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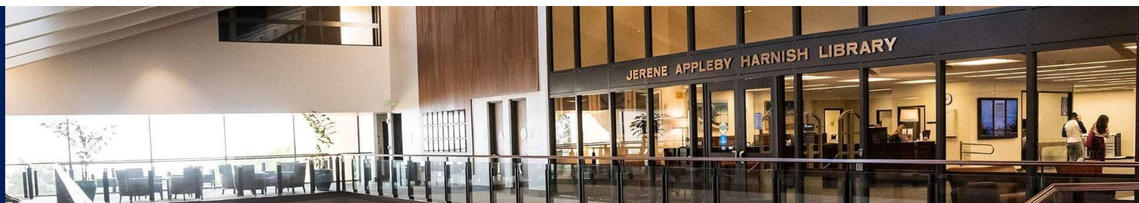

Michael A. Helfand

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Contractual Commitments and the Right to Change Religions

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CONTRACTUAL COMMITMENTS AND THE RIGHT TO CHANGE RELIGIONS

Michael A. Helfand[*]

ABSTRACT

Religious contracts have long been a feature of religious life and commerce in the United States. Across a range of contracting contexts—property, employment, arbitration and family law, to name a few—parties regularly enter into agreements where performance is measured against religious standards and objectives. But in more recent years, courts and scholars have begun questioning the routine enforcement of such agreements when one of the parties has subsequently changed their faith. To these critics, enforcing agreements under such circumstances threatens to undermine religious freedom by tethering parties to religious obligations in which they no longer believe. Indeed, for this reason, a growing number of scholars have argued against enforcing religious contracts; and a number of courts have begun to follow suit.

This Article argues that this trend is misguided. Courts and scholars should not view religious contract enforcement and religious freedom as in conflict. Instead, they should view them as mutually reinforcing. At its core, religious freedom rests on the principle of voluntarism—a principle that entails valuing, and protecting, authentic religious conduct. In turn, a commitment to religious freedom aims to protect private choices to pursue authentic religious conduct free from government coercion or improper persuasion. Contract law—with its central focus on assent, autonomy and self-determination—has the doctrinal resources to promote principles of voluntarism. Indeed, it already deploys a readymade set of defenses—such as impracticability and frustration of purpose—that directly address circumstances where parties have changed their faith after contract formation. In this way, contract law—as opposed to constitutional law—is far more capable of policing the line of autonomous self-determination, ensuring that religious contract enforcement promotes the First Amendment's core commitment to religious voluntarism.

[*] Brenden Mann Foundation Chair in Law and Religion, Vice Dean for Faculty and Research, and Co-Director, Nootbaar Institute for Law, Religion and Ethics, Pepperdine Caruso School of Law; Florence Rogatz Visiting Professor, Yale Law School. Many thanks to Brian Bix, Nathan Oman, Barak Richman, and Chaim Saiman as well as participants in the Nootbaar Fellows Workshop at Pepperdine Caruso School of Law and the UConn Law Faculty Workshop for their helpful and insightful comments on prior drafts.

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CONTRACTUAL COMMITMENTS AND THE RIGHT TO CHANGE RELIGIONS

INTRODUCTION

Religious contracts are an inextricable part of American life.[1] Whether in the context of employment,[2] arbitration,[3] property,[4] family,[5] corporate,[6] or trust law[7]—just to name a few—parties regularly enter agreements where services or goods are evaluated based on theological criteria or religious objectives.[8] In this way, religious contracts promote both the commercial

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[1] Brian Sites, *Religious Documents and the Establishment Clause*, 42 U. MEM. L. REV. 1, 2-3 (2018) ("Religious documents come in a variety of forms, including marriage contracts, disposition of property documents, agreements on a child's religious upbringing, commercial transactions, employment contracts, and arbitration agreements."); *see also* Eli Baruch, *The Sword and the Scroll: Judicial Enforcement of Religious Contracts*, 18 J. BUS. & TECH. L. 69 (2022); *see also See, e.g.*, William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 315 (1986) ("[O]rganized religion represents an increasingly pervasive force in all elements of the society, including politics, commercial enterprise, and social welfare."); Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887, 912 (2009) ("In many—and perhaps an increasing number of—instances, religion overlaps with the commercial sphere . . . .").

[2] *See, e.g.*, Nation Ford Baptist Church Inc. v. Davis, 876 S.E.2d 742, 747 (N.C. 2022); Welter v. Seton Hall Univ., 608 A.2d 206, 212 (N.J. 1992); Minker v. Baltimore Ann. Conf. of United Methodist Church, 894 F.2d 1354, 1358 (D.C. Cir. 1990); *see also infra* Section I.C.

[3] *See, e.g.*, Lang v. Levi, 16 A.3d 980, 987 (Md. Ct. Spec. App. 2011); Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. 2005); Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 729 (N.J. 1991); *see also infra* Section I.B.

[4] *See, e.g.*, Watson v. Jones, 80 U.S. 679, 714, 20 L. Ed. 666 (1871); Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn, 426 N.E.2d 480, 481 (1981); Mount Zion Baptist Church v. Second Baptist Church of Reno, 432 P.2d 328, 329 (Nev. 1967); *see also infra* notes 52-55 and accompanying text.

[5] *See, e.g.*, Cohen v. Cohen, 182 A.D.3d 545, 546 (N.Y. App. Div. 2020); Feldman v. Feldman, 874 A.2d 606, 615 (N.J. App. Div. 2005); Zummo v. Zummo, 574 A.2d 1130, 1144 (Pa. Super. Ct. 1990); *see also infra* Section I.A.

[6] James D. Nelson, *Corporate Disestablishment*, 105 Va. L. Rev. 595 (2019); Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929 (2018).

[7] *See, e.g.*, From the Heart Church Ministries, Inc. v. Afr. Methodist Episcopal Zion Church, 803 A.2d 548, 565 (Md. 2002); Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church, 489 A.2d 1317, 1321 (Pa. 1985); Norfolk Presbytery v. Bollinger, 201 S.E.2d 752, 756 (Va. 1974); *see also infra* notes 97-100 and accompanying text.

[8] *See, e.g.*, Odatalla v. Odatalla, 810 A.2d 93, 95 (N.J. Super. Ch. Div. 2002); Greenberg v. Greenberg, 238 A.D.2d 420, 421 (N.Y. App. Div. 1997); Avitzur v. Avitzur, 446 N.E.2d

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objectives and religious commitments of the parties.[9]

Religious commitments, however, do not always remain static. Indeed, over time, individuals and institutions change their religious commitments. And when they do so between contract formation and contract enforcement, a growing number of courts and scholars increasingly view the core objectives of contract law and constitutional law as at war with each other.

Consider some examples. A parent challenges the enforcement of a religious upbringing clause in a divorce settlement agreement, no longer committed to the same faith as their former spouse;[10] former members of a religious community resist the enforcement of an agreement to arbitrate disputes before religious authorities, no longer committed to the tenets of the arbitrators' faith.[11] And religious institutions refuse to abide by their ministers' employment agreement, no longer believing that their religious leader represents their evolving religious commitments.[12]

In such cases, enforcement of religious contracts pits two core liberal commitments—central to contemporary American law—against each other. On the one hand is the law's commitment to enforcing contracts—mutual agreements to a bargained-for exchange.[13] Without the law's commitment to contract enforcement there could be no freedom of contract, no ability for parties to "design the terms of trade,"[14] "create obligations that promote one's interests,"[15] or "recruit others to their future plans by committing their own future selves in return."[16]

136, 137 (N.Y. 1983); *see also infra* Part I.

[9] *See generally* Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015) (describing this phenomenon of co-religionist commerce with its two sets of objectives).

[10] *See, e.g.*, Zummo v. Zummo, 574 A.2d 1130, 1146 (Pa. Super. Ct. 1990); In re Marriage of Weiss, 42 Cal. App. 4th 106, 118 (1996).

[11] *See, e.g.*, Bixler v. Superior Court for Cal., 2022 Cal. App. Unpub. LEXIS 302, *29 (2022).

[12] *Cf.* Sklar v. Temple Israel, Westport Inc., No. X08FSTCV216053761S, 2023 WL 3071355, at *1 (Conn. Super. Ct. Apr. 21, 2023); Friedlander v. Port Jewish Center, 588 F. Supp. 2d 428 (2008) (dismissing minister's breach of contract claim); El-Farra v. Sayyed, 226 S.W.3d 792, 795 (Ark. 2006) (same)

[13] RESTATEMENT (SECOND) OF CONTRACTS § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.").

[14] Omri Ben-Shahar, *Foreword: Freedom from Contract*, 2004 Wis. L. Rev. 261, 263 (2004).

[15] *Id.*

[16] Hanoch Dagan & Michael Heller, *Specific Performance: On Freedom and*

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On the other hand, enforcing religious contracts can constrain the future religious choices of the parties. Where one party changes their theological commitments or religious affiliation between contract execution and contract enforcement, the specter of legal liability can generate pressure to perform in accordance with now-discarded religious commitments. And pressure to adhere to religious commitments—previously reduced to contractual obligations—can undermine an individual's religious freedom and thereby violate the First Amendment—or so the argument goes.[17]

For some time, courts generally resolved conflicts between contract law and religious freedom by emphasizing the volitional nature of contractual obligations. Where parties employed "neutral principles of law" in drafting their agreements,[18] courts enforced religious contracts because the obligations were mutually agreed upon by the parties. As a result, enforcing those contractual obligations would, in the words of one court, "merely require the defendant to do what he voluntarily agreed to do."[19] Or, in the words of another court, require "nothing more [of the defendant] than what he promised to do"[20] when he executed the agreement. Because the parties authored their own obligations, so to speak, enforcing those obligations should not be viewed as impinging on their religious freedom.

But in recent years and across a range of contexts, critics have worried that an unconstrained admixture of religion exercise and commercial instruments might undermine the objectives embodied in the First Amendment's religion clauses.[21] Thus, according to these critics, if private

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Commitment in Contract Law, 98 NOTRE DAME L. REV. 1323, 1325 (2023).

[17] *See, e.g.*, Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012) (noting how "As a result, enforcing religious arbitration agreements and awards undermines an individual's right to "change one's beliefs."); *see infra* Section I.A-I.C.

[18] Jones v. Wolf, 443 U.S. 595, 603 (1979) (embracing the "neutral principles of law" framework for enforcing religious agreements).

[19] Hanoch Dagan & Michael Heller, *Specific Performance: On Freedom and Commitment in Contract Law*, 98 NOTRE DAME L. REV. 1323, 1325 (2023).

[20] *Id.* at 795.

[21] Elizabeth Sepper & James D. Nelson, *Religion Law and Political Economy*, 108 IOWA L. REV. 2341 (2023) ("But Religion Clause doctrine and practice present similar—or perhaps more serious—dangers. As it turns out, large parts of the political economy are religious. And many of the largest institutional players have taken steps to insulate themselves from democratic demands."); *see also* Nathan B. Oman, *The Need for a Law of Church and Market*, 64 DUKE L.J. ONLINE 141, 160 (2015) ("Antidiscrimination norms provide a powerful alternative in which the social construction of a particular kind of market--one that is pluralistic, open to all, and in some sense 'secular'—takes priority over freedom of contract. The tension between these two approaches illustrates the need for more and better reflection on the relationship between commerce and religion. Before we decide which of

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law served as the only constraint on religious commerce, free exercise and church-state separation principles would suffer as religiously-motivated individuals and corporations pressed their aspirations through a range of commercial mechanisms.[22] Private law doctrines, on this view, are simply not up to the challenge of constraining the dangerous potential of religious commerce.

Religious contract enforcement has served as a prime example of this trend. Increasingly, both courts and scholars worry that religious contract enforcement has the potential to undermine religious freedom.[23] This is, to be sure, not surprising. In recent years, the Supreme Court has expanded the scope of protections afforded by the Free Exercise Clause.[24] And with that expansion comes the potential for growing tensions with contract law. Thus, as one court put it, to enforce a religious contract can "encroach[] upon the fundamental right of individuals to question, to doubt, and to change their religious convictions . . . ."[25] Or, as another court put it, to enforce a religious contract "would bind members irrevocably to a faith they have the constitutional right to leave."[26] In such cases, courts have become more willing to view religious contract enforcement against a party who has changed their faith as undermining their religious freedom and, in turn, a

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these approaches is best, we must bring their assumptions out into the open, examine them, and decide whether they are justified.").

[22] *See, e.g.*, Elizabeth Sepper & James D. Nelson, *Government's Religious Hospitals*, 109 VA. L. REV. 61 (2023) (exploring this problem in the context of the corporate consolidation of hospitals); James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595 (2019) (exploring this problem in the context of corporate law); Sophia Chua-Rubenfeld & Frank J. Costa, Jr., *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2087 (2019) (arguing that arbitration doctrine cannot adequately protect religious rights in the context of religious arbitration).

[23] *See infra* Part I.

[24] *See, e.g.*, Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 703 (2022) (cataloging and criticizing "a dramatic expansion in the Supreme Court's interpretation of the Constitution's Free Exercise Clause"); Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1497 (2022) (describing the Court's expanded protections of free exercise as "le[ading] to striking success for religious litigants at the Supreme Court."); Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 Minn. L. Rev. 1341, 1382 (2020) ("On the free exercise side, by contrast, the doctrine has been expansionist.").

[25] Zummo v. Zummo, 574 A.2d 1130, 1146 (Pa. Super. Ct. 1990); *see also* In re Marriage of Weiss, 42 Cal. App. 4th 106, 118 (1996) (holding that "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.").

[26] Bixler v. Superior Court for Cal., 2022 Cal. App. Unpub. LEXIS 302, *29 (2022).

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violation of the First Amendment.[27] On such views, courts must turn to constitutional law—and away from contract law—if principles of free exercise are to be vindicated.

Notwithstanding this trend, this Article argues that this turn to constitutional law—and invoking the First Amendment—to invalidate religious contracts is a mistake. The religion clauses, grounded in the fundamental principle of religious voluntarism, aim to protect authentic religious exercise.[28] Thus, the Free Exercise and Establishment Clauses are geared towards protecting the ability of individuals and institutions to make free and private choices to pursue voluntary religious obligations.[29] Creating that space for free and private religious choices requires keeping government coercion and improper persuasion at bay.[30]

Given the First Amendment's commitment to religious voluntarism, courts should analyze the enforceability of religious contracts through the prism of contract law. Properly applied, contract law can ensure that religious contracts amplify religious freedom. Where such contractual obligations flow from the free and private choices of the parties, and not government coercion, enforcing religious contracts enhances authentic religious exercise.

Importantly, contract law has developed doctrines geared towards evaluating whether a party's changed faith ought to render a religious contract unenforceable. And those doctrines—impracticability and frustration of purpose—hinge upon whether the law ought to view the changed circumstances as placing the contract beyond the mutual agreement of the parties.[31] In this way, the doctrines of contract law police the line between volitional and nonvolitional agreements, ensuring that contracts are only enforced to the extent they enhance the contractual autonomy of the parties.[32] As a result, in the case of changed circumstances, contract law authorizes enforcement only where the contractual commitments of the parties could be described as promoting principles of voluntarism.[33]

For these reasons, religious contracts and religious freedom ought to be viewed as mutually reinforcing. Ultimately, the defenses to contract

[27] *See, e.g.*, Weisberger v Weisberger, 154 A.D.3d 41, 53 (N.Y. App. Div. 2017); *see also infra* Part I.
[28] *See infra* Part II.
[29] *See infra* Part II.A.
[30] *See infra* Part II.B.
[31] *See infra* Part III.A.
[32] Id.
[33] *See infra* Part III.B.

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enforcement afforded by contract law ensure that religious contracts will promote First Amendment principles of voluntarism. Where contract law requires enforcement, First Amendment principles remain protected. And instances where religious contract enforcement—because of changed circumstances—would threaten First Amendment concerns, contract law would itself prohibit enforcement.

This Article proceeds in three parts. Part I examines the growing trend to invalidate religious contracts on constitutional grounds, focusing on contracts implicating family, communal and employment relationships. Part II then analyzes the underlying First Amendment value of religious voluntarism, exploring how that commitment entails creating space for authentic religious conduct free from government coercion and improper persuasion. Finally, Part III considers how contract law—through impracticability and frustration of purpose defenses—can evaluate whether the enforcement of a religious contract, in light of the changed faith of one of the parties, is truly volitional and thereby promotes values of both contractual autonomy and religious voluntarism.

I. RELIGIOUS LIBERTY VS. RELIGIOUS CONTRACTS

Religious commerce is simply a legal fact.[34] Whether with respect to property,[35] contract,[36] or tort,[37] the law is regularly tasked with resolving legal conflicts that require courts to simultaneously navigate the commercial and religious objectives of the parties.[38]

Interpreting and enforcing religious contracts has continuously presented particularly thorny legal dilemmas. Religious contracts, by definition,

[34] Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFFALO L. REV. 127, 180–83 (2003); *see generally* R. LAURENCE MOORE, SELLING GOD: AMERICAN RELIGION IN THE MARKETPLACE OF CULTURE (1994) (recounting the commercialization of religious goods and services since the beginning of the nineteenth century); *see also* Nathan B. Oman, *The Need for a Law of Church and Market*, 64 DUKE L.J. ONLINE 141, 160 (2015) (describing the "need for more and better reflection on the relationship between commerce and religion.").

[35] *See, e.g.*, Nicole Stella Garnett & Patrick E. Reidy, *Religious Covenants*, 74 FLA. L. REV. 821 (2022); Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929 (2018).

[36] Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015); Michael A. Helfand, *'The Peculiar Genius of Private-Law Systems': Making Room for Religious Commerce*, 97 WASH. U.L. REV. 1787 (2020).

[37] Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183 (2014).

[38] Helfand & Richman, *supra* note 36, at 776; Helfand, *supra* note 36, at 1792.

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incorporate provisions that employ religious terminology and thereby demand a party's performance to be evaluated against some contractually determined religious metric. Contracts requiring performance in accordance with religious standards or terminology recur in a host of agreements, including employment contracts with religious institutions,[39] sale-of-goods contracts for items with religious significance,[40] property purchases with religious covenants,[41] and arbitration agreements before religious tribunals.[42]

Judicially enforcing religious contracts has long run up against constitutional obstacles revolving around the Establishment Clause's religious question doctrine—that is, the constitutional prohibition against courts resolving cases where there is an "underlying controversy over religious doctrine or practice."[43] Accordingly, courts must "avoid . . . incursions into religious questions that would be impermissible under the first amendment,"[44] including "interpret[ing] ambiguous religious law and

[39] *See, e.g.*, Friedlander v. Port Jewish Center, 588 F. Supp. 2d 428 (2008); El-Farra v. Sayyed, 226 S.W.3d 792, 795 (Ark. 2006) (same); McEnroy v. St. Meinrad Sch. of Theology, 713 N.E.2d 334, 337 (Ind. Ct. App. 1999); Kirby v. Lexington Theological Seminary, 2012 WL 3046352 (Ky. App. 2012); Kant v. Lexington Theological Seminary, 2012 WL 3046472 (Ky. App. 2012); Hartwig v. Albertus Magnus College, 93 F. Supp. 2d 200, 203 (D. Conn. 2000); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 466 (D.C. Cir. 1996); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir. Ill. 2006) (music director); Starkman v. Evans, 198 F.3d 173, 177 (5th Cir. La. 1999) (same); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362 (8th Cir. 1991); Ross v. Metro. Church of God, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007) (director of the Worship Arts Department); EEOC v. Roman Catholic Diocese, 213 F.3d 795, 802-03 (4th Cir. 2000); Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 704 (7th Cir. Ill. 2003) (press secretary); Fisher v. Congregation B'nai Yitzhok, 177 Pa. Super. Ct. 359, 364-65, 110 A.2d 881, 883 (1955) (cantor).

[40] *See* Andrew Stone Mayo, Comment: *For God and Money: The Place of the Megachurch Within the Bankruptcy Code*, 27 EMORY BANKR. DEV. J. 609, 620-22 (2011) (describing the market for "quasi-religious products and services" and noting the $4.6 billion Christian products industry). Contracts for the sale of kosher food products are a common example of this phenomenon. *See* Wallace v. ConAgra Foods, Inc., 920 F. Supp. 2d 995, 999 (D. Minn. 2013) (dismissing lawsuit against kosher food provider on constitutional grounds); United Kosher Butchers Ass'n v. Associated Synagogues of Greater Bos., Inc., 211 N.E.2d 332, 333 (Mass. 1965) (involving contracts for the supply of kosher food products).

[41] *See* Garnett & Reidy, *supra* note 35, at 847-62 (describing various flavors of religious covenants imposed on property conveyances and how they may reference religious tenets).

[42] *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1243-52 (2011) [hereinafter Helfand, *Religious Arbitration and the New Multiculturalism*] (describing various forms of religious arbitration in the United States); Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3023-3042 (2015) [hereinafter Helfand, *Arbitration's Counter-Narrative*].

[43] *See, e.g.*, Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 31 (D.D.C. 1990).

[44] *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976);

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usage."[45] As a result, when courts encounter breach of contract claims where the provisions at issue include religious terminology or standards, they typically dismiss the suit on the grounds that interpreting and enforcing such provisions would violate the Establishment Clause.[46] In principle, this constitutional dynamic could severely undermine the vast industries of religious commerce that presently operate in the United States and beyond.

In practice, however, religious commerce has adapted to these Establishment Clause realities using a variety of tactics. The most prominent is through translating religious terminology and standards into secular contract terms and thereby embracing the Supreme Court's neutral principles of law framework. As the Court famously expressed in *Jones v. Wolf*, courts can adjudicate religious disputes so long as they do so without resolving religious questions. If parties recast contractual language in secular terminology, courts can adjudicate the dispute by embracing the neutral principles of law framework, which "relies exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges."[47] In so doing, courts would disentangle religious disputes from religious questions and avoid violating the Establishment Clause's prohibition on interrogating religious questions.[48] Thus, while courts may not resolve "controversies over religious doctrine and practice"[49] and must "avoid . . . incursions into religious questions,"[50] courts can resolve religious disputes so long as the

Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989); Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 31 (D.D.C. 1990); Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404, 415 (N.J. 1991).

[45] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708 (1976).

[46] *See, e.g.*, Smith v. Clark, 709 N.Y.S.2d 354, 359 (N.Y. Sup. Ct. 2000), aff'd, 286 A.D.2d 880 (2001) (dismissing a breach of contract claim against a religious employer because the First Amendment barred the court's jurisdiction over the religious question of a pastor's authority to terminate employment); Singh v. Sandhar, 495 S.W.3d 482, 490 (Tex. App. 2016) ("[D]espite Intervenors' labeling their claim as a breach of contract, because its resolution involves a religious question, the trial court lacked jurisdiction to address it.").

[47] Jones v. Wolf, 443 U.S. 595, 603 (1979).

[48] *See, e.g.*, Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("[T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.").

[49] *Id.* at 449-50 ("But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").

[50] Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404, 415 (1991).

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contracts and documents at the heart of dispute employ secular—as opposed to religious—terminology.[51]

By embracing the neutral principles of law framework, the Supreme Court expressly encouraged players in the religious commercial marketplace to translate theological terminology into secular contract provisions.[52] Doing so, explained the Court, would "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[53] The neutral principles of law framework encouraged private parties to, in the words of the Court, take advantage of "the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations."[54] Memorializing religious commercial commitments in secular terminology opened the door for courts to enforce those commitments in a manner that "reflect[ed] the intentions of the parties."[55] Where parties have employed secular terminology, courts would not need to dismiss claims on First Amendment grounds; instead, courts could resolve disputes without getting

[51] To be sure, while the Supreme Court embraced the "neutral principles of law" framework, state courts in a number of jurisdictions continue to employ frameworks for resolving church property disputes which defer to internal church rules. *See* Jeffrey B. Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 PEPP. L. REV. 399, 457 (2008). Numerous scholars have been critical of such approaches, contending that doing so undermines church autonomy and entanglement principles. *See, e.g.*, Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 327–28 (2016); See Arlin M. Adams & William R. Hanlon, Jones v. Wolf *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291 (1980); *see generally* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1884-85 (1998).

[52] *Id.* at 603 ("Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy.").

[53] *Id.* To be sure, both of these commitments have been contested since the moment the Court announced its decision in *Jones v. Wolf*. *See* Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 969 (1991); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1884-85 (1998) (worrying that the neutral principles approach can lead to outcomes that "are likely to diverge from the actual understandings of those concerned"); Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378, 1409-10 (1981) (arguing that the neutral principles approach limits judicial inquiry in ways that undermines a court's ability to reach a justifiable outcome).

[54] Jones v. Wolf, 443 U.S. 595, 603 (1979); *see also* Michael A. Helfand, *'The Peculiar Genius of Private-Law Systems': Making Room for Religious Commerce*, 97 WASH. U.L. REV. 1787 (2020).

[55] Jones v. Wolf, 443 U.S. 595, 604 (1979).

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mired in Establishment Clause objections.

To be sure, however, the neutral principles of law framework has its own drawbacks. Maybe the most significant is, what Barak Richman and I have termed elsewhere, the translation problem.[56] As with other doctrinal constraints,[57] parties to religious commercial contracts have and will continue to deftly respond to the religious question doctrine by adapting terms and provisions, taking advantage of the neutral principles of law framework.[58] But many religious objectives cannot be adequately reduced to alternative secular terminology; put differently, they resist translation.[59] Thus, for parties to draft contracts that describe the religious goods and services they desire to exchange, they require the very kinds of religious terminology that the Establishment Clause prohibits courts from interpreting. Paradigmatic examples include the contractual obligations of a minister,[60] or the religious standards for supervising kosher products.[61]

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[56] *See generally* Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015).

[57] *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1506 (1998) (discussing how parties will adapt their behavior to changing rules of law in accordance with their economic priorities); Ariel Porat, *Enforcing Contracts in Dysfunctional Legal Systems: The Close Relationship Between Public and Private Orders*, 98 MICH. L. REV. 2459, 2465–66, 2478 (2000) (noting that the formation of contracts will reflect the conditions of the public order, including the courts' rules of contract interpretation); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 771 (2000); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1584 (2005) (discussing the implications of how different modes of contract interpretation will move parties to responsively negotiate contract terms in a manner that maximizes their own economic interests).

[58] *See, e.g.*, *Wolf*, 443 U.S. at 603; Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

[59] *See* Greenawalt, *supra* note 53, at 1881–1907 (arguing that although the neutral-principles approach has many advantages, it can in some cases lead courts to issue decisions that "may not match" the intentions of the parties); Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378, 1409-10 (1981) (same).

[60] *See, e.g.*, Kraft v. Rector, Churchwardens & Vestry of Grace Church, No. 01-CV-7871, 2004 WL 540327, at *6 (S.D.N.Y. Mar. 15, 2004) (holding that the court could not decide whether the plaintiff was rightfully terminated for cause, as such a determination would run afoul of First Amendment considerations); El-Farra v. Sayyed, 226 S.W.3d 792, 793 (Ark. 2006) (dismissing an imam's breach-of-employment-contract claim for lack of subject-matter jurisdiction because the cause for termination included claims that the imam's "misconduct 'contradicts the Islamic law'").

[61] *See, e.g.*, Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 419 (2d Cir. 2002) (considering the constitutionality of the state's "kosher law"); Barghout v. Mayor of Baltimore, 833 F. Supp. 540, 542 (D. Md. 1993) (same); Ran-Dav's Cnty. Kosher, Inc. v.

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But in such circumstances, contract law provides other techniques to make enforcement possible. Parties to such agreements may, where litigation necessitates it, invoke various contractual aids of interpretation, such as course of dealing, industry standards and customary norms, or evidence of the shared subjective intent of the parties. Leveraging these sorts of anti-formalist techniques can empower courts to resolve disputes implicating religious commerce without requiring actual judicial resolution of religious questions.[62]

Alternatively, parties can also incorporate arbitration provisions in religious commercial agreements submitting any disputes thereunder to religious-arbitration tribunals.[63] Once such disputes are submitted to a religious-arbitration tribunal, the arbitrators can resolve the dispute by exploring religious questions, given that such constitutional prohibitions do not apply to arbitrators.[64] And, in turn, courts can enforce the decisions of such arbitration tribunals without addressing religious questions given that courts are generally prohibited from revisiting the underlying merits of an arbitration award.[65] In these ways, while the Establishment Clause looms large over religious contracts, there exist strategies and mechanisms—translation to neutral principles, anti-formalist interpretive techniques, and religious dispute resolution—to mitigate its impact, thereby providing avenues for religious commercial industries to grow and develop.

Such strategies, however, have proven inadequate to address a second—and increasingly attractive—litigation strategy: claims that enforcing religious contracts can violate a party's religious liberty. Such claims are often asserted under the Free Exercise Clause, with parties arguing that enforcing religious contracts constrains their free exercise of religion.[66] Similarly, such claims are sometimes asserted under the Establishment Clause where parties, instead of focusing on the religious question doctrine, argue that enforcement of religious contracts constitutes prohibited religious coercion.[67] While the doctrinal framing may vary, both versions of the

State, 608 A.2d 1353, 1355 (N.J. 1992) (same).

[62] Helfand & Richman, *supra* note 36, at 785.

[63] *See generally* Helfand, *Religious Arbitration and the New Multiculturalism*, *supra* note 42.

[64] Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 506-09 (2013).

[65] *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976) ("[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes."); *see also infra* notes 129-137 and accompanying text.

[66] *See infra* Sections II.A-II.C.

[67] Id.

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argument rely on the manner in which religious contracts, like any other contract, constrain future choices. They entail contractual obligations, which—if not satisfied—can lead to the imposition of contract damages. As a result, judicial enforcement of religious contracts can incentivize compliance with religious obligations and deter parties from choosing to ignore religious demands.

The underlying puzzle of such religious liberty claims is that the contractual obligations are not, at bottom, imposed by a court. The provisions are, like any other contractual obligation, generated by the voluntary agreement of the parties at the time the contract was formed. As a result, these religious liberty claims—whether sounding in free exercise or establishment—differ in kind from typical religion-clause claims where parties seek to challenge government imposition of rules that violate their religious commitments.[68]

They also, importantly, differ from other contract defenses asserted in the context of religious agreements. Contract law has developed a series of context-dependent defenses that limit contract enforceability based upon the substance of the underlying agreement. For example, child custody agreements—regardless of whether they implicate religion—are typically deemed unenforceable on public policy grounds.[69] Similarly, premarital and martial agreements—also irrespective of whether they implicate religion—are often subjected to more exacting requirements because of the unique stakes of such contracts.[70] By contrast, this logic of these religious liberty claims applies irrespective of the underlying stakes of a particularly contracting context, such as power asymmetries or public policy considerations. So long as religious contract in question constrains future choices, the religious liberty claims counsel against enforcement.[71]

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[68] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (challenging a state educational requirement that undermined Amish religious instruction); Bowen v. Roy. 476 U.S. 693 (1986) (challenging the federal government's assignment and use of a Social Security Number as spiritually damaging); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (challenging local ordinances that prohibited the rites of the Santeria faith); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) (challenging a state regulatory determination that required a baker to make cakes for same-sex weddings in violation of his religious beliefs).

[69] *See infra* notes 91-96 and accompanying text.

[70] Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 Wake Forest L. Rev. 579, 581 (2010); *see also* Brian H. Bix, *Mahr Agreements: Contracting in the Shadow of Family Law (and Religious Law)—A Comment on Oman's Article*, 1 Wake Forest L. Rev. Common Law 61 (2011).

[71] I thank Nomi Stolzenberg for emphasizing this point to me.

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This clash between religious liberty and contract enforcement is particularly acute where one party to a religious contract has, over time, modified their religious commitments. This can come in the form of altering their views on particular religious matters, changing their religious affiliation, or leaving a faith community altogether. Under normal circumstances, citizens cannot be penalized for discarding old faith commitments. But where faith commitments have been reduced to contractual obligations, ignoring those obligations can trigger legal liabilities. And when contract enforcement is framed in that way—as restrictions on the free exercise of religion—it has led courts and scholars to consider whether the enforcement of religious contracts might violate the First Amendment's religious liberty protections.[72]

Not surprisingly, religious liberty challenges to the enforcement of religious contracts have come where parties seek to dissolve preexisting relationships embodied, to some degree or another, in contractual commitments. In many of those cases, parties seek to dissolve those relationships precisely because their religious commitments have changed. But their changing religious commitments stand in tension with contractual commitments, raising the specter of legal liability. Maybe the most common circumstances raising these tensions are communal, employment, and familial relationships—where parties have captured prior religious commitments in contracts, thereby transforming those religious commitments into legal obligations.

A. Familial Relationships

The conflicting demands of contract and changed religious commitments have long been a prominent feature in familial relationships. Maybe the most common area of conflict has been with respect to divorcing couples, attempting to balance competing values of both law and public policy.

On this front, one of the most prominent examples of conflict has been religious upbringing clauses in prenuptial or divorce settlement agreements. Such provisions provide terms for how the parents will address future disputes over raising the children in a particular faith or in accord with particular religious rules. On the one hand, such agreements can be viewed as an opportunity to enhance parental autonomy and thereby ensure that complex future decisions are made in accordance with agreed upon terms.[73]

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[72] *See infra* Part I.A-I.C.

[73] For classic arguments along these lines, see Janet Maleson Spencer & Joseph P. Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 916, 918-19 (1976); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE

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At the same time, courts have worried that enforcing such provisions open the possibility of tethering a parent to a faith to which they are no longer committed.[74]

Likely the most well-known example of this phenomenon is *Zummo v. Zummo*, where a Pennsylvania court addressed the enforceability of a court order prohibiting a father from taking his children to "religious services contrary to the Jewish faith."[75] The trial court had issued its order based, in part, on an oral prenuptial agreement between the parents that "any children would be raised in the Jewish faith,"[76] as well as a stipulation and agreement submitted to the trial court during the divorce proceedings.[77] The appellate court, however, invalidated the provision of the trial court's order prohibiting the father from bringing the children to religious services contrary to the Jewish faith for three reasons. First, the court argued that the agreement was indefinite, and therefore failed on ordinary contract grounds.[78] Second, and relatedly, the court noted that the lack of specificity in the oral prenuptial agreement triggered entanglement problems under the Establishment Clause as the court would be required to interpret the precise meaning of vague provisions.[79]

But beyond those two considerations, the court also emphasized "a broader and more fundamental" problem with enforcing religious upbringing agreements: "Enforcement plainly encroaches upon the fundamental right of individuals to question, to doubt, and to change their religious convictions, and to expose their children to their changed beliefs."[80] Indeed, explained the court, "The First Amendment specifically preserves the essential religious freedom for individuals to grow, to shape, and to amend this important aspect of their lives, and the lives of their children. . . . [W]hile we agree that a parent's religious freedom may yield to other compelling interests, we

L.J. 950, 957 (1979).

[74] *See, e.g.*, Hackett v. Hackett, 150 N.E.2d 431, 434-40 (Ohio Ct. App. 1958) (compiling authorities for the rule against enforcement of religious upbringing agreements that violate the "strong policy in a democracy in allowing persons to worship God as their conscience now dictates"); Brown v. Szakal, 514 A.2d 81 (N.J. Super. Ct. Ch. Div. 1986) (reasoning that the enforcement of a religious upbringing agreement would amount to the "impos[ition] of the mother's beliefs and those of the children upon her former husband").

[75] Zummo v. Zummo, 574 A.2d 1130, 1158 (Pa. Super. Ct. 1990).

[76] *Id.* at 1141.

[77] *Id.*

[78] *Id.* at 1145.

[79] *Id.* at 1146.

[80] *Id.*

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conclude that it may not be bargained away."[81]

Numerous courts have subsequently cited *Zummo* for the proposition that religious upbringing clauses are generally not enforceable,[82] a trend that has also faced significant scholarly criticism.[83]

In an even more recent example,[84] a New York appellate court rejected a trial court's expansive interpretation of a religious upbringing clause in a custody agreement between a divorcing ultra-Orthodox Jewish couple—the Weisbergers—that required the parents to "give the children a Hasidic upbringing in all details, in home or outside of home, compatible with that of their families."[85] A trial court, using the agreement as the "paramount factor" in its custody determination,[86] had granted the father custody because the mother had ceased, in the husband's view, adhering to the requirements of Jewish law by informing the children that the mother was a lesbian and introducing the children to other LGBT individuals.[87] But an appellate court

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[81] *Id.* at 1148.

[82] *See, e.g.*, In re Marriage of Weiss, 42 Cal. App. 4th 106, 118 (1996) (extensively discussing the applicability of *Zummo* and, on that basis, holding that "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."); Sotnick v. Sotnick, 650 So. 2d 157, 160 (1995) (quoting *Zummo* for the proposition that "[t]he great weight of legal authority is against enforcement of such [religious training] agreements over the objections of one of the parties."); Kendall v. Kendall, 426 Mass. 238, 240 (1997) (citing *Zummo*, among other sources, for the proposition that "The majority of courts adhere to the view that predivorce agreements are unconstitutionally unenforceable.").

[83] *See, e.g.*, Lauren D. Freeman, *The Child's Best Interests vs. The Parent's Free Exercise of Religion*, 32 COLUM. J.L. & SOC. PROBS. 73, 92-95 (1998); Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 NEW ENG. L. REV. 1121, 1132-36 (1991) ("*Zummo* exemplifies the shortcoming of the current judicial approach, in that it fails to promote post-divorce family stability by ignoring the legitimate and reasonable religious contracts formed by the pre-divorce family."); Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971, 992 (1998).

[84] Sharon Otterman, *When Living Your Truth Can Mean Losing Your Children* , N.Y. TIMES (May 18, 2018), https://www.nytimes.com/2018/05/25/nyregion/orthodox-jewish-divorce-custody-ny.html; Stephen Bilkis, *A Custody Agreement Providing for a Specific Religious Upbringing Will be Enforced Only if it is in the Best Interests of the Child*, N.Y. FAM. L. BLOG (Sept. 26, 2022), https://www.newyorkfamilylawblog.com/a-custody-agreement-providing-for-a-specific-religious-upbringing-will-be-enforced-only-if-it-is-in-the-best-interests-of-the-child-weisberger-v-weisberger-60-n-y-s-3d-265-2017/.

[85] Weisberger v Weisberger, 154 A.D.3d 41, 43 (N.Y. App. Div. 2017).

[86] *Id.* at 49, 52.

[87] *Id.* at 44.

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reversed and granted custody to the mother,[88] holding that such an interpretation of the religious upbringing clause violated Establishment Clause and substantive due process considerations.[89] As the appellate court emphasized, courts may not "compel any person to adopt any particular religious lifestyle," nor may they render a custody decision that "violates a parent's legitimate due process right to express oneself and live freely."[90]

However, notwithstanding decisions like *Zummo* and *Weisberger*, judicial reluctance to enforce such agreements tells us less about religious contracts than initially meets the eye. While it may be the case that courts, "as a practical matter," do not invalidate custody agreements "when matrimonial litigants reach a settlement on issues regarding child custody,"[91] such agreements[92] "are not binding on the courts. Instead, the court as *parens*

[88] *Id.* at 53.

[89] *Id.*

[90] *Id.*

[91] Fawzy v. Fawzy, 199 N.J. 456, 476 (2009); *see also* Spring v. Glawon, 89 A.D.2d 980 (1982) (noting that, as a default, courts will not undermine a child custody agreement unless there is affirmative evidence demonstrating that the agreement is not in the best interest of the child); E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH & LEE L. REV. 1139, 1160 n.65 (2000) ("[A] court ordinarily will adopt a parental separation agreement respecting the custody of the parents' minor child as its own order."); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 866 (2000) ("[C]ourts will seldom second-guess an agreement between parents dealing with custody or support unless one of the parents later questions the contract's capacity to meet the child's needs."); Mnookin & Kornhauser, *supra* note 73, at 995 ("The evidence we have suggests that in operation courts rarely overturn parental agreements. Given the resources devoted to the task of scrutinizing agreements, there is little reason to believe that the process operates as much of a safeguard when there is no parental dispute to catch the judge's attention."); ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06 cmt. a (2002) ("Despite judicial rhetoric about the reviewability of agreements, agreements are rarely rejected on any grounds.").

[92] While not the focus of this paper, it is worth emphasizing that contract law does, at times, restrict enforcement of a category of contract, often through use of the public policy exception. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §179 (listing contracts in restraint of trade, contracts that impair family relations, and contracts that interfere with other protected interests as examples of contracts void on public policy grounds). Importantly, the use of the public policy exception under such circumstances is context sensitive. For that reason, for example, child custody agreements are not treated in the same way as general commercial contracts.

By contrast, arguments that change of faith ought to undermine the volitional nature of an agreement—and thereby trigger First Amendment defenses—conflate a range of contracts, embracing a rule that applies equally to family law as it does to arms-length commercial transactions. For that reason, this article addresses why First Amendment challenges, based on change of faith, ought not undermine religious contract enforcement.

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patriae must make support and custody decisions in the best interest of the children involved, despite any contrary agreement of the parents."[93] Thus, when courts enforce custody agreements between parents or take account of religious commitments when rendering a custody agreement,[94] they typically do so as part of a broader best-interest-of-the child calculus,[95] not as the enforcement of a contract qua contract.[96]

Such arguments, because they apply across the board, fail to take into account differences between different contracting contexts. By contrast, this article does not address attempts to void a specific category of contracts—such as child custody agreements—for reasons specific to child custody dynamics. Such considerations do not apply specifically to religious contracts.

[93] Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 494 (1981); *see also* Glauber v. Glauber, 192 A.D.2d 94, 98 (N.Y. App. Div. 2d Dep't 1993) ("[I]f custody and visitation are in issue, the court's role as parens partriae must not be usurped."); Crutchley v. Crutchley, 293 S.E.2d 793, 797 (N.C. 1982) ("It is a well-established rule in this jurisdiction that parents cannot by agreement deprive the court of its inherent and statutory authority to protect the interests of their children."); Lieberman v. Lieberman, 566 N.Y.S.2d 490, 495 (N.Y. Sup. Ct. 1991) ("In a custody dispute, an agreement between a husband and a wife will be upheld so long as the agreement is in the best interest of the children, however, the court retains supervisory power in its capacity as '*parens patriae*.'"); Z.S. v J.F., 918 N.E.2d 636, 641 (Ind. Ct. App. 2009) ("Though the wishes of the parent are to be given great weight, it is the duty of the trial court to determine if any agreement is in the best interests of the child."); Wist v. Wist, 503 A.2d 281, 282 n.1 (N.J. 1986) ("[W]hatever the agreement of the parents, the ultimate determination of custody lies with the court in the exercise of its supervisory jurisdiction as parens patriae"); *see generally* BRIAN H. BIX, FAMILIES BY AGREEMENT: NAVIGATING CHOICE, TRADITION, AND LAW 81, 84-85 (2023) (noting that "the general doctrinal rule is that the terms in a separation agreement regarding parental matters—child custody, child support, and relocation of a custodial parent—cannot bind the court" and as a result, most courts are reluctant to enforce provisions in ways that interfere with parents' religious activities or the way they bring up their children")

[94] George L. Blum, Annotation, *Religion as Factor in Child Custody Cases*, 124 A.L.R.5th 203 (2004).

[95] Child Welfare Information Gateway, *Determining the Best Interests of the Child: Summary of State Laws*, U.S. DEPT. OF HEALTH & HUMAN SERVS. (July 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

[96] *See* RESTATEMENT (SECOND) OF CONTRACTS § 191 ("A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy unless the disposition as to custody is consistent with the best interest of the child."); *cf.* Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App. 1958) (explaining that "there is a strong policy in a democracy in allowing persons to worship God as their conscience now dictates, a policy that is equally applicable to teaching their children how to worship God. It would be contrary to this policy judicially to enforce a contract not to change one's own religious beliefs or practices; and it is equally contrary to this policy to judicially enforce a contract not to change the religious upbringing to one's children.").

It is worth noting that where child custody orders or religious upbringing clauses impose obligations on one of the parents to comply with religious practices that are not in accord

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This sort of quasi-constitutional public policy approach has also animated judicial treatment in another family-related context: use of religious qualifications for trust beneficiaries. The Restatement of Trusts deems trust provisions "ordinarily invalid if [their] enforcement would tend to restrain the religious freedom of the beneficiary by offering a financial inducement to embrace or reject a particular faith or set of beliefs concerning religion."[97] This rule, however, falls under the general rule invalidating trust provisions that are "contrary to public policy."[98] Thus, while that policy may have concrete expression in the religious protections of the federal and state constitutions, judicial invalidation is based on trust law's disfavor for terms violative of public policy rather than on constitutional limits.[99] Courts have followed this public policy logic in prohibiting religious qualifications or restrictions with respect to bequests and trusts.[100]

By contrast, divorce cases have raised more direct questions of religious contract enforcement with respect to agreements to execute religiously significant divorce agreements alongside the standard civil divorce process. Such religious divorce settlement agreements have become a recurring theme in Jewish divorce disputes because Jewish law grants the husband unilateral authority to initiate a divorce by providing the wife with a *get*—that is, a Jewish divorce document.[101] As a result, Jewish women have, at times,

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with his or her faith commitments, courts have been more likely to invoke the protections of the First Amendment. *See, e.g.*, Brown v. Szakal, 514 A.2d 81 (N.J. Super. Ct. Ch. Div. 1986) (deciding not to enforce a religious upbringing agreement because the mother could not "through this court as a state agency, constitutionally impose the practice of her beliefs and those of the children upon her former husband"); Feldman v. Feldman, 874 A.2d 606, 615 (N.J. Super. Ct. App. Div. 2005) ("There is no question that a court order compelling a person to affirmatively participate in a religion, not their own, is state action and therefore a constitutional violation.").

[97] RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. k (AM. L. INST. 2003); *see also* GEORGE T. BOGERT, TRUSTS 181 (6th ed. 1987).

[98] RESTATEMENT (THIRD) OF TRUSTS § 29 (AM. L. INST. 2003).

[99] *See id.* ("The policy underlying these constitutional safeguards is reflected in a general way in the principles and discussion in the commentary on the policies and possible prohibitions in the trust law.").

[100] For an early case, see *Maddox v. Maddox's Administrator*, 52 Va. (11 Gratt.) 804, 805 (1854); *see also* Drace v. Klinedinst, 118 A. 907, 909 (Pa. 1922).

[101] This asymmetry has long been a recurring theme within the secondary literature. *See, e.g.*, Kent Greenawalt, *Religious and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 811-12 (1998); Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385 (2000); Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Analysis*, 34 ISR. L. REV. 170 (2000); Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540 (2004); Irving Breitowitz, *The Plight of the* Agunah*: A Study in* Halacha*, Contract and the First Amendment*, 51 MD. L. REV. 312 (1992).

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looked to courts to enforce either implied or express settlement agreements that include provisions requiring husbands to provide a *get*.[102] And, in turn, husbands have responded by raising First Amendment challenges to the enforcement of such agreements.[103]

In one of the earliest "*get* settlement" cases, *Koeppel v. Koeppel*, a divorcing couple executed a settlement agreement that included a provision requiring both of them to "appear before a Rabbi or Rabbinate selected and designated by whomsoever of the parties who shall first demand the same, and execute any and all papers and documents required by and necessary to effectuate a dissolution of their marriage in accordance with the ecclesiastical laws of the Faith and Church of said parties."[104] The husband challenged the constitutionality of the provision, arguing that "a decree of specific performance would interfere with his freedom of religion under the Constitution."[105] But the court rejected his constitutional challenge, ultimately concluding that "Specific performance herein would merely require the defendant to do what he voluntarily agreed to do."[106]

A number of other courts have reached similar decisions. In 1976, a New York court addressed a divorce settlement agreement, which included a provision requiring the husband to furnish his wife with a *get*.[107] The husband challenged enforcement of the provision, but relying on *Koeppel*, the court upheld the provision, concluding that it "may grant specific performance of the provision in the separation agreement requiring the parties to obtain a 'Get'."[108]

And in 1990, an Illinois appellate court upheld a lower court judgment

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[102] *See generally* Alan C. Lazerow, *Give and "Get"? Applying the Restatement of Contracts to Determine the Enforceability of Get Settlement Contracts*, 39 U. BALT. L. REV. (2009).

[103] To be sure, similar issues have arisen in the context of the Islamic *mahr* agreement, although because enforcement of the *mahr* typically entails a financial payment, the constitutional issues are more easily avoided. *See, e.g.*, Odatalla v. Odattala, 810 A.2d 93 (N.J. Super Ch. 2002); *see also*, Zawahiri v. Alwattar, 2008 Ohio 3473, ¶¶ 20-23 (Ohio Ct. App. 2008); Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Sup. Ct. 1978); Aleem v. Aleem, 947 A.2d 489 (Md. Ct. App. 2008)

[104] Koeppel v. Koeppel, 138 N.Y.S.2d 366, 370 (1954).

[105] *Id.* at 373.

[106] *Id.*

[107] Waxstein v. Waxstein, 90 Misc. 2d 784, 786 (1976). The full provision read: "Prior to the Wife vacating the premises as hereinbefore set forth, the parties shall obtain a Get from a duly constituted Rabbinical court. The Wife shall, directly or indirectly pay for the Get, and the Husband agrees to the Get provided it is done within the sixty day period prior to the vacation of the marital premises by the Wife." *Id.*

[108] *Id.* at 788-89.

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requiring a husband to provide his wife with a *get*.[109] The case involved a divorcing couple that were originally married in a Reconstructionist Jewish ceremony, but the wife had become an Orthodox Jew during the marriage.[110] According to the court, the husband's contractual obligation to provide the *get* derived from the *ketubah*—a document executed as part of the Jewish marriage process—which the court interpreted as containing an implied promise to provide a *get* if the parties were to divorce.[111] The husband argued that requiring him to provide a *get* violated his rights both under the Free Exercise and Establishment Clauses.[112] The court rejected both these challenges. On the Establishment Clause side of the ledger, the court upheld enforcement of the *get* requirement under the *Lemon* test, concluding—among other determinations—that participating in the execution of a *get* did not require the husband to perform "any act of worship or profess any religious belief."[113] And with respect to the Free Exercise Clause, the court held both that the husband did not articulate a religious belief underlying his refusal to provide his wife with a *get* and that judicial enforcement of the agreement amounted to requiring "nothing more than what he promised to do when he signed the ketubah."[114]

In more recent years, however, some courts have become more sympathetic to constitutional claims challenging the enforcement of such agreements. For example, in a 1996 opinion *Aflalo v. Aflalo*, a New Jersey appellate court expressly took issue with existing case law in other jurisdictions, holding that a judicial order requiring a husband to provide his wife with a *get* violated the First Amendment. In so doing, the court raised a number of objections. It concluded that "The Free Exercise Clause, obviously implicated here, prohibits government from interfering or becoming entangled in the practice of religion by its citizens."[115] It also rejected the view that the *get* "is not a religious act nor involves the court in the religious beliefs or practices of the parties"[116] and that ordering the provision of the *get* "concerned purely civil issues."[117] As a result, the court worried about the religiously coercive implications of issuing an order interpreting a *ketubah* to require a husband to provide a *get*: "Should a civil court fine a husband for every day he does not comply or imprison him for contempt for following his

[109] In re Marriage of Goldman, 196 Ill. App. 3d 785 (1990).
[110] *Id.* at 787.
[111] *Id.* at 790-91.
[112] *Id.* at 793.
[113] *Id.* at 794.
[114] *Id.* at 795.
[115] Aflalo v. Aflalo, 295 N.J. Super. 527, 537 (1996).
[116] *Id.* at 538.
[117] *Id.*

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conscience?"[118] Other courts have subsequently followed the holding of *Aflalo* although the reasoning has varied.[119]

B. Communal Relationships

Maybe the most contested clash between contractual commitments and the right to change religion has come in the context of individuals seeking to extract themselves from affiliation within religious communities. While doing so typically entails simply voluntary withdrawal, severing relationships with a faith community can become more complex when parties have signed religious arbitration agreements that require submitting all disputes to religious authorities within the faith community. Until recently, courts have generally concluded that religious arbitration agreements are immune from free exercise challenges.[120] As a result, even if one party to the agreement no longer considers themselves a member of the faith community reflected in that agreement, they would still be obligated to participate in the arbitral proceedings. However, this trend towards enforcement has shown more recent signs of reversing, raising serious questions as to whether religious arbitration will continue to withstand free exercise challenges going forward.

The judicial trend towards enforcement of religious arbitration agreements and awards relies heavily on the structure of current arbitration doctrine. As a general matter, parties are free to enter religious arbitration agreements, which typically include religious choice-of-law provisions selecting a mutually agreed upon body of religious law to govern the dispute as well as religious forum selection clauses that identify religious authorities to adjudicate the dispute.[121] As noted above, religious arbitration affords

[118] *Id.* at 541-542.

[119] Tilsen v. Benson, 2019 Conn. Super. LEXIS 2475, at *19 (2019) ("The neutral principles approach requires civil courts to refrain from deciding disputes involving matters of religious faith, law, doctrine, practice and the 'true' meaning of religious texts. Here, enforcement of the 'Torah law' provision of the parties' Ketubah would require the court to choose between competing rabbinical interpretations of Jewish law. This the court cannot do without violating the first amendment."); Mayer-Kolker v. Kolker, 359 N.J. Super. 98 (2003) (holding that the appellate court lacked a sufficient record to evaluate the enforceability of a *ketubah*, but noting that the trial court relied on *Aflalo* to reject enforcement of the *ketubah* on First Amendment grounds).

[120] *See, e.g.*, Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999); Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. 2005); Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 731 (N.J. 1991); *see also* Helfand, *supra* note 63, at 1244 ("While some have argued that enforcing religious arbitration awards violates the Establishment Clause, courts have ruled otherwise by finding that enforcing a religious arbitration award does not require them to address the merits of the underlying dispute.").

[121] I have explored religious arbitration, identifying many of its benefits and potential pitfalls, in a series of articles. *See generally* Helfand, *supra* note 36; Michael A. Helfand,

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parties a forum where they can submit disputes that might have otherwise been dismissed in court on account of the religious question doctrine.[122]

Until recently, the relatively limited role of courts in the arbitration process has generally foreclosed free exercise challenges to religious arbitration. Courts, under current arbitration doctrine, generally intervene in the arbitral system at only two stages: enforcing arbitration agreements[123] and confirming arbitration awards.[124] When it comes to enforcing arbitration agreements, courts must determine whether there exists a duly executed arbitration agreement between the parties covering the substantive matter in dispute.[125] Courts may invalidate an arbitration agreement only on "such grounds as exist at law or in equity for the revocation of any contract,"[126] such as unconscionability, duress or any other common law contract defenses.[127] Thus, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."[128]

When an arbitration is completed and the arbitrators issue an award, courts are sometimes asked by the victorious party to confirm the award—and thereby render the award legally enforceable[129]—or alternatively vacate the award—and thereby reject the tribunal's decision.[130] As a general matter, courts may only vacate awards based upon the grounds detailed in the Federal Arbitration Act.[131] Once again, courts generally do not make determinations

The Future of Religious Arbitration in the United States: Looking Through A Pluralist Lens, OXFORD LEGAL HANDBOOK ON GLOBAL LEGAL PLURALISM (Paul Schiff Berman, ed. forthcoming 2019); Helfand, *Arbitration's Counter-Narrative*, *supra* note 42; Helfand, *Religious Arbitration and the New Multiculturalism*, *supra* note 42; Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141 (2015); Yaacov Feit & Michael A. Helfand, *Confirming* Piskei Din *in Secular Court*, 61 J. HALACHA & CONTEMP. SOC'Y 5 (2011); Michael A. Helfand, *From Public Law to Private Law Through Contract: Promoting Religious Values Through Religious Dispute Resolution*, CHRISTIANITY AND PRIVATE LAW (Robert Cochran & Michael Moreland eds. forthcoming 2020).

[122] *See supra* text accompanying notes 63-65.

[123] 9 U.S.C. §2

[124] 9 U.S.C. §10.

[125] 9 U.S.C. § 2.

[126] *Id.*

[127] *See, e.g.*, Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.").

[128] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985).

[129] 9 U.S.C. § 9.

[130] 9 U.S.C. § 10.

[131] Hall St. Assocs., LLC. v. Mattel, Inc., 552 U.S. 576, 584-89 (2008). Courts remain divided over whether "manifest disregard of the law" remains a viable ground for vacating

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to confirm or vacate an award based on their substance. Instead, as per the Federal Arbitration Act, courts focus on ensuring the fundamental fairness of the arbitral process. Thus, courts vacate awards only when they can identify some sort of corruption, fraud, bias, or misconduct on the part of the arbitrators—or where the arbitrators exceeded their powers in rendering the award.[132] This review is aimed to ensure that the arbitration proceedings both meet the contractual expectations of the parties and adhere to the legally mandated procedural standards. By contrast, courts are prohibited from examining the merits of the award when rendering such determinations.

The limited nature of the twin judicial inquiries with respect to enforcing arbitration—both enforcing agreements and confirming awards—is why no courts, until recently, have held that enforcing religious forms of arbitration trigger First Amendment concerns. As a consequence of arbitration doctrine, neither inquiry authorizes courts to interrogate the underlying merits of the dispute. On the front end, courts must simply determine whether there is an enforceable agreement to arbitrate the dispute in question;[133] on the back end, courts may not—with rare exception[134]—review the merits of an arbitration award.[135] Instead, they simply evaluate whether the arbitration procedures comply with statutory requirements.[136] Neither inquiry leads courts to adjudicate religious questions or resolve theological disputes, providing good reason to think judicial enforcement of religious arbitration deftly sidesteps

arbitration awards given *Hall Street*'s holding. For a summary of the evolution of this ongoing debate, see Stuart M. Boyarsky, *The Uncertain Status of the Manifest Disregard Standard One Decade After* Hall Street, 123 DICK. L. REV. 167 2018).

[132] 9 U.S.C. § 10; *see generally* Amina Dammann, *Note: Vacating Arbitration Awards for Mistakes of Fact*, 27 REV. LITIG. 441, 470-75 (2008) (collecting state grounds for vacatur).

[133] Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. Ct. App. 2005).

[134] As noted above, there remains some dispute as to whether some grounds for vacatur formerly viewed by courts as non-statutory grounds remain viable in light of the Supreme Court's holding in *Hall Street Associates*. *See supra* note 131 and accompanying text. Examples of such grounds include manifest disregard of the law and public policy, where courts do, to some extent, review the substance of an award. Even if viable, such grounds for vacatur are rarely employed by courts. For further discussion, see Richard C. Reuben, *Personal Autonomy and Vacatur After* Hall Street, 113 PENN. ST. L. REV. 1103, 1144-49 (2009).

[135] *See, e.g.*, TC Contr., Inc. v. 72-02 N. Blvd. Realty Corp., 39 A.D.3d 762, 763 (N.Y. App. Div. 2007) ("A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one."); *cf*. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976).

[136] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008) (holding that the Federal Arbitration Act provides the exclusive grounds for vacating an arbitration agreement).

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First Amendment concerns.[137]

But in more recent years, commentators have worried that the enforcement of religious arbitration agreements and awards amounts to empowering religious communities at the expense of secular considerations.[138] In turn, these concerns have been transformed by legal scholars into constitutional claims that judicial enforcement of religious arbitration triggers free exercise violations. For example, Nicholas Walter has argued that enforcing religious arbitration agreements and awards violates the Free Exercise Clause.[139] According to Walter, the problem presented by religious arbitration is that a party may be perfectly willing to enter a religious arbitration agreement; but by the time arbitration proceedings actually begin—which can take place many years later—that party may no longer have the same faith commitments. As a result, enforcing religious arbitration agreements and awards undermines an individual's right to "change one's beliefs."[140] And Jeff Dasteel has argued that enforcement of religious arbitration provisions in contracts of adhesion violates the Religious Freedom Restoration Act (RFRA), which presumptively prohibits substantial burdens on religious exercise.[141] According to Dasteel, the "weaker party" should be able to assert a RFRA defense in order to avoid enforcement of religious arbitration provisions "included in contracts of adhesion when there is a

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[137] *See, e.g.*, Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. Cir. 2005) (holding that granting an action to compel arbitration before rabbinical court did not violate the First Amendment because "the resolution of appellants' action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties' underlying dispute"); *see also* Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1113 (D. Colo. 1999); Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 731 (N.J. 1991).

[138] *See, e.g.*, Jessica Silver-Greenberg & Michael Corkery, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html#:~:text=%E2%80%9CThe%20Holy%20Scripture%20shall%20be, family%20disputes%20and%20spiritual%20debates; Alex J. Luchenitser, AM. CONST. SOC'Y BLOG (Nov. 4, 2015), https://web.archive.org/web/20151128014854/https://www.acslaw.org/acsblog/making-%E2%80%98biblical-justice%E2%80%99-mandatory-the-growth-of-religious-arbitration-clauses; Hemant Mehta, *New York Times Reveals How Religious Arbitration Cases Work Against the Powerless*, PATHEOS (Nov. 3, 2015), http://www.patheos.com/blogs/friendlyatheist/2015/11/03/new-york-times-reveals-how-religious-arbitration-cases-work-against-the-powerless/#zGC9c5d2JTKqdqpA.99; Nate Burcham, *Losing Faith in Religious Arbitration*, AMICUS BLOG: HARV. CR-CL L. REV. (Nov. 21, 2015), http://harvardcrcl.org/losing-faith-in-religious-arbitration/.

[139] *See* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012).

[140] *Id.* at 549.

[141] Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ON ARB. & MEDIATION 45, 58-65 (2016).

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disparity in bargaining power."[142] Under such circumstances, the reluctant party may be forced to participate in religious arbitration proceedings that make use of religious rules not in keeping with the party's religious commitments. Such circumstances—being forced to participate in such religious proceedings—could "substantial[ly] burden" a reluctant and "weaker" party's religious exercise.[143]

Importantly, these concerns have migrated from secondary literature to judicial opinions. In more recent years, a number of courts have contended with cases revolving around the Church of Scientology's arbitration agreement. For example, in *Garcia v. Church of Scientology*,[144] two former Church of Scientology members—Maria and Luis Garcia—filed suit in federal district court against the Church of Scientology, alleging fraud and breach of contract claims predicated on monies they had previously given the church.[145] The Church of Scientology, however, argued that the court lacked subject-matter jurisdiction because the Garcias—early on in their relationship with the church—had signed an arbitration agreement to submit disputes to the Church of Scientology's arbitral process. The Garcias challenged the enforceability of the arbitration agreement on a variety of grounds, including unconscionability and lack of neutrality,[146] but both the district court and then the Eleventh Circuit held that evaluating those claims would require assessing Scientology theology—the sort of inquiry prohibited by the First Amendment.[147] As a result, both courts instructed the parties to move forward with the Church of Scientology's arbitral process.

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[142] *Id.* at 46.

[143] *Id.*

[144] Garcia v. Church of Scientology Flag Serv. Org., Inc. , 2021 U.S. App. LEXIS 32601 (11th Cir. Nov. 2, 2021).

[145] *Id.* at *3-4.

[146] Garcia v. Church of Scientology Flag Serv. Org., 2015 U.S. Dist. LEXIS 178033, at *31 (M.D. Fla. Mar. 13, 2015).

[147] *See* Garcia v. Church of Scientology Flag Serv. Org. , No. 8:13-cv-220-T-27TBM, 2015 U.S. Dist. LEXIS 178033, at *33 (M.D. Fla. Mar. 13, 2015) ("As compelling as Plaintiffs' argument might otherwise be, the First Amendment prohibits consideration of this contention, since it necessarily would require an analysis and interpretation of Scientology doctrine. That would constitute a prohibited intrusion into religious doctrine, discipline, faith, and ecclesiastical rule, custom, or law by the court."); Garcia v. Church of Scientology Flag Serv. Org., Inc. , No. 18-13452, 2021 U.S. App. LEXIS 32601, at *27 (11th Cir. Nov. 2, 2021) ("Based on these well-established precedents, the district court correctly ruled that the First Amendment prevented it from entertaining the argument that Scientology doctrine rendered the arbitration agreements substantively unconscionable. Although the Garcias presented evidence to support their interpretation of Scientology doctrine, the International Justice Chief offered a conflicting interpretation. The First Amendment barred the district court from resolving this underlying controversy about church doctrine.").

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But a recent California Court of Appeals, in a landmark case, rejected that approach and invalidated a Church of Scientology arbitration agreement on free exercise grounds. In *Bixler v. Church of Scientology*, the plaintiffs alleged they were sexually assaulted by Daniel Masterson, himself a member of the Church of Scientology, and that the Church of Scientology sought not only to cover up these incidents, but also threatened and harassed the plaintiffs once they reported the incidents.[148] The Church of Scientology responded by filing a motion to compel arbitration, arguing that the claims in the complaint must all be submitted for binding arbitration pursuant to an arbitration agreement executed between the plaintiffs and the church when the plaintiffs joined the church.[149]

The court, however, invalidated the arbitration agreement on constitutional grounds. According to the court, "Individuals have a First Amendment right to leave a religion,"[150] and "once petitioners had terminated their affiliation with the Church, they were not bound to its dispute resolution procedures to resolve the claims at issue."[151] Although by the terms of the agreement, the parties' dispute ought to have been submitted to arbitration, the court held that "Scientology's written arbitration agreements are not enforceable against members who have left the faith, with respect to claims for subsequent non-religious, tortious acts. To hold otherwise would bind members irrevocably to a faith they have the constitutional right to leave."[152] In so doing, the court held that enforcing the agreement would prevent the plaintiffs from leaving Scientology and, as a result, the First Amendment—and its underlying value of facilitating a change of faith—demanded invalidating the arbitration agreement.[153]

C. Religious Contracts and Employment Relationships

A third, but somewhat underappreciated, area of tension between contractual commitments and religious liberty has been in the employment

[148] Complaint for Damages, Bixler v. Church of Scientology, No. 19STCV29458 (Cal. Super. Ct., L.A. County, filed Aug. 22, 2019).

[149] Notice of Motion and Motion to Compel Religious Arbitration, Bixler v. Church of Scientology, No. 19STCV29458 (Cal. Super. Ct., L.A. County, filed Mar. 26, 2020).

[150] Bixler v. Superior Court for Cal., 2022 Cal. App. Unpub. LEXIS 302, *2 (2022).

[151] *Id.*

[152] *Id.* at *29.

[153] For criticism of the court's decision in *Bixler*, see Michael J. Broyde, *Contract Law Should Be Faith Neutral: Reverse Entanglement Would Be Stranglement for Religious Arbitration*, 79 N.Y.U. ANN. SURV. AM. L. 17 (2023); Michael A. Helfand, *Who Arbitrates? Arbitrator Qualification Clauses in Religious Arbitration Agreements*, CANOPY FORUM (March 16, 2022), https://canopyforum.org/2022/03/16/who-arbitrates-arbitrator-qualification-clauses-in-religious-arbitration-agreements/.

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context. Such cases typically arise when the employer—often a religious institution—desires to deviate from the express provisions of an employment agreement with a ministerial employee. In such cases, the employer will seek to shield itself from liability for its breach by invoking the ministerial exception, which provides broad protections to religious institutions from liability in the hiring and firing of ministers. While ministerial exception cases typically cover circumstances unrelated to either party changing their faith, the underlying logic of the ministerial exception—which affords employers control over selecting their religious leaders—arguments running directly to instances where a religious institution has changed its religious commitments. Accordingly, the employer argues that its decision to modify the terms of employment ought to be protected by the First Amendment and its right to select its ministerial employees should remain free from government interference.

The Supreme Court has quite clearly and on multiple occasions confirmed that the ministerial exception does indeed protect the rights of religious institutions—and that these protections are grounded in both the Establishment and Free Exercise Clauses of the First Amendment.[154] In so doing, the Court has applied the ministerial exception to a variety of employment discrimination statutes.[155] That being said, the Court has explicitly declined to "express [a] view on whether the exception bars . . . actions by employees alleging breach of contract or tortious conduct by their religious employers."[156] In the absence of guidance from the Court, lower courts[157] and scholars[158] have proposed a variety of approaches to such

[154] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 188-89 (2012).

[155] *Id.* at 179; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

[156] *Hosanna-Tabor*, 565 U.S. at 196.

[157] *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008) (announcing an ad hoc test looking to "the nature of the dispute" to determine when the ministerial exception applies, but acknowledging that it will often not apply to tort and contract actions); Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968, 984 (7th Cir. 2021) (acknowledging "the split in the circuits on whether the ministerial exception covers [tort] claims" and ultimately concluding that the exception categorically bars such claims).

[158] *See, e.g.*, Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J. L. & PUB. POL'Y 839, 861-62 (2012) (proposing an ad hoc approach turning on the nature of the contract or tort claim much like the Second Circuit's test in *Rweyemamu*); Maxine Goodman, *The Expanding Role and Dwindling Protection for Private Religious School Teachers During the Pandemic: Rethinking the Ministerial Exception After* Morrissey-Berru, 54 U.C. DAVIS L. REV. ONLINE 61, 85 (2021) (suggesting that courts apply the ministerial exception to claims involving termination for religious reasons); Rachel Barrick, Comment, *The Ministerial Exception: Seeking Clarity and Precision Amid Inconsistent Application of the* Hosanna-Tabor *Framework*, 70 EMORY L.J. 465, 516 (2020) (arguing that the ministerial

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claims. Notwithstanding these variations, one consistent theme is that courts have dismissed breach of contract claims where the controversy revolves around the interpretation of religious terminology or job responsibilities. In such cases, the Establishment Clause's religious question doctrine prevents courts from adjudicating the breach of contract claim.[159]

By contrast, cases which implicate no religious questions—and therefore no direct Establishment Clause concerns—have exposed tensions between the Free Exercise Clause and contract enforcement. Consider one recent example, *Sklar v. Temple Israel*.[160] In *Sklar*, a Connecticut Superior Court considered, among other claims, a breach of contract claim asserted by a cantor against his former employer, a synagogue. According to the cantor, his contract included a "three strikes" rule, that "required the [synagogue] to provide him with written notice of any dissatisfaction with his performance as cantor, as well as specific examples of conduct the defendant deemed unacceptable"[161] and that "the receipt of three such notices within a single twelve-month period would be grounds for termination . . . ."[162] The plaintiff alleged, however, that the synagogue terminated his employment without complying with these contractual provisions and other related procedural requirements.

But the court rejected the cantor's breach of contract claim, arguing that it was barred by the ministerial exception. According to the court, "the manner in which the defendant Temple Israel discharged or disciplined the plaintiff would constitute government interference with an internal decision

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exception should only apply to contracts that include "an express expectation of religiosity"); Kevin J. Murphy, Note, *Administering the Ministerial Exception Post-*Hosanna-Tabor*: Why Contract Claims Should Not Be Barred*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 386 (2014) (arguing that "courts should only dismiss [contract] claims under the broader ecclesiastical abstention doctrine when interpreting the contractual provision would lead to excessive entanglement in religious affairs").

[159] *See, e.g.*, Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1358-60 (D.C. Cir. 1990) (affirming the dismissal of a contract claim based on religious standards because "this court could not interpret or enforce such a provision without running afoul of the first amendment," but reversing as to the dismissal of another claim based on a non-religious contract for employment); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 117 (3d Cir. 2018) (affirming summary judgment against an employee suing for breach of contract because adjudication would require the court to decide "what constitutes adequate spiritual leadership and how that translates into donations and attendance—questions that would impermissibly entangle the court in religious governance and doctrine prohibited by the Establishment Clause").

[160] Sklar v. Temple Israel, Westport Inc., No. X08FSTCV216053761S, 2023 WL 3071355, at *1 (Conn. Super. Ct. Apr. 21, 2023).

[161] *Id.*

[162] *Id.*

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that affects the faith and mission of the synagogue, thereby violating the Free Exercise Clause."[163] As with cases where contract claims and the Free Exercise Clause clash, the underlying puzzle of *Sklar* is that enforcement of the "three strikes" rule would not constitute interfering—at least in an obvious way—with an internal decision; it would simply be enforcing the terms of the internal decision previously agreed upon by the parties.

Sklar, to be sure, is not itself clearly a case of where a party changed its faith. A house of worship could have many reasons why it might wish to avoid preexisting contractual commitments to a ministerial employee. But the logic of *Sklar* applies regardless of the underlying reasons for why an institution has this sort of change of heart regarding the continued employment of a ministerial employee. It allows a house of worship, based on its change of preferences, to assert religious liberty as a justification for avoiding contract enforcement. Such logic paves the way for houses of worship to avoid contractual commitments based upon changes to the underlying religious orientation of the institution. In such circumstances, if previously hired employees no longer fit with the institution's new religious visions, then *Sklar* interprets the ministerial exception to authorize invalidating the agreement.

Sklar, to be sure, is not the only ministerial exception case of this sort. Consider a pair of 2014 cases both filed by former employees terminated by the Lexington Theological Seminary, which had begun terminating tenured faculty on account of financial difficulties. In the first, *Kant v. Lexington Theological Seminary*,[164] the Kentucky Supreme Court found in favor of the employee, arguing that he did not have a ministerial role and therefore the ministerial exception did not apply.[165]

In the second case, *Kirby v. Lexington Theological Seminary*, the court faced a more challenging set of circumstances. The court held that Kirby, who had taught Christian social ethics for fifteen years, was in fact a ministerial employee. However, notwithstanding the applicability of the ministerial exception, the Kentucky Supreme Court held that while Kirby's employment discrimination claims could not go forward, his breach of contract claims could. As the court explained, the purpose of the ministerial

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[163] *Id.* at *4. The court also held that the breach of contract claim was barred by the Establishment Clause, "which prohibits government involvement in ecclesiastical decisions because it concerns internal management decisions of the synagogue as to its employment relationship with its clergy." *Id.*

[164] Kant v. Lexington Theol. Seminary, 426 S.W.3d 587, 589, 2014 Ky. LEXIS 160, *3, 122 Fair Empl. Prac. Cas. (BNA) 1852, 38 I.E.R. Cas. (BNA) 228, 2014 WL 1511387.

[165] *Id.*

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exception is "to allow religious institutions, free from government interference, to exercise freely their right to select who will present their faith tenets."[166] But enforcement of contractual obligations, including those associated with tenure, "are not governmental restrictions. Simply put, the restrictions do not arise out of government involvement but, rather, from the parties to the contract, namely, the religious institution and its employee."[167] In this way, and contrary to *Sklar*, the court concluded that enforcing contractual provisions—so long as doing so did not implicate the Establishment Clause's religious question doctrine—did not constrain the parties' free exercise of religion.

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In sum, in all three contractual spheres—family, community, and employment—contract law and religious liberty tangle, with contract enforcement providing a perceived mechanism to constrain future religious choices. Thus, a settlement agreement requiring a husband to provide his wife with a religious divorce means that, in the future, the husband may have to participate in a religious act of which he no longer approves; similarly, a religious arbitration agreement may demand that a party participate in religious proceedings conducted in accordance with religious rules by which he or she no longer abides; and a ministerial employment contract may require that a house of worship continue to employ—under threat of financial liability—a minister that it no longer believes reflects the religious commitments of the congregation or institution. In all such cases, contract stands in the way of unfettered religious freedom. The question, to which we now turn, is whether such aspirations of religious freedom ought to counsel against contract enforcement.

II. RELIGIOUS VOLUNTARISM AND RELIGIOUS CHOICE

Religious contracts and theological evolution can, at times, stand at loggerheads. On the one hand, religious contracts typically embody obligations that must be fulfilled over time and, therefore, into the future. Failure to do so will often trigger legal liability. On the other hand, theological views and religious commitments do not always remain static over time. As a result, imposing contractual liability when individuals and institutions seek to change their religious conduct—and therefore discard their contractual obligations—tethers the faithful to practices in which they may no longer believe. In this way, critics sometimes view religious contracts

[166] Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 615 (Ky. 2014).
[167] *Id.*

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as undermining religious freedom.

The coming sections challenge this assessment. Instead of viewing religious contracts and religious freedom as at odds, the argument below contends that they are actually mutually reinforcing. This is because, properly understood, religious freedom—as conceived through the religion clauses—is grounded in a fundamental principle of voluntarism. At its essence, voluntarism values authentic religious exercise. Thus, individuals and institutions exercise religious freedom when they make free and private choices to pursue voluntary religious obligations. By contrast, the religious freedom of individuals and institutions is constrained when government imposes religious obligations. Acting in accordance with coerced government commands leads to inauthentic religious exercise.

In this way, voluntarism seeks to create space for religion and religious obligation. And, viewed through the prism of voluntarism, religious contracts amplify religious freedom. Such contractual obligations flow from free and private choices by the parties, not government coercion. As a result, determining whether such agreements violate the constitutional rights of the parties requires determining whether the underlying contractual obligations were generated by the free and private choices of the parties.

A. *The Value of Voluntarism*

Developing an approach to religious contracts ought to begin with the recognition that constitutional and related statutory protections for religious liberty aim, at their most basic, to promote the value of voluntarism. While the subject of many formulations, "[r]eligious voluntarism is religious liberty in its most basic sense, that is, the freedom of individuals to make religious or irreligious choices for themselves, free from governmental compulsion or improper influence."[168] The commitment to voluntarism thereby entails "the juridical stance that beliefs and practices that are inherent to religious faith are not to be the intentional object of governmental influence."[169]

A constitutional commitment to voluntarism requires protecting *authentic* religious exercise: "For religious devotion to be authentic, it must be a voluntary matter between the individual and God"; in turn, "The state

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[168] Daniel O. Conkle, *The Establishment Clause and Religious Expression in Government Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 318 (2007); *see also* DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 38 (2003).

[169] Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 64 (1998).

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neither is competent to define the 'correct' relation between that person and God, nor may it legitimately use its power to direct or force individual devotion to God."[170] In this way, the centrality of voluntarism to formulating the proper relationship between church and state flows from a fundamental commitment to religious conscience.

James Madison articulated this voluntarist impulse by emphasizing that every individual must "be left to [his] conviction and conscience" when it came to matters of faith.[171] And this wholesale embrace of liberty of conscience also traces itself to the work of John Locke,[172] serving as a frequent refrain during the founding period.[173] A constitutional commitment to voluntarism is predicated on the view that religion has value to the extent that it emanates from each person's individual conscience. For this reason, government must be restricted from exerting its influence on the process of religious decision-making, allowing citizens to make those decisions based on the "dictates" of their "consciences."

In these ways, voluntarism is "not merely the absence of official coercion," but is also "the absence of the government's influence concerning inherently religious beliefs and practices."[174] A commitment to voluntarism represents "the antithesis of compulsion," because "[w]hen a state uses its coercive power to favor an establishment, it infringes . . . on the right of . . . adherents to act voluntarily in accordance with conscience."[175] In both explicitly eschewing religious coercion and compulsion—while also prohibiting improper government influence beyond mere coercion—the

[170] E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 490 (2009) (describing the "early commitment to religious freedom").

[171] James Madison, *Memorial Remonstrance Against Religious Assessments* § 1 (1785).

[172] John Locke, *A Letter Concerning Toleration*, *in* A LETTER CONCERNING TOLERATION IN FOCUS 32 (John Horton & Susan Mendus eds.1991) ("No way whatsoever that I shall walk in against the dictates of my conscience will ever bring me to the mansions of the blessed . . . . I cannot be saved by a religion that I distrust and by a worship that I abhor . . . . Faith only and inward sincerity are the things that procure acceptance with God . . . . And therefore, when all is done, [men] must be left to their own consciences.").

[173] For more on the focus on conscience and voluntarism during the founding period, see John Witte Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 389-94 (1996); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385; Esbeck, *supra* note 169, at 63-67; David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 853-58 (1991); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

[174] Esbeck, *supra* note 169, at 64.

[175] Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1635 (1989).

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principle of voluntarism ultimately aims to protect "the ability of individuals to voluntarily practice their religious exercise consistent with their own free self-development."[176] This focus on self-development thereby deploys the principle of voluntarism to create a space for individuals and institutions[177] to make private—and free—choices about religious commitments free from government intervention.

B. Voluntarism and the Religion Clauses

The principle of voluntarism, as it has been implemented through constitutional doctrine, envisions religious exercise as resulting from free and private choices aimed at individual and institutional self-development. Of course, the sphere of religion is not without commitments and obligations. It is simply that those commitments and obligations are internally generated, free—to the extent possible—from government influence and coercion. Douglas Laycock, one of the seminal proponents of this view, has captured this intuition as follows: "[m]inimizing government influence leaves religion maximally subject to private choice, thus maximizing religious liberty."[178]

For this reason, scholars and courts often use market metaphors to express religion clause doctrine. Such characterizations are often deployed to capture how voluntarism values private religious choices free from government coercion. Maybe the most well-known articulation of religion-clause jurisprudence as marketplace is from Michael McConnell and Richard Posner who, in their article *An Economic Approach to Issues of Religious Freedom*, argued that "Freedom of religion can be understood as a

[176] Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1325 (2021).

[177] I have explored the unique implications of voluntarism in the institutional context in a series of articles. *See* Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and a Defense*, 50 CONN. L. REV. 877 (2018); Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539 (2015); Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013); Michael A. Helfand, *What is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. L. ISSUES 401 (2013).

[178] Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 65 (2007); *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990) ("[R]eligion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. Government should not interfere with our beliefs about religion either by coercion or by persuasion. Religion may flourish or wither; it may change or stay the same. What happens to religion is up to the people acting severally and voluntarily; it is not up to the people acting collectively through government.").

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constitutionally prescribed free market for religious belief," and therefore argued that "economic understanding of the workings of free markets and the effects of government intervention . . . [are] pertinent to interpretation of religious cases."[179] Similarly, Tom Berg has characterized this voluntaristic impulse as follows: "The baseline against which effects on religion should be compared is a situation in which religious beliefs and practices succeed or fail solely on their merits—as those merits are presented and judged by individuals and groups, not by government. . . . A good, evocative model is of a free, competitive market in religious beliefs and activities."[180]

Over the years, voluntarism has remained a recurring and consistent—at least, as much as any principle has remained consistent—frame deployed by the Supreme Court in interpreting the religion clauses. In such cases, the Court has expressed the core intuition that constitutionally valuable religious choices are those private choices made by citizens free from government coercion and improper persuasion. For example, in 1952, the Supreme Court's decision in *Zorach v. Clausen* captured this voluntaristic impulse as applied to the Establishment Clause: "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."[181] In 1985, the Court's opinion in *Wallace v. Jaffree* explained "religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."[182] And in 1992, the Court's opinion in *Lee v. Weisman* argued that "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."[183]

Similarly, the principles of voluntarism have long animated the Court's free exercise jurisprudence. In its 1963 decision, *Sherbert v. Verner*, the Court embraced the notion of voluntarism in rejecting the government's attempt to force a choice between religious adherence and unemployment

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[179] Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 60 (1989).

[180] Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 704 (1997); *see also* McConnell & Posner, *supra* note 179, at 14 ("[T]he First Amendment can be understood as positing that the 'market'-the realm of private choice-will reach the 'best' religious results; or, more accurately, that the government has no authority to alter such results."); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1092-93 (1996) ("The multiplicity of religious factions competing in the marketplace of ideas . . . is in fact an important structural protection for religious liberty.").

[181] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[182] Wallace v. Jaffree, 472 U.S. 38, 53 (1985).

[183] Lee v. Weisman, 505 U.S. 577, 589 (1992).

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benefits: "[T]he pressure upon [Sherbert] to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[184] Similarly, facing yet another case of withheld unemployment benefits, the Court expressed this same concern in its 1981 decision *Thomas v. Review Board*.[185] And the Court has repeatedly invoked this voluntaristic principle, arguing that the Free Exercise Clause prohibits a wide range of coercive forms of government overreach; thus even "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."[186] In subsequent years, even after the Court's decision in *Employment Division* significantly altered free exercise standards, the Court continued to invoke voluntaristic principles in resolving religious liberty disputes.[187]

Of course, noting the recurring use of voluntarism principles does not, on its own, provide answers to how courts ought to resolve religion clause disputes. Indeed, some of the most challenging dilemmas in religion clause jurisprudence revolve around line-drawing questions within the voluntarism framework. How much government pressure ought to be sufficient to trigger free exercise protections?[188] And should the Establishment Clause provide

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[184] Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[185] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-718 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.").

[186] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450

[187] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 460 (2017) (invoking the *Lyng* standard); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (same); Carson v. Makin, 142 S. Ct. 1987 (2022) (same); *see generally* Williams & Williams, *supra* note 173, at 815-16 (describing the use of voluntarism principles in the Supreme Court's free exercise jurisprudence). Similar principles have animated the Court's jurisprudence in the RFRA context. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014).

[188] *See* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1775 (2016) (arguing that the substantiality of burdens on free exercise should turn on the "civil penalties triggered by religious exercise"); *see also* Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1774 (2022); Gabrielle M. Girgis, *What is a "Substantial Burden" on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1764 (2020); Christopher Lund, *Answers to* Fulton*'s Questions*, 108 IOWA L. REV. 2075, 2083 (2023); Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. ONLINE 19, 21-22; Chad Flanders, *Insubstantial Burdens*, *in* RELIGIOUS EXEMPTIONS 299 (Kevin Vallier & Michael Weber eds., 2017); Anna Su, *Varieties of Burden in Religious Accommodations*, 34 J.L. & RELIGION 42, 61 (2019); Abner S. Greene, *A Secular Test for a Secular Statute*, 2016 U. ILL. L. REV.

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protections beyond what might be demanded by voluntarism, such as entanglement and endorsement?[189]

But what the voluntarism prism provides is an important set of principles, especially when it comes to resolving thorny questions of enforcing religious contracts. And these principles are well-grounded in the Court's jurisprudence over time. At its core, voluntarism conceives of religious exercise as valuable to the extent it is authentically pursued by individuals and institutions. Such exercise is rendered inauthentic to the extent it is the result of improper government coercion and influence.[190] There are two sides to this coin.

First, voluntarism focuses on the ability of individuals and institutions to make free and private choices about faith. A commitment to voluntarism aims to banish all forms of religious coercion, and even some forms of religious influence. Doing so generates a space for religious decision-making that is authentic because it represents free and private choices. As described by Donald Giannella, "Religious voluntarism thus conforms to that abiding part of the American credo which assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit. Institutional independence of churches is thought to guarantee the purity and vigor of their role in society, and the free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society."[191]

These free and private choices, however, are not simply about whether

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ONLINE 34, 36; D. Bowie Duncan, *Inviting an Impermissible Inquiry? RFRA's Substantial-Burden Requirement and "Centrality,"* 48 PEPP. L. REV. 1, 27–29 (2021); Elizabeth Sepper, *Substantiating the Burdens of Compliance*, 2016 U. ILL. L. REV. ONLINE 53, 56-59; *see generally* Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 IOWA L. REV. 2189 (2023) (responding to criticisms of the civil penalties approach).

[189] *See, e.g.*, Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53 (1990) (arguing that non-endorsement is independently valuable for protecting the political standing of all citizens); Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1720-27 (2020) (arguing that some aspects of entanglement jurisprudence are important to upholding religious pluralism in the United States).

[190] *See* Williams & Williams, *supra* note 187, at 817-18 ("The Constitution protects certain spheres of autonomy so as to allow individuals to exercise their ability to choose how to live their lives based on their own views about the good life. Such autonomy would be meaningless if individuals were at the mercy of forces beyond their control. When an individual speaks, acts, or believes a given way, generally those acts are morally attributable to her will, not to an external web of causation.").

[191] Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968).

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to embrace a particular set of religious commitments or obligations. Not only should individuals and institutions be free to develop their own religious beliefs and practices absent coercion and influence. Individuals and institutions should also maintain "the unencumbered ability to choose and *to change* one's religious beliefs and adherences."[192] In this way, religious individuals ought to remain free to choose their religious commitments; but they also should remain free to change those commitments as their views on authentic religious exercise evolve over time. At its essence, the voluntarism principle contends that all commitments and obligations with respect to religion ought to be the result of private choice and conscience.

This all means that critics rightfully assail the value of certain religious commitments when individuals and institutions make those religious commitments in an environment that constrains choice to such a degree that those choices no longer can be described as free and private. As an example, consider Elizabeth Sepper's work on healthcare institutions and the spread of religious commitments—often through contract—among, for example, merging and purchased hospitals.[193] As she notes, the specter of monopolies and oligopolies in the health care industry can undermine the degree to which institutional choices to adopt religious commitments are sufficiently autonomous. In her words, "Autonomy for commercial actors from generally applicable laws is unlikely to foster pluralism or nourish individual free exercise"[194] because "wealthy religious entities can instead corner the market on religious compliance, driving out other religious groups and secular options."[195] But the fact that religious commercial agreements sometimes fail to promote autonomy should not be construed as a failure of the framework; to the contrary, the autonomy framework provides a basis upon which to evaluate religious commercial arrangements and, when applicable, criticize them.[196]

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[192] Witte, *supra* note 173, at 390.

[193] *See generally* Sepper, *supra* note 35.

[194] *Id.* at 964.

[195] *Id.*

[196] For this reason, Sepper & Nelson's criticism of my "implied consent" framework for religious institutional authority goes too far. *See* Elizabeth Sepper & James D. Nelson, *Religion Law and Political Economy*, 108 IOWA L. REV. 2341, 2351 (2023). On their view, implied consent theories "assume that working for a religious business represents 'the voluntary choice of individuals to join the religious institution'"—an assumption that fails to take the institutional context of such choices seriously. Id. But an implied consent theory does not assume that choosing to work for a religious business is always voluntary any more than contract law assumes all contracts are voluntarily entered into. *See* Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and a Defense*, 50 CONN. L. REV. 877, 904 (2018) ("[A]n implied consent theory contends that the law should value the relationship

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Indeed, for this reason, a jurisprudence of voluntarism also entails developing private law doctrines in a manner that protects the sphere of free and private religious choice. Communal and institutional dynamics can, through subtle and overt forms of social pressure, undermine voluntarism by constraining the free and private choices of individuals. In this way, judicial decisions that discount the impact of religious communal pressure on individual choice pose a threat to voluntarism.[197] For that reason, private law doctrines, refracted through the value of voluntarism, ought to be deployed to resist such stingy applications.[198]

The other side of the coin is that religious voluntarism not only values religious commitments that flow from free and private choices—and interprets private law doctrines accordingly; it also, when it comes to constitutional law, aims to protect the sphere of free and private choices from *government* coercion and improper influence. Thus, the religion clauses are geared to prevent government from exercising its authority and power to impose obligations, or demand that individuals and institutions remain static in their religious commitments. Both the Free Exercise and Establishment Clauses work in tandem to create a space for free and private religious choices—free, that is, from government overreach.

It would therefore be a mistake to say voluntarism anticipates that

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between religious institutions and their members—and accordingly grant some legally recognized degree of authority and autonomy—only to the extent that there exist sufficient indications to justify categorizing the relationship as voluntary.").

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

[198] For one such attempt to expand application of private law doctrines to protect voluntarism, see Helfand, *Arbitration's Counter-Narrative*, at 3042-51 (proposing expanded application of duress and unconscionability where religious communal pressure unduly influences execution of religious contracts); *see also* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 117-45 (2001); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 509 (2001) (advancing the principle of cultural dissent, which "enhances individual autonomy and equality within culture, enables cultural 'outsiders' to challenge discrimination without fear of losing their culture, challenges cultural relativist arguments, prevents insularity, improves relations across cultural groups, and increases diversity.").

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individuals and institutions ought to be free from religious commitments or obligations. Far from it. Instead, what is essential to the voluntarism principle is that those commitments and obligations are authentic because they are generated by private choices and not by government fiat.

This last point is particularly illuminating for articulating a set of principles that ought to apply to religious contract enforcement. Religious contracts, like all other contracts, can only be enforced to the extent they were freely entered into by the parties.[199] In this way, religious contracts capture the core impulse of the voluntarism principle—the generation of authentic religious commitments that flow from the free and private choices of individuals and institutions.

This line between voluntary contractual arrangements and government-imposed obligations is also manifested in the state action doctrine. Under the state action doctrine,[200] constitutional protections—like those of the religion clauses—do not apply to the "[i]ndividual invasion of individual rights."[201] Of course, the state action doctrine has famously been described as a "conceptual disaster,"[202] because it still required answering the fundamental question: "in what situations should government be held in some way responsible for harm inflicted by one person or entity (the wrongdoer) upon another person or entity (the victim)?"[203] And to meet this challenge, and determine when state action is implicated, the Court has, over time, embraced a multiplicity of tests as "different ways of characterizing the necessarily fact-bound inquiry" of state responsibility for private action.[204]

Most of these tests, however, remain largely inapplicable to the

[199] RESTATEMENT (SECOND) OF CONTRACTS ch. 7, introductory note (AM. L. INST. 1981) ("Contract law has traditionally relied in large part on the premise that the parties should be able to make legally enforceable agreements on their own terms, freely arrived at by the process of bargaining."); Peter Benson, Contract as a Transfer of Ownership, 48 Wm. & Mary L. Rev. 1673, 1673 (2007) ("Unless an agreement is voluntary on both sides, it cannot be binding and so cannot be a contract at all.").

[200] *The Civil Rights Cases of 1883*, 109 U.S. 3 (1883).

[201] *Id.*

[202] Charles L. Black Jr., *Foreword: State Action, Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

[203] G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 336 (1997); *see also Terry v. Adams*, 345 U.S. 461, 473 (1953) ("The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power" that resulted in a constitutional rights violation.).

[204] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) (noting several different state action tests but ultimately treating as unimportant whether they are "actually different in operation"); *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

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enforcement of private agreements generally and, as a result, religious contracts in particular.[205] The "public function" test,[206] for example, finds state action when a private entity acts under delegated powers that are "traditionally exclusively reserved to the State."[207] Execution of private

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[205] To be sure, *Shelley v. Kraemer* famously stands out as the exception, where the Court invalidated state judicial orders to enforce racially restrictive covenants on the disposition of real estate. 334 U.S. 1 (1948). But, over time, the Court has largely limited *Shelley* to its fact, refusing to extend its logic to other forms of judicially enforced private agreements. *See, e.g.*, *Evans v. Abney*, 396 U.S. 435 (1970) (refusing to extend the logic of *Shelley*); *see generally* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (Part II of II)*, 34 HOUS. L. REV. 665, 698-700 (1997) (describing this history). The Court has apparently abandoned the theory of state action on which *Shelley* was predicated through a "conspiracy of silence." *Id.* at 699; *see also* Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided - Some New Answers*, 95 CALIF. L. REV. 451, 453 (2007) (arguing that the Court's neglect of *Shelley* is a reflection of the fear that its faithful application would "dissolve the distinction between state action . . . and private action . . . ."); Donald M. Cahen, *The Impact of* Shelley v. Kraemer *on the State Action Concept*, 44 CALIF. L. REV. 718, 733 (1956) (providing an example of more contemporary concern with the limitless expansion of the state action doctrine that could follow from *Shelley*'s logic); David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT 409, 414 (1993) (arguing that in the context of Jim Crow, "the functional equivalent of state action might still be present [in cases of private racial discrimination], because much private action was for all practical purposes indistinguishable from government action"); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1711-12 (2d ed. 1988) ("[C]ourts and commentators have characteristically viewed *Shelley* with suspicion."); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Punishment and Federal Preemption of State Law*, 63 Fordham L. Rev. 529, 566 (1994) ("[T]he argument that contract enforcement constitutes state action has not succeeded outside the race discrimination context of *Shelley v. Kraemer.*").

Another noteworthy counterexample to the Court's general reluctance to find state action based upon contract enforcement is Cohen v. Cowles Media Co., 501 U.S. 663 (1991). However, the Court in *Cohen* emphasized that its finding of state action was not linked to a generic enforcement of a contract, but a promissory estoppel claim, "a state-law doctrine which, in the absence of a contract, creates obligations never explicitly assumed by the parties." Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991); *see also* Susan Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFFALO L. REV. 1, 63-64 (1995) ("While the Court in *Cohen* made it clear that a breach of confidence action founded in promissory estoppel meets the state action requirement, it was equally careful to leave open the issue of whether a pure contract action would do so. Contract, because it enforces obligations 'explicitly assumed by the parties,' arguably does not involve the same degree of state activity and thus would not trigger First Amendment scrutiny at all.").

[206] *See, e.g.*, Terry v. Adams, 345 U.S. 461, 476-77 (1953) (finding state action where election officials charged with administration of a state primary excluded Black voters); Marsh v. Alabama, 326 U.S. 501, 505-07 (1946) ("[T]he owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.").

[207] *Id.* at 352.

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agreements is not traditionally a function of state government, much less exclusively so.[208] Another alternative, the nexus test,[209] interrogates the number and character of contacts between the state and private actor; links such as regulatory control or contractual relationship indicate greater state influence over the actor's conduct.[210] But when it comes to enforcing contracts of any type, the contacts between the state and the contracting parties are minimal—at most, there will be one isolated contact when a court rules the agreement is enforceable.

On the other hand, under the state compulsion test, courts do find state action "[w]hen the State has commanded a particular result" because under such circumstances "it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice."[211] By contrast, where "government participation does not extend significantly beyond the 'mere' act of permission,"[212] courts have largely declined to find state action. Such a test tracks the inner logic of the voluntarism principle; state action occurs when particular conduct is no longer generated by private choice, but instead is imposed by the government.[213]

As applied to private contracts, the state compulsion test generates results that track the voluntarism principle. In the main, the enforcement of private contracts does not constitute state action.[214] Where contractual obligations

[208] One exception is the enforcement of arbitration agreements. In this context, numerous scholars have argued that courts should find state action pursuant to the public function test. *See, e.g.*, Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 109 (1992); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1006 (2000); Jean R. Sternlight, *Creeping Mandatory Arbitration, Is It Just?*, 57 STAN. L. REV. 1631, 1649 (2005). Courts, however, have not adopted this view. CHRISTOPHER DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 18 (3d ed. 2013).

[209] Jackson v. Metro. Edison Co., 419 U.S. 345, 350-51 (1974).

[210] *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-24 (1961) (finding state action where a restaurant refused to serve Black patrons because the restaurant leased its land from and benefitted from public maintenance by a local parking authority).

[211] Peterson v. Greenville, 373 U.S. 244, 248 (1963).

[212] Buchanan, *supra* note 205, at 762.

[213] Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970) ("[A] State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act."); *see also* Jordan Goodsom, *The State of the State Action Doctrine: A Search for Accountability*, 37 TOURO L. REV. 151, 163 (2021) (quoting Kirtley v. Rainey, 326 F.3d 1088, 1094 (9th Cir. 2003)) ("In essence, the coercion/compulsion test 'considers whether the coercive influence or 'significant encouragement' of the State effectively converts a private action into a government action.'").

[214] Buchanan, *supra* note 205, at 762 ("Typically, this point will encompass the wide

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flow from the private agreement of the parties, the court—in enforcing the contract—is not compelling a result; it is simply enforcing the private commitments of the parties.[215] For this reason, courts have repeatedly rejected the possibility of state action when enforcing contracts even as parties have argued that enforcing the contract would violate the First Amendment.[216]

And it is also why, where parties enter into a religious contract, courts typically enforce such agreements so long as they can be interpreted under neutral principles of law.[217] From the perspective of the voluntarism principle, contractual obligations flow from the free and private agreement of the parties. As one New York court put it in the context of a *get* settlement agreement, "Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence . . . . Specific performance herein would merely require the defendant to do what he voluntarily agreed to do."[218] As a result, no state action exists and the principle of voluntarism would counsel in favor of enforcement. The contractual obligations were authentic reflections of the free and private choices of the parties.

By contrast, where an agreement is not truly voluntary—if contract defenses, for example, determine that surrounding factors undermine mutual assent—then not only would the contract not be enforceable, but enforcing such an agreement could, in theory, violate the First Amendment. In this way,

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range of private activities that the legal system permits to occur . . . . Such activities would normally include the making of contracts . . . .").

[215] *See* Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment."); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 165 (1978) ("[T]he State . . . is in no way responsible for [a private] decision, a decision which the State permits but does not compel . . . .").

[216] *See, e.g.*, State v. Noah, 9 P.3d 858, 863 (Wash. Ct. App. 2000) ("State enforcement of a contract between two private parties is not state action, even where one party's free speech rights are restricted by that agreement."); Naoko Ohno v. Yuko Yasuma, 723 F.3d 984, 998 (9th Cir. 2013) ("In the context of First Amendment challenges to speech-restrictive provisions in private agreements or contracts, domestic judicial enforcement of terms that could not be enacted by the government has not ordinarily been considered state action."); Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 204-05 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 931 (2013) ("The Supreme Court has declined to find state action where the court action in question is a far cry from the court enforcement in *Shelley* . . . . Court enforcement of a private agreement to limit a party's ability to speak or associate does not necessarily violate the First Amendment.").

[217] Helfand, *supra* note 36, at 1795.

[218] Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (1954); Waxstein v. Waxstein, 90 Misc. 2d 784, 787 (1976) (quoting *Koeppel*).

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the religion clauses, voluntarism and state action all point to the same inquiry: are the contractual obligations of the parties the result of their free and private choices? And the answer to that question is most naturally found in one place: contract law.

III. CONTRACTUAL OBLIGATIONS AND CHANGING FAITHS

Courts and scholars increasingly characterize contract enforcement and religious freedom as in conflict. Across a range of contexts—family contracts, communal contracts and employment contracts as prominent examples—there is a growing sense that enforcement of religious contracts amounts to a form of constitutionally prohibited coercion.[219] And that coercion exists even though enforcing the contract does not run afoul of any concerns regarding a court's ability to parse religious terminology or resolve religious questions. Instead, forcing a party that has changed their faith to adhere to their preexisting contractual commitments constitutes, on this view, a method of tethering that party to a faith that is no longer theirs. Doing so, in turn, violates the First Amendment.

The argument thus far presented in this Article is that such a view is misguided. Instead of viewing contract enforcement and religious freedom as in conflict, the two should be viewed as mutually reinforcing. At its core, whether viewed through the Establishment Clause or the Free Exercise Clause, religious freedom rests on the principle of voluntarism. That principle entails valuing religious conduct when that conduct is authentic. In turn, when individuals make free and private choices to pursue authentic religious conduct, the law aims to protect those choices from government coercion and improper persuasion. By doing so, the law values and protects voluntary religious conduct where the acts and commitments of individuals are the result of their own choices and not the coercion or manipulation of the state. This anti-coercion commitment finds further manifestation in the state action doctrine's state compulsion test, which requires some degree of coercion in order to find the necessary state action to trigger constitutional protections.

Framed in this way, contract enforcement against those who have changed their faith only presents a religious freedom problem where such enforcement constitutes coercion. Viewed in this way, the core question enforcement of a religious contract presents is whether the law views enforcing the contract against the breaching party as coercive. This question, ultimately, is not a question best addressed through religious freedom law; that law provides the voluntarist principle. Whether the enforcement of a

[219] *See supra* Part I.

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particular contract is coercive—even against someone who believes doing so tethers them to a faith no longer their own—is a question that can best be answered by *contract law itself*.

That contract law is best positioned to evaluate whether enforcement of a religious contract is coercive is, in a word, intuitive. At the very essence of modern contract law stands the mutual agreement of the parties. Or, in the words of an oft-quoted and celebrated decision, "Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract."[220] In turn, "A contract that forms upon mutual assent—upon the bilateral manifestation of consensus over its terms—accords each party an opportunity to exercise the 'first' contractual freedom, the freedom of contract, that is, the freedom to design the terms of trade."[221]

This core impulse of contractual freedom—the right to voluntarily enter into a set of reciprocal and legally enforceable obligations—stands at the center of any number of contract law theories. Indeed, freedom of contract is, not surprisingly, a central feature of the Restatement (Second) of Contacts,[222] which emphasizes "the power of the contracting parties to control the rights and duties they create."[223] At bottom, this freedom of contract, built upon the mutual agreement of parties to enter into a bargained for exchange, encapsulates "the power to create obligations that promote one's interests, the power to harness others people's efforts to the pursuit of one's affairs."[224] For these reasons, "[t]he definition of the contract as the parties' manifestations of mutual assent is probably the most fundamental principle of contract law, because it rests on the even more fundamental principles of personal autonomy and democratic governance"—both of which "require that a person not be subject to laws to which he did not manifest his assent in some meaningful sense."[225]

Given the centrality of voluntary mutual exchange to contract, it is not surprising that a variety of scholars view contract doctrine through the prism of "autonomy theory"[226]—indeed, some view it as the "primary theory"

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[220] Specht v. Netscape Communs. Corp., 306 F.3d 17, 29 (2002); *see also* RESTATEMENT (SECOND) OF CONTRACTS §17 ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

[221] Ben-Shahar, *supra* note 14, at 263.

[222] *See generally* Robert Baucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 598 (196).

[223] Id.

[224] Ben-Shahar, *supra* note 14, at 263.

[225] W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 872.

[226] There are, of course, many versions of autonomy-based theories of contract. *See, e.g.*,

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justifying the "institution of contract."[227] But even theories that center other overarching principles similarly emphasize the mutual intent and assent of the contracting parties to adopt contractual obligations.[228]

This emphasis, however, presents a puzzle of sorts. Contractual commitments typically bind the parties' future selves, thereby limiting their autonomy or range of choices in the future. In this way, contract law generally must contend with a problem analogous to the clash between religious liberty and religious contract enforcement: how can theories and doctrines that aim to promote principles such as choice and autonomy be reconciled with the enforcement of future legal constraints on action? One of contract law's doctrinal answers to this puzzle comes in the form of legal doctrines that explicitly account for the contractual autonomy and choice of both present and future selves: impracticability and frustration of purpose.[229] In turn, these doctrines provide a blueprint for how contract doctrine can build on the

CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 57 (2d. ed. 2015) ("The moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be."); Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1608 (2009).

[227] MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW 90 (2014).

[228] For example, a law-and-economics approach to contract law attempts to explain contract enforcement as a set of rules that "optimize[s] the interactions between promisor and promisee" by "maximizing the net social benefits of promissory activity." Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1274 (1980). Yet the parties' intentions remain very relevant to determining these costs and benefits. Indeed, to the economists, one way in which contract law achieves the desired efficiency is "to reduce the costs of contract negotiation by supplying contract terms that *the parties would probably have adopted explicitly had they negotiated over them*." Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 88 (1977). This focus, in turn, is due to the fact that "[i]f the parties are better judges of their self-interest than a court is . . . then their intentions . . . will provide a better guide to what the efficient terms would be than a court's attempt to determine them directly." Richard A. Posner, *supra* note 57, at 1590. Thus, even scholars more interested in the explanatory power of the economic incentives underlying contract enforcement must grapple with the content of the parties' voluntary agreement.

[229] *See* Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, 34 CAN. J.L. & JURIS. 297, 298 (2021) ("But cases of failure of *shared* basic assumption—those that are governed by the doctrines of mutual mistakes, impossibility, impracticability, and frustration—are relatively easy; they do not require contract law to consider the competing autonomy interests of the parties' present and future selves. Once the basic assumption of both parties failed, encumbering their future selves with the obligations encapsulated in their agreement can no longer be justified even by reference to the self-determination of the parties' present selves.").

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underlying principles of religious voluntarism, providing doctrinal solutions to the challenge of when religious contract enforcement ought to be deemed voluntaristic. And, in instances where these doctrines demonstrate that particular religious contracts ought to be deemed volitional—and therefore enforced—as a matter of contract law, then constitutional law ought to similarly deem such contracts enforceable as voluntaristic and non-coercive.

A. The Autonomy Logic of Impracticability and Frustration of Purpose

Modern contract law provides two defenses to contract enforcement predicated on circumstances changing between the time of contract formation and the time of contract enforcement. The first, the defense of impracticability, excuses contract enforcement where "a party's performance is made impracticable" by an event when "the non-occurrence of [that event] was a basic assumption on which the contract was made," so long as the party asserting the defense is not at fault and "unless the language or the circumstances indicate the contrary."[230] The second, the defense of frustration of purpose, excuses contract enforcement where "a party's principal purpose is substantially frustrated" by an event when "the non-occurrence of [that event] was a basic assumption on which the contract was made," so long as the party asserting the defense is not at fault and "unless the language or the circumstances indicate the contrary."[231]

Both doctrines turn on, among other considerations, the "the degree of hardship caused by the supervening event" and "the foreseeability of the event."[232] And because of these similarities, both doctrines might—in principle—be applicable to the enforceability of a religious contract where one party's theological commitments or religious affiliation has changed. Both parties may have shared a basic assumption that each party would remain committed to the same set of religious principles. But one party's change of faith, through no fault of their own, might now render the principal purpose substantially frustrated—that party simply no longer sees value in the object of the religious contract.

Similarly, one might imagine a party claiming that their change of faith renders a contract impracticable because engaging in the contractually required conduct is now deeply offensive or alienating to the party—enough to justify a claim that doing so is so burdensome and so costly as a personal

[230] RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981).
[231] RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981).
[232] 14 CORBIN ON CONTRACTS § 74.2.

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matter, that contract enforcement ought to be deemed impracticable.

Such arguments, to be sure, help highlight why such defenses have long been deeply controversial.[233] In the oft-quoted words of the Restatement (Second) of Contracts, "Contract liability is strict liability."[234] Thus, it is "an accepted"—and foundational—"maxim that *pacta sunt servanda*, contracts are to be kept."[235] The reason, at least in principle, is two-fold. First, the idea that supervening events might excuse performance undermine contract doctrine's goal of promoting the autonomy of the parties; contracts are enforced on their terms because the parties reached agreement on the scope and nature of their future obligations to each other. To subvert that agreement would, on such a view, subvert the will of the parties.[236]

Second, and relatedly, strict liability ensures that contracts can accomplish what is often described as one of their most essential functions: risk allocation.[237] By locking in future commitments, parties are able to constrain future risk, knowing the cost of securing goods or services some time down the road. In this way, contracts have long served as a form of insurance.[238] Parties often contract in order to transfer the risk of performance to another and, in the words of one early critic, "this purpose would be completely defeated if the law should excuse one who had assumed a greater obligation than he could profitably discharge."[239] As a result, affording parties an excuse from contract performance where that performance has

[233] *See* John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 GEO. L. J. 1575, 1620-21 nn.205-06 (1987) (surveying the early criticisms of the expanding excuse doctrines).

[234] RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note (AM. L. INST. 1981).

[235] *Id.*

[236] *See, e.g.*, Thomas R. Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks under UCC Section 2-615*, 54 N.C. L. REV. 545, 575 (1976); Mark P. Gergen, *A Defense of Judicial Reconstruction of Contracts*, 71 IND. L.J. 45, 45 (1995); *see also* Retail Merchants' Bus. Expansion Co. v. Randall, 153 A. 357, 358 (1931) (stating that the expansion of frustration doctrine "should be regarded with great caution, since there is danger that courts, in their desire to relieve parties in hard cases, may go too far. The province of courts is to construe and enforce contracts, not to make or modify them.").

[237] *See generally* Robert E. Scott, *In (Partial) Defense of Strict Liability in Contract*, 107 MICH. L. REV. 1381 (2009) (arguing that courts continue to embrace the strict liability framework and justifying this framework as both reducing contracting costs as well as "best support[ing] parties' efforts to access informal or relational modes of contracting, especially where key information is unverifiable.").

[238] Ira M. Price, *Impracticability of Performance as an Excuse for Breach of Contract*, 46 MICH. L. REV. 224, 234 (1947).

[239] *Id.* at 227.

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become "impracticable" or where the purpose of the contract has become "frustrated" injects uncertainty into the picture, jeopardizing the ability of the parties to rely on the contract for risk allocation purposes and, in turn, undermining the autonomy and *ex ante* preferences on the parties.[240] In the eyes of critics, if parties hope to protect themselves against supervening events, they should do so in the text of the contract.[241]

Notwithstanding these apparent tensions between the objects of contract law and the impracticability and frustration contract defenses, both contract law and theory have provided robust justifications as to why such doctrines remain essential to contracting. These justifications have revolved around linking the limits of the parties' shared *ex ante* intent to contract enforcement.[242]

To understand the link between the voluntary agreement of the parties and the defenses of impracticability and frustration of purpose, consider that

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[240] *See, e.g.*, Jody S. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323, 1382-83 (2020) ("In our view, the personal sovereignty account provides the most morally compelling, and therefore the best, explanation of American contract law's ex ante doctrines. Given that these doctrines not only comprise the overwhelming majority of American contract doctrines, but also form its foundational core, the continued recognition of the ex post doctrines as valid components of American contract law cannot be justified. The time has come for courts and commentators to prune the ex post vestigial branch from the common law tree.").

[241] *See, e.g.*, George G. Triantis, *Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability*, 42 U. TORONTO L.J. 450, 483 (1992) ("The role of contract law should be limited to the interpretation and enforcement of the parties' risk allocations."); *see also* Linda Crandall, *Commercial Impracticability and Intent in UCC Section 2-615: A Reconciliation*, 9 CONN. L. REV. 266, 267 (1977) ("To prevent the possibility for revision of parties' intent, critics would have courts follow the presumption that a seller assumes all risks involved in its performance except those expressly allocated to the buyer.").

[242] *See, e.g.*, Waddy v. Riggleman, 606 S.E.2d 222, 230 (W.Va. 2004) (conditioning the impracticability excuse on the fact that "the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance"); Freidco of Wilmington, Del., Ltd. v. Farmers Bank of State of Del., 529 F. Supp. 822, 826 (D. Del. 1981) ("[T]he inquiry is whether the parties, by virtue of their implicit assumptions, have contracted in a universe more limited than the literal undertaking, or whether they intended to allocate a duty without regard to the possibility of change, foreseeable or otherwise."); Aluminum Co. of Am. v. Essex Grp., Inc., 499 F. Supp. 53, 75 (W.D. Pa. 1980) (granting relief based on impracticability because "the circumstances surrounding the contract show a deliberate avoidance of abnormal risks"); Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 310 N.E.2d 363, 367 (Mass. 1974) ("It is implicit . . . that certain risks are so unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties.").

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the defense of impracticability was born out of the defense of impossibility.[243] At its inception, courts viewed impossibility as linked to the presumed intent of the parties at the time of contract formation. Thus, in one of the earliest cases, *Taylor v. Caldwell*, the Court of Queen's Bench addressed claims of performers who had entered into an agreement to rent a hall that was subsequently destroyed by fire. The court held that the performers had no remedy against the owner because it read an "implied condition" into the contract based upon the presumed intent of the parties—or, in the words of the court, "the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done."[244] In this way, the justification for the excuse of impossibility stemmed from the intent of the parties. Therefore, the parties' contractual responsibilities to each other flowed from the terms of their agreement thereby not disturbing the risk-allocation function of the contract.

Subsequent developments hit on similar themes. In subsequent years, courts expanded the doctrine beyond physical impossibility, but the underlying logic remained the same. Maybe most famously, in *Krell v. Henry*, the defendant had rented a room in order to watch the coronation procession of Edward VII. However, when the procession was cancelled due to the king's illness, the defendant refused to pay. The court, siding with the defendant, emphasized that, in its view, "the condition which fails and prevents the achievement of that which was, in the contemplation of both parties" served as a valid defense to contract enforcement and that *Taylor* should still apply even though the "the direct subject of the contract" was still in existence.[245] Similarly, the Supreme Court of California's opinion in *Mineral Park Land v. Howard*, in expressly extending the doctrine of impossibility to impracticability, linked its analysis again to the shared intent of the parties.[246] As a result, when the cost of hauling some of the gravel—

[243] *See* Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for the "Wisdom of Solomon*,*"* 135 U. PA. L. REV. 1123 (1987) ("The most obvious resolution to the risk allocation question is a demonstration of the actual intent of the parties to use contractual silence to allocate the risk to one of them. . . . Courts did exactly this when developing the excuse of physical impossibility. While espousing the need for a doctrine of excuse predicated on the mutual intent of the parties, the courts replaced a finding of actual intent with the fiction of a presumed intent to condition performance.").

[244] Taylor v. Caldwell, 122 Eng. Rep. 309 (Q.B. 1863).

[245] 2 K.B. 740 (1903).

[246] Mineral Park Land Co. v. Howard, 172 Cal. 289 (1916).

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the service contracted for in that case—became too great, the court excused the performance of the defendant, because "it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost."[247] And in so holding, the court expressly relied on what the parties "contemplated and assumed."[248] Thus, even as the scope of defenses related to supervening events expanded, courts still relied on implied conditions based upon the presumed intentions of the parties.

The introduction of the Uniform Commercial Code (U.C.C.) and the Restatement (Second) of Contracts served as attempts to further liberalize the concept of impracticability. Both tied impracticability to the occurrence of an event or contingency, the non-occurrence of which was a "basic assumption on which the contract was made."[249] This shift from the language of an "implied condition" in earlier cases to "basic assumption" represented a shift from "an inflexible objective test [to] a new subjective inquiry into the rationale of the parties."[250] Under this new framework, foreseeability of the supervening event continues to play an important role. Under the U.C.C., a party may be excused from performance where such "performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting."[251] But judicial interrogation of foreseeability is part of a subjective inquiry geared to determining whether "some unforeseen contingency . . . alter[ed] the essential nature of the performance"[252] to the point whereby performance was now beyond what the parties "actually contemplated."[253] Accordingly, the Restatement emphasized that in applying the defense of impracticability, "a court will look at all circumstances, including the terms of the contract."[254] Again, foreseeability is important: "[t]he fact that the event was unforeseeable is significant as suggesting that its non-occurrence was a basic assumption."[255] However, "the fact that it was foreseeable, or even foreseen, does not, of itself, argue for a contrary conclusion, since the parties may not have thought it sufficiently important a

[247] *Id.* at 293.
[248] *Id.*
[249] U.C.C. 2-615; RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981).
[250] Deborah L. Jacobs, *Legal Realism or Legal Fiction? Impracticability Under the Restatement (Second) of Contracts*, 87 COM. L.J. 289, 292 (1982).
[251] U.C.C. § 2-615 cmt. 1.
[252] U.C.C. § 2-615 cmt. 4.
[253] Halpern, *supra* note 243, at 1147.
[254] RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note (AM. L. INST. 1981).
[255] Id.

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risk to have made it a subject of their bargaining."[256] All told, the U.C.C. and Restatement imagined a far more flexible and free-flowing inquiry, but in so doing, tethered the logic of the impracticability and frustration defenses not merely to the presumed intentions of the parties, but to the actual subjective intentions of the parties.

Given the flexibility of the modern impracticability doctrine, it is viewed by some—both supporters[257] and critics[258]—as merely the imposition of an *ex post* method for courts to avoid contract enforcement in cases of extreme cost. But, in the main, justifications of the doctrine continue to link the doctrine to the mutual agreement of the parties. For example, consider Richard Posner and Andrew Rosenfield who have argued that efficiency considerations should govern the impracticability inquiry. Thus, where the promisee is the "superior risk bearer"—that is, where the promisee is the more efficient bearer of risk—then performance by the promisor should be discharged.[259] But even taking this view, the underlying logic of impracticability and frustration doctrines remain tied to the intentions of the parties. Thus, on Posner's view, the justification for defenses such as

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[256] Id.

[257] *See, e.g.*, Robert A. Hillman, *The Future of Fault in Contract Law*, 52 DUQ. L. REV. 275, 290-91 (2014) ("The often fogginess of this investigation invites courts to consider matters such as the fault of the promisor. In many impracticability cases, in fact, fault and the degree of harm caused by performance are probably the most influential factors."); Eric A. Posner, *Fault in Contract Law*, 107 MICH. L. REV. 1431, 1437 (2009) ("The standard interpretation of [impracticability] doctrine is that performance is excused only when it is extremely costly . . . ."); George M. Cohen, *The Fault That Lies Within Our Contract Law*, 107 MICH. L. REV. 1445, 1457 (2009) ("[F]ault inevitably influences the [impracticability] doctrine. . . . [C]ourts are more willing to grant excuse when the changed circumstances are less subject to promisor manipulation."); Steven W. Hubbard, *Relief from Burdensome Longterm Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment*, 47 MO. L. REV. 79, 83 (1982) ("Commercial impracticability and frustration of purpose focus on severe hardship as the basis for relief . . . ."); Marsha J. Speziale, *The Turn of the Twentieth Century as the Dawn of Contract "Interpretation": Reflections in Theories of Impossibility*, 17 DUQ. L. REV. 555, 569-74 (1978) (describing the softening of the impossibility doctrine as a means of achieving equity and justice); Halpern, *supra* note 243, at 1133 n.42.

[258] *See, e.g.*, Kraus & Scott, supra note 240, at 1382-83; Scott, *supra* note 237, at 1391 ("A court may be tempted (with the encouragement of one of the parties) to see gaps and to use fault-based doctrines such as mistake, excuse, or frustration as devices for implying standards into the parties' agreement. But this is generally an error."); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 600 (2003) ("Courts decide after the fact whether a performance would have been 'impracticable . . . .'"); *see also* 6 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1932 (rev. ed. 1938) (urging a narrow version of the impracticability doctrine focusing on the risks that the parties agreed each would assume).

[259] Posner & Rosenfield, *supra* note 228, at 85.

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"impossibility and frustration" ultimately lies in the presumed intent of the parties; the doctrines aim to "allocate risk as the parties could be expected to have done had they negotiated over the issue."[260] Numerous other scholars have followed suit, pressing on theories grounded in "presumed intent"[261] and "implied terms"[262] to explain how impracticability and frustration doctrines can be grounded in the mutual and voluntary agreement of the parties.

Maybe the most direct link between the agreement of the parties and impracticability and frustration doctrines comes through scholarship highlighting the autonomy-enhancing feature of contracts. As expressed by Hanoch Dagan, contract law—among other branches of private law—"is about autonomy as self-determination."[263] In turn, "[g]iven the significance of people's interpersonal relationships to their autonomy, people's fundamental right to self-authorship requires the state to create legal institutions that confer upon individuals the normative powers that are crucial for their ability to self-determine."[264] Thus,

> A genuinely liberal contract law conceptualizes contract as a plan co-authored by the parties in the service of their respective goals. Law's justification for enforcing the parties' agreement is grounded in its commitment to enhance their self-determination, and both its animating principles and its operative doctrines are guided by this autonomy-enhancing *telos*.[265]

For this reason, "Contract's operative doctrines . . . allow people legitimately to recruit others to their future plans by committing their own future selves

[260] Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1352-53 (2009)

[261] *See, e.g.*, FRIED, *supra* note 226, at 60; Nicholas R. Weiskopf, *Frustration of Contractual Purpose-Doctrine or Myth*, 70 ST. JOHN'S L. REV. 239, 265-66 (1996) (favoring an objective understanding of what the parties actually intended over a gap-filling theory of frustration of purpose). Triantis, *supra* note 241, at 450 ("The doctrine of impracticability has its origins as an implied term that reflected the presumed intention of contract . . . .").

[262] *See, e.g.*, Donald J. Smythe, *Impossibility and Impracticability*, *in* CONTRACT LAW AND ECONOMICS 207, 207 (Gerrit de Geest ed., 2011); John H. Schlegel, *Of Nuts and Ships and Sealing Wax, Suez and Frustrating Things*, 23 RUTGERS L. REV. 419, 422-25 (1969) (tracing the history of the implied term theory). *But see* J. Barrigan Marcantonio, *Unifying the Law of Impossibility*, 8 HASTINGS INT'L & COMP. L. REV. 41, 55 n.56 (1984) (explaining how American contract law rejects the "implied term" terminology in favor of focusing on party intentions as to assumed risk allocations).

[263] Dagan & Somech, *supra* note 229 at 298.

[264] *Id.*

[265] *Id.* at 307.

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in return."[266] In this way, "contract is an empowering practice that is, and should be, guided by an autonomy-enhancing mission."[267] And because "[c]ontract is an autonomy-enhancing device . . . contract law must proactively facilitate, as it in fact does, people's ability to commit and thus to be able to enlist others to their plans."[268]

The challenge to a contract theory grounded in personal autonomy is that contractual commitment "necessarily curtails the self-determination of the promisor's future self."[269] While this feature enhances autonomy by facilitating planning, it also constrains the parties' future choices. Thus, a commitment to autonomy requires "that promisors' future selves are not unacceptably encumbered, so that their self-determination is not undermined" because "self-determination also requires that people have the right to re-write the story of their lives."[270] As a result a theory committed to autonomy and self-determination, both embraces "the normative power to make contractual commitments," but at the same time it "cannot fully ignore the impact of such contracts on their future selves."[271] Ultimately, "[c]ontract-keeping is justified because *and only to the extent that* the claimed dominion of the present self over the future self can itself be justified."[272]

Dagan argues that doctrines like impracticability and frustration strike this autonomy-enhancing balance. On the one hand, when promisor's assume contractual commitments, contract law assumes they are enforceable: "insofar that these commitments are indeed part of the current self's plan, the future self is presumed to adhere to them."[273] But that isn't necessarily true about "tacit assumptions," which people "constantly challenge."[274] And this is precisely how, on Dagan's view, impracticability and frustration doctrines operate. They absolve promisors of liability when a shared basic assumption of the parties fails. In such cases, vitiating liability "does not override [the parties'] judgment or their will."[275] This is because the parties never consciously deliberated the contract's enforceability under such

[266] Dagan & Heller, *supra* note 16, at 1325.
[267] *Id.*; *see generally* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017).
[268] Dagan & Somech, *supra* note 229, at 298.
[269] *Id.*
[270] *Id.* at 310.
[271] *Id.* at 310-11.
[272] Dagan & Heller, *supra* note 266, at 1325-26.
[273] Dagan & Somech, *supra* note 229, at 310.
[274] *Id.* at 315.
[275] *Id.*

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circumstances. And under such circumstances, tacit assumptions—as opposed to conscious deliberation—fail to provide adequate autonomy-enhancing justification for the present self to override the autonomy of the future self. By contrast, where parties merely miscalculate—for example, underestimating the scope of potential liability—impracticability and frustration are inapplicable justifications for avoiding contract enforcement; where there is conscious, but erroneous, deliberation, then the law continues to privilege autonomous priority of the present self.[276]

Dagan's elegant philosophical exposition of the impracticability and frustration doctrines provides one of the strongest links between change in circumstances and the parties' autonomy. What it shares in common with implied-terms and presumed intent-theories is that it understands these doctrines as policing the line of contract enforcement in a manner that breathes life into the intentions of the parties. Thus, doctrines that limit contract enforcement based on changed circumstances do so to ensure that where the parties either presumptively intended otherwise or lacked conscious deliberation for contract enforcement, their future selves ought not have the terms imposed upon them. Or, put differently, where a contract is legally impracticable or where the purposes are legally frustrated, contract enforcement would not enhance the parties' autonomy or derive from the intentions of the party. In this way, impracticability and frustration serve to enhance the parties' autonomy, self-determination and voluntarism. On the other hand, where changed circumstances are insufficient to generate a defense to enforcement, the law demands contract enforcement based upon the will, volition and autonomous self-determination of the parties.

This last point is essential for our present purposes. It captures how, through the prism of a variety of theories, the impracticability and frustration doctrines can stand in service of religious voluntarism. At their core, impracticability and frustration protect the future selves of parties to contracts generally and, in turn, religious contracts in particular. In sum, they serve as doctrinal tools to determine whether and when imposition of contract liability, over and above changed circumstances, still ought to be deemed autonomous self-determination. Where changed circumstances are sufficient to trigger these defenses, they are geared—in their focus on the basic assumptions of the parties—to protect future selves from coercive contract enforcement. And policing the line of contractual liability in this way enables contract law to provide precisely the kinds of doctrinal tools that capture the core objectives of free exercise voluntarism.

[276] *Id.*

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B. Applying Impracticability and Frustration of Purpose to Religious Contracts

Should a party be able to assert a free exercise defense to avoid performance under a contract because they have changed their faith? As described above, the question is whether judicial enforcement of the contract—and requiring the party to either pay damages or perform—constitutes an infringement on their ability to freely exercise their faith. Does the supervening event—the change of faith—render the payment of damages or performance coerced and thereby undermine principles of religious voluntarism? Or should we view such contractual obligations as still free because they flow from the mutual and volitional agreement of the parties?

The doctrinal DNA of impracticability and frustration, because of their focus on autonomous self-determination, enables contract law—as opposed to constitutional law—to provide the best answer to this question.

It provides guidelines from contract law which ought to inform the constitutional question. Where the non-occurrence of a supervening event is a "basic assumption upon which the contract is made," then courts should excuse performance precisely because such performance does not flow from the agreement of the parties. Thus, requiring performance under such circumstances would not be free because it would no longer flow from the voluntary agreement of the parties—or, to use Dagan's phrase, their conscious deliberation. Accordingly, if remaining an adherent of the same religion qualifies as a basic assumption of a religious contract, then performance when someone has changed their faith would not only be excused because the contract should no longer be deemed enforceable, but because judicial enforcement would undermine the ability of the party to freely exercise their religion. Put differently, if impracticability requires excusing performance, then performance no longer flows from the intent of the parties, rendering it improper on contract grounds *and* unconstitutional on First Amendment grounds.

On the flipside, if a supervening event is insufficient to trigger an impracticability defense because performance was still within the contemplation of the parties, then not only should performance be required on contract grounds, but it also should not be invalidated on First Amendment grounds. In such circumstances, because the performance falls within the intent of the parties, it ought to be deemed free for both public and private

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law purposes.[277]

Collapsing the contract and constitutional inquiries requires answering the underlying question: is one of the basic assumptions on which religious contracts are made that the parties will not leave the faith? Contract law's answer begins with an emphasis on the contextual inquiry; ultimately, doctrines like impracticability and frustration take a variety of factors into account when determining whether a contract should be rendered unenforceable due to change in circumstances.[278] That being said, the flexibility of the doctrine has not led to its widespread success in court. Indeed, impracticability and frustration of purpose are rarely vindicated as successful defenses.[279] This result should be far from surprising given the inherent controversial nature of the doctrine.[280]

The contextual and multifactored nature of impracticability and frustration of purpose inquiries make application highly contingent on the facts of a particular case. That notwithstanding, below are some important considerations for how application of these doctrines might operate in cases where one of the parties seeks to avoid contract enforcement based upon his or her change of faith.

1. Impracticable versus primary purpose.

The doctrines of impracticability and frustration of purpose overlap significantly—they are "so closely related that they are almost indistinguishable, and in many cases, the same facts could support the application of either doctrine."[281] The primary difference between the two is that each employs a slightly different trigger for the defense to enforcement. For impracticability, the supervening event must make performance

[277] It is worth noting that such a view takes no position on when and whether to apply the public policy exception to religious contract enforcement. *See infra* note 92.

[278] RESTATEMENT (SECOND) OF CONTRACTS, § 261 cmt. b (describing the basic assumption criterion as "sufficiently flexible to take account of factors that bear on a just allocation of risk"); *see also* U.C.C. § 2-615(a).

[279] *See, e.g.*, Jennifer Camero, *Mission Impracticable: The Impossibility of Commercial Impracticability*, 13 U.N.H. L. REV. 1, 6 (2014) ("[C]ourts continue to rarely excuse a party under the doctrine of commercial impracticability."); Halpern, *supra* note 243, at 1134 ("What began as a simple gloss on existing doctrine has become increasingly complex, leaving the appearance, if not the reality, of incoherence and a doctrine that is frequently invoked, but only rarely and erratically applied.").

[280] *See supra* nn. 233-241 and accompanying text.

[281] Brian A. Blum, *The Protean Concept of Materiality in Contract Law*, 2020 Mich. St. L. Rev. 643, 691 (2020).

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"impracticable"[282]—that is, where the supervening event causes "extreme and unreasonable difficulty, expense, injury, or loss to one of the parties."[283] While not necessarily obvious at first glance, one can imagine many change-of-faith cases potentially satisfying this definition of impracticability. In *Bixler*, for example, one can imagine the plaintiffs arguing that participating in the Scientology dispute resolution process might be "unreasonably difficult" given the underlying allegations—not only the plaintiffs alienation from the Church of Scientology, but also the allegation that the Church of Scientology had participated in a coordinated campaign of harassment in order to protect a member who had sexually assaulted the plaintiffs. Or, one might imagine a party to a *get* settlement agreement, who subsequently left the Jewish faith, arguing that being forced to participate in what is now a foreign ritual might contend that such participation—and the psychic harm it causes—ought to make performance qualify as "unreasonably difficult."

At the same time, the more natural doctrinal home for such claims is likely frustration of purposes. The trigger for frustration of purpose is not difficulty of performance, but that performance will no longer achieve the core object of the contract—that is, its "principal purpose."[284] For the object to qualify as a contract's "principal purpose,"[285] it "must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense."[286] Put differently, "the frustration of purpose doctrine generally deals with changed circumstances that make the contract almost completely worthless to one of the parties."[287]

Given this trigger, invoking a change-of-faith defense to contract enforcement will more typically align with frustration of purpose. Religious contracts, whether in the context of family, community or employment, incorporate religious expectations into the agreement. Such religious

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[282] RESTATEMENT (SECOND) OF CONTRACTS, § 261.

[283] Id. at cmt. d.

[284] Nicholas R. Weiskop, *Frustration of Contractual Purpose: Doctrine or Myth?*, 70 St. John's L. Rev. 239, 239-240 (1996) ("Precisely defined, frustration of purpose is to be distinguished from the concept of impossibility (or impracticability) of performance. In a true case of frustration, it is not that either party's performance has become impossible or significantly more difficult than originally contemplated. Rather, the party seeking discharge on frustration grounds (the paying party in the non-barter transaction) can still do that which the contract requires, but no longer has the motivation to do so which originally induced its participation in the bargain.").

[285] RESTATEMENT (SECOND) OF CONTRACTS, § 265.

[286] Id. at cmt. a.

[287] *See* Danielle Kie Hart, *If Past Is Prologue, Then the Future is Bleak: Contracts, COVID-19 and the Changed Circumstances Doctrine*, 9 TEX. A&M L. REV. 347, 359 (2021).

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contractual expectations would appear to capture the shared understanding of the agreement's principal purpose without which "the transaction would make little sense." Religious arbitration provisions, religious upbringing clauses and ministerial employment contracts—to name a few—all appear to have religious objectives, predicated on the shared faith of the parties, as their principal purpose. Or, at a minimum, parties seeking contract enforcement on account of changed faith are likely to have strong arguments as such.

2. *Fault as control*

Impracticability and frustration of purpose defenses have, as one of their elements, that the party asserting the defense not be at "fault." Thus, for impracticability, that means "a party's performance is made impracticable without his fault";[288] for frustration of purpose, that means "a party's principal purpose is substantially frustrated without his fault."[289] The Restatement (Second) of Contracts provides some guidance on what fault means in this context: "[a]s used here 'fault' may include not only 'willful' wrongs, but such other types of conduct as that amounting to breach of contract or to negligence."[290]

One way in which this fault requirement has been applied is that it precludes successful invocation of changed circumstance defenses when the supervening event was "under the control of either party."[291] As explained by one scholar, to successfully apply a changed circumstance defense requires the supervening event "have been caused by an exogenous—rather than endogenous—event."[292] Conversely, if the promisor seeking to assert a changed circumstance defense is "guilty of contributory fault,"[293] then he "cannot say that performance was prevented by the supervening [event]."[294] Instead, it is best understood as prevented "by the promisor's own willful or negligent conduct or omission."[295] True, "[p]erformance may have eventually become impossible, but the promisor is responsible for causing the

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[288] RESTATEMENT (SECOND) OF CONTRACTS, § 261.

[289] RESTATEMENT (SECOND) OF CONTRACTS, § 265.

[290] RESTATEMENT (SECOND) OF CONTRACTS, § 261, cmt. d; *see also* Robert A. Hillman, *The Future of Fault in Contract Law*, 52 DUQ. L. REV. 275, 276-77 (2014) ("[I]f a promisor has done all that is reasonably possible to avoid breach, but changed circumstances make performance impossible or impracticable, the promisor has neither willfully nor negligently breached. . . . As used here, "fault" encompasses willful, reckless, and negligent breaches.").

[291] 30 WILLISTON ON CONTRACTS §77:95 at 596 (4th ed. 2004).

[292] Andrew A. Schwartz, *Frustration, the MAC Clause, and COVID-19*, 55 U.C. DAVIS L. REV. 1771, 1790 (2022).

[293] 14 CORBIN ON CONTRACTS § 74.15.

[294] Id. at § 74.16.

[295] Id.

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impossibility."[296]

Applying fault as control in the context of impracticability or frustration defenses to the enforcement of religious contracts generates a question with complex philosophical and theological dimensions: does someone control—or should they be viewed as responsible—for losing faith or changing faiths? If the answer is yes, then the fault requirement would foreclose the possibility of promisors asserting such defenses predicated on changing or losing faith as a supervening event. Put differently, we might view the loss or change of faith as an endogenous, and not an exogenous, event.

This argument, however, goes too far. The degree to which individuals can exercise agency in selecting and adopting religious identities and affiliations remains, no doubt, a hotly contested matter in a variety of disciplines, including political theory.[297] But without wading into those deep philosophical waters, it seems fair to conclude that individuals do not retain sufficient control over their faith commitments such that contract law should deem them responsible—and therefore withhold change of circumstances defenses—for a change of faith. While, as noted above, voluntarism aims to protect authentic religious conduct from improper government influence, that does not mean individual choices regarding faith are not influenced by exogenous events. Some people lose their faith when catastrophe strikes; others, even without catastrophe, have a crisis of faith where they simply can no longer believe. As I've described elsewhere, John Locke captured this

[296] Id.; *see e.g.*, Mountaire Farms, Inc. v. Williams, 2005 Del. Super. LEXIS 165, *15-16 (Superior Ct. 2005) ("[Defendant] cannot claim that an intervening circumstance out of his control prevented performance of this contract. [Defendant] chose to entrust [Plaintiff's] goods with [the driver]. The employment of drivers to carry loads to their delivery destinations was entirely within [Defendant's] control. The fact that the successful delivery of the shipment failed due to the actions of an employee does not excuse [Defendant's] responsibility for the goods as a carrier."). When viewed from a law and economics perspective, this notion of fault is interpreted through the prism of efficiency. *See, e.g.*, Eric A. Posner, *Fault in Contract Law*, 107 MICH. L. REV. 1431, 1438 (2009) ("Here, again, the court is influenced by notions of fault. It examines whether the cost of the relevant precaution would have been low enough, and the benefit great enough.").

[297] While a review of the full literature is well beyond the scope of this article, theories of liberalism are typically associated with the notion that the self is ontologically prior to its social surroundings. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 12 (1999) [1974]; ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 165 (1989). Communitarian theories typically take a contrary view, arguing for the "encumbered" nature of the self. *See, e.g.*, ALASDAIR MACINTYRE, AFTER VIRTUE (1981); Michael Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984); 2 CHARLES TAYLOR, *Atomism*, *in* PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 187 (1985).

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notion by describing the relationship between our self and our conscience;[298] to use Locke's words, individuals make choices based on the "dictates of [our] conscience"[299]—a dynamic that captures the way in which individuals make choices about matters of faith based on considerations that are outside of their control—following, as it were, what the conscience demands. And it is that dynamic that, for the purposes of contract law, should lead us to reject arguments that impose fault on those who change their faith.

3. *Basic assumption and foreseeability*

As is often the case with change of circumstance doctrines, the most difficult element to satisfy in the context of religious contracts is likely to be the basic assumption requirement. Both impracticability and frustration of purpose require that the non-occurrence of the supervening be a "basic assumption on which the contract was made."[300] One of the central considerations in determining whether the non-occurrence of an event was a basic assumption is its foreseeability. The Supreme Court once articulated the underlying logic as follows: "The premise of [the basic assumption] requirement is that the parties will have bargained with respect to any risks that are both within their contemplation and central to the substance of the contract . . . 'if [the risk] was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.'"[301] By contrast, if the risk was not foreseeable, that provides a strong indication that the non-occurrence of the supervening event was indeed a basic assumption.[302] In the words of the Restatement (Second) of Contracts, "[t]he fact that the event was unforeseeable is significant as suggesting that its non-occurrence was a basic assumption."[303]

That being said, the fact that an event is foreseeable does not foreclose the inquiry. The Restatement (Second) of Contract puts it this way: "the fact

[298] Michael A. Helfand, *A Liberalism of Sincerity: Religion's Role in the Public Square*, 1 J. L. RELIGION & STATE 217 (2013)

[299] Id. at 230.

[300] RESTATEMENT (SECOND) OF CONTRACTS § 261; id. at § 265.

[301] United States v. Winstar Corp., 518 U.S. 839, 905 (1996) (quoting Lloyd v. Murphy, 25 Cal. 2d 48, 54 (1944)).

[302] Mishara Constr. Co. v. Transit--Mixed Concrete Corp., 365 Mass. 122, 129 (1974) ("Was the contingency which developed one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance? Was it one of that variety of risks which the parties were tacitly assigning to the promisor by their failure to provide for it explicitly? If it was, performance will be required. If it could not be so considered, performance is excused.").

[303] Id.

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that it was foreseeable, or even foreseen, does not, of itself, argue for a contrary conclusion, since the parties may not have thought it sufficiently important a risk to have made it a subject of their bargaining."[304] Indeed, as one scholar has noted, "To some extent all commercial contingencies are foreseeable. The question is better put in terms of *How* foreseeable the occurrence was."[305] The problem is, however, that assessing the degree of foreseeability—and determining how much foreseeability will undermine a claim of basic assumption—can be a thorny question to answer both as a theoretical and practical matter.[306] These complications notwithstanding, "courts will not excuse performance if the promisor should reasonably have foreseen the risk and, through its own neglect, failed to contract around the risk or to take reasonable precautions against it."[307]

As applied to the context of religious contracts, there is good reason to think that change of faith is a sufficiently foreseeable possibility such that a party would struggle to successfully assert remaining the same faith was a basic assumption on which the contract was made. Statistical data demonstrates that Americans, in the aggregate, are quite likely to change their faith. For example, according to the Pew Research Center, 44% of "American adults have changed religious affiliation at least once during their lives," with a significant percentage becoming religiously unaffiliated.[308] The reasons why vary, but given these statistics, one can imagine a court concluding that a party leaving a faith ought to be foreseeable at the time parties enter into an agreement. And while foreseeability does not end the inquiry under modern contract law, it makes it difficult to imagine that the parties did not think of

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[304] Id.

[305] Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 625 (1983).

[306] Melvin A. Eisenberg, *Impossibility, Impracticability and Frustration*, 1 J. of Legal Analysis 207, 215-16 (2009) ("Foreseeability is a complex concept, and its meanings can vary with the context. In the context of an unexpected-circumstance case, whether a circumstance was reasonably foreseeable should depend on (i) the degree of difficulty that the contracting parties would have had in foreseeing the circumstance and (ii) the likelihood that the parties did foresee the circumstance, given the information the parties actually knew and the salience of the possibility that the circumstance would occur."); Eric A. Posner, *Fault in Contract Law*, 107 Mich. L. Rev. 1431, 1438 (2009) ("[N]o one has supplied a satisfactory definition of 'basic assumption.'").

[307] Robert A. Hillman, *The Future of Fault in Contract Law*, 52 DUQ. L. REV. 275, 290 (2014).

[308] *Faith in Flux*, PEW RSCH. CTR. (Apr. 27, 2009), https://www.pewresearch.org/religion/2009/04/27/faith-in-flux/#key-findings; *see also* Jane Lampman, *Why So Many Americans Switch Religions*, CHRISTIAN SCI. MONITOR (Apr. 28, 2009), https://www.csmonitor.com/USA/Society/2009/0428/p02s01-ussc.html (discussing Pew Research Center findings); C Barrett, *How Often Do Americans Change Their Religion? New Survey From Pew*, WORLD RELIGION NEWS (Dec. 4, 2018) (same).

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it as "sufficiently important a risk to have made it a subject of their bargaining."[309] In turn, these statistics—and the degree of foreseeability that they express—provides a significant headwind in the face of arguments contending that remaining with a faith can serve as a "basic assumption" upon which the parties entered into an agreement.

That being said, the fact that the deck appears stacked against successful assertions of basic assumption should not lead courts to prejudge the question. One can imagine increasingly contextual versions of these defenses—that is, particular circumstances where a change of faith is far less foreseeable. Sociological data may bear out that for specific faiths, changing religious affiliation is highly improbable. Maybe other contextual considerations applicable in a unique case would alter the probabilistic calculus such that the impracticability and frustration defenses seem far more plausible.

The court in *Zummo v. Zummo* gestured in this direction—although without invoking impracticability and frustration doctrines—arguing that "it is also generally acknowledged that it would be difficult, if not impossible, for an interreligious couple engaged to be married to project themselves into the future so as to enable them to know how they will feel about religion, if and when their children are born, and as the children grow; and that it would be still more difficult for such a couple to attempt to project themselves into the scenario of a potential divorce after children were born, in order to accurately anticipate the circumstances under which religious upbringing agreements would be enforced if such agreements were given legal effect."[310]

This sort of argument—whether unwitting or not—channels the very kinds of considerations that impracticability and frustration doctrines take quite seriously. In so doing, they capture the core intuition that a contract may not be volitional given the occurrence of events well beyond the contemplation of the parties at the time the contract was executed. In turn, the contract may no longer flow from the intent of the parties given the lack of conscious deliberation.[311] And in that case, given the particular

[309] RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note (AM. L. INST. 1981).

[310] Zummo v. Zummo, 574 A.2d 1130, 1147 (Pa. Super. Ct. 1990).

[311] *See* Andrew A. Schwartz, *Frustration, the MAC Clause, and COVID-19*, 55 U.C. DAVIS L. REV. 1771, 1789-90 (2022) ("The best way to understand the relevance of foreseeability is that it relates to whether the risk of the extraordinary event was implicitly allocated to the party claiming Frustration. A risk that is clearly foreseeable, such as the government denying a necessary permit or license, may, depending on the circumstances, be implicitly allocated to one party. If that risk eventuates, the party may not then look to the

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circumstances of the parties, contract performance ought to be excused on impracticability or frustration grounds—to do otherwise, might not only be the wrong outcome on contract grounds, but the lack of volition might also render contract enforcement unconstitutional on First Amendment grounds.

Still, in the main, the foreseeability factor may mean that such defenses will succeed quite infrequently. Notwithstanding the *Zummo* court's comments above, there is good reason to think that the possibility of divorce is within the contemplation of couples at the time of marriage. In 2021, while the marriage rate was 6 per 1,000 of the total population, the divorce rate was 2.5 per 1,000 of the total population.[312] And according to some studies, the divorce rate appears to climb even higher for to interfaith couples, like the couple in *Zummo*.[313] Thus, given the probability of one spouse changing their faith and the likelihood of divorce—along with the attendant questions of child custody—there is good reason to think that, to the extent courts choose to enforce premarital agreements, those agreements ought to be enforced over and above defenses such as impracticability and frustration of purpose. Ultimately, such circumstances likely qualify as sufficiently foreseeable. In turn, conflicts over religious upbringing clauses—and other faith-related agreements triggered by a couple's divorce—would seem to be within the contemplation of the parties at the time of contract formation.

At the same time, one can imagine more targeted data, specific to trends within a particular faith community, that would support such defenses. If data demonstrated that within a faith community such as—to take the example of *Bixler* above—Scientology, individuals leave the community only in the rarest of circumstances, then impracticability and frustration of purpose defenses might turn out to be viable. Like impracticability in commercial contexts, much will ultimately turn on whether a change of faith, in the particular contracting context, can qualify as a basic assumption on which the contract is made.

The fact that, in the main, such defenses are unlikely to succeed provides

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doctrine of Frustration for relief. It is not merely that the frustrating event was foreseeable, but rather that its risk was implicitly assigned to the complaining party.").

[312] *Marriage and Divorce*, NATIONAL CENTER FOR HEALTH STATISTICS, CENTER FOR DISEASE CONTROL AND PREVENTION, *available at* https://www.cdc.gov/nchs/fastats/marriage-divorce.htm (noting that the marriage rate is 6 per 1,000 total population, while the divorce rate is 2.5 per 1,000 total population);

[313] *See* Evelyn L. Lehrer & Carmel U. Chiswick, *Religion as a Determinant of Marital Stability*, 30 DEMOGRAPHY 385 (1993); Evelyn L. Lehrer, *Religious Intermarriage in the United States: Determinants and Trends*, 27 SOCIAL SCIENCE RESEARCH 245 (1998); Tim B. Heaton & Edith L. Pratt, *The Effect of Religious Homogamy on Marital Satisfaction and Stability*, 11 J. FAMILY ISSUES 191 (1990).

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strong reasons for the parties to make these sorts of expectations explicit. Thus, in circumstances where contracts are predicated on continued religious affiliation or membership, parties to the contract might consider explicit provisions noting that where the parties' religious affiliation or membership changes, the contract is no longer enforceable. Of course, given the somewhat subjective nature of the trigger for non-enforcement, one can imagine the reluctance of some parties to agree to such terms. But if true, this sort of negotiation would make explicit the costs and benefits at play in religious contracts. And it would do so without *ex post* determinations by courts—determinations that may be wholly untethered from the *ex ante* preferences of the parties. In sum, these sorts of negotiations of religious contracts might surface how the default rule—that religious contracts ought to be enforced even when a party changes faith—is in fact the kind of default rule that enhances both religious voluntarism and autonomous self-determination. All told, it might show how a turn to contract law is the best way to advance the principles underlying the First Amendment.

CONCLUSION

Religious contracts are essential to the marketplace, providing enforceable and predictable legal instruments to protect both the commercial expectations and religious aspirations of the parties. Without a mechanism to predictably enforce such agreements, parties to religious contracts could opportunistically avoid performance, bringing the religious commercial marketplace to a screeching halt. In turn, recognizing a First Amendment right to invalidate religious contracts—simply by asserting a change in faith—hands a dangerous doctrinal tool to marketplace participants.

Contract law, by contrast, has tried and true mechanisms to police religious contracts. Leveraging defenses such as impracticability and frustration of purpose, courts can enforce religious contracts in a manner that both enhances the autonomous self-determination of the parties and protects their religious freedom over time. Such an emphasis is not only consistent with contract law, but it brings contract law as well as state-action and First Amendment doctrine into alignment. In this way, the enforcement of religious contracts serves as a reminder as to how mining the intricacies of private law to resolve thorny questions of religious commerce provides protections that far more adequately balance the rights and expectations of the parties than does wholesale and unvariegated imposition of constitutional law doctrines. And in so doing, contract law provides a path forward to autonomous self-determination that ensures that individuals and institutions remain committed to only authentic and self-generated religious obligations.

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