THE CHALLENGE OF CO-RELIGIONIST COMMERCE

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ABSTRACT

This Article addresses the rise of “coreligionist commerce” in the United States—that is, the explosion of commercial dealings that take place between coreligionists who intend their transactions to achieve both commercial and religious objectives. To remain viable, coreligionist 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, coreligionist 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 tools of contract interpretation, thereby providing the necessary evidence to give meaning to coreligionist commercial agreements. However, contextual approaches to coreligionist commerce have been undermined by two current legal trends—one in constitutional law, the other in commercial law. The first is the 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 coreligionist commercial agreements.

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This Article proposes that courts preserve coreligionist 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’ intent and distinguish commercial from religious substance. Empowering the intent of coreligionist parties and limiting the doctrinal developments that threaten to undermine coreligionist commerce can secure marketplace dealings without intruding upon personal faith.
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THE CHALLENGE OF CO-RELIGIONIST COMMERCE

INTRODUCTION

Though a rich tradition warns that mixing religion and money corrupts both,¹ there is a great deal of “coreligionist commerce” in America—that is, commerce between coreligionists who intend their transactions to adhere to religious principles or pursue religious objectives.² Prominent examples of coreligionist commerce in the United States include a $4.6 billion Christian-products industry,³ a $12.5 billion kosher-food market,⁴

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.

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.”).

and a growing share of an $800 billion global Sharia-compliant finance market.\footnote{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).}

documents to ensure religious compliance have assumed all the complexity and creativity that characterize modern legal practice. Co-religionist commerce is not just big business, it is also sophisticated practice of law. And like any other modern industry, coreligionist 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, coreligionist commerce presents an unusual challenge to American law. When commercial disputes arise among coreligionists, courts are asked—for example, in determining the parties’ intent or customary norms—to interpret religious terminology, standards, and practices. Courts therefore often shy away from adjudicating coreligionist commercial disputes, fearing that intervention would impermissibly contravene prevailing interpretations of the Establishment Clause. Yet courts also recognize that refusing to issue rulings both abdicates the judicial responsibility to resolve legal disputes and withdraws the legal infrastructure that is routinely available to—and

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necessary to support—secular commerce. 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.” 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.”

Unfortunately, the neutral-principles framework has proven less successful than participants in coreligionist commercial markets might have hoped. The core problem lies in a translation difficulty. Parties to coreligionist commercial agreements often lack the flexibility to replace religious terms in their agreements with secular terms, and therefore cannot contract around the Establishment Clause. 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 modified from their traditional form if they are to

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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. L. 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, 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; 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).


14 Id.

15 See, e.g., Ira Mark Ellman, Driven from the Tribunal: Judicial Resolution of Internal Church Disputes, 69 CALIF. L. REV. 1378, 1409–10 (1981) (arguing that the neutral-principles approach limits judicial inquiry in ways that undermine a court’s ability to reach a justifiable outcome); see also 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”).

16 Id.
have their desired religious effect. For example, religious marriage contracts—such as the *mahr* in Muslim marriages or the *ketubah* in Jewish marriages—often assign financial commitments through the use of religious references, yet 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 coreligionist 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 coreligionist commercial disputes has been discouraged by what private-law scholars have called New Formalism. 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, the New Formalism restricts courts from inquiring into the subjective intent of parties or extrinsic evidence that might inform the contracting environment between parties. Under such a New Formalist framework, courts cannot

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17 *See infra* Part II.B.
18 *See infra* notes 107–116 and accompanying text.
19 *See infra* notes 117–120 and accompanying text.
21 *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 of legal and extralegal terms” and deters them from “flexibly
invoke contextual evidence to interpret religious terminology in coreligionist commercial agreements.22

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 coreligionist 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,23 thereby undermining the core commitments of the neutral-principles approach to coreligionist commerce.24 When courts refuse to adjudicate coreligionist disputes, damages flowing from commercial fraud,25 professional defamation,26 and

22 See supra note 21.
24 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 on the ground that it 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 15, 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).

This current 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,
contractual breach are left unremedied.

Together, New Formalism and Establishment Clause Creep have formed the Scylla and Charybdis of coreligionist 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. Coreligionists are unable to characterize their dispute in either implied or explicit terms.

The combination of these two doctrinal trends denied coreligionists the institutional support that is available to other merchants. The most significant result has been that coreligionists have great difficulty drafting contracts that both accurately capture their commercial intent and contains language that is ultimately enforceable in court. But the doctrinal combination also exposes coreligionists to tortious economic harm, since economic torts between coreligionists—including antitrust disputes—also involve a comingling of neutral principles with religious context. By removing the efficiencies typically gained by having courts securing contract and property rights and protecting 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 coreligionist commerce are all-the-more concerning because co-religionist commerce is a growth industry. Continued globalization of commercial relationships and America’s changing demographics all but guarantee that coreligionist

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 (N.Y. App. Div. 1940).


27 See infra Part II.

28 See infra Part III.

29 See supra notes 2-3.


31 Especially given the importance of Sharia-compliant finance to the global
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. EEOC* ruled that the First Amendment shields religious institutions from liability under certain antidiscrimination laws, while the Supreme Court of New Mexico imposed liability under the state’s public-accommodations law on a photographer that, citing her religious commitments, refused to provide her professional photography services at a same-sex marriage. Perhaps most significantly, on the final day of the 2014-15 term, the Supreme Court held in *Burwell v. Hobby Lobby* that the federal Religious Freedom Restoration Act affords protection to closely held for-profit corporations. Consequently, certain religiously motivated corporations need not comply with the Affordable Care Act’s “contraception mandate” when doing so would violate the

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33 For a discussion of *Elane Photography*—and questions of religious conscience and commerce more broadly—see 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 also 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”). See generally Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (2010); 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).


35 See 45 C.F.R. § 147.130 (2014) (requiring employers that provide health insurance to include coverage for contraception and other related preventative care).
religious conscience of those who own the corporation.36

All of these cases involve parties that both engage in commercial conduct and profess religious commitments, and they all address the intersection of neutral, generally applicable laws and the First Amendment. They also illustrate that Religion Clause protections against general laws—even against statutes that have little to do with protecting contract or property rights—can inadvertently undermine the security of voluntary commercial relationships. Therefore, viewing these cases in relation to coreligionist 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 coreligionist commerce and should appreciate how the dual effects of New Formalism and Establishment Clause Creep contravene parties’ intent 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 coreligionist commerce. Part IV then outlines a path for limited contextualism that can support coreligionist 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.37 The Court hoped to preserve the judiciary’s obligation to resolve disputes between coreligionists without impermissibly resolving religious questions.38 To

37 For some recent analysis of the neutral-principles framework, see Idleman, supra note 9, at 259; Jonathon 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 Shmalzbach, Note: Confusion and Coercion in Church Property Litigation, 96 VA. L. REV. 443, 447, 450 (2010).
38 Jones v. Wolf, 443 U.S. 595, 603 (1979) (“The primary advantages of the neutral-
navigate this delicate balance, the Court encouraged participants in coreligionist 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.”39 And more generally, the Court assured parties that their coreligionist 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.”40

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.41 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.”42 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.43 This presumption—that

40 Wolf, 443 U.S. at 603.
41 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.”).
42 Id.
43 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”); see also Nancy S. Kim, Evolving Business and Social Norms and
parties can deftly respond to doctrinal constraints—stands at the very epicenter of the Supreme Court’s neutral-principles project and sustains the belief that courts can remain true to First Amendment values without abdicating their foundational dispute-resolution responsibilities.46


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

46 See Perry Dane, “Omalous” Autonomy, 2004 BYU 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. 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 24, 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., 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
Many religious objectives cannot be captured in alternative secular terminology, however, and thus many coreligionist commercial instruments resist translation. One reason for this “translation problem” is that parties enter coreligionist 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, or the religious standards for supervising kosher products. In drafting such agreements, parties aim to create commercial or financial arrangements that will comport with shared religious rules and values, and reference to specific religious terms are 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; 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. 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
A second reason parties to coreligionist commercial agreements lack the ability to modify their agreements is because their religious traditions and doctrines place formal restrictions on the structure and terms of the relevant documents. Examples of this dynamic arise regularly in the family-law context, particularly in cases of marriage and divorce. Within Jewish and Islamic communities, traditional marriage ceremonies...

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52 See Sirico, Jr., supra note 46, 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”).

One way to address this issue might be to increase the use of religious arbitration. Once a coreligionist 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 coreligionist 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., In re Ismailoff, 14 Misc. 3d 1229A (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”); Sieger v. Sieger, 297 A.D.2d 33, 36 (N.Y. App. Div. 2d Dep’t 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’”).

53 See infra Part II.B.


55 Odatalla v. Odatalla, 810 A.2d 93, 95 (N.J. Super. Ct. Ch. Div. 2002); see also
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. 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. 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 coreligionist 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. 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.


58 See supra notes 46–47.
This inherent disconnect between the parties’ subjective intentions and the need to use secular language causes predictable problems. Fact finders, 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 courts can interpret and enforce coreligionist commercial agreements to “reflect the intentions of the parties.”

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.” Instead of interpreting coreligionist 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 coreligionist commerce, while still avoiding any need to delve into ecclesiastical matters. 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

60 Id.
61 See infra Part II.B.
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 both ex-ante what correligionists can write into an agreement and ex-post how correligionists can their intentions.

II. NEW FORMALISM

One appropriate judicial response to the challenges of interpreting coreligionist commercial instruments would be to focus not on the content of religious doctrine, but on the intentions of the parties. As long as courts avoid defining religious terms or interpreting religious doctrine, they can circumvent Establishment Clause prohibitions. 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.

The introduction and growing influence of New Formalism—which now enjoys strong scholarly and judicial support—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. Realists, led by Karl Llewellyn, deigned to shape contract law in the mid-to-late twentieth century to incorporate the nascent

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62 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.”).

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

64 Jones, 443 U.S. at 603–04.

65 For a theoretical defense and empirical support for the rise of New Formalism, see Robert Scott, The Case for Formalism in Relational Contract, 94 Nw. U. L. Rev. 847 (2000).

rules embedded in the customs and practices of commercial parties.67 The court’s job was to “look for the law in life” and then incorporate an “immanent law” into contractual disputes.68 Adjudicating under Llewellyn’s realism—and the UCC that Llewellyn crafted—therefore required the costly tasks of understanding the contracting environment and discovering the imminent norms surrounding each case, such as the subjective intent of the parties, course of dealing, and industry standards.69

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,70 New Formalism is motivated by a desire to convey predictable outcomes to contracting parties should a dispute spill over into court.71 New Formalism

67 See, e.g., Richard Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 Stan. L. Rev. 621, 626 (1975); Robert E. Scott, The Case for Formalism in Relational Contract, 94 N.W. U. L. Rev. 847, 871–72 (2000); Charny, supra note 20, 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 complied with Llewellyn’s view of sound and reasonable commercial conduct.”).


70 See C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 4–5 (Boston: Little, Brown, and Company 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 66, 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) (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”) (citing CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Little, Brown, & Company 1871)).

71 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?
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. 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. 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 intrudson.

On one level, the New Formalism is well-suited to cater to parties, like coreligionists, 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. 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 coreligionist commerce. Thus, because parties to coreligionist commercial agreements


72 See Charny, supra note 20, at 849; see also Schwartz, supra note 21, 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).

73 See Scott, supra note 67, at 851; see also 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.”).

74 See Bernstein, supra note 72, at 1741–42; Scott, supra note 67, at 848.

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

Below we consider two types of problems posed by the New Formalism to coreligionist commerce: instances in which formalism prevents courts from interpreting and enforcing contracts for religious goods and services, and instances in which courts misapprehend the contractual intent of the parties to traditional religious contracts. In both instances, parties to coreligionist commerce cannot translate their agreements into secular terminology. And the New Formalism—in its refusal to use contextual evidence to surmise the parties’ intents—distorts coreligionist 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 coreligionist commerce. Producers of religious goods and services advertise, market, and sell to clientele specifically interested in the religious nature of these goods and services. In so

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doing, these producers often employ religious terminology to describe their goods and services to attract the interest and earn the trust of prospective purchasers. But the success of such coreligionist 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 coreligionist 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. 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.” The plaintiffs contended, however, that contrary to these representations, Hebrew National meat products did not satisfy these kosher standards. As a result, purchasers of Hebrew National meat products allegedly overpaid for these products, mistakenly believing them to be “100% kosher.” And having misrepresented the kosher quality of these meat products, the plaintiffs claim that ConAgra should be held liable for damages for breach of contract, negligence, and violation of

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78 The decision of the District Court of Minnesota was subsequently reversed on other grounds by the U.S. Court of Appeals for the Eighth Circuit. 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. Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1028 (8th Cir. 2014). 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, a state of Minnesota district court dismissed the action on First Amendment grounds, paralleling the same analysis employed by the federal district court. See Wallace v. ConAgra Foods, 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 Id. at *17–21.

81 Id. at *64.
various consumer-protection laws.\textsuperscript{82}

The Hebrew National litigation was far from the first time questions over the meaning of “kosher” made their way into U.S. courts.\textsuperscript{83} 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.\textsuperscript{84} The District Court of Minnesota similarly dismissed the Hebrew National lawsuit, concluding—as prior courts had when scrutinizing consumer fraud legislation which 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.”\textsuperscript{85}

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 \textit{governmental} endorsement of a particular definition of the term “kosher.”\textsuperscript{86} 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 misleading without encroaching upon the

\textsuperscript{82} Id. at *1–6.

\textsuperscript{83} See, \textit{e.g.}, \textit{supra} note 49.


\textsuperscript{86} The plaintiffs emphasized this point in their briefing. See Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, Wallace v. ConAgra, No. 0:12-cv-01354-DWF-TNL, at *33–35 (D. Minn. Oct. 1, 2012).
Establishment Clause worries.

Indeed, Hebrew National had provided some of that context in its advertising by specifically referencing “Orthodox” standards of kosher. Hebrew National’s advertising campaign may likely have intended to have those terms 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 interpretation—a point made by the plaintiffs in their brief on the motion to dismiss. 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.

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

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87 See Class Action Complaint, supra note 79, at *3.
89 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 (No. 12-cv-01354-DWF-TNL).
90 For the commercial reasons for uniformity of standards in the kosher-certification market, see LYTTON, supra note 88, at 132–34 (explaining how the interdependence of the kosher-certification market has led to the creation of increasingly uniform certification standards).
“kosher” that did not 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 the New Formalism. When contextual interpretive tools are taken off the table, however, courts face the false dilemma of dismissing coreligionist 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 coreligionist commerce also arises when parties seek to incorporate adherence to religious rules or doctrine as part of their commercial exchange. In Katz v. Singerman, 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.91 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.”92 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.”93 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 “Orthodox Polish Jewish Ritual,” and thus would violate the conditions of the donation.94

92 Id. at 517.
93 Id. at 518.
94 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
The Supreme Court of Louisiana, however, refused to enjoin the resolution, concluding that its conditions were insufficiently definite, clear, or specific. 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, and on this record, it concluded that the formal meaning of the conditions provided insufficient guidance to permit judicial enforcement of the terms.

To be sure, the court in Katz did—at least for a moment—consider mining anti-formalist resources to interpret the term “Orthodox Judaism” by considering what the grantor himself actually meant when employing the phrase “Orthodox Judaism.” 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.” On this basis, the court inferred “that he must have contemplated that such changes would inevitably occur in the future” and opted against

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95 Katz, 127 So. 2d at 533.
96 Id. at 527–32.
97 Id.
98 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 15, 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.”).
99 Katz, 127 So. 2d at 532–33 (emphasis added).
100 Id. at 533. It is worth emphasizing that a true anti-formalist 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 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 evidence regarding Jewish law as an indication of what the father “would have intended,” the tenuous link between the theological proposition and the actual intent of the father exposes the trial court’s analysis as insufficiently
gathering more evidence to interpret what was meant by “Orthodox Judaism.”

Cases like Wallace and Katz significantly endanger coreligionist commerce because they so severely limit the flexibility of important ecclesiastical terms. Because coreligionist 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. Consequently, attentive to true antiformalism, disguising a brand of formalism in anti-formalist terminology. See 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”).

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 coreligionist commercial instruments. These concerns should not, however, lead us to abandon antiformalism in the coreligionist context, especially given the significant problems with pursuing a purely formalist approach.

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 Israel v. Congregation Jeshuat Israel, 983 F. Supp. 2d 420 (S.D.N.Y. 2014) (No. 05-1631) (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”).

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 (N.Y. 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)).
a formalist approach that prohibits parties from explaining themselves too often leads to a misunderstanding or undermining of the parties' intents. In these instances, formalist legal reasoning not only impedes coreligionists 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 coreligionists 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 interpretation and instead looks to outward manifestations of contractual formation and meaning. One problem with applying this approach to coreligionist relationships is that it sometimes presumes contractual intent where no such intent exists. Indeed, coreligionists often participate in ceremonial events highlighted by religious documents that are intended to reflect religious symbolism rather than contractual obligations. Such distinctions are typically obvious to the participants who share religious affiliations—and who therefore understand the shared customs of the given

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105 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); 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”); Charny, supra note 20, 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 21, at 618 (proposing an economic model that discourages the use of extrinsic evidence in the interpretation of contracts between firms).

106 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.
religious community—but formalism’s discounting of context ignores such shared understandings, leading courts to enforce ceremony as 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 tailor them to capture the parties’ specific religious intent. As a result, strict application of contractual formalism unlikely to lead to modifications of the religious documents, and a textualist reading of those documents will generate misinterpretations of intent.

One illustration of this challenge routinely surfaces in disputes over Islamic mahr agreements, which are contracts executed as part of the traditional Islamic marriage process. Such mahr agreements are given

107 Aleem v. Aleem, 947 A.2d 489 (Md. 2008); 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); Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978); Aziz v. Aziz, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985) (enforcing a mahr agreement because it met the requirements of secular contract law); Ahmad v. Ahmad, No. L-00-1391, 2001 WL 1518116 (Ohio Ct. App. 2001); 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); Soleimani v. Soleimani, No. 11CV4668 (Kan. Dist. Ct. Aug. 28, 2012) (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); 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).

108 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 55, 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
by the groom to the bride in exchange for the bride entering into the marriage contract, and generally require the husband to 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. Courts have struggled with, and scholars have debated, 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. To illustrate, in In re The 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.

109 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 Qu’ran 4:4 (“And give the women (on marriage) their mahr as a (nikah) free gift”). It is worth noting that whereas the Qu’ran describes the mahr as a “gift,” it is a “mandatory part of an Islamic marriage contract.” Falsafi, supra, at 1917; see also supra note 108.

110 Oman, Bargaining, supra note 55, 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 55, 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).


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

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, 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.” And in Aziz v. Aziz, 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.”

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115 Id. at 249.
116 Aziz v. Aziz, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985). Other courts have been more ambiguous as to the relative balance they hope to strike between formalist and antiformalist approaches. In Odatalla v. Odatalla, for example, a New Jersey court enforced a mahr contract, outlining a purely formalistic standard against which such agreements should be judged. 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002) (“[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.
To be sure, choosing to enforce such agreements might reflect the correct outcome in that 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 coreligionist agreements.

A similar issue often arises in the context of the ketubah, the written document featured in Jewish weddings. 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 reflects an intent to be bound by a promise. 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. 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. Rarely have courts inquired whether the agreements manifest contractual intent or simply manifest customary symbolisms.

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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.
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*, for example, the court scrutinized the enforceability of a so-called “Sabbath Partnership Agreement.”  

The original transaction between the parties included a purchase of assets and an employment agreement, whereby the defendants hired the individual plaintiffs. 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.” The purpose of this agreement was to allow defendants to keep their businesses open while avoiding Jewish law’s prohibition against engaging in “work” on the Jewish Sabbath and holidays; under the Sabbath partnership agreement, the business would technically be owned by the defendants, whom the plaintiffs assumed were not Jewish. Indeed, this underlying the parties alluded to 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.” According to the terms of the Sabbath Partnership Agreement, the plaintiffs were entitled to one-seventh of the profits from the business—profits that the plaintiffs pursued as part of their complaint against the defendants.

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. Parties enter into these agreements to comply with the legal

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122 *Id.* at *2.
123 *Id.*
124 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* Colby v. Newman, 2:11-CV-07413-SVW-RZ, Document 204, at *8 (C.D. Cal. filed Jan. 4, 2013).
126 *Id.*
128 *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).
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. 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.

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 contract. 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 coreligionist commercial dealings and documents that are expressly not intended to be anything more than ceremonial. 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 differently—are, to say the least, inappropriate. For the mahrr or ketubah, expecting parties to adjust...

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130 *Id.*


132 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 coreligionist commerce from mere religious ceremony. See infra Part III.B.

133 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.”).
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, developed carefully over generations, designed 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.

III. ESTABLISHMENT CLAUSE CREEP

Formalist approaches to coreligionist commerce have led courts to myopic and misleading understandings of ecclesiastical terms and coreligionist 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 coreligionist commercial disputes while avoiding the religious question doctrine—that is, the constitutional prohibition against interpreting religious doctrine or practice.134 This framework encourages coreligionist parties to remove religious references from instruments they intend to be legally enforceable and thus separate ecclesiastical from secular matters.135 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 judiciable neutral principles.136 Consequently, courts have refused to adjudicate a

134 See, e.g., Lupu & Tuttle, supra note 10, at 134–37 (arguing that Jones v. Wolf reaffirmed courts’ prohibition from resolving religious questions).
135 Id.
136 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 and Comment, Contracting Into Religious Law: Anti-Sharia Enactments and the Establishment and Free Exercise Clauses, 20 Geo.
wider range of disputes than is constitutionally 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 undermining coreligionist 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. For example, in Soleimani v. Soleimani, a Kansas state court refused to enforce a mahr agreement. After concluding that the document, which was written in Farsi, had no agreed-upon translation, the court then determined that the document presented such unfamiliar questions that it parol evidence, would not “aid the court.” The court thus deemed the mahr unenforceable.

137 See supra notes 107–116 and accompanying text.
139 Soleimani, No. 11CV4668 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.
140 Id. at *26.
141 This conclusion was itself somewhat surprising under standard common-law
But the Kansas court’s reluctance to enforce the agreement went far beyond any worries 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.” 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. To enforce mahr agreements would “[p]erpetuat[e] such discrimination under the guise of judicial sensitivity to Establishment Clause prohibitions,” and thereby “abdicate the judiciary’s overall constitutional role to protect such fundamental rights.” The court also invoked Kansas’s recently enacted “anti-Sharia law,” like many of its counterparts in other jurisdictions, the anti-Sharia law renders contracts unenforceable where they incorporate rules from foreign or religious legal systems “that would not grant the parties the same fundamental liberties, rights and privileges granted under 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.”).

142 Soleimani, No. 11CV4668 at *29.

143 Id. at *30.

144 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.


146 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).
the United States and Kansas constitutions.”

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

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 coreligionist

147 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. 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.”

148 Soleimani, No. 11CV4668 at *34.

149 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.
commercial arrangements. 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”—the court suggested that recent interpretations of the Religion Clauses might remove any remaining legal protection upon which coreligionist commerce relies. 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 arrangement, including one that intersects with family law and takes place within a distinct ethnically homogeneous context.

This resistance to enforcing coreligionist 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. 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

150 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.

151 Id. at *34–35.

152 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, Oman, How to Judge, supra note 55, 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 55, 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.

153 Mushfique 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).
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.”154 These uncertainties are only exacerbated by the continued barrage of legislative initiatives in several states to pass anti-sharia laws.155

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,156 the growing case law over mahr agreements and other coreligionist commercial documents have been noticed by sophisticated commercial parties, further undermining the credibility of many coreligionist 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 coreligionist 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 avoid adjudicating tort disputes between coreligionists.157

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155 For examples of other anti-Sharia laws, see supra note 146. 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).

156 There has, however, been some litigation related to the constitutionality of governmental entanglement with Shari’a-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 Group, Inc. via the Troubled Asset Relief Program). For further discussion of Murray, see Hamoudi, supra note 155, at 146–50 (arguing that the Establishment Clause claim in Murray was quite weak and that the real motivation for the plaintiff’s claims in Murray “stemmed from a desire to deny specific space for Muslim accommodation because of the threat that the opponents of Islamic finance believed Islam posed to the United States”).

157 For discussion of judicial treatment of religious tort claims, see Goldstein, supra note 9, at 522–23 (finding that courts are generally reluctant to evaluate the standard of
One notable area in which common-law torts and the religious-question doctrine have tussled has been in claims of religious defamation. For example, plaintiffs frequently file defamation suits against religious leaders or coreligionists who have declared the plaintiffs as sinners or as violators of shared religious communal standards of behavior. 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. In turn, courts generally dismiss claims for religious defamation on such grounds.

However, not all claims of religious defamation follow this script. In Abdelhak v. Jewish Press, 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. The list included the plaintiff’s name, ostensibly because he had failed to grant his wife a divorce in accordance with Jewish law. 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. This error was particularly damaging to the plaintiff because his care applicable to religious counselors); Idleman, supra note 9, at 219 (predicting that adjudicatory prohibitions on religious tort claims will be eroded in the future).

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).

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).

See supra note 159.


Id. at 200–02.

Id. at 201–02.

Id. at 202.
patients were “almost without exception, women of the Orthodox Jewish faith,” 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.

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. The court nonetheless dismissed the case, concluding that the plaintiff’s claim required excessive entanglement with religious doctrine. Much of the court’s reasoning focused on the manner in which the jury would be asked to assess damages:

No 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 ‘faith . . . or ecclesiastical . . . custom’ that the [New Jersey Supreme] Court prohibited in McKelvey v. Pierce.

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.”

This sort of damages assessment is a standard fact-finding inquiry that

165 Id. at 200.
166 Id. at 208.
167 Id. at 202. In fact, the newspaper issued a retraction noting its error. Id.
168 Id. at 211.
169 Id. at 208 (quoting McKelvey v. Pierce, 800 A.2d 840, 851 (N.J. 2002)).
170 Id.
juries routinely are asked to make in predicting the market consequences of certain events, based on expert testimony and submitted evidence. In this way, the court’s holding unnecessarily shrouded much of coreligionist 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 coreligionists. 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

Coreligionist 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 coreligionists to secure commercial relations.

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. And Establishment Clause Creep has expanded the scope of cases in which courts refuse to enforce coreligionist dealings on First Amendment grounds. Together, these two trends have distorted the relationship between coreligionist commerce and its particular commercial context, preventing courts from providing the legal infrastructure necessary to ensure the enforceability and predictability of coreligionist commerce.

171 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”); see also 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 23, at 193–95; Helfand, supra note 9, at 517–18.

172 See supra Part II.B.

173 See supra Part II.A.
But we need not—and ought not—close the courthouse doors to coreligionist 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.174 New Formalism thus is motivated purely on achieving parties’ intents while minimizing transaction and error costs, and 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.175

However, parties to co-religionist commercial dealings cannot similarly capture the advantages of formalism. Coreligionist 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,176 they cannot adapt their agreements to the demands of the relevant legal doctrine by using formal terms.177 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.178 As a result, parties cannot simply avoid costly 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 coreligionists. This contextualist approach offers an

174 See, e.g., Adam B. Badawi, Interpretive Preferences and the Limits of the New Formalism, 6 BERKELEY BUS. L.J. 1, 22–23 (2009); Omri Ben-Shahar, The Erosion of Rights by Past Breach, 1 AM. L. & ECON. REV. 190, 216 (1999); Scott, supra note 66, at 376.


178 See supra Part II.A.
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 coreligionists to translate religious terms into secular analogues and thus leverage private law’s dynamism like other commercial parties.179

A limited and narrowly circumscribed embrace of contextualism would resolve the unusual legal challenges of coreligionist 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 coreligionist commerce arises. When parties have intended to draft enforceable commercial agreements or suffer from purely economic torts, 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 unnecessarily void coreligionist commercial agreements.180

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 interpreting and enforcing coreligionist commercial agreements. The very nature of coreligionist 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.181 In other cases, contextual inquiry may provide a basis to

179 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.

180 See supra Part III.A.

181 As described above, examples of this phenomenon include documents related to religious marriage and divorce—such as the Jewish ketubah and the Islamic mahr
interpret seemingly religious terminology, thus allowing enforcement without encroaching on Establishment Clause prohibitions. In this way, contextualism can further ensure the enforceability of coreligionist commerce by avoiding Establishment Clause pitfalls, using the norms and understandings shared by coreligionists to fill in gaps and interpret terms in coreligionist 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 coreligionist commerce with the adjudicative infrastructure it needs to remain viable.

Fortunately, some courts have resisted rigid formalist analysis of coreligionist commercial disputes and have illustrated how contextualism can resolve coreligionist 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.

A. Disentangling Coreligionist Commerce from Coreligionist 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 coreligionist commercial instruments with surgical precision, carefully extracting secular contract terms from their surrounding religious context. In *Light v. Light*,182 for example, a Connecticut court enforced a standard prenuptial agreement drafted by a prominent rabbinical court—the Beth Din of America.183 The goal of the 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. (discussing examples of this dynamic).

Beth Din’s prenuptial agreements is to provide the wife with financial leverage to obtain a Jewish divorce. 185 Since traditional Jewish law grants the husband unilateral authority to initiate a divorce, 186 the so-called “Jewish prenup” 187 emerged after creative drafting on the part of lawyers and rabbis to prevent husbands from using this authority as leverage during the course of dissolving their marriages. 188

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. . .” 189 Thus, the longer the

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184 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).
185 See Michelle Greenberg-Kobrin, Civil Enforceability of Religious Prenuptial Agreements, 32 COLUM. J.L. & SOC. PROBS. 359, 365 (1999) (affirming this sentiment).
186 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., Ann Laquer Estin, Embracing Tradition: Pluralism in American Family Law, 63 Md. L. REV. 540, 566 (2004) (analyzing this balance); 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); Breitowitz, supra note 118, at 320–21 (same); Greenawalt, supra note 15, at 812 (same).
189 Light v. Light, 2012 Conn. Super. LEXIS 2967, at *3 (Conn. Super. Ct. Dec. 6,
husband refuses to provide his wife with a Jewish divorce document, the larger his debt grows.\textsuperscript{190}

The husband in \textit{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.\textsuperscript{191} Nonetheless, the court proceeded to carefully separate the agreement from its religious context, stating:

\begin{quote}
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.\textsuperscript{192}
\end{quote}

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 coreligionist commerce going forward.\textsuperscript{193} Certainly, the decision in \textit{Light} offers the possibility that parties entering into a religious marriage can structure their legal obligations with the help of secular, court-enforced instruments.\textsuperscript{194} The ruling thus validates the use of state-enforced legal instruments as a response to problematic

\textsuperscript{190} See Lang v. Levi, 16 A.3d 980, 991 (Md. App. 2011) (enforcing a religious arbitration award modifying the amount of payment pursuant to a Jewish prenuptial agreement); see also Mordechai Willig, \textit{The Prenuptial Agreement: Recent Developments}, 1 J. BETH DIN OF AM. 8, 14–15 (2012) (further discussing marital negotiations in this context).


\textsuperscript{192} \textit{Id.} at *19.


\textsuperscript{194} Berger, supra note 193 (quoting Susan Aranoff, director of the advocacy group Agunah International, as noting that the “unanswered question with regard to the prenup was always will it be enforceable in civil court”).
religious doctrine that fails to address the contemporary needs of a religious community.\textsuperscript{195} In this way, the prenuptial agreement is emblematic of how religious communities can employ commercial instruments to achieve religious objectives. But \textit{Light v. Light} also illustrates that these agreements are not self-enforcing, and the authority of public courts are 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.”\textsuperscript{196} 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 that rely on state court enforcement. Put differently, to capitalize on what the neutral-principles approach can provide coreligionist commerce, courts must beat back Establishment Clause creep and recognize that just because a legal instrument emerges from a religious context does not mean its enforcement involves ruling on religious doctrine.

\textbf{B. Employing Coreligionist Context to Interpret Coreligionist Commerce}

A commitment to contextualism encourages courts to recognize that sophisticated application of the neutral-principles approach is necessary for the continued viability of coreligionist commerce. Thus, courts should focus on enforceable neutral principles when parties intentionally draft coreligionist 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 coreligionist disputes.


\textsuperscript{196} Jones v. Wolf, 443 U.S. 595, 603 (1979).
Some courts have successfully employed contextualist approaches to ensure that coreligionist 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. 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. 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. 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. At bottom, these agreements are best understood as religiously sanctioned loopholes to avoid religious rules against charging interest, and do not represent the

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200 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 biblical prohibition against charging interest by one Jew to another.”); see generally J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 376–85 (1983) (discussing the Jewish legal background to heter iska agreements). For examples of such agreements, see J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 385–88 (1983) (providing boilerplate heter iska agreements for use in different commercial contexts); YISROEL REISMAN, THE LAWS OF RIBBIS 419–24 (1994) (same). It is also worth noting that heter iska agreements typically incorporate heightened evidentiary requirements to prove the venture’s losses, and are intended to impede the ability of the borrower from avoiding his payments to the lender. See YISROEL REISMAN, THE LAWS OF RIBBIS 377–407 (1994) (discussing these heightened requirements).
parties’ mutual assent to adopt contractual obligations.\textsuperscript{201}

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.\textsuperscript{202} 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.\textsuperscript{203}

By and large, formalism has not lured courts into enforcing heter iska agreements.\textsuperscript{204} 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.\textsuperscript{205} In so doing, courts have emphasized the contractual background of heter iska agreements, often emphasizing their factual context to infer the true intent of the parties.

For example, in \textit{Heimbeinder v. Berkowitz}, 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,\textsuperscript{206} 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.’”\textsuperscript{207} The court concluded that the heter iska agreement was not intended to be enforceable, but “was ‘merely a compliance in form with

\textsuperscript{201} See, e.g., Bollag v. Dresdner, 130 Misc. 2d 221, 224 (N.Y. Civ. Ct. 1985) (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”).

\textsuperscript{202} 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).

\textsuperscript{203} Id.


\textsuperscript{206} Heimbinder v. Berkovitz, 175 Misc. 2d 808, 817 (N.Y. Sup. Ct. 1998).

\textsuperscript{207} Id.
Hebraic law.” 208 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. 209

Contextualism can also prove useful in enforcing commercial elements of the mahr agreement that were intended to be enforced. In Ahmed v. Ahmed, a dispute over a mahr agreement, 210 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.” 211 The defendant argued on appeal that the agreement was simply “‘too vague and uncertain to be enforced’” 212 since it failed to state who was meant to pay whom, when it would be paid or how it was to be paid. 213

But the court resisted such a purely formalist approach, choosing instead to treat the mahr as an incomplete document that required further

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208 Id.
209 See Edelkind, 539 F. Supp. 2d at 454 (D. Mass. 2007) (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 (Civ. Ct. 1968) (finding that the parties did not intend to enforce the agreement).
211 Id. at 195.
212 Id.
213 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 also 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 55, at 210-18 (arguing that the uncertain terms of many mahr contracts should preclude their enforcement).
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.214

Importantly, the court did not admit the wife’s testimony as objective evidence of the religious doctrine at stake in a mahr contract; rather, the court relied on her testimony as evidence of the shared subjective understanding of the parties.215 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.”216

A similar contextual approach convinced a Washington state court to refuse to enforce a mahr agreement. In In re The Marriage of Obaidi, 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.217 These contextual considerations convinced the court that for this

214 Ahmed, 261 S.W.3d at 195 (emphasis added).
215 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).
216 Id.
couple, the mahr was merely a ritual formality and did not constitute any contractual assent. 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 coreligionist commercial disputes without encroaching on Establishment Clause concerns. This contextual approach allows private law to work its “genius” among coreligionists as it does among all parties.

V. CONCLUSION

This Article explores the existential threat to coreligionist 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 coreligionists 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 coreligionist commerce has become uncertain.

The impact of these developments has been vast. They threaten the sustainability of multi-billion-dollar markets, and they encroach 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 coreligionist commerce reveals just how central commercial dealings are to coreligionist 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

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218 *Id.* at 791.
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 coreligionist 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 coreligionist 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 will not hold much longer, and the price of participating in commercial markets will be that parties must check their religion at the door.