy, and often, for the parties to move past the dispute, there must be a formalized way to resolve their conflicts. These matters represent genuine disputes, whether courts are willing to address them or not.<sup>22</sup> While these conflicts will get resolved, society must decide whether the matters should be dealt with through internal religious powers rather than through the traditional legal system.<sup>23</sup>

Co-religionists engaged in secular activities walk a tightrope when drafting contracts: they must incorporate enough faith-based concepts to fully define the expectations of a contract, but the more religion inserted into the writing, the more fearful civil courts become \*23 when enforcing agreed-to sanctions of the faith-infused contract.<sup>24</sup> Rather than pass faulty judgment and risk unconstitutional decision-making, civil judges often mishandle and misinterpret coreligionist contracts and ultimately administer insufficient justice for all parties.<sup>25</sup> Sidestepping the Establishment Clause problems and tying religious doctrine into contracts through reference further fails to serve justice. In secular conflicts, courts struggle with whether to include context, or parole evidence, when interpreting ubiquitous contracts; however, courts nearly always prefer strict textual interpretations of religiously influenced contracts.<sup>26</sup> Where extrajudicial regulatory practices such as arbitration fail, the faithful require secular enforcement of contracts that allow for religious tribunals.

Constitutional jurisprudence also fails to resolve co-religionist disputes where faith intertwines with the secular world. First Amendment free exercise jurisprudence requires a “separation of religion from power,” an artificial delineation directly shaped by the West’s unique post-Reformation history.<sup>27</sup> Instead, international comparative analysis of religion reveals that many cultures regularly mix faith, law, and politics--a combination too spicy for current American free exercise jurisprudence to

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handle.<sup>28</sup> Under American law, a religious group would be required to “recognize itself, and articulate this self-recognition, within the terms of liberal national discourse. Religious sensibilities that do not yield to such protocols of legibility cannot be heard in the public domain.”<sup>29</sup> Such a consensus model presupposes that religious minority communities will follow the integrationist model of American Catholics by assimilating into pre-defined and nationally minded “democratic mores.”<sup>30</sup> The state expects the religious to view holy texts as \*24 historical objects, similar to post-Reformation Protestant Christians,<sup>31</sup> and for the faithful to abide by civil authorities' tolerance of their practices.<sup>32</sup> Seemingly, this citizen must be a member of the nation first, and the religious community second. But secular tolerance is a weak foundation upon which to build predictable expectations. Religious minorities who wish to organize their private and public lives to align with their beliefs have turned to the private law wheelhouse, an avenue well-traveled by private businesses throughout the last century.

Modern religious arbitration is an American legal reality. “Biblically based” forums designated by arbitration agreements are enforceable in several jurisdictions.<sup>33</sup> For example, the Beth Din of America is a religious arbitration forum that “obtain[s] Jewish divorces, confirm[s] personal status and adjudicate[s] commercial disputes stemming from divorce, business and community issues” and operates in most states.<sup>34</sup> The Beth Din addresses around 400 family law matters and 100 commercial disputes per year.<sup>35</sup> The Jewish extrajudicial process earned respect from the judiciary despite its procedural differences:<sup>36</sup> “[the Beth Din] method of arbitration has the imprimatur of our own judicial system, as a useful means of relieving the burdens of the inundated courts dealing with civil matters.”<sup>37</sup>

\*25 As another example of legally-recognized religious arbitration, look to the New York Diamond Dealers Club (DDC).<sup>38</sup> The New York DDC is “a member of the World Federation of Diamond [trading club]” where membership allows access to the global diamond industry.<sup>39</sup> The DDC handles around 80% of rough diamonds entering America.<sup>40</sup> As the organization is predominately of Orthodox Jewish membership, they have created an extralegal process that requires consent to religious arbitration before members may access the association.<sup>41</sup> Where conflicts between members arise, arbitrations occur quickly to mitigate damages to the victim.<sup>42</sup> Without general rules similar to those in civil law to limit overwhelming liability,<sup>43</sup> damage awards are an “uncertain component” to a successful arbitration.<sup>44</sup> There are internal and formal appeals processes for disappointed parties; however, decisions are rarely written, and there are no findings of fact in these procedures.<sup>45</sup> Within a small, insular community, close personal relations foment bias.<sup>46</sup> But the arbiters are experts in industry custom,<sup>47</sup> and most importantly, the dispute resolution process is private--a quality that both members and the association prefer.<sup>48</sup> One such example of an “industry custom” is Jewish Law: in conflict with U.S. antitrust law and policy, which encourages competition and inhibits monopolies, traditional Jewish Law permits restriction of specific competitive business practices.<sup>49</sup> Jewish Law mandates price controls, restrictions on interest-based lending, and departs from common law doctrines in matters of land use and nuisance, torts, and other \*26 areas.<sup>50</sup> The flexibility between law and custom demonstrated by Jewish Law is only available through arbitration.<sup>51</sup>

An examination of Christian and Islamic dispute resolution further highlights the benefits and pitfalls of commercial extralegal arbitration for the religious.<sup>52</sup> Christian Conciliation prioritizes, as implied in the name, *conciliation*--a trait that defies the American adversarial dispute resolution process.<sup>53</sup> Following Jesus' admonition of legal jurists,<sup>54</sup> Christian dispute resolution focuses on negotiation and an introspective examination of one's own interests, and then the conflict of individual interests with the greater good.<sup>55</sup> The goal is to repair the relationship between the parties rather than decide a winner or a loser.<sup>56</sup> Lawsuits between Christians are discouraged until other gospel-based processes have been exhausted.<sup>57</sup> Groups like the Christian Dispute Resolution Professionals, Inc. and Peacemaker Ministries apply this dispute resolution model to matters ranging from real estate to insurance to employment to personal injury disputes, providing alternative avenues for dispute resolution rooted in religious texts and values.<sup>58</sup>

\*27 Ambassadors of Reconciliation, operating within the Institute for Christian Conciliation, operates on an international scale and deploys 175 certified and trained Conciliators to solve conflicts through Biblical values rather than through adversarial

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litigation.<sup>59</sup> The founder of Peacemaker Ministries, Ken Sande, highlights the values of an alternative, restorative justice in the context of an estate fight between a mourning family.<sup>60</sup> The clash involved six siblings, one of whom was mentally ill and lived at the property in dispute. Frank, who lived at the farmhouse under fire, had a trust established for his care at the death of his parents while the farmhouse was deeded to the other five siblings. The five siblings wished to sell the farmhouse immediately by evicting Frank, but when they told him, he was terrified to leave the only home he had ever known. Heated arguments over the farmhouse culminated in Frank nearly assaulting his siblings with a baseball bat. After a call to a pastor to reach a consensus and avoid violence or litigation over the property, the family prayed over how to honor God, respect their parents' wishes, and treat one another "in a way that shows the power of gospel in each of [their] lives."<sup>61</sup> Ultimately, the solution the family reached was separate from and much more kind to Frank than what a civil court would have decided:

"Frank," he [a brother] went on, "in appreciation for all you did for Mom, we want to give you this gift. It is an agreement we have all signed that gives you a life estate in the farmhouse. That means you will be able to stay there as long as you live. We found a buyer who is willing to purchase the rest of the farmland. Ownership of the house will eventually pass to our children. But as long as you want to live there, we want you to know that it is your home."<sup>62</sup>

In a civil court, Frank would clearly be found in the wrong, but costly adversarial solutions would have only shattered the family further. By partaking in an adversarial process, parties entrench their destructive behaviors, and "instead of learning where they need to change and how they can avoid similar problems in the future, \*28 many parties leave a courtroom holding even more tightly to their harmful values and opinions."<sup>63</sup> As an alternative, Christian Conciliation discourages adversarial advocacy and encourages confessionals on "matters of the heart" between parties<sup>64</sup> --a values structure which can resolve a wide variety of seemingly secular conflicts.<sup>65</sup>

To drill down on the mundane nature of religious disputes settled in arbitration, we proffer the boogeyman of American politics: Islamic courts and dispute resolution which adheres to *Shari'a*. Islamic dispute resolution operates on a smaller scale because of community structures in America,<sup>66</sup> theological conflicts over whether *Shari'a* can operate in non-Islamic jurisdictions,<sup>67</sup> and racism from outside the community.<sup>68</sup> Despite these challenges, in recent years, *Shari'a* tribunals have built positive precedential support in civil courts.<sup>69</sup> While Islamic arbitration agreements are a recent development, courts generally respect the mutual consent of the parties to use Islamic principles and institutions in their private disputes.<sup>70</sup>

\*29 *Jabri v. Qaddura* involved an arbitration agreement that contemplated asset division in divorce as calculated by the Texas Islamic Court.<sup>71</sup> The case arose when one party argued that past conflicts fell outside the scope of their expansive arbitration agreement's language. In a civil court divorce proceeding, the former couple battled over custody, "child support, division of the parties' estate, and enforcement of provisions in the marriage certificate, which had granted the bride half the value of a house as a 'dowry.'"<sup>72</sup> After a partial summary judgment in the courts, the former couple agreed to arbitrate their dispute through the Texas Islamic Court. Years later, in a five-party free-for-all, the former couple and their ex-in-laws still disputed the divorce stipulations.<sup>73</sup> Ultimately, without touching on the First Amendment or the nature of the extrajudicial tribunal, the court ruled that the arbitration clause was unambiguous--that the Texas Islamic Court had the right to hear the divorce arguments and to issue an award on them, even if those issues had been previously settled by a trial court.<sup>74</sup> Under Islamic Law, "how a Muslim handles his or her marriage and divorce carries no more weight or significance than how a Muslim[ ] handles his or her business affairs."<sup>75</sup> While child custody was a component of the litigation, most of the acrimony centered around a property promised as "dowry"--effectively, much of the conflict was financial, despite the religious overtones.

*Shari'a* procedural requirements, impossible in a civil courtroom, can comply with Islamic dispute resolution. For example, under Islamic Law, the role of claimant and defendant are fluid titles which are determined by the strength of a claim: "the claimant is the party whose claim is deemed weaker and who needs to present additional evidence to support his case."<sup>76</sup>

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Parties view the defendant position as stronger, as presumptions or evidence lead to a defendant title, and a first step of litigation is settling who takes \*30 which role.<sup>77</sup> The claimant, however, does not need “to produce all relevant evidence in order to satisfy a *prima facie* standard,” and under Islamic evidentiary rules, the plaintiff may shift “the burden onto the defendant, forcing the hand of what might otherwise be a complacent corporation.”<sup>78</sup>

Further, basic tenets of Islamic finance, such as the prohibition of interest, are incompatible with American financial priorities and mandates--both on the macro and microeconomic levels. Among Islamic scholars, there is consensus that “the prohibition of interest is not limited to usury but refers to interest on debt in any form.”<sup>79</sup> Contracts based on speculation, such as agreements for the future sale of goods or most kinds of insurance arrangements are disallowed under Islamic Law as well.<sup>80</sup> Such religious prohibitions raise interesting questions in America, where most retirement plans are built on speculative trading, and interest on loans is required by law. Without arbitration, Muslims in the United States have had to rely on “the creation of legal acrobatics to avoid the technical usage of usury, while meeting the demands of the global market for returns on investments.”<sup>81</sup>

Uniquely, Islamic tribunals in the United States offer an opportunity for Muslim adherents to revive the pluralistic ethos of pre-Ottoman imperial *Shari'a*. Currently, there is a new, developing Islamic jurisprudence--*Shari'a* for Muslims living in non-Muslim nations, or *Fiqh al-aqalliyat*. Under a *Fiqh* paradigm, Islamic Law shifts and adapts its rules to the reality of living through a diaspora; it allows rule adaptions which otherwise may not be allowed under Islamic Law.<sup>82</sup> This is brand new jurisprudence, and it offers an alternative for Muslims to coexist with secular, democratic nations while not violating tenets of their faith. While the post-colonial perception of Islam is one of stasis--an unmoving, “unchangeable set of norms that is binding upon all Muslims”--this is a historical anomaly that began with the Ottoman consolidation of power, codification by European powers, and internal movements towards modernization (which often followed European trends in common law).<sup>83</sup> To regain a dynamic jurisprudence, many Islamic arbitration \*31 tribunals today operate using a procedural posture called *tahkim*, which typically involves a flexible, less law-based arbitral process.<sup>84</sup> These decisions, rather than dictated by precedent, are grounded in *maslahah*, or equitable, pragmatic policy.<sup>85</sup>

The goal of the religious dispute resolution process is not merely--or perhaps even primarily--to reach the most accurate, formally legalistic resolution of a dispute. Religious arbitration processes instead pursue “fairness, reconciliation, acknowledgement of wrongdoing, and the establishment of equitable and peaceful relations between disputants.”<sup>86</sup> Traditional legal resolutions include lawyers and counsel to empower litigants stretching their rights “to the furthest extent of the law.” However, these parties are counterproductive within the religious dispute resolution framework due to its goals of each person fulfilling their religio-legal and moral obligation to each other.<sup>87</sup> Some religious arbitration tribunals proscribe the involvement of lawyers in direct contradiction to the legal framework for arbitration established by many secular law regimes.<sup>88</sup> Alternative dispute resolution is not limited to Abrahamic faith-influenced extrajudicial tribunals. It also provides opportunities for conflict resolution in “encapsulated communit[ies] within a larger constitutional regime.”<sup>89</sup> While we will limit our analysis on these models to focus on religious entanglement and arbitration, it is important to draw attention to the widespread appeal of choice of law and choice of forum for affinity communities whose expectations are misaligned with U.S. civil court priorities and values. For example, the Navajo Nation infuses their dispute resolution processes with corporate, collective ideals of justice, rather than the individualistic, rights-based model of the U.S. legal regime.

\*32 The Peacemaker Program of the Navajo Nation,<sup>90</sup> a result of the Navajo Common Law Project, sought to understand and apply Navajo wisdom in dispute resolution after a century of assimilation demands by the U.S. federal government on Navajo Courts.<sup>91</sup> In 1982, the Navajo Nation Judicial Conference created the Peacemaker Court as an alternative to the adversarial justice found in American courts and propagated through Courts of Indian Offenses.<sup>92</sup> Instead of common law models of dispute resolution, the Peacemaker Division utilizes “*hozhooji naat'aanii*, or peacemaking,” which requires parties and community members to discuss conflicts under the guidance of a respected leader of the community, or *naat'aanii* (peacemaker).<sup>93</sup> District court judges have supervisory authority over the peacemakers, who are considered officers of the court, and a supervisory judge “may issue protective orders ending the peacemaking process on grounds including misconduct by the peacemaker.”<sup>94</sup> Relatives and friends, interested parties, and members of local government structures are invited to

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participate in the peacemaking process,<sup>95</sup> and where a civil court may only focus on aggrieved parties, peacemaker solutions balance “traditional values, thinking about the impacts of the events on everyone involved, seeking forgiveness, and focusing on the wellbeing of their families, Clan, and the *Diné* community.”<sup>96</sup> Instead of rights vindication \*33 or punishment, this process seeks out consensual agreements between parties in conflict to restore both parties and the community as a whole to “*Hózhó*,” or harmony, for a more integrated definition of justice.<sup>97</sup> While the *hozhooji naat'aanii* dispute resolution model is not based in contract law, and criminal matters cannot be solved by private resolution, it provides another powerful example of the strong desire to resolve disputes in accord with alternative values.

Diversity of values and dispute resolution practices can encourage moderation of sharp cultural practices. For example, the United States has a greater diversity of Muslim adherents and greater representation from all jurisprudential schools of Islamic Law than other countries, such as the United Kingdom.<sup>98</sup> This means that, “unlike most Muslim-majority countries, ... there is freedom for robust differences of opinion on the correct application of Islamic law.”<sup>99</sup> Diversity, and *tolerance* of diversity--both religious and ethnic--may return some of the dynamism of early Islamic Law. The United States' lack of historical conflict between branches of Islamic jurisprudence, say between Sunni and Shi'a Muslims, creates a neutral space for cooperation and collaboration. The United States' laws on personal status, dominated by the equality ethos, could influence future conversations between Islamic jurists and encourage modernization. Take the role of women in Islamic arbitration: *Hanafis* only allow woman arbitrators in disputes involving property or directly relating to women, whereas \*34 “some *Maliki* and *Zahiri* scholars permit women to serve as judges, and therefore they may serve as arbitrators in some circumstances.”<sup>100</sup> In the United States, where our Muslim population is disproportionately well-educated,<sup>101</sup> sophisticated women could forum shop between Islamic schools of jurisprudence--not only to benefit themselves within a given conflict but also to push modern Islamic Law towards doctrinal preferences more favorable towards women.<sup>102</sup>

Opponents of religious arbitration regularly point to the unequal treatment of women under faith-based rules, and it would be disingenuous of us to simply handwave violence and oppression against women within religious arbitration--a phenomenon well documented by feminist legal scholars, both internationally and in the U.S.<sup>103</sup> For example, traditional Jewish and Islamic law both have numerous formal, gender-based procedural differences.<sup>104</sup> Under traditional Jewish Law, women cannot serve as rabbinic court judges, which means that Jewish religious arbitration panels are all-male. Women are also formally ineligible from offering witness testimony in rabbinic courts.<sup>105</sup> Traditional Islamic Law accords different weight to the verbal testimony of men and women, and religiously inspired conceptions of feminine modesty lead some Islamic courts and tribunals to compel woman litigants, advocates, and lawyers to take a less public and obtrusive role in religious proceedings.<sup>106</sup>

\*35 But to ban the faithful from drafting their personal contracts does not protect women.<sup>107</sup> Both Canada and Great Britain have grappled with *Shari'a* accommodations in family law, and through a policy of hostility, both nations pushed the faithful to contract in the shadows.<sup>108</sup> While such accommodations have been banned in other secular nations,<sup>109</sup> the religious continue to practice in accord with their faith, and such faith-based agreements are forced underground, outside the purview of public society oversight.<sup>110</sup>

Some American religious minorities practice polygamy, especially where immigrants travel from home countries and cultures with strong polygamist traditions.<sup>111</sup> Fears of deportation and the illegitimate status of their marriages discourage reports of abuse within these minority, and often immigrant, communities.<sup>112</sup> Ironically, while current bans on polygamy are justified by the high potential for abuse, the ban itself drives polygamist families into the shadows--exactly where abuse thrives.<sup>113</sup> Consider the Fundamentalist Church of Jesus Christ of Latter-Day Saints and its leader, and now convicted sex offender, Warren Jeffs.<sup>114</sup> When his \*36 practices were faced with public scrutiny, civil lawsuits, and criminal investigations in Arizona and Utah,<sup>115</sup> he fled to rural Texas with his followers.<sup>116</sup> His abuse of young women, through marriage with them or his direction of their marriage to others, was enabled by deep societal secrecy. A generation of police raids on FLDS churches encouraged outward distrust and isolation.<sup>117</sup> Without legal license, women lose access to public policy protections, like judicial review of contractual consent,<sup>118</sup> when married but totally invisible to civil law.

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Gender abuse through religious arbitration is reprehensible. But violence against women, both physically and through contract, is not isolated to the sphere of the faithful. Congress has recognized that arbitration law, particularly when coupled with contracts of adhesion, can be dangerous for women suffering sexual harassment and assault in the workplace. In response to the #metoo movement, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, showing a political will to limit arbitration of certain public policy-focused disputes.<sup>119</sup> This Act does two things--one concrete and one, a seed. The concrete creation is that Congress recognizes a greater societal interest in sexual assault and harassment. Congress recognizes that, no matter how rational and independent the individual actor, enforcing a pre-dispute agreement to arbitrate and effectively waive Title VII rights is impermissible.<sup>120</sup>

Ultimately, people who choose to arbitrate based on religious or cultural laws are choosing their set of laws precisely because it offers something that the secular world or dominant legal regime \*37 cannot.<sup>121</sup> If their intent was to have a neutral observer picked for them with formal legal training, or with the legal priorities of fairness and common law, there are courtrooms for that style of dispute resolution in every municipality in the country.<sup>122</sup> Instead, the unique inability for affinity groups, including the religious, to articulate their expectations through secular language results in a ban that prohibits only the faithful from incorporating their alternative values into contracts. Arbitration clauses which direct disputes to be settled by religious tribunals using religious laws have allowed religious minority groups to access justice that would otherwise be mishandled by judges within civil courts. Where gender abuse occurs within religious arbitration, we condemn it--however, we aver that such power abuses are inherent to the current state of American contract law. Robust reform of arbitration law would allow for the proliferation of alternative value communities while defending against the use of religion as a weapon against the United States' greater equality project.

***B. Room for Sexual and Gender Minorities Within the House of Private Contract Law***

The battle for equal access to define and shape lives under a hostile U.S. judicial paradigm is not only for religious minority groups: it exists for the queer community and other minority groups as well. While a court may be able to identify the practices of a minority community, their attempts to understand the *why* of such practices often lead to a faulty balance of interests and the inevitable de-legitimization of minority practices. Contract law has a variety of stopgaps for abuse, but it rarely requires a *why* in determining the results of a breach. This lack of questioning removes the value judgments that accompany decision-making in an adversarial legal system. Contract law has provided, and continues to provide, an alternative avenue to establish and maintain unique expectations, be they in family, business, or in how individuals of a community relate to one another.<sup>123</sup> Today, with the weakening of \*38 substantive due process under *Dobbs*,<sup>124</sup> the allure of contract law grows ever stronger, and there is a lot that the LGBTQ community can learn from the religious model of alternative dispute resolution. We propose private law for all outsiders, regardless of moral orientation. Alternative dispute resolution is an avenue for other minority communities, discussed below, to create and enforce shared expectations without civil court gatekeeping.

Reliance on substantive due process for queer rights does little to “challenge the pervasive and often invisible heteronormativity” of modern American society.<sup>125</sup> Similar to religious minority groups, queer communities struggle to articulate their unique experiences before the bench. Civil courts often find themselves preoccupied with “rights” rather than “interests” of the queer claimants seeking vindication, and a “broad range of social, cultural, economic, and legal interests ... may not be fully satisfied by the vindication of [only] rights claims.”<sup>126</sup> Rights claims, even when extended to the queer community, were developed by parties who did not consider the queer perspective or needs. Instead, to access the right, minorities generally, but the queer community explicitly, “run the risk of performing, circulating, and thereby perpetuating [their] own feelings of subjugation in reality.”<sup>127</sup>

In a rights-based civil court context, the acceptance and perpetuation of preconceived identity structures is a feature, not a bug, of the process. For example, within family law, civil courts struggle \*39 with the “abrupt, often jarring transitions between genders” that face mid-transition or non-passing individuals.<sup>128</sup> For a claim to be adjudicated, a transitioned or transitioning individual must articulate their experience while balancing the dire consequences of confusing a judge. But the transitioning

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process does not fit a singular nor a sympathetic mold. Instead, the more successful queer litigant is one that advances a “socially-acceptable, law-abiding, model ‘queer’ citizen that is highly exclusionary of non-normative sexual identities and experiences.”<sup>129</sup> The structure of the courtroom and reliance on rights bound up by the adversarial need to win “privileges homonormative gays and lesbians at the expense of the most vulnerable members of LGBTQ2 communities, particularly those who dwell at the intersection of multiple systems of oppression.”<sup>130</sup> To operate using a rights paradigm created without a queer identity in mind foists a “history of usages that one never controlled, but that constrain the very usage that now emblematises autonomy.”<sup>131</sup> The less queer a litigant appears, the more socially acceptable they appear, and the more likely they are to convince a judge of their righteousness. The more queer a litigant appears, especially when coupled with race or disability or non-passing while transgender, the more confusion is interjected into the dispute resolution practice.

There is a strong desire within the queer community for nonheteronormative liberation,<sup>132</sup> rather than mere rights allocation, and there are queer communities which have resisted the assimilationist nature of a privacy or equal protection rights regime. To demand equal rights within an unequal paradigm seems Sisyphean, and while the LGBTQ community fought for general acceptance, countercultural queer communities proliferated. Beyond decriminalizing sodomy or demanding equal access to monogamous marriage, queer groups developed their own communities, rituals, values--and yes, even dispute resolution practices.

\***40** Consider the Radical Faeries, a secular spiritualist worldwide network for gay, mostly effeminate, men.<sup>133</sup> Where conflict is involved, the lack of formal leadership or dogma within the Radical Faeries is necessary to the consensus-style dispute resolution process.<sup>134</sup> For example, the Radical Faeries faced an internal schism when deciding to open events to a mix-gendered audience and still fight over the issue today,<sup>135</sup> an echo of whether to allow mixgendered services within more traditional organizations. Today, Nomenus, the nonprofit organization which stewards the Wolf Creek Sanctuary, a haven for Radical Faeries, provides a method and committee for current conflict resolution practices “by people living with each other, as in the Sanctuary, or simply working together within Nomenus.”<sup>136</sup> Rather than approaching conflict through a “corporate, hierarchical, or even democratic mindset,” such as a more traditional subject-object model, the Radical Faeries use a subject-subject model of interpersonal interaction and consciousness. Harry Hay, one of the originators of the Radical Faeries, describes how a subject-subject model creates connectivity:

When I think of myself, ... I think of me as *subject*. When I think of other who illuminates my life, I don't think of him as an object--an object to be manipulated or controlled--I think of him as SUBJECT also, as I do myself, sharing with me as I with him, a double sharing to be celebrated.<sup>137</sup>

A loose, but community-focused standardized approach to dispute resolution with this model of consciousness requires “the effort to have multiple perspectives to work from,” and often encourages parties who cannot find a resolution on their own to seek out “a person who both parties trust to ground the interaction, who can help both people to hear each other calmly.”<sup>138</sup> The Conflict Resolution Flow process provides a variety of forums for dispute resolution, ranging from “a small guided discussion, to a structured meeting with an officer or other member, to CoCo \***41** [(Coordinating Council)], and finally to Great Circle [(a semi-annual meeting)].”<sup>139</sup>

Cut from the same cloth as the Radical Faeries are the Sisters of Perpetual Indulgence.<sup>140</sup> As an Order of queer and trans nuns armed with vows for the “spiritual enlightenment and spirits lightenment of the community,”<sup>141</sup> the Sisters have been in continuous operation since 1979.<sup>142</sup> In service to their communities, the Sisters can disentangle queer charity efforts from state-funded reliance (and surveillance).<sup>143</sup>

Today, each Sister house operates autonomously: 45 of such houses in 27 states.<sup>144</sup> But this collectivity was not always the case. Procedural concerns tore at the Sisters in the mid-1980s--anarchists who demanded full consensus decision-making were ignored with the ratification of “The Sisters’ Constitution and Rules of Order,” which instituted an elective democracy and

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“provided for the semiannual election of three” Mistresses.<sup>145</sup> A cohort preferred Robert’s Rules of Order and were dissatisfied with a democratic \*42 consensus hybrid.<sup>146</sup> Where schisms between local variations of the community occur, there are three options:

Most commonly, one of the houses resulting from the schism survives while the other or others fade out. In some cases, as in Seattle in recent years, the two houses exist side by side but only one is recognized by the San Francisco house. And on rare occasions, two houses may be recognized and coexist with varying levels of peace and conflict.<sup>147</sup>

One such split, referred to as “the war of the drag queens” in news media, was only resolved through court-ordered arbitration, name trademarking, and by incorporating the Sisters as a legal entity.<sup>148</sup>

In more recent counter-culture movements, more and more queer families are evolving to be polygamous in nature.<sup>149</sup> While polygamy is traditionally associated with the Mormon way of life,<sup>150</sup> increasing numbers of the queer community are leaning into the practice.<sup>151</sup> Estimates place polygamist relationships at around 150,000 people within the United States,<sup>152</sup> while polyamory and other open relationships range from about 4-5% of the United States population.<sup>153</sup> Different terms (e.g., polygamy and polyamory) are used by different communities, but the effect is the same: a family structure with multiple partners rather than only two. These family structures may also choose to have children: three men, all of whom had been in a relationship with each other for over eight years, fought for equal legal custody of their two children and won.<sup>154</sup> Such a choice--to have a child--is often fraught \*43 for heterosexual couples, but with the medical necessities and legal contracts involved in surrogacy, the added hurdle of having each member of the throuple placed on their children’s birth certificates created immense costs.<sup>155</sup> Despite California law allowing more than two parents on a child’s birth certificate, civil courts were hesitant about the polyamorous throuple’s parenthood. In having to justify their parenthood, the men emphasized the importance of “automatic inheritance, [the] ability to make decisions on medical consents, [and] visitation rights should they split up.”<sup>156</sup>

All these familial concerns are mundane for monogamous heterosexual couples, but nearly impossible to manage for same-sex, polyamorous ones-- despite the emotional similarities involved in becoming parents. Where seemingly monogamous same-sex parenthood occurs, “multiple parents may in fact be involved” when the same-sex couple requires “additional gametes, reproductive labor, or both from outside the parenting dyad.”<sup>157</sup> While not always the case, these third parties to a couple may be “interested in playing a role in the life of a child” even if the third party was only originally a surrogate.<sup>158</sup> With the advent of same-sex marriage and the desire for heteronormativity within parts of the queer community, polygamist families are “on track to follow in the rainbow contrails of same-sex marriage, [by] tracing the same arcs of fundamental liberty and equality.”<sup>159</sup>

We see a current demand for the expression of queer values within American commerce too. Equal protection enforcement and inclusionary initiatives work great for LGBTQ assimilation into and acceptance from greater society.<sup>160</sup> However, a queer perspective \*44 demands space which “serves [the] community” while also “align[ing] with … values” outside the dominant structures of economics and power.

As Judge Posner wrote, “[t]he voluntary nature of commercial arbitration is an important safeguard for the parties that is missing in the case of the courts.”<sup>161</sup> Those who engage in alternative dispute resolution, outside the realm of civil courts, value a “tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter.”<sup>162</sup> There is no reason why this rationale ought to be limited to the commercial sphere. The faithful have leaned into the expertise of those seated on religious extrajudicial tribunals.<sup>163</sup> The queer community, often harmed by a lack of understanding within greater society, ought to follow suit by having their disputes resolved in ways that prioritize understanding queer values and justice rather than placing impartiality on a pedestal. While private law has been wielded by

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powerful industries against weaker parties, and currently, the unique application of alternative dispute clauses within contracts are utilized by conservative religious groups, its application cannot be ceded to those communities forever.

Rather than siloing solutions by the current palatability of certain politics, we propose private law for all societal “outsiders,” regardless of moral orientation. Private law and alternative dispute resolution are an avenue for the queer community and non-heteronormative family structures to create and enforce shared expectations without civil court gatekeeping.

**\*45 II. UNCONSCIONABILITY UNTANGLES THE *BIXLER* RULING**

Liberal states must provide religious arbitration with the same protections given to other dispute resolution systems due to religious liberty and disestablishment obligations.<sup>164</sup> Both religious and non-religious arbitration processes must have equal benefits and safeguards to incentivize citizens to use private dispute resolution rather than the traditional legal procedures, if that is what society wants.<sup>165</sup> Without this equality, the government would face a grave constitutional issue: attempting to disestablish religion for irreligion.<sup>166</sup>

Without violation of religious liberties or FAA jurisprudence, it would be easy to imagine promulgated boundaries to arbitration law that would prevent the unintentional waiver of rights by vulnerable parties while also making religiously compliant arbitration practically impossible within the United States.<sup>167</sup> Such limits could oblige arbitration panels to ignore religious laws conflicting with state procedural rules.<sup>168</sup> Similarly, the laws could obligate religious tribunals to follow secular adjudication procedures, specifically equality rules. These include, but are not limited to, “the inclusion of women as arbitrators or not drawing gender, age, or faith distinctions between the statuses of the testimony of different witnesses.”<sup>169</sup> In the same vein, state laws might forbid certain actions by arbitration panels--such as enforcement of religious customs or ordering certain remedies--that conflict with secular society's view of both substantive and distributive justice in the lenses of law and policy.<sup>170</sup> These rules would not violate the Constitution, including Free Exercise or Establishment protections for religion, but the regulations would significantly impede on day-to-day practice of the various traditional religious dispute resolution processes.<sup>171</sup>

But under modern U.S. law, this is an unlikely scenario. Significant limitations on contractual liberties run counter to historic trends in American common law. Further, the federalist structure of American common law guarantees that no sole “correct” law \*46 always applies to all citizens. Unlike many other nations with uniform national rules, the U.S. has a deep commitment to functional federalism; there are fifty different sets of state laws coexisting with federal, Indian tribal, and a myriad of local laws.<sup>172</sup> The American legal system's diversity allows for choice of legal regimes by citizens through “deciding which states, cities, or counties to live in, where to organize and register their business entities, where to practice their professions, and where to marry, divorce, and raise their children.”<sup>173</sup> Though this approach may be at times muddled and inefficient, United States Supreme Court Justice Louis Brandeis \*47 pointed out that it still has a significant purpose: allowing intertwining legal procedures to act as “laboratories of democracy”; Americans can “experiment” with the different local laws and policies to find acceptable solutions for their multitude of issues.<sup>174</sup> These resolutions can then be adjusted for other jurisdictional use. On the other hand, failed legal solutions can be substituted with continued experimentation while not affecting the nation's broad legal structure.

However, as religious arbitration detractors correctly aver, there is a lot of room for abuse in contract law, especially where power imbalances are integral to the contractual relationship. Consider an employment hypothetical to highlight the danger of adhesive contracts and power imbalances:

You apply to be a cashier at a supermarket. During the interview, remarks by the interviewer lead you to believe that your Muslim faith may repel a job offer. You sue in federal court for discrimination, but your employment application had an arbitration clause, and current FAA jurisprudence requires deference to such contractual agreements. Your case is dismissed by the federal court, and you meet the supermarket's representatives in arbitration. The arbiter, a pastor, conducts a Christian tribunal guided by equity, scripture, and some American

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Law. You lose the case. Due to FAA-required deference, you likely have no avenue through which to file an appeal.<sup>175</sup> FAA deference to arbitration creates a non-appealable, outcome-determinative loss for weaker parties to a contract of adhesion. Contract's equitable defenses, like unconscionability, are mere paper tigers--as documented by many scholars,<sup>176</sup> such equitable defenses fail even where clear power imbalances exist.<sup>177</sup>

While the platonic ideal of contract requires a meeting of the minds by two fully independent and benefit-maximizing parties, the reality is this: weaker parties to contracts often feel that they faced no other option but to consent to an alternative dispute process \*48 that prioritizes values with which they may disagree. Some scholars have identified religion as the poison in the pudding--the religious tribunal, not the contractually and societally enforced power imbalance, is what renders this situation unfair. There are two main proposals to limit power imbalance abuse in contracts with religious arbitration agreements: (1) the creation of a brand-new free exercise-based exit right to contract, as exemplified by the *Bixler* court; and (2) Reverse Entanglement, which uses the state action doctrine to refuse enforcement of violated religious agreements. While the former approaches contracts from the Free Exercise Clause, the latter relies on the Establishment Clause. Both would result in the exorcism of religion from public life--solutions that run counter to the American model of secularism, and, ultimately, fail to solve the arbitration abuse problems modern contract law has enabled.

Instead, we proffer the humble unconscionability defense as the correct legal solution for cases involving questionable religious arbitration clauses. Use of unconscionability would tamp down on arbitration abuse while still protecting extrajudicial tribunals as an avenue for religious minorities' free exercise rights.

### A. Religious Exit Right to Contract

This is a simple fact of modern life: Americans regularly sign away their rights, both statutory and constitutional. The duel between the dual powers of contractual freedom and judicial authority has shaped the past century of American jurisprudence.<sup>178</sup> Judges, loathe to give authority and legitimacy to the noninitiated, fought and ruled against extrajudicial arbitration for decades.<sup>179</sup> But under the FAA and derivative state laws, the paradigm is now procedural due process,<sup>180</sup> and courts apply a high level of deference to alternative dispute awards. Most importantly, the Supreme Court has stated time and time again that arbitration clauses are to be treated no differently than any other contractual clause.<sup>181</sup> Exit rights to arbitration clauses are narrow and narrowing, and those few exit rights almost entirely rely on unconscionability where fraud is not present. Instead of a heavier reliance on unconscionability to undercut abusive contracts, the *Bixler* court has created a religious exit right to contract law that would only apply when signors incorporate religion into their agreements. The *Bixler* decision puts free \*49 exercise on a pedestal: that regardless of past assent and contractual relationship, free exercise is completely unwaivable.

We argue that *Bixler* runs counter to the long American tradition of rights waiver through contract. Additionally, instead of the invention of a new religious exit right to contract law, we will argue that a classic unconscionability analysis would better suit the decision to dismiss the Church of Scientology's arbitration clause in *Bixler*. Further, *Bixler*'s religious exit right to contract and the expansion of the state action doctrine through the Reverse Entanglement principle are both solutions meant to protect against the unwitting waiver of state and federal rights of weaker parties to contract, but both effectively abolish religious dispute resolution within the United States.

#### 1. The Rights We Sign Away

Regularly, constitutional rights are waived through a variety of legal mechanisms.<sup>182</sup> Plea bargains waive the accused's right to trial before a jury--a common occurrence within the criminal justice system with decidedly higher stakes than a breachable contract.<sup>183</sup> Under plea bargains, defendants waive their constitutional rights, like "the Fourth Amendment right to be free from unreasonable searches and seizures, the Fifth Amendment right against self-incrimination, and the Sixth Amendment rights to a jury trial, to confrontation of witnesses, and to the assistance of counsel," in exchange for certain benefits, like lesser or dropped

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charges, lesser sentences, or avoiding the publicity of a trial.<sup>184</sup> Beyond criminal law, lawyers waive their Seventh Amendment jury rights under fee disputes.<sup>185</sup> Settlement agreements, trade secrets, collective bargaining, \*50<sup>186</sup> and non-disclosure agreements are common in the business world--all of which involve waiver of judicial remedies and speech.<sup>187</sup> When one works for the government, public service neutrality is needed from employees who are required to abstain from participation in public political affairs at the expense of their First Amendment rights.<sup>188</sup>

Similarly, choice of law clauses, even those within contracts of adhesion, allow for a wide waiver of both state and federal rights. This is a recent legal development--before the 1980s, an "adhesive arbitration agreement" was unenforceable under *Wilko v. Swan*.<sup>189</sup> However, with the rising importance of international commerce, the Supreme Court changed course. In *Scherk v. Alberto-Culver Company* in 1974, the U.S. Supreme Court mandated enforcement of international arbitration agreements--even where they circumvented and nullified U.S. statutory rights through choice of law and choice of forum provisions.<sup>190</sup> Moreover, the Supreme Court has essentially ended the Effective Vindication of Rights doctrine, which permits plaintiffs to invalidate an arbitration agreement if the agreement precludes the plaintiffs from effectively vindicating their federal statutory rights.<sup>191</sup>

In *Scherk*, a commercial contract was signed by an American company with a German citizen in Switzerland.<sup>192</sup> This contract had an arbitration provision which required all disputes to be resolved within the International Chamber of Commerce in Paris, France.<sup>193</sup> A trademark dispute between the parties led to claims arising under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder<sup>194</sup>--statutes which created rights for investors \*51 within the United States. The Court ruled against the SEC rights adjudication in favor of the arbitration clause's choice of forum and law clauses: to ignore the clause would create a "dicey atmosphere of ... a legal no-man's-land [that] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."<sup>195</sup>

With the momentum from *Scherk*, rights waivers within arbitration agreements have swelled to a legal crescendo. A series of cases throughout the past few decades have reinforced an arbitration clause's waiver of rights over both federal and state statutory protections. In 1985, the Supreme Court allowed for companies with a federal antitrust dispute to be addressed by the Japan Commercial Arbitration Association: "we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims."<sup>196</sup> Without "congressional intention expressed in some other statute" to carve out specific statutory rights claims from the FAA, "[n]othing ... prevents a party from excluding statutory claims from the scope of an agreement to arbitrate."<sup>197</sup> In *Shearson/American Express Inc. v. McMahon*,<sup>198</sup> the Supreme Court expanded this logic to RICO claims: "we find no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims."<sup>199</sup> Soon after, the Court ruled on the arbitrability of age discrimination claims in an employment conflict.<sup>200</sup> Without a specific carveout for ADEA claims against arbitration clauses in either the ADEA or FAA, the general policy to favor arbitration triumphs over statutory rights which are abrogated by contract.<sup>201</sup>

The general policy to favor arbitrability also outweighs the right to a class action lawsuit. In *AT&T Mobility LLC v. Concepcion*,<sup>202</sup> the plaintiffs purchased what was advertised as a "free phone[ ]," but were charged \$30.22 in sales tax.<sup>203</sup> Their claim was consolidated within a putative class action suit that alleged AT&T "had engaged in false advertising and fraud by charging sales tax on \*52 phones it advertised as free."<sup>204</sup> The plaintiffs argued that California state law allowed them to vindicate their claim against AT&T through class action procedure,<sup>205</sup> but the Supreme Court disagreed. The Court cited that class action arbitration "sacrifices the principal advantage of arbitration--its informality--and makes the process slower, more costly, and more likely to generate procedural morass."<sup>206</sup> The nature of a class action, in court or in arbitration, necessitates a high level of procedural formality to bind absent class members.<sup>207</sup> Such procedural formality runs counter to the purpose of an arbiter,<sup>208</sup> and "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."<sup>209</sup> Moreover, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."<sup>210</sup> These high stakes render arbitration an unacceptable forum for these disputes.<sup>211</sup> The Court believed that the complexities of class action certification and procedure were beyond

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the scope of an arbitrator's expertise, and that the opportunity for error would unduly force defendants to settle uncertain claims rather than argue a class action suit before a confused arbitrator.<sup>212</sup>

Most recently, in *Epic Systems Corp. v. Lewis*,<sup>213</sup> the Court ruled that the FAA preempted the National Labor Relations Act and that a class action claim for unpaid overtime wages was required to go to arbitration.<sup>214</sup> Justice Gorsuch re-emphasized the expansive scope of an arbitration agreement where statutory rights waiver is challenged: “[t]he parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect *pretty absolutely.*”<sup>215</sup>

Where are rights waivers, especially those within contracts of adhesion, prevented--where rights outweigh the FAA? Found \*53 within the savings clause of § 2 of the FAA, the repudiation of an arbitration agreement is possible under general state contract defenses<sup>216</sup> --a “substantive command that arbitration agreements be treated like all other contracts.”<sup>217</sup> Fraud, illegality, unconscionability, and duress are all valid means of nullifying an arbitration agreement.<sup>218</sup> Generally, these challenges fall into two categories: a challenge to the contract generally and a challenge to the agreement to arbitrate.<sup>219</sup> Based on the federal court policy to favor arbitration agreements, even where an underlying contract is void or voidable,<sup>220</sup> the arbitration agreement may still stand alone, independent of the tainted contract.<sup>221</sup> Separating an arbitration agreement from its host contract was a historical tool used by courts to stop arbitration before the widespread acceptance of alternative dispute resolution took hold in common law, but now, the severability doctrine allows the arbitration agreement to outlive the underlying contract.<sup>222</sup>

Breach or repudiation of a contract does not “preclude the right to arbitrate,” nor does “illegality of part of the contract ... operate to nullify an agreement to arbitrate.”<sup>223</sup> A “mere cry of fraud in the inducement” does not remove an arbitrable dispute to civil courts; otherwise, such forum change would frustrate the agreement to arbitrate entirely.<sup>224</sup> If a claim of fraud fails to extend to the legally separate agreement to arbitrate and, instead, only focuses on the terms of the host contract, the doctrine of severability, “as a matter of substantive federal arbitration law,” allows for an arbitration claim to stand.<sup>225</sup> Further, if the arbitration clause is broad enough to encompass a finding of a fraudulent contract, be it in inducement or in performance,<sup>226</sup> “the mutual promises to arbitrate would form the quid pro quo of one another and constitute \*54 a separable and enforceable part of the agreement.”<sup>227</sup> An arbitration agreement may be nullified if the contractual defenses are directed towards the arbitration clause itself. Where a claimant claims to have never signed the contract, which includes the requirement to arbitrate conflicts, both the contract and arbitration agreement are void.<sup>228</sup>

Within contracts of adhesion, the severability doctrine is limited where either the contract or provisions within the contract fall outside the reasonable expectations of the weaker party or, within context, the contract is deemed unduly oppressive to the point of unconscionability.<sup>229</sup> The quintessential case, *Broemmer v. Abortion Services of Phoenix*, places limitations on contracts written in complicated legalese or in language beyond the understanding of the typical consumer of a product.<sup>230</sup> Here, the “take it or leave it” nature of the contract of adhesion coupled with the target market of the Abortion Facility (high school education only, unmarried, and under the heavy weight of time-sensitive physical and emotional stress), led the court to “conclude that the contract fell outside plaintiff’s reasonable expectations” and was unenforceable.<sup>231</sup> Likewise, in another abortion case, a New York Supreme Court deemed an arbitration agreement attached to a contract of adhesion void when it was tucked in with other contractual forms and not explained to the emotionally distressed consumer.<sup>232</sup> But, most recently, under *Viking River Cruises, Inc. v. Moriana*, the U.S. Supreme Court ruled that even where a state has a nominal interest in the arbitration, state law interference with the right to arbitration will not be tolerated.<sup>233</sup>

These exceptions to a contract of adhesion rarely apply outside of sufficiently sympathetic fact patterns, and with shifting social and political attitudes over the past thirty years (for example, towards abortion), unconscionability's applicability may further shift. Other courts have attempted to craft their own bright lines for unconscionability to determine when to enforce agreements to arbitrate, especially within contracts of adhesion. For example, the Louisiana Supreme Court, in resolving a split in its circuits,

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has created a spectrum \*55 of party sophistication to delineate between vulnerable and knowing parties to unconscionable contracts.<sup>234</sup> Additionally, one California appellate court allowed the adhesiveness of a host contract to weigh against the enforcement of an arbitration agreement where a party is attacking the arbitration clause alone.<sup>235</sup> Despite the difference in interpretation, the ends of the subjective unconscionability spectrum are clear: sophisticated parties like Google and Apple, with teams of very well-paid lawyers, cannot ever enter into an unconscionable agreement--no matter how lopsided it may seem. On the other side of the unconscionability spectrum, a company presenting an arbitration agreement in a stack of documents to a particularly vulnerable and emotionally stressed minor without explanation meets the unconscionability threshold in sufficiently sympathetic situations.

Arbitration agreements attached to contracts of adhesion have additional requirements to avoid procedural unconscionability: neutrality of arbitrator,<sup>236</sup> adequate discovery,<sup>237</sup> written decisions which allow for a narrow form of judicial review,<sup>238</sup> and restrictions on the cost of arbitration.<sup>239</sup> Most relevant to our argument is the neutrality of tribunal requirement, and whether, within a contract of adhesion, a designated arbitrator, "by reason of its status and identity, is presumptively biased in favor of one party," fits within an unconscionability analysis.<sup>240</sup> If an employer designates itself as the arbitrator for a conflict between itself and an employee, any result will be denied based on unconscionability "[i]rrespective of any proof of actual bias or prejudice" because "a man may not be a judge in his own cause."<sup>241</sup> With a party to the contract identified as the arbitrator of conflicts, the arbitration clause becomes illusory, \*56 as it "yields the power to an adverse party to decide disputes under the contract."<sup>242</sup>

This party-as-arbitrator limitation does not preclude parties from choosing decision-makers who, by virtue of a relationship with a party or interest in a dispute, would "adopt something other than a 'neutral' stance in determining disputes."<sup>243</sup> For example, "many government contracts customarily provide that all disputes arising under them shall be arbitrated by a specified official of the governmental entity which is one of the contracting parties."<sup>244</sup> Instead, where an arbitration requirement is attached to an adhesive contract, courts must scrutinize the agreement "with particular care to insure that the party of lesser bargaining power ... is not left in a position depriving him of any realistic and fair opportunity to prevail in a dispute."<sup>245</sup>

Even with contracts of adhesion, flirting with arbiter bias is allowed, where both the procedural and substantive due process of the arbitration veer from absolute neutrality.<sup>246</sup> The minimal acceptable level of arbitrator neutrality within an adhesive agreement is whether "an entity or body which by its nature is incapable of 'deciding' on the basis of what it has 'heard'" and the agreement to arbitrate becomes "but an engagement to capitulate"; the hearing needs to be genuine.<sup>247</sup> Where a designated arbitrator is not a direct party to the contract but their "interests are so allied with those of [a] party," they are subjected to the same unconscionability prohibitions.<sup>248</sup> Even where such a party-aligned arbitrator is against public policy, the court may still require arbitration but give parties a "reasonable opportunity to agree on a suitable arbitrator and, failing such agreement, ... appoint the arbitrator."<sup>249</sup> Further, the rules outlined by a tribunal, even where its identity passes the minimal standards of integrity analysis, may be unconscionable based on substantive burden analysis.<sup>250</sup> Where an arbitration \*57 agreement within a contract of adhesion fails to impose bilateral burdens, it may be deemed unconscionable.

The arbitration agreement in *Armendariz v. Foundation Health Psychcare Services, Inc.* required that employees, who had signed contracts of adhesion as a condition for employment, arbitrate claims for wrongful termination but imposed no such burden on the employer.<sup>251</sup> The court, at least for employee-employer contracts, required a "modicum of bilaterality;" otherwise, the arbitration "appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage."<sup>252</sup> Where the "clear effect of the established procedure of the arbitrator will be to deny the resisting party a fair opportunity to present his position, the court should refuse to compel arbitration."<sup>253</sup> If the identity of the arbitrator or procedures of the tribunal are not, on their face, unconscionable, then matters proceed by the arbitration clause, and other means of relief are necessary--like a subsequent petition to vacate an award after the conclusion of the arbitration.<sup>254</sup>

Where rights are not directly signed away but are technically impossible due to prohibitive costs, well--"[t]oo darn bad."<sup>255</sup> These rights are effectively waived--a step beyond unwitting rights waiver. This waiver problem happens, not between

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sophisticated parties, but where power imbalances are inherent to the relationship, like in arbitration agreements and in employment contracts.<sup>256</sup>

The inability to vindicate rights under the FAA was not a judicial inevitability. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court allowed for a Japanese tribunal to resolve an antitrust dispute because it found no reason to believe that a Japanese tribunal would not allow “the prospective litigant [to] effectively ... vindicate its statutory cause of action.”<sup>257</sup> Following this logic, in *Green Tree Financial Corp.-Alabama v. Randolph* (*Green Tree*),<sup>258</sup> the appellate court found that the high potential costs of arbitration “failed to provide the minimum guarantees required to ensure that respondents could vindicate their statutory rights” and deemed the arbitration clause unenforceable.<sup>259</sup> However, the Supreme Court reversed, ruling on the speculative nature of the prohibitive costs and placing the burden of evidence on the party resisting arbitration of their claims to prove the likelihood of such high costs.<sup>260</sup> Already established under arbitration law was the unenforceability of high filing and administrative fees which make “access to the forum impracticable.”<sup>261</sup> However, the Court remained silent on the permissibility of astronomical arbitration costs within the arbitral process itself, i.e., expert witness fees to prove a claim, until 2013.

In *American Express Co. v. Italian Colors Restaurant*, American Express was in the habit of forcing merchants to accept credit card rates at 30% higher than fees offered by competitors--a ploy successful due to the ubiquity of their card usage.<sup>262</sup> If a plaintiff wished to challenge American Express's practice, even with treble damages, each would receive only a few thousand dollars. The cost of the expert analysis necessary to prove relevant antitrust claims, however, would range from hundreds of thousands to perhaps over a million dollars.<sup>263</sup> Needless to say, this was the exact situation that class action was created to solve: one where there is no economic incentive to pursue a legitimate claim. As the dissent put it aptly: “[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.”<sup>264</sup> Justice Scalia, in denying the class action's claims and enforcing the arbitration clause, asserted that “antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”<sup>265</sup> The effective vindication of antitrust rights, according to the *Italian Colors* majority, applies only to a party's theoretical “right to pursue statutory remedies” and not the affordability of proving such remedies.<sup>266</sup> Such analysis, the dissent argued, created a foolproof way for companies to “kill[ ] off valid claims,” as companies now “have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless.”<sup>267</sup> The death of the Effective Vindication of Rights doctrine signals an increasingly powerful corporate legal right to skirt punishment for bad behavior--just so long as it is the legally correct type of bad behavior.

With the end of the Effective Vindication doctrine, the most common doctrine for defense against rights violations within a contract is unconscionability.<sup>268</sup> Unconscionability is a seemingly simple doctrine standing on a complicated division between substantive unconscionability and procedural unconscionability. Developed within England's courts of conscience, or equity, in 1751, Lord Chancellor Hardwicke declared unenforceable agreements which “no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>269</sup> Such agreements were “unconscious bargains,” and “[a]s early as 1889 the U.S. Supreme Court referred to ‘unconscionable’ contracts, opening its decision [*Hume*] with the celebrated judgement of Lord Hardwicke.”<sup>270</sup> For nearly seventy years now, unconscionability has been a defense set forth within the Uniform Commercial Code: where a contract or a clause within a contract was “unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause ....”<sup>271</sup> By pulling unconscionability from common law into statutory law, legislatures followed the trend of “huge growth of statutory interventions in contract law, much of which is quite avowedly designed to ensure substantive fairness in exchange.”<sup>272</sup>

To use unconscionability as a defense, United States federal law requires a conscience test to determine whether an agreement fits the bill: if a contract, or a term of a contract, “shocks the conscience,” then it is unenforceable for unconscionability reasons.<sup>273</sup> Because of the variability of what “shocks,” often, courts reserve unconscionability as a “safety net” of last resort.<sup>274</sup> Where shock is found, the court begins a dual procedural-substantive unconscionability analysis to determine whether

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the offending contract or clause ought to be struck down.<sup>275</sup> First, the court examines whether procedural unconscionability is present within the agreement. Here, the contract is examined for imbalances in its written form-- like if the contract uses “fine print and convoluted language.”<sup>276</sup> Under this test, unfair bargains are limited only where they are “atypical in the local business community,” and the “mores and businesses practices of the time and place” are measured against the terms of the agreement.<sup>277</sup> For the procedural shock test, the court leans on the business community to guide its conscience.

Second, the court examines whether the agreement is substantively unconscionable. Here, courts look to the actual content of the contract for a balance of rights and obligations among the parties. For example, a substantively unconscionable clause may give one party greater rights of recovery or demand one party arbitrate all claims while offering the other party a choice between arbitration and civil courts.<sup>278</sup> Courts are divided on whether both procedural and substantive unconscionability are required to void a contract or clause, but there seems to be a sliding scale: “the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required to annul the contract or clause.”<sup>279</sup>

Unconscionability is all or nothing--as an action in equity, there are no awards of damages, only enforcement of the contract or no enforcement at all.<sup>280</sup> Mere nonenforcement of a contract or clause does not put the offended party back to where they were before the contract was signed, nor does it try to compensate the harmed party for injury. Bad actors keep acting badly. Those bad \*61 actors are often repeat players, “and thus ha[ve] economies of scale and a much greater incentive to litigate the specific issue.”<sup>281</sup> Because unconscionability “requires an in-depth factual analysis to determine whether there was both procedural and substantive unconscionability ... the cases are usually expensive to bring.”<sup>282</sup> Without compensation for winning litigation, a party who signs an unconscionable contract is punished twice: first within the terms of the contract and again by the expensive litigation fees.

The weakening of unconscionability has created a consequence-free environment for contractual abuse: consumers and employees often find themselves bound by decisions that strongly favor retailers, wholesalers, manufacturers, and employers in ways that cut against contemporary notions of distributive justice.<sup>283</sup> Research shows that consumers who sign contracts with arbitration clauses which prohibit class action suits for credit cards, cable and internet services, and online retail do not pursue their very valid claims against business abuse.<sup>284</sup>

## 2. Unconscionability and the Neutral Principles Doctrine

With the rights waiver analysis complete, we can now turn to religious arbitration and the case at the top of our article: *Bixler v. Scientology*.<sup>285</sup> Religious arbitration must echo the norms of the secular; otherwise, civil courts will refuse to enforce an award.<sup>286</sup> However, FAA's policy of favoritism towards arbitration and its effect in weakening unconscionability as a contract defense claim has \*62 always been allowed. With lax standards under contract for “knowing,” the textbook worrisome case is that “a party--not knowing what they are getting themselves into or later wishing for different terms--binds themselves inextricably to a harsh term ... that will produce a manifest injustice.”<sup>287</sup> Such abuse is not limited to religious arbitration agreements, and to prohibit religious arbitration on First Amendment grounds of free exercise would not lower the thresholds for an unconscionability claim or repudiate an expansive severability doctrine. Contract abuse should be dealt with in contract defense, not by elevating or prohibiting religious contracts.

In *Bixler*, former members of the Church of Scientology sued the Church and a powerful member of the Church who had allegedly raped and sexually harassed them while they were members.<sup>288</sup> An arbitration clause within the contracts they signed as members of the Church of Scientology required all claims or controversies to be resolved via the procedures of the Church's Ethics, Justice and Binding Religious Arbitration system.<sup>289</sup> Citing a minister from the Church, the Scientologists argued that “[t]he justice codes and procedures are an inherent part of the religion, and are derived from our core beliefs.”<sup>290</sup> For a civil court to determine whether alternative dispute resolution is a key tenet of the Church of Scientology would be a blatant Establishment Clause violation--as argued by the Church of Scientology and identified by the lower district court.<sup>291</sup>

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In essence, the Church of Scientology wanted the binding power of contract combined with the heightened inscrutability of free exercise practices to compel arbitration.

The California Court of Appeals ruled against Scientology by relying on a petitioners' constitutional right to change religions completely unfettered.<sup>292</sup> The court interpreted this case as balancing "petitioners' First Amendment rights to leave a faith and Scientology's right to resolve disputes with its members without court intervention."<sup>293</sup> A read of the contract reveals the potential of unconscionability within a "forever" arbitration clause:

My freely given consent to be bound exclusively by the discipline, faith, internal organization, and ecclesiastical rule, custom, \*63 and law of the Scientology religion ... in all my dealings of any nature with the Church, and in all my dealings of any nature with any other Scientology church or organization which espouses, presents, propagates or practices the Scientology religion means that *I am forever abandoning, surrendering, waiving, and relinquishing my right to sue, or otherwise seek legal recourse with respect to any dispute, claim or controversy* against the Church, all other Scientology churches, all other organizations which espouse, present, propagate or practice the Scientology religion, and all persons employed by any such entity both in their personal and any official or representational capacities, regardless of the nature of the dispute, claim or controversy.<sup>294</sup>

The court, while paying lip service to contract law, forewent a proper unconscionability analysis and instead focused on a superficial balance of First Amendment free exercise rights between the Church and the individual.

We think the California court's analysis is disingenuous to the actual problems the case presents. A religious-based contract should not be treated any differently than a secular contract, and a neutral contractual analysis of the case would be sufficient to prevent abuse and to defend constitutional rights to free exercise. We have written on this before: contracts can always be broken; contract enforcement is distinguishable from the government's coercive control over its citizenry.<sup>295</sup> The price for breaking a contract, limited by general contract law, still allows for an individual to convert to a new religion while honoring previous agreements.<sup>296</sup>

Broad arbitration clauses are nothing new, but the coupling of the "waiving forever" and "any dispute" language used in Scientology's arbitration clause is worthy of a hardy unconscionability analysis. The Church of Scientology argues that the arbitration clause would survive beyond the natural end of its host contract and the contractual relationship it controls. As the California court rightly pointed out: "[a] former member would be bound by Scientology dispute resolution procedures regardless of the fact \*64 that the member had left the Church years, even decades, before the tort."<sup>297</sup> While the severability doctrine allows for an arbitration clause to be enforced in circumstances where the rest of the contract may be invalid, it likely does not allow for a zombie arbitration clause to shamble on after the conclusion of the underlying contractual relationship.<sup>298</sup>

To understand the incongruity of a zombie arbitration clause with modern contract law, substitute the Church of Scientology and its contract for a gym subscription. You sign up for a local gym as part of your New Year's resolution, but within a month or two, you lose momentum, pay the cancellation fees, and end your subscription. Fifteen years later, you are walking by the gym at the exact moment a machine malfunctions, and its exploding parts injure you on the street. If the gym subscription contract had a similar arbitration clause to that within the Church of Scientology's contract, the dispute over this injury would require arbitration even though you had not set foot in the gym in over a decade, nor would you have ever foreseen this scenario when you signed the contract. The religious exercise component of the Church of Scientology's claims does not alleviate the absurdity of a zombie arbitration clause nor the potential unconscionability of arbitrating claims long after the death of the host contract. Nor should the religious exercise component allow the court to nullify the arbitration agreement for conflicts which take place during the life of the contract.

The unconscionable extension of a zombie arbitration agreement is decidedly secular in nature, and if coupled with an unaware waiver of federal rights, civil courts refuse to enforce subsequent alternative dispute awards. Do not misunderstand: the duration of the arbitration clause is not the problem. At its core, unconscionability requires a fact-specific analysis of the contract and the

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parties to the contract. Perhaps no contract agreed to between Apple and Google could be unconscionable: these are maximally sophisticated parties. Large corporations, under guidance from lawyers, executive boards, and shareholders, could agree to a contractual clause that mandates that all conflicts between these two companies are resolved by CEO combat. This combat clause could cover “any dispute” and could last “forever”—all while remaining perfectly conscionable. But the potential for unconscionability of both “any \*65 dispute” and “forever” within an arbitration clause increases as the sophistication of a party decreases and as the signing occurs during a highly emotional activity, like during worship. Unconscionability cannot be measured by one-size fits all. Instead, unconscionability, as a contractual defense, provides flexibility through its fact-specific, subjective analysis. With flexibility, unconscionability may defend against abuses while allowing for contractual liberties to flourish.

The religious components of the arbitration agreement are superfluous: the neutral principles doctrine ought to apply. Under neutral principles, normal contract law and its equitable remedies apply; the equities are balanced in religious contracts just as they would be in secular contracts.<sup>299</sup> Neutral contractual analysis of religious contracts already happens in faith-based prenuptial agreement cases.<sup>300</sup> For example, in a case involving a *mahr* (a type of Islamic marital contract) signed two hours before a wedding ceremony and an embarrassed groom who felt forced to sign as wedding guests arrived and looked on, Ohio courts deemed the *mahr* void for coercion.<sup>301</sup> Where a *mahr* failed to satisfy New York Domestic Relations Law, one New York Supreme Court struck it down as invalid and unenforceable—not because of its religious nature, but because of its lack of adherence to secular contract law: “[t]he neutral principle of law approach prevents *mahr* agreements, and other private, religious marriage agreements, from being denied simply because they came about in a religious context allowing them to be enforced based solely on their ability to comply with the ‘objective, well-established,’ secular laws.”<sup>302</sup> Lower courts in California and Washington share a similar opinion.<sup>303</sup>

\*66 Where judges ignore neutral principles and bypass the unconscionability defense, they often reach the wrong decisions precisely because they are not well-situated to understand the religious issues at hand-- and cannot become fully conversant without treading upon religious freedom and establishment concerns. This is exemplified by the jurisprudence surrounding Islamic *mahr* agreements<sup>304</sup> and Jewish *ketubah* contracts in the family law context,<sup>305</sup> as well as the *heter iska* in commercial settings.<sup>306</sup> Courts handling these types of agreements regularly reach conflicting results and inadequate rulings for litigants.<sup>307</sup>

Courts, even when armed with the subjective unconscionability defense, have a poor track record of recognizing various forms of pressure exerted by religious communities to get individuals to agree to arbitrate disputes. For example, traditional Jewish Law calls on Jews to settle their disputes in rabbinic courts with co-religionists in line with Jewish Law.<sup>308</sup> After being summoned in response to a complaint, if a Jewish litigant declines to appear in the rabbinic tribunal, that litigant may be subject to a *seruv*. A *seruv* is a public statement that the litigant is in contempt of the court; the consequences of which differ significantly depending on the Jewish community involved.<sup>309</sup> Consequences may include exclusion from religious services of the community and refusal of rights and privileges.<sup>310</sup> The *seruv* may also result in negative economic effects for the litigant, as members of the Jewish community may decline to do business with him or her.<sup>311</sup> To determine whether these consequences and religious doctrines like the *seruv* coerce individuals to arbitrate disagreements in religious forums, courts would need to judge religious norms and practices.<sup>312</sup> Courts should not engage in this type of judgment. They are not only unable to make truly \*67 informed determinations but may be precluded from making this kind of judgment under religious freedom doctrines.<sup>313</sup> Thus, while the courts leave these individuals without a remedy, arbitration's legal frameworks can redress their injuries.<sup>314</sup>

Because courts are oftentimes ill-equipped to handle some disputes, like those involving individuals in certain religious or queer communities, arbitration's choice of law provision is particularly important. All citizens have the right to have cases resolved by state courts in accordance with state laws. However, the modern notion of freedom to contract allows individuals to contract around this and choose which forum and law should govern their disputes.<sup>315</sup> Individuals have ownership over their rights, and the ability to surrender such rights—even religious rights—is inherent within ownership. Otherwise, without the ability to waive an owned right, such rights become an obligation. From the family to international commerce, Americans submit to

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extrajudicial dispute resolution for a wide variety of reasons: expediency, affordability, and privacy to name a few. With choice of law and forum clauses, parties regularly arbitrate conflicts using the laws of other nations or industrial customs at the expense of their constitutional and statutory rights. To have a choice of law clause which selects French law as governing disputes which requires waiving U.S. federal rights is a common occurrence in today's globalized economy. In general, the law presumes that people are the best judges of their own interests and respects their contractual choices and preferences.<sup>316</sup> Inherent to any choice of law clause is rights waiver, as you are waiving the default rights and rules which would otherwise apply.

Arbitration agreements, like all contracts, are void if secured through coercion or duress.<sup>317</sup> Parties cannot use contractual autonomy to consent to being the victim of violence as to absolve their perpetrator of criminal liability, and courts will refuse to enforce contracts made freely but under circumstances in which there were large differences between the relative bargaining powers of contracting parties or where parties contract extremely unfair terms.<sup>318</sup> The U.S. Supreme Court has held that "a substantive waiver of federally \*68 protected civil rights" in an arbitration agreement "will not be upheld."<sup>319</sup> Additionally, American courts have long held that arbitration awards--whether secular or religious--can and should be vacated by courts when the substance of such award is contrary to public policy.<sup>320</sup> This practice helps protect important public interests in cases where a disputant participating in an arbitration proceeding has privately agreed to alienate certain legal rights that are intended to protect the public generally.<sup>321</sup> In such cases, courts often refuse to enforce the arbitration award, reasoning that the waiver of substantive rights is not merely a matter of private contract, but implicates broader societal interests that contract ought not be permitted to abrogate.

The Supreme Court has held, even when an arbitration result does not run counter to legislation or constitutional norms, that awards may be vacated on public policy grounds. Even arbitration decisions that conflict with broader, but not strictly legal, policy concerns may be vacated on these grounds.<sup>322</sup> The argument here is not that states must always enforce every outcome of every religious arbitration. Instead, religious arbitration should have reasonable limits in place, regarding how to resolve disputes, just as there are limits in place on choice of law in secular courts. This is consistent with legal pluralism.

### ***B. State Action and Reverse Entanglement***

Similar to the religious exit right in the *Bixler* court, state action and the Reverse Entanglement principle cannot resolve contractual abuse without eliminating religious arbitration. While these are both meant to protect against waiver of rights of weaker parties to contract, both effectively abolish religious dispute resolution. To illustrate the state action expansion under the Reverse Entanglement principle,<sup>323</sup> we offer one more hypothetical:

You are Orthodox Jewish, and you enter a marriage with your Orthodox Jewish spouse. Both of you agree to live by the faith and sign a prenuptial agreement that selects a suitable rabbinical tribunal as the forum for arbitration of any future dispute and "Jewish \*69 Law" as the rules of decision for such disputes.<sup>324</sup> Further, the agreement requires that any children of the union must be raised within the Orthodox Jewish faith and that one spouse will provide for the other.

Fifteen years and three children later, you convert from Judaism to a different religion, and you file for divorce, citing irreconcilable differences. Under state law, you would likely pay less in spousal and child support fees and could perhaps nullify any religion requirements from the custody agreement. However, the prenuptial agreement, signed fifteen years prior, requires a beth din to adjudicate any disagreements or challenges to it. Under a beth din, fault in divorce may be considered, and Jewish jurisprudence identifies you as breaching the prenuptial agreement as well as duties of the faith, which Jewish Law will penalize you for doing.

You don't like your chances under Jewish Law. So, you go to a secular court and demand they handle the divorce. You argue that if the secular court were to enforce your prior agreement, they would be in violation of the Establishment Clause, as the arbitration clause enforcement would be a de facto establishment of religion in violation of the Constitution. The prior agreement does not matter; the prior fifteen years of contractual compliance does not matter; the non-violation of the contract by the other party does not matter.

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This dispute *will* be resolved, and regardless of the outcome, someone *will* be disappointed. The legal quandary we face is over *who* ought to be disappointed: the party adhering to the contract or the party with a change in position. By silencing the option for religious arbitration that the parties agreed to in advance of conflict, the only answer to the “*who* is disappointed” question is that the previous meeting of the minds is void: the party who abides by the contract is disappointed. This, in essence, is the Reverse Entanglement Principle proposed by academics to prohibit religious contract enforcement.<sup>325</sup> In a situation where the contract is legitimate and not void nor voidable for abuse or error, this result strikes us as counter to a variety of American legal tenets.

By its novel interpretation of the *Lemon* test,<sup>326</sup> Reverse Entanglement would apply the state action doctrine to the judicial \*70 enforcement of private, secular agreements between co-religionists who consent to faith-driven dispute resolution. If a party to a faithbased conflict seeks secular enforcement of a settlement, civil courts risk the unconstitutional religious establishment by enforcing a religious tribunal's rulings. As a sword, it cuts out the civil enforcement of faith-based dispute resolution within the sphere of secular conflicts. As a shield, it protects minorities from contractual power imbalances and limits lay exposure to religious law and values. Reverse Entanglement creates a firm boundary between the religious and the secular by prohibiting civil enforcement of faithinfluenced contractual obligations.

This is not an entirely new argument. Since the 1990s, academics and politicians, concerned by Supreme Court deference for arbitration, have launched a multi-pronged attack against arbitration and enforcement.<sup>327</sup> One such prong advocates for the application of the state action doctrine to arbitration award enforcement to tie in constitutional procedural due process to the arbitration process.<sup>328</sup> Nonetheless, every federal court has rejected the application of state action to contractual arbitration thus far.<sup>329</sup>

\*71 Similar to the religious exit right conjured by the *Bixler* court, Reverse Entanglement fails to solve its core fear of contractual abuse while also isolating and eliminating religious arbitration entirely. Religious minorities face a catch-22: current jurisprudence discourages them from outlining religious concepts within contracts,<sup>330</sup> but where co-religionist commerce must occur, the legitimacy of religious tribunals to resolve disputes is at risk. Interpreting civil enforcement of religious arbitration as state establishment of religion only tightens the thumbscrews for religious minority groups and ignores the historical *de minimis* entanglement between church and state, which has always been tolerable under the Constitution.<sup>331</sup>

For a viable use of the state action doctrine to limit arbitration abuse, we yet again proffer unconscionability as a solution. Further, unconscionability can be strengthened by the state action doctrine. Instead of expanding the interpretation of *Shelley v. Kraemer*,<sup>332</sup> the lynchpin behind Reverse Entanglement, from enforcement of racial covenants to include the enforcement of religious agreements, we propose a reinterpretation. When examining the state's role in arbitration enforcement, the crux of the *Shelley* decision was the control exerted on non-parties to the contract--that future buyers and sellers of a home with a racial covenant are forced to adhere to terms to which they never assented. Reverse Entanglement builds on *Shelley*'s state action doctrine to expand it to religious tribunals. \*72 We propose a contractual privity model when determining whether an arbitration agreement, through civil court enforcement, constitutes a state action.

### 1. State Action and Arbitration

Arbitration clauses have proliferated in recent decades, and with this growth, concern for the effective vindication of rights, both statutory and constitutional, has flourished. As a solution to this concern, litigators and academics alike have advanced the theory that, where a court enforces an arbitration clause or award, that court is performing a state action.<sup>333</sup> Where state action is found, the vindication of constitutional protections and rights is required by the courts. Such protections normally do not apply between nongovernment actors, but by asking the court for enforcement of a private agreement, state action would bind the courts to apply constitutional limitations to private parties and private conflicts. In other words, the court's enforcement of the agreement would constitute state action, and thus it must comply with the Constitution. Such a mix between constitutional protection and individual liberties is a tall order, as requirements like procedural due process, meant to prevent governments from making arbitrary or capricious decrees, would severely limit the functionality of private businesses and the efficiency of

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dispute resolution.<sup>334</sup> We argue that religious choice of law or forum clauses remain in the substantive law sphere and maintain equal judicial oversight as similarly situated non-religious contracts.

Originally within the private contract sphere, the state action doctrine forbids the civil enforcement of racial covenants within property law, as portrayed in the case *Shelley v. Kraemer*.<sup>335</sup> While *Shelley* was a consolidation of two cases, the relevant facts were the same: a racial minority family moved into a home within a neighborhood governed by prohibitive covenants, and members of the neighborhood petitioned civil courts to evict the families. In the namesake case, the Shelleys, an African American family, moved into a St. Louis neighborhood that had enacted a racially restrictive prohibition on African and Asian Americans from living in the neighborhood.<sup>336</sup> A member of that neighborhood, Kraemer,<sup>\*73</sup> brought a civil suit to enforce his and his neighbors' expectations of a white community and requested the eviction of the Shelleys from their newly purchased home.<sup>337</sup> There were many problems with this racially restrictive covenant: not all members of the neighborhood had signed on, the covenant was deemed inactive without the proper number of signatures, African Americans already lived within the community (and had refused to sign on), and neither the Shelleys nor the seller of the property were informed of the covenant until after the purchase.<sup>338</sup>

While the Supreme Court of Missouri upheld Kraemer's claim on the merits of private law enforcement, the United States Supreme Court found that civil enforcement of such a covenant would cause the state to violate the Equal Protection Clause of the 14th Amendment. The *Shelley* Court identified the intent of the 14th Amendment's drafters: "it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."<sup>339</sup> Without support "by the full panoply of state power, petitioners [the Shelleys] would have been free to occupy the properties in question without restraint."<sup>340</sup> Any action, demanded by an individual or by the state, "which results in the denial of equal protection of the laws to other individuals," was verboten.<sup>341</sup>

Today, state action jurisprudence is a "conceptual disaster area," and its application has been described as "a torchless search for a way out of a damp echoing cave."<sup>342</sup> There is no single test to identify when a private actor's actions transcend into state action.<sup>343</sup> Where tests do exist, the Supreme Court defines the circumstances of their use narrowly,<sup>344</sup> and circuit courts apply these tests haphazardly.<sup>\*74</sup> To dissimilar fact patterns,<sup>345</sup> *Shelley* was decided in the post-World War II period--a time when American society grappled with its moral victory against the Nazis and its own discriminatory policies at home.<sup>346</sup> The zeitgeist of the era encouraged the Court to act expansively against racial discrimination and punitively against racist private law. Further, the application of the covenant in *Shelley* was against the wishes of both the buyer and seller of the home and instead was the vindication of contractual rights granted to parties outside the agreement--a likely factor the Court considered when overturning the lower court's enforcement of the covenant.<sup>347</sup>

However, without expanding the state action doctrine further into contract law and beyond racially motivated covenants, federal and state governments and courts found alternative avenues for restricting private, racially influenced behavior. Public policy, legislative enactments, and courts' balancing of conflicting rights "are available to achieve the same, if not a better result, without clouding the difference between state and private action."<sup>348</sup> Despite the difficulty of applying state action doctrine to contract law, no court has "found state action solely on the basis that the court enforced an otherwise private arrangement."<sup>349</sup> *Shelley* "has not been extended beyond the context of race discrimination,"<sup>350</sup> and arbitration fits under the category of a neutral private arrangement--a realm that, even where enforcement occurs, is not intertwined enough with state actors to implicate the state action doctrine.<sup>351</sup>

Even where private parties rely on statutory schemes and make use of the judicial system to vindicate their rights, courts are hesitant<sup>\*75</sup> to find state action outside of racial animus.<sup>352</sup> Entangling a conflict and its resolution with the state is not enough to render it an action of the state.<sup>353</sup> Instead, to find state action in entanglement, the Supreme Court requires "significant encouragement, either overt or covert" by the state: "mere approval or acquiescence of the State is not state action."<sup>354</sup> Under

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the FAA, the state authorizes, but does not require, the use of arbitration.<sup>355</sup> Courts are only involved at the start of the dispute, to stay litigation and compel arbitration, and at the end of the dispute, to enforce an award or handle an appeal of that award.

Reverse Entanglement rests its laurels on expanding *Shelley*'s state action doctrine to religious tribunals. The principle is violated when a civil court enforces an extrajudicial faith-based tribunal decision as the court is de facto establishing religion. Therefore, any choice of law or forum clause which implicates religious values is treated as void, no matter the length of adherence to the contract, consensus of the parties, or validity of the assent. There are some activities--like dueling--that society sets forth as *prima facie* facially unacceptable no matter how genuinely the parties consent nor how expertly and intelligently they contract. Reverse \*76 Entanglement would seek to add religion outside the home to that list of socially unacceptable activities.

State action can be found in a writ because it requires the state for operative effect, but with contractual arbitration agreements, the agreement becomes operative at the time of the signature--an act in which the state is completely uninvolved.<sup>356</sup> The decision to sign an arbitration agreement rests entirely with the private parties. While the FAA and the state are involved with the creation and enforcement of arbitration, "private choice cannot support a finding of state action," and the decision to sign a contract is, at its core, a private choice.<sup>357</sup> Where enforcement is required, without the direct involvement of a state official in the deprivation of a right, there is likely no state action, as "subtle encouragement" is insufficient.<sup>358</sup> Merely using the court system for a remedy, even if it deprives another of their rights, is not significant enough involvement of state officials to constitute as state action.<sup>359</sup>

Dispute resolution is "neither a traditional nor exclusive state function."<sup>360</sup> The extrajudicial nature of arbitration distinguishes it from civil court resolution. The parties, through an arbitration clause, delegate power to the arbitrator to resolve their disputes. This delegation of authority is easily distinguished from the government delegating authority to a power company or to conduct elections.<sup>361</sup>

Reverse Entanglement expands *Shelley*'s state action doctrine to religious tribunals by arguing that any enforcement of religious agreements would be undue entanglement with religion, and therefore any religious arbitration enforcement by civil courts is an Establishment Clause violation. Entanglement was originally a full \*77 prong of the *Lemon* test--a legal examination to determine whether a government action violated the Establishment Clause of the Constitution.<sup>362</sup> Throughout the last half century, the *Lemon* test has been modified, and today, the entanglement analysis is tempered by the requirement that the government must have been found to advance a particular religion.<sup>363</sup>

The *Lemon* test, in its new form, allows for greater cooperation between political and religious officials when providing social and educational services.<sup>364</sup> In essence, neutrality of legislation is not determinative of an Establishment Clause violation, and instead, to find constitutional violations, the Court has created a variety of inconsistent tests which range from an endorsement analysis,<sup>365</sup> to a coercion analysis,<sup>366</sup> to strict neutrality.<sup>367</sup> Equal Treatment, a weaker form of strict neutrality, has enthralled the current conservative majority on the Court.<sup>368</sup> Under this formulation, the religious are not "disabled by the First Amendment" from equal participation in government programs when compared to similarly situated non-religious actors.<sup>369</sup> Instead, the new formulation of the *Lemon* test asks first, whether a statute is religious on its face, and second, whether it is religiously neutral in its application.<sup>370</sup> The second prong is the new entanglement test, and the edits to the *Lemon* test have weakened Establishment Clause claims against government actions that impact the religious.<sup>371</sup>

The Court now allows, without establishment of religion, "religious parties to avail themselves of the same statutory rights and benefits available to everyone else."<sup>372</sup> While equal treatment for \*78 the religious under the FAA may have invoked the Establishment Clause under the original *Lemon* test, current Establishment Clause jurisprudence would declare that the government has established secularism such that the religious have unequal access to an entire field of law.<sup>373</sup>

The case of *Carson v. Makin* indicates that it is exceedingly unlikely that discrimination against the religious in providing access to privileges available to all will never be constitutional.<sup>374</sup> Here, the Court stated, "[i]n particular, we have repeatedly held that

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a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.”<sup>375</sup> Of course, a state can limit adjudication of cases to its courts, but it cannot permit adjudication through any arbitration the parties want other than religious arbitration. Similar, and what *Carson v. Makin* held, is that the state cannot fund all private schools other than religious schools—it could abolish funding for private schools entirely, but it cannot target religious private schools directly.

### 2. Western States and Establishment Limits

Not all legal regimes maintain the kind of strict establishment limits that exist in the United States, nor are such restrictions on states' privileging of religion over nonreligion or irreligion over religion strictly necessary from a standard liberal perspective. Modern Western nation states have adopted a range of different approaches to this issue ranging from American-style neutrality, to freedom of religion alongside an official state church as in the United Kingdom, to the affirmative secularism and public hostility toward religious practice seen in countries like France.<sup>376</sup> In many cases, the United States included, these commitments are products of unique historical experiences.<sup>377</sup> To expand the state action doctrine and to outright ban religious tribunals from the legal realm of alternative dispute resolution would be to adopt a decidedly non-American stance against religious pluralism and a very French *laïcité* approach to handling religion in public life.

The current state of French secularism seems to move beyond a state actor limitation on expressions of religion to a prohibition within the public sphere of religious free exercise and expression. \*79<sup>378</sup> An examination of two cases involving Muslim women wanting to wear religious head coverings within European Courts will illuminate the peculiarities of French *laïcité*: *Dogru v. France* (2008) and *S.A.S. v. France* (2014).<sup>379</sup> Both cases involve Muslim women and the free exercise of their religion in wearing head coverings.<sup>380</sup> In *Dogru*, a student was expelled where she refused to remove her headscarf during physical education class and rejected the school's offer of a correspondence education program.<sup>381</sup> Here, a school's dress code policies outweighed the free exercise of the individual, and the European Court “accorded France an ample ‘margin of appreciation’ for its state policy of secularism.”<sup>382</sup> *S.A.S.* involves the individual free exercise rights against what is, seemingly to some, a xenophobic face-covering ban. Here, while the European Court recognized that the woman's free exercise rights were violated by the French ban, the Court prioritized French neutrality in public life and reasoned that “individuals who are present in places open to all may not wish to see practices or attitudes ... which ... call into question the possibility of open interpersonal relationships.”<sup>383</sup> The neutral public culture promulgated by French secularism once again outweighed the non-harmful, public expression of religious free exercise. Unlike within the United States, the strict division between private, religious life and secular, public life is a core tenet of French society.

Whereas the United States weighs free exercise heavily during the balance of equities, the French system of secularism prioritizes neutrality of public life.<sup>384</sup> The problems French secularism seeks to solve are inherently different from the ones American secularism prioritizes, and to apply a French model to an American legal problem is counterintuitive and detrimental to religious minority groups. To outlaw religious tribunals or to treat them differently \*80 than other tribunals, be they based on international law, reconciliation, privacy, or otherwise other concerns, is to enforce a French style of secularism—to foist privacy onto religion and to smother its expression in public life. In contravention of the current, neutral treatment of religion by courts, the Reverse Entanglement principle attempts to prohibit religious arbitration by declaring enforcement of such arbitration awards as the establishment of a religion by the U.S. government.

Why expand state action doctrine to forbid things far less pernicious than racially exclusionary covenants? Why allow civil courts to prohibit the enforcement of faith-based extrajudicial tribunals' judgment which would otherwise be allowed but not for its religious nature? Deeming a court's enforcement of an arbitration award to fall under the state action doctrine would have a rippling effect, crippling arbitration jurisprudence entirely. To understand this point, we remind you of international commercial arbitration. If a choice of law clause indicates French law as the dispute resolution paradigm, all American rights are waived. If choice of law indicates an Alabama law paradigm, and the forum and conflict occur in California, then California state rights are waived. We see no difference between using another nation's legal rules to resolve disputes and using Jewish Law or Christian Canon Law to resolve disputes, so long as the agreement signed fits within contract law requirements for validity.

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### 3. Unconscionability and the State Action Doctrine

Currently, the FAA demands a high level of deference to extrajudicial tribunals, which weakens oversight of abusive contractual relationships. While we disagree that the state action doctrine should be invoked with enforcement of *all* arbitral agreements, there is some room for applying state action doctrine when enforcing private agreements. For example, we believe that when contractual obligations go beyond the parties in privity to impact nonparties, civil court enforcement becomes state action, and these contracts should be held to higher scrutiny under an unconscionability defense. The state action doctrine and its entanglement with free exercise needs to be clarified. Contracts of adhesion and ecommerce have loosened standards of mutual assent which may weaken the liberty-enhancing powers of private law. Assent and unconscionability claims against improper assent must be rigorously guarded or enhanced by Congress, more so than they are within civil courts currently.

\***81** We call for a new application of the state action doctrine within arbitration law to limit enforcement of agreements on parties outside of contractual privity. *Shelley v. Kraemer* can easily be read as a prohibition on the enforcement of racial covenants that governed the new buyers and sellers to an encumbered property rather than the prohibition on enforcement of racial covenants only.<sup>385</sup> For example, a covenant in property seeks to control the behavior of subsequent property buyers--those without a say in writing the agreement but beheld by the mutual assent of people they may have never met. Such a covenant ought to be limited to only the signors even if there is an arbitration provision. By limiting the contractual universe to the signors and keeping a sharp eye on any agreements which seek primarily to control interactions with outside parties, unconscionability can address the problems of alternative dispute resolution identified by opponents of religious dispute resolution while defending the faithful's right to choose alternative avenues of justice.

Privity was originally used by English courts to limit a product manufacturer's liability to recover in tort absent privity between the harmed and the manufacturer.<sup>386</sup> When privity was exported to American common law, American courts were already suspicious of the doctrine and sought to limit manufacturers' ability to avoid liability.<sup>387</sup> After about half of a century of grappling with the privity doctrine,<sup>388</sup> it was tossed into the dustbin of common law by *MacPherson v. Buick Motor Co.* and replaced with the reasonable duties of care doctrine.<sup>389</sup> Later, *MacPherson*'s evolution away from privity developed into strict products liability.<sup>390</sup> However, when common law develops past a doctrine, it ought not be discarded forever--instead, we propose recycling privity within alternative dispute resolution contract law.

Justice Douglas' dissent in *Scherk v. Alberto-Culver Co.* echoes this privity paradigm, where he expands the definition of "victim" \***82** from the titanic companies in conflict to the "thousands of investors who are the security holders in [the company]. If there is fraud and the promissory notes are excessive, the impact is on the equity in [the company]."<sup>391</sup> Here, he argues that the SEC does not only protect parties to a contract and the direct victims of securities fraud, but also tertiary victims.

Such privity analysis fits well with the current ban on enforceable pre-dispute arbitration agreements with sexual assault and sexual harassment cases. Where sexual violence runs rampant in a company, there are two levels of victims. The first victim category is obvious: the target of the sexual violence. The second, however, is less obvious, and such victim status may be unknown to the victim parties. In a company where promotions are granted via sexual favors, those who are never propositioned, i.e., employees deemed unattractive by a sexual harasser in power, find their careers stagnant. Further harmed are the employees who know about the sexually charged environment and take active steps to remove themselves from potentially dangerous situations at the expense of the networking necessary for career elevation. By prohibiting predispute arbitration agreements of these claims, parties who may have never realized their victim status are protected by the sunlight that shines on repeat offenders and their public exorcism from positions of power.

Like the torts' interpretation of privity to limit redress to harm,<sup>392</sup> we believe non-privity should evoke higher scrutiny from the courts through classic unconscionability analyses. Contracts that contain alternative dispute resolutions ought to only address the universe of interactions between signors and *not* the relationship between a signor and others. Consider *Bixler* once more. The plaintiffs alleged that under the laws of Scientology, members cannot report crimes to the police, as the report to authorities

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would be considered a “high crime” and likely would be punished in accordance with Scientology’s laws.<sup>393</sup> The claims against Scientology consist of *crimes*<sup>394</sup> —crimes that, if the arbitration agreement were \*83 enforced by the court, would impact the ability of the police to prevent crimes and the courts from punishing crimes. Stalking, vandalism, harassment, and theft are criminal behavior necessitating a response from law enforcement, and in *Bixler*, the goal of the arbitration agreement was seemingly to silence reports of abuse to parties outside of the Church.

Contractual conditions which control and impact the relationship and actions towards a third, non-privity party, ought to have a higher level of scrutiny and ought to have stronger defenses available against enforcement by the third, uninvolved, party.

Racial covenants in which signors in a neighborhood all agree that African American or Jewish or queer people cannot move into a neighborhood would continue to be struck down, as they impact the rights and liberties of a non-signor party. But where such a contract only governs the universe of actions between the signors, whether real estate, commercial, or marital, then decisions within such agreements will warrant the high level of deference required by civil courts within the FAA and common law. Child custody distinguishes contracts kept in privity between signing individuals from contracts that seep outside of the agreed-to universe.<sup>395</sup> Exactly because children are not assets and may not be contractually divided, binding arbitration is limited and ought to remain limited under this new paradigm. Judges cannot fundamentally engage in only a procedural review; they must also engage in substantive review to determine the best interests of the child. They have no choice but to ask whether the arbitration panel reached the right, or a plausibly right, answer. Regardless of the court’s standard of review of the arbitration panel, the predicate of child custody analysis is not procedural due process but some form of substantive due process.<sup>396</sup> Under the new paradigm, child custody cases affecting third, uninvolved parties would continue to remain limited.

A look at the classic religious contract case under this new paradigm, *In re Marriage of Weiss*,<sup>397</sup> undergirds the logic of privity and state action doctrine. Here, a couple signed a prenuptial agreement \*84 to raise their children “in loyalty to the Jewish faith and its practices.”<sup>398</sup> After the couple’s divorce, the wife, who had previously converted to Judaism, re-committed to Christianity and enrolled their child in Sunday school and church-based summer camp.<sup>399</sup> The father sued to stop the child’s indoctrination into Christianity and enrollment in activities that “would be contrary to his Jewish faith.”<sup>400</sup> The court ultimately denied the father’s claims on two points: first, that “a parent cannot enjoin the other parent from involving their child in religious activities in the absence of a showing of harm to the child”<sup>401</sup> and second, that a written antenuptial agreement between parents cannot dictate the upbringing of the child.<sup>402</sup> The father argued for a heightened deference towards a religious-control clause based on his free exercise rights to raise his child in the Jewish faith.<sup>403</sup> In response, the court based part of its ruling on concerns for judicial entanglement, stating that it was hesitant to define what is and is not an upbringing within the Jewish faith or indoctrination into Christianity.<sup>404</sup> Additionally, the court based its opinion on the free exercise right of the mother to change her religion and to raise her child within that religion.<sup>405</sup> Without explanation or elaboration, the court stated:

Further, in view of Marsha’s *inalienable* First Amendment right to the free exercise of religion, which includes the right to change her religious beliefs and to share those beliefs with her offspring, her antenuptial commitment to raise her children in Martin’s faith is not legally enforceable for that reason as well.<sup>406</sup>

Both of the court’s rationales focus on the parents’ rights, rather than those of the child, and give unnecessary special treatment to religious-focused clauses. In essence, this conflict between the child’s parents sought to control how one parent, a party to the antenuptial agreement, treated the child, a nonparty to the antenuptial agreement. While the court focused intensely on the religious requirement of the antenuptial agreement, we think that the \*85 opinion would be the same if, instead of a Christianity prohibition, the father had argued for a soccer prohibition or a debate club prohibition. All activities, religious attendance or soccer or debate, are presumptively harmless to the child without a subsequent showing of clear harm. The passing of a child between divorced households subsequently implies a passing of parental authority,<sup>407</sup> and while the father’s claims in *Weiss* seemed to simply enjoin the actions of the mother,<sup>408</sup> his arguments instead sought to dictate how the mother exercised her parental authority and interacted with a non-party to the contract, i.e., the child.

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This privity-focused model applies in financial matters as well, as is the case in bankruptcy. While in most commercial disputes the contractual relationship between the parties generates the obligation to go to arbitration, it is well established that this is not the case when one of the parties is in bankruptcy. It is impossible to resolve only one dispute alone in bankruptcy since assets given to one party cannot then be given to another party. Rather, the bankruptcy court must have sole jurisdiction to resolve all disputes, since in a case of an insolvent debtor, all disputes interrelate. Based on this, it is widely asserted that:

[E]nforceability of arbitration agreements is within the sound discretion of the bankruptcy court. Thus, when a contracting party is also a debtor in bankruptcy and an arbitrable issue arises before a bankruptcy court, the decision to compel arbitration rest[s] within the sound discretion of the bankruptcy judge.<sup>409</sup>

And this enforceability is not governed by the Federal Arbitration Act exclusively.

As a *reductio ad absurdum* example to highlight how revolutionary this privity-based reliance on private law can be, we present a hypothetical white supremacist tribunal (Ku Klux Konflict Resolution, if you will). If the KKK wants its civil law disputes settled away from the spotlight of modern, equality-based liberalist state courts, and they organize themselves to the degree where they can legitimately invest authority into a body of decision-makers, then let them use contract law between themselves to seek white-washed justice. Say a member of the Bayou Knights violates a contract with a \*86 white nationalist publication, or crashes his car into a member of the Knights of the White Camelia's car, or starts a cross-burning that runs amok and burns down the house of Will Quigg, and each perpetrator and victim have signed agreements to settle their disputes before a panel of Grand Dragons. Civil courts ought not interfere with the extrajudicial tribunal's decision. Of course, common law contract limitations still apply: unconscionability, coercion, and wildly lopsided decisions ought to be evaluated and struck down within civil courts. Through this (frankly silly) example, we want to emphasize that private law pluralism can be tailored for a variety of lived experiences, whether characteristic of the Left, Right, or Center. To only allow some politically-affiliated groups to take advantage of private law potential would be to ignore the knock at the door of liberty.

Just as any agreement between two businesses, two people, or two co-religionists could be unconscionable, we believe that de facto declaring only one of those agreements void but requiring civil court procedure to determine the status of the others is inconsistent. We admit that not all contracts between co-religionists are validly created, but we also insist that many secular contracts suffer the same defect. To only target religious agreements due to the threat of abuse is pernicious and would violently prune an avenue of blossoming American pluralism. Where an alternative dispute award is grossly wrong and runs counter to public policy, we agree that the state action doctrine ought to apply against enforcement. We aver that religious extrajudicial tribunal clauses ought to be policed on the same standards for unconscionability, manifest disregard, and lack of assent which bind other similar, but secular, contracts. Solutions to unfairness within arbitration cannot and will not be solved by targeting only religious communities.

## CONCLUSION

Alternative dispute resolution allows minority religious communities to exercise different values from those prioritized within an adversarial civil court system. Arbitration creates a haven for free exercise within religious minority communities. To shut down this avenue would be a violation of religious liberty. A religious arbitration clause should be no different than a choice of law clause that mandates foreign law govern dispute resolution. To only outlaw a religious arbitration clause and not a secular one, both of which may involve federal rights waiver, is a state action inhibiting free exercise.

\*87 Although genuine problems exist within the wide expanse of choice of law and forum clauses, treating religious arbitration clauses differently than secular clauses would be disastrous. The religious exit right to contracts in both *Bixler* and Reverse Entanglement are present viable legal theories; however, such heavy-handed jurisprudence runs counter to the American religious tradition and would rob minority groups of the opportunity to utilize contract law similar to how businesses, marriages, and the government do.

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Instead, legal scholars and practitioners should turn to unconscionability to shut down arbitration abuse, whether secular or religious. The subjectivity inherent to unconscionability allows for the weighing of power dynamics, emotional state and ties, and the substance of the contract itself. Additionally, the state action doctrine can create a lower threshold of unconscionability for contracts that violate privity--contracts that seek to control the actions of parties uninvolved in the contract signing. Utilizing unconscionability against arbitration clauses would defend against abuse without silencing the flourishing co-religionist commerce within religious minority communities or derailing the current alternative dispute resolution revolution.

**Footnotes**

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1 *Bixler v. Super. Ct. for the State of Cal.*, No. B310559, 2022 WL 167792 (Cal. Ct. App. Jan. 19, 2022), *review denied sub nom.* *Bixler v. Super. Ct.*, S273276, 2022 Cal. LEXIS 2283 (Apr. 20, 2022), *cert. denied sub nom. Church of Scientology Int'l v. Bixler*, 143 S. Ct. 280 (2022). The California Supreme Court declined to grant review of the case, and it was ordered as not for publication.

2 *Id.*

3 *Id.* at \*1.

4 *Id.* at \*11.

5 See **Michael J. Broyde** & Alexa J. Windsor, *In Contracts We Trust (And No One Can Change Their Mind!)*, 21 PEPP. DISP. RESOL. L.J. 1 (2021).

6 See generally Sophia Chua-Rubinfeld & Frank J. Costa, Jr., *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2087 (2019).

7 See *infra* Section III.A.

8 See *infra* Section II.

9 See **Broyde** & Windsor, *supra* note 5, at 15-22.

10 Although cases have not arisen on this issue, we believe that the jurisprudence behind a religious exit right to contract would be reciprocal to secular contracts. For example, you sign a contract that requires the payment of interest. You then convert to Islam, where the payment of interest runs counter to religious prohibitions on usury. As the interest

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payments harm your newly found Islamic conscience, under *Bixler*, you would likely receive an exit right to this entirely secular contract. Or, say you are in a same-sex marriage, and you convert to a religion that does not recognize same-sex marriage. Your marriage inhibits your free exercise of religion and is thereby void.

11 **Broyde** & Windsor, *supra* note 5, at 35-37.

12 *Id.* at 41-44.

13 *Id.* at 80.

14 See *infra* Section II.A.

15 **MICHAEL J. BROYDE**, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS 37 (2017).

16 *Id.* at 42; **Michael** A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769, 771-73 (2015).

17 Helfand & Richman, *supra* note 16, at 773.

18 *Id.* at 773 n.10 (“Although the reasons for this constitutional restriction vary, most scholarly treatments contend that the Establishment Clause erects structural or jurisdictional barriers to courts’ ability to interfere with the authority of religious institutions to govern religious life.”).

19 **Encore Prods., Inc. v. Promise Keepers**, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) (“‘Neutral principles’ are secular legal rules whose application to religious parties or disputes do not entail theological or religious evaluations.” (citing *Jones v. Wolf*, 443 U.S. 595 (1979))).

20 Helfand & Richman, *supra* note 16, at 773-74 (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)).

21 Co-religionists are two members of the same faith.

22 **Michael J. Broyde**, *Faith-Based Arbitration Evaluated: The Policy Arguments for and Against Religious Arbitration in America*, 33 J.L. & RELIGION 340, 370 (2018).

23 *Id.*

24 For an example as to how this plays out within the kosher industry, see **Broyde** & Windsor, *supra* note 5, at 17-19.

25 *Id.*

26 **BROYDE**, *supra* note 15, at 43.

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- 27 Silvio Ferrari, *Introduction: The Challenge of Law and Religion*, in ROUTLEDGE HANDBOOK OF LAW AND RELIGION 1, 7 (Silvio Ferrari ed., 2015) (quoting TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 28 (1993)).
- 28 For another cultural example of this comingling of law and politics, see Fernanda Pirie, *Secular Morality, Village Law, and Buddhism in Tibetan Societies*, 12 J. ROYAL ANTHROPOLOGICAL INST. 173, 173-190 (2006).
- 29 Saba Mahmood, *Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation*, 18(2) PUBLIC CULTURE 323, 328 n.10 (2006).
- 30 Charles Taylor, *Why We Need a Radical Redefinition of Secularism*, in THE POWER OF RELIGION IN THE PUBLIC SPHERE 34, 36 (Eduardo Mendieta & Jonathan VanAntwerpen eds., Colum. Univ. Press 2011).
- 31 Mahmood, *supra* note 29, at 335-36.
- 32 For an example of general Protestant Christian morality hysteria in jurisprudence, see *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (“Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”); *id. at 166* (“Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?”).
- 33 **BROYDE**, *supra* note 15, at 16-17; *see, e.g.*, *Woodlands Christian Acad. v. Weibust*, No. 09-10-00010-CV, 2010 WL 3910366 (Tex. App. Oct. 7, 2010); *Easterly v. Heritage Christian Schs.*, 107 Fair Empl. Prac. Cas. (BNA) 173 (S.D. Ind. 2009).
- 34 Abdul Wahid Sheikh Osman, *Islamic Arbitration Courts in America & Canada?*, HIIRAAN ONLINE (2005), [https://www.hiiraan.com/op/eng/2005/dec/Prof\\_Abdulwahid211205.htm](https://www.hiiraan.com/op/eng/2005/dec/Prof_Abdulwahid211205.htm) [<https://perma.cc/EN4D-VWCG>]; *see BROYDE*, *supra* note 15, at 14-16.
- 35 Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 521 (2012).
- 36 *See generally Michael J. Broyde*, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 N.Y.L. SCH. L. REV. 287 (2012-2013).
- 37 *Mikel v. Scharf*, 432 N.Y.S.2d 602, 605 (Sup. Ct. 1980), *aff'd*, 444 N.Y.S.2d 690 (App. Div. 1981) (affirming vacatur of award granted by religious tribunal); *see, e.g.*, *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343 (D.C. 2005) (allowing religious arbitration within Beth Din to continue).
- 38 *See Lisa Bernstein*, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); *see also Barak D. Richman*, *An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange*, 9 J. LEGAL ANALYSIS 247 (2017).
- 39 Bernstein, *supra* note 38, at 121.

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40      *Id.* at 119.

41      *Id.* at 140.

42      *Id.* at 141, 152.

43      See *Remedies for Breach of Contract*, UNIV. OF N.M. JUD. EDUC. CTR., <http://jec.unm.edu/education/online-training/contract-law-tutorial/remedies-for-breach-of-contract> [<https://perma.cc/XXJ3-RF7H>].

44      Bernstein, *supra* note 38, at 127.

45      *Id.* at 125.

46      *Id.* at 127 (“Many dealers feel that the arbitrators have redistributive instincts.”); see also *id.* at 115, 119-21, 124-30, 148-51, 157.

47      Bernstein, *supra* note 38, at 148; **BROYDE**, *supra* note 15, at 6.

48      Bernstein, *supra* note 38, at 124.

49      **Broyde**, *supra* note 22, at 349.

50      *Id.*

51      See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983).

52      Religious arbitration results may not reflect “contemporary liberal justice” under the FAA. **Broyde**, *supra* note 22, at 347. For example, a religious institution applied biblical values to their arbitration award when holding a principal was wrongfully terminated, and the principal received about \$150,000 in damages. *Prescott v. Northlake Christian Sch.*, 141 F. App'x 263, 265 (5th Cir. 2005). The school argued the award was substantially inconsistent with the normative standards governing employer-employee relationships under applicable state law, where an employee could be terminated without cause. *Id.* The reviewing court affirmed the decision by the arbitrator, rejecting the school's argument that the biblical standards should not have applied. *Id.* This is consistent with the general American law rule that “the fact that the remedy ordered by an arbitrator is inconsistent with state law is not grounds for vacating an award.” *Id.* at 272.

53      **Michael** A. Helfand, *Arbitration, Transparency, and Privatization: Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 2997 (2015).

54      Matthew 23:23 (New International) (“Woe to you, teachers of the law ... you have neglected the more important matters of the law—justice, mercy, and faithfulness.”).

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- 55 R. Seth Shippee, “*Blessed Are the Peacemakers*”: Faith-Based Approaches to Dispute Resolution, 9 ILSA J. INT'L & COMP. L. 237, 242-43 (2002).
- 56 Judith M. Keegan, *The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation*, 1987 J. DISP. RESOL. 11, 12 (1987).
- 57 *Handbook for Christian Conciliation*, RELATIONAL WISDOM 360, at 11 (June 2022), <https://rw360.org/wp-content/uploads/2019/04/Handbook-for-Christian-Conciliation-v5.3-4-23-19.pdf> [https://perma.cc/3J5Q-FNQK] (citing Matthew 18:15-20; 1 Corinthians 6:1-8).
- 58 RELATIONAL WISDOM 360, rw360.org [https://perma.cc/Y943-UNX6].
- 59 *Are ICC Mediators & Arbitrators Qualified?*, INST. FOR CHRISTIAN CONCILIATION, <https://www.iccpeace.com/qualifications/> [https://perma.cc/M629-AM32].
- 60 Ken Sande, *Turning Assault into Reconciliation*, RELATIONAL WISDOM 360 (Jan. 11, 2015), <https://rw360.org/2015/01/11/turning-assault-reconciliation/> [https://perma.cc/BDZ8-UVPD].
- 61 *Id.*
- 62 KEN SANDE, THE PEACEMAKER: A BIBLICAL GUIDE TO RESOLVING PERSONAL CONFLICT 20 (3d ed. 2004).
- 63 Ken Sande, *The Dangers of “Good” Advocacy*, RELATIONAL WISDOM 360 (Apr. 2, 2022), <https://rw360.org/2022/06/17/the-dangers-of-good-advocacy/> [https://perma.cc/4Z3R-YP2Q].
- 64 *Handbook for Christian Conciliation*, *supra* note 57, at 9.
- 65 *Id.* at 6-7. Successful solutions were found in conflicts such as:  
[T]he owner of a house accused a builder of doing defective work[,] an employee claimed that she was improperly fired from her job[,] the owners of a business could not agree on how to divide its assets[,] a church was being torn apart by doctrinal and personality conflicts[,] a partner in an oil and gas development venture believed he had been defrauded[,] a patient alleged that a doctor had performed surgery improperly[,] the birth mother of a child wanted to reverse an adoption[,] an author claimed that a publisher had broken a contract to publish his book[,] a husband and wife were struggling with an impending divorce[,] two ranchers disagreed on road right-of-way[,] a company claimed that its competitor's product infringed on its patent[,] a divorced couple disagreed constantly over child support and visitation.  
*Id.*
- 66 Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI.-KENT L. REV. 111, 120 (2015).
- 67 BROYDE, *supra* note 15, at 20.

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68 Osman, *supra* note 34.

69 See, e.g., *Jabri v. Qaddura*, 108 S.W.3d 404 (Tex. App. 2003); *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004).

70 Compare CYNTHIA BROUGHER, CONG. RSCH. SERV., R41824, APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES 3 (2011) (“Though some of the legal ramifications of these Islamic arbitration agreements are still unclear, *courts have in most respects treated them no differently than other arbitration agreements*. Such agreements reflect the mutual consent of the parties to use Islamic principles and institutions in subsequent disputes.” (emphasis added)), with Gregory C. Sisk & **Michael** Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012) (finding Muslim free exercise claims disproportionately fail in federal court).

71 108 S.W.3d 404 (Tex. App. 2003).

72 Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT'L L.J. 108, 130 (2010).

73 *Jabri*, 108 S.W.3d at 412.

74 *Id.* at 413.

75 Rabea Benhalim, *The Case for American Muslim Arbitration*, 2019 WIS. L. REV. 531, 564 (2019).

76 **Michael** A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1265-66 (2011).

77 *Id.*

78 *Id.*

79 Aida Maita, *Arbitration of Islamic Financial Disputes*, 20 ANN. SURV. INT'L & COMP. L. 35, 37 (2014).

80 **Broyde**, *supra* note 22, at 349.

81 Benhalim, *supra* note 75, at 564.

82 *Id.* at 532-33.

83 *Id.* at 540, 562-63 (“During the colonial and post-colonial periods throughout Muslim-majority countries, the qualities of classical Islamic law of being ‘highly localized, flexible, and dynamic ... [were] seen as antithetical to the modern legal system, which by its nature requires a centralized government ....’” (quoting Kristina Benson, *The Moroccan Personal*

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*Status Law and the Invention of Identity: A Case Study on the Relationship Between Islam, Women, and the State*, 12 UCLA J. ISLAMIC & NEAR E. L. 1, 4 (2013)).

84 *Id.* at 571.

85 *Id.* at 571-72.

86 See Mahdi Zahraa & Nora A. Hak, *Tahkim (Arbitration) in Islamic Law Within the Context of Family Disputes*, 20 ARAB L.Q. 1, 33-34 (2006).

87 **Broyde**, *supra* note 22, at 353.

88 See C. Paul Dredge, *Dispute Resolution in the Mormon Community: The Operation of Ecclesiastical Courts in Utah*, in 4 ACCESS TO JUSTICE: THE ANTHROPOLOGICAL PERSPECTIVE 191, 198 (Klaus-Friedrich Koch ed., 1979); **MICHAEL J. BROYDE**, THE PURSUIT OF JUSTICE AND JEWISH LAW 14-20 (1996).

89 See generally Edo Banach, *The Roma and the Native Americans: Encapsulated Communities Within Larger Constitutional Regimes*, 14 FLA. J. INT'L L. 353 (2002).

90 *The Peacemaking Program of the Navajo Nation*, NAVAJO NATION JUD. BRANCH, <http://www.courts.navajonsn.gov/indexpeacemaking.htm> [<https://perma.cc/TZD5-TTYH>].

91 James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 80-82 (1997); see Russel Lawrence Barsh, *Navajo Tribal Courts, Property and Probate Law, 1940-1972*, 6 L. & ANTHROPOLOGY 169, 176 (1991); Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 300 n.21 (2000).

92 Brown, *supra* note 91, at 301.

93 *Id.*

94 *Id.* at 304.

95 *Id.* at 303 (“The judge may select the *naat'aanii* from a list compiled and certified at meetings of local chapters and maintained by the court clerk. Otherwise, the court may appoint the *naat'aanii* ‘from qualified persons known to it or any person recommended as being qualified as a [p]eacemaker.’” (quoting JAMES W. ZION & NELSON J. MCCABE, NAVAJO PEACEMAKER COURT MANUAL 102-03 (1982))).

96 *Community Newsletter*, NAVAJO NATION DIV. OF CMTY. DEV. (Sept. 2021), <https://www.nndcd.org/wp-content/uploads/2021/09/DCD-Newsletter-September-2021.pdf> [<https://perma.cc/TJ7E-4LRM>]. After thirty years of practice, the Navajo community found that the institutionalization of its peacemaking process came to resemble mediator-assisted settlement processes, and that the process lost necessary Navajo components: “Its teaching component, its heroic component, and its dynamic life value engagement component as *hózh?óji naat'aah* were not included in the peacemaker court rules and, over time, fell out of practice.” *Plan of Operations*, PEACEMAKING PROGRAM OF THE JUD. BRANCH OF THE NAVAJO NATION, at 2 (July 30, 2012), <https://courts.navajo-nsn.gov/Peacemaking/Plan/>

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PPPO2013-2-25.pdf [<https://perma.cc/FYV4-MNBK>]. Ultimately, “the emotional component of peacemaking came to be viewed as a complication that the peacemaker ought to quieten and diffuse” rather than address and resolve. *Id.* Beginning in the early 2000s, the Navajo Nation began reform efforts to realign *hózh?óji naat'aah* with traditional Navajo values--the Judicial Conference and Council dropped “court” from the English title of the process, peacemaking rules were changed to guidelines, and laws were passed to increase family law referrals without court orders to the Peacemaking Program. *Id.* In criminal law, the Peacemaker Program provides, in a limited capacity, suggestions of *nályééh*, or reparations, at sentencing. *Id.* at 3.

97 Brown, *supra* note 91, at 301.

98 Benhalim, *supra* note 75, at 547 (“Muslims’ interpretations of religious law often closely parallel their cultural backgrounds, such that in the United States there is a much broader diversity of interpretations of religious law than in the United Kingdom, which is mostly South Asian and thus mostly adherent to the Hanafi doctrinal school.”).

99 *Id.* at 557.

100 *Id.* at 573-74.

101 *Id.* at 548.

102 *Id.* at 574.

103 See GENDER AND JUSTICE IN FAMILY LAW DISPUTES: WOMEN, MEDIATION, AND RELIGIOUS ARBITRATION (Samia Bano ed., 2017) for a collection of essays on the topic. Specifically, for a North American analysis of religious arbitration abuse, see Wendy Kennett, *Religious Arbitration in North America*, in GENDER AND JUSTICE IN FAMILY LAW DISPUTES: WOMEN, MEDIATION, AND RELIGIOUS ARBITRATION, *supra*, at 189-214.

104 **Broyde**, *supra* note 22, at 352.

105 Also formally ineligible from offering witness testimony are unrepentant sinners, relatives of litigants, and others with financial interests in the outcome of the case. In practice, all do testify. See EMANUEL QUINT, 1 A RESTATEMENT OF RABBINIC CIVIL LAW 52, 275-300 (1990).

106 See, e.g., Saher Tariq, *Muslim Mediation and Arbitration: Insights from Community and Legal Practice*, in GENDER AND JUSTICE IN FAMILY LAW DISPUTES: WOMEN, MEDIATION, AND RELIGIOUS ARBITRATION, *supra* note 103, at 126, 128-36; Shaista Gohir & Nazmin Akthar-Sheikh, *British Muslim Women and Barriers to Obtaining a Religious Divorce*, in GENDER AND JUSTICE IN FAMILY LAW DISPUTES: WOMEN, MEDIATION, AND RELIGIOUS ARBITRATION, *supra* note 103, at 166, 171-72; Samia Bano, *Agency, Autonomy, and Rights: Muslim Women and Alternative Dispute Resolution in Britain*, in GENDER AND JUSTICE IN FAMILY LAW DISPUTES: WOMEN, MEDIATION, AND RELIGIOUS ARBITRATION, *supra* note 103, at 46, 55; see also HAUWA IBRAHIM, PRACTICING SHARIAH LAW: SEVEN STRATEGIES FOR ACHIEVING JUSTICE IN SHARIAH COURTS 140-41 (2012).

107 Osman, *supra* note 34.

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- 108 JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 246 (4th ed. 2016).
- 109 *Id.*
- 110 Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 403-06 (2009).
- 111 See, e.g., All Things Considered, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 27, 2008, 12:49 AM), <https://www.npr.org/transcripts/90857818> [<https://perma.cc/DY2N-N6DB>]; All Things Considered, *Philly's Black Muslims Increasingly Turn to Polygamy*, NPR (May 28, 2008, 10:59 AM), <https://www.npr.org/templates/story/story.php?storyId=90886407> [<https://perma.cc/H7GV-RE2D>].
- 112 See *Some Muslims in U.S. Quietly Engage in Polygamy*, *supra* note 111 (“If you are the second or third or fourth wife, that marital relationship is not going to be recognized for immigration purposes .... [I]f your husband is a citizen or green card holder, he can't sponsor you .... [I]f your husband gets asylum, you don't get asylum at the same time.””).
- 113 See Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 2 (2014) (“[T]hese second or third wives can only reveal their married status in certain circles, as their relationships are relegated to a place of silence and inferiority in public for fear of social stigma or criminal sanctions.”).
- 114 *Polygamist Leader Convicted of Child Sex Abuse*, NPR (Aug. 4, 2011, 5:44 PM), <https://www.npr.org/2011/08/04/139004476/polygamist-leader-convicted-of-child-sex-abuse> [<https://perma.cc/UF42-QRJX>].
- 115 Thomas Korosec, *West Texas Polygamist Compound Worries Some*, HOUS. CHRON. (Mar. 6, 2005), <https://www.chron.com/news/houston-texas/article/West-Texas-polygamist-compound-worries-some-1928079.php> [<https://perma.cc/23CK-MEKP>].
- 116 *Id.*
- 117 See Geoffrey Fattah, *Parallels to Short Creek Raid in 1953 Are Pointed Out*, DESERETNEWS (Apr. 10, 2008), <https://www.deseret.com/2008/4/10/20081346/parallels-to-short-creek-raid-in-1953-are-pointed-out> [<https://perma.cc/HZ83-PRVK>] (“Texas authorities need to know that after the 1953 Short Creek raid, every man, woman and child returned to Short Creek to resume their polygamist lives. The raid quickly became the FLDS Church's rallying point.”). As a note, DeseretNews is owned by The Church of Jesus Christ of Latter-day Saints.
- 118 See *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872 (Ct. App. 1988).
- 119 9 U.S.C. § 401 (2022).
- 120 By requiring alternative dispute agreements for rights, either statutory or constitutional, to take place *after* disputes, the mutuality of arbitration seems more likely--where parties, if disinclined to waive their federal rights, still have an avenue of vindication once those rights are violated.

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121 **Broyde**, *supra* note 22, at 355.

122 *Id.*

123 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 (2011) (noting that “partners could incorporate compulsory arbitration provisions that allow them to select gay-friendly decision-makers to resolve future disputes”); Nancy Levit, *Cohabitation, Domestic Partnerships, and Nontraditional Families Annotated Bibliography*, 22 J. AM. ACAD. MATRIM. LAW. 169, 174-76, 185, 187-89, 192 (2009).

124 See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Justice Alito tries to distinguish same-sex marriage and sodomy substantive due process as different from abortion:

Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed “potential life.”

*Id.* at 2280 (citations omitted). However, Justice Thomas, in his concurrence, pulls no such punches: “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous.’” *Id.* at 2301 (Thomas, J., concurring) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring)).

125 **Michael** Warner, *Introduction: Fear of a Queer Planet*, 29 SOC. TEXT 3, 3 (1991).

126 Daniel Del Gobbo, *Queer Dispute Resolution*, 20 CARDOZO J. CONFLICT RESOL. 283, 292 (2019).

127 *Id.* at 296.

128 Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in THE TRANSGENDER STUDIES READER 244, 245 (Susan Stryker & Stephen Whittle eds., 2006).

129 Del Gobbo, *supra* note 126, at 310.

130 *Id.*

131 Judith Butler, *Critically Queer*, 1 GLQ: J. LESBIAN & GAY STUD. 17, 19 (1993).

132 Heteronormative refers to traditional American societal standards for sexual and gender identities and expressions. Non-heteronormative refers to individuals who do not adhere to these expectations.

133 John A. Stover III, *When Pan Met Wendy: Gendered Membership Debates Among the Radical Faeries*, 11 NOVA RELIGIO: J. ALT. & EMERGENT RELIGIONS 31, 31 (2008).

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134 *Id.* at 35.

135 *Id.* at 33.

136 *Proposal: Conflict Resolution Flow*, NOMENUS, <https://nomenus.org/wiki/conflict-resolution-flow-2011/> [<https://perma.cc/2TNK-RBWU>].

137 Stover, *supra* note 133, at 34 (quoting HARRY HAY, RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER 287 (Will Roscoe ed., 1996)).

138 *Proposal: Conflict Resolution Flow*, *supra* note 136.

139 *Id.*

140 Literally. Both via the fluidity of membership between the two groups and the fact that the Radical Faeries and their sewing machines helped create the first nun habits for the Sisters. MELISSA M. WILCOX, QUEER NUNS: RELIGION, ACTIVISM, AND SERIOUS PARODY 59 (2018).

141 Cathy B. Glenn, *Queering the (Sacred) Body Politic: Considering the Performative Cultural Politics of the Sisters of Perpetual Indulgence*, THEORY & EVENT (2003) (emphasis omitted).

142 *Sistory*, THE SISTERS OF PERPETUAL INDULGENCE, INC., <https://www.thesisters.org/sistory> [<https://perma.cc/F8VF-696S>].

143 WILCOX, *supra* note 140, at 8-9, 22. The relationship an Order takes with a state seems to vary based on complicity or fear of being co-opted by a government:

In each country there is a different relationship, often at least somewhat formalized, between the Sisters and the state. These relationships span the gamut, however, from working closely together, as the Uruguay house and many of the German-speaking houses do, to refusing all state funding, as many of the French houses do. The former move seems to be more common in regions where there are state-sponsored outreach programs for sexual health and where the state--or at least that aspect of it--is generally trusted by the communities the Sisters serve, in which case the Sisters often partner with or even become an arm of those programs. Greater separation between convent and state is more common in situations where there are concerns about complicity with or co-optation by government forces.

*Id.* at 8-9.

144 *Orders Worldwide*, THE SISTERS OF PERPETUAL INDULGENCE, INC., <https://www.thesisters.org/world-orders>. [<https://perma.cc/FF8Q-2YPH>].

145 WILCOX, *supra* note 140, at 55-56.

146 *Id.*

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147 *Id.* at 7.

148 *Id.* at 58.

149 See Faucon, *supra* note 113, at 1; Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540 (2004).

150 See Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 287 (2010).

151 Zachary Zane, *Who Really Practices Polyamory?*, ROLLING STONE (Nov. 12, 2018), <https://www.rollingstone.com/culture/culture-features/polyamory-bisex-ual-study-pansexual-754696/> [https://perma.cc/62HT-MGQQ] ("That's really all polyamory is--being open to the idea of loving more than one person and having a serious relationship with multiple people at the same time.").

152 Faucon, *supra* note 113, at 1.

153 Jennifer D. Rubin, Amy C. Moors, Jes L. Matsick, Ali Ziegler & Terri D. Conley, *On the Margins: Considering Diversity Among Consensually Non-Monogamous Relationships*, 22 J. FÜR PSYCHOLOGIE 1, 3 (2014) (Ger.), <https://journal-fuer-psychologie.de/article/view/324> [https://perma.cc/N6M9-TBU5].

154 Faith Karimi, *Three Dads, a Baby and the Legal Battle to Get Their Names Added to a Birth Certificate*, CNN (Mar. 6, 2021) <https://www.cnn.com/2021/03/06/us/throuple-three-dads-and-baby-trnd/index.html> [https://perma.cc/GGW7-MWWE].

155 *Id.*

156 *Id.*

157 Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047, 2058 (2015).

158 *Id.*

159 *Id.* at 2053.

160 Since 2002, the National LGBT Chamber of Commerce (NGLCC) has supported initiatives which require the inclusion of LGBT businesses within current commerce structures. The NGLCC is the only third-party certifying body for Certified LGBT Business Enterprise companies that requires a business be majority owned, operated, managed, and controlled by LGBT persons and exists independently from non-LGBT business enterprises. Once certified, these LGBT-certified businesses have access to the over 200 corporate partners and several federal agencies which work with the NGLCC to promote supplier diversity and inclusion within the business community. *About Us*, NGLCC: NATIONAL LGBT CHAMBER OF COMMERCE, <https://nglcc.org/about-us/> [https://perma.cc/SX6U-9TS7]; *Corporate Partners*, NGLCC: NATIONAL LBGT CHAMBER OF COMMERCE, <https://nglcc.org/>

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corporate-partners [<https://perma.cc/MY7C-UJQW>]. The Founding Corporate Partners are as follows: IBM, Wells Fargo, American Airlines, JPMorgan Chase & Co., Ernst & Young, aetna, Travelport, Motorola Solutions, intel, Wyndham Worldwide, American Express; federal agencies are as follows: U.S. Departments of Commerce, Labor, Transportation, Housing and Urban Development, Agriculture, U.S. Small Business Administration, and the Central Intelligence Agency. *Id.* Over 1,500 companies have been certified under this model, and together, these LGBT businesses generate over 1.7 trillion dollars to the U.S. economy each year. Gene Marks, *There's Green in Being Gay: LGBT Businesses Contribute \$1.7 Trillion to the U.S. Economy*," WASH. POST (Jan. 23, 2017), <https://www.washingtonpost.com/news/on-small-business/wp/2017/01/23/theres-green-in-being-gay-lgbt-businesses-contribute-1-7-trillion-to-the-u-s-economy/> [<https://perma.cc/4KVZ-FJU2>].

161 Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983).

162 *Id.*

163 See *supra* Section II.A.

164 **Broyde**, *supra* note 22, at 365.

165 *Id.*

166 *Id.*

167 *Id.* at 367-68.

168 *Id.* at 368.

169 *Id.*

170 *Id.*

171 *Id.*

172 See PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 3 (Cambridge Univ. Press 2012).

173 **Broyde**, *supra* note 22, at 344. The American legal system is not entirely pluralistic because the Constitution has put restrictions in place on what state and local laws may be passed. State and local laws that violate the Constitution, like those abridging freedom of speech or authorizing warrantless searches, will be struck down. Under Article VI, clause 2 of the U.S. Constitution (i.e., the Supremacy Clause), federal law trumps state law, and in any conflict between the two, federal law will preempt state laws. See *Gibbons v. Ogden*, 22 U.S. 1, 210-11 (1824). Congress has invoked the Supremacy Clause in several aspects of society to create a consistent legal framework. See, e.g., 17 U.S.C. § 301 (preempting state laws in favor of federal copyright laws); 21 U.S.C. § 350k(a) (preempting state safety regulations for medical devices that varied from federal standards); 29 U.S.C. §§ 1144(a)-(b) (preempting state employee insurance benefit plans); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (preempting all state regulation and laws regarding alien registration because federal immigration law was sufficiently pervasive). Federal authority also reaches American Indian

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nations as their sovereignty and lawmaking power is contingent on congressional discretion. See 25 U.S.C. §§ 1301-03 (applying most of the Bill of Rights to American Indian tribes). Despite this, pluralism remains in American law as citizens are given the chance to have a say in what laws may rule over them. With limited constitutional impositions, individual states have the discretion to enact local tort, criminal, family, and property laws. Even as many push for more consistency across states, distinct differences remain. When a person decides where they want to live, they are also deciding which laws they want to apply to them. For example, different tort liabilities, drug laws and policies, gun-control measures, and landlord-tenant laws will apply depending on which state a person lives in. Furthermore, in areas where the Constitution gives Congress the authority to regulate, the Supremacy Clause mandates that federal laws are given supremacy over state laws. See U.S. CONST. art. VI, cl. 2. Even in areas where the federal and state governments have concurrent lawmaking power, the federal government has often allowed states to create their own laws, creating varied legal standards. The Supreme Court also has limited the uniformity of laws by requiring clear Congressional intent to preempt alternative state regulations. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983). Finally, even when there is a federal law in place, ninety-four district courts in twelve federal circuits must interpret and apply the federal law. This oftentimes leads to a wide variety of results and different standards in different parts of the country. See **Broyde**, *supra* note 22, at 344-45 n.20.

174 See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

175 Deference is high, even with manifest disregard of the law claims. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986) (“To adopt a less strict standard of judicial review would be to undermine our well-established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the ‘manifest disregard’ standard is therefore extremely limited.” (citations omitted)).

176 See Chua-Rubinfeld & Costa, *supra* note 6, at 2091-94.

177 Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 346 (2010).

178 **Broyde** & Windsor, *supra* note 5, at 4-9.

179 *Id.*

180 **BROYDE**, *supra* note 15, at 145-46.

181 See Chua-Rubinfeld & Costa, *supra* note 6, at 2099-103.

182 The Supreme Court has articulated a three-prong standard for waiver of fundamental rights in criminal cases: the waiver must be “knowing, voluntary, and intelligent,” though this standard only applies in criminal cases. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *Brady v. United States*, 397 U.S. 742, 748 (1970). Some scholars have advocated for expanding this standard to waiver of civil and constitutional rights. See Brittany Scott, *Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract*, 46 HASTINGS CONST. L.Q. 451, 453 (2019); Daniel P. O’Gorman, *A State of Disarray: The “Knowing and Voluntary” Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73 (2005); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001); Jennifer Lee Koh,

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*Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013).

183 Hodges v. Easton, 106 U.S. 408 (1882).

184 Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831 (2003).

185 See *Shimko v. Lobe*, 813 N.E.2d 669, 673-82 (Ohio 2004) (holding that where binding arbitration was required in a lawyer fee dispute, the court's regulation of the legal profession allowed for the waiver of Ohio's constitutional right to a jury trial); see also *Anderson v. Elliott*, 555 A.2d 1042, 1049 (Me. 1989); *In re Application of LiVolsi*, 428 A.2d 1268 (N.J. 1981).

186 Leonard v. Clark, 12 F.3d 885 (9th Cir. 1993).

187 Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 264-65 (1998).

188 David M. Levitan, *The Neutrality of the Public Service*, 2 PUB. ADMIN. REV. 317 (1942).

189 Stephen J. Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, 68 FLA. L. REV. 1227, 1229 (2016) (quoting STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.13 (3d ed. 2016)); *Wilko v. Swan*, 346 U.S. 427 (1953).

190 Scherk v. Alberto-Culver Co., 417 U.S. 506, 506 (1974).

191 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 240 (2013) (Kagan, J., dissenting).

192 *Scherk*, 417 U.S. at 508.

193 *Id.*

194 *Id.*

195 *Id.* at 517.

196 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).

197 *Id.* at 627-28.

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

199 *Id.* at 242.

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200 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

201 *Id.* at 29.

202 AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011).

203 *Id.* at 337.

204 *Id.*

205 *Id.* at 336.

206 *Id.* at 348.

207 *Id.* at 349.

208 *Id.*

209 *Id.* at 350.

210 *Id.*

211 *Id.*

212 *Id.*

213 138 S. Ct. 1612 (2018).

214 *Id.*

215 *Id.* at 1621 (emphasis added).

216 Perry v. Thomas, 482 U.S. 483, 490 (1987).

217 Buckeye Check Cashing, Inc. v. Cardega, 546 U.S. 440, 447 (2006).

218 Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000).

219 *Buckeye Check Cashing, Inc.*, 546 U.S. at 444.

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- 220     *Id.* at 446 (“[*Prima Paint*] rejected application of state severability rules to the arbitration agreement without discussing whether the challenge at issue would have rendered the contract void or voidable.” (emphasis omitted) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-04 (1967))).
- 221     Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St., 673 P.2d 251 (Cal. 1983).
- 222     Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959).
- 223     *Id.*
- 224     *Id.*
- 225     Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006).
- 226     Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d 625 (2d Cir. 1945).
- 227     *Devonshire Fabrics*, 271 F.2d at 411.
- 228     See, e.g., *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992).
- 229     *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 168 (Cal. 1981).
- 230     *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992).
- 231     *Id.*
- 232     See generally *Sanchez v. Sirmons*, 467 N.Y.S.2d 757 (Sup. Ct. 1983).
- 233     *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1912 (2022).
- 234     *Aguillard v. Auction Mgmt. Corp.*, 908 So. 2d 1, 18 (La. 2005).
- 235     See generally *Bruni v. Didion*, 73 Cal. Rptr. 3d 395 (Ct. App. 2008).
- 236     *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 173 (Cal. 1981) (“We are thus brought to the question whether the contract provision requiring the arbitration of disputes before the A.F. of M. ... is for that reason to be deemed unconscionable and unenforceable.”).

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237     *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000) (“[T]he arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration.”).

238     *Id.*

239     *Id.*

240     *Scissor-Tail, Inc.*, 623 P.2d at 173.

241     *Id.* at 175 (quoting *In re Cross & Brown Co.*, 4 A.D.2d 501, 502 (N.Y. App. Div. 1957)).

242     *Id.* (quoting *In re Cross & Brown Co.*, 4 A.D.2d 501, 503 (N.Y. App. Div. 1957)).

243     *Id.* at 176.

244     *Id.* at 174 (quoting *Federico v. Frick*, 84 Cal. Rptr. 74, 76 n.4 (Ct. App. 1970)).

245     *Id.* at 176.

246     *Id.*

247     *Id.* (quoting *In re Cross & Brown Co.*, 4 A.D.2d 501, 502 (N.Y. App. Div. 1957)).

248     *Id.* at 177.

249     *Id.* at 180.

250     *Id.*

251     *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689-92 (Cal. 2000).

252     *Id.* at 692 (citing *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 151 (Ct. App. 1997)).

253     *Scissor-Tail, Inc.*, 623 P.2d at 177.

254     *Id.* at 177 n.23.

255     *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 240 (2013) (Kagan, J., dissenting).

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- 256 Colby J. Byrd, *Vindicating the Effective Vindication Exception: Protecting Federal Statutory Rights in the Employment Context*, 70 OKLA. L. REV. 761 (2018).
- 257 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).
- 258 531 U.S. 79 (2000).
- 259 Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 399 (2014) (citing *Randolph v. Green Tree Fin. Corp.-Alabama*, 178 F.3d 1149 (11th Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 79 (2000)).
- 260 *Green Tree*, 531 U.S. at 92.
- 261 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013).
- 262 *Id.* at 231.
- 263 *Id.*
- 264 *Id.* at 245 (Kagan, J., dissenting).
- 265 *Id.* at 233 (majority opinion).
- 266 *Id.* at 236 (emphasis omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).
- 267 *Id.* at 244 (Kagan, J., dissenting).
- 268 Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1087-88 (2006).
- 269 Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1751).
- 270 Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2016 B.Y.U. L. REV. 427, 439 (2016) (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889)).
- 271 U.C.C. § 2-302 (AM L. INST. & UNIF. L. COMM'N 1977).
- 272 PATRICK ATIYAH, ESSAYS ON CONTRACT 331 (1986).

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- 273     *Unconscionability*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/unconscionability> [<https://perma.cc/CZV7-EG29>].
- 274     See Friedman, *supra* note 177, at 346.
- 275     *Id.*
- 276     *Id.*
- 277     Tulowitzki v. Atl. Richfield Co., 396 A.2d 956, 960 (Del. 1978) (quoting Gordon v. Crown Cent. Petrol. Corp., 423 F. Supp. 58, 61-62 (N.D. Ga. 1976)).
- 278     Graham v. Scissor-Tail, Inc., 623 P.2d 165, 165 (Cal. 1981).
- 279     Carboni v. Arrospide, 2 Cal. Rptr. 2d 845, 849 (Ct. App. 1991).
- 280     Friedman, *supra* note 177, at 329.
- 281     *Id.* at 333 (quoting Peter Linzer, “*Implied*,” “*Inferred*,” and “*Imposed*”: Default Rules and Adhesion Contracts—the Need for Radical Surgery, 28 PACE L. REV. 195, 208 (2008)).
- 282     *Id.* (quoting W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standardized Form*, 2006 MICH. ST. L. REV. 853, 860 (2006)).
- 283     See, e.g., Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75 (2004); Herman Schwartz, *How Consumers Are Getting Screwed by Court-Enforced Arbitration*, NATION (July 18, 2014), <https://www.thenation.com/article/how-consumers-are-getting-screwed-court-enforced-arbitration/> [<https://perma.cc/A4CG-N4LE>].
- 284     See Schwartz, *supra* note 283.
- 285     Bixler v. Super. Ct. for the State of Cal., No. B310559, 2022 WL 167792 (Cal. Ct. App. Jan. 19, 2022), review denied *sub nom.* Bixler v. Super. Ct., S273276, 2022 Cal. LEXIS 2283 (Apr. 20, 2022), cert. denied *sub nom.* Church of Scientology Int'l v. Bixler, 143 S. Ct. 280 (2022).
- 286     **BROYDE**, *supra* note 15, at 150 (“Arbital tribunals must accept that secular courts will be powerless to enforce their awards unless they satisfy the minimal technical requirements set by the secular law arbitration framework.”).
- 287     **Broyde**, *supra* note 22, at 351.
- 288     *Bixler*, 2022 WL 167792, at \*2.

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289 *Id.* at \*4-5.

290 *Id.* at \*6.

291 *Id.* at \*11.

292 *Id.* at \*9-10.

293 *Id.* (emphasis added).

294 *Id.* at \*4 (emphasis added).

295 **Broyde** & Windsor, *supra* note 5, at 30-34. The restraints on a person's freedom of conscience by contractual obligation are easily distinguishable from the free exercise restraint on conscience where the government, using its full coercive power, sends men to kill or sends them to jail. See *Welsh v. United States*, 398 U.S. 333 (1970), and its other draft-based progeny for free conscience claims at their zenith.

296 **Broyde** & Windsor, *supra* note 5, at 30-34.

297 *Bixler*, 2022 WL 167792, at \*15.

298 See *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. Dist. Ct. App. 2000) ("[T]he FAA puts arbitration clauses on an equal footing with other clauses in a contract. It does not put such clauses above state law or other contractual provisions." (citations omitted)).

299 **Broyde**, *supra* note 22, at 341.

300 See, e.g., *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008).

301 *Id.* at \*6.

302 *Khan v. Hasan*, 153 N.Y.S.3d 752, 756 (Sup. Ct. 2021) (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)).

303 See, e.g., *In re Marriage of Turfe*, 233 Cal. Rptr. 3d 315, 322 (Ct. App. 2018) (stating, where a husband and wife had differing, undiscussed understandings of the purpose of a *mahr*, that "Husband's argument that wife defrauded him when she agreed to be bound by the *mahr* agreement makes the assumption that there is a universal understanding of the impact of the *mahr* agreement in the event of a divorce"); *In re Marriage of Obaidi & Qayoum*, 226 P.3d 787, 791 (Wash. Ct. App. 2010) (finding no meeting of the minds where a party "was not told that he would be required to participate in a ceremony that would include the signing of a *mahr* until 15 minutes before he signed the *mahr*" and "was unaware of the terms of the agreement until they were explained to him by an uncle after the *mahr* had been signed").

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- 304 See *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct. July 10, 1995); see also *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 871 (Ct. App. 1988); *In re Marriage of Obaidi & Qayoum*, 226 P.3d at 790.
- 305 See *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990); see also *Koeppel v. Koeppel*, 138 N.Y.S. 2d 366 (Sup. Ct. 1954); *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).
- 306 See *Leibovici v. Rawicki*, 290 N.Y.S.2d 997 (Civ. Ct. 1968), VNB N.Y. Corp. v. 47 Lynbrook LLC, 2012 N.Y. Slip Op. 30207(U), at 4-5 (Sup. Ct. 2012); *Bollag v. Dresdner*, 495 N.Y.S.2d 560 (Civ. Ct. 1985).
- 307 See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).
- 308 **Broyde**, *supra* note 22, at 355.
- 309 *Id.*
- 310 *Id.*
- 311 *Id.*
- 312 *Id.* at 359.
- 313 *Id.*
- 314 *Id.*
- 315 *Id.* at 355.
- 316 See Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 441 (2006).
- 317 See, e.g., 9 U.S.C. § 10(a)(1).
- 318 See **Broyde**, *supra* note 22, at 371.
- 319 14 Penn Plaza, LLC v. Pyett, 556 U.S. 247, 273 (2009).
- 320 See Helfand, *supra* note 76, at 1254.
- 321 *Id.*

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- 322 See, e.g., *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 63 (2000).
- 323 See Chua-Rubinfeld & Costa, *supra* note 6, at 2088 (defining the Reverse Entanglement principle as “protect[ing] secular law from religious interference”).
- 324 See *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 (Can. S.C.C.) (holding that an agreement to appear before rabbinical authorities to obtain a Jewish divorce was valid).
- 325 See Chua-Rubinfeld & Costa, *supra* note 6.
- 326 The *Lemon* test, as set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is a three-part test that governs what constitutes an “establishment of religion.” Government can assist religion if: (1) the primary purpose of the assistance is secular, (2) the assistance neither promotes nor inhibits religion, and (3) there is no excessive entanglement between church and state. *Id.* at 612-13.
- 327 See Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 1 (2005); see, e.g., Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 275 (1990); Margaret A. Jacobs, *Woman Claims Arbiters of Bias Are Biased, Too*, WALL ST. J., Sept. 19, 1994, at B1. Senator Russell Feingold also introduced legislation designed to invalidate predispute arbitration agreements between employers and employees. See S. 2405, 103d Cong. (1994); H.R. 4981, 103d Cong. (1994).
- 328 See Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145 (2004); 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); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 102-13 (1992) (exploring why arbitrators do not consider constitutional rights in arbitration and on review).
- 329 See Cole, *supra* note 327, at 4 n.11 (including expansive list of federal cases rejecting the application of state action to contractual arbitration); see, e.g., *Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 138 (2d Cir. 2002); *Koveleskie v. SBC Cap. Mkts., Inc.*, 167 F.3d 361, 368-69 (7th Cir. 1999); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999); *Lodal, Inc. v. Home Ins. Co. of Ill.*, 156 F.3d 1230, No. 95-2187, 1998 WL 393766, at \*6 (6th Cir. June 12, 1998); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998); *United Food & Com. Workers Union v. Safeway, Inc.*, 165 F.3d 918 (9th Cir. 1998); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1190-92 (11th Cir. 1995); *Fed. Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987); *Elmore v. Chi. & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986); *Dluhos v. Strasberg*, No. 00-CV-3163, 2001 WL 1720272, at \*5, \*11 (D.N.J. Aug. 31, 2001), aff'd in part, 321 F.3d 365 (3d Cir. 2003); *Brannon v. Mass. Mut. Life Ins. Co.*, No. 99-3497, 2000 WL 122241, at \*5 (E.D. La. Jan. 31, 2000); *D'Alessio v. N.Y. Stock Exch., Inc.*, 125 F. Supp. 2d 656, 659 (S.D.N.Y. 2000); *Moorning-Brown v. Bear, Stearns & Co., Inc.*, No. 96 Civ. 4130 JSR HBP, 2000 WL 16935, at \*3 (S.D.N.Y. Jan. 10, 2000); *Century Aluminum of W. Va. v. United Steelworkers of Am.*, 82 F. Supp. 2d 580, 583 n.4 (S.D. W. Va. 2000); *In re Knepp*, 229 B.R. 821, 840-41 (Bankr. N.D. Ala. 1999) (following Eleventh Circuit law despite disagreement regarding arbitration as state action); *Martens v. Smith Barney, Inc.*, 190 F.R.D. 134, 137-38 (S.D.N.Y. 1999); *McDonough v. Equitable Life Assurance Soc'y of the U.S.*, No. 98 Civ. 3921 (BSJ), 1999 WL 731424, at \*3 n.4 (S.D.N.Y. Sept. 20, 1999); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1465-70 (N.D. Ill. 1997); *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 734-35 (N.D. Tex. 1997); *Glennon v. Dean Witter Reynolds, Inc.*, No. 3-93-0847, 1994 WL 757709, at \*10-13 (M.D. Tenn. Dec. 15, 1994); *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970, 973 (N.D. Cal. 1992); *Austern v. Chi. Bd. Options Exch., Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989).

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330 See **Broyde** & Windsor, *supra* note 5, at 17.

331 *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“Judicial caveats against entanglement must recognize that the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”); WITTE & NICHOLS, *supra* note 108, at 163.

332 334 U.S. 1 (1948).

333 See, e.g., Chua-Rubinfeld & Costa, *supra* note 6, at 2111.

334 Cole, *supra* note 327, at 6 n.18.

335 334 U.S. 1 (1948).

336 Evie Hemphill, “*We Live Here*” Revisits Shelley v. Kraemer 70 Years Later by Talking with Family Who Changed History, ST. LOUIS PUB. RADIO (Aug. 30, 2018), <https://news.stlpublicradio.org/show/st-louis-on-the-air/2018-08-30/we-live-here-revisits-shelley-v-kraemer-70-years-later-by-talking-with-family-who-changed-history> [<https://perma.cc/9CWF-RUSL>].

337 *Shelley*, 334 U.S. at 6.

338 *Id.*

339 *Id.* at 23.

340 *Id.* at 19.

341 *Id.* at 22.

342 Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

343 *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 294 (2001).

344 For an outline of seven distinct tests for state action application, see Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 565-68 (2008).

345 *Id.* at 568-72.

346 See Alexis Clark, *Returning from War, Returning to Racism*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/magazine/black-soldiers-wwii-racism.html> [<https://perma.cc/G3EB-JHLC>].

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- 347 See Cole, *supra* note 327, at 10 n.43.
- 348 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, 63 (1998); cf. Cheryl W. Thompson et al., *Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country*, NPR (Nov. 17, 2021, 5:06 AM), <https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination> [https://perma.cc/HY9F-HVAD] (discussing how the passage of the 1968 Fair Housing Act outlawed racially restrictive covenants).
- 349 Cole, *supra* note 327, at 11.
- 350 Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995).
- 351 Cole, *supra* note 327, at 14-15 (examining the use of state action doctrine in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), which found that discriminatory intent in the creation of a jury, as a jury and judge are entangled in the judicial making process).
- 352 *Id.*; see, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982).
- 353 Cole, *supra* note 327, at 19 (citing and interpreting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (holding that a private party's decision to withhold workers' compensation payment under a Pennsylvania regulatory scheme was insufficient for a finding of state action in the deprivation of payment)).
- 354 *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).
- 355 Here, we are only discussing contractual arbitration, rather than courtordered or agency-initiated arbitration. Court-ordered arbitration is state action where a court, obeying statutory authority, compels parties to participate in arbitration, regardless of the parties' wishes. Procedural due process and rights protection, both statutory and constitutional, are required; as such, court-ordered arbitration is not binding. See Cole, *supra* note 327, at 27 n.127; see, e.g., *Lisanti v. Alamo Title Ins. of Tex.*, 55 P.3d 962, 968 (N.M. 2002) (finding that regulation ordering arbitration for title insurance claims violated the Seventh Amendment); *Glazer's Wholesale Distrib., Inc. v. Heineken USA, Inc.*, 95 S.W.3d 286, 305-06 (Tex. App. 2001) (finding that a statute enforcing post-dispute binding arbitration where only one party requests it a violation of judicial delegation); *Firelock, Inc. v. Dist. Ct. In & For the 20th Jud. Dist. of Colo.*, 776 P.2d 1090, 1097-98 (Colo. 1989) (holding that a statute requiring claims less than \$50,000 to be litigated in binding arbitration was allowed because the statute also allowed for trial *de novo* for any dissatisfied party). But see *GTFM, LLC v. TKN Sales, Inc.*, 257 F.3d 235, 238 (2d Cir. 2001) (holding that a state statute requiring binding arbitration for the termination of a sales representative was allowed because the case was present in federal court only on diversity jurisdiction, and the Seventh Amendment has not been incorporated against the states).
- 356 Cole, *supra* note 327, at 43.
- 357 *Sullivan*, 526 U.S. at 54.
- 358 See Cole, *supra* note 327, at 46; *Sullivan*, 526 U.S. at 53.

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- 359 Cole, *supra* note 327, at 45.
- 360 *Id.* at 48 (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 157-58, 161 (1978)); see *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 (1978) (discussing a warehouse that sold items in unpaid storage in accord with state statute: “[t]he challenged statute itself provides a damages remedy against the warehouseman for violations of its provisions. This system ...., recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign.” (citation omitted)); Cole, *supra* note 327, at 48 (“Like debtors and creditors, employees and consumers have myriad options, from mediation to arbitration and beyond, to resolve their disputes. That negotiating alternatives to arbitration at the beginning of a contractual relationship would be difficult would be irrelevant to a court, as it was immaterial to the Court in *Flagg*.”).
- 361 Cole, *supra* note 327, at 46; *Flagg Bros.*, 436 U.S. at 158-60.
- 362 See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).
- 363 *Agostini v. Felton*, 521 U.S. 203, 232 (1997); WITTE & NICHOLS, *supra* note 108, at 165.
- 364 *Agostini*, 521 U.S. at 232; WITTE & NICHOLS, *supra* note 108, at 165.
- 365 See Justice O'Connor's opinion in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), upholding the constitutionality of the Equal Access Act.
- 366 See Justice Kennedy's opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), and Justice Stevens' opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 310-318 (2000).
- 367 See Justice Souter's opinion in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 696 (1994), where he called for a policy of neutrality between religion and non-religion.
- 368 See WITTE & NICHOLS, *supra* note 108, at 202.
- 369 *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988).
- 370 *Zelman v. Simmons-Harris*, 536 U.S. 639, 663 (2002) (O'Connor, J., concurring); WITTE & NICHOLS, *supra* note 108, at 169.
- 371 WITTE & NICHOLS, *supra* note 108, at 171.
- 372 *Id.* at 202.
- 373 *Id.* at 162.
- 374 142 S. Ct. 1987, 1996 (2022).

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375 *Id.*

376 *See, e.g.*, STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES (2009).

377 *See generally id.*

378 Michel Troper, *French Secularism, or Laicite*, 21 CARDozo L. REV. 1267, 1279 (2000).

379 *Dogru v. France*, App. No. 27058/05, 2008 Eur. Ct. H.R. (involving a woman asked to remove her headscarf during physical education classes); *S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R. (G.C.) (involving a woman wearing a *niqab* and *burqa* in public).

380 *Dogru*, 2008 Eur. Ct. H.R. (involving a woman asked to remove her headscarf during physical education classes); *S.A.S.*, 2014 Eur. Ct. H.R. (G.C.) (involving a woman wearing a *niqab* and *burqa* in public).

381 *Dogru*, 2008 Eur. Ct. H.R.

382 WITTE & NICHOLS, *supra* note 108, at 262 (citing *Dogru*, 2008 Eur. Ct. H.R.).

383 *Id.* (quoting *S.A.S.*, 2014 Eur. Ct. H.R. (G.C.)).

384 Arthur Kutoroff, *First Amendment Versus Laicite: Religious Exemptions, Religious Freedom, and Public Neutrality*, 48 CORNELL INT'L L.J. 247 (2015).

385 *See generally Shelley v. Kraemer*, 334 U.S. 1 (1948).

386 *See Winterbottom v. Wright*, [1842] 152 Eng. Rep. 402.

387 *See, e.g.*, *Thomas v. Winchester*, 6 N.Y. 397 (1852).

388 Compare *Loop v. Litchfield*, 42 N.Y. 351 (1870) (applying privity), with *Devlin v. Smith*, 89 N.Y. 470 (1882) (limiting of privity due to inherent dangers of improperly formed scaffolding).

389 *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 401 (1916).

390 It was reasonable to abandon at the time. With a privity limitation, the laissez-faire privilege of manufacturers over consumers and employees was disastrous, as industrialization encouraged careless production and unrecoverable harms. See Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 566-67 (2014).

391 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 526 (1974) (Douglas, J., dissenting).

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392 *See* Winterbottom v. Wright, [1842] 152 Eng. Rep. 402.

393 *Bixler v. Super. Ct. for the State of Cal.*, No. B310559, 2022 WL 167792, at \*2 (Cal. Ct. App. Jan. 19, 2022), *review denied sub nom. Bixler v. Super. Ct.*, S273276, 2022 Cal. LEXIS 2283 (Apr. 20, 2022), *cert. denied sub nom. Church of Scientology Int'l v. Bixler*, 143 S. Ct. 280 (2022).

394 *Id.* (“[P]laintiffs allege Scientology's agents committed the following acts against them: surveilled them, hacked their security systems, filmed them, chased them, hacked their email, killed (and attempted to kill) their pets, ... set the outside of their home on fire, went through their trash, and poisoned trees in their yards.”).

395 *See, e.g., Marran v. Marran*, 376 F.3d 143 (3d Cir. 2004) (discussing privity in child custody cases).

396 *See, e.g., Glauber v. Glauber*, 192 A.D.2d 94, 97 (N.Y. App. Div. 1993) (finding that “the court must always make its own independent review and findings” in child custody cases, despite an arbitration award); *Fawzy v. Fawzy*, 973 A.2d 347, 350 (N.J. 2009) (finding a New Jersey constitutional right to child custody arbitration).

397 *In re Marriage of Weiss*, 42 Cal. App. 4th 106 (Ct. App. 1996).

398 *Id.* at 109.

399 *Id.*

400 *Id.* at 110.

401 *Bixler v. Super. Ct. for the State of Cal.*, No. B310559, 2022 WL 167792, at \*11 (Cal. Ct. App. Jan. 19, 2022) (citing *In re Marriage of Weiss*, 42 Cal. App. 4th at 112).

402 *In re Marriage of Weiss*, 42 Cal. App. 4th at 109.

403 *Id.* at 115.

404 *Id.*

405 *Id.*

406 *Id.* at 118.

407 *Zummo v. Zummo*, 574 A.2d 1130, 1140 (Pa. 1990).

408 *In re Marriage of Weiss*, 42 Cal. App. 4th at 106.

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- 409 Thomas H. Oehmke & Joan M. Brovins, *Arbitration and Mediation of Bankruptcy Disputes*, 105 AM. JUR. TRIALS 125, § 78 (2007). The classical cases on this topic are: *In re Hart Ski Mfg. Co.*, 711 F.2d 845, 846 (8th Cir. 1983), and *Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55 (3d Cir. 1983).

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