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## From Private Prejudice to Public Policy: How Religious Conservatives Use Liberalism to Control Women's Bodies – the United States and Israel in Comparative Perspective

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**FROM PRIVATE PREJUDICE TO PUBLIC POLICY: HOW  
RELIGIOUS CONSERVATIVES USE LIBERALISM TO  
CONTROL WOMEN’S BODIES—THE UNITED STATES AND  
ISRAEL IN COMPARATIVE PERSPECTIVE**

Gila Stopler\*

The Article uses the feminist critique of the patriarchal nature of religion and liberalism, the feminist critique of flaws in political liberalism, and a socio-political analysis of the power of religious conservative groups in the United States and Israel to claim that religious conservatives use the patriarchal nature of liberalism, its inherent flaws, and conservative political power to turn private religious prejudice into public policy. Analyzing the constitutional and legal status of religion in the United States and the recent dramatic changes it has undergone, the Article shows that contrary to popular belief, and due to the aforementioned factors, the American model of separation between religion and the state cannot protect women’s rights against the religious conservative attack. The Article uses a comparative analysis of the religious conservative attack on women’s rights in Israel to show that despite the very different religion-state relations, the religious conservative attack in the two countries is similar in both method and success.

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#### INTRODUCTION

Control over women’s bodies and sexuality has always been central to human society, culture, and politics.<sup>1</sup> However, in recent years, the clash between religious patriarchy and a woman’s right to equality, and the corresponding struggle over who controls women’s bodies, seems to have reached new heights.<sup>2</sup> Important reasons for this escalation have been the pervasive repoliticization of religion and the rise of religious populism, which has united nationalist and religious groups around the desire to return to traditional gender ideology as part of the struggle against progressive liberal elites.<sup>3</sup> The most common sites of struggle in the United States and Europe

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<sup>1</sup> SANDRA LEE BARTKY, *FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION* 95–109 (1990).

<sup>2</sup> Ruth Rubio-Marín, *Gendered Nationalism and Constitutionalism*, 18 *ICON* 441, 444–45 (2020).

<sup>3</sup> Michel Rosenfeld, *The Conscience Wars in Historical and Philosophical Perspective: The Clash between Religious Absolutes and Democratic Pluralism*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 58, 76 (Susanna Mancini & Michel Rosenfeld eds., Cambridge Univ. Press 2018) [hereinafter *THE CONSCIENCE WARS*] (discussing the repoliticization of religion and the flourishing of religious conscience-based claims); Susanna Mancini, *Introduction: Constitutionalism and Religion in an Age of Consolidation and Turmoil*, in *CONSTITUTIONS AND RELIGION* 1, 9–12 (Susanna Mancini ed. 2020) [hereinafter *CONSTITUTIONS AND RELIGION*] (discussing religious populism). One example from the United States is the Teavangelicals. See Jose Pedro Zuquete, *Populism and Religion*, in *THE OXFORD HANDBOOK OF POPULISM* 445, 448 (2017). On populism and its attack on women’s rights in various European countries, see, e.g., Ruth Rubio-Marín, *supra*

have been women's reproductive rights and the recognition of same sex marriages, which are both central to the patriarchal sexual order and its inseparable linking of sex and marriage.<sup>4</sup> At the same time, in Israel, the war over women's bodies is centered on the even more fundamental right of women to participate fully and freely in the public sphere without segregation and exclusion.<sup>5</sup> The exclusion and segregation of women is achieved through rules and practices that "constrain women's actions, movement, voice, or appearance" in the public sphere due to their sex.<sup>6</sup> The official motivation for the exclusion and segregation of women in the public sphere in Israel is to enable ultra-orthodox Jews, and increasingly, other religiously conservative Jews, who abide by strict modesty rules in their private and communal life, to participate in the public sphere under conditions that suit their religious beliefs and cultural practices.<sup>7</sup> Thus, just like in the United States, the price of religious conservatives' religious beliefs is paid by women.

An important common denominator between the recent struggles over sexuality and women's bodies is that in these struggles, religious conservatives are successfully turning their private prejudices into public policy.<sup>8</sup> By allegedly demanding the protection of their own rights to religious liberty, conscientious objection, equality, and, where applicable, multicultural accommodations, religious conservatives are preventing, and even reversing, progress in women's rights, and working to create

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note 2; Agnieszka Bień-Kacała, *Using Shifting Narratives to Undermine Gender Equality: Comparative Insights from Hungary, Poland and Turkey*, IACL-AIDC BLOG (Feb. 4 2021), <https://blog-iacl-aidc.org/gender/2021/2/4/using-shifting-narratives-to-undermine-gender-equality-comparative-insights-from-hungary-poland-and-turkey> [<https://perma.cc/79GM-99P3>].

<sup>4</sup> Some of the Supreme Court cases in these two areas include: *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'r*, 138 S. Ct. 1719 (2018); *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018). On the central role of homosexuality in undermining the patriarchal sexual order, see Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187–88 (1988). On reproductive rights and same sex marriage as threatening the link between sexuality and marriage, see Robert Post, *The Politics of Religion: Democracy and The Conscience Wars*, in *THE CONSCIENCE WARS*, *supra* note 3, at 473, 474. For a comparison between the United States and Europe, see Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS*, *supra* note 3, at 187, 188–90; Susanna Mancini & Kristina Stoeckl, *Transatlantic Conversations: The Emergence of Society-Protective Antiabortion Arguments in the United States, Europe, and Russia*, in *THE CONSCIENCE WARS*, *supra* note 3, at 220, 220–21.

<sup>5</sup> Gila Stopler, *Constitutionalism and Religion in a Jewish and Democratic State*, in *CONSTITUTIONS AND RELIGION*, *supra* note 3, at 208, 219–20 [hereinafter *Constitutionalism and Religion*]. See generally Yofi Tirosh, *Diminishing Constitutional Law: The First Three Decades of Women's Exclusion Adjudication in Israel*, 18 (3) *ICON* 821 (2020).

<sup>6</sup> See Tirosh, *supra* note 5, at 824.

<sup>7</sup> See Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20; Tirosh, *supra* note 5, at 824.

<sup>8</sup> See Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

wholesale societal change.<sup>9</sup> In all of these cases, religious conservatives are using liberal rights and concepts as a weapon against women.<sup>10</sup> One example of the weaponization of liberal rights in the United States is the use of the First Amendment.<sup>11</sup> In *National Institute of Family and Life Advocates v. Becerra* (hereinafter *NIFLA*), the majority of the U.S. Supreme Court held that California's FACT Act, which required crisis pregnancy centers to post notices that other options for pregnancy, including abortion, are available from state-sponsored clinics, violated petitioner's First Amendment rights.<sup>12</sup> Using the weapon metaphor, the four dissenting Justices objected to the decision, stating that "[m]edical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions."<sup>13</sup> As Catharine MacKinnon argued, the First Amendment has morphed from a shield for the disempowered "[in]to a claim by dominant groups to impose and exploit their hegemony."<sup>14</sup> Erwin Chemerinsky and Michele Goodwin argue that the only way to understand the Court's decision in *NIFLA* "is that it reflects the hostility of the Court's majority to reproductive rights and its indifference towards the rights and interests of women."<sup>15</sup> Consequently, it "reflects a dangerous turn in the Court for which we should all be concerned."<sup>16</sup> While in *NIFLA* religious conservatives weaponized the free speech component of the First Amendment, the free exercise of religion has undergone a similar weaponization process in recent years, both as a constitutional right and as a statutory right under the federal Religious Freedom Restoration Act.<sup>17</sup> Starting with the *Hobby Lobby* case, and through a series of cases on women employees' right to

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<sup>9</sup> On this phenomenon in the United States and Europe, see NeJaime & Siegel, *supra* note 4, at 188–90; Mancini & Stoeckl, *supra* note 4, at 221–22. On Israel, see Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20. See generally Tirosch, *supra* note 5.

<sup>10</sup> On a similar tactic of using culture and religion as a sword rather than as shield in civil adversarial disputes between private parties in family matters, see Ayelet Shachar, *Demystifying Culture*, 10 (2) *ICON* 429, 431 (2012).

<sup>11</sup> Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 *VA. L. REV.* 1223, 1224 (2020).

<sup>12</sup> *NIFLA v. Becerra*, 138 S. Ct. 2361, 2361 (2018).

<sup>13</sup> *Id.* at 2382. Notably, in this case, the weaponized right used is freedom of speech, but the method of use and the purpose for using it is to restrict women's rights. Similarly, though in a different context, U.S. Supreme Court Justice Elena Kagan labeled this use of the First Amendment as "weaponizing the First Amendment" in the *Janus* case. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting). In this case the majority accepted the petitioner's claim that the First Amendment prevents states and public-sector unions from extracting agency fees from nonconsenting employees whom they represent.

<sup>14</sup> MacKinnon, *supra* note 11, at 1224.

<sup>15</sup> Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering against Abortion Rights: NIFLA v. Becerra*, 94 *N.Y.U. L. REV.* 61, 118 (2019).

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

<sup>17</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

have contraceptive coverage as part of their workplace health insurance under the Affordable Care Act (ACA), religious conservative employers, with the help of the Court and the Trump administration, conjured up a new right to religious liberty of for-profit corporations and successfully weaponized it against women employees' basic right to control their own bodies.<sup>18</sup>

In Israel, religious conservatives use similar tactics, weaponizing liberal rights protections to roll back hard-won achievements in women's rights that, until recently, seemed to be unassailable and indisputable.<sup>19</sup> Consequently, even the right of women to be freely present in the public sphere, to freely use public buses, or to get equal access to public services, has been put into question and even denied.<sup>20</sup>

In this Article, I will analyze the tactics of religious conservatives in the United States and Israel to argue that the success of the weaponization of liberal concepts against women's right to control their bodies stems from the patriarchal nature of liberalism and from flaws within liberal theory and practice. These flaws legitimate religious bigotry, especially bigotry in matters involving gender and sexuality, and enable religious conservatives to undermine liberal rights protections regardless of the formal relationship between religion and the state, even where religion is constitutionally separated from the state as it is in the United States of America.

The choice to compare the United States and Israel needs some explanation. Allegedly, the relationship between religion and the state in the United States and in Israel could not be more different. The United States has, at least until recently, been considered a bastion of the secular state, while Israel, from its inception, integrated religion into law and politics.<sup>21</sup> While the ties between religion and the state in Israel clearly violate women's right to equality in personal status laws, the American separation between religion and the state is ostensibly more protective of women's equality.<sup>22</sup> However, I will show that the extensive autonomy given to religious institutions by American law has always been detrimental to the rights of women. Moreover, recent developments in American law and policy have strengthened the ties between religion and the state in the United States while at the same

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<sup>18</sup> See *infra* Section III.B; *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>19</sup> Tirosh, *supra* note 5, at 821–22.

<sup>20</sup> For multiple examples, see *generally id.* See also Section IV.B.

<sup>21</sup> On the recent changes in the United States, see Howard Gillman & Erwin Chemerinsky, Symposium: *The Unfolding Revolution in the Jurisprudence of the Religion Clauses*, SCOTUS-BLOG (Aug. 6, 2020, 10:36 AM), <https://www.scotusblog.com/2020/08/symposium-the-unfolding-revolution-in-the-jurisprudence-of-the-religion-clauses/> [<https://perma.cc/G55G-K6M6>]; Erwin Chemerinsky, Symposium: *The Crumbling Wall Separating Church and State*, SCOTUS-BLOG (June 27, 2017, 10:18 AM), <https://www.scotusblog.com/2017/06/symposium-crumbing-wall-separating-church-state/> [<https://perma.cc/7LRV-5TNQ>]. For previous discussions, see, e.g., Laura Athens, *Is the Wall Between Church and State Crumbling?*, 81 MICH. BAR J. 19, 19 (2002).

<sup>22</sup> See discussion *infra* Section III.A.

time extending exemptions previously reserved for religious organizations to for-profit corporations.<sup>23</sup> These changes seriously endanger the rights of women and further expand an already too-extensive right to the “free exercise of discrimination” in the United States.<sup>24</sup> Moreover, I will argue that the liberal separation between religion and state and between the public and the private, which was intended to protect the public sphere from private religious prejudices, has instead proven to be a powerful breeding ground for religious prejudices that are now demanding respect and accommodation in the public sphere and are being granted their demands through judicial changes in church-state jurisprudence and through changes in government policies.<sup>25</sup> Thus, from the perspective of ensuring women’s equality, the American relationship between religion and the state has in many respects become as problematic as the flawed Israeli system. Consequently, the current situation brings to mind Justice O’Connor’s famous remark in *McCreary County v. ACLU of Kentucky*, where she astutely cautioned that “[t]hose who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”<sup>26</sup>

Furthermore, I will show that, notwithstanding the differences in religion-state relations in the United States and Israel, there is a close resemblance in the level of involvement of religion in the political process in the two countries and the effects of this involvement on the rights of women. As will be discussed in detail, the current attacks on reproductive rights in the United States and on women’s presence in the public sphere in Israel are carried out by religious conservatives who are set on changing the public sphere in each country to make it more religious (Christian and Jewish, respectively).<sup>27</sup> In the United States, the process is led by American Christian nationalists who, rather than seeking to deepen the practice of religion in their private lives,<sup>28</sup> aim to infuse conservative Christianity into the American public sphere, just as their counterparts—the Israeli Jewish religious nationalists comprised of large parts of the Ultra-Orthodox and Religious Zionist groups in Israel—are determined to do so in Israel.<sup>29</sup> Both groups have the necessary political power and legal knowledge, and are skillfully using liberal arguments to justify infusing the

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

<sup>24</sup> Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women’s Equality*, 10 WM. & MARY J. WOMEN & L. 459, 462 (2004) [hereinafter *The Free Exercise of Discrimination*].

<sup>25</sup> See *infra* Section III.B.

<sup>26</sup> *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 883 (2005) (O’Connor, J., concurring).

<sup>27</sup> See *infra* Part V.

<sup>28</sup> ANDREW L. WHITEHEAD & SAMUEL L. PERRY, *TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES* 152–55 (Oxford Univ. Press 2020) [hereinafter *TAKING AMERICA BACK FOR GOD*].

<sup>29</sup> *Id.*

public sphere with their private religious prejudice, dismantling the liberal protection of women's rights.<sup>30</sup> The combined result of an extensive interpretation of the free exercise of religion, which allows conservative religion to grow and gain power in the private sphere, and a massive involvement of religion in politics that translates this power into public policy, has stripped the American separation model of any effective means of providing protection for women's rights against religious prejudice.

The success of the conservative strategy in the United States and in Israel hinges on the willingness of courts and policy makers to adopt the religious conservative's arguments and to exempt them from the duty to respect women's rights, when such rights conflict with their religious beliefs.<sup>31</sup> In both the United States and Israel, religious conservatives have gradually chipped away at the rights of women by continuously expanding the scope and meaning of the religious exemptions granted to them in a manner that threatens to turn these individual exemptions into the general rule.<sup>32</sup>

In Part I of the Article, I will discuss the significance of maintaining control over women's bodies to the patriarchy and the manifestations of this control in religion and liberal society. I will claim that patriarchy manifests itself in religious as well as in liberal society, both in the form of private and public patriarchy, and show how control over women's bodies is maintained and strengthened in all these arenas. The shared need for liberal and religious patriarchal societies to control women's bodies facilitates the misuse of liberal concepts by religious conservatives in their quest to undermine women's reproductive rights and restrict their freedoms based on modesty rules. In Part II of the Article, I will discuss the feminist critique of political liberalism and show how liberal principles reflected in the American constitutional and legal framework, has allowed the flourishing of patriarchal religion, shielded it from criticism, and enabled it to gain strength in both the public and private spheres, to an extent that threatens to undermine all the gains in women's equality and create a wholesale change in the liberal foundations of the state.

In Parts III and IV, I will discuss the respective religion-state relations in the United States and Israel and claim that although the partial establishment existing in Israel is detrimental to women's rights, the American model of dwindling separation and expanding free exercise is similarly inimical to women's rights, as the general theoretical discussion of the failings of political liberalism in Part III demonstrate. In Section III.A, I will further claim that while the separation between religion

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<sup>30</sup> See *infra* Part V.

<sup>31</sup> See *infra* Part V.

<sup>32</sup> One jurisdiction in which this religious conservative strategy has not been successful to date is Canada, where the courts have resisted conservative attempts to expand religious exemptions and to narrow down the scope of gay rights. In doing so Canadian courts have employed a more restrictive interpretation of religious freedom than the one adopted by American courts and have given the right to equality and fair inclusion primacy over demands for multicultural accommodation. *Trinity W. Univ. v. L. Soc'y of Upper Can.*, [2018] 2 S.C.R. 453 (Can.).



and state is an important factor in the protection of women's rights, two other crucial factors are the contours of religious liberty, and discuss how, in recent years, these factors transformed from a shield for minority religions into a sword for majority religions. In this context, I will discuss the increasing power of religious conservatives, who are described by Whitehead and Perry as Christian Nationalists, and their commitment to inserting Christian morality and traditional views of gender and the family into the public sphere.<sup>33</sup> In Section III.B, I will discuss the recent attack on women's right to control their bodies focusing on U.S. Supreme Court decisions on contraceptive coverage, including *Hobby Lobby*, *Zubik*, and *Little Sisters of the Poor*.<sup>34</sup> I will describe how these decisions have radically changed religious liberty jurisprudence to allow religious and traditional beliefs of powerful religious and traditionalist employers to restrict the reproductive rights of women employees and their right to control their bodies.<sup>35</sup>

In Part IV, I will present religion-state relations in Israel and show that while religion is established in the state in the specific area of personal family law, in other areas, liberal principles and a relatively advanced regime of protection of women's rights apply. I will then discuss the recent attack by politically powerful Jewish religious conservatives in Israel on women's right to control their bodies, which leads to restrictions on women's presence in various parts of the public sphere through rules and practices that constrain their actions, movements, voices, or appearances due to their sex, for religious reasons.<sup>36</sup> After a short description of the facts of the Israeli case, I will present and refute the arguments raised by religious conservatives in Israel in favor of the exclusion and segregation of women in the public sphere for religious reasons.

Lastly, in Part V, I will compare the struggle over the segregation of women in Israel to the struggle over women's reproductive rights in the United States. There are at least three points of similarity between the tactics used by religious conservatives in Israel and the United States. First, both groups argue that anything short of an unconditional and sweeping acceptance of their own rights claims would constitute a grave violation of their rights. Second, both groups deny that such unconditional acceptance of their claims would violate the rights of women. Lastly, while religious conservatives in both Israel and the United States claim that their goal is to protect their personal religious beliefs, conscience, or culture, an additional and unstated goal of their efforts is to affect a wide ranging change in the legal protection afforded to women in order to prevent them from fully exercising their equal rights.<sup>37</sup> In this

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<sup>33</sup> See WHITEHEAD & PERRY, TAKING AMERICA BACK FOR GOD, *supra* note 28, at 152–54.

<sup>34</sup> See *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* 140 S. Ct. 2367, 2377 (2020).

<sup>35</sup> See discussion *infra* Section III.B.

<sup>36</sup> Tirosh, *supra* note 5, at 824.

<sup>37</sup> In a recent article, NeJaime and Siegel argue that although religious conservatives in

manner, religious conservatives in both Israel and the United States weaponize liberal concepts in order to undermine liberal rights and restore or create a conservative order to which they are committed.<sup>38</sup> The use of these tactics by religious conservatives in the United States, Israel, and elsewhere, and the fact that they are accepted by policymakers, state institutions, and courts, and are used to justify widespread restrictions on the rights of women, serves to uncover the patriarchal nature of liberalism as well as the inherent weaknesses in the liberal conceptualization of religious freedom, freedom of conscience, multiculturalism, and equality, and the political power of religious conservatives.

### I. PATRIARCHY AND THE CONTROL OVER WOMEN'S BODIES IN RELIGION AND IN LIBERALISM

#### A. *Feminism and Women's Right to Control Their Bodies*

Feminist thought is highly varied and includes a range of approaches, perspectives, and explanations for women's oppression.<sup>39</sup> Despite their diversity, all forms of feminist thought share a common core: "Feminism is . . . the range of committed inquiry and activity dedicated first, to describing women's subordination—exploring its nature and extent; dedicated second, to asking both how—through what mechanisms, and why—for what complex and interwoven reasons—women continue to occupy that position; and dedicated third to change."<sup>40</sup> According to feminists, women's subordination is, both historically and at present, the result of patriarchy.<sup>41</sup> Patriarchy can be defined as "a system of social structures and practices in which men dominate, oppress and exploit women."<sup>42</sup> This definition emphasizes the structural—rather than individual—nature of patriarchy that employs social structures and social

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the United States and Europe portray the conscience exemption regimes that they demand as necessary to protect their rights as disempowered religious minorities in a pluralistic society, these exemption regimes, far from being pluralistic, are in fact intended to enforce majoritarian norms of sexual morality that violate rights of women and gays that have only recently and fragilely been protected by law. NeJaime & Siegel, *supra* note 4, at 218–19; *see also* Post, *supra* note 4, at 473–84.

<sup>38</sup> On the desired conservative order, *see, e.g.*, WHITEHEAD & PERRY, *TAKING AMERICA BACK FOR GOD*, *supra* note 28, at 121–49.

<sup>39</sup> ROSEMARIE TONG, *FEMINIST THOUGHT: A MORE COMPREHENSIVE INTRODUCTION* 1–2 (2d ed. 1998). The discussion in this Section relies in part on my discussion in Gila Stopler, Hobby Lobby, S.A.S., and the Resolution of Religion-Based Conflicts in Liberal States, 14 (4) *ICON* 941, 945–46, 957–59 (2016).

<sup>40</sup> Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 *BERKELEY WOMEN'S L.J.* 1, 2 (1987–88).

<sup>41</sup> *See generally* GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986); SYLVIA WALBY, *THEORIZING PATRIARCHY* (1990).

<sup>42</sup> WALBY, *supra* note 41, at 20.

practices to maintain women's subordination to men.<sup>43</sup> The social structures and practices which are of interest in this Article are those that serve to restrict women's autonomy over their bodies. These structures and practices restrict various aspects of women's control over their bodies, including control over their reproductive abilities, their sexuality and appearances, and even their presence in the public sphere.<sup>44</sup> Thus, for example, a legal structure that enables the subordination of women's bodies to the interests of men and communities is the lack of recognition, on the international level as well as in many countries, of reproductive rights, or of a human right to safe and legal abortion.<sup>45</sup> This lack of recognition enables courts around the world to affirm the denial of women's rights to reproductive health, and to the autonomy to decide to discontinue a pregnancy.<sup>46</sup> A different, socio-cultural, structure that restricts women's autonomy and subordinates their bodies to the interests of men is the imposition of a normative femininity upon the female body.<sup>47</sup> Normative femininity demands conformity to highly oppressive standards of beauty and dress, the attainment of which requires disciplinary practices—in the Foucauldian sense—such as norms of feminine body comportment, dieting, physical exercise, hair care, skin care, covering and uncovering, and so on.<sup>48</sup> Importantly, these standards vary widely between communities, from extensive exposure to thorough covering, depending on the forms of patriarchal control exercised in each community.<sup>49</sup>

### *B. Patriarchy and the Control over Women's Bodies*

The control over women's bodies and, through it, their sexuality and procreative ability, is at the heart of patriarchy in general and patriarchal religion in particular.<sup>50</sup> A primary manifestation of patriarchal ideology is the biblical story of Adam and Eve, which serves as one of the founding myths of Western Civilization and has defined the relationships between men and women on both the theoretical and practical levels in countries influenced by the Judeo-Christian tradition for generations.<sup>51</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> Gila Stopler, *Reproductive Rights*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Rüdiger Wolfrum et al. eds., 2017).

<sup>45</sup> Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence*, 15 HUM. RTS. L. REV. 569, 572 (2015).

<sup>46</sup> Stopler, *Reproductive Rights*, *supra* note 44; Cosentino, *supra* note 45, at 569–89.

<sup>47</sup> Sandra Lee Bartky, *Body Politics*, in A COMPANION TO FEMINIST PHILOSOPHY 321, 326–27 (Jaggar & Marion Young eds. 1998).

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

<sup>49</sup> *Id.*

<sup>50</sup> LERNER, *supra* note 41, at 9–10.

<sup>51</sup> MARY DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* 44–45 (1985); ORIT KAMIR, *EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW* 3–4 (2001); LERNER, *supra* note 41, at 1–14.

According to the biblical Creation Story, after creating Adam, the man, from the dust of the earth, God put Adam to sleep and from his rib created his mate, who Adam then named Woman.<sup>52</sup> After the woman was tempted by the snake to eat from the tree of knowledge and seduced Adam into eating as well, they were both banished from paradise and Adam renamed the woman Eve, for “she was the mother of all living.”<sup>53</sup> In the service of patriarchy, the creation of Eve from Adam’s rib has been portrayed as proof of the “God-given inferiority of woman.”<sup>54</sup> An additional justification for women’s inferiority in the Christian tradition was found in Eve’s responsibility for the fall of Adam, which was interpreted to hold all women responsible for the advent of evil into the world.<sup>55</sup> At the time of the writing of Genesis, the snake was associated with the fertility goddess and symbolically represented her.<sup>56</sup> It was the woman’s inducement by the snake, which represents the fertility goddess and in turn a woman’s own free sexuality, that is responsible for the Fall.<sup>57</sup> Woman’s punishment for her act is comprised of her eternal subjugation to her husband, the restriction of her sexuality solely for purposes of procreation within the conjugal relationship, and the pain of child bearing.<sup>58</sup> In Christian thought, the woman’s role as a submissive wife and mother is not only her punishment but also her only means of salvation.<sup>59</sup>

Thus, in the service of patriarchy, the story of Creation establishes both women’s subservience to man and the fact that sexual intercourse, pregnancy, and childbirth are the physical manifestations of women’s punishment for the Fall.<sup>60</sup> Since woman’s punishment for the Fall is both to be the vessel of man’s procreative power and to suffer pain and sorrow while performing this role, treating women as a means for

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<sup>52</sup> *Genesis* 2:21–23 (King James). It should be noted that an alternative creation story (the story of Adam and Lilith) which appears in *Genesis* 1:27 “God created man in his own image. In God’s image he created him; male and female he created them”, and which is an egalitarian creation story, has been largely suppressed and forgotten. Throughout the ages, Lilith’s image has been demonized and vilified by the patriarchal social order and has only recently been resurrected as a role model by some feminists. Gila Stopler, *Creations Stories*, in *THE WILEY-BLACKWELL ENCYCLOPEDIA OF GENDER AND SEXUALITY STUDIES* 1–2 (Nancy Naples et al. eds., 2016).

<sup>53</sup> *Genesis* 3:20 (King James).

<sup>54</sup> LERNER, *supra* note 41, at 183.

<sup>55</sup> ROSEMARY RADFORD RUETHER, *SEXISM AND GOD-TALK: TOWARDS A FEMINIST THEOLOGY* 167–68 (1993).

<sup>56</sup> LERNER, *supra* note 41, at 196.

<sup>57</sup> *Id.* at 198.

<sup>58</sup> *Id.* at 196; *Genesis* 3:16 (King James).

<sup>59</sup> *1 Timothy* 2:12–15 (American Standard Version) (“But I permit not a woman to teach, nor to have dominion over a man, but to be in quietness. For Adam was first formed, then Eve; and Adam was not beguiled, but the woman being beguiled hath fallen into transgression: but she shall be saved through her child-bearing, if they continue in faith and love and sanctification with sobriety.”).

<sup>60</sup> LERNER, *supra* note 41, at 183.

procreation becomes not only permissible but necessary and commendable.<sup>61</sup> Viewed this way, the story of creation provides an airtight justification for man's superiority over woman, his right to control her sexuality and procreative ability (and therefore her body), and his right to possess both her and her offspring.<sup>62</sup>

Moreover, for American Christian nationalists, maintaining the proper roles for men and women within the family is not only a personal religious commitment mandated by the story of the Fall, but an essential national goal because "[t]hreats to the 'traditional' (patriarchal, heterosexual, nuclear) family are not just the symptoms of sin in a fallen world.<sup>63</sup> They are threats to the very fabric of American society."<sup>64</sup> As will be further discussed in this Article, the solution for these threats, according to American Christian nationalists, is the political reinforcement of the godly order through national policy and legislation.<sup>65</sup>

Importantly, the myth of Adam and Eve, with its implications for man's right to control woman, her sexuality, her procreative ability, and her body, has had profound effects not only on religious thought, but also on the development of liberal theory.<sup>66</sup> While classical liberalism is based on a voluntary social contract between free and equal men, it is simultaneously predicated on Adam's dominion over Eve and Eve's role as submissive wife and mother.<sup>67</sup> Thus, one of the core elements of classical liberalism is the division between the public political sphere, in which men participate and contract as free and equal persons, and the private familial sphere, in which paternal power is maintained and women are kept in a state of subjection that is perceived as natural and extraneous to the public political sphere.<sup>68</sup> Unlike in classical patriarchy, in which the personal was the basis for the political (the paternal power of the father was the basis for his political right, and hence the basis for a society established on natural hierarchy), in liberalism, the personal is severed from the political in order to allow the personal to continue to be predicated on natural hierarchy.<sup>69</sup> Men's right to keep women subordinated in the private sphere while keeping the public sphere of freedom and equality for themselves is justified by Locke on the basis of the order of God and of the laws of nature<sup>70</sup> and is predicated on Adam's dominion over Eve and on Eve's submissive role as wife and mother.<sup>71</sup>

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<sup>61</sup> RUETHER, *supra* note 55, at 169.

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

<sup>63</sup> WHITEHEAD & PERRY, *TAKING AMERICA BACK FOR GOD*, *supra* note 28, at 148.

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

<sup>65</sup> *Id.* at 148–49.

<sup>66</sup> CAROLE PATEMAN, *THE SEXUAL CONTRACT* 93 (Stanford Univ. Press ed. 1988).

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

<sup>68</sup> *Id.* at 91.

<sup>69</sup> *Id.*

<sup>70</sup> Zillah R. Eisenstein, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 42 (Ne. Univ. Press ed. 1993).

<sup>71</sup> *Id.* at 41.

In the past this right was best exemplified by the notorious doctrine of coverture that has defined married women as a legal nonentity well into the end of the nineteenth century and has prevented their entry into and participation in the public sphere.<sup>72</sup> Even after the elimination of coverture many of the notions underlying this institution have remained, and women's subordination within liberal states is maintained through the use of new juridical forms such as the invocation of privacy.<sup>73</sup>

Moreover, the entrance of women into the public sphere in the Twentieth century has brought about a transformation within patriarchy and a significant move from private patriarchy towards public patriarchy.<sup>74</sup> In private patriarchy, the individual father or husband is the direct oppressor and the beneficiary of the subordination of the women in his household, and his continued power is ensured through the complete exclusion of women from the public sphere.<sup>75</sup> In public patriarchy women are no longer excluded from public arenas, but are segregated and subordinated within the public sphere and their expropriation is performed by the collective.<sup>76</sup>

The shift from private to public patriarchy has been evident in many domains, including reproduction and sexuality.<sup>77</sup> One of the markers of modernization has been the shift, starting in the nineteenth century and culminating in the twentieth century, in control over births from female midwives to male doctors.<sup>78</sup> Conflicts over reproduction have involved not only women and medical professionals, but also churches and eugenicists.<sup>79</sup> Thus, in the nineteenth century United States, doctors used religious understandings of women's roles to advance their claim that the community has the right and the duty to control procreation through the medical

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<sup>72</sup> Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2130–31 (1994). Siegel points to “wife’s work,” i.e., unpaid housework, as one of these traces. *Id.* The doctrine of coverture stipulates that:

by marriage the husband and wife are one person in law: that is, the very being, or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called. . . a femme-covert . . . her husband, [is called] her baron, or lord.

Sir William Blackstone, *Commentaries on the Laws of England* (1783), in CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA 1, 442 (Garland Publ'g, Inc. ed. 1978); see also *Bradwell v. Illinois*, 83 U.S. 130, 131 (1872).

<sup>73</sup> Reva Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111, 1118 (1997) (“By the turn of the century, courts seeking to justify wives’ continuing legal disabilities described marriage as an emotional relationship subsisting in a private realm ‘beyond’ the reach of law.”).

<sup>74</sup> WALBY, *supra* note 41, at 184–85.

<sup>75</sup> *Id.* at 178.

<sup>76</sup> *Id.* at 178–79.

<sup>77</sup> *Id.* at 179.

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

<sup>79</sup> *Id.* at 79.

profession.<sup>80</sup> Similarly, in the United States and elsewhere, eugenicists have advocated giving low-class women access to contraception and abortion in order to enhance the quality of the human race and the nation.<sup>81</sup> To this day, abortions, even in the first trimester, are regulated and subject to restrictions and prohibitions in many countries, including the United States; so are birth control pills and most other female means of contraception.<sup>82</sup> Thus, the existing structure of public patriarchy within liberal states, even when allegedly separated from religion, constitutes a firm basis upon which religious conservatives can reassert the right of religious patriarchy to control women's bodies and sexuality.

The exclusion and segregation of women in the public sphere in Israel is another poignant example of the penetration of private patriarchy into the public sphere and the deepening of public, allegedly secular, patriarchy in the service of religious private patriarchy.<sup>83</sup> The notion of women's modesty has been used for decades by religious conservatives to socialize religious women to confine themselves to the private sphere and bow their heads to the authority of men, viewing themselves as incapable of making important decisions without the direction of their husbands and spiritual leaders.<sup>84</sup> This same notion is utilized by the secular state, as an allegedly neutral, non-religious excuse, to restrict women's presence in the public sphere, segregate them, and even to exclude them altogether from areas where the state gives precedence to the presence of religious men over the presence of women, such as the army.<sup>85</sup>

Importantly, women's bodies and their dress code, which are strictly regulated in conservative religions, are similarly regulated in the liberal state. In both instances, women's bodies, dressed and undressed, are objectified and used to serve individual as well as collective male interests.<sup>86</sup> The same objectification of women's bodies which entails covering them in religious private patriarchy leads to their complete uncovering on billboards and in pornography, and to the enforcement of a strict beauty code in western liberal public patriarchy.<sup>87</sup> As the exclusion and segregation

<sup>80</sup> Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 296–97 (1992).

<sup>81</sup> WALBY, *supra* note 41, at 79.

<sup>82</sup> On the regulation of abortion and contraception in the United States and elsewhere, *see generally* Gila Stopler, *Biopolitics and Reproductive Justice: Fertility Policies Between Women's Rights and State and Community Interests*, 18 U. PA. J.L. & SOC. CHANGE, 169–207 (2015).

<sup>83</sup> *Id.*

<sup>84</sup> Alice Shalvi, 'Renew our Days as of Old': *Religious Fundamentalism and Social Change in the Modern Jewish State*, in THE FREEDOM TO DO GOD'S WILL: RELIGIOUS FUNDAMENTALISM AND SOCIAL CHANGE 75, 79 (Gerrie ter Haar & James J. Busuttill eds., 2003).

<sup>85</sup> *See discussion infra* Section IV.B; *see also* Karin Carmit Yefet, *Synagogue and the State in the Israeli Military: A Story of "Inappropriate Integration"*, 10 L. & ETH. HUM. RTS. 223, 236–37 (2016); Idit Shafran Gittleman, *Women in the IDF: The Challenge of an 'Integrated' Army*, ISR. DEMOCRACY INST. (Feb. 28, 2018), <https://en.idi.org.il/articles/20967>.

<sup>86</sup> Bartky, *supra* note 47, at 326.

<sup>87</sup> For a detailed account of how western liberal public patriarchy uses control over women's

of women in the public sphere in Israel shows, the objectification of women's bodies that leads to their uncovering on billboards in liberal states can lead to their covering, segregation, and exclusion from the public sphere in the same states as long as they continue to sanction and protect patriarchy.<sup>88</sup>

## II. THE FEMINIST CRITIQUE OF POLITICAL LIBERALISM

The feminist critique of liberalism goes beyond a critique of its general patriarchal origins to an analysis of the way in which liberal concepts maintain and promote a patriarchal state structure that preserves, normalizes, and masks the subordination of women.<sup>89</sup> Thus, feminists are critical of the extensive use of the public-private distinction within liberalism and have often claimed that it is being used to shield bigotry and exploitation.<sup>90</sup>

In this section, I will focus on the principles of political liberalism, which to a large extent reflect the practice of most liberal democracies, including the United States and, to a large extent, Israel, and claim that the liberal choice to allow the flourishing of bigotry and intolerance in the private sphere and require respect for equality only in the public sphere, has allowed religious conservatives to make use of liberal concepts to restrict, rather than protect, the rights of women, making the status and rights of women in society exceedingly vulnerable.<sup>91</sup>

The feminist claim against liberalism holds that by insisting certain social structures, actions, and ideologies are part of an inviolable private sphere within which almost no state involvement should be tolerated, liberals have often been too quick to free themselves from the obligation to critique unjust and discriminatory aspects of such structures, actions, or ideologies, and allow their unhindered existence and growth.<sup>92</sup> The outcome has been particularly damaging for women, whose entire existence has, for a long time, been relegated to the private sphere, and who continue

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appearances to preserve their subordination, see NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 13 (1992). See also Bartky, *supra* note 47, at 326–27.

<sup>88</sup> See discussion *infra* Section IV.A.

<sup>89</sup> CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY*, 118 (Stan. Univ. Press ed. 1989).

<sup>90</sup> *Id.*

<sup>91</sup> The distinction between the public and the private is complex and ambiguous and varies between traditions of thought. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 182 (Harv. Univ. Press 2001) [hereinafter *JUSTICE AS FAIRNESS*]. The discussion of the public and the private in this Article refers to Rawls' distinction between the public political domain, which includes the basic structure of society and its basic institutions, and the private non-political domain, which includes the personal, the familial (which Rawls describes as affectional), and the associational (which is ideological and voluntary). See Judith Squires, *Public and Private*, in *POLITICAL CONCEPTS* 131, 132–33 (Richard Bellamy & Andrew Mason eds., Manchester Univ. Press 2003).

<sup>92</sup> PATEMAN, *supra* note 89, at 119.



to disproportionately bear the brunt of the subordination and exploitation prevalent in this sphere.<sup>93</sup> Two central modern liberal theories consolidating and expanding the public-private distinction and the immunity it generates to structures, actions, or ideologies attributed to the private sphere have been political liberalism and liberal multiculturalism.<sup>94</sup> While the latter is specifically concerned with shielding minority cultures from the corrosive influence of majoritarian liberal society, the former is engaged with finding a general liberal framework within which the peaceful coexistence of liberal, non-liberal, and illiberal comprehensive doctrines can be guaranteed.<sup>95</sup> Despite their different foci, both theories are highly accommodationist towards non-liberal and illiberal comprehensive doctrines, and liberal multiculturalism even calls on the liberal state to provide proactive assistance to illiberal minority cultures, garnering feminist criticism for doing so.<sup>96</sup> A common denominator among the religious conservative groups in the United States and Israel is that they are majoritarian.<sup>97</sup> Consequently, my analysis in this section will focus mainly on the feminist critique of political liberalism and its implications for political liberalism's ability to protect women from majoritarian religious conservative prejudice. However, because claims in support of the segregation of women in the public sphere in Israel rely, among other things, on the portrayal of the ultra-orthodox in Israel as a minority community and the exclusion and segregation of women as a necessary multicultural accommodation, I will discuss and refute this claim separately in Section IV.C.4 below.

In his book *Political Liberalism*, which has become the blueprint for many liberal theorists and policymakers, John Rawls introduced a new variant of liberalism—political liberalism.<sup>98</sup> Rawls argues that political, rather than comprehensive, liberalism is the appropriate political theory for modern heterogeneous democratic societies in which a pluralism of incompatible yet reasonable comprehensive religious, philosophical, and moral doctrines exist.<sup>99</sup> The purpose of political liberalism, according

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<sup>93</sup> Squires, *supra* note 91, at 134.

<sup>94</sup> The central theorist of liberal multiculturalism is Will Kymlicka. *See, e.g.*, WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* (2001) [hereinafter *POLITICS IN THE VERNACULAR*]; WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* (2007). For an overview of liberal theories of multiculturalism, see Menachem Mautner, *From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups*, 9 *THEORETICAL INQUIRIES IN L.* 609, 612–13, 633–34 (2008).

<sup>95</sup> *Id.* at 631–32.

<sup>96</sup> *See, e.g.*, Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., Princeton Univ. Press 1999).

<sup>97</sup> *Id.* at 19–20.

<sup>98</sup> JOHN RAWLS, *POLITICAL LIBERALISM* xvi (Colum. Univ. Press 1993).

<sup>99</sup> *See id.* at xviii. According to Rawls, comprehensive doctrines apply not only to the political organization of society, but also include conceptions as to what is of value in human

to Rawls, is to lay out the framework for a constitutional democratic regime that will enable citizens who embrace reasonable and incompatible comprehensive doctrines to live together and maintain, over time, a stable and just society of free and equal citizens.<sup>100</sup> Accordingly, Rawls proposes a political and constitutional framework within which, he hopes, “deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime.”<sup>101</sup> Put differently, in his vision for liberal democracies Rawls attempts to formulate a liberal political and constitutional conception that religious, non-liberal, and even illiberal doctrines may be able to endorse.<sup>102</sup> While this attempt was enthusiastically embraced by many liberal thinkers, feminists have, from early on, been suspicious of the ability of a political and constitutional structure that grants extensive leeway and respect to non-liberal and illiberal doctrines to live up to its promise of maintaining over time a stable and just society of free and equal citizens.<sup>103</sup>

One of the most insightful feminist critics of Rawls’ *A Theory of Justice* and later, of his *Political Liberalism*, has been Susan Okin.<sup>104</sup> Okin, along with other feminists, pointed out early on that in *A Theory of Justice* Rawls omits sex from the list of personal characteristics that are veiled from those in the original position, and that he specifies that those who reason in the original position are all “heads of families.”<sup>105</sup> By doing so, Okin argued, Rawls is ignoring the social institution of gender and the sexual division of labor in the household, as well as their unequal and unjust effects on girls and women.<sup>106</sup> Furthermore, she observed “the questions of whether and how the family, in its traditional or any other form, is a just social institution and how or whether it translates the principles of justice into social practice are never raised.”<sup>107</sup> Okin noted that this was particularly disturbing since Rawls acknowledges that the family plays a prominent role in the moral development of citizens, and his account of the development of a sense of justice that he considers essential to the stability of a just society relies heavily on the justness of families.<sup>108</sup> However, if many families are not truly just, and teach their members intolerance and exploitation of women, then how can children whose moral development takes

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life, ideals of personal character, friendship, familial and associational relationships, and other aspects that inform our conduct and even our life as a whole. *Id.* at 13.

<sup>100</sup> *Id.* at xviii, xx.

<sup>101</sup> *Id.* at xviii.

<sup>102</sup> *Id.* at xxvii–xxviii.

<sup>103</sup> SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 3–4 (Princeton Univ. Press 1979).

<sup>104</sup> See, e.g., OKIN, *supra* note 103; SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 89–90 (Basic Books 1989).

<sup>105</sup> Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *FORDHAM L. REV.* 1537, 1547 (2004).

<sup>106</sup> *Id.* at 1550.

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

<sup>108</sup> *Id.* at 1551.

place in these families become just citizens who embrace unreservedly the political equality of the sexes or any other forms of political equality?

The feminist critique of liberalism's failure to address discrimination and injustice in the private sphere has extended well beyond the family and gender relations.<sup>109</sup> Following the publication of *Political Liberalism*, this critique expanded to include the theory's fundamental distinction between the political sphere and the non-political sphere and the resulting protection, and even legitimation, it grants to almost all sexist and otherwise intolerant comprehensive doctrines.<sup>110</sup> In a nutshell, the crux of the problem with political liberalism lies in its organizing principle, which is the formulation of a liberal political conception of justice that is thin enough to gain the endorsement of religious, non-liberal, illiberal, and comprehensive doctrines, but at the same time supposedly thick enough to protect the rights of all citizens as free and equal.<sup>111</sup> If successful, it aspires to maintain, over time, an overlapping consensus between citizens in which all citizens commit to a liberal political conception of justice, although some of them, and perhaps many of them, simultaneously affirm comprehensive doctrines that are non-liberal and even illiberal.<sup>112</sup> The impossibility of this aspiration has been clear to feminists from early on. There are two major errors in the theory of political liberalism and in the practice on which it is based and for which it advocates.<sup>113</sup> Its first error is that through its use of concepts such as reasonable comprehensive doctrines, reasonable overlapping consensus, impartiality and the idea of public reason, it effectively shields illiberal doctrines from criticism, allowing them to flourish and acquire legitimation, and provides insufficient protection to the rights of citizens as free and equal.<sup>114</sup> Its second error is that it is naïve, and indeed misguided, to assume that citizens who adhere to non-liberal and illiberal comprehensive doctrines will simultaneously develop a genuine commitment to a liberal political conception of justice.<sup>115</sup>

I will briefly elaborate on political liberalism's two errors, starting with the looseness of its concepts and continuing with its misguided assumptions. Political liberalism's concept of a reasonable comprehensive doctrine is deliberately wide and loose.<sup>116</sup> In order to count as reasonable, a doctrine need only be a more or less

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<sup>109</sup> *Id.* at 1553.

<sup>110</sup> *Id.* at 1555–57.

<sup>111</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 98, at xviii.

<sup>112</sup> *Id.* at xviii–xix.

<sup>113</sup> Political liberalism purports to be grounded in historical facts and arguably also reflects the actual practice of many extant liberal democracies. Jan-Werner Müller, *Rawls, Historian: Remarks on Political Liberalism's 'Historicism'*, 237 REVUE INTERNATIONALE DE PHILOSOPHIE, 327, 327–28 (2006).

<sup>114</sup> Gila Stopler, *Political Liberalism in a Jewish and Democratic State*, in STRENGTHENING HUMAN RIGHTS PROTECTIONS IN GENEVA, ISRAEL, THE WEST BANK AND BEYOND 203 (Joseph David et al. eds., Cambridge Univ. Press 2021).

<sup>115</sup> *Id.* at 201.

<sup>116</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 98, at 59.

coherent and consistent exercise of theoretical, as well as practical, reason, that draws on a tradition of thought, and is stable over time but still open to change for reasons that it views as good and sufficient.<sup>117</sup> The only comprehensive doctrines that Rawls finds unreasonable are doctrines that do not endorse some form of liberty of conscience and freedom of thought; doctrines that support egregious violations of rights, such as slavery in ancient Athens or the antebellum South; and doctrines that espouse certain kinds of religious fundamentalism.<sup>118</sup> As Okin points out of Rawls' account, religions that both preach and practice highly sexist modes of life are all seen as reasonable. Since the basic texts of Judaism, Christianity and Islam are all "rife with sexism," and orthodox forms of these religions "still discriminate against women and reinforce their subordination within religious practices, and within and outside the family, in numerous significant ways," many of the doctrines that Rawls views as reasonable and legitimate are in fact illiberal doctrines that do not view women as free and equal persons.<sup>119</sup> Moreover, according to Rawls, illiberal comprehensive doctrines, both religious and non-religious, that advocate gender, sexual orientation, racial, and religious discrimination, would still count as reasonable as long as they are willing to accept the liberal political conception of justice.<sup>120</sup>

Another important concept in political liberalism that serves to buttress the power and legitimacy of illiberal doctrines is impartiality. Impartiality requires political liberals not to attack, criticize, or reject any comprehensive doctrine defined as reasonable or any of the views expressed in it.<sup>121</sup> Rawls explains that since the judgments rendered by these doctrines are seen as internal and non-political, they need not be based on public reason and can only be evaluated from within the doctrines themselves.<sup>122</sup> Thus, political liberals remain impartial even in the face of egregiously sexist and racist views expressed by comprehensive doctrines, as long as these views do not directly shape decisions regarding constitutional essentials and questions of basic justice.<sup>123</sup> Only decisions of this latter kind must be supported by reasons that are compatible with public reason and with the political values expressed by a political liberal conception of justice.<sup>124</sup> Decisions of this kind must therefore be justified in ways that all citizens, as free and equal, are able to endorse in light of their own reason.<sup>125</sup>

However, even this narrow protection for citizen's rights is easy to bypass, since almost any reason internal to a particularistic comprehensive doctrine can be expressed

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<sup>117</sup> *Id.* at 59–60.

<sup>118</sup> *Id.* at 60–66, 170, 196.

<sup>119</sup> OKIN, *supra* note 105, at 1556.

<sup>120</sup> Stopler, *Political Liberalism in a Jewish and Democratic State*, *supra* note 114, at 205 n.22.

<sup>121</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 98, at xxi–xxii.

<sup>122</sup> *Id.* at xxi–xxii.

<sup>123</sup> *Id.* at 195.

<sup>124</sup> *Id.* at xx–xxi.

<sup>125</sup> On the idea of public reason, see RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 91, at 90–91.

in terms that disguise its particularistic origins and that are compatible with public reason. An important example concerning abortion is the U.S. Supreme Court case *Harris v. McRae*, in which a challenge was made to the Hyde Amendment, a funding restriction that prohibits federal funding of abortions for Medicaid recipients except when the continuation of the pregnancy would endanger the woman's life.<sup>126</sup> The plaintiffs in *McRae* argued that the Hyde Amendment was a violation of the Establishment Clause (and in Rawlsian terms, of the idea of public reason) because it codified the teachings of the Roman Catholic Church with regard to abortions.<sup>127</sup> The Supreme Court rejected this argument on the ground that the fact that the law happens to coincide with the teachings of a certain religion does not lead to a violation of the Establishment Clause as long as there is a legitimate secular purpose for the law.<sup>128</sup> Beyond the court's intentional failure to take notice of the connection between the law and Roman Catholic teachings, the secular purpose that the Court found is particularly instructive. According to the Court, denying federal funding for abortions is not an establishment of religion because "[t]he Hyde amendment . . . is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."<sup>129</sup>

*McRae* is but one example of how easily particularistic religious comprehensive doctrines can be disguised as traditionalist, non-religious, public reason and legislated into law, even in countries which allegedly maintain strict separation between religion and the state.<sup>130</sup> Scholars researching traditionalists and conservative religious actors, such as the Catholic Church and traditionalists within Russian Orthodox Christianity, have argued that while these religious actors translate religious arguments into secular arguments, they do so only strategically in order to influence the public debate and push forward a thoroughly anti-liberal agenda, while at the same time remaining closed to any possibility of change in their own positions.<sup>131</sup> For example, in order to advance laws that prohibit blasphemy, these traditionalists will refrain from invoking the fourth commandment that prohibits taking the name of the lord in vain.<sup>132</sup> Instead, they will offer the harm to the integrity of individual religious believers as a secular justification that may restrict blasphemous speech within a liberal political conception.<sup>133</sup> However, their use of this argument will be purely

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<sup>126</sup> *Harris v. McRae*, 448 U.S. 297, 302 (1980).

<sup>127</sup> *Id.* at 311.

<sup>128</sup> *Id.* at 319–20.

<sup>129</sup> *Id.* at 319.

<sup>130</sup> *Id.*

<sup>131</sup> Kristina Stoeckl, *Political Liberalism and Religious Claims: Four Blind Spots*, 43 PHIL. & SOC. CRITICISM 34, 39–40 (2017); Anja Hennig, *Habermas's Translation Proviso and Conservative Religious Actors in the Public Sphere*, in RELIGIOUS PLURALISM: A RESOURCE BOOK 95, 99 (Aurélia Bardon et al. eds., Eur. Univ. Inst. 2015).

<sup>132</sup> Stoeckl, *supra* note 131, at 39.

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

strategic and will not indicate any genuine willingness to be open to other perspectives on the matter.<sup>134</sup> Thus, political liberalism's first error has long allowed non-liberal and illiberal comprehensive doctrines to flourish and gain strength in liberal societies, and use that strength, in both the private and the public spheres, to restrict the rights of women and other disempowered groups.<sup>135</sup>

Political liberalism's second error is its naïve, and indeed misguided, assumption that citizens who adhere to non-liberal and illiberal comprehensive doctrines will simultaneously develop a genuine commitment to a political liberal conception of justice.<sup>136</sup> The recent rise of right-wing religious and nationalist populism in many parts of the world, including the United States and Israel, which have successfully mobilized religious and nationalist illiberal groups against the liberal state, has clearly exposed the frailty of the extant political liberal framework.<sup>137</sup> Rawls' aspiration to persuade adherents of non-liberal and illiberal comprehensive doctrines to develop a genuine commitment to a political liberal conception of justice is embodied in political liberalism's concept of a reasonable overlapping consensus.<sup>138</sup> Rawls believes that a reasonable overlapping consensus over a shared political liberal conception of justice can be reached when "the political conception is supported by the reasonable though opposing religious, philosophical, and moral doctrines that gain a significant body of adherents and endure over time from one generation to the next."<sup>139</sup>

However, Rawls concedes that his theory of political liberalism cannot prove, and does not even attempt to prove, that the reasonable overlapping consensus on which the successful realization of the theory is predicated will indeed form around a political liberal conception of justice in any given setting.<sup>140</sup> Thus, he explains, the most political liberalism does is "present a freestanding liberal political conception that does not oppose comprehensive doctrines on their own ground and does not preclude the possibility of an overlapping consensus for the right reasons."<sup>141</sup>

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

<sup>135</sup> *Id.* at 36.

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., William A. Galston, *The Populist Challenge to Liberal Democracy*, 29 J. DEMOCRACY 5, 12–13 (2018). Although different types of populism share common characteristics, there are also important differences between them. My claim here pertains to the different types of right-wing populism. For a discussion of the different types of populism and the distinctions between them, see Mark Tushnet, *Varieties of Populism*, 20 GER. L.J. 382, 387–89 (2019), <https://doi.org/10.1017/glj.2019.27> [<https://perma.cc/W846-EEQA>]. For a discussion of American Christian Nationalism as populist, see WHITEHEAD & PERRY, TAKING AMERICA BACK FOR GOD, *supra* note 28, at 2–3, 70–71, 174. On American religious populism, see also Jose Pedro Zuquete, *Populism and Religion*, in THE OXFORD HANDBOOK OF POPULISM 569–70 (2018).

<sup>138</sup> Stoeckl, *supra* note 131, at 36.

<sup>139</sup> RAWLS, JUSTICE AS FAIRNESS, *supra* note 91, at 32.

<sup>140</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 98, at xix.

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

Moreover, he acknowledges that while achieving an overlapping consensus may be theoretically possible, under many historical conditions, efforts to achieve it may be overwhelmed by the success of unreasonable doctrines, and consequently, the attempt to formulate an overlapping consensus will fail.<sup>142</sup> In my view such failure is an almost inevitable result of Rawls' wide definition of reasonable comprehensive doctrines, and that many of the doctrines which he defines as reasonable are doctrines that cannot realistically be expected to embrace a political liberal conception of justice.

Despite his acknowledgment that maintaining an overlapping consensus of a political liberal conception of justice over time is not guaranteed, Rawls bases his entire theory on the success of such an endeavor.<sup>143</sup> He acknowledges that if the initial acquiescence to a political liberal conception as a *modus vivendi* is, over generations, to turn into a stable and enduring overlapping consensus, "a certain looseness in our comprehensive views, as well as their being not fully, but only partially comprehensive, may be particularly significant."<sup>144</sup> He hopes that when citizens whose views are loose and only partially comprehensive are faced with an incompatibility "between the political conception and their comprehensive doctrines, then they might very well adjust or revise the latter rather than reject the political conception."<sup>145</sup> This "liberal expectancy"—the expectation that illiberal doctrines would liberalize over time upon realizing the advantages of liberalism over illiberalism—is shared by other liberal theorists such as Will Kymlicka and Nancy Rosenblum, and serves as a basis for their respective theories of liberal multiculturalism and the appropriate relations between the liberal state and private associations.<sup>146</sup> Unfortunately, liberal expectancy seems overly optimistic, and there is no empirical evidence to support it.<sup>147</sup>

Furthermore, Rawls' reliance on the looseness and incompleteness of comprehensive doctrines ignores the fact that, in many liberal democracies, significant parts of the population adhere to fully comprehensive illiberal doctrines (mostly, but not only, religious) that are neither loose nor incomplete, and resist any internal liberalization and even work diligently—often successfully—to resist and reverse liberalization of state laws in areas like women's reproductive rights or LGBTQ+ rights.<sup>148</sup>

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<sup>142</sup> *Id.* at 126.

<sup>143</sup> RAWLS, JUSTICE AS FAIRNESS, *supra* note 91, at 193.

<sup>144</sup> *Id.* at 193.

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

<sup>146</sup> WILL KYMLICKA, MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY 94 (Oxford Univ. Press 2007); NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 55–58 (Princeton Univ. Press 1998).

<sup>147</sup> *See id.* at 57.

<sup>148</sup> On American Christian Nationalists efforts in these areas, see WHITEHEAD & PERRY, TAKING AMERICA BACK FOR GOD, *supra* note 28, at 122–37. On other attempts by traditional religions to prevent liberalization of state laws in these and similar areas, see Stoeckl, *supra* note 131, at 37.

Another way of phrasing this problem was suggested by Stoeckl who argues that Rawls implicitly assumes that there are only two kinds of religious doctrines—fundamentalist doctrines, which are the minority and are unreasonable and therefore shunned, and all remaining religious doctrines which he designates as reasonable and implicitly assumes that they are all liberal doctrines (at least in the sense that they willingly adopt a political liberal conception of justice that treats all citizens as free and equal).<sup>149</sup> Stoeckl argues that the empirical study of religious actors reveals that there is a third group of religious actors which she calls “traditionalists.”<sup>150</sup> Traditionalists are not fundamentalists, and therefore they are not shunned either by political liberalism or by society.<sup>151</sup> However, at the same time, traditionalists are unwilling to adopt a political liberal conception of justice which treats all citizens as free and equal, and they use their extensive political power, both internally within states and internationally, to change the consensus over the appropriate conception of justice in society.<sup>152</sup>

Importantly, the religious resurgence across the world in recent decades has been characterized by increased support for such traditionalist religious groups coupled with a parallel decline in more moderate religious groups.<sup>153</sup> I would argue that political liberalism’s designation of almost all comprehensive doctrines as reasonable and its failure to take into account the many religious traditionalist groups, as well as many non-religious illiberal groups, that are all committed to shifting the overlapping consensus towards non-liberal conceptions of justice, makes it far too optimistic with regard to the ability to maintain a stable and just society of free and equal citizens over time. As Yael Tamir has rightly argued in the context of debates around multiculturalism, the most that can be expected from illiberal communities is to agree strategically to maintain a *modus vivendi* within a political liberal structure in order to protect their own status and rights.<sup>154</sup> However, once illiberal communities obtain enough power to challenge and change the political liberal structure to their own

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<sup>149</sup> Stoeckl, *supra* note 131, at 34–35.

<sup>150</sup> Her own empirical work revealed such a group within Russian Orthodox Christianity, but other works have revealed similar traditionalists in other religions. *Id.* at 35.

<sup>151</sup> Stoeckl defines traditionalists as being neither religious liberals nor religious fundamentalists. They share with religious fundamentalists their rejection of egalitarian individualism and universalism. However, unlike fundamentalists, they do not retreat from society and they reject violent means of reversal. Instead, they use their significant political power and the conservative political and religious establishment strategically in order to implement their illiberal ideology. *Id.* at 35–38. This definition fits both American Christian nationalists and most Jewish Religious groups in Israel.

<sup>152</sup> *Id.* at 37.

<sup>153</sup> Peter L. Berger, *The Desecularization of the World: A Global Overview*, in *THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS* 1, 6 (Peter L. Berger ed., 1999); John L. Esposito, *Religious Fundamentalism & the Global Resurgence*, in *FUNDAMENTALISM, POLITICS, AND THE LAW* vii–viii (Marc A. Hamilton & Mark J. Rozell eds., Palgrave MacMillan Press 2011).

<sup>154</sup> Yael Tamir, *Two Concepts of Multiculturalism*, 29 *J. PHIL. EDUC.* 161, 170–71 (1995).



advantage they will do so, since “[t]he compromise from the point of view of the illiberal community is not even a principled *modus vivendi*, based on a ‘live and let live’, but a conditional one which is based on fear rather than respect.”<sup>155</sup> This important insight is all the more true with respect to non-liberal and illiberal religious and nationalist majoritarian groups who have no incentive to accept a liberal *modus vivendi*, since their own rights are never in any serious danger.<sup>156</sup> Moreover, by strategically using their aggregate political power, these groups have the ability to redesign the public and institutional spheres and restrict the rights of others.<sup>157</sup> This is precisely what we are witnessing religious conservatives do successfully in the United States and in Israel.<sup>158</sup>

### III. RELIGION, LAW, AND POLITICS AND THEIR IMPACT ON WOMEN’S RIGHTS IN THE UNITED STATES

#### *A. Religion, Law, and Politics in the United States*

The First Amendment to the U.S. Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>159</sup> These clauses have been interpreted as requiring “a wall between church and state.”<sup>160</sup> This wall of separation between religion and state has, for many years, been seen as embodying two distinct commitments. First, separation has been construed as prohibiting any direct state funding for religious activities and placement of religious symbols on government property in a way that may indicate governmental preference of a certain religion.<sup>161</sup> Second, while the First Amendment has been understood as preventing the government from giving direct aid or preference to religion, it has also been interpreted as preventing any governmental restrictions on the religious liberty of adherents and religious institutions.<sup>162</sup> Importantly, while the combination

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<sup>155</sup> *Id.* at 171.

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

<sup>157</sup> Stopler, *Political Liberalism in a Jewish and Democratic State*, *supra* note 114, at 179–80 nn.75–79; Stoeckl, *supra* note 131, at 35.

<sup>158</sup> *See infra* Part V.

<sup>159</sup> U.S. CONST. amend. I.

<sup>160</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

<sup>161</sup> For examples of the prohibition of direct funding for religious activities by the state, see *Bowen v. Kendrick*, 487 U.S. 589 (1988). *But see* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Regarding the prohibition on placing religious symbols on government property in a way that might indicate the government’s preference for a certain religion, see *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005). For a debate concerning the possible shift in American law from strict separation to a milder form of state neutrality, see STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* 15–51 (2d ed., 2009). For examples of types of separation, *see generally* Carl H. Esbeck, *Five Views of Church State Relations in American Thought*, 1986 BYUL REV. 371.

<sup>162</sup> For example, the U.S. Supreme Court has upheld the ministerial exception, which

of some degree of both separation between religion and the state and respect for religious freedom is prevalent in liberal states, the degree of non-establishment and the extent of religious freedom granted to religious organizations and individuals vary from country to country, and these variations can have important implications for civil rights in general and for the rights of women in particular.<sup>163</sup>

There are several reasons why the American separation model has not provided adequate protection to women's rights against religious bigotry over the years. First, the U.S. Constitution is generally understood to preclude the imposition of norms ensuring equality for women on religious entities, due to the supremacy of the freedoms guaranteed by the First Amendment.<sup>164</sup> An early example of how the separation model can serve as a shield for injustice is the *McClure v. Salvation Army* case.<sup>165</sup> In *McClure*, the Fifth Circuit held that the Free Exercise Clause precluded the court's intervention in a suit filed by an ordained minister of The Salvation Army, who alleged that she received a lower salary and fewer benefits than her male counterparts and was fired after she complained to the EEOC.<sup>166</sup> The Salvation Army did not claim, and the court did not hold, that the discrimination against McClure was based on religious precepts.<sup>167</sup> Further, despite the fact that it seems highly unlikely that the discrimination in salary and benefits against women clergy was religiously based, the Salvation Army was not required to offer any reasons for the alleged discrimination because the court held that the First Amendment prohibits any state involvement in ecclesiastical matters such as the relationship between a church and its ministers.<sup>168</sup> Importantly, the court's decision was not based on the integrity of the religious message of The Salvation Army, or on the deeply held religious beliefs

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exempts religious institutions from complying with antidiscrimination laws concerning employment decisions, when employees perform some religious function, even when their primary functions are secular. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012); *see also, e.g., McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972); *Rayburn v. Gen. Conf., Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996).

<sup>163</sup> *See generally* Gila Stopler, *Religion-State Relations and Their Effects on Human Rights: Nationalization, Authorization, and Privatization*, 6 OXFORD J.L. & RELIGION 474 (2017); Gila Stopler, *The Liberal Bind: The Conflict Between Women's Rights and Patriarchal Religion in the Liberal State*, 31 SOC. THEORY & PRAC. 191 (2005). *But see* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992) (arguing that a strong position on both establishment and free exercise is required).

<sup>164</sup> *See, e.g.,* Elizabeth S. Wendorff, *Employment Discrimination and Clergywomen: Where the Law Has Feared to Tread*, 3 S. CAL. REV. L. & WOMEN'S STUD. 135, 136 (1993); Cass R. Sunstein, *Should Sex Equality Law Apply to Religious Institutions*, in IS MULTICULTURALISM BAD FOR WOMEN? 85, 86 (Susan Moller Okin ed., 1999).

<sup>165</sup> *McClure*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

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

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 560.

of the members of the church. What the *McClure* court defended in its decision was merely the right of the existing leadership of the church to make decisions and take actions with impunity, even when such actions involved otherwise unlawful discrimination, regardless of whether these actions were religiously motivated or compatible with the wishes of members of the church.<sup>169</sup>

Even as the ties between religion and the state have become much closer, the understanding that the First Amendment precludes the imposition of norms ensuring women's equality on religious entities has expanded over the years. Moreover, the classical paradigm of separation between religion and the state has been replaced by a paradigm of state neutrality towards religion,<sup>170</sup> and later by preferential treatment of religions, especially Christianity.<sup>171</sup> This new paradigm has been expressed through various normative and legal constructs such as "Judeo-Christian tolerance,"<sup>172</sup> "special solicitude to the rights of religious organizations,"<sup>173</sup> freedom of the church, new religious institutionalism, and corporate religious liberty.<sup>174</sup>

Under the neutrality model, religious institutions are no different than any other institution and should be treated as such by the state.<sup>175</sup> Thus, this model entails neutrality between religion and non-religion and not merely neutrality between the different religions.<sup>176</sup> Though the shift to state neutrality towards religion should have been conducive to the enforcement of antidiscrimination laws on religious institutions, such enforcement has become even less likely in the era of neutrality than it was in the era of strict separation.<sup>177</sup> At the same time, government funds that

<sup>169</sup> *Id.* at 559–61 (finding that Title VII was not intended to regulate employment matters between a church and its ministers).

<sup>170</sup> Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 70–71 (2002).

<sup>171</sup> Mark Tushnet, *Religion and the Roberts Court: The Limits of Religious Pluralism in Constitutional Law*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 465 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., Oxford Univ. Press 2016).

<sup>172</sup> Frederick M. Gedicks, *Undoing Neutrality? From Separation to Tolerance in Establishment Clause Jurisprudence*, 46 WILLAMETTE L. REV. 691, 691 (2010).

<sup>173</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

<sup>174</sup> Chad Flanders, Micah Schwartzman, & Zoë Robinson, *Introduction*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY xiii–xiv (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., Oxford Univ. Press 2016).

<sup>175</sup> *Id.* at xiii–xiv, xviii.

<sup>176</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 639 (2002) (finding an Ohio program that provided tuition aid to students whose parents chose for them to attend private school did not offend the Establishment Clause); Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 918 (2003) [hereinafter *Zelman's Future*].

<sup>177</sup> Courts have refused to apply the holding in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 872 (1990), which rejected religious belief as a basis for exemption from generally applicable laws, to discrimination against women in religious institutions. See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). The

were once given only to non-religious institutions are increasingly granted to religious institutions as well.<sup>178</sup> Thus, the combined result of the reluctance to interfere with religious beliefs on the one hand, and the push for neutrality towards religion in terms of funding on the other has been the further legitimization of religiously motivated discrimination against women and the use of government money to support it.<sup>179</sup>

In her important article, *The Politics of Women's Wrongs and the Bill of "Rights,"* Mary Becker observes that there has never been a real separation between religion and the state in the United States, nor has there been government neutrality towards religion.<sup>180</sup> Instead, she claims, government has always advanced religion by granting it substantial subsidies in the form of exemptions from income and property taxes, and awards of government contracts.<sup>181</sup> As Becker rightly points out, by subsidizing religion and increasing its power through the grant of government contracts, the government magnifies religion's subordinating effects on women.<sup>182</sup> This observation has become even more true over the years. Charitable choice and school voucher programs have enabled patriarchal religions to further enhance their power and to spread their subordinating teachings concerning women's proper role to an ever-increasing audience.<sup>183</sup> Moreover, by supplying patriarchal religion with government funds, the government implicitly, if not explicitly, sanctions subordinating teachings, especially by supporting programs that use the religious view about women's and men's roles as a remedial tool and funding religious schools that teach the subordination of women.<sup>184</sup> Nevertheless, support for such schools and programs have increased over the years, and in its recent *Espinoza* decision, the Supreme Court practically imposed an expansion of the grant of government money to religious schools by deciding that a state that gives tax credits to parents who send their children

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Court's reasoning, which was not supported by the *Smith* holding itself, was that the *Smith* principle applied to religious individuals but not to religious institutions, and thus the latter might still be exempt from otherwise applicable neutral laws such as antidiscrimination laws. *Id.* at 462.

<sup>178</sup> *Zelman*, 536 U.S. at 639.

<sup>179</sup> For example, the Ohio vouchers program that was affirmed by the Supreme Court in *Zelman* requires schools accepting the vouchers not to discriminate on the basis of race, national origin, or religion in admission, but does not require them not to discriminate on the basis of sex. *Id.* at 645.

<sup>180</sup> Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 479–86 (1992).

<sup>181</sup> *Id.* In *Zelman*, Justice O'Connor gives a detailed survey of the amount of funds that federal, state, and local governments provide to religious institutions, which reveals that a staggering amount of public money, estimated in the billions of dollars each year, reaches religious institutions either in the form of tax exemptions or as payment for services. *Zelman*, 536 U.S. at 667–68.

<sup>182</sup> Becker, *supra* note 180, at 484.

<sup>183</sup> See generally *Zelman's Future*, *supra* note 176.

<sup>184</sup> *Id.* at 983–84; JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 39 (Ithaca: Cornell Univ. Press 1998).

to secular private schools is mandated by the Free Exercise Clause to give the same amount of tax credit to parents who send their children to religious schools.<sup>185</sup>

Furthermore, while the Court is sidestepping the Establishment Clause and insisting that religion should be treated equally in government funding, it is extending preferential treatment to religion on the basis of the Free Exercise Clause.<sup>186</sup> In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court unanimously held that both churches and affiliated organizations, such as religious schools, can assert a “ministerial exception” to prevent the application of antidiscrimination laws, including the Americans with Disabilities Act, to decisions on hiring and firing religious leaders.<sup>187</sup> In the recent *Our Lady of Guadalupe School* case, the Court expanded the exception for religious schools even further to cover all teachers regardless of their religious leadership role.<sup>188</sup> Thus, the same religious schools that are granted government money through parental tax credits in the name of equal treatment, are also granted a license to discriminate against teachers with impunity.<sup>189</sup>

There are at least five facets of the relationship between religion and the state in contemporary democracies that are crucial to an understanding of the ways in which religion affects the state and the rights of its citizens, particularly women: (1) the institutional differentiation between religion and the state; (2) the level of protection of religious liberty; (3) the extent of religious involvement in education and social services; (4) the involvement of religion in politics; and (5) the levels of religious belief of individuals in society.<sup>190</sup> Until now, the discussion in this part has

<sup>185</sup> See generally *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246 (2020).

<sup>186</sup> Gillman & Chemerinsky, *supra* note 21; see also Caroline Mala Corbin, *Espinoza and the Continued Evisceration of the Establishment Clause*, TAKE CARE (July 1, 2020), <https://takecareblog.com/blog/espinoza-and-the-continued-evisceration-of-the-establishment-clause> [<https://perma.cc/TK7Y-VYV7>]. “*Espinoza* leaves us with a gluttonous Free Exercise Clause, and a starved Establishment Clause. . . the traditional goals of the Establishment Clause, once a co-equal religion clause, are not even compelling.” Ira C. Lupo & Robert W. Tuttle, *Espinoza v. Montana Department of Revenue—Requiem for the Establishment Clause?*, TAKE CARE (July 1, 2020), <https://takecareblog.com/blog/espinoza-v-montana-department-of-revenue-requiem-for-the-establishment-clause> [<https://perma.cc/BS79-DMNW>].

<sup>187</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–90 (2012).

<sup>188</sup> See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

<sup>189</sup> Gillman & Chemerinsky, *supra* note 21. For a less critical view of the *Our Lady of Guadalupe* case which interprets it more as a clarification than as a revolution, see generally Ira C. Lupo & Robert W. Tuttle, *The 2020 Ministerial Exception Cases: A Clarification, Not a Revolution*, TAKE CARE (July 8, 2020), <https://takecareblog.com/blog/the-2020-ministerial-exception-cases-a-clarification-not-a-revolution> [<https://perma.cc/V7E7-Z7JM>]. Nevertheless, Lupo and Tuttle agree that “[c]oupled with *Espinoza*, the ministerial exception already moves the Court an uncomfortable distance toward that posture of funding equality and regulatory privilege.” *Id.*

<sup>190</sup> Stopler, *The Liberal Bind: The Conflict Between Women’s Rights and Patriarchal Religion in the Liberal State*, *supra* note 163, at 194.

covered the first three facets and has shown how American law has gradually changed to become more accommodating toward religion, allowing it to gain more power, resources, and autonomy.<sup>191</sup> However, these changes cannot be fully understood and would not have transpired without the increasing involvement of religion in American politics and political mobilization of religious adherents to the goal of strengthening the public role of religion in the country. In their important book, *Taking America Back for God*, sociologists Whitehead and Perry claim that the recent religious conservative turn in the United States is driven by a religious nationalist conservative ideology which they term “Christian nationalism.”<sup>192</sup> Whitehead and Perry define American Christian nationalism as an ideology “that idealizes and advocates a fusion of Christianity with American civic life.”<sup>193</sup> According to their analysis, American Christian nationalists are not necessarily deeply religious people that want to deepen the practice of religion in their private lives.<sup>194</sup> Rather, they may belong to both religious and non-religious groups, which are bound together by the desire to see religion, and specifically a particular ethnocultural strain of Christianity, privileged in the public sphere in the United States.<sup>195</sup> Americans who embrace Christian nationalist views to varying degrees comprise more than half of the population, and “Christian nationalism is influential across the entire [American] population.”<sup>196</sup>

Whitehead and Perry argue that “Christian nationalist ideology is fundamentally focused on gaining and maintaining access to power. It seeks to ensure that one particular group, with a specific vision for the country, enjoys privileged access to the halls of power and has the ability to make the culture in its own image.”<sup>197</sup> In order to do so, American Christian nationalists have firmly supported president Trump, and he rewarded them with executive and policy decisions that have promoted their vision by turning the Supreme Court into a conservative stronghold and restricting women’s reproductive rights.<sup>198</sup> While approval of Christian nationalism is a strong predictor

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<sup>191</sup> See *supra* Section III.A.

<sup>192</sup> See generally WHITEHEAD & PERRY, *TAKING AMERICA BACK FOR GOD*, *supra* note 28.

<sup>193</sup> *Id.* at 10.

<sup>194</sup> *Id.* at 13.

<sup>195</sup> *Id.* at 152.

<sup>196</sup> *Id.* at 25, 152. For a related finding, according to which “about half of Americans (49%) say the Bible should have at least ‘some’ influence on U.S. laws,” see Michael Lipka, *Half of Americans Say Bible Should Influence U.S. Laws, Including 28% Who Favor It Over the Will of the People*, PEW RSCH. CTR. (Apr. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/04/13/half-of-americans-say-bible-should-influence-u-s-laws-including-28-who-favor-it-over-the-will-of-the-people/> [<https://perma.cc/NNG4-AXHF>].

<sup>197</sup> WHITEHEAD & PERRY, *TAKING AMERICA BACK FOR GOD*, *supra* note 28, at 161.

<sup>198</sup> *Id.* at 153; Andrew Whitehead & Samuel Perry, *Is a “Christian America” a More Patriarchal America? Religion, Politics, and Traditionalist Gender Ideology*, 56 CAN. REV. SOCIO. 151, 152 (2019) [hereinafter *Is a “Christian America” a More Patriarchal America?*]; Leah Litman, *Redefining Reproductive Rights and Justice*, 118 MICH. L. REV. 1095, 1095 (2020); David D. Cole, *Defending Liberty in the Trump Era: Reflections from the Front*, 100

of various anti-liberal stances such as racial intolerance, ethnocentrism, right-wing authoritarianism, and populism, the most important stances in the context of this Article, for which Christian nationalism is a predictor, are sexism and traditional views of gender and family.<sup>199</sup> According to Whitehead and Perry “Christian nationalism advocates for a particular social order that lionizes hierarchies between men and women.”<sup>200</sup> The society that strong Christian nationalists wish to live in—whether they are theologically conservative Christians or not—is a society in which families are “traditional,” and men and women are in their “proper place.”<sup>201</sup> Consequently, “embracing Christian nationalism is the strongest predictor of espousing a more traditional gender ideology for Americans, net of their religious and political characteristics.”<sup>202</sup>

Because Christian nationalism is political at its core, it views threats to the traditional family as “threats to the very fabric of American society” and its adherents see as a vital part of the solution to these threats the political reinforcement of the gendered godly order.<sup>203</sup> Christian nationalism is, according to Whitehead and Perry, “ultimately about privilege,”<sup>204</sup> and Christian nationalists are “seeking to retain or gain power in the public sphere” and are cloaking their political and social ends in the transcendent.<sup>205</sup> Thus, “Christian nationalism is used to defend against shifts in the culture toward equality for groups that have historically lacked access to the levers of power—women, sexual, racial, ethnic, and religious minorities.”<sup>206</sup> Whitehead and Perry argue that “politicians at all levels of federal, state, and local governments use Christian nationalism to engender support and advocate for their particular vision for America.”<sup>207</sup> One example is Project Blitz, an initiative created by a coalition of groups on the Christian right under the leadership of the Congressional Prayer Caucus Foundation that offers model legislation promoting and sometimes even imposing Christian nationalist interpretations of Christian values at the local, state, and federal levels.<sup>208</sup> The attack on women’s reproductive rights

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B.U.L. REV. 2413, 2415, 2419 (2020); ISABELLA ABELITE, EVELYN MICHALOS, & JOHN ROQUE, PROTECTING THE SUPREME COURT: WHY SAFEGUARDING THE JUDICIARY’S INDEPENDENCE IS CRUCIAL TO MAINTAINING ITS LEGITIMACY, 1 (Fordham Univ. Sch. L., Jan. 2021), [https://ir.lawnet.fordham.edu/faculty\\_scholarship/1112](https://ir.lawnet.fordham.edu/faculty_scholarship/1112) [<https://perma.cc/8RE3-K4R4>].

<sup>199</sup> WHITEHEAD & PERRY, TAKING AMERICA BACK FOR GOD, *supra* note 28, at 13; Whitehead & Perry, *Is a “Christian America” a More Patriarchal America?*, *supra* note 198, at 152.

<sup>200</sup> WHITEHEAD & PERRY, TAKING AMERICA BACK FOR GOD, *supra* note 28, at 17.

<sup>201</sup> *Id.* at 152–54.

<sup>202</sup> Whitehead & Perry, *Is a “Christian America” a More Patriarchal America?*, *supra* note 198, at 153.

<sup>203</sup> WHITEHEAD & PERRY, TAKING AMERICA BACK FOR GOD, *supra* note 28, at 148.

<sup>204</sup> *Id.* at 153.

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

<sup>206</sup> *Id.* at 153–54.

<sup>207</sup> *Id.* at 159.

<sup>208</sup> *Id.* For the website of the initiative, see <http://cpcfoundation.com/first-freedom-coalition-project-blitz/> [<https://perma.cc/J8LV-DFCW>].

discussed in this Article is orchestrated and carried out by conservative politicians, legislatures, and even judges who share the Christian nationalist agenda.<sup>209</sup>

*B. The Recent Attack on Women's Reproductive Rights in the United States*

The obvious starting point for a survey of the recent attack on women's reproductive rights in the United States is the *Hobby Lobby* case.<sup>210</sup> The *Hobby Lobby* case involved closely held corporations that were required by federal regulations issued by the American Department of Health and Human Resources (HHS) under the ACA to provide their employees with health insurance coverage for certain methods of contraception.<sup>211</sup> Owners of the corporations claimed that the regulations violate their sincerely held religious beliefs and should therefore be struck down.<sup>212</sup> The case reached the U.S. Supreme Court, which ruled for the corporations and struck down what has come to be known as the "contraceptive mandate"<sup>213</sup> contained in the regulations, holding that the contraceptive mandate violated the Religious Freedom Restoration Act (RFRA).<sup>214</sup> The RFRA is a federal law that was passed by Congress in 1993 following the Supreme Court's *Smith* decision.<sup>215</sup> The RFRA prohibits the government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government can show the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means for furthering that interest.<sup>216</sup> The application of the RFRA to the contraceptive mandate raised four questions: (1) Can for-profit

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<sup>209</sup> See *infra* Section III.B.

<sup>210</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 682 (2014).

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

<sup>212</sup> *Id.*

<sup>213</sup> It is important to note that the appellation "contraceptive mandate" is a misnomer because the ACA offers all employers a choice between paying a tax to the government (similarly to the Social Security tax) that would subsidize the government's provision of health care to employees and providing their employees directly with a *comprehensive* health insurance plan (that must also include contraceptive coverage). Nevertheless, the majority chose to treat it as a real mandate. See *id.* at 733–35. For a detailed analysis see Marty Lederman, *Hobby Lobby Part III—There Is No "Employer Mandate"*, BALKINIZATIONBLOG (Dec. 16, 2013, 9:36 AM), <https://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-theres-no-employer.html> [<https://perma.cc/37UF-7RXQ>].

<sup>214</sup> Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. §§ 2000bb *et seq.*

<sup>215</sup> *Id.*; *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 872 (1990). In *Smith*, two members of the Native American Church were dismissed from their jobs and denied unemployment benefits because they ingested peyote as an essential element of a religious ceremony. *Id.* at 872. Oregon law included a general rule forbidding the consumption of peyote, and the *Smith* Court rejected the employees' claim that the denial of unemployment benefits violated their free exercise rights, holding that the First Amendment is not violated when a prohibition of the exercise of religion is merely the incidental effect of a generally applicable and otherwise valid law. *Id.* at 878.

<sup>216</sup> Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. §§ 2000bb *et seq.*



corporations be considered persons who exercise religion?<sup>217</sup> (2) Does the contraceptive mandate substantially burden the corporations' religious exercise?<sup>218</sup> (3) Is the contraceptive mandate in furtherance of a compelling government interest?<sup>219</sup> (4) Does the mandate represent the least restrictive means for furthering that interest?<sup>220</sup>

The majority of the Supreme Court held that for-profit corporations can be considered persons under the RFRA, and that the contraceptive mandate substantially burdens their religious exercise.<sup>221</sup> The majority further decided to assume without adjudicating that "the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA," but held that the contraceptive mandate was not the least restrictive means of furthering this compelling interest and was therefore incompatible with RFRA.<sup>222</sup> The four minority justices rejected the majority's decision as well as its reasoning.<sup>223</sup> The minority reasoned that the contraceptive mandate does not substantially burden the petitioners' religious exercise, that it serves a compelling governmental interest, and that it is the least restrictive means to achieve that interest.<sup>224</sup> Consequently, the four minority justices found that the contraceptive mandate was constitutional and that the challenge to it should be rejected.<sup>225</sup>

In a forceful dissent, Justice Ginsburg referred to the majority opinion as being of "startling breadth" and as deviating considerably from prior American free-exercise jurisprudence.<sup>226</sup> Ginsburg pointed to three important deviations. First, for the first time the Court decided that for-profit corporations may be entitled to protection of their free exercise of religion.<sup>227</sup> Second, to hold that the mandate substantially burdens their religion without requiring any further showing, the Court relied solely on the corporations' owners' statement that the contraceptive mandate is incompatible with their sincerely held religious beliefs.<sup>228</sup> Third, the Court decided that where an enterprise claims a religion-based exemption and the government can assume the cost of the exemption in lieu of the enterprise, there exists a "less restrictive means" to achieve the compelling governmental interest, regardless of the additional cost to the public and despite the additional burden placed on the enterprise's employees.<sup>229</sup>

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<sup>217</sup> *Hobby Lobby*, 573 U.S. at 705.

<sup>218</sup> *Id.* at 719.

<sup>219</sup> *Id.* at 726.

<sup>220</sup> *Id.* at 728–31.

<sup>221</sup> *Id.* at 706–07.

<sup>222</sup> *Id.* at 726–31.

<sup>223</sup> *Id.* at 739–40 (Ginsburg, J., dissenting).

<sup>224</sup> *Id.* at 768 (Ginsburg, J., dissenting).

<sup>225</sup> *Id.* at 740 (Ginsburg, J., dissenting).

<sup>226</sup> *Id.* at 739–40 (Ginsburg, J., dissenting).

<sup>227</sup> *Id.* at 751–52 (Ginsburg, J., dissenting).

<sup>228</sup> *Id.* at 758–60 (Ginsburg, J., dissenting).

<sup>229</sup> The additional burden on the employees would require them to "take steps to learn about, and to sign up for, a new [government funded and administered] health benefit," and

This, Ginsburg noted, goes against Court precedent on free exercise claims since “with respect to free exercise claims no less than free speech claims, ‘[y]our right to swing your arms ends just where the other man’s nose begins.’”<sup>230</sup> Contrary to Justice Ginsburg, some commentators read the majority opinion as agreeing to the principle that free exercise claims should not be accepted if they cause third-party harm, while differing from the minority only in their assessment of whether any harm was suffered by third parties in the case at hand.<sup>231</sup>

Just several days after deciding the *Hobby Lobby* case, the Supreme Court further extended the religious exemptions from the contraceptive coverage requirement when it granted an injunction pending appeal to the religious non-profit Wheaton College based on its demand to be granted *an exemption from the exemption*.<sup>232</sup> The College argued that even taking the necessary steps to request an exemption from the contraceptive coverage requirement constitutes a substantial burden on its religious freedom since by requesting the exemption it triggers someone else’s duty to provide the contraceptives to its students/employees.<sup>233</sup> The majority of the Court enjoined the government from requiring religious non-profit organizations to fill out a two page form in order to receive the exemption from the contraceptive coverage requirement pending appeal.<sup>234</sup> In a scathing dissent, Justice Sotomayor, joined by Justices Ginsburg and Kagan, pointed out that in its decision, the Court is enjoining the precise procedure which a few days earlier, in *Hobby Lobby*, it described as the proper alternative to the contraceptive mandate while explaining that it “constitutes an alternative that achieves all of the Government’s aims while providing greater respect for religious liberty.”<sup>235</sup> After striking down the contraceptive mandate based on the existence of this alternative means, the Court went ahead and gave an interim order enjoining the government from requiring employers to use it, allegedly accepting *prima facie* the plaintiffs’ argument that it likely places an unjust substantial burden on their sincere religious beliefs.<sup>236</sup> Similarly, in *Zubik v. Burwell*, where plaintiffs were primarily non-profit organizations that provide health insurance to their employees, the Court

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to hope that the scarce funds allocated by the government for safety-net family-planning services, which are only aimed at covering the needs of uninsured individuals, will be able to cover their needs as well. *Id.* at 765–66 (Ginsburg, J., dissenting).

<sup>230</sup> *Id.* at 746 (Ginsburg, J., dissenting).

<sup>231</sup> *E.g.*, Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GEN. 153, 175–76 (2015); Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GEN. 1, 29–30 (2015). *But see* Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GEN. 193, 206–08 (2015) (claiming that the Court largely sidestepped the issue of third-party burdens but disapproved their relevance in future RFRA cases).

<sup>232</sup> *Wheaton College v. Burwell*, 573 U.S. 958, 958–59 (2014).

<sup>233</sup> *Id.* at 960.

<sup>234</sup> *Id.* at 958–59.

<sup>235</sup> *Id.* at 960 (internal quotation omitted).

<sup>236</sup> *Id.* at 958–59.

decided to remand the case to the lower courts, vaguely instructing them to “arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’”<sup>237</sup> Thus, while in these three cases the Court has shown much concern for the religious liberty claims of for-profit and non-profit organizations, it seems to have been much less concerned with the necessity of ensuring that their employees will actually receive the “seamless contraceptive coverage” that they were entitled to receive.<sup>238</sup>

Under the Court’s instruction in *Zubik* that directed the administration to formulate rules for contraceptive coverage that accommodate religious exercise, and in light of the Court’s refusal to confront head-on the question whether it is plausible for employers to claim that the mere notification of refusal to pay contraceptive coverage can be considered a substantial burden on religion, the Trump administration formulated rules that expanded exemptions for both religious and non-religious employers dramatically.<sup>239</sup> The Administration issued interim rules, which it later finalized, that significantly broadened the definition of exempt religious employers to encompass any employer that objects to contraceptive coverage on the basis of sincerely held religious beliefs, including for-profit and publicly traded entities.<sup>240</sup> The exemption means that these employers do not even need to participate in the self-certification process that can ensure their employees receive coverage through government plans unless they voluntarily choose to do so.<sup>241</sup> Moreover, similar rules were created to offer a “moral exemption” for non-profit employers, for-profit employers with no publicly traded components, and employers with sincerely held moral objections to providing some or all forms of contraceptive coverage.<sup>242</sup> The Supreme Court affirmed these rules in the *Little Sisters of the Poor* case, holding that providing women employees with contraceptive coverage is not a compelling state interest, and that requiring employers to take part in a self-certification process that would enable the government to ensure alternative contraceptive coverage for their women employees constitutes a substantial burden on the employer’s religious

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<sup>237</sup> *Zubik v. Burwell*, 578 U.S. 403, 408 (2016) (per curiam).

<sup>238</sup> *Id.* at 410. While Justices Sotomayor and Ginsburg in their concurrence, which emphasized the duty towards the women employees, used the word “seamless” to describe the required coverage, this word was missing from the Court’s opinion.

<sup>239</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2377 (2020).

<sup>240</sup> The interim rules and then the final rules were challenged in various courts and the Third Circuit has issued a preliminary nationwide injunction against their enforcement. *Commonwealth of Pennsylvania; State of New Jersey v. President of the United States of America*, Docket Nos. 17-3752, 18-1253, 19-1129, 19-1189 (3d Cir. 2019).

<sup>241</sup> 45 C.F.R. § 147.132 (religious exemptions in connection with coverage of certain preventive health services).

<sup>242</sup> 45 C.F.R. § 147.133 (moral exemptions in connection with coverage of certain preventive health services).

exercise.<sup>243</sup> In her dissent, Justice Ginsburg noted that under the Court's judgement, "between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services" and that such a result violates the principle that government cannot accommodate religion beyond Free Exercise Clause requirements "at the expense of the rights of third parties."<sup>244</sup>

It is possible to view the result in *Little Sisters of the Poor* as a sudden deviation from the respect the Court has shown in *Hobby Lobby* and other contraceptive coverage cases to the principle of preventing third-party harm.<sup>245</sup> However, in my view, the respect shown by the majority of the Court to the reproductive rights of women in these cases has from the beginning been merely theoretical and conditional, and the Court did not show any interest in protecting these rights in either of these cases. While in *Hobby Lobby* the Court simply assumed that women's reproductive rights are protected, and in *Wheaton College* and *Zubik* it gave a vague order to the administration to try to protect them, in *Little Sisters of the Poor* the Court chose to acknowledge that, in its view, protecting women's reproductive rights was not a compelling state interest and that therefore restricting them to protect religious freedom was not only allowed but actually required by the RFRA.<sup>246</sup> By interpreting the RFRA so broadly as to allow (or even require) the government to restrict the rights of others for the sake of religious interests that are not mandated by the Free Exercise Clause, the Court has condoned a violation of the Establishment Clause and has given unwarranted preference to religious citizens.<sup>247</sup>

#### IV. RELIGION, LAW, AND POLITICS AND THEIR IMPACT ON WOMEN'S RIGHTS IN ISRAEL

##### A. Religion, Law, and Politics in Israel

Israel is generally considered a Western liberal democracy, although it is an outlier among Western democracies in its religion-state relations.<sup>248</sup> Yet, as discussed above, recent changes in the place and importance of religion in the United States, as well as in other Western liberal countries, have made the Israeli situation more pertinent to such democracies.<sup>249</sup> The increasing desecularization of the world and

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<sup>243</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2394–96.

<sup>244</sup> *Id.* at 2401.

<sup>245</sup> See, e.g., *Affordable Care Act—Contraceptive Mandate—Religious Exemptions—Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 134 HARV. L. REV. 560, 560 (2020).

<sup>246</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2396.

<sup>247</sup> Gedicks, *supra* note 231, at 172.

<sup>248</sup> Steven Menashi, *Ethnonationalism and Liberal Democracy*, 32 U. PA. J. INT'L L. 57, 67 (2010).

<sup>249</sup> For typologies of religion state relations, see Gila Stopler, *Religion-State Relations and*

concurrent increasing demands for what José Casanova calls the deprivatization of religion have raised many questions regarding the proper place of religion within the state and its constitutional order.<sup>250</sup> Casanova describes the deprivatization of religion as “the fact that religious traditions throughout the world are refusing to accept the marginal and privatized role which theories of modernity as well as theories of secularization had reserved for them.”<sup>251</sup> In Israel, religion has been partly institutionalized in some areas of law from the outset, while being kept in the private sphere and separated from the state in all others.<sup>252</sup> However, in recent years, Jewish religious conservatives vying for a larger role for religion in the public sphere in Israel have initiated a wide-ranging and carefully orchestrated political struggle to restrict the presence of women in the public sphere for religious reasons.<sup>253</sup> Consequently, Israel is currently undergoing a highly contentious political struggle between religious conservatives and feminists over women’s right to an unobstructed presence in the public sphere, which resembles in many respects the struggle in the United States between Christian nationalists and feminists over women’s reproductive rights.<sup>254</sup>

Whereas most liberal democratic states do not define themselves in reference to their ethnic or religious character, Israel is defined in its Basic Laws as a Jewish and Democratic state.<sup>255</sup> This definition is relatively new and was adopted along with the two Basic Laws on human rights—Basic Law: Human Dignity & Liberty and Basic Law: Freedom of Occupation.<sup>256</sup> However, the origins of this definition can be traced to the Israeli Declaration of Establishment.<sup>257</sup> This declaration states that Israel is to be a “Jewish state,” but at the same time that it will “ensure complete equality of social and political rights to all its inhabitants irrespective of religion,

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*Their Effects on Human Rights: Nationalization, Authorization, and Privatization*, 6 OXFORD J.L. & RELIGION 476–79 (2017) [hereinafter *Religion-State Relations and Their Effects on Human Rights*]. See generally MONSMA & SOPER, *supra* note 161.

<sup>250</sup> JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 5 (1994).

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

<sup>252</sup> See Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

<sup>253</sup> *Id.* See generally Tirosh, *supra* note 5.

<sup>254</sup> See *supra* Section III.B; Tirosh, *supra* note 5, at 842.

<sup>255</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 208.

<sup>256</sup> Basic Law: Human Dignity & Liberty, 5752-1992, SH 1391 60, 60 as amended (Isr.), <https://www.mfa.gov.il/mfa/mfa-archive/1992/pages/basic%20law-%20human%20dignity%20and%20liberty-.aspx#:~:text=The%20purpose%20of%20this%20Basic,a%20Jewish%20and%20democratic%20state.&text=2.,of%20any%20person%20as%20such.&text=T here%20shall%20be%20no%20violation%20of%20the%20property%20of%20a%20person> [https://perma.cc/BF8P-63EW]. See also Basic Law: Freedom of Occupation, 5754-1994, SH 1454 90, 90 (Isr.), <https://www.mfa.gov.il/mfa/mfa-archive/1994/pages/basic%20law-%20freedom%20of%20occupation-.aspx> [https://perma.cc/G5BF-EXW8].

<sup>257</sup> The Declaration of Establishment of the State of Israel (Israel, May 14, 1948), <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx#:~:text=On%20May%2014%2C%201948%2C%20on,of%20the%20State%20of%20Israel> [https://perma.cc/8WWW-JBYV].

race or sex; it will guarantee freedom of religion, conscience, language, education and culture.”<sup>258</sup>

There is an ongoing and yet unsettled debate in Israel with regard to the exact meaning of its definition as a Jewish state.<sup>259</sup> While some claim that this definition establishes the Jewish religion in the state and justifies the granting of legal authority and status to the Jewish religion, others dispute this reading of the Basic Laws, arguing that the definition “Jewish state” should be understood merely as designating the character of Israel as the home of the Jewish people, where Jews realize their right to national self-determination, and not as an establishment of the Jewish religion in the state.<sup>260</sup>

Regardless of this debate, and long before the enactment of the Basic Laws, the Jewish religion in its Orthodox version has been partially established in the state through laws granting legal status to Orthodox Jewish religious authorities in several areas, the most important of which being that of personal laws.<sup>261</sup> All Jews in Israel are subject to Orthodox Jewish religious personal laws.<sup>262</sup> At the same time, members of other recognized religious communities such as Muslims and various Christian denominations are also subject to the personal religious laws of their respective religions.<sup>263</sup> This state of affairs has been established during the period of the

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<sup>258</sup> *Id.*

<sup>259</sup> See, e.g., Avigdor Levontin, “*Jewish and Democratic*”—*Personal Reflections*, in *THE STATE OF ISRAEL: BETWEEN JUDAISM AND DEMOCRACY* at 322, 328 (Yossi David ed., 2000); Menahem Alon, *Constitution by Legislation: The Values of a Jewish and Democratic State in Light of Basic Law: Human Dignity and Personal Freedom*, 17 *IUNEI MISHPAT* 659 (1993).

<sup>260</sup> See Levontin, *supra* note 259, at 322, 328 (taking a position against interpreting the term “Jewish” in the Basic Laws as including the Jewish religion); Alon, *supra* note 259, at 668–70 (taking a position supporting the inclusion of the Jewish religion in the term “Jewish”).

<sup>261</sup> Orthodox Judaism in Israel contains two separate streams—the Orthodox stream (often referred to as the Religious Zionist stream) and the ultra-Orthodox stream. These two streams share control over the Jewish religious establishment in Israel. See generally *Israel’s Religiously Divided Society*, PEW RSCH. CTR. (Mar. 8, 2016), <http://www.pewforum.org/2016/03/08/israels-religiously-divided-society/> [<https://perma.cc/5QCL-XN8M>].

<sup>262</sup> RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 233–34 (Penn Press 2004).

<sup>263</sup> The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law. See *The Palestine Order in Council, 1922*, ¶ 51, Aug. 10, 1922, League of Nations (Palestine). The authority of the Muslim religious courts can still be found in Sign 52 of the Palestine Order in Council, 1922, and that of the various Christian denominations in Sign 54 of the Order. *Id.* at ¶¶ 52, 54. The authority of the Jewish Rabbinical Courts is set out in the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act, 1953. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, LSI 134 139 (1952–1953) (Isr.), [https://knesset.gov.il/review/data/eng/law/kns2\\_rabbiniccourts\\_eng.pdf](https://knesset.gov.il/review/data/eng/law/kns2_rabbiniccourts_eng.pdf). The authority of the Druze religious courts can be found in the Druze Religious Courts Law, 1962. Druze Religious Courts Law, 5723-1962, LSI 383 27 (1962–1963) (Isr.). For a philosophical-legal discussion of the laws of marriage and divorce in Israel and the question of their compatibility with liberal principles, see

Ottoman rule over the Eretz-Israel/Palestine region and has been maintained by the British mandate and later by the state of Israel.<sup>264</sup> The imposition of the religious personal laws of the various religious communities on all residents, and the lack of an alternative civil marriage, constitute a violation of the right to freedom of conscience and belief, as well as a violation of the rights of women who are subject to the discriminatory patriarchal religious laws of the various religious communities.<sup>265</sup> However, it should be noted that each person has the legal right to change her religious affiliation and exit her religious community, thereby avoiding being subjected to the community's religious personal law.<sup>266</sup> Other ways of avoiding the application of religious personal laws are marrying abroad or living as common law spouses, a status which is particularly broad in Israel and has been legally recognized through both legislation and judicial decisions to enable people to live as spouses without having to partake in a religious marriage.<sup>267</sup> That the state-sanctioned violation of rights occurs within each religious group and group members can partly ameliorate it by exiting the group makes the Israeli case pertinent to the American case since the American model of separation between religion and the state with the extensive autonomy it grants to religious institutions similarly results in state-sanctioned discrimination against women within their own religious communities.<sup>268</sup> In both cases, the right of exit cannot be considered an adequate remedy, and the discrimination translates into women's subordinate status in society.<sup>269</sup>

The centerpieces of the liberal facets of Israel's constitutional system are Basic Law: Human Dignity & Liberty and Basic Law: Freedom of Occupation, which afford constitutional protection to several fundamental rights.<sup>270</sup> These basic laws on human rights do not explicitly protect the right to freedom of religion and conscience, or the right to equality or to free speech.<sup>271</sup> However, the Israeli Supreme Court has ruled

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GIDEON SAPIR & DANIEL STATMAN, *STATE AND RELIGION IN ISRAEL: A PHILOSOPHICAL-LEGAL INQUIRY* 167–85 (Cambridge University Press, 2019).

<sup>264</sup> *The Palestine Order in Council, 1922*, ¶ 51, Aug. 10, 1922, League of Nations.

<sup>265</sup> See, e.g., Frances Raday, *On Equality—Judicial Profiles*, 35 *ISR. L. REV.*, 380, 390–91 (1995).

<sup>266</sup> Religious Community Ordinance (Conversion) [last modified 6/14/47].

<sup>267</sup> See SAPIR & STATMAN, *supra* note 263, at 177–85.

<sup>268</sup> See Tirosh, *supra* note 5, at 828–30; WHITEHEAD & PERRY, *TAKING AMERICA BACK FOR GOD*, *supra* note 28, at 151.

<sup>269</sup> On the insufficiency of the right of exit as a remedy for discrimination, see Stopler, *The Free Exercise of Discrimination*, *supra* note 24, at 517–23.

<sup>270</sup> Basic Law: Human Dignity & Liberty, 5752-1992, SH 1391 60, 60 as amended (Isr.), <https://www.mfa.gov.il/mfa/mfa-archive/1992/pages/basic%20law-%20human%20dignity%20and%20liberty-.aspx#:~:text=The%20purpose%20of%20this%20Basic,a%20Jewish%20and%20democratic%20state.&text=2.,of%20any%20person%20as%20such.&text=There%20shall%20be%20no%20violation%20of%20the%20property%20of%20a%20person> [https://perma.cc/5VYL-89UD].

<sup>271</sup> *Id.*

that all these rights are protected by Basic Law: Human Dignity & Liberty, inasmuch as they are all an essential part of the right to dignity, which is expressly enshrined in the Basic Law.<sup>272</sup> In most contexts, the Supreme Court has given these rights, as well as other rights enshrined in the Basic Laws, a liberal interpretation based on the commitment of the Israeli legal system to individual liberty and to substantive equality.<sup>273</sup> A similar liberal commitment is also evident in various human rights laws such as the Equal Employment Opportunities Law, the Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, the Freedom of Information Law and the Male and Female Workers Equal Pay Law, which even includes a comparable worth component.<sup>274</sup> Another central piece of liberal legislation is the Israeli Women's Equal Rights Law, which due to its importance was termed by the Israeli Supreme Court "a regal law" whose intent of ensuring equality for women should, according to the Court, inform any legal action.<sup>275</sup>

The legal framework determining religion-state relations in Israel is not enshrined in any of its basic laws; rather it was determined by regular legislation enacted prior to them. Because the Basic Laws have constitutional status, regular legislation is generally subject to the Basic Laws.<sup>276</sup> However, Basic Law: Human Dignity & Liberty contains a provision stating that its enactment shall not affect the validity of any laws enacted prior to it.<sup>277</sup> The result is that although the Supreme Court has interpreted Basic Law: Human Dignity & Liberty as affording constitutional status to fundamental rights such as equality, freedom of religion, and freedom of speech, this status cannot be used to challenge the validity of the pre-existing legislation that gives state power to religion, regardless of the violation of basic

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<sup>272</sup> Gideon Sapir, Daphne Barak-Erez & Aharon Barak, *Introduction: Israeli Constitutional Law at the Crossroads*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 1, 2–3 (Gideon Sapir, Daphne Barak-Erez, Aharon Barak eds., Hart 2013).

<sup>273</sup> Moshe Cohen-Eliya, *The Israeli Case of a Transformative Constitutionalism*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 173 (Gideon Sapir, Daphne Barak-Erez, Aharon Barak eds., Hart 2013).

<sup>274</sup> Employment (Equal Opportunities) Law 5748-1988, SH 1240 64 (Isr.); Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000; Freedom of Information Law 5758-1998; Male and Female Workers Equal Pay Law 5756-1996 (Section 3 guarantees equal pay for equivalent work).

<sup>275</sup> Women's Equal Rights Law 5711-1951 SH 82 248 (Isr.); H CJ 1000/92 Bavli v. The Great Rabbinical Court, 48(2) PD 221, 240 (1994) (Isr.). Nevertheless, the law sets explicit exceptions in matters pertaining to the substantive application of religious laws of marriage and divorce, and to the appointment of religious judges. *Id.* §§ 5, 7(3).

<sup>276</sup> *Constitution of Israel*, The Knesset (2014).

<sup>277</sup> Basic Law: Human Dignity & Liberty, 5752-1992, SH 1391 60, Section 10 as amended (Isr.), <https://www.mfa.gov.il/mfa/mfa-archive/1992/pages/basic%20law-%20human%20dignity%20and%20liberty-.aspx#:~:text=The%20purpose%20of%20this%20Basic,a%20Jewish%20and%20democratic%20state.&text=2.,of%20any%20person%20as%20such.&text=There%20shall%20be%20no%20violation%20of%20the%20property%20of%20a%20person> [<https://perma.cc/2FAN-S7A8>].



rights that it entails.<sup>278</sup> The most important pre-existing laws affecting women's rights are those that subject all matters of marriage and divorce in Israel to the religious courts of the various religious communities, which are staffed by religious judges who adjudicate cases according to the community's religious law.<sup>279</sup> The largest and most powerful courts are the Jewish religious courts, the Rabbinical Courts, which are mostly staffed by ultra-orthodox judges whose interpretation of Jewish religious law is most conservative and highly discriminatory towards women.<sup>280</sup>

While the Israeli Women's Equal Rights Law declares a general commitment to women's full equality in all legal matters, it allows specific exceptions in matters pertaining to the substantive application of the religious laws of marriage and divorce, and to the appointment of religious judges.<sup>281</sup> Over the years, the Israeli Supreme Court has interpreted these exemptions narrowly to expand the protection of women's rights.<sup>282</sup> For example, in the *Doe* case the Court held that the appointment of a female arbitrator on behalf of the woman in proceedings before a Sharia Court pertains neither to the substantive application of the religious laws of marriage and divorce, nor to the appointment of religious judges, and is therefore subject to the equality mandate and must be allowed by the Court.<sup>283</sup> This case is an example of the Israeli Supreme Court's willingness to restrict religious law's adverse impact on women's right to equality in order to advance liberal egalitarian constitutional principles, wherever this is possible. Unlike religious bodies in most liberal states, which are private and therefore largely immune to egalitarian constitutional norms,<sup>284</sup>

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<sup>278</sup> *Id.*

<sup>279</sup> The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law. *See* Palestine Order in Council, Aug. 10, 1922, ¶ 51 (Palestine). The authority of the Muslim religious courts can still be found in Sign 52 of the Order, and that of the various Christian denominations in Sign 54 of the Order. *Id.* at ¶¶ 52, 54. The authority of the Jewish Rabbinical Courts is set out in the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act, 1953. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.). The authority of the Druze religious courts can be found in the Druze Religious Courts Law, 1962. Druze Religious Courts Law, 5723-1962, 8 LSI 27 (1962-1963) (Isr.).

<sup>280</sup> Stopler, *Religion-State Relations and Their Effects on Human Rights*, *supra* note 249, at 484-86.

<sup>281</sup> §§ 5, 7(3) Women's Equal Rights Law 5711-1951 SH 82 248 (Isr.), [https://www.knesset.gov.il/review/data/eng/law/kns1\\_women\\_eng.pdf](https://www.knesset.gov.il/review/data/eng/law/kns1_women_eng.pdf). These exceptions are designed to align the scope of the equality legislation with the authority of the religious courts.

<sup>282</sup> *See, e.g.*, H CJ 3856/11 *Doe v. Supreme Sharia Court of Appeals* (2013) (Isr.). Translation by Versa: Opinion of the Supreme Court of Israel, <http://versa.cardozo.yu.edu/opinions/doe-v-supreme-sharia-court-appeals> [<https://perma.cc/NG2T-SWHX>].

<sup>283</sup> In a different case concerning Jewish religious courts, the Israeli Supreme Court ruled in favor of petitioners who claimed that women should be trained and appointed as rabbinical pleaders on behalf of litigants in the rabbinical courts, on similar grounds. H CJ 6300/93 *Institute for the Training of Claims Court v. The Minister of Religious Affairs*, 48(4) IsrSC 441 (1994).

<sup>284</sup> *See* discussion of the ministerial exception *supra* Section III.A.

most religious courts in Israel operate as state organs and are therefore subject to constitutional supervision wherever prescribed by law.<sup>285</sup> As the Supreme Court explained in *Doe* with respect to religious state organs:

. . . this is a field in which discrimination against women at the declarative and principle level, too, still remains. This is partly protected by legislation, and the Court must maneuver its way in a manner that respects the legislator's decisions, but with maximum commitment to the basic principle and constitutional right of equality for women. This is particularly true when at hand are public and state institutions whose services are required by the entire public who cannot avoid such institutions' services. The perspective regarding discrimination against women shall be different for a member of a community that chooses to belong to it and to accept its rules and the rulings of its institutions, than for a public institution which the public cannot choose whether or not to need its services.<sup>286</sup>

As briefly described above, Israeli Law sets forth a complex arrangement that is intended to strike a balance between a narrowly defined area of institutionalized religious control over aspects of family law and other areas of law covered by secular liberal legislation. While this balance has always been detrimental to women in terms of family law, it has provided them an extensive and progressive protection of rights in most other areas.<sup>287</sup> However, in recent years, religious conservatives, who have always been disproportionately politically powerful, have gained enough political power to initiate changes in public policy that allow the segregation and exclusion of women from some parts of the public sphere in Israel for religious reasons.<sup>288</sup>

The two most significant religious conservative groups working for this change are the Jewish ultra-orthodox (UO) community, for whom the segregation was initiated in the first place, and the more conservative sections of the Jewish Religious Zionist (RZ) community, who are demanding its further expansion to suit their own needs.<sup>289</sup> Together, these two groups comprise eighteen percent of the population in Israel, or twenty-two percent of its Jewish population.<sup>290</sup> While both communities

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<sup>285</sup> See H CJ 3856/11 *Doe v. Supreme Sharia Court of Appeals* (2013) (Isr.). Translation by Versa: Opinion of the Supreme Court of Israel, <http://versa.cardozo.yu.edu/opinions/doe-v-supreme-sharia-court-appeals> [<https://perma.cc/B63M-Z6LA>].

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

<sup>287</sup> See *supra* Section IV.A (discussing religion and women's rights in Israel).

<sup>288</sup> See *supra* Section IV.B (discussing women in the public sphere in Israel).

<sup>289</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 211.

<sup>290</sup> *Israel's Religiously Divided Society*, PEW RSCH. CTR. (Mar. 8, 2016), <http://www.pewforum.org/2016/03/08/israels-religiously-divided-society/> [<https://perma.cc/SCU2-BLYS>].

belong to the Orthodox stream of Judaism, they differ in important respects. “The RZ community is well integrated into Israeli society in terms of places of residence, of work and of army service, and its subgroups are varied in their interpretations of Orthodox Jewish religion.”<sup>291</sup> Nevertheless, “it would be accurate to say that most of the RZ community lean towards the more conservative side of the spectrum of orthodox Judaism, and an increasingly influential minority among them espouse the UO’s ultra conservative religious views and practices.”<sup>292</sup>

The ultra-orthodox Jewish community in Israel is a highly religious community that comprises nine percent of the population and abides by strict modesty standards that often include the segregation between men and women in many settings.<sup>293</sup> Although the UO are a distinct and very religious community, they are divided into diverse subgroups along the axes of types of religiosity, ethnicity, and social status.<sup>294</sup> While the UO community is a minority numerically and most of its members keep themselves apart from the rest of society both geographically and culturally, the UO are nevertheless a politically powerful community whose political leaders are highly influential.<sup>295</sup> The community’s political power well exceeds their size due to their leaders’ ability to play the tie breaker on important political questions, and due to their almost constant presence in key positions in the Israeli government.<sup>296</sup> Another reason for the UO’s political power is the fact that the UO (together with the RZ) control the extensive Jewish religious establishment in Israel.<sup>297</sup> The Jewish religious state institutions in Israel are state organs with sizable budgets that, among other things, hold coercive state power over all Jews in Israel in matters of marriage and divorce, as previously discussed.<sup>298</sup> The UO’s religious way of life includes intensive religious studies for most of the men and intensive child bearing for the women, making the UO community the poorest community in Israel and leaving it highly

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Ultra-orthodox comprise nine percent of Jews, religious Zionists thirteen percent, Masorti Jews (traditional) comprise twenty-nine percent of Jews, and secular Jews comprise forty-nine percent of all Jews. *Id.*

<sup>291</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 211.

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

<sup>293</sup> *Id.*

<sup>294</sup> Lee Cahaner, Opinion, *The Ultra-Orthodox Community on the Conservatism-Modernism Spectrum*, ISR. DEMOCRACY INST. (May 31, 2019), <https://en.idi.org.il/articles/26911> [<https://perma.cc/UXV5-3ZM3>].

<sup>295</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 211.

<sup>296</sup> *Id.*

<sup>297</sup> Nissan Slominski, Opinion, *The Appointment of Rabbinical Court Judges—An Ultra-Orthodox State or a Zionist State?*, TORAVODA (Oct. 2007), <http://www.toravoda.org.il/node/584>; Uri Polak, *For the First Time in a Decade: A Religious Zionist Judge in the Great Rabbinical Court*, KIPA (Mar. 25, 2012), <http://www.kipa.co.il/now/47971.html> [<https://perma.cc/X3N4-JVN5>].

<sup>298</sup> The Chief Rabbinate of Israel Law, 5740-1980, SH 965 90 (Isr.); The Jewish Religious Services Law, 5731-1971, SH 628 130 (Isr.).

dependent on state funds and on its leaders who secure these funds through political maneuvering.<sup>299</sup> UO Yeshiva students are exempt from military service and this fact creates tensions between the UO and other sections of the Israeli Jewish population as well as legal complications.<sup>300</sup> The exemption of UO Yeshiva students from military service has become a politically charged issue and has even brought about the dissolution of the Israeli parliament (Knesset) on several occasions.<sup>301</sup>

The majority of the UO, as well as the majority of the RZ, should be considered “traditionalists” in Stoeckl’s sense discussed above.<sup>302</sup> Indeed, the political leadership of these two communities operates in ways that are strikingly similar to those of traditionalists in the Catholic Church and in the Russian Orthodox Christian community discussed by Stoeckl.<sup>303</sup> Just like Christian traditionalists, the UO and RZ make extensive strategic use of secular arguments in public discourse to achieve their goals. They use liberal concepts such as freedom of religion and conscience, pluralism, equality, and multiculturalism to justify their own demands for religious accommodations while at the same time remaining closed to any possibility of change in their own positions.<sup>304</sup> The manifestly strategic use the UO and RZ make of these liberal concepts is evidenced by the fact that these two communities jointly control the Jewish religious establishment, which is a theocratic state institution whose coercive powers are imposed on Jews in Israel. The leaders of both communities adamantly object to any curtailment in the power of the Jewish religious establishment and work diligently to expand it.<sup>305</sup> As we will see, the same strategic use

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<sup>299</sup> See generally Gila Stopler, *The Right to an Exclusively Religious Education—The Ultra-Orthodox Community in Israel in Comparative Perspective*, 42 GA. J. INT’L & COMP. L. 749 (2014) [hereinafter *The Right to an Exclusively Religious Education*].

<sup>300</sup> Yedida Stern, *A Blow to the IDF as the People’s Army*, ISR. DEMOCRACY INST. (Feb. 26, 2020), <https://en.idi.org.il/articles/30881> [<https://perma.cc/FR8T-QUEF>].

<sup>301</sup> *Id.*

<sup>302</sup> See *supra* notes 150–54 and accompanying text. As explained earlier, Stoeckl defines traditionalists as being neither religious liberals nor religious fundamentalists. They share with religious fundamentalists their rejection of egalitarian individualism and universalism. However, unlike fundamentalists they do not retreat from society and they reject violent means of reversal. Instead, they use their significant political power and the conservative political and religious establishment strategically in order to implement their illiberal ideology. Stoeckl, *supra* note 131, at 35–38.

<sup>303</sup> See *supra* notes 149–52 and accompanying text.

<sup>304</sup> The most important socially and religiously conservative think tank in Israel, Kohelet, is funded by American conservatives (the American Tikvah fund) and promotes an American-style conservative agenda. Rafi Reznik, *The Rise of American Conservatism in Israel*, 8 PA. ST. J.L. & INT’L AFF. 383, 452–53 (2020). Kohelet is involved in key cases concerning the segregation and exclusion of women that will be discussed below, and promotes the idea that such segregation should be allowed not only for UO, but also to RZ’s and others who desire it.

<sup>305</sup> Gila Stopler, *Political Liberalism in a Jewish and Democratic State*, in STRENGTHENING HUMAN RIGHTS PROTECTIONS IN GENEVA, ISRAEL, THE WEST BANK AND BEYOND 218 (Joseph David et al. eds., Cambridge Univ. Press 2018) (forthcoming 2021).

of liberal concepts to expand the power of religion in the public sphere and curtail the rights of women is evident in their demand for the segregation of women in the public sphere for religious reasons.<sup>306</sup>

*B. The Exclusion and Segregation of Women in the Public Sphere in Israel*

In recent years Israeli authorities have initiated the exclusion and segregation of women in various public spaces and services, presumably to facilitate the integration of the UO community into the economy and general society, and encourage its members to serve in the army, obtain higher education, and integrate in the job market.<sup>307</sup> The reasoning offered for the initiated exclusion and segregation of women is to facilitate UO integration through the replication of the strict standards of sexual modesty practiced by the UO within their private sphere into the common public sphere.<sup>308</sup> Supposedly, such replication will allow UO members to integrate without abandoning their way of life and their customary practices.<sup>309</sup>

When referring to women's exclusion and segregation (*hadarat nashim*) I am referring to "rules and practices that constrain women's actions, movement, voice, or appearance due to their sex" in the public sphere.<sup>310</sup> The exclusion and segregation of women in the public sphere is achieved by denying them some services entirely (exclusion),<sup>311</sup> by forbidding their presence in various places at the same time as men (segregation),<sup>312</sup> or by allowing their presence only as long as they dress and behave "modestly".<sup>313</sup> Such rules and practices

<sup>306</sup> See Stopler, *The Right to an Exclusively Religious Education*, *supra* note 299, at 789, 793.

<sup>307</sup> See Yofi Tirosh, Opinion, *Israel's Access for ultra-Orthodox Men Excludes Women*, HAARETZ (Apr. 24, 2018), <https://www.haaretz.com/opinion/.premium-israels-access-for-ultra-orthodox-men-excludes-women-1.5627035> [<https://perma.cc/DD8H-4W4Z>]; TOI Staff, *High Court okays gender-segregated ultra-Orthodox college programs*, ISR. TIMES (July 13, 2021, 12:44 AM), <https://www.timesofisrael.com/high-court-okays-gender-segregated-ultra-orthodox-college-programs/> [<https://perma.cc/9Y8L-P7HL>].

<sup>308</sup> *Id.*

<sup>309</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

<sup>310</sup> Tirosh, *supra* note 5, at 824.

<sup>311</sup> For example, segregation occurs when a municipality initiates a music performance and restricts participation to only men. Examples can be found in MIRIAM ZALKIND, THE ISRAEL WOMEN'S NETWORK, WOMEN'S EXCLUSION IN ISRAEL—A DECADE OF STRUGGLE 8–9 (2020) (Heb.) [hereinafter WOMEN'S EXCLUSION IN ISRAEL—A DECADE OF STRUGGLE], <https://iwn.org.il/wp-content/uploads/2020/12/wonems-right-booklet-FINAL-2020.pdf>.

<sup>312</sup> For example, when women are sent to the back of the bus, when they are instructed to walk only on one side of the sidewalk or to enter medical clinics or public events only from a designated entrance and restrict themselves to certain parts of the building. *Id.* at 9–10.

<sup>313</sup> For example, when bus drivers refuse to allow women to board a bus because they are not dressed modestly or when women are barred from entering certain shops or even certain neighborhoods for this reason. *Id.* at 10–11.

Openly and categorically deny women equal participation in the public sphere based on a view that as females, they are fundamentally different . . . [and] hinder women's enjoyment of primary goods such as dignity, voice, personal autonomy, freedom of speech, freedom of occupation, political, cultural, and social voice, and other conditions that foster an individual and group-based sense of self-respect and the conditions for human flourishing.<sup>314</sup>

It is important to note that while all agree that sexual modesty standards in Judaism have religious origins, the specific religious source for these standards and their precise content are highly varied and contested. Consequently, many contested justifications have been offered for the gender segregation initiated by the state, including respect for religious freedom, freedom of conscience, respect for religious feelings, multicultural accommodation, and the right of the UO to equality.<sup>315</sup>

While the sex segregation was presumably intended to affect only members of the UO community, it has inevitably had a significant effect on all users of the public sphere in Israel, leading to the exclusion of all women from increasingly larger segments of the public sphere and consequently to restrictions on their rights and on their equal opportunities.<sup>316</sup> This has generated heated opposition from feminists who have initiated a struggle against the gender exclusion and segregation in the public sphere working through the courts, in government and in the legislature.<sup>317</sup>

Consequently, some of the state-sponsored segregation practices have been thwarted. Thus, for example, segregation in parts of the public transportation system where women were sent to sit in the back while men were seated in the front was struck down by the Supreme Court in 2011 as discriminatory towards women.<sup>318</sup> Another relative success for the feminist struggle was a 2014 government resolution adopting a report by the Ministry of Justice which prohibited the segregation of women in certain public services and spaces.<sup>319</sup> However, other forms of segregation, such as

<sup>314</sup> Tirosh, *supra* note 5, at 824.

<sup>315</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

<sup>316</sup> *Id.* at 219.

<sup>317</sup> WOMEN'S EXCLUSION IN ISRAEL—A DECADE OF STRUGGLE, *supra* note 311, at 12–15 (detailing significant milestones in the litigation against women's exclusion from 2010–2020); Tirosh, *supra* note 5, at 829–30, 832–33, 843–46 (analyzing the legislation and litigation relating to women's exclusion in Israel); *see also* Stopler, *The Free Exercise of Discrimination*, *supra* note 24, at 492–95 (discussing the early history of gender segregation in Israel).

<sup>318</sup> HCJ 746/07 Ragen v. Ministry of Transport 64(2) PD 530 (2011) (Isr.), [http://elyon1.court.gov.il/files\\_eng/07/460/007/t38/07007460.t38.htm](http://elyon1.court.gov.il/files_eng/07/460/007/t38/07007460.t38.htm). An unofficial English translation of the Judgment is available on VERSA, *Ragen v. Ministry of Transport*, <https://versa.cardozo.yu.edu/opinions/ragen-v-ministry-transport> [<https://perma.cc/CT79-5QP4>] (last visited Mar. 28, 2022).

<sup>319</sup> MINISTRY OF JUST., REPORT OF THE DEPARTMENTAL TEAM EXAMINING THE PHENOMENON OF THE EXCLUSION OF WOMEN IN THE PUBLIC SPHERE (2013) (Heb.), <http://www.justice.gov.il/Publications/Articles/Documents/DochHadaratNasim.pdf>. On March 30, 2014, this

segregation in various public events, still prevail and have even spread, and the debate over their legality and legitimacy has intensified.<sup>320</sup> Another form of gender segregation that has continued to expand over time is the segregation of women in the Israeli army.<sup>321</sup> The army has committed itself to providing UO male recruits with a “female-free zone” during their army service, and physically bars women soldiers as well as women officers from being present in the vicinity of UO soldiers.<sup>322</sup> Similarly, the Israeli Council for Higher Education has initiated segregated university courses for UO men and women in which female professors are barred from teaching the UO male students, while male professors are free to teach UO female students.<sup>323</sup>

### C. Assessing the Justifications for the Segregation of Women in the Public Sphere

The struggle over the segregation and exclusion of women in the public sphere in Israel is ongoing and the forms of segregation are diverse and changing. Until recently, the major segregation cases before the Israeli Supreme Court were the cases initiated against the Israeli Council for Higher Education (ICHE) regarding segregation in academia, filed in 2016 and 2017; their slow adjudication, as well as the Court’s obscure final judgement, given more than four years after the commencement of the cases signal the Court’s reluctance to rule on the matter.<sup>324</sup> The reluctance of the Court to rule on this specific matter reflects a larger unwillingness of the Court to give substantive constitutional rulings on cases pertaining to the exclusion and segregation of women in the public sphere.<sup>325</sup> According to a study

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report was adopted by the government as Resolution No. 1526 of the Thirty-Third Government of Israel.

<sup>320</sup> Michal Gera Margalio & Miriam Zalkind, *Feminism in Israel Contesting Social Exclusion in Israel*, FATHOM (Feb. 2018), <https://fathomjournal.org/feminism-in-israel-contesting-social-exclusion-in-israel/> [<https://perma.cc/34X8-YPJS>]; WOMEN’S EXCLUSION IN ISRAEL—A DECADE OF STRUGGLE, *supra* note 311, at 20–22.

<sup>321</sup> See Margalio & Zalkind, *supra* note 320.

<sup>322</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20. See also, e.g., Yefet, *supra* note 85, at 258–59; Dr. Idit Shafran Gittleman, *Women in the IDF: The Challenge of an ‘Integrated’ Army*, ISR. DEMOCRACY INST. (Feb. 28, 2018), <https://en.idi.org.il/articles/20967> [<https://perma.cc/L55A-9JYD>].

<sup>323</sup> Or Kashti & Netael Bandel, *Israel’s Top Court Allows Sex-Segregated University Classes to Integrate Haredim*, HAARETZ (July 13, 2021), <https://www.haaretz.com/israel-news/premium-israel-s-top-court-allows-sex-segregated-at-university-classes-to-integrate-haredim-1.9994427> [<https://perma.cc/R8KG-SMSH>].

<sup>324</sup> H CJ 8010/16 Berzon v. Council for Higher Education; H CJ 6500/17 Dr. Yofi Tirosh v. Council for Higher Education; 8683/17 Kohelet Policy Forum v. Council for Higher Education (2021) (Isr.), <https://supremedecisions.court.gov.il/Home/Download?path=Hebrew Verdicts\16\100\080\k61&fileName=16080100.K61&type=4> [<https://perma.cc/2UQQ-5YUR>]. For the petition to the Supreme Court against the Council for Higher Education’s policy, see Pet’rs’ Req., Dec. 7, 2017, <https://law.acri.org.il/he/wp-content/uploads/2017/12/bagatz-6500-17-gender-segregation-amicus.pdf>.

<sup>325</sup> Tirosh, *supra* note 5, at 839.

by Tirosh “[i]n the past decade, the HCJ has consistently refrained from developing constitutional doctrine on women’s exclusion. Instead, it has favored ad-hoc procedural solutions to mitigate the concrete cases of discriminatory exclusion brought before it.”<sup>326</sup> Tirosh argues that this reluctance by the Court has resulted in a deepening of the segregation and exclusion of women.<sup>327</sup> Tirosh posits that the Court’s reluctance to issue substantive rulings in these kinds of cases may be due to the justices’ underestimation of the threat posed to women’s rights by the expanding segregation and exclusion of women; such reluctance by the Court may also be a result of the Israeli Supreme Court’s recent practice to refrain from ruling on publicly sensitive human rights petitions that may draw criticism against the Court for being too activist or culturally insensitive.<sup>328</sup>

While both reasons given by Tirosh are plausible, I would argue that the political power exhibited by the UO and RZ is an additional central consideration influencing the Court to try and resolve the issue of women’s segregation and exclusion without making any substantive rulings. Still, it is important to note that neither of the weighty considerations detailed above stopped the Court from making substantive repeated rulings annulling laws exempting Yeshiva students from military service, despite the very high stakes involved in them.<sup>329</sup> The different treatment of the two issues is in line with this Article’s claim that the patriarchal nature of liberal society can explain—at least in part—the failure by the Court to understand the magnitude of the issue of women’s segregation and exclusion. This failure is also evident in the Court’s obscure final judgement and verdict in the cases concerning the segregation in the academia. While in their respective decisions all justices gave lip service to the importance of women’s equality and the potentially disastrous effects of a policy of segregation based on the notion of “separate but equal”, the majority of the Court rejected the petitions.<sup>330</sup> It held that the Israeli Council for Higher Education (ICHE) was authorized to initiate the segregation and that it was not persuaded by the substantial evidence brought by petitioners that the segregation was indeed discriminatory. In a move similar to that of the U.S. Supreme Court in the Hobby Lobby line of cases, the Israeli Supreme Court chose to ignore the inevitably discriminatory effects

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<sup>326</sup> *Id.* at 823.

<sup>327</sup> *Id.* at 839.

<sup>328</sup> *Id.* at 841.

<sup>329</sup> HCJ 1877/14 Movement for Quality of Government in Israel v. The Knesset (2017) (Isr.).

<sup>330</sup> *See* pg. 129–130 to Court’s verdict, <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\16\100\080\k61&fileName=16080100.K61&type=4> [https://perma.cc/27AD-VWMK]. The majority was comprised of three out of the five justices on the bench. In the only prong of the petition that was accepted the majority held that the ICHE should stop discrimination against women professors who are prevented from lecturing to UO male students. However, the Court refrained from ordering that women professors should be allowed to teach all courses, thereby enabling respondents to continue the practice of assigning women professors exclusively to elective courses which the UO students can choose not to take.



of the segregation on women and to settle for instructing the ICHE to ascertain that it implements the segregation without violating women's right to equality.<sup>331</sup>

In view of the above, in this section, I will raise and refute the substantive arguments raised by the UO and other supporters of the segregation and exclusion of women from the public sphere for religious reasons. I will argue that these practices of segregation and exclusion cannot be justified by principles of either religious freedom, freedom of conscience, equality, or multiculturalism, and that they are discriminatory and must not be allowed.

### 1. Religious Liberty and Offense to Religious Feelings

One claim that the UO makes is that requiring them (men in particular) to be present in the public sphere, such as in public events, the military, or academic settings, under conditions in which both men and women are present in mixed company is a violation of their right to religious freedom.<sup>332</sup> There are two different perspectives from which to examine this claim—the religious one and the legal one. From the religious perspective, until recently there was a general agreement that the strict separation between men and women in the public sphere was not required religiously but was merely an enhancement of the observance of the Mitzvah (divine commandment) beyond the formal demands of the Jewish law (Hidur Mitzvah).<sup>333</sup> Nevertheless, the increasing attempts by religious conservatives to spread the segregation throughout the public sphere and the escalating struggle against these attempts has resulted in opinions by religious leaders stating that sex segregation in the public sphere is in fact required by Jewish religious law and its prohibition would force religiously observant Jews to violate their religion.<sup>334</sup> This development

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<sup>331</sup> For my argument regarding a similar move in the *Hobby Lobby* line of cases, see notes 245–47 and accompanying text. Also, similarly to the *Hobby Lobby* line of cases, the two justices in the minority emphasized that the majority of the Court chose to ignore both the patent lack of legal authorization for the ICHE to initiate gender segregation and the violation of women's rights that resulted from the segregation. See Francis Raday, Opinion, *Ruling on Gender Segregation in Colleges Is a Mistake*, THE JERUSALEM POST (July 19, 2021, 8:36 PM), <https://www.jpost.com/opinion/ruling-on-gender-segregation-in-colleges-is-a-mistaken-surrender-opinion-674352> [<https://perma.cc/Z2NA-X39H>].

<sup>332</sup> E.g., Yefet, *supra* note 85, at 267–69 (analyzing the reasoning of religious freedom as justification for the Israeli army's gender segregation policies under the Appropriate Integration Regulation).

<sup>333</sup> See, e.g., Rabbi Eliezer Melamed, *Gender Segregation on Buses is Not Jewish Law*, ARUTZ SHEVA ISR. NAT'L NEWS (Dec. 30, 2011), <https://www.israelnationalnews.com/Articles/Article.aspx/11057> [<https://perma.cc/B3EV-K372>] (explaining the concept of Hidur Mitzvah and the Jewish Halakhic stance that segregation on buses is not a religious obligation).

<sup>334</sup> E.g., Rishon LeZion & Chief Rabbi Yitzchak Yosef, *Civil Service Commissioner Please Maintain Separation*, KIKAR HASHABBAT (Nov. 14, 2018) (Heb.), <https://www.kikar.co.il/273634.html> [<https://perma.cc/68SC-ALP5>] (detailing the letter of opinion published by the Sefardi Chief Rabi of Israel justifying the segregation of women in a training course for entrance into Israel's civil service for ultra-orthodox academics following a petition filed against

is an example of the strategic use made by religious conservatives of religious dogma in order to achieve their goal.

When deciding whether a certain restriction on a religiously motivated practice is a violation of religious freedom, it is important to distinguish between the religious perspective and the legal perspective. In religious liberty theory and jurisprudence outside of the United States, there is a significant distinction between the violation of the right to religious freedom, which is considered a violation of a fundamental human right, and the offense to religious feelings, which, despite the potential for a person's feelings to be harmed, does not violate his rights.<sup>335</sup>

While a violation of religious freedom mostly occurs when a believer is coerced into taking actions that go against her religious beliefs, for example, coercing a religious Jew or Muslim to eat pork, an offense to religious feelings occurs when a religious person is made aware of, or is confronted with, a practice that contradicts her religious beliefs, but is not an active participant in it.<sup>336</sup>

This important distinction relies on Mill's harm principle.<sup>337</sup> A person's conduct may only be restricted when it causes definite damage to another individual; causing outrage to the feelings of another does not constitute such damage.<sup>338</sup> Otherwise, explains Mill, any majority, or any other powerful group, will be justified in enforcing its religious and moral inclinations, such as a prohibition on eating pork (in Muslim majority countries), or a prohibition on Sunday amusements (in Christian majority countries) on the rest of the population.<sup>339</sup>

The UO men's claim that the mere presence of women in the public sphere together with the men constitutes a violation of the UO men's religious freedom should likewise be rejected for two reasons. First, such a claim is akin to a claim by a religious person that being exposed to someone eating pork or to people enjoying

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the segregation by the Israeli Women's Network (IWN)). Pet'r's Req., HCJ 3515/18 IWN v. National Lab. Ct. (2018) (Isr.), <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C18%5C150%5C035%5Cr03&fileName=18035150.R03&type=4> [<https://perma.cc/LME5-MRUZ>].

<sup>335</sup> Stopler, Hobby Lobby, S.A.S., and the Resolution of Religion-Based Conflicts in Liberal States, *supra* note 39, at 946. This is the legal situation in Israel. *See, e.g.*, HCJ 1514/01 Gur Aryeh v. Second Television and Radio Authority (2001) (Isr.).

<sup>336</sup> Stopler, Hobby Lobby, S.A.S., and the Resolution of Religion-Based Conflicts in Liberal States, *supra* note 39, at 946. *See* Gidon Sapir & Daniel Statman, *Why Freedom of Religion Does Not Include Freedom from Religion*, 24 L. & PHIL. 467, 475–76, 485 (2005).

<sup>337</sup> JOHN STUART MILL, ON LIBERTY 13 (1859) (“That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

<sup>338</sup> *Id.* at 86, 88.

<sup>339</sup> *Id.* at 8.

Sunday amusements is a violation of his religious freedom.<sup>340</sup> At most, a religious observant could claim that being exposed to people who are eating pork or enjoying Sunday entertainment is an offense to his religious feelings. However, such an offense cannot justify restricting other people's right to eat pork or to partake in Sunday entertainment. Second, and moreover, the religious conservative claim that women's presence in the public sphere should be prohibited because such presence violates the conservative's religious feelings is a deep affront to women's human dignity and therefore an unacceptable violation of their fundamental rights. The fact that women are a disempowered group that is still struggling to achieve full equality and have its members' human dignity fully recognized in modern society makes this claim even more unacceptable in liberal theory.<sup>341</sup> As will be discussed in the next Part, the expansive and unwarranted scope given by Israeli religious conservatives to religious freedom under this interpretation is very similar to the ever-widening scope of complicity claims of religious conservatives in the United States in matters of reproductive rights. Religious conservatives use the indefinite contours of the rights to freedom of religion and conscience to expand their reach and justify restrictions on women's rights which are normally strictly forbidden under antidiscrimination legislation.<sup>342</sup>

## 2. Freedom of Conscience

The analysis of the scope of freedom of religion carried out above is similarly applicable to freedom of conscience.<sup>343</sup> From the legal perspective, one could argue for a violation of one's freedom of conscience only in cases in which one is required to directly perform an act that goes against his or her deeply held conscientious beliefs, or is directly prevented from performing an act required by his or her conscience.<sup>344</sup> While a man may personally *feel* that his conscience is threatened by the presence of women in the public sphere next to him, from the legal perspective women's presence in the public sphere cannot be considered a violation of the man's freedom of conscience. A similar point was made by U.S. Supreme Court Justice Ruth Bader Ginsburg in her dissent in *Little Sisters of the Poor* when she referred to the Court's holding in *Bowen v. Roy*: "*Roy* signals a critical distinction in the Court's religious exercise jurisprudence: A religious adherent may be entitled to religious accommodation with regard to her own conduct, but she is not entitled to 'insist that . . . others must conform *their* conduct to [her] own religious necessities.'"<sup>345</sup> Were the

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<sup>340</sup> *Id.* at 78–79.

<sup>341</sup> Tirosh, *supra* note 5, at 824–25.

<sup>342</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219.

<sup>343</sup> Sapir & Statman, *supra* note 336, at 479–81.

<sup>344</sup> Alan Donagan, *Conscience*, in 1 *ENCYCLOPEDIA OF ETHICS* 205–06 (Lawrence C. Becker & Charlotte B. Becker eds., 1992) ("An agent's conscience is restricted to that agent's own actions: one's conscience cannot make one conscious that somebody else ought to do something.").

<sup>345</sup> *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367,

law to recognize that a woman's presence or her actions violate the conscience of the religious man, powerful groups would be able to dictate the banishment of disempowered groups from the public sphere, allegedly to protect the former's conscience.<sup>346</sup>

A related question, applicable for claims of both religion and conscience, is who should bear the burden of belief? Should the believer carry the burden of the hardships that may result from his beliefs, or should that burden be placed on others? Thus, if UO men insist that according to their beliefs they may not be present in particular sections of the public sphere at the same time as women, who should bear the burden of this conviction? Should women's presence in the public sphere be restricted in order to enable UO men to make use of these sections of the public sphere without encountering women? Or should UO men be required to bear the burden of their own convictions, and either avoid these sections of the public sphere themselves when women are present, or make use of them in the presence of women despite their religious and conscientious convictions?<sup>347</sup>

While liberal theory grants strong protection to freedom of belief, this protection does not entail shifting the burden of belief onto others by making others bear the costs of one's convictions.<sup>348</sup> According to Rawls, while the state has an obligation to guarantee to every citizen their basic rights, liberties, and list of primary goods, the state has no obligation to its citizens to assist in the flourishing of their respective conceptions of the good; nor is the state required to give all reasonable comprehensive doctrines the same chance to flourish.<sup>349</sup> Furthermore, in political liberalism, one aspect of viewing citizens as free is that they are viewed as "capable of taking responsibility for their ends" and "as capable of restricting their claims in matters of justice to the kinds of things the principles of justice allow."<sup>350</sup> Consequently,

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2410 (Ginsburg, J., dissenting) (quoting *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985)). In *Bowen v. Roy*, the Court ruled against a Native American father's claim that he and his family should be exempt from the Social Security number requirement because of their religious beliefs that the Government's use of his daughter's social security number would harm her spirit pursuant to the Free Exercise Clause. *Bowen v. Roy*, 476 U.S. 693, 695 (1986).

<sup>346</sup> The claim of conscience discussed here can also be framed as a claim of complicity, which is the standard formulation of these types of claims in the United States when discussing cases such as *Hobby Lobby*. If we frame the discussion here in terms of complicity, the result in this case will be that this type of conscience-complicity claim should fail since complicity should not trump antidiscrimination law. See Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1978 (2015); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2588–89 (2015).

<sup>347</sup> In the United States, the issue framed in the discussion of such claims is whether the complicity claim results in third party harms. If it does, then it should not be accommodated. Sepinwall, *supra* note 346, at 1974–77; NeJaime & Siegel, *supra* note 346, at 2587–89.

<sup>348</sup> Peter Jones, *Bearing the Consequences of Belief*, 2 J. POL. PHIL. 24, 28 (1994).

<sup>349</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 98, at 184–85. According to Rawls, unreasonable comprehensive doctrines are impermissible in the well-ordered society of political liberalism.

<sup>350</sup> *Id.* at 33–34.

citizens cannot have any claim against the state to assist them in pursuing ends that are incompatible with the principles of justice.<sup>351</sup> Furthermore, according to Rawls, assisting comprehensive doctrines that do not view persons as free and equal is inconsistent with democratic values:

[I]f a comprehensive conception of the good is unable to endure in a society securing the familiar equal basic liberties and mutual toleration, there is no way to preserve it consistent with democratic values as expressed by the idea of society as a fair system of cooperation among citizens viewed as free and equal.<sup>352</sup>

Thus, the burden of the UO conviction that men cannot be present in the public sphere together with women should fall on the UO men. Any steps taken by the state to exclude women from the public sphere in order to accommodate UO men are not required by freedom of conscience and belief, and are inconsistent with democratic values.<sup>353</sup>

### 3. Equality

Similarly, the claim that in order to promote A's (the religious conservative) right to equality it is necessary to banish B (woman) from the public sphere is unacceptable. According to Ronald Dworkin, the rights that an individual has against the government are derived from the government's duty to show equal concern and respect for all.<sup>354</sup> As a result, if A's demand for the realization of his alleged right is predicated on treating B as unequal, then by definition A's demand cannot be considered the realization of an individual right but at most the realization of an interest that is not worthy of the protection of the law.<sup>355</sup> Accordingly, the religious conservative's claim that women's access to the public sphere should be restricted in order to protect his right to equality is incoherent and groundless. This is doubly so since the religious conservative's demand is based on banishing a disempowered and protected group—women—from the public sphere. A similar conclusion arises from John Rawls' principle of equal liberty and from his categorical admonition that religious adherents "cannot expect others to acquiesce in an inferior liberty" in order to accommodate the adherents' religious beliefs.<sup>356</sup>

Ayelet Shachar expresses an analogous idea in her analysis of the conflict between multiculturalism and equality in Canada:

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<sup>351</sup> *Id.* at 34.

<sup>352</sup> *Id.* at 198.

<sup>353</sup> Stoper, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

<sup>354</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272–73 (1977).

<sup>355</sup> *Id.*

<sup>356</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 182–83 (1999).

In those infrequent cases where diversity and equality diametrically and concretely clash, then, and where no legal considerations can mitigate the conflict, the Canadian approach concludes that it is unjust for one person's claim for fair inclusion to trump another's right to it. To put this point more schematically, it is unjust to accept X's claim for fair inclusion, if it leads to Y's unfair exclusion.<sup>357</sup>

She continues:

[I]f the Canadian experiment is to serve as a legal barometer, it can teach us that as a matter of principle, the outer limit of respect for diversity in the spaces we share as political equals is reached when it requires denying access to or excluding from full participation and equal treatment to other, once-vulnerable groups . . . .<sup>358</sup>

In the United States, this idea is expressed in the third-party harm restriction on free exercise that was controlling precedent until the *Little Sisters of the Poor* case, at least according to most commentators and Justice Ginsburg, who wrote in her dissent: "While the Government may 'accommodate religion beyond free exercise requirements,' . . . when it does so, it may not benefit religious adherents at the expense of the rights of third parties."<sup>359</sup>

Finally, a similar approach was taken by the UK employment tribunal that held that the firing of a man due to his call to discriminate against others, motivated by his philosophical belief in English Nationalism, cannot be considered a violation of his right to equality.<sup>360</sup>

Accordingly, the religious conservative's claim that women's access to the public sphere should be restricted in order to protect his right to equality is incoherent and groundless. This is doubly so since the religious conservative's demand is based on banishing a disempowered and protected group—women—from the public sphere.<sup>361</sup>

#### 4. Multiculturalism

Finally, a common justification Israeli state authorities give for their segregationist policies is that these policies allegedly constitute multicultural accommodations

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<sup>357</sup> Ayelet Shachar, *Squaring the Circle of Multiculturalism? Religious Freedom and Gender Equality in Canada*, 10 L. & ETHICS HUM. RTS. 31, 66 (2016).

<sup>358</sup> *Id.* at 66–67.

<sup>359</sup> *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2408 (Ginsburg, J., dissenting) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005)).

<sup>360</sup> *Uncles v. NHS Comm'n Bd.* [2017] UKET 1800958/2016, [91]–[94].

<sup>361</sup> Tirosh, *supra* note 5, at 826–27.

aimed at respecting the religious modesty practices of the UO.<sup>362</sup> Thus, these authorities and their supporters claim, liberal multicultural theory requires multicultural accommodations (sex segregation), created in order to allow the integration of a minority community (the UO) in the liberal state (Israel).<sup>363</sup> However, I wish to argue that this justification is wrong in each of its three prongs, and the aforementioned segregationist policies cannot be justified on the basis of liberal multicultural theory.<sup>364</sup>

First, sex segregation cannot be considered a multicultural accommodation. In his writings on multiculturalism, Kymlicka distinguishes between two types of accommodations: internal restrictions that are placed on rights of members of the minority community by the community itself in order to preserve its culture—to which he objects; and external protections that limit the economic or political power exercised by the larger society over the group, which he supports under certain conditions.<sup>365</sup> However, placing external restrictions on the rights of disempowered members of the larger society in order to cater to the illiberal practices of members of a minority community is not a type of accommodation which is even in the purview of Kymlicka's multicultural theory.<sup>366</sup> Thus, restricting the access of women in Israeli society to the public sphere on the basis of their sex in order to accommodate UO men's sensibilities cannot be considered a justified multicultural accommodation.<sup>367</sup>

Second, the UO community cannot be considered a minority community for the purposes of multicultural accommodations. "While a minority community in liberal multicultural theory is a disempowered community that needs the accommodation" for its culture to survive, the UO community is a flourishing and "politically powerful community that controls Israel's religious establishment and holds key positions in the Israeli government."<sup>368</sup> Furthermore, liberal multicultural theory engages with three types of minority groups that require multicultural accommodations.<sup>369</sup> The first are groups that seek to integrate into the existing liberal order while maintaining personal characteristics like religious dress codes or distinct prayer times, such as most Muslim immigrants to Europe.<sup>370</sup> The second are isolationist groups that shun liberal society and seek to preserve their illiberal way of life completely withdrawn from society.<sup>371</sup> Such groups, like the Amish in the United States, do not participate

<sup>362</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

<sup>363</sup> *Id.*

<sup>364</sup> WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 152–53 (1995).

<sup>365</sup> *Id.* at 7, 152.

<sup>366</sup> *Id.* at 7.

<sup>367</sup> For a similar argument in the context of segregation in the military, *see, e.g.*, Yefet, *supra* note 85.

<sup>368</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 220. *See* Tirosh, *supra* note 5, at 828–29.

<sup>369</sup> *See infra* notes 368–74.

<sup>370</sup> KYMLICKA, POLITICS IN THE VERNACULAR, *supra* note 94, at 156–57.

<sup>371</sup> *Id.* at 161–62.

in politics and do not receive social security benefits.<sup>372</sup> Jeff Spinner-Halev suggests referring to such groups as *partial citizens*, that may be exempted from certain duties of citizenship, as long as they are completely self-reliant and do not participate in politics.<sup>373</sup> Spinner-Halev contrasts the Amish with a third type of minority group, which is also arguably isolationist—the Satmar Hasidim of Kiryas Joel in New York.<sup>374</sup> Unlike the Amish, explains Spinner-Halev, the Satmar Hasidim do depend on public funds to maintain their illiberal and isolationist way of life and use their voting power in order to get politicians to cater to their needs.<sup>375</sup> Consequently, he argues, the Satmar Hasidim should not be considered *partial citizens*, nor should they enjoy exemptions from the obligations of citizenship.<sup>376</sup> There is a crucial difference between the UO community in Israel and each of the aforementioned minority communities. While these communities may request accommodation of their illiberal practices but do not aim to change the liberal structure of the state within which they reside, the UO community is set on changing the liberal democratic structure of the state in Israel by demanding the sanctioning of discriminatory illiberal practices in the public sphere in order to make it more compatible with their deeply conservative religious ideology.<sup>377</sup> In this respect, the UO resemble the politically powerful American Christian nationalists who use their political power and their positions in the administration in order to roll back women’s rights.

“Lastly, Israel is not a strong liberal state that can accommodate illiberal practices without endangering its liberal democratic foundations.”<sup>378</sup> The liberal democratic foundations of Israel are already weak due to the extensive role of the religious establishment and the state also provides the religious establishment with extensive autonomy, which emboldens the grasp of UO and RZ illiberal religious ideologies on the public sphere.<sup>379</sup> Under such conditions, any accommodation given to the UO community serves to not only further expand illiberal ideology, but also simultaneously undermine the liberal structure of the state.<sup>380</sup> Growing demands for sex segregation in the public sphere and the influence of UO demands for sex segregation on subsequent, similar demands by conservative elements in the RZ community are indicative of the injury to Israel’s liberal democratic foundations.<sup>381</sup> Thus, following “female-free zones” that the Israeli Army has created for UO men serving in the military, and after political pressure from conservative RZ leaders, RZ male

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<sup>372</sup> *Id.*

<sup>373</sup> Jeff Spinner-Halev, *Cultural Pluralism and Partial Citizenship*, in MULTICULTURAL QUESTIONS 71–72 (Christian Joppke & Steven Lukes, eds., 1999).

<sup>374</sup> *Id.* at 78–81.

<sup>375</sup> *Id.* at 80.

<sup>376</sup> *Id.* at 79–80.

<sup>377</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 220.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*



soldiers have also been given exemptions from serving with women in various units, which result in the removal of women from these units and their diminished opportunities during their army service.<sup>382</sup> Similarly, in academia, while the current policy of allowing sex-segregated classes is restricted to members of the UO community, a petition was filed to the Israeli Supreme Court by conservative members of the RZ community, claiming that they too are religiously required to study in sex-segregated classes, and asking the court to declare that such sex-segregated classes should be open to any student who desires to study in them, regardless of their religious convictions.<sup>383</sup>

The result of the above discussion is that the segregation of women in the public sphere in Israel for religious reasons is a grave violation of women's rights that cannot be justified under any of the justifications used to vindicate it, including religious freedom, freedom of conscience, equality, and multiculturalism. Nevertheless, this segregation continues to exist and even spread, and its supporters keep evoking these justifications in support of it.<sup>384</sup> In the next Section, I discuss the tactics used by religious conservatives in Israel to deepen and expand the segregation and exclusion of women in the public sphere and their similarity to the tactics used by religious conservatives in the United States to restrict women's reproductive rights.<sup>385</sup>

#### V. COMPARING THE MODE OF OPERATION OF RELIGIOUS CONSERVATIVES IN THE UNITED STATES AND ISRAEL

There are at least three points of similarity in the tactics used by religious conservatives in Israel to those used by religious conservatives in the United States in their parallel struggles to restrict women's right to control their bodies.

The first point of similarity is that both groups argue that anything short of an unconditional and sweeping acceptance of their own rights claims would constitute a grave violation of their religious freedoms, using this reasoning as an excuse to increase and extend the scope of their demands incrementally.<sup>386</sup> The demands of the UO in Israel started with segregation in public buses and have gradually expanded into segregation and exclusion in the Army, academia, and various services in the public sphere.<sup>387</sup> In addition to gradually expanding to additional settings, their

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<sup>382</sup> Yefet, *supra* note 85, at 258–59; Gittleman, *supra* note 322.

<sup>383</sup> See HCJ 8683/17 Kohelet Policy Forum v. Council for Higher Education (2021) (Isr.). This petition was filed following a petition by several university professors against the Council of Higher Education program in which it extended and expanded its policy approving gender segregation for UO students. The petition against the segregation policy is supported by human rights organizations. This counter-petition was filed by the Kohelet Policy Forum, the conservative think tank discussed above.

<sup>384</sup> Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

<sup>385</sup> Stopler, Hobby Lobby, S.A.S., and the Resolution of Religion-Based Conflicts in Liberal States, *supra* note 39, at 946.

<sup>386</sup> *Id.* at 942.

<sup>387</sup> See *infra* discussion in Section IV.B.

demands have also expanded in each of the settings. In academia, despite the fact that initially the segregation of women was supposed to be limited only to bachelor degree programs, the UO have increased their demands and the Council of Higher education has been gradually approving the expansion of the segregation to graduate degrees and Ph.D. programs.<sup>388</sup> Similarly, the segregation that was supposed to be limited only to the classes themselves has been expanded to cover the whole campus, and accompanied by strict dress codes and modesty rules.<sup>389</sup> In the Army, the military authorities have promised the UO men that their entire Army service would be carried out in what the Army itself defines as “Women-Free Zones” despite the obvious fact that outside of the Army these UO men do not live in “Women-Free Zones”.<sup>390</sup> Similarly, despite clear statements by the authorities that the segregation will not carry into the labor market, the government has initiated segregated professional training for UO men in the Israeli Civil Service, and a petition to open the course for both sexes has been denied.<sup>391</sup>

Every step in the gradual expansion is explained as a necessary accommodation without which the UO would not be able to integrate into society and realize their basic rights to study, work, and make a living. Each step is used as justification for the necessity of the next step. Thus, according to proponents of the expanding segregation, if the UO have been used to their own segregated society they must be provided with one in the army, and after finishing the army, they must be provided with a segregated academia and then with a segregated workforce, and any limitations on the rights of others, such as women, are merely minor and necessary concessions which they must make in order to respect the rights of the UO.<sup>392</sup>

Moreover, while at first it was conceded that the segregation in the public sphere was not mandated by any religious edict, this stance has gradually changed as the objections to the expanding segregation mounted and with it the need to find better explanations for its necessity.<sup>393</sup> Exploiting the liberal unwillingness to question or assess religious motivations the UO have started claiming that gender segregation in the public sphere is in fact religiously mandated.<sup>394</sup> This new position has become official in a letter by the Chief Rabbi of Israel in which he states as much in response to a

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<sup>388</sup> *Israeli Education Council Paves Way for More Gender Segregation in Universities*, MIDDLE E. EYE (Nov. 24, 2018), <https://www.middleeasteye.net/news/israeli-education-council-paves-way-more-gender-segregation-universities> [https://perma.cc/X3XA-RGM9].

<sup>389</sup> *See id.*

<sup>390</sup> *See* Yefet, *supra* note 85, at 258–59.

<sup>391</sup> HCJ 3515/18 *Israel Women’s Network v. National Labor Court et al.* (2018) (Isr.), <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\150\035\r03&fileName=18035150.R03&type=4> [https://perma.cc/LZ94-Q7EP] (The government has declared to the Court that it will open a similar course for women in the near future and this satisfied the Court).

<sup>392</sup> *See* Yefet, *supra* note 85, at 272.

<sup>393</sup> *See* Tirosh, *supra* note 5, at 827.

<sup>394</sup> *See* Stopler, *Constitutionalism and Religion*, *supra* note 5, at 212.

decision by a regional Labor Court that ordered the desegregation of the professional training for UO men in the Israeli Civil Service and the inclusion of women in the training.<sup>395</sup> The regional court's decision was stayed by the National Labor Court following an appeal in which the Chief Rabbi's letter was produced as evidence and later the Israeli Supreme Court rejected the petition against the stay, leaving the segregation in professional training courses in preparation for entry into the Israeli Civil Service in place.<sup>396</sup>

A similar pattern of both sweeping and increasing demands can be discerned in the *Hobby Lobby*, *Zubik* and the *Little Sisters of the Poor* cases in the United States. In *Hobby Lobby*, the petitioners, religious employers who were required to pay comprehensive health insurance for their employees, claimed that their religious freedom was violated by the fact that the insurance may later be used by their women employees, at their own discretion, to acquire contraceptives.<sup>397</sup> While the majority of the Court conceded that the act of paying for comprehensive health insurance was "innocent in itself" it still held that the mere subjective belief of the religious employer that the payment was immoral is enough for the payment to constitute a "substantial burden" under RFRA and provide the employer with an exemption from paying women health insurance that may cover contraception.<sup>398</sup> This reasoning was further expanded by religious conservatives when in *Zubik*, religious organizations claimed that even notifying the government that they have religious objections to the full coverage was in itself complicity with an immoral act.<sup>399</sup> While the Court remanded the cases to the lower courts without deciding on the merits of the case, it did instruct the lower courts to try to arrive at an approach that accommodates petitioners' religious exercise while ensuring that women receive full and equal health coverage.<sup>400</sup> The conditional acknowledgment that petitioners' religious exercise is implicated even by the mere notification to the government that they are not willing to pay full insurance has expanded the scope of religious exercise beyond any reasonable legal standard and has paved the way for the Trump Administration's interim and final rules, that were affirmed by the Supreme Court in the *Little Sisters of the Poor* case.<sup>401</sup> These rules significantly broaden the definition of an exempt religious employer to encompass any employer that objects to contraceptive coverage on the basis of sincerely held religious beliefs, including for-profit and

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<sup>395</sup> Israel National Labor Court, Request for Leave to Appeal in Case No. 36077-04-18 (decision date April 22, 2018) (Heb.).

<sup>396</sup> *Id.*

<sup>397</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723–24 (2014).

<sup>398</sup> Stopler, *Hobby Lobby, S.A.S., and the Resolution of Religion-Based Conflicts in Liberal States*, *supra* note 39, at 952.

<sup>399</sup> *Zubik v. Burwell*, 578 U.S. 403, 406–08 (2016).

<sup>400</sup> *Id.* at 408–09.

<sup>401</sup> *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2370–71 (2020).

publicly traded entities, and exempt such employers even from the need to participate in the self-certification process that can ensure that their employees receive coverage through government plans.<sup>402</sup> Moreover, parallel rules offer a “moral exemption” for non-profit employers, for-profit employers with no publicly traded components, and for any other employer who holds moral objections to providing some or all forms of contraceptive coverage, regardless of the harm that such exemptions cause to women.<sup>403</sup>

A similar grant of wide and exclusive exemptions to religious conservative entities is evident in the *NIFLA* case.<sup>404</sup> In this case, medical facilities that objected to abortion for religious reasons claimed that the California FACT Act requiring them to inform patients of the availability of state-sponsored abortion services was unconstitutional and violated their First Amendment right to free speech.<sup>405</sup> The majority of the Supreme Court accepted this argument, holding that the FACT Act violated the First Amendment.<sup>406</sup> The four dissenting justices noted that the majority’s decision contradicted prior court precedent in which the Court held that general state regulation of business activity, and especially of health related activity, does not impinge on the constitutional protection of free speech.<sup>407</sup> Specifically, the *NIFLA* majority decision contradicted the *Casey* decision, which is the controlling precedent on the duty of reproductive health clinics to supply information to women patients.<sup>408</sup> In *Casey*, the Court held that laws requiring clinics to provide women seeking abortion with information on the condition of the fetus, medical assistance for childbirth, potential child support, and adoption services, did not violate the clinics’ right to free speech.<sup>409</sup> The *Casey* Court reasoned that laws requiring reproductive health clinics to provide women with information related to their reproductive health options amounted to reasonable measures to ensure that the patients can make an informed choice and were part of the reasonable licensing and regulation to which the practice of medicine is subject.<sup>410</sup> Applying this standard, the

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<sup>402</sup> 45 C.F.R. § 147.132(religious exemptions in connection with coverage of certain preventive health services).

<sup>403</sup> 45 C.F.R. § 147.133(moral exemptions in connection with coverage of certain preventive health services).

<sup>404</sup> *NIFLA v. Becerra*, 138 S. Ct. 2361, 2361–62 (2018). I decided to discuss this case here as an example for the mode of operation of religious conservatives although I did not refer to it in my discussion in Section III.B because that part focused on religious liberty arguments against women’s reproductive rights on the basis of RFRA, while this pivotal case is based on First Amendment free speech arguments and is therefore not directly connected to the discussion in that part. Nevertheless, it is relevant here since it represents a similar expansion of liberty claims by religious conservatives in order to restrict women’s reproductive rights.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 2378.

<sup>407</sup> *Id.* at 2381.

<sup>408</sup> *Id.* at 2384–85.

<sup>409</sup> *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–85 (1992).

<sup>410</sup> *See NIFLA*, 138 S. Ct. at 2384.

minority justices in *NIFLA* observed that there is no convincing reason to distinguish between *Casey* and *NIFLA* and to hold that the FACT Act violated the First Amendment rights of the clinics, whereas the law at issue in *Casey* did not violate clinics' free speech rights.<sup>411</sup> Furthermore, as the *NIFLA* minority pointed out, the strongly held religious and non-religious convictions on both sides of the debate regarding the permissibility or impermissibility of abortion make evenhandedness in the application of the First Amendment in these cases all the more important.<sup>412</sup> Such evenhandedness, as well as women's right to make an informed choice, would demand that *NIFLA*'s pro-life clinics, which object to abortion for religious reasons, be required to inform women patients that the state provides free or low-cost services, including abortions, just as pro-choice clinics, which object to pressuring women into carrying the fetus to term, are required to inform women patients of state sponsored pro-life services.<sup>413</sup> Instead, the majority decision in *NIFLA* gives pro-life clinics preferential treatment that is contrary to existing precedent and in contravention of women's right to make an informed choice.<sup>414</sup>

The above are all examples for how religious conservatives in both Israel and the United States use the indefinite contours of the rights to freedom of religion and conscience and the liberal unwillingness to probe religious and conscientious claims, as well as their own significant political power and influence, in order to expand the reach of their conservative agenda at the expense of women's rights.

The second point of similarity in the tactics used by religious conservatives in Israel and the United States is that they all deny that the unconditional acceptance of their religious claims would violate the rights of women.<sup>415</sup> Moreover, this tactic is often adopted by state institutions to justify their accommodation of religious conservative claims.<sup>416</sup> Thus, in Israel for example, state authorities supporting gender exclusion and segregation in the public sphere deny that such exclusion and segregation violate women's rights.<sup>417</sup> Although the doctrine of separate but equal was generally rejected by the Israeli Supreme Court, and the Court even struck down specifically the practice of gender segregation in public transportation as discriminatory towards women, many other segregationist practices still prevail, including in academia, the Army, and various other public places, despite their clear violation of women's rights.<sup>418</sup>

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<sup>411</sup> See *id.* at 2385.

<sup>412</sup> See *id.* at 2388.

<sup>413</sup> See *id.*

<sup>414</sup> See *id.* at 2384–85.

<sup>415</sup> See Stopler, *Constitutionalism and Religion*, *supra* note 5, at 212–13.

<sup>416</sup> See *id.* at 210–11.

<sup>417</sup> See *id.* at 219.

<sup>418</sup> See H CJ 746/07 Ragen v. Ministry of Transportation, 64(2) PD 530, 9–11 (2011) (Isr.), [http://elyon1.court.gov.il/files\\_eng/07/460/007/t38/07007460.t38.htm](http://elyon1.court.gov.il/files_eng/07/460/007/t38/07007460.t38.htm) [<https://perma.cc/5VJG-F78N>].

To give just one example, the gender segregation in academia involves barring women professors from teaching UO male students, while male professors can teach both male and female UO students.<sup>419</sup> The Council for Higher Education approved this restriction and has denied that it violates women's right to equality.<sup>420</sup> According to the Council, institutions of higher education may not discriminate against women professors in hiring, but they can decide to assign only male professors to teach male UO students. The Council's position stands in clear violation of the Israeli Employment (Equal Opportunities) Law, which prohibits discrimination at any stage of the employment and in any condition of employment on the basis of sex.<sup>421</sup> Nevertheless, the Council posits that its policy does not discriminate against women since institutions are able to give women professors other classes to teach.<sup>422</sup> The Council is ignoring the substantial risk that as a result of its own discriminatory policy, institutions of higher learning will prefer to hire men as professors instead of women, since men can teach all courses while women can only teach some.<sup>423</sup> This pattern of denying discrimination against women involved in gender segregation is similarly evident with respect to gender segregation in the Army and in other public places.<sup>424</sup> It serves to confer legitimacy on a discriminatory practice by denying its discriminatory effects, leaving only the religious motivation as a powerful justification in favor of accommodation. This same pattern was adopted by the Israeli Supreme Court in its decision in the segregation in academia cases, that was given after four years of dithering.<sup>425</sup> Rejecting most of the petition the Court chose to ignore the inevitably discriminatory effects of the segregation on women and to settle for instructing the ICHE to ascertain that it implements the segregation without violating women's right to equality. Even while partly accepting the prong of the petition aimed against the discrimination against women professors the Court chose to refrain from ordering that women professors should be allowed to teach all courses. As a result, institutions of higher education can continue the practice of assigning women professors exclusively to elective courses which the UO students can choose not to take, thereby restricting women professors' work opportunities on account of their sex.

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<sup>419</sup> See Stopler, *Constitutionalism and Religion*, *supra* note 5, at 219.

<sup>420</sup> See *id.*

<sup>421</sup> § 2(a) Employment (Equal Opportunities) Law, 5748-1988, SH 1240 64 (Isr.), [http://www.knesset.gov.il/review/data/eng/law/kns11\\_equalopportunity\\_eng.pdf](http://www.knesset.gov.il/review/data/eng/law/kns11_equalopportunity_eng.pdf).

<sup>422</sup> See § 91 262RH0 Multiyear Plan (2017–2022) Widening the Accessibility of Higher Education for Ultra-Orthodox, Council of Higher Education.

<sup>423</sup> See *id.*

<sup>424</sup> See Yefet, *supra* note 85, at 258–59.

<sup>425</sup> HCJ 8010/16 Berzon v. Council for Higher Education; HCJ 6500/17 Dr. Yofi Tirosh v. Council for Higher Education; 8683/17 Kohelet Policy Forum v. Council for Higher Education (2021) (Isr.), <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\16\100\080\k61&fileName=16080100.K61&type=4> [<https://perma.cc/5NMJ-RPKK>].

A similar pattern can be observed in the United States. In the *Hobby Lobby* case, the dissenting justices and numerous commentators observed that the majority's assumption that the exemption given to religious employers does not harm the rights of women employees was clearly mistaken.<sup>426</sup> The de facto result of granting religious employers an exemption from paying full health insurance coverage for their women employees was that these women had to pay for contraceptives out of their own pockets rather than have them covered by their insurance.<sup>427</sup> Nevertheless, this false assumption served as the basis for the ruling in favor of petitioners.<sup>428</sup> Similarly, in *Zubik*, religious petitioners claimed women employees will not be harmed by petitioners' exemption since the women can purchase insurance for contraception in the private market, although such an option did not exist.<sup>429</sup> The Court remanded the case to the lower courts instructing them to arrive at an approach that accommodates petitioners' religious exercise while ensuring full and equal health coverage for women.<sup>430</sup> However, such an approach was not likely to emerge, since it would have entailed allocating funds for state subsidies of contraceptive health coverage for insured women.<sup>431</sup> Funds for state subsidies for family planning services are very scarce to begin with and are insufficient to cover even the needs of the uninsured women to whom they were originally directed.<sup>432</sup> Moreover, at the time of the decision they were being further restricted by the Trump administration.<sup>433</sup> It would seem naïve to assume that the Court was not aware of this fact when it gave its decision.

And indeed, as expected, in *Little Sisters of the Poor*, the administration explained to the Court that there was no feasible way to accommodate religious employers' demands while at the same time ensuring full and equal contraceptive coverage for women.<sup>434</sup> Consequently, the administration decided, and the Court affirmed, that while protecting the religious liberty of religious employers to the full

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<sup>426</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 739–40, 749–50, 771–72 (2014) (Ginsburg, J., dissenting); NeJaime & Siegel, *supra* note 4, at 206.

<sup>427</sup> See *Hobby Lobby*, 573 U.S. at 732.

<sup>428</sup> See *id.*

<sup>429</sup> See *Zubik v. Burwell*, 578 U.S. 403, 408–09 (2016).

<sup>430</sup> See *id.* at 405–08.

<sup>431</sup> See *id.* at 409–11.

<sup>432</sup> Ruth Dawson, *What Federal Policymakers Must Do to Restore and Strengthen a Title X Family Planning Program That Serves All*, GUTTMACHER POL'Y REV. (Mar. 8, 2021), <https://www.guttmacher.org/gpr/2021/03/what-federal-policymakers-must-do-restore-and-strengthen-title-x-family-planning-program#> [<https://perma.cc/XT9E-HAC3>].

<sup>433</sup> Dartunorro Clark, *Biden Administration Rolls Back Trump-Era Rule Restricting Federal Funds to Clinics Over Abortion Services*, NBC NEWS (Oct. 4, 2021 6:40 PM), <https://www.nbcnews.com/politics/white-house/biden-admin-rolls-back-trump-era-rule-barring-abortion-providers-n1280757> [<https://perma.cc/SK7B-R6GL>].

<sup>434</sup> See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020).

extent of their demands was required by RFRA, ensuring women employees' full and equal contraceptive coverage was not a compelling state interest and could simply be relinquished.<sup>435</sup> As Justice Thomas summarily explained while dismissing the claim that women employees denied full and equal contraceptive coverage are harmed:

The dissent and the court below suggest that the new rule is improper because it imposes burdens on the employees of entities that the rule exempts, . . . but the rule imposes no such burden. A woman who does not have the benefit of contraceptive coverage under her employer's plan is not the victim of a burden imposed by the rule or her employer. She is simply not the beneficiary of something that federal law does not provide.<sup>436</sup>

The *NIFLA* case provides another example in which the majority of the Court chose to ignore the harm caused to women due to the protection granted to religious conservatives' claims of conscience.<sup>437</sup> The majority rejected California's claim that the FACT Act requiring the clinics to provide women patients with information on available state-sponsored services, including abortion, was necessary to ensure that the women patients can make an informed choice regarding their reproductive health.<sup>438</sup> The Court reasoned that the service provided by appellant pro-life clinics should not be considered a medical procedure and therefore no informed consent is necessary.<sup>439</sup> As the four dissenting justices pointed out, this claim is wrong.<sup>440</sup> Similarly to pro-choice clinics, pro-life clinics engage medical personnel that provide women with medical services that directly affect their health.<sup>441</sup> Moreover, in the United States "child birth is 14 times more likely than abortion to result in' the woman's death."<sup>442</sup> Consequently, the distinction between reproductive health services provided by pro-choice clinics and reproductive health services provided by pro-life clinics, which allegedly justified withholding information from women patients that visit pro-life clinics lacks any moral, practical, or legal force.<sup>443</sup>

The third point of similarity in the tactics used by religious conservatives in Israel and the United States is that while they claim that their goal is to protect their personal religious beliefs, conscience, or culture, their unstated goal is to affect a wide ranging change in the legal protection afforded to women in order to prevent

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<sup>435</sup> *See id.* at 2367.

<sup>436</sup> *See id.* at 2396 (Thomas, J., concurring).

<sup>437</sup> *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2375, 2378 (2018).

<sup>438</sup> *See id.* at 2376.

<sup>439</sup> *See id.* at 2373–74.

<sup>440</sup> *See id.* at 2385–86.

<sup>441</sup> *See id.*

<sup>442</sup> *Id.* at 2386.

<sup>443</sup> *See id.* at 2385–86.



them from exercising their equal rights.<sup>444</sup> In Israel, gender exclusion and segregation in the public sphere was initially portrayed as a necessary and temporary accommodation aimed to advance the integration of UO members into the larger, gender-mixed Israeli society.<sup>445</sup> However, the more widespread the gender exclusion and segregation becomes and the longer they persist, the more religious conservatives insist that allowing permanent gender exclusion and segregation in the public sphere is necessary in order to respect the rights of religious people.<sup>446</sup> Even state institutions that initially claimed they support gender segregation merely as an interim arrangement have come to accept and defend it as a permanent and necessary accommodation.<sup>447</sup> Thus, the Council for Higher Education—which initially claimed that the gender segregation in academia is only required as a first step in UO integration in mixed society—has changed its position and is now claiming that anything short of instituting permanent gender segregation and even expanding it to graduate studies, would violate the UO’s rights and jeopardize the interests of the state in UO integration.<sup>448</sup> At the same time, the more conservative factions of the Religious Zionist community are demanding permission to open their own sex-segregated programs for anyone who desires them, claiming that the freedoms of religion, conscience, and association entitle them to such a right.<sup>449</sup> Thus, gender segregation in the public sphere for religious reasons is no longer a limited exception but a common reality that seriously threatens the whole rationale behind antidiscrimination legislation.

A similar pattern of expansion, by which the exception becomes the rule, is evident in the United States. While *Hobby Lobby* expanded the rationale of exemptions for religious organizations to allow for exemptions to religious corporate employers, *Zubik* further extended *Hobby Lobby*’s rationale, and the Trump administration rules affirmed in *Little Sisters of the Poor* have widened the exemption to such an extent that not only will it most likely affect tens of thousands of women, but also that the exemption has clearly become the rule since there is no longer any barrier for its utilization by almost any employer who wishes to do so.<sup>450</sup>

#### CONCLUSION

Thus, step by step, the individual accommodations and exemptions for religion turn the exception into the rule. Powerful religious conservative groups exploit the patriarchal nature of liberal societies and the societal obsession with the control over women’s bodies, as well as inherent flaws in political liberal theory, to gain significant

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<sup>444</sup> NeJaime & Siegel, *supra* note 4, at 218–19.

<sup>445</sup> See Stopler, *Constitutionalism and Religion*, *supra* note 5, at 210, 212–13.

<sup>446</sup> See *id.* at 219–20.

<sup>447</sup> See *id.*

<sup>448</sup> See *id.*

<sup>449</sup> See *id.* 211–12, 220.

<sup>450</sup> See NeJaime & Siegel, *supra* note 4, at 208.

victories in their war on women.<sup>451</sup> By weaponizing liberal rights, such as religious freedom, freedom of conscience, multiculturalism, and equality, majoritarian religious conservative groups turn these rights against disempowered women, using them to roll back women's right to control their bodies, and to restore or create the conservative order to which they are committed.<sup>452</sup>

Due to the religious conservatives' political power, the patriarchal nature of liberal societies, and the flaws in liberal theory, policy makers, state institutions, and courts are keen to accommodate religious conservative concerns over who controls women's bodies and are too quick to approve widespread restrictions on women's rights.

With a "starved Establishment Clause," "gluttonous Free Exercise Clause" and RFRA,<sup>453</sup> and a politically powerful Christian Nationalist movement that has a stronghold in the Supreme Court, the ability of religious conservatives to turn private prejudice into public policy in the United States is as potent as the ability of religious conservatives in Israel to do so, and the consequences for women's right to control their bodies in both cases are dire.<sup>454</sup> As the Israeli example shows, claims for accommodations and exemptions based on politically powerful religious consciences may extend well beyond the refusal to be complicit in securing reproductive rights, and can just as easily be used to roll back settled antidiscrimination law or move women out of the public sphere altogether.<sup>455</sup>

Robert Post argues that religion and conscience-based exemptions can only be a privilege exercised by a relatively small number of people.<sup>456</sup> If such exemptions become routine or commonplace they undermine the force and authority of law itself.<sup>457</sup> This, Post claims, does not only cause harm to third parties, but also to democracy: "When the faithful claim the right to exemptions as a means to undo in law what they have failed to achieve in politics, the stakes are the democratic process itself. That is a very high price, even to protect religious freedom."<sup>458</sup> In this Article, I have shown that the stakes for the liberal democratic constitutional framework in general and for women's rights in particular are even higher when powerful religious conservative groups, such as the Christian nationalists in the United States and the Jewish Ultra-Orthodox and Religious Zionists in Israel, are successfully using both law and politics to turn their private religious prejudices into public policy.<sup>459</sup>

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<sup>451</sup> See Stople, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

<sup>452</sup> *See id.*

<sup>453</sup> Caroline Mala Corbin, *Espinoza and the Continued Evisceration of the Establishment Clause*, TAKE CARE (July 1, 2020), <https://takecareblog.com/blog/espinoza-and-the-continued-evisceration-of-the-establishment-clause> [<https://perma.cc/TK7Y-VYV7>] ("Espinoza leaves us with a gluttonous Free Exercise Clause, and a starved Establishment Clause.").

<sup>454</sup> *See id.*

<sup>455</sup> See Stople, *Constitutionalism and Religion*, *supra* note 5, at 219–20.

<sup>456</sup> See Post, *supra* note 4, at 484.

<sup>457</sup> *See id.*

<sup>458</sup> *Id.* at 484.

<sup>459</sup> *See id.*