USING JEWISH LAW: JEWISH RELIGIOUS LIBERTY ADVOCACY FOR THE RIGHT TO ABORTION

MICHAEL A. HELFAND[†]

[†] Brenden Mann Foundation Chair in Law and Religion, Professor of Law, and Co-Director of the Nootbaar Institute on Law, Religion and Ethics at Pepperdine Caruso School of Law; Florence Rogatz Visiting Professor, Yale Law School; Senior Fellow, Shalom Hartman Institute. Many thanks to Nathan Diament, Jessie Hill, Micah Schwartzman and the participants in Wayne Law Review's annual symposium, "The Evolution of Religious Liberty."

I. INTRODUCTION

The recent interest in Jewish law's approach to abortion seems, in a word, strange. But in the wake of *Dobbs v. Jackson Whole Women's Health*,[1] legal advocates have mined Jewish law's somewhat unconventional approach to abortion as a first line of response to the Supreme Court's decision to jettison the right to abortion. Legal commentator Elie Mystal, for example, tweeted—in his typical caustic tone—that after a Supreme Court reversal of *Roe v. Wade*, "the first lawsuit I'd like to see is from a Jewish woman who has access to an abortion provider denied in a Christian Theocracy state sue that the Christian rules inhibit her religious freedom under the free exercise clause of the 1st Amendment."[2] Similarly, in the days after a draft of the *Dobbs* opinion was leaked, Ronit Stahl captured this intuition, arguing that "Jewish voices in support of abortion access and care can help build a more pluralistic and equitable legal infrastructure for religious freedom."[3]

Of course, given the typical framing of the battle over the right to abortion, one can see why Jewish law is so useful. All too often, people frame the debate as "religious" advocates rejecting the right to abortion on the one hand and "secular" advocates supporting the right to abortion on the other. Jewish law's general disapproval of abortion, but endorsement of abortion when it promotes the health and "well-being" of the mother, broadly construed, does not fit neatly into either of those categories.[4]

The fact that Jewish law, in many circumstances, actually *requires* abortion when it is in support of the mother's well-being generates a legal conflict that unsettles typical narratives about the right to abortion.[5] In some cases, that religious obligation, grounded in traditional Jewish law and Jewish texts, can put the religious liberty of Jews in conflict with abortion restrictions.[6] In this way, the Jewish law of abortion puts two principles, increasingly characterized as conservative political commitments, in tension: religious liberty and anti-abortionism.[7]

---

1. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

2. Elie Mystal (@ElieNYC), X (May 3, 2023), https://twitter.com/ElieNYC/status/1521347266824519682 [https://perma.cc/JZ67-K5WX].

3. Ronit Y. Stahl, *Why Jewish voices matter: religious freedom and abortion activism*, THE JEWISH NEWS OF N. CAL. (MAY 10, 2023), https://jweekly.com/2022/05/10/why-jewish-voices-matter-religious-freedom-and-abortion-activism/ [https://perma.cc/8KDS-AD46].

4. *See infra* Part II.

5. *See infra* note 36.

6. *See infra* Part II.

7. *Id.*

Not surprisingly, then, the first wave of litigation after *Roe*'s reversal has in fact placed Jewish plaintiffs front and center. In June 2022, a synagogue filed suit against a Florida abortion restriction, which it argued violated the religious liberty of, among others, Jews: "In Jewish law, abortion is required if necessary to protect the health, mental or physical well-being of the woman . . . ."[8] In September 2022, a group of Indiana plaintiffs—including three Jewish plaintiffs—filed suit against an Indiana abortion restriction, arguing that it violated their religious liberty because "Jewish law stresses the necessity of protecting the life and physical and mental health of the mother prior to birth as the fetus is not yet deemed to be a person."[9] In October 2022, three Jewish plaintiffs filed suit against a Kentucky abortion restriction, once again arguing that enforcing such a restriction violated their religious liberty because "Jewish law stresses the necessity of protecting birth givers in the event a pregnancy endangers the woman's life and causes the mother physical and mental harm."[10]

This wave of Jewish religious liberty claims against abortion restrictions has also generated an avalanche of scholarly commentary. Numerous articles have debated the substantive merits of religious liberty claims predicated on Jewish law's approach to abortion—that is, whether courts should embrace these sorts of religious liberty claims.[11] But beyond the legal merits of such claims, some scholars have also veered into debates over the authenticity of such religious liberty claims. Thus, in the wake of *Dobbs*, Josh Blackman outlined some "tentative thoughts" about these sorts of religious liberty claims, insinuating that lawsuits filed by progressive Jews were inauthentic; on this view, because progressive Jewish denominations "tend not to view [Jewish law] as binding," there is strong reason to be dubious of their claims that abortion restrictions

8. Emergency Motion for Temporary Injunctive Relief at 12 ¶42, Generation to Generation, Inc. v. Florida, No. 2022 CA 00980 (2nd Cir. Flor., Leon Cnty. Jun. 10, 2022).

9. Complaint at 7 ¶26, Anon. Plaintiff 1 v. Individual Members of the Medical Licensing Bd. of Ind., et al., No. 49D01-2209-PL-031056 (Marion Super. Ct., Ind. Sept. 8, 2022).

10. Complaint at 6 ¶38, Sobel v. Cameron, No. 22-CI-005189 (Jefferson Circ. Ct. Ky. Oct. 6, 2022).

11. *See, e.g.*, Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299 (2023); David H. Schraub, *Liberal Jews and Religious Liberty*, 98 N.Y.U. L. REV. 1556 (2023); Josh Blackman, Howard Slugh & Tal Fortgang, *Abortion and Religious Liberty*, 27 TEXAS REV. L. & POL. 441 (2023); Elizabeth Sepper, *Free Exercise of Abortion*, 49 BYU L. REV. 177 (2023); Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WIS. L. REV. 473 (2023); David Segal, *A Religious Right to Choose? Prospects for Jewish Free Exercise Exemptions from Abortion Bans*, 61 HOUS. L. REV. (2024); Ari Berman, *The Religious Exception to Abortion Bans*, 76 STAN. L. REV. (forthcoming 2024).

substantially burden their religion.[12] Put differently, "Those who are less devout are less likely to be burdened by restrictions on religion" and they now "seek redress in the courts" because they are "at odds with prevailing societal norms."[13]

On the other side of the political ledger, David Schraub has similarly attacked Orthodox Jewish approaches to abortion as largely inauthentic—a "relatively recent . . . pivot toward an abortion position that converges with, albeit is not identical to, that of conservative Christianity . . . ."[14] On this account, trending views within Orthodox Judaism are not, first and foremost, a reflection of the content of Jewish law, but rather an attempt to "solidify an alliance with the Christian right,"[15] which has thereby "effectuated a dramatic change in how Orthodox Jews approach the issue of abortion over the past fifty years."[16]

In these ways, Jewish religious liberty challenges to abortion restrictions have triggered a growing controversy over the authenticity of American Jewish commitments—as well as a debate over which side of the Jewish denominational spectrum other political groups and faith communities are *using* as part of the broader clashes over the right to abortion.

What has not happened—at least of late—is an assessment of these various religious liberty claims in light of the significant history of Jewish legal advocacy with respect to the right to abortion. That is, evaluating the scholarly clash over whether and how Jewish law—or, for that matter, Jews—are, in the wake of *Dobbs*, being *used* inauthentically in these legal clashes, would, at least in part, require comparing current advocacy with the broader history of Jewish religious liberty legal advocacy for abortion.

This essay aims to provide a first pass at such a history. While such a history would no doubt cover a wide range of sources, this essay provides a first glimpse into Jewish legal advocacy trends by primarily exploring

---

12. Josh Blackman, *Tentative Thoughts on the Jewish Claim to a "Religious Abortion"*, THE VOLOKH CONSPIRACY (June 20, 2022 5:04 PM), https://reason.com/volokh/2022/06/20/tentative-thoughts-on-the-jewish-claim-to-a-religious-abortion/ [https://perma.cc/GPE8-64MQ] [hereinafter Blackman, *Tentative Thoughts*]. To be sure, Blackman subsequently refined his approach. Josh Blackman, *Some Less-Tentative Thoughts on Abortion and Religious Liberty, One Year Later*, THE VOLOKH CONSPIRACY (May 12, 2023 8:30 AM), https://reason.com/volokh/2023/05/12/some-less-tentative-thoughts-on-abortion-and-religious-liberty-one-year-later/ [https://perma.cc/39QL-VRLA].

13. Blackman, *Tentative Thoughts*, *supra* note [12].

14. Schraub, *supra* note [11], at 1586.

15. *Id.* at 1579–80 (citing Joshua Shanes, *The Evangelicalization of Orthodoxy*, TABLET MAG. (Oct. 12, 2020), https://www.tabletmag.com/sections/belief/articles/evangelicalization-orthodox-jews [https://perma.cc/4CJW-WAKU]).

16. *Id.* at 1579–80.

Supreme Court *amicus* briefs filed by Jewish organizations in cases addressing the right to abortion. These briefs provide a somewhat complex picture of this advocacy, highlighting the challenges faced by a minority faith community seeking to assert its own voice against the backdrop of multiple legal objectives. In sum, what did Jewish advocacy on abortion look like in a world governed by *Roe*–and how does that compare to a post-*Roe* world? And what do those differences tell us about how minority faiths might engage in abortion and religious liberty advocacy?

II. JEWISH LAW AND ABORTION RELIGIOUS LIBERTY

It would be hard to overstate the voluminous nature of Jewish law literature addressing abortion.[17] As a result, any attempt at summarizing that material will be inherently inadequate. But for present purposes, consider the following general sketch of Jewish law's treatment of abortion. One of the earliest Jewish law sources explicitly addressing abortion is a Mishna from Tractate Ohalot:

> If a woman is having trouble giving birth, they cut up the child in her womb and bring it forth limb by limb, because her life comes before the life of [the child]. But if the greater part [of the child] has come out, one may not touch [the child], for one may not set aside one person's life [lit: *nefesh*] for that of another.[18]

Given its explicit Jewish law analysis of a late-term abortion, this text has been central to the assessment of the circumstances when Jewish law permits—and often requires—an abortion.[19]

One oft-cited and analyzed interpretation of this text comes from Maimonides. According to his gloss of the Mishna, the reason why the

---

17. For prominent treatment of the topic in English-language publications, *see, e.g.*, Elli Fischer, *Feticide in Halakhah: Attitudes, Approaches, and Application*, *in* OXFORD HANDBOOK ON JEWISH LAW (forthcoming 2024); BASIL HERRING, JEWISH ETHICS AND HALAKHA FOR OUR TIME 25–46 (1984); Avraham Steinberg, *Induced Abortion in Jewish Law*, 1 J. HALACHA & CONTEMPORARY SOC'Y 29 (1981); Aharon Lichtenstein, *Abortion: A Halakhik Perspective*, 25 TRADITION 3 (1991); Fred Rosner, *The Jewish Attitude Towards Abortion*, 10 TRADITION 48 (1968); J. David Bleich, *Abortion in Halakhic Literature*, 10 TRADITION 72 (1968); Immanuel Jakobovits, *Jewish Views on Abortion*, *in* JEWISH BIOETHICS 139 (Fred Rosner & J. David Bleich eds., 1979).

18. Ohalot Chapter 7, Mishnah 5.

19. *See, e.g.*, Bleich, *supra* note [17], at 73 ("The basic halakhic principle governing abortion practices recorded in the Mishnah, *Oholot* 7:6."); Rosner, *supra* note [17], at 58 ("We have referred to the Mishnah in Tractate Oholoth 7:6 upon which the Jewish legal attitudes toward therapeutic abortion is based.").

fetus may be terminated while in the womb is because it is *rodef*—that is, a "pursuer" of a life—which under Jewish law can itself be terminated: "our Sages ruled that when complications arise and a pregnant woman cannot give birth, it is permitted to abort the fetus in her womb, whether with a knife or with drugs. For the fetus is considered a *rodef* (trans: "pursuer") of its mother."[20] By contrast, according to Maimonides, once "the head of the fetus emerges, it should not be touched, because one life should not be sacrificed for another. Although the mother may die, this is the nature of the world."[21] Maimonides's view raises a variety of theological, practical, and conceptual questions for Jewish law,[22] but those questions and puzzles notwithstanding, it is codified in the Code of Jewish law.[23]

While a full analysis of Jewish law's approach to abortion is beyond the scope of our present discussion, the aforementioned sources highlight a few important points that will illuminate our subsequent discussion.

First, the dominant view within Jewish law is that a fetus is not a person.[24] To be sure, this is not universally agreed upon, but one sees this in the text of the Mishna quoted above. It is only once the fetus "emerges" that it is described as a *nefesh*—best translated as either a life or a soul.[25] While there are other sources that provide contrary indications, the implication of the Mishna above is that prior to "emerging," the fetus is not considered a life.[26]

Second, notwithstanding this dominant view, Jewish law still only authorizes an abortion where the well-being of the mother is in danger.[27] This is the direct implication from the Mishna; it is only where the mother

---

20. Maimonides, Mishna Torah, Laws of Murder 1:9.

21. *Id.*

22. One of the central questions raised by subsequent interpreters of Maimonides is why, if the fetus is classified as a *rodef*, the rule is that one cannot terminate the fetus even after it has "emerged." As a general matter, a *rodef* is considered to forfeit his or her life because it is endangering the life another. For collections of answers to this longstanding question, *see* Fischer, *supra* note [17], at *7–9; DAVID M. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL AND ABORTION IN JEWISH LAW 275–84 (1968).

23. Shulchan Aruch, Choshen Mishpat 425:2.

24. *See, e.g.*, Adena Berkowitz, *My Body, My Choice: Biblical, Rabbinic, and Contemporary Halakhic Responses to Abortion*, 37 TOURO L. REV. 1133, 1153 (2021) ("The main line of Jewish tradition makes a much-needed contribution to the discussion of abortion. Without sharing the view that the fetus is from conception fully a person, it stops short of a complete dismissal of the value problem in destroying a fetus."); *see also* Fred Rosner, *The Jewish Attitude Towards Abortion*, 10 TRADITION 65 (1968) ("From forty days until birth, the fetus is not considered a living person (nefesh) but is regarded as part of mother's flesh and aborting it might not be legally considered murder.").

25. *See* Ohalot, *supra* note [18].

26. *See generally* Fischer, *supra* note [17]; FELDMAN, *supra* note [22], at 251–84.

27. *See* Maimonides *supra* note [20].

is "having trouble" giving birth that the Mishna contemplates authorizing an abortion.[28] Absent that consideration, Jewish law authorities have interpreted the Mishna to conclude that such an abortion is prohibited.[29] As summarized by Adena Berkowitz,

> Jewish tradition is committed to the sanctity of life. However, though it has been unwilling to evaluate the fetus's anticipated quality of life, the qualitative interests of the woman, whose life and mental well-being are at stake, are primary. Although halakhic sources do not recognize either a 'right to privacy' or a 'right of ownership' of one's body in the same vein as understood by the Supreme Court/American Jurisprudence, Jewish law views the well-being of the woman as paramount.[30]

Third, the Mishna appears—certainly according to Maimonides's gloss—to authorize an abortion where the fetus threatens the mother's physical well-being. But Jewish law authorities have long debated whether the principle of the Mishna—that protecting a mother's well-being permits an abortion—ought to be interpreted more broadly. Rabbi Moshe Feinstein, one of the leading 20th century Jewish law authorities in America, adopted a narrow interpretation of the Mishna, one that only permits an abortion when the physical health of the mother is at stake.[31] By contrast, Rabbi Eliezer Waldenberg, one of the leading Jewish law authorities in Israel, argued that abortions were also permissible under Jewish law where the mental well-being of the mother was at stake.[32] Importantly, as outlined by Elli Fischer, there is a trend among Jewish law authorities—notwithstanding the general prohibition against abortion—to permit abortions in a broad range of circumstances where sensitive considerations of the mother's well-being, both physical and mental, are at stake.[33] In Fischer's words, "Although limited but significant leeway is

---

28. *See* Ohalot, *supra* note [18].

29. For a summary of various theories of the Jewish law prohibition, and the resulting limitations of the prohibition, *see* Lichtenstein, *supra* note [17].

30. Adena Berkowitz, *My Body, My Choice: Biblical, Rabbinic, and Contemporary Halakhic Responses to Abortion*, 37 TOURO L. REV. 1133, 1139–40 (2021).

31. Melanie Mordhorst-Mayer et al., *'Perspectivism' in the Halakhic Debate on Abortion Between Moshe Feinstein and Eliezer Waldenberg – Relations Between Jewish Medical Ethics and Socio-Cultural Contexts*, 10 WOMEN IN JUDAISM 1, 13 (2013).

32. *Id.* Maybe the most well-known example of this debate was in the context of abortion of fetuses diagnosed in utero with the Tay–Sachs disease--a painful and incurable disease that invariably leads to the child's death within a few years of being born. Rabbi Moshe Feinstein prohibited abortion in this context, while Rabbi Eliezer Waldenberg permitted it. *See* Fischer, *supra* note [17], at *11 (collecting sources).

33. *Id.* at *12.

brought to bear on individual cases, these cases, due to their sensitive nature, tend to remain out of the spotlight. This results in an incongruity, particularly in Orthodox circles, between the public-facing, 'wholesale' *halakhah*, which emphasizes the wrongness of abortion, and a more secretive, individuated 'retail' *halakhah*, where there may be grounds to permit abortion."[34] Indeed, some rabbinic authorities who interpret Jewish law sources to permit abortion in only the rarest of circumstances will, at times, recommend that women—facing difficult choices—consult with more permissive authorities who are more likely to interpret Jewish law to permit abortions.[35]

Finally, Jewish law's underlying logic of permitting abortion to promote the well-being of the mother generates a peculiar outcome. In cases where Jewish law permits an abortion, it will also often require the abortion.[36] This consequence flows naturally from, for example, Maimonides' gloss that the fetus is a "pursuer" or "aggressor."[37] Such a classification under Jewish law typically generates an obligation to eliminate the pursuer, for example as applied to cases of self-defense. Thus, instead of a right to abortion, one might—in the main—consider Jewish law to generate an obligation of abortion under circumstances where the mother's well-being is at stake. Protecting the well-being of the mother is an obligation, not merely a right.[38]

Given the commitments of Jewish law, one can see how it somewhat naturally generates First Amendment claims against state-enacted abortion restrictions. Consider, for example, the fact that many state abortion

---

34. *Id*.

35. *Id*. at *22 ("The phenomenon of halakhic authorities referring questioners to more permissive authorities, while remaining silent about their personal views, is hard to conceptualize within secular legal contexts. . . . It seems clear that this phenomenon is grounded in a strong conception of halakhic pluralism, wherein multiple legitimate halakhic opinions coexist. One whose understanding of the halakhic issue mitigates toward a restrictive view must act and rule consistently with that understanding. Yet, such an authority may still acknowledge the existence and integrity of an opposing permissive view, and even, in some circumstances, recommend consulting an authority who espouses it.").

36. Bleich, *supra* note [17], at 87 (1968) ("Authority for performance of an embryotomy in order to pre serve the life of the mother is derived from the previously cited Mishnah, *Oholot*, 7:6. Virtually all authorities agree that the Mishnah does not merely sanction but deems mandatory that the life of the fetus be made subordinate to that of the mother."); FELDMAN, *supra* note [22], at 275 (referencing Mishna Oholot 7:6 and noting that it "permits—nay, requires—an abortion . . . to save the life of the mother.").

37. For a summary of sources analyzing Maimonides' "pursuer" approach to abortion, *see* FELDMAN, *supra* note [22].

38. *See supra* note 36.

restrictions include an exception for rape.[39] The Supreme Court has recently held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[40] As a result, in those jurisdictions, were a Jewish woman to assert the right to an exemption from the state abortion restriction on the grounds that the abortion fell within Jewish law's 'well-being of the mother' rule, then the existence of the rape exception would presumably generate a *prima facie* free exercise claim—requiring the state to permit her religiously-motivated abortion. The state could, of course, contend that the abortion restriction, even as applied to the particular case, satisfied strict scrutiny. But the Court has generally been dubious that the government can satisfy strict scrutiny where other exceptions to the law—like a rape exception—already exist.[41] Thus, Jewish law's obligation to abort where the health of a mother, often broadly construed to encompass mental well-being, would likely generate under current free exercise doctrine a successful claim for a religious exemption.

III. THREE PATHS FOR JEWISH ADVOCACY

The unique contours of Jewish law's treatment of abortion have long resisted classification within American debates over the right to abortion. Given that Jewish organizations have been quite active as *amici* in church-state cases,[42] it is not surprising that they have consistently filed numerous *amicus* briefs in cases before the Supreme Court addressing the constitutionality of abortion restrictions.

Unfortunately, however, as litigation over Jewish religious liberty claims in the context of abortion has escalated, the history of this advocacy has become increasingly obscured. Thus, Jewish religious liberty claims for abortion exemptions have become associated with progressive Jewish groups; by contrast, traditionalist Jewish groups have become increasingly

39. *See, e.g.*, Corbin, *supra* note [11], at 505 (noting that "several allow abortion if the pregnancy is the product of rape or incest").

40. Tandon v. Newsom, 593 U.S. 61, 62 (2021).

41. Fulton v. City of Philadelphia, Pa., 593 U.S. 522, 542 (2021) ("The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures."); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546–47 (1993) ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").

42. See Gregg Ivers, Religious Organizations as Constitutional Litigants, 25 POLITY 243, 255–57 (1992).

associated with anti-abortion advocacy. History tells a far more complicated story, one that highlights the ways in which Jewish law has been deployed over time for a variety of purposes—purposes that have changed as the baseline constitutional rules of the right to abortion have moved from an era governed by *Roe* to a post-*Roe* era governed by *Dobbs*. Indeed, the story provides a reminder—and maybe even a cautionary tale—of the challenges faced by minority communities in asserting their own authentic voice as the surrounding legal and political context changes over time.

A. Agudath Israel and the Embrace of Exemptions

While rarely noted, some of the earliest attempts in asserting claims for religious exemptions from abortion restrictions were advanced by Agudath Israel, one of the most prominent American Orthodox Jewish organizations.[43] The first such filing before the Supreme Court came in the 1989 case of *Webster v. Reproductive Health Services*.[44] At issue was a Missouri law that required viability testing for fetuses at 20 weeks and also prohibited the use of public resources for abortions not deemed medically necessary—a law that the Court ultimately upheld.[45]

Agudath Israel filed an *amicus* brief before the Court that captured its ambivalence in navigating the competing commitments of Jewish law as applied to debates over the right to abortion. The brief characterized its argument as, on the one hand, "[i]nformed by classical Jewish tradition which teaches that all human life is sacred, and possessed of the firm view that laws which undermine the sanctity of human life send a message that is profoundly dangerous for all of society."[46] However, "[a]t the same time, as a representative of a religious minority community whose constituents rely heavily on the religious freedoms guaranteed under the First Amendment, Agudath Israel of America is a staunch advocate of religious liberty for all Americans."[47] For that reason, Agudath Israel contended that "Missouri's legislative finding that human life begins at conception implicates both of these concerns in a manner that, to some extent, creates a dilemma for Agudath Israel of America."[48]

---

43. *About*, AGUDATH ISRAEL OF AM., https://agudah.org/about/ [https://perma.cc/DF85-5WN2].

44. Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

45. *Id.* at 499.

46. Brief of Agudath Israel of America as Amicus Curiae at *2, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605).

47. *Id.*

48. *Id.*

Given these considerations, Agudath Israel's brief "welcome[d]" reconsideration of *Roe*.[49] "Jewish tradition," according to Agudath Israel, "accords fetal life significant protection; it rejects the notion that termination of pregnancy, even prior to fetal viability, is a matter of free choice within the province of the mother."[50] At the same time, the brief argued that:

> any reconsideration of *Roe v. Wade*, particularly in the context of a state 'finding' that human life begins at conception, carries with it the danger that abortions might be legislatively proscribed even where they are mandated by religious belief—under sinaitic Jewish law, for example, where the mother's life is endangered.[51]

In turn, "What is called for, in Agudath Israel of America's view, is a jurisprudential framework that is at once protective of human fetal life yet solicitous of religious freedom."[52]

Meeting these twin objectives led Agudath Israel to pursue a unique interpretation of the Fourteenth Amendment's fundamental rights doctrine. *Roe*, on this view, was wrongly decided. The right to abortion,

> [i]n most cases, where the pregnancy poses no danger to maternal life and there is no religious mandate for abortion, and where the sole constitutional source of the claimed right to abortion is the personal liberty/due process right developed in Roe . . . the right to abortion should not be accorded the status of a 'fundamental' right.[53]

By contrast:

> There are times, though, when abortion is necessary to preserve the mother's life, or when it is mandated under the mother's religious beliefs. In those exceptional circumstances, a woman's claimed right to an abortion may be grounded not only in her personal liberty/due process right, but also in her Fourteenth Amendment right to life or her First Amendment right freely to

49. *Id*. at *2.
50. *Id.* at *2–3.
51. *Id*. at *3.
52. *Id*. at *3.
53. *Id*. at *3–4.

> exercise her religion. In such cases, access to abortion is indeed a right that is 'fundamental.'[54]

To make this claim, Agudath Israel argued that where the health of the mother is at stake, or where religious liberty considerations are implicated, the right to abortion ought to be deemed fundamental because the right under those circumstances is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[55] The brief went on to cite the Mishna discussed above to support the proposition that abortions under such circumstances "have long been permitted by civilized societies."[56] For that reason, "[r]econsideration of the central holding of *Roe*—that all abortions are expressions of a 'fundamental' right—by no means requires the Court to vitiate the enhanced constitutional status of at least those abortions performed to preserve the mother's life."[57]

Similarly, the brief argued, "there are times when the right to abortion should be deemed 'fundamental' on the basis of the woman's religious beliefs."[58] Because "[f]ree exercise rights are indisputably 'fundamental,'" the brief argued that a law must satisfy strict scrutiny before being allowed to prohibit religiously motivated abortions.[59] In turn, "[i]n those relatively few cases, a rational basis should not be a sufficient basis for proscribing abortion."[60]

This approach, for its time, can best be described as novel. It both advocated for overturning *Roe*, while carving out constitutionally required exceptions both for preserving the mother's life and for where the abortion was based upon religious commitments. And it was not the last time Agudath Israel advanced such an argument.

Only three years later, when the Court heard *Planned Parenthood v. Casey*, Agudath Israel once again filed an *amicus* brief both advocating for the overturning of *Roe*, and emphasizing the importance of religious exemptions in post-*Roe* jurisprudence.[61] In *Casey*, Agudath Israel's arguments continued to emphasize the core tenets of Jewish law:

---

54. *Id.*
55. *Id.* at *10.
56. *Id.* at *10 (citing Mishnah, Tractate Oholoth 7:6).
57. *Id.*
58. *Id.* at *11.
59. *Id.* at *11–12.
60. *Id.* at *11.
61. Brief of Agudath Israel of America as Amicus Curiae in Support of Robert P. Casey, et al., Planned Parenthood v. Casey, 505 US 833 (1992) (No. 91-744).

> Jewish tradition accords fetal life significant protection. As a general rule, Judaism rejects the notion that termination of pregnancy, even prior to fetal viability, is properly a matter of free maternal choice. Nonetheless, in certain exceptional cases, Jewish law may authorize abortion—indeed, may require abortion as a matter of religious obligation.[62]

One important difference between Agudath Israel's *Webster* brief and its *Casey* brief is the doctrinal hook for its religious liberty claims. In the intervening years between the briefs, the Supreme Court's decision in *Employment Division v. Smith* had significantly circumscribed the scope of religious liberty protections afforded by the Free Exercise Clause.[63] However, in so doing, *Smith* articulated a hybrid-rights doctrine—a doctrine that has subsequently been the subject of much derision[64]—whereby "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . [where the free exercise claim is advanced] in conjunction with other constitutional protections . . ."[65] On that basis, Agudath Israel contended that "[s]uch a 'hybrid situation' . . . which under *Smith* does merit heightened constitutional protection, would appear to be present when a woman seeks abortion as an expression of her religious beliefs; her claim in such cases would be predicated on the twin constitutional bases of liberty/privacy and free exercise."[66]

Thus, in *Casey*, Agudath Israel once again advanced a brief whose "central premise . . . is that characterization of the right to abortion as

---

62. *Id*. at *2.

63. Employment Division v. Smith, 494 U.S. 872 (1990).

64. *See, e.g.*, Fulton v. City of Philadelphia, Pa., 593 U.S. 522, 599 (2021) (Alito J., concurring) ("It is hard to see the justification for this curious doctrine. The idea seems to be that if two independently insufficient constitutional claims join forces they may merge into a single valid hybrid claim, but surely the rule cannot be that asserting two invalid claims, no matter how weak, is always enough. So perhaps the doctrine requires the assignment of a numerical score to each claim. If a passing grade is 70 and a party advances a free-speech claim that earns a grade of 40 and a free-exercise claim that merits a grade of 31, the result would be a (barely) sufficient hybrid claim. Such a scheme is obviously unworkable and has never been recognized outside of *Smith*.)"; Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) ("We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the free Exercise Clause if it did not implicate other constitutional rights. . . . Such an outcome is completely illogical . . . ."); Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003) ("We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated.").

65. *Smith*, 494 U.S. 872, 881.

66. Brief of Agudath Israel of America as Amicus Curiae in Support of Robert P. Casey, et al., *supra* note [61], at *13 (quoting *Smith*, 494 U.S. 872, 882).

'fundamental' need not be a matter of always or never."[67] Accordingly, "when a woman's claimed right to an abortion is grounded not only in her personal liberty/privacy right, but also in another constitutionally protected interest" such as "an expression of the mother's religious beliefs, her constitutional claim is enhanced by her First Amendment right freely to exercise her religion."[68] For these reasons, "access to abortion is indeed a right that is 'fundamental,' and may not be abridged absent a countervailing compelling state interest."[69]

In subsequent years, however, Agudath Israel has not filed *amicus* briefs arguing for the twin objectives of overturning *Roe* and exemptions for religiously-motivated abortions. Nor has it filed *amicus* briefs in any recent religious liberty challenges to state abortion restrictions. Maybe, given that the courts have largely rejected the hybrid-rights doctrine, the argument in the *Casey* brief would not have much purchase. That being said, the advent of the Religious Freedom Restoration Act[70]—along with state law analogs[71]—as well as the Supreme Court's recent expansion of free exercise protections,[72] would appear to provide significant doctrinal bases to advance similar arguments. Alternatively, Agudath Israel's reluctance to file briefs in cases of recent religious liberty challenges may ultimately stem from the fact that none of the Jewish plaintiffs appear to be mothers who, at present, are seeking abortions for reasons sanctioned by Jewish law—although that characterization also applies to *Webster* and *Casey* where Agudath Israel did choose to intervene with an *amicus* brief.

Inferring from silence, however, is a tough business. One thing, though, seems clear: the lack of more recent *amicus* briefs is not because

---

67. *Id*. at *3.

68. *Id*. at *4.

69. *Id*. It is interesting to note that the Agudath Israel's *Casey* brief also argued, tracking it's brief in *Webster*, that "[t]here are other contexts in which abortion may rise to the level of a 'fundamental' constitutional right. The most obvious example is where the pregnancy threatens the mother's life." *Id*. at *15 n.5. But as opposed to its brief in *Webster*, this argument was relegated to a footnote.

70. 42 U.S.C. §2000bb et seq. (1993).

71. See, *e.g.*, IDAHO CODE ANN. §§73-401 to 404 (2001); *see generally Federal & State RFRA Map*, BECKET (Mar. 11, 2024, 11:43 AM), https://www.becketlaw.org/research-central/rfra-info-central/map/[https://perma.cc/8DS2-9H9G].

72. *See, e.g.*, Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U.. J.L. & LIBERTY 699, 703 (2022) (cataloging and criticizing "a dramatic expansion in the Supreme Court's interpretation of the Constitution's Free Exercise Clause"); Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1497 (2022) (describing the Court's expanded protections of free exercise as "le[adding] to striking success for religious litigants at the Supreme Court."); Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1382 (2020) ("On the free exercise side, by contrast, the doctrine has been expansionist.").

Agudath Israel has changed its views. After the Supreme Court handed down its decision in *Dobbs*, Agudath Israel issued a statement with familiar notes:

> Agudath Israel has long been on record as opposing Roe v. Wade's legalization of abortion on demand. Informed by the teaching of Jewish law that fetal life is entitled to significant protection, with termination of pregnancy authorized only under certain extraordinary circumstances, we are deeply troubled by the staggering number of pregnancies in the United States that end in abortion.[73]

At the same time, "there are certain extraordinary circumstances where our faith teaches that a woman should terminate her pregnancy. Agudath Israel fully supports her right to abortion in such situations, both as a matter of constitutional free exercise and moral principle."[74]

B. Progressive Jewish Organizations and Religious-Exemption Ambivalence

Agudath Israel is far from the only Jewish organization to have incorporated religious liberty arguments into its advocacy on abortion. In fact, a wide range of progressive Jewish organizations—over a course of decades—leaned heavily in their *amicus* briefs on religious liberty in supporting the right to abortion. Indeed, in so doing, they expressly leveraged the unique content of Jewish law when pressing their claims. But contrary to Agudath Israel's approach, these organizations—at least prior to the Supreme Court's opinion in *Dobbs*—rejected an approach that wove together a rejection of *Roe* with a free exercise right to exemptions for religiously motivated abortions. Instead, they deployed religious liberty as a principle supporting a broad right to abortion.

Already in *Roe*, progressive Jewish organizations joined *amicus* briefs in support of the right to abortion.[75] And those filings addressing the right to abortion continued in subsequent cases before the Supreme Court

---

73. *Agudath Israel of America Welcomes Supreme Court Overruling Roe v. Wade*, AGUDATH ISRAEL OF AM. (June 24, 2022), https://agudah.org/agudath-israel-of-america-welcomes-supreme-court-overruling-roe-v-wade/[https://perma.cc/8TMF-7TVH].

74. *Id.*

75. Motion of American Ethical Union, et al. for Leave to file a Brief as Amici Curiae in Support of the Appellants' Position, Roe v. Wade, 410 U.S. 179 (1973) (Nos. 70-40, 70-18), 1971 WL 128051 (amicus brief filed by a variety of organizations, including the American Jewish Congress the Union of American Hebrew Congregations).

through the 1980s.[76] But in *Webster*, a group of progressive Jewish organizations joined religious groups from other faith communities and began pressing new arguments against abortion restrictions.[77] The number of groups joining the brief also increased significantly from previous filings and included the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League, B'nai Brith Women, the Commission on Social Action of Reformed Judaism, the Federation of Reconstructionist Congregations and Havurot, the Jewish Labor Committee, the National Council of Jewish Women, the National Federation of Temple Sisterhoods, and the National Jewish Community Relations Advisory Council.[78] And the arguments, instead of focusing—as prior briefs had—on constitutional arguments supporting the right to abortion shifted to the Free Exercise Clause.[79]

By shifting focus, the *Webster* brief aimed at disrupting the narrative that religious communities all supported abortion restrictions, while only nonreligious communities comprised the coalition supporting the right to abortion.[80] Thus, in describing the interests of the *amici*, the brief explained "Amici are religious organizations and representatives of religious groups dedicated to preserving religious freedom for all persons, and to protecting a woman's right to terminate her pregnancy in consultation with her religious conscience."[81] And in summarizing the argument, the brief explained "state statutes drastically curtailing access to abortion unacceptably interfere with constitutionally protected religious

76. See, *e.g.*, Brief for Amici Curiae American Ethical Union, et al., Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268), 1979 WL 199986 (amicus brief filed by a variety of organizations, including the American Jewish Congress, National Council of Jewish Women, and the Union of American Hebrew Congregations); Brief of the Amici Curiae Planned Parenthood Federation of America, Inc. et al. in Support of Appellees, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (No. 84-495), 1985 WL 669710 (amicus brief filed by a variety of organizations, including the American Jewish Committee and the American Jewish Congress); Brief for the Unitarian Universalist Associations, and Twenty-Two Other Religious Organizations, as Amici Curiae, in Support of Appellees, *Thornburgh*, 476 U.S. 747 (Nos. 84-495, 84-1379), 1985 WL 669624 (amicus brief filed by a variety of organizations, including B'Nai Brith Women, National Council of Jewish Women, National Federation of Temple Sisterhoods, Union of American Hebrew Congregations, United Synagogue of America, and Women's League for Conservative Judaism).

77. Brief Amicus Curiae for American Jewish Congress et al., Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127720.

78. *Id.*

79. *See supra* notes 80–94 and accompanying text.

80. *See infra* notes 85–88.

81. *Id.* at *2–3.

and private conscience."[82] In turn, "Missouri's ban . . . violates the Free Exercise Clause of the First Amendment."[83]

As part of the argument, the brief spent significant space explicating the details of Jewish law. "Within the Jewish tradition," the brief explained, "there is considerable agreement that the fetus is not a person before birth and that abortion therefore is not murder, and may be permitted, and indeed required in situations where the life of the mother is threatened."[84] The brief then described the Jewish legal analysis of abortion in medieval texts, the Code of Jewish Law and later responsa, before turning its attention to the commonalities and differences between various Jewish denominations in their approach to abortion.[85]

Maybe the most striking feature of the brief is the manner in which it deployed the content of Jewish law to support a free exercise argument. According to the brief, "[g]iven the contrasting views about abortion within and across religious groups, it is obvious that many strongly held religious beliefs directly clash with the Missouri law."[86] In turn, Missouri's "law interferes with the religious lives of those who are adherents to these beliefs, just as interference with religious beliefs would arise if a state were to adopt a law mandating abortion under specified circumstances."[87]

Leveraging the Free Exercise Clause enabled the brief to further unsettle the perceived alliance between religious communities and anti-abortion views: "Missouri cannot claim that the Free Exercise Clause guarantees only people's freedom to hold pro-choice views, but not their freedom to obtain an abortion in any public facility, to discuss the matter with any public employee, or to act contrary to a state law declaring that human life begins at conception."[88] As the brief continued, invoking the prevailing free exercise doctrine of 1989, "[t]he Free Exercise Clause guards much religiously inspired conduct, not just religious views. . . . In the context of religious freedoms, this constitutional protection applies where the government withholds a benefit as much as when it imposes a penalty."[89]

Finally, the brief provided an overarching assessment of the role of free exercise and the vital need for the Court to apply the Free Exercise Clause in this context:

---

82. *Id*. at *4.
83. *Id.*
84. *Id*. at *15.
85. *Id*. at *15–17.
86. *Id*. at *17.
87. *Id.*
88. *Id*. at *19.
89. *Id*. (citation omitted).

> This Court's role in preserving space for the free exercise of religion is never more crucial than when there is massive public turmoil surrounding the subject. Otherwise, majorities, or even effectively mobilized minorities, can invoke the power of the state to curb the religious freedoms of those they do not like; otherwise, we risk escalating intolerance not only toward isolated groups on specific issues, but toward anyone who does not abide by the religiously inspired views pursuing the instruments of state power. . . . Vehement public ferment on the subject of abortion is bound to emerge if this Court allows the interference with free exercise represented by the Missouri statute. The Free Exercise Clause of the First Amendment makes explicit a courageous and unparalleled American vision of tolerance for differences which includes, by necessity, governmental restraint. . . . This Court has long been the eloquent defender and enforcer of this vision, and adherence to that role has never been more important than at this time.[90]

Subsequent briefs joined by progressive Jewish organizations emphasized similar themes, often reprising the text and arguments of the *Webster* brief verbatim. Thus, in 2000, numerous Jewish groups joined various other religious groups supporting the right to abortion in an *amicus* brief filed in *Stenberg v. Carhart*.[91] Like the *Webster* brief, the brief filed in *Carhart* similarly argued that:

> Given the range of beliefs about abortion, the state is not permitted to impose one view as orthodoxy where it would interfere with a fundamental right. By adopting the Act . . . Nebraska has unconstitutionally imbedded into law certain religious beliefs over others. The Act, therefore, unconstitutionally infringes not only on the right to privacy, but also on the right of religious liberty that underlies that right.[92]

---

90. *Id*. at *21–22 (citations omitted).

91. Brief of Amici Curiae Religious Coalition for Reproductive Choice et al. in Support of Respondent, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 340115 (including among the *amici* the American Jewish Committee, Anti-Defamation League, Central Conference of American Rabbis, Hadassah, Jewish Women International, National Council of Jewish Women, Union of American Hebrew Congregations, and Women of Reform Judaism).

92. *Id*. at *20.

In later years, progressive Jewish organizations joined *amicus* briefs in *Ayotte v. Planned Parenthood*[93] and *Whole Woman's Health v. Hellerstdt*,[94] which also referenced Jewish law's unique views on abortion, although with decreasing prominence and more muted emphasis on the theme of religious liberty.[95]

The link in these briefs between Jewish law's broad consensus supporting abortions that promote the mother's wellbeing on the one hand, and religious liberty on the other, did, however, raise a bit of a doctrinal puzzle. According to this line of argument, first and most extensively expressed in the *Webster* brief, because "many strongly held religious beliefs directly clash with the Missouri law," "[t]hat law interferes with the religious lives of those who are adherents to these beliefs."[96] Thus, the argument concludes, "regulations like Missouri's ban against abortion in public facilities, and its ban against counseling about abortion by public employees, invade religious liberty and freedom of conscience."[97] Jewish law, because of the "considerable agreement that . . . abortion . . . may be permitted, and indeed required in situations where the life of the mother is threatened," thereby provided a clear example of this concern.[98] Jewish law might require abortions in circumstances prohibited by abortion restrictions.

But if this religious liberty argument aimed to provide access to abortions when required by Jewish law, then the argument's more natural legal remedy would have been not to strike down the abortion restriction *in toto* but to provide exemptions for those seeking religiously-motivated abortions.[99] It is Establishment Clause claims that typically require

---

93. See Brief Amici Curiae of the Religious Coalition for Reproductive Choice and Fourty-One Other Religious and Religiously Affiliated Organizations in Support of Respondents at *12, Ayotte v. Planned Parenthood, 546 U.S. 320 (2006) (No. 04-1144).

94. Brief of Judson Memorial Church et al. as Amici Curiae in Support of Petitioners, Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (No. 15-274).

95. Brief Amici Curiae of the Religious Coalition for Reproductive Choice and Fourty-One Other Religious and Religiously Affiliated Organizations in Support of Respondents, *supra* note 93, at *12 (weaving together "the Casey Court's emphasis on freedom of conscience" with the "Court's religious liberty cases"); Brief of Judson Memorial Church et al. as Amici Curiae Supporting Petitioners, *supra* note 94, at *7 ("When a woman determines, consistent with her faith and conscience, that abortion is an appropriate option in her specific circumstance, she must have ready access to medically safe procedures. As religious leaders and pastoral counselors, amici are committed to social justice and recognize that each woman must be afforded equal dignity and access to this healthcare.").

96. Brief Amicus Curiae for American Jewish Congress et al., *supra* note 77, at *17.

97. *Id*. at *18.

98. *Id*. at *15.

99. A recent *amicus* brief filed in *Dobbs* by the Jewish Coalition for Religious Liberty, criticizing the *Webster* brief, made this point as follows: "In the past, religious supporters

striking down a law in its entirety.[100] The religious liberty claims of the Free Exercise Clause generate arguments for religious exemptions, leaving the rest of the law in place.[101] And yet, the briefs joined by progressive Jewish organizations advanced these arguments to strike down the abortion restrictions: "The Constitution has long provided, and must continue to assure, protection against governmental arrogation of crucial decisions which require the guidance of religious teachings and individual conscience."[102] In this way, these *amicus* briefs—notwithstanding the emphasis on religious liberty and free exercise—supported lawsuits to eliminate the challenged abortion restrictions.

A footnote in the *Webster* brief provided an answer. First, the brief explained why it focused on religious liberty rights under the Free Exercise Clause as opposed to Establishment Clause arguments: "This is not a claim, under the Establishment Clause, that the government may not adopt one religious view over others if, as this Court decided *Harris v. McRae*, that the law happens to coincide with the religious views of some."[103] In the brief's view, Supreme Court precedent appeared to foreclose an Establishment Clause claim.[104] Thus, the brief pivoted to the Free Exercise Clause: "Instead, the objection here is that certain topics require protection against state regulation if the free exercise of religion is to mean anything. Basic decisions about procreation and termination of pregnancies epitomize such topics, in light of the massive and deep disagreement among religions over these issues."[105]

So why not seek religious exemptions? "We do not argue here for religious exemptions to Missouri's law not only because that would be impracticable, given the large numbers of people whose religious beliefs are burdened by the law. Even more importantly, any process providing for exemptions would be insufficient protection of religious freedom, given the intrusion any process for considering exemption would itself

---

of a right to abortion have advocated for a novel conception of religious liberty that is incompatible with this traditional understanding. In their view, the fact that some religions may allow or even require women to obtain abortions should cause this Court to recognize a general constitutional right to abortion." Brief of Amicus Curiae Jewish Coalition for Religious Liberty Supporting Petitioners, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 3192478.

100. *See generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental*, 84 IOWA L. REV. 1 (1998).

101. *See generally* Mark L. Rienzi & Stephanie H. Barclay, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B. C. L. REV. 1595 (2018).

102. Brief Amicus Curiae for American Jewish Congress et al. *supra* note 77, at *5.

103. *Id*. at *17 n.7 (citing Harris v. McRae, 448 U.S. 297, 319–20 (1980)).

104. *Id.*

105. *Id.*

place on the individuals facing intimate decisions involving procreation and termination of pregnancy."[106] And such a process would, inevitably, run afoul of the Establishment Clause's entanglement prohibitions: "This Court's rulings on the dangers of government entanglement with religion would apply in any case-by-case evaluation of religious beliefs about abortion."[107]

In this way, during the era governed by *Roe*, progressive Jewish groups pressed religious liberty claims to expand access to abortion. The content of Jewish law, which authorized and often required abortion to promote the well-being of the mother, served as the fulcrum of such arguments. But these arguments also incorporated an anti-religious exemptions component. Indeed, it was this anti-religious exemption arguments that bridged the gap between Jewish law and striking down the entirety of abortion restrictions; on this view, it was because religious exemptions for abortion restrictions could not satisfy the demands of the Establishment Clause that religious liberty claims required striking down the entirety of various abortion restrictions. This logic animated *amicus* briefs filed by progressive Jewish organizations in a series of Supreme Court cases, from *Webster* and *Stenberg* to *Hellerstedt* and *Ayotte*.[108]

In these early days of the post-*Roe* era, progressive Jewish groups continue to center *amicus* advocacy on the unique features of Jewish law, whereby the well-being of the mother can both authorize and, at times, require an abortion. This Jewish law focus represents an important and consistent theological through line for progressive Jewish *amicus* advocacy from *Roe* to *Casey* to *Dobbs* and beyond. At the same time, given the significant changes to constitutional doctrine and abortion politics, progressive Jewish groups have adopted a new strategy for religious exemptions, shifting from a rejection of those exemptions to an endorsement of those exemptions.

As a prime example of this shift, consider the current religious liberty lawsuit filed against Indiana's abortion restrictions.[109] The lawsuit alleges that these restrictions violate the plaintiff's religious liberty, protected pursuant to Indiana's Religious Freedom Restoration Act;[110] Indiana's RFRA "prohibits government action that substantially burdens a person's religious exercise, unless the burden is in furtherance of a compelling

106. *Id.*

107. *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

108. *See supra* notes 91–95.

109. Order Granting Plaintiffs' Motion for Preliminary Injunction, Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056 (Marion Super. Ct., Ind. Dec. 2, 2022).

110. IND. CODE § 34-13-9-0.7, (2015)., et seq.

governmental interest and is the least restrictive means of furthering that interest."[111] On this basis, the complaint seeks exemptions for the plaintiffs' religious beliefs which the abortion restrictions will substantially burden. And, in granting a preliminary injunction to the plaintiffs, the trial court did just that: "THEREFORE, the Court GRANTS the plaintiffs' Motion for Preliminary Injunction, and hereby ENJOINS the Defendants and their officers from enforcing the provisions of [the abortion restriction] *against the Plaintiffs*."[112]

On appeal before the Indiana Court of Appeals, progressive Jewish groups filed *amicus* briefs supporting the religious liberty claims of the plaintiffs.[113] These briefs, like prior briefs, highlight the unique features of Jewish law when it comes to abortion. Thus, an *amicus* brief joined by the Anti-Defamation League, Bend the Arc: A Jewish Partnership for Justice, the Central Conference of American Rabbis, Men of Reform Judaism, the Reconstructionist Rabbinical Association, Union of Reform Judaism and Women of Reform Judaism, notes how "some Jewish sources hold that abortion is required if the pregnant person's life or health (including mental health) is at risk."[114] Similarly, an *amicus* brief joined by the National Council for Jewish Women, the Reconstructionist Rabbinical Association, Zioness, T'Ruah, Keshet, the Rabbinical Assembly, and Avodah, cites the aforementioned Mishna and then explains "In a situation in which the pregnant person's life is in danger from the pregnancy or labor, Jewish law is clear: the pregnant person's life takes precedence."[115]

At the same time, these more recent filings have deviated from the longstanding position contending that religious exemptions from abortion restrictions are unconstitutional.[116] Instead, these recent briefs support claims in favor of such religious exemptions. For example, responding to

---

112. Order Granting Plaintiffs' Motion for Preliminary Injunction, *supra* note [109], at *43 (emphasis added). An Indiana Court of Appeals subsequently modified the scope of the injunction. *See* Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, 2024 Ind. App. LEXIS 86, at *77–79.

113. Brief in Support of Appellees of *Amicus Curiae* National Council of Jewish Women et al., Individual Members of the Med. Licensing Bd. of Ind., v. Anonymous Plaintiff 1, No. 22A-PL-02938 (Ind. Ct. App. March 10, 2023); Brief in Support of Appellees of *Amicus Curiae* Americans United for Separation of Church and State, Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, No. 22A-PL-02938 (Ind. Ct. App. March 13, 2023).

114. *Id*. at *15; *see also id*. at *18 (quoting the testimony of Rabbi Aaron Spiegel that "Under Jewish law, abortion is not only permissible in some circumstances but is required if necessary to protect the physical and mental health of the pregnant woman.").

115. Brief in Support of Appellees of *Amicus Curiae* National Council of Jewish Women et al., *supra* note [113], at *21.

116. *See infra* notes 118–120.

amicus briefs questioning the sincerity of the plaintiffs,[117] the *amicus* brief filed by the National Council of Jewish Women and others focuses on the sincerity of the Indiana plaintiffs, highlighting a variety of strong reasons why their claims—grounded in Jewish law and values—are consistent, clear and sincere.[118] Importantly, though, the brief ends with unambiguous support for a religious exemption: "Plaintiffs and Hoosier Jews hold sincere religious beliefs about abortion. . . . Plaintiffs' and Hoosier Jews' behavior is religiously motivated; S.E.A. 1 places a substantive burden on the exercise of their religious beliefs regarding abortion. Therefore, this Court should affirm the trial court's preliminary injunction."[119] Along similar lines, the *amicus* brief filed by the Anti-Defamation League and others also supports the trial court's decision granting an exemption, although its argument focuses more on questions of religious preferentialism than on religious liberty.[120]

This shift from an anti-exemption stance to a pro-exemption stance reflects, in many ways, significant changes in Supreme Court doctrine. First, the shift reflects changes with respect to the Supreme Court's religion clause doctrine. When progressive Jewish groups rejected the constitutional possibility of religious exemptions from abortion restrictions, it was during a period when the Court interpreted Establishment Clause constraints relatively broadly;[121] thus, the notion that implementing such exemptions in the context of abortion could violate Establishment Clause principles of entanglement still had some purchase. Indeed, it was during those years that progressive Jewish groups expressed Establishment Clause concerns with respect to claims for religious exemptions in other contexts.[122]

In more recent years, however, the Supreme Court not only expanded the scope of constitutionally required religious exemptions,[123] but it also

---

117. Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Appellees, Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, No. 22A-PL-02938 (Ind. Ct. App. March 10, 2023).

118. Brief for National Council of Jewish Women et al. as Amicus Curiae Supporting Appellees, *supra* note [115], at *7–16.

119. *Id*. at *24.

120. Brief in Support of Appellees of *Amicus Curiae* Americans United for Separation of Church and State, *supra* note [113], at *9–25.

121. *See, e.g.*, Cnty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573 (1989); Estate of Thorton v. Caldor, 472 U.S. 703 (1985); Aguilar v. Fenton, 473 U.S. 402 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984).

122. Michael A. Helfand, *Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Liberty Advocacy*, 56 SAN DIEGO L. REV. 305, 330–38 (2017).

123. *See supra* note 72.

jettisoned the *Lemon* test.[124] Thus, past Establishment Clause arguments of progressive Jewish organizations resisting religious exemptions lack legal foundations in current Supreme Court doctrine. In that light, the recent shift in *amicus* advocacy from rejecting exemptions to embracing exemptions makes the most out of existing Court doctrine.

Of course, in addition to changes in the Court's religion clause doctrine, maybe the more important change impacting progressive Jewish *amicus* abortion advocacy is with respect to abortion doctrine itself—from *Roe* to *Dobbs*.[125] Thus, when *Roe* and *Casey* were the law of the land, progressive Jewish groups supported litigation that advocated against abortion restrictions.[126] In their view, those restrictions undermine the right to abortion advanced in *Roe* and *Casey*.[127] And advancing those arguments, they emphasized religious liberty arguments in order to unsettle the narrative that all religious groups and faith communities were hostile to abortion.[128] Thus, they looked to religious liberty as a way of expressing why abortion restrictions were offensive to their faith tradition—and, in turn, how those abortion restrictions violated the First Amendment's religious liberty protections.[129]

Those arguments, though, only made sense if religious exemptions were off the table. Otherwise, abortion restrictions, with religious exemptions, could provide space for Jewish religious liberty claims. And so, pre-*Dobbs*, progressive Jewish groups advanced Establishment Clause arguments that took exemptions off the table.[130] Doing so provided a framework in which religious liberty arguments justified striking down the entirety of abortion restrictions—not merely providing religious exemptions.[131]

By contrast, now that the protections of *Roe* and *Casey* are gone, the stakes of religious exemptions from abortion restrictions are much bigger. Absent those exemptions, Jewish claimants lack any other constitutional protections. Under such circumstances, and given the changes in the Court's religion clause doctrine, embracing religious exemptions serves as a viable mechanism to increase abortion access. [132] Shifting strategies here

---

124. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) ("[T]his Court long ago abandoned Lemon and its endorsement test offshoot.").

125. *Compare* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) *with* Roe v. Wade, 410 U.S. 113 (1973).

126. *See supra* notes 75–108 and accompanying text.

127. *Id.*

128. *See supra* notes 88–89 and accompanying text.

129. *See supra* notes 77–95 and accompanying text.

130. *See supra* notes 99–107 and accompanying text.

131. *Id.*

132. *See supra* notes 118–120 and accompanying text.

does not require a change with respect to the substance of Jewish law; to the contrary, both a pro-exemption and anti-exemption approach consistently articulates Jewish law as generally prohibiting abortion except when the well-being of the mother, broadly construed, is at stake. But the shift does require altering constitutional commitments, leveraging changes with respect to the Supreme Court's religion clause doctrine to fill the gap created by the Supreme Court's abortion doctrine.

C. The Orthodox Union and Resisting Advocacy

Thus far, the story of Jewish legal advocacy with respect to the right to abortion has highlighted differences between the Jewish groups' *amicus* briefs filed pre-*Dobbs* and post-*Dobbs*. On one hand, traditionalist Jewish organizations have, in more recent years, throttled back their *amicus* briefs, pressing for religious liberty rights in the context of abortion restrictions.[133] On the other side of the ledger, prominent progressive Jewish organizations have jettisoned pre-*Dobbs* constitutional concerns with religious exemptions from abortion restrictions, supporting religious exemption claims in the current post-*Dobbs* landscape.[134]

But it is also worth outlining a third approach—that of the Union of Orthodox Jewish Congregations of America, often referred to as the Orthodox Union or the OU. The Orthodox Union has long served as arguably the most prominent umbrella organization of American Orthodox Judaism; indeed, it maintains an advocacy center that serves at "the non-partisan public policy arm of the nation's largest Orthodox Jewish organization, representing nearly 1,000 congregations nationwide, and leads the OU's advocacy efforts in Washington, DC, and state capitals."[135]

While many other Jewish organizations have engaged in significant *amicus* advocacy with respect to abortion, the Orthodox Union has chosen not to follow suit. While it is normally challenging to glean much from a group's decision not to file *amicus* briefs, the Orthodox Union's consistent decision not to file over the years stands in contrast to its active engagement in filing *amicus* briefs in other contexts, especially in the context of religious liberty litigation before the Supreme Court.[136] In this way, it provides an instructive counterbalance to the weaving advocacy of groups like Agudath Israel and the National Council for Jewish Women.

---

133. *See supra* Section III.A.

134. *See supra* Section III.B.

135. *About the OU*, ORTHODOX UNION, https://www.ou.org/about/**[**https://perma.cc/589E-YMRY].

136. Michael A. Helfand, *Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Liberty Advocacy*, 56 SAN DIEGO L. REV. 305, 345–90 (2019) (providing examples of recent Jewish religious liberty advocacy).

It is a reminder how some Jewish groups, in reflecting on the unique commitments of Jewish law on abortion, have simply chosen to avoid *amicus* engagement—and self-consciously so.

To understand the Orthodox Union's reluctance to do so, one has to look at other policy documents. Maybe the best indications come from policy statements issued by the Jewish Council for Public Affairs (JCPA), which is an umbrella organization for "125 local Jewish Community Relations Councils, and 16 national Jewish agencies"[137]—one of which is the Orthodox Union. Prior to 1997, the JCPA was called the National Jewish Community Relations Advisory Council (NJCRAC),[138] and before 1971, it was called the National Community Relations Advisory Council (NCRAC).[139] In its various incarnations, the JCPA regularly convened its various constituent organizations and developed a Joint Program Plan that outlined the priorities and commitments of the American Jewish community.[140] And in addition to those Joint Program plans, the JCPA passed—and continues to pass—resolutions at their annual conference, called the Plenum.[141]

Not surprisingly, these policy statements regularly outlined the consensus view among the JCPA's constituent organizations on abortion and reproductive rights. These statements follow a relatively consistent pattern: the consensus view of the JCPA or NJCRAC supporting the right to abortion is followed by a somewhat ambiguous dissenting view from the Orthodox Union.

For example, the 1974 NJCRAC Joint Program Plan stated that, in response to attempts to enact a Right to Life constitutional amendment, the view of the NJCRAC constituent organizations was to "oppose proposals to amend the Constitution to invalidate the recent U.S. Supreme Court decision concerning abortion."[142] But the Orthodox Union contested this consensus view and, in accordance with the NJCRAC process, filed a dissent which was incorporated into the Joint Policy Program: "The Union of Orthodox Jewish Congregations of America dissents from this section.

---

137. *Mission and History*, JEWISH COUNCIL FOR PUB. AFFAIRS, http://www.jewishpublicaffairs.org/about-jcpa/mission-and-history/.

138. *Id.*

139. J.J. GOLDBERG, JEWISH POWER: INSIDE THE AMERICAN JEWISH ESTABLISHMENT, at xiii (1996).

140. *See, e.g.*, National Jewish Community Relations Advisory Council, JOINT PROGRAM PLAN FOR JEWISH COMMUNITY RELATIONS 1974 3 (1974) (describing the joint planning process); National Jewish Community Relations Advisory Council, JOINT PROGRAM PLAN FOR JEWISH COMMUNITY RELATIONS 1978–79 3 (1974).

141. JCPA By-Laws, Article IV, Section I, *in* JCPA Board Manual.

142. National Jewish Community Relations Advisory Council, JOINT PROGRAM PLAN FOR JEWISH COMMUNITY RELATIONS 1974 42 (1974).

We believe that an unborn fetus has the right to live and that society has the obligation to protect that life. It should therefore remain the responsibility of law to protect the child and society against abortion by convenience."[143] Note how the dissent takes on the issue of "abortion by convenience," carefully sidestepping the issue of therapeutic abortions, which—as noted above—are often permitted and even required under Jewish law.

Subsequent dissents from the Orthodox Union would further expand on that theme. The 1978 Joint Program Plan of the NJCRAC announced the consensus view of the constituent organizations "approv[ing] of the legislation to require that pregnancy disability be covered by employee disability agreements and oppose any limitation of such coverage of disability attendant upon abortion."[144] The Orthodox Union once again dissented: "The Union of Orthodox Jewish Congregations of America, in view of the halachic opinion that from conception the fetus is considered a live person with the rights of any other individual, opposes a public policy permitting or encouraging abortion. Accordingly, any policy that would favor or pay for abortions is not in concert with Jewish law and tradition and is opposed by the [Orthodox Union]."[145] The 1978 statement differs in important ways from its 1974 predecessor; maybe most notably, the 1978 dissent inches closer to the view of fetal personhood, which the 1974 dissent deftly avoided. But the two share a general disapproval of abortion while avoiding the more complex Jewish law issue of therapeutic abortions.

In subsequent statements, the Orthodox Union took on therapeutic abortions more directly. The 1983 Joint Program Plan expressly criticized on a number of grounds legislative attempts to restrict access to abortion, including "the fundamental principles of individual freedom."[146] The Orthodox Union filed what the Joint Program Plan describes as a "note"—and a cryptic one at that: "The Union of Orthodox Jewish Congregations of America opposes any public policy encouraging abortion, unless sanctioned by Halacha."[147] While far more terse than previous dissents, this note conveys a similar ambivalence on the intersection of the right to abortion and Jewish law. Thus, the Orthodox Union rejected policies that encouraged abortions unless those abortions were either permitted or required by Jewish law. The inference from the note appears to be that

143. *Id*. (emphasis added).

144. National Jewish Community Relations Advisory Council, JOINT PROGRAM PLAN FOR JEWISH COMMUNITY RELATIONS 1978–79 40 (1979).

145. *Id*.

146. National Jewish Community Relations Advisory Council, JOINT PROGRAM PLAN FOR JEWISH COMMUNITY RELATIONS 1983–84 56 (1984).

147. *Id*.

where Jewish law does permit or require an abortion, the Orthodox Union supported encouraging abortion and potentially even providing financial support for abortion.

This ambivalence became even more pronounced in subsequent years. In response to a statement on reproductive choice adopted by the JCPA at its 2005 Plenum, the Orthodox Union filed the following dissent:

> The Union of Orthodox Jewish Congregations of America (UOJCA) does not as a matter of longstanding policy, join with the Jewish Council for Public Affairs in resolutions concerning "reproductive choice." We cannot endorse a public policy that does not reflect the complex response of halacha (Jewish Law) to the abortion issue. In most circumstances the halacha proscribes abortion but there are cases in which halacha permits and indeed mandates abortion. The question is a sensitive one and personal decisions in this area should be made in consultation with recognized halachic authorities.[148]

Note the increased emphasis on the complexity of Jewish law and the attempt to navigate Jewish law's general disfavoring of abortion, while still emphasizing that there exist circumstances where Jewish law both allows and even requires abortion. Moreover, it is precisely because Jewish law resists—at least to the mind of the Orthodox Union—straightforward categorization that the Orthodox Union refused to join statements on reproductive choice.

This same dynamic repeated in 2014. In response to a lengthy Resolution on Reproductive Health adopted at the 2014 JCPA Plenum, the Orthodox Union yet again filed a dissent:

> The Union of Orthodox Jewish Congregations of America has long standing policy of not joining in JCPA Resolutions on "Reproductive Rights." While we welcome the Resolution's acknowledgement that "human life is to be valued and protected," we cannot endorse a public policy that does not reflect the complex response of halacha to the abortion issue. In most circumstances, the halacha proscribes abortion, but there are cases in which halacha permits and indeed mandates abortion. The question of abortion is a sensitive one and personal decisions in

148. *Reproductive Choice (Task Force Concern): Adopted by the 2005 JCPA Plenum*, JPCA (Feb. 24, 2005), https://jewishpublicaffairs.org/resolutions/reproductive-choice/[https://perma.cc/5TBU-BDQX].

> this area should be made in consultation with recognized halachic authorities.[149]

This same approach made its way into the Orthodox Union's public statement after the Supreme Court's decision in *Dobbs*.[150] Thus, the Orthodox Union explained that it was "unable to either mourn or celebrate the U.S. Supreme Court's overturning of *Roe v. Wade*."[151] The reason for its ambivalence once again drew from the way in which Jewish law's approach to abortion resisted categorization: "We cannot support absolute bans on abortion—at any time point in a pregnancy—that would not allow access to abortion in lifesaving situations."[152] On the other hand, "we cannot support legislation that does not limit abortion to situations in which medical (including mental health) professionals affirm that carrying the pregnancy to term poses real risk to the life of the mother."[153] For these reasons, *Dobbs* was, in the view of the Orthodox Union, a mixed bag. Jewish law, in the view of the Orthodox Union, rejects "[t]he 'right to choose" because such an approach is "completely at odds with our religious and halachic values."[154] At the same time, "Jewish law prioritizes the life of the pregnant mother over the life of the fetus such that where the pregnancy critically endangers the physical health or mental health of the mother, an abortion may be authorized, if not mandated, by Halacha and should be available to all women irrespective of their economic status."[155] As a result, "Legislation and court rulings, federally or in any state, that absolutely ban abortion without regard for the health of the mother would literally limit our ability to live our lives in accordance with our responsibility to preserve life."[156]

Given this ambivalence—and the reluctance to map Jewish law's approach to abortion on either side of the abortion debates—it becomes far less surprising that the Orthodox Union has avoided wading into abortion litigation before the Supreme Court. In those cases, neither side of the litigation captured the preferred outcome of the Orthodox Union. Its statement on the heels of the Court's opinion in *Dobbs* makes that quite clear. Moreover, the Orthodox Union viewed the complexities of Jewish

---

149. *Resolution on Reproductive Health: Adopted by the 2014 JPCA Plenum*, JPCA (May 5, 2014), https://jewishpublicaffairs.org/resolutions/reproductive-health/ [https://perma.cc/SAA9-G28Y].

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

law—the commitment to ensuring access to therapeutic abortions, while disapproving of abortion otherwise—as difficult to express and convey within the context of litigation over the right to abortion. In this way, the best option for Jewish law in the context of abortion litigation was, in the view of the Orthodox Union, just to stay out of it altogether.

IV. CONCLUSION

What lessons can we draw from this history? The story of Jewish religious liberty advocacy for abortion presents, among other puzzles, a fundamental dilemma. How does a minority faith, whose theological commitments do not fit easily into the categories of contemporary culture wars, craft and advance a legal advocacy agenda over time?

In some ways, Jewish religious liberty advocacy on abortion—across time and across denominations—has remained incredibly consistent as a matter of Jewish law and theology. Advocates, almost without exception, characterize Jewish law as both maintaining a general prohibition against abortion, while also supporting a broadly construed exception where the well-being of the mother is at stake. Put differently, statements on the content of Jewish law have stood up well to the push and pull of the abortion wars.

And yet, at the same time, the legal approaches taken by various organizations have waxed and waned with the fluctuations of constitutional doctrine over time. Indeed, changes in prevailing law and politics demonstrate the challenges of mapping minority theology on to the changing politics at the crossroads of abortion and religious liberty. In the pre-*Dobbs* era, religious exemptions found a home within some traditionalist Jewish groups, while progressive Jewish groups discounted their constitutional validity. In the post-*Dobbs* era, the roles appear to have reversed, with progressive Jewish groups seizing the mantle of religious exemptions, while the advocacy of some traditionalist Jewish groups has become more muted. These shifts seem only natural in light of the demise of *Roe* and the expansion of religious liberty rights.

The vicissitudes of constitutional trends also explain why some Jewish groups have chosen to stay out of the abortion wars. Jewish law does not coincide fully with either a pro-choice or a pro-life view; and constitutional litigation, with its inner logic of winner takes all, may not serve the purposes of a minority faith tradition that lives between the battle lines.

All told, the story of Jewish religious liberty advocacy on abortion captures the dilemma of maintaining the consistency and integrity of minority legal advocacy amidst ongoing culture wars. The challenges

inherent in this advocacy have led some to simply eschew the project altogether—and, given the alternatives, one can certainly understand why. For those who choose to enter the fray, remaining consistent not only with respect to theological, but also constitutional, commitments may simply be too tall an order. If the law rarely remains static, maybe we should expect nothing different from legal advocacy.