

THE CHALLENGE OF CO-RELIGIONIST COMMERCE

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ABSTRACT

This Article addresses the rise of “co-religionist commerce” in the United States—that is, the explosion of commercial dealings that take place between co-religionists who intend their transactions to achieve both commercial and religious objectives. To remain viable, co-religionist commerce requires all the legal support necessary to sustain all other commercial relationships. Contracts must be enforced, parties must be protected against torts, and disputes must be reliably adjudicated.

Under current constitutional doctrine, co-religionist commercial agreements must be translated into secular terminology if they are to be judicially enforced. But many religious goods and services cannot be accurately translated without religious terms and structures. To address this translation problem, courts could make use of contextual

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tools of contract interpretation, thereby providing the necessary evidence to give meaning to co-religionist commercial agreements. However, contextual approaches to co-religionist commerce have been undermined by two current legal trends—one in constitutional law, the other in commercial law. The first is New Formalism, which discourages courts from looking to customary norms and relational principles to interpret commercial instruments. The second is what we call Establishment Clause Creep, which describes a growing judicial reticence to adjudicate disputes situated within a religious context. Together, these two legal developments prevent courts from using context to interpret and enforce co-religionist commercial agreements.

This Article proposes that courts preserve co-religionist commerce with a limited embrace of contextualism. A thorough inquiry into context, which is discouraged by both New Formalist and many Establishment Clause doctrines, would allow courts to surmise parties' intents and distinguish commercial from religious substance. Empowering the intent of co-religionist parties and limiting the doctrinal developments that threaten to undermine co-religionist commerce can secure marketplace dealings without intruding upon personal faith.

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INTRODUCTION

Though a rich tradition warns that mixing religion and money corrupts both,¹ there is a great deal of “co-religionist commerce” in America—that is, commerce between co-religionists who intend their transactions to adhere to religious principles or to pursue religious objectives.² Prominent examples of co-religionist commerce in the United States include a \$4.6 billion Christian-products industry,³ a \$12.5 billion kosher-food market,⁴ and a growing share of an \$800 billion global Sharia-compliant finance market.⁵

In recent years, American religious communities have become increasingly sophisticated players in commercial markets, developing legal instruments that comply with the demands of religious dictates

1. Consider, as a historical and literary example, the following exchange between the farmer John Proctor and Reverend John Hale:

Hale: I note that you are rarely in the church on Sabbath Day. . . . Will you tell me why you are so absent? . . .

Proctor: I surely did come when I could, and when I could not I prayed in this house.

Hale: Mr. Proctor, your house is not a church; your theology must tell you that.

Proctor: It does, sir, it does; and it tells me that a minister may pray to God without he have golden candlesticks upon the altar.

Hale: What golden candlesticks?

Proctor: Since we built the church there were pewter candlesticks upon the altar; Francis Nurse made them, y'know, and a sweeter hand never touched the metal. But [Reverend] Parris came, and for twenty week he preach nothin' but golden candlesticks until he had them. I labor the earth from dawn of day to blink of night, and I tell you true, when I look to heaven and see my money glaring at his elbows—it hurt my prayer, sir, it hurt my prayer.

ARTHUR MILLER, *THE CRUCIBLE* 64–65 (Penguin Books 1981) (1952).

2. 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 and courts are obligated to determine whether or not to adopt an entirely hands-off approach simply because the specter of religion lurks on the horizon.”).

3. See, e.g., Jay Reeves, *Some in \$4.6B Christian Industry Copy Designs, Logos*, USA TODAY, Dec. 18, 2009, http://usatoday30.usatoday.com/news/religion/2009-12-18-christian-copyright_N.htm; *Christian Product Sales Put at \$4 Billion Plus*, L.A. TIMES, July 7, 2001, <http://articles.latimes.com/2001/jul/07/local/me-19488>; see also 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 existence of a \$4.6 billion Christian-products industry).

4. See KOSHERFEST, KOSHER INDUSTRY FACTS, <http://www.kosherfest.com/kosher-facts> (last visited Jan. 2, 2015).

5. Scott R. Anderson, *Recent Development: Forthcoming Changes in the Shari’ah Compliance Regime for Islamic Finance*, 35 YALE J. INT’L L. 237, 237 (2010).

while engineering substantial business transactions.⁶ Religious institutions have adopted employment agreements and arbitration systems that reflect substantive religious objectives,⁷ houses of worship have provided their constituents with a growing array of commercial services,⁸ and businesses have drafted increasingly

6. See, e.g., Martin M. Shenkman, *Integrating Religious Considerations into Estate and Real Estate Planning*, 22 PROB. & PROP. 34 (2008) (suggesting practical financial-structuring and contract-drafting adaptations to account for religious parties).

7. See, e.g., *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006) (affirming the dismissal of an employment discrimination suit by a music director on the grounds that the music director served a ministerial function within the church); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (affirming the dismissal of an employment discrimination suit by a press secretary on the grounds that the secretary served a ministerial function within the church); *Equal Emp't Opportunity Comm'n v. Roman Catholic Diocese*, 213 F.3d 795, 802–03 (4th Cir. 2000) (affirming the dismissal of an employment discrimination suit by a music director on the grounds that the music director served a ministerial function within the church); *Starkman v. Evans*, 198 F.3d 173, 177 (5th Cir. 1999) (affirming the dismissal of an employment discrimination suit by a choir director on the grounds that the choir director served a ministerial function within the church); *Equal Emp't Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996) (dismissing the case on Establishment Clause grounds because a court evaluation of the professor's qualifications to teach Canon law would be impermissibly intrusive); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991) (affirming the dismissal of an employment discrimination suit by a former chaplain against a religious hospital in order to avoid excessive interference with religion in violation of the First Amendment); *Nevius v. Afr. Inland Mission Int'l*, 511 F. Supp. 2d 114, 120 (D.D.C. 2007) (dismissing a missionary's discrimination claim against a missionary organization in order to avoid venturing into an "ecclesiastical dispute"); *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007) (dismissing a § 1981 claim by the director of the "worship arts" department against a church because the director's function had been a ministerial one within the church); *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 203 (D. Conn. 2000) (dismissing claims by a professor at a Catholic college on Establishment Clause grounds to avoid becoming entangled in religious matters); *El-Farra v. Sayyed*, 226 S.W.3d 792, 795 (Ark. 2006) (affirming a summary judgment against an Islamic minister because resolution of his claims would involve deciding ecclesiastical issues); *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334, 337 (Ind. Ct. App. 1999) (affirming the dismissal of a seminary professor's claims in order to avoid excessive entanglement in religious affairs); *Kant v. Lexington Theological Seminary*, 2011-CA-000004-MR, 2012 WL 3046472 (Ky. Ct. App. 2012), *rev'd*, 426 S.W.3d 587 (Ky. 2014) (reversing a grant of summary judgment against a tenured professor for breach of contract claims against a seminary because the professor was not a ministerial employee of the seminary); *Kirby v. Lexington Theological Seminary*, 2010-CA-001798-MR, 2012 WL 3046352 (Ky. Ct. App. 2012), *rev'd*, 426 S.W.3d 597 (Ky. 2014) (reversing a grant of summary judgment against another seminary professor in materially similar circumstances); *Fisher v. Congregation B'nai Yitzhok*, 110 A.2d 881, 883 (Pa. Super. Ct. 1955) (affirming a ruling for a rabbi-cantor on a breach of contract case because the legal issue did not involve religious matters but rather the intent of the parties).

8. See, e.g., Bobby Allyn, *Nashville Megachurch Appeals Tax Break Ruling over Bookstore, Cafe*, THE TENNESSEAN, Nov. 15, 2012, <http://www.tennessean.com/article/20121115/NEWS06/311150008/Nashville-megachurch-appeals-tax-break-ruling-over-bookstore-cafe> (noting that Christ Church in Nashville, Tennessee, has "a gym, bookstore, and cafe on its

complex and creative legal documents to ensure compliance with religious standards. Co-religionist commerce is not just big business, it is also a sophisticated practice of law. And like any other modern industry, co-religionist commerce and its legal framework rely heavily on the formal legal support—enforcement of contracts, protection against torts, and adjudication of disputes—that is necessary to sustain all commercial arrangements.

Because of its ecclesiastical qualities, however, co-religionist commerce presents an unusual challenge to American law. When commercial disputes arise among co-religionists, courts are asked—for example, in determining the parties’ intents or customary norms—to interpret religious terminology, standards, and practices.⁹ Courts therefore often shy away from adjudicating co-religionist commercial disputes, fearing that intervention would impermissibly contravene prevailing interpretations of the Establishment Clause.¹⁰ Yet courts also recognize that refusing to issue rulings both abdicates the judicial responsibility to resolve legal disputes¹¹ and withdraws the legal

property”); Jesse Bogan, *America’s Biggest Megachurches*, FORBES (June 26, 2009), available at <http://www.forbes.com/2009/06/26/americas-biggest-megachurches-business-megachurches.html> (noting that the Second Baptist Church of Houston, Texas, has “fitness centers, bookstores, information desks, a café, a K-12 school, and free automotive repair service for single mothers”).

9. See, e.g., Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 520 (2005) (collecting cases); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 514–17 (2013) (same); Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 259 n.115, 260 n.116 (2000) (same).

10. Although the reasons for this constitutional restriction vary, most scholarly treatments contend that the Establishment Clause erects structural or jurisdictional barriers to courts’ ability to interfere with the authority of religious institutions to govern religious life. See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 5–6, 75 (1998); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 851–52 (2009); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 869 (2009); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL’Y 119, 120 (2007).

11. See *In re Marriage of Goldman*, 554 N.E.2d 1016, 1021, 1023 (Ill. App. Ct. 1990) (holding that the use of neutral principles of law to enforce a *ketubah* advanced the secular purposes of enabling parties to enter contracts and promoting the “amicable settlement of disputes that have arisen between parties to marriage”); cf. Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1382–83, 1410–12 (1981) (emphasizing the burdens on religious institutions when courts refuse to embrace their traditional dispute-resolution function); Patty Gerstenblith, *Civil Resolution of Property Disputes Among Religious Organizations*, 39 AM. U.L. REV. 513, 515 (1990) (noting that “a strong policy favoring dispute settlement and the protection of civil interests mandates civil court intervention in [religious disputes]”).

infrastructure that is routinely available to—and necessary to support—secular commerce.¹² Constitutional doctrine has long recognized this challenge and has instructed courts, when confronted with disputes that are imbued with ecclesiastical circumstances, to adjudicate on the basis of “neutral principles of law”—that is, to issue rulings based “on objective, well-established concepts of [] law familiar to lawyers and judges.”¹³ Relying on neutral principles of law allows courts to resolve disputes among co-religionists while avoiding “entanglement in questions of religious doctrine, polity, and practice.”¹⁴

Unfortunately, the neutral-principles framework has proven less successful than participants in co-religionist commercial markets might have hoped. The core problem lies in a translation difficulty. Parties to co-religionist commercial agreements often lack the flexibility to replace religious terms in their agreements with secular terms, and therefore cannot contract around the Establishment Clause.¹⁵ For example, parties entering into purchase agreements for kosher food or into employment agreements for ministers seek a certain type of religious product or service that cannot be described without reference to religious requirements or religious standards. In other instances, co-religionist commercial agreements cannot be

12. Advocates of broader First Amendment protection for religious institutions have long worried that regulating religious institutions purely as commercial actors requires casting off religious commitments as the price of admission to the commercial and financial markets. *See, e.g.,* Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 397–99 (2013). These concerns might even provide good reason to rethink some widely held constitutional commitments, including constitutional objections to judicial resolution of religious questions. *See generally, e.g.,* Helfand, *supra* note 9 (arguing that courts should not abstain from resolving disputes that turn on religious doctrine or practice when no other institution has authority to resolve the dispute). For other critiques of the religious question doctrine, see Goldstein, *supra* note 9, at 525–33 (providing examples of certain judicial determinations that necessarily involve religion and asserting that it is neither possible nor desirable to adopt an absolute prohibition on the “judicial assessment of religious questions”); Samuel J. Levine, *Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 123 (1997) (examining the harms that may result from judicial unwillingness to inquire into religious practices in Establishment Clause cases).

13. *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

14. *Id.*

15. *See, e.g.,* Ellman, *supra* note 11, at 1409–10 (arguing that the neutral-principles approach limits judicial inquiry in ways that undermine a court’s ability to reach a justifiable outcome); 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”).

modified from their traditional form if they are to have their desired religious effect.¹⁶ For example, religious marriage contracts—such as the *mahr* in Muslim marriages¹⁷ or the *ketubah* in Jewish marriages¹⁸—often assign financial commitments through the use of religious references. But assigning these obligations with purely secular terminology would undermine the religious significance of the marriage ceremony.

This translation problem need not foreclose the possibility of predictable and enforceable co-religionist commercial transactions. Courts do, on occasion, embrace a contextual approach to understanding ecclesiastical terms within a neutral framework. This flexible interpretive approach can secure religious commercial transactions, even as it sometimes requires delving into customary norms to extract commercial substance from religious principles or permitting evidence from religious authorities to translate ecclesiastical terms into secular language.

Employing contextualism as a response to the translation problem, however, has been stymied by two doctrinal developments—one in commercial law and the other in constitutional law. In commercial law, a subjective or contextual approach to understanding co-religionist commercial disputes has been discouraged by what private-law scholars have called New Formalism.¹⁹ New Formalism refers to trends in court decisions and legal scholarship that increasingly advocate textual interpretations of contracts between merchants. A reaction to Karl Llewellyn's and the Uniform Commercial Code's (UCC's) embrace of business customs and general good-faith standards, New Formalism urges courts to refrain from inquiring into contextual elements—such as customary norms, notions of equity, and relational principles—when interpreting and enforcing contractual arrangements. In turn, New Formalism restricts courts from inquiring into the subjective intent of parties or extrinsic evidence that might inform the contracting environment between parties.²⁰ Under such a New Formalist framework, courts

16. See *infra* Part II.B.

17. See *infra* notes 109–19 and accompanying text.

18. See *infra* notes 120–23 and accompanying text.

19. See, e.g., David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 842 (1999).

20. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1807–08 (1996) (arguing that contextualist interpretation prevents parties from contracting according to their “preferred mix

cannot invoke contextual evidence to interpret religious terminology in co-religionist commercial agreements.²¹

And in constitutional law, courts have exhibited a growing wariness of adjudicating disputes that involve, even tangentially, ecclesiastical interests. This has led to what this Article refers to as “Establishment Clause Creep,” a growing tendency by courts to interpret the Establishment Clause expansively to preclude adjudication of co-religionist disputes that, at their core, are commercial in nature. In such instances, courts conflate the commercial objectives of a transaction with the religious commitments of the parties,²² thereby undermining the core commitments of the neutral-principles approach to co-religionist commerce.²³ When courts refuse to adjudicate co-religionist disputes, damages flowing from commercial fraud,²⁴ professional defamation,²⁵ and contractual breach²⁶ are left unremedied.

of legal and extralegal terms” and deters them from “flexibly adjust[ing] their contracting relationships”); Charny, *supra* note 19, at 846–48 (observing that the new formalist rejects evidence of custom because of “the radical institutional and transactional specificity of transactional norms”); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 587 (2003) (arguing that contextualist interpretation can create moral hazard).

21. See sources cited *supra* note 20.

22. Michael A. Helfand, *Fighting for the Debtor’s Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 159 (2011) (observing that courts often refuse to adjudicate certain religious cases due to “a hypersensitivity to entanglement concerns” with religion, not because of any “require[d] dismissal on Establishment Clause grounds”).

23. Given this trend, it is not surprising that the neutral-principles approach has been exposed to some significant criticism. Some have criticized the neutral-principles doctrine on the ground that it is insufficiently attentive to the sovereignty of religious institutions over their own religious matters. See, e.g., 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, 1294–97 (1980); Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 969 (1991); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 863–68 (1984). Others have worried that the neutral-principles doctrine requires courts to consider only the neutral features of the case—a tactic that may lead to errors in adjudicating disputes. See Ellman, *supra* note 11, at 1409–10 (criticizing the neutral-principles doctrine); Greenawalt, *supra* note 15, 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).

24. In late 2012, this issue became the subject of litigation with allegations that Hebrew National failed to conform its meat to its advertised kosher standards. See *Wallace v. ConAgra Foods, Inc.*, 920 F. Supp. 2d 995 (D. Minn. 2013), *rev’d on other grounds*, *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014); Tiffany Tsu, *Suit Says Hebrew National Isn’t Kosher; ConAgra Says Without Merit*, L.A. TIMES, June 20, 2012, <http://articles.latimes.com/2012/jun/20/business/la-fi-mo-hebrew-national-con-agra-20120620>.

Together, New Formalism and Establishment Clause Creep form the Scylla and Charybdis of co-religionist commerce. On the one hand, New Formalism requires parties to use explicit language, but on the other hand, Establishment Clause Creep causes courts to withdraw whenever a dispute implicates, even tangentially, an ecclesiastic issue. Co-religionists are unable to characterize their dispute in either implied or explicit terms.

The combination of these two doctrinal trends has denied co-religionists the institutional support that is available to other merchants.²⁷ The most significant result has been that co-religionists have had great difficulty drafting contracts that both accurately capture their commercial intent and contain language that is ultimately enforceable in court. But the doctrinal combination also exposes co-religionists to tortious economic harm because economic torts between co-religionists—including antitrust disputes—also involve a commingling of neutral principles with religious context. By removing the efficiencies typically gained by having courts secure contract and property rights and protect parties from tortious harm, these doctrinal developments generate substantial economic costs. And by imposing a unique economic burden on religious conduct, these developments also do injury to religious liberties.

Indeed, these fundamental challenges to co-religionist commerce are even more concerning because co-religionist commerce is a growth industry.²⁸ Continued globalization of commercial relationships²⁹ and America's changing demographics³⁰ all but

This litigation is far from the first time that kosher standards have served as the foundation for a legal suit. *See, e.g.*, *Cohen v. Eisenberg*, 19 N.Y.S.2d 678, 679 (N.Y. Sup. Ct. 1940) (determining the plaintiff's poultry trade to have been kosher, and in turn, finding the defendant's public proclamation that the plaintiff's poultry trade was not kosher to have been defamatory), *aff'd*, 24 N.Y.S.2d 1004 (App. Div. 1940).

25. *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 203 (D. Conn. 2000); *Abdelhak v. Jewish Press*, 985 A.2d 197, 207–10 (N.J. Super. Ct. App. Div. 2009) (finding that inquiry into the nexus between a defamatory statement and damages would require impermissible investigation of religious doctrine).

26. *See infra* Part II.

27. *See infra* Part III.

28. *See supra* notes 2–3 and accompanying text.

29. Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 565 (2006) ("In addition to issues in interpretation of commercial agreements and practices, differences in custom, language, culture, and religion continue to fuel conflicts and disagreements between commercial players.").

30. Especially given the importance of Sharia-compliant finance to the global commercial markets, *see Anderson, supra* note 5, at 237, it is worth noting that some projections predict that

guarantee that co-religionist commerce will continue to represent a growing share of the nation's economy. Moreover, these commercial trends are expanding at exactly the moment when tensions between religious exercise and commercial objectives stand at the center of some of the most foundational church–state debates in the United States. For example, the Supreme Court's 2012 decision in *Hosanna-Tabor v. Equal Employment Opportunity Commission*³¹ ruled that the First Amendment shields religious institutions from liability under certain antidiscrimination laws.³² That same year, the Supreme Court of New Mexico imposed liability under the state's public-accommodations law on a photographer who, citing her religious commitments, refused to provide her professional photography services at a same-sex marriage.³³ Perhaps most significantly, on the final day of the 2014–15 term, the Supreme Court held in *Burwell v. Hobby Lobby*³⁴ that the federal Religious Freedom Restoration Act affords protection to closely held for-profit corporations.³⁵ Consequently, certain religiously motivated corporations need not comply with the Affordable Care Act's "contraception mandate"³⁶

the Muslim population in the United States will more than double in the next two decades. *See The Future of the Global Muslim Population*, PEW F. ON RELIGION & PUB. LIFE (Jan. 2011), available at http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Muslim/FutureGlobalMuslimPopulation-WebPDF-Feb10.pdf.

31. *Hosanna-Tabor v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012).

32. *See id.* at 705 (noting uniform acceptance of the ministerial exception by federal courts of appeals).

33. *See* Robert K. Vischer, *Conscience and the Common Good*, 49 J. CATH. LEG. STUD. 293, 305 (2010) (quoting Chai Feldblum, a member of the EEOC, as saying, "If you run a wedding photography service, even if you don't like the fact that those two ex-gays are getting married, you'd better have someone on your staff who will take those pictures."); Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1405 (2012) (critiquing the view "that the owners of Elane Photography can honor their consciences by keeping their moral beliefs out of the marketplace" because it "ignores the external orientation of conscience"); *see generally* ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2010) (discussing the facts of the case generally and observing that "both sides in the Elane Photography case [could] wrap themselves in the mantle of conscience," notwithstanding the outcome); Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1426 (2012) (noting that "[n]umerous business owners in California and elsewhere (including medical providers, websites, event venues, photographers, landlords, and civil servants) have refused to provide services to gay couples on the basis of moral objections to homosexuality," and collecting relevant cases).

34. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

35. *Id.* at 2772–73.

36. *See* 45 C.F.R. § 147.130 (2015) (requiring employers that provide health insurance to include coverage for contraception and other related preventative care).

when doing so would violate the religious conscience of those who own the corporation.³⁷

All of these cases involve parties that both engage in commercial conduct and profess religious commitments, and they highlight how the unique statutory and constitutional treatment of religion can inadvertently undermine the security of voluntary commercial relationships. Therefore, viewing these cases in relation to co-religionist commerce both reveals how impactful these cases can be on significant areas of commerce and suggests how critical it is for the law to be able to distinguish between the blurred categories of commerce and religion.

This Article argues that courts should recognize the unique challenges of co-religionist commerce and should appreciate how the dual effects of New Formalism and Establishment Clause Creep contravene parties' intents and undermine growing commercial markets. Part I focuses on the root of the legal conundrum by examining the "translation problem" and how it poses a unique challenge to the neutral-principles framework. Parts II and III then identify the emerging trends of New Formalism and Establishment Clause Creep and explain how they constitute a dual threat to co-religionist commerce. Part IV then outlines a path for limited contextualism that can support co-religionist commerce while making better use of the neutral-principles doctrine and enabling parties to engage in the commercial dealings they desire.

I. THE TRANSLATION PROBLEM

The neutral-principles framework was born out of the Supreme Court's attempt to successfully navigate a complex balancing act.³⁸ The Court hoped to preserve the judiciary's obligation to resolve disputes between co-religionists without impermissibly resolving religious questions.³⁹ To navigate this delicate balance, the Court

37. *Hobby Lobby*, 134 S. Ct. at 2772–73.

38. For some recent analysis of the neutral-principles framework, see Idleman, *supra* note 9, at 259; Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 607–11 (2000); Calvin Massey, *Church Schisms, Church Property, and Civil Authority*, 84 ST. JOHN'S L. REV. 23, 50 (2010); Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 VA. L. REV. 443, 447, 450 (2010).

39. *Jones v. Wolf*, 443 U.S. 595, 603 (1979) ("The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity.").

encouraged participants in co-religionist commercial markets to translate their agreements, replacing religious terminology with secular analogs. The Court emphasized, in the context of church-property disputes, that “[s]tates, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”⁴⁰ And more generally, the Court assured parties that their co-religionist commercial dealings would be supported and enforced so long as the questions presented would “rel[y] exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges.”⁴¹

Thus, the Supreme Court committed itself to neutral principles of law presuming that parties can and would structure their legal dealings in secular language to avoid Establishment Clause problems.⁴² In this way, the neutral-principles framework leveraged what the Supreme Court called “the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties.”⁴³ It relied on the dynamism of private law—and particularly of drafting contracts—that empowers parties to adjust to legal parameters and craft their dealings within the shadow of the law.⁴⁴ This presumption—that

Scholars continue to debate the precise Establishment Clause worry implicated when courts resolve religious questions. *See* Esbeck, *supra* note 10, at 5–6 (arguing that the Establishment Clause creates a structural restraint on courts, which divests them of jurisdiction to resolve religious questions); Garnett, *supra* note 10, at 862–63 (linking the prohibition against judicial resolution of religious questions to the autonomy of religious institutions); Koppelman, *supra* note 10, at 883 (arguing that judicial intervention in religious questions corrupts religion); Lupu & Tuttle, *supra* note 10, at 122–23 (arguing that courts are adjudicatively disabled from resolving religious questions). *But see* Helfand, *supra* note 9, at 520 (arguing that the religious question doctrine stems from a misunderstanding of Establishment Clause principles).

40. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

41. *Wolf*, 443 U.S. at 603.

42. *Id.* (“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.”).

43. *Id.*

44. *See* Melvin Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1762 (2000) (discussing how contract-law principles have responded to the multifaceted and “moving stream of events that precedes, follows, or constitutes the formation of a contract”); Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for A Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 531 (2005) (commenting on how contract-law objectives demand consideration of the evolving business and social norms and needs that underlie the formation of contracts shaped by regional, cultural, and linguistic assumptions between parties).

parties can deftly respond to doctrinal constraints⁴⁵—stands at the very epicenter of the Supreme Court’s neutral-principles project⁴⁶ and sustains the belief that courts can remain true to First Amendment values without abdicating their foundational dispute-resolution responsibilities.⁴⁷

45. 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).

46. See, e.g., *Wolf*, 443 U.S. 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.”); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”).

47. See Perry Dane, “*Omalous*” *Autonomy*, 2004 B.Y.U. L. REV. 1715, 1743 (noting that the neutral-principles approach is contingent on “whether private ordering through instruments such as deeds and trusts can in particular instances effectively translate religious principles into enforceable secular norms”); Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 357 (1986) (“[The neutral-principles approach] assumes that the church has translated into familiar secular terminology its organizational characteristics, no matter how secular or alien they may be.”).

To be sure, scholars have vigorously debated the utility of the neutral-principles approach ever since the Court announced its decision in *Jones v. Wolf*, 443 U.S. 595 (1979). For some, the notion that courts would now be given free entry into the life of religious institutions—free to regulate so long as they could avoid engaging religious doctrine or practice—undermined the core commitment to religious institutional freedom expressed in many of the Supreme Court’s prior decisions. See Dane, *supra* note 23, at 969 (“The problem with [the neutral-principles approach] . . . is that it too denies the collective, self-defining character of true legal orders. It treats religious autonomy as a negative freedom—the right not to have secular courts decide religious orthodoxy. But it ignores the positive side of autonomy, the right to define, and to enforce, legal rubrics and rights apart from those provided by the secular state.”).

Meanwhile, others worried that there would be something lost in the translation of religious commitments into secular terminology, raising the possibility that courts might misinterpret the nature of the intended legal obligations between the parties. See, e.g., Ellman, *supra* note 11, at 1409–10 (arguing that the neutral-principles approach limits judicial inquiry in ways that undermine a court’s ability to reach a justifiable outcome); Greenawalt, *supra* note 15, at 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”).

Many religious objectives cannot be captured in alternative secular terminology, however, and thus many co-religionist commercial instruments resist translation.⁴⁸ One reason for this “translation problem” is that parties enter co-religionist commercial arrangements to purchase *religious* goods or secure *religious* performance, but these religious goods and services are often not susceptible to description in secular terminology. Frequent examples include the contractual obligations of a minister,⁴⁹ or the religious standards for supervising kosher products.⁵⁰ In drafting such agreements, parties aim to create commercial or financial arrangements that will comport with shared religious rules and values. Reference to specific religious terms is essential to the agreement. To use the above examples, a party seeking to ensure that he is purchasing kosher food cannot translate that requirement into secular terminology,⁵¹ and a congregation that retains the contractual right to terminate a minister for “cause” cannot incorporate secular terminology that captures the religious standards of conduct expected within the given religious community.⁵² Such contractual expectations are not just too multifarious to be contractually memorialized, but they incorporate by reference religious rules and values that are inherently religious and therefore lack secular analogs.⁵³

48. See Greenawalt, *supra* note 15, 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).

49. 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’”).

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

51. See cases cited *supra* note 49.

52. See *Wallace v. Conagra Foods, Inc.*, 920 F. Supp. 2d 995, 999–1000 (D. Minn. 2013) (dismissing a lawsuit claiming the defendant falsely advertised its food was “100% kosher” because resolving the dispute would violate First Amendment principles), *rev’d on other grounds*, *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1033 (8th Cir. 2014); see also cases cited *supra* note 50.

53. See *Sirico*, *supra* note 47, at 357 (criticizing the neutral-principles approach “because it assumes that selectively culled provisions accurately reflect the expectations of the parties [and] . . . thus permits dispute resolution only by positing an artificial formalism on the church’s part”).

A second reason parties to co-religionist commercial agreements lack the ability to modify their agreements is that their religious traditions and doctrines place formal restrictions on the structure and terms of the relevant documents.⁵⁴ Examples of this dynamic arise regularly in the family-law context, particularly in cases of marriage and divorce. Within Jewish⁵⁵ and Islamic⁵⁶ communities, traditional

One way to address this issue might be to increase the use of religious arbitration. Once a co-religionist commercial dispute is submitted to a religious-arbitration tribunal, the arbitrators could resolve the dispute by exploring religious questions, given that there is no constitutional prohibition against arbitrators investigating such religious questions. *See* Helfand, *supra* note 9, at 506–09 (describing the gap-filling role of religious arbitration). Although religious arbitration mitigates this translation problem somewhat because the arbitrators can interpret and enforce religious terminology, it is an insufficient mechanism to solve the problem for a number of reasons. First, not all religious communities have access to religious-arbitration tribunals capable of addressing complex claims of co-religionist commerce. *See, e.g.*, Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1249–52 (2011) (discussing the lag in the development of Islamic arbitration tribunals in the United States). Second, and relatedly, even when a religious community maintains religious tribunals, not all members of the religious community will have access to religious tribunals that align with their own denominational and theological affiliations. And third, courts sometimes refuse to enforce arbitration provisions that attempt to authorize religious tribunals to resolve a dispute precisely because they use religious terminology to ensure that the forum selected and law chosen will track the intentions of the parties. *See, e.g.*, *Sieger v. Sieger*, 747 N.Y.S.2d 102, 104 (App. Div. 2002) (refusing on First Amendment grounds to enforce a purported arbitration provision that required a dispute to be resolved “in accordance with the ‘regulations of Speyer, Worms, and Mainz’”); *In re Ismailoff*, 14 Misc. 3d 1229(A) (N.Y. Sur. Ct. Feb. 1, 2007) (refusing to enforce an arbitration provision that required the selection of “three persons of the Orthodox Jewish faith”).

54. *See infra* Part II.B.

55. *See, e.g.*, *Victor v. Victor*, 866 P.2d 899, 902 (Ariz. Ct. App. 1993); *In re Scholl*, 621 A.2d 808, 811 (Del. Fam. Ct. 1992); *Aflalo v. Aflalo*, 685 A.2d 523, 524 (N.J. Super. Ct. Ch. Div. 1996); *Mayer-Kolker v. Kolker*, 819 A.2d 17, 18 (N.J. Super. Ct. App. Div. 2003); *Minkin v. Minkin*, 434 A.2d 665, 668 (N.J. Super. Ct. Ch. Div. 1981); *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. 103 (2009) (discussing the nature and enforceability of Jewish bill-of-divorce contracts).

56. *Odatalla v. Odatalla*, 810 A.2d 93, 95 (N.J. Super. Ct. Ch. Div. 2002); *see also* *Soleimani v. Soleimani*, No. 11CV4668 (Dist. Ct. Kan. Aug. 28, 2012), *available at* <http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf> (discussing Establishment Clause concerns preventing the interpretation of a mahr agreement); *Aleem v. Aleem*, 947 A.2d 489, 490–91 (Md. 2008); *Chaudry v. Chaudry*, 388 A.2d 1000, 1002 (N.J. Sup. Ct. App. Div. 1978); *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at *5–6 (Ohio Ct. App. July 10, 2008); *Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116, at *3 (Ohio Ct. App. Nov. 30, 2001).

This apparent increase in mahr cases has also spawned a number of recent articles. *See, e.g.*, 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, 580 (2010) [hereinafter Oman, *Bargaining*]; Nathan B. Oman, *How to Judge Shari’a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 290 (2011) [hereinafter Oman, *How to Judge*]; Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts:*

marriage ceremonies require the couple not only to execute religious documents that have important symbolic and religious value, but also to include provisions in those documents that assign financial obligations between the couple.⁵⁷ Some couples may, of course, fully understand and embrace both the symbolic and financial aspects of these agreements; others may sign them simply to conform to longstanding family traditions.⁵⁸ But the limitations placed by religious doctrine on the form and substance of these documents prevent the parties from ensuring that the terms of their co-religionist commercial agreements reflect the precise intentions of the parties.

The inherent obstacles to translating religious obligations into secular terminology have long served as a fundamental critique to the Supreme Court's neutral-principles approach.⁵⁹ The doctrine presumes that religious parties can incorporate purely ecclesiastical customs, words, and documents into neutral language. Put another way, it presumes that parties can use secular language to represent religious intents that are beyond what is apparent to the objective observer. Thus, the neutral-principles approach presents a classic challenge in legal interpretation, pitting objective methods against subjective intents.

This inherent disconnect between the parties' subjective intentions and the need to use secular language causes predictable problems. Factfinders, for example, are likely to make interpretation errors, either perceiving an instrument that represents symbolic and ecclesiastical value to be purely commercial, or interpreting intentionally commercial terms to have unintended ecclesiastical meaning. As a result, these translation challenges are more than mere inconveniences, as they strike at core features of interpretation. They pose a direct challenge to the motivation underlying the neutral-principles approach, which the Supreme Court designed so that courts

Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women, 76 S. CAL. L. REV. 189, 191 (2002); Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 611 (2006).

57. See Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 540 (2004); see generally MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel Nichols ed., 2012) (discussing the intersection of religion and civil society in marriage).

58. See, e.g., *In re the Marriage of Obaidi*, 226 P.3d 787, 791 (Wash. Ct. App. 2010).

59. See *supra* notes 47–48.

can interpret and enforce co-religionist commercial agreements to “reflect the intentions of the parties.”⁶⁰

One way to avoid the translation problem is to take the Supreme Court at its word and, irrespective of interpretive canons, place a greater primacy on determining the “intentions of the parties.”⁶¹ Instead of interpreting co-religionist commercial agreements textually, courts can take a contextual approach and place a greater primacy on divining parties’ intents. This would involve adopting permissive rules on parol and extrinsic evidence, emphasizing course of dealing and customary norms, and seeking subjective intents rather than objective manifestations. Thus, instead of trying to determine—as an objective matter—what the word “kosher” means in a consumer contract or how to define “cause” in an employment agreement with a house of worship, courts could interpret such terms by trying to determine what the parties intended for the provisions to mean or how those words are understood in a particular commercial industry. Similarly, when faced with traditional religious agreements—such as religious marriage contracts—in which religious doctrine prevents parties from tinkering with the customary terms, courts could interpret the agreement with reference to the subjective intent of the parties and other contextual considerations. Doing so would align contract enforcement with the intentions of the parties, thereby fulfilling the overall purpose of the neutral-principles approach to co-religionist commerce, while still avoiding any need to delve into ecclesiastical matters.⁶² Unfortunately, two doctrinal trends—one in commercial law, the other in constitutional law—are making contextual interpretation increasingly difficult. Developments in commercial law encourage courts to limit the use of contextual and parol evidence, thereby reducing parties’ ability to explain the intents behind secular language. Yet developments in Establishment Clause cases have expanded what courts consider to be ecclesiastical, and thereby have reduced parties’ ability to codify their intentions in writing. The combination limits *ex ante* what co-religionists can write into an agreement, and *ex post* how co-religionists can actualize their intentions.

60. *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

61. *Id.*

62. *See infra* Part IV.

II. NEW FORMALISM

One appropriate judicial response to the challenges of interpreting co-religionist commercial instruments would be to focus not on the content of religious doctrine, but on the intentions of the parties.⁶³ As long as courts avoid defining religious terms or interpreting religious doctrine, they can circumvent Establishment Clause prohibitions.⁶⁴ In turn, by marshaling the variety of contract doctrines that focus not on religious doctrine, but on the contracting context, courts can leverage doctrinal tools that avoid the pitfalls of the Establishment Clause while still interpreting and enforcing co-religionist commercial instruments that incorporate religious terminology.⁶⁵

The growing influence of New Formalism—which now enjoys strong scholarly and judicial support⁶⁶—has limited courts’ use of these doctrines for permissive interpretation. New Formalism has been described as “anti-antiformalism,” since it is a reaction to, and is intended as a correction to, the realist jurisprudence that wrested contract law from the formalism that defined it under Williston and other early twentieth-century jurists.⁶⁷ Realists, led by Karl Llewellyn, deigned to shape contract law in the mid-to-late twentieth century to incorporate the nascent rules embedded in the customs and practices of commercial parties.⁶⁸ The court’s job was to “look for the law in life” and then incorporate an “immanent law” into contractual

63. Cf. Ellman, *supra* note 11, at 1416 (“What the courts needed to decide in the synagogue cases was not the essence of Judaism, an unconstitutional if not impossible task, but rather the essence of the grantor’s intent. The courts ought to have determined whether the language of the trust instrument by which the grantor conditioned his gift should have been construed, under normal rules of interpretation, to bar mixed seating.”).

64. For sources discussing these Establishment Clause prohibitions, see *supra* note 9.

65. *Jones*, 443 U.S. at 603–04.

66. For a theoretical defense and empirical support for the rise of New Formalism, see generally Robert Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000).

67. See Charny, *supra* note 19, at 842–43; Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, 12 IUS GENTIUM 115, 116 (2006); Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 379–80 (2004).

68. See, e.g., Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 626 (1975); Scott, *supra* note 66, at 871–72; Charny, *supra* note 19, at 842–43; see also Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1151–60 (1985) (“The rules incorporate actual business practices, however, only to the extent that such practice comported with Llewellyn’s view of sound and reasonable commercial conduct.”).

disputes.⁶⁹ Adjudicating under Llewellyn's realism—and the UCC that Llewellyn crafted—therefore required the costly tasks of understanding the contracting environment and discovering the immanent norms surrounding each case, such as the subjective intent of the parties, the parties' course of dealing, and the given industry's standards.⁷⁰

New Formalism, primarily motivated by reducing the costs of contracting, squarely aims at reintroducing formalism into contract law. But unlike the formalism of the early twentieth century, in which traditional legal definitions and logic dictated contract law,⁷¹ New Formalism is motivated by a desire to convey predictable outcomes to contracting parties should a dispute spill over into court.⁷² New

69. See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 122 (1960); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); Danzig, *supra* note 68, at 635.

70. See James W. Bowers, *Incomplete Law*, 62 LA. L. REV. 1229, 1273 (2002); Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 504–05 (1987).

71. See C. C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* 4–5 (Little, Brown, & Co. 1880); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94, 106 (2000); Movsesian, *supra* note 67, at 121; see also Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605–10 (1908) (describing the early twentieth-century legal order as a "scientific legal system" threatening to become "a mechanical jurisprudence" of logical deductions from traditional rules).

Earlier classicists generally understood the legal order as a logical weaving of rules into a harmonious, rational, gapless whole—emphasizing a conceptual and abstract essentialism. See Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 405 (2004) (citing CHRISTOPHER C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (Little, Brown, & Co. 1871)) (characterizing late nineteenth to early twentieth-century formalism as trying to "systematiz[e] the great body of common law cases along a modest number of general principles").

72. See Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 497–98 (2003); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 644 (1999); see, e.g., Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicaastro*, 16 LEWIS & CLARK L. REV. 905, 907 (2012) ("This Article's thesis is that formalism can be justified . . . in functional terms such as enhancing predictability."); Posner, *supra* note 45, at 752–53 (noting that while literal contract enforcement can produce error, "at least this error would be predictable"); Schwartz, *supra* note 20, at 618 (arguing that firms prefer the state "to enforce the contracts they write," because they prefer adjudicators to be more accurate on average rather than perfect in every instance); Scott, *supra* note 66, at 859–60 (arguing that "[i]f correct interpretation is indeed an important value and if this requires interpretation that is transparent and predictable," then a formalist approach is better); Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 844–45 (2000) (observing the common suggestion that courts "should engage in a literalistic interpretation of verifiable terms to preserve the value of predictable interpretation and advance standardization").

Formalism therefore relies on bright-line rules over standards, textual interpretation over either contextual approaches or permissive rules on allowing extrinsic evidence to explain ambiguous language, and penalty rules on the definiteness requirement over encouraging courts to fill contractual gaps.⁷³ The logic of New Formalism is that predictable and inexpensive court interventions—even interventions that are unlikely to accurately implement what the parties originally intended—would be mutually preferred *ex ante* by contracting parties, especially parties likely to engage in multiple contractual relations.⁷⁴ If outcomes are easily foreseen, then costly litigation can be avoided. Meanwhile, drafting errors are simply corrected in subsequent contracts, and social norms and extralegal enforcement stabilize ongoing contracting relations without court intrusion.⁷⁵

On one level, New Formalism is well suited to cater to parties, like co-religionists, who engage in repeat transactions, have shared norms that are more familiar to the parties than to any adjudicating factfinder, and frequently use nonlegal norms to supplement legal penalties.⁷⁶ However, at its core, the central doctrines in New Formalism presume that parties can adapt their commercial agreements to account for problematic legal doctrines—a presumption that often does not hold true for co-religionist

73. See Charny, *supra* note 19, at 849 (noting that with gap-filling, “formalism has particular appeal because there is a readily available device” to resolve them: to infer consent to the gap “from the voluntary decision to enter into the transaction”); Schwartz, *supra* note 20, at 618–19 (arguing for the implementation of a New Formalist–type approach); cf. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1735–44 (2001) (exploring the extent to which private legal systems can supply New Formalist approaches over courts’ gap-filling procedures).

74. See Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What To Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323, 326 (2004) (“[T]he new formalists['] . . . approach suggests that while *ex ante* there is uncertainty about the future state of the world, . . . courts should be modest about intervening.”); Scott, *supra* note 66, at 851 (asserting that a formalist approach “require[s] the parties expressly to signal *ex ante* their preference for more aggressive modes of interpretation of the contract terms”).

75. See Bernstein, *supra* note 73, at 1741–42; Scott, *supra* note 66, at 848.

76. See Adam B. Badawi, *Interpretive Preferences and the Limits of the New Formalism*, 6 BERKELEY BUS. L.J. 1, 5–6 (2009) (“This model predicts that the less contextual rules endorsed by the New Formalists are likely to be preferred where transactions are frequent and certain”); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375, 429 (1990) (asserting that for rational parties who prefer nonlegal resolutions, formalism “would minimize drafting costs”); Helfand, *Religious Arbitration*, *supra* note 53, at 1243–51 (2011) (exploring the use of arbitration to resolve disputes within religious communities); Speidel, *supra* note 72, at 844.

commerce. Thus, because parties to co-religionist commercial agreements often cannot avoid the consequences of the Establishment Clause, a court's failure to employ antiformalist interpretive tactics—such as inquiring into the parties' shared subjective intent and relational history—withholds from the factfinder information that is essential to understand the dispute. These antiformalist interpretive methods are crucial to the viability of co-religionist commerce precisely because of certain Establishment Clause prohibitions against judicial resolution of religious questions. Thus, the Establishment Clause prohibits courts from using objective methods to interpret co-religionist commercial agreements, whereas New Formalism forecloses using subjective and contextual methods of interpretation as an alternative.

Below we consider two types of problems posed by New Formalism to co-religionist commerce: First, formalism can prevent courts from interpreting and enforcing contracts for religious goods and services. Second, courts sometimes misapprehend the contractual intent of the parties to traditional religious contracts. In both instances, parties to co-religionist commerce cannot translate their agreements into secular terminology. And New Formalism—in its refusal to use contextual evidence to surmise the parties' intents—distorts co-religionist commerce in deeply troublesome ways, preventing parties from crafting financial instruments that achieve both commercial and religious objectives.

A. *Religious Goods and Services*

The sale of religious goods and services stands as one of the paradigmatic forms of co-religionist commerce.⁷⁷ Producers of religious goods and services advertise, market, and sell to clientele specifically interested in the religious nature of these goods and services.⁷⁸ In so doing, these producers often employ religious

77. 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).

78. See, e.g., Mayo, *supra* note 3, at 620–22 (describing the market for “quasi-religious products and services” and noting the \$4.6 billion Christian-products industry). For some examples of companies marketing Christian goods and services, see Christian Retailing, CHRISTIAN RETAILING, <http://www.christianretailing.com> (last visited Jan. 2, 2015), and Faith Centered Resources, FAITH CENTERED RESOURCES, <http://www.faithcenteredresources.com> (last visited Jan. 2, 2015).

terminology to describe their goods and services to attract the interest and earn the trust of prospective purchasers. But the success of such co-religionist markets is predicated on the ability of courts to interpret, enforce, and otherwise hold participants accountable in these co-religionist markets when they employ religious terminology to market and sell religious goods and services. Because parties cannot always adequately describe the religious goods and services in secular terminology, courts often abstain from interpreting co-religionist agreements so as to avoid running afoul of the Establishment Clause. And a purely formalist approach to interpreting religious terminology prevents courts from using contextual evidence to uncover the parties' shared understandings.

For example, consider the recently dismissed class-action lawsuit against ConAgra, the parent corporation of the Hebrew National brand.⁷⁹ According to a complaint filed in 2012, ConAgra advertises and sells meat products under the Hebrew National label, describing them as "100% kosher" "as defined by the most stringent Jews who follow Orthodox Jewish law."⁸⁰ The plaintiffs contended, however, that contrary to these representations, Hebrew National meat products did not satisfy these kosher standards.⁸¹ As a result, purchasers of Hebrew National meat products allegedly overpaid for these products, mistakenly believing them to be "100% kosher."⁸² And having misrepresented the kosher quality of these meat products, the plaintiffs claimed that ConAgra should be held liable

79. *Wallace v. ConAgra Foods, Inc.*, 920 F. Supp. 2d 995, 1000 (D. Minn. 2013), *vacated and remanded*, 747 F.3d 1025 (8th Cir. 2014). The dismissal by the District Court of Minnesota was subsequently reversed on other grounds by the U.S. Court of Appeals for the Eighth Circuit. *Wallace*, 747 F.3d at 1033. According to the Court of Appeals, the plaintiffs failed to plead injury in an individualized or particular manner, thereby failing to demonstrate standing to bring the suit. *Id.* at 1028. The Court of Appeals thereby avoided addressing the Establishment Clause question at the heart of the case. Because the Court of Appeals concluded that the plaintiffs lacked standing, however, it remanded the case back to state court. *Id.* at 1032. And on remand, the District Court of Minnesota dismissed the action on First Amendment grounds, paralleling the same analysis employed by the federal district court. *See Wallace v. ConAgra Foods, Inc.*, 19HA-CV-12-3237, at 10–17 (Minn. Dist. Ct. Oct. 3, 2014), *available at* <http://failedmessiah.typepad.com/files/suit-against-hebrew-national-dismissed-10-6-2014.pdf>.

80. Class Action Complaint at 3, *Wallace*, 920 F. Supp. 2d 995 (D. Minn. June 6, 2012) (No. 0:12-cv-1354).

81. *Id.* at 17–21.

82. *Id.* at 64.

for damages for breach of contract, negligence, and violation of various consumer-protection laws.⁸³

The Hebrew National litigation was far from the first time questions over the meaning of “kosher” made their way into U.S. courts.⁸⁴ A number of states had attempted to incorporate definitions of kosher into consumer protection legislation, only to have such legislation struck down as violating the Establishment Clause.⁸⁵ The District Court of Minnesota similarly dismissed the Hebrew National lawsuit, concluding—as prior courts had when scrutinizing consumer-fraud legislation that regulated the labeling of kosher food—that “[t]he definition of the word ‘kosher’ is intrinsically religious in nature, and this Court may not entertain a lawsuit that will require it to evaluate the veracity of Defendant’s representations that its Hebrew National products meet any such religious standard.”⁸⁶

But, by conflating the Hebrew National lawsuit with litigation over kosher legislation, the court missed the fundamental difference between the two. Kosher legislation raised Establishment Clause concerns because it entailed *governmental* endorsement of a particular definition of the term “kosher.”⁸⁷ By contrast, the Hebrew National lawsuit avoided these Establishment Clause concerns because it involved private plaintiffs who simply alleged that the defendant had mislabeled its product.

This key difference presented the district court with an opportunity to allow the suit to go forward. For, instead of delving into the objective meaning of the word “kosher,” the court could have used contextual evidence to evaluate whether the parties had a shared understanding of what “kosher” meant. By shifting its focus from the objective meaning of “kosher” to the subjective understanding of the parties, the court therefore could have focused on the central and meaningful question of whether Hebrew National’s labeling was

83. *Id.* at 1–6.

84. *See* cases cited *supra* note 50.

85. *See* *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1340 n.5 (4th Cir. 1995) (listing twenty-one states that have adopted such laws). For a discussion of the constitutionality of these laws, see Kent Greenawalt, *Religious and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 785–810 (1998).

86. *Wallace*, 920 F. Supp. at 999.

87. The plaintiffs emphasized this point in their briefing. *See* Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss at 33–35, *Wallace*, 920 F. Supp. 2d 995 (D. Minn. Oct. 1, 2012) (No. 0:12-cv-1354).

misleading without running afoul of Establishment Clause prohibitions.

Indeed, Hebrew National had provided some of that context in its advertising by specifically referencing “Orthodox” standards of kosher.⁸⁸ Hebrew National’s advertising campaign may have intended those terms to convey a particular representation to potential consumers. Thus, interrogating the subjective intent of the parties might have yielded a shared interpretation of the term that could have been employed to evaluate whether or not the advertising constituted either false advertising or a breach of contract.

Moreover, the court might have used contextual evidence to evaluate Hebrew National’s “kosher” representations in light of various aids of interpretation. It could have considered the consistency of Hebrew National’s implementation of its kosher standards under the course-of-dealing rubric for contract interpretation⁸⁹—a point made by the plaintiffs in their brief on the motion to dismiss.⁹⁰ And, maybe most materially, the court might have considered the commercial standards for kosher certification, which had become relatively uniform as a result of various market pressures.⁹¹

The district court’s failure to approach the Hebrew National lawsuit through a contextual lens highlights how the case is not simply about judicial interpretation of the Establishment Clause, but is more fundamentally about judicial refusal to consider context when interpreting private agreements. Such an outcome is fairly typical of how New Formalism constrains a court’s ability to parse private agreements between parties. The court assumed that the only method for adjudicating the plaintiffs’ claims was to provide an objective interpretation of “kosher” based solely on the formal text of its commercial representations. But a contextual approach could have provided methods for interpreting the term “kosher” that did not

88. See Class Action Complaint, *supra* note 80, at *3.

89. TIMOTHY D. LYTTON, *KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD* 81–84 (2013) (describing why the kosher certification adopted by Hebrew National has become an industry outsider).

90. Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 16, *Wallace*, 920 F. Supp. 2d 995 (D. Minn. Oct. 1, 2012) (No. 0:12-cv-1354).

91. For the commercial reasons for uniformity of standards in the kosher-certification market, see LYTTON, *supra* note 89, at 132–34 (explaining how the interdependence of the kosher-certification market has led to the creation of increasingly uniform certification standards).

require becoming enmeshed in religious doctrine. A contextual approach could have provided an equally useful answer to a slightly different question: Did the parties have a shared understanding of the term kosher?

The Hebrew National lawsuit is essentially about the interpretive constraints of New Formalism. When contextual interpretive tools are taken off the table, however, courts face the false dilemma of dismissing co-religionist commercial claims or delving into the objective meaning of religious terminology. To be sure, the use of contextual evidence—such as subjective intent, course of dealing, course of performance, and trade usage—might have been insufficient to determine whether Hebrew National could be held liable for consumer-protection fraud or breach of contract. But a categorical embrace of New Formalism prevents courts from even exploring this opportunity.

The challenge posed by New Formalism to co-religionist commerce also arises when parties seek to incorporate adherence to religious rules or doctrine as part of their commercial exchange. In *Katz v. Singerman*,⁹² for example, the court considered whether to enjoin a synagogue from allowing mixed seating (that is, permitting men and women to sit together) on the grounds that it would violate conditions placed by the grantor who donated the building.⁹³ The grantor, Benjamin Rosenberg, had donated property to the Chevra Thilim Congregation on the condition that, among other things, the building would “only be used as a place of Jewish worship according to the strict ancient and orthodox forms and ceremonies.”⁹⁴ The congregation’s board of directors accepted the donation from Rosenberg on the specific condition that, among other things, the building would be used “for the worship of God according to the Orthodox Polish Jewish Ritual.”⁹⁵ When the congregation considered passing a resolution to permit mixed seating, the plaintiffs sought an injunction, arguing that such a practice would fail to qualify as “worship according to the strict ancient and orthodox forms” and

92. *Katz v. Singerman*, 127 So. 2d 515 (La. 1961).

93. *Id.* at 515.

94. *Id.* at 517.

95. *Id.* at 518.

“Orthodox Polish Jewish Ritual,” and thus would violate the conditions of the donation.⁹⁶

The Supreme Court of Louisiana, however, refused to enjoin the resolution, concluding that its conditions were insufficiently definite, clear, or specific.⁹⁷ In reaching this conclusion, the court’s focus was first and foremost formalistic, focusing its inquiry on the objective meaning and content of “Orthodox Judaism.” The court considered conflicting expert testimony over whether Orthodox Judaism permitted mixed seating at services,⁹⁸ and on this record, it concluded that the formal meaning of the conditions provided insufficient guidance to permit judicial enforcement of the terms.⁹⁹

To be sure, the court in *Katz* did—at least for a moment—consider mining antiformalist resources to interpret the term “Orthodox Judaism” by considering what the grantor himself actually *meant* when employing the phrase “Orthodox Judaism.”¹⁰⁰ But instead of engaging in a contextualist inquiry—and considering actual evidence regarding the grantor’s intent—the court folded the inquiry into its larger formalist picture, concluding that “[i]t is reasonable to *presume* that when Benjamin Rosenberg made the donation in question he was aware of the fact that the ancient Jewish religion had in the past undergone certain changes, modifications or evolutions in its ritual, forms, and ceremonies.”¹⁰¹ On this basis, the court inferred “that he must have contemplated that such changes would inevitably occur in the future”¹⁰² and opted against gathering more evidence to interpret what was meant by “Orthodox Judaism.”¹⁰³

96. *Id.* at 525–26. Many congregations have found themselves in divisive debates over seating arrangements, including several that resulted in litigation. *See, e.g.,* *Davis v. Scher*, 97 N.W.2d 137 (Mich. 1959) (adjudicating a dispute over mixed-gender seating in a synagogue).

97. *Katz*, 127 So. 2d at 533.

98. *Id.* at 527–32.

99. *Id.*

100. *Id.* at 532–33. For a similar critique of *Katz*, focusing more directly on the Establishment Clause concerns than on the larger issues of contract interpretation, see Ellman, *supra* note 11, at 1416 (“What the courts needed to decide in the synagogue cases was not the essence of Judaism, an unconstitutional if not impossible task, but rather the essence of the grantor’s intent. The courts ought to have determined whether the language of the trust instrument by which the grantor conditioned his gift should have been construed, under normal rules of interpretation, to bar mixed seating.”).

101. *Katz*, 127 So. 2d at 532–33 (emphasis added).

102. *Id.* at 533. It is worth emphasizing that a true antiformalist approach does not construct subjective intent by simply relying on theological propositions. For example, in *Wolf v. Rose Hill Cemetery Ass’n*, 832 P.2d 1007 (Colo. App. 1991), a Colorado appellate court reversed a trial-court decision that had denied a woman’s petition to disinter her father’s and sister’s

Cases like *Wallace* and *Katz* significantly endanger co-religionist commerce because they so severely limit the flexibility of important ecclesiastical terms.¹⁰⁴ Because co-religionist transactions routinely employ ecclesiastical references to specify their relations, the translation problem already limits their ability to use alternative terms. New Formalism further constrains parties' ability to elaborate or explain, ex post, through parol or contextual evidence, what they mean when they use particular ecclesiastical terms. Unsurprisingly, courts interpreting religious terminology (to the degree the Establishment Clause permits) see far less nuance, depth, and variation in those terms than do the parties who chose them. This is particularly true for terms that apply to a variety of uncertain circumstances over an extended period of time.¹⁰⁵ Consequently, a formalist approach that prohibits parties from explaining themselves

remains because the trial court had improperly concluded that doing so would contravene Orthodox Jewish law. *Id.* at 1008. Although the trial court appears to have considered interpretations of Jewish law as an indication of what the father "would have intended," the tenuous link between Jewish law and the actual intent of the father exposes the trial court's analysis as insufficiently attentive to contextualism, disguising a brand of formalism in antiformalist terminology. *See generally id.* (noting that "[u]ncontroverted testimony indicated that the father worked and drove a car on the Sabbath, dined at non-kosher restaurants, and only went to synagogue on high holidays which would indicate that he was not an Orthodox Jew").

103. In critiquing Ellman, *supra* note 11, Professor Kent Greenawalt has argued that too strong an emphasis on subjective intent might lead a court to improperly use theological propositions as a proxy for parties' intent. *See* Greenawalt, *supra* note 15, at 1892. There are good reasons to share Greenawalt's concerns. Indeed, such concerns would seem to counsel caution in using antiformalist techniques—such as trade usage or evidence of subjective intent—when interpreting co-religionist commercial instruments. These concerns should not, however, lead us to abandon antiformalism in the co-religionist context, especially given the significant problems with pursuing a purely formalist approach.

104. Notably, these problems persist in currently active litigation. *See, e.g.*, Plaintiff Shearith Israel's Memorandum in Opposition to Defendant's Motion to Dismiss or Transfer at 4, *Congregation Shearith Isr. v. Congregation Jeshuat Isr.*, 983 F. Supp. 2d 420 (S.D.N.Y. 2014) (No. 12-cv-8406) (arguing for ownership of religious property based on a proviso claiming that religious services at the synagogue housing the property be conducted "according to the Ritual, Rites and Customs of the ORTHODOX SPANISH AND PORTUGUESE JEWS, as at this time practiced and observed in the Synagogue of the CONGREGATION SHEARITH ISRAEL in the City of New York").

105. Another prominent example of this dynamic—in which parties used religious choice-of-law provisions—is *Sieger v. Sieger*, 747 N.Y.S.2d 102 (App. Div. 2002). In *Sieger*, the contract between the parties provided that any disputes arising out of their agreement would be settled "in accordance with the regulations of Speyer, Worms, and Mainz." *Id.* at 104. But instead of using contextual evidence to interpret the provisions, the court refused to enforce them, concluding that doing so "would place [the court] in the inappropriate role of deciding whether religious law has been violated." *Id.* at 105 (quoting *Lightman v. Flaum*, 761 N.E.2d 1027, 1033 (N.Y. 2001)).

too often leads to a misunderstanding or undermining of the parties' intents. In these instances, formalist legal reasoning not only impedes co-religionists from seeking to engage in rudimentary and mutually beneficial commercial exchange, but it even undermines the very objectives of New Formalism. Rather than enabling parties to write clear, readily enforceable contracts, New Formalism can invalidate many effective, efficient contractual references that co-religionists are likely to use. Courts' commitment to formalism leaves the parties with little leeway in enacting their contractual intents.

B. Traditional Religious Agreements

As noted above, New Formalism excludes considerations of context and intent in deciding questions of contract formation and interpretation¹⁰⁶ and instead looks to outward manifestations of contractual formation and meaning.¹⁰⁷ One problem with applying this approach to co-religionist relationships is that it sometimes presumes contractual intent when no such intent exists. Indeed, co-religionists often participate in ceremonial events highlighted by religious documents that are intended to reflect religious symbolism rather than contractual obligations.¹⁰⁸ Such distinctions are typically obvious to the participants who share religious affiliations—and who therefore understand the shared customs of the given religious community—but formalism's discounting of context ignores such shared understandings, leading courts to enforce ceremony as

106. See Bowers, *supra* note 70, at 1273; Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (with Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 15–16 (2001); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 101 (2009). *But see* Jonathan Yovel, *Relational Formalism and the Construction of Financial Instruments*, 48 AM. BUS. L.J. 371, 372 (2011).

107. See Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 789–92 (1999) (critiquing erosion doctrines that are vital to contextual interpretation, such as waiver and course of performance); Charny, *supra* note 19, at 854–55 (lamenting antiformalists' willingness to consider “general norms of fairness . . . ; bans on certain types of intentional advantage-taking; or . . . considerations of need” when interpreting a contract); Schwartz & Scott, *supra* note 20, at 618 (proposing an economic model that discourages the use of extrinsic evidence in the interpretation of contracts between firms); William C. Whitford, *Relational Contracts and the New Formalism*, 2004 WIS. L. REV. 631, 643 (2004) (describing New Formalism as rekindling the neoclassical touchstones of “plain meaning, . . . a strict parol evidence rule, and . . . the indefiniteness doctrine”).

108. Of course, the fact that such documents no longer reflect contractual intentions is not to say that they cease to have importance within the given religious community. Indeed, attempts to modify the form of such documents will likely be met with fierce resistance.

contract. Moreover, the traditions surrounding the use of such religious documents are often quite rigid, limiting the parties' ability to modify the substance of those documents or to tailor them to capture the parties' specific religious intent. As a result, a strict application of contractual formalism is unlikely to lead to the modification of the religious documents, and a textualist reading of those documents will likely generate misinterpretations of intent.

One illustration of this challenge routinely surfaces in disputes over Islamic mahr agreements,¹⁰⁹ which are contracts executed as part of the traditional Islamic marriage process.¹¹⁰ Such mahr agreements are given by the groom to the bride in exchange for the bride entering into the marriage contract,¹¹¹ and generally require the husband to

109. See, e.g., *Akileh v. Elchahal*, 666 So. 2d 246, 248–49 (Fla. Dist. Ct. App. 1996) (enforcing a mahr agreement because it met the requirements of secular contract law); *Soleimani v. Soleimani*, No. 11CV4668 (Kan. Dist. Ct. Aug. 28, 2012), available at <http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf> (discussing why Establishment Clause principles precluded the interpretation of a mahr agreement); *Odatalla v. Odatalla*, 810 A.2d 93, 96, 98 (N.J. Super. Ct. Ch. Div. 2002) (concluding that a mahr agreement was not invalid simply because it was entered into at the marriage ceremony); *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978); *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985) (enforcing a mahr agreement because it met the requirements of secular contract law); *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at *5–6 (Ohio Ct. App. 2008) (upholding the lower court's finding that a mahr provision of an Islamic marriage contract was void because the parties did not discuss the provision until the day of marriage, and because of the hurried negotiation conditions); *Ahmed v. Ahmed*, 261 S.W.3d 190, 195–96 (Tex. App. 2008) (using parol evidence to supplement a mahr agreement, but remanding the case for reconsideration as to whether the agreement complied with the statutory requirements for antenuptial agreements because the agreement was signed after the parties were civilly married); *In re Marriage of Obaidi*, 226 P.3d 787, 788, 791–92 (Wash. Ct. App. 2010) (holding that a mahr agreement was unenforceable for a variety of reasons, including because the terms of the agreement failed to sufficiently describe the husband's financial obligation; the contract's negotiation was conducted in Farsi, which the husband did not speak; and the husband only learned that he would be signing a mahr agreement, an agreement with which he was not familiar, at the marriage ceremony); *Zawahiri v. Alwattar*, No. 07 DR-02-756 (Ohio Ct. of Common Pleas Oct. 10, 2007) (refusing to enforce a mahr agreement on Establishment Clause grounds).

110. Under Islamic law, a husband's mahr obligations exist in the absence of a contractual arrangement; they are a legal requirement of marriage itself. See Oman, *Bargaining*, *supra* note 56, at 590 (“Under the classical *fiqh*, a marriage contract is not valid without a *mahr*.”). Indeed, the amount that the husband must pay under the mahr obligation would be determined by a court in the absence of an agreement. See Chelsea A. Sizemore, *Enforcing Islamic Mahr Agreements: The American Judge's Interpretational Dilemma*, 18 GEO. MASON L. REV. 1085, 1087 (2011) (“If the marriage contract does not contain a specified *mahr*, the husband still must pay the wife a judicially determined sum, typically based on the *mahr* amount that women of equivalent social status receive.”).

111. See Shiva Falsafi, *Religion, Women, and the Holy Grail of Legal Pluralism*, 35 CARDOZO L. REV. 1881, 1914 (2014) (“The Qur'an defines the *mahr* as a gift to the bride for entering into the marriage contract.”); see also QUR'AN 4:4 (“And give the women (on marriage) their *mahr* as a (*nikah*) free gift”). It is worth noting that whereas the Qur'an

make two financial payments to his wife. The first of these payments is given to the wife immediately upon marriage; the second portion—the deferred mahr—is held in trust for the wife to be distributed in the event of divorce or the husband’s death.¹¹² Courts have struggled with, and scholars have debated,¹¹³ how to resolve disputes over mahr agreements, in large part because they stand at the nexus of three areas of law: statutory rules governing both pre- and postnuptial agreements; common-law contract doctrines, such as mutual assent, integration, and parol evidence; and constitutional law, most notably the Religion Clauses of the First Amendment.

On its face, the mahr agreement is a standard financial agreement that obligates the husband, in the event of divorce, to provide his wife a financial payment. However, because the mahr is a staple of a traditional Muslim wedding ceremony, its presentation and ceremonial signing reveal mixed motivations and multiple objectives.¹¹⁴ To illustrate, in *In re the Marriage of Obaidi* the court described the defense of one husband, Khalid Qayoum, in refusing to pay his ex-wife the payment required by their mahr:

The Nikkah [wedding] ceremony was conducted in Farsi, except when Mr. Aji-sab, who performed the ceremony, asked Mr. Qayoum if he wanted to marry Ms. Obaidi. Mr. Qayoum does not speak, read, or write Farsi. Mr. Qayoum has lived in the United States for all but two or three years of his life. He considers himself “American first.” He explained that he went through the Afghan marriage process because his mother was concerned that he would lose even the small amount of cultural knowledge he had about

describes the mahr as a “gift,” it is a “mandatory part of an Islamic marriage contract.” Falsafi, *supra*, at 1917; see also sources cited *supra* note 110.

112. Oman, *Bargaining*, *supra* note 56, at 588–93. To be sure, Islamic law entitles the wife to the mahr at the time of marriage, and the deferring of a portion of the mahr “is a matter of contractual forbearance on her part.” Oman, *How to Judge*, *supra* note 56, at 302.

The purpose of the mahr is to ensure that upon the dissolution of marriage, the wife has secured assets and is not left completely destitute in the event that the husband is no longer providing financial support. See, e.g., Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639, 644 (2007).

113. See, e.g., Blenkhorn, *supra* note 56; Richard Freeland, *The Islamic Institution of Mahr and American Law*, 4 GONZ. J. INT’L L. 2, 2–4 (2000); Oman, *How to Judge*, *supra* note 56; Oman, *Bargaining*, *supra* note 56; Trumbull, *supra* note 56; Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & RELIGION 67, 71–72 (2000).

114. Cf. Estin, *supra* note 57, at 575 (2004) (“Contemporary Islamic marital agreements often reflect new expectations and circumstances, and Muslim communities in the United States actively debate how to adapt [the mahr’s] traditions to the American legal environment.”).

Afghanistan. Mr. Qayoum testified that he had never heard the word “mahr” before the day of the Nikkah ceremony.¹¹⁵

Although the court in *Obaidi* allowed the contracting context to support a defense to the mahr’s enforcement, not all courts are willing to resist the general trend of New Formalism when enforcing mahr agreements. For example, in *Akileh v. Elchalal*,¹¹⁶ a Florida court enforced a mahr contract on formalist grounds, concluding that for the purposes of interpretation the “husband’s subjective intent at the time he entered into the agreement is not material in construing the contract.”¹¹⁷ And in *Aziz v. Aziz*,¹¹⁸ a New York court enforced a mahr agreement, emphasizing the agreement’s formal conformity with the relevant contract doctrines over the husband’s contention that the “mahr is a religious document and not enforceable as a contract.”¹¹⁹

To be sure, choosing to enforce such agreements might reflect the correct outcome because the parties may, in fact, have intended the mahr agreements to reflect actual contractual obligations. But courts will not know whether the contractual obligations they choose to enforce accurately reflect the parties’ intentions until they recognize the limitations of formalism as applied to traditional co-religionist agreements.

A similar issue often arises in the context of the ketubah, the written document featured in Jewish weddings.¹²⁰ On the one hand, the ketubah literally details a transaction, and marrying couples often treat it as a contractual instrument by adding language that accurately

115. *In re Marriage of Obaidi*, 226 P.3d 787, 789 (Wash. Ct. App. 2010).

116. *Akileh v. Elchalal*, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996).

117. *Id.* at 249.

118. *Aziz v. Aziz*, 488 N.Y.S.2d 123 (Sup. Ct. 1985).

119. *Id.* at 124. Other judicial decisions have been more ambiguous as to the relative balance they hope to strike between formalist and antiformalist approaches. In *Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002), for example, a New Jersey court enforced a mahr contract, outlining a purely formalistic standard against which such agreements should be judged. *Id.* at 98 (“[T]he Mahr Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults.”). The court reviewed the context of the agreement, detailing video evidence of the negotiation and the signing of the contract, but it provided limited justification for inferring contractual—as opposed to ceremonial—intent from the husband’s signing the agreement. *Id.* at 97.

120. See generally J. David Bleich, *Survey of Recent Halakhic Periodical Literature: The Ketubah*, 31:2 TRADITION 50, 53–55 (1997) (discussing the role of the ketubah in Jewish marriage ceremonies).

reflects an intent to be bound by a promise.¹²¹ Yet on the other hand, the ketubah's language is rarely read and understood by the marrying couple, and it is often brought into the modern wedding ceremony to pay homage to old traditions and imbue the wedding with religious symbolism, rather than to memorialize a specific, negotiated agreement.¹²² Relying on formalist logic, courts have interpreted the ketubah to subject the parties to a variety of contractual obligations—obligations neither party may ever have intended—including an obligation to submit to the authority of a rabbinical tribunal in order to execute a religious divorce.¹²³ Rarely have courts inquired whether the agreements manifest contractual intent or simply manifest customary symbolism.

The problems associated with confusing ceremony for contract are not limited to the marriage context; they can just as easily undermine arm's-length commercial arrangements. In *Colby v. Newman*,¹²⁴ for example, the court scrutinized the enforceability of a so-called “Sabbath Partnership Agreement.”¹²⁵ The original transaction between the parties included a purchase of assets and an employment agreement, whereby the defendants hired the individual plaintiffs.¹²⁶ However, the defendants also proposed to execute an agreement that would transfer ownership of the business to plaintiffs on the Jewish Sabbath and “Jewish Holidays.”¹²⁷ The purpose of this agreement was to allow the defendants to keep their businesses open

121. See Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract and the First Amendment*, 51 MD. L. REV. 312, 346–48 (1992) (describing the contractual provisions of the ketubah); Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 375–76 (1999) (describing the trend within Conservative Judaism to insert the “Lieberman Clause” into the ketubah).

122. See, e.g., Breitowitz, *supra* note 121, at 347; Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 GEO. L.J. 193, 216–17 (1984).

123. See, e.g., Scholl v. Scholl, 621 A.2d 808, 813 (Del. Fam. Ct. 1992); Minkin v. Minkin, 434 A.2d 665, 665–66 (N.J. Super. Ct. Ch. Div. 1981); Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983).

It is also worth noting that some courts have refused to enforce these provisions of the ketubah on First Amendment grounds. See, e.g., Aflalo v. Aflalo, 685 A.2d 523, 528–29 (N.J. Super. Ct. Ch. Div. 1996). Such cases may represent a significant irony; to avoid the consequences of potentially exaggerating the degree of contractual intent manifested by the ketubah, courts may have to exaggerate the scope of the Establishment Clause.

124. *Colby v. Newman*, 2:11-cv-7413 (C.D. Cal. filed June 11, 2013).

125. Order re: Motions for Summary Judgment; to Dismiss; and for Sanctions, *Colby v. Newman*, (C.D. Cal. filed June 11, 2013) (No. 2:11-cv-7413).

126. *Id.* at *2.

127. *Id.*

while avoiding Jewish law's prohibition against engaging in "work" on the Jewish Sabbath and Jewish holidays.¹²⁸ Under the Sabbath Partnership Agreement, the business would technically be owned by the defendants, whom the plaintiffs assumed were not Jewish.¹²⁹ Indeed, the parties alluded to the agreement's underlying purpose in the text of the document itself, which stated: "This deed fulfills all the requirements of Jewish Law set forth by the Jewish sages."¹³⁰ According to the terms of the Sabbath Partnership Agreement, the plaintiffs were entitled to one-seventh of the profits from the business¹³¹—profits that the plaintiffs pursued as part of their complaint against the defendants.¹³²

Sabbath Partnership Agreements are common in certain religious communities, and they are intended as a religiously sanctioned loophole that technically shifts ownership to non-Jews on the Jewish Sabbath and holidays.¹³³ Parties enter into these agreements to comply with the legal strictures of religious law and rarely intend to convey an economic interest via an enforceable commercial agreement. In *Colby*, for example, the plaintiffs, in the four years between the execution of the agreement and the filing of the lawsuit, never once sought to collect the profits provided for by the Sabbath Partnership Agreement.¹³⁴ Indeed, it was not clear whether, before the onset of litigation, the plaintiffs had engaged in any conduct typical of business partners, such as attending partnership meetings or making the type of business decisions typical of partners.¹³⁵

128. See *Colby v. Newman*, 2:11-cv-7413, Document 204, at *7 (C.D. Cal. filed Jan. 4, 2013).

129. As it turned out, the defendants were mistaken in this assumption: the plaintiffs were in fact Jewish—an error that led the plaintiffs to claim, albeit unsuccessfully, that the contract should be rescinded on the ground of mistake. See *id.* at *8.

130. *Colby v. Newman*, 2:11-cv-7413, Document 207-9, at *3 (C.D. Cal. filed Jan. 12, 2013) (Exhibit 7).

131. *Id.*

132. Second Amended Complaint, *Colby v. Newman*, (C.D. Cal. filed Dec. 29, 2011) (No. 2:11-cv-7413).

133. Cf. Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685, 1740 (1997) (noting that if Jewish law were to conceptualize shareholders as partners in a business, then the "partners" would be liable if the business were to operate on the Sabbath).

134. Defendant's Motion for Summary Judgment at 8, *Colby v. Newman*, 2:11-cv-7413, (filed Jan. 4, 2013). The defendants framed this argument in terms of laches as opposed to the failure of mutual assent.

135. *Id.*

The court, however, took a purely formal approach to the agreement and opted against considering any contextual evidence that could have elucidated the parties' shared understandings. The court explained that it would admit "evidence concerning the parties' intentions" only where there was an ambiguity in the text of the contract.¹³⁶ As a result, it refused to dismiss the plaintiffs' claim to profits pursuant to the Sabbath Partnership Agreement, leaving open the possibility of transferring millions of dollars to the plaintiffs. Conflating ceremony and contract, the court enforced a document that neither party had believed to be an enforceable agreement.

These unanticipated legal outcomes are more than just uncomfortable inconveniences. They reflect and contribute to deep confusion over both documents designed to codify co-religionist commercial dealings and documents that are expressly not intended to be anything more than ceremonial.¹³⁷ Moreover, the typical formalist responses to judicial errors—"leave the losses where they fall" and correct the judicial error either extralegally or by drafting contracts differently¹³⁸—are, to say the least, inappropriate. For the mahr or ketubah, expecting parties to adjust to formalist rules would force marrying couples to revise ancient traditions and transform a timeless ceremony to unnecessarily avoid judicially superimposed commercial consequences. And for some religious players in the commercial markets, adjusting to formalism would foreclose religiously sanctioned loopholes that have been developed carefully over generations to reconcile religious convictions with financial needs. However groundbreaking New Formalism has become in transforming our understanding and implementation of contract law, and in unleashing important transactional efficiencies, these cases reveal meaningful limits to the effectiveness of formalism. Surely the law can do better than persisting with formalist logic when rudimentary circumspection would produce better outcomes.

136. Order re: Motions for Summary Judgment; to Dismiss; and for Sanctions at *31, Colby v. Newman, 2:11-cv-7413 (C.D. Cal. 2013).

137. As we note below, there are some instances in which courts have done a far better job discerning the shared understanding of parties, thereby distinguishing true co-religionist commerce from mere religious ceremony. See *infra* Part III.B.

138. See ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 346 (3d ed. 2002); see also Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats A Unitary Default Rule for Interpretation*, 96 KY. L.J. 43, 69–70 (2008) ("If one applies a textualist approach that does not allow for implied terms or a broad approach to judicial interpretation, then courts will be unable to solve some critical problems for the parties, which failure will engender deadweight losses.").

III. ESTABLISHMENT CLAUSE CREEP

Formalist approaches to co-religionist commerce have led courts to myopic and misleading understandings of ecclesiastical terms and co-religionist instruments. The opposite has been true in constitutional law, where courts have suffered not from myopia, but from operating at too high a level of abstraction.

In advancing the neutral-principles framework, the Supreme Court enabled courts to resolve co-religionist commercial disputes while avoiding the religious question doctrine—that is, the constitutional prohibition against interpreting religious doctrine or practice.¹³⁹ This framework encourages co-religionist parties to remove religious references from instruments they intend to be legally enforceable and thus separate ecclesiastical from secular matters.¹⁴⁰ Following a trend we have termed Establishment Clause Creep, however, judicial decisions have slowly moved in the opposite direction. Instead of carefully distinguishing secular from ecclesiastical issues, courts often conflate the two. And instead of using the neutral-principles approach to avoid religious questions, courts view religious questions so broadly as to leave little room for applying the neutral-principles approach.¹⁴¹ Consequently, courts have refused to adjudicate a wider range of disputes than is constitutionally

139. See, e.g., Lupu & Tuttle, *supra* note 10, at 134–37 (arguing that *Jones v. Wolf* reaffirmed courts' prohibition on resolving religious questions).

140. See *id.*

141. Others have worried about excessive judicial expansion of the Establishment Clause to cases in which disputes do not implicate religious questions or religious doctrine. See, e.g., Muhammad Elsayed, Note & Comment, *Contracting Into Religious Law: Anti-Sharia Enactments and the Establishment and Free Exercise Clauses*, 20 GEO. MASON L. REV. 937, 969 (2013) (collecting cases and concluding that “[i]n applying the neutral principles of law doctrine, some courts have mechanically refused to adjudicate disputes involving religious agreements for fear of violating the Establishment Clause. This refusal to sift through complex cases to determine where secular matters end and religious doctrine begins can exact a heavy cost on religious individuals who may be left without legal recourse as a result of this hypersensitivity in dealing with religious disputes” (footnote omitted)); 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, 395 (2014) (collecting cases and concluding that “most [courts] read *Hosanna-Tabor* to bar all wrongful termination claims by ministers regardless of the substance of the employment contract”); see also Falsafi, *supra* note 111, at 1900–27 (collecting religious-divorce cases and highlighting the problematic application of the neutral-principles framework, including repeated overexpansion of the Establishment Clause to preclude adjudication of such cases); cf. Ashley Alderman, *Where’s the Wall?: Church Property Disputes Within the Civil Courts and the Need for Consistent Application of the Law*, 39 GA. L. REV. 1027, 1042–51 (2005) (collecting cases and highlighting systemic uncertainty and inconsistency in the judicial application of the neutral-principles framework).

necessary, even those in which rulings could easily avoid deciding questions of religious law and doctrine. When courts interpret these Establishment Clause prohibitions so broadly, they thwart the shared intent of the parties and undermine co-religionist commercial markets.

A. Contract and Context: Narrowing the Space for Neutral Principles

As noted above, courts have struggled to address the recent influx of cases contesting the enforceability of mahr contracts.¹⁴² For example, in *Soleimani v. Soleimani*,¹⁴³ a Kansas state court refused to enforce a mahr agreement.¹⁴⁴ After concluding that the document, which was written in Farsi, had no agreed-upon translation,¹⁴⁵ the court then determined that the document presented such unfamiliar questions that parol evidence would not “aid the court.”¹⁴⁶ The court thus deemed the mahr unenforceable.¹⁴⁷

But the Kansas court’s reluctance to enforce the agreement went far beyond any concern over enforcing an irreparably vague document. To the contrary, the court concluded that mahr agreements are inherently suspect because “they stem from jurisdictions that do not separate church and state, and may, in fact, embed discrimination through religious doctrine.”¹⁴⁸ The court thus worried that enforcing such agreements threatened equal-protection requirements because the process of divorce in Islamic law entails the “basic denial of due process” by granting the husband the power to unilaterally effectuate the divorce.¹⁴⁹ To enforce mahr agreements would “[p]erpetuat[e] such discrimination under the guise of judicial

142. See *supra* notes 109–19 and accompanying text.

143. *Soleimani v. Soleimani*, No. 11CV4668 (Kan. Dist. Ct. Aug. 28, 2012), available at <http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf>.

144. *Id.* at 33–34.

145. *Id.* at 12–13. The court also emphasized that the amount of the deferred mahr—\$677,000—was so large that it functioned as a penalty for divorce. *Id.* at 26. Therefore, enforcing the mahr would have violated public policy. *Id.* at 26–29.

146. *Id.* at 26.

147. This conclusion was itself somewhat surprising under standard common-law contract grounds. The court did note that the parties had agreed upon the existence of a contract and to the contract’s “critical terms.” *Id.* at 14. Thus, it is unclear why the court could not use parol evidence to supplement the agreement and fill in the necessary gaps created by the lack of an authenticated translation. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 216(1) (“Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.”).

148. *Soleimani*, No. 11CV4668 at 29.

149. *Id.* at 30.

sensitivity to Establishment Clause prohibitions,” and thereby “abdicate the judiciary’s overall constitutional role to protect such fundamental rights.”¹⁵⁰ The court also invoked Kansas’s recently enacted “anti-Sharia law”;¹⁵¹ like many of its counterparts in other jurisdictions,¹⁵² the anti-Sharia law renders contracts unenforceable when they incorporate rules from foreign or religious legal systems “that would not grant the parties the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions.”¹⁵³

The mahr, however, need not be viewed as an inherently religious or foreign instrument. The wife, in asking the court to enforce the agreement, described the mahr merely as a severable and independent financial agreement that should be interpreted and enforced using “neutral principles of law.”¹⁵⁴ The court, however, refused, ruling:

Even assuming this Court could interpret the contract, it would then be put in the dilemma of fashioning a remedy under a contract that clearly emanates from a legal code that may be antithetical to

150. *Id.* The court never quite explained how enforcing the mahr agreement in question would perpetuate the alleged discrimination. It is far from clear how preventing a wife from enforcing an agreement requiring her husband to pay a debt to her—in this case, a substantial debt of \$677,000—would further perpetuate an allegedly discriminatory system whereby the husband exercised too much authority.

151. *See, e.g.*, ASSOCIATED PRESS, *Anti-Shariah Bill Advances in Kansas*, BOS. GLOBE, May 12, 2012, <http://www.bostonglobe.com/news/nation/2012/05/11/anti-shariah-bill-advances-kansas/UXdUEob8p17YmgHKZabRCJ/story.html>.

152. *See* Omar Sacirbey, *Anti-Sharia Movement Gains Success*, HUFFINGTON POST (May 17, 2013, 12:19 AM), http://www.huffingtonpost.com/2013/05/17/anti-shariah-movement-gains-success_n_3290110.html (noting that six states have enacted various forms of the so-called anti-Sharia laws); *see also* *Bans on Court Use of Sharia/International Law: OK Approves New Ban; WA Approves Modified Version; AL Approves Sweeping Constitutional Amendment; MO Governor May Sign or Veto*, GAVEL TO GAVEL (May 23, 2013), <http://gaveltogavel.us/site/2013/05/23/bans-on-court-use-of-shariainternational-law-ok-approves-new-ban-wa-approves-modified-version-al-approves-sweeping-constitutional-amendment-mo-governor-may-sign-or-veto> (providing an overview of recent legislation regarding use of religious law).

153. House Substitute for Senate Bill No. 79, 2012 Kan. Sess. Laws, 1089, § 4. It is worth noting that the law requires that the contractual provision in question incorporate law that undermines fundamental liberties “as applied to the dispute at issue,” a qualification that was not only unaddressed by the court, but that would appear to undermine the court’s decision. *Id.* (emphasis added). Indeed, by the terms of the statute, in *Soleimani*, it should not have been enough to simply state that the mahr’s contractual provision connected to the same general legal system or religious community that elsewhere employed a process deemed “discriminatory,” just because the process of divorce was not “at issue.”

154. *Soleimani*, No. 11CV4668 at 34.

Kansas law. To suggest the mahr obligation is neutrally severable from its religious context is not apparent.¹⁵⁵

Leaving aside the extraordinary implications of the word “antithetical,” the court’s contention that commercial instruments are inseparable from their “religious context” crisply reflects how Establishment Clause Creep has expanded Establishment Clause jurisprudence to threaten the integrity and reliability of co-religionist commercial arrangements.¹⁵⁶ Moreover, in refusing to apply the Supreme Court’s neutral-principles doctrine—and actually aiming to discard the doctrine altogether, calling it “more hopeful than realistic”¹⁵⁷—the court suggested that recent interpretations of the Religion Clauses might remove any remaining legal protection upon which co-religionist commerce relies.¹⁵⁸ Although the court’s language is especially stark and uncompromising, it reveals the potential for a court to use the Establishment Clause to invalidate the most intimate arrangements, including one that intersects with family law and takes place within a distinct ethnically homogeneous context.

155. *Id.* at 31. Indeed, in the event there was any question as to the court’s view of mahr agreements, the court’s concluding discussion of the mahr answered with the following proclamation:

[T]he protection of Kansas law, applicable to the parties here, requires an equitable division of property in a secular system that is not controlled by the dictates of religious authorities or even a society dominated by men who place values on women in medieval terms.

Id. at 36. Of course, by refusing to enforce the mahr, the court prevented the wife from collecting \$677,000. Instead, the court allowed the husband to retain his premarital property because he had given his wife \$116,000 before their marriage. *Id.* The court also refused to require the husband to provide continuing spousal support. *Id.* at 39.

156. At one point in the decision, the court states that its primary worry is the way in which the mahr agreement degrades women by conceptualizing them as “chattel.” *Id.* at 33. It does so, explained the court, because the mahr is “almost always . . . ill-defined, leaving some Islamic courts to infer a mahr amount.” *Id.* And this valuation process, which uses criteria such as family, beauty and virginity, “suggests [that] women are, comparatively-speaking, chattel, not human beings. This entire valuation process is contrary to American jurisprudence . . .” *Id.* Of course, none of these worries were implicated in the case before the court because the mahr agreement specified the amount of the mahr, therefore obviating the need for a valuation process.

157. *Id.* at 34–35.

158. At one point, the court cites Nathan Oman’s article *How to Judge Shari’a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, *supra* note 56, at 314, as support for its claim that a mahr agreement could not be severed from its religious context, *Soleimani*, No. 11CV4668 at 31. Oman argues, however, that the relationship between the mahr and its context should lead to *enforcing* the mahr, but not as a premarital agreement. Oman, *How to Judge*, *supra* note 56, at 323–24. This ensures that the wife can collect the secured debt of the mahr from her husband without forgoing any other claims in the distribution of the marital property. *Id.*

This resistance to enforcing co-religionist commercial instruments—and its application in the context of Islamic contracts—is being noticed by more than soon-to-be-married couples. The financial press has reported that, in large part because of rulings on mahr agreements like *Soleimani*, the United States is not perceived to be hospitable to the growing market for Islamic finance.¹⁵⁹ In fact, Fitch Ratings recently observed that U.S. legal precedents serve as “[o]ne of the main limitations [preventing] effective enforcement” of Islamic bonds. Although the Islamic bond market is growing worldwide, Fitch Ratings warned that “[i]t remains uncertain whether certificate holders will be able to enforce their contractual rights in [U.S.] courts.”¹⁶⁰ These uncertainties are only exacerbated by the continued barrage of legislative initiatives in several states to pass anti-Sharia laws.¹⁶¹

These concerns are a material indicator of the economic harm—to say nothing of limitations on religious commitments—imposed by Establishment Clause Creep. Although there has been little litigation over Islamic bond instruments,¹⁶² the growing case law over mahr

159. Mushfiq Shams Billah, *Arab Money: Why Isn't the United States Getting Any?*, 32 U. PA. J. INT'L L. 1055, 1092–93 (2011) (identifying First Amendment doctrine as a perceived “barrier to Islamic finance in the United States”). In contrast, British regulators have taken steps to facilitate the growth of Islamic finance in the United Kingdom, exempting various Islamic financial instruments (*sukuk*) and similar bonds from certain domestic regulations. See Ben Meggeson, *Time for Britain to Sukuk and See*, SNL FINANCIAL (Feb. 1, 2013).

Islamic finance or Sharia-compliant finance generally refers to banking and investment activity that conforms with the requirements of Islamic law. Thus, for a fund to be Sharia-compliant, it

may not invest in assets that violate the basic tenets of Islamic finance, which proscribe: (1) *riba* (literally defined as “an increase” but commonly translated as “interest”); (2) transactions that are *gharar* (an excessive uncertainty or speculation); and (3) certain morally reprehensible industries according to Islam (such as those engaging in gambling or pork products).

Russell Powell & Arthur DeLong, *The Possible Advantages of Islamic Financial Jurisprudence: An Empirical Study of the Dow Jones Islamic Market Index*, 19 FORDHAM J. CORP. & FIN. L. 393, 397 (2014).

160. *Fitch: Sukuk 2013 Issuance Outlook Positive Following Solid 2012*, REUTERS, Jan. 14, 2013, available at <http://www.reuters.com/article/2013/01/14/idUSWLA005W820130114>.

161. For examples of other anti-Sharia laws, see *supra* note 152. To be sure, some have argued that Establishment Clause questions are more of a “sideshow” and that the primary obstacles to Sharia-compliant finance in the United States stem from tax and regulatory rules. E.g., Haider Ala Hamoudi, *The Impossible, Highly Desired Islamic Bank*, 5 WM. & MARY BUS. L. REV. 105, 147 (2014).

162. There has, however, been some litigation related to the constitutionality of governmental entanglement with Sharia-compliant financial instruments. See *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 745 (6th Cir. 2012) (alleging that the Department of Treasury violated the Establishment Clause by committing federal dollars to American International

agreements and other co-religionist commercial documents has been noticed by sophisticated commercial parties, further undermining the credibility of many co-religionist commercial instruments.

B. Confusing Religious Doctrine with Sociological Patterns: Avoiding Neutral Principles of Law

Worries of Establishment Clause Creep do not simply inhabit contract cases. Not surprisingly, as co-religionist commerce has continued to expand, similar issues have arisen in tort actions, in which courts make insufficient use of the neutral-principles approach. In these cases too, courts use an overbroad reading of Establishment Clause prohibitions to avoid adjudicating tort disputes between co-religionists.¹⁶³

One notable area in which common-law torts and the religious question doctrine have tussled is in claims of religious defamation. For example, plaintiffs frequently file defamation suits against religious leaders or co-religionists who have declared the plaintiffs as sinners or as violators of shared religious communal standards of behavior.¹⁶⁴ When the plaintiff files a claim of defamation, the defendant will typically assert the defense of truth, thereby drawing the court into a dispute over the truth or falsity of the religious claims.¹⁶⁵ In turn, courts generally dismiss claims for religious defamation on such grounds.¹⁶⁶

Group, Inc. via the Troubled Asset Relief Program). For further discussion of *Murray*, see Hamoudi, *supra* note 161, at 146–50.

163. For discussion of judicial treatment of religious tort claims, see Goldstein, *supra* note 9, at 522–23; Idleman, *supra* note 9, at 219.

164. See, e.g., *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1287 (D. Minn. 1993) (hearing a pastor's defamation suit against his former church organization after the organization denied his church's application to be a mission); *Goodman v. Temple Shir Ami, Inc.*, 712 So. 2d 775, 776 (Fla. Dist. Ct. App. 1998) (detailing a rabbi's suit against his former temple for defamation and breach of employment contract); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 810 (Md. Ct. Spec. App. 1996) (hearing a former priesthood candidate's defamation suit after he was released from the archdiocese on disciplinary grounds); *Schoenhals v. Mains*, 504 N.W.2d 233, 234 (Minn. Ct. App. 1993) (detailing church members' fraud, defamation, and breach-of-contract suit against their former minister and church over the termination of their membership).

165. See, e.g., *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 219 (D. Conn. 2000) (dismissing the plaintiff's defamation claim because addressing the defense of truth would require impermissible entanglement with Canon law); *Klagsbrun v. Va'ad Harabonim*, 53 F. Supp. 2d 732, 742 (D.N.J. 1999) (dismissing the plaintiff's defamation claim because addressing the defense of truth would require impermissible entanglement with Jewish law).

166. See cases cited *supra* note 165.

However, not all claims of religious defamation follow this script. In *Abdelhak v. Jewish Press*,¹⁶⁷ for example, the plaintiff was an Orthodox Jewish doctor, specializing in high-risk obstetrics, who sued a Jewish newspaper for defamation because his name was published on a list of individuals against whom a rabbinical court had issued a *seruv*—an order of contempt.¹⁶⁸ The list included the plaintiff’s name, ostensibly because he had failed to grant his wife a divorce in accordance with Jewish law.¹⁶⁹ But both parties agreed that the plaintiff’s name was included on the list due to misinformation provided to the newspaper by the rabbinical court.¹⁷⁰ This error was particularly damaging to the plaintiff because his patients were “almost without exception, women of the Orthodox Jewish faith,”¹⁷¹ and the plaintiff consequently alleged that his reputation within the religious community—and, in turn, his medical practice—was severely damaged by the newspaper’s erroneous report.¹⁷²

Because both parties agreed that listing the plaintiff’s name was an error, the court was able to avoid the standard constitutional obstacle to adjudicating a claim of religious defamation. The newspaper conceded its error and the court thus did not need to determine the truth or falsity of a religious claim.¹⁷³ The court nonetheless dismissed the case, concluding that the plaintiff’s claim required excessive entanglement with religious doctrine.¹⁷⁴ Much of the court’s reasoning focused on the manner in which the jury would be asked to assess damages:

[N]o jury could determine how much of the decline in plaintiff’s income resulted from the defamatory Seruv Listing, and how much of the decline resulted from other factors, unless the jury immersed itself in Orthodox Jewish beliefs. . . . Such conclusions could not be drawn unless, again, the jury were to develop a keen understanding of how an Orthodox Jew would view each such event. Such an undertaking exemplifies the excessive involvement in matters of

167. *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197 (N.J. Super. Ct. App. Div. 2009).

168. *Id.* at 200–02.

169. *Id.* at 201–02.

170. *Id.* at 202.

171. *Id.* at 200.

172. *Id.* at 208.

173. *Id.* at 202. In fact, the newspaper issued a retraction noting its error. *Id.*

174. *Id.* at 211.

“faith . . . or ecclesiastical . . . custom” that the [New Jersey Supreme] Court prohibited in *McKelvey v. Pierce*.¹⁷⁵

One understands the court’s reticence to permit a jury of laypeople to speculate into the behavior of a particular ethnic community—the circumstances might be unlikely to produce an accurate assessment. But although a damages calculation would require an inquiry into the social consequences of a *seruv*, it would not require rendering a determination regarding religious doctrine. To the contrary, it is an empirical inquiry into social perceptions of particular conduct within a given community—in the court’s words, “how an Orthodox Jew would *view* such an event.”¹⁷⁶ This sort of damages assessment is a standard fact-finding inquiry that juries routinely are asked to make in predicting the market consequences of certain events, based on expert testimony and submitted evidence.¹⁷⁷ In this way, the court’s holding unnecessarily shrouded much of co-religionist commerce in deep mystery beyond the purview of judicial assessment. Conflating religious doctrine with sociological preferences not only offers another example of recent Establishment Clause Creep, but it also immunizes tortfeasors against claims from their co-religionists. Like contracts that are not enforced, torts without redress are another consequence of Establishment Clause Creep that exposes religious merchants to risks from which their secular counterparts are protected.

IV. TOWARD A BETTER CONTEXTUALISM

Co-religionist commerce stands at the nexus of both public and private law precisely because it involves transactions that pursue both commercial and religious objectives. It therefore is vulnerable to trends in constitutional law and commercial law that have unwittingly combined to undermine the ability of co-religionists to secure commercial relations.

175. *Id.* at 208 (quoting *McKelvey v. Pierce*, 800 A.2d 840, 851 (N.J. 2002)).

176. *Id.*

177. By way of an example, juries are expected to play this type of fact-finding role in obscenity cases, in which they must determine communal standards of decency. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 31 (1973) (concluding that courts could continue to rely on juries in obscenity cases, which require ascertaining “community standards of decency”); *Smith v. California*, 361 U.S. 147, 164–65 (1959) (Frankfurter, J., concurring) (endorsing the use of experts for determining community standards in obscenity cases).

For more critical analysis of *Abdelhak*, see Helfand, *supra* note 22, at 193–95; Helfand, *supra* note 9, at 517–18.

As Part II shows, New Formalism has prevented courts from inquiring into the contracting context to determine the parties' subjective contractual intent, even when commercial instruments are written creatively to incorporate religious objectives while avoiding Establishment Clause hurdles.¹⁷⁸ And Establishment Clause Creep has expanded the scope of cases in which courts refuse to enforce co-religionist dealings on First Amendment grounds.¹⁷⁹ Together, these two trends have distorted the relationship between co-religionist commerce and its particular commercial context, preventing courts from providing the legal infrastructure necessary to ensure the enforceability and predictability of co-religionist commerce.

But we need not—and ought not—close the courthouse doors to co-religionist commerce. At its core, New Formalism instructs courts to avoid identifying and effectuating customary norms and subjective expectations because the costs of doing so are sufficiently high that parties *ex ante* would prefer formalist over contextualist adjudication.¹⁸⁰ New Formalism thus is motivated purely by achieving parties' intents while minimizing transaction and error costs. Moreover, it encourages courts to focus on the formal text of commercial agreements only because it assumes that parties can react to judicial decisions and adapt the terms of their agreements to track clear legal rules.¹⁸¹

However, parties to co-religionist commercial dealings cannot similarly capture the advantages of formalism. Co-religionist commercial parties have limited leeway to find contractual terminology that both accurately reflects the religious objectives of the parties and remains sufficiently secular to avoid nonenforcement on Establishment Clause grounds; they cannot adapt their agreements to the demands of the relevant legal doctrine by using formal terms. And these Establishment Clause obstacles have become increasingly formidable as courts have expanded the range of disputes they refuse to adjudicate on account of Religion Clause prohibitions.¹⁸² As a result, parties cannot simply avoid costly

178. *See supra* Part II.B.

179. *See supra* Part II.A.

180. *See, e.g.,* Badawi, *supra* note 76, at 22–23; Omri Ben-Shahar, *The Erosion of Rights by Past Breach*, 1 AM. L. & ECON. REV. 190, 216 (1999); Scott, *supra* note 66, at 376.

181. *See* Bernstein, *supra* note 20, at 1810; Juliet P. Kostritsky, *supra* note 138, at 46–47; Robert E. Scott, *The Uniformity Norm in Commercial Law*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CONTRACT AND COMMERCIAL LAW* 152 (Kraus & Walt eds., 2000).

182. *See supra* Part II.A.

litigation by circumventing the demands of the Establishment Clause. To the contrary, the Establishment Clause often prevents parties from correcting the errors generated by New Formalist approaches. In short, one of the core presumptions that motivates the efficiency rationale of New Formalism is undermined by Establishment Clause Creep.

Accordingly, we advance a limited case for contextualism, which will enable courts to take the commercial context into account when resolving disputes among co-religionists. This contextualist approach offers an antidote to the dual onslaughts of New Formalism and Establishment Clause Creep, ensuring that co-religionists can enjoy both the legal support necessary to sustain their commercial endeavors and the freedom to adhere to their religious principles without suffering commercial hardship. Contextualism is necessitated in these limited situations by the inability of co-religionists to translate religious terms into secular analogs and thus leverage private law's dynamism like other commercial parties.¹⁸³

A limited and narrowly circumscribed embrace of contextualism would resolve the unusual legal challenges of co-religionist commerce. First, contextualism would curtail the encroachment of Establishment Clause Creep by discouraging courts from simply conflating co-religious commerce with its religious context. Contextualism instead encourages factfinders to admit contextual evidence to inform the interpretation and enforcement of commercial instruments. Factfinders thus would be able to inquire into the unique commercial and social environment from which co-religionist commerce arises. When parties suffer from purely economic torts or have intended to draft enforceable commercial agreements, contextualism encourages courts to be sensitive in differentiating the commercial elements of an agreement from its ecclesiastical context, thereby ensuring that the Establishment Clause does not unnecessarily void co-religionist commercial agreements.¹⁸⁴

Second, in contrast to New Formalism's priority on text and outward manifestations, contextualism encourages courts to consider the parties' shared norms, expectations, and intentions when

183. To be sure, our limited embrace of contextualism is not a religion-specific rule. The justification for increased contextualism is based upon the inability of the parties to modify their agreements to surmount legal doctrines that undermine enforceability. In this way, the use of contextualism is triggered by wholly secular considerations and is not restricted based upon the religious nature of the commercial context in question.

184. *See supra* Part III.A.

interpreting and enforcing co-religionist commercial agreements. The very nature of co-religionist commerce suggests that careful evaluation of context will frequently lead courts to different conclusions. For example, contextual inquiry may in some cases reveal that documents that facially appear to be commercial instruments were instead intended by the parties to serve as religious symbols and were drafted as part of traditional religious ceremonies.¹⁸⁵ In other cases, contextual inquiry may provide a basis to interpret seemingly religious terminology, thus allowing enforcement without encroaching on Establishment Clause prohibitions. In this way, contextualism can further ensure the enforceability of co-religionist commerce by avoiding Establishment Clause pitfalls, using the norms and understandings shared by co-religionists to fill in gaps and interpret terms in co-religionist commercial agreements.

Because co-religionist commerce offers a narrow—but growing—instance in which the presumptions of New Formalism do not hold, a narrow—but meaningful—exception to formalist adjudication would mitigate the twin constraints this Article identifies. A limited contextualist correction would merely require courts to consider whether the contracting environment and the social norms of the commercial parties are such that formalist interpretation leads to an incorrect result. A healthy dose of contextualism might help courts navigate their way between New Formalism and Establishment Clause Creep, providing co-religionist commerce with the adjudicative infrastructure it needs to remain viable.

Fortunately, some courts have resisted rigid formalist analysis of co-religionist commercial disputes and have illustrated how contextualism can resolve co-religionist disputes. The remainder of this Part shows how courts can use limited contextualism to adjudicate cases fairly and accurately while maintaining a fidelity to the Religion Clauses.

185. As described above, examples of this phenomenon include documents related to religious marriage and divorce—such as the Jewish ketubah and the Islamic mahr agreement—as well as documents that temporarily shift ownership over commercial goods or enterprises in order to account for religious rules and requirements. *See supra* Part III.B.

A. *Disentangling Co-Religionist Commerce from Co-Religionist Context*

Establishment Clause Creep is predominantly a product of the judicial failure to differentiate between the substantive content of religious agreements and their surrounding context. In some circumstances, however, courts have approached co-religionist commercial instruments with surgical precision, carefully extracting secular contract terms from their surrounding religious context. In *Light v. Light*,¹⁸⁶ for example, a Connecticut court enforced a standard prenuptial agreement drafted by a prominent rabbinical court¹⁸⁷—the Beth Din of America.¹⁸⁸ The goal of the Beth Din’s prenuptial agreements is to provide the wife with financial leverage to obtain a Jewish divorce.¹⁸⁹ Since traditional Jewish law grants the husband unilateral authority to initiate a divorce,¹⁹⁰ the so-called “Jewish prenup”¹⁹¹ emerged after creative drafting on the part of lawyers and

186. *Light v. Light*, 2012 Conn. Super. LEXIS 2967 (Conn. Super. Ct. Dec. 6, 2012).

187. *See Binding Arbitration Agreement*, BETH DIN OF AM., http://theprenup.org/pdf/Prenup_Standard.pdf (last visited Jan. 2, 2015) (providing a boilerplate version of an updated prenuptial agreement).

188. For a discussion of the innovations of the Beth Din of America and of the potential lessons to be gleaned from these innovations, see generally Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 N.Y.L. SCH. L. REV. 287 (2013).

189. *See Greenberg-Kobrin*, *supra* note 121, at 365 (affirming this sentiment).

190. This asymmetry has long been an issue of concern within the Jewish community and has been the topic of significant scholarly commentary. *See, e.g.*, Breitowitz, *supra* note 121, at 320–21 (analyzing this balance); Estin, *supra* note 57, at 566 (same); Greenawalt, *supra* note 15, at 812 (same); Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 405–08 (2000) (same); Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Analysis*, 34 ISR. L. REV. 170, 175–78 (2000) (same).

In response to these issues, New York has famously adopted two “Get Statutes,” which authorize courts to account for a husband’s failure to provide his wife with a Jewish divorce document when they grant secular divorces and divide marital assets. N.Y. DOM. REL. LAW § 253 (McKinney 2010); N.Y. DOM. REL. LAW §§ 236B(5)(h), (6)(d) (McKinney 2010). *See* Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703, 706–07 (1995) (discussing the purpose behind this legislation).

191. *See, e.g.*, Michael A. Helfand, *Enforcing the “Jewish Prenup”*, CTR. FOR L. & RELIGION F. (Mar. 29, 2013), <http://clrforum.org/2013/03/29/enforcing-the-jewish-prenup>; Hannah Scholl, Estee Goldschmidt & Marc Herman, *Insisting on a Jewish Prenup*, JEWISH DAILY FORWARD (Mar. 21, 2012, 10:00 AM), <http://blogs.forward.com/sisterhood-blog/153359/insisting-on-a-jewish-prenup>.

rabbis to prevent husbands from using this authority as leverage during the course of dissolving their marriages.¹⁹²

Although this form prenuptial agreement is intended to counteract an inequity in Jewish divorce law, the document itself intentionally avoids importing religious terminology or criteria. The key provision in these religious prenuptial agreements is the “support provision,” which requires the husband to pay his wife \$100 per day in the event the couple “do[es] not continue domestic residence together for whatever reason . . . from the day [the couple] no longer continue[s] domestic residence together, and for the duration of [the couple’s] Jewish marriage”¹⁹³ Thus, the longer the husband refuses to provide his wife with a Jewish divorce document, the larger his debt grows.¹⁹⁴

The husband in *Light* sought to have the court invalidate his prenuptial agreement on the ground that enforcing such an agreement violated the Establishment Clause. He argued that “the prenuptial agreement refers to and reflects religious doctrine, protocols and ceremonies” and therefore should not be enforced by a civil court.¹⁹⁵ Nonetheless, the court proceeded to carefully separate the agreement from its religious context, stating:

In the present case, a determination as to whether the prenuptial agreement is enforceable would not require the court to delve into religious issues. Determining whether the defendant owes the plaintiff the specified sum of money does not require the court to evaluate the proprieties of religious teachings. Rather, the relief sought by the plaintiff is simply to compel the defendant to perform a secular obligation, i.e., spousal support payments, to which he contractually bound himself.¹⁹⁶

Commentators have noted that the court’s decision—and its careful attention to disentangling contractual terms from their religious context—offers significant hope for various forms of co-religionist

192. See Greenberg-Kobrin, *supra* note 121, at 375–78 (discussing the development of Jewish prenuptial agreements); *Rabbinic Endorsements*, THE PRENUP, <http://theprenup.org/rabbinic.html> (last visited Jan. 2, 2015).

193. *Light v. Light*, 2012 Conn. Super. LEXIS 2967, at *3 (Conn. Super. Ct. Dec. 6, 2012).

194. See *Lang v. Levi*, 16 A.3d 980, 991 (Md. App. 2011) (enforcing a religious arbitration award which modified the amount due pursuant to a Jewish prenuptial agreement); Mordechai Willig, *The Prenuptial Agreement: Recent Developments*, 1 J. BETH DIN OF AM. 8, 14–15 (2012) (further discussing marital negotiations in this context).

195. *Light*, 2012 Conn. Super. LEXIS 2967, at *6–7.

196. *Id.* at *19.

commerce going forward.¹⁹⁷ Certainly, the decision in *Light* offers the possibility that parties entering into a religious marriage can structure their legal obligations with the help of secular, court-enforced instruments.¹⁹⁸ The ruling thus validates the use of state-enforced legal instruments as a response to problematic religious doctrine that fails to address the contemporary needs of a religious community.¹⁹⁹ In this way, the prenuptial agreement is emblematic of how religious communities can employ commercial instruments to achieve religious objectives. But *Light* also illustrates that these agreements are not self-enforcing, and the authority of public courts is necessary to effectuate their purpose.

Indeed, this dynamic captures the core rationale behind the Supreme Court's endorsement of the neutral-principles doctrine, which "shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties."²⁰⁰ Thus, the promise of the neutral-principles doctrine—to empower religious communities to use private legal instruments to organize their affairs—can only be realized to the extent courts avoid erroneously conflating a religious context with secular elements of an agreement. Put differently, to capitalize on what the neutral-principles approach can provide co-religionist commerce, courts must beat back Establishment Clause Creep and recognize that just because a legal instrument emerges from a religious context does not mean that its enforcement requires ruling on religious doctrine.

B. *Employing Co-Religionist Context to Interpret Co-Religionist Commerce*

A commitment to contextualism encourages courts to recognize that sophisticated application of the neutral-principles approach is

197. Paul Berger, *In Victory for 'Chained' Wives, Court Upholds Orthodox Prenuptial Agreement*, THE FORWARD (Feb. 15, 2013), available at <http://forward.com/articles/170721/in-victory-for-chained-wives-court-upholds-o/?p=all#ixzz2NwAbHtuu>; Sam Sokol, *U.S. Court Validates Halachic Prenuptial Agreement*, JERUSALEM POST (Feb. 11, 2013), available at <http://www.jpost.com/JewishWorld/JewishNews/Article.aspx?id=302836>.

198. Berger, *supra* note 197 (quoting Susan Aranoff, director of the advocacy group Agunah International, as noting that the "unanswered question with regard to the prenu was always will it be enforceable in civil court").

199. Michael A. Helfand, *Religion's Wise Embrace of Commerce*, FIRST THINGS "ON THE SQUARE" (Feb. 7, 2013), <http://www.firstthings.com/onthesquare/2013/02/religionrsquos-wise-embrace-of-commerce>.

200. *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

necessary for the continued viability of co-religionist commerce. Thus, courts should focus on enforceable neutral principles when parties intentionally draft co-religionist commercial agreements using secular terms and should not deny access to court enforcement by overextending the constitutional prohibition against resolving religious questions. But, just as courts must avoid erroneously triggering constitutional prohibitions, they must also be sensitive to the religious context of particular agreements. Even when an instrument or conduct appears devoid of ecclesiastical content, courts must nonetheless use contextualism to understand and adjudicate co-religionist disputes.

Some courts have successfully employed contextualist approaches to ensure that co-religionist agreements were enforced in a manner that reflected the shared intentions of the parties. One of the most notable examples has been a series of cases addressing *heter iska* (literally, “permissible venture”) agreements, which restructure loans as joint ventures to avoid Jewish law’s prohibition against usury.²⁰¹ Accordingly, the intended borrower, instead of simply agreeing to pay interest, promises to pay a rate of return on an “investment,” typically capped at a rate equal to the intended interest rate.²⁰² Although sometimes such *heter iska* agreements will be executed as the sole agreement between the parties, they are often executed alongside other documents—anything from a standard loan agreement to mortgage documents.²⁰³ This device, introduced into the Jewish commercial markets sometime between the twelfth and fourteenth centuries, enables market participants to grant interest-bearing loans—but under a different name—thereby technically avoiding charging interest in violation of Jewish law.²⁰⁴ At bottom,

201. Steven H. Resnicoff, *A Commercial Conundrum: Does Prudence Permit the Jewish “Permissible Venture”?*, 20 SETON HALL L. REV. 77, 80–85 (1989); see generally Jay M. Zitter, *Application, Recognition, or Consideration of Jewish Law by Courts in United States*, 81 A.L.R.6th 1 (2013) (discussing this claim).

202. 2 J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS* 376–85 (1983) (discussing the Jewish legal background to *heter iska* agreements); see also YISROEL REISMAN, *THE LAWS OF RIBBIS* 377–407 (1994) (providing further analysis of the Jewish-law rules applicable to the *heter iska*).

203. See, e.g., *Edelkind v. Fairmont Funding, Ltd.*, 539 F. Supp. 2d 449, 452 (D. Mass. 2007) (executing a *heter iska* agreement alongside mortgage documents); *Heimbinder v. Berkovitz*, 175 Misc. 2d 808, 810 (N.Y. Sup. Ct. 1998) (executing a *heter iska* agreement alongside loan documents); *Barclay Commerce Corp. v. Finkelstein*, 11 A.D.2d 327, 328 (N.Y. App. Div. 1960) (executing a *heter iska* agreement alongside a factoring agreement).

204. See *Leibovici v. Rawicki*, 290 N.Y.S.2d 997, 1000 (Civ. Ct. 1968) (“‘Hetter Isske’ or [heter ‘iska’ was a device developed in the twelfth to fourteenth centuries to overcome the

these agreements are best understood as religiously sanctioned loopholes to avoid religious rules against charging interest, and do not represent the parties' mutual assent to adopt contractual obligations.²⁰⁵

Not surprisingly, courts have been asked on occasion to interpret such heter iska agreements in instances in which the borrower's venture has failed and the creditor would like his loan repaid.²⁰⁶ In such circumstances, the borrower will frequently cite the heter iska agreement and argue that because the creditor bore the risk that the venture would fail, there is no remaining debt under the terms of the agreement.²⁰⁷

By and large, formalism has not lured courts into enforcing heter iska agreements.²⁰⁸ To the contrary, courts have employed a variety of antiformalist tactics to demonstrate that the parties intended only to satisfy a religious formality and never intended these agreements to be contractually binding.²⁰⁹ In so doing, courts have emphasized the

biblical prohibition against charging interest by one Jew to another.”); *see also* BLEICH, *supra* note 202, at 376–85 (discussing the Jewish legal background to heter iska agreements). For examples of such agreements, *see id.* at 385–88 (providing boilerplate heter iska agreements for use in different commercial contexts); REISMAN, *supra* note 202, at 419–24 (same). Heter iska agreements typically incorporate heightened evidentiary requirements to prove the venture's losses, and are intended to prevent the borrower from avoiding his obligation to pay the lender. *See id.* at 377–407 (1994).

205. *See, e.g.,* Bollag v. Dresdner, 495 N.Y.S.2d 560, 562 (N.Y. Civ. Ct. 1985) (citing Lester v. Levick 376 N.Y.S.2d 619 (N.Y. App. Div. 1975)) (noting in the context of a heter iska agreement that “[a] transaction must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties assign to it”).

206. *See, e.g.,* Barclay Commerce Corp., 11 A.D.2d at 327 (attempting to avoid payment of outstanding debts on the basis of a heter iska agreement).

207. *Id.*

208. Mahmoud A. El-Gama, *Incoherence of Contract-Based Islamic Financial Jurisprudence in the Age of Financial Engineering*, 25 WIS. INT'L L.J. 605, 606 (2008) (noting that courts have “dismissed the religious-legal characterization of the [heter iska] contract as investment agency in favor of treating it as typical interest-based debt”).

209. *See, e.g.,* Edelkind, 539 F. Supp. 2d at 450 (accepting a recommendation for the dismissal of claims involving a heter iska agreement based on a lack of standing); *Leibovici*, 290 N.Y.S.2d at 1000–01 (concluding that the court was not bound by the heter iska agreement); *Arnav Indus., Inc. v. Westside Realty Assoc.*, 180 A.D.2d 463 (N.Y. App. Div. 1992) (failing to recognize the existence of a separate heter iska partnership, though a promissory note was explicitly written to be in accordance with heter iska); *Barclay Commerce Corp.*, 11 A.D.2d at 327 (concluding that the heter iska agreement was “merely a compliance in form with Hebraic law”); *VNB N.Y. Corp. v. 47 Lynbrook LLC*, 2012 N.Y. Misc. LEXIS 364 (N.Y. Sup. Ct. Jan. 11, 2012) (concluding that the heter iska agreement did not alter the terms of a note and a mortgage).

contractual background of heter iska agreements, often emphasizing their factual context to infer the true intent of the parties.

For example, in *Heimbinder v. Berkowitz*,²¹⁰ the court refused to enforce a heter iska agreement after taking into consideration a variety of contextual factors, including that the defendant had produced the agreement from his pocket at the conclusion of the closing,²¹¹ and that the plaintiff admitted that the defendant had executed the heter iska agreement simply “because under Jewish law he was ‘not supposed to be charged interest.’”²¹² The court concluded that the heter iska agreement was not intended to be enforceable, but “was ‘merely a compliance in form with Hebraic law.’”²¹³ Other courts have followed suit, recognizing that just because the form of the heter iska resembles a true contract, the context of such agreements clearly indicated that the parties did not intend them as enforceable legal instruments.²¹⁴

Contextualism can also prove useful in enforcing commercial elements of the mahr agreement that were intended to be enforced. In *Ahmed v. Ahmed*,²¹⁵ a dispute over a mahr agreement,²¹⁶ the plaintiff—the defendant’s ex-wife—had been awarded \$50,000 by the trial court pursuant to the terms of the mahr agreement. The key provision of the agreement stated that the parties “have been united . . . in matrimony as husband and wife against a Mahr of \$50,000 of which prompt payment is nil and deferred payment is \$50,000.”²¹⁷ The defendant argued on appeal that the agreement was simply “‘too vague and uncertain to be enforced’”²¹⁸ since it failed to

210. *Heimbinder v. Berkowitz*, 175 Misc. 2d 808 (N.Y. Sup. Ct. 1998).

211. *Id.* at 817.

212. *Id.*

213. *Id.*

214. *See Edelkind*, 539 F. Supp. 2d at 454 (citation omitted) (“In civil courts, Shtar Heter Iska agreements have been interpreted as ‘merely a compliance in form with Hebraic law,’ that does not create a partnership between the parties, and that causes of action based on an attempt to create obligations out of such an agreement are ‘devoid of merit.’”); *Arnav Indus., Inc.*, 180 A.D.2d at 464 (holding that the plaintiff’s claims predicated on a heter iska agreement creating a partnership were “devoid of merit”); *Barclay Commerce Corp.*, 11 A.D.2d at 328 (“The plaintiff explained the purpose of the ‘Heter Iska’ as being merely a compliance in form with Hebraic law, but did not create a partnership or intend to create one and its explanation of the ‘Heter Iska’ and its purpose is not contradicted by the defendants”); *see also Leibovici*, 290 N.Y.S.2d at 1000 (finding that the parties did not intend to enforce the agreement).

215. *Ahmed v. Ahmed*, 261 S.W.3d 190 (Tex. App. 2008).

216. *Id.* at 190.

217. *Id.* at 195.

218. *Id.*

state who was meant to pay whom, when it would be paid or how it was to be paid.²¹⁹

But the court resisted such a purely formalist approach, choosing instead to treat the mahr as an incomplete document that required further evidence to interpret and enforce. The court also avoided ruling on what a mahr contract required as a matter of religious doctrine, which might have been a constitutionally problematic approach. Instead, the court simply zeroed in on the subjective intent of the parties. The court thereby leveraged the parties' shared understanding of the mahr agreement to fill in the perceived gaps in the document:

Both parties were raised in the Islamic faith, and Afreen [the plaintiff] testified that the Mahr agreement is a contract based on Islamic custom and religious principles. Amir [the defendant] offered no testimony regarding the Mahr, but Afreen explained that the Mahr constitutes a promise of an amount to be paid to the bride and if not given before, it must be given at the time of a divorce. If credited by the trial court as factfinder, this evidence establishes that *the parties understood their agreement* and that the terms are sufficiently specific to be enforced.²²⁰

Importantly, the court did not admit the wife's testimony as objective evidence of the religious doctrine at stake in the mahr contract; rather, the court relied on her testimony as evidence of the shared subjective understanding of the parties.²²¹ In this way, the court explicitly embraced a contextual approach, stating that it "may look to the relationship between the parties and the circumstances surrounding the contract to determine if the terms were sufficiently definite for the parties to understand their obligations."²²²

219. *Id.* ("Amir contends this language is too vague to be enforceable because it does not explain who would make the payment and when and how it would be paid."); see Appellant's Brief, *Ahmed v. Ahmed*, No. 14-07-00008, at *13–15 (June 7, 2007) (arguing that the mahr agreement was too vague to be enforced). For the full text of the agreement, see *id.* at *2.

Several have also claimed that mahr agreements often lack the requisite specificity and certainty to warrant enforcement. See, e.g., Blenkhorn, *supra* note 56, at 210–18 (arguing that the uncertain terms of many mahr contracts should preclude their enforcement).

220. *Ahmed*, 261 S.W.3d at 195 (emphasis added).

221. *Id.* ("If credited by the trial court as factfinder, this evidence establishes *that the parties understood their agreement* and that the terms are sufficiently specific to be enforced." (emphasis added)).

222. *Id.*

A similar contextual approach convinced a Washington state court to refuse to enforce a mahr agreement. In *In re the Marriage of Obaidi*,²²³ the court concluded that the defendant lacked any understanding of the agreement, emphasizing a variety of contextual considerations, including that the defendant did not read Farsi (the language in which the mahr agreement had been drafted), had not heard of the mahr contract until the day of his wedding, and had signed the agreement only at the behest of his mother.²²⁴ These contextual considerations convinced the court that for this couple, the mahr was merely a ritual formality and did not constitute any contractual assent.²²⁵

While reaching different outcomes, the state courts in both *Ahmed* and *In re the Marriage of Obaidi* focused on the parties' subjective intents in deciding whether to enforce a mahr agreement. Their contextual approaches illustrate how courts can resolve co-religionist commercial disputes without encroaching on Establishment Clause concerns. This contextual approach allows private law to work its "genius" among co-religionists as it does among all parties.

CONCLUSION

This Article explores the existential threat to co-religionist commerce that is being produced by two separate doctrinal developments. New Formalism instructs courts to resist considering contextual evidence and relational principles that might illuminate the contracting parties' shared intent and understandings. And Establishment Clause Creep has caused courts to be increasingly reluctant to enforce agreements situated within a religious context. The combination has expanded the scope of cases between co-religionists that result in judicial abstention, rendering contracts unenforceable and removing protections from economic torts. Consequently, plaintiffs have been left to absorb commercial harms without an avenue for judicial remedy, and the viability of co-religionist commerce has become uncertain.

The impact of these developments has been vast. They threaten the sustainability of multi-billion-dollar markets, and they encroach

223. *In re the Marriage of Obaidi*, 226 P.3d 787 (Wash. Ct. App. 2010).

224. *Id.* at 788–89.

225. *Id.* at 791–92.

upon important and intimate dealings in multiple religious communities in the United States. They also limit the ability of religiously devout individuals to use legal instruments to order their affairs and transact with community members in manners consistent with their faith. Thus, zealous Establishment Clause jurisprudence has combined with formalistic commercial law to, paradoxically, limit religious free expression. Understanding co-religionist commerce reveals just how central commercial dealings are to co-religionist relationships and religious life and how religious expression frequently relies upon judicial intervention, not judicial restraint. Religion Clause jurisprudence has not fully appreciated how rulings aimed at protecting religious practice from state intrusion can instead undermine religious dealings between community members, and commercial law has not appreciated (at all) that co-religionist commerce offers an unusual category of transactions in which the logic underlying formalism does not apply.

This Article suggests a limited embrace of contextualism as a solution. By leveraging shared subjective intent, religious norms, and communal understandings, courts can selectively navigate the doctrinal minefields that cause courts to misunderstand or neglect commercial disputes and can provide a more stable adjudicative infrastructure for co-religionist commerce. Contextualism has its own rich history in both contract and tort law, and this very circumscribed invocation can correct some unintended and undesirable excesses of combining New Formalism with Establishment Clause Creep. Failing to adopt this contextualist correction will add to the uncertainty that currently plagues co-religionist commerce and will undermine the ability of individuals to simultaneously pursue their religious and commercial objectives. Indeed, if both public law and private law continue on their current trajectory, there is good reason to believe that the foundations of co-religionist commerce will not hold much longer, and that the price of participating in commercial markets will be that parties must check their religion at the door.