# FREE-EXERCISE ARGUMENTS FOR THE RIGHT TO ABORTION:

## Reimagining the Relationship Between Religion and Reproductive Rights

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## Introduction

At an event held in Louisville, Kentucky's First Unitarian Church to commemorate the anniversary of *Roe v. Wade*,[1] Reverend Millie Horning Peters, a retired United Methodist pastor, oversaw a small booth that held a sign stating, "Her Faith. Her Decision."[2] Reverend Peters had gathered alongside fellow pastors, congregants who were still dressed in the orange vests that they wore while serving as clinic escorts at the state's sole abortion clinic, and people from several other churches.[3] Collectively, they aimed to commemorate the strides made since *Roe* and mobilize against ongoing threats to reproductive freedom.[4] For Reverend Peters, such advocacy work is typical. As co-chair of the Kentucky chapter of the Religious Coalition for Reproductive Choice, she speaks at abortion-rights rallies and testifies in favor of legislation that aims to remove barriers to reproductive healthcare.[5] Such advocacy work is also fundamentally driven by her faith. She became involved in reproductive justice when the issue "spoke to her like a moving scripture passage."[6] In explaining the relationship between her faith and her support for abortion, she has stated, "Life is complicated, but it is just my firm belief that God has given us a mind and given me a heart of compassion that reaches out to people. To be pro-choice is just a given."[7]

As an abortion provider, Dr. Laura Gil also advocates for reproductive rights.[8] The way in which she grounds her work in faith is similar to Reverend Peters. In explaining how she responds to people who ask why she performs abortions, she has stated, "I tell them I perform abortions because, to be a true Christian, I must

1. 410 U.S. 113 (1973).

2. Grace Schneider, Roe v. Wade *Marked With Call to Action*, Courier-Journal (Jan. 26, 2015, 6:14 AM), https://www.courier-journal.com/story/news/local/2015/01/25/roe-wade-marked-call-action/22326687 [https://perma.cc/T2WA-5KEA].

3. *Id.*

4. *Id.*

5. Melissa Hellmann, *The Women Ministers of Kentucky Preaching Abortion Rights*, Yes! Mag. (Sept. 7, 2017), https://www.yesmagazine.org/democracy/2017/09/07/the-women-ministers-of-kentucky-preaching-abortion-rights [https://perma.cc/KP92-4PLH].

6. *Id.*

7. *Id.*

8. Lauren Barbato, *Faithful Providers*, Conscience Mag. (Dec. 12, 2019), https://www.catholicsforchoice.org/resource-library/faithful-providers [https://perma.cc/ZBG3-UXHV].

support women who have abortions. For me, it has always been spiritual."[9]

The story of Reverend Peters and the people of faith who gathered at the First Unitarian Church challenge the widespread narrative of the relationship between religion and reproductive rights—that religious people inevitably oppose abortion. The statements of Dr. Gil complicate a related version of that narrative—that religious convictions lead healthcare providers to refrain from the provision of abortion care. The presumption that faith inevitably conflicts with support for reproductive rights is a chapter in a larger story—created and reinforced both legally[10] and culturally[11]—that links religious liberty to conservative views about sex, sexuality, and reproduction.

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9. *Id.*

10. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (holding that requiring Catholic adoption agencies that objected to placing children with same-sex couples to abide by the city's nondiscrimination policy violated the Free Exercise Clause); Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (2020) (involving religious and moral exemptions from the Affordable Care Act's contraceptive-coverage requirement); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (raising but not answering the question of whether religious individuals are entitled to exemptions from antidiscrimination laws); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that, under the Religious Freedom Restoration Act (RFRA), a closely-held for-profit corporation was entitled to an accommodation from the Affordable Care Act's contraceptive-coverage requirement); Elane Photography v. Willock, 309 P.3d 53 (N.M. 2013) (involving a wedding photographer's religious objection to photographing a same-sex couple's commitment ceremony); Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego L. Rev. 163, 164–65 (2016) (stating that such cases, even if they do not represent the bulk of RFRA cases, "drive the discussion on both the left and the right" and "have become the face of free exercise to the general public").

11. *See, e.g.*, Elizabeth Reiner Platt, Katherine Franke, Kira Shepherd & Lilia Hadjiivanova, Colum. L. Sch.: L., Rts., & Religion Project, Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right (2019) (discussing how media coverage of "religious liberty" has been "overwhelmingly dominated by articles dissecting the impact of marriage equality and reproductive rights on conservative Christian practitioners"); Bromleigh McCleneghan, *I'm a Pro-Choice Minister, and I'm Far From the Only One. We Should Speak Up More*, Wash. Post (May 20, 2019), https://www.washingtonpost.com/outlook/2019/05/20/im-pro-choice-minister-im-far-only-one-we-should-speak-up-more [https://perma.cc/QWU3-2SPR] (quoting a leader of an interfaith group that promotes reproductive justice as stating that religious progressives "maintain public support . . . but we've lost the public narrative"); Dov Fox, *Medical Disobedience and the Conscientious Provision of Prohibited Care*, 21 Am. J. Bioethics 72, 72 (2021) (noting that "medical conscience has been tied to religious conservativism" for several decades).

As this Article demonstrates, this typical abortion tale, while well-worn, is one-sided. Many religious people support one's right to terminate a pregnancy not in spite of their faith but rather *because* of their faith. And many providers describe *offering* abortion care, not opting out of it, as an exercise of religious or conscientious obligations.

This Article traces the history of the claim that restrictions on abortion violate either the Free Exercise Clause or the Religious Freedom Restoration Act (RFRA). This claim asserts that laws that ban or restrict access to abortion burden pregnant people's[12] ability to make reproductive decisions guided by their sincerely held religious beliefs or burden healthcare providers' ability to provide abortion care as dictated by their religious beliefs. This Article argues that recovering this lost history reveals a dual erasure: erasure of the fact that faith motivates or even requires people to provide or obtain abortions and erasure of the decades-long legal claim that protecting the right to abortion is actually more consistent with religious-liberty principles than restricting it. There is a rich tradition of the clergy, the women's movement, and religious organizations fusing free-exercise arguments with arguments about economic justice, dignity, and pregnant people's ability to make choices about their lives and families.

This Article is situated within a larger context in which scholars and litigants are increasingly challenging the idea that religious freedom is solely a conservative value and trying to reclaim faith-motivated action for causes that progressives champion.[13] In recent years, plaintiffs have argued that the federal RFRA or state RFRAs protect the right to perform same-sex marriage ceremonies,[14] provide food and water to migrants in the desert,[15] open a safe-injection site,[16] protest at nuclear power facilities,[17] halt construction of the border wall on one's land,[18] challenge the U.S. Food

12. This Article uses the term "women" when referencing sources that also use that term. But because people of all gender identities and expressions seek and have abortions, it uses gender-neutral language elsewhere.

13. *See* Platt, Franke, Shepherd & Hadjiivanova, *supra* note 11, at 22–64 (documenting the many contexts in which progressive humanitarian and social justice movements have fought for religious freedom).

14. *See* Amended Complaint, Gen. Synod of the United Church of Christ v. Resinger, No. 3:14–cv–00213–MOC–DLH, 2014 WL 5094093 (W.D.N.C. Oct. 10, 2014).

15. *See* United States v. Warren, No. MJ-17-0341-TUC-BPV, 2018 WL 6809430 (D. Ariz. Dec. 27, 2018).

16. *See* United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019).

17. *See* United States v. Walli, 976 F. Supp. 2d 998 (E.D. Tenn. 2013).

18. *See* United States v. 65.791 Acres of Land, More or Less, 7:18-CV-00329

and Drug Administration's prohibition on blood donations from sexually active men who have sex with men,[19] and provide sanctuary to refugees.[20]

At the same time, some scholars have posited that RFRA could serve as a means for challenging laws that circumscribe abortion access, particularly in light of the Court's deferential approach to evaluating substantial burdens on religious exercise in *Burwell v. Hobby Lobby*[21] and the increase in state laws designed to eviscerate *Roe*.[22] But no Article has provided a historic account of the argu-

(S.D. Tex. Dec. 31, 2018).

19. *See* Brian Soucek, *The Case of the Religious Gay Blood Donor*, 60 Wm. & Mary L. Rev. 1893 (2019).

20. *See* Thomas Scott-Railton, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 Yale L.J. 409 (2018).

21. 573 U.S. 682 (2014); *see* Elizabeth Sepper, *Gendering Corporate Conscience*, 38 Harv. J.L. & Gender 193, 198–200 (2015) (explaining that *Hobby Lobby* "signal[ed] significant change in religious liberty doctrine" in part because it "relaxed the requirement that objectors establish that the burden on their religious freedom is substantial." Under this relaxed substantial burden standard, a religious objector "may claim a sincerely held religious belief, assert that the burden of compliance with a regulation is substantial, and, with pleadings alone, shift the burden of proof to the government" to demonstrate that the law is the least restrictive means of furthering a compelling interest).

22. *See, e.g.*, Platt, Franke, Shepherd & Hadjiivanova, *supra* note 11, at 38 (suggesting that if *Roe* is either explicitly overturned or eroded, "religious liberty laws, including state RFRAs, could provide potential avenues for medical providers, activists, clergy, and patients to preserve abortion care," such as by serving as a defense to prosecution); Violet S. Rush, *Religious Freedom and Self-Induced Abortion*, 54 Tulsa L. Rev. 491 (2019) (arguing that caregivers who assist with self-induced abortion for religious reasons can assert state RFRAs as a defense against a criminal charge); Kaili E. Matthews, *Reverse* Hobby Lobby*: The Satanic Temple's Fight Against Indoctrination Abortion Laws*, 19 Rutgers J.L & Religion 383 (2018) (arguing that Missouri's informed consent laws violate the Establishment Clause and the Free Exercise Clause); Sophia Martin Schechner, *Religion's Power Over Reproductive Care: State Religious Freedom Restoration Laws and Abortion*, 22 Cardozo J.L. & Gender 395 (2016) (asserting that informed consent laws in Alabama and Missouri violate state RFRAs); Kara Loewentheil, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of* Hobby Lobby*'s Implications for State Law*, 9 Harv. L. & Pol'y Rev. 89, 123 (2015) ("If the owners of Hobby Lobby have a judicially-recognized religious belief that they must provide insurance coverage for their employees . . . then it seems plausible that a business owner might just as well have a religious belief that he or she must provide insurance coverage that includes coverage for abortion to their employees."); Priscilla J. Smith, *Who Decides Conscience –RFRA's Catch 22*, 22 J.L & Pol'y 727, 731 (2014) (contemplating that "RFRA's protections could mean a new birth of freedom," including "freedom from draconian limits on reproductive choice" but expressing doubt that the U.S. Supreme Court will apply RFRA even-handedly).

ment that limiting abortion access burdens religious exercise or seriously considered why the relationship between past traditions of religious advocacy and the present state of reproductive rights matters. The historic and normative groundwork laid in this Article helps to illuminate now-largely-invisible concerns with restricting not only the right to abortion but also reproductive healthcare access broadly; to create a more holistic, complete account of what it means to protect religious freedom in the reproductive-rights context; and to consider the significance of grounding the right to abortion in either the Free Exercise Clause or RFRA.

Part I describes how religious beliefs guide or even compel people of faith to have abortions, perform abortions, and advocate for reproductive justice. It shows that people like Reverend Peters and Dr. Laura Gil are far from anomalous, as faith-based commitments to reproductive justice are not recent and they are not rare. Once it becomes apparent that seeking, supporting those who seek, and providing abortions can all be acts motivated or obligated by religious beliefs, it seems natural that individuals would argue that laws banning abortion or regulating the procedure out of existence infringe on religious exercise.

Part II reconstructs the roots of this argument. It begins with the 1960s and 1970s, in which the campaign to repeal laws criminalizing abortion gained support. When the procedure was still illegal, rabbis and ministers formed a nationwide referral service, called the Clergy Consultation Service (CCS), that helped people obtain safe abortions. CCS members invoked allegiance to "higher laws" and divinely inspired duties to challenge criminal abortion statutes that caused suffering and deprived people of dignity. They also publicly contended that these statutes were infringements upon religious freedom and directly linked reproductive healthcare access to economic justice. At the same time, litigants explored a range of constitutional arguments against laws proscribing abortion, including that they violated the Free Exercise Clause.

While abortion bans were not struck down on free-exercise grounds, religious liberty formed a central part of efforts to prevent the retrenchment of *Roe* in the 1970s and 1980s. The conventional account of *Roe* is that people of faith came to consider the decision an attack on religion and traditional morality. But this is only partly correct. Other religious individuals also perceived a close connection between *Roe* and religion—but in the opposite direction. In their view, a mutually reinforcing relationship existed between the right to privacy and the First Amendment. *Roe* was compelled by the First Amendment because individuals must be able make

and effectuate fundamental decisions about family and childbearing according to the dictates of their faith, and courts needed to adhere to *Roe* to preserve the First Amendment because preventing individuals from making life-shaping family decisions as guided by their faith would burden their religious exercise. Several faith groups also read *Roe* to be a victory for religious liberty because, by declining to endorse a theory of when life begins, the U.S. Supreme Court affirmed individuals' ability to seek an abortion as a matter of their own religious and spiritual concerns. In doing so, the Court prevented the state from compelling people to conform to a particular theological viewpoint about fetal life and the permissibility of abortion, which would pressure people with contrary religious beliefs to abandon or violate them.

The argument that abortion restrictions violate the Free Exercise Clause reached the Supreme Court for the first—and only—time in 1982 with *Harris v. McRae*.[23] In this case, pregnant indigent women and the Women's Division of the United Methodist Church argued that the Hyde Amendment, which prohibits federal Medicaid funding for medically necessary abortion services but not for childbirth services, violated the Due Process Clause, in addition to the Free Exercise Clause and the Establishment Clause.[24] Now, the case is primarily viewed as instructive on the limits of the right to privacy to ensure that all people have the ability to determine the course of their reproductive lives.[25] But at the time, people also viewed it as a significant religious-liberty case.[26] Yet, the Supreme Court never reached the free-exercise claim and, instead, disposed of the claim on standing grounds.[27]

However, the legacy of *Harris v. McRae* endured, including during Congressional debates over RFRA. In fact, RFRA was delayed for years because some feared that it would create an independent statutory basis for the right to abortion if *Roe* were overturned.[28] Several scholars have sketched the broad strokes of this legislative history: that many conservative groups initially opposed the statute but changed their position when *Planned*

23. 448 U.S. 297 (1980).

24. *Id.* at 305.

25. *See, e.g.*, Khiara Bridges, The Poverty of Privacy Rights 25–27 (2017).

26. *See* Part C, *infra*.

27. *Harris*, 448 U.S. at 320.

28. *See* Part D, *infra*; *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 231 (1994) (explaining how anti-abortion opponents of RFRA held this view).

*Parenthood of Southeastern Pennsylvania v. Casey*[29] reaffirmed the central holding of *Roe*, thereby seemingly reducing the likelihood that the Court would soon overrule it, and when Congress added some reassuring language in the U.S. House of Representatives and U.S. Senate reports.[30] This Article examines the legislative history in detail and offers a different read of it by explaining how, as RFRA pertains to abortion, the statute was an example of attempted religious gerrymandering, in which legislation tries to target specific conduct motivated by religious beliefs and subject it to unfavorable treatment.[31] This attempted religious gerrymandering reflected and replicated abortion exceptionalism.

Part III turns to the practical and normative implications of pursuing the claim that laws prohibiting or limiting access to abortion violate either the Free Exercise Clause or RFRA. It concludes by noting that reimagining the relationship between faith and reproductive rights is much needed, particularly in light of two concurrent jurisprudential and legislative trends: purported solicitousness for religious freedom and perils to reproductive freedom.

## I. A Religious Basis for the Right to Abortion

In 2018, four Christian pastors and one rabbi gathered to bless an abortion clinic in Bethesda, Maryland.[32] Reverend Carlton Veazey, a Baptist pastor, opened the interfaith ceremony with "a prayer for the well-being of the doctor and nurses who facilitate abortions at a clinic here and for their patients."[33] In describing the views that motivated him to participate in the ceremony, he stated that supporting the right to abortion "affirms a woman's moral

29. 505 U.S. 833 (1992).

30. *See, e.g.*, Robert F. Drinan, S.J. & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & Religion. 531, 537–38 (1994). The report language stated that the statute did not change the ability of religious claimants to obtain relief in a manner consistent with the Court's pre-1990 free-exercise jurisprudence, under which religious exemptions from laws were rare. *See* Part D, *infra*.

31. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 536 (1993) (defining a "religious gerrymander" as "an impermissible attempt to target [religious] petitioners and their religious practices").

32. Julie Zauzmer, *Clergy Gather to Bless One of the Only U.S. Clinics Performing Late-Term Abortions*, Wash. Post (Jan. 29, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/01/29/clergy-gather-to-bless-an-abortion-clinic-which-provides-rare-late-term-abortions-in-bethesda [https://perma.cc/A4EU-EMSX].

33. *Id.*

agency."[34] Inspired by similar views, clergy have blessed clinics everywhere from Cleveland, Ohio, to Washington, D.C.[35]

Clinic blessings, which are designed to honor pregnant patients and amplify the voices of progressive religious individuals,[36] are a small-scale representation of the various ways in which reproductive rights can be grounded in religion. That continuum extends from clinic patients who seek abortions because of their faith, to religious leaders within those faith traditions, to physicians who provide abortions because of their faith.

This Part describes how, for various individuals and groups, sincere religious convictions underpin the position that one has a right—and responsibility—to make decisions about the timing and circumstances of their childbearing. In describing various beliefs, it does not intend to suggest that individuals within a certain religious tradition are monolithic in their outlooks. As this Part illustrates, beliefs can differ both between and among denominations. Rather, the aim of this Part is to challenge the archetypal account that there is a single religious stance on reproductive rights and to construct a more nuanced one.

## A. *Seeking and Supporting the Right to Seek Abortion Care*

### 1. Religious Traditions

A faith-based commitment to the right to terminate a pregnancy is well-established and, for many, customary. According to one United Methodist pastor who serves in the United Church of Christ, the "support for reproductive health and rights is neither knee-jerk nor shallow and comes from wrestling with texts and traditions, social and medical science, and the complexity inherent in human life."[37] Thus, the reproductive-rights position can be a deeply religious one.[38]

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34. *Id.*

35. Alex Zielinski, *Why a Group of Clergy Are Blessing an Abortion Clinic*, ThinkProgress (Oct. 8, 2015, 12:08 PM), https://thinkprogress.org/why-a-group-of-clergy-are-blessing-an-abortion-clinic-c715804d1fab [https://perma.cc/J3VD-79R8].

36. Zauzmer, *supra* note 32.

37. McCleneghan, *supra* note 11.

38. *History*, Religious Coalition for Reproductive Choice, https://rcrc.org/history [https://perma.cc/KW5E-XEVC] (last visited Apr. 8, 2022). For a historic overview of religious stances on abortion, *see* Lawrence Lader, Abortion 94–102 (1966). For a recent overview, *see* Comment Letter on Proposed Rule to Protect Statutory Conscience Rights in Health Care from Columbia Law School, The Public Rights/Private Conscience Project, to U.S. Department of Health and Human Services, Office for Civil Rights (March 27, 2018) https://lawrightsreligion.law.columbia.edu/sites/default/files/content/

Several faith traditions, such as the Unitarian Universalist Association,[39] the United Church of Christ,[40] the Presbyterian Church (USA),[41] the Metropolitan Community Churches,[42] the Disciples of Christ,[43] Reform Judaism,[44] and Conservative Judaism[45] hold that pregnant people must be able to control their reproductive destiny free from governmental interference. Many publicly

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Policy%20Analyses/Policy_HHSRule_3.27.18.pdf [https://perma.cc/M68C-ZS4A].

39. *1993 General Resolution, Federal Legislation for Choice*, Unitarian Universalist Ass'n (July 1, 1993), https://www.uua.org/action/statements/federal-legislation-choice [https://perma.cc/42ER-K9BV] (recognizing that "further erosion or overturning of *Roe v. Wade* by future decisions of the Supreme Court could leave a woman's right to choose subject to state legislation, which may be unsympathetic or even opposed to choice by creating demeaning and unnecessary barriers to safe, timely, and accessible services").

40. *General Synod Statements and Resolutions Regarding Freedom of Choice*, United Church Christ 3 (1971), https://www.uccfiles.com/pdf/GS-Resolutions-Freedom-of-Choice.pdf [https://perma.cc/R4N4-MLG6] (in a 1971 resolution, calling for the repeal of laws prohibiting abortion, which would "take abortion out of the realm of penal law and make voluntary and medically safe abortion legally available to all women").

41. Office of the General Assembly, Presbyterian Church (U.S.A.), Report of the Special Committee on Problem Pregnancies and Abortion 10–11 (1992), https://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf [https://perma.cc/LS86-9JWA] ("We affirm the ability and responsibility of women, guided by the Scriptures and the Holy Spirit, in the context of their communities of faith, to make good moral choices in regard to problem pregnancies.").

42. *Statement of Faith on Women's Reproductive Health, Rights, and Justice*, Metro. Cmty. Churches (Mar. 20, 2013), https://www.mccchurch.org/statement-of-faith-on-womens-reproductive-health-rights-and-justice [https://perma.cc/5H9L-CT7P] (holding that individuals should have "the right to choose their reproductive health care options" and "the means to exercise those options at their sole discretion").

43. *GA-1930: On Women and Just Peacemaking*, Disciples of Christ, (Mar. 7, 2019, 10:42 PM), https://ga.disciples.org/resolutions/2019/ga-1930 [https://perma.cc/8KJ9-E8RF] ("[The] Disciples of Christ has repeatedly proclaimed the equality of all people—emphasizing . . . economic justice, access to health care, and reproductive freedom").

44. *Reproductive Rights*, Union for Reform Judaism, https://urj.org/what-we-believe/resolutions/reproductive-rights [https://perma.cc/PRT2-GXEN] (last visited Apr. 8, 2022) (affirming an "unwavering commitment to the protection and preservation of the reproductive rights of women" and pledging "support wherever, whenever, and for however long our goal may require it at the federal, state and local levels of government").

45. *Resolution on Reproductive Freedom in the United States*, Rabbinical Assembly (May 21, 2012), http://rabbinicalassembly.org/story/resolution-reproductive-freedom-united-states [https://perma.cc/82MT-YVRB] ("Over the past four decades the Rabbinical Assembly has consistently supported reproductive freedom.").

supported the right to abortion before *Roe v. Wade*,[46] including the Unitarian Universalist Association, which in 1963 passed the first denominational policy statement in favor of reforming abortion laws.[47] Among those faith traditions expressing the most comprehensive support for reproductive rights, the Unitarian Universalist Association has urged the passage of federal legislation to "guarantee the fundamental right of individual choice in reproductive matters."[48] The United Church of Christ has enjoined "all parts of the church to work toward a society where a full range of reproductive options is available to all women regardless of economic circumstances."[49]

Some faiths traditions have explicitly declared that abortion access is not solely a Fourteenth Amendment issue but also a First Amendment one. The Central Conference of American Rabbis, which represents Reform movement rabbis, and the Rabbinical Assembly, which represents Conservative movement rabbis, have emphasized that access to the complete spectrum of reproductive healthcare is matter of religious liberty.[50] They have explained that Judaism may mandate abortion in cases when the life or health of the pregnant person is in jeopardy, and to deny an individual the ability to obtain an abortion when Jewish tradition requires it is an infringement on free exercise.[51]

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46. 410 U.S. 113 (1973).

47. Rev. Debra W. Haffner, Religious Inst., A Time to Embrace: Why the Sexual and Reproductive Justice Movement Needs Religion 21 (2015), http://religiousinstitute.org/wp-content/uploads/2015/10/1-Time_to_Embrace_Color.pdf [https://perma.cc/5YKG-STE8]; *General Synod Statements and Resolutions Regarding Freedom of Choice*, *supra* note 40; *Abortion/Reproductive Choice Issues*, Presbyterian Church (U.S.A.), https://www.presbyterianmission.org/what-we-believe/social-issues/abortion-issues [https://perma.cc/4V3J-UXXN] (last visited Apr. 8, 2022); *Abortion: Digests of Resolutions Adopted by the Central Conference of American Rabbis Between 1889 and 1974*, Cent. Conf. Am. Rabbis, https://www.ccarnet.org/ccar-resolutions/abortion-1889–1972 [https://perma.cc/TU5X-D33N] (last visited Apr. 8, 2022).

48. *1993 General Resolution, Federal Legislation for Choice*, *supra* note 39.

49. *General Synod Statements and Resolutions Regarding Freedom of Choice*, *supra* note 40, at 10.

50. *Free Choice in Abortion*, Union for Reform Judaism, https://urj.org/what-we-believe/resolutions/free-choice-abortion [https://perma.cc/4NQZ-8SE2] (last visited Apr. 8, 2022); *On Abortion and the Hyde Amendment*, Cent. Conf. Am. Rabbis, https://www.ccarnet.org/ccar-resolutions/abortion-1984 [https://perma.cc/F5NT-GSUQ] (last visited Apr. 8, 2022); *Resolution on Reproductive Freedom*, Rabbinical Assembly, https://www.rabbinicalassembly.org/resolution-reproductive-freedom [https://perma.cc/WT9T-4S6D] (last visited Apr. 8, 2022).

51. *Resolution on Reproductive Freedom in the United States*, *supra*

Other faith traditions take a more nuanced stance but still express some support for pregnant people's bodily and decisional autonomy. For instance, the United Methodist Church has stated that while it affirms "the sanctity of unborn human life," it is "equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy."[52] The Evangelical Lutheran Church in America has similarly expressed respect for individual decision-making regarding abortion.[53] While it recognizes that the government has a "legitimate role" in regulating the procedure, it opposes laws that ban abortion and laws "that prevent access to information about all options available to women faced with unintended pregnancies."[54] Additionally, the Evangelical Lutheran Church has stated that its position is driven by the fact that its members hold a wide range of views on the issue, including that, for some, "the question of pregnancy and abortion is not a matter for governmental interference, but a matter of religious liberty and freedom of conscience protected by the First Amendment."[55] The Episcopal Church has taken a more complex position and discussed the diversity of positions among its congregants too. In a series of statements, it has opposed abortion as a means of family planning but has maintained since 1967 its "unequivocal opposition" to "any legislative, executive or judicial action . . . that abridges the right of a woman to reach an informed decision about the termination of pregnancy or that would limit the access of a woman to safe means of acting on her decision."[56] And, in a manner recalling *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[57] the Episcopal Church has

note 45; *see also* Sheila Katz & Danya Ruttenberg, *The Jewish Case for Abortion Rights*, Newsweek (June 29, 2020, 5:01 PM), https://www.newsweek.com/abortion-jewish-right-scotus-june-medical-services-louisiana-constitution-1514214 [https://perma.cc/HXF7-LAMJ].

52. The United Methodist Church, *Statement of Social Principles (1972)*, *reprinted in* Linda Greenhouse & Reva Siegel, Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling 70, 70–71 (2d ed. 2012).

53. Evangelical Lutheran Church in America, A Social Statement on Abortion 2 (1991), https://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf [https://perma.cc/5VFL-MAQT].

54. *Id.* at 9.

55. *Id.*

56. *Reaffirm General Convention Statement on Childbirth and Abortion*, Archives Episcopal Church, https://www.episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1994-A054 [https://perma.cc/Y9TT-AELQ] (last visited Apr. 8, 2022).

57. 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to

recently linked reproductive autonomy to one's standing in society by emphasizing that equitable reproductive healthcare access "is an integral part of a woman's struggle to assert her dignity and worth as a human being."[58]

In addition, religious traditions such as Islam,[59] Buddhism,[60] and Hinduism,[61] consist of individuals who hold a range of positions on abortion, including the belief that abortion can at times be the best decision given the "moral complexity of life" and one that rests with pregnant people to make based on their religious values. For one Buddhist, "reproductive choice for all people is fundamental to the Buddhist view," in part because compelled childbirth "denies the equal personhood of a being," and equality is "among the highest" of Buddhist values.[62]

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personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

58. *Advocate for Gender Equity, Including Reproductive Rights, in Healthcare*, Archives Episcopal Church, https://www.episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=2018-D032 [https://perma.cc/Z7JP-KF3U] (last visited Apr. 8, 2022).

59. Brief for Catholics for Choice et al. as Amici Curiae Supporting Respondents at 8, Dobbs v. Jackson Women's Health Org., No. 19-1392 (Sept. 2021) (noting that many schools of Islamic thought permit abortion under certain circumstances up to 120 days after conception, which is about nineteen to twenty weeks' gestation); Khaleel Mohammed, *Islam and Reproductive Choice*, Religious Coalition for Reproductive Choice, https://rcrc.org/muslim [https://perma.cc/EN3Z-3DJ9] (last visited Apr. 8, 2022) (asserting based on one Muslim's interpretation of religious texts that "women must not be seen simply as vessels" to carry fetuses to maturity and that "women must assert control of their bodies, and their concerns and feelings must be given prime consideration").

60. *Buddhism and Reproductive Choice*, Religious Coalition for Reproductive Choice, https://rcrc.org/buddhist [https://perma.cc/3JPA-CK58] (last visited Apr. 8, 2022); Buddhist Churches of America Social Issues Committee, *A Shin Buddhist Stance on Abortion*, Buddhist Peace Fellowship Newsl., July 1984, at 7 ("Although others may be involved in the decision-making, it is the woman carrying the fetus, and no one else, who must in the end make this most difficult decision . . . ."); James J. Hughes, *Buddhism and Abortion: A Western Approach*, *in* Buddhism and Abortion (Damien Keown, ed., 1998) ("Buddhists . . . have adopted many different moral logics. All of these logics can be used to argue both for and against the permissibility of abortion.").

61. *Hindus in America Speak out on Abortion Issues*, Hinduism Today (Sept. 1, 1985), https://www.hinduismtoday.com/magazine/september-1985/1985–09-hindus-in-america-speak-out-on-abortion-issues [https://perma.cc/EG5B-DY8H] (noting that several Hindu institutions do not take a formal or unequivocal position on abortion but rather advise that "each case requires unique consideration" and that the ultimate choice rests with the woman to make based on consideration of "her lifestyle, morals and values").

62. Sallie Jiko Tisdale, *Is There a Buddhist View on Abortion?*, Tricycle

Even within religious traditions that officially oppose abortion, subgroups of believers declare that their faith propels them to support pregnant people's power and freedom to make decisions about abortion. For example, the organization Catholics for Choice consists of individuals who believe because of their Catholic faith that abortion should be accessible and affordable to everyone.[63] The organization's members maintain that the Catholic principle of helping those of lower socioeconomic statuses calls them to support public funding for abortion services and to view equal access to reproductive healthcare as a "moral imperative."[64] This position is longstanding. Editorials published in Catholic publications in the 1970s discussed how the issue of abortion rights was more diverse and complex than the Catholic Church's absolutist stance suggested. For example, a 1975 editorial in *Jesuit* magazine referred to the "deep-seated doubts" among individual Catholics about the correctness of the Church's position and argued that such doubts were a product of faith and compassion, "especially when the faithful who encounter [doubts] do so because of serious and conscientious attention to both the church's teaching and the practical dilemmas that sometimes face pregnant women."[65] Similarly, a 1976 editorial in the Jesuit magazine *America* stated that impugning "the good conscience of those disagreeing with us is itself a contradiction of Christian life."[66]

2. Religious Beliefs Within Those Traditions

Members of the above faith traditions support people's right and ability to decide on abortion—and people within those faith traditions seek abortions—because of several different interconnected religious beliefs.

One belief is a deep respect for individuals' moral agency, meaning the idea that individuals are endowed with the God-given "free will to make moral decisions about their bodies, families, and

(Oct. 8, 2021), https://tricycle.org/trikedaily/buddhism-abortion [https://perma.cc/J4DS-WMZ3].

63. *New Campaign: Catholics Support Public Funding for Abortion in Good Faith*, Catholics for Choice (Sept. 12, 2016), https://www.catholicsforchoice.org/new-campaign-catholics-support-public-funding-for-abortion-in-good-faith [https://perma.cc/NXJ5-HLUM] (announcing a multi-year campaign designed to amplify the voices of Catholics who support public funding for abortion services).

64. *Abortion in Good Faith*, Catholics for Choice, https://www.ingoodfaith.us [https://perma.cc/62L5-GJ6D] (last visited Apr. 8, 2022).

65. McRae v. Califano, 491 F. Supp. 630, 709 (E.D.N.Y. 1980) (quoting editorial in *Jesuit*).

66. *Id.* (quoting editorial in *America*).

lives" and are capable of making those decisions.[67] This belief says that pregnant people are morally independent and must be able to make what they deem to be a responsible reproductive choice based on their understanding of right and wrong and their interpretation of God's will.[68] For example, in a 1996 letter expressing support for President Clinton's veto of federal legislation that would have banned a method of abortion with no health exception, nearly thirty Protestant and Jewish leaders stated that "none of us can discern God's will as well as the woman herself, and that is where we believe the decision must remain."[69] Likewise, Catholics for Choice has stated that pregnant people, as self-governing moral agents, are the only ones with the ability to make their own decisions about childbearing—and, consequently, that "[a] just society does not compel women to continue an undesired pregnancy."[70] As

67. *RCRC Statement on Alabama Abortion Ban*, Religious Coalition for Reproductive Choice (May 15, 2019), https://rcrc.org/37090–2 [https://perma.cc/WF62-KMGB]; *see also A Matter of Faith, Conscience and Justice*, Religious Coalition for Reproductive Choice, https://rcrc.org/faith-perspectives [https://perma.cc/99LN-VUJT] (last visited Feb. 7, 2022) (emphasizing that "there is broad consensus that the moral agency of human beings—especially that of a woman when making decisions about her reproductive life—is God-given."); Women's Rabbinic Network, We Trust Women: The Women's Rabbinic Network Responds to Attacks on Women's Rights, (May 15, 2019), https://www.womensrabbinicnetwork.org/resources/Documents/WRN%20Statement%20on%20Legislation%20limiting%20and%20banning%20abortion.pdf [https://perma.cc/8V2G-N9TG] ("[I]t is nonetheless certain that legislation which diminishes women's right to choose thereby questions women's ability to be moral, ethical, loving, and thoughtful about life and its potential."); Carlton W. Veazey, *An Interfaith Call to Action on Reproductive Health*, Rewire News Grp. (Nov. 12, 2008, 7:00 AM), https://rewirenewsgroup.com/article/2008/11/12/an-interfaith-call-action-reproductive-health [https://perma.cc/6HGC-AFP6] (stating in a 2008 letter to President Obama that "[a]s faith communities, we believe that each individual is capable of making complex moral decisions").

68. *See, e.g.*, Brief for Judson Memorial Church et al. as Amici Curiae Supporting Petitioners at 3, Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (No. 15-274); *Abortion/Reproductive Choice Issues*, *supra* note 47 ("Humans are empowered by the spirit prayerfully to make significant moral choices, including the choice to continue or end a pregnancy.").

69. Laurie Goodstein, *Religious Leaders Back Abortion Ban Veto*, Wash. Post, Apr. 30, 1996, at A4. Signatories included leaders in the Presbyterian Church (U.S.A.), the Episcopal Church, the United Church of Christ, the United Methodist Church, the New Bethel Baptist Church, and the Union of American Hebrew Congregations. *Id.*

70. *London Declaration of Prochoice Principles*, Catholics for Choice, https://web.archive.org/web/20160331205131/https://www.catholicsforchoice.org/topics/abortion/LondonDeclaration.asp [https://perma.cc/N4DY-ZGMD] (last visited Apr. 8, 2022).

an article of their faith, then, many religious individuals hold that, with matters as profound, personal, and life-shaping as whether to have a child and whether to become a parent, one's right and capacity to make the ultimate determination is sacred.[71] The right to decide on abortion thereby vindicates the agency entrusted to individuals.[72] Indeed, one interfaith minister has stated that because abortion affirms a person's "divine right to choose their own destiny," it is a "moral and social good."[73]

Under this account, laws that make abortion unavailable by banning it or by leading clinics to close, such as those that require providers to obtain admitting privileges or clinics to meet the same requirements as ambulatory surgical centers, undermine a pregnant person's moral agency because they make abortion either legally or practically inaccessible.[74] Some religious individuals have stated that informed-consent laws that require patients to receive inaccurate or misleading information before having an abortion[75] also

71. *See, e.g.*, Brief for Catholics for Choice et al. as Amici Curiae Supporting Petitioners at 4–5, June Medical Servs. v. Russo, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460); Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees at 48, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605) ("Only the woman can determine whether moral or spiritual values compel her to terminate her pregnancy.").

72. Haffner, *supra* note 47, at 27; Holly Meyer, *Religious Abortion Rights Supporters Fight for Access*, ABC News (Nov. 28, 2021, 8:32 AM), https://abcnews.go.com/US/wireStory/religious-abortion-rights-supporters-fight-access-81431484 [https://perma.cc/X9BM-44QH] (quoting Rev. Erika Forbes, an interfaith minister, as stating that "I believe that the God of our understanding is on the side of a woman's right to autonomy and agency and thriving, and so that means that God is on a woman's side to choose").

73. Erika Forbes, *Opinion: Texas' Anti-Abortion Senate Bill 8 Should Scare Everyone*, Houston Press (Aug. 30, 2021, 4:00 AM), https://www.houstonpress.com/news/opinion-the-scary-controlling-power-of-the-states-new-abortion-law-11821490 [https://perma.cc/XA8Q-RS9T].

74. *See* Brief for Catholics for Choice et al., *supra* note 71 (describing the position of the organization Muslims for Progressive Values as believing that "requiring doctors to have admitting privileges at hospitals is a disingenuous attempt to curtail a woman's basic right to self-determination and is contrary to faith-based values"); Brief for Judson Memorial Church et al., *supra* note 68 (opposing Texas statute with admitting privileges requirement and requirement that abortion clinics comply with standards for ambulatory surgical centers).

75. For example, several states require abortion providers to inform pregnant patients that abortion can result in an array of specific, serious psychological problems despite the fact that studies have found that there is no causal relationship between abortion and negative psychological consequences. *See* Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 Mich. J. Gender & L. 1, 14–16 (2012). Other states require abortion providers to offer statements about fetal

hinder pregnant people's moral authority over reproductive matters because they attempt to dissuade them from making an autonomous decision, deprive them of the accurate information they need to do so, and try to compel them to repudiate their belief that abortion is a moral choice.[76]

Another religious belief, without which agency cannot exist, is freedom of conscience. Freedom of conscience refers to the ability to make decisions on the basis of one's core religious or spiritual principles without government interference.[77] The idea is that individuals best make—and must be free to make—procreative choices in consultation with their conscience, faith, values, and family members, not through the government's imposition or prescription.[78] Some religions command that "choice is an ethical necessity."[79] And some hold that when issues involve moral decision-making, once a person has reached a conscientious decision, they must be able to act on it.[80] Thus, the religious obligation to make the best decision

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pain that "are designed to make patients think that it is likely that a fetus of a certain gestational age can feel pain in circumstances when in fact the scientific evidence does not support that proposition." *Id.* at 23.

76. *See* Brief for the Unitarian Universalist Association et al. as Amici Curiae Supporting Respondents at 32–33, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379) ("Other constraints on the informed consent process, such as the giving of false, misleading, erroneous and distorted information as to risks and benefits, or the availability of adoption or other services—are designed to induce a woman to renounce abortion or, at the least, to impugn her decision-making process."); *see also* Central Conference of American Rabbis, *Resolution on State Restrictions on Access to Reproductive Health Services*, Religious Inst., http://religiousinstitute.org/denom_statements/resolution-on-state-restrictions-on-access-to-reproductive-health-services-ccar [https://perma.cc/JXT4-32NA] (last visited Apr. 8, 2022) (opposing biased counseling and mandatory waiting laws).

77. Reverend Dr. Carlton W. Veazey & Marjorie Brahms Signer, *Religious Perspectives on the Abortion Decision: The Sacredness of Women's Lives, Morality and Values, and Social Justice*, 35 N.Y.U. Rev. L. & Soc. Change 281, 292 (2011).

78. Haffner, *supra* note 47, at 27.

79. Brief for the Religious Coalition for Reproductive Choice et al. as Amici Curiae Supporting Respondent at 20, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830) (explaining how members of the Unitarian Universalist Association, the United Church of Christ, and the Presbyterian Church (U.S.A.), along with some Catholics, espouse this belief).

80. *See Cruel Bill Plays Politics With Women's Health and Lives: Why Catholics Reject 20-Week Ban*, Catholics for Choice (May 13, 2015), https://www.catholicsforchoice.org/cruel-bill-plays-politics-with-womens-health-and-lives-why-catholics-reject-20-week-ban [https://perma.cc/Y6P7-QGM7] (declaring in a letter opposing proposed federal legislation to ban abortion at twenty weeks' gestation that "[t]he Catholic faith tradition believes that individual conscience is the final arbiter in moral decision-making").

for one's specific circumstances requires that abortion remain an available option.[81] If the government prohibits or limits the availability of abortion care, people cannot make a choice that reflects their own convictions or engage in prayerful consideration of their options, as there is only choice—childbirth—available to consider and make.[82] Consequently, for a denomination such as the Presbyterian Church, "[t]he legal right to have an abortion is a necessary prerequisite to the exercise of conscience in abortion decisions."[83] In a print advertisement that exhorted Congress to fund Planned Parenthood, Catholic state legislators put it more forcefully, stating that "it's a sin to hold a conscience captive" by depriving people of the ability to make reproductive decisions on the basis of core religious and ethical beliefs.[84] Essentially, it is because the decision to have an abortion can be religious—not in spite of it—that people cannot be prevented from choosing it, either due to laws that proscribe it or laws that regulate it out of existence by making it practically unobtainable.

Relatedly, life and parenthood can be some of the most important areas in which people are called to make conscientious decisions. While a belief in the sanctity of life is often by default linked to religious opposition to abortion, for many people of faith, a belief in the sanctity of life underlies their position that pregnant people must have the freedom to make reproductive choices that, in light of their particular circumstances, foster their own lives, safety, and health, along with that of their families.[85] For some

81. Religious Coalition for Reproductive Choice, Abortion: Why Religious Organizations in the United States Want to Keep It Legal, (rev. ed. 1990), https://digitalcollections-baylor.quartexcollections.com/Documents/Detail/abortion-why-religious-organizations-in-the-united-states-want-to-keep-it-legal/820039?item=820040 [https://perma.cc/R7WL-KMYN].

82. *See* Presbyterian Church (U.S.A.), The Covenant of Life and The Caring Community and Covenant and Creation: Theological Reflections on Contraception and Abortion 99 (1983), https://www.pcusa.org/site_media/media/uploads/_resolutions/covenant-of-life-and-covenant-and-creation.pdf [https://perma.cc/4FM7-R4ME].

83. *Id.*

84. *Catholic State Leaders Urge Congress to Take a Stand on Planned Parenthood*, Catholics for Choice (Sept. 28, 2015), https://www.catholicsforchoice.org/press-releases/catholic-state-leaders-urge-congress-to-take-a-stand-on-planned-parenthood [https://perma.cc/A9U5-A8VX].

85. *See, e.g.*, *Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary*, 97th Cong. 798 (1981) (statement of Rabbi Henry Siegman) (emphasizing that support for one's independent moral judgment on abortion is a position "grounded in profound religious conviction and in the desire to enhance the sacredness and the dignity of life"); *Hearings on Proposed Const. Amends. on Abortion Before the Subcomm. on Civil and*

religious people, "the preservation of the health and well-being of existing, living persons, and consideration of the responsibilities of parenthood outweigh the interest in potential life and ranks among the highest obligations of human beings towards one another and toward God."[86] When childbirth, pregnancy, or parenthood could sacrifice an individual's own well-being, that of their family, or that of incipient life, the individual is religiously required to consider all reproductive options, and the fetus does not assume more priority than the pregnant person.[87] Indeed, because of the fundamental life-altering implications of pregnancy, childbirth, and parenthood, many "believe that motherhood should be a choice of free citizens and that women should have a right to bear children when they are prepared in their own view to undertake that responsibility."[88] Alternatively, the decision to have an abortion may be "motivated by religious or spiritual beliefs that place priority on service and conduct of life as values even higher than procreation."[89] It is against this backdrop in which family and life circumstances are complex and highly particularized that some religions teach that, in varying situations, abortion may be a more moral course of action than childbirth.[90] According to one interfaith group, "[i]t is

*Const. Rights of the H. Comm. on the Judiciary*, 94th Cong. 324 (March 24, 1976) (statement of Teresa Hoover) (referring to a 1968 statement from the American Baptist Convention that declared that "[b]ecause Christ calls us to affirm the freedom of persons and the sanctity of life, we recognize that abortion should be a matter of responsible personal decision").

86. Brief for the Unitarian Universalist Association et al., *supra* note 76, at 27; *see also Right to Choose: 1987 General Resolution*, Unitarian Universalist Ass'n, https://www.uua.org/action/statements/right-choose [https://perma.cc/3455-LHAX] (last visited Apr. 8, 2022).

87. Brief for the Religious Coalition for Reproductive Choice et al., *supra* note 79, at 20; Steph Black, *The Jewish Case for Abortion Access*, Hey Alma (Sept. 1, 2021), https://www.heyalma.com/the-jewish-case-for-abortion-access [https://perma.cc/RT2A-E8CL].

88. *Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary*, 97th Cong. 798 (1981) (statement of William P. Thompson, Stated Clerk, General Assembly, Presbyterian Church (U.S.A.)).

89. Brief for the National Abortion Rights Action League et al. as Amici Curiae Supporting Respondents at 27, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 and 84-1379).

90. Brief the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae, *supra* note 71 ("Many women believe that their religious or moral values impel them not to bring an unwanted child into difficult circumstances in a hostile world."); Brief for the National Abortion Rights Action League et al., *supra* note 89 at 27 (detailing the story of one woman who explained that, as a Christian, "having an abortion seemed to be the most thoughtful and loving decision we could make" and, in fact, "seemed to be the only decision we could make which would still maintain our life goals

precisely because life and parenthood are so precious that no individual should be forced to carry a pregnancy to term."[91]

In addition, a fundamental belief of many faiths supporting abortion rights is the inherent dignity of all people. Dignity is defined to include respect for autonomy, freedom from coerced childbirth, and freedom from stigma and punishment imposed as a result of exercising one's moral decision-making abilities.[92] For the Metropolitan Community Churches, "one of the ways women may express their dignity is in their having and exercising control over their bodies when it comes to questions of reproductive health care," including abortion care.[93] One multi-faith group has argued that the denial of equal access to contraception and abortion services "effectively translates into coercive childbearing and is an insult to human dignity."[94] Laws or policies that limit access to these services, it emphasizes, "are punitive and do nothing to promote moral decision making."[95]

Closely connected to dignity is a commitment to economic and social justice.[96] This commitment in turn requires a commitment to reproductive justice based on the fact that abortion restrictions both perpetuate and reflect existing inequalities and thereby harm the most vulnerable, whom many faiths hold they have a mandate to serve.[97] For instance, the Alliance of Baptists has called for a

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and plans in helping serve others as we had hoped").

91. Haffner, *supra* note 47, at 27.

92. *See, e.g.*, *53 Faith-Based and Civil Rights Organizations Support the Women's Health Protection Act (WHPA)*, Nat'l Council Jewish Women (Feb. 11, 2020), https://www.ncjw.org/news/whpa-interfaith-letter [https://perma.cc/8T4K-WG9C]; Haffner, *supra* note 47, at 28–29.

93. *Statement of Faith on Women's Reproductive Health, Rights, and Justice*, *supra* note 42.

94. Haffner, *supra* note 47, at 29.

95. *Id.*

96. National Council of Jewish Women, Interfaith Support for Abortion Coverage (2014), http://www.ncjw.org/wp-content/uploads/2017/07/Talking-Points_Interfaith-Support-for-Abortion-Coverage.pdf [https://perma.cc/J4HT-KJ5U] ("Out of respect for social justice and the common good, we believe that it is our moral responsibility to speak out against policies that harm marginalized members of our communities. Abortion care restrictions fly in the face of our commitment to pursue justice."); *General Synod Statements and Resolutions Regarding Freedom of Choice*, *supra* note 40, at 11 ("[A]bortion is a social justice issue, both for parents dealing with pregnancy and parenting under highly stressed circumstances, as well as for our society as a whole."); Brief for Catholics for Choice et al., *supra* note 59 ("Public funding for abortion is a Catholic social justice value.").

97. *See, e.g.*, Jack Jenkins, *As Supreme Court Debates Abortion, Dueling Theologies Protest Outside*, Religion News Serv. (Dec. 1, 2021), https://religionnews.com/2021/12/01/as-supreme-court-debates-abortion-dueling-theologies-protest-outside [https://perma.cc/GM58-HWTN] (quoting Rev.

"faith-based commitment to sexual and reproductive rights, including access to voluntary contraception and abortion" as part of their mission to "side with those who are poor," and "[p]ursue justice with and for those who are oppressed."[98] Other religious groups have voiced parallel views with equally compelling language. A letter to Congress from sixty faith-based organizations expressing support for federal funding for Planned Parenthood termed it a "travesty of justice to single out a specific health service that is both legal and sought by so many women."[99] The concept of economic and social justice features in discussions about the Hyde Amendment because of the view that banning Medicaid funding for abortion prevents low-income individuals from making any decision at all, let alone one that is guided by their faith.[100]

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Amanda Hambrick from the Middle Collegiate Church in New York City as stating that "[t]he people who will be most harmed by an overturning of *Roe* are going to be those people who are poor . . . those people are . . . also Black, brown, and Indigenous. The God that I know and follow lives at the intersection of all those things and would be looking out for the ones who will be most oppressed."); Jamie Manson, *Abortion Is a Catholic Value. Just Ask Joe Biden*, Rewire News Grp. (Dec. 22, 2020, 9:00 AM), https://rewirenewsgroup.com/article/2020/12/22/abortion-is-a-catholic-value-just-ask-joe-biden [https://perma.cc/9W3S-EQ6B] ("Catholic social justice doctrine teaches that caring for the poor and marginalized should be our first priority. Denying anyone reproductive health care of any kind is to deny them of their human rights."); *General Synod Statements and Resolutions Regarding Freedom of Choice*, *supra* note 40 ("Present laws prohibiting abortion are neither just nor enforceable. . . . By severely limiting access to safe abortions, these laws have the effect of discriminating against the poor.").

98. Alliance of Baptists, A Statement on Lifelong Sexual Education, Sexual & Reproductive Rights, and Opposing Sexual Justice and Violence (2012).

99. Letter from 60 Faith-Based Organizations to Congress Announcing Support for Planned Parenthood (Apr. 26, 2017), https://www.catholicsforchoice.org/wp-content/uploads/2017/04/2017-Interfaith-Planned-Parenthood-Letter.pdf [https://perma.cc/ZL8D-6PFQ].

100. The Hyde Amendment prohibits the federal government from funding abortion services but not from funding childbirth services. Lauren Barbato, *Abortion in Good Faith: Lauren's Pledge*, Catholics for Choice, https://www.ingoodfaith.us/story/laurens-pledge [https://perma.cc/7D8Y-7NDP] (last visited Apr. 8, 2022) ("When there is no health insurance coverage or public funding available, there is no choice. Where there is no choice, there is no justice."); *see also* Chris Davies, *Commentary: Guided By My Grandmother's Wisdom: Faith and Reproductive Justice*, United Church Christ (July 5, 2018), https://www.ucc.org/guided_by_my_grandmother_s_wisdom_faith_and_reproductive_justice [https://perma.cc/72DG-FS9A] ("I believe God wants the choice of women to be informed by their faith, but also free of the structural circumstances that limit women's spectrum of choice, be they lack of fair wages, affordable housing, healthcare, a healthy environment or a safe community in which to raise a child.").

3. Living Out Those Religious Beliefs

In recent years, examples abound in which people of faith have lived out their beliefs by standing up for reproductive rights. After the Texas legislature passed S.B. 8, a law that bans abortion beginning at six weeks after one's last menstrual period and that deputizes private citizens to enforce it,[101] religious individuals spoke out about the law's threat to religious freedom.[102] Faith leaders emphasized that because the law restricts the ability of clergy and congregants to engage in the sacred work of helping pregnant individuals consider all their reproductive options, it imperils the First Amendment rights of those clergy and congregants.[103] Melding principles of free exercise and civil disobedience, one rabbi wrote in an op-ed that the law violates the rights of those who believe that abortion is not simply permitted but rather mandated when pregnancy poses a serious threat to one's mental or physical well-being—and that he would defy the law if necessary.[104] In addition to making public statements, one interfaith minister and one minister in the Unitarian Church joined abortion clinics in a suit seeking to enjoin enforcement of the law, arguing that clergy members "risk costly and burdensome civil lawsuits for providing spiritual and emotional counseling to patients and parishioners, as they are called by their own religious beliefs to provide."[105] Collectively, these positions suggest that the Texas S.B. 8 abortion ban has a dual problem. It not only undermines bodily autonomy but also will compel some pregnant individuals and some faith leaders to choose between following the law and contravening their own

101. Order on Application to Vacate Stay and Petition for Writ of Certiorari Before Judgment, United States v. Texas, No. 21A85 (21-588) (2021).

102. Rose Minutaglio, *The Texas Faith Leaders Fighting Abortion Bans*, ELLE (Oct. 19, 2021), https://www.elle.com/culture/a37857608/texas-faith-leaders-abortion-ban [https://perma.cc/MEN7-6HM4] (spotlighting the voices of a Presbyterian pastor, a Catholic activist, an interfaith minister, and a rabbi).

103. Jack Jenkins, *Some Faith Groups Laud Texas Abortion Ban, Others Cite Religious Freedom Concerns*, Religion News Serv. (Sept. 2, 2021), https://religionnews.com/2021/09/02/as-some-religious-groups-laud-texas-abortion-ban-others-cite-religious-freedom-concerns [https://perma.cc/7UAN-NGGN]; *see also* Forbes, *supra* note 73 (stating that the Texas law "jeopardizes powerful and emotional conversations that take place between clergy members and their parishioners every single day").

104. Danny Horwitz, *Texas' Abortion Ban Is Against My Religion. As a Rabbi, I Will Defy It if Necessary*, Religion News Serv. (Sept. 2, 2021), https://religionnews.com/2021/09/02/texass-abortion-ban-is-against-my-religion-as-a-rabbi-i-will-defy-it-if-necessary [https://perma.cc/FF9F-P9P9].

105. Complaint for Declaratory and Injunctive Relief at ¶ 112, Whole Woman's Health v. Jackson, No. 1:21-cv-00616 (W.D. Tex. July 13, 2021).

conscience.[106] A group of Catholic, Protestant, Jewish, and Muslim organizations have made a similar contention about the Mississippi law at issue in *Dobbs v. Jackson Women's Health Organization*[107] that bans abortions after fifteen weeks of pregnancy.[108] In an amicus brief, they stressed that the law undermines free-exercise rights by "imposing the view of certain faiths upon all women in the State, including women whose religious faith supports an approach to the beginning of human life and the termination of pregnancy that is at odds with the approach reflected in the Ban."[109]

In addition to working to prevent the erosion of reproductive rights, people of faith have worked to advance reproductive rights too. Just Texas: Faith Voices for Reproductive Justice, a Texas-based initiative that works to unite progressive people of faith to promote reproductive freedom and LGBTQ equality, launched an effort to designate certain churches "Reproductive Freedom Congregations."[110] To earn the designation, churches participate in a months-long process in which they learn how to advocate for better access to contraception, abortion, pregnancy care, and comprehensive sex education.[111] Since the effort launched in 2016, more than thirty churches have earned the designation, and seventy are in the process of doing so.[112] While the effort is recent, it has strong ties to the past. It was launched in the same church in Dallas that several women who wrote an amicus brief supporting the right to abortion in *Roe* attended.[113]

106. *See* Alejandra Molina, *Clergy Among Advocates Suing Texas Over New Law Deputizing Citizens to Enforce Abortion Ban*, Religion News Serv. (July 16, 2021), https://religionnews.com/2021/07/16/clergy-among-advocates-suing-texas-over-new-law-deputizing-citizens-to-enforce-abortion-ban [https://perma.cc/LS5A-H3UT] (describing religious leaders who are put in the position of "not having conversations with women that are open and allow all options, including abortion" and "observing these laws out of fear").

107. 141 S. Ct. 2619 (2021) (granting certiorari in part).

108. Brief for Catholics for Choice et al., *supra* note 59, at 24.

109. *Id.* During oral argument, Justice Sotomayor probed the Mississippi Solicitor General on this point, asking how the state's position that *Roe* confers the right to end a human life was "anything but a religious view." Transcript of Oral Argument at 29, Dobbs v. Jackson Women's Health Org, (No. 19-1392) (Sept. 2021).

110. Alejandra Molina, *Churches Are Getting Designated as 'Reproductive Freedom Congregations*,' Wash. Post (Aug. 27, 2021, 4:31 PM), https://www.washingtonpost.com/religion/abortion-rights-churches/2021/08/27/6f76e4d2-074a-11ec-8c3f-3526f81b233b_story.html [https://perma.cc/Q76D-EJUB]; *Reproductive Freedom Congregations*, Just Texas, https://justtx.org/rfc [https://perma.cc/5GDZ-LJRC] (last visited Apr. 8, 2022).

111. Molina, *supra* note 106.

112. *Id.*; Meyer, *supra* note 72.

113. Jessica Montoya Coggins, *Faith Leaders Affirm Commitment to*

Moreover, some congregational and spiritual leaders are trained to provide non-judgmental, agency-affirming pastoral care to those considering abortion.[114] Faith Aloud, a national nonprofit that traces its origin to the CCS, runs a clergy counseling line staffed by people from diverse denominations that offers "compassionate religious and spiritual support" for those making decisions about pregnancy.[115] Ministers who have provided spiritual counsel to those considering their reproductive options directly link their work to the sacred obligation to offer care and support during times of needs.[116] According to Reverend Harry Knox, the former President and CEO of the Religious Coalition for Reproductive Choice and one who has served as a pastor to many seeking guidance on reproductive matters, "[a]s faith leaders, we all feel literally called — and supported by spirit on a daily basis — to model something different" than the "complete lack of compassion" for the lives and needs of pregnant people that too often characterizes public conversations about abortion.[117]

Support for reproductive rights extends from personal relationships at the congregational level to advocacy at the federal level too. Prompted by an increase in state abortion restrictions, faith-based organizations have entreated members of Congress to pass legislation codifying the right to abortion, remarking that "our nation's founding principle of religious liberty . . . is integrally bound to reproductive freedom."[118]

In sum, an array of sincere religious convictions motivates people to seek or support the right to seek abortions. But the failure to recognize these beliefs creates a double-layered harm. The first harm is the creation of a biased sample. If individuals who

*Abortion Rights on the Eve of Extreme New Law*, Texas Signal (Aug. 26, 2021), https://texassignal.com/faith-leaders-affirm-commitment-to-abortion-rights-on-the-eve-of-extreme-new-law [https://perma.cc/XR4M-VYF7].

114. *Clergy Counseling Line*, Faith Aloud, https://www.faithaloud.org/find-clergy-support/clergycounseling [https://perma.cc/SR5G-6E6T] (last visited Apr. 8, 2022).

115. *Id.*

116. Meyer, *supra* note 72.

117. Tara Culp-Ressler, *'God Loves Women Who Have Abortions': The Religious Abortion Advocates That History Forgot*, ThinkProgress (Dec. 16, 2014, 5:31 PM), https://archive.thinkprogress.org/god-loves-women-who-have-abortions-the-religious-abortion-advocates-that-history-forgot-8e28030230f1 [https://perma.cc/628N-BLQJ].

118. Letter from 101 Faith-Based, Religious, & Civil Rights Organizations Expressing Support for the Women's Health Protection Act (June 16, 2021), https://actforwomen.org/wp-content/uploads/2021/07/6.16.21-SJC-WHPA-Hearing-Testimony-Faith-Based-and-Civil-Rights-Orgs.pdf [https://perma.cc/CX4X-QMZ6].

oppose abortion are taken to unilaterally represent the paradigmatic religious stance on reproductive rights, then the convictions of those who support abortion are overlooked entirely. Consequently, the facts regarding what faith traditions believe about abortion become inaccurate and stripped of complexity. The second harm is an expressive harm by inference. If the only religious stance on abortion that gets accorded weight, credibility, or attention is opposition to abortion, then the beliefs that undergird support for abortion become wrong, misguided, insincere, or abnormal. Those who hold them can be then marked out with a lesser status. For example, individuals have debated the authenticity of President Biden's Catholic faith in light of his support for abortion rights.[119] And Georgia Senator Reverend Raphael Warnock's support for reproductive justice was met with the false objection that "there is no such thing as a pro-choice pastor."[120]

This hierarchy of religious beliefs can also generate practical consequences. It occludes the ways that abortion bans can erode religious liberty and encroach on pregnant people's religious exercise, and it can demote the constitutional or statutory protections that religious beliefs underlying abortion rights receive.[121]

If religious beliefs supporting reproductive rights continue to be disregarded, the debate about abortion in the courts and in cultural narratives will continue to pit faith against either the absence of faith or opposition to faith. But in reality, the debate is between two different ideas of faith.[122]

### B. *Providing Abortion Care*

Faith also compels healthcare providers to offer abortion care. Some providers believe that because abortion "respects the inherent worth and dignity of women, providing abortion is a spiritual

119. Elizabeth Dias, *Targeting Biden, Catholic Bishops Advance Controversial Communion Plan*, N.Y. Times (Oct. 29, 2021), https://www.nytimes.com/2021/06/18/us/targeting-biden-catholic-bishops-advance-controversial-communion-plan.html [https://perma.cc/2AHQ-VD9R].

120. Jack Jenkins, *Rev. Warnock Blasted for Being a 'Pro-Choice Pastor,' but His Position Isn't Uncommon*, Religion News Serv. (Dec. 18, 2020), https://religionnews.com/2020/12/18/rev-warnock-blasted-for-being-a-pro-choice-pastor-but-his-position-isnt-uncommon [https://perma.cc/2Q9U-2TJ7].

121. *See* Platt, Franke, Shepherd & Hadjiivanova, *supra* note 11, at 64 (noting that while the potential religious-liberty claims that can be brought by those engaged in social-justice movements are "nearly endless," they have in the past had only limited success).

122. *See* Brief for the Unitarian Universalist Association et al., *supra* note 76, at 55 ("The battle raging over abortion is not a battle between good and evil, as some may see it, but is rather a battle between differing conceptions of the good.").

and moral act."[123] They "trust women to make ethical decisions over their bodies that will allow them to thrive."[124] These providers may also understand abortion provision to be a means of alleviating suffering, honoring the "full personhood and self-determination" of pregnant people, and offering empathy.[125] Some perform abortions "out of deep moral conviction and an unwavering commitment to put [their] patients first."[126] Others value the health and life of a pregnant individual more than the potential life of a fetus.[127]

Some abortion providers describe their work in an expressly religious way. For example, Dr. George Tiller, who from the late 1970s through the mid-2000s was one of only a few physicians in the country to provide abortions at twenty-four weeks' gestation or later for those facing serious health conditions or severe fetal anomalies, referred to his practice of medicine as a "ministry" to women.[128] His clinic "pioneered the incorporation of religious elements into abortion care."[129] The clinic had a Protestant minister on staff who tailored services for Christian and non-affiliated patients, and it cultivated relationships with local rabbis and an imam in a neighboring county.[130] Dr. Mary Smith has also explicitly underscored the religious overlay of her work, stating that, "I continue to do abortions after 25 years . . . . In the small still hours of the night I am at peace with myself and with God, who gave me this

123. Barbato, *supra* note 8.

124. Catholics for Choice, *An Open Letter to Pope Francis*, Safe2Choose (Nov. 7, 2018), https://safe2choose.org/blog/an-open-letter-to-pope-francis [https://perma.cc/N7S6-LHJ6].

125. Lisa H. Harris, *Recognizing Conscience in Abortion Provision*, 367 N. Eng. J. Med. 981, 982 (2012); *see also* Carole Joffe, Doctors of Conscience: The Struggle to Provide Abortion Before and After Roe v. Wade 78, 82, 94, 179–80 (1995).

126. Harris, *supra* note 125, at 982; *see also* Rebecca J. Cook & Bernard Dickens, *Conscientious Commitment to Women's Health*, 113 Int'l J. Gynecology & Obstetrics 163 (2011).

127. Harris, *supra* note 125, at 983.

128. *Revolution Interview with Dr. Susan Robinson: "Chasing the Abortion,"* Revolution Newspaper (May 16, 2014), https://revcom.us/movement-for-revolution/stop-patriarchy/a/335/chasing-the-abortion-interview-with-dr-susan-robinson-en.html [https://perma.cc/26ME-W8Z4]; Comment Letter on Proposed Rule to Protect Statutory Conscience Rights in Health Care, *supra* note 38, at 6.

129. Carole Joffe, *Working with Dr. Tiller: His Staff Recalls a Tradition of Compassionate Care at Women's Health Care Services of Wichita*, Rewire News Grp. (Aug. 15, 2011, 8:30 PM), https://rewirenewsgroup.com/article/2011/08/15/working-tiller-staff-recollections-women-health-care-services-wichita [https://perma.cc/7JRQ-5T8E].

130. *Id.*

mission in life."[131] In a similar manner, Jewish abortion providers have described how their faith drives their medical practice, including one who has explained that, "I have this skill, and it relieves suffering, so it is a mitzvah to do the right thing."[132] Catholic providers offer parallel sentiments, such as "[t]here's no more spiritual component of my life than practicing medicine, and that includes providing safe abortions to those in need."[133]

In addition to being called by religion, other healthcare providers explain that they are compelled by a moral obligation[134] or by conscience[135] to perform abortions. Thus, while exercising conscience in healthcare is usually taken to mean refusing to participate in contested services, providing abortion care is also conscience-based.[136] As a result, preventing providers from offering such care, such as through state laws or institutional policies, can actually generate a crisis of conscience.[137]

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131. Steph Sterling & Jessica L. Waters, *Beyond Religious Refusals: The Case for Protecting Health Care Workers' Provision of Abortion Care*, 34 HARV. J.L. & GENDER 463, 472 (2011).

132. Ron Kampeas, *This Physician Provides Abortions and Circumcisions. She Says Her Jewish Values Drive Both Practices*, JEWISH TELEGRAPHIC AGENCY (July 11, 2019, 3:47 PM), https://www.jta.org/2019/07/11/united-states/this-physician-provides-abortions-and-brit-milahs-she-says-her-jewish-values-drive-both-practices [https://perma.cc/4Z8C-MKEC]; *see also* Steph Herold, *What It's Like for Jewish Moms Who Are Abortion Providers*, KVELLER (May 15, 2017), https://www.kveller.com/what-its-like-for-jewish-moms-who-are-abortion-providers [https://perma.cc/D8BN-HTPV] (quoting one Jewish abortion provider as stating that she "didn't have to struggle to mesh Judaism and abortion together" because "it just made sense"); Comment Letter on Proposed Rule to Protect Statutory Conscience Rights in Health Care, *supra* note 38, at 6.

133. Barbato, *supra* note 8.

134. Brief for Catholics for Choice et al., *supra* note 59.

135. Harris, *supra* note 125, at 982 (defining conscience as "a special subset of an agent's ethical or religious beliefs—one's 'core' moral beliefs").

136. *Id.* at 981; *see also* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1503-05 (2011) ("Lawmakers and scholars focus . . . on the archetypal doctor who refuses to participate in contested treatments that his or her institution provides," but "conscience equally may compel a doctor or nurse to deliver a controversial treatment to a patient in need."); Kyle G. Fritz, *Unjustified Asymmetry: Positive Claims of Conscience and Heartbeat Bills*, 21 AM. J. BIOETHICS 46, 47 (2021) (noting that healthcare providers can be just as conscientiously compelled to perform abortions as to refuse to perform them).

137. Harris, *supra* note 125, at 982 ("Moral integrity can be injured as much by not performing an action required by one's core beliefs as by performing an action that contradicts those beliefs."); Sepper, *supra* note 136, at 1512–14 (describing how conscience clauses undermine the consciences of doctors and nurses who provide care that their institution prohibits because they can be fired for doing so); *see also* Debra Stulberg, Annie M. Dude, Irma Dahlquist & Farr A. Curlin et al., *Obstetrician–Gynecologists, Religious Institutions, and*

This conscientious commitment to the delivery of reproductive healthcare has a long history. Before *Roe*, physicians offered safe and empathetic abortion care while facing the risk of fines, imprisonment, or loss of their medical license.[138] They did so because of convictions that access to safe abortion saved lives, that it honored "the dignity of humanity," and that it was "the right—even righteous—thing to do."[139]

Failure to recognize providers' religious or moral duty to ensure that abortion care is accessible creates the same type of double dignitary harm that pregnant people or religious leaders can experience. One, it can overlook the beliefs of the providers completely. Two, it can result in the following, inaccurate inference: if the non-provision of care is by default seen as exercising some type of religious or moral belief, and the provision of care is not, then those who provide care either have no religious or moral obligations at all or have immoral obligations. The result is the same in seeking abortion care and providing abortion care. Just as individuals who obtain or support the right to obtain an abortion can be seen as either anti-faith, supporters of immorality, or motivated by incorrect or insincere religious beliefs, providers who offer abortion care can be seen as either motivated by "bad" conscience or an incorrect conceptualization of conscience.[140] The unilateral equation of religious, ethical, or moral convictions with the refusal to provide healthcare can thereby reinforce the stigmatization of abortion providers.[141] This stigma has numerous injurious—and even life-threatening—consequences. Abortion providers face harassment, threats to themselves and their families, cost-prohibitive regulations, isolation within mainstream medicine, and the loss of their careers, particularly for those in religiously affiliated

*Conflicts Regarding Patient—Care Policies*, 73 Am. J. Obstetrics Gynecology 1, 1 (2012) (reporting that a national survey found that 52 percent of obstetrician-gynecologists working in Catholic hospitals experienced a conflict with religiously based policies for patient care).

138. *See generally* Joffe, *supra* note 125.

139. Harris, *supra* note 125, at 982; *see also generally* Joffe, *supra* note 125.

140. Harris, *supra* note 125, at 982 (noting that "[f]ailure to recognize that conscience compels abortion provision, just as it compels refusals to offer abortion care, renders 'conscience' an empty concept").

141. *Id.*

hospitals that constrain the provision of reproductive healthcare.[142] And, as the case of Dr. George Tiller illustrates, they also risk their lives. Indeed, the "sincerity of many willing providers' beliefs . . . is manifest in the heavy burdens they endure in order to follow their consciences."[143]

Lack of attention to the fact that individuals provide reproductive healthcare as a matter of moral, ethical, and religious duty also has legal consequences. While numerous states and institutions offer protections for healthcare providers who cannot conscientiously provide medical treatment, they seldom offer complementary protections for those who cannot conscientiously withhold medical treatment.[144] This disparity has become more pronounced with laws that ban abortion pre-viability. As one bioethicist has noted, state laws that ban abortion after the detection of cardiac activity provide no exemptions for providers who believe "that they cannot, in good conscience, deny providing an abortion to a woman who requests it."[145]

Given that people have or offer abortions because of sincerely held religious beliefs, it seems logical or natural that individuals would argue that abortion restrictions burden religious exercise. Part II traces the history of free-exercise arguments for abortion rights.

## II. The History of Free-Exercise Arguments for Abortion Rights

Before the Supreme Court had yet to decide *Roe v. Wade*,[146] Ruth Bader Ginsburg, who was then general counsel for the Women's Rights Project of the American Civil Liberties Union, was preparing to appear before the Court in a different reproductive

142. Carole Joffe, *Commentary: Abortion Provider Stigma and Mainstream Medicine*, 54 Women & Health 666, 666–67 (2014). Within the first few days after Texas's ban on abortion at six weeks went into effect, clinic staff reported "relentless harassment; trespassing; conducting drone surveillance; blocking roads, driveways, and entrances; yelling at staff and patients; using illegal sound amplification; video recording staff, staff vehicles, and license plates, as well as surreptitiously recording inside the health center; and trying to follow staff home." United States' Emergency Mot. for TRO or Prelim. Inj. at 11, United States v. Texas, No. 1:21- cv-796 (W.D. Tex. Sept. 14, 2021).

143. Sepper, *supra* note 136, at 1534.

144. *Id.* at 1512–15; *see also* Mark Wicclair, *Conscience Clauses and Ideological Bias*, 21 Am. J. Bioethics 65, 65 (2021).

145. Fritz, *supra* note 136, at 46 (noting that laws that ban abortion after the detection of cardiac activity make the "unjustified asymmetry" in conscience protections more prominent).

146. 410 U.S. 113 (1973).

rights case. She represented Captain Susan Struck, an Air Force officer who became pregnant and, pursuant to an Air Force regulation that made pregnancy grounds for automatic discharge, was given a choice.[147] Captain Struck could either have an abortion and remain in the military, or give birth and leave the military.[148] Captain Struck was a practicing Catholic who believed that abortion was not an option for her.[149] But she also did not want to end her career.[150] Instead, she intended to use her accrued leave time of sixty days to cover her childbirth and arrange for her child's adoption.[151] The Air Force rejected this proposal.[152] Ginsburg challenged the regulation, and in October 1972, the Supreme Court granted certiorari in the case.[153] The stage was set for a case in which equal protection, reproductive autonomy, and free exercise were intertwined in a way that the Court had not yet seen—and has not seen since.

In her brief, Ginsburg illustrated how sex discrimination was inextricably connected to women's ability to determine whether to have children and how women's ability to determine whether to have children was in turn connected to one's faith. Her argument contained three strands. One, the Air Force regulation violated the Equal Protection Clause because it was based on the archaic and overbroad stereotype that pregnant women must devote themselves to childcare after giving birth.[154] Two, it violated Captain Struck's "right to privacy in the conduct of her personal life" by interfering with her autonomy in deciding "whether to bear . . . a child."[155] Three, it violated the Free Exercise Clause.[156] Ginsburg stressed that the regulation "operate[d] with particularly brutal force against women who . . . have strong religious objections to

147. Neil S. Siegel & Reva B. Siegel, Struck *by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 776 (2010).

148. *Id.* At that time, abortion was available on military bases to servicemembers and dependents of servicemembers. *See Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 103d Cong. 205 (1993) (statement of Judge Ruth B. Ginsburg, nominee for Associate Justice of the Supreme Court of the United States).

149. Brief for the Petitioner at 56, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178).

150. *Id.*

151. *Id.* at 4.

152. *Id.*

153. Ruth Bader Ginsburg, *A Postscript to* Struck *by Stereotype*, 59 DUKE L.J. 799, 799 (2010).

154. Brief for the Petitioner, *supra* note 149, at 37.

155. *Id.* at 53–54 (quoting Eisenstadt v. Baird, 405 U.S. 439, 453 (1972)).

156. *Id.* at 52–58.

obtaining an abortion."[157] It put Captain Struck to a choice between following her religious precepts and foregoing her employment or, alternatively, abandoning her religious precepts and retaining her employment. Thus, "the regulation pitted her Air Force career . . . against her right to privacy and autonomy in sexual matters as well as her religious conscience."[158]

In presenting this argument, Ginsburg linked pregnancy discrimination to women's equal citizenship, women's equal citizenship to reproductive freedom, and reproductive freedom to religious exercise. This multifaceted claim that tied together various aspects of women's lives—from the convictions they hold to the family choices they can make to the employment opportunities they can pursue—is part of what made *Struck* such a distinctive case. So too did the fact that it elevated the childbearing decisions and religious reasoning of an individual woman. Ginsburg "aimed to present the issue of reproductive choice through [Captain Struck's] eyes and experience."[159]

Yet, the Supreme Court never reckoned with the revolutionary potential of the case. Following the recommendation of the Solicitor General, who was concerned about the government's chances before the Court, the Air Force waived Captain Struck's discharge and changed its policy before oral argument, rendering the case moot.[160]

The legacy of *Struck* endures because it was one of the first attempts to apply proscriptions on sex-role stereotyping to the regulation of pregnancy.[161] But *Struck* is important for another, less-recognized reason: the case encapsulates many of the themes that pervade the tradition of free-exercise arguments for abortion rights, which this Part illustrates. Ginsburg asserted that the regulation infringed on the religious exercise of the belief that abortion is impermissible. But one of the common themes running through the history of religious reproductive justice is that this argument has equal force in the opposite direction: a law under which the only available option for pregnant people is childbirth infringes on

157. *Id.* at 56.

158. *Id.*

159. Ginsburg, *supra* note 153, at 799.

160. Struck v. Sec'y of Def., 409 U.S. 1071 (1972); *see also* Ruth Bader Ginsburg, Assoc. Just., U.S. Supr. Ct., Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at the Equality Principle, Address at the University of Cape Town, South Africa (Feb. 10, 2006), https://www.supremecourt.gov/publicinfo/speeches/sp_02–10–06.html [https://perma.cc/UE3Y-FLT3].

161. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.–C.L. L. Rev. 415, 449 (2011).

the exercise of religious beliefs that dictate that abortion is religiously required or that, under the precepts of one's faith, it is the correct moral decision for one's circumstances. While the specific religious convictions of the pregnant person and the resulting moral choice are different than in *Struck*, these claims have the same elements: sincere beliefs that counsel a choice that conflicts with the one mandated by the government. Indeed, Ginsburg viewed *Struck* to be about both the right to terminate a pregnancy *and* the right to continue one.[162] She insisted that "it was a woman's choice either way—her choice to bear or not to bear a child."[163] The problem with the regulation was that under it, a woman's choice "operate[d] in one direction only."[164] Those who have argued that abortion restrictions violate the Free Exercise Clause have identified an identical problem with laws that, in attempting to make abortion an unattractive or unattainable option, are a mirror image of the Air Force policy. And similar to Ginsburg, they have connected this religious burden to pregnant people's equal citizenship status and documented how laws that constrain reproductive options and coerce conscience deprive individuals of the chance to make meaning of their lives.

Viewed from the perspective of contemporary ideological divides, it may seem strange that Ginsburg would wed gender equality so closely to religious opposition to abortion. From the same viewpoint, it also may seem strange to some that religion can guide people to have abortions and that religion has historically featured in sex-equality claims that maintain that reproductive autonomy is a precursor to women's liberation. However, in both instances, the core concept is the affirmation of pregnant people's moral agency and right to make the decision that promotes their health, well-being, and safety free from government interference.

Using *Struck* as a thematic entry point, this Part traces the history of free-exercise arguments in the abortion context, beginning with the movement to repeal laws criminalizing abortion in the 1960s, through the post-*Roe* era, and up to the current landscape.

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162. Neil S. Siegel, *The Pregnant Captain, The Notorious REG, and the Vision of RBG: The Story of* Struck v. Secretary of Defense, *in* Reproductive Rights and Justice Stories 38 (Melissa Murray, Reva Siegel & Katherine Shaw eds. 2019).

163. *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States*, *supra* note 148, at 205.

164. Brief for the Petitioner, *supra* note 149, at 54.

### A. *The Pre-*Roe *Era*

In 1961, a state medical society drafted and supported a state abortion-reform bill for the first time.[165] The bill sought to change a New Hampshire law that, likely due to a drafting error, prohibited abortions *before* quickening.[166] To rally public opinion against a governor's veto after the bill passed, twenty-one members of the clergy, including the Episcopal and Methodist bishops of New Hampshire and the heads of Baptist, Congregational, Unitarian, and Jewish places of worship, issued a joint statement.[167] They declared that "religious conscience would not be jeopardized" if the bill passed, but that "if the bill does not become law, the state is fettering by law the consciences of a great many physicians and patients."[168]

Six years later, a separate group of twenty-one clergy members also worked to expand abortion access, this time by launching a nationwide referral service that helped women obtain safe legal and illegal abortions.[169] This story illustrates the deep roots not only of religious reproductive justice but also of the argument that the right to abortion is a matter of religious liberty. Much like those advocating for the New Hampshire bill, these clergy members challenged the idea that there was a singular religious perspective on abortion and declared that suppressing other perspectives had theological and constitutional problems. Meanwhile, litigants and scholars also appealed to religious liberty before *Roe*. They relied on the Free Exercise Clause to challenge the constitutionality of abortion bans.

#### 1. An Appeal to "Higher Laws": The Clergy Consultation Service

In 1967, when New York State outlawed abortion except when necessary to preserve the pregnant person's life, nineteen Protestant ministers and two rabbis formed the CCS to provide women counseling and referrals for safe abortion.[170] They also publicly

165. Lader, *supra* note 38, at 112.

166. *Id.* Quickening refers to before the first detectable fetal movements that typically occur around four or five months of pregnancy.

167. *Id.* at 115.

168. *Id.*

169. Doris Andrea Dirks & Patricia Relf, To Offer Compassion: A History of the Clergy Consultation Service on Abortion 122 (2017); Edward B. Fiske, *Clergymen Offer Abortion Advice: 21 Ministers and Rabbis Form New Group—Will Propose Alternatives*, N.Y. Times, May 22, 1967, at A1.

170. Joshua Wolff, Ministers of a Higher Law 52 (1998); Cynthia Gorney, *Abortion, Once Upon a Time in America*, Wash. Post (April 26, 1989), https://www.washingtonpost.com/archive/lifestyle/1989/04/26/abortion-once-upon-a-time-in-america/dcc01d3a-20eb-49c0-b4a6-6e4769866656 [https://

announced the service in a front-page article in the *New York Times*.[171] The referral service's phones "rang incessantly" the first week after the article was published.[172] Women from every state called in, and they were willing to travel extensively for counseling and information.[173] Within three years, CCS grew from a group of twenty-one clergy in one state to a nationwide network that operated in twenty-six states and that had referred around 100,000 women for abortions without a single fatality.[174] Throughout its six-year existence, it referred about 500,000 women.[175] It became one of the most important sources of information for those seeking safe abortions in states in which the procedure was still illegal.[176] For instance, *The Student Guide to Sex on Campus*, a booklet written in 1971 by students at Yale University and distributed nationwide, listed forty-three CCS members in the United States and Canada and enjoined people to use the service rather than try to obtain an illegal abortion by themselves.[177] Clergy members connected people to physicians who could perform the procedure safely and at a reasonable cost, and, in some states, they scheduled appointments and arranged transportation.[178] They hoped that police and prosecutors would respect the confidence of what was said between the clergy and a member of the clergy's congregation.[179]

The story of CCS has two key enduring elements. One, we can trace to its work many of the beliefs and arguments that animate

perma.cc/T4HJ-YLVT].

171. Fiske, *supra* note 169.

172. Howard Moody & Arlene Carmen, Abortion Counseling and Social Change 35 (1973).

173. *Id.* ("Far more women responded to our offer of advice and counsel than we ever dreamed were out there in our city."); *see also More Clerics Plan Advice on Abortion*, N.Y. Times, May 26, 1967, at A32 (quoting the leader of CCS as referring to the "tremendous human need [for information about obtaining an abortion] all over the country").

174. Moody & Carmen, *supra* note 172, at 75. Of a sample of 6455 women referred by the New York CCS in 1970, 34 percent identified as Catholic, 34 percent identified as Protestant, and 23 percent identified as Jewish. Dirks & Relf, *supra* note 169, at 64. Several CCS chapters reported that the religious demographics of the women they counseled were the same as those of the region in which the chapters were located. *Id.*

175. Woolf, *supra* note 170, at 94–106, 166.

176. Greenhouse & Siegel, *supra* note 52, at 29–30.

177. *Id.*

178. *Id.*; *see also* Woolf, *supra* note 170, at 58–60; Madeleine Ware, *"Our Moral Obligation:" The Pastors That Counseled in Pre-*Roe South Carolina, Nursing Clio (May 9, 2019), https://nursingclio.org/2019/05/09/our-moral-obligation-the-pastors-that-counseled-in-pre-roe-south-carolina [https://perma.cc/7EB8-WVCT].

179. Gorney, *supra* note 170.

people of faith today. It is thereby a source of historical legitimacy and legacy, revealing how those who advocate for abortion access as part of the full spectrum of reproductive healthcare are situated in a long-lived tradition—one that largely preceded serious religious opposition to abortion. Two, the work of CCS foreordained many of the current debates on abortion laws and offers insight on how to best deliver abortion care. Therefore, even while the religious and legal landscape has shifted since the organization was founded, its work remains notably modern. In fact, some ministers have pondered whether, given the recent increase in abortion bans, faith leaders may need to create a modern reincarnation of CCS.[180]

For the clergy, helping women access safe, affordable abortions was a religious mandate. They invoked allegiance to "higher laws and moral obligations transcending legal codes" and stated that it was a "pastoral responsibility and religious duty to give aid and assistance to all women with problem pregnancies."[181] The clergy accordingly announced that they were engaged in an act of civil disobedience, and this responsibility to violate unjust laws was in turn theologically grounded.

Mirroring contemporary views, they were driven by a belief in the sanctity of life, the inherent dignity of each individual, the duty to ease suffering, and the duty to fight injustice. At the time CCS was founded, illegal abortions caused high mortality rates disproportionately among women of color.[182] A 1965 report showed that 94 percent of abortion-related deaths in New York City occurred among Black and Puerto Rican women.[183] Even the exception under which abortions were legal in New York was a manifestation of inequity, as it was overwhelming wealthy, white women who had access to physicians who could say that a pregnancy was life-threatening.[184] Legally, abortion may have been denied to everyone, but practically, it was denied disproportionately to the most vulnerable. Reverend Howard Moody, the lifetime leader of CCS, declared that

180. McCleneghan, *supra* note 11.

181. *Clergy Statement on Abortion Law Reform and Consultation Service on Abortion (1967)*, *reprinted in* Greenhouse & Siegel, *supra* note 52, at 29, 30–31.

182. *See* Fiske, *supra* note 169.

183. *See id.* To illustrate, of the 4703 legal abortions performed in New York between 1951 and 1952, all but 169 took place in private hospitals, and all but 342 involved white women. *Id.*

184. *See* Howard Moody, *The Dark Ages: Man's Vengeance on Woman—The Penalty for an Unwanted Pregnancy*, *in* Moody & Carmen, *supra* note 172, at 13.

the law was "heartless and inequitable" and that therefore there was a "moral and theological imperative to correct [it]."[185]

But it was not just the risk to life that clergy were concerned about. It was also the punitive nature of the criminalization of abortion and the concomitant lack of dignified care. According to Reverend Moody, based on the practical operation of the law, it was difficult to conclude anything other than that the law was "directly calculated, whether conscious or unconscious, to be an excessive and self-righteous punishment, physically or psychologically, of women."[186] CCS discussed how women were "forced by ignorance, misinformation, and desperation into courses of action that require humane concern on the part of religious leaders."[187] A CCS member in Florida connected helping people access abortion to easing suffering that the law caused, stating that "[w]henever we try to make conditions for each other more human, we are engaged in a religious pursuit."[188] As such, the service perceived doctors who performed abortions out of compassion and concern for pregnant people "as living by the highest standards of religion and of the Hippocratic oath."[189]

Furthermore, presaging the connection between reproductive justice and economic justice that guides religious individuals today, the clergy also knew that the main obstacle to delivering abortion care was economic.[190] When CCS realized that it was serving overwhelmingly white, middle-class women because travel expenses and the cost of the procedure were prohibitively high for many, it used its market power to negotiate with doctors for a lower price.[191] One of the most interesting facts about CCS is its focus on the practical needs of women, rather than on extensive moralizing about the acceptability of the procedure.[192] Witnessing these needs convinced the clergy of the rightness of their work. As one CCS member put it, "[i]f I started out with any qualms about the rightness of what I was doing, these were soon gone in the experience of talking with women whose situations were so difficult that I wanted to be on

185. *Id.* at 19.

186. *Id.*

187. *Clergy Statement on Abortion Law Reform and Consultation Service on Abortion (1967)*, *supra* note 181.

188. Gillian Frank, *The Surprising Role of Clergy in the Abortion Fight Before* Roe v. Wade, Time (May 2, 2017, 12:30 PM), http://time.com/4758285/clergy-consultation-abortion [https://perma.cc/UR5K-FWRF].

189. *Clergy Statement on Abortion Law Reform and Consultation Service on Abortion (1967)*, *supra* note 181.

190. *See* Moody & Carmen, *supra* note 172, at 62.

191. *See id.* at 61; Wolff, *supra* note 170, at 68.

192. *See* Moody & Carmen, *supra* note 172, at 6.

their side."[193] Some clergy even believed that their CCS work was "the most affecting and powerful par[t]" of their ministry.[194]

While it presented religious support for reproductive rights as a lifesaving, dignity-enhancing, social-justice position, CCS also illustrated the foundation of the claim that restrictive abortion laws undermine free exercise. Its members linked abortion access and religious freedom, making theological claims with political and constitutional resonance in a manner reminiscent of John Locke and James Madison. Writing in 1973, Reverend Moody and his colleague at the Judson Memorial Church, Arlene Carmen, laid out the argument that "every woman must possess the freedom, guaranteed by the U.S. Constitution, to follow her religious conscience in the determination of whether she will or will not bear a child."[195] Moody and Carmen tried to reorient the abortion debate away from fetal life and toward broader equality and religious-liberty principles. For them, the issue that needed sustained debate was not when life begins but "when do[] freedom of choice and conscience end in society?"[196] Much like Locke and Madison, they argued that the threat of punishment was not capable of producing belief, and they asserted that, in a pluralistic society, to rely primarily on the law to attain conformity with a specific set of convictions, such by criminalizing abortion based on a particular view of fetal life and punishing people accordingly, was a "dangerous precedent."[197] They perceived a slippery slope in which religious condemnation of abortion could result in persecution and the deprivation of liberty, for if people who have or perform abortions "are to be called murderers or criminals or unfit to be part of the church, then it's a small

193. Dirks & Relf, *supra* note 169, at 122.

194. Tom Davis, *A Truly Fearless Human Being: Rev. Howard Moody, 1921–2012*, Religion Dispatches (Oct. 5, 2012), https://religiondispatches.org/a-truly-fearless-human-being-rev-howard-moody-1921-2012 [https://perma.cc/4SFK-FCKL].

195. Moody & Carmen, *supra* note 172, at 120.

196. *Id.* at 114.

197. *Id.* at 113. John Locke and James Madison have made similar arguments in texts that are considered part of the historic foundation of the Free Exercise Clause and the Establishment Clause. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, Founders Online Nat'l Archives, https://founders.archives.gov/documents/Madison/01-08-02-0163 [https://perma.cc/RUL8-MFGP] (last visited Apr. 8, 2022); John Locke, A Letter Concerning Toleration 5 (James H. Tully ed., Hackett Publishing Co. 1983) (1689). For an expression of a similar view by the Supreme Court, see W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.").

step to denying them freedom and locking them up."[198] Moody and Carmen also depicted laws criminalizing abortion as coercive, given that women, "many of them Catholic and Protestant and Jewish," may decide "under the guidance of their consciences and religious convictions to terminate pregnancies."[199] Under this account, a law that would be just as much of an infringement as an abortion ban would be one that compelled women against their religious beliefs to have an abortion or be sterilized.[200]

In addition to serving as a piece of religious-reproductive-justice history, CCS portended contemporary debates about abortion access. For example, to make low-cost and dignified care available to more people, Moody and his colleagues helped open the nation's first freestanding abortion clinic, which provided an inviting atmosphere, low-cost services, and compassionate care.[201] This approach contrasts sharply with laws that require clinics to transform into ambulatory surgical centers. Indeed, members of the clergy opposed a precursor to such laws. They resisted the Health and Hospitals Corporation in New York City when it encouraged the Board of Health to pass stringent guidelines for clinics that would make them mini-hospitals.[202]

Moreover, CCS's work revealed important facts about pregnant people's decisional certainty, forecasting some of the debates about mandatory waiting periods and biased counseling laws. Those who oppose such laws argue that they do not lead pregnant people to make better decisions but rather only impose extra costs and time delays because pregnant people seeking an abortion have already seriously considered their options. The clergy maintained an identical position in 1967. Most of the counseling that CCS did was pro forma because women had already given their decision careful consideration and made up their minds that they wanted to have an abortion by the time they reached the clergy.[203] What they really needed was information: what the procedure entailed, where to get it, and how much it would cost.[204] It is estimated that

198. Moody & Carmen, *supra* note 172, at 111.

199. *Id.* at 122.

200. *Id.* at 114–15.

201. *See* Susan Edmiston, *A Report on the Abortion Capital of the Country*, N.Y. Times, April 11, 1971, at SM10; *see also* Wolff, *supra* note 170, at 137; Moody & Carmen, *supra* note 172, at 76.

202. *See* Moody & Carmen, *supra* note 172, at 85.

203. *See* Wolff, *supra* note 170, at 124.

204. *See* Dirks & Relf, *supra* note 169, at 69. A Conservative rabbi who estimated that he counseled about five hundred women from 1967 to 1970 stated that, "I learned to stay out of their business. They needed help, not counseling . . . They needed a name, address and phone number." *Id.* at 67–68.

between 90 and 98 percent of the women counseled chose to have an abortion.[205] As one minister described it, "I was educated by these women as to how clear they were about what they were doing . . . [T]hey really didn't need any of my worldly wisdom. They knew what they wanted."[206] Accordingly, from the outset, the clergy wanted to change the laws that made their service necessary. The New York CCS elected to go out of business once New York repealed its law, based on the premise that "the decision about abortion really should be left between a woman and her doctor, and that no person, either psychiatrist or clergy, should be involuntarily placed between a woman and her physician."[207] In sum, religious people who support reproductive rights have been making the same arguments for decades.

Yet, even amidst their efforts to change the laws that perpetuated gender subordination and inequality, some feminists[208] perceived the practical effect of CCS's work to still involve men defining the terms of pregnant people's access to abortion. Despite the organization's attempt to recruit female counselors, its members were overwhelmingly white and male.[209] The clergy themselves recognized that "in their efforts to make safe abortions accessible to women, men were still controlling that access."[210] For this reason, some feminists were skeptical of the counseling services. They perceived them as one additional step women had to take in their effort to be self-governing over their bodies and lives.[211] Feminists also were aware that "[t]he clergy, however well-meaning, were still men who were controlling women's access to abortion, placing themselves in paternalistic roles in relation to the women they counseled."[212] One woman, who in a 1967 *Village Voice* essay recounted her experience seeking help from CCS and having an illegal abortion, spoke directly to the importance of elevating the experiences of individual women.[213] She expressed her gratitude

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He reported that many women rejected counseling because they had already made up their minds. *Id.* at 68.

205. Wolff, *supra* note 170, at 59.

206. Dirks & Relf, *supra* note 169, at 69.

207. Wolff, *supra* note 170, at 140.

208. The term "feminists" refers to those individuals who formed part of "a movement to end sexism, sexist exploitation, and oppression." bell hooks, Feminist Theory: From Margin to Center XIV (2nd ed. 2000).

209. Dirks & Relf, *supra* note 169, at 99.

210. *Id.* at 100.

211. *See* Wolff, *supra* note 170, at 167.

212. Dirks & Relf, *supra* note 169, at 103.

213. Anonymous, *In 1967 Abortion Meant Indignity, Fear, and Pain*, Village Voice (Mar. 8, 2017), https://www.villagevoice.com/2017/03/08/

for the "immeasurable" help and relief the clergy provided, and then she offered a suggestion.[214] The service, she proposed, "could be augmented by women who have had the experience of abortion."[215] She posited that "[p]erhaps the clergymen could enlist a group of women they could call on to help those who come to them for advice."[216] The writer herself stated that she detailed her experience in print so that people could look at the "personal implications" of the issue.[217] When feminist lawyers brought the first cases that attempted to establish a women's right to abortion—as opposed to male doctors' right to perform the procedure and counselors' right to refer for it—they had a similar aim in mind.[218]

CCS, its work, and the conversations about women's equal standing that it sparked may have been particularly prescient, but its members' religious commitment to reproductive rights was not aberrant. Throughout the 1950s and 1960s, religious leaders spoke out against policies originating from Catholic influence that prohibited either state agencies or physicians at public hospitals from prescribing contraception.[219] These leaders argued that such policies discriminated on the basis of religion and violated free-exercise rights because they ignored the fact that for some denominations, "the use of contraceptives practiced in Christian conscience in planning parenthood fulfills rather than violates the will of God" and that it could actually be "a religious obligation for families to practice birth control in their family life."[220]

In keeping with this tradition, from the late 1960s to the early 1970s, members of the clergy formed part of a movement that worked to repeal abortion laws and to illustrate that the Catholic Church did not maintain a monopoly on views about the sanctity of life. This movement consisted of religious organizations, physicians, social workers, legislators, and, most notably, a growing number of women.[221] At that time, the Catholic Church's opposition to reform or repeal was an outlier position, rather than the rule.[222] Even conservative groups such as the National Associa-

in-1967-abortion-meant-indignity-fear-and-pain [https://perma.cc/Z7ZE-AS9G].

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Part 2, *infra*.

219. *See* Tom Davis, Sacred Work: Planned Parenthood and Its Clergy Alliances 63–69, 90–96 (2005).

220. *Id.* at 83, 96.

221. Gene Burns, The Moral Veto 168 (2005); *Abortion Comes Out of the Shadows*, Life Mag., Feb. 27, 1970, at 20.

222. *See* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v.

tion of Evangelicals and the Southern Baptist Convention favored limited reform.[223] This next Subpart turns from the clergy to the other individuals who worked to change the laws, including scholars, litigants, and members of the women's movement.

### 2. An Appeal to the First Amendment: The Voices Calling for the Repeal of Abortion Bans

Before *Roe*, litigants and scholars considered several constitutional arguments that they could raise against criminal abortion statutes, including one that appealed to the Free Exercise Clause. Therefore, from the very outset of the first sustained effort to constitutionally challenge abortion laws, litigants presumed a fact that has been rendered obscure: not simply that varying religious views on abortion exist, but that people decide to have abortions on the basis of religious beliefs. Both of those facts placed First Amendment constraints on the state's ability to intervene in ways that constricted people's reproductive freedoms.

Like Moody and Carmen, scholars and litigants stated that one problem with abortion bans was that they enacted and enforced subjective religious values through criminal sanctions.[224] As a result, people who held opposing religious convictions, which might guide them to have abortions, could not be faithful to those convictions and were forced to violate their own consciences to abide by the law.[225] Abortion statutes "fail[ed] to protect the free exercise rights of persons whose religious and moral beliefs are consistent with the

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Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2064 (2011).

223. *See id.* at 2048.

224. *See, e.g.*, Joseph S. Oteri, Mitchell Benjoia & Jonathan Z. Souweine, *Abortion and the Religious Liberty Clauses*, 7 HARV. C.R.–C.L. L. REV. 559 (1972); *Recent Cases*, 23 VAND. L. REV. 1341, 1351 n.33 (1970); Harriet Pilpel, *The Right of Abortion*, ATLANTIC (June 1969) https://www.theatlantic.com/magazine/archive/1969/06/the-right-of-abortion/303366 [https://perma.cc/CK7J-RE44]; Betty Wolf, *Abortion Law Reform at a Crossroads*, 46 CHI.-KENT L. REV. 102 (1969); Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968); Harriet F. Pilpel, *The Abortion Crisis*, *in* THE CASE FOR LEGALIZED ABORTION NOW 112–13 (Alan F. Guttmacher ed., 1967); Joseph P. Kennedy, Merle F. Wilberding & Laurent L. Rousseau, *Church-State: A Legal Survey—1966–1968*, 43 NOTRE DAME L. REV. 684 (1968).

225. *See* Oteri, Benjoia & Souweine, *supra* note 224, at 593; *see also* Wolf, *supra* note 224, at 106; Pilpel, *The Right of Abortion*, *supra* note 224; Lucas, *supra* note 224, at 751–52; Pilpel, *The Abortion Crisis*, *supra* note 224, at 112 ("Constitutional rights of pregnant women are violated whenever present law is applied to compel such a woman to have a child which according to the overwhelming weight of religious and medical opinion she should not be forced to have.").

act of obtaining an abortion."[226] In this view, the statutes could not be justified by an interest in women's health because they endangered women's health by forcing women to obtain unsafe abortions. And they could not be justified by an interest in protecting fetal life because—in an argument that anticipated the reasoning in *Roe*—there was no single view of a fetus' status.[227] For one group of scholars, this argument extended to women whose religions specified situations when abortion was appropriate or whose religions left "the entire decision to the individual to be resolved in a manner consistent with her understanding of her religion."[228] These scholars also suggested that the argument extended to women who did not adhere to a formalized religious sect but instead developed a "personal religious and moral code" that dictated that abortion was the best option for various reasons, such as that a person could best fulfill their religious and moral code by adopting an existing child.[229]

Therefore, much like members of contemporary faiths, some scholars expressed the view that because of the Free Exercise Clause, the religious nature of the decision to have an abortion was itself a reason that the procedure must be legal and that the right to terminate a pregnancy must be constitutionally protected.[230] They declared that "the decision to seek an abortion is often so inevitably intertwined with religious and moral considerations that restrictive abortion statutes impinge on conduct based on an individual's religious scruples."[231] These discussions about free exercise were rooted in coercion: in criminalizing abortion, the state was wielding its coercive power to compel people to abide by the view that abortion is immoral.[232]

One of the main principles that emerges from these discussions is that there are two sides to the free-exercise coin. Just as people of faith, such as Captain Struck, could not be compelled to terminate a pregnancy, people also could not be compelled to continue a pregnancy. In essence, if religious beliefs on abortion are multifaceted, then constitutional protections must be bidirectional.

226. Oteri, Benjoia & Souweine, *supra* note 224, at 593.

227. *See id.* at 595–96; Lucas, *supra* note 224, at 744.

228. Oteri, Benjoia & Souweine, *supra* note 224, at 593.

229. *Id.* at 594.

230. *See supra* notes 103–109 and accompanying text.

231. Oteri, Benjoia & Souweine, *supra* note 224, at 593.

232. *See* Lucas, *supra* note 224, at 777 (declaring that "the states wield coercive power over the pregnant woman from the moment she conceives—requiring that she gave birth without regard for her personal belief as to the morality of abortion"); Oteri, Benjoia & Souweine, *supra* note 224, at 593 (stating that with abortion laws, women are "coerced by the state into accepting an essentially sectarian viewpoint").

One of the arguments offered against criminal abortion statutes was that they were selectively protective of religion. These statutes granted one set of adherents the ability to live out their religious beliefs, while denying that ability to another set of adherents.[233] They "protect[ed] the free exercise rights only of those who believe in immediate ensoulment and deny the free exercise rights of those who hold differing views."[234] And they were singularly compulsive because they required only one group to abandon their sincerely held religious convictions.

Accordingly, repealing abortion laws would actually be more protective of religion. They would be a kind of leveling up. Those whose religion led them to eschew abortion would still be able to practice their religion freely *and* those whose religion said otherwise would now be able to abide by theirs. Legalizing abortion would expand religious freedom because it would grant free-exercise rights to a group of people whose rights were being violated under existing law.

The linking of abortion rights and free exercise reached the courts too. When feminist lawyers pioneered litigation that represented women directly, rather than representing male physicians, they appealed to the First Amendment, primarily through two cases: *Abramowicz v. Lefkowitz*[235] and *Women v. Connecticut*.[236] Religious freedom thereby extended out of the scholarly world and became part of an innovative legal terrain that sought to center the voices of women.

*Abramowicz* and *Women v. Connecticut* were similar to *Struck* in that litigants presented the issue of reproductive freedom through women's eyes and experiences, and they made equality and religious-liberty arguments in conjunction. *Abramowicz*, which was brought by a large group of female plaintiffs, was the "first abortion case which fully developed the concept of a woman's right to abortion."[237] The plaintiffs' attorneys argued that the New York law prohibiting abortion with limited exceptions violated the Free Exercise Clause because, by depriving women of safe and adequate

233. *See* Pilpel, *The Abortion Crisis*, *supra* note 224.

234. Oteri, Benjoia & Souweine, *supra* note 224, at 593.

235. Hall v. Lefkowitz (Abramowicz v. Lefkowitz), 305 F. Supp. 1030 (S.D.N.Y. 1969).

236. Abele v. Markle (Women v. Connecticut), 342 F. Supp. 800 (D. Conn. 1972).

237. Janice Goodman, Rhonda Copelon Schoenbrod & Nancy Stearns, Doe *and* Roe*: Where Do We Go From Here*, 1 Women's Rts. L. Rep. 20, 22 (1973); *see also* Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims that Engendered* Roe, 90 B.U. L. Rev. 1875, 1886–94 (2010) (exploring the sex-equality claims advanced in *Abramowicz* and *Women v. Connecticut*).

medical care on the basis of the belief that abortion is a sin, it prohibited women from acting freely on opposing beliefs.[238] Those who testified in the case described their frightening and demeaning experiences seeking illegal abortions, illuminating the plurality of religious tenets and the ways in which, if abortion were legal, they would have been able to make a decision in line with their faith.[239] Nancy Stearns, who along with Black feminist advocate and lawyer Florynce Kennedy helped litigate the case, connected it to clergy activism.[240] She noted that the work of CCS was "an essential part of the overall struggle" to advance reproductive freedom, and so too was this new mode of litigation.[241] *Women v. Connecticut* was likewise brought by a large group of women who in a recruiting pamphlet argued that a Connecticut statute imposed the religious conviction that life begins at conception upon others who had "the constitutional right to hold their [contrary] beliefs without interference by state laws."[242]

Ultimately, neither the court in New York nor Connecticut considered the First Amendment claims. Activism following *Abramowicz* led the New York legislature to legalize abortion until the twenty-fourth week of pregnancy, and the case was dismissed as moot.[243] Meanwhile, a three-judge panel of the Connecticut federal district court invalidated Connecticut's abortion law on privacy grounds.[244] However, both cases are significant because they demonstrate how free-exercise claims have advanced causes that feminists consider important. When feminists challenged abortion laws, they were engaged in a larger effort to promote women's equal citizenship—and the Free Exercise Clause was not only fully consistent with that effort but also an affirmative source of constitutional protection that could assist them in achieving it. Most importantly, it was women themselves who described the moral reasoning around their reproductive decision-making.

Religious support for reproductive rights also featured in other cases that occurred around the same time. Clergy members who referred women for abortions contended that a Florida law that prohibited advising on or distributing material about abortion

238. *See* Diane Schulder & Florynce Kennedy, Abortion Rap 217 (1971) (quoting plaintiffs' brief in *Hall* (*Abramowicz*)).

239. *See id.* at 34, 50–51, 86–88.

240. *Id. See* Goodman, Schoenbrod & Stearns, *supra* note 237, at 22.

241. *Id.* at 22.

242. Greenhouse & Siegel, *supra* note 52, at 175.

243. *See* Schulder & Kennedy, *supra* note 238, at 50–51, 80–82.

244. *See* Abele v. Markle (Women v. Connecticut), 342 F. Supp. 800 (D. Conn. 1972).

was unconstitutional under the Free Exercise Clause.[245] A physician at a Catholic hospital who was denied admitting privileges after refusing to adhere to the hospital's prohibition on sterilization and abortion procedures also made a similar constitutional claim.[246] Much like in *Abramowicz* and *Women v. Connecticut*, the courts never reached these arguments, as both suits were dismissed on procedural grounds.[247] But while abortion bans were not struck down on free-exercise grounds, faith-based arguments that the right to abortion was a matter of religious liberty formed part of the efforts to prevent the retrenchment of *Roe*.

### B. *Dual Invocations of* Roe

History on the relationship between *Roe* and religion focuses overwhelmingly on how abortion opponents cited the decision as an affront to religious values and one that needed to be reversed.[248] However, what history tends to overlook is that *Roe* has long been invoked by another set of religious individuals to argue the opposite: that the decision was a victory for religious liberty and one that needed to be defended. *Roe* is the source of dual religious invocations, in which different groups employ the same means but for radically different ends. While some people of faith appealed to religious convictions to help mobilize a movement to overturn the decision, others appealed to religious convictions to prevent its erosion. Like the feminist lawyers in *Abramowicz* and *Women v. Connecticut*, the supporters of religious reproductive rights rooted their position in defending women's control over their sexual and family lives.

In amicus briefs in Supreme Court cases primarily from the 1970s through the 1980s, organizations representing Catholic, Jewish, and mainline Protestant believers have argued that the right to abortion is doubly protected by the right to privacy in the Fourteenth Amendment and the Free Exercise Clause.[249] According to

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245. *See* Landreth v. Hopkins, 331 F. Supp. 920 (N.D. Fla. 1971).

246. *See* Watkins v. Mercy Med. Ctr., 364 F. Supp. 799 (D. Idaho 1973).

247. A court found that the clergy members did not have standing to challenge the Florida law because they had not yet been prosecuted for violating it, and a court determined that the physician denied admitting privileges could not bring his constitutional claim against the hospital because the hospital was not a state actor. *See Landreth*, 331 F. Supp. at 925; *Watkins*, 364 F. Supp. at 803; Dirks & Relf, *supra* note 169, at 97.

248. *See* Greenhouse & Siegel, *supra* note 222, at 2079–80.

249. Brief for the American Jewish Congress et al. as Amici Curiae Supporting Respondents at 7–10, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) ("It is not by accident that this Court's historic protections for families draw on both notions of individual privacy and notions of religious

this position, due process and free-exercise rights are doctrinally entwined. Decisions about family life, including procreation, contraception, and abortion, are life-defining determinations that one must have ultimate agency over *and* that implicate religion because people make them by looking to the guidance of religious teachings and sincerely held theological beliefs.[250] Determining whether to marry, use contraception, or have a child are "simultaneously matters of individual choice and religious significance."[251] Consequently, both privacy cases and free-exercise cases are about the limited role of the state, as they enforce a sphere of private decision-making from which the state is excluded.[252] Relatedly, both the ability to make intimate and personal choices on one's own terms and the ability to shape one's own religious beliefs without compulsion from the state are central to constitutional values of dignity and autonomy.[253] By linking privacy and the First Amendment, religious groups demonstrated how free exercise was not just consistent with the right to abortion but also an entirely separate constitutional source of this right. In fact, in 1986, over thirty Jewish, Protestant, and Catholic organizations asserted that the Free Exercise Clause should control in *Webster v. Reproductive Health Services*, which involved a state law that featured a preamble declaring that "[t]he

liberty.") (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972)); *see also* Brief for Catholics for a Free Choice et al. as Amici Curiae Supporting Respondents at 47, *Webster*, 492 U.S. 490 (No. 88-605); Brief for the Unitarian Universalist Association et al., *supra* note 76, at 7.

250. Brief for the National Abortion Rights Action League et al., *supra* note 89, at 22–28; Brief for Religious Coalition for Reproductive Choice et al., *supra* note 79, at 2–8; Brief for American Jewish Congress et al., *supra* note 249, at 7–10.

251. Brief for the American Jewish Congress et al., *supra* note 249, at 8.

252. *See* Brief for a Group of American Law Professors as Amicus Curiae Supporting Respondents at 8–10, *Webster*, 492 U.S. 490 (No. 88-605) ("It is irrational, and incompatible with a decent respect for a pregnant woman's fundamental right of conscientious choice, to suppose that a state legislature's broad prohibition on abortions at any stage of pregnancy can provide a better answer than a responsible and situated woman's own to the questions for multiple human lives, actual and potential, that many pregnancies present."); *see also* Brief for American Jewish Congress et al., *supra* note 249, at 8; Brief for the Religious Coalition for Reproductive Choice et al., *supra* note 79, at 4; Brief for Catholics for a Free Choice et al., *supra* note 249, at 45; Brief for the Unitarian Universalist Association et al., *supra* note 76, at 17.

253. *See* Brief for Catholics for a Free Choice et al., *supra* note 249, at 29 ("The right of reproductive autonomy is essential to the moral independence of women."); Brief for a Group of American Law Professors, *supra*, note 252 ("Broad restrictions on abortion fail . . . to take seriously the moral independence of women in the exercise of responsible choice.") (internal citation omitted).

life of each human being begins at conception" and that prohibited public employees from performing or counseling about abortions.[254] These organizations argued that, because restricting abortion and legislating a theory of when life begins blocks people from consulting their faith "when exercising religious and personal conscience in making a decision whether to terminate [a] pregnancy," the law "invades private religious freedoms assured protection for individuals by the Free Exercise Clause and demanded by the variety of religious views about abortion."[255]

According to this conceptualization, the First Amendment and *Roe* have a symbiotic relationship. *Roe* was required by the First Amendment because if the state were permitted to adopt a particular belief about when life begins and accordingly prohibit abortion or make it functionally inaccessible, individuals who held contrary religious beliefs on either fetal life or the permissibility of abortion could not exercise them.[256] And the First Amendment necessitated adhering to *Roe* because pregnant people who determined based on their religious convictions that abortion is the right choice for them must be able to live out those convictions.[257] Today, anti-abortion litigants or public officials contend that competing views on abortion are a reason to return the issue to state legislatures and that judicial non-intervention will somehow either mollify controversy or lead to legislative compromise.[258] Religious supporters of

254. *Webster*, 492 U.S. at 504 n.4; *see also* Brief for the American Jewish Congress et al., *supra* note 249, at 10–22.

255. Brief for the American Jewish Congress et al., *supra* note 249, at 3, 10.

256. *See* Brief for the American Jewish Congress et al. as Amici Curiae at 12, Poelker v. Doe, 432 U.S. 519 (1977) (No. 75-442); *see also* Brief for the Unitarian Universalist Association et al., *supra* note 249, at 42; Brief for Catholics for a Free Choice et al., *supra* note 249, at 39–41.

257. *See* Brief for the Religious Coalition for Reproductive Choice et al., *supra* note 79, at 6–8 (explaining that "[t]he *Roe-Casey* formulation of the right to privacy helps to ensure the religious freedoms guaranteed by the Establishment and Free Exercise clauses" because "[m]atters of individual conscience require protection from governmental interference, and adoption of one 'creed' by the state over all others impermissibly and unconstitutionally impedes the exercise of individual conscience"); Brief for the Unitarian Universalist Association et al., *supra* note 76, at 26 (declaring that *Roe* "is necessary to avoid infringement of the individual right to make and effectuate a conscientious decision on abortion protected by the religious liberty clauses").

258. *See, e.g.*, Transcript of Oral Argument at 36, Dobbs v. Jackson Women's Health Org. (2021) (No. 19-1392) ("But, if the matter is returned to the people, the people can deal with it, they can work, they can compromise and reach different solutions.") (statement of Mississippi Solicitor General Scott Stewart); Preterm-Cleveland v. McCloud, 994 F.3d 512, 537 (2021) (Sutton, J., concurring) ("Every time the federal courts leave an issue of abortion policy to local decision-making, they create the possibility for compromise at the local

reproductive rights, however, maintained that divergent positions on what for many were intrinsically and fundamentally theological matters meant that individual choices about childbearing must be withdrawn from the political sphere.[259] And if the issue of abortion were simply left to the political arena, divisiveness and oppression could result, as influential or effectively mobilized faiths would be able to "invoke the power of the state to curb the religious freedoms of those they do not like."[260]

In this view, *Roe* was not an offense to religion. Rather, it was a win for religious liberty because it protected the ability of pregnant people for whom abortion is a matter of spiritual and religious concerns to make procreative decisions as dictated by their faith.[261] Moreover, if the state demanded adherence to one viewpoint on the status of the fetus and, by extension, abortion, it would have to compel conformity to that belief—and thereby pressure those with differing beliefs to renounce and violate them.[262] By safeguarding voluntarism, *Roe* protected free exercise, as well as privacy.[263]

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level.").

259. Brief for the American Jewish Congress et al., *supra* note 249, at 20 ("'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.'") (quoting W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)); *see also* Brief for the Committees on Civil Rights, Medicine and Law, and Sex and Law of the Association of the Bar of the City of New York and Others as Amicus Curiae Supporting Respondents at 8, *Webster*, 492 U.S. 490 (No. 88-605); Brief for the Women Lawyers' Association of Los Angeles et al. as Amici Curiae Supporting Respondents at 34, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379).

260. Brief for the American Jewish Congress et al., *supra* note 249, at 20 ("'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .'") (quoting *Barnette*, 319 U.S. at 642). This concern that mainstream faiths would receive legislative protections and minority or disadvantaged groups would not influenced Congressional passage of RFRA. *See* Scott-Railton, *supra* note 20, at 454.

261. *See* Brief for the Unitarian Universalist Association et al., *supra* note 76, at 25–26; Brief for a Group of American Law Professors, *supra*, note 252.

262. Brief for Catholics for a Free Choice et al., *supra* note 249, at 39–41; *see also GA-1930: On Women and Just Peacemaking*, *supra* note 43 (explaining that "making abortion illegal, when many committed Christians do not even agree when life begins, would become coercion and create widespread disrespect and cynicism for what may be an unenforceable law").

263. Brief for Catholics for a Free Choice et al., *supra* note 249, at 40–42; *cf.* Wallace v. Jaffree, 472 U.S. 38, 53–54 (1985) (explaining that the First

Additionally, in light of the wide divergence among faith traditions about what the sanctity of life entails, what constitutes a moral decision on abortion, and how one ought to go about making it, *Roe* honored the concept of religious pluralism by refusing to allow the state to espouse a theory of life that would override pregnant people's liberty interest pre-viability.[264] According to a coalition of Protestant, Catholic, and Jewish groups, "[t]he principle enunciated . . . in *Roe v. Wade*—that the state may adopt no 'theory of life' either to coerce or induce conformity—is the only one consistent with the First Amendment and the preservation of the pluralistic society which it envisioned."[265] These groups insisted that just as the constitutional guarantees of privacy and free exercise protect the right of people of faith to refuse to consider abortion, the same protections must be accorded equally to others "whose moral and religious beliefs concerning the well-being of existing life and of responsible parenthood counsel that abortion is an appropriate choice for the realization of important moral goals."[266] These arguments offered in the Court's abortion cases extend beyond simple recognition of the fact that the right to abortion is an issue over which people of faith may disagree. Rather, they assert that those diverse opinions have First Amendment significance.

While it does not explicitly discuss the Free Exercise Clause or the Establishment Clause, *Roe* does have religious roots, which can explain why some would read it as a religious-liberty decision. The Court recognized that competing views on the status of the fetus could all be deeply held.[267] Justice Blackmun observed that "organized [Protestant] groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family."[268] For this claim, he cited an amicus brief written by a variety of religious and humanist organizations that contended that abortion is a "matter of individual

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Amendment right to "select any religious faith or none at all" derives from the conviction that "religious beliefs worthy of respect are the product of free and voluntary choice by the faithful").

264. *See* Brief for the American Jewish Congress et al., *supra* note 249, at 10; Brief for Catholics for Choice et al., *supra* note 59, at 17. For a recent example of the diversity of faith positions on abortion, see Jenkins, *supra* note 97 (documenting the "competing faith-rooted views" on abortion expressed by individuals who rallied outside the Supreme Court during oral argument in *Dobbs v. Jackson Women's Health Organization*).

265. Brief for the Unitarian Universalist Association et al., *supra* note 76, at 25.

266. *Id.* at 47.

267. *See* Roe v. Wade, 410 U.S. 113, 159–61 (1973).

268. *Id.* at 160.

conscience to be exercised within the context of one's own faith" free of government intrusion.[269] These individuals asserted that the right to privacy "protects the free exercise of one's views (whether of religious or secular origin) on birth control," and they saw a similar set of connected rights at work in abortion.[270] They deemed laws that banned abortion a free-exercise violation that could not be justified on the ground that "they comport with one group's 'moral' condemnation of the exercise of the guaranteed freedom by others."[271]

This religious foundation in *Roe* is in fact traceable to the first case in which the Court considered a criminal abortion statute. In *United States v. Vuitch*, the Court upheld, against a vagueness challenge, a D.C. law that prohibited abortion except when "necessary for the preservation of the mother's life or health."[272] Writing separately, Justice Douglas cautioned that abortion statutes concerned conduct that was "heavily weighted with religious teachings and ethical concepts" and referenced the "treacherous grounds" the Court tread when it attempted to translate those concepts into law.[273] For these propositions, he quoted two sources, both of which rebutted the idea that the relationship between faith and abortion was either unidirectional or homogenous. The first was a 1969 report published by a professional association of psychiatrists that noted that "[a]lthough the moral issue hangs like a threatening cloud over any open discussion of abortion, the moral issues are not all one-sided," given that some individuals hold that "there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood."[274] The second was an article published by Justice Clark after he left the Court, which emphasized that while some Catholics deemed abortion a grave moral wrong, "[o]thers, including some Catholics," supported the right to abortion based on the idea that any termination of potential life was "outweighed by the social evils accompanying forced pregnancy and childbirth."[275] Douglas' opinion in *Vuitch*, taken together with Blackmun's opinion

269. *Id.* at 160 n.58 (citing Brief for the American Ethical Union et al. as Amici Curiae Supporting Petitioner at 3, 12, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-40, 70-18)).

270. Motion of American Ethical Union et al., *supra* note 269, at 12.

271. *Id.* at 34.

272. United States v. Vuitch, 402 U.S. 62 (1971).

273. *Id.* at 78–79 (Douglas, J., concurring in part and dissenting in part).

274. *Id.* at 78 n.1 (Douglas, J., concurring in part and dissenting in part) (quoting Group for the Advancement of Psychiatry, The Right to Abortion: A Psychiatric View 218–19 (1969)).

275. *Id.* at 79 n.2 (Douglas, J., concurring in part and dissenting in part) (quoting Thomas C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loy. U. L. Rev. 1, 4 (1969)).

in *Roe*, reveal that some Justices, with varying degrees of explicitness, recognized that the decision to have an abortion can indeed be religious and conscientious. This recognition was present from the origin of the Court's abortion cases.

Subsequently, when there was a significant push to overturn *Roe*, religious groups relied on the Free Exercise Clause to preserve it. Following *Roe*, a group of interfaith organizations came together and formed the Religious Coalition for Abortion Rights to safeguard the newly won constitutional right to abortion and, in doing so, broaden the abortion debate to include religious-liberty issues.[276] A group of prominent theologians and ethicists issued a public statement declaring support for *Roe* and public funding of abortion services in which they characterized the campaign by Catholic leaders to "enact religious based antiabortion commitments into law" as a "serious threat to religious liberty and freedom of conscience."[277] In addition, people of faith testified in Congressional hearings that a proposed fetal personhood amendment would burden religious exercise by codifying the religious position of some faiths and thereby eliminating abortion as an available option.[278] A report by the U.S. Commission on Civil Rights published in 1975 concluded the same.[279] Moreover, in amicus briefs in the Supreme

276. *See* Samuel A. Mills, *Abortion and Religious Freedom: The Religious Coalition for Abortion Rights (RCAR) and the Pro-Choice Movement, 1973–1989*, 33 J. Church & State 569, 569 (1991).

277. David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade 630 (1994).

278. *See, e.g.*, *Hearings on S.J. Res. 3 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 98th Cong. 132 (1983) ("While for some any consideration of abortion is a grave evil, others hold that a pregnant woman has a religious and moral obligation to make a decision and to consider abortion where the alternative is to sacrifice her well-being or her family's or that of the incipient life. The right to abortion is thus rooted in the recognition that women too make conscientious decisions.") (statement of Rhonda Copelon); *Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary.*, 97th Cong. 798 (1981) (stating that codifying one view of when life begins and thereby prohibiting abortion violates free exercise by preventing women "from exercising [their] priestly powers of discerning and doing the will of God") (statement of Paul D. Simmons); *Hearings on S.J. Res. 17 Before the Sen. Subcomm. on the Constitution*, 97th Cong. 1137 (1981) (declaring that such an amendment is counter to the beliefs of some Jewish individuals because it "subordinates women's bodies and lives to fetal survival") (statement of Shirley Leviton).

279. *See* Constitutional Aspects of the Right to Limit Childbearing: A Report of the United States Commission on Civil Rights at 96, 99 (1975) ("The proposed constitutional amendments are inconsistent with the history and law of the First Amendment in that they would give governmental sanction to one set of moral and religious views and inhibit the free exercise of any other

Court's abortion cases from the 1970s through the early 2000s, religious believers argued that several municipal policies and state and federal laws violated the Free Exercise Clause, including: a state law that banned a particular method of abortion without containing an exception when the method was necessary to preserve the pregnant person's health;[280] a city policy that prohibited "non-therapeutic" abortions in public hospitals;[281] a federal ban on Medicaid funding for medically necessary abortions;[282] a statute that contained a preamble that stated that life begins at conception and barred public employees from performing or counseling about abortions;[283] and an informed consent law that required physicians to tell pregnant patients that there may be "detrimental physical and psychological effects" from abortion.[284] However, with one exception—the ban on federal funding for medically necessary abortion services at issue in *Harris v. McRae*—none of these arguments were raised by the parties or commented on by the Court in the Court's abortion cases from the 1970s through the early 2000s. Meanwhile, in the lower courts, people made similar claims when challenging waiting periods and bans on state Medicaid funding for abortion. But much like at the Supreme Court, these claims largely went unaddressed, often because courts rested their decision on another basis, such as the right to privacy.[285]

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moral and religious views on the issue of when life begins.").

280. *See* Brief for the Religious Coalition for Reproductive Choice et al., *supra* note 79.

281. *See* Brief for the American Jewish Congress et al., *supra* note 249.

282. *See* Brief of Appellees, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268).

283. *See* Brief for the American Jewish Congress et al., *supra* note 249; Brief for Catholics for a Free Choice et al., *supra* note 249.

284. Brief for the Unitarian Universalist Association et al., *supra* note 76.

285. *See, e.g.*, Sojourner v. Roemer, 772 F. Supp. 930 (E.D. La. 1991) (declining to address free-exercise challenge to law that prohibited abortion with narrow exceptions); Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 552 F. Supp. 791 (E.D. Pa. 1982) (same for state informed-consent law); Margaret S. v. Edwards, 488 F Supp. 181 (E.D. La. 1980) (same for a Louisiana law that required second-trimester abortions to be performed in a hospital); Akron Ctr. for Reprod. Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979) (same for a state informed consent law and waiting period); YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972) (same for a state abortion ban); *but see* Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (holding that a religious duty to have an abortion could not serve as a basis for requiring public funding through state Medicaid because "to compel facilitation of the exercise of that religious duty" may violate the Establishment Clause); Women's Servs., P.C. v. Thone, 483 F. Supp. 1022, 1040 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980) (holding that a Nebraska statute that required women to be advised of "reasonably possible medical and mental consequences resulting

While *Roe* alluded to religious liberty indirectly and lower courts primarily avoided engaging with the concept, in *Harris v. McRae*, the Supreme Court in 1980 directly faced the issue of whether an abortion restriction could violate the Free Exercise Clause. For many, though, the case was disappointing both in terms of reproductive justice and religious liberty.

### C. *Abortion Funding as a Religious Question*

*Harris v. McRae*,[286] in which the Supreme Court upheld the Hyde Amendment's ban on federal Medicaid funding for medically necessary abortions but not for childbirth services, encapsulated many elements of the history of religious reproductive rights as it was written thus far. The case involved a challenge to a law that disproportionately impacted the most systemically disadvantaged in society; feminist and religious organizations working to illuminate the harms of abortion restrictions on women's lives; arguments about state coercion; and compelling free-exercise arguments that ultimately were sidestepped. The decision is remembered now as an example of the limits of the privacy rationale for the right to abortion. But at the time, it was also seen as a significant religious-liberty case.

The plaintiffs included pregnant women eligible for Medicaid, officers from the Women's Division of the United Methodist Church, and the Women's Division itself.[287] In addition to asserting that the Hyde Amendment violated the right to privacy and the Establishment Clause, they argued that it violated the Free Exercise Clause by conditioning entitlement to necessary healthcare on the abandonment of religious beliefs.[288] Presented in this way, religious women were in the same position as the plaintiff in *Sherbert v. Verner*,[289] in which the Court held that it violated the Free Exercise Clause to compel a woman to choose between observing a Saturday sabbath and forfeiting unemployment benefits, or abandoning her religious beliefs to accept employment. The Court found that state could not condition the availability of unemployment insurance on one's willingness to forgo conduct that one's religion required and thereby pressure that person to contravene

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from abortion, pregnancy and childbirth" and then wait forty-eight hours before having an abortion did not violate the Free Exercise Clause because there was no evidence that obtaining an abortion without these requirements constituted a fundamental tenet of any religion).

286. 448 U.S. 297 (1980).

287. *See id.* at 320.

288. *See* Brief of Appellees, *supra* note 282, at 151–66.

289. 374 U.S. 398 (1963).

their religious convictions.[290] Effectively, the Hyde Amendment put women to a similar choice: follow the directives of their faith, have an abortion, and be denied public benefits, or disobey their faith, give birth, and receive government benefits.[291] As a result, many economically insecure women would either be "discouraged from [making a] conscientious decision" or "completely precluded from acting in accordance with the tenets of their faith."[292] The plaintiffs also contended that no compelling interest could justify such a burden because women were seeking only to receive healthcare coverage for a legal, constitutionally protected act.[293]

The First Amendment claims in the case led a 1978 editorial in *The Nation* to boldly term the case the "[m]ost important religious liberties question since the *Scopes* trial."[294] Rhetorical flourishes aside, other publications discussed how it was "relatively uncomplicated" that the Hyde Amendment required pregnant women who had religious reasons for seeking an abortion to conform to a contrary set of beliefs in violation of the Free Exercise Clause.[295] When the case is viewed through a historical lens, it is unsurprising that a challenge to the amendment, which was itself spurred by religious opposition to abortion,[296] would be supported by religious groups.

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290. *See id.* at 410.

291. *See* Brief of Appellees, *supra* note 282, at 158.

292. *Id.* at 159.

293. *See id.* at 163.

294. Editorial, *Ringing Out, Ringing In*, 227 Nation 726 (1978). In the *Scopes* trial, which was the first trial in the United States to be broadcast live over a national radio network and which attracted widespread attention, high-school science teacher John Thomas Scopes was prosecuted for violating a Tennessee law that banned the teaching of evolution in public schools. *See* Noah Adams, *Timeline: Remembering the* Scopes *Monkey Trial*, NPR (July 5, 2005, 12:00 AM), https://www.npr.org/2005/07/05/4723956/timeline-remembering-the-scopes-monkey-trial [https://perma.cc/P8NQ-N4CX].

295. *See* Beverly Harrison, *Does the First Amendment Bar the Hyde Amendment?*, Christianity & Crisis, Mar. 5, 1979, at 34–36; Aryeh Neier, *The* McRae *Case: Theology and the Constitution*, 227 Nation 725 (1978); Frederick S. Jaffe, *Enacting Religious Beliefs in a Pluralistic Society*, Hastings Ctr. Rep., August 1978, at 14; Laurie Johnston, *Law and Religion Intermingled in Suit on Abortion Ban*, N.Y. Times, Mar. 14, 1978, at 37; *see also* Kenneth A. Briggs, *Ban on Abortion Pressed by Hyde*, N.Y. Times, Sept. 25, 1984, at A20 (acknowledging different views on the Hyde Amendment among Catholics).

296. In a 1984 New York Times article, Representative Henry Hyde, the sponsor of the amendment, denied that the amendment was sectarian and stated that it simply reflected the "legitimate place of religious values in public policy." *See* Briggs, *supra* note 295. He also stated that even if there were no public consensus capable of sustaining a constitutional prohibition of abortion, "[i]t is clearly insufficient for a Catholic public official to hold that his or her personal, conscientious objection to abortion as a matter of personal choice for

A coalition consisting of members of the feminist movement and Protestant groups who believed it was immoral to single out low-income individuals for disparate healthcare treatment helped block early efforts to pass the amendment.[297] When the amendment was debated in Congress in 1978, over two hundred Protestant and Jewish theologians issued a "Call to Concern" stating that abortion "may in some instances be the most loving act possible."[298] State affiliates and member organizations of the Religious Coalition for Abortion Rights created a campaign called "On the Line for Choice," through which they gathered and submitted to Congress thousands of signatures on petitions opposing the amendment.[299] In addition to this legislative and social-movement approach, individuals relied on the courts. During the late 1970s, litigants brought free-exercise challenges to bans on state public funding for abortion, though these arguments were resolved perfunctorily or on procedural grounds.[300] According to one writer at the time, in light of the many faith traditions that supported the right to abortion, a First Amendment challenge was so commonsensical that it "could astonish only those who do not grasp how deeply religious positions differ on the . . . issue."[301]

But to make sure the courts did grasp the diversity of religious views, the plaintiffs developed an extensive factual record showing how the decision to have an abortion could be guided or even compelled by faith.[302] Some of the teachings received in evidence included: the Jewish teaching that "the mother's welfare must be the primary concern in pregnancy" and the religious duty to preserve the pregnant person's life and health; the American Baptist teaching that "considers liberty of conscience itself the most precious single principle," according to which matters involving family and childbearing require the exercise of one's "moral awareness"; and the United Methodist teaching of responsible parenthood, under which "human beings must be sure that the conditions into which

himself or herself ends the matter." *Id.*

297. *Interview with Kathryn Kolbert*, PBS FRONTLINE (Nov. 8, 2005), https://www.pbs.org/wgbh/pages/frontline/clinic/interviews/kolbert.html [https://perma.cc/XY5M-4DGQ].

298. Jaffe, *supra* note 295.

299. Mills, *supra* note 276, at 588.

300. *See* Comm. To Defend Reprod. Rights v. Myers, 156 Cal. Rptr. 73 (Cal. Ct. App. 1979) (dismissing in one sentence a free-exercise challenge to a California law that prohibited state funding for abortions); Right to Choose v. Byrne, 398 A.2d 587 (N.J. Ch. Div. 1979) (dismissing free-exercise claim on standing grounds).

301. Harrison, *supra* note 295.

302. *See* McRae v. Califano, 491 F. Supp. 630, 639 (E.D.N.Y. 1980).

the new life is being born will sustain that life in accordance with God's intention for the life to be fulfilled."[303] Notably, a witness representing the Catholic Archdiocese of New York acknowledged that a "reverse" Hyde Amendment that would ban Medicaid payments for maternity care but authorize them only for abortion would coerce and violate the free-exercise rights of some Catholic women.[304]

In a detailed, nearly two hundred-page opinion, the district court held that the Hyde Amendment was unconstitutional under the Free Exercise Clause.[305] It stated that the decision to have an abortion for medical reasons was one of conscience protected by the Fifth Amendment and "doubly protected" by the First Amendment when "exercised in conformity with religious belief and teaching."[306] Furthermore, the court stated that because of the "irreconcilable conflict of deeply and widely held views on this issue," the government could intervene in reproductive decision-making, such as through the distribution of public funding, only to protect the "individual decisions of religiously formed conscience" to have an abortion.[307]

However, when the case reached the Supreme Court, despite success at the district court level and the lengthy buildup given that litigants had been exploring these types of arguments since the 1960s, it had a rather disappointing denouement. The Court evaded the free-exercise issue and disposed of it in only a few sentences.[308] It found that pregnant women covered under Medicaid lacked standing because "none alleged, much less proved, that she sought an abortion under compulsion of religious belief."[309] It concluded that the Women's Division, which included pregnant indigent women who would choose abortion on religious grounds, did not have standing to assert the rights of its members because "'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.'"[310] Moreover, for all of the arguments offered by both the plaintiffs and amici that the case was essentially a rerun of

303. *Id.* at 696–97, 700, 741; *see also* Laura Crocker, Harris v. McRae*: Whatever Happened to the* Roe v. Wade *Abortion Right?*, 8 Pepp. L. Rev. 861, 884 n.128 (1981).

304. *See* Jaffe, *supra* note 295.

305. *See McRae*, 491 F. Supp. at 742.

306. *Id.*

307. *Id.*

308. *See* Harris v. McRae, 448 U.S. 297 (1980).

309. *Id.* at 320.

310. *Id.* at 321 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

*Sherbert*, the Court dismissed the relevance of *Sherbert* in a footnote.[311] Neither the concurrence nor any of the four dissents discussed the First Amendment.

Even though *Harris v. McRae* did not engage with any substantive arguments about the Free Exercise Clause, its legacy played an important role in a subsequent chapter in the history of religious reproductive rights: Congressional debates on RFRA. The questions that the case raised, such as whether religious exercise in the abortion context meant one had to be compelled by religious belief or whether a Court would view a future challenge as meritorious, featured extensively in these debates.[312] While the Court referenced religious liberty in terms of general principles in *Roe* and then sidestepped the issue when directly faced with it in *Harris v. McRae*, Congress engaged in express, sustained discussions when it considered RFRA.

### D. *RFRA as an Attempt at Religious Gerrymandering*

Before 1990, the Supreme Court held that neutral laws of general applicability received a form of heightened review when they imposed a burden—even if incidental—on an individual's religious exercise.[313] If a law did impose such a burden, the government was required to show that the law was narrowly tailored to serve a compelling interest.[314] However, in 1990, the Supreme Court reshaped free-exercise doctrine when it held in *Employment Division v. Smith*[315] that neutral laws of general applicability that burdened religion—meaning those that do not have the purpose of specifically targeting religion—were subject only to rational basis review.[316] Exemptions from such laws were legislatively permissible, but they were not constitutionally required.[317]

*Smith* was met with backlash from both the political left and right.[318] Congress immediately started working to restore the test

311. *See id.* at 317 n.19.

312. *See infra* notes 350–354 and accompanying text; *infra* notes 370–372 and accompanying text.

313. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

314. *See, e.g.*, *Sherbert*, 374 U.S. at 403.

315. 494 U.S. 872 (1990).

316. *Id.* at 878; *see also* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 545 (1993) (explaining that the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief" or pursue its interest "only against conduct motivated by religious belief").

317. *Smith*, 494 U.S. at 890.

318. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 (1992).

from cases like *Sherbert*, and "a most ideologically eclectic collection of organizations" came together to form the Coalition for the Free Exercise of Religion and draft RFRA.[319] The statute explains that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[320] It also states that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[321] According to Congress, however, the Court's pre-*Smith* cases set forth "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[322] Therefore, under the statute, the government may "substantially burden" the exercise of a person's sincere religious belief only if it shows that the "application of the burden to the person" is the "least restrictive means" of furthering a compelling government interest.[323]

RFRA eventually passed with bipartisan support.[324] But the statute was held up in Congress for three years because of debates about abortion, which pervade the legislative history.[325] Some anti-abortion individuals and groups such as the United States Catholic Conference, the National Right to Life Committee, and Americans United for Life opposed RFRA because they feared that it would create an independent statutory basis for the right to abortion.[326] Specifically, these groups believed that it would enable

319. Michael P. Farris & Jordan W. Lorence, Employment Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 Regent U. L. Rev. 65, 88 (1995).

320. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2018)).

321. *Id.* § 2000bb(a)(4).

322. *Id.* § 2000bb(a)(5).

323. *Id.* § 2000bb-1(b)(1)-(2).

324. RFRA passed the U.S. House of Representatives through unanimous consent and passed the U.S. Senate ninety-seven to three. *See* H.R. 1308, Religious Freedom Restoration Act of 1993 (1993–94).

325. One Republican House aide who worked on the bill said that because of debates on abortion, he saw the effort to pass RFRA "grow from a lovefest into a nightmare." Joan Biskupic, *Abortion Dispute Entangles Religious Freedom Bill*, 49 Cong. Q. 913 (Apr. 13, 1991); *see also Religious Freedom Restoration Act of 1991 on H.R. 2797, Hearing Before the Subcomm. on Civ. and Const. Rts of the H. Comm. on the Judiciary.*, 102d Cong. 8 (May 13–14, 1992) [hereinafter *House RFRA Hearings*] (alluding to debate) (statement of R. Patricia Schroeder).

326. It is important to note that several anti-abortion groups supported RFRA, including: the Christian Life Commission of the Southern Baptist Convention, the National Association of Evangelicals, the Church of Jesus Christ of Latter-day Saints, the Christian Legal Society, Concerned Women for America, Agudath Israel, the Rabbinical Council of America, the Traditional

women whose religious convictions led them to seek abortions to argue that laws regulating abortion burdened their religious exercise.[327] Under RFRA, if those seeking abortions demonstrated that such laws did in fact pose a substantial burden on their religious exercise, the laws would need to pass strict scrutiny.[328] Therefore, some abortion opponents asserted that the statute would give not only outright abortion bans but also laws like informed-consent, waiting-period, and parental-notification requirements a pathway to heightened review that the laws would not survive.[329]

Historical background helps contextualize this concern. Many anticipated at the time Congress was debating RFRA that *Roe* would be overturned, given that the Supreme Court's then-most-recent abortion case, *Webster v. Reproductive Health Services*,[330] upheld every challenged aspect of a Missouri abortion regulation.[331] The *Webster* plurality also expressed skepticism of a constitutional right to privacy, and Chief Justice Rehnquist, joined by two others, stated that the trimester framework from *Roe* should be abandoned.[332] Abortion opponents were wary of creating a potential

Values Coalition, and others. *See House RFRA Hearings*, *supra* note 325, at 125–26 (statement of Rep. Stephen Solarz); *Abortion: A Religious Right?*, Christianity Today (June 24, 1991), https://www.christianitytoday.com/ct/1991/june-24/religious-freedom-abortion-religious-right.html [https://perma.cc/T2XZ-ZZWD]; Ruth Marcus, *Reins on Religious Freedom?*, Wash. Post. (March 9, 1991), https://www.washingtonpost.com/archive/politics/1991/03/09/reins-on-religious-freedom/b4f96a5d-1bbe-4b78-ad7b-8207669b6289 [https://perma.cc/XYU5-XJTZ].

327. *See* Mark Silk, *Restoring Faith's Freedom: Religious Liberty Bill Cracks Anti-Abortion Coalition*, Atl. J. & Const., Jan. 25, 1993, at E6; Peter Steinfels, *Belief*, N.Y. Times, Feb. 29, 1992, at 1010.

328. *See* 42 U.S.C. § 2000bb-1(b)(1)-(2) (stating that the government may substantially burden a person's religious exercise only if the application of the burden to the person "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest").

329. *The Religious Freedom Restoration Act, Hearing Before the Sen. Comm. on the Judiciary*, 102d Cong. 2969 (Sept. 18, 1992) at 106–10 [hereinafter *Senate RFRA Hearings*] (statement of Mark Chopko); *id.* at 222 ("*Casey* demonstrates that when the court uses a standard less than compelling interest . . . they will uphold restrictions. If they impose a compelling interest standard, then the result will be striking down those regulations—informed consent, waiting period, parental notification—as they did under *Akron* and under *Thornburgh*.") (statement of James Bopp).

330. 492 U.S. 490 (1989).

331. *See* Brad Jacob, *Free Exercise in the Lobbying Nineties*, 84 Neb. L. Rev. 795 (2010).

332. *See Webster*, 492 U.S. at 520 (declining to engage in "a 'great issues' debate as to whether the Constitution includes an 'unenumerated' general right to privacy as recognized in" *Griswold v. Connecticut*, 681 U.S. 479 (1965), and

"safe harbor" for abortion that would "provide an opportunity for a future Supreme Court to protect the abortion right" if *Roe* were overturned.[333] In response, those who supported both reproductive rights and RFRA typically did not deny that the statute could be used to protect religiously motivated abortions but instead contended that those claims deserved to be evaluated under the same standards as any other type of religious exercise.[334] In other contexts, RFRA's bipartisan support was a virtue. In the abortion context, its bipartisan support made some abortion opponents "highly suspicious of the new coalition" working to pass the statute.[335]

Consequently, RFRA spurred significant discussion about the connection between religious beliefs and abortion. This discussion reveals that, even while purportedly trying to pass legislation intended to protect burdens on religious exercise, some members of Congress and some faith groups specifically disregarded one subset of sincere religious convictions: those that led people to have abortions. As such, the legislative history displays a twist on religious gerrymandering, in which legislation targets a group of believers for unfavorable treatment. The legislative history of RFRA reveals an attempt to single out particular believers not by including them within the statute and thereby subjecting their behavior to the statute's scope of regulation but by *excluding* them from the statute and thereby removing them from the statute's scope of legal protection. At the same time, the debate about abortion prompted some members of Congress to adopt contradictory or paradoxical views in an attempt to treat the religious convictions that motivate or compel a pregnant person to seek an abortion differently than religious convictions that motivate or compel other forms of religious exercise. Both the attempt at religious gerrymandering, at times more explicit and at other times subtler, and its resulting ironies are examples of abortion exceptionalism, under which abortion is subjected "to unique, and uniquely burdensome, rules," even when it shares commonalities with other activities.[336]

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*Roe*); *id.* at 546 ("The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution, or in any place else one would expect to find a constitutional principle.").

333. James C. Bopp, *RFRA Needs Abortion Amendment*, *in House RFRA Hearings*, *supra* note 325, at 278.

334. *See, e.g.*, *House RFRA Hearings*, *supra* note 325, at 83–84 ("We believe, as do the members of the coalition supporting this bill, that all religious claimants deserve their day in court on an equal footing. That does not mean that all will succeed; simply that all should be evaluated according to the same standard.") (statement of Nadine Strossen).

335. Steinfels, *supra* note 327.

336. Caitlin Borgmann, *Abortion Exceptionalism and Undue Burden*

The most direct attempt to exclude religiously based abortions from judicial relief—and an illustrative example of abortion exceptionalism—was seen in the fact that some members of Congress and some religious organizations insisted on an "abortion-neutral amendment" to RFRA. By this they meant an amendment that would have barred people of faith from using RFRA to challenge abortion statutes.[337] Some proposed sample language for such an amendment. One member of the RFRA drafting committee suggested the following language be inserted in the Congressional committee report: "RFRA could not be invoked to challenge the bane existence of restrictive or permissive abortion laws, but it could be invoked by persons who for religious reasons wish to abstain or not participate in abortion where a law imposed contrary restrictions or obligations."[338] In pursuit of a similar aim, a member of the House of Representatives offered a bill to rival RFRA called the Religious Freedom Act (RFA). It was identical to RFRA with an exception: it contained a clause that stated that the act did not authorize a cause of action for any person to challenge "any limitation or restriction on abortion, on access to abortion services or on abortion funding."[339] Of course, the legislation was not really "abortion neutral" because it barred those whose religious beliefs counseled abortion from even being heard in court, let alone obtaining any relief. It thereby explicitly singled out a religious practice for disparate and disadvantageous treatment.[340]

*Preemption*, 71 Wash. & Lee L. Rev. 1047, 1048 (2014). This concept of abortion exceptionalism is usually discussed in the context of state and federal laws regulating the procedure. For example, states have passed laws that require abortion providers to obtain admitting privileges at hospitals within a certain distance of an abortion clinic, purportedly on the basis of pregnant people's health. *See* Linda Greenhouse and Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 Yale L.J. 1428, 1446 (2016). But providers who perform other medical procedures that pose a much higher risk to patients have no such requirement. *See Planned Parenthood of Wis. v. Schimel*, 806 F.3d. 908, 921 (7th Cir. 2015) ("A number of other medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed.").

337. *See, e.g.*, *House RFRA Hearings*, *supra* note 325, at 8 (statement of Rep. Henry Hyde); *id.* at 34 (statement of Mark Chopko); *id.* at 146 (statement of Rep. Chris Smith).

338. 186 Cong. Rec. HR2792 (daily ed. Nov 26, 1991) (quoting May 9, 1991 memorandum from Marc Stern to Rep. Stephen Solarz).

339. H.R. 4040, Religious Freedom Act (1991). The act also stated that it could not be used to challenge "the tax status of any other person," or "the use of disposition of Government funds or property derived from or obtained with tax revenues." *Id.*

340. *See House RFRA Hearings*, *supra* note 325, at 127 ("The abortion

Thus, paradoxically, in the very course of their effort to overturn *Smith* because it was not sufficiently solicitous of infringements on religious exercise, some advocated for the exact type of legislation that *Smith* said *would* burden religious exercise because, by its own terms, it targeted one set of religious practices.[341] The amendment's proponents believed that the standard for triggering heightened review set in *Smith* was too deferential and yet simultaneously managed to meet that deferential standard. In addition, the entire driving force behind RFRA was the idea that neutral and generally applicable laws could substantially burden religious exercise and that even incidental burdens could warrant heightened review.[342] Neutral in this context meant laws that did not regulate one group on the basis of religion but nevertheless put people to a choice of following the law or following their conscience.[343] Neutral was upended in the abortion context, as it meant laws that *did* regulate one group on the basis of their beliefs. Through RFRA, Congress aimed to reinstate the Court's pre-*Smith* free-exercise jurisprudence, but the treatment of abortion collided with the part of that jurisprudence that held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[344] The amendment's religious preferentialism was so notable that it was opposed by an Orthodox Jewish organization that believed that *Roe* should be overturned. The organization pointed out that Orthodox Judaism teaches that abortion is required when a pregnant person's life is endangered, and, therefore, abortion can in fact be an expression of faith in some circumstances.[345] Pointing out the conspicuous dissonance between the purported aims of the effort to pass RFRA and the practical effects of an amendment that would pick and choose which convictions deserved protection, it deemed it "most ironic—to put it charitably—that a bill carrying the noble title 'Religious Freedom Act' would expressly exclude a tenet of the

question provides this Committee with a clear example of how the passions associated with a highly charged political issue can lead Congress to attack, however inadvertently, the ancient faith of a deeply religious people.") (statement of Rep. Stephen Solarz).

341. *See* Emp. Div. v. Smith, 494 U.S. 872, 882 (1990) (distinguishing generally applicable laws from laws that "represent[] an attempt to regulate religious beliefs").

342. *See* 42 U.S.C. §§ 2000bb to 2000bb-4 (2018).

343. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403–04 (1963).

344. Thomas v. Rev. Bd., 450 U.S. 707, 714 (1981).

345. *House RFRA Hearings*, *supra* note 325, at 417–18 (statement of Agudath Israel).

Jewish faith from legal consideration as an expression of free religious exercise."[346]

Others supported RFRA because they deemed abortion claims unlikely to succeed.[347] An attorney for the National Association of Evangelicals stated that it was "unthinkable that the Supreme Court would reject the right to abortion under one constitutional argument—that is, the right to privacy—only to recreate that right on the basis of religion."[348] He suggested that "[t]his explains why many pro-life organizations . . . support RFRA."[349] While this is a much less extreme form of exclusion than RFA's affirmative attempt at religious gerrymandering, it still embodies the same underlying idea that it is reassuring that some types of religious claims will be kept out of court.

Some legislators and organizations were so keen to exclude religiously based abortion claims from RFRA that they tried to bend the statute in a way that could have undermined its purpose simply to reach abortion. For example, one debate among members of Congress and advocates was whether the statutory term "religious exercise" included acts motivated by religious belief or solely acts compelled by religious belief.[350] Some abortion opponents wanted to limit RFRA to the "compelled" standard based on their idea that few religions compelled people to have an abortion as a matter of religious obligation.[351] Moreover, individuals such as Representative Hyde, a leading opponent of the statute in the House, and James Bopp, the general counsel of the National Right to Life Committee, interpreted the Court's statement in *Harris v. McRae* that the plaintiffs did not allege that they "sought an abortion under compulsion of religious belief" to mean that, to assert a free-exercise claim, pregnant people must be compelled by

346. *Id.* at 417.

347. *Senate RFRA Hearings*, *supra* note 329, at 137 (statement of a panel consisting of Forest D. Montgomery et al.).

348. *Id.*

349. *Id.*

350. Drinan, S.J. & Huffman, *supra* note 30, at 536–37.

351. *See, e.g.*, *House RFRA Hearings*, *supra* note 325, at 119 (statement of Rep. Stephen Solarz); James C. Bopp, *RFRA Needs Abortion Amendment*, *in House RFRA Hearings*, *supra* note 325, at 284–85 (noting that whether a woman "could credibly argue that she was motivated by her religion to make this moral choice herself and that she chose abortion" is "a far easier test than whether one is compelled as a religious duty to engage in certain activity"); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L.R. 145, 151 (1995) ("Congress rejected the view that only religious compulsion is protected. In committee hearings, lobbyists offered amendments to change to a compulsion standard, but those amendments went nowhere.").

religious duty.[352] According to this position, moving to a "motivated" standard could make it easier to obtain exemptions from abortion restrictions than it would be under existing jurisprudence and broaden the class of people who would be able to bring claims under the statute.[353] However, the compelled standard could, in reality, compromise the statute's aims. As the chief sponsor and scholars pointed out, several practices most would readily deem religious, such as prayer, serving as a minister, or leading laity in church, were not always compelled and would not be protected with a compulsion definition.[354]

This insistence on foreclosing challenges to abortion laws stemmed in part from recognition that litigants had maintained as far back as the 1960s that the free exercise of religion was a basis on which to claim an abortion right.[355] Representative Hyde pointed to the fact that a coalition of religious organizations filed a brief with free-exercise claims in *Webster* as evidence that many religious groups "believe and assert fervently and passionately that there is a free exercise right to an abortion."[356] In trying to convince others of RFRA's potential to expand abortion access, James Bopp distributed a fall 1990 newsletter from the Religious Coalition for Reproductive Choice that discussed the group's long-held claim that free exercise and reproductive rights were inseparable.[357] Bopp

352. *Senate RFRA Hearings*, *supra* note 329, at 204 (statement of James C. Bopp); *see also* Letter from Edward R. Grant, Vice President of Americans United for Life, Re: H.R. 2797—Religious Freedom Restoration Act to Rep. Alan B. Mollohan 3 (Oct. 18, 1991), *in House RFRA Hearings*, *supra* note 325, at 466.

353. *See House RFRA Hearings*, *supra* note 325, at 136 (statement of Rep. Henry Hyde); *Senate RFRA Hearings*, *supra* note 329, at 107 (statement of Mark E. Chopko, General Counsel on behalf of the United States Catholic Conference); *id.* at 272 (statement of James C. Bopp, General Counsel, National Rights to Life Committee).

354. *See Senate RFRA Hearings*, *supra* note 329, at 46 (statement of Oliver S. Thomas); Letter from Rep. Stephen Solarz to Rep. Don Edwards (June 22, 1992), *in House RFRA Hearings*, *supra* note 325, at 128–30; Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1502 (1997); Laycock & Thomas, *supra* note 28, at 232-33.

355. *House RFRA Hearings*, *supra* note 325, at 270 (statement of James C. Bopp); *see also* Steinfels, *supra* note 327 (reporting that several anti-abortion groups were wary of the statute because "a number of civil libertarian and abortion rights groups in the anti-*Smith* coalition have been making that kind of Constitutional claim [that abortion restrictions infringe on free exercise] for years").

356. *House RFRA Hearings*, *supra* note 325, at 135 (statement of Rep. Henry Hyde).

357. *See* Biskupic, *supra* note 325.

acknowledged that some religious doctrines held not only that the decision to have an abortion could be consistent with one's religion but also that the ability to decide on abortion was religiously required. He explained that for some groups of believers both "large and small," "the right to make a free choice between abortion and childbirth is religiously mandated" and that "a religious duty to practice responsible parenthood by not bringing children into less than optimum conditions" can make the consideration of all reproductive options, including abortion, a "religious obligation."[358] He also recognized that a pregnant person could "logically" assert that "a state statute eliminating one of those options [of childbirth or abortion] burdens her religious practice."[359] In circumstances ranging from everything such as the use of peyote in worship to objections to autopsies, the longstanding history of sincere religious beliefs and the potential that those beliefs could be impinged upon were reasons to support RFRA. For abortion, these same principles were used as reasons to oppose it.

The different manifestations of abortion exceptionalism reveal that aspects of the legislative history reflected an asymmetrical view of the relationship between religion and reproductive rights—and, as a result, an attempt to grant asymmetrical legal protections. One of the examples that the statute's proponents cited most often as proof that RFRA was needed was that, under *Smith*, healthcare providers and Catholic hospitals who had religious objections to abortion could be compelled to perform them.[360] Coalitions for America, an advocacy organization opposed to abortion, supported RFRA because it believed the statute would be "an essential pro-life weapon" by restoring "needed protection" to, and providing a defense for, refusing healthcare providers.[361] While religious opposition to abortion was seen as consistent with religious liberty, support for abortion was seen as in conflict with it. The United States Catholic Conference argued that RFRA would create a "loophole" for safeguarding abortion rights, conveying the presumption that any claim involving a religiously based abortion would exploit the statute, rather than fulfill its purpose

358. James C. Bopp, *RFRA Needs Abortion Amendment*, *in House RFRA Hearings*, *supra* note 325, at 286-91.

359. *Id.* at 287.

360. *See, e.g.*, *Senate RFRA Hearings*, *supra* note 329, at 149 (statement of Michael P. Farris).

361. Coalitions for America, *Restoring Religious Liberty in America: An Analysis of the Religious Freedom Restoration Act*, *in Senate RFRA Hearings*, *supra* note 329, at 167.

of protecting religious freedom.[362] Others framed their support in terms of a tradeoff: a large benefit of preserving religious freedom in exchange for the slight risk of expanding abortion access.[363] This framing suggests that abortion rights and free-exercise rights are at odds and that the advancement of one curtails the other.

Ultimately, political and legal developments cleared the way for RFRA's passage. President Clinton's election and the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[364] which affirmed the central holding of *Roe*—that pregnant people have the right to choose whether to continue or end a pregnancy up until viability—seemingly made it unlikely that *Roe* would be overturned in the near future.[365] By reaffirming the right to privacy as the constitutional basis for the right to abortion, the need for an alternative basis in free exercise appeared less pressing.[366] House and Senate reports accompanying RFRA stated that the holding in *Casey* rendered discussion about the statute's applicability to abortion "increasingly academic."[367] Congress also inserted compromise language into the reports that stated that "the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*."[368] This language was decisive in resolving deadlock.[369]

But much like the rest of RFRA's legislative history, this language reveals how the desire to keep abortion claims out of court led abortion opponents to actually be less attentive to religious liberty in some ways. Representative Hyde changed his stance because he interpreted the phrase "prior to *Smith*" in the Congressional reports to incorporate "all [f]ederal court cases prior to *Smith*," including, most importantly, the Supreme Court's reversal of the district court's decision in *Harris v. McRae*.[370] He explained

362. *See* Linda Feldman, *Congress to Boost Freedom of Religion*, Christian Science Monitor (May 17, 1993), https://www.csmonitor.com/1993/0517/17013.html [https://perma.cc/YK7S-MGZE].

363. *See* Coalitions for America, *supra* note 361, at 167.

364. 505 U.S. 833 (1992).

365. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 896 (1994).

366. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. Ark. Little Rock L.J. 575, 582–83 (1998).

367. H. Rep. 103-88 (1993); S. Rep. 103-111 (1993).

368. H. Rep. 103-88 (1993); S. Rep. 103-111 (1993).

369. Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 Yale L.J.F. 416, 430–31 (2016).

370. 139 Cong. Rec. 9681-2 (1993) (statement of Rep. Henry Hyde).

that "[b]ecause free exercise challenges to abortion restrictions were ultimately unsuccessful" pre-*Smith*, he was "confident that although such claims may be brought pursuant to the Act, they will be unsuccessful."[371] The reports placated others for the same reason.[372] However, the Supreme Court in *Harris v. McRae* never addressed the merits of the free-exercise challenge. Therefore, ironically, people found reassuring a case that preserved the question of whether seeking or having an abortion could be considered part of the free exercise of religion. The very issue that they deemed a settled matter was still a live issue.

Furthermore, abortion opponents were correct that free-exercise cases in the abortion context were overwhelmingly unsuccessful. But they were also overwhelmingly unsuccessful in other contexts. In practice, religious exemptions were rare even before *Smith*. "[T]he government almost always prevailed, notwithstanding the Court's use of the language of so-called 'strict scrutiny.'"[373] Therefore, according to abortion opponents' own rationale, the reports were an inversion of their desired outcome. They incorporated a case about abortion in which religious claimants still theoretically had an opportunity to prevail because the case was dismissed on procedural grounds, and they incorporated an array of cases not about abortion in which religious claimants lost when the courts ruled on the merits.

### E. *Concerns in the Current Landscape*

Writing on the eve of the Supreme Court's much-anticipated decision in *Webster*, which the Solicitor General argued in a brief presented "an appropriate opportunity" to overrule *Roe*,[374] Nancy Stearns, who previously represented the class of female plaintiffs in *Abramowicz*, issued a warning and a demand. She stated that abortion opponents had significantly shaped the abortion debate and helped appoint "countless federal judges," while a high-profile case risked rolling back reproductive rights.[375] "Nonetheless," Stearns urged, "those supporting the right to choose remain the majority. Our voices must once again dominate the debate. If not, we may face a future many of us have long considered unthinkable."[376]

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371. *Id.*

372. Lederman, *supra* note 369, at 430–31.

373. *Id.* at 431.

374. Linda Greenhouse, *Reagan Administration Renews Assault on 1973 Abortion Ruling*, N.Y. Times, Nov. 11, 1988, at A20.

375. Nancy Stearns, Roe v. Wade*: Our Struggle Continues*, 4 Berkeley Women's L.J. 1, 8 (1988).

376. *Id.*

Thirty-three years later, the same cultural and legal trends are at work: changes in the judiciary, much-anticipated Supreme Court cases that directly threaten the fate of *Roe*,[377] and fears about the future of legal abortion. These are the same developments that have led people to suggest that the federal RFRA or state RFRAs could be used to protect abortion access.

Stearns' call to action is equally timely when we apply it specifically to people of faith who support reproductive rights. Viewed in light of the lost history of free-exercise arguments for the right to abortion, the erasure of religious beliefs that motivate or compel people to seek, support those who seek, and provide abortions is stark. These beliefs are as longstanding, firmly held, sincere, personal, and significant to those who hold them as any conflicting ones. They cannot be easily dismissed.

Since *Smith* and then *Casey*, the Free Exercise Clause, the federal RFRA, or state RFRAs have not formed a central part of efforts to challenge abortion restrictions.[378] The absence of RFRA claims is notable given that, during Congressional debates, many of the reasons people offered for why faith-based challenges to abortion restrictions would be unsuccessful were tenuous at the outset. For instance, members of Congress often cited a Congressional

377. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (holding that abortion providers could bring a pre-enforcement challenge to Texas's S.B. 8 against only state executive licensing officials, not against various other named public-official defendants); United States v. Texas, 142 S. Ct. 522 (2021) (dismissing as improvidently granted the writ of certiorari in the United States Department of Justice's challenge to S.B. 8); Jackson Women's Health Org. v. Dobbs, 951 F.3d 246 (5th Cir. 2020), *cert. granted* 141 S. Ct. 2619 (2021) (involving abortion providers' challenge to Mississippi's pre-viability ban on abortion).

378. *See* Stephanie Russell-Kraft, *The Right to Abortion—and Religious Freedom*, Atlantic (Mar. 3, 2016), https://www.theatlantic.com/politics/archive/2016/03/abortion-rights-a-matter-of-religious-freedom/471891 [https://perma.cc/NB83-7STH]. For exceptions, *see* Doe v. Parson, 960 F.3d 1115 (8th Cir. 2020) (holding that a Missouri law that required abortion providers to offer and pregnant people to certify in writing that they have been offered seventy-two hours before an abortion a booklet stating that life begins at conception did not violate the Free Exercise Clause because it was neutral and generally applicable); Doe v. Parson, 567 S.W.3d 625, 630 (Mo. 2019) (determining that the same Missouri law did not impose a substantial burden under Missouri's RFRA because it required only that pregnant people be offered the booklet, not that they read it); Complaint for Vacatur of Unlawful Agency Rule & Declaratory & Injunctive Relief, Baltimore v. Azar, 392 F. Supp. 3d. 602 (D. Md. 2019) (No. 1:19-cv-01103) [hereinafter Complaint for Vacatur] (arguing that federal regulations that prohibited healthcare providers working within Title X, the federally funded family planning program, from referring for abortions violate RFRA).

Research Service report that stated that such claims would be relevant only if the Supreme Court overruled *Roe* and thus allowed states to ban abortion before viability.[379] But, as the amicus briefs and lower-court cases from the 1970s and 1980s indicate, individuals consistently asserted not simply that complete prohibitions on abortion burdened religious exercise but also that disparities in public funding, limits on the provision of abortion in public hospitals, and informed-consent statutes did too.

Moreover, during Congressional debates, legislators, scholars, and advocates asserted that even if people of faith could satisfy the threshold elements of a RFRA claim, the government could simply assert a compelling interest in fetal life, which would be sufficient to bar any relief.[380] However, this explanation failed to address tailoring concerns about whether requiring a religious believer to remain pregnant and give birth would be the least restrictive means of furthering a compelling interest in fetal life.

Surprisingly, the only person to ever discuss tailoring concerns during the legislative debates over RFRA was James Bopp, who pointed out that individuals seeking abortion because of their faith could argue that "[t]here are a variety of ways in which a state could seek to assert an interest in protecting unborn life, most of them less restrictive than barring abortion."[381] He listed several, including promoting adoption by simplifying legal procedures and providing financial assistance to those who wish to adopt or state-sponsored advertising that promoted childbirth and adoption over abortion.[382] Based on the existence of these alternatives, he concluded that it was "entirely conceivable that some court could find that barring abortion would weigh too heavily on women seeking abortion."[383]

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379. David M. Ackerman, Cong. Rsch. Serv., 92-366 A, The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis 28 (1992) ("Whether such claims could be made . . . depends, of course, on whether the Supreme Court overturns its ruling in *Roe v. Wade* . . . and thus makes it possible for the States or the Federal government to legislate additional restrictions on abortion.").

380. *See id.* (stating that because of the government's compelling interest in protecting fetal life, "it seems doubtful that most . . . claims would have any likelihood of success"); *House RFRA Hearings*, *supra* note 325, at 21 (statement of Robert Dugan, Jr.); *Senate RFRA Hearings*, *supra* note 329, at 166 (statement of Coalitions for America); *id.* at 65 (statement of Douglas Laycock).

381. *Senate RFRA Hearings*, *supra* note 329, at 238 (statement of James C. Bopp).

382. *Id.*

383. *Id.*

A final proposition that the Congressional Research Service Report and some scholars, advocates, and legislators offered alongside references to the government's compelling interest was that the only real potential for RFRA challenges would be for some Jewish individuals who believe that abortion is required if a pregnant person's life is threatened.[384] This narrow view of compulsion omitted the fact that for some people of faith, their beliefs obligate them to make their own authentic, moral choice about childbearing or, because of childbirth's impact on their own health and well-being and that of their family, to arrive at that choice by prayerfully exploring all reproductive options. The duty to make an authentic moral choice and to contemplate all available alternatives necessitates the ability to choose abortion and therefore the legal availability of abortion.[385] Equally important, conduct that qualifies as religious exercise under RFRA includes conduct that is neither compelled by nor central to a person's faith, which suggests that the statute can be implicated in a much broader range of claims involving abortion access.[386]

The lack of free-exercise challenges to restrictive abortion laws is significant not only because the above rationales were dubious from the moment RFRA was introduced but also because since the statute's enactment—and the enactment of state RFRAs—the Supreme Court has become increasingly protective of some of the religious claimants who appear before it.[387] In the context of RFRA,

384. *See* Ackerman, *supra* note 379, at 29; Letter from Michael McConnell, Edward Gaffney & Douglas Laycock to Reps. Stephen Solarz and Paul Henry (Feb. 21, 1991), *in Senate RFRA Hearings*, *supra* note 329, at 164.

385. Brief for the Unitarian Universalist Association et al., *supra* note 76, at 21 ("Legally speaking, abortion should be a woman's right because, theologically speaking, making a decision about abortion is, above all, her responsibility."); *see also Senate RFRA Hearings*, *supra* note 329, at 228 ("What is evident from these positions on abortion is that major religious organizations do have religious positions approving—and giving religious justification for—abortion in much broader circumstances than the life of the mother.") (statement of James C. Bopp).

386. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 (2014) (explaining that the Religious Land Use and Institutionalized Persons Act amended RFRA's definition of "religion" and that Congress "defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'") (quoting 42 U.S.C. § 2000cc-5(7)(A)).

387. *See* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, Sup. Ct. Rev. (forthcoming 2021) (finding that the Roberts Court has ruled in favor of religious organizations far more frequently than its predecessors); *but see* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (determining that plaintiffs who challenged under the Establishment Clause the former President's executive

the Court has taken complicity claims for granted as a legal matter and indicated that courts must accept plaintiffs' assertion that laws impose a substantial burden on their religious exercise.[388] And most recently, the Supreme Court has endorsed a "most-favored-nation theory" of religious exercise, under which laws are not neutral and generally applicable for the purpose of *Smith* and therefore trigger strict scrutiny "whenever they treat *any* comparable secular activity more favorably than religious exercise."[389] If a law does not need to have the purpose or object of stifling religious exercise to receive strict scrutiny under the Free Exercise Clause or if religious exemptions are constitutionally required when, as is the case with most laws, a law has even just one secular exception that undermines the government's stated interest,[390] then recent doctrinal developments could—at least theoretically—open up more possibilities for bringing free-exercise challenges to contemporary abortion bans or regulations.

Another trend is occurring at the same time. State legislatures, emboldened by a conservative majority on the Court, have enacted with greater alacrity laws aimed at prompting the Court to overrule *Roe*.[391] Yet, amidst these dual developments, the voices

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order that banned the entry of foreign nationals from several Muslim-majority nations did not demonstrate a likelihood of success on the merits of their claim).

388. *See Hobby Lobby*, 573 U.S. at 725 ("[T]heir companies sincerely believe that providing the insurance coverage demanded . . . lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial."); *see also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (discussing RFRA cases that involve religious objections to being made complicit in the sinful conduct of others).

389. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); *see also* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689 (2019) (documenting the rise of the most-favored-nation theory).

390. *See* Dr. A. v. Hochul, 142 S. Ct. 552, 556–57 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief); Cavalry Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh J., dissenting from denial of application for injunctive relief); *see also* Oleske, *supra* note 389, at 728–29 (describing the single-secular-exception approach to religious exemptions and the critique that such an approach would implicate nearly every law).

391. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 171.204–210 (West 2021) (banning abortion beginning at six weeks after one's last menstrual period; barring public enforcement; and, instead, empowering private citizens to sue anyone who provides an abortion in violation of the statute, "aids or abets" the performance of such an abortion, or intends to engage in such conduct); *see also* Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (June 14, 2021), https://www.guttmacher.org/

of people seeking reproductive healthcare and abortion providers remain effaced, which has unique consequences in the case of religious exemptions. For example, this occlusion may lead courts to overlook the fact that, with contraception, "[l]ack of coverage also impedes the ability of women (and their partners) to live out their own religious and moral beliefs about reproduction"[392] Or, in the case of prohibitions on providing information or referrals for abortion, it may lead courts to overlook the fact that "patients' . . . religious exercise [could] be substantially burdened by the inability of their physician to provide honest counseling."[393] Against this backdrop, cases like *Struck*, *Abramowicz*, and *Women v. Connecticut* seem particularly revolutionary given their attempt to present the experiences of individual women. Pregnant people's voices, their actual experiences accessing reproductive healthcare, and the hardships they face in doing so—which these earlier cases successfully spotlighted—remain largely absent from recent cases involving employers' religious exemptions from contraceptive coverage and from recent abortion jurisprudence.[394]

With the developments that have caused some to increasingly turn their attention to free-exercise arguments for the right to abortion in view, the next Part assesses the practical and strategic aspects of such arguments.

## III. Considerations in Pursuing Free Exercise or RFRA Claims

From a practical perspective, asserting Free Exercise or state RFRA challenges to laws banning or curtailing access to abortion may be limited in terms of the effect of their remedial scope. The remedy would likely be individual exemptions from laws for particular religious people, as opposed to a finding that laws impose an

article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades [https://perma.cc/82M4-4J7Q] (noting that from January 2021 to April 2021, 561 abortion restrictions, including 165 abortion bans, were introduced across forty-seven states and that 2021 was tied with 1973 for the most enacted abortion restrictions in a single year).

392. Sepper, *supra* note 21, at 205.

393. Complaint for Vacatur, *supra* note 378, at 53.

394. *See* Dahlia Lithwick, *Women Are Being Written Out of Abortion Jurisprudence*, Slate (July 2, 2020, 6:06 PM), https://slate.com/news-and-politics/2020/07/abortion-supreme-court-women.html [https://perma.cc/DX36-69W2] (lamenting the fact that the plurality opinion in *June Medical Services v. Russo* featured "no women" but instead "a lot of physicians (mostly male) seeking admitting privileges at hospitals," and "a lot of judges (mostly male) substituting their own judgment for the women who desire to terminate a pregnancy").

undue burden in one or all applications for pregnant people seeking abortion for either religious or secular reasons.[395] In addition, in the past, when litigants have raised free-exercise arguments for abortion rights, these arguments typically either have not succeeded or, most often, have been ignored by the courts in favor of a focus on the right to privacy.[396] This fact may be part of a larger pattern scholars have documented, in which religious-exemption claims brought by people of faith who engage in forms of religious exercise that are associated with more progressive causes have historically faced limited legal success, compared to claimants with beliefs associated with more conservative positions.[397] In a similar manner, scholars have shown that affirmative religious claimants, meaning those who seek to engage in some action that the law restrains rather than

395. *See* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. Rev. 1595, 1611 (2018) (explaining that, whether they result from litigation brought under constitutional free-exercise grounds or statutory grounds such as RFRA, "[j]udicially-created religious exemptions are functionally a species of as-applied adjudication" because "the court will order a remedy that protects the exercise of the constitutional right, but otherwise leaves the law in place to apply to other circumstances that may arise"); *see also* March for Life v. Burwell, 128 F. Supp. 3d 116, 131 (D.D.C. 2015) (explaining that RFRA requires the court to "focu[s] on the context of the religious objectors, and conside[r] whether and how the government's compelling interest is harmed by granting specific exemptions to particular religious claimants").

396. *See, e.g.*, Sojourner v. Roemer, 772 F. Supp. 930 (E.D. La. 1991) (declining to address free-exercise challenge to law that prohibited abortion with narrow exceptions), *aff'd*, 974 F.2d 27 (5th Cir. 1992); Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 552 F. Supp. 791 (E.D. Pa. 1982) (declining to address free-exercise-challenge to state informed-consent law), *aff'd*, 476 U.S. 747 (1986); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980) (declining to address free-exercise challenge to a state law that required second-trimester abortions to be performed in a hospital), *aff'd*, 794 F.2d 994 (5th Cir. 1986); Akron Ctr. for Reprod. Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979) (declining to address free-exercise challenge to a state informed consent law and waiting period), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 462 U.S. 416 (1983); Comm. to Defend Reprod. Rights v. Myers, 156 Cal. Rptr. 73 (Cal. Ct. App. 1979) (dismissing in one sentence a free-exercise challenge to a California law that prohibited state funding for abortions), *overruled by* 172 Cal. Rptr. 866 (Cal. 1981); Right to Choose v. Byrne, 398 A.2d 587 (N.J. Ch. Div. 1979) (dismissing on standing grounds free-exercise challenge to a New Jersey law that barred state funding for abortions), *rev'd*, 450 A.2d 925 (N.J. 1982); YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972) (not addressing whether state law that banned abortions with limited exceptions violated the Free Exercise Clause), *aff'd*, 493 F.2d 1402 (3d Cir. 1974); *but see* McRae v. Califano, 491 F. Supp. 630, 709 (E.D.N.Y. 1980) (finding that the Hyde Amendment violated the Free Exercise Clause).

397. *See* Platt, Franke, Shepherd & Hadjiivanova, *supra* note 11, at 64.

refuse to do something the law requires, persistently face unique doctrinal obstacles.[398] For instance, courts may insist that such individuals do not face direct government coercion or that there are alternative ways to exercise one's faith.[399] The history of free-exercise arguments for the right to abortion, however, helps demonstrate the similarities between affirmative and refusing conduct that the law insists on treating as different. People of faith have illustrated over decades how individuals whose religion dictates obtaining an abortion or whose religion compels providing abortions do face coercion when they are put to a choice between adhering to their faith or adhering to the law. And suggesting that pregnant people can select an alternative would undermine the very conviction that pregnant people have the right to decide how to live out their faith in sexual and family matters.

From a more strategic perspective, asserting these claims could have three potential unintended consequences that are worth discussion by scholars, litigants, and advocates. First, grounding the right to abortion in free exercise could potentially re-inscribe the privacy framework, which can minimize the gender-equality issues at stake in the right to abortion and narrow the scope of the right itself by entrenching the idea that it is government non-intervention, rather than affirmative support, that best enables people to secure equality.[400] The idea of privacy is built on the notion that private acts operate primarily at the individual level.[401] But, as scholars and activists have long pointed out, control over the timing and circumstances of childbearing is central to pregnant people's status and well-being as a collective.[402] It affects their health, education, economic opportunities, and relationships. It also "repudiate[s] customary assumptions about women's agency and women's roles"

398. *See* Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 KAN. L. REV. 535, 543–44 (2020); *see also* Sepper, *supra* note 136, at 1512 (describing the law's asymmetrical treatment of providers).

399. *See* Sepper, *supra* note 136, at 1512. For an example of this type of reasoning, see Doe v. Parson, 567 S.W.3d 630 (Mo. 2019) (determining that a Missouri law that required people seeking abortions to certify in writing that they received a booklet stating that life begins at conception did not impose a substantial burden under the state RFRA because the law required only that people be offered the booklet, not that they read it).

400. *See* Sepper, *supra* note 21, at 215.

401. *See* Catharine A. MacKinnon, *Abortion: On Public and Private*, *in* TOWARD A FEMINIST THEORY OF THE STATE 184, 187 (1989).

402. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 818 (2007); LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 382–83 (1985).

by recognizing them as competent, self-determining individuals who do not exist solely to fulfill the responsibility of motherhood.[403] Justice Ginsburg long maintained the virtues of situating abortion within an equal-protection framework, lamenting the fact that the Supreme Court never heard *Struck v. Secretary of Defense*[404] because she believed it provided "an ideal case to argue the sex equality dimension of laws and regulations governing pregnancy and childbirth."[405] In contrast, the privacy rationale has historically been used to perpetuate individuals' unequal status because it is seen as a "passive right" that holds that "as long as the public does not interfere, autonomous individuals interact freely and equally."[406] *Harris v. McRae*,[407] which by upholding bans on Medicaid coverage for abortion services created disparate race and class effects, provides one example of this rationale. It maintained that liberty was realized solely by protecting people from state-imposed obstacles to the right to abortion, not by giving them the resources to make that right effective.[408] Nancy Stearns recognized immediately after *Roe v. Wade*[409] was decided that a distinction between privacy and equality could "have very important implications for access questions like Medicaid."[410] Free-exercise claims revolve around the concept of private "choices" and a personal realm within which the state cannot reach. An unintended consequence of doubling down on the privacy and closely related "choice" rationale is that it could further position abortion as a right that the government is not required to affirmatively support, along with the idea that all

403. Siegel, *supra* note 402, at 819.

404. 409 U.S. 1071 (1972) (vacating and remanding for consideration of mootness).

405. Ginsburg, *supra* note 153, at 799.

406. MacKinnon, *supra* note 401, at 190; *see also* Rebecca L. Rausch, *Reframing* Roe*: Property over Privacy*, 27 Berkeley J. Gender L. & Just. 28, 31 (2012) (explaining that the right to privacy is "relegated to the land of negative rights, which might provide the right woman with reproductive choice free from government intrusion, but for the wrong woman—one with limited resources—the so-called 'choice' becomes nonexistent"); Loretta Ross, *What Is Reproductive Justice?*, *in* Reproductive Justice Briefing Book: A Primer on Reproductive Justice and Social Change 4, (explaining that reproductive justice "[m]ov[es] beyond a demand for privacy and respect for individual decision making to include the social supports necessary for . . . individual decisions to be optimally realized").

407. 448 U.S. 297 (1980).

408. *See id.* at 316 ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.").

409. 410 U.S. 113 (1973).

410. Goodman, Schoenbrod & Stearns, *supra* note 237, at 27.

people have sufficient structural support that enables them to have choices in the first instance.[411] The privacy rationale may merely affirm the status quo, but the status quo is what reproductive justice aims to change.

A second factor to consider is how zeroing in on the morality of abortion could unintentionally perpetuate abortion exceptionalism. The moral concern of abortion has historically served as a justification for treating it differently than other forms of healthcare—typically by singling it out for onerous restrictions.[412] Some feminists expressed reservations about CCS because even though its members stated that the referral network "was intended to place abortion in a moral context where women would be free from guilt" and "cut away a lot of the moralizing reactions that weren't about the morality of the issue at all, but were really about the repression of women," the very existence of abortion counseling "prevented the moral issues related to abortion from being completely diffused" in such a way that would enhance women's autonomy, not reproduce their subordination.[413] Reproductive-rights advocates have long worked for abortion care to be seen simply as healthcare.[414] The idea of a weighty moral decision may fuel a conception that the decision is inevitably difficult or tragic—regardless of people's varying experiences—or, alternatively, redound in favor of one-size-fits-all measures that employ morality to diminish pregnant people's moral agency, rather than promote it.[415] CCS provides an example. Shortly after abortion was legalized in New York in

411. Dorothy Roberts, *Reproductive Justice, Not Just Rights*, Dissent Mag., (2015), https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights [https://perma.cc/42SY-6LEY] (emphasizing the need to focus on justice, rather than individual choice, because the concept of choice erodes the argument for the state support that most people need to exercise control over their reproductive lives); Ross, *supra* note 406, at 4 (explaining that the reproductive justice framework "analyzes how the ability of any woman to determine her own reproductive destiny is linked directly to the conditions in her community—and these conditions are not just a matter of individual choice and access").

412. *See* Greenhouse & Siegel, *supra* note 336, at 1430.

413. Wolff, *supra* note 170, at 167.

414. *See, e.g.*, *Facts Are Important: Abortion Is Healthcare*, Am. Coll. Obstetricians & Gynecologists, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare [https://perma.cc/Y54M-WNFL] (last visited Jan. 16, 2022).

415. *But see* Rebecca Todd Peters, Trust Women: A Progressive Christian Argument for Reproductive Justice 9 (2018) ("[T]he problem is not in recognizing that abortion is a moral issue. The problem is that we do not trust women to make moral decisions about their bodies, their lives, and their families.").

1970, a state legislator introduced a bill to require women to receive counseling from a psychologist or member of the clergy before having an abortion.[416] Moody and other CCS members opposed it for similar reasons that advocates today oppose mandatory waiting periods and counseling laws, which can be seen as contemporary twists on the old proposal. In the clergy's experience, women had already made their decisions by the time they decided to seek an abortion; counseling was of little benefit if abortion were legal; and requiring counseling would only burden women.[417] *Planned Parenthood of Southeastern Pennsylvania v. Casey* provides another example, in which the Court justified a parental-consent statute with references to religious consultation, stating that a waiting period for minors "may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family."[418]

The third factor to consider is the effect of free-exercise claims on nonbelievers. RFRA and the Free Exercise Clause give only religious individuals possible relief from abortion restrictions. People can have equally compelling and sincere secular convictions that underpin their decision to have an abortion—yet lack a similar remedial avenue.[419] Further, abortion restrictions harm both people of faith and people for whom abortion is not a moral or difficult issue or who do not draw on faith in seeking one.

Collectively, much like the right to privacy or equal-protection principles, the various dimensions of free-exercise claims do not indicate that such claims are not worth pursuing. Instead, they indicate two facts. First, any single constitutional provision or legal tool is imperfect for securing equality for those who, as Catharine MacKinnon notes, are "constituted unequal prior to law" in social arrangements and who therefore need broad-based movements, including the religious reproductive justice movement, that aim to shed these structural impediments.[420] Ginsburg in *Struck* and Stea-

416. *See* Wolff, *supra* note 170, at 92.

417. *See id.*

418. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899–900 (1992).

419. *See* Amy Littlefield, *The People Reclaiming Religious Freedom From the Christian Right*, Vice (Nov. 12, 2019, 5:00 AM), https://www.vice.com/en/article/59n85z/the-people-reclaiming-religious-freedom-from-the-christian-right [https://perma.cc/NF22-BFJN] (reporting on advocates who remain circumspect about pursuing religious exemptions for politically progressive causes out of concern that seeking exemptions "gives unfair weight to those who act out of religious, rather than secular, convictions").

420. MacKinnon, *supra* note 401, at 44. Justice Ginsburg noted the interconnected constitutional bases for the right to abortion in discussing

rns in *Abramowicz v. Lefkowitz*[421] melded free-exercise, privacy, and equal-protection arguments to challenge abortion laws as part of a more pervasive social system that reinforced pregnant individuals' unequal status.

Second, even if the Free Exercise Clause is not likely to be the only or primary means of safeguarding abortion access, unbundling religious liberty from inexorable opposition to abortion—whether through bringing claims by religious people under the Free Exercise Clause and state RFRAs or through religious-reproductive-justice advocacy—is much needed. Despite the potential doctrinal weaknesses of free-exercise arguments for the right to abortion, these arguments nonetheless have value and an important role to play in this effort. They elucidate the wide range of faith positions on abortion and, by extension, foreground the full range of harms that state abortion restrictions can pose. For example, while free-exercise arguments cannot alone ensure that the complete spectrum of reproductive healthcare, including abortion care, is legally available to all, they can complement other litigation efforts. In doing so, free-exercise arguments expose how modern abortion statutes can in reality undercut religious liberty not only by dispossessing pregnant people of the ability and freedom to live out their personal theological tenets concerning pregnancy but also by inducing them to disregard the conviction that abortion is correct and moral in exchange for convictions that they conscientiously reject. The conventional account of the relationship between faith and reproduction, driven not only by cultural narratives but also by high-profile First Amendment cases, creates a narrow and oversimplified conceptualization of both religious freedom and reproductive rights, in which these two concepts are ineluctably in tension. This incomplete rendering reinforces and replicates the type of legislative

*Struck* in her Senate confirmation hearings. When she was asked whether equal protection or individual autonomy formed the justification for the right to abortion, she responded, "My answer is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices." *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States*, *supra* note 148, at 207. The reproductive justice movement has long emphasized the importance of conceiving of the right to determine whether and when to bear children and parent the children one has in a safe environment as inseparable from other movements that address intersecting oppressions. *See* Ross & Solinger, *supra* note 402.

421. Hall v. Lefkowitz (Abramowicz v. Lefkowitz), 305 F. Supp. 1030 (S.D.N.Y. 1969).

asymmetries that are seen in the debate over RFRA. Placing the lost history of free-exercise arguments for the right to abortion in view illuminates the now-often-overlooked fact that, by interfering with bodily autonomy, dignity, and pregnant people's agency, state limitations on abortion additionally implicate religious exercise. This history also exposes the fact that calls to safeguard religious liberty are incomplete if they also do not recognize the decades-long conviction that, for many people of faith, part of upholding the commitment to religious liberty requires ensuring that people have the right—and resources—to make the ultimate determination to obtain an abortion according to their own faith. It would be difficult to simultaneously call for protections for religious exercise yet fail to recognize the history of religious reproductive justice.

## Conclusion

Surfacing and examining the history of free-exercise arguments for abortion rights is a call to reimagine how we conceive of the connection between religion and reproductive rights. This history reveals that people of faith have long been at the forefront of claims about justice and dignity in the abortion context. But cultural and legal dialogues often elide both this faith-based commitment to reproductive rights and the long-established constitutional claim that an integral component of free exercise is the right to have abortions, provide abortions, and support abortion access. This erasure matters because it creates dignitary harms, as it discounts the perspectives of many religious people while misrepresenting the compatibility between faith and reproductive autonomy. And, as the legislative history of RFRA, conscience protections, and contemporary abortion restrictions demonstrate, it can generate lopsided legal protections depending on whether one opposes or supports abortion. Disregarding the religious grounding for abortion can also lead courts, legislatures, and the public to ignore the moral reasoning and lived experiences of pregnant people. The history of religious reproductive justice is long-lived and robust, and highlighting it—through media, scholarship, and constitutional or statutory claims—can help build a more comprehensive, pregnant-person-centered account of both religious freedom and reproductive freedom. The need to uplift this history is both evident and urgent.