# PRACTICAL PIETY: DIVINING RELIGION'S ROLE IN REPRODUCTIVE POLICYMAKING

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ABSTRACT

*By examining the regulation of family planning in three governmental contexts—theocracy, ethnoreligious democracy, and secular liberal democracy—this Article contends that the secular liberal democracy overreaches both when it adopts disingenuous legislative rationales simply to avoid the appearance of promoting religion and when it judicially dismantles general welfare legislation based solely on a burden that it imposes on a tertiary religious doctrine. These phenomena short-circuit the democratic process. The former deprives lawmakers and their constituents of the opportunity to evaluate the true motivations behind a proposed bill. If a proposal is religiously inspired, its palatability to a religiously pluralistic society should be evaluated for the normative value that religious doctrine purportedly promotes, not some post hoc rationale developed solely to satisfy constitutional scrutiny. The latter's invalidation of duly enacted, generally applicable legislation to protect even the most ancillary forms of religious expression transforms the judiciary into a religious tribunal. This both contravenes notions of religious freedom that undergird these democracies and places judges in the impossible position of selecting which religious doctrines deserve legal protection. A task best left to the legislative process.*

CONTENTS



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## INTRODUCTION

Quantifying religion's influence on liberal democratic governance is a tall order. Far from the top-down mandates of a theocracy or even the bottom-up consensus of a religiously homogenous democracy, religious pluralism often obfuscates the appearance of religious influence in the legal decision-making of secular democracies. But an absence of immediately apparent influence is hardly evidence of religious detachment. Similarly, the structural cues that a theocracy or ethnoreligious democracy might send may prove misleading concerning a legal or policy decision's guiding logic. Simply put, governmental structure only tells part of the story—an important part, to be sure, but nevertheless incomplete. For the latter, government's explicit religiosity threatens to overshadow the often-pragmatic rationales that guide legal decision-making. Conversely, the former's secularity provides convenient cover for religiously motivated lawmaking, thereby eluding the scrutiny of courts and constituents.

By examining the regulation of family planning in these three governmental contexts, this Article discusses the complexity that comparative structuralism overlooks. Though governmental structure inarguably reflects one society's belief concerning the true source of state power,[1] understanding religion's influence over a nation's policy decisions

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[1] *Compare* U.S. CONST., Preamble ("We the People of the United States. . .") *with* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], pmbl. (The Form of Governance in Islam) ("In the view of Islam, government does not derive from the interests of a class, nor does it serve the domination of an individual or a group. Rather, it represents the fulfillment of the political ideal of a people who bear a common faith and common outlook, taking an organized form in order to initiate the process of intellectual and ideological evolution towards the final goal, i.e., movement towards Allah.").

urges the supplementation of a more individualized, purposive assessment. In the context of regulating reproduction, this additional layer of analysis provides notable insight into the sometimes-paradoxical relationship between governmental structure and policymaking. For the theocracy and the ethnoreligious democracy, the seeming ideological consensus concerning the divine (or at the very least, religiously/ethnically homogenous) source of state power appears to free policymakers to rationalize decisions by referencing the often-areligious ends that the underlying religious doctrine exists to facilitate. By contrast, the legal separation of church and state[2] presents unique challenges to lawmakers looking to adopt similar policies in a secular democracy. Additionally, the protection of religious pluralism requires lawmakers to refrain from the adoption of policies promoting religious doctrine while simultaneously avoiding legislation that burdens the exercise of any other religion.[3] The resulting paradox is especially visible in the regulation of reproduction.

Stopping well short of endorsing religious or ethnic homogeneity as the structural ideal for the state, this Article suggests that the secular democracy goes too far both when it adopts disingenuous legislative rationales for the sole purpose of avoiding the appearance of promoting religion and when it judicially dismantles general welfare legislation based solely on a burden that it imposes on a tertiary religious doctrine. These phenomena short-circuit the democratic process. The former deprives lawmakers and their constituents of the opportunity to evaluate the true motivations behind a proposed bill. If a proposal is religiously inspired, its palatability to a religiously pluralistic society should be evaluated vis-à-vis the normative value that religious doctrine purportedly promotes, not some post hoc rationale developed solely to satisfy constitutional scrutiny. Meanwhile, the invalidation of properly enacted, generally applicable legislation under the auspices of protecting religious groups elevates the judiciary to the position of high council on religion. Not only is such a position antithetical to notions of religious freedom that undergird secular democracies, but it also puts judges in the impossible position of selecting which religious doctrines are entitled to legal protection and those which are not. Such an assessment, this Article argues, is better left to the legislative process.

This Article proceeds in four Parts. The first three parts evaluate the regulation of procreation in three different countries. Each part contains three sections: (1) an overview of that country's governmental structure, (2) a discussion of religion's role in its national narrative, and (3) an analysis of the rationales underlying that country's efforts of procreation. This Article

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[2] *See* U.S. CONST., amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ").

[3] *See id.*

begins in Part I with the Islamic Republic of Iran. Part II then looks to the State of Israel. Part III discusses the United States of America (U.S.). This Article concludes by expounding upon the previously discussed view that secular democracies like the U.S. fall short of their pluralistic ideals by substituting searching judicial review for legislative deliberation concerning sensitive policy matters in which religious values are more likely to be triggered.

## I. REGULATING PROCREATION IN A THEOCRACY

As an example of a modern theocracy, this Article looks to the Islamic Republic of Iran. The Islamic Republic was established in 1979 following the Islamic Revolution, a populist anti-imperial uprising led by the late Ayatollah Ruhollah Khomeini that culminated in the removal of the Western-backed Pahlavi monarchy and the eventual ratification of Iran's modern constitution.[4] Adopted by popular referendum, the Constitution of the Islamic Republic of Iran rejects the separation of church and state in favor of a theocratic state.[5] It establishes a system of government based on the Islamic faith[6] and declares that "[a]bsolute sovereignty over the world and the human being belongs to God."[7] The subsequent sections of this Part examine the impact of this religious mandate on the Iranian governmental structure, the role of Islam in the Islamic Republic's national narrative, and finally, the impact that these realities have on the government's consideration and adoption of policies regulating female reproductive autonomy.

### *A. Iranian Governmental Structure*

To call Iran's governmental scheme complex would be a gross understatement.[8] It is a vast, intertwined web of checks and balances fixed

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[4] *See* Janet Afary, *Iranian Revolution of 1978-79*, ENCYCLOPEDIA BRITANNICA (last updated May 31, 2013), https://www.britannica.com/event/Iranian-Revolution-of-1978-1979.

[5] *See* Said Amir Arjomand, "Constitution of the Islamic Republic," ENCYCLOPEDIA IRANICA, VI/2, pp. 150-58, http://www.iranicaonline.org/articles/constitution-of-the-islamic-republic (last updated Oct. 28, 2011) ("[T]he major objective of the constitution: elimination of the traditional duality between political and religious authority . . . "); *see also* Greg Bruno, *Religion and Politics in Iran*, COUNCIL ON FOREIGN RELATIONS (June 19, 2008), http://www.cfr.org/iran/religion-politics-iran/p16599.

[6] *See* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 2.

[7] *Id.* art. 56.

[8] *See* Gregory F. Giles, *The Crucible of Radical Islam*, in KNOW THY ENEMY: PROFILES OF ADVERSARY LEADERS AND THEIR STRATEGIC CULTURES 141-42 (Barry R. Schneider & Jerrold M. Post eds., 2d ed. 2003) ("Iran's system of governance is complex and does not readily lend itself to simple description.").

within a distinctive blend of traditional parliamentary institutions and uniquely theocratic ones.[9] Modern Iran boasts "a system of government that combines elements of Islamic theocracy with bits of democracy."[10] The purpose of this section is merely to provide an overview. A basic understanding of the institutions comprising the Islamic Republic will provide useful context in the examination of how the Iranian government deliberates and crafts policy regulating reproduction.

Atop the governmental hierarchy rests the Supreme Leader of Iran, which is currently Ayatollah Ali Khamenei—the second Supreme Leader since the Islamic Revolution.[11] Ayatollah Khamenei is considered the "single most powerful individual" in Iran.[12] He is the chief executive and military commander, endowed with power to confirm or reject the country's presidential election results, appoint the head of the judiciary, choose six of the twelve members comprising Iran's Guardian Council, and select the commanders of the armed forces.[13] The Supreme Leader also selects the leaders of the Iranian media.[14]

Ayatollah Ruhollah Musavi Khomeini, Iran's first Supreme Leader and constitutional architect, envisioned his role as that of *faqih*, or Islamic jurist.[15] Per Khomeini, the Supreme Leader ensures governmental compliance with Islamic law by supervising the executive, legislative, and judicial branches.[16] One scholar describes the role of the modern Supreme Leader more as governmental shepherd than high commander, ruling Iran "by consensus rather than decree, with his own survival and that of the theocratic system as his top priorities."[17] Though the Supreme Leader is constitutionally superior

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[9] *See Explainer: Iran's Complex Political System*, AL JAZEERA (Feb. 28, 2012), http://www.aljazeera.com/indepth/features/2012/02/201222715367216980.html; *The Structure of Power in Iran*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/tehran/inside/govt.html (last visited Dec. 31, 2020).

[10] Bruno, *supra* note 5.

[11] *Id.*

[12] *Id.* (quoting KARIM SADJADPOUR, READING KHAMENEI: THE WORLD VIEW OF IRAN'S MOST POWERFUL LEADER 1 (2009)).

[13] SADJADPOUR, *supra* note 12, at 7; *see also Guide: How Iran is Ruled*, BBC NEWS (last updated June 9, 2009), http://news.bbc.co.uk/2/hi/middle_east/8051750.stm (last updated June 9, 2009).

[14] *Guide: How Iran is Ruled*, *supra* note 13.

[15] *See* Bruno, *supra* note 5; *see also* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 5.

[16] Bruno, *supra* note 5.

[17] SADJADPOUR, *supra* note 12, at 1; *accord* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], pmbl. (Governance of the Just Jurisprudent) (describing the Supreme Leader as one whose "leadership protects various institutions against deviations in fulfilling their authentic Islamic responsibilities").

to all other branches, including the President, his influence rests on a narrow but sliding scale, impacted by factors including presidential charisma on the global stage, national economic performance, and even parliamentary composition.[18]

The Supreme Leader is chosen by the Assembly of Experts.[19] The body consists of 86 members charged with supervising and, at least theoretically, removing the Supreme Leader should it find his performance unsatisfactory.[20] Assembly members serve eight-year terms and are chosen by popular election; however, candidates must be clerics approved by the Guardian Council.[21]

The Guardian Council is perhaps the most influential body of all.[22] In addition to vetting candidates for the Assembly of Experts, the Council retains the right to veto legislation deemed incompliant with Islamic law, as well as disqualify parliamentary candidates.[23] The body's twelve members include six theologians hand-selected by the Supreme Leader and six jurists chosen by the judiciary and confirmed by parliament.[24] Council members serve six-year terms, and the selection process is staggered so that half the body is replaced every three years.[25]

The Iranian parliament, or Majlis, consists of 290 popularly elected members from the country's thirty provinces.[26] Each serves a four-year

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[18] *See* SADJADPOUR, *supra* note 12, at 1-2.

[19] Bruno, *supra* note 5; *Guide: How Iran is Ruled*, *supra* note 13; *see also* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 107 (providing for the various powers and responsibilities of the Supreme Leader and Leadership Council).

[20] Bruno, *supra* note 5; *Guide: How Iran is Ruled*, *supra* note 13; *see also* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 111.

[21] Bruno, *supra* note 5; *Guide: How Iran is Ruled*, *supra* note 13; *see also* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 107 (providing for the various powers and responsibilities of the Supreme Leader and Leadership Council).

[22] *See generally* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], arts. 91-99 (providing the constitutional basis for the extensive powers of the Guardian Council).

[23] *Id.*; *see also* Saeed Kamali Dehghan, *Iran Elections: Why Are They Important, and Who is Running?*, THE GUARDIAN (Feb. 23, 2016, 2:00 PM), https://www.theguardian.com/world/2016/feb/23/iran-elections-why-are-they-important-and-who-is-running.

[24] Bruno, *supra* note 5; *Guide: How Iran is Ruled*, *supra* note 13.

[25] *Guide: How Iran is Ruled*, *supra* note 13.

[26] Bruno, *supra* note 5; *Guide: How Iran is Ruled*, *supra* note 13; *see generally* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358

term.[27] As noted above, candidates and legislation must be cleared by the Guardian Council.[28] When a dispute arises between the Majlis and the Guardian Council, the Expediency Council—a product of 1988 constitutional amendment—steps in and resolves it.[29] The Expediency Council is comprised of theologians, academics, and political figures appointed by the Supreme Leader.[30]

The President's power is second only to that of the Supreme Leader.[31] Chosen by popular vote (subject to Supreme Leader approval), the President may serve up to two consecutive four-year terms.[32] The Iranian constitution mandates that the President "be elected from among the religious and political elite" —namely, a Shiite Muslim, native-born Iranian national with leadership experience, an untarnished record, and a commitment to the "fundamentals of the Islamic Republic."[33] The President is supported by a cabinet,[34] or Council of Ministers, whom the President nominates and the Majlis must confirm.[35]

Finally comes the judiciary.[36] The Iranian constitution describes the judiciary as "an independent power that protects individual and social rights and is responsible for actualizing justice."[37] Under the leadership of the head of the judiciary—whom the Supreme Leader selects—the Ministry of Justice is responsible for the establishment and maintenance of the judicial system, the enforcement of Islamic law, and the resolution of legal grievances.[38] At the top of the judiciary is the Supreme Court, which supervises the lower courts, maintains procedural consistency, and ensures the accurate

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[1980], ch. 6 (The Legislative Power).

[27] QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 63.

[28] *See Guide: How Iran is Ruled*, *supra* note 13.

[29] Bruno, *supra* note 5; *Guide: How Iran is Ruled*, *supra* note 13; *see also* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 112.

[30] Bruno, *supra* note 5; *Guide: How Iran is Ruled*, *supra* note 13.

[31] *See* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 113.

[32] *Id.* art. 114.

[33] *Id.* art. 115; *see also* Bruno, *supra* note 5; *Guide: How Iran is Ruled*, *supra* note 13.

[34] *See* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 124.

[35] *Guide: How Iran is Ruled*, *supra* note 13.

[36] *See generally* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980, ch. 11 (The Judiciary).

[37] *Id.* art. 156.

[38] *See id.* arts. 156-159; *see also id.* The Judiciary in the Constitution; *Guide: How Iran is Ruled*, *supra* note 13.

enforcement of Iranian law.[39]

In sum, the Iranian government is intentionally convoluted.[40] The result is what one scholar describes as a "constant state of maneuver and negotiation" between debating factions, thereby achieving an almost paradoxical sense of political stability.[41] It is with this not-so-basic structure in mind that this Article next considers Islam in the Iranian national narrative.

### *B. The Islamic Republic: Religion in Revolutionary Iran*

Islam's influence in the Iranian Revolution and ensuing Islamic Republic is neither a clear nor fixed quantity. Granted, the Iranian constitution is infused with Islamic theology, with nearly every passage supported by one or more Quranic references.[42] But this picture blurs against the backdrop of political discontent that sowed the seeds of rebellion.

Prior to the 1979 revolution, the Pahlavi dynasty governed Iran.[43] Established in 1925 by Reza Shah Pahlavi, the dynasty's policies largely aimed to rid the country of foreign influence and slowly westernize its political and economic systems.[44] Yet the dynasty would suffer a brief disruption only a couple decades into its rule. After the British and Russian military occupation in 1941 led to Reza Shah's exile, tension between the dynasty—headed at the time by Reza Shahs' son, Mohammad Reza—and Iranian nationalists began to intensify.[45] Matters escalated in 1951, with the election of Mohammed Mosaddeq, whose successful nationalization of Iran's oil industry led to Mosaddeq's appointment as Premier of Iran and the eventual ouster of the shah.[46] But in 1953, the CIA, with the support of

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[39] *See* Qanuni Assassi Jumhurii Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], art. 161.

[40] *See* Giles, *supra* note 8, at 143 ("By design, Iran's formal government structure is decentralized and power is relatively dispersed.").

[41] *Id.*

[42] *See generally* Qanuni Assassi Jumhurii Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980].

[43] Bruno, *supra* note 5; *see also Mohammad Reza Shah Pahlavi: Shah of Iran*, Encyclopedia Britannica (last updated Dec. 15, 2016), https://www.britannica.com/biography/Mohammad-Reza-Shah-Pahlavi.

[44] *See* Hassan Arfa, *Reza Shah Pahlavi: Shah of Iran*, Encyclopedia Britannica (last updated Nov. 9, 2016), https://www.britannica.com/biography/Reza-Shah-Pahlavi; *see generally* Cyrus Ghani, Iran and the Rise of the Reza Shah; From Qajar Collapse to Pahlavi Power (2001) (recounting the rise of Reza Shah and the British-backed coup that led to the ouster of the Qajar dynasty and establishment of the Pahlavi dynasty).

[45] *Mohammad Reza Shah Pahlavi*, *supra* note 43.

[46] *See id.*; *Mohammad Mosaddegh: Premier of Iran*, Encyclopedia Britannica (last updated Dec. 15, 2016), https://www.britannica.com/biography/Mohammad-Mosaddeq; *see also* Saeed Kamali Dehghan & Richard Norton-Taylor, *CIA Admits Role in 1953 Iranian*

Britain's MI6, orchestrated a coup d'état, removing Mosaddeq and his National Front Party from power and restoring the pro-western Pahlavi dynasty to power.[47]

Such a tumultuous history complicates the assessment of religion's role in Iran's revolutionary narrative. Its theocratic achievement notwithstanding, the Iranian Revolution and the Islamic Republic it birthed was hardly monolithic. The revolution was fomented not only by Islamists whom the shah had marginalized during his reign, but also by Communists, indigenous peoples, and liberal nationalists.[48] Ayatollah Khomeini would ultimately "muscle aside" these groups following the shah's successful removal.[49] From there, the eventual Supreme Leader would proceed to weave Shia Islam into the nation's political fabric.[50] As noted above, the most critical element of this process was Khomeini's idea of *velayat-e faqih*, or "governance of the jurisprudent," which placed the Supreme Leader at the forefront of the nation's political discourse,[51] thereby keeping Iran on course toward its constitutionally "ultimate goal" of "movement toward God."[52]

The anti-colonial tenor of Iran's constitution further confuses the analysis. In the section entitled "The Dawn of the Uprising," the constitution suggests that opposition to the "White Revolution" of the American-backed shah was the true "catalyst" for revolution, framing it as "a step toward strengthening the foundations of tyranny and increasing Iran's political, cultural, and economic dependency on world imperialism."[53] As one scholar explains:

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*Coup*, THE GUARDIAN (Aug. 19, 2013), https://www.theguardian.com/world/2013/aug/19/cia-admits-role-1953-iranian-coup.

[47] *See* Dehghan & Norton-Taylor, *supra* note 46; Bruno, *supra* note 5; *accord* Malcolm Byrne, *CIA Confirms Role in 1953 Iran Coup*, NAT'L SEC. ARCHIVE ELEC. BRIEFING BOOK NO. 435 (Aug. 19, 2013), http://nsarchive.gwu.edu/NSAEBB/NSAEBB435/.

[48] *See* Bruno, *supra* note 5; *see generally* MANSOOR MOADDEL, CLASS, POLITICS, AND IDEOLOGY IN THE IRANIAN REVOLUTION (1993) (discussing the role of class politics and group power struggles in the Iranian Revolution and the Islamic Republic's failure to achieve political democracy).

[49] *See* Bruno, *supra* note 5.

[50] *See id.*

[51] *See id.*; QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], pmbl. (Islamic Gov't, Governance of the Just Jurisprudent (Faqih)) (English translation from *Constitution of the Islamic Republic of Iran 1979*, WORLD INTELL. PROP. ORG., https://www.wipo.int/edocs/lexdocs/laws/en/ir/ir001en.pdf (last visited Dec. 31, 2020) [hereinafter WIPO Iranian Constitutition (English)]).

[52] QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], pmbl. (Form of Gov't in Islam) (translation from WIPO Iranian Constitution (English)).

[53] QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] pmbl. (The Dawn of the Uprising) (translation from WIPO

> The 'White Revolution' was intended to be a bloodless revolution from above aimed at fulfilling the expectations of an increasingly politically aware general public as well as the ambitious and growing professional socio-economic group, and as such anticipating and preventing what many considered to be the danger of a bloody revolution below.[54]

This "bloodless revolution" consisted of a series of reforms aimed at social, economic, and political modernization.[55] These included land reform, the enfranchisement of women, and the expansion of literacy.[56] The most controversial of these was land reform, which "curtailed the power of feudal lords, converted the peasantry into either small landowners or rural proletariat who then migrated to cities, developed commodity relations in the countryside, and expanded communications between villages and cities and within the countryside in general."[57] Though the result was a more robust middle class, the fallout from the shah's reforms landed almost squarely on the backs of the clergy, landowners, and local merchants[58]—groups that the shah had aggressively courted in his reconsolidation of power following the 1953 coup.[59]

The constitution's clarion call to religious fulfillment thus fails to fully explain the impetus for the Iranian Revolution. In fact, many clerics remained divided about the need of revolution, much less Iran's compatibility with Khomeini's vision of *velayat-e faqih*.[60] Bubbling just beneath the revolution's Islamic religious façade was an uprising sparked by the scourge of betrayal, economic uncertainty, and international meddling.[61] Khomeini's repeated calls for beating back Western imperialism and protecting individual liberty therefore proved an effective means of mobilizing the broader Iranian

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Iranian Constitution (English)).

[54] Ali M. Ansari, *The Myth of the White Revolution: Mohammad Reza Shah, 'Modernization' and the Consolidation of Power*, 37 MIDDLE EASTERN STUD., Jul. 2001, at 2.

[55] *See id.*

[56] Asef Bayat, *Revolution Without Movement, Movement Without Revolution: Comparing Islamic Activism in Iran and Egypt*, 40 COMP. STUD. IN SOC'Y & HIST. 136, 148 (1998).

[57] *Id.*

[58] *See id.* at 149-50.

[59] *See* James Goode, *Reforming Iran During the Kennedy Years*, 15 DIPLOMATIC HIST. 13, 14 (1991).

[60] Arang Keshavarzian, *How Islamic Was the Revolution?*, MIDDLE EAST REP, Spring 2009, at 12.

[61] *See id.*

population against the shah.[62] And their efficacy persists today.[63] The constitution's own aspirational calls for political equality and social justice[64] likewise hint at an Iranian story that is far more diverse than critics of the regime or the Supreme Leader himself dare suggest.[65]

Fundamentally, Islam appears to fit, not above, but *within* a complex blend of values that comprise Iran's revolutionary narrative.[66] But as the next section shows, this sophisticated relationship among religion, government, and Iranian culture plays a curious role in the nation's regulation of reproduction.

### *C. Family Planning in Revolutionary Iran*

Iranian policy on family planning has undergone marked change in the decades since the Iranian Revolution. Against the backdrop of the prior two sections, this section analyzes the Islamic Republic's complicated relationship to gender, family, and reproduction. Before its fall, the Pahlavi dynasty's White Revolution included a policy aimed at raising women's non-domestic status in Iranian society.[67] The shah accomplished this in part by increasing the availability of contraception in hopes of lowering fertility.[68] But this would change under the new regime of the Islamic Republic.

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[62] *See id.*; Bruno, *supra* note 5; *accord* Michael Dodson & Manochehr Dorraj, *Populism and Foreign Policy in Venezuela and Iran*, 9 WHITEHEAD J. OF DIPL. & INT'L REL. 71, 78 (2008) ("Regionalism also complemented the pan-Islamic ideology of the new regime with its populist, anti-imperialist and developing world solidarity proclivities.").

[63] *See, e.g.*, Michael Crowley, *Iran's Anti-U.S. Conspiracies*, POLITICO (May 1, 2015, 4:36 PM), http://www.politico.com/story/2015/05/irans-anti-us-conspiracies-117509; Hamid Dabashi, *Mossadegh and the Legacy of Non-Aligned Movement*, AL JAZEERA (Aug. 26, 2012), http://www.aljazeera.com/indepth/opinion/2012/08/201282681749809950.html.

[64] *See* QANUNI ASSASSI JUMHURII ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] arts. 2-3 (translation from WIPO Iranian Constitution (English)) (calling for "the negation of all kinds of oppression, authoritarianism, or the acceptance of domination, which secures justice, political and economic, social, and cultural independence and national unity" and "the securing of all-inclusive rights for everyone, man and woman, and the creation of judicial security for everyone, equality for all before the law," among other things).

[65] *See* Naghmeh Sohrabi, *The "Problem Space" of the Historiography of the 1979 Iranian Revolution*, History Compass (Nov. 9, 2018).

[66] *See* Keshavarzian, *supra* note 60 ("While both the regime and its opponents abroad seek to dress the revolution solely in the garb of Ayatollah Khomeini, in popular memory the revolution is woven of many threads.").

[67] *See* Nahid Talebi, SHAH MOHAMMAD REZA PAHLAVI OF IRAN: A PSYCHOHISTORICAL ANALYSIS FOCUSED ON HIS INTEREST IN WOMEN'S RIGHTS 69, 178-82 (1994).

[68] Mohammad Jalal Abbasi-Shavazi et al., *Family Change and Continuity in Iran: Birth Control Use Before Pregnancy*, 71 J. MARRIAGE & FAM. 1309, 1312 (2009).

The Iranian constitution addresses women specifically. In the section of the preamble entitled "Women in the Constitution," the nation's charter characterizes women as victims of "multifaceted foreign exploitation" and despotic oppression.[69] Rejecting the shah's White Revolution, it declares the primacy of the family unit as the "essential center for the growth and grandeur of men," calling upon the new government to invest in the family both as the primary source of human growth and development, as well as an effective means of social conformity.[70] The section concludes:

> In accordance with this view of the family unit, women are emancipated from the state of being an "object" or a "tool" in the service of disseminating consumerism and exploitation, while reclaiming the crucial and revered responsibility of motherhood and raising ideological vanguards. Women shall walk alongside men in the active arenas of existence. As a result, women will be the recipients of a more critical responsibility and enjoy a more exalted and prized estimation in view of Islam.[71]

The early manifestations of Iranian women's newfound liberation consisted of several conservative reforms aimed at purging the nation of any pro-western taint left by the ousted regime.[72] These included Islamic dress codes, public segregation of the sexes, and the social exaltation of the domestic woman, who married young and immediately entered motherhood.[73] However, the new regime's rejection of the shah's policies was more nuanced than a mere imposition of Islamic doctrine: "Family planning was labeled an imperialist plot to reduce the number of Muslims."[74] Even at the dawn of its reign, the Islamic leadership justified its new policies, not by religious decree, but by channeling the plurality of revolutionary sentiments that had elevated the new regime to power.[75]

A subsequent spike in fertility and drop in oil prices forced the Islamic Republic to reassess its family planning policies.[76] This would prove difficult, however, at least rhetorically. As Ayatollah Khomeini and other

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[69] *See* Qanuni Assassi Jumhurii Islami Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], pmbl. (Women in the Constitution) (translation from WIPO Iranian Constitution (English)).

[70] *See id.*

[71] *Id.*

[72] *See* Abbasi-Shavazi, *supra* note 68, at 1312 ("tumultuous and focused on the rejection of nearly everything Western").

[73] *Id.*

[74] *Id.*

[75] *See* Keshavarzian, *supra* note 60, at 12.

[76] *See* Abbasi-Shavazi, *supra* note 68, at 1312.

religious leaders pondered the reinstatement of the shah's comparatively liberal birth control policy, they took steps to recast family planning, not as the western conspiracy it had previously been, but as inherently Islamic and therefore laudable.[77] That is, limiting offspring to a fiscally manageable number was not only acceptable, but the duty of all Muslim families.[78] In so doing, the Islamic Republic was able to preserve its religious veneer and continue speaking to its broader revolutionary audience, even in the face of changing circumstances that required a more pragmatic policy response.[79]

The Islamic Republic has reversed course in recent years. Faced with a plummeting fertility rate and 70 percent of its population below the age of 35, Iran has begun altering its view of family planning once again.[80] In a lead-up to a proposed ban on voluntary vasectomies, increased abortion restrictions, and more limited contraceptive access,[81] Ayatollah Khamenei channeled a slightly subdued version of his predecessor's anti-imperialist ire, criticizing contraceptive use as an imitation of the so-called Western lifestyle,[82] but stopping short of dogmatic proclamations or claims of

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[77] *See id.* (quoting Homa Hoodfar & Samad Assadpour, *The Politics of Population Policy in the Islamic Republic of Iran*, 31 STUD. FAM. PLAN. 19, 28 (2000)).

[78] *See* Abbasi-Shavazi, *supra* note 68, at 1313; *accord* Heshmat Sadat Moinifar, *Religious Leaders and Family Planning in Iran*, 11 IRAN & CAUCASUS 299, 301 (2007) ("It is accepted in Islam that family planning or the planning of births enhances the family's well-being. The Qu'ran does not prohibit birth control, nor does it forbid a husband or wife to space pregnancies or limit their number. The vast majority of Islamic jurists believe that family planning is permissible under the condition that the actions taken in that direction do not violate any prohibition of the Qu'ran or the *Sunnat*.").

[79] *See* Abbasi-Shavazi, *supra* note 68, at 1313.

[80] *See* Saeed Kamali Dehghan, *Iran Aims to Ban Vasectomies and Cut Access to Contraceptives to Boost Births*, THE GUARDIAN (Mar. 10, 2015), https://www.theguardian.com/world/2015/mar/11/iran-ban-voluntary-sterilisation-contraceptive-access-block-boost-population; Lucy Westcott, *Iran's Plan to Boost Declining Birth Rate? Block Access to Birth Control*, NEWSWEEK (Mar. 11, 2015, 12:44 PM), http://www.newsweek.com/irans-plan-boost-declining-birth-rate-block-access-birth-control-312984.

[81] *See* Wescott, *supra* note 80; Helen Regan, *Iran Mulls Laws That 'Reduce Women to Baby-Making Machines,' Says Amnesty*, TIME (Mar. 11, 2015), http://time.com/3740201/iran-population-draft-laws-family-planning-birth-control-amnesty-international-report/; *see also* AMNESTY INT'L, YOU SHALL PROCREATE: ATTACKS ON WOMEN'S SEXUAL AND REPRODUCTIVE RIGHTS IN IRAN 6 (2015), https://www.amnesty.org/en/documents/MDE13/1111/2015/en/ (discussing the specific bills under consideration in greater detail).

[82] *See* Saeed Kamali Dehghan, *Iran Considers Ban on Vasectomies in Drive to Boost Birthrate*, THE GUARDIAN (Apr. 15, 2014), https://www.theguardian.com/world/2014/apr/15/iran-ban-vasectomies-birthrate; Elahe Izadi, *Iran Bans Vasectomies, Wants More Babies*, WASH. POST (Aug. 12, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/08/12/iran-bans-vasectomies-wants-more-babies/?utm_term=.99a5d1abee16.

Western-orchestrated conspiracies.[83]

The regime's rhetorical restraint in the advancement of this rollback of progressive reforms is noteworthy for three interrelated reasons. First, it suggests that the government is likely all too aware of the increasingly progressive, secular, and pro-Western bent of Iran's young people, which comprise an overwhelming majority of the country's population.[84] This consciousness undoubtedly informs the rationales that an Iranian leadership interested in preserving its own power uses to justify policy decisions. Second, with the Iranian Revolution and its clear socioeconomic underpinnings still in recent memory, those at the helm are keenly aware of the importance of maintaining economic stability[85]—a critical balance that would benefit from greater political dexterity than that which Khomeini left himself by initially painting family planning as an anti-Muslim conspiracy.[86] Third, religious doctrine tends to lack the necessary plasticity to address dynamic concerns regarding population control and economic stability.[87] This is particularly notable considering the increased skepticism with which religious proclamations are likely to be received by Iran's younger population, as well as the immense political cost that another doctrinal pivot would reap, even among more religious constituents.[88]

In sum, the Islamic Republic's revolutionary roots appear to be steadily ossifying. The religious and anti-colonial fervor that once guided Iran's family planning policies seems slowly to be giving way to the pragmatism necessary for institutional credibility among its younger population. Such functional self-awareness offers a potential lesson to secular democracies that

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[83] *See* Abbasi-Shavazi, *supra* note 68, at 1313.

[84] *See* Slater Bakhtavar, *Millennial Iranians Bring Back Their Persian Roots*, FORBES (Nov. 18, 2016, 10:58 AM), http://www.forbes.com/sites/realspin/2016/11/18/millennial-iranians-bring-back-their-persian-roots/#39c6e65767d7 (noting that "a majority of Iran's population is young, progressive, and, unlike its government, not at all hostile towards the West"); Bill Spindle, *Iran's Legions of Weary Young People Push Against Old Ways*, WALL ST. J. (July 7, 2015, 10:55 PM), http://www.wsj.com/articles/irans-legions-of-weary-young-people-push-against-the-old-ways-1436323115 ("[H]ard-liners who have dominated Iran for a decade are bumping up against another force: Iran's rambunctious youth, most born long after the 1979 revolution. More than half of Iran's 75 million people are under 35 years old. Many are weary of overweening religious edicts, economic mismanagement and isolation brought by a decade of international sanctions.").

[85] *See* Shefali S. Kulkarni, *Iran May Ban Vasectomies, Cut Access to Contraceptives to Boost Births*, PUB. RADIO INT'L (Mar. 11, 2015), http://www.pri.org/stories/2015-03-11/iranian-parliament-considers-two-new-bills-would-greatly-restrict-fertility (noting the primacy of economic considerations in deciding whether to have children).

[86] Abbasi-Shavazi et al., *supra* note 68, at 1312.

[87] *See* Hoodfar & Assadpour, *supra* note 77, at 20, 22-23.

[88] Spindle, *supra* note 84.

lack the persistent interest in maintaining a specific religious gloss.

## II. Regulating Procreation in an Ethnoreligious Democracy

Israel's status both as a Jewish state and a democracy makes it an apt case study for determining the role of a state-endorsed religion or ethnicity in an otherwise-democratic state's decision-making. Established in 1948 in the aftermath of World War II and the Holocaust, the State of Israel marked the end of a two-millennia diaspora during which Jewish people fervently awaited their eventual return to their homeland.[89] Like the revolutionary narrative of the Islamic Republic, the painstaking, often-antagonistic process by which modern Israel came into being has come to play a similarly prominent role in the nation's political process. And yet, their manifestations are markedly different, especially concerning the regulation of the family and reproductive autonomy. The subsequent sections of this Part proceed in similar fashion to the previous one. Following a brief structural overview of the Israeli government and discussion of Israel's ethnoreligious national narrative, this Article will again turn to the issue of regulating procreation and assess the role that narrative plays in its lawmaking process.

### *A. Israeli Governmental Structure*

Israel lacks a formal written constitution.[90] Though the First Knesset was originally tasked with preparing a national charter, its early dissolution left that job to future Knessets, which would adopt a series of Basic Laws over the following decades.[91] These Basic Laws establish Israel's parliamentary form of government,[92] form an independent judiciary,[93] and relatively recently, recognize the centrality of human dignity and liberty to Israeli law.[94] Though originally envisioned as something well short of a formal

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[89] Sammy Smooha, *The Model of Ethnic Democracy: Israel as Jewish and Democratic State*, 8 Nations & Nationalism 475, 484 (2002).

[90] *See* Amnon Rubinstein, *Israel Studies an Anthology: Israel's Partial Constitution – The Basic Laws*, Jewish Virtual Library (2009), http://www.jewishvirtuallibrary.org/jsource/isdf/text/Rubinstein.html.

[91] *See id.*; *see also* The Existing Basic Laws: Full Texts (last visited Jan. 6, 2017), https://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm; The Existing Basic Laws: Summaries (last visited Jan. 6, 2017), https://knesset.gov.il/description/eng/eng_mimshal_yesod2.htm.

[92] *See* Basic Law: The Knesset (5718 - 1958), http://knesset.gov.il/laws/special/eng/BasicLawTheKnesset.pdf.

[93] *See* Basic Law: The Judiciary (5748 - 1984), http://knesset.gov.il/laws/special/eng/BasicLawTheJudiciary.pdf.

[94] *See* Basic Law: Human Dignity and Liberty (5752 - 1992), http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf.

constitution, the Basic Laws have nevertheless achieved a certain "constitutional status,"[95] manifesting a governmental system that one scholar calls a "hybrid" lying somewhere between the universes of parliamentary sovereignty and constitutional (or judicial) supremacy.[96]

Complicated constitutional development aside, Israel's governmental structure nevertheless remains a relatively familiar one vis-à-vis other parliamentary democracies. Organizationally, it does not necessarily tip its ethnoreligious hand.[97] Like Canada, Great Britain, or Australia, it consists of a legislature (the Knesset), executive, and judiciary.[98] And unlike the Iranian model, which essentially takes a parliamentary system and infuses both the electoral and policymaking process with religious checks, the Israeli system, like a typical parliamentary model, places the legislature at the center of the political process.[99]

The legislature thus provides an apt starting point. The Knesset is comprised of 120 seats, which are won through an electoral system of national proportional representation—a process whereby voters choose a party's slate of candidates rather than individuals vying to represent a particular geographic constituency.[100] Those parties receiving at least two percent of the popular vote are assigned a proportionate number of Knesset seats.[101] Representatives serve four-year terms and together exercise the power to enact laws by simple majority, as well as to remove the President.[102] Following parliamentary elections, the President, with the advice of the political parties,[103] nominates a candidate to be Prime Minister, who, once confirmed by majority vote, is tasked with forming a new government and serving as its chief executive.[104] Because no single party typically wins a

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[95] Justice Aharon Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4 CONST. F. 83, 83-84 (1993), https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/11986/9162.

[96] Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349, 406-07 (2012).

[97] *But see* Basic Law: Human Dignity and Liberty*, supra* note 94. ("The purpose of this Basic Law law is to protect human dignity and liberty, in order to stipulate the values of the State of Israel as a Jewish and democratic state, in a Basic Law.").

[98] Eben Kaplan & Caroline Friedman, *Israel's Political System*, COUNCIL ON FOREIGN RELATIONS (Feb. 11, 2009), http://www.cfr.org/israel/israels-political-system/p8912.

[99] *See* Oren Liebermann, *How Does Israel's Parliament Work?*, CNN (Mar. 14, 2015), http://www.cnn.com/2015/03/14/world/israel-knesset-explainer/.

[100] Kaplan & Friedman, *supra* note 98.

[101] *Id.*

[102] *Id.*

[103] Liebermann, *supra* note 99.

[104] *See* Kaplan & Friedman, *supra* note 98.

majority,[105] this requires coalition building and political shrewdness in assigning cabinet positions on the part of the Prime Minister.[106] Should the candidate fail to timely form a new government, parliament is dissolved and the electoral process begins anew.[107] The electoral and political structure of the Knesset thus makes political parties particularly important to the Israeli system[108]—both to the electorate who chooses from among them and to the lawmakers who must court them to form governing coalitions.[109]

With the Knesset at the center of the political machinery and the Prime Minister holding most executive power, the President's role is rather modest. Though endowed by *Basic Law: The President of the State* to sit "at the head of the State," the Israeli presidency is widely considered to be a largely ceremonial position carrying minimal power.[110] Elected to a single seven-year term by majority vote of the Knesset, the President's powers include the ability to sign laws and treaties adopted by the Knesset, accredit diplomatic representatives and swear in judges, and issue pardons and penalty reductions.[111] The President does retain a critically important role in selecting a Knesset Member to become Prime Minister and form a new government.[112] Even so, the President's role in daily governance remains relatively limited.

The final branch of the Israeli government is its judiciary. The Basic Laws

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[105] Liebermann, *supra* note 99.

[106] *See* Kaplan & Friedman, *supra* note 10098.

[107] *Id.* In fact, current Prime Minister Benjamin Netanyahu nearly missed his deadline to form a new government, narrowly securing the necessary 61-vote majority to move forward following the 2015 elections. *See* Jodi Rudoren, *Netanyahu Forms an Israeli Government, With Minutes to Spare*, N.Y. TIMES (May 6, 2015), http://www.nytimes.com/2015/05/07/world/middleeast/netanyahu-israel-coalition-government.html.

[108] *See* Ishaan Tharoor, *A Guide to the Political Parties Battling for Israel's Future*, WASH. POST (Mar. 14, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/03/13/these-are-the-political-parties-battling-for-israels-future/?utm_term=.6fd01dc5a4e3 (profiling ten political parties vying for Knesset seats in the 2015 elections).

[109] *See* Kaplan & Friedman, *supra* note 98.

[110] *See, e.g.*, Ricky Ben-David & Nira Yadin, *Natanyahu vs. the President—of Israel*, DAILY BEAST (Mar. 16, 2015), http://www.thedailybeast.com/articles/2015/03/16/netanyahu-vs-the-president-of-israel.html; Richard Gonzales, *Former Israeli President and Prime Minister Shimon Peres Hospitalized*, NPR (Sept. 13, 2016), http://www.npr.org/sections/thetwo-way/2016/09/13/493784567/former-israeli-president-and-prime-minister-shimon-peres-hospitalized; Peter Beaumont, *Reuven Rivlin Elected President of Israel*, GUARDIAN (June 10, 2014), https://www.theguardian.com/world/2014/jun/10/reuvin-rivlin-elected-president-israel.

[111] *See* Basic Law: The President of the State (1964), https://www.knesset.gov.il/laws/special/eng/basic12_eng.htm.

[112] Ben-David & Yadin, *supra* note 110; *see* Basic Law: The Government (1968), https://www.knesset.gov.il/laws/special/eng/basic1_eng.htm.

vest judicial power in both public and religious courts.[113] On the public side rests a familiar structure: Magistrates' Courts that sit as trial courts of general jurisdiction, intermediate District Courts that hear appeals from the Magistrates' Courts and retain original jurisdiction over select civil and criminal matters, and a Supreme Court sitting as the court of finality.[114] In addition to being the appellate court of last resort, it sits as a High Court of Justice, which allows the Court "to grant relief for the sake of justice" when such recourse is "necessary."[115] Meanwhile, religious courts retain jurisdiction over marital matters and are organized by religious belief (Judaism, Christianity, Islam, Baha'i, and Druze).[116] The independence of the judiciary is of critical importance, with *Basic Law: The Judiciary* expressly stating that "[a] person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law."[117] Additional insulation is provided by the selection process, whereby a nine-member Judges' Election Committee (JEC) appoints new judges.[118] The JEC includes both judges and legislators, as well as a select group of cabinet members and other representatives.[119] While judges are not appointed for life *per se*, their tenure ends only upon retirement, resignation, election to another position, or removal by either the JEC or the Court of Discipline.[120]

Structurally speaking, Israel's government hardly bears an ethnoreligious bent. A far cry from Iran's exceptionally complicated governmental scheme, Israel's tripartite parliamentary arrangement, with certain narrow exceptions, is a common one among secular and religious democracies alike.[121] Even so, Israel's national narrative, like that of Iran, plays a critical policymaking role—one that obscures its modest governmental veneer. The next section discusses the roots of this narrative and assesses its role against the backdrop of this common governmental system.

### *B. A Jewish State: Zionism in Israel's National Narrative*

The role of Zionism in Israeli policymaking and legal decision-making is

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[113] See Basic Law: The Judiciary, (1984) (Isr.), https://www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

[114] *See id.*; *Israel Judicial Branch: History & Overview*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/Politics/judiciary.html.

[115] Basic Law: The Judiciary, *supra* note 113, § 15(c).

[116] *See Israel Judicial Branch*, *supra* note 114.

[117] Basic Law: The Judiciary, *supra* note 113.

[118] *See* id., § 4(a)-(b)..

[119] *Id.*

[120] *See id.*, § 7(1)-(5).

[121] DON PERETZ & GIDEON DORON, THE GOVERNMENT AND POLITICS OF ISRAEL 173, 175-76 (3rd ed. 1997).

a complicated one. This section attempts to offer some clarity by providing an explanation of Zionist theory, its role in the ultimate achievement of statehood, and its residual influence in Israeli governance. Consider the following:

> From the perspective of both historical Judaism and Zionism, **Jews** are members of a policy built around a covenantal community linked by a shared destiny, a promised land, and a common pattern of communications whose essential community of interest and purpose and whose ability to consent together in matters of common interest have been repeatedly demonstrated. In traditional terms, **Judaism** is essentially a theopolitical phenomenon, a means of seeking salvation by constructing God's polity, the proverbial 'city upon a hill' through which the covenantal community takes on meaning and fulfills its purpose in the divine scheme of things. **Jewish peoplehood** has been the motivating force for communal life and creativity throughout the long history of the Jewish people. The power and pervasiveness of this force has certainly been demonstrated in our own time.[122]

The reclamation of Palestine was a pivotal moment toward the fulfillment of this ethnoreligious destiny.[123] Yet the pursuit of political sovereignty was not always a priority among the politically and geographically diverse Jewish community.[124] Zionist theorists were even divided concerning the propriety of such a pursuit.[125] However, later events would serve to catalyze a share of the community that saw statehood as indispensable to its survival.[126]

Yet even after Zionism achieved critical mass, the realization of statehood took time. It began with the 1917 Balfour Declaration, the British government's "declaration of sympathy" with the Zionist movement and support for "the establishment in Palestine of a national home for the Jewish people."[127] Two years later at the San Remo Conference following World

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[122] Daniel J. Elazar, *Israel as a Jewish State*, 2 JEWISH POL. STUD. REV. 3, 5 (1990) (emphasis in original).

[123] *See id.* at 6 ("The Jewish polity is worldwide in scope but partially territorial. It is more than a state, although a state is an essential part of it.").

[124] *See, e.g.*, Naomi Wiener Cohen, *The Reaction of Reform Judaism in America to Political Zionism (1897-1922)*, 40 PUBS. OF AM. JEWISH HIST. SOC. 361, 361-63 (1951) (examining the early opposition to Zionism among religious portions of the American Jewish community); Moses Rischin, *The Early Attitude of the American Jewish Committee to Zionism (1906-1922)*, 49 PUBS. OF AM. JEWISH HIST. SOC. 188, 188-200 (1960) (discussing the Committee's slow, reluctant acceptance of Zionism during the World War I period).

[125] Elazar, *supra* note 122, at 13.

[126] *See id.*

[127] Arthur James Balfour, *The Balfour Declaration*, ISR. MINISTRY OF FOREIGN AFF. (Nov. 2, 1917), https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20balfour%20

War I, the Supreme Council of the Principal Allied Powers (Britain, France, Japan, and Italy, with the U.S. observing) decided to incorporate the Balfour Declaration into the British Mandate.[128] In so doing, Britain committed itself to making good on the Declaration's promise. As one scholar explains, this was "a move which confirmed intentional recognition of the right of Jewish self-determination in the place known to the Jews as the Land of Israel."[129] It marked an unquestioned victory for the Zionist movement. The Supreme Council's support for a "national home" was more than a casual nod to Jewish statehood.[130] It was an endorsement by the world's foremost military powers.[131]

Remaining pieces of the Zionist vision would come into place within a few decades. "If there were some lingering doubts in the international community about the wisdom of a Jewish state, the German Nazi horrors of the Holocaust made abundantly clear its absolute necessity."[132] The passage of U.N. General Assembly Resolution 181 in 1947 formally recognized the "Jewish state" and set the decolonization of the British Mandate for Palestine in motion, dividing the Mandate into Jewish and Arab states.[133]

But this idea was not a popular one.[134] To the contrary, it has remained a source of regional strife and perpetual war.

On May 14, 1948, the date of the Mandate's expiration and the Jewish People's Council declaration of Israel's statehood, a coalition of Arab nations including Lebanon, Syria, Iraq, and Egypt attacked Tel-Aviv and later invaded the former British Mandate.[135] Though the war would end early the following year, the resulting peace was fragile. The armistice ending the Arab-Israel War of 1948 left Egypt and Jordan in control of the West Bank and Gaza Strip and Israel holding a portion of the Mandate originally allotted

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declaration.aspx.

[128] Joshua Teitelbaum, *Israel as the Nation-State of the Jewish People: From the San Remo Conference (1920) to the Netanyahu-Abbas Talks*, 579 JERUSALEM CTR. FOR PUB. AFF. (Sept. 15, 2010), https://jcpa.org/article/israel-as-the-nation-state-of-the-jewish-people-from-the-san-remo-conference-1920-to-the-netanyahu-abbas-talks/.

[129] *Id.*

[130] *See id.*

[131] *See id.*

[132] *Id.*

[133] *Id.*; G.A. Res. 181 (II), at 131 (Nov. 29, 1947); OFFICE OF THE HISTORIAN, U.S. DEPT. OF STATE, MILESTONES IN THE HISTORY OF U.S. FOREIGN RELATIONS: 1945-1952, THE ARAB-ISRAELI WAR OF 1948, https://history.state.gov/milestones/1945-1952/arab-israeli-war [hereinafter ARAB-ISRAELI WAR OF 1948].

[134] *See* ARAB-ISRAELI WAR OF 1948, *supra* note 133.

[135] *See id.*; The Declaration of the Establishment of the State of Israel, 5708-1948, LSI 1 3 (1948-48), https://www.nevo.co.il/law_word/law150/LAWS%20OF%20THE%20STATE%20OF%20ISRAEL-1.pdf.

to the Arabs.[136]

Over the following decade, regional antagonism festered and grew. Egypt armed and supported guerrilla attacks along Israel's borders, imposed a blockade of Israeli shipping in the Straits of Tiran, and nationalized the Suez Canal.[137] Tensions only escalated when Jordan and Syria placed their armies under Egyptian command.[138] On October 29, 1956, Israel responded to such "belligerence" by attacking Egypt and seizing the Gaza Strip, much of the Sinai, and Sharm al-Sheikh in the process.[139] Though Israel would relinquish Sinai when hostilities ended, the 1956 Sinai War fostered new international alliances, lifted the blockade of Israeli shipping in the Straits of Tiran, and even put an end to the guerilla attacks on its borders.[140]

But that peace, too, would be short-lived. In the early 1960s, Syria began shelling Israeli farms and villages from the Golan Heights.[141] As shelling escalated over the coming years, so too did Egyptian aggression with renewed guerilla attacks, the re-closure of the Straits of Tiran, and the movement of Egyptian and Syrian troops into the Sinai region along Israel's border.[142] When negotiations with its neighbors failed, Israel once again responded militarily, this time with a surprise attack seizing the Golan Heights, Sinai, the Egyptian-controlled Gaza Strip, and the Jordan-controlled West Bank.[143] Six days later, a new ceasefire left Israel with four times more territory than it had the week before.[144]

What would come to be called the Six-Day War had a notable, but complicated effect on Israel's Zionist narrative. As one scholar observes, Israel's territorial expansion "triggered a new debate inside Israel about the territorial aims of Zionism and the emergence of the settlement movement, resulting in a reshaping of the political landscape altogether with strong repercussions for the political culture inside Israel."[145] Before the wars, Israel

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[136] *See* ARAB-ISRAELI WAR OF 1948, *supra* note 133.

[137] *See* MITCHELL G. BARD, MYTHS AND FACTS: A GUIDE TO THE ARAB-ISRAELI CONFLICT 46-47 (American-Israeli Cooperative Enterprise 2002).

[138] *Id.*

[139] *Id.*

[140] Ze'ev Schiff, *Fifty Years of Israeli Security: The Central Role of the Defense System*, 53 MIDDLE E. J. 434, 437-38 (1999).

[141] *See* BARD, *supra* note 137, at 53.

[142] *See id.* at 53. As it turns out, escalating tension was attributable in part to an "ill-informed" intelligence report from the Soviet Union, which led Egypt and Syria to suspect that Israel was planning an attack. *See* Roland Popp, *Stumbling Decidedly into the Six-Day War*, 60 MIDDLE E. J. 281, 285-89 (2006).

[143] *See* Popp, *supra* note 142, at 285.

[144] *Id.* at 281.

[145] *Id.*

had little interest in territorial expansion beyond its 1948 boundaries.[146] After the wars, the political landscape shifted. The annexation of vast swaths of the historic land of Israel breathed new life into the Zionist narrative in Israeli politics—a narrative that persists to this day.[147]

Yet this resurgence has proven neither infinitely durable nor monolithic. To the contrary, the evolution of Israel's political culture over subsequent decades has followed a varied and complicated trajectory, further muddying Israel's seemingly paradoxical status as both a Jewish state and a democracy.[148] This is at least partially attributable to the presence of non-Jews in modern Israel.[149] Even more significant, though, are the vast and fluctuating notions among Jewish residents about what it means to be Israeli and what role Zionism should play in the formation of that identity.[150]

At bottom, though Zionism continues to permeate its national "calendar and rhythm,"[151] Israel's simultaneous secular democratic form obscures the influence Zionism has in day-to-day policymaking.[152] Of course, Zionism has found fertile soil in the regional hostility that has imbued Israel's brief modern history, energizing the narrative of mutual resolve, of overcoming adversity in pursuit of a common destiny.[153] Yet as the next section shows, the Zionist narrative's role in Israel's regulation of the family and procreation is not quite so prevalent.

### *C. Family Planning in the Jewish State*

Unlike the survivalist tenor of the Iranian narrative, Israel's policy concerning abortion access and family planning appears more explicitly rooted in the principles of Judaism. Using the regulation of abortion to illustrate, this section suggests that, despite its secular democratic form, Israel's concern with reproduction appears to be more deeply rooted in religious doctrine than that of its theocratic neighbor, Iran. Put differently, while Iran has invoked shared religious identity to ensure compliance with

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[146] Arye Naor, *"Behold, Rachel, Behold": The Six Day War as a Biblical Experience and Its Impact on Israel's Political Mentality*, 24 J. ISRAELI HIST. 229, 230 (2005) ("no aspirations to territorial expansion" before Six-Day War).

[147] *See* Eliezer Don-Yehiya, *Messianism and Politics: The Ideological Transformation of Religious Zionism*, 19 ISR. STUD. 239, 240-41 (2014); Daniel Elazar, *Israel as a Jewish State*, 2 JEWISH POL. STUD. REV. 3, 36 (1990).

[148] *See generally* Elazar, *supra* note 122 (examining the complex, seemingly incalculable relationship between the Jewish political tradition and its status as a modern European state).

[149] *See id.*

[150] *See generally id.*

[151] *Id.* at 18.

[152] *See generally id.*

[153] *See generally* Don-Yehiya, *supra* note 147.

what has steadily become a religiously unmoored family planning policy, Israeli policy has remained anchored to Jewish doctrine. While inherently nationalistic to some degree, Israel's approach maintains an inward gaze that contrasts sharply with Iran's more reactive anti-Western posture that takes its cues from global events.

Israel maintains a "conditional" policy concerning abortion access.[154] This policy, which is administered as a part of the country's national healthcare system, requires approval by the Committee for Interruption of Pregnancies (CIP) before a woman may terminate a pregnancy.[155] The CIP will only approve an abortion if (1) the woman is either unmarried, younger than 17, or older than 40, (2) the pregnancy occurred out of wedlock or resulted from illegal activity (rape, incest, adultery), (3) the fetus has a physical or mental abnormality, or (4) continuing the pregnancy would jeopardize the health of the mother.[156] For a brief time, terminating a pregnancy could also be justified if continuing the pregnancy threatened to "cause a serious harm to the woman or her children, based on the harsh family or social conditions of the woman and her environment."[157] But this "economic clause" has since been repealed.[158]

Additional rules also apply. If CIP approves a woman's request, she must give informed written consent concerning the physical and psychological risks associated with termination.[159] Minors do not require parental approval, and CIP may not reject a request without permitting the applicant to appear in person and state her case.[160] Moreover, Israeli law protects gynecologists and other physicians from performing an abortion if he or she objects on medical or conscientious grounds.[161]

Such an elaborate regulatory scheme notwithstanding, the odds of CIP

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[154] RUTH LEVUSH, ISRAEL: REPRODUCTION AND ABORTION: LAW AND POLICY 13 (Law Lib. of Cong. (U.S.), Global Research Directorate 2012), https://www.loc.gov/law/help/il-reproduction-and-abortion/israel-reproduction-and-abortion.pdf [hereinafter "LLOC"]; *see* Caroline Wheeler, *Conceptions of Conception: Definitions of the Beginning of Life and Their Effect on Abortion Regulation*, 19 MENLO ROUNDTABLE 15, 33 (2014), http://roundtable.menloschool.org/issue19/2_Wheeler_MS_Roundtable19_Fall_2014.pdf.

[155] LLOC, *supra* note 154; *see* Wheeler, *supra* note 154, at 33.

[156] *See Planned Termination of Pregnancy: Induced Abortion*, ST. OF ISR. MINISTRY OF HEALTH, *https*://www.health.gov.il/English/Topics/Pregnancy/Abortion/Pages/default.aspx (last visited Dec. 31, 2020); *see also* LLOC, *supra* note 154, at 13; *Wheeler*, *supra* note 154, at 33.

[157] LLOC, *supra* note 154, at 13-14 (citing Penal Law 5737-1977 § 316(5), repealed by Amendment No. 8, SH No. 954 p. 40 (Isr.)).

[158] *Id.* at 13.

[159] *Id.* at 14.

[160] *Id.*

[161] *Id.*

disapproval are slim, with more than 98 percent of all applications being approved.[162] The Israeli government also provides financial support to women seeking abortions, including full funding for young women.[163] In fact, Israel's abortion policy is politically uncontroversial by most measures. Although small segments—Jewish Orthodox on one end, leftist groups on the other—of the public have vociferously opposed the regulatory regime as either too lenient or too restrictive, most Israelis lack a strong position concerning its propriety.[164]

Israel's abortion policy finds sound footing in Jewish doctrine. Though clearly flanked by the Zionist quest to survive and flourish, especially with the Holocaust in recent memory,[165] a central policy feature is the Jewish principle that life begins at birth.[166] Thus, even the staunchest Jewish Orthodox critics of the CIP system have serious difficulty providing a religious basis for a complete ban on abortion,[167] although some have certainly tried.[168] At the same time, however, a critical check on expansive abortion access is Israeli culture's distinctly "pro-natalist attitude."[169] As one scholar explains:

> This attitude is underpinned by major biblical texts. Jewish national identity is founded on family myths (e.g., the Patriarchs and Matriarchs), and the biblical commandment 'Be fruitful and multiply' constitutes childbearing as not only a goal in one's own life, but as a contribution to a collective mission. Although at present the majority of Israeli Jews do not define themselves as 'observant' and do not adhere to religious dictates, all are well acquainted with these biblical notions, which are repeatedly taught and alluded to in the national school curriculum. Thus, even for many secular Israelis, childbearing often carries the broader significance of linking oneself to the communal Jewish body.[170]

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[162] *See id.*

[163] *See id.* at 15.

[164] *See id.* at 16-17.

[165] *See id.* at 21.

[166] *Id*.

[167] *See* Daniel Eisenberg, *Issues in Jewish Ethics: Abortion and Halacha*, JEWISH VIRTUAL LIB. (last visited Sept. 20, 2020), http://www.jewishvirtuallibrary.org/jsource/Judaism/abortion.html#6.

[168] *See* LLOC, *supra* note 154, at 18-19.

[169] *Id.* at 20.

[170] Daphna Birenbaum-Carmeli, *'Cheaper Than a Newcomer': On the Social Production of IVF Policy in Israel*, 26 SOC. OF HEALTH & ILLNESS 897, 901 (2004) (citing MICHAEL GOLD, AND HANNAH WEPT: INFERTILITY, ADOPTION AND THE JEWISH COUPLE 23-27 (1988); PAULA HYMAN, THE JEWISH FAMILY: LOOKING FOR A USABLE PAST, IN ON BEING A JEWISH FEMINIST: A

This cultural consensus is bolstered by the Supreme Court, whose relatively new power of judicial review places the judiciary in a unique position of divining (pun intended) constitutional meaning for a majority Jewish, yet nevertheless diverse population.[171] Citing God's call in Genesis to "be fruitful and multiply," the Court has recognized parenthood as a basic right that exists independently of a woman's right to choose.[172]

Granted, principles of Judaism are not the exclusive bases for Israel's abortion policy. "Th[e] mythical significance [of the pro-natalist attitude] is made more relevant by recently-acquired meanings, namely the Holocaust trauma and the Zionist quest to enlarge the Jewish population of the state of Israel."[173] Yet there remains a marked contrast between the outward-facing nationalism that guides Iranian policy on reproductive rights and the more introspective posture that Israel has adopted. Despite its considerably small size and population relative to its highly fertile (and sometimes hostile) Arab neighbors, Israeli policy on reproductive rights has remained relatively consistent since the CIP system's adoption in 1977, concerning itself primarily with the fertility rates of its residents rather than the activities of other countries in the region.[174] In a word, ethnoreligious norms remain the linchpin of Israeli family planning policy.

Though decidedly different from the Iranian approach, Israel's inspiration for regulating family planning likewise offers an important lesson for secular democracies in search of a less divisive means of doing so. This is discussed more in Part IV. Nevertheless, it bears noting here that a shared sense of national identity appears to play an indispensable role in that process. Of course, a common ethnoreligious background provides a starting point to which other secular democracies with more pluralistic populations cannot realistically (nor desirably) aspire.

## III. Regulating Procreation in a Liberal Democracy

As a religiously and ethnically pluralistic democratic state with a large

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Reader (S. Heschel ed., 1995); Marilyn. P. Safir, Religion, Tradition and Public Policy Give Family First Priority, in Calling the Equality Bluff (B. Swirski & M.P. Safir eds., 1991)).

171 *See* LLOC, *supra* note 154, at 19-21; *see also* Barak, *supra* note 95.

172 LLOC, *supra* note 154, at 20.

173 Birenbaum-Carmeli, *supra* note 170, at 901; *accord* LLOC, *supra* note 154, at 21 (citing Jacqueline Portugese, Fertility Policy in Israel: The Politics of Religion, Gender and Nation 20-56 (1998); Judith T. Shuval, Social Dimensions of Health: The Israeli Experience 66 (1992)).

174 *See* LLOC, *supra* note 157, at 26-27. Illegal abortions went unprosecuted for more than two decades before the law's adoption. *See* William Farrell, *Abortion Law is Approved in Israel* N.Y. Times Feb. 1, 1977, at 11.

foreign-born population,[175] the U.S. occupies a relatively unique space on the global stage. Yet the nation's status as a refuge for freedom-seekers is hardly so simple as the Statue of Liberty's call for the world's "huddled masses" might suggest. This is especially true concerning matters of procreative autonomy. As subsequent sections of this Part reveal, the constitutional protection of religious freedom in the U.S. has more readily proven a sword than a shield when it comes to the commingling of religion and public policy. This Part proceeds in three sections. The first provides a brief overview of the federalist system of government in the U.S. The next section examines the mythology of American manifest destiny by discussing the origins of this narrative and asking what, if anything, remains of it in contemporary public policy in the U.S. The last section turns once again to the issue of family planning and assesses the motivating narrative behind the regulation of abortion and contraceptive access.

### *A. American Governmental Structure*

The U.S. government is built upon the notion of shared power among the federal government, the states, and the people.[176] Emblematic of this arrangement is the constitutional mandate that powers neither given to the federal government nor specifically assigned to the states "are reserved to the States respectively, or to the people."[177] While this Part's focus will be on policymaking at the federal level, a basic understanding of the larger system is nevertheless useful.

Consider the structural similarities between the U.S. government and those of Iran and Israel. Like those of the other two countries, the U.S. Constitution establishes a federal government consisting of legislative, executive, and judicial branches. Article I vests "[a]ll legislative powers" in the Senate and the House of Representatives.[178] House members are elected every two years by the voters of roughly equal-sized districts.[179] The number of representatives is capped by statute at 435 seats, which are proportionately

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[175] *See* U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES (2013), http://www2.census.gov/programs-surveys/demo/tables/foreign-born/2013/cps2013/2013-asec-tables-nativity.pdf; Alan Gomez, *U.S. Foreign-Born Population Nears High*, USA TODAY (Sept. 28, 2015, 12:02 PM), http://www.usatoday.com/story/news/2015/09/28/us-foreign-born-population-nears-high/72814674/.

[176] For a deeper analysis of America's federalist system, *see generally* Matthew J. Stanford & David A. Carrillo, *Judicial Resistance to Mandatory Arbitration as Federal Commandeering*, 71 FLA. L. REV. 1397 (2019).

[177] U.S. CONST., amend. X.

[178] *Id.* art. I, § 1.

[179] *Id.* art. I, §§ 1-2.

allocated based on populations of the fifty states.[180] The Senate, by contrast, consists of 100 seats, and the electorate of each state elects two Senators to serve six-year terms.[181] To become law, proposed legislation must be passed by majorities of both houses and signed by the President.[182] Congress has the power to, among other things, collect taxes, borrow money, regulate commerce, organize and regulate the armed forces, and declare war.[183] The Constitution also includes a number of prohibitions regulating congressional behavior, including bans on state favoritism, bills of attainder, and titles of nobility.[184]

Article II establishes the Presidency and vests "[t]he executive power" in this office.[185] The President and Vice President together are elected to a four-year term pursuant to a state-administered electoral system whereby the recipient of the state's popular vote receives the number of electoral votes equal to the number of Senators and Representatives from that state.[186] Only natural born citizens are eligible to run for President and Vice President.[187] The President's primary duties include serving as "commander in chief" of the armed forces, making treaties, and appointing ambassadors, officers, and judges.[188]

Finally, Article III establishes the federal judiciary by establishing a Supreme Court and leaving to Congress the power to establish inferior courts.[189] Today, the federal judicial system consists of the trial-level District Courts of general jurisdiction, the intermediate appellate Court of Appeals, which is arranged into eleven geographically based regions (or "circuits") and one special subject-matter court, and the Supreme Court at the top.[190] In addition to these three basic levels, the federal judiciary includes special jurisdictions, including the Court of Claims and Court of International Trade.[191] Article III judges are appointed by the President and confirmed by the Senate, to serve for "good behaviour"—in effect, lifetime tenure.[192]

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[180] *Id.* art. I, § 2; Apportionment Act of 1911, Pub. L. No. 62-5, 37 Stat. 13.

[181] *See* U.S. CONST. art. I, § 3, amend. XVII.

[182] *Id.* art. I, § 7.

[183] *See id.* art. I, § 8.

[184] *See id.* art. I, § 9.

[185] *Id.* art. II.

[186] *See id.* art. II, § 1, amend. XII.

[187] *Id.* art. II, § 1.

[188] *Id*. art. II, § 2.

[189] *Id.* art. III, § 1.

[190] *Court Role and Structure*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure.

[191] *Id.*

[192] U.S. CONST. art. II, § 1.

Article III grants federal courts the power to hear a whole host of legal claims, including constitutional, federal law, and treaty-based matters.[193]

The structural similarities, however, appear to end there. Unlike the supremacy of the Knesset in Israel or the Supreme Leader in Iran, the American system is predicated on a theory of coequality.[194] James Madison described the constitutional separation of powers as indispensable to good governance, maintaining that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded."[195] The Supreme Court has long recognized this principle as implicitly mandated by the Constitution.[196] This scheme, former Chief Justice Warren Burger once explained, "produces conflicts, confusion, and discordance at times."[197] But that was precisely the point, he continued, because such an arrangement functions "to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power."[198]

At first blush, this arrangement of coequality among branches would seem to subvert the same limitations on government power that the constitutional separation of powers was crafted to protect. Without a final word on the constitutionality of government action, each branch would lack both the incentive and the necessary guidance to comport themselves in a constitutional manner. Only fifteen years after the Constitution was ratified, this was the question on former Chief Justice John Marshall's mind when the Supreme Court would decide what has proven to be one of, if not the most consequential decision in American history.[199]

In *Marbury v. Madison*,[200] the Court was asked to determine whether President Jefferson was required to deliver a commission to William Marbury, whom the outgoing President Adams had appointed to serve as a justice of the peace in the District of Columbia.[201] When President Jefferson ordered Secretary of State James Madison not to deliver the commission, Marbury petitioned the Supreme Court to issue a writ of mandamus ordering

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193 *See id.* § 2.

194 THE FEDERALIST NO. 47 (James Madison).

195 *Id.*

196 *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 722 (1986); Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935).

197 *Bowsher*, 478 U.S. at 722.

198 *Id.*

199 *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

200 *See id*.

201 *See id.* at 154-55.

the new President to deliver the commission.[202] After finding that Marbury was legally entitled to the commission, Chief Justice Marshall nevertheless found that the Judiciary Act unconstitutionally granted Marbury the right to seek relief from the Supreme Court, because Article III specified only a limited set of circumstances in which the Court's original jurisdiction could be invoked.[203] Invoking the supremacy of "original right" of the people to define the limiting principles of government power, the Chief Justice mused:

> This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.
>
> The government of the U.S. is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.[204]

Considering courts' institutional capacity to interpret and apply rules, Marshall had little difficulty resolving this conundrum: "It is emphatically the province and duty of the judicial department to say what the law is."[205] Given the superiority of the Constitution relative to legislative acts, it necessarily followed that when a conflict exists between the two, the judiciary must follow the Constitution, lest its limitations on federal power be a dead letter.[206]

*Marbury*'s establishment of judicial review is critical to understanding the influence that religion has on federal policy concerning family planning. The constitutional proscription against laws "respecting an establishment of religion, or prohibiting the free exercise thereof,"[207] affords the Supreme Court a role in policymaking that comes closest to rivaling that of the Iranian

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202 *See id.*

203 *See id.* at 173-74.

204 *Id.* at 176-77.

205 *Id.* at 177.

206 *Id.* at 177-78.

207 U.S. CONST. amend. I.

Supreme Leader or the Israeli Knesset. Thus, to provide an effective comparison across these three governmental systems, this Article looks to two recent decisions of the Supreme Court in its assessment of religion's influence on this area of American policy. But first, this Article will briefly examine American manifest destiny and assess what influence, if any, it wields in modern American jurisprudence.

### *B. America's Religion: Manifest Destiny in the National Narrative*

"From sea to shining sea," "from California to the New York island" – the language of manifest destiny permeates the fabric of American folklore.[208] Its stories tell of heroism, courage, and even divine ordinance, of an imprisoned people freeing itself from the shackles of tyranny in pursuit of liberty and opportunity.[209] Westward expansion was more than a mere quest for power and wealth. It was fate. Unlike the Zionist narrative that preceded the establishment of modern Israel, American manifest destiny more closely resembles a post-production enhancement of a less coherent vision of national sovereignty.

The pivotal invocation of "manifest destiny" on Capitol Hill was not until 1846. Standing on the floor of the House of Representatives, Massachusetts Representative Robert C. Winthrop rose in opposition to a resolution seeking to end the U.S. occupation of the Oregon territory.[210] The congressman proclaimed a "new revelation of right which has been designated as the right of our manifest destiny to spread over this whole continent."[211] A year earlier, he had penned an editorial pronouncing that this was God's will:

> [Our claim to Oregon] is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us. . . . The God of nature and of nations has marked it for our own; and with His blessing we will firmly maintain the incontestable rights He has given, and fearlessly perform the high duties He has imposed.[212]

His words echoed those of John Louis O'Sullivan, who prophesied of America as a democratic savior who would "smite unto death the tyranny of kings, hierarchs, and oligarchs" while bringing "glad tidings of peace and

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[208] KATHARINE LEE BATES, AMERICA THE BEAUTIFUL (Oliver Ditson & Co., 1910); WOODY GUTHRIE, THIS LAND IS YOUR LAND (1944).

[209] *Id*.

[210] Julius W. Pratt, *The Origin of "Manifest Destiny",* 32 AM. HIST. REV. 795, 795 (1927).

[211] *Id*.

[212] *Id.* at 796.

good will" to those who "endure an existence scarcely more enviable than that of beasts of the field."[213] Against this background began the first discussions of "manifest destiny" among lawmakers.[214] It was the perfect summation of the "self-confident nationalist and expansionist sentiment" that had come to define the popular outlook of the time.[215] What began as a defense of territorial expansion would later provide the basis for the projection of regional influence. Though manifest destiny initially meant the annexation of Oregon, it would later mean making the world "safe for democracy."[216] This narrative contrasts sharply with the anti-imperial fervor of the Iranian Revolution or the Zionist hope for the dispersed citizens of an ancient people reclaiming their homeland.[217] It is the story of the emboldened colonist who fought the empire—and won.

The judiciary has hardly shown immunity to this rhetorical revolution. Though perhaps more easily detected in the bluster of congressional debate and presidential resolve, examples of manifest destiny in American jurisprudence abound. As an example, this section assesses the impact of American manifest destiny on federal Indian law—namely, the role of the narrative as it pertains to the judicial understanding of indigenous rights.

The seminal case on this issue hearkens back to first-year property class. Before the Revolutionary War, the Piankeshaw Indians had sold a stretch of land to Thomas Johnson.[218] After America declared independence, the State of Virginia assigned the same piece of land to the federal government, which later sold part of that parcel to William M'Intosh.[219] When Johnson died, his son Joshua, who had inherited his father's estate, filed an ejectment action against M'Intosh.[220] Writing for a unanimous Court, Chief Justice Marshall found that Johnson lacked a legitimate claim to the land now held by M'Intosh.[221] Because the transfer took place before America won independence from England, the newly formed nation "unequivocally acceded to that great and broad rule by which its civilized inhabitants now

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[213] John L. O'Sullivan, *The Great Nation of Futurity*, 6 U.S. MAG. & DEMOCRATIC REV. 426, 430 (1839).

[214] *See* Pratt, *supra* note 210, at 796-97.

[215] *Id.* at 798.

[216] *See* The Learning Network, *April 2, 1917 | Woodrow Wilson Asks for Declaration of War Against Germany*, N.Y. TIMES: THE LEARNING NETWORK (Apr. 2, 2012, 4:02 AM), https://learning.blogs.nytimes.com/2012/04/02/april-2-1917-woodrow-wilson-asks-for-declaration-of-war-against-germany/.

[217] Dodson, *supra* note 62; Elazar, *supra* note 122.

[218] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 555-57 (1823).

[219] *See id.* at 558-60.

[220] *See id.* at 560-61.

[221] *See id*. at 604-05.

hold this country."[222] Accordingly, the pre-war transfer to Johnson was superseded by the post-war transfer of the same land to M'Intosh, thus negating any enforceable claim that Johnson's son might have had to the same.[223]

In a long, convoluted opinion, the Court justified its finding by citing a rather convenient doctrine. Though the Piankeshaw and other tribes maintained an enduring right of "occupancy" in the American territory, "ultimate dominion" rested in their European conquerors under the purportedly universal rule of discovery.[224] Under this rule, discovery of territory includes the right to acquire title in the land via either conquest or purchase.[225] Included in this right is the ability to "extinguish" the Indian right of occupancy.[226] Thus, when the treaty that ended the Revolutionary War transferred power from Britain to the U.S., land transfers like the one between the Piankeshaw and Johnson were not enforceable in the fledgling nation.[227]

The influence of manifest destiny in *Johnson v. M'Intosh* is remarkable. In explaining the rule's legitimacy, Chief Justice Marshall noted its Christian origins. "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire," he explained.[228] European settlers addressed the presence of indigenous populations by suggesting that "ample compensation" was paid "by bestowing on them civilization and Christianity, in exchange for unlimited independence."[229] Besides, Marshall later explained, subjugation of the indigenous population was unavoidable:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[230]

With the tribes' inferior right of occupancy in place, all that was needed

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[222] *Id.* at 587.
[223] *See id*. at 588-89.
[224] *Id.* at 574.
[225] *Id*. at 573.
[226] *Id.* at 587.
[227] *See id*. at 584-85.
[228] *Id.* at 572.
[229] *Id.* at 573.
[230] *Id*. at 590.

was a rule governing land rights among European settlers.[231] Enter the rule of discovery. Notably, the rights it embodied had an important limitation—they originated with the first *Christian* nation to claim the land.[232] Not unlike O'Sullivan's vision of seizing and occupying the American territory in the name of pacifying the land's beast-like population,[233] the Court in *M'Intosh* invoked the language of destiny and spiritual superiority to justify a rule that favored European sovereignty over land long occupied by the Native Americans.[234] Thus, it was only proper that the U.S., upon defeating the British Empire, be afforded the same divine right of dominion.[235]

Though the chief justice was careful in *M'Intosh* to avoid an explicit endorsement of the dominionist theology that undergirded the discovery doctrine, America's new status as the "chosen people" was firmly in place.[236] Subsequent Supreme Court decisions have left little doubt that the divine had accorded Americans that status. Picking up where Marshall left off some fifty years later, the Court in *Beecher v. Wetherby*[237] laid down what would ultimately become the guiding philosophy of federal Indian law. Explaining that the Indian right of occupancy could only be disturbed by the federal government, Associate Justice Stephen Field proclaimed that any such determination presumably "would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."[238]

Today, the protectorate status of the Native Americans is largely taken for granted and is more readily considered a paternalistic offshoot of imperial ambition than part of a larger manifesto for the divinely favored.[239] Nevertheless, this section has shown that this longstanding doctrine takes root in the same religious narrative that later gave rise to the explicit endorsement of American manifest destiny. This self-assigned status as a "chosen people" is distinct from that of Zionism. Whereas one inspired hope for the end of a centuries-long diaspora, the other fueled the expansionist ambitions of a newly formed nation. Likewise, the protective, anti-imperial narrative of the Islamic Republic contrasts sharply with manifest destiny's aggressive vision of America as divine conqueror. Yet the next section

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231 *See id.* at 573.

232 *See id.* at 573-77.

233 *See* O'Sullivan, *supra* note 213, at 430.

234 *See M'Intosh*, 21 U.S. (8 Wheat.) at 589-90.

235 *See* Steven Paul McSloy, *"Because the Bible Tells Me So": Manifest Destiny and American Indians*, 9 ST. THOMAS L. REV. 37, 44-45 (1996).

236 *See id.* at 45.

237 95 U.S. 517 (1877).

238 *Id.* at 525.

239 *See* McSloy, *supra* note 235, at 45-46.

suggests that this narrative's role in the regulation of reproductive autonomy is rather subdued, if not wholly absent.

### *C. Family Planning in the American Promised Land*

Regulating contraceptive and abortion access in the U.S. is a complicated affair. Unlike Iran and Israel, the U.S. lacks a uniform federal scheme governing the issue.[240] Instead, states are generally left to regulate reproductive health in the manner they see fit—subject, of course, to constitutional limitations. The most notable of these is the constitutional right to privacy,[241] which was first recognized in the seminal Supreme Court decision in *Roe v. Wade* to include a qualified right to abortion access.[242] This right's composition changed considerably over the next four decades. Far from *Roe*'s originally rigid framework focused on the rights of the woman,[243] the contemporary rule, most recently reaffirmed in *Whole Woman's Health v. Hellerstedt*,[244] focuses instead on the extent to which a state may burden[245] what has become a more diluted version of that right.[246]

Such volatility makes it appealing to analyze the role that religious doctrines regarding the women's role in society have played in defining the contours of the right to abortion access. But an alternative approach offers a more direct assessment of religious influence on the regulation of family planning in the U.S. By looking to the Court's application of a law limiting legal burdens on religious freedom, this section attempts to provide a clearer picture concerning this immensely sensitive issue.

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA).[247] This Act provides that the federal government[248] "shall not

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[240] Sigrid G. Williams, Sarah Roberts & Jennifer L. Kerns, *Effects of Legislation Regulating Abortion in Arizona*, 28-4 WOMEN'S HEALTH ISSUES 297, 297 (2018).

[241] *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

[242] *See* 410 U.S. 113, 154 (1973).

[243] *See id.* at 164-65.

[244] 136 S. Ct. 2292 (2016).

[245] *See id.* at 2309-18 (applying the contemporary analysis state regulations on abortion providers); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877-78 (1992) (announcing the "undue burden" standard).

[246] *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 560 (1989) (Blackmun, J., concurring) ("For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.").

[247] 42 U.S.C. §§ 2000bb – 2000bb-4. (1993).

[248] *See* City of Boerne v. Flores, 521 U.S. 507, 532-36 (1997) (holding that RFRA could not be applied to the states via the enforcement power granted to Congress in Section 5 of the Fourteenth Amendment).

substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless such a burden "(1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[249]

For the purposes of this Article, it is important to understand the statute's inspiration. Congress passed RFRA in response to the Supreme Court's 1990 decision in *Employment Division v. Smith*.[250] There, the Court upheld an Oregon law that denied a Native American's unemployment benefits after they were fired for "misconduct" involving their use of peyote.[251] Rejecting the Free Exercise Clause challenge, the Court reiterated its venerable rule that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[252]

RFRA represented a direct repudiation of *Smith*. Noting the serious threat that "neutral" laws posed to the "unalienable right" of religious freedom, Congress found that *Smith* "virtually eliminated" government responsibility to avoid such burdens.[253] To fix this problem, RFRA requires strict scrutiny of all federal laws burdening free exercise of religion.[254]

Fast forward to 2014. Following the passage of the Patient Protection and Affordable Care Act of 2010 (ACA), the Department of Health and Human Services (HHS) was tasked with issuing regulations enacting the ACA's requirement that employers with at least 50 full-time employees offer health insurance that provides "minimum essential coverage."[255] At the center of controversy was one HHS regulation, coined the "contraceptive mandate," which requires nonexempt employers to offer health plans that fully cover FDA-approved contraception.[256] When a for-profit corporation objected to the contraceptive mandate on religious grounds, the Court intervened.

In *Burwell v. Hobby Lobby Stores, Inc.*, the craft store chain argued that the HHS regulation violated RFRA insofar as it required the company to offer insurance coverage for so-called "abortifacients."[257] Citing the company's mission to "operate in a professional environment founded upon the highest

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[249] 42 U.S.C. § 2000bb-1(a)-(b).

[250] 494 U.S. 872 (1990).

[251] *See id.* at 874, 890.

[252] *See id.* at 879, 890 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[253] 42 U.S.C. § 2000bb(a)(1)-(3334).

[254] *See id.*, § 2000bb(b).

[255] 26 U.S.C. § 4980H(a), (c)(2)(A); 5000A(a), (f)(2) (2016).

[256] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. Ct. 682, 696-98 (2014).

[257] *Id.* at 691.

ethical, moral, and Christian principles," Hobby Lobby's owners claimed that compliance with the mandate would force them to facilitate abortions in violation of their religious beliefs.[258] Writing for a five-justice majority, Associate Justice Samuel Alito said that the regulation was a bridge too far, striking it down as a violation of RFRA's protection of religious freedom.[259]

Perhaps most illustrative of the privileged position religion enjoys in the regulation of contraception is what happened before the Court reached the merits of the regulation. The Court rejected the Third Circuit's skeptical view of corporations having the capacity to exercise religion, holding that Congress specifically included corporations within the RFRA's definition of "persons."[260] However, instead of looking to the RFRA, Justice Alito consulted the Dictionary Act, which broadly defined the word "person" to include corporations.[261] Citing an absence of contrary language in RFRA itself, the Court made short work of an immensely controversial legal question, holding that the Dictionary Act gave a "quick, clear, and affirmative answer" to the threshold issue of the RFRA's applicability to for-profit corporations.[262]

From there, Alito systematically dismantled each argument against this finding. But he did so *argumentum ad ignorantiam*.[263] He rejected the distinctions between non-profit and for-profit companies and between sole proprietors and corporations, suggesting that neither difference offered sufficiently clear guidance.[264] He likewise dismissed the argument that corporations cannot exercise religion, refusing the invitation to interpret RFRA as nothing more than the pre-*Smith* status quo, under which corporations had never before been accorded standing to assert religious freedom claims.[265] Finally, Justice Alito addressed concerns that deeming Hobby Lobby a "person" under RFRA would open the floodgates for publicly traded corporations representing a heterogeneous group of shareholders to seize similar protections. "These cases, however, do not involve publicly traded corporations," he responded, "and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims."[266]

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[258] *Id.* at 701.

[259] *See id*. at 713.

[260] *See id.* at 707.

[261] *Id.* at 707-08.

[262] *See id.* at 708.

[263] *See generally* Douglas Walton, *The Appeal to Ignorance, or Argumentum Ad Ignorantiam,* 13 ARGUMENTATION 367 (1999) (explaining the use and origins of this informal logical fallacy).

[264] *See Hobby Lobby*, 573 U.S. at 709-12.

[265] *See id.* at 713.

[266] *Id.* at 717.

Hobby Lobby was a "closely held corporation" subject to the ownership and control of one family, and thus categorically distinct from the nameless faceless companies whose widely dispersed ownership might make holding a religious belief an impossible endeavor.[267] In sum, no evidence supporting the exclusion of corporations like Hobby Lobby from RFRA was all the evidence the Court needed.[268]

*Hobby Lobby*'s treatment of the jurisdictional question alone exemplifies a certain determination by the Court (and Congress) to ensure religion's privileged status concerning this deeply controversial issue. Indeed, the majority went so far as to cite a dissent that broke with a plurality of the Court that refused to consider a for-profit kosher market's standing to challenge a law under the First Amendment's Free Exercise Clause.[269] Two considerations underscore the Court's steadfast determination to expand RFRA's reach. First, it is a longstanding principle of American law that the plaintiff, not the defendant, carries the burden of establishing standing to sue.[270] Yet here, the majority quietly shifted that burden to HHS. This enabled the Court to use its dissatisfaction with the agency's arguments to support its otherwise unprecedented finding. Second, the majority's reliance on a dissent to resolve a question that a plurality of the Court avoided in the same case is peculiar. RFRA did not exist at the time, thus begging the question: how much light does a pre-RFRA dissent shed on that statute's intended meaning?

Now free to reach the substance of Hobby Lobby's claim, the majority struck down the regulation with relative ease.[271] In fact, the majority assumed that the interest in providing cost-free access to the challenged contraceptive methods was sufficiently compelling, choosing instead to dismantle the regulation under the almost impossible-to-satisfy standard that the mandate be the "least restrictive means" of achieving that interest.[272] Nevertheless, one key assumption in the majority's analysis warrants closer inspection. Instead of assessing Hobby Lobby's claim that the challenged contraceptives were in fact abortifacients before reaching the substantial burden question, the Court substituted the company's *belief* that those methods were abortifacients for that part of the analysis.[273] The Court eluded the thornier

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[267] *See id.*

[268] *See id*. at 691, 708-09, 719.

[269] *See id.* at 714-15 (*citing* Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961)).

[270] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.")

[271] *See Hobby Lobby*, 573 U.S. at 736.

[272] *See id.* at 2779-83.

[273] *See id.* at 2778 ("The Hahns and Greens believe that providing the coverage

scientific question about the actual effect of the contraceptives at issue, the answer to which might well have undermined the company's claim.[274] What the company believed the drugs did was enough.

Once again, the Court showed itself resolute to commingle religious tradition with the regulation of contraceptive access. Yet unlike the top-down decrees of Iran's Supreme Leader or the life-begins-at-birth tradition that undergirds Israel's family planning bureaucracy, the American approach privileges the religious beliefs of powerful objectors, even at the expense of what the Supreme Court itself acknowledges as a compelling public interest in reproductive health. The contrast among these systems sharpens when one notes the complete absence of American manifest destiny from both the logic and tenor of the Court's analysis of an issue that the other countries consider integral to national longevity. While revolution and destiny play crucial rhetorical and substantive roles in Iranian and Israeli policymaking concerning family planning, America's expansionist ambitions lack a comparable role. And yet, religion's role is especially pronounced. Despite its liberal democratic makeup, the U.S. places such a premium on free exercise that it leaves one of its most intimate policy issues most vulnerable to religious caprice.

The effect of this approach is two-fold. First, unlike the more uniform policies found in Iran and Israel, the sanctity of religious exercise in American law provides for a disjointed regime that is subject to infinite and unpredictable change. Like women in the other two countries, an American woman's rights may change by government decree. But they may also change when she moves to another city, crosses state lines, or begins working for a new employer. Second, the American approach elects not to insulate women from religious influence in the manner one might expect from a secular democracy. To the contrary, it consecrates a host of means by which a woman's reproductive decisions may be limited by religious doctrine to which she may not even ascribe.

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demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.").

[274] *See* Robin Abcarian, *The Craziest Things About the Supreme Court's Hobby Lobby Decision*, L.A. TIMES (June 30, 2014, 6:47 PM), http://www.latimes.com/nation/la-me-ra-craziest-thing-about-hobby-lobby-20140630-column.html (explaining that the challenged contraceptives work to prevent fertilization, not to prevent implantation or destroy developing embryos).

## CONCLUSION: THE DIVINE IN THE SECULAR AND THE SECULAR IN THE DIVINE

Governmental structure is the recipe, not the meal. To understand the way a governing body is arranged and the channels through which policy is made, while critical, is not to master the logic that guides those decisions. Often the history which precedes those structures provides a more fulsome picture. These histories cultivate powerful narratives, whose rhetorical fervor sparks revolution. It is against these revolutionary backgrounds that governments are formed and policies are made. Terms such as theocracy, ethnoreligious democracy, and secular democracy are often misleading, conjuring wildly divergent impressions depending on the audience before which they are uttered. They are foundational yet aspirational, limiting yet liberating, uniting yet disaffecting.

It might seem foolish to compare these regimes. An absence of definable terms, it might be argued, leaves little to compare and even less to glean. That would be true if the purpose of this Article was to simplify, to provide a single normative claim upon which future comparative scholarship might be built. But the purpose of this Article is just the opposite. Its aim is to add a degree of complication where these labels tend to grossly oversimplify, to illuminate the myriad inputs that guide a nation's policymaking calculus, and to provide some perspective for the U.S., which stands to learn both from its "less" democratic counterparts and about itself.

Yet for all the abstruseness it generates, this Article aims to offer one certainty: the relationship between religious influence in public policy and democracy is not inversely proportionate. This is particularly true concerning the regulation of family planning. That is not to say that the U.S. should adopt a national religion or prevent people from worshipping (or not) in the way they choose. The Constitution prohibits such measures after all—and for good reason. But perhaps not all behavior motivated by religious belief ought necessarily be considered an act of worship entitled to aggressive legal protection. As shown in Part III, the Supreme Court's expansive reading of the RFRA allowing corporate employers who hold a scientifically suspect belief to be exempt from general welfare legislation undermines the religious freedom that secular democracies exist to promote. Conversely, despite their more explicitly religious governmental structures, Israel and Iran boast reproductive healthcare regimes that often place the nation's public welfare concerns closer to the forefront. These values are informed, at least in part, by shared religious values. But they are also frequently motivated by pragmatic considerations, including population control and economic stability. Part I revealed how this has actually led to the steady dilution of overt religious influence in family planning policy in Iran. Meanwhile, increased protection for religious exercise in the U.S. has steadily exposed

women to greater, religiously motivated restriction of their reproductive autonomy.

An easing of judicial review where the free exercise of religion is implicated offers one potential solution to this contemporary slippage in the U.S. For example, when Congress enacts a law reasonably tailored to the admittedly compelling public interest in protecting women's reproductive health, the Supreme Court could exercise greater restraint in questioning legislative judgment. This is especially true when the Court is interpreting a statute under a previously enacted statute, as opposed to the Constitution. In applying RFRA, the Court could require challengers to meet a higher burden before presuming that Congress enacted a law that violates its own earlier enactment. A more relaxed approach might facilitate deliberation to which Congress—whose membership is chosen by a religiously pluralistic population—is arguably better suited. If religion motivates a legislator's proposal, its palatability should be evaluated with respect to the social value that the underlying religious doctrine promotes, not some post hoc rationale developed solely to satisfy constitutional scrutiny. Likewise, striking down duly enacted legislation to advance an expansive understanding of free exercise converts the Court into a high council on religion, complete with the power to determine which religious practices deserve legal protection. To continue short-circuiting the legislative process in this manner seems antithetical to notions of religious freedom that undergird secular democracies.