

## RELIGIOUS COVENANTS

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### Abstract

When religious institutions alienate property, they often include religiously motivated deed restrictions that bind future owners, sometimes in perpetuity. These “religious covenants” serve different purposes and advance different goals. Some prohibit land uses that the alienating faith communities consider illicit; others seek to ensure continuity of faith commitments; still, others signal public disaffiliation with the new owners and their successors. Some religious covenants are required by theological mandates, but many are not. This Article examines the phenomenon of religious covenants as both a private law and public law problem. This Article concludes that most, but not all, of the religious covenants are likely enforceable, and furthermore, that traditional private law rules governing covenant enforcement represent a bigger impediment to their enforcement than public law principles.

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### INTRODUCTION: A TALE OF TWO PARKING LOTS

A downtown parking lot rarely inspires the religious imagination. But its open pavement and the soaring property values that surround it can invite private developers to dream.<sup>1</sup> In May 2019, JDL Development, a Chicago-based real estate developer, paid an astronomical 110 million dollars to purchase the surface parking lot outside of Holy Name Cathedral from the Roman Catholic Archdiocese of Chicago for a project known as One Chicago Square.<sup>2</sup> In addition to some street level retail space, JDL's project includes two skyline-altering, luxury residential towers that overlook the church.<sup>3</sup> Nearly five years earlier, the First Church of Christ, Scientist sold its modest surface lot behind Christian Science Plaza to another Chicago-based developer, Pritzker Realty

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1. See Tom Acitelli, *Parking Lots, Once Asphalt Wasteland, Become Golden Opportunities*, N.Y. TIMES (Dec. 3, 2019), <https://www.nytimes.com/2019/12/03/business/parking-lot-death-redevelopment.html> [<https://perma.cc/7NBS-U4EM>].

2. See *id.*; Jay Koziarz, *Work on 78-Story Skyscraper Across from Holy Name Cathedral Begins*, CURBED CHI. (Mar. 21, 2019, 11:53 AM), <https://chicago.curbed.com/2019/3/21/18275779/construction-holy-name-skyscraper-one-chicago-square> [<https://perma.cc/3WGB-KU6T>]; Ryan Ori, *Luxury Towers Planned After Holy Name Cathedral Parking Lot Sold for \$115 Million*, CHI. TRIB. (Apr. 5, 2017, 5:08 PM), <https://www.chicagotribune.com/business/ct-holy-name-parking-lot-development-ryan-ori-0406-biz-20170405-story.html> [<https://perma.cc/25C5-S693>]; Robert Herguth, *Much of \$100 Million from Sale of Holy Name Lot to Go to Church Sex-Abuse Debts*, CHI. SUN-TIMES (Feb. 8, 2019, 8:00 AM), <https://chicago.suntimes.com/2019/2/8/18317337/much-of-100-million-from-sale-of-holy-name-lot-to-go-to-church-sex-abuse-debts> [<https://perma.cc/P8NL-4XGN>].

3. See Koziarz, *supra* note 2; Dennis Rodkin, *Here's the First Look Inside Those High-End Condos Going Up Across from Holy Name*, CRAIN'S CHI. BUS. (Nov. 6, 2019, 2:10 PM), <https://www.chicagobusiness.com/residential-real-estate/heres-first-look-inside-those-high-end-condos-going-across-holy-name> [<https://perma.cc/K832-8MXX>].

Group.<sup>4</sup> Captivated by urban residential growth in Boston, Pritzker paid 21.9 million dollars for title to the asphalt parking spaces, replacing them with lavish apartments in its landmark tower, 30 Dalton.<sup>5</sup> While 30 Dalton and One Chicago Square command lucrative per-unit price tags,<sup>6</sup> both properties remain subject to covenants imposing extensive land-use restrictions on current and future developers. Many of these use restrictions, memorialized in the deeds transferring title, flow from the religious commitments of each lot's former owner.<sup>7</sup>

To grantees unfamiliar with Christian Science or Roman Catholicism (or, indeed, to many adherents of these faiths), the use restrictions might seem unusual. According to its deed, the nonresidential portions of 30 Dalton may not be used for “the sale, display, manufacture or distribution” of alcohol, tobacco, narcotics, or pharmaceuticals; medical products, equipment, or services; or pornography.<sup>8</sup> In addition to prohibiting gambling, any “recurring activities in support of a particular religious denomination or organization,” as well as any signage “which would imply an association with The First Church of Christ, Scientist,” are expressly prohibited.<sup>9</sup> The deed for One Chicago Square defines similar restrictions with respect to pornography, drugs, alcohol, and ecclesiastical association—property owners “will not use nor permit the use of the name ‘Roman Catholic Church’ or ‘The Catholic Bishop of Chicago’ or any derivative.”<sup>10</sup> But developers in Chicago also agreed that the cathedral's former parking lot would not be used for abortion, in vitro

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4. See Eric Convey, *Christian Science Parcel Sells for \$22M, with Some Serious Strings Attached*, BOS. BUS. J. (Oct. 22, 2014, 12:31 PM), <https://www.bizjournals.com/boston/real-estate/2014/10/christian-science-parcel-sells-with-strings.html> [<https://perma.cc/4DNN-A86S>].

5. See *id.*; BOS. LANDMARKS COMM'N, CHRISTIAN SCIENCE CENTER COMPLEX 2–3 (2011), [https://www.cityofboston.gov/images\\_documents/Christian%20Science%20Center%20Complex%20Study%20Report,%20as%20amended\\_tcm3-17697.pdf](https://www.cityofboston.gov/images_documents/Christian%20Science%20Center%20Complex%20Study%20Report,%20as%20amended_tcm3-17697.pdf) [<https://perma.cc/3FF6-5ZLM>]; *Floor Plans*, 30 DALTON, <https://www.30dalton.com/floor-plans> [<https://perma.cc/9VBD-U3NB>].

6. Monthly rent for some units in 30 Dalton will likely exceed \$10,000. See *Floor Plans*, *supra* note 5. For-sale residences in One Chicago stretch from \$1.75 to \$28 million. Jay Koziarz, *A Closer Look at the High-Tech Condos Headed to River North's One Chicago Development*, CURBED CHI. (Dec. 11, 2019, 10:26 AM), <https://chicago.curbed.com/2019/12/11/21005192/one-chicago-development-condos-renderings-construction> [<https://perma.cc/BY58-EDP8>].

7. SUFFOLK COUNTY REGISTRY OF DEEDS, DEED BK. 53581, P. 309, QUITCLAIM DEED 1 (Oct. 19, 2014) [hereinafter Deed to 30 Dalton] (on file with the authors); COOK CNTY. RECORDER OF DEEDS, NO. 1913022048, SPECIAL WARRANTY DEED exhibit C (May 10, 2019) [hereinafter Deed to One Chicago Square] (on file with the authors).

8. Deed to 30 Dalton, *supra* note 7, at 3 (noting that use restrictions contained in “Sections 1 and 3 above shall not apply to individual residential condominium units or the common areas appurtenant thereto”).

9. *Id.*

10. Deed to One Chicago Square, *supra* note 7, at 6–7.

fertilization, surrogacy, euthanasia, assisted suicide, embryonic and fetal stem cell research, Satanism, atheism, palm reading, astrology, or any kind of “restaurant, bar or club that encourages or requires personnel to be shirtless or to wear provocative clothing . . . (e.g., so-called hot pants, shorts not covering the entire buttocks, tight fitting or otherwise revealing tank tops or halter tops).”<sup>11</sup> “Any activity not listed” that is “inconsistent with or contrary to the tenets of the Roman Catholic Church” may be prohibited at One Chicago Square based on “the sole discretion of the then-sitting Bishop or Archbishop [of Chicago] with jurisdiction over the Property.”<sup>12</sup> While neither deed claims a right of reversion for breach, both specify that any use restriction deemed “invalid . . . under applicable law” may be severed without invalidating the covenant.<sup>13</sup>

Religiously motivated covenants are not unique to the Archdiocese of Chicago or the First Church of Christ, Scientist. When alienating or leasing property, many religious organizations and faith communities impose use restrictions that differ in breadth and detail—but not in kind—from those imposed on the parking lots outside Holy Name Cathedral and Christian Science Plaza. The Church of Jesus Christ of Latter-day Saints restricts future uses that involve substances considered harmful in the “Word of Wisdom,” including alcohol, tobacco, tea, and coffee.<sup>14</sup> The Episcopal Trinity Church in Manhattan utilizes long-term leases that prohibit leasing to any person “convicted of a hate crime or a crime involving fraud, theft, embezzlement, misappropriation of funds, breach of trust or moral turpitude which, in the reasonable judgment of Landlord, has or may reasonably be expected to have a material adverse effect on the Building, Landlord’s Fee Estate or Landlord’s reputation.”<sup>15</sup> The

11. *Id.* at 6. The deed also prohibits the property from being used for an arcade, billiard hall, casino, bar, night club, or bowling alley that either: primarily serves alcohol or marijuana; remains open later than 11:59 PM; operates primarily for “assembling, manufacturing, distilling, refining, smelting, agricultur[e], or mining” that might “emit[an] obnoxious odor, noise or sound” outside buildings on the lot; pawn shops or flea markets; any “dumping, disposing, incineration or reduction of garbage,” exclusive of garbage compactors not visible from the street; car washes or vehicle repair shops; tattoo parlors; or any “mobile home park, trailer court, junkyard, or stockyard.” *Id.* at 7–8.

12. *Id.* at 7.

13. *Id.* at 8; Deed to 30 Dalton, *supra* note 7, at 4.

14. Interview with Loyal C. Hulme, Shareholder, Kirton McConkie (June 11, 2020) (describing use restrictions incorporated into property deeds by the Church of Jesus Christ of Latter-day Saints) [hereinafter Hulme Interview]; see *Word of Wisdom*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/gospel-topics/word-of-wisdom?lang=eng> [https://perma.cc/Q2BM-4Q3Y].

15. Interview with Sujohn Sarkhar, Managing Director of Asset Management, Trinity Church Wall Street (May 26, 2020); Episcopal Trinity Church, “Prohibited Person & Prohibited Use (Negotiated 99-Year Ground Lease, Not Yet Closed)” (on file with the authors).

Catholic Diocese of Buffalo prohibits use of the property for “any purposes either by speech or action which would bring discredit, ridicule, criticism, and/or scandal upon . . . the Roman Catholic Church.”<sup>16</sup> Use restrictions provide evidence of the tension between religious conscience and secular markets as they converge on property—tension that extends beyond Western Christianity.<sup>17</sup>

Although this tension between sacred and secular defines the contours of religious covenants, not all religious covenants advance the same goals. Their content reflects the fact that faith communities alienating property have diverse reasons for restricting future land uses. Some religious covenants prohibit future uses on alienated property—both adjacent to and distant from property still owned and used for religious purposes—that faith communities understand to be spiritually or morally illicit.<sup>18</sup> In some cases, the religious organization may be (or believe themselves to be) bound by theological mandates. For example, some faith communities are bound by theological rules that require them to take the necessary steps to protect property that has been used for, or dedicated to, sacred purposes. While these faith communities may permit the repurposing or selling of a house of worship, their religious commitments forbid property once used for ritual worship from any involvement in activities they consider immoral.<sup>19</sup> Even when not required theologically, faith communities may feel bound to protect themselves from association or complicity with activities that contradict their spiritual and moral commitments. Relatedly, religious owners may see deed restrictions as a means of advancing the “common good” by prohibiting illicit or disfavored activities.<sup>20</sup> Within the deeds transferring title, a few faith communities even delegate to their own religious authorities an interpretive discretion over covenant provisions—especially those that turn on the interpretation of doctrine.<sup>21</sup> Still others seek to ensure

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16. ERIE CNTY. CLERK, NO. 813689/2015, ORDER 4 (Dec. 14, 2015) [hereinafter Deed to Saints Peter and Paul Roman Catholic Church] (on file with the authors).

17. See discussion *infra* Sections I.A–B.

18. See, e.g., Deed to One Chicago Square, *supra* note 7, at 6–8 (restricting numerous activities considered illicit in Catholicism).

19. The Code of Canon Law permits Roman Catholic churches “no longer . . . used for divine worship” to be repurposed or sold for “profane [secular] but not sordid use.” 1983 CODE c.1222, § 2.

20. Hulme Interview, *supra* note 14.

21. See, e.g., Deed to One Chicago Square, *supra* note 7, at 7 (prohibiting “[a]ny activity . . . which is inconsistent with or contrary to the tenets of the Roman Catholic Church, including canon law, doctrine, moral law or customs, in the sole discretion of the then-sitting Bishop or Archbishop with jurisdiction over the Property”); Hulme Interview, *supra* note 14 (clarifying that any determination of whether future uses conflict with Church-imposed covenants remains “in the seller’s sole discretion”); see also *infra* notes 206–15 and accompanying text.

continuity with the religious community by limiting ownership or use of alienated property to members of the same faith community.<sup>22</sup>

On the other hand, some religious covenants are neither theologically required nor motivated but instead seek to advance other goals. Some reflect a desire to disassociate the previous religious owner from affiliation with future owners. These covenants are imposed for reputational or expressive reasons. They signal—both to coreligionists and to anyone who might occupy their alienated property—public disaffiliation from future land uses. For example, the deeds for both One Chicago Square and 30 Dalton prohibit successive owners from claiming affiliation with the alienating religious institutions.<sup>23</sup> Many other deed restrictions imposed by religious organizations cannot be fairly characterized as religious at all, but rather reflect a commonplace desire to protect adjacent property that continues to be held by the religious entity (as well as neighboring owners) from undesirable land uses.

While, in the short term, all of these goals might be accomplished by contracts between the buyers and sellers of property, religious covenants are more than simple contracts. Rather, they are nonpossessory property interests (“servitudes”) retained by the seller that theoretically “run with [the] land” and bind current and future owners of alienated, religious property, sometimes in perpetuity.<sup>24</sup> Religious covenants achieve their objectives by enabling faith communities to divide the property rights associated with land that they choose to alienate, thereby transferring title to property while retaining a nonpossessory property interest in its use.<sup>25</sup> This nonpossessory property interest may extend in perpetuity, binding future generations who are temporally and religiously distant from the property’s original buyer and seller—the parties who created the covenant. Because they are property interests, religious covenants raise numerous complex legal and policy questions: Should courts enforce religiously motivated deed restrictions? Why or why not? When? If there is a line between enforceable and non-enforceable covenants, what is it?

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22. See *infra* notes 132–54 and text accompanying notes.

23. See Deed to One Chicago Square, *supra* note 7, at 6; Deed to 30 Dalton, *supra* note 7, at 3.

24. See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.1 (AM. L. INST. 2022).

25. Cf. UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 174 (1981) (defining a conservation easement as “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property”).

Religious covenants implicate both private and public law. On the private law side, common law doctrines governing covenants have evolved over centuries. But left unanswered is how these doctrines treat religious covenants that are typically held “in gross” and that benefit the seller as an individual or organization—rather than the owner of a parcel of property—in contrast to traditional “appurtenant” covenants that benefit parcels of land. Further, how should common law concerns about notice and information costs affect courts’ decisions about whether to enforce covenants that introduce uncertainty by delegating interpretive authority to private parties, including religious authorities? Finally, can and should judges determine the contours of the religious deed restrictions that specifically refer to theological teachings?

On the public law side, religious covenants frequently restrict constitutionally protected activities. Would judicial enforcement of such religious covenants raise constitutional concerns by enlisting courts to enforce private restrictions that implicate constitutional rights in a way inconsistent with the principle announced in *Shelley v. Kraemer*?<sup>26</sup> Would such enforcement raise Establishment Clause concerns, either because it would delegate secular legal authority to religious organizations, contrary to the rule announced in *Larkin v. Grendel’s Den*,<sup>27</sup> or because it would require secular courts to interpret religious doctrine, contrary to the “church autonomy” or “ecclesiastical abstention” doctrine?<sup>28</sup> Additionally, would non-enforcement of religious covenants raise Free Exercise Clause concerns by burdening religious practices and undermining the neutrality of the law?<sup>29</sup>

Admittedly, cases involving religious covenants do not overwhelm the judiciary.<sup>30</sup> Simple economics may explain why: buyers and sellers have already internalized their costs by agreeing to a lower purchase price when such restrictions are included in their initial agreement. Moreover,

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26. 334 U.S. 1, 20 (1948) (holding that judicial enforcement of racially restrictive covenants would violate the Equal Protection Clause).

27. 459 U.S. 116, 123 (1982) (holding that a law giving churches veto power over liquor licenses violated the Establishment Clause).

28. This doctrine is designed to shield religious organizations from state interference by prohibiting secular courts from interpreting and applying religious doctrine. See *infra* notes 269–74 and accompanying text.

29. See *infra* notes 280–85 and text accompanying notes.

30. To date, religious covenants seem to have faced greater scrutiny outside the courts. See, e.g., Evan Allen, *ACLU Studying Land Sale: Restrictions on Church-Site Sale*, BOSTON.COM (Apr. 29, 2012), [http://archive.boston.com/news/local/massachusetts/articles/2012/04/29/aclu\\_studyin\\_g\\_land\\_deal](http://archive.boston.com/news/local/massachusetts/articles/2012/04/29/aclu_studyin_g_land_deal) [<https://perma.cc/6FM4-QVTM>]. Journalists and commentators treat other contemporary servitudes with “barely disguised disapproval.” See Carol M. Rose, *Servitudes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 296, 298 (Kenneth Ayotte & Henry E. Smith eds., 2011).

subsequent owners are presumably on notice because religious covenants are included within the deed transferring title to property and are publicly recorded.<sup>31</sup> Yet, as time passes and the initial sales imposing these restrictions become more remote, the chances of litigation challenging them may increase, and the need to address these questions may become more acute. This Article concludes that many religious covenants likely are enforceable. For those that are not, this Article suggests that private law poses more substantial impediments to their enforcement than public law. This Article also concludes that there are both normative and prudential reasons for enforcing them in many cases. Normatively, some religious traditions require the imposition of use restrictions (at least in some circumstances).<sup>32</sup> Civil courts' refusals to enforce such restrictions would therefore raise serious religious liberty concerns, as would the selective non-enforcement of religious covenants when similar kinds of restrictions are routinely enforced by courts. Prudentially, there are strong public policy arguments against legal rules that discourage religious organizations from alienating property, particularly since they own so much of it.<sup>33</sup> Religious institutions' in rem portfolios are vast and diverse, and—for a variety of economic, sociological and demographic reasons—many properties owned by them are underutilized. Encouraging the alienation and repurposing of these properties usually accords with the public interest.

This Article is organized as follows: Part I surveys the theological rules that govern the disposition of property held by religious institutions in three faith traditions—Judaism, Islam, and Roman Catholicism. Although these are not the only faith traditions with rules governing the dispensation of property, analyzing their approaches to property ownership provides an opportunity to identify reasons why many faith communities may choose to bind their alienated property with covenants. Part II examines religious covenants as a private law problem by exploring how traditional private law rules should treat covenants imposed by religious organizations for religious reasons. Part III explores religious covenants as a public law problem, examining whether their

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31. RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 58 (2013) (explaining the “cost internalization” argument).

32. *See e.g.*, Code *supra* note 19 (quoting canon law requirement that alienated church not be used for sordid use).

33. For example, the Roman Catholic Church is the largest nongovernmental landowner in the world, with an estimated 177 million acres in property holdings. Timothy Schuler, *Mapping One of the World's Largest Landowners*, *CURBED* (Oct. 18, 2017, 8:00 AM), <https://archive.curbed.com/2017/10/18/16483194/catholic-church-gis-goodlands-esri-molly-burhans> [<https://perma.cc/TH8U-5RV8>]; *see also Making Land Work for Good*, *GOODLANDS*, <https://good-lands.org> [<https://perma.cc/N2CZ-2B9Z>] (providing a plan for the Church to use its land for good).

enforcement might raise Equal Protection or Establishment Clause issues and whether their non-enforcement might raise Free Exercise issues. Part IV concludes by examining prudential arguments in favor of enforcing religious covenants in most cases.

## I. THE THEOLOGY OF RELIGIOUS COVENANTS

This Part explores the theology undergirding religious covenants in three faith traditions. It engages in a comparative study of religious law, surveying theological rules that govern the disposition of property held by religious institutions. In doing so, this Part identifies reasons why faith communities may choose to bind their alienated property with religious covenants. Understanding these rules helps shed light on the legal implications of covenant enforcement. But this Part also reveals the extent to which use restrictions imposed on many alienated properties are not mandated by religious law.<sup>34</sup> Ultimately, it suggests that alienated church properties—Jewish, Islamic, and Roman Catholic—exist along a spectrum of sacrality based on their prior religious uses.

At the outset, a comparative study of religious law requires cautious engagement. As Professor James Whitman instructs, many religious traditions “do not distinguish ‘law’ from ‘religion’ at all.”<sup>35</sup> To many Muslims and non-Western faith communities, “it can seem misguided and even dangerous to sever the connections” between legal obligations and religious duties.<sup>36</sup> While distinctions are frequently drawn between orthodoxy and orthopraxis in comprehending contrasting notions of religious obligation,<sup>37</sup> the discussion below merely attempts to illustrate how theological rules may obligate different faith communities to impose use restrictions on their alienated sacred properties. It does not attempt to situate rules within larger systems of religious belief or practice.

Also, religious institutions own many different types of properties that have a variety of purposes. In addition to buildings used for worship or other sacred rites (e.g., churches, monasteries, synagogues, mosques, temples), faith communities own elementary and secondary schools,

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34. For example, the Code of Canon Law requires the Catholic Church to take steps to prevent “sordid” future uses of alienated church sanctuaries; it says nothing about wearing “so-called hot pants” on former church parking lots. 1983 CODE c.1222, § 2.

35. James Q. Whitman, *Comparative Law and Religion*, THE OXFORD HANDBOOK OF COMPARATIVE LAW 734, 738 (Mathias Reimann & Reinhard Zimmerman eds., 2d ed. 2019).

36. *Id.* at 739 (“The sacred Law of Islam is an all-embracing body of religious duties, the totality of Allah’s commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual as well political and (in the narrow sense) legal rules.” (quoting JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1966))).

37. *Id.* at 739–40 (“Orthodoxy requires that the individual *believe* certain things (for example, that God and Christ are consubstantial) whereas orthopraxis requires that the individual *do* certain things (for example, perform certain rituals of purification or engage in certain charitable good works).”).

colleges and universities, hospitals, commercial properties, and housing (convents, rectories and parsonages, homeless shelters, assisted living facilities, and others). They also own, as the examples discussed in the introduction above illustrate, parking lots and other vacant properties with development potential. Religious organizations sometimes receive properties as gifts, often testamentary ones, that they never use for any purpose connected with their religious mission at all. For a variety of reasons, it is sometimes necessary or advisable to sell these properties, and theological rules may impose different duties depending both on the previous use of the property that is being alienated and the reasons for which it was originally acquired.

### A. Jewish Law: Holiness and Transference

Jewish law governing the alienation of property derives from common law rabbinic interpretation of the Mishnah, an ancient code of oral law that developed to supplement and explain the written law given to Moses on Mount Sinai and contained in the Pentateuch.<sup>38</sup> The following statement of law from *Mishnah Megillah* 3:1 drives any discussion of how sacred property may be sold:

The trustees of the community who sell a courtyard (used for sacred gatherings) can only buy with those funds a synagogue. If they sell a synagogue, they must buy an ark. If they sell an ark they must buy the dressings for the Torah. If they sell the dressings for the Torah, they must buy sacred books. If they sell sacred books they must buy a sefer Torah. And conversely, if they sell a Torah, they may not buy sacred books. If they sell sacred books they may not buy dressings for the Torah. If they sell the dressings for the Torah they may not buy an ark. If they sell an ark they may not buy a synagogue. If they sell a synagogue they may not buy a courtyard. And so also with the excess.<sup>39</sup>

These Mishnah restrictions on sale seek to protect the sacrality of ritual property, both real and moveable. According to Jewish belief, holiness accrues to particular objects used for worship and study—for

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38. Codified in Palestine during the third century C.E., the Mishnah contains an oral law tradition that developed over many centuries, first by the Scribes (*Soferim*), then by the early rabbis (*Tannaim*). George J. Webber, *The Principles of the Jewish Law of Property*, 10 J. COMP. LEGIS. & INT'L L. 82, 82 (1928); see Ora R. Sheinson, *Lessons from the Jewish Law of Property Rights for the Modern American Takings Debate*, 26 COLUM. J. ENV'T L. 483, 491 (2001).

39. David J. Fine, *On the Sale of Holy Property* 1 (Comm. on Jewish L. & Standards, Legal Paper No. OH 153:2.2005a, 2005) (quoting *Mishnah Megillah* 3:1), [https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/fine\\_holyproperty.pdf](https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/fine_holyproperty.pdf) [<https://perma.cc/7QRT-W3RD>].

example, a Sefer Torah or sacred book.<sup>40</sup> If a holy object is sold, that object's holiness transfers into any funds received for the sale, and holiness remains in those funds, including any excess funds remaining after an acceptable future purchase.<sup>41</sup> Because holiness is not uniform across objects, Jewish law only permits sacred property to be sold in ways that "raise the level of holiness and do not lower the level of holiness."<sup>42</sup> Funds from an alienated synagogue may be used to acquire sacred books or Torah dressings, but an ark or Sefer Torah may never be used to buy a synagogue.<sup>43</sup>

The Mishnah concepts of holiness and transference define rules for alienating sacred property under Jewish law. With respect to synagogue buildings, holiness inhabits property only because of the context of its use, rather than its material structure: "A synagogue is a building used for worship. But if there is no worship in the building, and no sacred items, the building is just a building."<sup>44</sup> Because holiness can depart from the building itself, Jewish faith communities need not place limits on their sale of an old synagogue; indeed, synagogue buildings may even be sold to Christian churches.<sup>45</sup> The only requirement is that sale proceeds not immediately used for purchase of a new synagogue or for structural repair must be kept separate from other communal funds because they retain an original holiness. Trustees of the congregation may stipulate that any

40. *Id.* at 1 ("[T]here are certain documents and books that are holy because they are canonized or otherwise recognized as sacred texts, and retain that holiness from the time they are written onward."). In the Jewish tradition, a Sefer Torah is written in Hebrew by a qualified calligrapher on vellum or parchment and enshrined in an ark of the Law for public readings during synagogue services. See *Sefer Torah*, BRITANNICA, <https://www.britannica.com/topic/Sefer-Torah> [<https://perma.cc/RZU4-89T5>].

41. Fine, *supra* note 39, at 1. While holiness can depart from an object that is sold, that holiness "does not cease to exist. Rather, it transfers itself into the funds into which the asset of the synagogue was 'converted.' The transference of the essence of a thing into its monetary equivalent is a concept that is found throughout Jewish law." *Id.* at 2.

42. *Id.* at 1. The Mishnah explicitly legislates "degrees of holiness" in sacred objects: "The holiness of a sefer Torah is of the highest or first degree. Sacred books are second degree. Torah dressings are third degree. The ark is fourth degree. The synagogue building is fifth degree. And an open space used for holy gatherings is sixth degree." *Id.* at 2. Funds into which holiness has transferred "can only be used to purchase items of a greater degree." *Id.* The Mishnah's list of sacred property is not exhaustive, though everything listed contains "similar types of holiness, all deriving from its use in study and worship." *Id.* at 9.

43. *Id.* at 1.

44. *Id.* at 2.

45. *Id.* (citing Letter from Kassel Abelson, Chairman, Law Committee for the Rabbinical Assembly) ("[W]hen the sacred symbols have been removed from a synagogue building no longer in use, and when the congregation has already moved to its new quarters, the congregation is justified in selling the old building. It need not be sold indirectly, and it may be sold to a church."). But see *Orthodox Rabbis Warn Against Selling Synagogue Buildings*, JEWISH TELEGRAPHIC AGENCY, May 7, 1954, at 5 (on file with authors) (recounting the Union of Orthodox Rabbis' statement that "under no circumstances may a synagogue be sold to a church").

dedicated funds in excess of those required to purchase new sacred property be divested of holiness, rendering the funds unrestricted for communal use.<sup>46</sup>

Jewish law imposes few use restrictions on alienated property. Tractate Megillah in the Babylonian Talmud recounts the dominant view that an old synagogue could not be sold for “four things, which would be an affront to the synagogue’s previous sanctity: For a bathhouse, where people stand undressed; or for a tannery, due to the foul smell; for immersion, i.e., to be used as a ritual bath, where people also stand undressed; or for a lavatory.”<sup>47</sup> But the Code of Jewish Law includes an exception to this rule, allowing a sale for “even these four things” if performed publicly by “seven distinguished men of the city . . . in an assembly of [city] residents.”<sup>48</sup> In the absence of theological rules necessitating use restrictions on alienated sacred property, Jewish deeds transferring title are unlikely to include religious covenants.

### B. Islamic Law: Inalienability of Waqf Property

The Islamic law of *waqf* stands in sharp contrast to Jewish rules for selling property, effectively making property that is held for religious purposes inalienable. Developed by Muslim jurists within the first three centuries of Islam and authorized directly by the Prophet Mohammed, *waqf* involves “the detention of [property] from the ownership of any person and the gift of its income or usufruct either presently or in the future, to some charitable purpose.”<sup>49</sup> Property placed in *waqf* forms an unincorporated charitable trust directed toward *qurba*, “the performance of a work pleasing to God,” with beneficiaries claiming a legal interest in the spiritual and material usufruct of the *waqf* property.<sup>50</sup> From Ottoman

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46. Fine, *supra* note 39, at 6–7.

47. *Megillah* 27b, SEFARIA (William Davidson ed.), [https://www.sefaria.org/Megillah\\_27b.5?lang=bi&with=all&lang2=en](https://www.sefaria.org/Megillah_27b.5?lang=bi&with=all&lang2=en) [<https://perma.cc/26KR-URMU>].

48. Code of Jewish Law § 153:9, SEFARIA, [https://www.sefaria.org/Shulchan\\_Arukh%2C\\_Orach\\_Chayim.153.9?lang=bi&with=Mishnah%20Berurah&lang2=bi](https://www.sefaria.org/Shulchan_Arukh%2C_Orach_Chayim.153.9?lang=bi&with=Mishnah%20Berurah&lang2=bi) [<https://perma.cc/9N9-3L5L>].

49. Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231, 1232–34 (1988) (“While ownership of the *waqf* property was thereby relinquished . . . it [i]s not acquired by any other person; rather, it [i]s “arrested” or “detained.”” (footnote omitted) (quoting Cattani, *The Law of Waqf*, in *LAW IN THE MIDDLE EAST* 203, 212–18 (1955))).

50. *Id.* at 1234. These beneficiaries included mosques, colleges, hospitals, and other charitable institutions, which the *waqf* corpus would endow. *Id.* at 1233.

soup kitchens<sup>51</sup> to the Temple Mount in Jerusalem,<sup>52</sup> *waqf* can comprise both simple and substantial interests in Muslim property. The rules for structuring *waqf* property derive from accounts of the first *waqf* mentioned by Muslim legal authorities, created at the Prophet's instruction:

Ibn Omar . . . said: "O Messenger of Allah! I have got land in Khaybar than which I have never obtained more valuable property; what dost thou advise about it?" He said: If though likest, make the property itself to remain inalienable, and given (the profit from) it in charity." So Omar made it a charity on the condition that it shall not be sold, or given away as a gift, or inherited, and made it a charity among the needy and the relatives and to set free slave, and in the way of Allah and for the travellers and to entertain guests; there being no blame on him who managed it if . . . not accumulating wealth thereby.<sup>53</sup>

Once property is declared *waqf* by its former owner, the trust thereby created is transferred to an appointed *mutawalli*—analogous to an administrative trustee or custodian—and remains "irrevocable, perpetual, and inalienable" by law.<sup>54</sup>

The inalienability of *waqf* property derives from its sacred dedication to Allah. Muslims attribute the prohibition on sale to the Prophet, whom they believe to have declared, "You must bestow the Actual LAND ITSELF, in order that it may not remain to be either SOLD or BESTOWED, and that INHERITANCE may not hold in it."<sup>55</sup> Because property in *waqf* is dedicated to Allah, it must be held in perpetuity; indeed, any attempt to declare *waqf* on a mosque or school, house or farm, for a limited period of time would be void ab initio.<sup>56</sup> "Having been

51. See Jennifer Çelik, *Waqf: The Backbone of Ottoman Beneficence*, DAILY SABAH (June 9, 2015, 12:00 AM), <https://www.dailysabah.com/feature/2015/06/09/waqf-the-backbone-of-ottoman-beneficence> [https://perma.cc/V5X9-SBWV].

52. See Dov Lieber, *Amid Temple Mount Tumult, the Who, What and Why of Its Waqf Rulers*, TIMES OF ISRAEL (July 20, 2017, 6:52 PM), <https://www.timesofisrael.com/amid-temple-mount-tumult-the-who-what-and-why-of-its-waqf-rulers> [https://perma.cc/25FT-D594] ("The Waqf is entirely controlled and funded by the Jordanian government. It administers daily life on the Temple Mount, which includes the Al-Aqsa Mosque, Dome of the Rock, archaeological sites, museums and schools.").

53. ASAF A.A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* 275 (4th ed. 1974).

54. Gaudiosi, *supra* note 49, at 1234–35.

55. Jeffrey A. Schoenblum, *The Role of Legal Doctrine in the Decline of Islamic Waqf: A Comparison with the Trust*, 32 VAND. J. TRANSNAT'L L. 1191, 1212–13 (1999) (quoting 2 THE HEDAYA: COMMENTARY ON THE ISLAMIC LAWS 335 (Charles Hamilton trans., 1989)).

56. *Id.* at 1206.

granted to Allah,” *waqf* property “can hardly be reclaimed.”<sup>57</sup> Islamic jurists thus define *waqf* in legal and theological terms:

[T]he tying up of the substance of a thing under the rule of the property of Almighty God so that the proprietary right of the [former owner] becomes extinguished and is transferred to Almighty God for any purpose by which its profits may be applied to the *benefits* of His creatures.<sup>58</sup>

Since Allah owns property dedicated in *waqf*, no “mere mortal[.]” can take it back, dispose of it, or profit privately from its use.<sup>59</sup> There is “no limitation on the retention of the usufruct” for immediate and future beneficiaries “throughout time, short of the end of the world.”<sup>60</sup>

Commitment of *waqf* property to Allah similarly limits its ability to be mortgaged, leased, or encumbered in any way because “no secured creditor ought to be able to remove it from . . . endowment for the Almighty.”<sup>61</sup> The mandatory *waqf* rule in favor of perpetuities—whether based on divine prophecy or legal construction designed to serve an earthly agenda—has effected an extensive withdrawal of property from the marketplace in many Islamic communities.<sup>62</sup> By making the poor its ultimate beneficiaries, Islamic law imparts a greater permanency to *waqf* property than other charitable endowments could legally ensure. Even when non-Muslims are permitted to employ a *waqf*, it “cannot be designed for unacceptable purposes under Islam, such as the eventual support of a church.”<sup>63</sup> If *waqf* property could be bought and sold, many comparable prohibitions would likely feature in Islamic religious covenants. But, given Islamic theological rules restricting alienation of sacred property under *waqf*, Muslim faith communities are unlikely to transfer title in the first place. Thus, their use of religious covenants seems doubtful.

57. *Id.*

58. *Id.* (quoting 1 SYED AMEER ALI, MAHOMMEDAN LAW 336 (4th ed. 1912)). This Article attempts to follow the Sunni schools of law concerning *waqf* property. As Professor Schoenblum notes, the Shiite position is “less clear” with respect to the corpus owner, who “may even be the beneficiary.” *Id.* at 1206 n.81.

59. *Id.* at 1207, 1213–14.

60. *Id.* at 1207.

61. *Id.* at 1215–16.

62. *Id.* at 1208 (noting that *waqf* property became unavailable for general community purposes).

63. *Id.* at 1225 & n.184 (“A *waqf* for a church would be void, since the object (must be valid both under the creed of the founder *as well as* under Islam. The latter law prohibits dedication for churches.”).

### C. Canon Law: Profane, Not Sordid Use

The Roman Catholic Church follows canon law when alienating sacred property. While the *Codex Iuris Canonici* asserts the Roman Catholic Church's right to acquire and use property ("temporal goods") in pursuit of its proper ends—namely, divine worship, support of the clergy and other ministers, apostolic works, and charity—particular canons limit the conditions under which "sacred" property, which is property that has been used for ritual worship, may be sold.<sup>64</sup>

Canon 1222 specifically governs the alienation of a church building:

If a church cannot be used in any way for divine worship and there is no possibility of repairing it, the diocesan bishop can relegate it to profane [i.e., secular] but not sordid use. Where other grave causes suggest that a church no longer be used for divine worship, the diocesan bishop . . . can relegate it to profane but not sordid use, with the consent of those who legitimately claim rights for themselves in the church and provided that the good of souls suffers no detriment thereby.<sup>65</sup>

Canon law defines "church" as "a sacred building designated for divine worship to which the faithful have the right of entry for the exercise, especially the public exercise, of divine worship."<sup>66</sup> Because churches and their altars are dedicated by solemn rite, their relegation and alienation require more than removal of sacred objects.<sup>67</sup> Even when its altar and tabernacle are removed, along with any relics, bells, or artwork, the church's consecration remains.<sup>68</sup> In this respect, church relegation differs from Jewish removal of sacred objects from synagogues in which the faith community no longer worships. For Roman Catholics, a former church is never "just a building," even after the bishop deconsecrates it.<sup>69</sup>

64. 1983 CODE cc.1290–98 (regulating alienation of "the temporal goods of the Church").

65. 1983 CODE c.1222. Canon law gives diocesan bishops discretion in determining what constitutes "grave causes" that would necessitate relegation of a church. In the United States, bishops have named dire financial burden, dwindling numbers of Catholics, and extreme physical disrepair as "grave causes" justifying relegation. See Marie Fazio, *From Sacred to Secular: What Happens When a Catholic Church Shuts Down?*, CHI. TRIB. (June 28, 2019, 5:00 AM), <https://www.chicagotribune.com/news/ct-cb-catholic-churches-closure-how-20190628-k4t53a6nmnf5lltnn34doei5n4-story.html> [<https://perma.cc/DPE7-L59J>].

66. 1983 CODE c.1214.

67. 1983 CODE cc.1217–19.

68. See Fazio, *supra* note 65 ("When it is impossible to [re]move an item, it is occasionally destroyed in place . . ."). The tabernacle is a sacred vessel in which the Eucharist—consecrated bread believed by Catholics to be "Christ the Lord himself"—remains between sacramental celebrations. 1983 CODE cc.897–99.

69. See Fazio, *supra* note 65. For a fascinating study of the comparative effects of Jewish and Catholic conceptions of sacredness on neighborhood development, see generally GERALD GAMM, *URBAN EXODUS: WHY THE JEWS LEFT BOSTON AND THE CATHOLICS STAYED* (1999).

Canon law obligates diocesan bishops who alienate property that has been used as a house of worship to ensure that “the good of souls suffers no detriment thereby.”<sup>70</sup> The bishop must prove that his parishioners will not be abandoned if their church is closed—that they can access another nearby place of worship.<sup>71</sup> But he also must safeguard “church buildings that have been used for Catholic worship” against future uses that would be “inappropriate,” “offensive,” or “potentially . . . harmful to the Catholic faithful and their understanding and practice of their Faith.”<sup>72</sup> Sacred dedication of church buildings precludes their use for “sordid” purposes.<sup>73</sup>

Roman Catholic dioceses differ in their approach to use restrictions on alienated churches—perhaps because bishops differ in their interpretation and application of canonical prohibitions on “sordid use.” Since canon law entrusts bishops with “all ordinary, proper, and immediate power” required for teaching, sanctifying, and governing in their local dioceses, any authority over determining what constitutes “sordid use” of relegated church buildings remains within their discretion.<sup>74</sup> Different dioceses use different approaches to address this problem. Some dioceses adopt policies *ex ante* governing the sale of all church properties, regardless of whether they were used for sacred worship. For example, the policy in the Archdiocese of Boston provides:

[T]he Archbishop shall determine, in his sole discretion and in accord with Canon Law, whether the potential purchaser, in conjunction with the proposed use of the building, directly or indirectly, is or likely will be offensive to Catholic belief and practice, or openly contradicts the tenets and practices of the Catholic Faith, in which event the Archbishop shall refrain from conveying said church building to said purchaser. Where a proposed purchaser of a church building is deemed to be appropriate by the Archbishop in accordance with his obligation to protect the faithful, any purchase and sale agreement, deed or other method of conveyance or transaction shall contain a use restriction(s) which the Archbishop shall determine, in his sole discretion, to be sufficient to safeguard against the use of the church building

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70. 1983 CODE c.1222, § 2.

71. *Id.*; Fazio, *supra* note 65.

72. *A Corporation Sole's Policy on the Sale of Church Buildings*, ROMAN CATHOLIC ARCHBISHOP OF BOS. (2007) [hereinafter Policy Statement], [https://www.bishop-accountability.org/news2007/11\\_12/Policy\\_Sale\\_Church\\_Buildings.pdf](https://www.bishop-accountability.org/news2007/11_12/Policy_Sale_Church_Buildings.pdf) [<https://perma.cc/ZM8J-UGE7>].

73. 1983 CODE c.1222, § 2; Policy Statement, *supra* note 72.

74. 1983 CODE cc.375, 381; *see* Policy Statement, *supra* note 72.

in a manner that is offensive to the teachings of the Catholic Church and the Catholic faithful.<sup>75</sup>

Even where such policies are not established, deeds reflect these concerns. For example, when the Diocese of Buffalo sold its former parish and rectory, Saints Peter and Paul Catholic Church, the deed imposed use restrictions meant to ensure fidelity to ecclesiastical law.<sup>76</sup> Its covenant terms translated the canonical prohibition on “sordid use” quite literally: “Grantee covenants that it shall not permit or conduct any obscene performances . . . on the premises hereby conveyed (land and Buildings) or permit them to be used for any obscene or pornographic purposes or activities,” including “a topless bar, X-rated movie theater, or similar establishment.”<sup>77</sup>

While the exercise of discretion by different dioceses can explain the Roman Catholic Church’s inconsistent approach to use restrictions on alienated church buildings, bishops’ interpretations and applications of “sordid use” can only extend so far. Canon 1222 does not apply to church-owned property outside the sanctuary.<sup>78</sup> Roman Catholic theological rules may necessitate religious covenants for alienated church buildings, but religious deed restrictions are regularly imposed outside of this context. For example, the former Holy Name Cathedral parking lot was never consecrated for sacred worship, so canon law did not dictate the conditions, if any, placed on its sale. In such cases, religious covenants may be religiously motivated, but they are not theologically required.

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Properties held by religious communities exist along a spectrum of sacrality based on their prior religious use. On one end, Jewish law understands holiness to imbue the synagogue when sacred objects—for example, Torah scrolls—or ritual worshippers are present within. When they leave, so does holiness, and the synagogue is rendered “just a building.” On the other end, Islamic law conceives of holiness imbuing *waqf* property because of its perpetual dedication to Allah. Since Allah owns every *waqf* inalienably, and their spiritual and material usufruct are eternally directed toward charity, holiness never leaves the building. Somewhere in between, Roman Catholic canon law instructs that church buildings must be dedicated for sacred worship. Holiness imbues churches through that sacred worship—liturgies of word and sacrament,

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75. Policy Statement, *supra* note 72 (noting that “[a]ll properties sold . . . will contain negative use restrictions prohibiting” abortion, euthanasia, embryonic stem cell research, or “any use that would directly violate the consistent ethical and moral teachings of the Magisterium of the Roman Catholic Church.”).

76. Deed to Saints Peter and Paul Roman Catholic Church, *supra* note 16.

77. *Id.*

78. See 1983 CODE c.1222.

when the People of God gather around an altar to celebrate the Eucharist. But sacramental worship requires a particular kind of solemn dedication that sets church buildings apart from other sacred spaces. Even when Roman Catholic churches are alienated, something of their original holiness remains and must be protected.

## II. RELIGIOUS COVENANTS AS A PRIVATE LAW PROBLEM

While landowners have long used covenants to ensure their own property interests against those of their neighbors, only in the twentieth and twenty-first centuries have courts streamlined doctrines governing nonpossessory interests in property—known collectively as “servitudes”—enough to allow the possibility of modern religious covenants. At common law, courts recognized three different kinds of servitudes: easements, real covenants, and equitable servitudes.<sup>79</sup> In short, easements are nonpossessory property interests that give the holder a right to use the property of another for certain limited purposes.<sup>80</sup> On the other hand, covenants and equitable servitudes are nonpossessory property interests that convey the right to restrain others in their use of their property.<sup>81</sup> Both of the latter two devices serve the same function, although they historically had different requirements for enforceability and were enforced by different remedies.<sup>82</sup> These categories have somewhat collapsed in the past century, and it is likely that the deed restrictions that this Article categorizes as “religious covenants” could be enforced as either covenants or equitable servitudes.

Precisely because they are nonpossessory, servitudes raise particular concerns for courts. All servitudes burden property in some way—either by giving the beneficiary the right to use the burdened property for some narrow purpose or the right to restrain permissible uses of the burdened property.<sup>83</sup> Because servitudes separate “ownership” and “possession,” they carry the risk of high information costs and may impose burdensome externalities on third parties. These concerns are particularly prevalent when the burden is a “negative” one—that is, one that negates the use rights on a parcel of property.<sup>84</sup> Such negative rights (e.g., covenants and equitable servitudes) are invisible to the eye, as is the case with most

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79. See Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1266 (1982). Common law courts only permitted a few types of negative easements: light and air, the flow of an artificial stream, lateral support, and subjacent support. *Id.* at 1267. Courts have “exhibited great reluctance to recognize additional negative easements in the absence of legislative authorization.” Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 748 n.32 (2002).

80. See French, *supra* note 79, at 1266.

81. See *id.* at 1269, 1276.

82. See *id.* at 1269–77.

83. See *id.* at 1261–62, 1267.

84. *Id.* at 1286.

religious covenants. An outsider to the agreement cannot know, by looking, that restaurants located in One Chicago Square are prohibited from requiring employees from wearing “so-called hot pants.”

The first half of Part II traces the evolution of modern servitude law from its origins in nineteenth-century England to reveal three primary concerns that justified judicial skepticism of covenants and other negative rights: notice and information, renegotiability and value, and externalities.<sup>85</sup> Even though the *Restatement (Third) of Property* formally abandoned many of the traditional common law rules governing servitudes,<sup>86</sup> these concerns continue to preoccupy courts asked to enforce covenant restrictions imposed on properties. The second half of Part II addresses how courts might apply these traditional rules when confronted with various kinds of religious covenants.

### A. *Traditional Constraints and Concerns*

#### 1. Notice and Information

Traditional limitations on servitudes sought to address notice concerns arising from the remote and indefinite relationship between benefited and burdened property owners. Unlike an obligation under contract, where promisor and promisee form an agreement binding against one another, covenants and other servitudes can be enforced against remote owners of burdened land and need not be based on any interaction between a “downstream owner” and the benefited owner.<sup>87</sup> When servitudes are first created, the parties to whom they will run are “indefinite,” or unknown.<sup>88</sup> That indefinite quality of their relationship increases the likelihood that burdened property owners—and beneficiary successors in interest—will not understand what the servitude involves or whether it remains desirable.<sup>89</sup>

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85. We borrow this useful framework from Professors Carol Rose and Molly Shaffer Van Houweling. Rose, *supra* note 30, at 298; see also Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 893 (2008) (“Long-standing limitations of land servitudes can be explained at least in part by notice concerns arising from the remote and indefinite relationship between burdened and benefited parties.”). Instead of renegotiability, Professor Van Houweling uses “the problem of the future” from Julia Mahoney’s critical article on conservation easements. *Id.* at 893 n.24 (quoting Mahoney, *supra* note 79).

86. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.4, 2.6, 3.2, & Introductory Notes to chs. 2 & 3 (AM. L. INST. 2000).

87. Van Houweling, *supra* note 85, at 893.

88. *Id.* Professors Tom Merrill and Henry Smith associate this “indefinite” quality with in rem property rights more generally. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 779 (2001).

89. Professor Van Houweling explains how enforcing servitudes without notice risks leaving “purchasers . . . vulnerable to bad bargains—paying more for servitude-encumbered assets than they would have paid had they known about the servitudes.” Van Houweling, *supra* note 85, at 893–94.

Before land recording systems alleviated many of these information concerns, courts attempted to promote notice by only enforcing covenants if the parties to the original agreement were in “privity of estate” with one another, meaning that they shared an interest (either mutual or successive) in the parcel of property bound by the covenant.<sup>90</sup> This “horizontal privity” requirement served to guard against hidden burdens by ensuring that the content of covenant obligations was memorialized in some major document of transfer.<sup>91</sup> Later purchasers could receive notice of the covenant by reviewing the deed or lease; indeed, “where recording was not generally used, it was important that information-poor obligations be characterized as covenants, because one of the major features of the covenant designation was to push such claims into a more information-rich structure.”<sup>92</sup> In the landmark case of *Tulk v. Moxhay*,<sup>93</sup> the English court created the equitable servitude, which serves the same purpose as a real covenant but does not require privity; rather, an equitable servitude allows land-use restrictions to run with the land provided that subsequent owners are on notice of the restriction.<sup>94</sup>

Common law restrictions on servitudes underscored the importance of notice when binding landowners and their successors in interest.<sup>95</sup> Public recording of interests in land allowed courts to relax common law restrictions on covenants that facilitated notice.<sup>96</sup> While American courts initially adopted many of the English doctrinal limitations on covenants, recording allowed for an expanded notion of privity that included grantor-grantee relationships in addition to landlord-tenant relationships.<sup>97</sup> Local government land record systems enable “title-insurance companies to protect land purchasers against the kinds of surprise restrictions that had

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90. See French, *supra* note 79, at 1270.

91. *Id.* at 1270–72.

92. Rose, *supra* note 30, at 301. Because American courts could rely on recording, they eventually relaxed this privity rule in equity jurisprudence. See *id.*; Van Houweling, *supra* note 85, at 896–97.

93. 41 Eng. Rep. 1143 (1848).

94. *Id.* at 1144 (“[T]he question is . . . whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.”).

95. Before recording, English courts promoted notice indirectly through doctrinal limitations that disfavored “especially unnoticeable easements.” Van Houweling, *supra* note 85, at 894. For an easement to run, its benefit needed to be appurtenant, rather than in gross, because attachment to a specific parcel of land promoted notice. “Appurtenant easements, which often benefit land that neighbors the servient estate, are easier to observe—and their beneficiaries are easier to identify—than easements that benefit people who may have no presence in the neighborhood or connection to the land (whose remoteness, in other words, is especially pronounced).” *Id.* (citing French, *supra* note 79, 1286–87). As result, common law judges would not allow easements in gross to transfer. Rose, *supra* note 30, at 299.

96. See French, *supra* note 79, at 1284.

97. *Id.* at 1293–94.

worried English courts.”<sup>98</sup> Most states no longer require horizontal privity for a covenant to run with the land because “particular rules designed to give notice are no longer needed. The modern technology of record systems and title search procedures . . . have made these rules superfluous.”<sup>99</sup>

But, even when land records provide express notice of covenant obligations, courts may remain concerned about the effectiveness of that notice, particularly when covenants include idiosyncratic terms.<sup>100</sup> Many use restrictions contained in religious covenants are rooted in moral or spiritual commitments that are unique to faith communities and not necessarily shared by the wider society—for example, prohibitions involving alcohol, pornography, pharmaceuticals, or “so-called hot pants.”<sup>101</sup> For larger, well-known religious institutions like the Roman Catholic Church, prohibitions involving abortion or Satanism may not surprise purchasers of the property, although use restrictions that preclude tank tops and short shorts might.<sup>102</sup> In contrast, purchasers may have no idea what to anticipate from faith communities with limited membership or enigmatic teachings.<sup>103</sup> Church property purchasers need not share the religious commitments of faith community sellers to accept their use restrictions; indeed, those use restrictions can be imposed by contract. But once they become part of the property, unusual or idiosyncratic restrictions affect future purchasers of the faith community’s former property, as well as third parties searching for properties to buy.<sup>104</sup>

Recording certainly can give notice of religiously motivated use restrictions, although future purchasers may not accurately account for them in evaluating property once owned by religious institutions, particularly when buying from owners who succeed faith communities in title. Certain covenant terms will invariably lack salience for purchasers. Covenants prohibiting pornography, adult entertainment, personnel wearing provocative clothing, and escort services seem difficult to

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98. Robert C. Ellickson, *Stale Real Estate Covenants*, 11 (Aug. 21, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3678927](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678927) [<https://perma.cc/5E7F-5X4J>].

99. Van Houweling, *supra* note 85, at 897.

100. See Antony Dnes & Dean Lueck, *Asymmetric Information and the Law of Servitudes Governing Land*, 38 J. LEGAL STUD. 89, 101 (2009).

101. See *Deed to One Chicago Square*, *supra* note 7, at 6–7.

102. See *supra* notes 11–12 and accompanying text.

103. See *supra* notes 8–10 and accompanying text.

104. Professors Tom Merrill and Henry Smith argue that these “idiosyncratic” restrictions—what they call “fancies”—impose information costs on potential purchasers and third parties: “The existence of unusual property rights increases the cost of processing information about all property rights.” Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8, 26–27 (2000).

miss.<sup>105</sup> But when situated within an extensive litany of seemingly unrelated use restrictions and bundled with purchasers' salient interest in possessing a desired property, non-salient covenant terms can make it complicated for purchasers to comprehend the full extent of use restrictions imposed on land they wish to buy.<sup>106</sup>

## 2. Renegotiability and Value

Common law servitude rules also sought to ensure that property owners could modify or escape their land-use obligations, particularly when those obligations were rendered obsolete. Because of the possibility for indefinite relationships between burdened and benefited owners—many of whom may be complete strangers—courts sought to limit the number and types of potential claimants with an interest in the property of others. If an easement owner could not be located, or if a covenant involved too many disparate interest holders, servitude obligations would be difficult to renegotiate.<sup>107</sup> For covenants, the law required that the original and successive owners of bound property be in vertical privity of estate with one another (which, in the United States, typically means a buyer-seller relationship) and that the obligations imposed on the burdened property “touch and concern” the land.<sup>108</sup> The law also required covenants to be appurtenant—that is, to burden one parcel and benefit an adjacent one—while prohibiting in gross covenants held by individuals rather than enjoyed by virtue of ownership of benefited property.<sup>109</sup>

Vertical privity describes the relationship between the original property owners and their successors in interest. According to the vertical privity doctrine, “only a successor in interest who has some kind of interest in a predecessor’s land” could assert rights under the covenant, and owners could not be bound to fulfill obligations running with burdened land unless they “held exactly the same kind of interest” as the originally burdened owner.<sup>110</sup> The rule placed covenant enforcement

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105. See *Deed to One Chicago Square*, *supra* note 7, at 6.

106. Van Houweling, *supra* note 85, at 899 (“Bundling [potentially non-salient covenant terms] seems especially likely to exacerbate notice and comprehension problems where it is combined with other obstacles to effective comparison shopping—such as when the land upon which the restriction is imposed is unique and therefore not subject to full competition with regard to the terms with which it is bundled . . .”); see Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 894–95 (1988).

107. Rose, *supra* note 30, at 301–02.

108. See French, *supra* note 79, at 1270, 1273.

109. This blanket prohibition has been eroding for some time. See, e.g., Stewart E. Sterk, *Neponset Property Owners’ Association v. Emigrant Industrial Savings Bank*, in PROPERTY STORIES 301, 322 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

110. Rose, *supra* note 30, at 302. Professor Rose explains this complicated doctrine with elegant precision in her chapter on “Servitudes” for the *Research Handbook on the Economics of Property Law*. *Id.*

rights with that focused group of property owners who would value them most. An effect of vertical privity was to limit the “anticommons” problem and obsolescence that can result from fragmented property interests.<sup>111</sup>

Courts of equity also responded to renegotiability concerns by developing a “sunset rule” for obsolete covenants—the “changed circumstances” doctrine.<sup>112</sup> If an outdated covenant can be shown to have “no further value for its purported beneficiaries,” a court may dissolve its obligations.<sup>113</sup> In theory, this legal tool allows courts to address “the problem of the future” created by servitudes, freeing future generations from earlier land-use decisions that may have limited autonomy, imposed inefficiency, and threatened alienability altogether.<sup>114</sup>

Given the likelihood that an idiosyncratic covenant—perhaps one motivated by the unique religious commitments of a faith community with limited membership—may become obsolete over time, changed circumstances would seem to facilitate renegotiability. Yet courts apply the doctrine “very sparingly,” largely because judges are “uneasy about assessing the value of landed interests in such a way as to override objecting claimants.”<sup>115</sup> That judicial uneasiness seems likely to be compounded by covenant holders claiming subjective moral or spiritual value in their nonpossessory interests. Courts are ill-equipped to evaluate subjective property value and typically avoid engaging religious

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111. In an anticommons, “multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse—a *tragedy of the anticommons*.” Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998). Anticommons are “especially problematic where a property would have higher value in some *new* use, since the fragmentation of interests impedes what would otherwise be a normal transition from less to more valuable uses.” Rose, *supra* note 30, at 302.

112. Rose, *supra* note 30, at 303. Professor Robert Ellickson argues that courts initially developed these doctrines for terminating obsolete covenants, in part, because of sloppy covenant drafting. Ellickson, *supra* note 98, at 12. While some drafters specified fixed termination dates “twenty-five or fifty years in the future,” and a few stated explicitly that their covenants were to be “perpetual,” most “simply fail[ed] to address the issue of covenant length, thereby implying that the restrictions were to last forever.” *Id.* 12–13; see also Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of “Obsolete” Covenants*, 91 COLUM. L. REV. 546, 550 (1991) (explaining that dramatically changed conditions render the covenant obsolete).

113. Rose, *supra* note 30, at 303.

114. Mahoney, *supra* note 79, at 748 n.32, 752 (raising “the problem of the future” in the context of perpetual conservation easements, a statutorily recognized negative easement in gross); see also Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 457 (1984) (arguing that the “market response of a future property owner to the future needs of society is likely to be more effective than a past owner’s fixed blueprint”).

115. Rose, *supra* note 30, at 303.

questions (and, indeed, as this Article discusses below, often are constitutionally prohibited from doing so).

Courts may also remain concerned about excessive property fragmentation and its impact on subsequent alienations of property. When former church properties retain multiple owners—some of whom may be difficult to identify or track down, and others with property interests that are ambiguously defined—potential purchasers looking to buy an entire parcel may incur prohibitive transaction costs when attempting to reassemble the parcel.<sup>116</sup> If courts are concerned about applying doctrines governing covenant obsolescence *ex post*, they could decide to screen religious covenants *ex ante* that have the potential to impede future land sales.<sup>117</sup> The touch-and-concern doctrine represents one possible avenue for doing so. Common law courts developed a rule that covenants would be enforced only when they “touch and concern” land—an enigmatic restriction that basically limited enforceability to negative restraints and precluded affirmative duties imposed on property owners.<sup>118</sup> Scholars have argued that the touch-and-concern doctrine sought to “screen for value-enhancing servitudes,” avoiding burdensome renegotiations with every title transfer while dropping “unwanted servitudes whose enforcement would only provide a temptation to rent-seeking.”<sup>119</sup> Idiosyncratic or unusual covenant restrictions that might have been upheld in contract were generally not enforced beyond the original property owners.<sup>120</sup> To the extent that religious covenants impose idiosyncratic obligations—especially affirmative ones—some courts may find that they do not “touch and concern” the burdened land.

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116. See Note, *Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 951 (2009) (“The [Third] Restatement does not provide much protection against excessive property fragmentation.”); see also, e.g., *Deed to One Chicago Square*, *supra* note 7, at 7 (delegating interpretive authority over covenant terms to the Archbishop of Chicago).

117. See *Rose*, *supra* note 30, at 307 (“When courts apply standardized categories, they are most likely to take an *ex ante* posture, even if they do so artificially, asking whether some claimed interest met the formal requirements from the outset.”).

118. *Id.* at 303.

119. *Id.* at 304 (citing James E. Krier, Book Review, 122 U. PA. L. REV. 1664, 1678–81 (1974) (reviewing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972))).

120. See *Keppell v. Bailey*, 39 Eng. Rep. 1042, 1049 (1834) (fearing “much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property” by courts permitting “incidents of a novel kind [that] can be devised and attached to property at the fancy or caprice of any owner”); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S380, S382 (2002) (explaining that “contract law generally leaves parties free to deviate from” standard property rights).

### 3. Externalities

Because their burden extends over time and space, covenants amplify concerns about externalities imposed upon third parties.<sup>121</sup> While certain common law doctrines—specifically, touch-and-concern and changed circumstances—could patrol for third party effects, “overt consideration of externalities was not a major feature of traditional servitude law.”<sup>122</sup> And yet, traditional rules that addressed information costs and the problem of the future managed to confront externalities just the same:

Inadequate or costly information about the nature of property rights in a specific parcel of land can produce confusion about property rights more generally. When one landowner’s parcel is burdened by a strange and confusing covenant, the rest of the neighborhood’s residents may become concerned and confused about the nature of their own rights. They bear an ‘information-cost externality,’ to use Merrill and Smith’s terminology. Similarly, the costs imposed by servitudes that will burden future generations in unpredictable ways may not be accounted for in today’s land transactions.<sup>123</sup>

There are, of course, other concerns about the externalities caused by religious covenants. For example, in recent years, some scholars have raised concerns that laws accommodating religious liberty sometimes impose costs on non-coreligionists. Rebecca G. Van Tassell and Professor Frederick Gedicks label these costs “negative religious externalities.”<sup>124</sup> Other scholars label these potential costs as “third-party harms” of religious exercise.<sup>125</sup> To the extent that this is a valid concern—and it has been vigorously challenged<sup>126</sup>—then it presumably also applies to religious covenants that restrict, at least to some extent, the amount of

121. Professors Merrill and Smith note that contracts affecting many third parties could inspire similar concern. See Merrill & Smith, *supra* note 88, at 777.

122. Rose, *supra* note 30, at 305 (“One place where third party effects did appear more openly was in some courts’ reluctance to enforce covenants not to compete. The doctrinal rubric was [touch and concern], but the courts’ statements clearly showed an unwillingness to enforce an agreement that seemingly smacked of monopoly, with its attendant effect on consumers.”). Professor Van Houweling notes that the “touch and concern requirement has sometimes seemed like a catch-all doctrinal hook used by courts to weed out servitudes that impose harmful externalities.” Van Houweling, *supra* note 85, at 905.

123. Van Houweling, *supra* note 85, at 904–05 & n.90 (citing Merrill & Smith, *supra* note 104, at 8) (“The existence of unusual property rights increases the cost of processing information about all property rights.”).

124. See Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357–62 (2014).

125. Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 781, 786 (2018).

126. See, e.g., Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 876–80 (2019); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 46 (2014).

property available for the activities prohibited by deed restrictions, including some that are constitutionally protected. These concerns may be particularly salient in certain narrow circumstances, such as when religious hospitals are sold and bound with covenants prohibiting certain medical procedures.<sup>127</sup> On the other hand, it is not evident that the externalities resulting from religious covenants imposed when most other types of properties are sold (e.g., parking lots in downtown Chicago or Boston) are particularly high. Nor is it evident that the costs of these covenants are appreciably higher than other types of land-use restrictions, such as zoning and residential-only covenants, all of which limit the amount of land available for various activities.

The current *Restatement (Third) of Property: Servitudes* attempted to address externalities more directly. Rather than relying upon traditional servitude doctrines—many of which were abandoned by the *Restatement's* reporter—courts were instructed simply to invalidate servitudes found to be “illegal or unconstitutional or [in violation of] public policy.”<sup>128</sup> Since most servitudes originate in some contractual undertaking, the *Restatement* advocated a contract-like conception of servitude doctrine, focused on the intent of the original parties and subject to standard contractual defenses.<sup>129</sup> For example, an in gross restrictive covenant is considered enforceable provided that it does not violate public policy, is not “arbitrary, spiteful, or capricious,” does not “unreasonably burden[] a fundamental constitutional right,” does not “impose[] an unreasonable restraint on alienation” or “an unreasonable restraint on trade or competition,” or is not “unconscionable.”<sup>130</sup>

This Article discusses these limits below and analyzes the extent to which religious covenants are vulnerable to challenges asserting that they run afoul of such limits. For present purposes, however, it is sufficient to note that, to date, courts have largely ignored the doctrinal reforms urged by the *Restatement*, continuing instead to “apply the ‘outmoded’ common

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127. Professor Elizabeth Sepper has criticized the use of deed restrictions that prohibit abortion and sterilization procedures when faith-based hospitals are sold to or merge with secular ones. Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. UNIV. L. REV. 929, 930–31 (2018). She raises concerns that such restrictions result in “zombie religious institutions” because the restrictions persist long after the religious operator has exited the picture. *Id.*

128. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (AM. L. INST. 2000). While this restriction predates the *Restatement*, the reporter’s decision to use it to supplant all common law doctrines was new. See Susan F. French, Tribute, *The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger*, 77 NEB. L. REV. 653, 655 n.7 (1998).

129. Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 694 (2014).

130. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (AM. L. INST. 2000).

law in determining when servitudes run with the land.”<sup>131</sup> The next Section explores how courts might address these traditional judicial concerns raised by religiously motivated covenants.

### B. *Affiliation, Adjacency, and Authority*

Religious covenants achieve their objectives by enabling faith communities to divide the property rights associated with land they previously owned, transferring title to their property while retaining a nonpossessory interest in restricting its use. But not all religious covenants serve the same goals. Some are imposed to ensure compliance with theological mandates, and many others seek to avoid complicity with practices condemned by the religious organization selling the bound property. Still others seek to ensure continuity of affiliation and mission with the alienating institution, while others serve to permanently signal a disassociation with the purchaser and the purchaser’s successor in interest.

This Section explores religious covenants in light of traditional servitude law. It discusses different situations in which religiously motivated use restrictions could apply, unpacking judicial decisions that reveal how courts might evaluate them. This Section concludes that religious covenants are enforceable in many, if not most, cases. For others that may be suspect under the rules of traditional servitude law, other property devices—specifically, defeasible fees and lease arrangements—might prove more effective than covenants when faith communities seek to protect themselves from certain forms of complicity with activities that contradict their spiritual or moral commitments, rooted in sincerely held religious belief.

#### 1. Restrictions Limiting Ownership or Use to Coreligionists

Suppose the Archdiocese of Chicago sold property with covenant terms restricting ownership or occupancy to Catholic institutions or members of the Roman Catholic Church. In the litany of use restrictions contained in the deed transferring title to One Chicago Square, the Archdiocese would include something like the following: *Grantee agrees and covenants it will not use nor permit others to use or lease or otherwise transfer the use of the subject Property or any portion thereof to any entity that is not affiliated with the Roman Catholic Church.* Within that provision, the covenant might specify how “an entity

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131. Merrill & Smith, *supra* note 129, at 694; see also Ronald H. Rosenberg, *Fixing a Broken Common Law—Has the Property Law of Easements and Covenants Been Reformed by a Restatement?*, 44 FLA. ST. UNIV. L. REV. 143, 191 (2016) (“[T]he cases decided over the last fifteen years reveal that federal and state reported case decisions only give modest attention to the *Restatement*.”).

affiliated with the Roman Catholic Church” should be determined, ensuring that only Catholic organizations may own or use property alienated by their church. There are any number of reasons why a religious entity might do this. For example, the Archdiocese might wish to transfer a Catholic high school to a Catholic religious order that plans to assume operational control of the school while ensuring that the building will continue to be used for such purposes should later transfers occur. Similarly, a religious order with a declining membership might wish to transfer an underutilized convent or school to the Archdiocese but ensure that the property will continue to be used for Catholic purposes. Or, a religious institution might wish to transfer underutilized property to a health care entity to establish an assisted living facility for retired clergy.

Covenants limiting property to use by specified denominations appear to be relatively commonplace. For example, Luke Goodrich and Professor Michael McConnell report that denominations seek to protect themselves from property disputes that arise when congregations fracture by binding property with covenants that specify that the property must be used for the benefit of a particular denomination.<sup>132</sup> This practice is required, for example, by the United Methodist Church’s “Book of Discipline,” which requires “all written instruments of conveyance” for all church property to state that the property “shall be kept, maintained, and disposed of for the benefit of The United Methodist Church and subject to the usages and the Discipline of The United Church.”<sup>133</sup> Other denominations utilize similar practices.<sup>134</sup> Provisions requiring that property be used by or for the benefit of certain faith communities also are commonplace in donative and testamentary gifts, and are generally enforced, as are other donative restrictions for charitable purposes.<sup>135</sup>

A religious entity might also restrict the ownership, use, or occupation of property to coreligionists. For example, the Archdiocese of Chicago might encumber the deed to property with a covenant that provides: *Grantee agrees and covenants it will not use nor permit others to use or lease or otherwise transfer the use of the subject Property or any portion thereof to any person who is not a member of the Roman Catholic Church.* As above, the deed might specify a mechanism for determining membership, for example, by requiring that potential property owners or

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132. Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 342–43 (2016).

133. THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, ¶ 2503(4) (2016); see also *id.* at ¶ 2503(1) (providing specific language for places of divine worship); *id.* at ¶ 2503(2) (parsonages); *id.* at ¶ 2503(5) (properties acquired from other United Methodist entities).

134. See McConnell & Goodrich, *supra* note 132, at 343 n.200 (citing examples).

135. See, e.g., Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1094 (2005).

users submit a letter from the pastor of their parish church certifying their participation in the faith community.<sup>136</sup> While these provisions are presumably less commonplace, they may be understandable in some circumstances. For example, perhaps the Archdiocese wishes to facilitate the establishment of an assisted living facility in a former convent to provide for the long-term care of Catholics. So long as the local real estate market includes a significant population of Catholics, and the alienated property continues to be used for purposes related to Roman Catholicism, courts evaluating this kind of religious covenant seem likely to approve its enforcement on purely private law grounds.

When the alienated property is used for housing, faith communities attempting to restrict ownership or use of property to individual coreligionists have faced challenges under nondiscrimination statutes prohibiting religious discrimination.<sup>137</sup> The federal Fair Housing Act<sup>138</sup> (FHA) makes it unlawful to “refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>139</sup> Although the statute does contain exemptions for property owned or sold directly by religious organizations, this exemption has been narrowly interpreted to apply only to property that is controlled by a religious organization.<sup>140</sup> For example, in *United States v. Columbus Country Club*,<sup>141</sup> the U.S. Court of Appeals for the Third Circuit held that country club bylaws restricting bungalow leases to “members in good standing of the Roman Catholic Church” violated the FHA.<sup>142</sup> Despite its avowed “Catholic identity,” the club was not considered an exempt religious organization, association, or society.<sup>143</sup>

As a result, covenants restricting sale or rental of property to people from particular faith communities fall within FHA prohibitions. In an early case from California, the Theosophical Society was denied enforcement of covenant restrictions imposed in developing its own

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136. Roman Catholic pastors submit these kinds of letters when members of their church participate in sacraments, including baptism and marriage.

137. These statutes include the Fair Housing Act, 42 U.S.C. § 3604 (2018).

138. Titles VIII & IX of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601–19, 3631).

139. 42 U.S.C. § 3604(a) (2018).

140. *Id.* § 3607(a) (“Nothing in this subchapter shall prohibit a religious organization, association, or society . . . from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons.”).

141. 915 F.2d 877 (3d Cir. 1990).

142. *Id.* at 879, 885.

143. *Id.* The club invited local priests to celebrate Sunday Mass at its chapel. *See id.*

Theosophist-only retirement community.<sup>144</sup> *Taormina Theosophical Community, Inc. v. Silver*<sup>145</sup> involved property acquired in Ojai, where the Taormina Theosophical Community recorded “Covenants, Conditions and Restrictions (CCRs)” limiting ownership and occupancy to Theosophists “who had been members of the Society for [at least] three years” and “who were 50 years of age or over.”<sup>146</sup> When Robert and Esther Silver purchased land within the community, “neither [were] a member of the Society . . . and Robert was under 50.”<sup>147</sup> While the court of appeals avoided resolving whether Theosophy should be considered a “religion,” it nevertheless found the covenant unreasonable: “restricting *occupancy* to Society members who had been in the Society for three years . . . is sufficiently close to a restriction based on religion to be void under the [California antidiscrimination] statute.”<sup>148</sup> The court of appeals also concluded that the covenant created an unreasonable restraint on alienation.<sup>149</sup> When contrasting an “exceptionally small” number of Theosophists in the United States with a “vast potential market” of buyers interested in Southern California real estate, “[t]he quantum of restraint in this case [was] very great.”<sup>150</sup>

Religious litmus tests for membership in homeowners’ associations (HOAs) have also been challenged under the FHA. Before 2018, homeownership in Bay View, Michigan, required affiliation with the Bay

144. *Taormina Theosophical Cmty., Inc. v. Silver*, 140 Cal. App. 3d 964, 968 (1983). The Theosophists describe themselves as a community that seeks to “encourag[e] open-minded inquiry into world religions, philosophy, science, and the arts in order to understand the wisdom of the ages, respect the unity of all life, and help people explore spiritual self-transformation,” embracing a “vision of wholeness that inspires a fellowship united in study, meditation, and service.” *The Society*, THEOSOPHICAL SOC’Y, <https://www.theosophical.org/about/about-the-society> [https://perma.cc/FJH7-NYLP].

145. 140 Cal. App. 3d 964.

146. *Id.* at 968–69.

147. *Id.* at 969.

148. *Id.* at 976. Although most scholars consider Theosophy a religion, the *Taormina* trial court did not, following the organization’s disavowal of that characterization. *Id.* at 974 (“There was strong evidence to support a contrary finding but the trial court found that Theosophy was not a religion and that the restrictions did not discriminate on the basis of . . . religion.”). The court of appeals considered the CCR’s discriminatory function sufficiently comparable to statutory prohibitions on religious discrimination in land ownership:

The restriction on use by non-Theosophists therefore, operates like a religious restriction in that both discriminate based on a person’s sympathy to a set of ideas which are spiritual in nature. By including the word religion . . . the Legislature indicated that it considered the manner in which a person approaches spiritual matters an improper and irrelevant criterion for denying access to land.

*Id.* at 976.

149. *Id.* at 974.

150. *Id.* at 973 (“Southern California is a highly desirable place to live and people from all over the country seek to buy property [t]here.”).

View Association, which restricted membership to men and women “of Christian persuasion” who participate in their church.<sup>151</sup> Bay View had been founded as part of the Chautauqua movement—which grew out of the United Methodist Church, but remained separate from its ecclesiastical authority—to create “communities in rural settings centered around artistic and educational pursuits.”<sup>152</sup> In an eventual settlement agreement, Bay View agreed to amend its bylaws to allow non-Christian members, requiring merely that homeowners “of good moral character . . . respect and preserve the history and values of the Association.”<sup>153</sup> Because the Association was “not a religious organization . . . nor [was] it controlled, supervised, or operated in conjunction with a religious organization” as defined by the FHA, Bay View could not impose covenants restricting ownership or occupancy on its residential property.<sup>154</sup>

If Bay View or Columbus Country Club were themselves religious organizations rather than mere associations of Methodists and Catholics, respectively, their property restrictions may well have been enforceable. In both developments, the principal faith community provided significant religious services to its members who owned or leased property. And, unlike the Taormina Theosophical Community, neither Bay View nor Columbus faced an “exceptionally small” number of coreligionists potentially interested in buying—thus, courts seem unlikely to have found either covenant an unreasonable restraint on alienation.<sup>155</sup>

## 2. Restrictions Prohibiting Identification with the Seller

What if the Archdiocese of Chicago sold property under covenant terms prohibiting its identification with Roman Catholic ownership or

151. Complaint at 8, *Bay View Chautauqua Inclusiveness Grp. v. Bay View Ass’n*, No. 1:17-cv-00622, ¶ 47 (July 10, 2017) (“[C]onditions of membership include, among other things, that the applicant: ‘is of Christian persuasion’ and provides a reference letter from a pastor or church leader of the church the applicant attends or of which he is a member.”).

152. William T. Perkins, *Settlement Terms Released in Bay View Case*, NEWS-REVIEW (July 10, 2019, 5:00 PM), [https://www.petoskeynews.com/featured-pnr/settlement-terms-released-in-bay-view-case/article\\_71db67d5-6347-5f9c-b5f2-0fdf46068c6c.html](https://www.petoskeynews.com/featured-pnr/settlement-terms-released-in-bay-view-case/article_71db67d5-6347-5f9c-b5f2-0fdf46068c6c.html) [<https://perma.cc/Z7FS-Z6RK>]; see Rose Hackman, *The Michigan Town Where Only Christians Are Allowed to Buy Houses*, GUARDIAN (Feb. 9, 2018, 5:00 PM), <https://www.theguardian.com/us-news/2018/feb/09/christians-only-town-bay-view-michigan> [<https://perma.cc/8BCK-EBCJ>] (“What started out as a modest camping ground for Methodist families 140 years ago has quietly developed into a stunning vacation spot for people who can afford the upkeep of a second home . . . . But this paradise is not open to all.”).

153. Consent Order at 13, *Bay View Chautauqua Inclusiveness Grp. v. Bay View Ass’n*, No. 1:19-cv-00511-PLM-RSK (July 18, 2019).

154. *Id.* at 4.

155. See *id.* at 2–10 (failing to address the “restraint on alienation” issue); *United States v. Columbus Country Club*, 915 F.2d 877, 878–85 (3d Cir. 1990) (failing to find the covenant to be an unreasonable restraint on alienation).

use? By those terms, the Archdiocese would seek to ensure that purchasers and their successors disavow affiliation with the Catholic Church, thus preventing their successors in interest from capitalizing in some way on the property's connection with the Archdiocese (or tarnishing the grantor's reputation by such affiliation).<sup>156</sup> Neither motive is necessarily nefarious. Consider, for example, the proliferation of "beer churches," or microbrewery restaurants in closed houses of worship.<sup>157</sup> The Archdiocese may not wish to go to the length of prohibiting beer from being served in a deconsecrated church—and indeed may have no religiously motivated objection to it—but still object for reputational reasons to the proprietor calling the establishment "Holy Name Beer Church." Religions that object on moral grounds to alcohol consumption might fear that the affiliation between their name and a brewery would confuse and scandalize their adherents. Restrictions prohibiting identification with the alienating institution in these cases could be analogized to legitimate concerns about "trademark dilution."<sup>158</sup> In fact, the deed transferring title to One Chicago Square includes just this sort of provision: "*Grantee agrees and covenants . . . [i]t will not use nor permit the use of the name 'Roman Catholic Church' or 'The Catholic Bishop of Chicago' or any derivative of the aforementioned in connection with any operations or activities on the subject Property.*"<sup>159</sup>

Some religious covenants clearly reflect the faith community's concerns that strangers to the sale may assume that the alienated property will continue to be identified with the alienating institution because it is adjacent or in close proximity to property that continues to be owned and used for religious purposes.<sup>160</sup> For example, when the First Church of Christ, Scientist sold its Back Bay property interest for the development

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156. See, e.g., Dake Kang, *Holy Spirits: Closed Churches Find Second Life as Breweries*, ASSOCIATED PRESS (Oct. 6, 2017), <https://apnews.com/article/3a59e83486474aa097364c04ff7432d8> [<https://perma.cc/V8L4-NJRW>] (describing how opposition from Pittsburgh Catholics to the Church Brew Works—formerly St. John the Baptist Church—prompted diocesan officials to impose deed restrictions to prevent other closed churches from being transformed into bars and clubs).

157. Mike Pomranz, *Beer and Churches Forge a Holy Union: A Forthcoming Brewery-Church Combo Set to Open in Florida is the Latest Addition to the Trend*, FOOD & WINE (Nov. 2, 2018), <https://www.foodandwine.com/beer/beer-church-breweries> [<https://perma.cc/GC54-VLWQ>]; Cat Wolinski, *Brewing My Religion: 13 American Breweries in Former Churches*, VINE PAIR (Apr. 9, 2019), <https://vinepair.com/articles/breweries-in-churches/> [<https://perma.cc/39CR-SVFM>].

158. We are indebted to Nadav Shoked for pointing out this helpful analogy.

159. Deed to One Chicago Square, *supra* note 7, at 6 (emphasis added).

160. This seems to be exactly what the First Church of Christ, Scientist sought to avoid when it sold the 30 Dalton property. See Deed to 30 Dalton, *supra* note 7, at 1 ("[B]ecause the Property is located on the perimeter of . . . Christian Science Plaza, Grantor desires to reduce confusion and conflict with the teachings of Christian Science in connection with the conveyance of the Property.").

of 30 Dalton, its quitclaim deed imposed restrictions meant to ensure that future uses remain publicly disaffiliated from their religious organization: “Grantee hereby acknowledges that because the Property is located on the perimeter of . . . Christian Science Plaza [the Benefitted Land], Grantor desires to reduce confusion and conflict with the teachings of Christian Science in connection with the conveyance of the Property.”<sup>161</sup> Use restrictions provide reputational protection for the church, carrying expressive value for coreligionists and for anyone who might occupy the alienated Christian Science property.

Covenants that prohibit property from being identified with their former religious owners functionally resemble covenants not to compete in the sale of a business, which courts generally allow to protect goodwill.<sup>162</sup> “Goodwill” is the value of an up-and-running business with established customers, routines, and perhaps most relevantly, reputation. Beyond their stock or inventory, businesses become and remain valuable based on their goodwill, which can be destroyed through appropriation by competitors, including former owners. To ensure that former owners do not capitalize on the goodwill of businesses they choose to sell—for example, by opening a new business near their former business, advertising to its former customers, and using a similar name—purchasers will typically offer additional consideration for protections against “immediate competition” from sellers.<sup>163</sup> These covenants not to compete ensure that former business owners do not regain possession of purchasers’ newly acquired property interest in goodwill. If their duration and geographic scope are reasonable, courts will generally enforce covenants not to compete, exercising deference to avoid creating an unfair windfall for either party to the sale; and like real covenants, they can be assigned to future purchasers of a going concern.<sup>164</sup>

When faith communities impose restrictions prohibiting their former property from being identified as such, they seek to ensure that future uses remain publicly disaffiliated from their religious organization. Like the First Church of Christ, Scientist, faith communities “desire[] to reduce confusion and conflict with the teachings of [their religion] in connection with the conveyance of the [p]roperty.”<sup>165</sup> But that desire is motivated by

161. *Id.*

162. Covenants not to compete that arise from the sale of a business are often easier to enforce than noncompete agreements that are contained in employment contracts. *See* 6 WILLISTON ON CONTRACTS § 13:9 (4th ed. 2021).

163. *Id.* (“[P]ublic policy requires that when a man has by skill . . . obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser.”).

164. *See id.* (noting that reasonableness is often determined by examining the circumstances of the transaction).

165. Deed to 30 Dalton, *supra* note 7, at 1.

more than a commitment to catechesis. Reputation is an invaluable asset for faith communities. Reputation affects their ability to attract new members, to invite new contributions, to engage new ministries, to fully live out spiritual and moral commitments. Reputation can ignite or smother this potential, depending on how faith communities are identified. Use restrictions allow faith communities to avoid identification with their alienated property, mitigating their risk that successors in interest will capitalize on the property's connection with their religion. Because this kind of religious covenant effectively allows future purchasers full use of their property—limiting them only in their desire to expressly identify their property with its former owner—courts seem likely to approve its enforcement as well.

### 3. Restrictions Proscribing Uses on Adjacent Property

But when it comes to reputation and alienated property, the Archdiocese of Chicago may be concerned about more than just name recognition. The 110 million dollar parking lot that became One Chicago Square remains adjacent to Holy Name Cathedral, property still owned by the Archdiocese and publicly used for religious purposes.<sup>166</sup> Could the Archdiocese impose covenant terms on that alienated property proscribing specified uses that Roman Catholic teaching would deem spiritually or morally illicit because of its adjacency to the cathedral? This seems to be exactly what church officials sought to accomplish at One Chicago Square, including terms like:

*Grantee agrees and covenants . . . [i]t will not use, permit others to use or lease or otherwise transfer the use of the subject Property or any portion thereof to any person who uses or will use the Property or any portion thereof as a facility in which [r]esearch, performance, advocacy or counseling in favor of any of the following are conducted: 1. Abortion; 2. Sterilization; . . . 5. Experimentation on human embryos; 6. Destruction of human embryos; 7. Human cloning; . . . 10. Euthanasia; 11. Assisted Suicide; or 12. Death by means other than natural causes.*<sup>167</sup>

Covenants proscribing activities considered illicit by a faith community that owns and uses adjacent property for religious purposes have not been challenged in court. That said, as previously indicated,

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166. David Matthews, *Holy Name Parking Lot to Sell for \$110 Million to Developer: Report*, DNA INFO (Apr. 5, 2017, 12:54 PM), <https://www.dnainfo.com/chicago/20170405/downtown/holy-names-parking-lot-sell-for-110-million-developer-report-says/> [https://perma.cc/E7B3-6Z87].

167. Deed to One Chicago Square, *supra* note 7, at 6 (emphasis added).

under the private law of servitudes, covenants are void if they are contrary to public policy.<sup>168</sup>

While this restriction on the enforceability of covenants is invoked successfully with relative rarity, restrictive covenants that would raise constitutional concerns if imposed by the government have been held unenforceable by courts on public policy grounds.<sup>169</sup> Courts have invalidated covenants that prohibit residents from displaying political signs,<sup>170</sup> as well as covenants that restrict the number of occupants in a residence<sup>171</sup>—effectively refusing to enforce restrictions that thwart statutory policy goals.<sup>172</sup> On the other hand, not all covenants that limit the exercise of constitutional rights on particular parcels of land are contrary to public policy because many such restrictions could be constitutionally imposed by the government through zoning and other land-use regulations. Indeed, most, if not all, land-use regulations limit the exercise of constitutional rights to some extent, and most of the time, these limits are not unconstitutional. For example, zoning laws that dramatically restrict the amount of property available for adult entertainment within municipal boundaries typically survive First Amendment challenges.<sup>173</sup> Similarly, courts have rejected the claim that covenants are unenforceable on public policy grounds because they effectively restrict the amount of property available for constitutionally protected activities.<sup>174</sup> To date, covenant restrictions that implicate moral concerns have not been invalidated for violating public policy. In fact, courts have enforced covenants prohibiting pornography and “adult

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168. *See supra* note 128 and accompanying text.

169. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (AM. L. INST. 2000) (“Servitudes that are invalid because they violate public policy include, but are not limited to . . . (2) a servitude that unreasonably burdens a fundamental constitutional right . . .”).

170. *See, e.g.,* *Mazdabrook Commons Homeowners’ Ass’n v. Khan*, 46 A.3d 507, 510 (N.J. 2012) (citing free speech concerns).

171. *See, e.g.,* *Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App. 3d 87, 88, 95 (1986) (citing privacy concerns).

172. *See* *Cincinnati City Sch. Dist. Bd. of Educ. v. Conners*, 974 N.E.2d 78, 85 (Ohio 2012) (holding that a covenant imposed by a public school district prohibiting purchasers from using the burdened property “for school purposes” was contrary to public policy because state law required school districts to make unused classroom space available to charter schools).

173. *See, e.g.,* *Lim v. City of Long Beach*, 217 F.3d 1050, 1052–53 (9th Cir. 2000); *David Vincent, Inc. v. Broward Cnty.*, 200 F.3d 1325, 1328 (11th Cir. 2000); *Woodall v. City of El Paso*, 49 F.3d 1120, 1121–22 (5th Cir. 1995).

174. *See, e.g.,* *Kessler v. Stough*, 361 So. 2d 1048, 1050 (Ala. 1978) (illustrating that courts typically enforce “residential only” covenants that can effectively exclude faith communities from establishing houses of worship).

entertainment” without any reference to public policy concerns,<sup>175</sup> at times interpreting them expansively.<sup>176</sup> Covenants prohibiting abortion seem to not have been litigated.<sup>177</sup>

Covenants prohibiting activities considered morally illicit by the alienating religious institution are most justifiable when imposed on alienated property adjacent to property that continues to be used by the seller for religious purposes. Adjacency to property still owned and used for religious purposes can invite people to make connections between faith communities and activities that the religion considers illicit—even if that connection is negative, a kind of nose-thumbing at the faith communities’ beliefs or practices. Insofar as this kind of religious covenant is directed toward protecting the reputation of faith communities that risk affiliation by adjacency, courts may well enforce them for reasons similar to those described above.<sup>178</sup>

Because the adjacency of alienated property and property that continues to be held by the religious institution makes this kind of religious covenant salient, faith communities may choose to include provisions specifying the removal of covenant restrictions should their property no longer be owned or used for religious purposes. The Diocese of Buffalo offers instructive language in its deed transferring title to Saints Peter and Paul Catholic Church: “The foregoing restrictions and/or covenants may be removed . . . in the case where the Grantor is no longer a functioning Roman Catholic Church, by any successor corporation to the Grantor, and/or, in any case, by The Diocese of Buffalo, N.Y., upon application by an interested party.”<sup>179</sup> Removal provisions help address

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175. See, e.g., *Highlands Mgmt. Co. v. First Interstate Bank of Tex.*, 956 S.W.2d 749, 751 (Tex. App. 1997) (interpreting covenant restrictions that expressly prohibited the operation of an “adult entertainment facility” to proscribe the use of undeveloped land for parking spaces outside a strip club, even though the strip club was itself located on unrestricted land).

176. See *Focus Ent. Int’l, Inc. v. Partridge Greene, Inc.*, 558 S.E.2d 440, 442 (Ga. Ct. App. 2001) (enjoining the sale of “adult videos” based on covenant restrictions that prohibited “the sale or display of pornographic materials; operation of any pornographic business, including massage parlors; adult theaters displaying pornographic pictures or films; and adult bookstores dealing in pornographic materials.”). The court reasoned that the covenant was meant to cover all “materials . . . intended to arouse a sexual desire or excitement whether considered normal or prurient.” *Id.* at 445.

177. Before the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. (2022), at least one court had assumed that covenants effectively prohibiting abortion facilities are enforceable. See *Planned Parenthood of Greater Orlando, Inc. v. MMB Properties*, 211 So. 3d 918, 926–27, 929 (Fla. 2017) (remanding to determine whether an enjoined Planned Parenthood clinic would violate a covenant prohibiting outpatient surgeries in a medical center); see also Lauren Abdel-Razzaq, *Planned Parenthood Drops Auburn Hill Location*, *DETROIT NEWS* (June 22, 2012) (describing the use of a covenant limiting property to “restaurant, retail or office usage” to preclude an abortion clinic).

178. See discussion *supra* Section II.B.

179. Deed to Saints Peter and Paul Roman Catholic Church, *supra* note 16, at 6.

concerns with obsolescence and renegotiability, allowing faith communities to avoid judicial involvement when religious covenants may no longer be necessary.<sup>180</sup>

#### 4. Restrictions Proscribing Illicit Uses on Distant Property

Suppose the alienated property was *not* adjacent to anything still owned and used by the faith community for religious purposes. If instead of a surface parking lot beside Holy Name Cathedral, the Archdiocese of Chicago chose to alienate a brownstone home, located two miles from its closest church, which was bequeathed to the Archdiocese by deceased benefactors who used to commute across town for Sunday Mass. Would covenant terms imposed to prohibit uses that Roman Catholic teaching deems spiritually or morally illicit still be enforceable on that alienated property, despite its distance from any identifiable property that the Archdiocese owns and uses for religious purposes? The Archdiocese of New York included just this sort of covenant in its deed transferring title to an Upper West Side townhouse it sold for 5.5 million dollars: “*The party of the second part [Grantee/Buyer] covenants that it shall not use, permit or suffer the premises hereby conveyed to be used or occupied for the purpose of performing any abortions or place any signs or advertising on or about said premises that relate to abortions, birth control or euthanasia.*”<sup>181</sup> Despite similar reputational concerns to those motivating restrictions on adjacent property—indeed, the Archdiocese of New York considers violations of its townhouse covenant terms to be “seriously damaging and harmful to [its] reputation and standing” as a Roman Catholic religious organization—faith communities seeking to enforce this kind of religious covenant seem likely to encounter greater pushback from courts.<sup>182</sup>

Covenants imposed on property that is distant from land that continues to be owned by religious organizations and used for religious purposes implicate common law concerns about covenants in gross. Most covenants are appurtenant, meaning that they benefit one parcel of land (known as the “dominant tenement”) and burden another, usually an adjacent parcel (known as the “servient tenement”).<sup>183</sup> The benefit and burden of appurtenant covenants “run with the land” to successive owners of the dominant and servient tenements.<sup>184</sup> With in gross covenants, there

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180. See discussion *supra* Section I.B.

181. OFF. OF THE CITY REG., N.Y.C., NO. 2017000332581, BARGAIN AND SALE DEED 2 (Aug. 30, 2017) (on file with the authors) [hereinafter Deed to 272 West 91st Street] (emphasis added).

182. *Id.* (“The party of the second part recognizes that the party of the first part is a religious corporation under the auspices of the Roman Catholic Church.”).

183. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.5 (AM. L. INST. 2000).

184. *Id.* § 1.3.

is a servient tenement (burdened property), but no dominant tenement.<sup>185</sup> Instead, the beneficiary of an in gross covenant is an individual or organization (e.g., the Archbishop of Chicago or the Archdiocese) rather than a parcel of land.<sup>186</sup> The burden of the covenant runs to successive owners of the dominant tenement, but the right to enforce the covenant is held personally.<sup>187</sup> Although most religious covenants are, on their face, held in gross by the alienating faith community, when the alienated property is adjacent to other property owned by the alienating community, they function much like appurtenant covenants. For example, while the stated beneficiary of the covenants imposed on One Chicago Square is the Archdiocese of Chicago, the property's adjacency to the Cathedral lends itself to the argument that the deed restrictions function like traditional appurtenant covenants benefiting the Cathedral. The same cannot be said when in gross covenants are imposed on non-adjacent properties.

With rare exception, courts remain skeptical of in gross servitudes, particularly those that solely benefit idiosyncratic interests. Few states have recognized a common law right to create and enforce restrictive covenants in gross. As discussed above, the *Restatement (Third) of Property* asserts that prohibitions on the creation of covenants in gross "appear to serve little function" in light of modern land reporting technologies.<sup>188</sup> The *Restatement* would no longer require restrictive covenants to benefit another parcel of land, encouraging courts not to limit enforcement based on traditional notice or renegotiability concerns.<sup>189</sup> For courts to issue an injunction, the *Restatement* would only oblige covenant beneficiaries to "establish a legitimate interest in enforcing the covenant," an ambiguous standard focused on discerning the original parties' contractual intent.<sup>190</sup> But until more states adopt the *Restatement*, in gross servitudes remain questionable at common law.<sup>191</sup>

An idiosyncratic servitude case from New Hampshire gives some indication of how courts might evaluate covenants in gross under the

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185. *Id.* § 1.5.

186. *Id.* § 4.5.

187. *Id.* § 8.1 cmt. b.

188. *Id.* § 2.6 cmt. a. The *Restatement* gives one historical justification for limiting in gross covenants: "benefits in gross [may have] cause[d] greater problems than appurtenant benefits in locating the persons who are able to negotiate modification or termination of the servitudes." *Id.* § 2.6 cmt. d. This explanation echoes Professors Merrill and Smith in their justification for the *numerus clausus*. See Merrill & Smith, *supra* note 104, at 8.

189. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.6 (AM. L. INST. 2000) ("The benefit of a servitude may be created to be held in gross . . .").

190. *Id.* § 8.1.

191. Aside from conservation easements, which many states expressly permit by statute, and certain covenants imposed by homeowners associations, which state courts enforce. Korngold, *supra* note 114, at 437–38; see *infra* Section III.A.

*Restatement.* In 2014, the Supreme Court of New Hampshire held that restrictive covenants in gross may be enforced by any benefit holder who can “establish a legitimate interest in enforcement.”<sup>192</sup> *Lynch v. Town of Pelham*<sup>193</sup> involved an aesthetic covenant restriction requiring that “buildings to be constructed on the land hereby conveyed shall be of Colonial architecture and . . . [n]o building shall have a flat or single pitch roof and no building shall exceed two stories in height, excluding the basement.”<sup>194</sup> J. Albert Lynch sold an eighteen-acre parcel to Pelham for “municipal buildings” and objected when the town proposed building a fire station that “did not comport with the restrictive covenants in the deed to the Town”—specifically, because “portions of the new fire station w[ould] consist of poured concrete walls” and its “garage w[ould] have a flat roof.”<sup>195</sup> When Lynch moved to enjoin construction, Pelham moved to dismiss, claiming that Lynch lacked standing because he no longer owned “land benefiting from the covenants.”<sup>196</sup> The state trial court ruled that, “even if it were to construe the covenants as in gross and enforceable,” Lynch’s “aesthetic concerns” could not be considered a “legitimate interest” because he owned no nearby property.<sup>197</sup>

The Supreme Court of New Hampshire disagreed.<sup>198</sup> To “demonstrate a legitimate interest,” Lynch—and any other beneficiaries of in gross restrictive covenants—need only show that “he seeks enforcement ‘to advance the purpose for which the servitude was created.’”<sup>199</sup> The court discerned from “circumstances surrounding the transfer” and the “plain language of the deed itself” that the parties intended their covenant to be in gross.<sup>200</sup> Because Lynch sought “injunctive relief requiring the Town to comply” with its covenant obligations, the court concluded that his purely aesthetic interest in enforcing the servitude was legitimate.<sup>201</sup> But had the covenants been read as anything other than in gross, they would have been unenforceable.<sup>202</sup> To date, the case has received little

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192. *Lynch v. Town of Pelham*, 104 A.3d 1047, 1056 (N.H. 2014) (adopting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.1 (AM. L. INST. 2000)).

193. 104 A.3d 1047 (N.H. 2014).

194. *Id.* at 1050.

195. *Id.* at 1050–51.

196. *Id.* at 1051.

197. *Id.* (“The trial court . . . h[e]ld that any deeded covenant that is not clearly labeled ‘in gross’—including those at issue here—is an appurtenant covenant.”).

198. *Id.* at 1057.

199. *Id.* (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.1 cmt. c (AM. L. INST. 2000)).

200. *Id.* at 1054.

201. *Id.* at 1057.

202. *Id.* at 1055.

comment, cited principally for its discussion of how courts should interpret a deed.<sup>203</sup>

Faith communities seeking to enforce religious covenants in gross seem likely to encounter pushback from courts that choose not to follow the *Restatement*. Idiosyncratic and unusual restrictions held in gross will invariably create notice problems for future purchasers, forcing them to incur potentially prohibitive transaction costs.<sup>204</sup> While their deeds and leases may designate beneficiaries—for example, Trinity Church Vestry or the Archbishop of Chicago—the absence of adjacent property held by the alienating religious institution complicates the argument that covenant restrictions provide reputational protection for faith communities. Of course, faith communities could contend that they remain publicly identified with their former houses of worship, despite the absence of adjacent property that they continue to hold. They may also argue that restrictive covenants provide needed protection from affiliation with future uses they consider illicit.<sup>205</sup> But, when sacred property is alienated, faith communities may legitimately argue that the deed restrictions are required by theological mandates, and certain kinds of properties cannot be transferred without their protection. For example, as previously discussed, many religious traditions that permit a house of worship to be repurposed or sold still forbid property once used for ritual worship from any involvement in spiritual or morally illicit activities.<sup>206</sup> Without some form of in gross restriction, countless faith communities might feel obligated to hold onto properties used for sacred purposes.

### 5. Restrictions Delegating Interpretive Authority

Faith communities cannot anticipate every future use that may contradict their spiritual or moral commitments. Just the same, they may desire to protect themselves and their alienated property from complicity with activities they deem illicit. Could the Archdiocese of Chicago impose covenant terms that include a restriction allowing its own Roman Catholic authorities to determine whether future uses are spiritually or morally illicit, and thus prohibited, on alienated property? This seems to

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203. See, e.g., *Stowell v. Andrews*, 194 A.3d 953, 960 (N.H. 2018) (“In interpreting a deed, we give it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time.” (quoting *Lynch*, 104 A.3d at 1047)).

204. See discussion *supra* Section II.A.2 (noting that idiosyncratic or unusual covenant restrictions were generally not enforced beyond the original property owners under the common law).

205. Recall the Church Brew Works in Pittsburgh—formerly St. John the Baptist Church—which remains publicly identified with the Roman Catholic Church, to the chagrin of diocesan officials. See Kang, *supra* note 156.

206. See 1983 CODE c.1222, § 2.

be precisely what church officials wrote into the deed transferring title to One Chicago Square:

*Grantee agrees and covenants . . . [i]t will not use, permit others to use or lease or otherwise transfer the use of the subject Property or any portion thereof to any person who uses or will use the Property or any portion thereof as a facility in which . . . [a]ny activity not listed above which is inconsistent with or contrary to the tenets of the Roman Catholic Church, including canon law, doctrine, moral law or customs, in the sole discretion of the then-siting Bishop or Archbishop with jurisdiction over the Property.*<sup>207</sup>

Whether imposed on adjacent property or in gross, this kind of religious covenant introduces substantial uncertainty about its meaning. It therefore may be challenged as arbitrary or an unreasonable restraint on alienation.

While restrictive covenants rarely include provisions reserving authority over interpreting specific terms to the benefited party,<sup>208</sup> this issue arises far more frequently in contract law in the form of “satisfaction clauses.”<sup>209</sup> A typical satisfaction clause conditions the performance of one party on its satisfaction with the performance of the other.<sup>210</sup> These clauses are categorized as either subjective or objective.<sup>211</sup> The former includes satisfaction clauses that depend on the tastes, feelings, or judgments of one of the parties; the latter includes those that involve determinations of mechanical utility or durability.<sup>212</sup> So long as the party exercises discretion in good faith (if satisfaction is subjective) or justly and reasonably (if satisfaction is objective), courts will defer to its interpretation.<sup>213</sup>

But the degree of interpretive discretion permitted by satisfaction clauses is typically narrower than that which the Church’s restrictive covenants seem to grant. While satisfaction clauses can be subjective, their subjectivity is confined to a narrow set of criteria based on the task that one of the parties agreed to perform. A patron of the arts might apply subjective aesthetic criteria to a painting that she has commissioned, for

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207. Deed to One Chicago Square, *supra* note 7, at 6–7 (emphasis added).

208. The most common examples outside of the religious context likely are covenants delegating design decisions in planned residential communities to architectural review boards.

209. Though “the meaning of a contract is ordinarily decided by the court, rather than by a party to the contract, let alone the party that drafted it . . . a contract can vary from the norm by including language which indicates that one of the parties is to have discretion to interpret and apply the contract.” *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 330 (7th Cir. 2000).

210. *See, e.g., id.*

211. *Parise v. Integrated Shipping Sols., Inc.*, 292 F. Supp. 3d 801, 805 (N.D. Ill. 2017).

212. *Id.*

213. *Id.*

example, and while the ultimate satisfaction of the patron may depend on personal taste or fancy, a court would not have to look far beyond the four corners of the canvas to determine whether she exercised her discretion in good faith. The “satisfaction” of the bishop, however, depends upon the covenantor refraining from any activity that is “contrary to the tenets of the Catholic Church” or that “bring[s] discredit, ridicule, criticism, and/or scandal upon . . . the Roman Catholic Church.”<sup>214</sup> Because this grant of discretion is so broad, it would likely be difficult for courts to evaluate whether a bishop’s interpretation is in “good faith” or is “just and reasonable” without engaging in an analysis of Church teaching, thereby running afoul of the religious question doctrine. It is therefore possible that courts will find broad prohibitions against “scandalous” activities too vague to be enforceable.<sup>215</sup>

The problem is compounded when a covenant grants subjective discretion to religious authorities empowered to evaluate *every* future use in determining harmony with their faith communities’ tenets, laws, doctrines, or customs. Their satisfaction that activities on alienated property are not spiritually or morally illicit could seem indefinite. Although, as discussed below, courts routinely uphold religious arbitration agreements delegating significant interpretive authority to religious leaders in contract disputes, the fact that covenants are a condition of the property and not the contract may cause some courts to treat them differently. The obligations of covenants delegating broad discretion to religious leaders to restrict the activities of successive landowners who did not agree to the original terms of the sale may give courts pause. Through covenant terms reserving this subjective discretion for their leaders, faith communities retain an ambiguously defined, nonpossessory interest in their former property, precluding purchasers from ever controlling the parcel they choose to buy—sometimes in perpetuity.<sup>216</sup> Because this sort of nonpossessory interest can lead to property fragmentation and undermine investment in property, judicial enforcement of these covenant restrictions seems doubtful.<sup>217</sup>

### III. RELIGIOUS COVENANTS AS A PUBLIC LAW PROBLEM

Even if religious covenants are enforceable (or enforceable in most cases), according to traditional private law rules governing servitudes, religious covenants may also raise constitutional concerns because they

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214. Deed to Saints Peter and Paul Roman Catholic Church, *supra* note 16, at 4.

215. See, e.g., *Steiner v. Windrow Ests. Home Owners Ass’n*, 713 S.E.2d 518, 520, 526 (N.C. Ct. App. 2011) (finding a covenant provision void for vagueness when it prohibited “noxious activity . . . tending to cause embarrassment, discomfort, annoyance, or nuisance to the neighborhood”).

216. See Note, *supra* note 116, at 940.

217. See *Rose*, *supra* note 30, at 307.

require judicial enforcement of religiously motivated restrictions. This Part discusses three potential “buckets” of constitutional concerns. First, religious covenants that restrict the future owners or users of alienated property to members of specific religions (usually coreligionists of the former owner) may raise Equal Protection concerns. Second, religious covenants that require courts to interpret and apply theological terms or designate interpretive authority to a religious leader or organization may raise Establishment Clause concerns. Third, the selective non-enforcement of religious covenants because they are religious may raise Free Exercise concerns.

### A. *Religious Covenants and the State Action Doctrine*

In *Shelley v. Kraemer*,<sup>218</sup> the Supreme Court held that the enforcement of racially restrictive covenants constituted state action which denied equal protection under the law, and therefore would violate the Fourteenth Amendment.<sup>219</sup> Several years later, in *Barrows v. Jackson*,<sup>220</sup> the Court further held that the judicial judgments awarding damages for a breach of a racial covenant are also state action and likewise violate the Equal Protection Clause.<sup>221</sup> Though the Court confined its holding in *Shelley* to the context of racially restrictive covenants, the Court appeared to adopt an expansive “state action” test, suggesting that it would find state action when “[i]t is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.”<sup>222</sup> Such a broad reading of *Shelley* would “require all private agreements to satisfy constitutional standards because the enforceability of the covenants almost always depends on state court action.”<sup>223</sup> If courts confronted with requests to enforce covenants that implicate constitutional rights—for example, access to pornography—were to adopt this capacious reading of *Shelley*, they would presumably be hesitant to enforce them. However, this seems a distant possibility, and the state action enforcement concern articulated in *Shelley* does not appear to be a substantial impediment to the enforcement of religious covenants.

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218. 334 U.S. 1 (1948).

219. *Id.* at 23.

220. 346 U.S. 249 (1953).

221. *Id.* at 254.

222. *Shelley*, 334 U.S. at 19.

223. Thomas F. Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421, 443 (1984).

There is extensive literature on *Shelley*.<sup>224</sup> Most commentators agree that *Shelley* was correctly decided. However, many express trepidation about expanding the Court's holding outside of the particular context of racially restrictive covenants—and a general reluctance to expand its holding to the judicial enforcement of property rights that might implicate other constitutional limitations that apply to government action more generally.<sup>225</sup> Subsequent case law has also reflected this hesitation. The Supreme Court has declined to extend the underlying logic of *Shelley* any further, and following the Court's lead, lower courts generally have declined to find state action in the enforcement of covenants that restrict speech or religion in a manner that would clearly be unconstitutional if pursued directly by the government. For example, in *Evans v. Abney*,<sup>226</sup> the Supreme Court upheld the enforcement of a condition in a deed for a city park that mandated reversion to the grantor's estate if the park were ever desegregated.<sup>227</sup> The Court distinguished *Shelley*, concluding that there “state judicial action . . . had affirmatively enforced a private scheme of discrimination . . . [while] [h]ere the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself.”<sup>228</sup> In other words, the Court suggested that—even in the context of race—*Shelley* extends only to the judicial employment of public resources to perpetuate private discrimination.

Outside of the context of race, plaintiffs have attempted, though largely without success, to extend the state action theory of *Shelley* to covenants that allegedly restricted their First Amendment right to freedom of speech. Such cases most commonly involve HOA enforcement of restrictions on residents' ability to display political signs or religious ornamentation on their property. For example, in *Mazdabrook Commons Homeowners' Ass'n v. Khan*,<sup>229</sup> an HOA resident challenged the enforcement of covenant regulations that prohibited him from displaying a sign in his window promoting his own candidacy for office.<sup>230</sup> The Supreme Court of New Jersey concluded that enforcement of HOA regulations did not constitute state action in violation of the First

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224. See generally BROOKS & ROSE, *supra* note 31 (describing the rise and fall of racially restrictive covenants in America, unpacking why *Shelley* failed to end their influence).

225. *Id.* at 218 (“[M]any commentators—even sympathetic ones—thought that this formulation swept too far. To call judicial enforcement state action threatened to turn the whole area of private law into state action, potentially choking off vast numbers of individual arrangements that citizens routinely make among themselves.”).

226. 396 U.S. 435 (1970).

227. *Id.* at 436–37.

228. *Id.* at 445.

229. 46 A.3d 507 (N.J. 2012).

230. *Id.* at 509–10.

Amendment.<sup>231</sup> But New Jersey's constitution affords much greater protection against infringements on freedom of speech—including protection against “unreasonable” infringement by private actors.<sup>232</sup> And in this case, the court found that the HOA's restrictions were unreasonable due to the significant burden placed on the plaintiff's political speech, which was not outweighed by the minor aesthetic benefits bestowed on members of the HOA.<sup>233</sup>

More often than not, however, courts have upheld HOA restrictions on speech. In *Loren v. Sasser*,<sup>234</sup> the Eleventh Circuit affirmed summary judgment against plaintiffs' § 1983 claim based on an HOA's alleged violation of their First and Fourteenth Amendment rights, concluding that “[a]lthough the Supreme Court has held that the enforcement of a racially restrictive covenant constitutes state action . . . *Shelley* has not been extended beyond race discrimination.”<sup>235</sup> Similarly, in *Linn Valley Lakes Prop. Owners Ass'n v. Brockway*,<sup>236</sup> the Supreme Court of Kansas declined to extend *Shelley*'s underlying rationale beyond the narrow realm of racially restrictive covenants, rejecting the suggestion that a court could only enforce a covenant if it would be constitutionally valid if enacted as an ordinance.<sup>237</sup> Such a test, the court concluded, “would effectively bar enforcement of virtually any restrictive covenant, including agreements as to architectural style, residence size, fencing, etc.”<sup>238</sup> Courts have been equally willing to enforce covenants that restrict religious exercise. In *Christ's Methodist Church v. Macklanburg*,<sup>239</sup> the Supreme Court of Oklahoma held that a “residential use only” covenant, which prevented church use, was not against public policy, citing numerous cases from other jurisdictions in support of its conclusion.<sup>240</sup> As with restrictions on free speech, courts are willing to uphold covenants that restrict religious use, even if they would “refuse to allow the same result to be achieved by zoning.”<sup>241</sup>

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231. *See id.* at 513, 522 (deciding the question on state grounds because the state constitution does not require state action for a free speech violation).

232. *Id.* at 513.

233. *Id.* at 520, 522.

234. 309 F.3d 1296 (11th Cir. 2002).

235. *Id.* at 1303.

236. 824 P.2d 948 (Kan. 1992).

237. *Id.* at 951.

238. *Id.*

239. 177 P.2d 1008 (Okla. 1947).

240. *Id.* at 1011–12; *see also* *Voice of the Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 672 (Tex. Ct. App. 2005) (“Texas courts have routinely rejected the notion that a facially neutral, otherwise valid restrictive covenant violates constitutional religious freedom protections if applied against a church.”).

241. *See* Note, *Churches and Zoning*, 70 HARV. L. REV. 1428, 1437–38 (1957) (discussing the courts' failure to broaden the rationale of *Shelley v. Kraemer* to include restrictions on religious use).

While religious covenants that restrain the exercise of constitutional rights may theoretically be vulnerable on private law grounds as being contrary to public policy,<sup>242</sup> the development of the *Shelley* doctrine (or rather, its nondevelopment) suggests that courts are unlikely to view the state action doctrine as an impediment to enforcing religious covenants. This does not rule out the possibility that *Shelley* might be extended to apply to covenants that discriminate against a particular sect or denomination—or perhaps, covenants that restrict the use of property to members of a certain religion. After all, religion, like race, is a constitutionally protected class. Pre-*Shelley*, racially restrictive covenants sometimes also barred ownership by religious minorities, and while modern examples of covenants excluding minority religions have yet to be uncovered, there is no doubt that they exist.<sup>243</sup> They are likely unenforceable, although modern courts would be more likely to find that they violated public policy than employ the state action theory endorsed in *Shelley*.<sup>244</sup>

Covenants restricting future *users* to the coreligionists of the owner binding the property, including the examples discussed previously, may be more defensible—or at least, the intent behind the restriction may be less invidious. These restrictions on future users are less common than those restricting future *uses*, but they do exist. For example, in 1943, New York City’s famous Trinity Church sold a church in southern Manhattan

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242. The scope of this “public policy” limitation on the enforceability of covenants does not appear to be capacious.

243. See, e.g., BROOKS & ROSE, *supra* note 31, at 1 (recalling the deed restriction on Justice William Rehnquist’s summer house in Vermont “purport[ing] to exclude anyone of the ‘Hebrew race’” from ownership, an issue that arose during the jurist’s 1986 confirmation hearings to become Chief Justice of the Supreme Court); *id.* at 181 (describing the 1950s development of Spring Valley outside Washington, D.C., which imposed covenants on homes such that “no resident could sell or rent to a minority person, including . . . ‘Semitic’ persons generally”); Ellickson, *supra* note 98, at 5 (noting a covenant “bann[ing] residency by nonwhites,” including Jews and Muslims, in the 1920s development of Hancock Park in Los Angeles); see also Edmon J. Rodman, *Let My People Go . . . to Hancock Park*, JEWISH J. (Apr. 9, 2014), [https://jewishjournal.com/mobile\\_20111212/128273](https://jewishjournal.com/mobile_20111212/128273) [<https://perma.cc/HNQ6-XKP9>] (“Like many housing tracts developed in Los Angeles—and in many parts of the United States—in the first decades of the 20th century, Hancock Park had restricted housing covenants written into the title deeds that prohibited selling property to non-whites, a term that could include Jews, Italians, Russians, Muslims and Latinos.”); Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 740 n.11 (1989) (“The excluded group always included blacks and frequently included Asians, native Americans and religious minorities.”). In 1919, Minnesota banned covenants prohibiting the sale of property to Jews. *Mapping Prejudice: What Are Covenants?*, UNIV. MINN. <https://mappingprejudice.umn.edu/what-are-covenants/> [<https://perma.cc/DLY3-LRN8>].

244. Brooks and Rose note commentary arguing for “another and perhaps even better candidate than the courts for the state action rubric . . . the recorder of deeds.” See BROOKS & ROSE, *supra* note 31, at 218–25.

to the Serbian Orthodox Church.<sup>245</sup> The deed provided that the property would revert to the grantor if it ceased to be used for “Christian religious purposes,” presumably implying that the future users must also be Christian. Courts are likely to enforce such restrictions.<sup>246</sup> It is possible, however, that restrictive covenants specifically targeting religious users—as opposed to limiting religious use under the broader category of “commercial” or “non-residential” uses—might fall under greater scrutiny. But since no such covenants have ever been litigated, any conclusion regarding their enforceability is purely speculative.<sup>247</sup>

### B. *Religious Covenants and the Establishment Clause*

As discussed above, some religious covenants include theological language (e.g., uses inconsistent with the teachings of the Roman Catholic Church), often giving religious authorities broad discretion to interpret what constitutes a violation of their terms.<sup>248</sup> These covenants present two distinct Establishment Clause problems. The first is related to the state action difficulty discussed previously: Can judges enforce covenants granting religious authorities the right to interpret use restrictions employing theological terms, or would such enforcement represent the delegation of state power to religious entities? The second is related to what is known as the “church autonomy” or “ecclesiastical abstention” doctrine: Absent such a delegation, can courts themselves interpret use restrictions that are grounded in theology?<sup>249</sup>

Beginning with the delegation challenge, the principle argument that the enforcement of covenants delegating interpretive authority to

245. See INDENTURE 1 (Mar. 15, 1943) [hereinafter Deed to 414 West 18th Street] (on file with authors).

246. See, e.g., *Ireland v. Bible Baptist Church*, 480 S.W.2d 467, 470 (Tex. Civ. App. 1972) (rejecting a constitutional challenge against the application of “residential use only” to a church because the restriction did not discriminate against any particular religious group). Only one case has bucked this trend. In *W. Hill Baptist Church v. Abbate*, an Ohio trial applied the state-actor rationale of *Shelley v. Kraemer* to deny enforcement of two “residential use only” covenants against a church and a synagogue. *W. Hill Baptist Church v. Abbate*, 261 N.E.2d 196, 200–02. (Ohio C.P. 1969).

247. See Note, *Churches and Zoning*, 70 HARV. L. REV. 1428, 1437 (1957) (“It seems unlikely . . . that *Shelley* would be invoked to invalidate the enforcement of a covenant which permits the erection of commercial establishments but bars the building of churches.”). Religious restrictions imposed through gifts, wills, and trusts are common and commonly enforced.

248. See, e.g., Deed to One Chicago Square, *supra* note 7, at 7 (prohibiting “any activity . . . which is inconsistent or contrary to the tenets of the Roman Catholic Church, including canon law, doctrine, moral law or customs, in the sole discretion of the then-sitting Bishop or Archbishop with jurisdiction over the Property”). The standard covenant language from the Archdiocese of New York does not, however, purport to delegate any discretionary authority to the bishop. See Deed to 414 West 18th St., *supra* note 245.

249. See, e.g., Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What are We Talking About?*, 84 NOTRE DAME L. REV. 837, 859, 863 (2009).

religious authorities violates the Establishment Clause involves the intersection of *Shelley* and the Supreme Court decision in *Larkin v. Grendel's Den*.<sup>250</sup> The statute at issue in *Grendel's Den* delegated power to churches to veto the issuance of liquor licenses to businesses within a 500-foot radius of their property.<sup>251</sup> The Supreme Court struck down the statute, concluding that it generated excessive entanglement between church and state functions by substituting “the unilateral and absolute power of a church for the reasoned decision making of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications.”<sup>252</sup>

As an initial matter, it is important to note that *Grendel's Den* only poses a constitutional impediment to judicial enforcement of covenants delegating interpretive power to religious authorities if such enforcement is treated as state action under *Shelley v. Kraemer*. After all, the Establishment Clause only constrains the actions of government actors, not private individuals.<sup>253</sup> If judicial enforcement is not properly considered state action, covenants delegating enforcement power to religious leaders—such as the Archbishop of Chicago in One Chicago Square—may still be unenforceable on private law, not constitutional grounds. As discussed previously, traditional servitude law renders enforcement of such delegation problematic. But, given the development (or lack thereof) of the *Shelley* view of state action, there are doubts that *Grendel's Den* even applies to covenants that delegate interpretive authority to religious leaders.

Even if *Grendel's Den* does apply, there are reasons to doubt that it precludes judicial enforcement of the exercise of delegated interpretive authority. *Grendel's Den* has not proven to be a significant barrier to the delegation of government authority to religious entities, even when that delegation is accomplished directly.<sup>254</sup> State and federal courts have permitted delegation of legal authority to religious organizations so long as there are “articulated secular, neutral standards” for the use of such authority and that the delegation is made “on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.”<sup>255</sup> For example, while some courts have invalidated “kosher fraud” laws that required civil authorities to apply

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250. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (“The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”).

251. *Id.* at 120–21.

252. *Id.* at 126–27.

253. See U.S. CONST. amend. I.

254. See generally Jun Xiang, Note, *The Confusion of Fusion: Inconsistent Application of the Establishment Clause Nondelegation Rule in State Courts*, 113 COLUM. L. REV. 777 (2013) (describing post-*Grendel's Den* delegations to religious institutions).

255. *Harkness v. Sec'y of the Navy*, 858 F.3d 437, 450 (6th Cir. 2017).

religious rules to determine whether food satisfied kosher labeling standards,<sup>256</sup> courts have upheld delegation of power over promotions to sectarian naval chaplains,<sup>257</sup> permitted religiously affiliated universities to maintain police departments,<sup>258</sup> and permitted public schools to give credit for off-campus religious instruction.<sup>259</sup>

Though the enforcement of religiously motivated restrictive covenants sometimes involves the delegation of some authority to a religious agent, the connection between state action and that authority, which results from a private agreement, is far more attenuated than in contexts where religious organizations exercise government authority directly, or when state entities are required to interpret or apply religious rules. As Professor Kent Greenawalt has observed, state support of the private enforcement of religious rules is the “most modest” form of state involvement in religious exercise.<sup>260</sup> Further, Professor Greenawalt reasons that such enforcement—such as when a court would be asked to enforce a private contract designating which religious figure has the authority to make theological determinations—can be justified by the entirely religion-neutral motive of preventing fraud.<sup>261</sup>

It is also instructive that courts consistently decline to constitutionalize religious arbitration agreements, either through the application of *Grendel’s Den* or *Shelley*.<sup>262</sup> These agreements are similar to restrictive covenants delegating interpretive power to religious authorities in that they would “be ineffective without court orders compelling arbitration, confirming awards, or staying court suits in order

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256. Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 958 (1997) (citing *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995); *Ran-Dav’s Cnty. Kosher v. State*, 608 A.2d 1353 (N.J. 1992)); see *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 432 (2d Cir. 2002).

257. *Harkness*, 858 F.3d at 441.

258. *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 601–02 (4th Cir. 2012).

259. *State v. Yencer*, 718 S.E.2d 615, 616, 622–23 (N.C. 2011).

260. Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 789 (1998).

261. *Id.* at 790 (“The state has a legitimate secular interest in preventing fraud, even if people want a specific kind of product for religious reasons. Suppose that someone sold crosses with the claim, ‘Personally Blessed by the Pope.’ The state may properly prevent such fraud. No doubt, some claims of religious fraud present grave problems. Officials cannot assess the truth of essentially religious claims, and they should ordinarily not determine the sincerity of people who make claims about their own religious experiences . . . . But a simple determination that the Pope did not bless particular crosses does not raise such problems.”).

262. See Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 508 (2013) (“[C]ourts will routinely enforce awards issued in cases turning on religious doctrine or practice, just as they would any other arbitration award, and have consistently done so over and above Establishment Clause objections.”); see also Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1236–37 (2011).

to force arbitration.”<sup>263</sup> The law of private arbitration provides a particularly useful parallel for understanding how courts might treat constitutional challenges to the enforcement of covenants that grant religious authorities the power to interpret the scope of use restrictions, because courts have a lengthy, robust record of enforcing arbitration agreements adjudicated by religious tribunals.<sup>264</sup> Among the states, there is general consensus that “courts have the power, and perhaps a duty as well, to enforce secular contract rights, despite the fact that the contracting parties may base their rights on religious affiliations.”<sup>265</sup> So long as a religious arbitration agreement was entered into consensually, courts will enforce it, thus limiting their review to instances of unconscionability, fraud, or collusion.<sup>266</sup> Courts have even enforced religious arbitration agreements that explicitly defer to scripture over federal law.<sup>267</sup>

Commentators and popular media outlets have criticized religious arbitration agreements for, among other things, inoculating powerful institutions against liability and requiring litigants to be judged by religious beliefs to which they do not themselves adhere.<sup>268</sup> These commentators claim that religious arbitration agreements pose a particularly high risk of unfairness and abuse because the decisions of religious arbitrators are under-scrutinized by courts, which fear that substantive analysis of these agreements would violate the neutral principles test.<sup>269</sup> Indeed, according to Sophia Chua-Rubinfeld and Frank Costa, the religious question doctrine—intended to protect churches from

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263. Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 111 (1992).

264. Helfand, *Litigating Religion*, *supra* note 262, at 506–08 (detailing the “wide deference” granted to decisions of religious arbitrators, whose “tribunals now service America’s Christian, Islamic, and Jewish communities”).

265. *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 729 (N.J. 1991).

266. *Id.* at 731; *see* Helfand, *Litigating Religion*, *supra* note 262, at 507 (“So long as no such grounds [of misconduct] exist, U.S. courts will enforce awards issued by religious arbitration tribunals.”). *But see* Sophia Chua-Rubinfeld & Frank J. Costa, Jr., Comment, *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2087, 2099 (2019) (suggesting that courts have been reluctant to invalidate religious arbitration agreements on substantive unconscionability grounds due to concern that this would lead to “impermissible analysis of church law”).

267. Chua-Rubinfeld & Costa, Jr., *supra* note 266, at 2087 & n.4 (compiling cases where “courts have compelled arbitration even when the arbitration agreement explicitly stated that holy texts would trump federal law”).

268. *See, e.g.*, Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html> [<https://perma.cc/5NKW-3BNW>].

269. Chua-Rubinfeld & Costa, Jr., *supra* note 266, at 2099.

state interference—has opened a back door for religious interference with state law, an effect they have dubbed “reverse entanglement.”<sup>270</sup>

Not all scholars are so skeptical of religious arbitration agreements or courts’ ability to adjudicate religious disputes through private law. Indeed, provisions delegating religious disputes—including, presumably, the interpretation of religious covenants—to religious tribunals arguably sidestep the second, and more formidable, Establishment Clause problem with covenants using theological language. Namely, the Supreme Court has long made clear that civil courts lack the authority to resolve religious questions, including property disputes involving matters such as the meaning of a covenant that refers specifically to strictures of theology.<sup>271</sup> As Professor Michael Helfand argues, “the existence of such alternative forums for litigating religion has long factored into Supreme Court decisions addressing the non-justiciability of religious questions under the Establishment Clause.”<sup>272</sup> The Supreme Court has consistently recognized that judges are ill-positioned to evaluate the beliefs and practices of faith communities, particularly those of minority religious traditions in the United States.<sup>273</sup> The “church autonomy doctrine,” also known as “ecclesiastical abstention,” precludes civil courts from intervening in matters of religious “discipline, or of faith, or ecclesiastical

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270. *Id.* at 2107, 2110.

271. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) (“The Supreme Court’s basic constitutional approach . . . is that secular courts must not determine questions of religious doctrine and practice.”); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1887 (2009); Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1653–59 (2004).

272. Helfand, *Litigating Religion*, *supra* note 262, at 499.

273. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 361–62 (2015) (dismissing the district court’s misguided evaluation of an Islamic prisoner’s sincere religious exercise under RLUIPA’s “substantial burden” analysis); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185–88 (2012) (summarizing cases that underscore the Court’s avoidance of “quintessentially religious controversies whose resolution the First Amendment commits exclusively to [church authorities]”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” (quoting *Thomas v. Rev. Bd.*, 450 U.S. 707, 714 (1981))); *Emp. Div. v. Smith*, 494 U.S. 872, 886–87 (1990) (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”); *Thomas v. Rev. Bd.*, 450 U.S. 707, 714 (1981) (“The determination of what is a ‘religious’ belief or practice . . . [I]s not to turn upon a judicial perception of the particular belief or practice in question . . . .”); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[A] determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question . . . .”).

rule, custom, or law.”<sup>274</sup> Yet, rather than providing merely a principle of judicial abstention, Professor Helfand shows how the Establishment Clause structures judicial deference: “the Court’s willingness to dismiss such cases [involving religious doctrine] has been predicated on the importance of shuttling the litigation of religion to church courts created by the given religious community.”<sup>275</sup> Institutional deference under the church autonomy doctrine ensures that faith communities and their members can structure private agreements in terms that will be legally and religiously cognizable.<sup>276</sup> The church autonomy doctrine protects religious liberty while preserving civil authorities from excessive entanglement with religion.

Although the legal foundation for religiously motivated covenants is at little risk of being disturbed on *Shelley* state action grounds or on *Grendel’s Den* nondelegation grounds, they could be more susceptible to challenges if they require courts to interpret whether a restriction runs afoul of theological terms rather than deferring to a religious authority’s interpretation of those terms. It is instructive that the Supreme Court has given lower courts room to choose their adjudicatory approach in the context of other types of religious property disputes, usually involving disputed claims of ownership between splintered factions in the congregation.<sup>277</sup> In these religious property adjudications, courts can choose either to defer to religious authorities—if the religion has a hierarchical structure—or to apply neutral principles of property law.<sup>278</sup>

Following either approach, most religious covenants can be constitutionally enforced, despite the private law concerns about notice

274. Helfand, *Litigating Religion*, *supra* note 262, at 498–99 (“Under public law, the church autonomy doctrine affords deference to internal religious adjudication by church courts, preventing U.S. courts from intervening in matters of religious ‘discipline, or of faith, or ecclesiastical rule, custom, or law.’” (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871))); *see also* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 *VILL. L. REV.* 273, 294–95 (2008) (arguing for the importance of religious institutions because they “contribute to . . . the reality of religious freedom under law” by serving as part of the infrastructure that makes religious freedom possible); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 *COLUM. L. REV.* 1373, 1373 (1981) (stating that the church autonomy doctrine “tends to be overlooked,” and that “churches have a constitutionally protected interest in managing their own institutions free of government interference”).

275. Helfand, *Litigating Religion*, *supra* note 262, at 499; *see Watson*, 80 U.S. (13 Wall.) at 727 (“[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.”).

276. *See* Helfand, *Litigating Religion*, *supra* note 262, at 513–17 (discussing contract cases interpreting religious terminology).

277. *See* McConnell & Goodrich, *supra* note 132, at 310.

278. *See id.* at 309; *Jones v. Wolf*, 443 U.S. 595, 605 (1979).

and arbitrariness they raise. However, covenants employing theological terminology without delegating interpretive authority are constitutionally problematic because they require secular courts to get involved in religious disputes. Consider, for example, several disputes over deeds requiring that property be used as an “Orthodox synagogue.” In each case, the congregation subsequently opted to end the traditional practice of gender-segregated seating during services, and in each, gender-segregated seating was challenged as being inconsistent with Orthodox Judaism. While these cases might have been resolved through an application of the theological abstention doctrine, in each case, the courts instead resorted to ordinary principles of property and trust law, asking whether the term “Orthodox” was too vague to be enforceable using ordinary principles of property law.<sup>279</sup>

### C. *Religious Covenants and the Free Exercise Clause*

On the other hand, the non-enforcement of many religious covenants might raise First Amendment concerns arising under the Free Exercise Clause for two different reasons. First, the non-enforcement of covenants *required* by alienating faith communities’ theological mandates could sometimes substantially burden religious practice. Second, the non-enforcement of covenants *because they are religious* (or religiously motivated) would likely run afoul of the Free Exercise Clause’s mandate of neutrality toward religion—as would the selective non-enforcement of religious covenants when similar secular covenants are routinely enforced by courts. At present, the second set of claims are likely stronger, although the opinions in the Supreme Court’s *Fulton v. City of Philadelphia*<sup>280</sup> decision suggest that the non-enforcement of religiously mandated covenants may be subjected to strict scrutiny as well.<sup>281</sup>

Imagine that the Archdiocese of Chicago sold the Holy Name Cathedral itself, rather than the adjacent parking lot, and included in the deed a range of covenants prohibiting uses that the Archbishop believed too “sordid.” Then suppose that the purchaser or a successor subsequently argued in court that the restrictions were unenforceable. In response, the Archdiocese might argue that these restrictions were *required* by theological teachings and that, therefore, the court’s refusal to enforce

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279. See *Katz v. Goldman*, 168 N.E. 763, 765 (Ohio Ct. App. 1929) (upholding denial of injunctive relief to plaintiffs seeking to stop mixed seating in synagogue, concluding that the meaning of “orthodoxy” was ambiguous); *Katz v. Singerman*, 127 So. 2d 515, 517, 532–33 (La. 1961) (interpreting the meaning of a deed requiring property to “be used as a place of Jewish worship according to the strict ancient and orthodox forms and ceremonies” and finding the term “orthodoxy” to be ambiguous and unenforceable); cf. *Davis v. Scher*, 97 N.W.2d 137, 144 (Mich. 1959) (finding that similar trust terms prevented mixed-gender seating).

280. 141 S. Ct. 1868 (2021).

281. See *id.* at 1876–77.

them would impose an unconstitutional burden on the Free Exercise of religion. How should the court resolve the dispute? Unfortunately, the answer to this question is not altogether clear.

In *Employment Division v. Smith*,<sup>282</sup> the Supreme Court held that the Free Exercise Clause does not require individualized exemptions to laws that are “neutral” toward religion and “generally applicable,” even when they impose a substantial burden on the practice of religion.<sup>283</sup> Many of the common law rules governing covenant enforcement are, of course, neutral toward religion, but are they “generally applicable”? The Supreme Court’s decision in *Fulton* suggests that such rules do not fall into the constitutional safe harbor provided by *Smith* because they require individualized, fact-based applications.<sup>284</sup> Since they do not fall into this safe harbor, their non-enforcement could be subject to strict scrutiny—that is, narrowly tailored to advance a compelling interest.<sup>285</sup> Importantly, while the Court declined to overturn *Smith* in *Fulton*, a majority of the Justices expressed an openness to doing so in a future decision.<sup>286</sup> If *Smith* were to be reversed, all applications of legal rules that substantially burden religion could be subject to strict scrutiny.

Judicial non-enforcement of religious covenants *because they are religious* (or religiously motivated) would also raise Free Exercise concerns even when the covenants themselves are not required by theological rules. This is because *Smith* makes clear that legal rules that are not neutral to religion are presumptively unconstitutional. While courts have struggled since *Smith* to determine the contours of the “neutrality” mandate, the Supreme Court’s interventions in litigation over COVID-19 restrictions on religious worship clarified that religion neutrality requires that religiously motivated conduct be treated at least as well as similar secular conduct.<sup>287</sup> Some commentators have begun to refer to this approach to religion neutrality as assigning religious conduct “most favored nation” status.<sup>288</sup> A refusal to enforce covenants *because*

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282. 494 U.S. 872, 886–87 (1990).

283. *Id.* at 878–79.

284. *See Fulton*, 141 S. Ct. at 1876–78.

285. *See id.* at 1881–82.

286. *Id.* at 1882 (Barrett, J., concurring); *id.* at 1883 (Alito, J., concurring in the judgment); *id.* at 1926 (Gorsuch, J., concurring in the judgment).

287. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (per curiam); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289, 1289–90 (2021) (mem.); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–68 (2020) (per curiam).

288. Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Radically Redefine Religious Liberty*, SLATE (Apr. 12, 2021), <https://slate.com/news-and-politics/2021/04/supreme->

*they are religious* is decidedly not neutral to religion, and would therefore be presumptively unconstitutional.

### CONCLUSION

Religious covenants arise from the tension between religious conscience and secular markets as they converge on property. When faith communities alienate property, they seek to protect themselves from association or complicity with activities that contradict their spiritual and moral commitments, rooted in sincerely held religious belief. Faith communities impose use restrictions for their expressive value—both to coreligionists and to anyone who might occupy their alienated property—in ensuring that future uses remain publicly disaffiliated from their religious organization. But faith communities also include use restrictions in their deeds of transfer to protect the sacrality of alienated property.

Religious covenants achieve their objectives by enabling faith communities to divide the property rights associated with land they choose to alienate, transferring title to property while retaining a nonpossessory interest in its use. In this way, the alienating religious communities and institutions can achieve a number of goals: shielding property once dedicated to sacred use from desecration; ensuring continuity by limiting ownership or use of alienated property to members of the same faith community; and protecting their reputations by preventing the identification of that property with its former religious owners. Some religious covenants are arguably required by theological doctrine, yet others seek to advance the common good by preventing future owners from conducting activities that run afoul of faith principles. Still others reflect a desire to enshrine, through property law, a vision of the good life at odds with prevailing cultural norms. As Professor Molly Brady has reminded us in another context, not all property arrangements were or are meant to maximize wealth. Some served, and perhaps continue to serve, communal goals that may be undervalued in our modern, market-driven society.<sup>289</sup>

While religious covenants have not been widely litigated, courts seem likely to confront the question of their enforceability in the future. Some, when confronted with their arcane and at times controversial restrictions, may hesitate to enforce them. This Article has analyzed the various private and public law challenges to their enforcement that may arise in this litigation. Overall, this Article suggests that religious covenants can,

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court-religious-liberty-covid-california.html [https://perma.cc/6WB9-VCJ3]; Brendan Pierson, *How COVID and Shadow Docket Exploded SCOTUS' Scope of Religious Freedom*, REUTERS (June 17, 2021, 4:33 PM), <https://www.reuters.com/legal/government/how-covid-shadow-docket-exploded-scotus-scope-religious-freedom-2021-06-16/> [https://perma.cc/4YH5-FD3W].

289. Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 880–81 (2019).

and should, be enforced—that, in most cases and with limited exceptions, neither the private law of servitudes nor the federal Constitution poses significant impediments to their enforcement. In those cases where they are not enforceable as covenants, different faith communities might employ other devices to protect themselves from complicity with activities that contradict their spiritual or moral commitments. Where courts remain skeptical about covenants in gross, an in gross restriction enforced by defeasible fee might prove effective. Additionally, a long-term lease could accomplish similar results.<sup>290</sup> While faith communities would not receive simpler legal remedies like injunctions or damages for violation of use restrictions, as they might from covenant enforcement, their reliance on defeasible fees or lease arrangements would achieve the same protective end: preventing further illicit use of alienated property by taking it back. Insofar as defeasible fees and long-term leases are enforceable against successors in interest and sublessees, their in gross restrictions can effectively “run with the land.” Neither the Archdiocese of Chicago nor the First Church of Christ, Scientist claimed a right of reversion for breach in their deeds transferring title to One Chicago Square and 30 Dalton.<sup>291</sup> Had they retained reversionary rights in the case of breach, their respective positions would have been considerably stronger. But, of course, the sale price of the property might have been considerably lower.

This Article closes with a comment on prudence, both on the part of courts considering the enforceability of religious covenants and on the part of religious organizations considering whether, and what, religious covenants to impose. On the judicial side of the equation, it is important to acknowledge that religious organizations own immense amounts of property in the United States (and beyond). Much of that property is underutilized. It could, and often should, be sold and repurposed. Court-imposed barriers to religious covenants may impede the efficient transfer of property from religious to secular owners, who may transform parking lots to apartments, shuttered schools into assisted living facilities, churches into soup kitchens, and the like. These barriers may also impede the distinctive private ordering arrangements that pure market forces would not produce.<sup>292</sup> For example, some Catholic dioceses have worked to repurpose closed facilities as housing for young professionals seeking to live in an intentional Catholic community.<sup>293</sup>

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290. This seems to be how Trinity Church manages its property, offering ninety-nine-year ground leases in Manhattan that can be terminated for violation of use restrictions imposed on lessees). See Interview with Sujohn Sarkhar, *supra* note 15.

291. *Id.* at 8; Deed to 30 Dalton, *supra* note 7, at 4.

292. We are indebted to Professor John McGinnis for this insight.

293. See, e.g., HARBOR: CATH. HOUSE OF DISCERNMENT & CO-WORKING SPACE, *Come Home to Harbor*, <http://harbor.community/> [<https://perma.cc/NW3B-YBFF>].

On the other hand, faith communities alienating property should consider the economic and political costs of religious covenants. Economically, faith communities stand to lose significant amounts of money from the sale of their property by restricting its use. The kinds of religiously motivated use restrictions imposed on One Chicago Square or 30 Dalton are unlikely to benefit future owners of those properties, regardless of whether they embrace Roman Catholicism or Christian Science. Purchasers will pay less, sometimes significantly less, for property subject to restrictions that offer them little to no advantage.<sup>294</sup> To be sure, faith communities and purchasers can internalize the prospect of a lower resale value when including use restrictions in their initial agreement, and both parties can give notice to future owners by documenting religious covenants within the deed transferring title to property. Yet this lost income from the sale of property that faith communities have no intention of reacquiring—in particular, property that was never used for religious purposes and may hold no sacred value for faith communities—should give religious authorities pause. Across the United States, faith communities like the Archdiocese of Chicago and the First Church of Christ, Scientist serve the spiritual and corporal needs of believers and nonbelievers alike.<sup>295</sup> They seek to advance the common good by educating the young in schools, feeding the hungry in soup kitchens, welcoming the homeless in shelters, caring for the sick in clinics, and burying the dead in cemeteries.<sup>296</sup> Their ministries on church-

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294. This includes alternative property devices, like defeasible fees or long-term leases. Purchasers will pay less, and financial institutions may choose not to lend them money, particularly for arrangements involving defeasible fees. By comparison, purchasers will typically accept restrictions when they offer some benefit. Many subdivisions require dues paid to their local homeowners association, which then handles ongoing maintenance, common expenses, and any other common concerns—plowing snow on shared streets, staffing a community pool, or providing additional security, for example. See Rose, *supra* note 30, at 303–05, 311–16.

295. In Roman Catholic communities like the Archdiocese of Chicago, “ministries” are largely guided by the “Corporal Works of Mercy” (e.g., feeding the hungry, giving drink to the thirsty, sheltering the homeless, visiting the sick, burying the dead) and the “Spiritual Works of Mercy” (e.g., comforting the sorrowful, counseling the doubtful, instructing the ignorant). See *The Corporal Works of Mercy*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/jubilee-of-mercy/the-corporal-works-of-mercy.cfm> [https://perma.cc/J7F7-6NYV]; *The Spiritual Works of Mercy*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/jubilee-of-mercy/the-spiritual-works-of-mercy.cfm> [https://perma.cc/937G-W4AL].

296. See *Catholic Education*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/about/public-affairs/backgrounders/catholic-education.cfm> [https://perma.cc/LM2P-L7VJ]; *Catholic School Data*, NAT’L CATH. EDUC. ASS’N, [https://ncea.org/NCEA/Who\\_We\\_Are/About\\_Catholic\\_Schools/NCEA/Who\\_We\\_Are/About\\_Catholic\\_Schools/Catholic\\_School\\_Data/Catholic\\_School\\_Data.aspx?hkey=86ec3eb1-b329-4e98-9f0e-f271dc6b8d50](https://ncea.org/NCEA/Who_We_Are/About_Catholic_Schools/NCEA/Who_We_Are/About_Catholic_Schools/Catholic_School_Data/Catholic_School_Data.aspx?hkey=86ec3eb1-b329-4e98-9f0e-f271dc6b8d50) [https://perma.cc/SK4C-EZGC]; *Catholic Health Care, Social Services and Humanitarian Aid*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/about/public-affairs/backgrounders/health-care-social-service->

owned property flow from the same religious beliefs that are given ritual expression in worship. When the time comes to sell that property, faith communities would do well to weigh their desire for covenant restrictions against the additional income that unencumbered property could generate.

Politically, religious covenants could provoke backlash against faith communities. Use restrictions imposed on alienated property aim to control the behavior of people who may not share the spiritual or moral commitments of former owners. These sorts of religiously motivated restrictions have already begun to raise concerns with civil rights organizations.<sup>297</sup> Increased political attention could inspire lawmakers to reevaluate the liberties enjoyed by faith communities with respect to land-use regulations, potentially limiting their ability to purchase, sell, own, or use property. Of course, popular protest and neighborhood pressure could also encourage landowners to refrain from selling to faith communities in the first place. While courts have normative and prudential reasons for enforcing most religious covenants, the fact that they are enforceable does not make them advisable. Religious institutions should exercise prudence and carefully discern the extent to which they include religious covenants in deeds alienating property to secular owners.<sup>298</sup>

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humanitarian-aid.cfm [<https://perma.cc/8MJM-ZQ8F>]; *Our Ministry*, CATH. CHARITIES USA, <https://www.catholiccharitiesusa.org/our-ministry> [<https://perma.cc/PAW8-GQ55>]; *Our Work Overseas*, CATH. RELIEF SERVS., <https://www.crs.org/our-work-overseas> [<https://perma.cc/FM B9-PSUC>].

297. See, e.g., Allen, *supra* note 30.

298. See 1983 CODE c.1222, § 2.