

PLAYGROUND RESURFACING AND RELIGIOUS
ARBITRATION ARE VERY SIMILAR ACTIVITIES:
TRINITY LUTHERAN CHURCH AS APPLIED TO
RELIGIOUS ARBITRATION

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I. INTRODUCTION

The Supreme Court has spoken, and it has done so in a clear and unambiguous way. In *Trinity Lutheran Church v. Comer*, hereafter known as *TLC*, the Supreme Court ruled that government discrimination against religion in the matter of funding of playgrounds is unconstitutional.²

The concern is not about the future of Trinity Lutheran Church, rather, the concern is the future of the cases that will come after it and the jurisprudence that preceded it. Although the primary opinion in this case (which at least six Justices agreed to³) speaks glowingly about the need for equality in funding, the Court clearly limited the holding of this case in “Footnote Three”, which stated simply:

This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.⁴

The importance of this footnote is highlighted by the fact that Justices Thomas and Gorsuch each filed concurring opinions joining in the opinion of the other, singling out footnote three for

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² *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

³ *Id.* at 2016-17.

⁴ *Id.* at 2024 n.3 (emphasis added).

their own brand of vitriol⁵ and left only four justices supporting the “playground resurfacing” limitation. Justice Breyer concurred in the judgment, drawing parallels to *Everson* by noting that the police and fire protection mentioned there are not significantly different from the health and safety fears in *TLC*.⁶ The typology of the case is thus important:

- Four Justices (Roberts, Kennedy, Alito and Kagan), while writing grandly of the importance of equality of access to governmental funding, limit the precedential holding of *TLC* to “playground resurfacing” and (one hopes) those cases similar to it.
- Two Justices (Thomas and Gorsuch) impose no such limitation requiring equality in access to fund for a much broader variety of activities.
- Justice Breyer rules that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.
- Two Justices (Sotomayor and Ginsburg) accept that government may – but need not – choose to discriminate against religious institutions in funding priority.

In short, *TLC* was a 4-2-1-2 opinion, with seven Justices ruling that the withholding of government funding for playground resurfacing from a church is unconstitutional if generally available to non-churches. Not much more is clear. The applications of the holding of *TLC* will undoubtedly be numerous and far-reaching, but, only a few short weeks after the case was decided, many details remain uncertain. The Establishment Clause is no stranger to this kind of turmoil,⁷ and earlier cases like *Everson* and *Locke v. Davey* had led many to be unsure of what decision the Roberts Court would reach and on what grounds. *TLC* is still extremely unclear about

⁵ *Id.* at 2025, 26 (citing Thomas, J. and Gorsuch., J., dissenting).

⁶ *Id.* at 2027 (citing Breyer, J., dissenting).

⁷ *County of Allegheny v. ACLU*, 492 U.S. 573, 578 (1989) (noting that the Supreme Court had a seven part opinion with subsections that resulted in a majority, plurality, concurrence, and three concurrences/dissents.)

what is similar to “express discrimination based on religious identity with respect to playground resurfacing,”⁸ so that this case will serve as precedent for future cases, which is the model of the court now common.⁹

This article will discuss the application of the Supreme Court’s decision in *TLC* to the field of religious arbitration, a topic I have recently published a book on, entitled *Sharia Tribunals, Rabbinical Courts and Christian Panels: Religious Arbitration in America and the West*.¹⁰ *TLC* reinforces a basic point made in the penultimate chapter of that work (which was finished before *TLC* was decided): Religious arbitration may not be restricted without generally restricting all arbitration.¹¹ It would violate the First Amendment to restrict religious arbitration in ways that secular arbitration is not restricted. As the Court reiterated in *TLC*, a law cannot discriminate based on some or all religious beliefs, laws to regulate cannot be religiously motivated, and special disabilities cannot be imposed through law on the basis of religious status.¹²

II. RELIGIOUS ARBITRATION: THRUSTS AND PARRIES

At the core, there are a variety of defenses to religious arbitration, and many critiques as well. Reviewing material I have published elsewhere, there is a case to be made against religious arbitration. It has five flavors, each with its own approach.

A. *The Arguments Against*

The first can be called “One Law for One People” and it goes as follows. While it is important for the secular state to be respectful

⁸ *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

⁹ SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 1-7 (Yale University Press 1986) (emphasis added).

¹⁰ MICHAEL BROYDE, *SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST* 205-69 (Oxford University Press 2017).

¹¹ *Id.* at 205-35.

¹² *Trinity Lutheran*, 137 S. Ct. at 2021.

of cultural diversity, all need to be governed by a single law which none can opt out of, not even by contract. It is necessary for any society to have only a single legal order in which all citizens and societal relationships are bound and governed by the same set of norms. For the United States, this need for equal treatment under the law predates the nation, it being a self-evident truth “that all men are created equal.”¹³ In reality, the “one people one law” argument presented above is likely the weakest challenge to secular enforcement of religious arbitration in the United States. Like it or not, there is not now, nor has there ever really been only one law of the land in the United States. The country’s basic Federalist framework is built on the idea that there is no single “correct” law that should apply to all Americans all the time.¹⁴ Unlike many other nations which have uniform national and local laws, the United States maintains a much deeper commitment to substantive federalism in which there are fifty states and sixteen territories, not including the District of Columbia. Each of these jurisdictions have their own laws, an overlay of federal law, Indian tribal law, and a maddening patchwork of overlapping local codes and regulations at the county, city, and town levels.¹⁵

This diversity – which Europeans find frustrating¹⁶ – provides Americans with myriad opportunities to choose which kinds of legal regimes they will use to order their lives. Americans make such choices of law by deciding what states, cities, or counties to live in; where to organize and register their business entities; where to practice their professions; where to marry, divorce, or raise their children; or even where they go for their summer vacations.¹⁷ The legal term for this practice—forum shopping—has become a

¹³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁴ As many have pointed out, *TLC* carried along with it a federalism issue that the Court skipped over in favor of the neutrality argument. In this way, many of the Justices who would normally be swayed in favor of state’s rights did not have to reconcile federalism issues alongside religious claims. See Ira Lupu et al., *Trinity Lutheran Church v. Comer: Dodging on the Playground*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (June 28, 2017), <https://www.acslaw.org/acsblog/all/trinity-lutheran-church-v.-comer>.

¹⁵ SEXTON AND ESTREICHER, *supra* 8, at 205-12.

¹⁶ Thomas C. Fischer, “Federalism” in the European Community and the United States: A Rose by Any Other Name..., 17 FORDHAM INT’L L.J. 389, 440 (1993).

¹⁷ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587, 595 (1991).

kind of “dirty word” that is frowned upon by many courts and litigants, but is still practiced widely and freely.¹⁸ United States Supreme Court Justice Louis Brandeis noted that while messy and perhaps inefficient, this legally pluralistic approach serves an important purpose. It permits various semi-autonomous legal systems to act as “laboratories of democracy” wherein citizens can experiment with law and policy solutions at a local level.¹⁹

The second criticism is more profound: religious arbitration produces terrible injustice, both procedural and substantive. First, religious norms and values very often include commitments that clash severely with contemporary liberal notions of gender equality, religious liberty, freedom of choice, personal privacy, and distributive justice. The much publicized 2005 ban on religious arbitration in family law enacted in Ontario²⁰, Canada, argued that the practice of religious norms through religious arbitration produces substantive injustices to women and other traditionally disadvantaged parties during divorce.²¹ Only months ago, these contemporary liberal notions clashed directly with the free exercise of religion in Canada. In the province of Quebec, a newly minted State Religious Neutrality Law, styled as a bid for greater secularism, bans the wearing of any face coverings for people who use public services, effectively targeting the small Muslim minority of women who wear either a hijab or a niqab.²²

This conflict between religious norms and secular thought is not only a problem in family law. Many Christian arbitration organizations explicitly commit themselves to resolving disputes brought before them in accordance with biblical principles. It is not too difficult to imagine, however, in some Christian arbitrations such principles might clash sharply with contemporary, liberal legal commitments in commercial and other contexts. Consider, for

¹⁸ Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999).

¹⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

²⁰ *Ontario Bill Bans Faith-based Tribunals*, THE GLOBE AND MAIL, Nov. 15, 2005, <https://www.theglobeandmail.com/news/national/ontario-bill-bans-faith-based-tribunals/article1131070/>.

²¹ Broyde, *supra* 9, at 212-22.

²² <https://www.nytimes.com/2017/10/25/world/canada/quebec-ban-face-coverings.html>

example, the case of a Christian owned bakery, which as part of its standard custom baking contract includes an arbitration clause. After entering such a contract with a customer to bake a cake for a wedding, and just shortly before the cake is scheduled to be delivered, the baker discovers that the wedding will be that of a same-sex couple and refuses to perform under the contract.²³ The customer might seek legal redress for this breach of contract, but find him or herself bound to resolve the dispute through Christian Conciliation or some similar religious dispute resolution forum that applies what it regards as biblical norms and values. Religious arbitrators might find squarely in favor of the baker, holding that no valid agreement could be made to provide support services for a union that contravenes what they view as biblical principles and values. If the arbitration element were removed from this hypothetical, it would virtually mirror the question that is currently before the Court in *Masterpiece Cakeshop*.²⁴

A third issue that opponents of religious arbitration further argue is that religious dispute resolution often lacks the kinds of procedural protections necessary to ensure an equitable and unbiased arbitration process. Existing arbitration law frameworks provide that parties to arbitration proceedings are entitled to certain basic procedural protections that help ensure the fairness of the proceedings and protect vulnerable parties.²⁵ These protections include the right to have notice of when and where the hearings will take place; the right to have an attorney present for the proceedings; the right to be heard and present and impeach evidence; the right to a fair and impartial tribunal; and the right to have the tribunal consider relevant evidence.²⁶

²³ *Court Rules Bakery Illegally Discriminated Against Gay Couple*, AMERICAN CIVIL LIBERTIES UNION OF COLORADO, <http://aclu-co.org/court-rules-bakery-illegally-discriminated-against-gay-couple/>.

²⁴ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, 137 S. Ct. 2290 (2017).

²⁵ As an example, the Financial Industry Regulatory Authority (FINRA) provides guides as to the procedural options available to both sides of an arbitration. *Arbitration Process*, FINRA.ORG, <https://www.finra.org/arbitration-and-mediation/arbitration-process>.

²⁶ Broyde, *supra* 9, at 222-29.

Opponents of religious arbitration argue that religious arbitration processes are often unfair because religious procedural rules fail to provide the kinds of protections for vulnerable parties and even playing fields that we have come to expect from contemporary due process standards. Both traditional Jewish and Islamic law, for instance, maintain formal procedural distinctions between men and women in a number of respects and do not allow women to assume all of the same roles as men in adjudication.

Sometimes religious law rules of evidence and burdens of proof may also be taken as being inconsistent with secular notions of how to protect disadvantaged parties, ensure fair dealing, and produce truthful results in dispute resolution settings. In Islamic jurisprudence, for instance, burdens of proof typically depend on which of the litigants in a given case ends up being procedurally classified as the plaintiff, and which as the defendant. Some religious traditions also oppose the inclusion of counsels or attorneys in dispute resolution proceedings.

A fourth concern is the problem of coercion. All arbitration is premised on the parties' voluntarily agreeing to submit their dispute to arbitration, but courts have a poor track record of recognizing various forms of pressure exerted by religious communities to get individuals to agree to arbitrate disputes before religious tribunals as legal duress.

The ways in which some well-organized religious groups have dealt with allegations of sexual abuse committed by religious leaders is illustrative, although not always strictly an instance of formal religious arbitration. Such allegations have been rippling through Catholic²⁷, Jewish²⁸, and more recently Muslim²⁹ communities. In many cases, the religious establishments in these

²⁷ Sean Holstege, *Dark Clouds of Sex Abuse Continues to Follow Former Phoenix Bishop O'Brien*, PHOENIX NEW TIMES, Aug. 7, 2017, <http://www.phoenixnewtimes.com/news/former-phoenix-bishop-thomas-obrien-faces-allegations-of-sex-abuse-9568479>.

²⁸ Sharon Otterman et al., *Ultra-Orthodox Shun Their Own for Reporting Child Sexual Abuse*, N.Y. TIMES, May 9, 2012, <http://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html?pagewanted=all>.

²⁹ *Stroke-on-Trent Muslim sexual abuse cleric jailed*, BBC, Mar. 18, 2011, <http://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html?pagewanted=all>.

communities seek to resolve such matters internally, without involving secular law enforcement authorities. The Catholic Church has used a variety of different means to convince alleged victims and whistleblowers to keep such matters within Church disciplinary channels. In one headline-making case of alleged sexual abuse of a minor girl by an unlicensed community therapist and rabbi, communal leaders enacted numerous measures to punish the victim and her family for handling the matter through the secular criminal justice system. The victim and her family received threatening calls, were ostracized by neighbors, and the victim's husband had his local business boycotted and the business was forced to close.

Additionally, while existing legal frameworks from judicial review of arbitration may help prevent substantive and procedural unfairness and duress in theory, in practice, courts are highly deferential to religious arbitrators. Such deference significantly heightens the concern that individuals may be pressured to participate in religious proceedings that are unfair, lack important procedural protections, and produce results that are at odds with standard notions of substantive justice. Judicial deference to arbitration proceedings is not only a concern in religious dispute resolution.

Finally, secular enforcement of religious arbitration ultimately involves state coercion to give force to religious arbitration and is thus a serious violation of individuals' right to the free exercise of religion. By recognizing and enforcing religious arbitration agreements and the decisions of religious arbitration tribunals, secular courts compel recalcitrant parties to participate in what are essentially religious practices, or abide by religious norms and values that they may not hold.³⁰ Giving religious arbitration courts the weight of the State to enforce such claims carries considerable Establishment Clause concerns as well.

Take for example, the 1999 case of *Encore Productions, Inc. v. Promise Keepers*.³¹ In that case, Promise Keepers, a Christian

³⁰ Broyde, *supra* 9, at 229-33.

³¹ *Encore Productions, Inc. v. Promise Keepers*, 53 F.Supp. 2d 1101 (N.D. Col. 1999).

organization that conducts meetings and conferences for men in large venues across the United States, entered into a contract with Encore Productions under which Encore would provide production and consulting services for Promise Keepers' events. The agreement included an arbitration clause in which the parties agreed that disputes between them would be resolved through binding arbitration in accordance with Christian Conciliation procedures.

When the relationship between Encore and Promise Keepers broke down, Encore sued Promise Keepers, and the defendants moved to have the action dismissed and sent to Christian arbitration pursuant to the parties' original service contract. In ruling to dismiss the claim, the court rejected an argument made by Encore that compelling it to engage in and abide by the decision of a Christian Conciliation proceeding would violate its rights to the free exercise of religion. Encore argued that its agents and employees could not be compelled to participate in a religious proceeding conducted in accordance with the tenets and values of a faith to which they did not subscribe. While the court rejected Encore's argument, *Encore* illustrates what many have noted is a serious challenge to religious freedom posed by secular court enforcement of religious arbitration agreements and awards.

Some commentators have argued that societal recognition and enforcement of religious arbitration is a problematic social ill that undermines important interests in the assimilation of religious communities into secular society. Some others have argued that the recognition of religious arbitration helps promote a multicultural society in which numerous religious groups can better maintain their own identities, cultures, and practices. However, opponents of religious arbitration – including members of some religious communities – have countered that such multiculturalism is to be avoided rather than encouraged. Even from a standard liberal perspective, these commenters argue that by permitting religious groups to remain insular and unintegrated into mainstream societal norms, secular enforcement of religious arbitration actually highlights and widens gaps between ordinary members of society and religiously observant "others." Rather than encourage isolation and factionalism, society ought to encourage minority groups and

cultures to more fully integrate into a broader societal ethos. At least in part, this means that all members of society ought to order their lives and affairs under the same sets of norms and values; or, at the very least, they should not be given encouragement and government support for avoiding doing so. In practical terms, this is the same style argument that has echoed throughout Establishment Clause jurisprudence in the United States, with parties going back and forth over how rigid or permeable the walls of separation between church and state should be.

Religious isolationism within secular societies, moreover, correlates to a number of serious communal ills within religious communities that ought to be discouraged and if possible, avoided. Some of the most often referenced concerns relate to the subjugation and oppression of women and children. Feminist-criticisms of religious group autonomy within secular societies maintain that by giving faith communities limited powers of self-government through the legal enforcement of religious arbitration, the state entrenches traditional power structures, and puts vulnerable parties at greater disadvantages within their communities.

B. The Arguments in Support

There are, as I explained elsewhere as well, four basic policy arguments in favor of religious arbitration. Each is simple to understand.

The first is the idea that religious arbitration often resolves disputes better than secular adjudication. One of the chief reasons for this is that the contracting parties are best positioned to really understand their own needs and preferences and to form agreements that meet those interests and expectations. When parties have chosen to have a dispute resolved by a religious tribunal, there is good reason to assume that they did so precisely because religious arbitrators are more likely to understand the critical subject-matter subtext of the underlying facts, conflict, and sought-after remedies, and will therefore craft better decisions.³² In this way, it is not just a question of whether the courts should get

³² Broyde, *supra* 9, at 242-47.

involved, but if they would even understand what is going on. This has been confirmed in cases like *Ben-Levi v. Brown*, where the district and circuit courts were unequivocally wrong in their interpretation of Jewish law and the Supreme Court failed to grant *certiorari* to correct the problem.³³ Justice Alito took the courts to task when concluding that, “In essence, respondent’s argument—which was accepted by the courts below—is that Ben-Levi’s religious exercise was not burdened because he misunderstood his own religion.”³⁴ If a federal district and circuit court could make such a mistake, it is not unthinkable that a state court ruling on a matter of family law would do the same.

The second idea is related: religious arbitration is necessary for resolving religious problems, which are beyond the scope of many secular courts. Certain problems can only be solved by religious tribunals, and societies that do not have them lack solutions to certain religious problems: perhaps the most famous example of this phenomenon is the “*agunah* problem” in Jewish law.³⁵ Traditional Jewish law prescribes that a divorce can only be affected by the willing giving of a *get*, or bill of divorce written in a prescribed ritual manner, by the husband to the wife. Because the *get* must be given willingly, and because, except in the rarest and most exceptional circumstances, Jewish law does not provide for the judicial dissolution of marriage, husbands can and sometimes do use their refusal to grant a *get* as leverage in divorce proceedings. Without the *get*, the wife will continue to be considered religiously married; she will not be able to marry anyone else under Jewish law; and any romantic relationships she subsequently has with other men will be considered adulterous, with serious religio-legal and communal implications for both herself and any future children she may have. A woman whose husband refuses to grant her a *get* after the practical dissolution of the marital relationship is called an *agunah*, a “chained woman.” Because the *get* must be given willingly and only for due cause can a rabbinic court directly compel

³³ *Ben Levi v. Brown*, 136 S. Ct. 930 (2016).

³⁴ *Id.* at 933. (Alito, J. dissenting).

³⁵ MICHAEL BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA, xv-iii (2001).

a husband to give the *get*, and it cannot unilaterally dissolve the marriage, a great deal of rabbinic expertise is needed to handle these cases. In modern times, however, rabbinic courts have no such authority absent an arbitration agreement. Indeed, exerting such pressure would violate secular criminal laws, as one recent case in the United States illustrates.³⁶

Third, secular recognition of religious arbitration helps moderate and integrate religion. Religious arbitration is not only good for religion, and it is not only a necessary consequence of secular commitments to religious freedom; religious arbitration is also good for secular societies in their own right. Secular arbitration frameworks can help promote more complex and moderate modes of religious thought and practice among religious minority groups in secular societies. This, in turn, helps ensure that religious individuals and communities view themselves as partners in a broader societal project that transcends parochial identities, and do not come to view their relationships with general society in oppositional terms. Secular societies ought to facilitate effective faith-based arbitration because by doing so they will encourage their constituent religious communities to become more integrated into society, and more moderate in their ecumenical convictions and practices.³⁷

These requirements induce religious groups interested in developing legally enforceable faith-based arbitration to engage in a conversation with the demands set by societal norms and values. The examples of the Beth Din of America³⁸ in the United States and the Muslim Arbitration Tribunal in the United Kingdom³⁹ illustrate how religious communities can adapt and reinterpret their own traditions in order to comply with important societal demands.⁴⁰

³⁶ MaryAnn Spoto, *Lakewood rabbi sentenced to 10 years in prison for divorce kidnappings*, NJ.COM (Dec. 15, 2015, 4:14PM), http://www.nj.com/ocean/index.ssf/2015/12/lakewood_rabbi_sentenced_to_10_years_in_prison_for.html; Broyde, *supra* 9, at 247-54.

³⁷ Broyde, *supra* 9, at 254-61.

³⁸ The Journal of the Beth Din of America, 18-20 (Vol. 2 2014).

³⁹ *Muslim Arbitration Tribunal*, JAMIA ISLAMIA (ISLAMIC STUDIES CENTRE) TRUST (2015), <http://www.matribunal.com>.

⁴⁰ *Supra* 36.; Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 *Wayne L. Rev.* 1685, 1763-65 (1997).

These Jewish and Muslim dispute resolution tribunals do not punish ritual offenses, do not use coercive methods, and generally afford parity to litigants and witnesses regardless of their gender or faith.

Ultimately, the prevailing legal scheme that permits religious arbitration within certain necessary limits helps encourage religious minorities to become more integrated into the general society, rather than more isolated. This is good for society, which avoids the problem of separatist religious groups with antagonistic attitudes towards society and the State. This is also good for religious communities, which are afforded the immediate benefit of being able to voluntarily practice their religious norms in a way that will be legally enforced.

Finally, secular recognition of religious arbitration promotes value sharing that enriches public policy and discourse. Religious arbitration is important because it helps faith-traditions participate in important societal discussions on law, policy, ethics, and other normative concerns. While engagement between religious and secular norms and values through a system of faith-based dispute resolution helps moderate religion by encouraging it to contend with outside norms and values, this engagement is a two-way street. Just as religion stands to learn and grow from its integration with society, secular society can benefit from its interactions with religion. In liberal, pluralistic societies it is important to have numerous voices and traditions as part of any deliberative public discourse. Religious traditions, like any other ideological, philosophical, cultural, ethnic, or political frames of reference, provide an important perspective that ought to be included in such conversations.⁴¹

Societies work better, progress faster, and innovate more creatively when public discourses on important issues of law and policy are more diverse. This claim was famously made by Scott Paige in his 2008 book, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*. Paige's arguments are important for two reasons. First, his methodology is empirical and quantitative; his argument is not that societies

⁴¹ Broyde, *supra* 9, at 261-65.

should be more diverse for moral or philosophical reasons, but that in fact groups that partake of diversity and reach decisions based on input from multiple perspectives are in fact more successful in the long run. Second, and relatedly, Paige's claims are pragmatic. His study seeks to discover how organizations can be more productive and successful, and his research-based conclusion is that they can be so by including individuals and groups from very different perspectives.

These policy arguments – both for and against – are centrally not about constitutional rights. The final argument – which is central to the holding of *TLC* as well – is what this short comment will focus on.

III. RECOGNIZING THAT RELIGIOUS ARBITRATION IS NO DIFFERENT FROM ANY OTHER ARBITRATION IS A RELIGIOUS FREEDOM IMPERATIVE

Commitments to religious liberty and religious non-establishment require liberal states to give religious arbitration the benefit of the same legal protections offered to commercial and other non-religious dispute resolution. If society wishes to enable and encourage citizens to utilize private dispute resolution forums rather than state courts to resolve litigious conflicts, then it must do so by putting both religious and non-religious arbitration mechanisms on equal footing. Any other result would amount to a government attempt to disestablish religion in favor of irreligion, a serious constitutional problem, at least in the United States. From this perspective, secular societies ought to create frameworks for legally enforceable religious arbitration, not because they want to, but because they have to. Either all forms of arbitration must be permitted, or else none may be.

Of course, a state may prohibit any and all arbitration. As a member of the New York Court of Appeals in 1914, Justice Benjamin Cardozo discussed his concerns about arbitration, noting:

In each case . . . the fundamental purpose of the contract [of arbitration] is the same—to submit the rights and wrongs of litigants to the arbitrament of

foreign judges to the exclusion of our own. Whether such a contract is always invalid where the tribunal is a foreign court we do not need to determine. There may conceivably be exceptional circumstances where resort to . . . courts of another state is so obviously convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary. The jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties.⁴²

That case involved a contract with both a choice of law to an alternative legal system and a choice of forum to private arbitration.⁴³ In Cardozo's view, neither was permitted and both are a bad idea.

Cardozo was not alone. In fact, most western legal systems were initially hostile to ADR forums operating apart from the state-sponsored justice system and resolving conflicts in accordance with

⁴² *Meacham v. Jamestown, F. & C. R. Co.*, 211 N.Y. 346, 353-54, (1914) (Cardozo, J., concurring) (internal citation omitted).

⁴³ The contract stated:

In order to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, it is mutually understood and agreed that the said chief engineer shall be and hereby is made arbitrator to decide all matters in dispute arising or growing out of this contract between them, and the decision of said chief engineer on any point or matter touching this contract shall be final and conclusive between the parties hereto, and each and every of said parties hereby waives all right of action, suit or suits or other remedy in law or otherwise under this contract or arising out of the same to enforce any claim except as the same shall have been determined by said arbitrator.

Id. at 347-48.

substantive and procedural values different from those embraced by the law.⁴⁴ Giving parties the ability to govern their own agreements, including allowing them to agree to choice of law and choice of forum provisions therein, made opponents of ADR, including Cardozo, uneasy.

Notwithstanding Cardozo's venerable view, both choice of law and choice of forum (including private arbitration) would eventually be universally accepted by United States courts and made part of Federal law through the Federal Arbitration Act of 1924. In the United States, the Federal Arbitration Act (FAA) and state-specific arbitration rules often based on the Uniform Arbitration Act create a legal framework in which private arbitration can operate with the support of the official court system.⁴⁵ One characteristic of the Uniform Commercial Code would prove central to the rise of arbitration law: almost any of an arbitration agreement's provisions may be modified by agreement of the parties.⁴⁶ Contract law—namely judges' familiarity with contract law as a doctrine—was the initial legal pivot point of arbitration. Judges, extremely familiar with the well-developed and

⁴⁴ STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 12–13 (2002).

⁴⁵ Michael J. Broyde, Ira Bedzow & Shlomo C. Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 HARV. J. RACIAL & ETHNIC JUST. 33, n.29 (2014) (“9 U.S.C. §§ 1–16 (2012). Prior to Congress’ enacting the Federal Arbitration Act, courts were often hostile to alternative dispute resolution, including arbitration. See *Meacham v. Jamestown, F. & C.R. Co.*, 105 N.E. 653, 655 (N.Y. 1914) (Cardozo, J., concurring) (arguing that courts should not enforce contracts that grant jurisdiction to resolve disputes to private arbitrators rather than regular courts). Congress passed the Act to combat this hostility. See H.R. REP. NO. 68-96, at 1–2 (1924); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (citing H.R. REP. NO. 68-96, at 1–2 (1924)) (“The need for the [Federal Arbitration Act] arises from . . . the jealousy of the English courts for their own jurisdiction . . . This jealousy survived . . . and was adopted by the American courts.”).

⁴⁶ U.C.C. § 1-302 (1977) (“Variation By Agreement: Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement The presence in certain provisions of [the Uniform Commercial Code] of the phrase ‘unless otherwise agreed’, or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.”)

constantly vetted body of American contract law, grew more comfortable with the practice of arbitration.

Religious groups soon began taking advantage of America's legal arbitration regime by creating mechanisms that would allow religious practitioners to settle disputes with their co-religionists under the norms of their faith (what lawyers call "choice of law") and in tribunals staffed by religious functionaries serving as arbitrators (what lawyers call "choice of forum"). In other words, contemporary religious arbitration in America is more a choice of law and choice of forum matter than a free exercise or non-establishment issue. This kind of faith-based dispute resolution became possible during the 20th century when American law moved from generally prohibiting private arbitration to permitting parties in a dispute to choose both the law they want to apply to their dispute and the venue for resolving such a dispute. In the last thirty years, it has become clear that when people have a dispute, they can agree to choose both the law that applies to them and the arbitration panel that will determine the result. This is true in commercial law and family law, and has revolutionized all aspects of private law in the United States.

Having permitted such agreements in many different areas of commercial law, the general Establishment Clause jurisprudence of the U.S. would loath to prohibit the same to religious tribunals, and such is actually the law of the land. At its core, however, this is the central defense for religious arbitration and it is found in the holding of *TLC* and cases like it. *TLC* directs states to give religious arbitration the benefit of the same legal protections offered to commercial and other non-religious dispute resolution generally. Arbitration is another example of the refurbished playground which the state must protect. As the Court tells us in *TLC*:

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be

subjected to the “most rigorous” scrutiny. [citations omitted]

Under that stringent standard, only a state interest “of the highest order” can justify the Department’s discriminatory policy. *McDaniel*, 435 U.S., at 628, 98 S.Ct. 1322 (internal quotation marks omitted). Yet the Department offers nothing more than Missouri’s policy preference for skating as far as possible from religious establishment concerns. Brief for Respondent 15–16. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri’s same policy preference on a prior occasion, “the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.” *Widmar*, 454 U.S., at 276.

If society wishes to enable and encourage citizens to utilize private dispute resolution forums rather than state courts to resolve litigious conflicts, then it must do so by putting both religious and non-religious arbitration mechanisms on equal footing. Any other result would amount to a government attempt to disestablish religion in favor of irreligion, a serious constitutional problem, at least in the United States. From this perspective, secular societies ought to create frameworks for legally enforceable religious arbitration, not because they want to, but because they have to. Either all forms of arbitration must be permitted, or else none may be.⁴⁷

Considering the ubiquity of private dispute resolution across both the secular and religious world, it is unlikely that this will take place. A ban that would prevent private dispute resolution would undo years of work done in the family law field, corporate law,

⁴⁷ Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 563-66 (2012).

international arbitration, patent and trademark law, and other areas. Arbitration clauses have become virtually inescapable, as any Netflix or Amazon membership carries with it a mandatory arbitration clause.⁴⁸ Doing away with arbitration clauses seems like a near certain impossibility, whereas calls to ban private religious arbitration—specifically Islamic courts—have been louder than ever.⁴⁹

The doctrine of government neutrality between religion and irreligion is firmly established in American law and policy. In several important cases, the Supreme Court has held that this kind of neutrality is an important aspect of First Amendment limits of government involvement with religion. The Establishment Clause of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion.”⁵⁰ In addition to its prohibiting the government from creating an official state church; lending aid to particular religious faiths; or incorporating particular religious doctrines, practices, or teachings into law, this provision has also been understood as precluding attempts by government to establish or privilege secularism or irreligion over religion. In short, it requires the state to take a neutral stance towards religion, neither supporting it nor hamstringing it. As Justice Hugo Black wrote in *Everson v. Board of Education of the Township of Ewing*: “[The Establishment Clause] requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary.

⁴⁸ Megan Leonhard, *How Companies Block Your Day in Court* TIME (June 28, 2016), <http://time.com/money/4362582/forced-arbitration/>.

⁴⁹ Bobby Caina Calvan, *Montana Governor Rejects Bill Banning Shariah Law in Courts* U.S. NEWS & WORLD REPORT (Apr. 6, 2017, 9:37 PM),

<https://www.usnews.com/news/best-states/montana/articles/2017-04-06/montana-governor-rejects-bill-banning-shariah-law-in-courts>; 6 News Web Staff, *Michigan Lawmaker Proposes Bill Banning Sharia Law* WLNS.COM (Apr. 20, 2017, 1:45 PM), <http://wlns.com/2017/04/20/michigan-lawmaker-proposes-bill-banning-sharia-law/>; WILLIAM J. BOYKIN ET AL., SHARIAH: THE THREAT TO AMERICA: AN EXERCISE IN COMPETITIVE ANALYSIS REPORT OF TEAM B II 219-59 (2010).

⁵⁰ U.S. Const., amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

State power is no more to be used so as to handicap religions than it is to favor them.”⁵¹

For the state to ban private dispute resolution and arbitration simply because two individuals agree to be bound by a body of law or decisions beyond just those of a secular court with jurisdiction is presumptively unconstitutional. Not only is it a violation of the Establishment Clause, but a likely violation of the Free Exercise Clause as well.

This sentiment has been confirmed numerous times by American courts. In *Lemon v. Kurtzman*, in which the Supreme Court established an important test for determining whether government actions violate the Establishment Clause, the Court held that the state cannot enact laws whose principal or primary effect either advances or inhibits religion.⁵² Likewise, in one concurring opinion, Justice Sandra Day O’Conner urged that “[e]very government practice must be judged . . . to determine whether it constitutes an endorsement or disapproval of religion.”⁵³ In *Grand Rapids School District v. Ball*, the Supreme Court invalidated two state educational programs that provided classes to religious private school students on religious school premises used public school teachers. The court found that these programs principally advanced religion by relieving private religious schools of the burden of paying for such instruction themselves, making the religious school more educationally compelling, and freeing up private school funds to be used for additional religious purposes. In making its ruling, however, the Court reasserted the importance of a neutral approach to religious establishments in general, ruling that “[if] . . . identification [of the government with religion] conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.”⁵⁴

⁵¹ *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 18 (1947). See also *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-3 (1973) (“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion.”).

⁵² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

⁵³ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O’Conner, J., concurring).

⁵⁴ *School Dist. v. Ball*, 473 U.S. 373, 389 (1985).

To date, there have not been any cases that have explicitly raised the issue of government favoring irreligion over religion that have been decided on Establishment Clause grounds. More typically, such cases involve government actors, such as public schools and universities, discriminating between religious and non-religious groups or interests in providing public funding or public space. In *Rosenberger v. Rector and Visitors of the University of Virginia*, for example, the court reviewed the policy of a public university that provided funds to student organizations that met certain criteria, but denied such funding to a group that met those qualifications because the group planned to use the funds to publish a Christian magazine.⁵⁵ Another case concerned a policy by some New York public schools to permit residents of the school district to use school facilities for after school educational or artistic programming, but which denied an application to use school facilities for meetings of a religious group.⁵⁶

In both cases, the schools argued that their discrimination against religious groups was grounded in their desire to avoid infringing on the Establishment Clause; they believed that they could not provide public money or facilities to religious groups to further religious purposes without violating the First Amendment. In both cases, the Supreme Court ruled the schools' actions unconstitutional, not because the schools had impermissibly favored irreligion over religion, but because both had engaged in illegal restrictions on free speech based on the viewpoints that the religious groups sought to express. Underlying the Court's rulings in such cases is a concern that discrimination against religious speakers or viewpoints risks "fostering a pervasive bias or hostility to religion, which could undermine the very neutrality that Establishment Clause requires."⁵⁷

A legal framework that permitted and enforced non-religious arbitration while not giving the same benefit to religious dispute resolution would likely not implicate free expression concerns. Nevertheless, based on the United States Supreme Court's

⁵⁵ *Rosenberger v. Rector*, 515 U.S. 819, 825-6 (1995).

⁵⁶ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102-4 (2001).

⁵⁷ *Rosenberger*, 515 U.S. at 845-6.

Establishment Clause jurisprudence, it seems reasonable to say that such a discriminatory arbitration regime could not pass constitutional muster. It is almost beyond doubt that a scheme in which courts were instructed to enforce religious arbitration agreements and awards, but not irreligious ones, would constitute an unlawful establishment of religion because it would endorse and advance religion. But “if giving special benefits to religion is favoritism, advancement, and endorsement, then discriminating against religion is hostility, inhibition, and disapproval.”⁵⁸ Therefore, if American law is to permit private arbitration that meets certain qualifications, it cannot categorically refuse to recognize and enforce religious dispute resolution processes that satisfy the same requirements.

There are, however, important limits on governments’ constitutional obligations to respect religious practices and commitments. These qualifications permit the state to burden religious practices provided that it does so in a neutral, generally applicable way. This doctrine enables the state to address many of the salient concerns for the procedural and substantive justice of religious arbitration processes without impermissibly treading upon constitutional guarantees of free exercise or prohibitions on religious establishments. This doctrine was first articulated by the United States Supreme Court in *Employment Division v. Smith*.⁵⁹ The case concerned two individuals who had used the drug, peyote, as part of a Native American religious ritual. The individuals were fired for using the peyote, which was a crime under state law. The Court ruled that it was not unconstitutional to criminalize peyote use or to apply the criminal statute to the Native American religious users in that case.⁶⁰ This decision was based on the understanding that the Free Exercise Clause does not “relieve an individual from the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes)

⁵⁸ Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J. L., ETHICS & PUB. POL’Y 341, 369-70 (1999).

⁵⁹ *Employment Div. v. Smith*, 494 U.S. 872, 888-90 (1990).

⁶⁰ *Id.*

conduct that his religion prescribes (or proscribes).”⁶¹ *Smith* thus stands for the important idea that facially neutral, generally applicable and otherwise valid laws not designed to either advance or inhibit religion or religious practice, but nevertheless burden the ability of religious individuals or communities to fully observe their faiths, do not violate the First Amendment.

Following *Smith*, then, it would be perfectly valid for the state to refuse to respect or enforce all private arbitration awards, both religious and non-religious, since that would be a neutral and generally applicable law that only happens to burden religious practice.⁶² Likewise, laws designed to ensure the fairness and justice of all arbitration proceedings – such as many of the existing provisions of federal and state arbitration frameworks – would likely pass constitutional muster even if they did restrict the ability of some religious groups to fully observe and implement the totality of their respective traditional judicial and dispute resolution processes and remedies.⁶³ Indeed, it is not hard to imagine a secular law arbitration framework that imposed such onerous requirements on all arbitration proceedings as to make religious arbitration – at least arbitration that would comply with traditional religious norms and values – practically impossible. Such laws could require arbitration panels to follow state rules of evidence or pleadings, regardless of religious laws to the contrary. They might also provide that religious tribunals must respect the same kinds of equality rules respected in secular adjudication, such as the inclusion of women as arbitrators or not drawing gender, age, or faith distinctions between the statuses of the testimony of different witnesses. State laws could also prohibit arbitration panels from enforcing norms or ordering remedies that are substantially at odds with secular notions of substantive and distributive justice embraced by societal law and policy. Such rules would substantially

⁶¹ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J. concurring)).

⁶² Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 *SANTA CLARA L. REV.* 501, 565 (2012).

⁶³ Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 *VT. L. REV.* 157, 197-98 (2012).

restrict the actual practice of many forms of traditional religious dispute resolution without actually violating either Free Exercise or Establishment concerns.

Of course, not all jurisdictions maintain the kinds of strict establishment limits that exist in the United States; nor are such restrictions on states' privileging religion over non-religion or irreligion over religion strictly necessary from a standard liberal perspective. Modern Western nation states have adopted a range of different approaches to this issue, ranging from American-style neutrality to freedom of religion alongside an official state church, as in the United Kingdom, to the affirmative secularism and public hostility towards religion practice seen in countries like France. In many cases, the United States included, these commitments are products of unique historical experiences.⁶⁴

Canadian restrictions specifically on religious dispute resolution are illustrative. In 2006, Ontario moved to place a total ban of faith-based arbitration in family law matters. This move, grounded in a variety of different concerns about Islamic arbitration, was reinforced by a more general policy in Canada that permits public restrictions on religious practices or religious access to public institutions, provided that such restrictions are applied in an even-handed way, and do not privilege or burden any particular faith more than any others.⁶⁵

In any case, it seems reasonable to say that not all societies should be expected to enforce religious dispute resolution as a non-establishment necessity. Even in the United States, the First Amendment likely does not absolutely require societal enforcement of religious arbitration agreements and awards. Establishment concerns provide some basis for arguing that religious arbitration must be permitted and judicially enforced, even as there are good reasons to be wary of it. However, Free Exercise doctrine under *Smith* suggests that states can severely restrict the practice of

⁶⁴ See generally STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* (1997).

⁶⁵ Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 *SANTA CLARA L. REV.* 501, 506 (2012).

traditional religious arbitration, provided it does so in a religiously neutral manner.

IV. BEFORE AND AFTER *TLC*

Before the opinion in *TLC* was released, many were unsure of what the Supreme Court would decide: Would it agree with the lower court's position and recognize the precedence of *Locke* or branch the jurisprudence off in a new direction? What was well understood by many is that just as the fate of the playground's surface was in question, so was the future of *Locke v. Davey*.⁶⁶ Regardless of the side, *amicus* briefs painted a portrait of a Republic on the precipice of calamity, with nine justices in black robes as the only safety net. In actuality, none of this happened. The narrow reading, further limited by Footnote three, allowed the Court to achieve the desired outcome without harming any of the existing precedence. Therefore, to understand *TLC*, it is necessary to look back.

The District Court in *TLC* found similarities between the situation there and the Supreme Court decision in *Locke v. Davey*, a case with an outcome of 7-2 with only the most conservative of the Justices at the time—Justices Scalia and Thomas—in the minority.⁶⁷ In *Locke*, Joshua Davey was a college student attending Northwest College, a private school in Washington state. Not unlike many other colleges in different states, Washington had established a scholarship program that was meant “to assist academically gifted students with postsecondary education expenses.” There is no question that this case would have never seen the light of day had Davey pursued only his degree in business management, but it was the inclusion of a second major—a major in pastoral studies—that ran afoul of Washington's State Constitution that prevented any such funds to be used to pursue a devotional degree.

It was argued that such an application of the State's policies was contrary to the Establishment Clause and not a neutral

⁶⁶ Amy Howe, *Argument preview: More than just a playground dispute*, SCOTUSblog (Apr. 12, 2017, 11:08 AM), <http://www.scotusblog.com/2017/04/argument-preview-just-playground-dispute/>

⁶⁷ *Locke v. Davey*, 540 U.S. 712, 715 (2004).

application at all. The majority in *Locke* ruffled at the comparisons Davey tried to draw between his case and that in *Church of Lukumi*. As the majority explains, accepting the *Church of Lukumi* comparison would:

[E]xtend the *Lukumi* line of cases well beyond not only their facts but their reasoning . . . In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.⁶⁸

The panel in *TLC* was abundantly careful to carve out an exception in the area of playground equipment and to leave *Locke* and its progeny intact. Situations like that in *Locke* where the government is handing out funds, it is allowed to deny those funds in favor of upholding the Establishment Clause. However, when those funds are directly tied to a question of need that in turn involves the safety of others, the government cannot be allowed to withhold those funds. Further, the involvement of children will change the outcome of any such case, whether it is a question of protecting them from undue influence in the case of school prayer or reimbursing parents for the cost of public transportation like in *Everson*.

Following the Supreme Court's decision in *TLC*, there has been little discussion of the possible ramifications, perhaps because the majority opinion is so clearly limited to playground resurfacing, giving the case at first glance little precedential value. However, *TLC* and *Locke* are notable for not only involving the Establishment Clause, but the Free Exercise Clause as well. Questions of law involving the Establishment Clause have been few and far between

⁶⁸ *Id.* at 719-22.

in the recent memory of the Court, but there is a constant flow of Free Exercise cases. Whether in the form of RFRA/RLUIPA cases or constitutional claims, the Free Exercise Clause has experienced a deluge of jurisprudence compared to the relative trickle for the Establishment Clause.

Taken by itself, this does not mean all that much: It seems natural that people are more concerned with how their rights are observed—increasing the likelihood of Free Exercise claims—and most state and federal governments are fairly good about avoiding unconstitutional conditions and behaviors. Still, at a time when religious freedom is arguably the strongest it has been in decades, private religious arbitration is under the greatest threat.

But, the claim can be made that playground resurfacing, if it is to have some actual legal impact, must stand for the following five ideas:

- Playground resurfacing is neutral and can be done without any theological overtones.
- Playgrounds can be used by all and do not require any religious or theological test to play on.
- All religions and many secular institutions can benefit from playground resurfacing.
- Worship is not directly facilitated by playground resurfacing (i.e., it is the playground and not the chapel under discussion).
- Many playgrounds are present and many secular or religious playgrounds can be played on.

This listing is important, as it highlights the relationship between playground resurfacing and religious arbitration. As I show in my book, *Sharia Tribunals, Rabbinical Courts and Christian Panels: Religious Arbitration in America and the West*, this basic framework must be true for religious arbitration in order to allow for successful religious arbitration as well.

- Arbitration is neutral and can be done without any theological overtones.
- Arbitration can be used by all and does not require any religious or theological test to participate.
- All religions and many secular institutions can benefit from arbitration.
- Worship is not directly facilitated by arbitration (i.e., it is commercial or family arbitration and not the religious dogma under discussion).⁶⁹
- Many arbitration tribunals are present and many secular or religious arbitrations can be played in.

What we observed in this approach is the idea that the holding of *TLC* further protects the ability of communities to engage in religious arbitration.

There is yet another further application of the religious arbitration rule and it affects the next case in the religious freedom world. At the time of the writing of this article, the Supreme Court has granted *certiorari* in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.⁷⁰ The facts are fairly straightforward: a baker with certain religious beliefs refused to bake a wedding cake for a same sex couple and was penalized under Colorado's public accommodations law because of it.⁷¹ Another similar case, *Arlene's Flowers*, has an almost identical fact pattern, but involves the floral arrangements and wedding bouquet for the wedding instead of the

⁶⁹ This point is crucial. Government enforcement of arbitration that has a theological resolution of ecclesiastical issues is almost always impossible. Such "dogma resolving religious arbitration" is both fully First Amendment protected and may not be reviewed or enforced by a secular court, as they have no choice but to accept the correctness of the ecclesiastical resolution. American courts are precluded completely from reviewing how or why religious tribunals resolve internal ecumenical questions about the faith, doctrinal disputes between congregations, or conflicts between religious individuals over matters of faith. See, *Watson v. Jones*, 80 U.S. 679, 728-29 (1872); See, *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440, 446-47 (1969).

⁷⁰ 137 S.Ct. 2290 (Mem), (cert. granted).

⁷¹ Adam Liptak, *Justices to hear Case on Religious Objections to Same-Sex Marriage*, THE NEW YORK TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html>.

cake.⁷² Both cases have drawn attention from all sides of the political spectrum. At its most basic level, these cases involve the private convictions of a non-governmental individual acting within the stream of commerce. Meanwhile, private religious arbitration, which involves two private individuals consenting to be bound contractually to a specific body of law, draws skepticism from others, with Islam and Sharia law bearing the brunt of it.⁷³ Whatever is the underlying motivation for such feelings, the fact remains that a baker refusing to bake a cake garners more support from the public than two people making a private contract with religious terms. For now, private religious arbitration is likely to remain intact given that singling it out or any particular religion would likely be rendered unconstitutional, but as societal norms shift and what is considered unconscionable in the eyes of the law and society changes, all that will be necessary for infringement of religious beliefs to take place will be one judge willing to prove a point.

Masterpiece presents itself as an ideal situation in which private dispute resolution can address an underlying religious freedom concern. When an individual engages in the sale of a product to the general public, they do so in a public capacity as a private business run by private individuals with private beliefs. The secular wrinkle here is the public aspect of sales. By opening the transaction to the public, it seems reasonable that the business owner has stepped foot into the secular world governed by secular law. The person stepping into the shop to buy their cake has little

⁷² Barronelle Stutzman, *Why a friend is suing me: the Arlene's Flowers Story*, THE SEATTLE TIMES (Nov. 12, 2015, 4:11 PM), <http://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story/>.

⁷³ Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, THE NEW YORK TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.; Nate Burchman, *Losing Faith in Religious Arbitration*, HARV. C.R. C.L. LAW REV. (Nov. 21, 2015), <http://harvardcrcl.org/losing-faith-in-religious-arbitration/>.; *Arbitration by Faith: Religion & Ethics News Weekly*, PBS (May 6, 2016) <http://www.pbs.org/wnet/religionandethics/2016/05/06/arbitration-by-faith/30328/>.; Michael Curtis, *The Problem of Sharia Law in Britain*, GATESTONE INSTITUTE INT'L POLICY COUNCIL (Feb. 10, 2012, 5:00 AM), <https://www.gatestoneinstitute.org/2839/sharia-law-britain>.

concern for the beliefs of the baker, but is very concerned about whether they will have that three-tiered cake on their wedding day. This public component is what distinguishes *Masterpiece* from a religious arbitration situation where two private parties have opted to be bound privately via contract to using a private forum of their choice. Therefore, if the bakery in *Masterpiece* were to be brought more into the private sphere—making private arbitration a requirement of all their transactions—then anyone walking into the shop to buy that wedding cake would do so with forewarning that the cake could not be used in a manner forbidden by the agreement. This would satisfy the arrangement between the buyer and the seller. If a baker uses these agreements for one wedding, then he should be using them for all weddings. In the event that the baker wants to have the most control over where his goods end up, he would need to close the doors to his shop and provide his goods only through private transactions. The baker cannot be allowed to step out into public commerce when it so pleases him and retreat to safer territory when it moves him to. In this way, religious freedom is not meant to be used as both a sword and shield. Further, this kind of approach would be in line with *TLC*, *Lemon*, *Everson*, *Employment Division v. Smith*, *Church of Lukumi*, and every similar case: the baker would be treating all parties neutrally.

However, the baker cannot have his cake and eat it too. This neutrality comes with additional expenses that only become apparent after the fact. What many realize and no one chooses to acknowledge is that such an approach is not all that economically feasible. Service industries like bakeries are only as good as their last job, and there are likely to be more individuals deterred by having to sign an arbitration agreement than not. Even if a baker is able to make up the loss in work, how long can this hold? *Masterpiece Cakeshop* has reported losses as high as 40% due to the pending case before the Supreme Court.⁷⁴ A similar situation like in *Masterpiece* took place in Oregon, with the bakery eventually

⁷⁴ Blair Miller, *Masterpiece Cakeshop owner says he's lost 40% of business, welcomes SCOTUS hearing*, THE DENV. CHANNEL (Jun. 26, 2017, 6:00 PM), <http://www.thedenverchannel.com/news/politics/masterpiece-cakeshop-owner-says-hes-lost-40-of-business-welcomes-scotus-hearing>.

closing.⁷⁵ A dense population of religious adherents or a disperse population who are particularly observant may be able to support a single bakery, but what happens when a second bakery comes in? A local *beit din* in Brooklyn was faced with this issue when one trendy kosher pizza restaurant opened up across from another, leading to “a Solomonic decision about how the pie is going to be sliced.”⁷⁶ The conclusion is that there are ways for a devout baker to remain observant and protect his or her rights, but it will come with hardship. For some, this is perfectly acceptable, but for every ten willing to deal with the hardship, there is one litigant who is prepared to take the issue to court.

Perhaps the most difficult fact for proponents of *Masterpiece* is that we live in an evolving world. For many devout people—Mennonites who shun technology; a Hasidic community like a part of Lakewood, NJ; the Roman Catholic-centric Ave Maria, Florida—it is easier to maintain the metes and bounds of their community than it is to change the community around them.⁷⁷ In the lead up to the Supreme Court decision in *Obergefell v. Hodges*, there was a noted shift in the public opinion of same-sex marriage.⁷⁸ Though the shift happened far after the Court’s decision in *Loving v. Virginia*, interracial marriage experienced a similar societal shift over the decades.⁷⁹ What were once imperatives at one time will not always

⁷⁵ Bradford Richardson, *Sweet Cakes by Melissa, Christian Bakers from Oregon, appeal \$135k fine in gay wedding case*, THE WASH. TIMES (Mar. 6, 2017), <http://www.washingtontimes.com/news/2017/mar/6/sweet-cakes-melissa-christian-bakers-oregon-appeal/>.

⁷⁶ Michelle Hogi, *Kosher Pizza War Simmers On After Brooklyn Rabbis Rule*, FORWARD (Mar. 29, 2017), <http://forward.com/food/365904/kosher-pizza-war-simmers-on-after-brooklyn-rabbis-rule/>.

⁷⁷ As an example of this, See Rod Dreher, *The Benedict Option: A Strategy for Christians in a Post-Christian Nation*. There are some issues with Dreher’s approach in that it is far easier said than done—ask any insular Jewish community about this—but it does represent an approach that many have used for centuries in various religious traditions.

⁷⁸ Changing Attitudes on Gay Marriage, PEW RESEARCH CENTER (Jun. 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

⁷⁹ Frank Newport, *In U.S., 87% Approve of Black-White Marriage vs. 4% in 1958*, GALLUP (2013),

<http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx>. For some, this comparison is not perfect as the beliefs surrounding same-sex marriage are based on religion and those for interracial marriage no longer are, but both examples remain illustrative of the power of time in changing the views of society.

remain imperatives. Religious arbitration contracts along with closer communities would allow the most devout to protect their legitimate religious interests to the extent allowed by law. The financial concerns discussed before would still exist, but there would be a legal means of protecting their religious beliefs even as the world around them changes. How long this would be acceptable is unclear, but it does fall in line with the ethos America was based on: If you don't like what is going on in your community, you can always go create a new community of your own.

Yet, there will always remain this ticking time bomb. Even if the baker has his arbitration agreements, goes through private transactions only, opens his door by appointment, and otherwise attempts to remove himself from the public equation as much as possible, there is no telling what the next few decades could hold. The second he cracks his door open to the public world, so comes all of the public and secular law. Though not for certain, there will likely be a day when same-sex marriage and other LGBTQ issues will be added to the list of outlawed basis for discrimination included in the Civil Rights Act of 1964. When that happens, precedent in cases like *Heart of Atlanta*⁸⁰ will bring the government's compelling interest in upholding the Civil Rights Act directly at odds with the Free Exercise Clause, making for an interesting case before the Court. There has already been a long-standing push for Title VII claims to recognize questions of gender and sexual orientation, with no formal law on the books yet.⁸¹

VI. CONCLUSION

It is this same power that leads some religious people to draw inward and shield themselves off from a world that they see as hostile to their beliefs.

⁸⁰ *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 252 (1964) (holding that the U.S. Congress could use its power under the Commerce Clause to force private business to abide by Title II of the Civil Rights Act of 1964).

⁸¹ Courtney Joslin, *Protection for Lesbian, Gay, Bisexual, and Transgender Employees Under Title VII of the 1964 Civil Rights Act*, A.B.A HUM. RTS. Vol. 31 No. 3 (2004),

https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summer04_protectlgbt.html.

The holding of *TLC* and the fact that it was a seven to two decision masks a deep dispute between the Justices as to what really is the holding of the case. Four Justices insist on a very narrow holding, which is limited to express discrimination and playground resurfacing, while two Justices do not limit the holding to playground anything. The precedential value of this case thus hinges on the question of what are the characteristics of playground resurfacing that are generalizable. This article argues that even the four Justices who support a limited holding still will recognize that many secular activities are similar enough to playground resurfacing to be covered by the holding of *TLC*. Consider as an example a State governmental program that provides a free air conditioner to any business that generated more than \$1,000,000 worth of revenue in the state. *TLC* would still allow this program to refuse to provide air conditioners to be used in a worship sanctuary, but would prohibit such denials to a school church office.

Based on this, arbitration under religious auspices is protected by the holding of *TLC*, so long as it does not facilitate worship, can be generally used without any theological overtones, and is of a general secular and religious benefit.