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WHEN LIFE BEGINS: A CASE STUDY OF THE UNITARIAN UNIVERSALISM FAITH AND ITS POTENTIAL TO COMBAT ANTI-ABORTION LEGISLATION

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I. INTRODUCTION

The First Amendment's codification of the fundamental right to free exercise of religion reflects the Founders' intent to bolster religious freedom and distinguish the United States from the religious persecution and strife that had plagued England.[1] The Founders longed to distance themselves from religious upheaval and violence as well as limit governmental authority over religious belief and exercise.[2] The ability to engage in one's religious beliefs without government intrusion is an inherently American ideal that has undergone numerous iterations and interpretations since the Bill of Rights' drafting.[3]

The enactment of the Religious Freedom Restoration Act ("RFRA") in 1993 exemplified this importance of religious freedom. Three years prior, the Supreme Court had upended the protections surrounding free exercise in *Employment Division v. Smith*, and lowered the legal threshold that state and federal legislation was required to meet when touching upon issues of religious freedom.[4] Immense public outcry that crossed the political aisle then ensued, triggering the enactment of the RFRA.[5]

Recent successes under the RFRA have largely benefited conservative, Christian ideologies despite the statute's call for protection of all religious beliefs.[6] Pushback against anti-discrimination legislation, contraception mandates, and COVID regulations has been successful in both the Supreme Court and in lower courts.[7] For

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1. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

2. *Id*. at 1421, 1516.

3. *Id*. at 1416-20.

4. 494 U.S. 872 (1990).

5. Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 540-41 (1993) (quoting, 137 Cong Rec E2422 (daily ed June 27, 1991) (statement of Rep. Stephen J. Solarz)) ("With the stroke of a pen, the Supreme Court [in *Smith*] virtually removed religious from . . . from the Bill of Rights.").

6. ELIZABETH REINER PLATT, KATHERINE FRANKE, KIRA SHEPHERD & LILIA HADJIVANOVA, WHOSE FAITH MATTERS? THE FIGHT FOR RELIGIOUS LIBERTY BEYOND THE CHRISTIAN RIGHT, COLUM. L. SCH.: L., RTS., & RELIGION PROJECT (Nov. 2019), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Images/Whose%20Faith%20Matters%20Full%20Report%2012.12.19.pdf.

7. *See* Roman Catholic Archbishop v. Bowser, 531 F. Supp. 3d 22 (D.D.C. 2021); Capitol Hill

purposes of this Comment "conservative" religions and beliefs are those commonly aligned with evangelical Christian groups that profoundly oppose abortion, LGBTQ+ rights, and other similarly situated causes. Religions defined in this Note as "progressive" are those that openly affiliate themselves with progressive causes, such as pro-choice legislation or gay marriage. This is not to say that the entirety of a faith in all its sects are progressive in nature, but that they self-identify with progressive causes to varying degrees.[8]

This Comment argues that the RFRA can effectively be used by progressive religions to push back against abortion legislation in light of the *Dobbs v. Jackson Women's Health Organization* decision.[9] Section II of this Note discusses the history of the RFRA, weaving through its constitutional and statutory framework, its treatment by the Supreme Court, and its legislative history. Section II concludes by comparing the successes and failures of conservative and progressive groups in their utilization of the RFRA in both the Supreme Court and lower courts. Section III puts forth a case study of the Unitarian Universalism ("UU") faith and its potential to push back against restrictive abortion laws under the RFRA's five-part test. Section IV concludes that faiths with similar progressive beliefs can bring successful claims under the RFRA, and they must be more intentional and aggressive considering conservative successes.

II. BACKGROUND

Congress was compelled to pass the RFRA to codify a heightened standard of protection for religious liberty that it appeared the United States Supreme Court had abandoned.[10] Despite many legal and political battles over its breadth and application, the RFRA passed in large part to insulate smaller, unpopular religions from persecution.[11] Yet its successful uses throughout its history have led many scholars to find that it has benefitted the belief systems of one specific group:

Baptist Church v. Bowser, 496 F. Supp. 3d 284 (D.D.C. 2020) (both holding that COVID-19 regulations substantially burdened religious exercise); Zubik v. Burwell, 578 U.S. 403 (2016) (holding that the birth control certification process of the Affordable Care Act required a RFRA analysis).

8. *See Interfaith Families Welcome*, UNITARIAN UNIVERSALIST ASS'N, https://www.uua.org/families/interfaith (last visited Apr. 10, 2023).

9. 142 S. Ct. 2228, 2284 (2022).

10. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994).

11. *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civ. and Const. Rts. of the House Comm. on the Judiciary*, 102d Cong. 1 (1992) (statement of Don Edwards, Chairman, H. Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary).

conservative Christians.[12]

This Section discusses the history and background of the RFRA and its many applications. Part A outlines the constitutional and statutory framework and history underpinning the RFRA. Part B details the use of the RFRA to support both conservative and progressive causes with varying degrees of success.

A. Constitutional and Statutory Framework

The Free Exercise Clause of the First Amendment to the United States Constitution and the federal RFRA provide the basis for the protections and analysis conducted in this Note.[13] Dissecting these sources makes clear the RFRA's role in codifying a heightened standard of protection for religious liberty and protecting unpopular religions from persecution.[14] Understanding the origins and intentions of the RFRA and its constitutional source are key to formulating its potential applications by progressive religions in the future.

1. Free Exercise Clause

The Free Exercise Clause finds its origins in the First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[15] This language aimed to ensure that religious opinions, practices, and expressions received constitutional protection against government regulation.[16] Supreme Court jurisprudence following its passage broadened protections allowing for religious exemptions from otherwise constitutional provisions if the exemption was religious in nature.[17]

The Supreme Court's treatment of the Free Exercise Clause up until the *Smith* decision demanded that any imposition on an exercise of religion could only stand if it served a compelling interest of the state or federal government in line with the First Amendment.[18] With such a high standard set by the Court, individuals found strong constitutional backing in their fight for religious-based exemptions.

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12. Katherine McKeen, Opinion, *When Courts Play God, Whose Religion Matters?*, REGUL. REV. (Feb. 2, 2021), https://www.theregreview.org/2021/02/02/mckeen-when-courts-play-god-whose-religion-matters.

13. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2-2000bb-4.

14. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2-2000bb-4. .

15. U.S. CONST. amend. I.

16. McConnell, *supra* note 1, at 1516.

17. *Id*. at 102.

18. Drinan & Huffman, *supra* note 5, at 531.

2. Pre-RFRA Jurisprudence of the Free Exercise Clause

Case law addressing religious liberty claims prior to the enactment of the RFRA highlighted a tension between Congress and the Supreme Court over standards of protection for religious exercise. The analysis of the shift in standards from *Sherbert v. Verner*[19] to *Smith* is an important backdrop to the enactment of the RFRA, its motivations, and ensuing implementation.

i. Pre-Smith

Before *Smith* was decided in 1990, cases involving questions of religious liberty were decided under the compelling interest test set in *Sherbert*.[20] In *Sherbert*, the appellant was fired because she would not work on Saturday, the Sabbath Day in her Seventh-day Adventist religion.[21] When she was denied unemployment benefits by the state of South Carolina, she brought suit claiming that the statute infringed on her right to freely exercise her religion under the Free Exercise Clause.[22] The Court held that the government had imposed substantial burdens on her religious beliefs, and that the law would survive only if the government regulation was narrowly tailored to serve a compelling governmental interest.[23]

This standard became the prevailing method for analyzing free exercise of religion cases.[24] Legal scholars saw this standard as an apt protection of religious liberty, and without these types of formalized protections "nonconventional and unpopular religious groups w[ould] be left unprotected from the 'harsh impact' of majoritarian rule."[25] A diverse group would come together to protect this heightened standard in the future[26]

ii. Employment Division v. Smith and Its Impact

The Supreme Court majority in *Smith* upended this standard entirely. In *Smith*, Oregon passed a law prohibiting the knowing or intentional possession of a controlled substance, including the drug

19. 374 U.S. 398, 399 (1963).

20. *Id.* at 403; Laycock & Thomas, *supra* note 10, at 217-18.

21. *Id.* at 399.

22. *Id*. at 401.

23. *Id*. at 403.

24. Drinan & Huffman, *supra* note 5, at 531.

25. James E. Wood, *The Religious Freedom Restoration Act*, 33 J. CHURCH & STATE 673, 677 (1991).

26. *Id*. at 675.

peyote.[27] The respondents in *Smith* were indigenous peoples who ingested peyote for sacramental purposes and were subsequently fired from their jobs.[28] The respondents were ineligible for unemployment benefits because of their discharge, and they challenged their denial in court on religious freedom grounds.[29] The Supreme Court found the Oregon law constitutional and openly displaced the need for a "compelling interest" by the government.[30] This was replaced with a decree that only valid and neutral law[s] of general applicability will be subjected to rational basis review rather than something approaching strict scrutiny as required under *Sherbert*.[31] How burdensome the law may be to an individual's or institution's ability to freely exercise their religion carried little weight under this newly adopted analysis.[32]

The public response was swift and bipartisan, and the case law following the *Smith* decision made clear the hesitancy lower courts had in applying this new standard. Lawyers and lower court judges seemed to interpret the *Smith* decision as severely limiting, if not entirely repealing the Free Exercise Clause.[33] A district court judge in Rhode Island, despite disagreeing with *Smith*, found in *Yang v. Sturner* that a Hmong family's resistance to a state-ordered autopsy for religious reasons could not survive the new standard requiring the law be valid, neutral, and generally applicable.[34] A similar resistance to a state-ordered autopsy in Michigan based on the respondent's Jewish faith also failed the *Smith* test.[35] Other courts outright refused to follow *Smith*'s authority.[36] Only a week after *Smith* was decided, the Minnesota Supreme Court cited the state constitution's free exercise clause rather than the *Smith* rationale in holding that an Amish farmer was exempt from attaching a bright orange triangle to his horse because it was a "worldly" symbol in violation of his religious beliefs.[37]

A challenge to the new *Smith* standard found its way to the Supreme

27. Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

28. *Id*.

29. *Id*.

30. *Id*. at 888, 890.

31. *Id.* at 879 . Rational basis review requires a government regulation to be rationally related to a legitimate government purpose for the regulation to stand. Strict scrutiny requires the government regulation serve a compelling state interest that is narrowly tailored to the purpose and uses the least restrictive means to achieve that purpose.

32. *Id*.

33. Laycock & Thomas, *supra* note 10, at 216.

34. 750 F. Supp. 558, 559-60 (D. R.I. 1990); *Smith*, 494 U.S. at 879.

35. Montgomery v. Cnty. of Clinton, Mich., 743 F. Supp. 1253 (D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991).

36. State v. Hershberger, 462 N.W.2d 393 (Minn., 1990).

37. *Id.*

Court just three years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[38] In *Lukumi*, respondents were practicing members of the Santeria religion, which engaged in animal sacrifice.[39] When they attempted to establish a church in Florida, the city adopted ordinances explicitly prohibiting ritualistic animal sacrifices.[40] The Supreme Court stood firm behind its rationale in *Smith* and found that the ordinance was not neutral or generally applicable and its intent to suppress the church individually was unconstitutional.[41]

With *Lukumi* stating that the previous "compelling interest" test was antiquated, public outcry and calls for change to this new standard paved the way for the RFRA's enactment.[42] Scholars, practitioners, and religious leaders saw the *Smith* decision as catastrophic to the Free Exercise Clause.[43] Some went so far as to label the decision a "near total loss of any substantive constitutional right to practice religion[,] . . . creat[ing] the legal framework for persecution."[44] Of particular concern was the vulnerable position *Smith* put small, unpopular religions in.[45] With such power in the hands of legislative bodies, organizations and politicians banded together to try and reinstate a heightened standard of protection for religious liberty.[46]

3. RFRA

The legislative journey the RFRA took after the *Smith* decision reflected Congress' desire to push back against the Supreme Court's assertion that "valid and neutral laws of general applicability" that limit religious exercise are only afforded a minimal degree of scrutiny by the Court.[47] Dissecting the history, language, and the Supreme Court's response to the RFRA's implementation provides important background for future implementations by progressive activists.

i. Legislative History and Language

Before the RFRA even made its way to a review and debate before

38. 508 U.S. 520, 525 (1993).

39. *Id.* at 525.

40. *Id*. at 526.

41. *Id*. at 546-47.

42. Drinan & Huffman, *supra* note 5, at 540-41.

43. Wood, *supra* note 25, at 674.

44. *Id*. at 675.

45. Drinan & Huffman, *supra* note 5, at 532.

46. Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 248-49 (1994).

47. Emp. Div. v. Smith, 494 U.S. 872, 879 (1990).

the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary groups across the political spectrum tried to take immediate action against the Supreme Court's decision in *Smith*.[48] In May 1990, a diverse group of organizations ranging from the American Civil Liberties Union ("ACLU") to the Christian Legal Society to the National Association of Evangelicals petitioned the Court for a rehearing.[49] As many legal scholars noted, not since the anti-pornography movement of the 1980s had such diametrically opposed groups come together united behind a singular cause.[50] Even with such wide support, the rehearing was denied, and religious and public interest groups instead turned their sights towards a legislative approach.[51]

Prior to its passage the RFRA still faced ideological barriers despite such bi-partisan support. Pro-life groups, including the Catholic Conference and the National Right to Life Committee expressed deep concerns that the RFRA would be used by pro-choice groups if *Roe v. Wade* were to be overturned.[52] This opposition was so strong that a rival bill titled the Religious Freedom Act ("RFA") was introduced in the United States House of Representatives in November 1991.[53] While nearly identical to the RFRA, the RFA explicitly stated that the Act could not be used to challenge "any limitation or restriction on abortion, on access to abortion services or on abortion funding."[54] To quell such strong concerns, the Congressional Research Service and the Congressional Committee insisted that it was "improbable" that an abortion claim under the RFRA could be brought and they agreed to clarify this point in their legislative reports.[55] The outcome of *Planned Parenthood v. Casey* in 1992 further calmed the fears of pro-life groups and eventually the RFA was abandoned.[56]

With the support of influential pro-life groups regained, the United States Senate passed the RFRA in an overwhelmingly bipartisan vote in October 1993, with President Clinton signing it into law on November 16 of the same year.[57] Congressional hearings, committee notes, and the text of the RFRA itself makes clear that the RFRA was

48. *Religious Freedom Restoration Act of 1991*, supra note 11.

49. Drinan & Huffman, *supra* note 5, at 531; Petition for Rehearing, Emp. Div. v. Smith, 494 U.S. 872 (1990), denied, 496 U.S. 913 (1990).

50. Idleman, *supra* note 46, at 248-29.

51. Petition for Rehearing, Emp. Div. v. Smith, 494 U.S. 872 (1990), *denied*, 496 U.S. 913 (1990).

52. Drinan & Huffman, *supra* note 5, at 534; Laycock & Thomas, *supra* note 10, at 231.

53. Drinan & Huffman, *supra* note 5, at 535.

54. *Id*. (quoting H.R. 4040, 102nd Cong., 1st Sess. (1991)).

55. *Id*. at 535, 538.

56. *Id*. at 537-38.

57. Laycock & Thomas, *supra* note 10, at 210.

designed almost exclusively to reverse the damage caused by the *Smith* decision.[58] The opening statement of the RFRA hearing before the Subcommittee on Civil and Constitutional Rights in May 1992 stated this clearly: "H.R. 2797, the Religious Freedom Restoration Act, was drafted to respond to the void left by the Supreme Court's decision. The bill simply restores the compelling governmental interest test."[59] The text of the Act itself also names this purpose explicitly:

> SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.
> (a) IN GENERAL.— Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) EXCEPTION.— 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 compelling governmental interest.[60]

With the RFRA established, Section 3 of the Act came under scrutiny as religious groups and lower courts began to implement its provisions. In defining a "compelling interest," Congress looked to case law pre-*Smith* to establish what qualified under this standard.[61] *Sherbert* defined the interest as something necessary to avoid "the gravest abuses, endangering paramount interest."[62] The need for a "substantial burden" was defined by the House Report in very general terms: "All governmental actions which have a substantial external impact on the practice of religion [are]subject to the restrictions in this bill."[63] "Exercise of religion" was defined broadly as well but most notably protected conduct that was religiously motivated and practiced by either individuals or institutions.[64]

What came from the RFRA was a statutory right of individuals and religious institutions to be exempt from government regulations imposing on their religiously motivated conduct.[65] The RFRA reinstated and codified the "compelling interest" test used before the *Smith* decision

58. *Id*.

59. *Religious Freedom Restoration Act of 1991*, *supra* note 11.

60. 42 U.S.C. §§ 2000bb-1(a)-(b).

61. Laycock & Thomas, *supra* note 10, at 224.

62. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

63. Laycock & Thomas, *supra* note 10, at 229 (quoting *Religious Freedom Restoration Act of 1991*, *supra* note 11).

64. *Id.* at 232, 234.

65. *Id*. at 210.

upended free exercise jurisprudence.[66] At its passage, the RFRA was celebrated by scholars, religious leaders, and religious institutions, underlining the belief that the RFRA "endow[ed] the protection of religious liberty with a vigor that one would be hard pressed to discern in all but a handful of the Court's opinions."[67]

ii. Limiting RFRA: The Implications of City of Boerne v. Flores

The celebrations surrounding the passage of the RFRA proved to be short-lived. In 1997, St. Peter Catholic Church in the City of Boerne, Texas applied for a building permit to increase its capacity.[68] Despite the Church's need to expand, the City of Boerne denied their application, citing a recently passed ordinance authorizing the city's Historic Landmark Commission that required preapproval of construction.[69] In response, the Archbishop brought suit in the Western District of Texas, basing his claim on the belief that the RFRA provided the church with a religious exemption from the restrictions of the city ordinance.[70]

When the case reached the Supreme Court, the City of Boerne held firm that it maintained authority under the Fourteenth Amendment ofthe United States Constitution to enact the RFRA on both the federal and state levels, while the City of Boerne argued against the statute's constitutional application on the state level.[71] The Court found for the City of Boerne, agreeing that the RFRA's application to the state ordinance reached far past the congressional enforcement power afforded to Congress.[72] According to the majority, the RFRA was a clear attempt to overturn the holding in *Smith*.[73] With *Smith* being settled law, the Court believed Congress was encroaching on the judiciary's authority to interpret the Constitution in violation of the Fourteenth Amendment.[74] With such an overreach apparent, the Supreme Court deemed the RFRA unconstitutional on the state level, leaving decisions of religious exceptions to local and state governments rather than under the scope of the RFRA.[75]

66. Drinan & Huffman, *supra* note 5, at 533.
67. Idleman, *supra* note 46, at 251.
68. City of Boerne v. Flores, 521 U.S. 507, 512 (1997).
69. *Id*.
70. *Id*.
71. *Id*. at 517.
72. *Id*. at 536.
73. *Id.*
74. *Id*.
75. *Id*. at 534-36.

iii. RFRA Today

With the RFRA overturned on the state level, reactions in religious communities were immediate, and protections for religious minorities were deemed insufficient by legal analysists.[76] The federal government's reaction was two-fold. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA") mirroring the compelling interest test put forth in the RFRA and implementing it for state land use regulations.[77] Congress also amended the RFRA in 2003 to make clear that it only applied to federal laws as well as laws enacted by the legislatures of Washington, D.C., Puerto Rico, and other United States territories.[78]

Despite the holding of the *Boerne* decision, states could still enact the compelling interest test themselves, and many states did just that.[79] As of 2022, twenty-one states have enacted state-level RFRAs, with ten more states implementing RFRA-like protections that demand strict scrutiny for any burdens placed on religious exercise.[80] In the years following RFRA's journey through the Supreme Court, its use by religious institutions has been contentious and controversial, placing a mirror up to American society and its shifting views on religion and personal liberty interests.

B. RFRA in Action

Since the RFRA's enactment in 1990, its successes have largely been for the benefit of conservative causes.[81] Cases such as *Burwell v. Hobby Lobby*[82] seem to articulate the resounding push by conservative groups to codify religious exemptions from anti-discriminatory legislation and push back against more progressive policies around bodily autonomy. In contrast, attempts by progressive activists to use RFRA as a shield against criminal sanctions have been far less successful.[83] Analyzing successful uses of the RFRA provides a foundation from which more progressive

76. John Gatliff, *City of Boerne v. Flores Wrecks RFRA: Searching for Nuggets among the Rubble*, 23 AM. INDIAN L. REV. 285, 343, 345 (1998).

77. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

78. Religious Freedom Restoration Act, H.R. 1547, 108th Cong. (2003).

79. Dave Bridge, *Religious Freedom or Libertarianism: What Explains State Enactments of Religious Freedom Restoration Act Laws?*, 56 J. CHURCH & STATE 347, 350 (2014).

80. *Federal and State RFRA Map*, BECKET FUND FOR RELIGIOUS LIBERTY, https://www.becketlaw.org/research-central/rfra-info-central/map (last visited Apr. 10, 2023).

81. *See* EEOC v. R.G., 884 F.3d 560 (6th Cir. 2018); Fulton v. City of Phila., 922 F.3d 140 (3d Cir. 2019); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

82. 573 U.S. 682 (2014).

83. *See infra* Section B.II

causes can pull inspiration.

1. Conservative Uses

The use of the RFRA by conservative organizations, religions, and political leaders has been frequent and consistent.[84] The religious liberty policies pushed at the state level are often spearheaded by the "Christian right," and are narrowly tailored to benefit specific groups.[85] Scholars note that these narrowly tailored policies are united in their push for absolute protection for conservative religious beliefs and openly permit discrimination against religious minorities, LGBTQ+ people, and women.[86] With the backing of well-funded conservative religious liberty groups and their success in the *Dobbs* decision, it is important to unpack the conservative movement's successful efforts utilizing the RFRA to their advantage time and time again.[87]

i. Burwell v. Hobby Lobby

An incredibly important win for the conservative movement came in 2014 in the Supreme Court decision of *Hobby Lobby*.[88] With the recent successes of the marriage equality movement and the liberalization of policies surrounding contraception, religious conservatives began filing numerous religious exemption lawsuits and finding success.[89] *Hobby Lobby* holds such importance because of its successful use of the RFRA on the highest stage and its clear articulation of the "compelling interest" standard, ushering in even more exemption requests for conservative causes in state and federal courts across the country.[90]

The passage of the Patient Protection and Affordable Care Act ("ACA") in March of 2010 required all nonexempt employers to provide coverage for "Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling."[91] The ACA provided an exemption for "religious employers," which

84. PLATT ET AL., *supra* note 6, at 67.

85. *Id*. at 71.

86. *Id*.

87. *Id.*; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (holding that there is no constitutional right to abortion, overturning *Roe v. Wade* and *Planned Parenthood v. Casey*).

88. David Masci, *The hobby Lobby decision and the future of religious-liberty rights*, PEW RESEARCH CENTER, https://www.pewresearch.org/short-reads/2014/06/30/the-hobby-lobby-decision-and-the-future-of-religious-liberty-rights/ (last visited Apr. 23, 2023).

89. PLATT ET AL., *supra* note 6, at 19.

90. *Id*. at 20.

91. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 697-98 (2014) (quoting 77 Fed. Reg. 8725); Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2009-10).

included "churches, their integrated auxiliaries, and conventions or associations of churches."[92] To acquire this exemption, employers had to certify that they were a religious employer under this definition.[93] The Green family who had founded Hobby Lobby in 1972 with the goal of "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles" brought suit against the federal government under the RFRA and the Free Exercise Clause, challenging the ACA's contraceptive mandate because some of the contraceptive options they would be required to provide employees stopped the development of an already fertilized egg.[94]

The Supreme Court found that these ACA regulations substantially burdened the Greens' exercise of religion in violation of the RFRA.[95] The Court not only held that corporations could assert religious rights under the RFRA but went on to find that while guaranteeing cost-free access to contraception may be a compelling interest for the government, the contraceptive mandate did not provide the "least restrictive means" to achieve this interest.[96] The government had already established an exemption for organizations with religious objections, and it could have assumed the cost of contraception for individuals who could not obtain it through their employer due to religious objections.[97] That the government took no steps to either include these as alternative options or to make clear to the Court that they were not viable meant the government had failed the least-restrictive-means test codified by the RFRA.[98] The Greens were under no legal obligation to provide coverage for conduct that violated their religious belief that life starts at conception.[99]

ii. Continued Judicial and Legislative Efforts

The outcome in *Hobby Lobby* further bolstered efforts by religious groups to carve out exemptions targeting LGBTQ+ equality and pro-choice legislation.[100] These efforts spanned jurisdictions but were united by the conservative religious beliefs underpinning their claims.[101] Exam-

92. *Hobby Lobby*, 573 U.S. at 698; Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001-18122.

93. *Hobby Lobby*, 573 U.S. at 698; H.R. 3590.

94. *Hobby Lobby*, 573 U.S. at 703-04. *See Our Story*, HOBBY LOBBY NEWSROOM, https://newsroom.hobbylobby.com/corporate-background (last visited Apr. 10, 2023).

95. *Hobby Lobby*, 573 U.S. at 691.

96. *Id*. at 728.

97. *Id*. at 720, 728.

98. *Id*.

99. *Id*. at 720.

100. PLATT ET AL., *supra* note 6, at 67.

101. *Id*.

ples illustrative of the numerous claims filed by conservative religious groups and individuals in the wake of *Hobby Lobby* include: for-profit funeral homes seeking an exemption from federal employment law after firing a transgender employee, a foster care agency seeking similar exemptions in refusing to work with same-sex couples, and pharmacies challenging state laws requiring them to deliver contraception.[102]

Legislative support for these efforts proved numerous as well, again targeting LGBTQ+ and pro-choice identities and beliefs.[103] An overt representation of this is "Project Blitz," a legislative playbook authored by a collection of Christian groups, including the Congressional Prayer Caucus Foundation.[104] The text of this playbook offers politicians pro-Christian "model bills" that have been brought in dozens of states, most often targeting LGBTQ+ rights.[105] States across the country currently have similar bills in consideration, with Oklahoma, West Virginia, and South Carolina leading the way.[106] Such well-funded and organized support mirrors the judicial efforts by the same groups, creating a two-pronged attack under the RFRA.[107]

2. Progressive Uses

Conversely, religious exemption cases for progressive causes after the RFRA passed did not fare well.[108] *U.S. v. Merkt* and *U.S. v. Aguilar* exemplified the struggles facing individuals seeking religious exemptions for immigration related causes.[109] In both cases, individuals helped move Central American migrants covertly through the United States, motivated in part by their religious convictions.[110] Both the Fifth and Ninth Circuits denied their claim of religious exemption, holding that the government's interest in controlling immigration

102. EEOC v. R.G., 884 F.3d 560 (6th Cir. 2018); Fulton v. City of Phila., 922 F.3d 140 (3d Cir. 2019); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

103. PLATT ET AL., *supra* note 6, at 67.

104. *Id.*; David Taylor, *Project Blitz: The Legislative Assault by Christian Nationalists to Reshape America*, THE GUARDIAN (June 4, 2018, 4:00 AM), https://www.theguardian.com/world/2018/jun/04/project-blitz-the-legislative-assault-by-christian-nationalists-to-reshape-america.

105. PLATT ET AL., *supra* note 6, at 67.

106. *Project Blitz Legislation Tracker*, BLITZWATCH, https://www.blitzwatch.org/legislation (last visited Apr. 10, 2023).

107. PLATT ET AL., *supra* note 6, at 71.

108. McKeen, *supra* note 12.

109. PLATT ET AL., *supra* note 6, at 26-27

110. United States v. Merkt, 794 F.2d 950, 952-53 (5th Cir. 1986); United States v. Aguilar, 883 F.2d 662, 666-67 (9th Cir. 1988). Both Merkt and Aguilar were active in the sanctuary movement, in which religious activists created a network to help asylum seekers cross the border and gain access to food and shelter. This movement was led by faith-based social justice movements predicated on the belief of "welcoming the stranger." *See* PLATT ET AL., *supra* note 6, 23, 27.

outweighed their religious beliefs.[111] These decisions have led legal scholars to raise concerns that the federal judiciary treated the RFRA claims for progressive causes differently than those raised by conservative Christians.[112] This concern was further legitimized by the Supreme Court's choice to ignore a RFRA challenge to President Trump's executive order banning immigration from Muslim-majority countries in *Trump v. Hawaii*.[113]

Yet glimmers of hope for the progressive movement surprisingly arose under the Trump administration. In August of 2017, a small group of volunteers for No More Deaths traveled into the Cabeza Prieta National Wildlife Refuge outside of Tucson, Arizona, and placed food and water along common routes used by migrants traveling through Mexico into the United States.[114] The volunteers were charged with violations of federal law, including entering the refuge without a permit, abandoning property, and driving in a wilderness area in violation of federal law.[115] On appeal, the group argued that their acts were "sincere exercises of religion," and their conviction was barred by the RFRA.[116]

Basing its analysis on the RFRA's "very broad protection for religious liberty," the District court found in *United States v. Hoffman* the defendants' religious claims legitimate and worthy of protection, holding that not only were the defendants' beliefs religious in nature, but they were sincerely held.[117] No More Deaths is considered a "ministry" of the Unitarian Universalist Church of Tucson, and all four of the defendants agreed that they felt compelled by a deep spiritual calling to help others in need.[118] Just because these beliefs overlapped with political ideology, they were not less deserving of protection.[119]

The government also placed a substantial burden on the defendants' exercise of their religious beliefs. The regulations imposed upon the defendants served as a means of coercing them via criminal sanctions into abandoning their exercise of religion.[120] The defendants' successful usage of the RFRA was an enormous victory and viewed by scholars as a pushback against a trend of unsuccessful religious

111. *Merkt*, 764 F.2d at 957; *Aguilar*, 883 F.2d at 695.

112. McKeen, *supra* note 12.

113. Trump v. Hawaii, 138 S. Ct. 2392 (2018) (finding that the proclamation was facially legitimate in light of national security interests).

114. United States v. Hoffman, 436 F. Supp. 3d 1272, 1277, 1284 (D. Ariz. 2020).

115. *Id*. at 1278.

116. *Id*. at 1277.

117. *Id*. at 1279, 1284-85 (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014)).

118. *Id*. at 1277.

119. *Id*. at 1283-84.

120. *Id*. at 1285.

liberty claims brought by progressive groups.[121]

Soon after *Hoffman,* Scott Warren, another volunteer with No More Deaths, successfully overturned a misdemeanor charge of abandonment of property under the same line of reasoning in *Hoffman*.[122] The District court found especially persuasive the claim that Warren's religious beliefs compelled him to leave water in the desert for migrants, and the government's regulation of this activity imposed a substantial burden on the exercise of his religious beliefs.[123] The government could have implemented other, less restrictive means of protecting wildlife than prosecuting Warren for abandonment of property .[124] Such successes in light of the RFRA's long history of bolstering conservative causes serve as an important stepping stone for other progressive causes.

III. DISCUSSION

Given the history and legislative intent of the RFRA to protect all religious believers, including minority religions, from government overreach and persecution, the disconnect between its history and its applications creates cause for concern. With such limited success for progressive-leaning causes and religions, any successful outcomes under the RFRA warrants further inquiry.[125] Lessons learned from these successes and the religious beliefs they stem from could serve as the basis for future applications pertaining to timely progressive causes, such as abortion.

This Section analyzes the likelihood of success for abortion rights by progressive religious groups under the test put forth by the RFRA. Part A analyzes the two successful RFRA defenses by defendants providing humanitarian aid at the border in *Hoffman* and *Warren*. Part B uses the UU faith as a case study for future applications of the RFRA to push back against restrictions on abortion access. Part B also outlines the tenets of the UU faith and its relationship with abortion rights and applies those religious motivations to the five-part RFRA test.

121. Ryan Devereaux, *Humanitarian Volunteer Scott Warren Reflects on the Borderlands and Two Years of Government Persecution*, THE INTERCEPT (Nov. 23, 2019, 11:30 AM), https://theintercept.com/2019/11/23/scott-warren-verdict-immigration-border.

122. United States v. Warren, No. 17-00341MJ-001-TUC, 2019 U.S. Dist. LEXIS 202146, at *1, *2-3 (D. Ariz. Nov. 20, 2019).

123. *Id*. at *2.

124. *Id*.

125. *See supra* Section II.D.1.B.2.

A. Framework for Success for Progressive Causes

The decisions in *Hoffman* and *Warren* represented the first times a federal judge approved a religious freedom defense for a crime related to humanitarian aid at the United States-Mexico border.[126] But in a much broader sense, the decisions represented a shift in how the federal judiciary treated religious liberty claims from progressive social activists.[127] The evolution of the RFRA's test proved to be beneficial to the defendants in *Hoffman* and *Warren* and presented a promising application to other progressive causes. As it stands today, the RFRA's protections are ascertained under a five-part, burden-shifting test.[128] Those asserting a religious liberty claim under the RFRA must first prove three facets: that (1) the defendant holds a sincerely held religious belief, (2) the relevant conduct is an exercise of their religion, and (3) the sincerely held befief is substantially burdened by the government.[129] The sincerity of a claimant's religious beliefs has proven to be a highly deferential standard that has only been successfully challenged in extreme cases.[130] A substantial burden has been interpreted differently by different lower courts, but many consider the penalty imposed upon the claimants.[131]

These first three steps are minor roadblocks to parties defending their support of progressive causes under the flag of religious liberty concerns. As echoed in the *Hoffman* decision, defendants do not need to make claim to any established religion to have it be viewed by a court as "sincerely held."[132] The four defendants in *Hoffman* referenced a deep spiritual need and a calling "to do work based on what [they] believe in the world."[133] The fact that they volunteered under an organization closely aligned with the Unitarian Universalist Church was also enough for the court to find that their religious beliefs were

126. Jude Joffe-Block, *Scott Warren and Emily Saunders: Facing Decades in Prison for Helping Migrants*, UNIV. OF S. CAL. CTR. FOR RELIGION & CIVIC CULTURE (Dec. 17, 2020), https://crcc.usc.edu/scott-warren-and-emily-saunders-facing-decades-in-prison-for-helping-migrants.

127. Devereaux, *supra* note 121.

128. Thomas Scott-Railton, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408, 433 (2018).

129. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2-2000bb-4; Scott-Railton, *supra* note 126, at 433; United States v. Warren, No. 17-00341MJ-001-TUC, 2019 U.S. Dist. LEXIS 202146, at *2 (D. Ariz. Nov. 20, 2019).

130. Scott-Railton, *supra* note 128, at 438; United States v. Quaintance, 608 F.3d 717, 721 (10th Cir. 2010) (finding that sincerity of religious belief is a factual determination that is heavily reliant on the individuals involved).

131. Scott-Railton, *supra* note 128, at 440.

132. United States v. Hoffman, 436 F. Supp. 3d 1272, 1277, 1283 (D. Ariz., 2020); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 834 (1989) ("We reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.").

133. *Hoffman*, 436 F. Supp. 3d at 1282.

sincerely held.[134] That the *Hoffman* defendants' religious beliefs compelled them to leave water out for individuals in the desert proved enough to satisfy the second prong of the test.[135] Similarly, Scott Warren found success under this prong by not identifying with any organized religion, only claiming that his spirituality informed his actions.[136]

In determining whether there was a substantial burden, the Ninth Circuit in *Hoffman* looked to the penalty imposed to find that the enforcement of government regulations and the resulting criminal sanctions were a means of coercing defendants into abandoning their religious exercise.[137] Proving this burden also proves to be highly deferential to religious liberty claimants—once the court finds that the defendants have legitimate religious beliefs and motivations, infringement upon their religiously-motivated conduct would be, at the least, suspect. Yet the true definition of "substantial burden" in religious liberty disputes has not been universally defined, and the Supreme Court has declined to take on that task.[138]

Once the defendant has successfully established the first three prongs of the RFRA's test, the burden then shifts to the government to prove that the law: (1) serves a compelling government interest, and (2) is achieved through the least restrictive means available.[139] Unlike the burden placed upon religious adherents, these two prongs put forth a much higher, much more scrutinized standard.[140] To be considered "compelling" under the RFRA, the Supreme Court has made clear that a general interest in enforcing a law is not enough.[141] The Ninth Circuit in *Hoffman* pulled language directly from *Hobby Lobby* to assert that the compelling interest must be analyzed in its application to a "particular claimant whose sincere exercise of religion is being substantially burdened."[142] The court in *Hoffman* found that the government could not articulate an interest specific to the four defendants beyond its general interest in maintaining environmental conditions on public land, revealing how fact and case-specific this

134. *Id*. at 1283.

135. *Id*.

136. United States v. Warren, No. 17-00341MJ-001-TUC, 2019 U.S. Dist. LEXIS 202146, at *1-2 (D. Ariz. Nov. 21, 2019).

137. *Hoffman*, 436 F. Supp. 3d at 1285.

138. Scott-Railton, *supra* note 128, at 471.

139. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2-2000bb-4; Scott-Railton, *supra* note 128, at 433.

140. Scott-Railton, *supra* note 128, at 442, 445.

141. Gonzalez v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 427-30 (2006); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726 (2014); Scott-Railton, *supra* note 126, at 442.

142. *Hoffman*, 436 F. Supp. 3d at 1288 (quoting *Hobby Lobby*, 573 U.S. at 726).

inquiry is.[143]

The least restrictive means test proves just as challenging.[144] As articulated by the Supreme Court, this standard is "exceptionally demanding."[145] The least restrictive means test requires that if the government can use any less restrictive alternative to serve its compelling interest, then it must do so.[146] The judges in both *Hoffman* and *Warren* made clear that the government did not satisfy these criteria.[147] Most notably, in the *Hoffman* case, the defendants themselves suggested other means of maintaining environmental conditions via designated water drop-off points, making it clear to the court that other viable options existed.[148]

Both *Hoffman* and *Warren* articulated the RFRA's evolution within the Supreme Court's jurisprudence: a higher deference to religious activity coupled with a much higher burden placed upon government agencies in their application and enforcement of federal regulations. The first three prongs of the RFRA's test are highly beneficial to progressive religions and other minority sects. The Court's hesitancy to define accepted religious practices and sincerely held beliefs creates room for groups motivated by their spiritual calling to engage in work that actively overlaps with their political leanings. That the courts are finally legitimizing the claims of progressive groups rather than solely conservative ones creates ample precedent for those engaged in immigration or reproductive justice work to utilize the RFRA to oppose government regulation.

B. Future Applications: Unitarian Universalism as a Case Study

The UU faith is uniquely placed to bolster claims of religious exercise under the RFRA. As expanded upon below, the faith pulls from a variety of religious and scientific sources to inform its theology, the UU faith places progressive political causes at the heart of its religion, and activism is a core tenet of its ideology.[149] UU activism seems to operate in direct contradiction to many of the causes championed by conservative, Christian denominations.[150] Utilizing the

143. *Id.*

144. Scott-Railton, *supra* note 128, at 445.

145. *Hobby Lobby*, 573 U.S. at 728, Scott-Railton, *supra* note 128, at 446.

146. *Id.*

147. *Hoffman*, 436 F. Supp. 3d at 1289; United States v. Warren, No. 17-00341MJ-001-TUC, 2019 U.S. Dist. LEXIS 202146, at *1, *2 (D. Ariz. Nov. 20, 2019).

148. *Hoffman*, 436 F. Supp. 3d at 1289.

149. *The Seven Principles*, UNITARIAN UNIVERSALIST ASS'N, https://www.uua.org/beliefs/what-we-believe/principles (last visited Apr. 10, 2023).

150. *Id.*

UU ideology to apply a RFRA defense to a cause such as abortion presents progressive advocates with a strong likelihood of success under the RFRA's five-part test.

1. The Unitarian Universalism Faith

UU, the institution driving the volunteer work of the defendants in *Hoffman* and *Warren*, presents an ideology that could be an ideal vehicle for future applications of the RFRA by progressive causes. Formed from liberal Jewish and Christian traditions, UU theology expanded its beliefs to embrace Eastern and Western religious teachings that create room for believers of all ideologies.[151] Many congregants identify with disparate religions but attend a UU church and are guided by the underlying principles established by the Unitarian Universalist Association ("UUA").[152] UU's principles draw inspiration from sources such as science, poetry, scripture, and lived experience.[153] These principles are grounded in moral teachings and human rights rather than typical sources of spirituality.[154]

These principles are evidenced by the near-constant advocacy work of both local UU congregations and the work of the UUA and its affiliated organizations. The UUA engages in work related to climate justice, democracy and electoral justice, decriminalization, and LGBTQ+ and gender justice.[155] The UUA makes clear that congregants are encouraged to engage in "religious activism," and supports individual and congregation-led organizing on the grassroots level.[156] UU activism was particularly visible during the Trump administration, with groups launching countless initiatives to provide sanctuary to migrants and to push back against inhumane treatment at the U.S.-Mexico border.[157]

151. *Sources of Our Living Tradition*, UNITARIAN UNIVERSALIST ASS'N, https://www.uua.org/beliefs/what-we-believe/sources (last visited Apr. 10, 2023).

152. *The Seven Principles*, *supra* note 149.

153. *Id*.

154. *Id. The Seven Principles are: (1) "The inherent worth and dignity of every person," (2) "Justice, equity and compassion in human relations," (3) "Acceptance of one another and encouragement to spiritual growth in our congregations," (4) "A free and responsible search for truth and meaning," (5) "The right of conscience and the use of the democratic process within our congregations and in society at large," (6) "The goal of world community with peace, liberty and justice for all," and (7) "Respect for the interdependent web of all existence of which we are a part." Id.*

155. *Action Center*, SIDE WITH LOVE, https://sidewithlove.org/actioncenter (last visited Apr. 10, 2023).

156. Rachel Walden, *Religious Activism: Political, Not Partisan*, UNITARIAN UNIVERSALIST ASS'N (Jan. 11, 2017), https://www.uua.org/pressroom/stories/religious-activism-political-not-partisan.

157. *Immigrant Justice*, UNITARIAN UNIVERSALIST ASS'N, https://www.uua.org/immigration (last visited Apr. 10, 2023).

UU theology may also be an ideal vehicle because it is borne out of "Christian traditions."[158] Despite the fact that the courts in *Hoffman* and *Warren* held that an RFRA claim was successful for a progressive cause, the majority of successful RFRA decisions still benefit conservative belief systems. Even in the *Hoffman* decision, the court noted that the defendants' "choice to associate themselves with the Unitarian Universalist Church and to adopt elements of Christian faith" went far in showing that their beliefs were religious in nature.[159] UU's close ties to Christianity may lend more credence to their claims under the RFRA in the eyes of courts.

2. Abortion and Unitarian Universalism

In June of 2022, the Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey* when it decided *Dobbs v. Jackson Women's Health Org*.[160] In this landmark decision, the Court held that abortion regulations or prohibitions should lie with "the people and their elected representatives."[161] The majority made clear that the right to an abortion has no constitutional backing either in the Constitution's text or in the nation's history.[162] Beyond the public outcry over the rejection of what had been deemed a fundamental right for decades, there was also a flood of dialogue and pending lawsuits surrounding the potential use of the RFRA and other Free Exercise Clause grounds to push back against the *Dobbs* decision.[163] Most recently, this dialogue flourished into action: in September of 2022 the ACLU of Indiana filed a lawsuit on behalf of "Hoosier Jews for Choice," an advocacy organization that organizes around issues of reproductive justice and abortion access, arguing that Jewish, Unitarian Universalist, Muslim, Episcopal, and pagan faiths all recognize a right to abortion that would be banned under Indiana's state RFRA, an Act that mirrors the test put forth in the federal RFRA.[164]As of December 2022,

158. *Beliefs & Principles*, UNITARIAN UNIVERSALIST ASS'N, https://www.uua.org/beliefs/what-we-believe (last visited Apr. 10, 2023).

159. United States v. Hoffman, 436 F. Supp. 3d 1272, 1283 (D. Ariz. 2020).

160. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

161. *Id*.

162. *Id*. at 2283.

163. Don Byrd, *More Courts Are Being Asked to Consider Whether Abortion Restrictions Violate Religious Freedom*, BAPTIST JOINT COMM. FOR RELIGIOUS LIBERTY (Aug. 10, 2022), https://bjconline.org/courts-asked-to-consider-whether-abortion-restrictions-violate-religious-freedom-081022; *Hoosier Jews for Choice: About Us*, Hoosier Jews for Choice, https://hoosierjews4choice.wixsite.com/mysite/about-us (last visited Apr. 24, 2023).

164. Brandon Smith, *Lawsuit Uses Religious Freedom Restoration Act to Challenge Indiana's Abortion Ban*, WFYI INDIANAPOLIS (Sept. 8, 2022), https://www.wfyi.org/news/articles/lawsuit-uses-

Marion, Indiana Superior Court issued an injunction as the case works its way up to the Indiana Supreme Court.[165]

The UU faith has openly held a stance "supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy" since 1987.[166] A 2015 Statement of Conscience from the UUA further clarified its stance: "[W]e embrace the reproductive justice framework, which espouses the human right to have children, not to have children, to parent the children one has in healthy environments and to safeguard bodily autonomy and to express one's sexuality freely."[167] Most noticeably, this stance is grounded in a religious calling.[168] Supporting the right to choose is considered by UU followers as an embodiment of their principles and a reflection of the diverse beliefs and backgrounds the UU faith encompasses.[169] In essence, the right to abortion is inherently tied to the very foundations of the UU faith and its principles, in close alignment with the reasoning put forth by the Green family in *Hobby Lobby*.[170]

3. Applying the Unitarian Universalist Faith to Abortion under RFRA's Five-Part Test

While the Congressional Research Service and the Congressional Committee made assurances to conservative religious groups that the RFRA would not create a new statutory right to abortion, the manner of statutory interpretation used by the current Supreme Court makes clear that this legislative history holds little weight in comparison to the text of the Act itself.[171] The majority in *Dobbs* held firm to a traditionalist, textual interpretation of due process: constitutional analysis "must begin with 'the language of the instrument,'" and the right at issue must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[172] The

religious-freedom-restoration-act-to-challenge-indianas-abortion-ban; Religious Freedom Restoration Act, H.B. 1632, 119th Gen. Assemb. (Ind. 2015).

165. *Judge blocks Indiana abortion ban on religious freedom grounds*, REUTERS (Dec. 2, 2022), https://www.reuters.com/legal/judge-blocks-indiana-abortion-ban-religious-freedom-grounds-2022-12-03/.

166. *Right to Choose: 1987 General Resolution*, UNITARIAN UNIVERSALIST ASS'N (July 1, 1987), https://www.uua.org/action/statements/right-choose.

167. *Reproductive Justice: 2015 Statement of Conscience*, UNITARIAN UNIVERSALIST ASS'N (July 1, 2015), https://www.uua.org/action/statements/reproductive-justice.

168. *Id*.

169. *Id*.

170. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 702 (2014).

171. Drinan & Huffman, *supra* note 5, at 535, 538; Laycock & Thomas, *supra* note 10, at 237-38.

172. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2244 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

inquiry requires a survey of the United States' "common law tradition," not a deep dive into congressional debates leading up to the enactment of the legislation at issue.[173]

That RFRA's legislative history makes clear that the right to abortion was not an intended outcome of its drafting does not limit its use for that issue under the current Supreme Court majority's interpretive lens. The text of the RFRA makes no explicit mention of reproductive rights, and instead safeguards the exercise of religion for believers of any faith.[174] The right to freely exercise one's religion is undoubtably deeply rooted in this nation's history and traditions and is explicitly referred to in the First Amendment.[175] That some religions believe that life begins at conception and that other religions hold the right to bodily autonomy as central to their belief systems represents a divergence of ideals co-existing in a society whose Constitution seemingly aims to support the ability to hold conflicting views without repercussion.

Given that the RFRA's legislative history would be unlikely to serve as a barrier for its application to the right to abortion, the claim must then be analyzed under the five-part RFRA test through the lens of the UU faith. The evidentiary burden placed upon UU claimants in the first three facets of this test is likely to be met. *Hoffman* made clear that a "sincerely held religious belief" does not require "any particular established religion," but an association with the UU faith makes one's religiosity apparent.[176] Therefore, a claim made under the banner of the UU faith would likely fulfill the first prong of this test.

The second prong, that the relevant conduct is an exercise of religion, may be the most challenging standard for UU claimants to meet. Under this test, the individual's need for an abortion must be derived from their sincerely held religious belief. Yet the fact that the UU faith does not explicitly call for the protection of reproductive rights in the language of their principles and theology is unlikely to be a barrier. As the court in *Hoffman* articulated, defendants do not need to show that their beliefs required them to engage in their religiously motivated conduct.[177] This claim by the Ninth Circuit is bolstered by the House and Senate RFRA hearings, in which supporters and opponents alike agreed that the Act would protect conduct that was "religiously 'motivated'" rather than "'compelled' by religion."[178] The

173. *Id*. at 2247 (quoting *Glucksberg*, 521 U.S. at 711).

174. Religious Freedom Restoration Act of 1992, 42 U.S.C. §§ 2000bb-2000bb-4.

175. U.S. CONST. amend. I.

176. United States v. Hoffman, 436 F. Supp. 3d 1272, 1283 (D. Ariz., 2020).

177. *Id*. at 1286.

178. Laycock & Thomas, *supra* note 10, at 232.

right to choose to have an abortion proves emblematic of the UU faith and would likely be seen by the courts as religiously motivated and therefore an exercise of a defendant's religion.

Whether the claimant's belief is substantially burdened by the government would come down to how restrictive the relevant abortion laws are. In Texas, a trigger ban on abortion went into effect on August 25, 2022, criminalizing abortions from the moment of fertilization unless the patient's life is at risk.[179] In line with the successful reasoning in *Hoffman*, those who identify with the UU faith and its principles would effectively be "coerced to act contrary to their religious beliefs by the threat of . . . criminal sanctions" under a law like the one passed in Texas.[180] That they would have to choose between their religious beliefs and potential loss of liberty via criminal sanctions would likely be seen as a substantial burden, in line with *Hoffman*.

The government would bear a much higher burden once the UU claimants meet theirs. The government must first prove that the law criminalizing abortion serves a compelling government interest, which it has long-held to be that the sanctity of life starting at conception.[181] Yet, the use of the term "life" may be able to dismantle the government's argument. In *Roe* the Court found that there was too much diversity of opinion in the medical, scientific, and religious fields for it to decide when "life" begins.[182] *Casey* sidestepped that question and instead found a compelling interest once the fetus was "viable."[183] Despite these two decisions being overturned, they articulate the vast differences of opinion that exist around the concept of when life begins.

Post-*Dobbs* and under the RFRA test, courts must look to a particular claimant whose exercise of religion is being substantially burdened in assessing whether there is a compelling interest.[184] A UU claimant is likely grounding their religious practices in a wide range of influences, including Jewish traditions.[185] Not only does the Jewish

179. Relating to Prohibition of Abortion, H.B. 1280, 87th Legis. (Tex. 2021).

180. *Hoffman*, 436 F. Supp. 3d at 1285 (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008)).

181. *See* Roe v. Wade, 410 U.S. 113, 150 (1973) (in which state claimed its interest was protecting prenatal life based on the argument that a new human life is present from the moment of conception); Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992) (in which state claimed its interest was protecting potential life).

182. *Roe*, 410 U.S. at 159.

183. *Casey*, 505 U.S. at 870.

184. *Hoffman*, 436 F. Supp. 3d at 1287-88.

185. REV. JILL JOB SAXBY, THE ME. INTERFAITH COUNCIL FOR REPROD. CHOICES, REPRODUCTIVE CHOICES: A UNITARIAN UNIVERSALIST PERSPECTIVE, https://www.plannedparenthood.org/uploads/filer_public/23/d1/23d1ccf4-1def-4720-b359-88688e327478/reproductive_choices_-

faith believe that life begins at birth, but "most [UUs] would reject the idea that life begins at conception."[186] Considering the particularities of a UU claimant, the government's claim to a compelling interest is steeped in a purely Christian belief of life, and therefore cannot stand.

The government's compelling interest must also be accomplished by the least restrictive means possible. Looking again at Texas' trigger ban, the state effectively implemented a near total ban on abortion influenced in part by the belief system of one particular religion. The least restrictive means requirement is "exceptionally demanding," and the government must show that there are no other alternative regulations available.[187] Outside of Texas, other states have implemented several different abortion regulations, varying in timeframe and allowing various exceptions to the laws.[188] Yet, regardless of how the government alters its abortion regulations, the UU faith's conception of when life begins would undermine the government's compelling interest and render a "least restrictive means" analysis moot. Under this five-step analysis, an RFRA claim by a UU claimant brought against a restrictive abortion law may find success.

IV. CONCLUSION

Successful claims under the RFRA have largely benefitted conservative causes, pushing back on anti-discrimination legislation and mandatory contraception coverage. When dissecting the actual language and test put forth by the RFRA, it is clear that progressive causes and their religious counterparts have just as equal a claim to this defense. The UU faith, encompassing a variety of other belief systems and centering the inherent dignity and worth of all humans, is emblematic of a religion poised to use its religious tenets to push back against legislation that directly contradicts its views on when life begins and who maintains power over one's bodily autonomy. Progressive faiths must meet these issues with the same urgency and aggression as their conservative counterparts and under the RFRA, they have a high likelihood of success.

_a_unitarian_universalist_perspective.pdf (last visited Apr. 10, 2023).

186. *Id.*; NAT'L COUNCIL OF JEWISH WOMEN, ADVOCACY RESOURCE: JUDAISM AND ABORTION, https://www.ncjw.org/wp-content/uploads/2019/05/Judaism-and-Abortion-FINAL.pdf (last visited Apr. 10, 2023).

187. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

188. *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state (last visited Apr. 10, 2023).