

# Kosher Babies: How Israel's Approach to IVF Can Guide the United States in Fighting Separation of Church and State Abuses

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*“In Israel, in order to be a realist you must believe in miracles.”*<sup>1</sup>

## I. INTRODUCTION

In August 2014, Barbara Webb, a chemistry teacher working at a Catholic high school in Detroit, was terminated from her job after nine years of employment.<sup>2</sup> Though she has yet to file a lawsuit, she claims her firing was a result of her “non-traditional” pregnancy.<sup>3</sup> Webb’s conversations with the school administrators had made it clear their concerns were tied to “lifestyle or actions contradictory to the Catholic faith.”<sup>4</sup> The circumstances surrounding Ms. Webb’s firing are not unique. In October 2010, Christa Dias, a non-Catholic computer teacher in the Archdiocese of Cincinnati was happy to find out that she was pregnant.<sup>5</sup> She informed her boss of the good news.<sup>6</sup> The principal congratulated her, but other school officials did not share the sentiment.<sup>7</sup> Three days later Dias was fired for being unmarried, and pregnant via artificial insemination.<sup>8</sup> The school informed her that she was terminated for “failure to comply and act consistently in

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<sup>1</sup> Interview with David Ben-Guiron, CBS (Oct. 5, 1956), [https://en.wikiquote.org/wiki/David\\_Ben-Guiron](https://en.wikiquote.org/wiki/David_Ben-Guiron).<sup>3</sup> [http://perma.cc/8SM4-NSRK].

<sup>2</sup> Robert Allen & Katrease Stafford, *Gay Teacher Says Pregnancy Cost Her Catholic School Job*, USA TODAY (Sep. 3, 2014), <http://www.usatoday.com/story/new/nation/2014/09/03/gay-teacher-says-pregnancy-cost-her-job/15004783/> [http://perma.cc/GTN9-U4TR].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Bridgette Dunlap, *Why a Catholic School Teacher Was Fired for an IVF Pregnancy and Why She Was Awarded \$171,000*, RH REALITY CHECK, <http://rhrealitycheck.org/article/2013/06/10/why-a-catholic-school-teacher-was-fired-for-an-ivf-pregnancy-and-why-she-was-awarded-171000/> (last updated Jun. 18, 2013, 11:30 am) [http://perma.cc/7AFV-JUQH].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

accordance with the stated philosophy and teachings of the Roman Catholic Church.”<sup>9</sup> She filed suit and a jury awarded her \$171,000 in damages.<sup>10</sup> In 2012, Emily Herx, an elementary school teacher, filed an anti-discrimination suit against the Archdiocese of Fort Wayne.<sup>11</sup> School officials declined to renew her contract after she underwent a third round of IVF treatment.<sup>12</sup> The school put forth an argument, “used by a growing number of religious groups to justify firings related to IVF treatment or pregnancies outside of marriage: freedom of religion gives them the right to hire (or fire) whomever they choose.”<sup>13</sup> The school took it one step further by arguing, “religious liberty protects the school from having to have to go to court at all.”<sup>14</sup> The 7<sup>th</sup> Circuit awarded Herx \$1.9 million in damages.<sup>15</sup>

These stories are not uncommon. There are many people for whom problems with infertility or their sexual orientation force them to seek alternative means to creating a family. Because of the continued development of Assisted Reproductive Technologies (“ARTs”), their use doubled over the past decade, even though it is still relatively rare when compared to traditional pregnancy methods.<sup>16</sup> However, religious organizations often have legal justifications for the firing of their employees for public conduct that is otherwise explicitly prohibited by law. Although the

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<sup>9</sup> *Dias v. Archdiocese of Cincinnati*, 2012 WL 1068165 (2012).

<sup>10</sup> Dunlap, *supra* note 6.

<sup>11</sup> MOLLY REDDEN, *CATHOLIC CHURCH ARGUES IT DOESN'T HAVE TO SHOW UP IN COURT BECAUSE RELIGIOUS FREEDOM*, MOTHER JONES (NOV. 17, 2014), <http://www.motherjones.com/politics/2014/11/catholic-school-fires-teacher-using-ivf-unusual-religious-freedom-defense> [<http://perma.cc/D5YB-VACE>].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> REBECCA GREEN, *INDIANA DECISIONS - MORE ON: THE EMILY HERX CASE ISN'T OVER YET* (JAN. 22, 2015), INDIANA LAW BLOG, [http://indianalawblog.com/archives/2015/01/indiana\\_decisio\\_619.html](http://indianalawblog.com/archives/2015/01/indiana_decisio_619.html) [<http://perma.cc/EUD6-FE9K>].

<sup>16</sup> *Outline for a National Action Plan for the Prevention, Detection, and Management of Infertility* (May 7, 2010), CENTERS FOR DISEASE CONTROL, 5, <http://www.cdc.gov/art/PDF/NationalActionPlan.pdf> [<http://perma.cc/6X3Q-MUAD>].

Pregnancy Discrimination Act of 1978 (“PDA”) clearly prohibits discrimination based on pregnancy, childbirth, or related medical conditions<sup>17</sup>, the PDA, as interpreted by the courts, has yet to explicitly cover Assisted Reproductive Technologies.<sup>18</sup> Discrimination in any form is very clearly prohibited in numerous laws, yet it is still happening in America today.<sup>19</sup>

It comes as no surprise to many that religion seems to be central to the practice of discrimination, legal or not.<sup>20</sup> This may be due in part to the rise of the modern western state “as a political organization that has bid farewell to the medieval union of church and state in the *res publica christiana*.”<sup>21</sup> However, the division between church and state has continued to evolve in Europe, and in the United States as well.<sup>22</sup> Modern constitutions promote the separation of church and state in many different ways, and therefore, promote protections in different ways, also. The First Amendment of the United States Constitution was written to address “religious activities by delineating the structural relationship between church and state and guaranteeing individual freedom from state coercion.”<sup>23</sup> The Establishment Clause and the Free Exercise Clause of the United States Constitution are not unique as other modern constitutions contain these two clauses

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<sup>17</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>18</sup> SEE VALERIE GUTMANN, *ASSISTED REPRODUCTIVE TECHNOLOGIES: FAILURE TO COVER DOES NOT VIOLATE ADA, TITLE VII, OR PDA*, 31 J.L. MED. & ETHICS 2, 314-16 (2003).

<sup>19</sup> See Venessa Wong, *Workplace Discrimination Charges at Record High*, BLOOMBERG BUSINESS (July 29 2011), <http://www.bloomberg.com/bw/lifestyle/workplace-discrimination-charges-at-record-high-07292011.html> [<http://perma.cc/S8PR-J4YP>].

<sup>20</sup> According to a national survey released by the Tanenbaum Center for Interreligious Understanding, more than one-third of workers surveyed say they have personally experienced or witnessed some form of religious non-accommodation in their workplace. Additionally, nearly half-non Christian workers reported experiencing or witnessing religious non-accommodation at work. See *What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion*, p. 8.

<sup>21</sup> WINFRIED BRUGGER, ON THE RELATIONSHIP BETWEEN STRUCTURAL NORMS AND CONSTITUTIONAL RIGHTS IN CHURCH-STATE-RELATIONS 21 (2007), <http://www.encyclo.co.uk/meaning-of-Res%20publica%20christiana> [<http://perma.cc/ZJT5-QJFR>]. *Res publica christiana* is a Latin phrase combining the idea of *res publica* and *christiana* to describe the worldwide community of Christianity and its well-being, *id.*

<sup>22</sup> *Id.* at 22.

<sup>23</sup> *Id.* at 23.

as well.<sup>24</sup> A constitution containing the two clauses, however, does not necessarily mean a barrier between church and state has been created, nor is it easy to enforce.<sup>25</sup> Like the German Basic Law, for example, the clauses “tend to be more specific in the scope of protection.”<sup>26</sup>

In Israel, the relationship between church and state is not one of strict separation in theory and accommodation, as in the United States, or of division and cooperation, as in Germany.<sup>27</sup> Instead, there is a formal unity between the church and state with a substantive division.<sup>28</sup> People who are associated with a religion are subject to religious law when the issue involves an area that the Israeli law has authorized to be controlled by religious law.<sup>29</sup> When someone is not associated with a religion, in those specific areas where religious law applies, they are considered to be self-governing.<sup>30</sup> For example, because Israeli law does not currently allow civil marriage,<sup>31</sup> “the only form of standard marriage that can take place in Israel is marriage through the religious courts of one of the recognized religious communities.” In the United States, when people are associated with any religion, they are still thought to be subject to federal and state laws; however, when that person is a pregnant woman who works for a religious-based employer federal or state law does not protect her. She is subjected to the whim of that religious employer, in many cases, even if she

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<sup>24</sup> *Id.* at 25.

<sup>25</sup> *Id.* at 27.

<sup>26</sup> See BRUGGER, *supra* note 22, at 25.

<sup>27</sup> *Id.* at 40.

<sup>28</sup> *Id.*

<sup>29</sup> See MARCIA GELPE, *THE ISRAELI LEGAL SYSTEM* 5, 287 (2013). All religious courts have subject matter jurisdiction over issues of personal status. However, the scope of exclusive jurisdiction differs for the different religious courts. Christian religious courts have exclusive jurisdiction over marriage, divorce, and alimony. Jewish and Druze religious courts have exclusive jurisdiction over only marriage and divorce, *id.*

<sup>30</sup> *Id.* at 284. The current arrangement draws influence from the rule of the Ottoman Empire and its continuation into the British Mandate. When Israel became a state, the British laws of the Mandate were left in place. Over time those laws, including marriage and divorce, were revised or replaced. However, the basic principle of leaving each religious community to manage its own affairs remained, *id.*

<sup>31</sup> A bill proposed in the Israeli Parliament, the Knesset, that would have instituted civil marriage, including for gays, failed by a margin of 39-50 in July 2015. See Eric Cortellessa, *Why is There No Civil Marriage in Israel?*, *THE TIMES OF ISRAEL* (July 12, 2015), <http://www.timesofisrael.com/why-is-there-no-civil-marriage-in-israel/> [http://perma.cc/T25T-CZQ6].

does not associate herself with that religion beyond employment with the organization. Female church employees who are thinking about starting a family using procreative technologies may think otherwise if they know they will lose their jobs. This forms the basis for the analysis of how the two rights must be reconciled.

This Note will analyze the legal foundations of pregnancy discrimination that is permitted by the freedom of religion, and will explore the relationship between religion and law in Israel that can provide insight into eliminating the discrimination women face from their religious employers in America. This Note will argue that an alternative model of the separation of church and state may provide for a framework that fulfills the aims of the freedom of religion while preventing discrimination of pregnant women employed by religious organizations. Open discussion of the separation of church and state issues is an important step in achieving the aims of the freedom of religion provisions in the Constitution and anti-discrimination laws. Part II briefly describes the process and moral issues related to In vitro fertilization. Part III examines employment and pregnancy discrimination in the United States. Part IV gives an analysis of rights in the philosophical context. Part V gives an overview of the separation of church and state in the United States. Part VI gives an overview of the Israeli legal system. Part VII describes the compatibility of ART's with the exercise of religion. Part VIII describes the reconciliation of religions adherence and democratic values.

## II. IN VITRO FERTILIZATION

It is estimated that one out of six couples experience at least one form of infertility problem throughout their reproductive lifetime.<sup>32</sup> In vitro fertilization (“IVF”) is one of many Assisted Reproductive Technologies (“ART’s”) that have been developed to treat infertility. The term “in vitro” means ‘outside the living body and in an artificial environment,’ and literally is Latin for “in glass.”<sup>33</sup> According to estimates, more than five million babies have been born worldwide since the first baby was born via IVF in 1978.<sup>34</sup> IVF is the process of manually combining an egg and sperm in a laboratory, thus creating an embryo.<sup>35</sup> The process occurs in four stages.<sup>36</sup> During the first stage, ovulation induction, the woman is given hormones to stimulate her ovaries in order to facilitate the production of multiple eggs.<sup>37</sup> During the second stage, the eggs are surgically removed.<sup>38</sup> The third stage is where the fertilization occurs.<sup>39</sup> The eggs are first placed in a petri dish, and then sperm is introduced.<sup>40</sup> After approximately eighteen hours, the first egg divides into two cells, and shortly after divides again into a pre-embryo.<sup>41</sup> During the last stage, if the embryo

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<sup>32</sup> ART Fact Sheet, *EUROPEAN SOCIETY OF HUMAN REPRODUCTION AND EMBRYOLOGY* (June 2014), <http://www.eshre.eu/Guidelines-and-Legal/ART-fact-sheet.aspx> [<http://perma.cc/F5WU-46KS>].

<sup>33</sup> Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/in%20vitro> [<http://perma.cc/8FX4-3F3H>].

<sup>34</sup> ART Fact Sheet, *supra* note 33. Louise Joy Brown was the first “test tube baby” born on July 25, 1978. See *The World’s First Test Tube Baby*, PBS (Aug. 5, 2015), <http://www.pbs.org/wgbh/americanexperience/features/general-article/babies-worlds-first/> [<http://perma.cc/U4PN-9T8E>].

<sup>35</sup> Nivin Todd, *Infertility and In Vitro Fertilization*, WEBMD MEDICAL REFERENCE, (Last visited Mar. 10, 2015), <http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization> [<http://perma.cc/84WU-NL4V>].

<sup>36</sup> Nicole L. Cucci, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN’S L. REV. 417, 420-21 (2012).

<sup>37</sup> *Id.* at 420-21

<sup>38</sup> *Id.* at 421.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Cucci, *supra* note 37 at 420-21.

is not frozen for later use, one to three embryos<sup>42</sup> are implanted into the uterus<sup>43</sup> of the biological mother, non-biological mother, or surrogate.<sup>44</sup> These procedures offer couples the opportunity to produce a child when their own sperm and/or eggs may not be healthy enough to do so (or are actually nonexistent), and may be a couple's best option or only reproduction option available.<sup>45</sup>

#### A. MORAL ISSUES WITH IVF

IVF is a controversial subject and “[d]ebates on IVF are clouded by different ethical value systems and deep prejudices.”<sup>46</sup> When that debate does occur, many questions are raised that have no easy answer. Surplus embryos are used to substantially enhance the chance of success. This inevitably leads to the question of whether or not they are life forms. If so, then the next question is, who gets to decide how those “surplus” embryos are treated? The answers to these questions are based on one's belief on when life is said to begin; whether it begins at conception or implantation. Science has its view, and each world religion has its own view. Despite the controversy, adjustments have been made within Islam, Judaism, Confucianism, Hinduism, and most forms of Christianity, to facilitate the fertility of their adherents.<sup>47</sup> The only world religion

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<sup>42</sup> *Id.*

<sup>43</sup> *In Vitro Fertilization: IVF*, AMERICAN PREGNANCY ASSOCIATION (last updated, Sep. 2014), <http://americanpregnancy.org/infertility/in-vitro-fertilization> [<http://perma.cc/4RPM-MSFT>].

<sup>44</sup> *Surrogacy*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/fertility-treatment-options-surrogacy.html> [<http://perma.cc/CWB9-XDD9>].

<sup>45</sup> *Gamete and Embryo Donation: Deciding Whether to Tell*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (last visited Oct. 1, 2014), [http://www.reproductivefacts.org/FACTSHEET\\_Gamete\\_Donation\\_Deciding\\_Whether\\_To\\_Tell/](http://www.reproductivefacts.org/FACTSHEET_Gamete_Donation_Deciding_Whether_To_Tell/) [<http://perma.cc/W8YU-BE8F>].

<sup>46</sup> Amit Banerjee, *An Insight into the Ethical Issues Related to In Vitro Fertilization*, THE INTERNET JOURNAL OF HEALTH (2006), <https://ispub.com/IJH/6/1/4581> [<http://perma.cc/AQ3W-LYYQ>].

<sup>47</sup> *Id.*

that “unequivocally condemns the use of IVF” is Catholicism.<sup>48</sup> Specific religious views on IVF will be discussed at length in Part V.

### III. EMPLOYMENT AND PREGNANCY DISCRIMINATION

No single factor has contributed more to the growth and development of the United States labor force than the rise of the working woman.<sup>49</sup> A combination of factors led to the increased number of women in the workplace.<sup>50</sup> The post-World War II economy enjoyed major growth that vastly increased the labor demand.<sup>51</sup> The increased demand of labor in combination with “[t]he civil rights movement, legislation promoting equal opportunity in employment, and the women’s rights movement created an atmosphere that was hospitable to more women working outside the home.”<sup>52</sup> Though, this does not mean women were automatically granted equal rights in the workplace.

#### A. PREGNANCY DISCRIMINATION ACT

Several Supreme Court cases in the 1970’s laid the foundation for women gaining equal rights in the workplace. In *Cleveland Board of Education v. LaFleur*, two pregnant school teachers brought suit to challenge a mandatory maternity leave rule that forced them to quit their jobs without pay several months before giving birth.<sup>53</sup> The Court held that the mandatory termination provisions of the Cleveland and Chesterfield County maternity regulations violated the Due

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<sup>48</sup> *Id.*

<sup>49</sup> Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LABOR REVIEW, 18, (May 2002) available at <http://www.bls.gov/opub/mlr/2002/05/art2full.pdf> [<http://perma.cc/W5B8-ME9G>].

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 414 U.S. 632 (1974).

Process Clause of the Fourteenth Amendment.<sup>54</sup> This was a crucial case for female workers. However, the Court reversed course in two subsequent cases decided later in 1974 and in 1976 that left pregnant women unequal and unprotected.<sup>55</sup>

Congress then enacted the Pregnancy Discrimination Act of 1978 (“PDA”) to make it clear that, “discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (“Title VII”).”<sup>56</sup> Title VII, however, provides an exemption that allows religious organizations to discriminate on the basis of religion.<sup>57</sup> More specifically, it authorizes religious organizations to make decisions for their employees regardless of the employee’s connection to the function of the church in a religious capacity.<sup>58</sup> In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,<sup>59</sup> the Supreme Court upheld this broad exemption when the church fired one of its maintenance workers for failing to qualify for a certificate that he was a member of the Church and eligible to attend its temples.<sup>60</sup> It is easy to see though, the justifications a religious organization such as a Catholic church might have, in situations such as the insistence that its priests be Catholic.<sup>61</sup>

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<sup>54</sup> *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 651 (1974).

<sup>55</sup> Lauren Khouri & Liz Watson, *Pregnancy and Pink Slips: Yesterday, Today, Not Tomorrow*, National Women’s Law Center (Oct. 31, 2013) <http://www.nwlc.org/our-blog/pregnancy-and-pink-slips-yesterday-today-not-tomorrow> [<http://perma.cc/GT75-K6LB>].

<sup>56</sup> Jenny Yang, *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, EEOC (Jun 25, 2015), [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) [<http://perma.cc/M9S4-SABU>].

<sup>57</sup> *SEE QUESTIONS AND ANSWERS: RELIGIOUS DISCRIMINATION IN THE WORKPLACE*, EEOC [http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html) [<http://perma.cc/TP6M-HVYG>].

<sup>58</sup> CHRISTOPHER L. EISGRUBER & LAWRENCE SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION*, 249-50 (2007).

<sup>59</sup> 483 U.S. 327 (1987).

<sup>60</sup> *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

<sup>61</sup> EISGRUBER & SAGER, *supra* note 58 at 249.

## B. AMERICANS WITH DISABILITIES ACT

Title I of the Americans with Disabilities Act of 1990 (“ADA”), protects “individuals from employment discrimination on the basis of disability, limits when and how an employer may make medical inquiries or require medical examinations of employees and applicants for employment, and requires that an employer provide reasonable accommodation for an employee or applicant with a disability.”<sup>62</sup> Even though pregnancy itself is not a disability, “pregnant workers are and job applicants are not excluded from the protections of the ADA.”<sup>63</sup>

## C. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDANCE

Since the PDA was enacted, charges of pregnancy discrimination have increased substantially.<sup>64</sup> In 1997, more than 3,900 charges were filed with the Equal Employment Opportunity Commission (“EEOC”) and state and local fair employment practices agencies. In 2013, more than 5,300 charges were filed.<sup>65</sup> In July 2014, the EEOC issued updated enforcement guidance regarding the PDA and the ADA as they apply to pregnant workers.<sup>66</sup> According to the EEOC Guidance, Title VII of the Civil Rights Act of 1964 as amended by the PDA prohibits discrimination based on the following: current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth.<sup>67</sup> This guidance requires employers to make reasonable accommodations for pregnant employees. The EEOC puts forth the position that reasonable accommodations be made “available to individuals with temporary impairments, including impairments related to pregnancy.”<sup>68</sup> Essentially, the EEOC supports

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<sup>62</sup> *Supra* note 56. See 42 U.S.C. § 12112 (2015).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Yang, *supra* note 56.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

reasonable accommodations for normal pregnancies, not just those that rise to the level of disability under the ADA.

#### IV. RIGHTS IN THE PHILOSOPHICAL CONTEXT

##### A. BACKGROUND

Despite being founded by those who sought freedom from religious persecution, historians maintain that America was not intended to be a Christian nation.<sup>69</sup> Nowhere in the Constitution or the Bill of Rights is there a single mention of “God.”<sup>70</sup> Further, those documents have also set three commitments to religious freedom; prohibitions on the free exercise of religion, laws regarding the establishment of religion, and laws placing a condition of a religious oath on holding public office, as unconstitutional.<sup>71</sup> The freedom of religion is guaranteed by two clauses in the First Amendment of the Constitution; “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”<sup>72</sup>

The Constitution is a living document that established the Supreme Court.<sup>73</sup> However, the Constitution does not explicitly establish the role of the Court in making judicial decisions.<sup>74</sup>

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<sup>69</sup> See *Is America a Christian Nation?*, Americans United <https://www.au.org/resources/publications/is-america-a-christian-nation> [<http://perma.cc/X9R8-N8FT>].

<sup>70</sup> EISGRUBER & SAGER, *supra* note 58, at 1.

<sup>71</sup> *Id.* at 2.

<sup>72</sup> U.S. CONST. amend. I.

<sup>73</sup> See William H. Rehnquist, *The Notion of a Living Constitution*, 2 HARV. J.L. & PUB. POL'Y 29 (1976); U.S. CONST. art. III, § 1.

<sup>74</sup> See *id.*

Judicial review was established initially on the state level and in the debates over ratification.<sup>75</sup> In the landmark case *Marbury v. Madison*,<sup>76</sup> the Supreme Court had to define its role in determining whether or not legislation is consistent with the Constitution.<sup>77</sup> Primarily in the 20<sup>th</sup> century, “the Supreme Court has become a powerful vehicle for making public policy as it interprets law.”<sup>78</sup>

## B. RIGHT TO PRIVACY

The Supreme Court has defined the right to privacy as, “the right of the individual . . . to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>79</sup>

Rooted in the right to privacy is the fundamental right to procreation. That right was first declared as such in *Skinner v. Oklahoma*,<sup>80</sup> in which the court held that, “marriage and procreation are fundamental to the very existence and survival of the race.”<sup>81</sup> Additionally, the Court declared strict scrutiny is required when the government attempts to impose involuntary sterilization.<sup>82</sup> In 1965, the Supreme Court further protected the right to control one’s reproductive choice in *Griswold v. Connecticut*.<sup>83</sup> Here, the Court held the state statute prohibiting the use of

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<sup>75</sup> See *Annotation 13-Article III*, FindLaw, <http://constitution.findlaw.com/article3/annotation13.html> [<http://perma.cc/AVU5-Q9MA>].

<sup>76</sup> 5 U.S. 137 (1803).

<sup>77</sup> Steven Mintz, *The Survival of the Constitution*, The Gilder Lehrman Institute of American History, <http://www.gilderlehrman.org/history-by-era/creating-new-government/resources/survival-us-constitution> [<http://perma.cc/9VSX-VDPM>].

<sup>78</sup> *Id.*

<sup>79</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>80</sup> 316 U.S. 535 (1942).

<sup>81</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>82</sup> See *Skinner v. Oklahoma*, 316 U.S. at 535 (“strict scrutiny of the classification which a State makes in a sterilization law is essential . . .”).

<sup>83</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

contraceptives to be unconstitutional on the grounds that the law violated the right to marital privacy.<sup>84</sup>

Procreational autonomy has continued to be reinforced mainly in a series of cases in which embryos created via IVF and then frozen, are the center of a divorce dispute.<sup>85</sup> IVF is currently not considered to be included in the fundamental right to procreate, though a few courts have recognized that it is implicit in one's ability to exercise the right.<sup>86</sup> If more courts hold that IVF is included in the right to procreation, pregnant female church employees will, at the very least, have a more solid constitutional ground to stand on in court.

### C. PHILOSOPHICAL ANALYSIS OF RIGHTS AND THE SEPARATION OF CHURCH AND STATE

In 1920, Zechariah Chafee, a Harvard professor of law and well-known champion of civil liberties<sup>87</sup>, presented an illustrative way to view the conflict of two rights and the challenge of analyzing competing rights.<sup>88</sup> When one man was arrested for swinging his arms and hitting another man in the nose, the man asked the judge if he had a right to swing his arms in a free country.<sup>89</sup> The judge replied, “[y]our right to swing your arms ends just where the other man's nose begins.”<sup>90</sup> So the question becomes, how do we analyze the conflict of two rights?

Laying out the philosophical framework and defining what our rights are, will help in understanding how they interact with each other. Rights are defined as “entitlements (not) to

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<sup>84</sup> *Id.* at 485-86.

<sup>85</sup> See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998), *A.Z v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000); *Reber v. Reis*, 42 A.3d 1131 (Pa. Super. 2012).

<sup>86</sup> See GREGORY DOLIN ET. AL, MEDICAL HOPE, LEGAL PITFALLS: POTENTIAL LEGAL ISSUES IN THE EMERGING FIELD OF ONCOFERTILITY, 114 (2010).

<sup>87</sup> Marcel Green, *Zechariah Chafee Jr (1885-1957)*, <http://uscivilliberties.org/biography/3317-zechariah-chafee-jr-18851957.html> [<http://perma.cc/2HZ9-ACJP>].

<sup>88</sup> ZECHARIAH CHAFEE, FREEDOM OF SPEECH, 34 (1920).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 34-35.

perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states.”<sup>91</sup> The Hohfeldian Analytical System is a widely accepted system used in the conceptual and philosophical analysis of rights. When analyzed, rights are said to contain ordered arrangements of components, similar to the way molecules are ordered arrangements of chemical elements.<sup>92</sup> Wesley Hohfeld formulated the four components that make up the “elements” of rights, known as the “Hohfeld incidents;” (1) Privilege (or Liberties), (2) Claim, (3) Power, and (4) Immunity.<sup>93</sup> The first two, privileges and claims, are called “primary rules” and the last two are called “secondary rules.”<sup>94</sup> The secondary rules are rules that specify how the first two can be changed or altered.<sup>95</sup>

Privilege rights involve what their bearer has no duty not to do.<sup>96</sup> In other words, a license, such as the license to drive a motor vehicle endows one with the privilege to engage in that activity. But it is well known that the right to drive a vehicle is an activity in which A has a privilege to drive only if A has a privilege not to drive.<sup>97</sup> A right is a claim, when A has a claim that B does X, and only if B has a duty to A to do X. An employee has a claim that the employer pays him wages, meaning that the employer has a duty to pay the employee the wages.<sup>98</sup>

Powers are the first of the secondary rules that enables the alteration of the privileges and claims. A has the power to alter his own or the right of another, if and only if A has within a set of

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<sup>91</sup> *Rights*, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/rights/> [<http://perma.cc/KJ7Y-PMAC>].

<sup>92</sup> *Id.*

<sup>93</sup> 2.1 *THE FORM OF RIGHTS: THE HOHFELDIAN ANALYTICAL SYSTEM*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/rights/> [<http://perma.cc/2UM6-UE62>].

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> 2.1 *The Form of Rights*, *supra* note 89.

<sup>98</sup> *Id.*

rules the ability to do so.<sup>99</sup> A governmental agency has the power to alter one's privilege or claim. For example, the Department of Motor Vehicles has the power (stemming from various legal sources) to suspend one's privilege to drive a vehicle. In addition, powers can be used to alter the power of others.

Immunity is the absence of a power. If A has a power to change the right of B, then A has a power. If A lacks the power, then B has immunity. Immunity is a "core element of an American citizen's right to religious freedom."<sup>100</sup> The government lacks the power to change the religious rights of Americans, thus giving Americans immunity.

Each of the "atomic" incidents can be a right when it occurs in isolation. However, they also bond together in characteristic ways to form complex rights.<sup>101</sup> Each of the incidents are arranged and distinguished in different ways. The "active" and "passive" distinction fits neatly into the Hohfeldian system. Privilege and power are active in that they are concerned with their holder's actions.<sup>102</sup> A has a right to do X. Claim and immunity are passive in that they regulate the actions of others.<sup>103</sup> A has a right that B does X. In addition, the distinction between "positive" and "negative" is popular among some normative theorists.<sup>104</sup>

#### D. APPLICATION OF THE PHILOSOPHICAL ANALYSIS

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> 2.1.6 *The Form of Rights: The Hohfeldian Analytical System*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/rights/> [<http://perma.cc/TH9C-8HPY>].

<sup>102</sup> 2.1.7 *The Form of Rights: The Hohfeldian Analytical System*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/rights/> [<http://perma.cc/87F2-94PD>].

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

An important distinction should be made between the conceptual analysis and definitional stipulation. All rights can be represented by the Hohfeldian incidences; however, some diagrams of incidences that can be constructed do not correspond to any right.<sup>105</sup> In other words, “all thrones are chairs, but only chairs with a certain function are thrones.”<sup>106</sup> The question becomes what do rights do for those that hold them? The two major positions on this area, the Will Theory and the Interest Theory, shed light on this question.<sup>107</sup> Will theorists maintain that the holders of rights are sovereigns on a small scale.<sup>108</sup> The function of a right is to give the holder control over the other’s duty.<sup>109</sup> Interest theorists maintain that “[a]n owner has a right . . . not because owners have choices, but because the ownership makes the owner better off.”<sup>110</sup>

There are numerous theories as to how to reconcile the conflicts between rights, and if that is even possible. One theory called specificationism, holds “that each right is defined by an elaborate set of qualifications that specify when it does and when it does not apply: a set of qualifications that define the right’s ‘space.’”<sup>111</sup> Rights in the view of specificationists never conflict, but instead fit together like jigsaw puzzles, “so that in each circumstance there is only one right which determines what is permitted, forbidden or required.”<sup>112</sup>

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<sup>105</sup> 2.2.1 *The Form of Rights: The Hohfeldian Analytical System*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/rights/> [<http://perma.cc/79FP-NPEV>].

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 2.2 *THE FUNCTION OF RIGHTS: THE WILL THEORY AND THE INTEREST THEORY*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/rights/> [<http://perma.cc/9RTY-8YGG>].

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> 5.2 *Conflicts of Rights?*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/rights/> [<http://perma.cc/3WZ2-XYLC>].

<sup>112</sup> *Id.*

There are well-founded objections to this theory.<sup>113</sup> First, every qualification of a particular right would have to be set forth in order to be fully specified.<sup>114</sup> Second, rights that are so understood lose their force to be explainable in that they can only be conclusions, not the arguments of which side of a dispute should prevail.<sup>115</sup> Third, specificationists cannot explain the “moral residue” when a right is “defeated.”<sup>116</sup> For example, A has a property right over a pie and B has a right to not starve. If B eats A’s pie, B has a moral obligation to apologize and compensate A if he can.<sup>117</sup> Specificationists cannot explain the moral obligation B has on A, because A’s right was not violated when B ate the pie. A proponent that conflicts of rights do exist suggests that, “we should speak of a ‘defeated’ right as being permissibly ‘infringed’ (instead of ‘violated’), leaving residual obligations on the infringer.”<sup>118</sup>

Rights can also be viewed as “trumps” with reasons that are weighty, and can cause an override of other reasons.<sup>119</sup> In other words, rights “give reasons to treat their holders in certain ways or permit their holders to act in certain ways, even if some social aim would be served by doing otherwise.”<sup>120</sup> If the rights are framed as trumps, one is inevitably led to the question of who decides which rights are of higher status than others? Is there an “ace” of rights that trumps all others? In the real world, courts decide in non-theoretical and philosophical terms, the hierarchy

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 5.2 *Conflicts of Rights?*, *supra* note 107.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/rights/> [<http://perma.cc/8ESK-D7F3>]; *Rights as Trumps*, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/rights/#5.1> [<http://perma.cc/9J8Q-BA7Z>].

<sup>120</sup> *Id.*

of rights and how they interact with each other. As is evidenced by the many cases of freedom of religion implications, courts have seemingly ruled the freedom of religion right an “ace.”

#### V. SEPARATION OF CHURCH AND STATE

Many scholars have developed their own frameworks for the separation of church and state that are representative of a basic continuum. No state fits perfectly within each model but they provide a useful tool in analyzing the relationship a state has with religion along the continuum. Winfried Brugger’s framework provides six models on the relationship between church and state: 1) aggressive animosity between church and state; 2) strict separation in theory and in practice; 3) strict separation in theory, accommodation in practice; 4) division and cooperation; 5) formal unity of church and state, with substantive division; and 6) formal and substantive unity of church and state.<sup>121</sup>

The first model, aggressive animosity between church and state often exists in communist countries driven by Marxist-Lennist ideology and practice. Three different kinds of animosity or hostility have been distinguished: adversarial tones towards religion in general calling for its total elimination and replacement with secular ideas, softer hostility towards religion while fighting civilly for a secular outlook, and adversarial tones towards a particular religion.<sup>122</sup>

The next model, strict separation in theory and practice, is “a variation of the wall-of-separation doctrine to the extent that it refers to spatial and organization entanglements as well as common policies of church and state, and it is strictly applied in practice.”<sup>123</sup> An example of this

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<sup>121</sup> BRUGGER, *supra* note 22, at 31.

<sup>122</sup> *Id.* at 33.

<sup>123</sup> *Id.*

model was the decision reached in *Everson v. Board of Education*.<sup>124</sup> Here, a New Jersey statute authorized local school districts to make contracts and rules for the transportation of children to and from school.<sup>125</sup> The township board of education authorized, pursuant to this statute, reimbursement to parents who paid for their students' transportation via public transit.<sup>126</sup> A portion of the money went to pay for the transportation of some children to Catholic parochial schools.<sup>127</sup> The right of the board to allocate this money for that particular purpose was challenged on the grounds that the statute and resolution violated the Due Process Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment.<sup>128</sup>

The Supreme Court held that pursuant to the language of the First Amendment, New Jersey could not "hamper its citizens in the free exercise of their own religion."<sup>129</sup> Consequently, New Jersey could not exclude individuals belonging to any faith, because of their faith, or lack thereof, from receiving public welfare benefits.<sup>130</sup> Thus, the Court reasoned that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."<sup>131</sup> As interpreted by this Court, the "First Amendment has erected a wall between church and state...that must be kept high and impregnable."<sup>132</sup> In his history-laden dissent, Justice Rutledge disagreed with the majority's view of the scope of the statute and its interpretation of the First Amendment. He believed that New

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<sup>124</sup> *Everson v. Board of Ed. of Ewing Twp.*, 330 U.S. 1 (1947).

<sup>125</sup> *Id.* at 3.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 5.

<sup>129</sup> *Id.* at 16.

<sup>130</sup> *Everson v. Board of Ed. of Ewing Twp.*, 330 U.S. at 16.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

Jersey had favored one particular religion since “the resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools.”<sup>133</sup> Thus, Justice Rutledge maintained, “it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in dissensions inevitable when sect opposes sect over demands for public funds to further religious education, teaching or training in any form or degree, directly or indirectly.”<sup>134</sup> Though different in the conclusion they reached, the majority in *Everson* accepted the wall-of-separation doctrine.<sup>135</sup>

The third model, strict separation in theory with accommodation in practice, is primarily the model used in the United States. The practical application of this model lends itself to the complex interplay of church and state. As this Note will explore, despite the constitutional provisions guiding what can and cannot be done, each provision is open to interpretation by the courts. In *Everson*, the majority found it acceptable when taxes are raised neutrally and the state provides a service for both public and private schools.<sup>136</sup> Providing bus reimbursement from neutrally raised taxes is a “traditional state duty similar to providing police protection, trash collection, fire-fighting or ensuring the safety of public streets.”<sup>137</sup> Thus, “the Non-establishment Clause does not exclude religious schools and students from receiving state support.”<sup>138</sup> This view

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<sup>133</sup> *Id.* at 62.

<sup>134</sup> *Id.* at 59.

<sup>135</sup> BRUGGER, *supra* note 22, at 35.

<sup>136</sup> *Everson v. Board of Ed. of Ewing Twp.*, 330 U.S. at 17.

<sup>137</sup> BRUGGER, *supra* note 22, at 35.

<sup>138</sup> *Id.*

of separation is more accommodating than its stricter counterpart.<sup>139</sup> It suggests that the “wall need not be quite as high and thick as the other, stricter version.”<sup>140</sup>

The fourth model, division and cooperation, is the primary model in Germany. A wall of separation cannot exist where the church and state actually cooperate with each other beyond mere accommodation.<sup>141</sup> Article 137 (1) of the German Weimar Constitution and Article 140 Basic Law stipulate that state churches are not allowed.<sup>142</sup> Interestingly, this does not lead to strict separation, but instead leads to “partial cooperation and mutual coordination.”<sup>143</sup> Basic Law articles and other provisions of the Weimar Constitution provide for various methods of support and cooperation. The German government supports churches by way of statutes and contracts. Examples of such contracts include the administration of cemeteries, spiritual care of inmates and members of the German military, the organization of religious classes in public schools, as well as medical, education, and social activities of the church that are deemed to be in the public interest by the state.<sup>144</sup>

Israel fits into the fifth model of formal unity of church and state with substantive division. Despite the lack of a textual description of the relationship between church and state or religious freedom and Israel’s clear foundation as a “Jewish” homeland<sup>145</sup>, debate exists as to what the term “Jewish” means in the Basic Law.<sup>146</sup> As will be explored in more detail in Section VI, “the very

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<sup>139</sup> *Id.* at 36.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 38.

<sup>142</sup> BRUGGER, *supra* note 22, at 38.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 38-39.

<sup>145</sup> *Id.* at 44.

<sup>146</sup> The Basic Law: Human Dignity and Liberty provides, “The purpose of this basic law is to protect human dignity and liberty so as to anchor in basic law the values of the state of Israel as a Jewish and democratic state.” Prominent Israeli jurists have debated the phrases “Jewish state” and “democratic state”. As Israeli Supreme Court Justice

existence of a religious sector as a distinctive cultural subgroup within the population prevents the organic integration of religion into the national elements of the political culture.”<sup>147</sup>

In the sixth model, formal and substantive unity of church and state, the church is not merely symbolically, formally, or even softly associated.<sup>148</sup> Instead, practical policies and organizational structures of the state church or national religion and state authority are extensively intertwined.<sup>149</sup> Religious duties are often synonymous with legal obligations, and illegal acts are often seen as “sins.”<sup>150</sup> Moderate forms of the Muslim theocracy do exist, as well as extreme examples. The Taliban in Afghanistan prior to the U.S./North Atlantic Treaty Organization (“NATO”) intervention in 2002, for example, is an extreme form of this model.<sup>151</sup>

#### A. RELIGIOUS FREEDOM RESTORATION ACT OF 1993

In 1993, Congress passed the Religious Freedom Restoration Act (“RFRA”) in response to what was perceived as an attack on the freedom of religion.<sup>152</sup> This act provides for religious exemption from federal law. The government may “substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that

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Aharon Barak maintains, the term “Jewish” can have a wider level of abstraction “so that it will coincide with the democratic character of the state.” In contrast, Justice Menachem Elon notes “the concept of a *Jewish* state be interpreted by *studying* the Jewish sources as the heart of Judaism and *engaging* them.” See *The Jewish Political Tradition*, 502, 505.

<sup>147</sup> CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL, 28 (1984).

<sup>148</sup> BRUGGER, *supra* note 22, at 46.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> EISGRUBER & SAGER, *supra* note 58, at 46.

compelling interest.”<sup>153</sup> In the less than five years following its passing, the Supreme Court held much of RFRA to be unconstitutional.<sup>154</sup>

Congress had passed the Religious Freedom Restoration Act in an urgent response to the Supreme Court’s decision in *Employment Div. v. Smith*.<sup>155</sup> The *Smith* case had ignited a firestorm of controversy that created a prolonged conflict between Congress and the Supreme Court.<sup>156</sup> Based on this case and the perceived threat from the Court to the freedom of religion, Congress nearly unanimously passed RFRA in 1993, with only three dissenting votes in the Senate and none in the House.<sup>157</sup>

In 1990, two men, Alfred Smith and Galen Black, were fired from a private drug rehabilitation facility when they ingested peyote, an illegal hallucinogenic drug, during a religious ceremony as members of the Native American Church. Smith and Black were denied unemployment compensation “because they had been discharged for work-related ‘misconduct.’”<sup>158</sup> The Oregon Court of Appeals reversed the trial court holding that the denial of benefits violated their free exercise right under the First Amendment.<sup>159</sup> On appeal to the Oregon Supreme Court, the Employment Division argued that the denial of benefits was permitted because of the criminality of peyote use under Oregon law.<sup>160</sup> The Oregon Supreme Court disagreed and concluded that Smith and Black were entitled to unemployment benefits.<sup>161</sup> The Court reasoned

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<sup>153</sup> 42 U.S.C § 2000bb-1.

<sup>154</sup> EISGRUBER & SAGER, *supra* note 147, at 46.

<sup>155</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

that the criminality of the peyote use was irrelevant to their constitutional claim.<sup>162</sup> The purpose of the provision used to disqualify Smith and Black was not to enforce the criminal laws of Oregon, but to maintain the integrity of the compensation fund.<sup>163</sup> The Court further reasoned, that purpose was inadequate justification to the burden imposed on Smith and Black from their denial of unemployment benefits.<sup>164</sup>

In a six to three decision written by Justice Scalia, the Supreme Court held that Oregon could deny unemployment compensation for Smith and Black when their dismissal for ingesting peyote was constitutionally prohibited under Oregon law.<sup>165</sup> Justice O'Connor, in her concurring opinion, acknowledged that “[t]here is no dispute that Oregon’s prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion.”<sup>166</sup> In deciding this case, the Court declined to apply the *Sherbert* test.<sup>167</sup> This balancing test would have asked “whether Oregon’s prohibition substantially burdened a religious practice, and if it did, whether the burden was justified by a compelling government interest.”<sup>168</sup> The Court declined using this, reasoning that it would have created a “constitutional right to ignore laws of general applicability.”<sup>169</sup> The Court in *Smith* held that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”<sup>170</sup> Congress disagreed with this ruling and as a direct result passed RFRA.<sup>171</sup>

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<sup>162</sup> *Id.* at 875.

<sup>163</sup> *Employment Div. v. Smith*, 494 U.S. at 875.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 890.

<sup>166</sup> *Id.* at 903.

<sup>167</sup> *See Sherbert v. Verner*, 374 U.S. 398 (U.S.1963).

<sup>168</sup> *City of Boerne v. Flores*, 521 US 507, 513 (1997).

<sup>169</sup> *Id.* at 513.

<sup>170</sup> *Id.* at 514.

<sup>171</sup> EISGRUBER & SAGER, *supra* note 147, at 46.

While the *Smith* case involved a question to the First Amendment, *City of Boerne v. Flores*, was an important case following the passage of RFRA dealing with Congress' enforcement powers of the RFRA to the states under the Fourteenth Amendment.<sup>172</sup> In this case, the Archbishop of the historic St. Peter Catholic Church applied for a building permit with the City of Boerne, Texas, to expand the church. A few months prior to the application, the Boerne City Council had passed an ordinance allowing the city's Historic Landmark Commission to prepare a preservation plan.<sup>173</sup> Under this plan, the Commission had to pre-approve any construction plans affecting historic buildings or landmarks in a historic district.<sup>174</sup> Pursuant to this ordinance the Commission denied the Archbishop's application to expand the church. The District Court held that by enacting RFRA, Congress exceeded the scope of its enforcement power under the Fourteenth amendment.<sup>175</sup> The Fifth Circuit disagreed and reversed.<sup>176</sup> The Supreme Court looked to the legislative history of RFRA in reversing the Fifth Circuit and declaring RFRA unconstitutional.<sup>177</sup> Though the Court declared RFRA unconstitutional to the extent that it applies to state and local laws, RFRA still has force with federal statutes and regulations.<sup>178</sup>

The most recent Supreme Court case to further interpret the application of RFRA was *Burwell v. Hobby Lobby*.<sup>179</sup> In 2010, Congress passed the Affordable Care Act, mandating certain

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<sup>172</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>173</sup> *Id.* at 512.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See EISGRUBER & SAGER, *supra* note 58, at 47.

<sup>179</sup> *Burwell v. Hobby Lobby, Inc.*, 134 U.S. 2751 (2014).

employers to cover certain contraceptives.<sup>180</sup> As a result of this mandate, three closely held business corporations (Hobby Lobby, Conestoga, and Mardel) filed suit alleging the mandate violated their religious rights under RFRA.<sup>181</sup> In a 5-4 decision, the Supreme Court held “the regulations that impose the obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.”<sup>182</sup>

### **B. INDIANA SENATE BILL 101**

In light of the Court declaring RFRA to be unconstitutional when applied to state and local laws, many states have adopted or attempted to adopt similar religious freedom restoration laws.<sup>183</sup> In January 2014, Indiana lawmakers introduced Indiana’s version of the Religious Freedom Restoration Act, Senate Bill 101. The text of this bill was based on the Federal version of RFRA. On February 24, 2015, SB 101 passed the Senate by a vote of 40 to 10. About a month later the House of Representatives passed it by a vote of 63 to 31, mainly along party lines.<sup>184</sup>

This bill created a firestorm of controversy as soon as Governor Mike Pence signed it. Major Indiana businesses and organizations expressed concern over the message the bill sent about tolerance and acceptance in the state, and as a result some cancelled plans to expand business

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<sup>180</sup> RENEE MATTEI MYERS & REDEATE DESSALEGN, *DON'T BELIEVE THE HYPE: THE REAL EFFECT OF HOBBY LOBBY ON EMPLOYERS & EMPLOYEES* (JUL. 23, 2014), Jurist, <http://jurist.org/hotline/2014/07/myers-dessalegn-hobby-lobby.php> [<http://perma.cc/W4WH-TAKB>].

<sup>181</sup> *Id.*

<sup>182</sup> *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2759 (2014).

<sup>183</sup> States that currently have freedom restoration acts: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, and Texas. *See* Lewis Roca Rothberger, *State Religious Freedom Restoration Acts*, <http://www.churchstatelaw.com/statestatutes/religiousfreedom.asp> (last accessed Jan. 14, 2015) [<http://perma.cc/KQZ4-ADEF>].

<sup>184</sup> *Actions for Senate Bill 101*, INDIANA GENERAL ASSEMBLY, <https://iga.in.gov/legislative/2015/bills/senate/101#> [<http://perma.cc/S8XX-A3T7>].

operations or threatened to hold events elsewhere.<sup>185</sup> Some businesses outside of Indiana even went so far as to cancel plans to send employees to Indiana for training.<sup>186</sup> In addition, the mayor of Seattle banned municipal employees from traveling to Indiana on city funds.<sup>187</sup> The nationwide backlash was swift and severe.

In response to the economic damage and harm to the Indiana's image, lawmakers quickly acted to stop the bleeding. The governor signed an amendment to SB 101 explicitly stating that the law does not authorize "a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment or housing to any member of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service."<sup>188</sup> For the first time in the state's two hundred year history, the terms "gender identity" and "sexual orientation" appear in Indiana State law.

Though the language of the statute<sup>189</sup> even as amended, appears to not apply to religious employers in discriminating against their employees, it does illustrate the other side of the coin. The exercise of the freedom of religion by business owners denying service to gays based on the business owner's religious beliefs would have been made legal under this law. Religious employers firing employees based on the employer's religious beliefs invoke the employer's right

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<sup>185</sup> David Badash, *Angie's List Cancels \$40 million 1000 Jobs Indiana Expansion Over Anti-Gay 'Religious Freedom' Law* (Mar. 28, 2015), NEW CIVIL RIGHTS MOVEMENT, [http://www.thenewcivilrightsmovement.com/davidbadash/angie\\_s\\_list\\_cancels\\_40\\_million\\_1000\\_jobs\\_indiana\\_expansion\\_over\\_anti\\_gay\\_religious\\_freedom\\_law](http://www.thenewcivilrightsmovement.com/davidbadash/angie_s_list_cancels_40_million_1000_jobs_indiana_expansion_over_anti_gay_religious_freedom_law) [<http://perma.cc/8CU5-XYSQ>].

<sup>186</sup> Mollie Hemingway, *Salesforce CEO: I Can Do Business with Communist China, But Not Indiana* (Mar. 26, 2015), THE FEDERALIST, <http://thefederalist.com/2015/03/26/salesforce-ceo-i-can-do-business-with-communist-china-but-not-indiana/> [<http://perma.cc/K4UL-CM5J>].

<sup>187</sup> Emily Shapiro, *Seattle Mayor Prohibits City Employees From Traveling to Indiana* (Mar. 28, 2015), ABC NEWS, <http://abcnews.go.com/Politics/seattle-mayor-prohibits-city-employees-traveling-indiana/story?id=29979438> [<http://perma.cc/BMD7-H5BY>].

<sup>188</sup> ESB 50, <https://tribwttv.files.wordpress.com/2015/04/rfra-sb-50-conference-committee-report.pdf> [<http://perma.cc/K6C6-MJ6M>].

<sup>189</sup> See I.C. § 34-19-4.

to free exercise, but should trigger protection under Title VII for the employee. However, as this Note attempts to explain, the controversies stem from clashes between fundamental rights expressly identified in the Constitution and those formed through court interpretations.

### C. THE MINISTERIAL EXCEPTION

An employment discrimination case brought by a teacher at a church was the vehicle for the Supreme Court to consider whether a ministerial exception to federal employment discrimination laws complies with the Constitution. Until *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>190</sup> the Supreme Court had not heard a case to consider this issue. However, the Court of Appeals has extensive experience with this issue and has uniformly recognized the ministerial exception that is grounded in the First Amendment.<sup>191</sup> This exception “precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.”<sup>192</sup>

In *Hosanna-Tabor*, Cheryl Perich had filed a charge with the Equal Employment Opportunity Commission after she was fired from the school following a diagnosis of narcolepsy.<sup>193</sup> The EEOC then brought suit against Hosanna-Tabor claiming that a former employee of the Evangelical Lutheran Church and School had been fired in retaliation for threatening to file an Americans with Disabilities Act (ADA) lawsuit.<sup>194</sup>

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<sup>190</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012).

<sup>191</sup> *Id.* at 705.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 700.

<sup>194</sup> *Id.* at 701.

The church and school classify teachers in two categories: “lay” and “called.”<sup>195</sup> A lay teacher is not required to be trained by the Synod or required to be Lutheran.<sup>196</sup> The school board hired teachers to one-year terms, and the school hired Cheryl Perich first as a lay teacher.<sup>197</sup> The other category, “called,” are teachers that have “been called to their vocation by God through a congregation.”<sup>198</sup> Once qualified as a called teacher, they receive the formal title “Minister of Religion, Commissioned.”<sup>199</sup> Perich had been teaching for four years as a commissioned minister before her diagnosis.<sup>200</sup>

In deciding whether or not Perich was entitled to relief for her former employer’s alleged violation of the ADA, the court first had to consider the ministerial exception. The Supreme Court agreed with the Courts of Appeals that there actually is such a ministerial exception and that it does not violate the First Amendment.<sup>201</sup> Requiring a church to keep a minister they do not want to keep goes beyond merely an employment decision because, this “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”<sup>202</sup> The Court made it clear that the imposition of a minister on a religious employer would infringe the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.<sup>203</sup>

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<sup>195</sup> *Id.* at 699.

<sup>196</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. at 699.

<sup>197</sup> *Id.* at 700.

<sup>198</sup> *Id.* at 699.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 700.

<sup>201</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. at 706.

<sup>202</sup> *Id.* at 706.

<sup>203</sup> *Id.* at 703.

Secondly, the Court had to decide if the ministerial exception applied in the case before it. In deciding that it did, the Court concluded that it was reluctant “to adopt a rigid formula for deciding when an employee qualifies as a minister.”<sup>204</sup> Perich was educated and commissioned as a minister within the system of the Church. She had to complete eight college-level courses, submit a petition to her local synod containing academic transcripts, letters of recommendation, a personal statement, and written answers to ministry related questions.<sup>205</sup> In addition, she had to pass an oral examination at a Lutheran College.<sup>206</sup> Perich took six years to complete these rigorous requirements. Once she became a commissioned minister, she fulfilled her “important role in transmitting the Lutheran faith to the next generation.”<sup>207</sup> The Court, therefore, concluded that Perich was a minister covered by the ministerial exception.<sup>208</sup> When a minister brings a lawsuit for alleging her termination was discriminatory, the Court proclaimed, “the first Amendment has struck the balance for us . . . [t]he church must be free to choose those who will guide it on its way.”<sup>209</sup>

*Smith* and *Hosanna-Tabor* certainly can be distinguished from the cases involving infertile women who seek IVF treatments. Women seeking IVF treatments is not the same as someone ingesting peyote, which is prohibited under a valid and neutral law of general applicability.<sup>210</sup> *Hosanna-Tabor* came down to “the governmental interference with an internal church decision that affects faith and mission of the church itself.”<sup>211</sup> Women seeking IVF treatments who happen

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<sup>204</sup> *Id.* at 707.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. at 708.

<sup>208</sup> *Id.* at 708.

<sup>209</sup> *Id.* at 710.

<sup>210</sup> See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. at 707.

<sup>211</sup> *Id.*

to be members of churches should be protected by governmental interference from an internal church decision. In application of the exemption provided for by RFRA, the government may only substantially burden a person's exercise of religion, if proven, in furtherance of a compelling state interest. The compelling state interest in cases when female employees are fired from their religious employers for using IVF should be to ensure compliance with federal anti-discrimination laws by allowing women to use reproductive technologies.

## VI. THE ISRAELI LEGAL SYSTEM

The legal implications of religion and reproductive technologies in Israel would not have nearly as much meaning without first exploring some of the history behind the State of Israel. To better understand the boundaries of legal rights, "we must get behind rules of law to human facts."<sup>212</sup> The exercise of religion plays an integral role in the shaping of laws a society deems important. Examining how religion in Israel influences society and the development of the systems of law will help determine how to prevent discrimination against women in our own country who use ART's, while still maintaining the balance of freedom of religion.

### A. WHY ISRAEL?

The State of Israel is an important backdrop for studying issues of law, religion, and reproductive technologies for several reasons. First, what makes Israel "a curious democracy" is that it was "founded to be the national homeland of the Jewish people" while priding "itself on treating all religious communities in a fair and equitable manner."<sup>213</sup> In 2010, Jews comprised 75.4 percent of Israel's population of 7,587,000; 20.5 percent of the people were Arabic, and 4.1 percent

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<sup>212</sup> CHAFEE, *supra* note 84, at 34.

<sup>213</sup> Marc Galanter & Jayanth Krishman, *Personal Law and Human Rights in India*, 34 *ISR. L. REV.* 101, 120. (2000).

were classified as “other”.<sup>214</sup> Almost all of the Arab people in Israel are Sunni Muslims. The “other” category comprises 2 percent Christian, and 1.7 percent Druze.<sup>215</sup> While Jews undeniably make up the majority, “Judaism is not a state religion, but the state recognizes a special relation to it.”<sup>216</sup>

Secondly, the State of Israel has been an important political ally for the United States since the State’s establishment in 1948. A Gallup Poll conducted in 2013 suggests American sympathies heavily favor Israel over Palestine.<sup>217</sup> Since 2010, American partiality towards Israel has been consistently over 60%.<sup>218</sup> American sympathies towards Israel can be attributed in part to the philosophical ideals of its people.

Thirdly, the United States and Israel share similar legal upbringings, as both countries “were born from entities governed largely by British law.”<sup>219</sup> The ideological goals in our own Declaration of Independence are echoed in The Declaration of the Establishment of the State of Israel:

THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of Exiles; it will foster the development of the country for the benefit of all its inhabitants; . . . it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.<sup>220</sup>

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<sup>214</sup> GELPE, *supra* note 30, at 15.

<sup>215</sup> *Id.*

<sup>216</sup> Galanter & Krishman, *supra* note 203 at 120.

<sup>217</sup> Lydia Saad, *Americans’ Sympathies For Israel Match All-Time High* (March 15, 2013), <http://www.gallup.com/poll/161387/americans-sympathies-israel-match-time-high.aspx> [<http://perma.cc/M59Q-PZ7T>].

<sup>218</sup> *Id.*

<sup>219</sup> GELPE, *supra* note 30 at 5.

<sup>220</sup> Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3 (1948);, *see* GELPE, *supra* note 30 at 5.

Even though the foundations of the United States and the State of Israel were based on similar philosophical ideals, “law has developed in the two countries in different historical and social contexts.”<sup>221</sup> Two major influences are cited in the development of Israeli constitutional and parliamentary development; British and Zionism. Modern political science has emphasized the difference between the written and unwritten constitution as basic to understanding constitutionalism.<sup>222</sup> The American Constitution is the prime example of the written constitution, while the British Constitution is an excellent example of unwritten.<sup>223</sup> An unwritten constitution is built around a series of documents generally viewed as fundamental and as hallowed as the written constitution.<sup>224</sup> The term itself refers to the fact that there is not a single document that embodies all that is actually compiled in a single constitutional document. A country that does not have a written constitution has other documents to establish the fundamental laws of that country. Israel has no written constitution, though the outlines of an unwritten constitution emerged in other documents within a few months of the establishment of the State.<sup>225</sup>

### B. THE KNESSET AND BASIC LAWS

Israel’s unicameral parliament, made up of 120 members is called the Knesset. The word Knesset means assembly and has a historical connection to an institution called The Men of the Great Assembly,<sup>226</sup> which dates back to the Second Temple Period (538 BCE-70 CE).<sup>227</sup> Shortly

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<sup>221</sup> GELPE, *supra* note 30 at 5.

<sup>222</sup> DANIEL J ELAZAR, CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES, 19 (1990).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> ELIAHU LIKHOVSKI, ISRAEL’S PARLIAMENT: THE LAW OF THE KNESSET, 1 (1971).

<sup>226</sup> GELPE, *supra* note 30 at 27.

<sup>227</sup> Lili Eylon, *History of Jerusalem: Four Periods in the History of Jerusalem*, <http://www.jewishvirtuallibrary.org/jsource/History/jeru4.html>, (last visited on November 8, 2014)[ <http://perma.cc/RTV3-YES9>].

after the founding of the State of Israel, The Constituent Assembly was elected and immediately turned themselves into the First Knesset.<sup>228</sup> The First Knesset adopted the *Harrari Resolution* that charged the Committee on the Constitution, Legislation, and Law to prepare a recommended constitution.<sup>229</sup>

In 1958, the Knesset began enacting a series of Basic Laws.<sup>230</sup> There are twelve basic laws. The two dealing with individual rights were passed by the Knesset in March 1992: Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation.<sup>231</sup> The rights set forth in these two Basic Laws “became constitutionally protected and were accorded supra-legislative constitutional status.”<sup>232</sup> In a case regarding an amendment to a regular statute passed shortly after the Basic Law: Human Dignity and Freedom, the Supreme Court of Israel reaffirmed that the Knesset had clear authority to pass laws of constitutional quality.<sup>233</sup> Justice Aharon Barak wrote that the Knesset, an ordinary legislative body, had authority to enact laws of constitutionality that cannot be changed by regular legislation.<sup>234</sup> However, not all members of the Knesset agreed with Justice Barak’s assertion.<sup>235</sup> In 1992, when the Knesset enacted the Basic Law, some members did not even realize they were adopting a constitution at the time.<sup>236</sup>

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<sup>228</sup> GELPE, *supra* note 30 at 134.

<sup>229</sup> *Id.*

<sup>230</sup> GELPE, *supra* note 30 at 135.

<sup>231</sup> CA 6821/93 United Mizrahi Bank v. Migdal Communal Village 49(4) PD 221 [1995] (Isr.).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> GELPE, *supra* note 30 at 155.

<sup>236</sup> GELPE, *supra* note 30, at 155-56. Knesset member Michael Eitan reflected:

“I was in the Knesset in 1992. I clashed with the Chairman of the Constitution, Law and Justice Committee when he brought the law to the final reading and I can testify personally that the word constitution was not mentioned by anyone of the members of the Knesset. Ninety-five percent of them never thought that they had a constitutional power. It’s the first time I hear that a country can get a constitution retroactively. At the time of the legislation, the members of the Knesset did not know that they were adopting a constitution for the State of Israel, nor did anyone else. How do I know? In the newspapers the day after the enactment of the law, no one mentioned it. It came to our knowledge that

### C. THE DIFFERENCE BETWEEN JEWISH AND ISRAELI LAW

For most American Jews, being Jewish is mainly a matter of ancestry and culture, while a comparatively small portion say that being Jewish is mainly a matter of religion.<sup>237</sup> Most Jews in Israel “see themselves as a national group with a shared history, as an ethnic group with a shared culture . . . and as a people with a shared identity.”<sup>238</sup> Due to extraordinary high levels of immigration, Israel is very diverse.<sup>239</sup> Despite high levels of racial diversity, “the major fault line of diversity is different from that in the United States.” Israelis do not think in terms of American racial diversity between African-Americans, whites, Hispanics, and Asian-Americans.<sup>240</sup> The major “fault line” is between Arabs and Jews.<sup>241</sup>

Great diversity also exists within the Jewish community. The three major groupings are Sepharadim, Mizrahim, and Ashkenazim.<sup>242</sup> Israeli Jews are also grouped along the lines of religious observance: secular, traditional, national religious, and Ultra-Orthodox.<sup>243</sup> Secular Jews identify themselves as Jewish, though they are typically not religious observers.<sup>244</sup> Traditional Jews may strictly observe some Jewish practices while not observing others.<sup>245</sup> National religious

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we made the constitution a few months later, when Barak said the words I quoted, in a speech and later in an article. But, no one contemplated it at the time the law was enacted, *id.*”

<sup>237</sup> *A Portrait of Jewish Americans* (Oct. 1, 2013), <http://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey/> [<http://perma.cc/L6UH-CXD5>].

<sup>238</sup> GELPE, *supra* note 30 at 16.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* Sepharadim Jews are descendants of the large and influential community that lived in Spain and Portugal before their expulsion in 1492 and 1497. Mizrahim Jews are descendants from the communities that existed for centuries in the Middle East, North Africa, and the Caucuses. These two terms are often used interchangeably because of the significant similarities and overlaps. Ashkenazim are Jews who came from communities in northern and Eastern Europe, *id.*

<sup>243</sup> GELPE, *supra* note 30, at 17.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

Jews combine their Jewish religious practice with being “fully integrated into the fabric of modern life.”<sup>246</sup> Ultra-Orthodox Jews limit their modernity by living in separate enclaves.<sup>247</sup> The men are often pictured wearing long black coats, fur hats, and side-curls.<sup>248</sup> While the divisions do exist and each group has its particular characteristics, they are not as clear-cut in practice.<sup>249</sup>

Reflected in this view of themselves as an ethnic group, is an important characteristic of the systems of law in Israel; Jewish law and Israeli law are not the same things. They are distinct legal systems. Matters of personal status, such as marriage and divorce, are brought in religious courts that have exclusive jurisdiction authorized by Israeli statutes.<sup>250</sup> This system allows the law of each recognized religion to apply to people only within those communities, rather than Israel applying the law of one particular religion to its entire people.<sup>251</sup> Other systems of law operate in Israel, with the Jewish law system and the Islamic law system being the most prominent. These are very old systems, and are neither common law nor civil law.<sup>252</sup>

Despite the prominence of the Jewish law system, from a legal system development perspective “[t]he influence of Jewish law on the Israeli legal system has been limited.”<sup>253</sup> Several factors may have contributed to this. First, the secular Jews that founded and first populated the State did not feel bound to Jewish religious doctrine or Jewish law despite identifying themselves as members of the Jewish religion.<sup>254</sup> Second, in 1948 the need was strong for adopting a legal

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* See Leviticus 19:27, “Ye shall not round the corners of your heads, neither shalt thou mar the corners of thy beard, *id.*”

<sup>249</sup> GELPE, *supra* note 30, at 17.

<sup>250</sup> *Id.* at 284.

<sup>251</sup> *Id.* at 285.

<sup>252</sup> *Id.* at 66.

<sup>253</sup> *Id.*

<sup>254</sup> GELPE, *supra* note 30, at 66.

system that could become effective immediately. In addition, because of the ongoing war, there was limited time for modifying the legal system they inherited from the British, and there were few judges who were trained in Jewish law.<sup>255</sup>

#### D. COMMON LAW OR CIVIL LAW, OR BOTH?

Israel's legal system is a mixture of common law and civil law systems. The common law aspects of the Israeli legal system were inherited from the British with the termination of the British Mandate.<sup>256</sup> The origins of Israel's civil laws are more complex.<sup>257</sup> In 1516, the area that now makes up the modern State of Israel became part of the Ottoman Empire. In the nineteenth century, the Ottoman Empire was importing mainly French law in the form of procedural codes, commercial, and criminal law.<sup>258</sup> In 1917, Britain conquered Ottoman Palestine, and then in 1922 ruled it under a League of Nations Mandate.<sup>259</sup> English law was imported and large elements of "civil" law were overlaid with the common law, thus creating a mixed system.<sup>260</sup> After the establishment of the State in 1948, the founders decided to leave all of the existing law in place.

Influential jurists in academia and The Ministry of Justice active during the early years of the State of Israel were trained in Europe; Germany in particular.<sup>261</sup> The civil law orientation of these jurists helped shape the legal system of the new State.<sup>262</sup> In the 1960's and 1970's Israel decided to adopt a series of code-like laws that were based largely on the German model.<sup>263</sup> This

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<sup>255</sup> *Id.* at 66-67.

<sup>256</sup> *Id.* at 65.

<sup>257</sup> *Id.*

<sup>258</sup> Celia Fassberg, *Language and Style in a Mixed System*, 78 TUL. L. REV. 151, 155-156 (2003).

<sup>259</sup> *Id.* at 156.

<sup>260</sup> *Id.*

<sup>261</sup> Fassberg, *supra* note 248, at 157 n. 16.

<sup>262</sup> GELPE, *supra* note 30, at 65.

<sup>263</sup> Fassberg, *supra* note 248, at 157. The irony of Israelis adopting some features of the German legal system is not lost on commentators, *id.*

step created what is now the mixed system of public law dominated by common law, a court system that is largely common law, and codified private law.<sup>264</sup> Even though Israeli jurists now receive their legal educations from Israeli institutions, “Israeli authorities continue to look to European countries as sources of legal concepts.”<sup>265</sup>

## VII. ART’S AND THE FREEDOM OF RELIGION

Up until early 2014, Israel offered unlimited and nearly free IVF treatments to women up to age forty-five, or to those that had already had two children using the procedure.<sup>266</sup> Women are now limited to eight treatments funded by the state, and women over the age of forty-two are limited to three unsuccessful treatment cycles.<sup>267</sup> The Health Ministry defends its new restrictions, claiming that according to worldwide medical literature, the chances for success after three unsuccessful attempts of IVF at the age of forty-five are nearly zero.<sup>268</sup>

### A. RELIGIOUS PERSPECTIVES

Individual attitudes towards reproductive technologies “are likely the result in whole or in part of their individual beliefs systems.”<sup>269</sup> Since the development of IVF in the late 1960’s,<sup>270</sup> “most major religions have established teachings and philosophies pertaining to the existence of and use of assisted reproduction, each of them drawing from and interpreting their key doctrines for guidance.”<sup>271</sup> Catholicism and Judaism take positions that are on opposite sides of the

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<sup>264</sup> *Id.* at 157-158.

<sup>265</sup> GELPE, *supra* note 30, at 65.

<sup>266</sup> Ilene Prusher, *New IVF Policy Have Israeli Women Worried About Being Left Behind*, HAARETZ (Feb. 21, 2014), <http://www.haaretz.com/news/features/.premium-1.575442> [<http://perma.cc/K4GH-NCJH>].

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Melodie Shank, *Religion and Third-Party Reproduction*, FERTILITY AUTHORITY (Mar. 7, 2012), <https://www.fertilityauthority.com/articles/religion-and-third-party-reproduction> [<https://perma.cc/P9DP-HFQY>].

<sup>270</sup> See Bart C. Fauser & Robert G. Edwards, *The Early Days of IVF*, HUMAN REPRODUCTION UPDATE (August 2, 2005), <http://humupd.oxfordjournals.org/content/11/5/437.full> [<http://perma.cc/AEK3-N755>].

<sup>271</sup> Shank, *supra* note 267.

spectrum. The Catholic position on reproductive issues, such as ART's, abortion, and contraception, is set forth by their views on when life actually begins and how exactly the life was conceived. They base their position on a combination of the scientific fact that life begins at conception, along with moral implications stemming from various teachings they interpret from their Bible. In contrast, Judaism shifts the focus from the act of creating life itself, to what the purpose of creating life actually is.

### I. CATHOLIC APPROACH

According to Pope John XXIII “[h]uman life is sacred—all men must recognize that fact.”<sup>272</sup> However, from the strictest interpretation of the Catholic position, human life is only sacred when it is conceived in the proper way in which it “reveals the creating hand of God.”<sup>273</sup> If the creation of life does not reveal the creating hand of God, i.e. a life form created by artificial means, neither the life form nor the conceiver can be protected under Catholic ideology. This points directly to the perceived immorality of ART's. Though the document issued in 1987 by the Sacred Congregation for the Doctrine of Faith, known as the *Donum Vitae*, did not directly declare using all ARTs wrong, it did specifically state that some methods are definitely immoral.<sup>274</sup> The Church is morally opposed to any type of reproductive technologies that involve the creation of life outside of marriage or outside the body.<sup>275</sup>

In November 2014, Pope Francis reaffirmed the Catholic Church's position with remarks

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<sup>272</sup> Pope Paul VI, *Humanae Vitae* (July 25, 1968), <http://www.wf-f.org/HumVitae.html> [<http://perma.cc/76YC-ZT8D>].

<sup>273</sup> *Id.*

<sup>274</sup> John M. Haas, *Begotten Not Made: A Catholic View of Reproductive Technology*, U. S. CONF. OF CATH. BISHOPS (1998), <http://www.usccb.org/issues-and-action/human-life-and-dignity/reproductive-technology/begotten-not-made-a-catholic-view-of-reproductive-technology.cfm> [<http://perma.cc/E5X2-95XU>].

<sup>275</sup> *Id.*

he made in a meeting with members of the Association of Italian Catholic Medical Doctors. The Pope denounced a “false compassion” that “believes it is helpful to women to promote abortion . . . a scientific breakthrough to produce a child and consider it to be a right, rather than a gift to welcome; or to use human lives as guinea pigs, presumably to save others.”<sup>276</sup> He went on to say that we are in a time of experimentation “[m]aking children rather than accepting them as a gift . . . [b]e careful, because this is a sin against the Creator: against God the creator, who created things this way.”<sup>277</sup>

Marriage is very much a foundational principle for the conception of a child in accordance with Catholic teachings.<sup>278</sup> The transmission of human life requires “responsible collaboration with the fruitless love of God; the gift of human life must be actualized through specific and exclusive acts of husband and wife.”<sup>279</sup> Reproductive technologies utilizing gametes from third parties are explicitly immoral according to the Church because these methods are “contrary to the unity of marriage, to the dignity of the spouses, to the vocation proper to parents, and to the child's right to be conceived and brought into the world in marriage and from marriage.”<sup>280</sup> Conceiving a child in marriage respects the unity and conjugal fidelity of marriage, according to the Church.<sup>281</sup> The marital bond created “accords the spouses, in a[n] objective and unalienable manner, the exclusive right to become father and mother solely through each other.”<sup>282</sup> Even if two infertile

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<sup>276</sup> Francis X. Roca, *Pope Calls Abortion, Euthanasia, IVF Sins 'against God the creator'*, CATH. NEWS SERV. (Nov. 17, 2014), <http://www.catholicnews.com/data/stories/cns/1404767.htm> [<http://perma.cc/ZM8V-AU57>].

<sup>277</sup> *Id.*

<sup>278</sup> *About Catholic Marriage FAQ's*, FOR YOUR MARRIAGE, <http://www.foryourmarriage.org/catholic-marriage/faqs/> (last visited Feb. 8, 2015) [<http://perma.cc/2K9H-K5XR>].

<sup>279</sup> *Donum Vitae*, CONGREGATION FOR THE DOCTRINE OF FAITH, 7 (Feb. 22, 1987).

<sup>280</sup> *Id.* at 16.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

married people wish to create child through the only possible means, the Church remains opposed to it because “the act of conjugal love is considered in the teaching of the Church as the only setting worthy of human procreation.”<sup>283</sup>

## II. JEWISH APPROACH

Despite the long shared history with Catholicism, the Jewish position on procreative technologies is generally much more pragmatic. The modern day acceptance of IVF in Israel is founded in part on the ancient Jewish commandment to “be fruitful and multiply,”<sup>284</sup> that is “the cornerstone of the obligation and need of Jews to reproduce.”<sup>285</sup> The authors of the Bible could not have foreseen the scientific advances that have allowed humans to be conceived through means other than the natural process.<sup>286</sup> However, looking deeper into the ancient texts there are some instances in which we can “interpret religious directives in light of new technologies.”<sup>287</sup>

Historically, birthrates had to be very high in order for humanity to survive epidemics, wars, and famine.<sup>288</sup> Israel’s legal policy acceptance of reproductive technologies is linked to, “the Jewish quest for survival, ‘the dreadful memory of the Holocaust, the permanent loss of life in terrorist attacks and military battles, the demographic concern caused by competition with surrounding Arab nations, and the strong cultural perception of raising a family as a patriotic

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<sup>283</sup> *Id.* at 21.

<sup>284</sup> *Genesis* 1:28.

<sup>285</sup> Miryam Z. Wahrman, *Fruit of the Womb: Artificial Reproductive Technologies & Jewish Law*, 9 J. GENDER RACE & JUST. 109, 110 (2005).

<sup>286</sup> *Id.* at 112.

<sup>287</sup> *Id.* at 110.

<sup>288</sup> Jeff Wise, *About That Overpopulation Problem*, SLATE (Jan. 9, 2013), [http://www.slate.com/articles/technology/future\\_tense/2013/01/world\\_population\\_may\\_actually\\_start\\_declining\\_not\\_exploding.html](http://www.slate.com/articles/technology/future_tense/2013/01/world_population_may_actually_start_declining_not_exploding.html) [<http://perma.cc/RUK9-CPVF>].

endeavor.”<sup>289</sup> Becoming a parent is a desire that “is deeply rooted in the Israeli psyche — perhaps more so than in other countries.”<sup>290</sup>

The Israeli government has made the conscious decision to allow the Ministry of Health to provide all citizens of Israel (and medical tourists) with subsidized IVF treatments. Because of this, Israel has become an extremely popular choice in medical tourism, particularly for infertility treatments. Israel has become known as the IVF capital of the world.<sup>291</sup> One hospital in Tel Aviv performs about 7,000 procedures each year, one quarter of the country’s approximately 28,000 procedures performed annually.<sup>292</sup>

## VIII. RECONCILIATION OF RELIGIOUS ADHERENCE AND DEMOCRATIC VALUES

### A. ADDRESSING THE STATUS QUO

It is an unwritten rule among Americans that there are two main taboo subjects of discussion, particularly when people meet for the first time or in the workplace, politics and religion.<sup>293</sup> If they are brave enough to leave the confines of the trench and venture into no-man’s land to enter into what can be described as a heated debate, each is often driven back with heavy volleys of deeply rooted beliefs that inevitably lead to a stalemate. These issues are common in Israel, as well, and the status quo must be addressed there, but for reasons that do not even involve

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<sup>289</sup> LAW LIBRARY OF CONG., ISRAEL: REPRODUCTION AND ABORTION: LAW AND POLICY, GLOB. LEGAL RESEARCH CENTER 6 (Feb. 2012) <http://www.loc.gov/law/help/il-reproduction-and-abortion/israel-reproduction-and-abortion.pdf> [<http://perma.cc/JGS9-VEWL>].

<sup>290</sup> Shir Dar, *In Israel, One Less Worry*, SHMA (Oct. 1, 2014), <http://shma.com/2014/10/in-israel-one-less-worry/> [<http://perma.cc/MCD2-5D9P>].

<sup>291</sup> Dina Kraft, *Where Families Are Prized, Help is Free*, N. Y. TIMES (July 17, 2011), [http://www.nytimes.com/2011/07/18/world/middleeast/18israel.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/07/18/world/middleeast/18israel.html?pagewanted=all&_r=0) [<http://perma.cc/WWG5-CFRZ>].

<sup>292</sup> *Id.*

<sup>293</sup> See Bruce Weinstein, *The Ethics of Talking Politics at Work*, BLOOMBERG BUS. (Jan. 15, 2008), <http://www.bloomberg.com/bw/stories/2008-01-15/the-ethics-of-talking-politics-at-workbusinessweek-business-news-stock-market-and-financial-advice> [<http://perma.cc/2NFM-JSP3>].

IVF.<sup>294</sup> In the political and legal sphere, conflicts about specific application and fundamental principles in religion and state have become more and more common.<sup>295</sup>

Because Israel does not have a constitution that determines the underlying basis for the relationship between church and state, questions regarding this relationship were managed through the “Status Quo” doctrine.<sup>296</sup> This doctrine preserved, or was assumed to preserve, “a wide range of legal and practical arrangements of religious matters which were prevalent during the very beginning of Israel as an independent state.”<sup>297</sup>

In Israel, some suggest there is no way to find a common solution, “because the gaps are so wide that even the very general conceptions about the model for structuring the relationship are sharply different.”<sup>298</sup> While democracy calls for a separation of religion and state, Judaism must advance a union between them.<sup>299</sup>

As this Note argued, the legal status quo of the relationship between religion and state must be addressed in the United States. Something needs to be done to generate a working solution to prevent infertile women and couples from having to make a choice between their desires to start a family and their employment merely because a religious employer disagrees with someone’s individual choice. Court decisions, statutes passed by Congress, and the media all play a role in perpetuating the prevalent separation of church and doctrine.

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<sup>294</sup> Elazar Nachlon, *Structural Models of Religion and State in Jewish and Democratic Political Thought: Inevitable Contradiction? The Challenge for Israel*, 22 TOURO L. REV. 613, 623 (2006).

<sup>295</sup> *Id.* at 624.

<sup>296</sup> CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL 31 (Steven M. Cohen & Daniel J. Elazar eds., 1984); See Elazar Nachlon, *Structural Models of Religion and State in Jewish and Democratic Political Thought: Inevitable Contradiction? The Challenge for Israel*, 22 TOURO L. REV. 613, 622 (2006).

<sup>297</sup> Nachlon, *supra* note 294, at 622.

<sup>298</sup> *Id.* at 631-32.

<sup>299</sup> *Id.*

## IX. CONCLUSION

By strictly adhering to the principles of the freedom of religion, the courts and the legislature allow discrimination in certain circumstances. Though several cases have resulted in favorable outcomes in the lower courts, the stage is set for the Supreme Court to make a decision that could have substantial ramifications. Cases in which religious employers discriminate against female church employees for seeking to start a family by the only means medically possible will continue unless something changes. Opening a dialogue between churches that strictly adhere to a condemnation of ART's and members of the public could eventually bring an understanding of what each side is attempting to accomplish. Israel's funding of IVF procedures provides proof that religion and reproductive procedures can be compatible with one another, and that everything can be *kosher* between the two sides.

In America, the courts and legal bodies have made decisions for our society, which professes to view personal choice, to be stripped of it, in the name of another belief that they characterize as a freedom. A model of separation of church and state that allows accommodation in order to be constitutional, provides room for laws that create justified discrimination. The "wall" of separation perpetuates difficulties in the reconciliation of rights.

The struggle is perpetuated by court decisions that carve out exceptions for religious employers, stripping the constitutional protections for infertile women seeking to start a family. Even when they are a religious employee, the right a woman has to procreate, through whatever means necessary, should not be trumped by the freedom of religion "ace" as declared by some courts. Including IVF in the procreational protections would give infertile women more legal protections when faced with religious freedom challenges from the other side.