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# Sharia Tribunals, Rabbinical Courts, and Christian Panels Religious Arbitration in America and the West.
# Chapter 1: The Rise of Religious Arbitration
# by M.J. Broyde

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# Sharia Tribunals, Rabbinical Courts, and Christian Panels

## *Religious Arbitration in America and the West*

Michael J. Broyde

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## CHAPTER 1

# The Rise of Religious Arbitration

This chapter surveys the contemporary landscape of religious arbitration in the United States by exploring how different religious communities utilize arbitration, how these processes differ from each other, and where various faith-based dispute resolution models fall on the broader ADR spectrum. In particular, this chapter will explore developments in Jewish, Christian, and Islamic arbitration in America over the last several decades, and discuss what internal concerns and external stimuli have spurred these changes. In this context, this chapter will also reflect on why American Catholics have not moved in the same direction as some other religious groups, which have been eager to embrace the use of religious arbitration as a means of enabling their adherents to resolve ordinary secular conflicts in accordance with religious norms and values. Finally, this chapter will discuss the historical limitations of utilizing religious arbitration in many faiths and how some have evolved to embrace the practice.

Although controversial,[1] religious arbitration has grown immensely since its inception. In fact, almost every religion in the United States has its own system for settling disputes, each of which functions as an alternative to the civil courts. While these vary in detail, with different religious groups utilizing different methods of ADR and some developing more intricate, sophisticated, and successful systems than others, they all share the same goal: creating a system for settling disputes outside the realm of the secular court system.

1. Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. Times, Nov. 2, 2015.

Sharia Tribunals, Rabbinical Courts, and Christian Panels. Michael J. Broyde.

## A. CUSTOMIZING LAW: THE DEVELOPMENT OF RELIGIOUS ARBITRATION

Law is defined by Black's Law Dictionary as "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them."[2] This definition, among other things, highlights the importance many practitioners of the law place on the so-called "rule of law," or law as a rules-based system. For some time, law was viewed solely as a vehicle for setting standards of accepted behavior and managing said behavior. However, as the law has developed, it has turned into something different altogether—a structure that allows parties to set and meet their own expectations. These expectations could be those of employment for a certain period of time or for the purchase of a particular piece of property. No matter what the expectation is, however, the law has morphed into a vehicle that enables individuals to drive their dealings.

At one point in U.S. history, the only way parties could settle legal disputes was through the court system. As discussed later in Chapter Five, for various reasons, no arbitration—or anything similar—existed. Courts did not trust arbitrators to handle disputes in a manner consistent with the law. Moreover, they believed that arbitration interfered with the right of individuals to petition the court system for redress of their grievances. In the early twentieth century, however, the courts came to accept the idea of parties' right to agree to settle disputes by arbitration. Arbitration at that point, however, bore little resemblance to what it has become today. Parties had no ability to add choice-of-law provisions to their arbitration agreements, and were thus governed by federal, state, and local rules. Once this changed, however, and choice-of-law provisions were allowed, arbitration became a different tool altogether. Individuals and organizations could craft the rules by which they wanted their disputes to be governed. This led them to further embrace arbitration.

The better developed the system of arbitration became in the United States, the more comfortable judges, practitioners, and, most important, parties were with utilizing it. Although the rise of arbitration in general in the United States will be discussed in further detail later, it is helpful to

2. Black's Law Dictionary 962 (9th ed. 2009).

give a short summary here in order to situate the development of religious arbitration in particular.

## B. A BRIEF HISTORY OF ARBITRATION'S RISE IN THE UNITED STATES

For a long time, courts in the United States were viewed as experts in everything. Almost any dispute could be settled in a courtroom. In fact, courts were viewed as the only arena where legal disputes between parties *could* be settled. Over time, however, the ability of courts to settle disputes efficiently and effectively came into question. Courts got backed up, and volumes of codified law piled up. Litigation progressively became more expensive and draconian. Parties sought viable alternatives. Out of this frustration, alternative dispute resolution (ADR)—and arbitration in particular—was born.

Arbitration is "[a] method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[3] Although arbitration is now widely accepted by the U.S. legal system, this was not always the case. In its infancy, arbitration was shunned as an inferior method of settling disputes. Initially, in fact, the practice was entirely banned.

Judges shunned arbitration for a number of reasons. The most often cited factors were that arbitrators lack as robust an understanding of the law as judges, the lack of adequate judicial oversight of the arbitration process, and the lack of a binding effect. As time went on, however, and the body of American contract law developed, courts became satisfied that individuals could contract with one another to make their future disputes subject to arbitration. However, this freedom-of-contract theory only went so far.

Those who decided on arbitration were forced to remain subject to American law, thus moving the dispute out of the courtroom while maintaining the somewhat fixed variable of the U.S. rule of law. This method of regulating individual agreements came into question as individuals were progressively given more freedom to craft their agreements to meet their individual needs and expectations. Eventually, the rule requiring arbitrations to apply American law gave way to one giving individual contracting parties the ability to choose the applicable law. Although there have certainly been bumps in the road for arbitration, it has weathered the storms

3. *Id.* at 119.

and gained a significant amount of respect from almost the entire legal community, including judges whose dockets have become quite a bit more manageable because of the practice.

In short, arbitration allows parties to agree to settle disputes that arise from their dealing outside of the traditional court system and beyond the realm of the traditional rule of law, opting instead for a venue and law they find mutually agreeable. Therefore, the rule of law, at least in the customizable realm of arbitration, has become less of a fixed structure and more adaptive to individual needs and desires. This development has shifted the law from being viewed as a science from which a singular correct answer can be found, to a search for more contextual answers dictated by the parties' agreement to arbitrate. Stemming almost entirely from the contract setting, this newly discovered malleability of the law at most highlighted the fact that courts are not experts in all things and often do a poor job of settling disputes to the satisfaction of either—if any—of the parties, and at least justified allowing another avenue for parties to take in settling their disputes.

By analogy, it is helpful to think of arbitration and litigation as separate houses, with each arbitral specialization as a room within the arbitration house. At first, religious groups stood by and watched the construction of what would become the house of arbitration. Labor unions were one of the first groups to move in, quickly embracing it and testing its structural soundness. They soon found that arbitration was an excellent outlet for resolving disputes governed by collective bargaining agreements. Other groups then started occupying other parts of the house, each decorating its own room. As the number of individuals embracing arbitration increased, so did the number of arbitrators who focused solely on one type of dispute or one type of arbitrating party.

This specialization added new strength and beauty to the house of arbitration, and resolved an initial discrepancy between it and the litigation house—the latter of which initially had a vast knowledge and understanding of the law and, in turn, how disputes should be decided. By contrast, arbitrators were at first asked to balance the law on one hand and the wishes of the disputing parties on the other. Early critics of arbitration cited this as one of the reasons litigation was superior. But as arbitrators specialized, groups of prospective arbitral parties were able to build de facto court systems within which to settle their disputes, wherein they could have their legal issues decided, but with a slant toward their own internal policy preferences. As the class of arbitrable disputes grew, so did the groups who embraced the practice. Merchants, employers, and banks all began implementing it in some form or another.

Meanwhile, religious groups saw the litigation house tossing out the furniture of the values and beliefs that had, for a long time, gone hand in hand with religion. Too skeptical to move into arbitration at first, religious groups bided their time. In addition to the general concerns about arbitration's durability—especially its ability to stand up to the wrecking balls of judicial review and expectations for arbitration awards to be consistent with state and federal law—religion was faced with the very real concern that church and state should remain separate. In the eyes of many, cohabitation of legal and religious principles in arbitration set up religious arbitration to be judicially walled off. Courts were always wary of quasi-judicial bodies, and were prone to be especially so when religious groups were involved.

## C. THE BIRTH OF RELIGIOUS ARBITRATION

Although there are still arguments against arbitration—particularly the fear that certain parties invoke it in a coercive manner—the practice is continuing to grow, and will only be hampered inasmuch as certain government regulatory bodies allow it to be. To a great extent, as this book will explain, religious groups entered the arbitration universe later than other groups, mostly due to a lack of comfort with the skills needed to produce binding arbitration. Now, however, religious groups step over the threshold regularly.

The fact that religious groups settle disputes through quasi-arbitral bodies is nothing new. The Catholic Church has long utilized some manner of arbitration to settle matters of canon law. However, this method of dispute resolution has not been a matter of major concern because Catholic religious courts do not typically come in direct conflict with American law or draw judicial challenges from American courts for one very important reason: although there is a system of Catholic religious law, the Church distinguishes between the canon law and secular law jurisdictions. Canon law never moved into what would now be called arbitration because modern arbitration in the United States handles matters that fall under the scope of ordinary secular law—matters such as private property disputes, employer-employee conflicts, regular commercial and contractual matters, and so on. Canon law, by contrast, was historically concerned with the internal governance of the Church and its functionaries, as well as sacerdotal and ritual matters. Ordinary property disputes, employment matters, or other decidedly secular contract disputes between Catholic parishioners simply did not fall within the

scope of canon law or Church court jurisdictions. So, from a religious perspective, there was no need to resolve such issues based on religious principles. With respect to those kinds of secular disputes, at least, good Catholics could litigate cases in state courts without concern, rendering unto Caesar what is Caesar's.

Various Protestant groups have, until recently, also largely avoided the clash between faith-based dispute resolution and secular law. In the case of Protestant denominations, however, the tension was not diffused by the kind of strict jurisdictional separation between ecclesiastical and secular matters and law embraced by Catholicism, but by the confluence of two other factors. First, Protestantism in general lacks the kinds of nomos-centric characteristics of some other faiths, such as Judaism, Islam, and to some extent Catholicism. Consequently, the notion that disputes between Protestant practitioners had to be resolved in accordance with religious norms rather than secular laws was not particularly pronounced. Indeed, there was not much "Protestant law" to speak of to provide an alternative system of behavioral and relational norms that Protestants might be expected to utilize in structuring their ordinary material relations. Moreover, for much of American history, Protestants have made up a substantial majority of the population, and Protestant values and sensibilities have featured prominently in American law and policy. As a result, even deeply religious Protestant Americans often found little issue in adjudicating their litigious disputes in state federal courts. There was no relevant body of specific religious precepts that had to be observed and, in any case, the American law results issuing from traditional courts largely reflected their religious sensibilities.

But religious arbitration has taken on a much more sweeping public significance recently because of shifts in American social and legal values. The last half of the twentieth century saw the erosion of cultural foundations built upon religious values and their gradual replacement with more secular ones. Religious groups were keenly aware of the chasm that had developed between cultural values held by the general U.S. population and those held by them and their parishioners. They began to build upon the inroads made by the Catholic Church years earlier, slowly but surely wading deeper into the waters to see what limits courts would place on their use of arbitration. Judaism pioneered and perfected this practice, developing its own intricate system for settling disputes arising between individual members of the religion, even those that went beyond the pale of religious issues and into the realm of contract and family law. This went relatively unnoticed, however, because even though it has the largest number of followers of any non-Christian religion, as of 2007, only 1.9 percent of the U.S. population

identified as Jewish.[4] The attention drawn by religious arbitration as a viable option for settling religious disputes would only increase with time, as the cultural mores of the country strayed even further from Judeo-Christian values.

For some time, law in the United States was in very close alignment with Judeo-Christian values on many issues (race being the huge area of tension). The reason for this was obvious: most people in the United States identified as followers of a Judeo-Christian religion. As of 2007, 80.1 percent of the population identified as such.[5] Although this number fell to 72.5 percent in 2014, Judeo-Christians still make up a staggering majority of the population.[6] Even with this majority, however, there is no doubt that the U.S. population is progressively becoming less religious. Those individuals identifying as "Unaffiliated" with a religion—including atheists, agnostics, and those identifying as "Nothing In Particular"—have seen a notable increase in the past decade and a half, going from 16.1 percent of the population to 22.8 percent, a 6.7 percent increase in just seven years.[7] This group also has had the largest gains over the seven-year period from 2007 to 2014.[8] As the laws and principles of Americans have continued to develop in a more secular direction, these religious groups—especially Evangelical and mainline Protestant communities—whose religious beliefs were once perfectly reflected in the law—have realized they are now falling into the minority. They have essentially lost control of the law. This is evident in the decision to legalize same-sex marriage in the United States. Attempting to retake control of the law, and equipped with the history of Judaism's success with arbitration, newly-minority religious groups have started building arbitral bodies of their own. More than anything, these groups have lost the ability to participate in—and in most cases actually dictate—family law, the area of the law where cultural values are manifested most directly.

As secular law loses its Judeo-Christian roots, a trend that is likely to continue in the coming years, the people still rooted in Judeo-Christian values and traditions will continue to find other means for settling their disputes outside of the court system, whose values increasingly differ markedly from their own. Even non-Judeo-Christian religious groups, most notably Muslims, have followed suit in beginning to build their own arbitral bodies. They do so because arbitration gives them an opportunity

4. *America's Changing Religious Landscape*, Pew Research Ctr. (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

to decide matters through a lens that considers both the secular and the religious laws to which they are subject.

The movement by religious groups to create their own internal arbitral bodies has proven extremely controversial. Perhaps the skepticism toward religious arbitration stems from the secretive nature of certain churches, our own general lack of understanding of different religions, or even the deeply ingrained American principle that church and state should remain separate, and that allowing "religious courts" to exist pushes parties into an inherently unconstitutional forum. Nevertheless, religious groups have become arbitration specialists. In turn, the arbitral bodies developed by religious groups are intricately built and likely here to stay for the foreseeable future.

## D. VARIANTS OF RELIGIOUS ARBITRATION IN PRACTICE

Religious arbitration is a "process in which arbitrators apply religious principles to resolve disputes."[9] Although generally true, this simplistic definition does not do justice to what has become a widely implemented system of dispute resolution in the United States. In fact, even the definition of arbitration fails to fully summarize religious arbitration. In a sense, religious arbitration can run the gamut of dispute resolution practices. Some religious arbitral bodies utilize relaxed methods of ADR, such as negotiation, conciliation, and mediation, whereas others have implemented very strict, litigation-like procedures.

The advent of religious arbitration comes at an extremely interesting time in the United States. Many religiously observant Americans view the secularization of American laws and policies as repugnant to their own beliefs and principles, and have become further entrenched in their traditional beliefs. They also favor having their religious beliefs govern their everyday lives in all respects, including the way in which they settle disputes. Religious arbitration presents a perfect outlet for this by allowing religious individuals to agree to arbitrate all manner of basically secular disputes with their co-religionists in arbitral forums established and governed by their religion.[10]

9. 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 (2006).

10. Indeed, in recent years there has been a considerable increase in articles addressing religious arbitration. *See, e.g.*, Farrah Ahmed & Senwung Luk, *How Religious Arbitration Could Enhance Personal Autonomy*, 1 Oxford J.L. & Religion 424 (2012); Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*,

It can be a bit difficult to understand why it is important for religious individuals to be governed by the law of their religion.

To illustrate the *why* of religious arbitration and the problems that why can cause, let us consider a recent case of religious arbitration that was enjoined by a bankruptcy court as violative of the automatic stay, a provision designed to force all parties to adhere to bankruptcy rules:[11] *In re Congregation Birchos Yosef*.[12] In this case, an Orthodox Jewish creditor sought to have an Orthodox Jewish debtor or his proxy summoned to an Orthodox Jewish religious tribunal to adjudicate the propriety (and even perhaps the validity) of the debtor's bankruptcy filing as a matter of Jewish law. In the absence of the debtor's agreeing to appear before the rabbinical court for such adjudication, the creditor wished the rabbinical court to issue a writ of contempt, or *seruv*, against the debtor as being in violation of Jewish law. The debtor filed a motion in bankruptcy court seeking to enjoin the creditor and the rabbinical court in question from considering whether bankruptcy is a valid option under Jewish law, whether the creditor owed the debtor money, and whether the rabbinical court may issue a contempt citation under Jewish law.

The bankruptcy court held that the automatic stay applies to the proceedings of the rabbinical court no differently than to any other court. It stated simply:

> The automatic stay is clearly neutral on its face and is also neutral and generally applicable, as far as religious exercise is concerned, in practice. It applies to anyone who falls within the ambit of 11 U.S.C. § 362(a) (here, to anyone who commences a proceeding or takes another action covered by either 11 U.S.C. § 362(a)(1) or (3)). It prohibits the invocation of all covered proceedings, whether in state or federal court, a foreign court, **or a *beis din*.** (emphasis added)[13]

37 Vt. L. Rev. 157 (2012); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. Rev. 1231 (2011); Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 Santa Clara L. Rev. 501 (2012); 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 (2015); Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 Yale L.J. 2994 (2015).

11. The Bankruptcy Code's automatic stay prohibits a wide array of actions that attempt to collect prepetition claims or that otherwise interfere with property of the estate. *See* 11 U.S.C. § 362 (1982).

12. *In re* Congregation Birchos Yosef, 535 B.R. 629 (Bankr. S.D.N.Y. 2015).

13. *Id.* at 637.

It is worth understanding what was *not* under consideration in this case. All parties agreed to the following:

- The rabbinical court cannot issue a legally binding order, even with an arbitration agreement signed by both parties, if it contradicts the directive of the bankruptcy court.
- The debtor's assets cannot be used to repay the debt upon the directive of the rabbinical court, as the assets are under the control of the bankruptcy court.

By noting that the automatic stay applies directly to the rabbinical court in question, the bankruptcy court not only precluded the creditor and debtor from submitting to rabbinic court arbitration (which is an easy matter to preclude under bankruptcy law), but also used its authority to stay the rabbinical court's religious pronouncements concerning the correctness under Jewish law of the debtor's decision to file bankruptcy to begin with. Even if it could not have reached any meaningful decision on the merits of the case itself, the rabbinical court may have wished to issue the *seruv*, or writ of contempt, against the debtor in order to signal to both the parties and the wider Jewish community that the debtor had violated Jewish religious law by filing for bankruptcy in order to avoid paying his debts.[14] Although such religious pronouncements lack any real legal authority or implications, they are important from a religious perspective. The bankruptcy court, however, made it clear that such religious pronouncements must cease.[15]

This type of case is symptomatic of problems that secular courts and liberal society can encounter by allowing religious arbitration. Religious systems sometimes impede—from the secular view—the reasonable and orderly operation of the justice system by operating a religious arbitration system that perceives itself as morally and legally free from the constraints of the law. In particular, four problems arise, and these types of cases highlight all four of them.

14. For more on this, see Michael J. Broyde, *Forming Religious Communities and Respecting Dissenters' Rights*, *in* Human Rights in Judaism: Cultural, Religious, and Political Perspectives 35 (Michael J. Broyde & John Witte, Jr. eds., 1998).

15. The bankruptcy court states directly: "Based on the record of the hearing, while the full extent of the effect of a *sirov,* if issued, is somewhat unclear, the mere threat of the issuance of a *sirov,* and, in fact, the commencement of the *beis din* proceeding itself, has already adversely affected the Debtor, through its principals, and made it more difficult to conduct this case by exerting significant pressure to cease pursuing the Debtor's claims against those who invoked the *beis din*." Birchos Yosef, 535 B.R. at 631–32.

First, a religious system could be attempting to govern disputes between parties that did not actually consent to the religious legal system's authority. This concern is particularly present in the area of bankruptcy as (when a debtor is insolvent) money to pay creditors is very limited, and directions to pay Peter are also always about how much Paul will receive. Although this is sometimes a slippery slope (and money is frequently limited), it is particularly the case with bankruptcy that adjudication of any part of the estate impacts on all of the estate.

Second, a religious system could be attempting to adjudicate a case in which the secular legal authorities are expecting exclusive secular court jurisdiction. Criminal law is an example, as is bankruptcy, particularly commercial bankruptcy. Almost by definition, all attempts at arbitration violate society's legal sense that certain types of cases can and should be adjudicated only by a court of the government. Of course, religious communities might very well object to that policy, based on their faith's ideas of proper dispute resolution.[16]

Third, a religious legal system could be making an ecclesiastical point—that one party is a sinner—even though the underlying claim is financial and ought to be resolved in secular court. Ecclesiastical pronouncements in commercial matters—such as debtor and creditor rights—are easily understood (or misunderstood) by the courts to be attempts to coerce one of the parties out of his or her right to use the secular court system, and to generate a false consent to arbitration by labeling certain lawful conduct to be sinful.

Finally, a religious legal system could be attempting to impose a choice-of-law rule on a dispute in which all the parties did not wish or expect religious law to govern. This is related, but not identical, to the first objection, as a party does have the secular right to file for bankruptcy even if that party had a "religious law" choice-of-law clause, regardless of whether the religious law has provisions for bankruptcy. But such a choice-of-law provision—particularly when used in some commercial contracts and not others—gives rise to the possibility that this adjudication is prejudicial to some of the creditors in a way that is inconsistent with secular law.

On the other hand, this case is important to religious ADR because people in religious communities do not wish to be considered "sinners" by their communities. Allowing a functioning alternative religious court system creates the distinct possibility that religious communities will seek even greater autonomy from the general norms of secular law and life—in

16. Such as the Jewish ideal of disputes between Jews being resolved in rabbinical court or the Islamic ideal of the same.

this case, those of bankruptcy law. So, as one considers religious arbitration abstractly, one must consider both its impact in any given case as well as the systemic impact of an alternative legal system—almost a shadow law—on society as a whole. Even when lacking enforceable authority, the rabbinical court in this case had religious authority, and that is what it was enjoined against exercising.

The next section will outline the various arbitral bodies and procedures utilized by three of the different religions of the Abrahamic faith—Judaism, Christianity, and Islam—and explain how likely problems of the type the court encountered in *Birchos Yosef* can be endemic to religious arbitration. The greater the *Birchos Yosef* problem, the less compatible religious arbitration might be with Western democratic law.

## Jewish Arbitration

As previously noted, those who identify as Jewish make up about 1.9 percent of the U.S. population.[17] Although small in terms of the number of adherents—at least relative to other religions—Judaism has been a trailblazer in the area of religious arbitration in the United States.[18] Today, it enjoys the most sophisticated and formal systems of religious arbitration in the country.[19] It takes a pseudo-litigation or pseudo-adjudication approach similar to that of the secular court system. Highly specialized by area of law and well-versed in the historical foundations of Judaism and the Jewish people—including the Bible, *Talmud*, writings of Jewish scholars, and *halakha* (Jewish law)—Jewish law courts work to implement these religious principles and "preserve Jewish culture and religious law through Judaism-based dispute resolution."[20]

Pivoting around the principle of peace, in Jewish ADR, adversarial dispute resolution takes a back seat to conciliatory proceedings. This preference is a reflection of Judaism's central texts. The Talmud "highlights the advantages

17. Pew Research Ctr., *supra* note 4.

18. *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).

19. *Id.*

20. R. Seth Shippee, *"Blessed Are the Peacemakers": Faith-Based Approaches to Dispute Resolution*, 9 ILSA J. Int'l & Comp. L. 237, 249 (2002); *see also* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 Santa Clara L. Rev. 501 (2012); Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 Colum. L. Rev. 169 (2007); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. Rev. 493 (2013).

of mediation and compromise over a legal decision finding for one party or the other,"[21] and the *Shulchan Aruch*, the authoritative code of Jewish law, counsels adherents to work at settling disputes in a mutually beneficial manner as opposed to one in which the winner takes all.[22] However, realizing that disputes must be settled with some finality, Judaism-based dispute resolution leaves room for parties to move from conciliation to mediation and, if necessary, from mediation to arbitration. Therefore, Jewish ADR runs the gamut of ADR—from informal, to formal and non-binding, to formal and binding.

Most commonly, Jewish dispute resolution begins with an informal mediation or arbitration-like process referred to as a *bitzua* or *p'sharah*.[23] These proceedings can be presided over by a panel of two to three individuals, which can include a rabbi or simply individuals agreed to by the parties and familiar with the law.[24] The panel hears arguments from both sides and renders a decision, which can be either binding or non-binding, depending on the wishes of the parties.[25] If a non-binding decision issues and the parties are unsuccessful at settling their dispute, the parties may submit the matter to a Jewish court, or *beth din*.

These rabbinical courts are the flagship bodies in the Jewish dispute resolution arena. *Beth dins* are responsible for many things, from constructing internal rules of procedure to providing "a forum for arbitrating disputes through the *din torah* process, obtaining Jewish divorces, and confirming Jewish personal status issues."[26] Although cases heard by *beth dins* often involve issues of secular law, and *beth dins* rely primarily on Jewish law in reaching their decisions, their success has depended significantly on their ability to utilize "erudite rabbinic judges . . . capable of addressing *halachic* issues in areas of financial and family law through the prism of contemporary commercial practice and secular law."[27] *Beth dins*' ability to interweave religious and secular law is their key to success and, perhaps more importantly, why "their rulings are usually binding and enforceable in the secular court system."[28]

21. Shippee, *supra* note 20, at 249–50.
22. *Id.*
23. *Id.* at 251.
24. *Id.* at 249, 250.
25. *Id.* at 252.
26. *About Us*, Beth Din of Am., https://bethdin.org/about/ (last visited Jan. 15, 2016).
27. Shippee, *supra* note 20, at 253; *see also* Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urb. L.J. 633 (2004); Linda S. Kahan, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 Geo. L.J. 193 (1984); Aviva Vogelstein, *Is ADR the Solution? How ADR Gets Around the Get Controversy in Jewish Divorce*, 14 Cardozo J. Conflict Resol. 999 (2013).
28. Shippee, *supra* note 27.

It is worth referring back to the case of *In re Congregation Birchos Yosef* to understand how common such cases are in the Jewish tradition. Because the Jewish tradition recognizes that Jewish law is a complete legal code, it *does not* recognize that secular law is even needed to resolve any dispute between Jews. It does have a vibrant concept of "the law of the land is the law,"[29] but there are no disputes in Jewish law that cannot be resolved exclusively through reference to Jewish law. So, cases such as this are complex—the debtor's assets are finite, and allowing the rabbinical court to resolve any disputes related to them removes them from the bankruptcy estate. On the other hand, enjoining a religious tribunal from voicing its religious view on a matter is not a simple issue. Furthermore, the question of whether Jewish law even recognizes the validity of secular bankruptcy law remains an open one about which scholars do not agree.[30] The more "modern" in orientation the rabbinical court is, the more likely it is to work very hard to prevent the *Birchos Yosef* problem in all its four forms. For this reason, the rules of the Beth Din of America speak regularly about the civil law of the jurisdiction in which it is conducting arbitrations, and seek mightily to adhere to the law of the land.[31] Other rabbinical courts in the United States are less deferential to secular law and therefore more likely to encounter a *Birchos Yosef* problem.[32]

## Protestant Christian Arbitration

Those who identify as Christian make up about 70 percent of the U.S. population.[33] Although Judaism may be considered the trailblazer in religious arbitration, Christianity has developed its own successful, albeit less formal, system of settling disputes through ADR. Recognizing that Christianity has

29. For an explanation of the various theories relating to secular and Jewish law, see Michael J. Broyde, *Public and Private International Law from the Perspective of Jewish law*, *in* The Oxford Handbook of Judaism and Economics 363 (Aaron Levine ed., 2010).

30. *See, e.g.*, Steven H. Resnicoff, *Bankruptcy—A Viable Halachic Option?*, 24 J. Halacha & Contemp. Soc'y 5 (1992); Rabbi Yona Reiss, *Establishing a Rabbinical Court Hearing in the Case Where the Plaintiff Has Filed for Bankruptcy*, 15 Sharai Tzedek 139 (5775/2014).

31. *See, e.g.*, Resnicoff, *supra* note 30; Reiss, *supra* note 30 (this article is written by a member of the Beth Din of America and seeks exactly the accommodation noted in the text).

32. *See, e.g.,* Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 Geo. Mason L. Rev. 157 (2011) for a discussion of this issue.

33. Pew Research Ctr., *supra* note 4.

almost countless denominations, which cannot realistically be discussed here, it will suffice to discuss Christian ADR in a general sense.

Unlike Judaism's more formal, litigation-like arbitral process, Christian ADR looks significantly more like negotiation or mediation,[34] and is the least formal method of dispute resolution that will be discussed here. This less formal method of settling disputes has deep roots in Christian religious doctrine.

Christian ADR is based on teachings of the Bible, and particularly those of Jesus Christ from the New Testament,[35] which encourage Christians to settle disputes in a peaceful manner.[36] For this reason, Christian ADR focuses more on negotiation and mediation than arbitration.[37]

Although many Christian ADR tribunals exist, the industry's leader is Peacemaker Ministries.[38] Peacemaker Ministries has grown tremendously since its inception in 1982, and now counts as members "over three hundred churches, ministries, and organizations."[39] This makes Peacemaker "the largest, multi-denominational Christian dispute resolution service in the country."[40] Along with growing in size and membership, Peacemaker has gained experience and sophistication, and has developed a streamlined process for settling disputes efficiently and effectively.

Peacemaker Ministries' method of settling disputes begins with giving the parties an opportunity to reflect on whether they were perhaps partially to blame. If reflection does not settle the dispute, the parties are required to negotiate with one another. In the case that private negotiations are unsuccessful, the parties are asked to look to a "spiritually mature" person in the church to coach them in their negotiations.[41] If one of these conciliators is not enough, it is suggested that the parties turn to two respected individuals in the church to assist in settling the dispute through mediation and, if necessary, arbitration.[42] If even these individuals fail and the parties cannot reach a mutually agreeable resolution, the disputants may request

34. Shippee, *supra* note 20, at 241; *see also* Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 Cumb. L. Rev. 583 (1998/1999); Joseph Allegretti, *Dialogue and the Practice of Law and Spiritual Values: A Christian Perspective on Alternative Dispute Resolution*, 28 Fordham Urb. L.J. 997 (2001).

35. Shippee, *supra* note 34.

36. *Id.*

37. *Id.* at 242.

38. *Frequently Asked Questions*, Peacemaker Ministries, http://peacemaker.net/icc-frequently-asked-questions/ (last visited Jan. 15, 2016).

39. Shippee, *supra* note 20, at 242.

40. *Id.* at 243.

41. *Id.*

42. *Id.*

that a trained peacemaker from the Institute of Christian Conciliation get involved.[43] Although peacemakers charge to hear a dispute, they are arguably better trained and equipped to settle it, and the parties are encouraged to settle more quickly with the weight of a fee looming.

Christian ADR, like Jewish ADR, touches almost every method of ADR, from conciliation to arbitration, allowing adherents a wide variety of ways in which to settle disputes. As with Jewish arbitration, when disputants turn to arbitration and work through to an arbitration award, courts uphold it more often than not. However, in contrast to Judaism, there seem to be vast areas of secular law that have no direct Christian counterpart, vastly reducing the likelihood of the type of conflict found in *In re Congregation Birchos Yosef*, where the basic issue is what legal system ought to actually govern a substantive area of commercial law between two co-religionists. In a faith in which there is no substantive religious law governing commercial matters independently of secular law, Peacemaker Ministries serves as a "choice of forum," rather than a "choice of law." No matter what forum is chosen, secular bankruptcy law will govern—and, as secular bankruptcy law does not allow any forum other than bankruptcy court without leave of the court itself, the conflict is greatly diminished.[44]

## Catholic Christian Arbitration

Outside of Protestant Christianity, which has embraced ADR, there are Christian denominations that have very robust bodies of law, yet have distanced themselves from it. The most notable of these is the Catholic Church.

About 20 percent of Americans identify as Catholic.[45] It is worth focusing on the Catholic Church directly, as it is the exception to the rule of religious groups adopting methods for ADR. This is not to say that Catholics do not have laws governing their churches and parishioners. In fact, canon law, the body of ecclesiastical laws and regulations created to internally govern the Catholic Church, is one of the most ancient and robust legal systems in the world.[46] Even with its robust ecclesiastical law, however, the Catholic

43. *Id.* at 244.

44. *See* Bankruptcy Code, 11 U.S.C. §§ 105(a), 362(d) (1978) (permitting modification of the automatic stay with permission of the court).

45. Pew Research Ctr., *supra* note 4.

46. For the most recent and complete code of Canon Law, see *Code of Canon Law*, Holy See, http://www.vatican.va/archive/ENG1104/_INDEX.HTM (last visited Jan. 19, 2017).

Church has not embraced ADR. Although there are likely many reasons for this reluctance, it is mainly due to the fact that canon law is used mostly for church governance issues. Although canon law is "the law of the Catholic church by which all Catholics are bound,"[47] it is not easily accessible to—or often used by—individual members of the Catholic Church. It also extends to issues of marriage and divorce between Catholics, but it does not extend as far as general private disputes between co-religious parties—it neither professes to be a "choice of law" nor a "choice of forum" available for commercial disputes between members of the Catholic Church.

Because Catholic Church ecclesiastical law has no private ADR mechanism to resolve disputes between private parties, cases such as *In re Congregation Birchos Yosef* cannot appear or be settled under canon law. An exception exists when one of the adjudicants is a Catholic church itself, but even in such a case, canon law might simply send the matter to secular court, as it lacks civilly binding force in most such tribunals.

## Islamic Arbitration

Only about 1 percent of the U.S. population identifies as Muslim;[48] however, Islam has become the fastest-growing religious group in the United States.[49] With this growing population has come an interest, as in Jewish and Christian communities, in preserving its own culture. One way Muslims have done this is through settling disputes outside of the secular court system using Islamic principles of law. The procedures used by Muslim arbitral bodies fall somewhere between Christian and Jewish ones—between mediation and arbitration.[50]

The *Qur'an*, Islam's holiest book, like the Bible and Talmud, encourages settling disputes in a peaceful and conciliatory manner. Because of this emphasis, "the Islamic tradition has developed specialized intermediaries known as *qadis* who interpret and apply Islamic law (*Shari'a*), often in an

47. Everson v. Bd. of Educ., 330 U.S. 1 (1947).
48. Pew Research Ctr., *supra* note 4.
49. Shippee, *supra* note 20, at 245.
50. *See generally* Eugene Volokh, *Religious Law (Especially Islamic law) in American Courts*, 66 Okla. L. Rev. 431 (2014); Mohammad H. Fadel, *Shari'a and Halakha in North America: Religious Law, Family Law and Arbitration: Shari'a and Halakha in America*, 90 Chi.-Kent L. Rev. 163 (2015); Michael J. Broyde, *Shari'a and Halakha in North America: Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 Chi.-Kent L. Rev. 111 (2015); Cristina Puglia, *Will Parties Take to Tahkim?: The Use of Islamic law and Arbitration in the United States*, 13 Chi.-Kent J. Int'l & Comp. L. 151 (2013).

attempt to preserve social harmony by reaching a negotiated solution to a dispute."[51] *Qadis* work in the areas of conciliation, mediation, and arbitration, although conciliation and mediation are "the preferred dispute resolution approaches of the Prophet Mohammed."[52]

Disputing couples are the likeliest parties to become involved in Islamic ADR. Typically, a couple will name an older family member or some other individual to mediate their dispute. Commonly, one of the arbitrators is the couple's *imam*, or religious leader.[53] Following the *Qur'an*, the mediator's job is to give both parties an opportunity to hear one another's side of the story and identify the underlying issues causing the dispute.[54] Facilitating negotiation between the parties, the mediator's end goal is to help them find a mutually satisfactory resolution to the dispute. Muslim mediation is more often enforced in secular courts than its arbitration counterpart, as arbitration agreements stemming from *Shari'a* are often incompatible with local laws.[55]

Whether due to the fact that arbitration agreements stemming from *Shari'a* will not be enforced, or for some other reason, Muslims in the United States rarely use arbitration, at least currently.[56] However, many Islamic legal scholars feel that arbitration needs to be utilized more frequently, as arbitral decisions provide more finality than their less binding ADR counterparts, since they do not need additional court approval, but simply serve as stand-alone judgments.[57] Muslim arbitration can likely find enforceability in the same way Jewish and Christian arbitration have—through the development of a sophisticated arbitration board or multiple boards with specialized experts familiar with both Islamic and secular law. In this way, trained Muslim arbitrators could help Muslims settle their disputes through a religious lens, while ensuring that the principles being enforced run parallel to—and do not interfere with—secular laws.[58]

Much like Jewish and Christian ADR, Islamic dispute resolution has seen significant developments since its inception, and looks to continue to evolve by following in the footsteps of its predecessors. However, Muslim arbitration is likely to face many hurdles with which its predecessors were not forced to deal. Unlike Jewish law, Islamic law has a very weak doctrine of "the law of the land is the law," and this is likely to create significant ongoing

51. Shippee, *supra* note 20, at 246.
52. *Id.*
53. *Id.* at 247.
54. *Id.*
55. *Id.*
56. *Id.* at 248.
57. *Id.*
58. *Id.*

tension between it and secular law over the content of the laws used in adjudication. Cases such as *In re Congregation Birchos Yosef* will thus be much more common in Islamic tribunals because the basic validity of American bankruptcy law can be questioned from the rubric of Islamic law, whereas a significant strain of Jewish law validates secular bankruptcy law.[59]

## E. THE FUTURE OF RELIGIOUS ARBITRATION

Religious arbitration's viability rests on its ability to maintain the respect of secular courts and on the number of participants it can attract.

Religious groups have maintained success in the field of arbitration law particularly by following in the footsteps and procedural methods of their predecessors, building on a foundation of secular contract law and solid procedural foundations commensurate with secular procedural rules. With these foundations in place, religious arbitral bodies take secular courts to the outer limits of constitutionally permitted review, leaving them no choice but to uphold awards. Courts allowing such awards to stand, in turn, give parties faith in the religious arbitral process and make them more likely to view religious arbitration as a viable alternative to secular methods of dispute resolution.

So long as potential participants in religious arbitration view religious dispute resolution as a method that will be respected and upheld by courts, there is not likely to be a shortage of individuals who wish to settle their disputes through the lenses of their religious beliefs. This is especially true in light of recent developments in American religious culture, namely in the movement of secular Americans away from traditional, conservative values.

History shows that a strong system of arbitration may allow a religion to meet this desire by implementing its own law in settling disputes, but there are certain steps each successful religious arbitral body has taken in developing into a viable alternative to the secular court system, and in ensuring that its decisions will be enforceable in, and respected by, secular courts.

## F. CRAFTING A FRAMEWORK FOR ENFORCEABLE ARBITRATION DECISIONS

The legal system in America will not honor religious arbitration of family or any other matters unless lawmakers and judges can be confident that

59. *See* Resnicoff, *supra* note 30; Michael Broyde, The Pursuit of Justice and Jewish Law ch. 3, 4, 5 (2d ed. 2007).

religious arbitration is just and proper as understood by secular law and society. At the same time, faith-based arbitration, like any other form of ADR, is built upon the Federal Arbitration Act (FAA),[60] which is deeply rooted in the contractual approach to private dispute resolution. Under the FAA, courts defer to binding arbitration agreements and subject them only to procedural review for matters such as voluntariness and procedural fairness. Arbitration clauses that include both choice-of-law and choice-of-forum provisions are an especially powerful means of adopting alternative legal models, even when the chosen forum is an arbitration court and the chosen law is religious. Indeed, courts will defer even to decisions of panels that operate under principles that are dramatically different from the existing laws of any state, such as Jewish law, *Shari'a*, or even a non-law structure such as Christian conciliation, provided the parties' selection of the forum and decisional norms is voluntary and the arbitration procedures used are clear and reasonably fair.

As explained in greater detail in Chapter Seven, experience shows that there are six basic principles of procedural regularity that religious arbitration panels must incorporate to ensure that their decisions are honored by secular courts.[61]

First, the arbitration panel must develop and promulgate detailed, standardized rules of procedure. Uniform rules and procedures set clear expectations for the proceedings and protect vulnerable parties. More importantly, procedural safeguards are crucial to the viability of private arbitration, as courts generally review arbitration decisions for procedural, rather than substantive, fairness.

Second, any organization providing arbitration services should also develop an internal appellate process. This reduces the likelihood of errors, increases trust, and helps prevent decisions from being routinely overturned by courts.

Third, the governing rules should spell out choice-of-law provisions to facilitate the accommodation of religious traditions and principles, where possible.

Fourth, in addition to religious authorities, the arbitration panel should employ skilled lawyers and professionals who are also members of the

60. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (1947). Before Congress enacted the FAA, courts were often hostile to alternative dispute resolution, including arbitration. *See* Meacham v. Jamestown, 105 N.E. 653, 655 (N.Y. 1914).

61. Michael Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America*, 57 N.Y.L. Sch. L. Rev. 287 (2012/2013).

panel's constituent religious community and who can provide expertise in secular law and contemporary commercial practices.

Fifth, to ensure the effective resolution of commercial arbitrations, the organization should recognize and, to the greatest extent possible, incorporate into its rulings the realities of conduct in the public arena—even in family law. This is crucial to understanding the actions and intent of the parties in common transactions, but perhaps more important, it will inspire confidence in potential disputants. After all, a dispute resolution system that reflects grand abstract ideals but has little notion of business realities is unlikely to attract voluntary participants.

Finally, the tribunal should recognize that an aggregate of individual arbitrations will likely give rise to an active role in communal leadership. By dint of having organizations that a particular faith group recognizes as "dispensing justice," boundary line disputes within faith-based organizations can be settled judicially, rather than politically. This is particularly true among adherents, but it is to be more broadly expected as well.[62]

These six rules are based on a fundamental reality of religious arbitration: other than in child custody disputes,[63] American arbitration law pays little attention to notions of substantive due process. Neither the government nor the courts has a preconceived notion of the "right" substantive resolution of most any dispute, if the parties contractually choose to opt for a different resolution or a process that produces a different resolution from what state or federal law might. Rather, the FAA and the myriad state laws that derive from it have a strong notion of *procedural* due process.[64]

62. This basic idea is the focus of three recent articles of mine. *See* Michael J. Broyde, *Shari'a and Halakha in North America: Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 Chi.-Kent L. Rev. 111 (2015); Michael J. Broyde, Ira Bedzow & Shlomo C. Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 Harv. J. Racial & Ethnic Just. 33 (2014); Michael Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America*, 57 N.Y.L. Sch. L. Rev. 287 (2012/2013).

63. *See* Broyde, *supra* note 62, at page 115.

64. There are certain things arbitration panels may and may not do in the course of making decisions: They may not call a hearing at 4:00 AM on a federal holiday; they must provide litigants with a reasonable amount of notice; they must conduct hearings in a language that the parties understand; arbitrators may not have a financial interest in the resolution of the case or financial involvement with the parties, and they must honor other basic ideas of procedural fair play. *See, e.g.*, *JAMS Policy on Employment Arbitration: Minimum Standards of Procedural Fairness*, JAMS, http://www.jamsadr.com/employment-minimum-standards/ (last visited Oct. 1, 2016). Of course, the JAMS policy is only binding when it is incorporated by contract, and the minimal obligations of the arbitrator under state law are considerably lower.)

Religious tribunals recognize that, in order for secular courts to honor their decisions, they must follow only procedural, rather than substantive, due process. The Beth Din of America has promulgated legally sophisticated rules and procedures that are published on its website.[65] The Institute for Christian Conciliation[66] and the Muslim Arbitration Tribunal have done likewise.[67] These rules set out requirements such as the number of days between filing and response. They describe matters such as discovery, motion practice, transcription, and the appropriate place to file. They also establish the proper language for hearings, the procedure for compiling a record, waiver doctrines, notice provisions, and other rules of procedure.

Religious groups and their adherents have slowly realized that, so long as these foundations are in place, religious arbitration can be used to settle almost any dispute between any groups of disputants—be they individuals or business entities. The latter group are the most recent adopters of religious arbitration, having implemented the practice to settle disputes arising out of what has been dubbed "co-religionist commerce."

## G. RELIGIOUS ARBITRATION'S BIGGEST CHALLENGES MOVING FORWARD: MOLDING ANCIENT LAWS TO FIT A MODERN PARADIGM, AND EQUAL ACCESS OF ALL RELIGIONS TO RELIGIOUS ARBITRATION

Religious arbitration's proliferation still faces difficult issues, especially as new religions embrace the practice. The two biggest issues are apparent in the fledgling branch of Islamic religious arbitration in the United States. First, Islamic arbitrators, much like those of other religions, must mold ancient laws to fit a modern paradigm. This is indeed a challenge for any nomos-centric faith tradition that wishes to use its religious norms and values to effectively and convincingly resolve modern conflicts. Although doing so can often be challenging in practice, it is something that religious leaders and scholars of many faiths have done before and have within their power to do again. The second challenge is more difficult to overcome. Contemporary American Muslims face serious Islamophobia

65. *Rules and Procedures*, Beth Din of Am., http://bethdin.org/wp-content/uploads/2015/07/Rules.pdf (last visited Jan. 15, 2016).

66. Peacemaker Ministries, http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5394441/k.BD56/Home.htm (last visited Jan. 15, 2016).

67. Muslim Arbitration Tribunal, http://www.matribunal.com/ (last visited Jan. 15, 2016).

that is specifically directed at concerns over Islamic religious norms and practices—precisely the standards that Islamic arbitration would seek to uphold among Muslim disputants. Although this problem is particularly acute for Muslims—thus far, no states have attempted to ban the application of Jewish law or Christian values—it is in many ways part of a broader tension between contemporary societal values and traditional religious mores and practices.

As with Christian denominations, Islam is composed of numerous sects, some more conservative—strict in their adherence to the laws of their faith—than others. These subsets also have different interpretations of the *Qur'an* and its teachings. Different subsets will thus be more readily able to implement religious arbitration acceptable to American secular courts than will others. As with every other branch of dispute resolution, the enforceability of arbitration proceedings applying religious norms is limited by the bounds of public policy. Some groups' interpretations of the *Qur'an* breach or run contrary to public policy and thus will not be enforceable even in consented-to arbitration.

That said, with the growth of Islamic arbitral bodies has come the type of sophistication developed by other religions in their utilization of arbitration. Islamic arbitral bodies have gotten better at ensuring that they keep their decisions, arbitral awards, and arbitral procedures within the bounds of public policy, and they continue to work at perfecting this skill.

But instead of being met with increasing acceptance, Islamic religious arbitration has been framed as a different practice altogether. Muslims' arbitral bodies are often characterized as full-blown courts. This sort of characterization can be found in the following passage, taken from the less-than-mainstream Breitbart News, but which captures well the popular sentiment:

> An Islamic Tribunal using Sharia law in Texas has been confirmed by *Breitbart Texas*. The tribunal is operating as a non-profit organization in Dallas. One of the attorneys for the tribunal said participation and acceptance of the tribunal's decisions are "voluntary."[68]

68. Bob Price, *Islamic Tribunal Confirmed in Texas; Attorney Claims "It's Voluntary"*, Breitbart.com (Jan. 27, 2015), http://www.breitbart.com/texas/2015/01/27/hold-islamic-tribunal-confirmed-in-texas-its-voluntary-says-attorney/ (last visited Oct. 1, 2016). Of course, as Snopes.com notes (see http://www.snopes.com/politics/religion/shariatexas.asp, last accessed January 17, 2017), this Breitbart story is hyperbolistic, exaggerated, and not reliable in its details. It is quoted here exactly because this type of story emphasizes how Islamic tribunals—acting not much differently than

> *Breitbart Texas* spoke with one of the "judges," Dr. Taher El-badawi. He said the tribunal operates under Sharia law as a form of "non-binding dispute resolution." El-badawi said their organization is "a tribunal, not arbitration." A tribunal is defined by Merriam-Webster's Dictionary as "a court or forum of justice." The four Islamic attorneys call themselves "judges" not "arbitrators."
>
> El-badawi said the tribunal follows Sharia law to resolve civil disputes in family and business matters. He said they also resolve workplace disputes.

Upon review, the tribunal's website indicates a practice directly in line with other religious arbitral bodies.[69] Even if the tribunal were to decide issues not in accordance with the laws of the United States, such decisions could be challenged in the secular court system. Nevertheless, the fear of such tribunals captured by the tone of the above excerpt persists. For example, "[i]n 2006, the province of Ontario banned arbitration of family law disputes under any body of laws except Ontario law, in part to prohibit arbitration under religious laws."[70] Moreover, within the United States, seven states have passed their own laws banning courts from considering *Shari'a*.[71] Because bans on consideration of *Shari'a* in particular will likely be found unconstitutional in the United States, states that pass such laws will need to draft them broadly in order for them to pass constitutional muster. The unintended consequences can be significant:

> [T]he bans can have unintended consequences like disrupting marital prenuptial agreements or invalidating court decisions in other states. Especially in divorce and contract law, religious beliefs (like Sharia, orthodox Jewish or Catholic canon) can factor into how judges or arbitrators preside over a dispute. For example, a couple may sign a prenuptial agreement that requires them to go to an imam and that a religious leader must conduct the mediation. Alabama's [ban on consideration of *Shari'a*] nullifies that requirement.[72]

rabbinical courts—are treated differently by the public. *See also* Eric Celeste, "Anti-Muslim Sentiment in Irving (and the Imam Who Has To Tolerate It)," http://www.dmagazine.com/frontburner/2015/03/anti-muslim-sentiment-bubbles-up-in-irving-and-the-imam-who-has-to-tolerate-it/, last accessed Jan. 17, 2017).

69. *About Us*, Islamic Tribunal, http://www.islamictribunal.org (last visited Oct. 1, 2016).

70. Bilal M. Choksi, Comment, *Religious Arbitration in Ontario—Making the Case Based on the British Example of the Muslim Arbitration Tribunal*, 33 U. Pa. J. Int'l L. 791, 791 (2012).

71. Liz Farmer, *Alabama Joins Wave of States Banning Foreign Laws*, Governing (Nov. 4, 2014), http://www.governing.com/topics/elections/gov-alabama-foreign-law-courts-amendment.html (last visited Aug. 28, 2016).

72. *Id.*

Religious leaders fear such effects—as reflected in their willingness to stand united against such laws.[73] This trend must continue for universal acceptance of religious arbitration to continue. If bans are passed and awards from religious arbitral bodies consistently struck down, the practice will be less likely to be selected as a method for settling disputes between parties. Such nullification is unlikely, however, as it would disregard contract law.

## H. CONCLUSION

This chapter has provided a brief survey of contemporary faith-based dispute resolution in the United States and, in doing so, has set the stage for the following sections of this book. Religious arbitration serves an important function for religious individuals and communities in the United States. It provides a legally recognized mechanism whereby people can choose to bring their ordinary legal disputes over mundane matters such as property, employment, and commercial transactions to religious courts, staffed by religious functionaries who will resolve such conflicts in accordance with the parties' religious commitments. Although adjudications by religious courts have always existed in this country, it is only in recent decades that the presence and practice of faith-based dispute resolution has become both more urgent for religious individuals and communities, as well as more troublesome for some in the broader American political and legal landscape. In response, different major faith traditions, including Protestant, Jewish, and Muslim communities, have developed different models of dispute resolution. As was briefly alluded to above, the rise of various models of religious arbitration in recent decades is in part due to the gradually growing distance between the traditionally religious—especially Protestant Christian—bases for American law and policy, and contemporary societal norms and attitudes that embrace a different set of values. It is to this important catalyst for the development of faith-based arbitration as a serious alterative to American courts and American law that this book now turns.

73. *See, e.g.*, Tara Culp-Ressler, *Christians Blast Ballot Initiative Banning Sharia Law in Alabama*, ThinkProgress (Nov. 2, 2014), https://thinkprogress.org/christians-blast-ballot-initiative-banning-sharia-law-in-alabama-7166c97ae507#.qejhnbffj (last visited Aug. 28, 2016).