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Protecting liberal and progressive religious values in the public square: embracing religious freedom in the United States

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BOSTON UNIVERSITY
SCHOOL OF THEOLOGY

Project Thesis

**PROTECTING LIBERAL AND PROGRESSIVE RELIGIOUS VALUES IN
THE PUBLIC SQUARE:
EMBRACING RELIGIOUS FREEDOM IN THE UNITED STATES**

by

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ABSTRACT

This goal of this project is to assist liberals and progressives who are reluctant to speak out publicly on religious questions so that they can advance their moral values and protect their religious liberties by encouraging and educating them to use legal protections under the First Amendment. Rights to religious freedom in the American legal system are reviewed on the federal, state, and local levels. The denominational history of and theological evolution within Unitarian Universalism, the target group being studied, are examined. This examination has a particular focus on shifting historically strict intradenominational attitudes on the separation between church and state and using legal protections to advance progressive moral values and social justice objectives. Through a nonprofit legal foundation, the author seeks to educate and to support religious groups seeking to pursue religious projects and ministries that may face legal challenges and government opposition. The project also reviews metrics for assessing attitude change in response to educational workshops presented to Unitarian Universalist audiences.

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Summary

This project will assist liberals and progressives who are reluctant to speak out publicly on religious questions so that they can advance their moral values and protect their religious liberties by encouraging and educating them to use legal protections under the First Amendment.

Introduction

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.

Thomas Jefferson¹

The problem underlying this project is an imbalance between different religious groups. Religious conservatives have embraced the concept of “religious freedom” as a counterpoint to secular influences in the United States, particularly those associated with government policies and programs. Liberals and progressives more often extol the virtue of maintaining separation between church and state and therefore they are less likely to express their religious values within public policy debates about social issues. This difference in approach hinders the social justice goals of religious liberals and progressives because religious freedom is strongly protected under the law. The objective of this project is to operate a nonprofit legal foundation to educate and to assist religious liberals and progressive, and Unitarian Universalists specifically, concerning these legal

¹ Letter from Thomas Jefferson to the Danbury Baptist Association, January 1, 1802, Library of Congress, loc.gov/loc/lcib/9806/danpre.html

arguments. Furthermore, at a time in the United States when “religion” is becoming increasingly associated with conservative morality and regressive social policies, this project will help advance liberal and progressive religious values in the public square.

Thomas Jefferson is credited with first depicting the imagery of a wall of separation between church and state. This occurred in a short 19th century letter to a group of Connecticut Baptists, a minority religious group at that time that would struggle against established (*i.e.* publicly funded) Congregationalist institutions in New England. The letter offers a helpful summary of an ideal, that religion would not serve as a political fault line within this new society. Europe had suffered multiple extended conflicts over questions of religion, as Catholic and Protestant leaders had fought for territory and preeminence since the Reformation. The nascent United States was seeking to protect itself from such religious strife. But the wall as described by Jefferson, and as has evolved over many years, was and is less of a true barrier to conflict than modern minds might assume.

In his letter, Jefferson alludes to the First Amendment to the U.S. Constitution which provides that: “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*” That tightly packed sentence includes many fundamental rights of American citizens. Freedom of speech is possibly the most well-known, followed by the freedom of the press. The rights of assembly and petition are less frequently invoked but are nonetheless powerful. Each right stems from past grievances

against the English government, which had sought to curtail the behavior and expression of American colonists.

Similarly, rights to religious freedom were created in defense against *government* interference in religion and *government* preferences for certain religions. These religious rights were not intended, however, to limit the behavior of private individuals or religious organizations or, at least initially, the policies of state governments. The federal government was the worrisome new unknown in the former colonies and these enumerated rights were each designed as a hedge against such anxieties.

The so-called Free Exercise and Establishment Clauses of the First Amendment are often rounded off into the concept of separation between church and state. However, the first clause limits the government from *infringing* upon religion while the second clause prevents the government from *establishing* one. What was intended by these rights has not been a simple question. Even Jefferson, while extolling these rights to a concerned religious group, implicitly limited them. His offhand statement that the powers of government can affect *actions* but not *opinions* was prophetic or, perhaps more accurately, authoritative to the Supreme Court.

In the context of Jefferson's generation, and in reaction to past English and European practices, the right to believe freely may have been a significant point of progress. Yet in practice, this perspective would for many years serve to hamstring religious rights, rendering them little more than specialized versions of the right to free speech. The right to hold or to express an opinion freely is far different than the right to *act* freely upon such an opinion.

Why is this historical framing of religious rights necessary when introducing the current project? Because the evolution of these rights across this historical context is crucial. The 18th century bizarrely remains a live issue in the Supreme Court, as will be shown. And some explanation of the legal backdrop is necessary to follow the twists and turns over the centuries, and even within the past thirty years. It is a complicated and counterintuitive area of the law.

For example, legal opinions from the 1870s are still in common use in religious rights cases. And yet, those older cases have been mitigated by modern federal statutes. If one were simply to read recent newspaper headlines about religious decisions coming out of the Supreme Court, these older cases might seem to be outdated. But they are not. They are part of a sprawling legal landscape, and a judicious trail of breadcrumbs is needed to guide one through to the present state of the law and through the challenges religious folks face.

The scope of the Establishment and Free Exercise Clauses has been examined and recalibrated by the Supreme Court throughout the history of the United States. In the late 19th century, notably in *Reynolds v. U.S.*,² the scope of these rights was effectively minimized to protect only *beliefs* rather than actions. This significantly increased the power of the government to legislate, even if it infringed upon religious liberties. This was the restriction anticipated by Jefferson, one that was expressly premised upon his passing observation. Citing Jefferson's letter to the Danbury Baptists, the Supreme Court in *Reynolds* stated that: "Congress was deprived of all legislative power over mere

² *Reynolds v. U.S.*, 98 U.S. 145 (1878).

opinion, *but was left free to reach actions which were in violation of social duties or subversive of good order.*”³ The opinion of a “Founding Father” was used by the *Reynolds* court to bootstrap a desired judicial outcome, and not for the last time.

The scope of these religious rights was eventually expanded through a process known as *incorporation*. The Fourteenth Amendment and its requirements for due process were used by the Supreme Court in the 20th century to apply the provisions of the U.S. Constitution against the states. This had not been the case prior, such that cornerstone rights regarding Free Exercise and Establishment had never been applied to state governments. The states could and did establish, sponsor, and fund churches. This was common practice at the time of the Bill of Rights, created in 1789 and adopted in 1791. The last state to disestablish its church system was Massachusetts in 1833. And yet, this trend of disestablishment was not required constitutionally. It became the norm as the country grew more diverse religiously and ethnically.

But a norm is not a law. In the 19th century, after effective disestablishment across the country, religious traditions repeatedly popped up in public circumstances. For example, public schools frequently authorized the use of Bible readings for children. Public discontent boiled over into riots after disagreements between Protestants and Catholics about which Biblical translation to be used in the schools, but not over *whether* the Bible would be used.⁴

³ *Reynolds*, 164 (emphasis added).

⁴ Mark J.T. Caggiano, *Faith on Trial: Religion and the Law in the United States* (Boston: Skinner House Books, 2021), 121-122 (Philadelphia Bible riots leave one dead).

In the 1940s, such latent state powers would become unconstitutional. The Supreme Court applied the Free Exercise and Establishment Clauses against the states as an interpretation of the broad reach of the Due Process Clause.⁵ This change in judicial interpretation, developing from the 1940s to the 1970s, afforded minority religious groups protection from government impediments or sectarian favoritism. However, such protections were curtailed in the 1990s by a notably *conservative* reading of the First Amendment.

The landmark decision of *Employment Div. v. Smith* in 1990 invoked the logic of the *Reynolds* decision of 1878, which was a broadly worded opinion that allowed the federal government to legislate against public evils such as polygamy.⁶ That polygamy was a religious practice of the Church of Latter Day Saints was deemed immaterial in *Reynolds*, noting that the LDS church and this atypical marriage practice were both highly disfavored by many Americans at the time. During that period, the federal government went literally to war against the LDS church, resulting in the church's capitulation and disavowal of the practice of polygamy.⁷

In 1990, the *Smith* case upheld an Oregon state decision to deny someone unemployment benefits because an individual had violated a federal prohibition against using peyote. This is a psychedelic substance, one that was also used in sacred rituals by the Native American Church. This is a religious group that draws upon a range of

⁵ *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁶ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁷ Caggiano, *Faith on Trial: Religion and the Law in the United States*, 87.

indigenous practices. The *Reynolds* decision was an unexpected change after decades of legal precedent protecting such religious rights.

The *Smith* case allowed the federal government once again to legislate freely, provided the resulting laws were drafted in a manner ostensibly neutral to religious groups. The burden of showing non-neutrality fell upon the complaining religious groups or individuals. And that is essentially where we are historically and constitutionally. The Supreme Court displaced many decades of civil rights decisions and upheld the federal government's "neutral" policies.

That assessment of the current state of the law may seem counterintuitive, given the Supreme Court's recent decisions vigorously protecting religious freedom. That confusion is warranted because there is an additional puzzle piece missing. In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA") to overrule the Supreme Court's restriction of religious freedom in the *Smith* case. RFRA was arguably a *liberal* legislative response to a conservative legal decision. "Religious freedom" was in the late 20th century a mechanism for protecting the rights of minority religious groups against the effects of majority religious assumptions or preferences, such as employers expecting employees to work on Saturdays even if that was one's sabbath taking day.⁸ But the legislative emphasis did not remain liberal, because the rights granted by RFRA were by no means limited to minority religious groups.

⁸ *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh Day Adventist could collect state unemployment benefits even if she refused to take jobs that required Saturday work hours).

As described in the *Smith* case, Congress has the power under the Constitution to pass laws restricting religious behavior, presuming it is done neutrally, meaning without the specific intent of infringing religious behavior. RFRA was Congress' effort to *self-limit* federal power. RFRA has been called a "super" statute⁹ because it constrains federal power regarding religious matters in most respects, barring an explicit Congressional exception. Congress has in essence tied the federal government's hands when it comes to questions of religious freedom.

Religious groups and individuals under RFRA have protection against laws that are not the *least* restrictive means to achieve the stated government objective.¹⁰ "Least restrictive" is a difficult standard to meet, allowing any exception in law or in government practice to become the basis for exempting a religious group or individual. It allows even minor statutory exceptions to become the basis for invalidating laws affecting religious behavior.¹¹ And the burden falls upon the *government* to make that case, flipping the legal standard and making it difficult for the government to avoid even unintentional religious conflicts.

To further complicate the legal landscape, RFRA does not apply to the states, with the Supreme Court having struck down that original aspect of the statute.¹² Many

⁹ See, e.g., *Bostock v. Clayton County*, 590 U.S. ____, 140 S. Ct. 1731 (2020), 32 (slip opinion, J. Gorsuch).

¹⁰ Religious Freedom Restoration Act of 1993, 42 U.S. Code § 2000bb-1.

¹¹ *Hobby Lobby*, 682 (Under RFRA, private Christian employer could not be required to provide reproductive healthcare to employees).

¹² *Boerne v. Flores*, 521 U.S. 507 (1997).

states have subsequently adopted versions of RFRA, or similar statutes and policies, some which are even more stringent in protecting religious freedom.¹³ There is also the Religious Land Use and Institutionalized Persons Act (“RLUIPA”),¹⁴ a subsequent federal statute which once again applied the “least restrictive” standard to the states, specifically regarding religious land use restrictions and rules governing the religious rights of institutionalized persons such as prisoners.

This is a confusing system to navigate, even for legal professionals. This interlocking set of laws and policies, differing from state to state, also engenders complex legal analyses when considering how to legislate. But for all these complexities, these laws and policies can also provide expansive protection to religious individuals and organizations, assuming one is aware of these possibilities and is willing to use them.

As a lawyer, I have remained interested in and concerned by this evolving landscape of American religious rights. And as a minister, the contours of that interest and the depths of that concern lead me to my current project. The project is a legal and educational foundation to assist progressive and liberal religious groups seeking to protect their religious freedoms. The steps in that process are (1) to educate such groups and individuals as to their rights, and (2) to persuade them to pursue these rights, rights which have been advocated primarily by conservative religious groups, often to the detriment of progressive and liberal religious values.

¹³ E.g. Religious Freedom Restoration Act of 1998, Florida Statutes c. 761.01.

¹⁴ 42 U.S.C. § 2000cc.

The need for this outreach effort derives from what might be described as the creeping “re-establishment” of religion in the United State. As will be discussed, conservative religious individuals and organizations have been successful in invoking religious freedom as a shield against “secular” laws on the federal and state levels. For example, in *Burwell v. Hobby Lobby*, a for profit corporation successfully obtained an exemption under the Affordable Care Act to avoid providing its employees’ health insurance coverage for reproductive care.¹⁵ The corporation’s owners were able to use legal exemptions created for religious *nonprofit* organizations. The plaintiff’s employees, conversely, were not party to that lawsuit and were not able to defend their rights to healthcare. Those employees, and many others, may benefit from understanding the scope of their legal rights in the context of their personal faith. Those rights may prove to be equally powerful and, crucially, their invocation might have altered the *Hobby Lobby* decision and other similar cases.

2. *Problem, Context, and Vision: Religious Freedom Will Become Transformative for Unitarian Universalists*

Religious Conservative Challenges to Liberal and Progressive Religious Values in U.S. Society

Conservative religious groups and individuals frequently seek to champion their moral values and to secure their religious freedom through public discourse, legislative action, and judicial review. Some groups use such arguments to undermine liberal and progressive religious values. For example, the U.S. Supreme Court has in the past decade

¹⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

decided numerous cases in favor of religiously conservative litigants that restrict or interfere with the rights and interests of others, whether these matters related to access to abortion, workplace disputes over access to reproductive healthcare, or school officials offering prayers at football games.¹⁶ The religious right to deny reproductive healthcare or to pray as a public employee in a public setting comes at the expense of those of differing religious traditions, those who as a result lose their right to healthcare or who must become captive audiences for the religious expression of others.

The crux of this problem is an imbalance in U.S. society, one that presents a two-fold challenge. The lop-sided use of arguments about religious freedom by conservatives has the negative effect of shaping public opinion about religion as an expression of *conservative* values, without accounting for equally important values of religious liberals and progressives. Furthermore, this imbalance chills the use of the courts by liberals and progressives who may perceive the judiciary as hostile by repeatedly advancing the values of religious conservatives. Religion is therefore more likely to be perceived as a biased and polarizing influence upon society, a concern that is borne out by a recent study of public opinions about religion.¹⁷ As disaffiliation from organized religion grows in the

¹⁶ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S. Ct. 2228 (2022) (eliminating the federal right to an abortion); *Hobby Lobby*, 682 (religious employer exemption from contraception mandate under Affordable Care Act); and *Kennedy v. Bremerton School Dist.*, 597 U.S. ___ (2022) (public school coach had the right to offer a “private” Christian prayer at a sporting event).

¹⁷ “A growing body of evidence suggests that the rise in religious disaffiliation can be partly attributed to a political backlash against the Religious Right.” Ruth Braunstein, “A Theory of Political Backlash: Assessing the Religious Right’s Effects on the Religious Field,” *Sociology of Religion* 83, no. 3 (Autumn 2022): 293–323, doi.org/10.1093/socrel/srab050

United States,¹⁸ a value-oriented response by liberal and progressive religious groups to this trend is not only advisable but urgently needed.

For various historical and cultural reasons, religious liberals and progressives have typically refrained from making religious claims in public or political discourse. Instead, they have valued the ethic of the “separation between church from state” as an overarching goal. The ideal result of this goal is theoretically to restrict religious discourse in public matters, a hoped-for result that is *directly* at odds with the legal protections afforded to religious expression and behavior in the United States.

The rights set forth in the First Amendment make such a social goal impractical if not impossible: freedom of speech, freedom of assembly, freedom to petition the government, free exercise, etc. The rights of religious folks to express themselves are numerous and the scope of their ability to involve themselves in government matters has only grown in recent years. And the disparity in public efforts between conservatives versus liberals and progressives has led to an uneven representation of what “religious freedom” looks like across the religious spectrum. This discrepancy has in part led to an erosion of confidence in religion as a social institution.

What does this imbalance look like in practice? In June 2022, the U.S. Supreme Court rendered its decision in *Dobbs v. Jackson Women’s Health Organization*.¹⁹ This case overruled the earlier landmark case of *Roe v. Wade*, and subsequent related cases,

¹⁸ Gregory Smith, “About Three-in-Ten Adults are now Religiously Unaffiliated,” Pew Research Center, December 14, 2021, [pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/](https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/)

¹⁹ *Dobbs*, ____

which had enshrined the right to obtain an abortion into federal law.²⁰ *Dobbs* represented a reversal of fundamental rights for the reproductive choices of women, based in large measure on the absence of “abortion” as a legal right expressly mentioned in or implied by the U.S. Constitution, notably drafted in the 18th century. Prior acceptance of abortion as an implicit right under *Roe v. Wade* involved interpretation of broader constitutional principles, a framework currently foreclosed by *Dobbs*.

It is important to note that the *Dobbs* decision was *not* decided on First Amendment grounds or because of RFRA or its state-based progeny. However, the logic of *Dobbs* has become a form of default logic for the Supreme Court, one that not only cast aside fifty years of legal precedent in the case of *Roe*, but that also has repeatedly been used as the framework within the Roberts Court to dismantle 20th century civil rights advances.

In the seemingly unrelated area of Second Amendment law, the Supreme Court has once again used the 18th century as a model for modern jurisprudence. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court struck down a New York state licensing requirement for the concealed carrying of a firearm. The Court once more looked at history for its legal reasoning. Justice Thomas wrote in the majority opinion that, “the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”²¹ The Court is relying upon a regulatory system from a time of flintlocks and sabers in rural 18th century colonial

²⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

²¹ *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____, 142 S.Ct. 2111 (2022).

America to assess legislation about assault rifles and handguns in densely populated U.S. cities. It verges on the absurd, but that is the current state of the law.

Why then is either *Dobbs* or *Bruen* relevant to the present inquiry? Because they are illustrative of how the current Supreme Court functions. The majority of the Court has become single-mindedly willing to decide cases on questions of history rather than legislative intent or modern forms of policy making. And history has become a reliable way to overrule social change, at least when such change is not explicitly authorized in the Constitution.

Using that same legal mindset for questions of religious freedom will follow a depressingly narrow and predictable path. This was evident in the 1872 decision of *Reynolds v. U.S.* which was the first judicial case approving the effective dismantling of the Church of Latter-Day Saints. The LDS church did not fit the 18th century religious mold, allowing polygamous marriages and “socialistic” modes of religious community. “[The LDS churches] were collectivist religious communities that could be described as having proto-socialist characteristics and little boundary between church-and-state matters, at odds with more capitalist-minded and religious-liberty-oriented American Protestants.”²² The federal government seized LDS assets and forbade its existence until the church disavowed the offending practices.

In the modern legal framework surrounding religious liberty, this wide-ranging ability of the government to interfere with religious rights could be faced by minority, non-mainstream religious groups. That is the same logic set forth in the *Smith* case,

²² Caggiano, *Faith on Trial*, 81.

adopted from *Reynolds*, that religious practices such as taking peyote cannot be justified against government regulations against drug use. But for the Religious Freedom Restoration Act, the Supreme Court could turn back the pages of history and decide what is religiously permissible in the present by what was socially, culturally, and legally permissible in the 1700s.

Implausible? The Supreme Court has allowed public meetings to start with prayers because that was how things have worked historically. The Supreme Court has allowed public monuments bearing religious symbols, such as the Ten Commandments and a giant white cross, because their religious meaning has been diluted over time or in context. This suggests that if you break the rules about religious establishment or free exercise in the right ways, or for long enough, it will be allowed by this Supreme Court. Again, it may seem like we are straying into the absurd, but absurdities are now enshrined within the law.

Why then should liberals and progressives pursue this planned line of argument, if a conservative court is in place and has predictable patterns of decision-making? Because RFRA is useful for *all* religious groups. Under *Smith*, the federal government has power to legislate irrespective of religious sensibilities, a regulatory trend that could shift as governments change, whether liberal or conservative. Secularization by the government is indeed a target of religious conservatives. A legal landscape bounded solely by *Smith* might not be as hospitable to religion. RFRA is therefore favored by religious conservatives because it helps religion generally. And yet RFRA's protections are not limited to conservatives. It is therefore the premise of this project to advocate for the

protections that are available. Unless liberals and progressives embrace this language of religious liberty under RFRA, RLUIPA, and local versions of these laws, it may become extraordinarily difficult to overcome the historically predetermined system of legal interpretation that has become the norm in the Supreme Court's recent constitutional analysis.

This proposed change is both as a matter of social advocacy but also as individuals and groups seeking to press for their own religious freedom. Such public witness is needed, for example, in response to legislation that bears an undercurrent of religious intolerance, such as anti-transgender laws being promulgated across the United States.²³ This is “religious intolerance” because for many religious folks the right to embrace one’s sexual and gender identities is not merely a political position, but a religious outlook.²⁴

Within the *Dobbs* decision, Justice Samuel Alito indicated that the ongoing test for determining whether an implicit right, like abortion, exists under the Constitution is whether any such right is “deeply rooted in this Nation’s history and tradition.” Notably, the laws of the American colonies in the 1780s did not articulate any right to have an abortion. Under English common law, which would have been applicable during the American colonial period, abortion was permitted prior to “quickening,” the time when

²³ Ryan Thoreson, “Lawmakers in the US Unleash Barrage of Anti-Transgender Bills: Proposed Laws Threaten Health, Rights of Trans Kids,” January 20, 2020, *Human Rights Watch*, [hrw.org/news/2020/01/20/lawmakers-us-unleash-barrage-anti-transgender-bills](https://www.hrw.org/news/2020/01/20/lawmakers-us-unleash-barrage-anti-transgender-bills)

²⁴ The Unitarian Universalist Association’s General Assembly passed a 1970 resolution support LGBTQ people and calling for an end to discrimination in society, in employment and in congregations. [uua.org/action/statements/discrimination-against-homosexuals-and-bisexuals](https://www.uua.org/action/statements/discrimination-against-homosexuals-and-bisexuals)

the fetus began to move in the womb: “Life begins in contemplation of law as soon as an infant is able to stir in the mother's womb.”²⁵

In the American system of law, the common law was and is generally left to the various states to apply, adopt, or reject. “[C]ommon law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs.”²⁶ This is the secondary fallout of the *Dobbs* decision: the states now determine whether there is a local right to an abortion, whether such right arises from state legislation or common law “antiquity.”

The legal framework in *Dobbs* relying upon remote history as the measure of modern civil rights is obviously troubling for those seeking to advance reproductive freedom. By couching the prospective formulation of the law in “history and tradition,” the *Dobbs* case arguably represents an implicit effort by the Supreme Court to protect one preferred set of beliefs regarding reproductive questions—beliefs that are not coincidentally socially and religiously conservative. One need not be a historian to imagine how the “history and tradition” of women’s legal rights in the 1780s might diverge from modern American sensibilities and instead privilege a patriarchal Christian worldview. And yet that is the new measure of the law under *Dobbs*.

²⁵ William Blackstone, *Commentaries on the Laws of England*, v. I, 125 (Oxford: Oxford Univ. Press, 2016) (Original four volumes published between 1765-1769). This treatise would be invoked by various state courts in the decades after the Constitution was adopted. See, e.g., *Commonwealth v. Bangs*, 9 Mass. 387 (1812) (quickening was a necessary element of the alleged crime of abortion).

²⁶ *Black’s Law Dictionary* (St. Paul, MN: West Pub., 1990), 276.

The purpose of this observation is not to argue that the reasoning in *Dobbs* is pretextual—it may well be. The purpose is to underscore the task faced by liberal and progressive religious folks trying to advocate for their own religious values in a 21st century legal system that privileges 18th century history over 20th century social progress. This is a matter of great urgency for liberals and progressives. And spelling out how Unitarian Universalists might respond to such increasingly conservative influences is at the heart of this project.

Furthermore, the specific changes in *Dobbs* regarding abortion might not be the end of this historically dependent transformation of the law. Justice Clarence Thomas argued in a concurring opinion in *Dobbs* that many other 20th century civil rights could be subject to wholesale review and overturning. “[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”²⁷ The *Griswold* case established the right of *married* couples to obtain birth control. The *Lawrence* case established the right of adults to engage in private, consensual sexual acts. And *Obergefell* established the federal right of same-sex marriage. Thomas suggested that, like *Roe*, the Supreme Court has a duty to correct the “errors” of those past precedents.²⁸ It might be hard to imagine access to birth control and the right to engage in private sexual acts between consenting adults being splintered across the 50 states, but again that is a possibility under the logic of *Dobbs*.

²⁷ *Dobbs*, Thomas concurring opinion.

²⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Which is how the First Amendment becomes a potentially critical source of protection. Abortion, birth control, sexual behavior, and same-sex marriage are for many people not only legal questions but also *religious* ones. Depending on one's religious outlook, correcting such "errors" might be a welcomed change, an opportunity to return to a more traditional set of moral values and sexual mores, perhaps not unlike those of the 1780s. However, someone holding a more liberal or progressive religious perspective might react to such proposed changes with alarm. These legal shifts threaten core beliefs of different religious groups, ones that hold personal autonomy, social justice, and reproductive freedom to be central spiritual values. And such beliefs are central to Unitarian Universalism, which will be the denominational focus for this proposed project.

The distinction drawn in this paper between "liberal" and "progressive" is to contrast the liberal perspective of protecting individual rights, often with a secular orientation, from a progressive perspective of collective liberation sought from systemic injustice.²⁹ Progressive views may therefore be more amenable to the systematic religious approach suggested.

Are these truly religious questions, however, or are they secular matters to be judged independently from religious considerations, as seen from the liberal perspective? One need only examine the content of frequently made conservative arguments by religious individuals and organizations. They have repeatedly invoked religious liberty as a legal basis for refusing to comply with state and federal laws. For example, they have

²⁹ See, Sofia Betancourt, Dan McKanan, Tisa Wenger, and Sheri Prud'homme, "Claiming the Term 'Liberal' in Academic Religious Discourse," *Religions* 11, no. 6 (2020): 311. doi.org/10.3390/rel11060311.

successfully resisted federal healthcare mandates on contraceptives, obtained public school funding for religious schools, and overridden Covid-era emergency restrictions.³⁰ These conservative efforts were effective, and they are ongoing. And the religious counterarguments from liberals and progressives are necessary to correct the one-sided misrepresentation of religion as solely conservative.

This push by religious conservatives is not limited to the courts. Scratch the surface of the rhetoric used in recent legislative initiatives and one quickly discovers the openly religious bases for overturning abortion protections: “When Gov. Greg Abbott signed Texas law S.B.8 [regarding abortion restrictions], he provided an oft-heard reason for why the Lone Star state is effectively banning nearly all abortions: ‘Our creator endowed us with the right to life.’”³¹ There is little question that many of the conservative arguments being made are religious in nature.

The Supreme Court’s embrace of constitutional interpretation through 18th century historic models has been complicated by the overlay of federal laws like RFRA and RLUIPA. This is an opportunity, as making religious arguments in the context of 1780s jurisprudence would be a counterproductive strategy for liberals and progressives. Even “liberal” religious arguments in the vein of Jefferson’s personal deism or early strains of American Unitarianism would be a far cry from modern concerns about

³⁰ *Hobby Lobby*, 682 (religious employer exemption from contraception mandate under Affordable Care Act); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school voucher program could support religious schools through parental choice); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ____ (2020) (state could not impose emergency restriction unfairly targeting attendance of religious services).

³¹ Kelly Percival, “Religion Must Not Substitute Science in the Abortion Debate,” November 5, 2021, Brennan Center for Justice, [brennancenter.org/our-work/analysis-opinion/religion-must-not-substitute-science-abortion-debate](https://www.brennancenter.org/our-work/analysis-opinion/religion-must-not-substitute-science-abortion-debate)

personal autonomy, gender equality, LGBTQ rights, etc. That is the prospect afforded by these various federal laws and their state equivalents.

As the judicial record suggests, there is potentially much to be gained by making religious arguments to exempt liberal and progressive religious behaviors from new and intrusive *conservative* laws and government policies. For example, if there were to be a federal ban on abortion, there would be possible arguments to be made from the liberal and progressive perspective seeking exemptions under RFRA. Jewish litigants have set forth such arguments in a recent case to resist new limitations on abortion rights in Florida, noting the Jewish position that the primary moral concern regarding abortion is the life of the mother.³² There could be similar arguments readily made from a UU perspective.

First Amendment rights regarding religion, speech, and free assembly represent an array of important but differing protections. Free speech, for example, is limited to speech and forms of expression, not most forms of *behavior*. The twin constitutional freedoms relating to religion, the Establishment Clause and the Free Exercise Clause, go much further. They protect what someone has the right to do or not to do.

As discussed, a religious person might seek access to birth control or abortion services as an expression of their religious beliefs. And historically, the First Amendment's religious clauses were used by minority religious groups to protect their beliefs and practices against majoritarian religious assumptions and prejudice. It is only

³² *Generation to Generation, Inc. et al. v. Florida et al.* 2022 CA 000980 (2nd Cir. Leon County).

recently, perhaps beginning with the so-called Rehnquist Court era on the Supreme Court (1986-2005), that religious freedom became a rallying cry of religious conservatives struggling against the secular objectives of government. The objective of this project, to protect *minority* liberal and progressive religious liberties, is therefore nothing new though it may seem new to this generation.

This is not a theoretical argument, but one that some liberal and progressive religious groups have begun to put into practice. For example, the *Generation to Generation* synagogue in Florida and an arch-humanist organization in Texas, also known as the Satanic Temple, have challenged restrictions on abortion as violating their religious liberties.³³ The Satanic Temple in particular has repeatedly contended with conservative government efforts, such as attempting to place monuments to the Ten Commandments in public spaces.

The Satanic Temple's response has been to request the right to display a large statue of Satan alongside the proposed installations.³⁴ A provocative gesture, but one that relies upon the government's permission to allow one type of religious display and thereby potentially forcing them to include another unanticipated display as a matter of

³³ *Generation to Generation, Inc.* (Reformed synagogue disputing anti-abortion statute as infringing on religious freedom); *The Satanic Temple, Inc. et al. v. Hellerstedt*, Case No. 4:21-CV-00387 (Southern District of Texas, Houston Division) (Satanic Temple disputing anti-abortion statute infringing sacramental right to an abortion).

³⁴ Abby Ohlheiser, "The Satanic Temple's giant statue of a goat-headed god is looking for a home," *The Washington Post*, July 1, 2015, [washingtonpost.com/news/acts-of-faith/wp/2015/07/01/the-satanic-temple-giant-statue-of-a-goat-headed-god-is-looking-for-a-home](https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/01/the-satanic-temple-giant-statue-of-a-goat-headed-god-is-looking-for-a-home/).

fairness. In response to such tactics, at least one Ten Commandments monument in Oklahoma was quietly removed.³⁵

In 2014, Columbia Law School formed its Law, Rights, and Religion Project, seeking to promote “social justice, freedom of religion, and religious plurality.”³⁶ The Columbia project has, for example, recently issued reports on religious rights to abortion and their investigations of restrictions on access to healthcare in states that have imposed new restrictions on reproductive medicine.³⁷ And the American Civil Liberties Union has recently begun a concerted effort to present religious freedom arguments in lawsuits opposing restrictions on abortion.³⁸

As these examples illustrate, the underlying proposal for this project is not a unique legal strategy. The problem is again one of imbalance. Conservative legal efforts and funding for such religious challenges far outmatch liberal and progressive efforts. And one factor underscoring this difference is a classic liberal preference for maintaining a wall separating church from state.

³⁵ Abby Phillip, “Oklahoma’s Ten Commandments statue must be removed, state Supreme Court says,” *The Washington Post*, June 30, 2015, [washingtonpost.com/news/acts-of-faith/wp/2015/06/30/oklahomas-ten-commandments-statue-must-be-removed-state-supreme-court-says](https://www.washingtonpost.com/news/acts-of-faith/wp/2015/06/30/oklahomas-ten-commandments-statue-must-be-removed-state-supreme-court-says)

³⁶ lawrightsreligion.law.columbia.edu/content/about-us

³⁷ Law, Rights, and Religion Project of Columbia Law School, “A Religious Right to an Abortion: Legal history and Analysis,” August 2022; Law, Rights, and Religion Project of Columbia Law School, “The Southern Hospitals Report: Faith, Culture, and Abortion Bans in the U.S. South.”

³⁸ “Indiana’s controversial [Religious Freedom Restoration Act] protects religious freedom for all Hoosiers, not just those who practice Christianity.” aclu-in.org/en/news/indiana-abortion-ban-religious-freedom

Public Opinion About Questions of Church and State

Notwithstanding the power inherent in such First Amendment rights, liberals and progressives have generally been loath to make such legal arguments regarding their religious liberty. Moreover, a majority of Americans support the broad, abstract notion of maintaining separation between church and state matters. However, Americans are less uniform in their opinions about more concrete questions regarding religious influences upon public matters. And a belief in an ideal of maintaining separation between church and state need not be deemed anathema to cultivating a *practice* of embracing one's religious liberties.

In one 2022 survey, seventy-three (73) percent of Americans supported the statement "Religion should be kept separate from public policies," as compared to the statement, "Government policies should support religious values and beliefs."³⁹ Similarly, seventy (70) percent of U.S. adults want houses of worship to stay out of politics. According to such recent data, there is strong American support for the broad notion of separation rather than integration of church and state matters.

However, specific religious questions rather than abstract generalities lead to less consistent results. For example, nearly half of Americans say that the Bible should influence U.S. laws either a "great deal" (23 percent) or "some" (26 percent). Conversely, nineteen (19) percent say it should not influence U.S. laws "much" and 31 percent say it should not influence them "at all." And 28 percent say the "Bible should prevail over *the*

³⁹ Rebecca Leppert and Dalia Fahmy, "10 facts about religion and government in the United States," Pew Research Center, July 5, 2022, 3, [pewresearch.org/short-reads/2022/07/05/10-facts-about-religion-and-government-in-the-united-states/](https://www.pewresearch.org/short-reads/2022/07/05/10-facts-about-religion-and-government-in-the-united-states/)

will of the people if the two are at odds.”⁴⁰ These questions do not lead to oversized majorities. The Bible not having “*much*” of an influence on U.S. laws is far from building a clear wall of separation between church and state.

In an earlier 2021 survey, more than half of U.S. adults (54 percent) stated support for the principle of separation of church and state. Twenty-eight (28) percent expressed a *strong* church-state separationist perspective with an additional 27 percent indicating more moderate support. This majority is a composite figure based upon percentage agreement with a series of related propositions. For example, in spite of majority support for church-state separation, many Americans nonetheless supported allowing municipalities to display religious symbols on public property (39 percent) and allowing public school teachers to lead Christian prayers (30 percent).

These are admittedly minority opinions, but the survey suggest internal complexities. For example, 54 percent support enforcing separation between church and state while 19 percent support stopping such enforcement, with 27 abstaining. And yet in that same survey, thirty-nine (39) percent support allowing religious symbols on public property, with 35 percent saying such symbols should not be allowed and 26 percent abstaining.

If we assume there was no significant change in those abstaining, only down from 27 to 26 percent on this new issue, then there is some internal inconsistency in the opinions. From 54 percent supporting separation and 19 percent opposed, the prospect of public religious displays changed to 39 percent in *support* to 35 percent *against*. This

⁴⁰ Leppert and Fahmy, 7 (emphasis added).

suggests that about 18 percent of those surveyed support the separation between church and state *and* support allowing religious symbols on public property.

These numbers imply some measure of situational difference. For example, someone who supports separation between church and state might nonetheless support religious displays in public places, such as during the Christmas season. Such a lower scale and localized situation is less pervasive in effect than a highly abstract version of church-state integration. And research has generally shown that the public is not especially consistent in its answers to specific questions on the subject of religion, even on church-state separation.⁴¹

For example, in one older study, “Approximately three-fifths favored a ‘high wall of separation’ between church and state, but an equal number indicated that government should help all religions equally, rather than not help religion.”⁴² Religious organizations already receive significant government “support” by not paying taxes on donations and it is unclear from the questions presented in the 1987 survey if the desire for governmental support would extend beyond evenhandedness in this passive form.

Ignoring for a moment the logistical problems that might arise from more affirmative government support of religion, this public desire runs afoul of the plain language of the Constitution regarding not establishing a religion. Establishing “religion” generally—meaning providing government support to *all* religions—is a counterintuitive

⁴¹ Clyde Wilcox, “The Dimensionality of Public Attitudes Toward Church-State Establishment Issues,” *Journal for the Scientific Study of Religion* 32, no. 2 (1993): 169-176 (this study relies upon a 1987 survey of attitudes).

⁴² Wilcox, 170.

goal given the Establishment Clause has been historically seen as a counter to such centralized efforts. Conversely, “fairness” is not an obvious goal of the Establishment Clause, which has historically been used to *avoid* government entanglement with religion: “First [the law] must have a clear secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] finally, the [law] must not foster ‘an excessive government entanglement with religion.’”⁴³ But the broad, positive sounding messaging of fairly helping religion might be more enticing than court-written legal precepts.

Surveyed individuals also seemed to have been strongly influenced by question wording and the ordering of questions, such as when a question about allowing holiday displays of Jewish menorahs followed one about allowing Christian manger. The proximity of those questions may have influenced receptivity to the following proposition. Helping “religion” in this sense might be seen by the public as a matter of evenhandedness rather than favoritism, but that intra-survey dynamic would be obscured when taking the answers out of their overall context.

This data suggests that supporting the separation between church and state is not a monolithic opinion. The results from the 2021 Pew survey imply that for some supporters, “separation” might permit religious displays on public property. Would such nuanced supporters also tolerate greater acceptance of public discussion of liberal and progressive religious perspectives? That is the goal of this project among Unitarian Universalists and testing the flexibility of these attitudes is one aspect of the process.

⁴³ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

For example, forty-five (45) percent of Americans polled supported the statement “Should the U.S. be a Christian nation?”⁴⁴ And yet in the same poll, large majorities of U.S. adults thought the Supreme Court should keep its religious views out of its decision making (83 percent) and houses of worship should not endorse political candidates (77 percent). Obviously, some of those in the initial 45 percent had to shift their opinions to more circumspect positions about the Supreme Court and political endorsements. Those numbers are hard to reconcile unless there is an underlying difference in understanding about what a “Christian nation” implies. Additionally, those surveyed thought houses of worship should keep out of political matters (67 percent) compared with less than half concerned about them expressing opinions on day-to-day social/political questions (31 percent). “Politics” are apparently not “day-to-day” questions.

The responses vary between questions concerning broad abstracts and concrete examples. Words such as “Christian” and “Bible” that imply specific sectarian choices to some Americans may have broader, less doctrinal meanings to others. One secondary definition of the word “Christian” is “treating other people in a kind or generous way.”⁴⁵ If “Christian” is understood by some as a generalized sense of the good, the underlying basis for saying the United States should be “Christian” nation is not *per se* a sectarian outlook for a segment of the population.

⁴⁴ Gregory A. Smith, Michael Rotolo, and Patricia Tevington, “45% of Americans Say U.S. Should Be a ‘Christian Nation’” Pew Research, October 27, 2022, [pewresearch.org/religion/2022/10/27/45-of-americans-say-u-s-should-be-a-christian-nation/](https://www.pewresearch.org/religion/2022/10/27/45-of-americans-say-u-s-should-be-a-christian-nation/)

⁴⁵ “Christian,” [merriam-webster.com/dictionary/Christian](https://www.merriam-webster.com/dictionary/Christian)

In the same way, language must be carefully considered in the present project. In preparing a survey for a UU audience, question wording will be crucial, because calling for a “Christian nation” would be an alarming prospect for rank-and-file UUs even if such a question was widely used in larger, nation surveys. Due care will be necessary in drawing from existing survey questions, as expected in the forthcoming assessment phase of the project.

In keeping with this concern, one study suggested that political statements phrased in religiously non-particularistic terms, or “secularized evangelical discourse,” are responded to positively by a majority of Americans. This sanitized language provides a framing that not only provides the basis for religious belief and identity but also a *cultural* boundary of belonging.⁴⁶ Such answers are not discerning between “good” sounding propositions and any implicit religious messages.

Conversely, overt sectarianism can have negative effects upon public opinion. This is particularly the case on social matters that have wide public support, like same-sex marriage. It is also true for questions about divisive matters, such as whether businesses have the right to refuse to offer goods and services for religious reasons, such as in the *Masterpiece Cake* legal dispute between a Christian baker and a gay wedding couple.⁴⁷ The majority of Americans (58 percent) now support same-sex marriages,

⁴⁶ Jack Delehanty, Penny Edgell, Evan Stewart, “Christian America? Secularized Evangelical Discourse and the Boundaries of National Belonging,” *Social Forces* 97, no. 3 (March 2019): 1283–1306, doi.org/10.1093/sf/soy080

⁴⁷ *Masterpiece Cake* and the recent Supreme Court case *303 Creative LLC v. Elenis* are generally framed as competing claims of religious freedom versus LGBTQ+ rights. However, *Elenis* was decided on the grounds of free speech. See, *303 Creative LLC v. Elenis*, 600 U.S. ____ (2023). *Masterpiece Cake* could have been decided on that basis, though the Supreme Court decided it on narrow administrative law claims.

including majorities in many religious subgroups: White mainline Protestants (63 percent), Catholics (62 percent), Jews (73 percent), and the religiously unaffiliated (78 percent).⁴⁸

Most Americans (61 percent) oppose allowing small business owners to refuse to provide products or services to gays or lesbians, even if doing so would violate their religious beliefs. Only 30 percent of Americans favor such a policy and *no religious group* outright favors the practice, including no more than 50 percent of White evangelical Protestants. Instead, most support what might be characterized as a “do no harm” outlook on religious freedom: “Most Americans (89%)...agree, in the abstract, that everyone is free to follow their religious beliefs and practices in their personal lives, provided they do not cause harm to others.”⁴⁹

Religious opinions are clearly complicated and, as the same-sex marriage opinions suggest, these opinions are potentially subject to change. In 2004, Americans *opposed* same sex marriage by a margin of 60 to 31 percent.⁵⁰ However, based on polling in 2019, the opinions have inverted: a majority of Americans now *support* same-sex

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. ___, 138 S. Ct. 1719 (2018). In either case, *religious* arguments under the First Amendment were not the determining factors.

⁴⁸ Daniel Cox, Rachel Lienesch, and Robert P. Jones, “Who Sees Discrimination? Attitudes on Sexual Orientation, Gender Identity, Race, and Immigration Status: Findings from PRRI’s American Values Atlas,” 6/21/17, prri.org/research/americans-views-discrimination-immigrants-blacks-lgbt-sex-marriage-immigration-reform/

⁴⁹ PRRI, “Is Religious Liberty a Shield or a Sword?” 2/10/21 prri.org/research/is-religious-liberty-a-shield-or-a-sword/

⁵⁰ Pew Research Center, “Attitudes on Same-Sex Marriage: Public opinion on same-sex marriage” May 14, 2019, pewresearch.org/religion/fact-sheet/changing-attitudes-on-gay-marriage/

marriage, at 61 percent, while only 31 percent oppose it. This suggests that there is the real possibility for significant attitude change on religiously charged social issues. Same sex marriage became a reality and people adjusted to what had been a seemingly intractable issue along a cultural fault line.

The challenge for religious liberals and progressives undertaking the proposed forms of religious advocacy is the negative association the public seems to register about organized religion in light of *conservative* religious controversies. For example, “there is clear evidence that people, and probably those without strong relationships with houses of worship, use the Christian Right as a proxy for religion as a whole and discontinue their religious identities as a result [of such social controversies].”⁵¹ However, if the “religious” question of same sex marriage could be altered along liberal/progressive lines, it is possible that by spelling out other liberal/progressive religious viewpoints, it could not only help shift opinions but help to alter the negative perceptions Americans increasingly have about religion generally.

The same study found an increase in religious disassociation, or increased numbers of “nones,” in areas where conservative religious groups sought to counter progressive social campaigns, such as in support of same-sex marriage: “As a result, religion [in the study areas] lost somewhere between 2 and 8 percent of the population.”⁵² A more recent study confirmed this trend, finding that “religion” is generally blamed for

⁵¹ Paul A. Djupe, Jacob R. Neiheisel and Kimberly H. Conger, “Are the Politics of the Christian Right Linked to State Rates of the Nonreligious? The Importance of Salient Controversy,” *Political Research Quarterly* 71 (December 2018): 917-918.

⁵² Djupe, et al., “Are the Politics of the Christian Right Linked to State Rates of the Nonreligious? The Importance of Salient Controversy.”

such unpopular social conservatism rather than specific conservative religious groups, leading to declining membership *across* religious groups regardless of their conservative or liberal positions.⁵³

The premise of the proposed project is to encourage liberal and progressive religious groups and individuals to express more publicly their moral values on matters of social concern. That objective, however, must be considered in light of the potential fallout to such groups taking seemingly political positions. As one study observed:

Many wish religious organizations and leaders to speak to the pressing issues of the day, but it should be done only by recognizing that political involvement subjects the group to evaluation based on political disagreement. Doing so except when public opinion is essentially united will entail lost membership, declining rates of organizational engagement, and reduced support from outside the group by some. At times, this is the necessary price of principle, but the schedule of rates should be well understood.⁵⁴

There are potential costs to taking public positions on what might be considered political matters, such as same-sex marriage. Historically, liberal religious groups faced backlash for strong positions taken during the 1960s Civil Rights Movement. Ministers in mainline Protestant churches who supported efforts towards desegregation faced decreasing membership as some congregants left for more politically conservative (*i.e.* pro-segregationist) religious communities or communities that remained more apolitical on such matters.⁵⁵

⁵³ Braunstein, "A Theory of Political Backlash."

⁵⁴ Djupe, Neiheisel, and Conger, "Are the Politics of the Christian Right Linked to State Rates of the Nonreligious?" 918.

⁵⁵ Djupe, Neiheisel, and Conger, "Are the Politics of the Christian Right Linked to State Rates of the Nonreligious?" 918.

Again, the price of principle may be high. However, loss of membership is *already* being suffered by liberal and progressive religious groups, as suggested by recent studies concerning the growing negative perception of “religion” as inherently intolerant. It is worth liberals and progressives defending their moral principles in public to help correct the unbalanced view of religion as a conservative monolith. Even as more conservative members might grow disaffected from their “too liberal” congregations, more liberal members who grow disaffected from their “too conservative” congregations might at least discover alternative religious communities more consonant with their social values. That is assuming such differences are made known and is a primary motivation for expanding liberal and progressive religious outreach, messaging, and legal strategies on question of moral importance and theological difference.

The Paradox of Religious Freedom

One threshold question for any consideration of “religious freedom” is what exactly that phrase entails. It could be defined differently depending upon a change in legal setting. Religious freedom might differ in a jurisdiction in which religious authorities can be consulted on definitive religious matters. For example, in the State of Israel, there is the Chief Rabbinate of Israel which is recognized by law as the supreme rabbinic authority for Judaism.⁵⁶ The religious body is placed within the governmental system and, as such, serves as an authority on religious questions, one that can provide answers that bear social and legal significance.

⁵⁶ Chief Rabbinate of Israel Law, 5740-1980, 34 L.S.I. 97 (1980). And yet even that overarching religious body can be deemed to function within a secular governmental context. See, Izhak Englard, “Law and Religion in Israel,” *The American Journal of Comparative Law* 35, No. 1 (Winter, 1987): 185-208.

There is no equivalent religious structure in the United States. For this reason, the court system must determine whether something is “religious” whenever a Free Exercise or Establishment Clause question is alleged. One religious/legal scholar has posited that making such legal determinations about religion is, in fact, *impossible*: “The argument...is...that the law cannot get it right—today, at the beginning of the twenty-first century. It depends, in part, on how *law* is imagined...if, by *law*, we mean statutes and constitutions—the positivist secular law of states and the international community—then legally encompassing the religious ways of people in an intensely pluralistic society is most likely impossible.”⁵⁷

According to Fallers Sullivan, disestablished religion, *i.e.* non-state sponsored religion, “fit *uneasily* into spaces allowed for religion in the public square and in the courtroom.”⁵⁸ Religious authority in such a non-state sanctioned environment becomes situated in the personal experiences and judgment of the religious adherents. To borrow a Biblical phrase, it is not a “cloud of witnesses” but a cloud of opinions.⁵⁹

And as “mere” opinions rather than definitive determinations, a court will have difficulty assessing if a religious matter is central to a faith tradition or whether it is a matter of sincerely held religious belief. They could look to a religious authority or an administrative body within a denomination, but in many instances the denomination

⁵⁷ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, 2018 ed. (Princeton, NJ: Princeton Univ. Press, 2005), 138.

⁵⁸ Fallers Sullivan, *The Impossibility of Religion*, 138 (emphasis added).

⁵⁹ Hebrews 12:1-2.

might be either self-interested in the underlying legal matter or at odds with a schismatic figure or group. There is perhaps little that an American court can do objectively toward determining “religiousness.”

This struggle over centrality and sincerity likely underlies the Supreme Court’s decision in *Employment Division v. Smith*. The Court set aside decades of legal precedent that had placed the courts in the position of repeatedly arbitrating between the government versus religious groups and individuals about religious questions. The government was struggling to pass laws that did not unintentionally intrude upon some aspect of religious life. And, one imagines, the courts did not like being placed in the position of either overriding government policy and legislative intent or allowing religious liberties to be infringed.

And notably the *Smith* case was, at its core, about exempting someone from the requirements of the Controlled Substances Act.⁶⁰ A member of the Native American Church was seeking an exemption from a state policy applying federal drug laws in an unemployment benefits case. The person in question had used peyote, a hallucinogenic substance, in a sacramental practice. Peyote is a “Schedule I” drug under the Controlled Substances Act, meaning there is no legally acknowledged medical use or safe form of use for the substance. *Smith* was decided in 1990, deeply in the throes of the so-called “War on Drugs.”

The *Smith* case sought to avoid this result and did so by rejecting a line of 20th century cases supporting the religious rights of minority groups. According to *Smith*, and

⁶⁰ 21 U.S.C. 812

barring clear evidence of governmental intent to the contrary, a law is constitutional under the Free Exercise Clause if it is facially neutral and generally applied.⁶¹ And as to the prospect of assessing religious claims in such a proceeding, Justice Antonin Scalia writing the majority opinion noted: "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds."⁶² The Supreme Court was stepping away from making these complicated decisions, ones that often undermined governmental authority. And, according to Court, the ability of judges to assess the centrality or validity of someone's religious belief is questionable.

To be intellectually honest, there is something compelling about these arguments. The ability of the government to craft legislation that does not interfere with the divergent sensibilities of innumerable religious traditions, some obscure and even newly inspired, would be greatly simplified by maintaining the *Smith* doctrine of facial neutrality. However, that is not the law as it currently stands in the United States.

The scholarly argument by Winnifred Fallers Sullivan that the process of determining what is religious is "impossible" may have intellectual weight in an academic discussion, but it has no *legal* bearing when such a process of assessment is required by law.⁶³ It is possible, meaning the courts' power to do so exists and that power is being applied with growing frequency. For example, the Supreme Court unanimously

⁶¹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁶² *Smith* at 887.

⁶³ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*.

decided that the Americans with Disabilities Act cannot be relied upon by a “minister” of a church in a dispute with a religious employer because the federal government will not interfere with the inner workings or governance of a religious tradition.⁶⁴ A truly mixed blessing for ministers, but this case was a victory for those seeking to avoid secular government intrusion into religious decision-making.

The courts have become decidedly deferential as to whether something is a religious question. A court may not be able to determine the centrality or validity of a religious belief, but courts have sought to make findings about the *sincerity* of such beliefs.⁶⁵ That is also a challenging prospect and may in practice be as deferentially handled as centrality of belief.

The “locus” of religious belief is therefore a central challenge. Where are these rights situated and who has the right to claim them? In a person, in a tradition, in scripture? Or in the varying interpretations by and of these? For example, religious organizations as employers were intentionally exempted from the reproductive requirements under the Affordable Care Act. Because of this exemption, an employer/business owner who was claiming to be religious was also granted the right not

⁶⁴ *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

⁶⁵ *United States v. Ballard*, 322 U. S. 78 (1944). I have argued elsewhere that although the *Ballard* decision purports to allow the assessment of sincerity, the practical fallout of the case has been that courts are not inclined to inquire into whether litigants are *lying* about the sincerity of their religious beliefs. Caggiano, *Faith on Trial*, 173-174.

to offer contraceptive care to employees.⁶⁶ This was for a for profit business that was not religious in purpose but its owners self-reported as being religious.

What would have transpired in the landmark *Hobby Lobby* case if employees of the company had counter-sued claiming that *their* religious rights to government benefits were being infringed upon by the employer's religious claims? The government was in effect denying them access to publicly mandated benefits because of the happenstance of their employment situation and, significantly, allowing an employer's religious outlook to override that of the employee.

In a legal system that ostensibly disestablished all state sponsored churches, this 21st century evolution of the law is effectively “re-establishing” religious belief as a controlling factor in government policy. Rather than exempting the Roman Catholic Church and similar religious parties from such laws, which was at the root of the Affordable Care Act exemptions, the free-floating religious belief that reproductive freedom is “immoral” has become enshrined in a quasi-institutional sense by the Supreme Court's sweeping pronouncements in *Hobby Lobby*.⁶⁷ And critically for the present discussion, the nature of such religious privilege is often squarely assumed to be conservative in content: “[C]onservative views about sex are properly understood to be religious while liberal ones are *secular*.”⁶⁸

⁶⁶ *Hobby Lobby*, 682, (exemptions from contraceptive mandate for “religious employers” in 45 CFR §147.131(a)).

⁶⁷ Winnifred Fallers Sullivan, *Church State Corporation: Construing Religion in U.S. Law* (Chicago, IL: UChicago Press, 2020), 172 (emphasis added).

⁶⁸ Sullivan, *Church State Corporation*, 172

Those rejecting contraception and abortion are “religious” while those seeking to assure access to such healthcare are “secular.” Secular opinions are not, however, protected by the First Amendment’s religious jurisprudence when divorced from a religious tradition. Secular opinions have no weight on the judicial scales set up through RFRA, RLUIPA, and their state correlates. And for this reason, articulating liberal and progressive *religious* views about abortion, contraception, LGBTQ rights, immigration, etc. is necessary to correct the imbalance in society and the court system. That is necessary to help dispel the negative associations Americans are developing regarding “religion” generally *and* to help expand the horizons of the American religious imagination to include liberal and progressive values. This need may be a startling realization for two religious traditions that have been in the United States since the 18th century, but Unitarian Universalists cannot rely upon their past prominence to assure their present *relevance*. You only get some much traction from claiming Ralph Waldo Emerson.

If Hobby Lobby employees had had the awareness and the capability to fight against their employer’s lawsuit, the state of the law may have been different today. And, looking forward, if liberal and progressive religious parents of transgender children have the awareness and the resources to fight against newly proposed laws restricting gender reassignment care, the future state of such a law might be different.

Is access to contraception, abortion, and gender reassignment treatments a “religious” right being infringed upon? For Unitarian Universalists, such rights are *central* to our religious sensibilities which focus on the inherent worth and dignity of

each person and their right for personal expression and self-determination. And this determination of religiousness is not a high legal bar to reach. As discussed, the courts will not inquire into the centrality of belief or the validity of one's religious interpretation of a belief, only the sincerity of such belief. Convincing a court that something is "religious" is not the difficult step. Convincing liberal and progressive religious folks, like Unitarian Universalists, to take that step is the challenge.

Demographic and Opinion Data About Unitarian Universalists

This project will focus on Unitarian Universalists as a target group for encouraging more proactive public witness on matters of moral concern. This will allow for greater specificity in analysis of denominational considerations and, therefore, make for a more modest and manageable project. And, of course, the author as a UU minister is directly familiar with the contours of this religious tradition and the potential resources available and obstacles presented.

That familiarity particularly underscores the challenges of convincing a strongly liberal faith tradition to reassess its long-term support for the notion of maintaining separation between church and state. One need only look to a resolution of the Unitarian Universalist Association two years after its formation: "BE IT RESOLVED: That the Unitarian Universalist Association at its 1963 General Assembly, reaffirms its support of religious freedom based on the principle of separation of church and state..."⁶⁹ This declaration included calls for non-sectarian public education and opposition to Bible

⁶⁹ Unitarian Universalist Association General Assembly Resolution, July 1, 1963.

readings and religious observances in public schools. It also came on the heels of a landmark legal decision in which a Unitarian Universalist public school student sought relief from local requirements of reading passages from the Bible and saying the Lord's Prayer. This case culminated in the elimination of such practices in public schools across the United States.⁷⁰

In view of such historic support, how might current UUs be positioned along the spectrum of religious groups as to their attitudes toward the separation between church and state? What religious, social, and political characteristics of UUs will help make that evaluation?

UUs are a relatively small denomination, estimated in 2020 (pre-pandemic) to number 190,000, or approximately 0.06 percent of the U.S. population.⁷¹ This formal number is deceptive because UUs are notoriously opposed to the formalities of membership, frequently attending a congregation as a "friend" for decades without ever joining. This tendency artificially lowers the UU census as many "friends" are otherwise closely involved in the religious life and leadership of their UU communities. And the membership of a congregation is also used to set the monetary dues owed to the UUA, leading to reverse incentives to increase the membership roles in budget sensitive settings.

⁷⁰ *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (decided June 17, 1963).

⁷¹ uua.org/data/demographics/uua-statistics

The UUA and its member congregations also face a low youth retention rate (12.5 percent), one of the lowest among mainline Protestant denominations.⁷² This fosters a “free range” UU identity beyond the membership rolls of congregations that might confound the efforts of those attempting to study the group. And this concern about youth retention leads to a question: are UUs essentially liberals because they tend to lose their more progressive leaning youth? That is a concern for the advocacy goals of this project and for the health of the denomination in general. And yet, current and ongoing developments within the UUA, discussed later, suggest a diverging pathway heading decidedly toward the progressive left.

In the United States, UUs are generally highly educated, having the second highest share of college degree holders among major U.S. denominations—67 percent of UUs held college degrees in 2016 compared with a U.S. average rate of 27 percent.⁷³ Conversely, a contemporary survey of total family income placed UUs as only slightly higher than the U.S. average.⁷⁴ Finally, UUs are far more likely to be members of the Democratic Party than the general population at 84 percent compared to the U.S. rate of 44 percent. This cluster of characteristics predicts a solidly liberal viewpoint.⁷⁵

⁷² See, e.g., Christana Willie-McKnight, *The Problem of Retention in Unitarian Universalism*, uaa.org/sites/live-new.uaa.org/files/retention_of_uus_raised_in_the_church.pdf.

⁷³ Caryle Murphy, “The most and least educated religious groups,” November 4, 2016, pewresearch.org/fact-tank/2016/11/04/the-most-and-least-educated-u-s-religious-groups.

⁷⁴ David Masci, “How income varies among U.S. religious groups,” October 11, 2016, pewresearch.org/fact-tank/2016/10/11/how-income-varies-among-u-s-religious-groups

⁷⁵ Pew Research Center, October, 2017, “Political Typology Reveals Deep Fissures on the Right and Left.” pewresearch.org/politics/2017/10/24/9-views-on-religion-and-social-issues

The goal of the proposed project is to change attitudes, to shift UUs' perspective from seeking to maintain a strict sense of church-state separation toward embracing religious liberty as a social tool for bringing about systemic change and protecting liberal and progressive values. These are not necessarily incompatible goals, if the ideals held and the practices suggested can be harmonized on some level. Protecting religious freedom from government encroachment in one sense upholds separation between church and state, but that is quite different from seeking freedom *from* religion which is often an explicit goal of many liberals.

In a more post-modern sense, a diverse choir of religious viewpoints is necessary to better reflect the complexities of a society. This post-modern sensibility is more in keeping with a religiously pluralistic nation compared to a theoretical, and legally indefensible, wall of separation between the religious and the social, a boundary premised on a modernist notion of rational objectivity as the sole arbiter of public policies.

One key factor in such a process of social transformation from the rational to liberational will be an understanding of *UU theology*. This is a challenge because such theological considerations may foster UU resistance to the planned attitude shift. However, the UUA and its member congregations are currently in a mode of *progressive* introspection and pending change.

The Evolution of UU Theology

In my religious context as a Unitarian Universalist minister, the problematic imbalance between public witness by conservatives versus liberals and progressives is exacerbated by long-standing theological and philosophical choices. One challenge for

this project will be to assess these religious beliefs and to develop ways to transform the attitudes of UU congregations and individuals regarding religious freedom.

Resistance to such a proposed change in attitude clearly exists outside of the UU context, notably in mainline Protestant groups. The objectives of the project therefore could readily be applied to other liberal and progressive religious groups. UUs however hold to a strong ethic for maintaining separation between church and state, an assessment borne out by personal experience and denominational resolutions, as well as statistics. That separation is seen as necessary to encourage *rational* discourse in public matters. And addressing this particular mindset is essential to the objective of this project because *reason* has been a central religious guidepost for many Unitarian Universalists.

In 1961, the American Unitarian Association and the Universalist Church of America merged into the Unitarian Universalist Association: the name “Unitarian Universalist” came into being, with all its multi-syllabic charm and acronym building possibilities. UUism has embedded aspects of both of its precursor theologies, reflecting theological and philosophical positions of Unitarian and Universalist thought. But the predominant profile of 21st century UUism has been until recently a strongly humanistic, rationalistic, and individualistic strand of Unitarianism.

William Ellery Channing, a Congregational minister from Massachusetts, crystallized the tenets of American Unitarianism in his 1819 Baltimore Sermon. He set down arguments against the pervasive Calvinism within Congregationalism, such as predestination and the fundamental depravity of human beings. At the core of this theological manifesto was the centrality of human reason, particularly reason as applied

to matters of scripture: “We profess not to know of a book, which demands a more frequent exercise of reason than the Bible.”⁷⁶ Furthermore, that reliance upon reason reflects Channing’s understanding of the nature of God as a divine parent and the fundamental purpose of human existence as one of education and cultural advancement:

We look upon this world as a place of education, in which [God] is training men by prosperity and adversity, by aids and obstructions, by conflicts of reason and passions, by motives to duty and temptations to sin, by a various discipline suited to free and moral beings, for union with himself, and for a sublime and ever-growing virtue in heaven.⁷⁷

Human reason and moral cultivation became central aspects of his American version of Unitarianism. This Enlightenment era formulation owes much to the philosophical frameworks of the time, drawing as much from the writings of Immanuel Kant as from Reformed theology. And yet, unlike Kant, Channing opposed skepticism and defended the existence of Biblical miracles, a traditional facet within his otherwise nontraditional formulation of Christianity.⁷⁸

One subsequent and enduring steppingstone in the theological evolution of Unitarianism is the work of Ralph Waldo Emerson. Over twenty years after the Baltimore Sermon, he responded to Channing’s rationalistic yet dogmatic religious worldview with the Divinity School Address. In this sermon, Emerson rejects churchly dogma, communal judgments, and even Biblical norms in exchange for individual moral intuition: “Let me

⁷⁶ William Ellery Channing, “Unitarian Christianity,” *Three Prophets of Religious Liberalism* ed. Conrad Wright (Boston: Skinner House Books, 1986), 50.

⁷⁷ Channing, *Three Prophets*, 69-70.

⁷⁸ Warner Berthoff, “Renan on W.E. Channing and American Unitarianism,” *The New England Quarterly* 35, no. 1 (March, 1962): 71-92.

admonish you, first of all, to go alone; to refuse the good models, even those which are sacred in the imagination of men, and dare to love God without mediator or veil.”⁷⁹

While Channing argued that virtue and therefore goodness needed to be cultivated within a community of like-minded people, Emerson saw goodness as naturally stemming from within, a wellspring to be released rather than nurtured.

In the late 19th century, this Emersonian evolution within Unitarianism advanced through the works of Unitarian preacher Theodore Parker, who suggested a movement away from the Bible as the sole source for moral teachings. He extended Emerson’s Transcendentalist perspective of placing the individual at the center of spiritual engagement with God rather than from within the confines of a church tradition or, significantly for Parker, a *scriptural* tradition.⁸⁰ This step away from the Bible and church dogmatics set the stage for the largely humanist character of 20th century Unitarianism, as exhibited by the *Humanist Manifesto* published in 1933, which text greatly influenced Unitarianism and its successor organization, the Unitarian Universalist Association.⁸¹

“Humanism” in this sense might be best defined as *religious humanism*. This 20th century Unitarian interpretation of humanism would be set forth in a series of maxims in the *Manifesto*: “Religious humanists regard the universe as self-existing and not created,” “Humanism believes that man [sic] is a part of nature and that he has emerged as the

⁷⁹ Ralph Waldo Emerson, “The Divinity School Address,” *Three Prophets*, 108.

⁸⁰ Theodore Parker, “The Transient and the Permanent in Christianity,” *Three Prophets*, 147.

⁸¹ Mason Olds, *American Religious Humanism* (Hamden, CT: HUUMANISTS Assoc., 2006), 191-192.

result of continuous process,” etc.⁸² This is a scientifically driven, rationally bound, and explicitly non-metaphysical belief system that is nonetheless articulated through the institution of a congregation in familiar forms of observances, preaching, hymnody, and other common expressions of religious life. “Worship” may be dubbed a “service” and a “sermon” may become a “talk” but the familiar “hymn sandwich” style of Protestant worship is readily discernable.

The “individualism” within this framework is less explicit, but no less central to the standard form of UUism in the late 20th century. For example, in a 1998 survey of UUs, responses illustrated a strongly individualistic mode of thinking. When asked “What role has your congregation played most importantly in your life,” the largest single response by UUs was, “It supports my views and upholds my values.”⁸³ When asked about what values a congregation should seek to instill in children, over 70 percent of respondents selected, “a sense of their inherent worth and dignity, self respect.”

Humanism in this respect is more oriented on the individual outlook and inventory of beliefs than a concern for humanity. Paul Rasor, a modern UU theologian, described this trend as not merely a weakness of liberal religion, but indicative of the general individualism and “self-centered-ness” that increasingly describes American culture and which, to Rasor at least, suggests an inherent “social misunderstanding” of

⁸² Olds, *American Religious Humanism*, 21-22.

⁸³ Paul Rasor, *Faith Without Certainty: Liberal Theology in the 21st Century* (Boston, MA: Skinner House Books, 2005), 87.

human beings.⁸⁴ This trend may be culturally prevalent, but for present purposes it seems particularly reflected in the makeup of late 20th century UU thinking.

UUism in this period is therefore rationalistic, humanistic, and individualistic. And this “trinity” of influences arguably encourages an ethic of maintaining a wall separating church from state. Does humanism in this sense also suggest that *anything* could be described as “religious” if a rationalistic and humanistic tradition fits under the rubric?

At least one court has held that it was not a violation of the First Amendment to deny a humanist group for prisoners the right to meet.⁸⁵ This was a proposed chapter of the American Humanist Association and for a humanist counselor to visit to provide a “‘non-theistic,’ secular and naturalistic approach to *philosophy*.”⁸⁶ The court went on further to say that “humanism” has never been declared a religion.⁸⁷ This might be distinguished from the “religious humanism” that has characterized 20th century Unitarianism as courts have also become increasingly deferential on such religious questions. To be safe: do not use the word “philosophy.”

Channing’s rationalism, Emerson’s emphasis on personal experience, and Parker’s move away from the Bible represent a cumulative shift from seeking and adhering to moral norms dictated within a religious community. Instead, as

⁸⁴ Rasor, *Faith Without Certainty*, 88.

⁸⁵ *Kalka v. Hawk*, 215 F.3d 90 (2000).

⁸⁶ *Kalka* at 92 (emphasis added).

⁸⁷ *Kalka* at 99.

Transcendentalism suggests, the religious seeker must look inward to find the way forward—Emerson once lectured about the unique native “genius” of every person.⁸⁸ That inner focus would be disrupted by the intrusion of non-rationalistic religious dogmatism, whether in the pulpit or in the public square. Furthermore, such religious distractions would infringe upon rational discourse on matters of social importance.

The response of UUs to questions of religious speech in the public square could be characterized as a desire to be free *from* the religions of others. As the UUA pronounced on its website regarding *Religious & Civil Liberties*: “Affirming the inherent worth of every person and the right of conscience, we also believe that humans flourish under responsible liberty, and thus support civil liberties—*the right to freedom from government harassment, whether based on religion or otherwise.*”⁸⁹

In 1973, the UUA at its General Assembly reaffirmed its 1963 resolution regarding church-state matters, resolving to: “Support the efforts of organizations working to preserve and strengthen separation of church and state in the United States through litigation, legislation, and education.”⁹⁰ Similarly, in 1981 the UUA promulgated a business resolution regarding “The Radical Religious Right,” stating that:

“[T]he Radical Religious Right is a threat to the values of a *free church and free society*, values which the Universalist and Unitarian Churches have long struggled to maintain; and...

⁸⁸ Robert A. Gross, *The Transcendentalists and Their World* (New York: Farrar, Straus and Giroux, 2021), 320.

⁸⁹ “Religious & Civil Liberties,” uua.org/liberty (emphasis added).

⁹⁰ “Reaffirmation of Support for Church-State Separation, 1973 Resolution” uua.org/action/statements/reaffirmation-support-church-state-separation

[A]s Universalists and Unitarians, we have a stake in the social and political consequences of the issues raised concerning minority rights, women's rights, violence against women and minorities, *separation of church and state*, priority of welfare over rearmament, and the development of world community through peaceful means;

BE IT RESOLVED: That the 1981 General Assembly of the Unitarian Universalist Association encourages the Association, districts, local societies, and individuals to join continental, regional, and local coalitions dedicated to action in the defense of *religious and individual liberty*.⁹¹

This resolution predates the *Smith* decision in 1990 and the Religious Freedom Restoration Act of 1993. The “free church” is arguably one free from wider religious influences, particularly “governmental harassment” influenced by religious concerns.

One tension within the UUA is a clash of neoliberal versus progressive narratives, such as capitalism, meritocracy, and individualism against more progressive stances about anti-racism, white supremacy culture, etc. Neoliberal stances are so ubiquitous, that they are used by *both* proponents and opponents of arguments about religious liberty. As one research study noted: “[B]oth those who support and oppose religious freedom legislation draw on the cultural schema of ‘free market’ [indicating] the degree to which neoliberalism has infused how Americans make sense of social issues.”⁹²

This grounding narrative may even be a symptom of “an increasingly corporate-sponsored gay rights movements [*i.e.* gay “Pride” celebrations].”⁹³ Gay pride events are

⁹¹ “The Radical Religious Right, 1981 Business Resolution,” uua.org/action/statements/radical-religious-right (emphasis added).

⁹² Emily Kazyak, Kelsy Burke, and Mathew Stange, “Logics of Freedom: Debating Religious Freedom Laws and Gay and Lesbian Rights,” *Socius: Sociological Research for a Dynamic World* 4 (2018): 1–18.

⁹³ Kazyak, Burke, Stange, “Logics of Freedom.”

in this way normalized, but specifically within a *capitalist* narrative rather than adhering to their origins as radical social protests and, in some cases, literal riots.⁹⁴ LGBTQ rights in this sense are therefore considered to be more individualistically, in a libertarian modality, rather than collectively from a more liberatory outlook.

There is a not infrequent internal critique of Unitarian Universalism as being wedded to neoliberal economics more so that liberal theology—tending the church’s endowment is said to be more important than tending the faith. This is more commonly aimed at New England congregations operating in centuries old buildings and, occasionally, centuries old investments. And there are in some parts of the United States strong libertarian influences in UU congregational life under the banner of humanism. This is sometimes referred to as the “Gadfly Controversy,” after a book entitled “Gadfly” in which a minister in the Pacific Northwest attacked “woke” responses to white supremacy culture within the UUA.⁹⁵ He has since been removed from fellowship within the UUA and has set up a small splinter group of dissident UUs.

In that same vein, current UUA discussion of covenants and the language of liberation has been derided as “creeping creedalism” in a tradition that historically has shied away from all forms of dogma and creeds. “Deeds not creeds” is an informal UU motto. As such, religious individualism can become enshrined in some UU settings, at the

⁹⁴ “In the first flush of the gay liberation movement that followed the Stonewall Riot of 18 June 1969, many activists and organizations embraced Revolutionary politics and radical rhetoric.” Simon Hall, “Americanism, Un-Americanism, and the Gay Rights Movement,” *Journal of American Studies* 47, no. 4 (November, 2013): 1114.

⁹⁵ Todd F. Eklof, *The Gadfly Papers: Three Inconvenient Essays by One Pesky Minister* (Spokane, WA: Self-Published, 2019).

expense of any denominational norms or collective social justice efforts. But changes seem to be on the UU horizon.

The 2023 Effort to Amend the UUA's Seven Principles

In 1961, the American Unitarian Association and the Universalist Church of America “consolidated” into the Unitarian Universalist Association. This atypical legal step was perhaps intended to avoid the appearance of one group being the surviving entity through the more common legal mechanism of merger. UUism similarly has embedded aspects of both precursor traditions, reflecting theological and philosophical positions of Unitarian and Universalist thought. But again, the predominant profile of 21st century UUism has arguably been, until quite recently, the humanistic, rationalistic, and individualistic brand of Unitarianism discussed.

This observation is relevant in the context of a proposed change in 2023 to Article II of the UUA Bylaws, which article contains the corporate purposes of the organization. Why embed the theological outlook of a religious organization in its legal purpose clause rather than in a stand-alone document? That is a question the denomination is currently considering.

But as a long-time observer of such matters, the UUA has historically been flexible when it comes to theological matters, but *rigid* when it comes to procedure, *Robert's Rules of Order* only half-jokingly taking the place of a creed. For example, theology was an afterthought during my ordination process, but the knowledge of how to get a matter procedurally through our annual General Assembly was explicitly a concern for those seeking fellowship as clergy in the UUA.

Orthodoxy is in this sense less important than *orthopraxis*, and that is an avenue of inquiry worth pursuing in this project as it attempts to harmonize a long-term ideal with an immediate strategy. If “deeds not creeds” is a rallying cry for UUs, the deeds in question may need to leave the pulpit and the pews and, as this project reflects, make their way into the public square, the legislatures, and (as necessary) the courts.

The campaign for attitude change therefore requires *reconciling* concerns about separation between church and state with a proactive approach to expressing liberal and progressive religious values in public conversations and with government policy makers. That may seem a difficult challenge, but others have had some measure of success. One religious group that has actively sought to navigate this divide, preferring separation but also advocating religious diversity in public policies, is the Satanic Temple. This is an arch-humanist organization, whose name capitalizes on “moral panic” and whose often-pugnacious public outreach previously discussed has garnered attention over the past decade.

The UUA’s current Article II process would amend, or remove, the so-called “Seven Principles” which have served as a set of orienting UU concepts since they were adopted in 1985.⁹⁶ These were paired with the “Sources,” a list of six foundational repositories of wisdom and experience. These 1985 Principles and Sources are notably different from the version of Article II set forth in the original 1959 Constitution of the Unitarian Universalist Association. That version was entitled the “Purposes and Objectives” and contained the corporate purposes and powers of a new organization:

⁹⁶ “Principles and Sources,” uua.org/re/tapestry/adults/river/principles-sources

consolidating certain predecessors, empowering it to solicit and collect funds, etc. Again, it is an unusual place to store one's theological treasures.

In Article II, Section 2, the 1959 document spelled out the high-minded purposes of the new organization: “In accordance with these corporate purposes, the members [*i.e. congregations*] of the Unitarian Universalist Association, dedicated to the principles of a free faith, unite in seeking:

1. To strengthen one another in a free and disciplined search for truth as the foundation of our religious fellowship;
2. To cherish and spread the universal truths taught by the great prophets and teachers of humanity in every age and tradition, immemorially summarized in their essence as love to God and love to man [Note: the last clause would be amended by the precursor organizations to include “*in the Judeo-Christian heritage* as love to God and love to man”];
3. To affirm, defend and promote the supreme worth of every human personality, the dignity of man, and the use of the democratic method in human relationships;
4. To implement our vision of one world by striving for a world community founded on the ideals of brotherhood, justice and peace;
5. To serve the needs of member churches and fellowships, to organize new churches and fellowships, and to extend and strengthen liberal religion;
6. To encourage cooperation with men of good will in every land.”⁹⁷

Many things would change between 1959 to 1985, and I do not mean an unconscionable disregard for the Oxford comma. The repetitive gendered terminology was removed, a conscious choice in response to the strong feminist influence upon UU thinking in the 1970s. As was resolved in 1977: “[the] General Assembly of the Unitarian Universalist Association calls upon all Unitarian Universalists to examine carefully their own religious beliefs and the extent to which these beliefs influence sex-role stereotypes

⁹⁷ Dan McKanan, ed., *A Documentary History of Unitarian Universalism: Volume II from 1900 to the Present* (Boston, MA: Skinner House Books, 2017), 196.

within their own families.”⁹⁸ This resolution expressly cautioned UUs about “models of human relationships arising from religious myths, historical materials, and other teachings still creat[ing] and perpetuat[ing] attitudes that cause women everywhere to be overlooked and undervalued.”

The UUA General Assembly in June 2023 included an Article II redrafting session in Pittsburgh, Pennsylvania. The two textual examples from 1959 and 1985 are therefore illustrative of the dynamics currently in play and an evolutionary arc from a liberal faith to a progressive one. One set of resources for understanding these changes are seminal theological works. These are historic writers who some consider salient within the arc of UU thinking, such as Channing, Emerson, and Parker.

Another more timely source for UU theological grounding is the work of 20th century theologian James Luther Adams. There are many aspects of his work that have influenced UU thinking, but one particular legacy intersects with current denominational conversations: the concept of *covenant* in voluntary associations. “Covenant” is an old religious idea, of course, an ancient aspect of the Jewish tradition and Near East culture, likely in existence uncounted centuries before it was set down in the Hebrew scriptures. And “covenant” has become a watch-word in many UU conversations and organizations.⁹⁹

The Biblical notion of covenant has at least two forms. That of Ancient Israel and the Jewish tradition that derives from commandments, statutes, and behavioral norms,

⁹⁸ uua.org/action/statements/women-and-religion

⁹⁹ uua.org/safe/covenant (developing covenants of “right relations” within congregations).

such as those presented by God to Noah after the Flood or to Moses at Mount Sinai.¹⁰⁰ And that of Christianity, formulated by Paul as an eschatological conception realized in the sacrificial death of Christ presented in the Eucharist.¹⁰¹ The UU sense of covenant owes more to the behavioral covenant of the Jewish tradition as an agreement among individuals that may not hold identical beliefs but have strong feelings about being a part of an active, justice-oriented community.

These notions of covenant share certain hallmarks, but they differ as to their underlying metaphysical precepts. A covenant, like a contract or an agreement, contains propositions acceptable to the parties thereto. But it is more than a simple bargain being made. As a theological document, a covenant can be *descriptive*, cataloguing the history or the identity of a people, or *hortatory*, expressing who a people are *meant to be* rather than who they currently are. As one commentator noted: “The contrast between the two forms [of covenant] is rooted in the difference between an ontology of being (as represented in the tradition of neo-scholastic theology) and an ontology of *becoming* (as represented in the tradition of process theology).”¹⁰² For example, the existing Seven Principles of the UUA are arguably more descriptive of who UUs think they are, rather than who they are seeking to be. Compare this with the Eighth Principle, not adopted by the UUA but by many individual congregations. It calls for a “journey toward spiritual

¹⁰⁰ Genesis 9 and Exodus 20.

¹⁰¹ “This cup is the new covenant of my blood,” 1 Corinthians 11:25; see, “covenant” in *The Oxford Dictionary of the Christian Church*, ed. E.L. Cross and E.A. Livingstone (Oxford: Oxford Univ. Press, 2005), 428.

¹⁰² Douglas Sturm, “Natural Law, Liberal Religion, and Freedom of Association: James Luther Adams on the Problem of Jurisprudence,” *The Journal of Religious Ethics* 20 (Spring, 1992): 180 (emphasis added).

wholeness” and the building a diverse, multicultural “Beloved Community” working to dismantle racism and other forms of oppression. Those are different ways of envisioning one’s identity. One is more passive, the other more active. One is a declaration of who one is, or at least the ideals one holds dear, while the other is a call for change, to enter a process of becoming something new.

This sense of covenant follows Adams’ thinking, who drew amply from the well of process theology. Adams’ theories were informed by the works of Paul Tillich, with his existential theology, and Henry Nelson Weiman, with his concern for the transformative power of the transcendent. Put another way, Tillich’s hallmark “ground of being” stood in critique of classic Thomistic depictions of God as a *particular* being. Weiman’s process theology helped shift Adams’ work from Tillich’s ground of being onto a “ground of becoming.” This transformational mindset has been influential among UUs, but it is far more evident in the proposed changes to Article II and its focus on covenant than the prior Seven Principles.

Adams’ sense of covenant is in the context of natural law and the proper ordering of life in community.¹⁰³ For Adams, “Some form or aspect of the principle [of natural law] is therefore appealed to in any society that has passed beyond the archaic stage or that has not fallen into complete moral and legal relativism—or that has not surrendered to some cast-iron form of authoritarianism and tyranny.”¹⁰⁴ That does not mean Adams

¹⁰³ James Luther Adams, “The Law of Nature: Some General Considerations,” *The Journal of Religion* 25, no. 2 (1945): 90.

¹⁰⁴ Adams, “The Law of Nature: Some General Considerations,” 90.

considered natural law to be either a consistent or entirely salutary guide. Natural law has been used to support pernicious forms of inequality such as slavery as “natural” or to object to such inequalities on the same basis.

Adams however argued that one value of appealing to natural law would be that it offers a common framework regardless of sectarian differences.¹⁰⁵ And therefore reason becomes a necessary tool for discerning the wheat from the chaff. But Adams also questioned the absolute utility of reason, which could be used to enshrine preconceived notions as rigidly as any religion. In this way, reason is a tool rather than an end to itself and one must remain aware that a tool can build any number of wonderful or terrible things based upon the worker’s desires. As Adams stated, reason is “not itself creative or autonomous,” but “a power technique, as a weapon, rather than as a universal criterion.”¹⁰⁶

As a foundational concern for many UUs, from the time of Channing, reason has at times been treated *sacramentally* rather than experimentally. Reason implies using logic to assess problems or situations, such as the process known as the scientific method. UUs as liberals, however, often assume an optimistic perspective, one that can predetermine or prejudice the outcome of an otherwise rational inquiry. While a religious system may be based on such assumptions, positive or negative, can optimism be truly warranted in a religious system premised upon reason?

¹⁰⁵ Adams, "The Law of Nature: Some General Considerations," 90.

¹⁰⁶ Adams, "The Law of Nature: Some General Considerations," 94.

Theodore Parker famously stated in a 19th century sermon: “Look at the facts of the world. You see a continual and progressive triumph of the right. I do not pretend to understand the moral universe; the arc is a long one, my eye reaches but little ways; I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. And from what I see I am sure it bends toward justice.”¹⁰⁷ This sermon inspired Martin Luther King, Jr. over a century later to claim that the arc of the moral universe bends toward justice. Again, are such optimistic conclusions warranted given the underlying historical context of both Parker and King and centuries of enduring racial discrimination?

Parker further claimed that, “Man [sic] naturally loves justice, for its own sake, as the natural object of his conscience.”¹⁰⁸ Someone outside of such a liberal religious tradition might wonder if that positive conclusion could be justified given the longstanding injustices that have marked the American social system since its creation. At best, that perspective could be called naïve and, if one were further to claim reason as an overarching criterion, perhaps even a sign of willful ignorance. If optimism is assumed, then scientifically backed reason does not seem to be at work, because the scientific method cannot, or should not, abide any “thumb on the scale” predicating an outcome. That would be an article of *faith* rather than an application of reason.

One 20th century critic of liberal theology, Reinhold Niebuhr, remarked that liberals allowed their naivete regarding human nature to obscure the true potential for evil

¹⁰⁷ Theodore Parker, *Ten Sermons* (Boston, MA: Crosby, Nichols, and Co., 1983), 84-85.

¹⁰⁸ Parker, *Ten Sermons*, 76.

in humankind. Niebuhr drew from Christian scripture to coin a dichotomy between the perspectives of political optimists and cynics, referring to the former as the “children of light” and the latter as the “children of darkness.”¹⁰⁹ Niebuhr used this pair of lenses to examine the flaws of democratic society, limned by the fires of fascist Europe:

Our democratic civilization has been built, not by children of darkness but by foolish children of the light. It has been under attack by the children of darkness, by the moral cynics, who declare that a strong nation need acknowledge no law beyond its strength. It has come close to complete disaster under this attack, not because it accepted the same creed as the cynics; but because it underestimated the power of self-interest, both individual and collective in modern society. The children of the light have not always been as wise as the children of darkness.¹¹⁰

The liberal’s morally positive outlook thus cannot be reconciled with the objective process of scientific inquiry and rational thinking—one can be positive or rational, but not both.

Adams did not despair of the use of reason, though he could perhaps be slotted into the category of a “child of light.” He argued that “Justice” was more than a human convention. Instead, it served as a “fundamental structure and meaning of the universe.”¹¹¹ He turned to justice, or perhaps an abiding sense of *fairness*, as a social metric that did not require “mere fiat” but ideally requires the “consensus of the governed.” But again, this is an assumption rather than a scientific observation.

¹⁰⁹Reinhold Niebuhr, *The Children of Light and the Children of Darkness: A Vindication of Democracy and a Critique of its Traditional Defense* (New York: Charles Scribner's Sons, 1950), 9-10 (citing Ephesians 5:8).

¹¹⁰ Niebuhr, *Children of Light*, 10.

¹¹¹ Adams, "The Law of Nature: Some General Considerations," 95.

One might observe that Adams was leaning toward the social contract theories of Rousseau more so than the brutal political realities of Hobbes. Whether that preference rises to the level of natural law, the mechanism of reason has been an enduring historic influence on Unitarian theology and modern UU thought. Such assumptions stand at the center of any UU religious undertaking, with fairness more aptly informing this UU notion of covenant rather than a more legalistic mindset.

Adams described the “Old Testament” concept of covenant as attributing the meaning of life to the processes and responsibilities of history by and through an agreement, one that provides order and a sense of continuity to life.¹¹² As such, the people are responsible for the character of society. This ancient mindset was marked by a concern for the weak, an observation that Adams expressly compares to the political philosopher John Rawls’ vision of a fundamentally fair society—Rawls’ landmark work *A Theory of Justice* had been published seven years before.¹¹³

For Adams, individual practices, such as of piety or prayer, are always to be understood in their communal and institutional context. The covenant of the Hebrew scriptures is a “covenant of being” and is made between human beings and the “creative, sustaining, commanding, judging, and transforming Power.” The covenant includes a rule of law, defining a collective existence and a commitment to what is right, but also trust

¹¹² James Luther Adams, “The Prophetic Covenant and Social Concern,” in *The Essential James Luther Adams: Selected Essays and Address*, ed. George Kimmich Beach (Boston, MA: Skinner House Books, 1998) 232 (essay derived from lecture remarks at Meadville/Lombard Theological School in 1977).

¹¹³ Adams, “The Prophetic Covenant and Social Concern,” 233.

and affection—or as one might say in a Christian context, faith and love.¹¹⁴ This covenant, as an agreement, also exists in a setting of prophetic criticism which points out faithlessness and betrayal of covenantal values.

But forms of “restricted covenants” exist that condition participation in community because of factors like race or gender, which Adams compared to the racial policies of Nazi Germany and American gender inequality.¹¹⁵ An *unrestricted* covenant per this model therefore is an agreement made by consensus, one defining a group’s relationship within itself and with the transcendent power that creates, sustains, and transforms.

This sense of covenant will serve as a grounding for this project’s primary objective: to encourage a change of attitude about public witness and public expression on questions of progressive and liberal moral values. Why is this a relevant question? Because “covenant” has incrementally become a central concept in UU thought. And, significantly, covenant stands at the heart of the proposed revisions to the UUA’s Seven Principles. To couch the proposed change of attitude in the language of covenant will hopefully allow it to be heard as an invitation into progressive change rather than as a challenge to past liberal preferences, much like the current project’s attempt to “thread the needle” between UU attitudes about church-state matters and public discourse on liberal and progressive religious positions.

¹¹⁴ Adams, “The Prophetic Covenant and Social Concern,” 234.

¹¹⁵ Adams, “The Prophetic Covenant and Social Concern,” 236.

In current UU circles, there is no readily identifiable theological text or even outlook consistently at work, with the association being scrupulous about not imposing creedal expectations. Adams may be familiar, but he is not universally accepted or even read by UUs. The same could be said of Channing, Emerson, or Parker—we might name congregations after them, but knowledge of their works is less ubiquitous.

The language of covenant has however become a staple of UUA communications, both in the way denominational initiatives are presented and how we come together as a faith tradition. Covenant is a basis for maintaining behavioral “right relations” and how we as UUs function within our congregations. At what point covenant begins to conflate with creed would be an animated conversation at the UUA General Assembly.

As discussed, there is also a set of commonly invoked UU propositions known as the Seven Principles, both behavioral and theological in scope and currently under review:

1. The inherent worth and dignity of every person;
2. Justice, equity and compassion in human relations;
3. Acceptance of one another and encouragement to spiritual growth in our congregations;
4. A free and responsible search for truth and meaning;
5. The right of conscience and the use of the democratic process within our congregations and in society at large;
6. The goal of world community with peace, liberty, and justice for all;
7. Respect for the interdependent web of all existence of which we are a part.¹¹⁶

Since they were first adopted in 1983, these Seven Principles have served as a basis for theological and philosophical discussions within the UUA. Along with the

¹¹⁶ Unitarian Universalist Association Bylaws Article II, Section C-2.1 Principles.

Principles are the Sources, *i.e.* sources of inspiration that include direct transcendent experience, words and deeds of prophetic people, the wisdom of the world's religions, Jewish and Christian teachings, humanism, and Earth centered traditions.¹¹⁷ And yet, the Seven Principles are noticeably devoid of overt spiritual language, again owing to the preeminence of humanism in 1980s UU thought. But the language of the spiritual, along with a covenantal mindset, would take root in the subsequent decades, particularly in response to inequality on questions of race, gender, and sexual orientation and identity.

The humanistic, rationalistic, and individualistic focus of the UUA has begun to shift over the past few decades. For example, the language of the 1959 version of the UUA's Article II was changed substantially in response to the influence of feminist thought. A similar shift can be seen in the proposal for a new Eighth Principle. The language of the principle deals with racism and oppression and is also considerably more spiritual in character and progressive and liberatory in message:

We, the member congregations of the Unitarian Universalist Association, covenant to affirm and promote: journeying toward spiritual wholeness by working to build a diverse multicultural Beloved Community by our actions that accountably dismantle racism and other oppressions in ourselves and our institutions.¹¹⁸

While not a principle adopted by the UUA nationally at its annual General Assembly, the Eighth Principle has been approved by many individual congregations and

¹¹⁷ UUA Bylaws Art. II Sect. C-2.1.

¹¹⁸ 8thprincipleuu.org

is commonly invoked by clergy and lay leaders.¹¹⁹ The language is more robustly communal than the other seven and uses more clearly spiritual and specifically covenantal language about the “Beloved Community” to address systemic racism and other forms of oppression. While the Seven Principles are spiritually informed and individual rights oriented, they are more inwardly focused in the mode of Transcendentalism than they are outwardly concerned in the mode of liberation theology.

For example, a theological focus on “justice” can be based on principles *or* on practices, personal responsibility *or* systemic change. This shift within the UUA from a more individual outlook to collective concerns is subtle, but the difference between being a liberal versus a progressive is not a stark divide but a difference of approaches and emphasis. Similarly, being supportive of the separation between church and state can be equally as subtle, turning on the location of religious rights within a person or within a system. And the purpose of this project is *not* to eliminate the separation between church and state, or even the desire for that goal, but to offer a more nuanced understanding of religious freedom.

This recent UU willingness to adopt such language marks perhaps the beginning of a new way of thinking within the denomination, one more progressive and liberatory in its systemic objectives rather than being fixated on classic liberal concerns about individual rights. This nascent change in theological outlook is a promising starting point

¹¹⁹ More than 223 congregations had adopted the 8th Principle as of 2022. *See*, uaa.org/central-east/blog/better-together/8th-principle-congregations

for encouraging a transformation in thinking around the desirability of a strict separation between church and state.

3. *Process: A Legal Foundation to Advocate for Religious Liberty*
The Proposed Methodology: Kotter's Eight Steps

With the theological and denominational setting described, the next step is to consider the methodology for navigating this religious landscape and addressing the challenge of convincing religious liberals and progressives to pursue religious freedom as a strategy for social change. The methodology for this project will be John Kotter's "Eight Steps for Leading Change:"

1. Create a sense of urgency;
2. Build a guiding coalition;
3. Form a strategic vision;
4. Enlist a volunteer army;
5. Enable action by removing barriers;
6. Generate short-term wins;
7. Sustain acceleration; and
8. Institute change.¹²⁰

Kotter is an expert on leadership and change in organizations. His methodology is particularly suited for overcoming institutional hesitancy, as is predicted given UUs historic commitment to a separation of church and state. The first principle of his methodology is creating a sense of urgency, a priority which is particularly suitable for the proposed project and the underlying challenges to the moral values of liberals and progressives.

¹²⁰ John Kotter, "Leading Change: Kotter Methodology," kottorinc.com/methodology/; see also Richard R. Osmer, *Practical Theology: An Introduction* (Grand Rapids, MI: Wm. B. Eerdsman Publ., 2008), 206-207.

The first stage of the proposed work, and the current phase for this project, is the creation and presentation of newsletters, blog posts, and workshops about First Amendment rights and protections. This has been done individually for some time and has shifted to a new legal and educational foundation. Appendix A contains an example of such a workshop given at a UU gathering. It is a distillation of a graduate level course taught at Boston College Law School entitled “Church and State” and draws from extensive research previously published.¹²¹ The workshop is an exposition on the reasons for shifting to a more proactive approach of advancing progressive moral objectives by embracing religious liberty.

This educational outreach effort incorporates many of the steps in Kotter’s methodology. The *sense of urgency* is provided by a review of legal cases such as *Dobbs* and legislative initiatives such as new laws restricting reproductive freedom and transgender rights.¹²² These examples challenge important liberal and progressive religious values and are paired with successful or ongoing cases brought by religious liberals and progressives to challenge restrictive laws, which provide a model for action within the legal setting.

While religiously conservative employers have challenged legislation requiring that they provide access to reproductive healthcare, UU *employees* could challenge

¹²¹ Mark J.T. Caggiano, *Faith on Trial: Religion and the Law in the United States* (Boston: Skinner House Books, 2021)

¹²² E.g. Texas S.B.8 (a “six week” abortion ban, banning abortion upon detection of a fetal heartbeat and long before most would know they are pregnant; passed April 2023); Florida H.B. 1521 “Facility Requirements Based on Sex” (requires exclusive use of bathroom facilities based upon genders of “male” and “female” as defined at birth; passed May 2023).

employers' attempts at restricting healthcare that transcend their religious values, such as the UUA's First Principle stating the inherent worth and dignity of women and their right to personal autonomy. While conservative groups might seek to restrict transgender folks from accessing public restroom facilities or participating in competitive sports, UU liberals and progressives could seek to halt the denial of gender affirming care to transgender youth, because the self-determination of sexual and gender identities is both a hallmark of personal freedom and spiritual fulfillment for UUs. As stated in a 2021 Action of Immediate Witness, the UUA General Assembly resolved to:

Affirm that living one's identity, in terms of gender identity/expression, sex characteristics, and affectional/sexual orientation, is part of our free exercise of religion, and that religious exceptionalism that promotes discrimination abridges human rights and our free exercise of religion...¹²³

The religious statements of the UUA and its member congregations spell out numerous counterarguments against prevailing conservative religious narratives. They state religious claims about reproductive freedom, LGBTQ rights, and a wide range of topics. These arguments can be expressed beyond the confines of a secular philosophy, unprotected by RFRA and similar laws, and instead be articulated as a public religious outlook that would subject to the same religious protections sought out in *Hobby Lobby*.

Certain legal cases, such as *Masterpiece Cake*, are reviewed as well-known examples, ones that are significantly misunderstood by the UU community and the wider public. *Masterpiece Cake* does not stand for the proposition that a Christian store may

¹²³ UUA General Assembly 2021 Action of Immediate Witness, "Defend and Advocate with Transgender, Nonbinary, and Intersex Communities," uua.org/action/statements/defend-and-advocate-transgender-nonbinary-and-intersex-communities.

discriminate against an LGBTQ customer. Instead, the case is more accurately dealing with freedom of speech, *i.e.* the right not to be forced to speak, which legal theory would apply regardless of the religious themes of the case. This is an effort to shift the sense of urgency toward the “right” targets rather than attention garnering distractions. Such cases are “distractions” because the right to free speech expressed will persist regardless of efforts to keep church and state matters separate. Efforts regarding access to abortion, birth control, or other types of healthcare would be far more amenable, if not easy, targets for change.

The steps of *building a guiding coalition* and *recruiting a volunteer army* specifically draw upon the ranks of UU congregations and arise from this outreach and educational effort. Again, that UU focus as a starting point is helpful in the early stages of the new foundation’s work due to the author’s familiarity with and recognizability within the denomination. There is also a national network of UU colleagues that would allow for dissemination of information, calls to action, and coordinating workshops around the U.S.

Furthermore, and critical for present academic purposes, this UU orientation provides a more focused area of outreach that can be more closely examined using the proposed assessment. While it would be eventually useful to offer workshops to other religious liberals and progressives, the ability to assess outcomes would be diminished by confounding factors, such as denominational structures or theological differences.

This project is inherently a *strategic vision* for bringing out the desired outcome of a greater sense of religious freedom among liberals and progressives. The workshops

and outreach are opening tactics within that overall vision. Development of resources and creation of a legal network would be steps along a strategic pathway. And the direct action of bringing legal cases, petitioning lawmakers, and shifting public opinion are the ultimate goals of a multiphase effort.

The *removal of legal barriers* is a longer-term goal, with legal cases, legislative initiatives, and significant fundraising beyond the immediate scope of this project as reflected in this thesis. However, there will be collateral networking and development opportunities within the initial work. For example, there have already been initial inquiries from congregations in the United Church of Christ, the United Methodist Church, and the Orthodox Church of America.

Additionally, the outreach focus on theoretically reluctant UU attitudes is a threshold barrier which the workshops have been designed to address. Other religious traditions may conversely have less resistance to litigating church and state matters. For example, BU class members in the current D.Min. program from other denominations, notably those from the southern United States and from traditionally Black traditions, have expressed surprise that there would be congregational reluctance to make public witness claims about religious freedom.

Short-term wins for the project would be an expanding number of workshop engagements and people reached through the educational efforts. Short-term wins for the project as well as for the overall effort could take the form of filing legal briefs in support of legal challenges around the country. This is a common practice for nonprofits with interests in the outcome of such litigation. Taking a legal case through from initial filing

to final disposition is often a multi-year process, beyond the limited timeframe of this project, but nevertheless it would be an ultimate goal arising from this initial transformational groundwork.

In the same way, *sustaining acceleration* should be distinguished between ramping up the proposed workshops and the eventual pursuit of the legal work of the foundation. Instituting change will be inherent to this phase. Changes to federal law might be far off in time. But attitudinal change among UUs to this approach toward religious advocacy is essential, from the initial educational phase to be studied through to the longer-term goals of social change.

The Kotter methodology is applicable to this situation because it is a framework for organizational change. The proposed project might have wider ranging effects, hopefully, but the target group for the proposed foundation generally, and this educational phase specifically, is UU congregations and affiliated organizations. The UUA itself is not a primary target for the proposed change because the denomination operates under congregational polity and has a “bottom up” orientation that avoids dogmatic impositions.¹²⁴ Conversely, the individual congregations are highly independent, and most are completely autonomous in their ministries. The UUA would

¹²⁴ See, for example, the description of congregational polity in the UUA Bylaws. “Nothing in these Bylaws shall be construed as infringing upon the congregational polity or internal self-government of member congregations, including the exclusive right of each such congregation to call and ordain its own minister or ministers, and to control its own property and funds. Any action by a member congregation called for by these Bylaws shall be deemed to have been taken if certified by an authorized officer of the congregation as having been duly and regularly taken in accordance with its own procedures and the laws which govern it.” *UUA Bylaws Section C-3.2*.

hopefully serve as an amplifier of this project, both through its national and regional staff, its publications, and the convening authority it holds around General Assembly.

Richard Osmer distinguished in his work *Practical Theology* between revolutionary versus evolutionary organizational change.¹²⁵ The current proposal may be a hybrid situation. It relies upon an ongoing incremental shift in the UU theological outlook, one that has been evolving over the past few decades, a move from a primarily humanist and liberal orientation to a more spiritual and progressive alignment. And so, the proposed change in attitude regarding separation between church and state would be initiated during that theological flux, affording an opportunity arising from the dedicated work of others, such as by the Eighth Principle organizers. The changes to theological outlook within the UUA have taken years to bring about and would as such be “evolutionary” in process, but that incremental effort may offer an unexpected opening for “revolutionary” organizational and attitudinal change.

Distinguishing the Foundation from Existing Models

As this project involves operating a legal and educational foundation to advocate for liberal and progressive religious rights under the law in the United States, examining existing models of similar organizations offered parameters to be considered and possibilities for educational, legislative, or legal efforts. Three organizations in particular offered useful insights:

- (1) the Law, Rights, and Religion Project at Columbia University;
- (2) the Religious Freedom and Business Foundation; and

¹²⁵ Osmer, *Practical Theology*, 202.

(3) the Interfaith Alliance Foundation.

There are other organizations that concern themselves with religious freedom, such as the American Civil Liberties Union, but that do so under a wider umbrella of social issues. The ACLU pursues a broad portfolio of legal areas, with religious freedom having been historically a less common undertaking. The current review will specifically look to organizations that are primarily engaged in work relating to religious freedom in the U.S. The three organizations examined focus on religious freedom, though their approaches differ. Such differences were instructive for how a new organization might prioritize these issues.

These groups are also notably not religiously conservative in their outlook—this is a pivotal distinction. There are large and well-funded conservative organizations in this field of advocacy, such as the Alliance Defending Freedom (“ADF”). The ADF describes itself as “the world’s largest legal organization committed to protecting religious freedom, free speech, the sanctity of life, parental rights, and God’s design for marriage and family.”¹²⁶ While these objectives might seem neutral in some respects, the terms “sanctity of life” and “God’s design for marriage and family,” suggest a conservative religious orientation from at least the UU perspective. ADF is also well-funded, with \$96.8 million in revenues as indicated on its 2021 IRS 990 filing.¹²⁷ As tax filings for the other organizations indicate, this level of funding is significantly greater than liberal and progressive counterparts.

¹²⁶ adflegal.org/about-us/who-we-are

¹²⁷ projects.propublica.org/nonprofits/organizations/541660459/202331319349305353/full

Why not then look to these financially successful examples? There is something unsettling about the approach taken by these large-scale conservative advocacy groups. There is a strong element of “moral panic” threaded through their fundraising efforts, though one might respond that is simply “creating a sense of urgency” albeit with a strong dose of social alarm. For example, on the ADF “Donate” page, one can find this message:

“Government officials—including those in the Biden administration—are getting bolder. Together with the Far-Left, they’re trying to create a radically different America. We’re seeing unprecedented levels of government overreach across the nation, and we must fight it. But to do that, we need your help.”¹²⁸

This is a stark battle cry over societal divisions. It is political, calling out the current administration as an opponent to religious freedom, as defined by the ADF. The “Far-Left” being invoked is a straw-man enemy, with the added specter of government intrusion into the lives of supposedly non-radical Americans. Fear may be a successful fundraising tool and there may be an increasing amount of fear among people concerned about their personal freedoms, such as reproductive rights and sexual or gender identity. And yet another goal of this project is to offer Americans a more nuanced understanding of religion, not replace one version of “anxiety farming” with another.¹²⁹

Is there a difference between this proposed approach and the ADF’s alarms about the “Far Left”? One hopes there is, but “hope” is also likely one of the ADF’s operative

¹²⁸ adfflegal.org/support/standing-for-religious-freedom

¹²⁹ Anxiety farming, similar to fear mongering, may be defined as the intentional effort to cultivate anxiety in an audience to encourage continued attention to some form of media or to raise funds for some purpose. And, to the author’s knowledge, he invented the term. Caggiano, *Faith on Trial*, 95.

motivations. More specifically to this project, UUs are not easy targets for “sky is falling” rhetoric, being skeptical almost as a spiritual practice. That is not to suggest that UUs are immune to the echo chambers of media or the comforts of hearing their opinions repeated back to them. But there is an underlying strength to their rationalistic tendencies, and an overarching value for critical thinking, which makes convincing them to shift attitudes more difficult. Implicit in such outreach to UUs is the desire to achieve the sought-after change in attitudes, but not at the cost of credibility or in the underlying values of being a UU. Again, one hopes.

With this secondary objective in mind, an additional consideration for the present study is how to navigate the divide between conservative and liberal/progressive issues. Claiming a right frequently requires taking a position on social issues, because such issues do not generally lend themselves to neutrality. For example, a religious groups’ position on LGBTQ questions will typically place it upon one side of a cultural and religious debate. However, to ignore such thorny questions would undermine the purpose of this foundation, as would a “come one, come all” policy. And, as Desmond Tutu once said, “If you are neutral in situations of injustice, you have chosen the side of the oppressor”¹³⁰ Defining injustice is then the prime challenge.

That is not to suggest that religious liberty is a “zero sum” game. The *Hobby Lobby* employer seeking not to pay for reproductive healthcare does stand at odds with its

¹³⁰ Gary Younge, “Archbishop Desmond Tutu: The secrets of a peacemaker,” May 22, 2009, theguardian.com/books/2009/may/23/interview-desmond-tutu

employees seeking that same care. But that is also a refusal to let go—an employee could also use their *salary* to pay for such care and the employer has not right to stop that use. Benefits should be no different and, to a degree, the peculiarities of the U.S. health system make this conflict possible.

The reach of my religious liberty should be no farther than my personal decisions, all the while not hindering the liberties and decisions of others. “Liberty” is always conditioned by the intersection of the rights of those around us, like having the right to play the bagpipes but not being free to do so at 3:00 a.m. in your high-rise apartment. And so “fairness” in this regard allows the gay couple and the straight couple to be married, or not to marry, and the Christian couple and the UU couple to use, or not to use, birth control.

This does not mean a system without conflict, but a system that permits individual religious differences while also protecting the wider, societal freedom to choose. When religious values reach into the lives of those who do not share the same religious outlook, calls for religious freedom become a desire for religious establishment. This form of fairness cuts both ways, such as in the right of a religious family to opt their children out from certain public school curricula. That possibility for choice follows the contours of one’s particular religious differences without reaching into the religious lives of others.

The legal and educational foundation is to advance liberal and progressive religious views that are not being addressed by existing organizations. The additional capacity for that underserved group would be diminished by opening it up to broadly defined religious liberty. The three groups selected are exceptions to a scarcity of

resources, but their size and funding are modest. There are far more organizations and far more legal resources available for conservative religious groups and their religious concerns, as evidenced by the ADF's substantial nonprofit revenues compared to these three liberal exemplars.¹³¹ This is an effort to amplify voices that have been effectively muted for too long, not make the conservative argument that religion must stand in opposition to secular society, as clearly suggested by organizations like the ADF.

Several preliminary questions arise when considering the nature of an organization. Is the intended goal of such an organization to be partial, if not partisan? To advocate, one chooses a point to argue, if not a political party to follow. Unlike the ACLU, which advocates for civil rights generally, other groups make conservative or liberal/progressive choices as consistent goals, such as choosing to support minority religious views, to advance reproductive freedom, etc. Again, neutrality on issues of injustice is not the current goal.

This would be the approach of a general law firm, one that takes clients and advises them regardless of the positions to be argued. In the present case, that would mean catering to all religious outlooks rather than consistently selecting one side of a debate. One case taken by the organization might advocate for the recognition of LGBTQ rights from a religious perspective, while another might seek to curtail them.

¹³¹ Others conservative religious legal nonprofits include the Becket Fund (2018 revenues \$9.7 million), the First Liberty Institute (2021 revenues of \$18.8 million), and the Faith & Freedom Coalition (2021 revenues \$29.7 million). See, Becket Fund, projects.propublica.org/nonprofits/organizations/521858532, First Liberty Institute, projects.propublica.org/nonprofits/organizations/751403169, Faith & Freedom Coalition, Inc. <https://projects.propublica.org/nonprofits/organizations/270182697>

The present project does not seek neutrality. Choices about social issues are significant within a liberal or progressive moral vision. Choices about LGBTQ issues and reproductive rights matter—even the *language* framing those issues matters. And following a strictly “separation between church and state” perspective would be counterproductive. It would undermine the primary effort to encourage reluctant liberals and progressives to embrace religious liberty as a strategy in bringing about social change. And, as previously described, it is a goal that stands directly at odds with the broad range of rights under the First Amendment.

The Law, Rights, and Religion Project at Columbia University

The Law, Rights, and Religion Project at Columbia University (the “LRR Project”) is a “law and policy think tank based at Columbia Law School that promotes social justice, freedom of religion, and religious plurality.”¹³² In a law school setting, the LRR Project takes a primarily legal approach to questions of religion and the law. That is a choice of outlook, one that could otherwise be primarily religious or social science oriented.

Taking a strictly legal approach might also restrict how questions of religious liberty are pursued. As one scholar remarked, lawyers may become hampered by outdated academic paradigms, chiefly the history and philosophy of Western church-state relations or the sociological secularization theory.¹³³ The “secularization theory” posits

¹³² lawrightsreligion.law.columbia.edu/content/about-us. Revenues of LRR Project do not seem to be separated out from those of Columbia University or its law school. It has two staffers, so it is a relatively modest organization with impressive research output.

¹³³ Winnifred Fallers Sullivan, “Religion, Law and the Construction of Identities: Introduction,” *Numen*, Vol. 43, no. 2, (May, 1996), 130.

the decline of the demand for religion as societies develop, which tendency the United States has been stubbornly refuting until recent decades. Such an orientation on history and philosophy suggests an arms-length examination of religion as an object of study rather than as an objective to be advocated.

The LRR Project takes a legal perspective, clearly, but the focal points for its projects are arguably liberal and progressive objectives. For example, their Racial Justice Program examines the “impact of religious liberty law on communities of color” and has researched the disproportionate number of Black and Latinx women giving birth to children in hospitals that place religious restrictions on healthcare.¹³⁴ Similarly, the LRR Project prepared a legal analysis of an anti-LGBTQ Missouri bill which was “instrumental in stopping the bill from advancing out of committee.”¹³⁵ These project choices are in harmony with the foundation’s goals.

The LRR Project focuses on research and legal analysis. This provides resources to courts, legislators, and parties to lawsuits. For example, the LRR Project collected data on the disproportionate effects of religious exemptions on women’s healthcare in Southern states, particularly delays faced by those suffering severe pregnancy complication.¹³⁶ In this way, the LRR Project can assist policymakers in state houses and aggrieved parties in the courts.

¹³⁴ lawrightsreligion.law.columbia.edu/content/frequently-asked-questions

¹³⁵ lawrightsreligion.law.columbia.edu/content/frequently-asked-questions

¹³⁶ lawrightsreligion.law.columbia.edu/content/southern-hospitals-report. Allowing religious exemptions potentially limits the availability of healthcare providers or locations, *i.e.* those seeking the exemption, making it harder to gain access to healthcare in areas with limited options.

Why not provide resources to judges and courts directly? Courts may look far and wide for laws and precedents to guide their opinions. But it would be problematic for a court to search for “alternative facts” *sua sponte*, meaning on its own, or to scout up divergent expert opinions to shape its resolution of a case. More often, additional materials would be supplied by third parties submitting briefs in support of, or in opposition to, one side of a case in dispute. The same result is achieved through the work of others using the research of the LRR Project.

In keeping with that possibility, the LRR Project has prepared and submitted amicus briefs to support less well-represented litigants. As its Faculty Director, Professor Katherine Franke, stated: “Since the Justice Department has demonstrated a strong bias in favor of the religious liberty rights of conservative Evangelical Christians, as experts in the law of religious liberty we want to provide courts with an unbiased, neutral framework with which to approach all claims in which a party is seeking a faith-based exemption from the law.”¹³⁷

Similarly, the LRR Project has sponsored panel discussions on such topics. For example, in 2022, they organized a workshop on the rights of Indigenous religious groups:

The U.S government has long restricted—and even criminalized—many faith practices of Native American communities. Today, tribes across the country continue to bring religious liberty suits to defend their members’ religious exercise: most notably, to protect religious sites from environmental and spiritual degradation. At the same time, laws intended to protect religious exercise can also harm Native people by making them vulnerable to discrimination by religiously

¹³⁷ lawrightsreligion.law.columbia.edu/news/professors-law-and-religion-safehouse-amicus (case involving “safe injection” sites operated by a faith-based nonprofit in Philadelphia, PA).

affiliated groups, such as foster care agencies.¹³⁸

This discussion likely arose out of concern regarding the Standing Rock Pipeline, an energy project in North and South Dakota, which Native American tribes protested due to its potential for disrupting or destroying sacred sites along the pipeline's planned route.¹³⁹ The project moved forward regardless of the objections of local tribes. One notable legal case relating to such religious rights of Native American tribes was *Lyng v. Northwest Indian Cemetery Protective Association*, in which it was opined that, "the First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."¹⁴⁰ This statement from a 1988 opinion remains broadly true under *Smith*, except that the federal government in many cases curtailed its right to disregard such citizen-based vetoes, underscoring the potential benefits for minority religious groups.

Legal advocacy is not inherently neutral, though the LRR representative suggested otherwise. "Neutral" as referenced here might suggest some definitive state of the law, an ultimate legal truth that is more a textbook-derived philosophy than courtroom driven precedent. And yet, the case law around religious freedom is frequently in flux, changing yearly across situations and in degrees of divergence from prior precedent. The *Dobbs* case overruling *Roe v. Wade* is an example of how "neutrality" is a

¹³⁸ lawrightsreligion.law.columbia.edu/events/faith-native-communities-fighting-freedom-offrom-religion

¹³⁹ LaDonna Brave Bull Allard, "Why the Founder of Standing Rock Sioux Camp Can't Forget the Whitestone Massacre," September 3, 2016, yesmagazine.org/democracy/2016/09/03/why-the-founder-of-standing-rock-sioux-camp-cant-forget-the-whitestone-massacre

¹⁴⁰ 485 U.S. 439, 452 (1988).

difficult goal to achieve in a partisan seeming court system.¹⁴¹ And the interpretations available across two centuries of American legal precedent span from strong government deference under *Reynolds* and *Smith* to strong religious preferences under *Sherbert*. Neutrality is easier to invoke rhetorically than to achieve in practice.

As a model to emulate, the LRR Project offers a balance of legal research and direct support for litigation. It is not *politically* partisan, but its chosen projects lean toward a liberal and progressive worldview. It also provides desperately needed legal support beyond that available to conservative Evangelical Christians who have well-funded organizations, like the ADF, to assist in their legal defense.

The one potential drawback to a primarily legal approach is that it would do little *initially* to help persuade those who prefer a hands-off approach to questions of church and state. Pursuing legal cases is typically a prolonged, multi-year process. Nonetheless, the organization's publications, legal works, and panel discussions are a useful roadmap to follow overall.

To underscore a sense of urgency, at least as to respective organizational capacities, the LRR Project is far smaller in scope and resources compared to ADF. Revenues of LRR Project do not seem to be separated out from those of Columbia University or its law school, which are sizeable. However, the LRR Project has two directors and a faculty advisor, suggesting a modest staffing level compared with the

¹⁴¹ [pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/](https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/) (Democrat, college educated, and young voters have increasingly unfavorable views of the Supreme Court).

ADF, which along with its \$96.8 million in revenues claims that it has over 2600 “allied attorneys” and 4,900 “network attorneys.”¹⁴²

The Religious Freedom and Business Foundation

The Religious Freedom and Business Foundation (the “RFB Foundation”) describes itself as “dedicated to educating the global business community, policymakers, non-government organizations and consumers about the positive power that faith and religious freedom for all (including those with no religious faith) have on workplaces and the economy.”¹⁴³ It presents workshops, lectures, and written materials about the role of religion and religious differences in the workplace and marketplace. Compared to the conservative ADF, it is also a far smaller organization with \$400,000 in revenues in 2020.¹⁴⁴

One might describe it as offering a “human resources” approach to questions of religious freedom,¹⁴⁵ including one presentation entitled “EEOC: Best Practices,” with the U.S. Equal Employment Opportunity Commission being a federal agency tasked with enforcing federal civil rights laws. This approach is markedly different from the legal resources offered by the LLR Project. There is a business focus to the RFB Foundation that situates questions of religious freedom within the workplace, such as offerings for

¹⁴² adflegal.org/about

¹⁴³ religiousfreedomandbusiness.org/about-our-work

¹⁴⁴ projects.propublica.org/nonprofits/organizations/464626031/202103159349306825/full. In comparison, the LLR Project is under the umbrella of Columbia University and its finances are not reported separately to the IRS on a 990 form. However, they have a staff of two, so one can assume their resources are quite modest compared to the ADF.

¹⁴⁵ religiousfreedomandbusiness.org/issues

“Training and Consulting,” “Religious Literacy in Business,” and “Covenantal Pluralism & Business.”¹⁴⁶

Covenantal Pluralism is defined as “the responsibility to engage, respect, and protect one another without necessarily regarding each other’s beliefs or behaviors as equally right” and is to be distinguished from mere toleration of religious difference.¹⁴⁷ This dynamic would operate within opportunities for “cooperative competition” and would by the organization’s description pay *social* dividends, though most of the applications described on the RFB Foundation website are *business* oriented. As their mission statement¹⁴⁶ puts it: “The Religious Freedom & Business Foundation...works globally with the mission of demonstrating that the economic value and social benefits of robust religious diversity and liberty for all are tremendous [and] believes that business and religious freedom for all combine to form a powerful force for a better world.”

The RFB Foundation has different points of focus than this project’s foundation, being global in scope rather than U.S. oriented and business focused rather than focusing on legal and social matters. It also focuses on fostering and advancing diversity, specifically in business settings. The proposed foundation would not, for example, be working with churches to improve their workplace compliance with various state and federal employment laws. And notably relating to the underlying premise of this project, religious organizations have extremely broad discretion in hiring decisions, particularly when it comes to choosing who serves in the role of “minister.” As such, even the legal

¹⁴⁶ religiousfreedomandbusiness.org/about-our-work

¹⁴⁷ religiousfreedomandbusiness.org/covenantal-pluralism-business

requirements of the Americans with Disabilities Act may not apply to congregations.¹⁴⁸

The target audience of the RFB Foundation is the business community, and therefore its focus is not the same as the project foundation.

However, the RFB Foundation's workshops and panel discussions were instructive for selecting new ideas and designing future programs and curricula. Furthermore, while the LRR Project is an apt model for the longer-term activities of the proposed foundation, the RFB Foundation's more educational direction is more in keeping with the initial phase of the work.

Interfaith Alliance Foundation

The Interfaith Alliance Foundation ("IA Foundation") states that its mission is to "celebrat[e] religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism."¹⁴⁹ The group spells out its beliefs in a credo:

*We believe that religious freedom is a foundation for American democracy.
We believe that matters of personal conscience must be held sacred, but no one has the right to impose their beliefs on others.
We believe that religious and political extremists are a threat to individual liberty and democracy.
We believe that religious and cultural diversity are essential in building vibrant communities.*¹⁵⁰

¹⁴⁸ Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012)(federal disability law did not apply to religious organizations choosing their ministers).

¹⁴⁹ interfaithalliance.org/about-us/our-mission/

¹⁵⁰ interfaithalliance.org/about-us/our-mission/

The IA Foundation is an interfaith effort organized to work across denominational lines and to support minority religious groups. It is also a far smaller organization compared with the ADF, with \$1.3 million in revenues according to its 2021 IRS 990 Form.¹⁵¹

The IA Foundation also provides a description of “religious freedom,” relying upon a particular interpretation of the religious provisions of the First Amendment:

Religious freedom is one of several fundamental rights outlined in the First Amendment of the U.S. Constitution. It includes two complementary protections – freedom *of* religion and freedom *from* religion...Freedom *of* religion protects our ability to follow the religious tradition of our choice, or no religion at all, without facing discrimination or punishment. Freedom *from* religion prevents the government from codifying religious beliefs into law, favoring religion over non-religion, or giving special treatment to adherents of one faith and not others.¹⁵²

This characterization of religious freedom fits into the long-standing Jeffersonian narrative of maintaining separation between church and state. However, Jefferson limited his sense of religious freedom to opinions rather than behavior, claiming that social responsibilities could outweigh religious obligations.¹⁵³ That is a dated understanding of the Free Exercise Clause, one that likely would not hold up under existing laws and precedents. The more modern flaw in the IA Foundation definition of religious freedom is that it suggests there is a right to freedom *from* religion. That legal perspective may be desirable within their outlook, but legally it would be hard to defend under present circumstances and First Amendment analyses.

¹⁵¹ interfaithalliance.org/wp-content/uploads/2022/09/990-signed-copy-2021.pdf

¹⁵² interfaithalliance.org/get-involved/issues/advancing-true-religious-freedom/

¹⁵³ Thomas Jefferson, “Letter to a Committee of the Danbury Baptist Association,” January 1, 1802.

The Establishment Clause prevents the federal government from establishing a religion, a prohibition that has been extended to the states under the Fourteenth Amendment. That seeming broadening of secular rights does not mean that government support for religious activities cannot be provided. For example, religious groups can seek federal funds offered to non-religious groups, public school funding can be used for religious school tuition, and government meetings can begin with a sectarian prayer.¹⁵⁴ Employers can even rely upon *their* religious beliefs to limit *employee* benefits such as access to reproductive health option.¹⁵⁵

The IA Foundation offers a definition of religious freedom that does not account for what currently *is* the state of the law, versus what is being sought after in the future. This definition might be described as an aspirational as well as nostalgic for the past. The “past” in this regard may have only extended from the 1940s until the 1990s, as for most of U.S. history, the federal government had far greater power to intervene on religious questions. And thus, this purpose arguably provides an inaccurate portrayal of the challenges faced by liberals and progressives. As currently interpreted by the Supreme Court, the First Amendment does not provide protection *from* religion, either in government policies or everyday life.

¹⁵⁴ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ____; 137 S. Ct. 2012 (2017)(state program to improve playgrounds must allow religious organizations to apply); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)(public school vouchers can be used for religious schools); and *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (a town council meeting could begin with a prayer).

¹⁵⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

These legal and philosophical differences aside, the IA Foundation is a useful organizational model to emulate in several respects. It has an intentionally religious outlook, unlike the LRR Project, and an orientation on education and legislation rather than the courts. It does not focus on the workplace like the RFB Foundation, a narrow outlook that does not help militate the imbalance in religious advocacy between conservatives and liberal/progressives.

Conversely, the IA Foundation seeks to restore a societal balance regarding religion that predates the conservative legal shift on the Supreme Court. This however would be a generational undertaking given the current partisan makeup of the Supreme Court justices (with lifetime appointments). That is not to discount the power of educational outreach or legislative initiatives over time, but to caution that an outdated definition of religious freedom has already led to passivity among liberals and progressives when activism is needed.

These three organizations offer useful aspects to be considered and even replicated in the new foundation. The LRR Project in particular presents a base model to follow. The RFB Foundation provides useful formats for workshops and presentations, the primary mode of outreach in the initial phase of the proposed foundation. And the IA Foundation takes an interfaith approach that is a useful reference point from which to grow outreach.

The Specific Purposes of the Proposed Foundation

When a nonprofit is created, it generally is formed as a corporation or organized as a limited liability company. Either form provides limited liability and a familiar vehicle for general business purposes, like opening bank accounts, procuring insurance, paying employees, etc. The organization then submits an application to become a 501(c)(3) organization, allowing it to solicit funds without having to pay taxes on the donations. The basis for 501(c)(3) status for the current project, which is still pending, would be as a religious and educational organization. Under the Code of Federal Regulations, an organization will be deemed as exempt if:

An organization is organized exclusively for one or more exempt purposes only if its articles of organization (referred to in this section as its *articles*) as defined in subparagraph (2) of this paragraph:

- (a) Limit the purposes of such organization to one or more exempt purposes; and
- (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.¹⁵⁶

The purpose clause of a corporation is often a perfunctory list of everything possible, allowing a for profit corporation the ability to be flexible in its ventures. That is not the case for not-for-profit organizations seeking to maintain 501(c)(3) status, so some care should be given to the wording of the purposes.

¹⁵⁶ 26 CFR § 1.501(c)(3)-1(b)(1)(i).

Moreover, the purposes of the project are important to framing the forms of outreach to be undertaken. If an organization is planning to engage in lobbying activities, there are complex (and often confusing) legal restrictions on the amount of time spent on such efforts to maintain a 501(c)(3) designation. If lobbying is to be a major aspect of the organization's work, it may seek a 501(c)(4) designation, which may require disclosure of donors to the organization, such as required in the States of New York and Connecticut.

For the present project, the goal will be to become a 501(c)(3) organization and *not* a 501(c)(4) lobbying group. The first and current phase of the project is be educational, with perhaps some filing of legal briefs or publishing of legal materials such as law review articles. Lobbying for legislation is beyond the scope of this project, and possibly beyond the scope of the foundation's later works, though that potential activity could be addressed at a subsequent point and would require a potential filing under Section 501(c)(4).

Given the dual purpose of advocacy and education, the primary purpose clause is as follows: "The purposes of the corporation shall be, (1) To foster and to promote the use of law, including legal research, opinions, briefs, publications, forums, and arranging advice and representation to defend and advocate for progressive religious freedom and rights in the United States; and (2) To educate the public and religious organizations as to the religious rights of liberal and progressive individuals and organizations under federal and state law in the United States." These purposes are a composite drawn for similar

Massachusetts nonprofit organizations: the Greater Boston Interfaith Organization and the Conservation Law Foundation.

Along with purposes, an organization needs a name. The name of the legal and educational foundation is “The Progressive Religious Freedom Foundation, Inc.” The name specifies that the organization is “progressive” in orientation and signals to donors what is intended by the group’s work. There is an unfortunate habit among some organizations to provide names that suggest neutral sounding goals that are, on closer inspection, politically or religiously conservative. The current project is more forthright in its objectives.

Objectives According to the Selected Methodology

Purposes are threshold determinations for an organization and they are legal requirements for forming an organization. They spell out what the organization can and will do. Objectives are various goals set as milestones for those purposes. Returning to Kotter’s Eight Steps for Leading Change, the organization’s objectives need to follow a course of actions.¹⁵⁷

Create a Sense of Urgency. With the legal and educational foundation having been formed, the first steps have been developing a communication strategy to convey the need for change. This messaging draws upon the negative legal situation faced by liberals and progressives as well as the survey data about public attitudes. This draws

¹⁵⁷ John Kotter, “Leading Change: Kotter Methodology.”

upon well-known legal examples, such as the recent *Dobbs* decision and older cases like *Hobby Lobby*.

Selecting the correct media for communication is an important set of choices. One vehicle for the message might be a denominational publication, like the *UU World* magazine. This publication is sent in print to all UU congregations and enrolled members, with 115,000 subscribers in 2023, and a website.¹⁵⁸ Social media will be a useful platform, particularly focusing on UU colleagues. Ministers are a primary contact point for congregational communications—UUs operate under congregational polity, so internal organizational structures will vary, though the role of minister endures across such differences. There are collegial Facebook pages that serve closed groups like “UUMA Colleagues” or “UU Ministers in New England.” These pages have respectively 1,300 and 250 members and are one means for colleagues to communicate quickly and widely.

The Unitarian Universalist Ministers Association (“UUMA”) is a collegial organization for UU ministers and represents the vast majority of those in fellowship within the UUA. Although congregational polity does permit ordinations from within congregations, that is an atypical pathway to ordination within the UUA, which relies upon a centralized system of ordination guided by the Ministerial Fellowship Committee. The UUMA is therefore the most discrete and organized group of representatives of UU congregations around the United States.

¹⁵⁸ www.uuworld.org

The format for outreach will take the form of periodic publications, including a blog or newsletter specifically geared toward colleagues and broad congregational questions. The foundation will also issue, commission, or collaborate on reports like those published by the LRR Project. Articles will highlight recurring topics of interest, like disputes over signage regulations (a common issue for UU congregations with an abiding love for social justice banners), or will speak to broad topics like “How to Respond When the City Does Not Approve of Your New Ministry.” Larger writing projects entail comparisons of religious rights across regions, such as a planned comparison of the relevant laws and state constitutional provisions in the New England. Those publications will underscore the urgency of these issues but also supply a channel back to the foundation for concerns and inquiries for assistance.

The venues for the materials will need to be across a range of platforms: a website, social media applications, blogging sites, video sharing such as on YouTube, and emailed versions of newsletters, such as through Substack. Technological capability will obviously be a necessary skillset to be developed. Online communication will be a driver of the project during this opening phase of the organization.

Building a Coalition. The effort to organize liberal and progressive organizations would follow the initial communication effort. Ministers would become primary recipients of the foundation’s newsletter and social media postings. Other individuals and lay leaders would follow as would congregations and other religious organizations. Again, the identified UU resources would be a ready point of access and the author’s

familiarity with UU colleagues and UU organizations will be instrumental. This will be the beginning of a database of interested and aligned parties. This will be the communication chain for reaching out and providing information, but also for those looking to find assistance.

Form a Strategic Vision. The prior steps were about organizational and tactical matters. The longer-term strategy for the foundation and its overall goal will require the expansion of outreach and eventually the direct assistance to parties with legal situations, such as through a network of attorneys as established by the ADF. That is a challenging step without the ample resources of a group like ADF, but just as a journey of 10,000 miles beginning with a single step, so too must this project begin with its current single attorney.

As the communications network expands, the number of organizations seeking information will expand. The strategy will be to maintain those connections across New England and across the U.S. and to draw other like-minded organizations and volunteers into the effort. Like the LRR Project, the current project will need to work in order to grow—when first contacted, the LRR Project had one staffer and now they have a second within a two-year period. That speed of growth seems manageable. The LRR Project model of providing legal resources and research is the plan for the immediate future.

The strategy is one of *replication*. For example, as a hypothetical, a UU organization in Massachusetts seeks to install a temporary sign on its building in view of the street. However, the municipality rejects the proposal because the congregation is

within a historic district and the proposed sign has elements that are disfavored—font size, color choices, lighting, etc. Actual examples of this situation include rejected signs that provide the church’s website address or which favor social movements such as “Black Lives Matter.”

A municipality technically has the right to deny a permit for a temporary sign, such as in a historic district for spoiling the view or for concerns about distracting traffic. There are of course free speech considerations for any such applicant. However, in the case of a UU congregation, the RLUIPA law in particular makes such determinations complicated for a municipality. Therefore, the congregation can file an appeal of the municipality’s decisions on the basis that it infringed upon their free exercise of religion.

The temporary sign serves as an example of what is possible, both as an approachable teaching hypothetical and a likely situation faced by many UU congregations. The replication strategy would be to make each instance serve as the steppingstone for the next and to expand from one case to more interventions. Media interest in a developing dispute would help carry the example to a larger audience along with the possibilities that example might suggest to other individuals or organizations.

The goal in this strategy is not to “corner the market” on such cases, which is beyond the capacity of even a large and well-funded organization. The true goal is to raise awareness about how federal and state laws could be used by congregations—or other lawyers—to challenge such limitations on religious uses. These legal strategies have been used by conservatives for many years, so there is no “proprietary” information

that needs to be guarded. The desired development would be successful examples of progressive and liberal groups pursuing religious cases. That would serve the goal of shifting attitudes about “religious freedom” as a strictly conservative objective and, instead, transforming religious freedom into an important tool for advancing progressive and liberal religious values.

Enlist a volunteer army. This step in the process will likely have different manifestations. The growing database of subscribers to a blog and newsletter are potential links in a chain of communication among those who might be interested or who know someone in need. The plan is to draw upon that database as a source of donors, volunteers, or points of contact. In addition, those who have been helped in specific cases, such as the congregation seeking to get its temporary sign approved, might also serve as testimonial providers for the benefits of this approach. And, tangentially, other lawyers who pick up on these tactics to assist congregations, even if unrelated to the foundation, help further the goal of shifting attitudes about religious freedom. These lawyers may also join a network of professionals familiar with this area of law and therefore be primed to spot the legal issues and handle the cases.

Might there be a risk of spurring *conservative* religious groups and individuals to do the same? There is little “risk” of that because this has been a long-term strategy of many conservatives, with well-financed and resourced organizations actively soliciting cases from across the United States. From this perspective, the true risk is to do nothing in light of the imbalanced use of these generally available religious rights.

Enable action by removing barriers. What are the barriers to be removed? First, there are the underlying attitudes of liberals and progressives against such legal arguments under the theory of keeping church and state separate. That is an ultimate goal, not an initial one, and as such it needs to be addressed by incremental efforts. The blog posts, newsletters, workshops, and other offerings are the points for persuasion in the overall process. The initial barrier is therefore the reluctance to consider the issue, which would be chipped away by the replication process of communication and eventually successful cases of policy changes or legal challenges won.

There are also the barriers to religious values implicit in these various cases, but those barriers are the substance of the project. When a religious sign is not approved, that is a barrier to the message, but it can become a tool for dismantling the barrier of a local congregation's resistance to this religious freedom approach. These administrative decisions are not always made for the named reason and so naming them as such is another way of increasing transparency. When a temporary sign permit is ostensibly denied because it is deemed distracting to the drivers, the underlying reason might be the information on the sign, such as showing support for the "Black Lives Matter" movement or the congregation's public opposition to anti-LGBTQ policies being established in a state. Openly stating the true reason is more than being contrarian—it reveals bias and encourages the attitude change sought.

Free speech is one possible legal argument a congregation can make, but it is an argument in which the supposed neutrality of government policies is assumed—the *congregation* must rebut the presumption that the denial of the sign was for legitimate

governmental reasons. In a Free Exercise case, that burden of proof can be switched *against* the government. Free speech arguments are in this sense a barrier because they are less powerful while feeding into the UU bias against religious freedom language. Demonstrating the success of the religious freedom arguments will therefore help soften such resistance and help remove the barrier of attitudes.

Generate short-term wins. A “win” might take various forms in this situation. The first workshop given was a win, followed by more sessions for new organizations as the next step of progress. The first newsletter is a win, expanding through a growing list of those receiving the information. Consulting with a congregation on these issues and thereby *avoiding* the need for a lawsuit is a win. This saves both the congregation and the municipality time, resources, and negative media attention. The strategy is one of replication and therefore the initial steps are the groundwork from which subsequent steps are taken. Each task becomes a link in a chain—the means for pursuing the next goal, through greater exposure and wider communications.

Sustain acceleration. This step is longer term than the other immediate goals. The project is focused on the initial phase, the educational and communications aspects of the strategy. The acceleration will closely follow the contours of the communications and presentations. As more people seek out information, more opportunities will develop to help and to advise religious folks on related questions. Assisting in new and existing lawsuits will be a further step.

Institute change. The transformation sought is about persistent attitudes about church-state matters. The approach toward change relies upon incremental persuasion,

whether by newsletters, panel discussions, or support in legal disputes. The first phase, and the relevant phase to this project, is establishing a credible presence in the UU community. Like any social action project, it has a longer-term goal of helping liberals and progressives embrace religious liberty as a strategy for social change. The implicit and more immediate goal, however, is to begin shifting attitudes. And the method of assessment planned in the present case will be a pre- and post-participation survey given for informational workshops planned for UU audiences.

Developing Workshop Outreach and Educational Materials

The first step in the process for cultivating a change in attitude among UUs will be offering workshops, *i.e.* informational presentations. These will be offered to UU congregations, organizations, and clergy gatherings. The presentation will be geared toward a UU audience, so some “short-hand” language might not be as readily understood in non-UU settings. For present purposes, the attached and detailed workshop draft at Appendix A will contain explanatory notes as deemed necessary. This workshop is planned to last between 45 minutes to an hour, followed by a question-and-answer period if offered synchronously in person or online. It has already been offered as a stand-alone recording to be viewed on demand without such interaction.

Such workshops are common for UUs. They are a staple of the UUA’s General Assembly, an annual gathering of UUs from across the United States to consider the business of the denomination. In 2024, that “gathering” will be virtual. This experiment in remote activities began during the pandemic and may become an ongoing feature of UU polity. General Assemblies will continue to be annual, but in-person gatherings may

be in alternating years. That change in long standing habit will not change the offering of workshops at General Assembly. These will be presented online, whether live or recorded.

The first section of the presentation is simply offering information about the speaker and connections to and within the UUA. Shortly thereafter, the first legal case mentioned was chosen in spite of its less sensational content, such as compared to *Masterpiece Cake. Roman Catholic Diocese of Brooklyn v. Cuomo*¹⁵⁹ was an emergency lawsuit during the pandemic in response to restrictions placed on church operations in the State of New York. Under an emergency order, no groups larger than ten people were allowed to gather in a house of worship, regardless of the size of the building. The Roman Catholic Diocese of Brooklyn was successful in blocking this restriction, arguing that similar restrictions had not been imposed on “essential” secular organizations, such as acupuncturists, bicycle shops, and lawyers’ offices.

The implication was that worship is non-essential, at least in the opinion of the State of New York. This was perhaps a case of hasty drafting by New York, or its governor, applying a restriction expressly aimed at houses of worship. And the Supreme Court somehow equated a worship service with a trip to a bicycle shop, as if those activities were not inherently different in terms of length of a visit, numbers of people, or overall potential for exposure to Covid-19.

This case was chosen because it verges on the absurd from the typical UU perspective. Congregations within the UUA have been strongly supportive of Covid-19

¹⁵⁹ 592 U.S. ____ (2020).

restrictions, for example by advising online services and maintaining mask mandates long after most other denominations removed them.¹⁶⁰ Objecting to such public health measures is out of character for most UUs and so the sense of urgency presented by such conservative religious freedom arguments would be highlighted (“How could that church place public health at risk in that way?”). And creating a sense of urgency is the first of Kotter’s Eight Steps for Leading Change.

The presentation then juxtaposes the differences faced by a secular organization seeking to make similar arguments. If for example a movie theater had argued against restrictions on public assemblies during the pandemic, the courts would have been far less accommodating. Generally, the courts will defer to the government’s policy choices particularly in a public health crisis. However, recent pandemic era legal decisions like *Cuomo* have shifted from deference to government public health choices to greater suspicion of government policies. Any exception for a secular activity can become an exemption available for a religious activity, regardless of the divergent nature of the activity.¹⁶¹ A worship service seems a more risky activity for exposure to a virus than a trip to the bicycle shop and yet that difference was not clear to the Supreme Court.

The proposition for the workshop audience is that even during the pandemic, even during a life-threatening emergency, these religious freedom claims were upheld. The

¹⁶⁰ See, e.g., “As of August 2023, masks are encouraged, but not required, throughout the building.” First Unitarian Society of Madison, Wisconsin, fusmadison.org/coronavirus/ In December 2023, I am still called upon to wear face masks at UU clergy events.

¹⁶¹ Andrew Koppleman, “The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty,” 108 *Iowa Law Review* Vol 108, 2237 (2023). A “most-favored-nation” clause is a legal provision that guarantees that no one else will receive better terms in a similar agreement and the original agreement will be deemed amended to include those better terms.

initial reaction would expectedly be disagreement with the outcome rather than an immediate desire to emulate strategy, which is why more arguments will be brought forward. Beginning with the more extreme case, however, clearly underscores the strength of the religious arguments to a potentially resistant audience. This is to be followed by examples of liberal and progressive religious groups taking stands in successful legal vases.

There is also a warning about taking a generalized discussion as legal advice. This area of the law is complex and changing, as reflected in the 2023 law review article cited reviewing such shifting trends. While awareness of the issues is important, understanding how to respond to those issues requires professional assistance. A general primer on “law” is beyond the scope of such a workshop, but words to the wise and a few illustrative examples are hopefully sufficient. A more specific consideration of the First Amendment and its two religious clauses is necessary to situate the conversation and to explain the tension between protecting religious behavior from government intrusion and preventing government support for preferred religious groups.

The definition of “liberal” and “progressive” is then introduced. This definition draws upon the work of current UUA President Sofia Betancourt and Harvard Divinity School Professor Dan McKanan.¹⁶² As discussed, the UUA is in the process of amending its bylaws to reflect changing theological attitudes. President Betancourt and Professor McKanan are important figures in the denomination and their work places the

¹⁶² Sofia Betancourt, Dan McKanan, Tisa Wenger, and Sheri Prud’homme, “Claiming the Term ‘Liberal’ in Academic Religious Discourse,” *Religions* 11, no. 6 (2020): [mdpi.com/2077-1444/11/6/311](https://doi.org/10.3390/rel11060311)

conversation within a familiar context and authoritative light. The proposed UUA bylaw changes arguably shift the denomination from its historic liberal posture into a more progressive mode, with individual concerns de-emphasized in favor of more collective concerns.

In the attached presentation, there is a historic discussion of Thomas Jefferson's famous statement "wall of separation between Church & State," and its author's surprising understanding of what that wall was meant to achieve. This is to place the "wall" imagery in its historical context, being far more supportive of the *government* than modern audiences might realize. For Jefferson, civic duty trumped religious obligations. Older UUs might support the more civic minded orientation, while younger UUs would have more skeptical views on the government's authority to control personal behavior. Again, this difference in opinions is the hoped-for pivot point where attitudes begin to shift.

The hypothetical about a Massachusetts church sign is then spun out, interlaced with arguments about the various laws that might apply to the situation. The scenarios are expanded to other land use situations, like solar panels and wind turbines, or forms of ministry, such as feeding the homeless or helping refugees and immigrants.

Some cautionary language is again provided as some of these examples are far more complicated and, as in the case of helping immigrants, could subject a congregation to legal consequences and even criminal penalties. Conversely, many UU congregations have directly or indirectly helped establish "sanctuary" sites for undocumented immigrants trying to remain in the U.S. The risks are already being taken without regard

for these First Amendment arguments, which may be helpful to these groups in certain scenarios.

Some of the workshop text is about adjusting expectations. There is no right to be free from religion, but there are options for countering overt conservative claims to public spaces and public policies. And some of the text is homiletical, seeking to convince folks that a shift toward a progressive and covenantal outlook is not only necessary but already underway in the UUA. The First Amendment arguments are not a magic wand that can change everything, but they are strong possibilities to advance many liberal and progressive religious values.

4. *Assessment and Evaluation*

Surveying Attitudes About Separation of Church and State Among UUs

To assess whether efforts toward transforming religious attitudes among UUs is successful, workshop participants will be given a pre- and post-intervention assessment. The questions will be based upon survey questions developed by the Pew Research Center.¹⁶³ The form of question is a choice between a pair of statements that represent endpoints on a spectrum of belief. The person surveyed is asked which statement better reflects their opinion.

¹⁶³ A representative of Pew Research Center has indicated that the questions may be freely used for the project under the center's "Terms and Conditions." pewresearch.org/about/terms-and-conditions/

This set of questions is taken from a 2017 Pew “Political Topology” survey, with three additional questions regarding church-state attitudes in bold type:¹⁶⁴

Which of these statements comes closer to your views, even if neither is exactly right?

Government regulation of business is necessary to protect the public interest.

Government regulation of business usually does more harm than good.

Poor people today have it easy because they can get government benefits without doing anything in return.

Poor people have hard lives because government benefits don't go far enough to help them live decently.

Immigrants today strengthen our country because of their hard work and talents.

Immigrants today are a burden on our country because they take our jobs, housing and health care.

Most people who want to get ahead can make it if they're willing to work hard.

Hard work and determination are no guarantee of success for most people.

Business corporations make too much profit.

Most corporations make a fair and reasonable amount of profit.

Stricter environmental laws and regulations cost too many jobs and hurt the economy.

Stricter environmental laws and regulations are worth the cost.

Homosexuality should be accepted by society.

Homosexuality should be discouraged by society.

Civic duties should take priority over religious values.

Religious values should take priority over civic duties.

In foreign policy, the U.S. should take into account the interests of its allies even if it means making compromises with them.

In foreign policy, the U.S. should follow its OWN national interests even when its allies strongly disagree.

¹⁶⁴ Pew Research Center, *Political Topology*.

*It's best for the future of our country to be active in world affairs.
We should pay less attention to problems overseas and concentrate on problems here at home.*

***Government policies should support religious values.
Religion should be kept separate from government policies.***

*Our country has made the changes needed to give blacks equal rights with whites.
Our country needs to continue making changes to give blacks equal rights with whites.*

*The economic system in this country unfairly favors powerful interests.
The economic system in this country is generally fair to most Americans.*

***Individual rights are more important than collective responsibilities.
Collective responsibilities are more important than individual rights.***

*The obstacles that once made it harder for women than men to get ahead are now largely gone.
There are still significant obstacles that make it harder for women to get ahead than men.*

The base questions are from a survey about general political differences on a “left/right” axis of orientation. They will allow placement of respondents on a general political typology. In addition, two pairs of questions were added to assess the primary inquiry regarding separation of church and state. One pair regarding government policies was drawn from a 2021 Pew survey.¹⁶⁵

The first question is central to the assessment: “Civic duties should take priority over religious values” versus “Religious values should take priority over civic duties.” This is also an explicit statement of the distinction implied by Jefferson in his wall of separation comment to the Danbury Baptists. A more traditionally liberal UU might be

¹⁶⁵ Pew Research Center, “In U.S., Far More Support Than Oppose Separation of Church and State,” October 28, 2021, [pewresearch.org/religion/2021/10/28/in-u-s-far-more-support-than-oppose-separation-of-church-and-state/](https://www.pewresearch.org/religion/2021/10/28/in-u-s-far-more-support-than-oppose-separation-of-church-and-state/)

more amenable to this preference for civic duty. A more progressive UU might lean toward the religious, particularly in the collective sense set forth in the third pairing. The second question is a more generic phrasing of the separation of church and state conundrum.

The third pair of questions seeks to determine whether the respondent has more of a liberal versus progressive orientation: “Individual rights are more important than collective responsibilities,” versus “Collective responsibilities are more important than individual rights.” One might expect that those indicating a liberal leaning would be less inclined to adopt the proposed religious freedom arguments, while those indicating a progressive leaning would be more inclined to accept these arguments.

The selection of these questions is to help place people in the Pew Research political typology, which allows for comparison to a large sample size. *Government policies should support religious values/Religion should be kept separate from government policies*: this question is designed to assess how the workshop expands a participant’s definition of “religion” as inclusive of liberal and progressive moral values—the word “religion” itself might elicit pushback for some UUs, in a denomination that often avoids use of words like “church,” “worship,” and “God.” If there is no change in response across participants for this question, the intended message was not delivered as intended. This question is also from another Pew survey.

Those answering more moderately than the categories of “Solid Liberal” or “Progressive Left” from the Pew Research topology survey are *also* more likely to be

moderate on questions about the separation between church and state.¹⁶⁶ If however a “Solid Liberal” or “Progressive Left” respondent shows a change in attitude on the religious questions pre- and post-intervention, that will be evidence that a shift in attitude among the more stereotypical UUs has occurred to some degree. Attitude change is the overall goal, but assessing how well the message is being received by the participants predicted to be more resistant is important information.

Proposed Statistical Methodology and Analysis

The research methodology will be to perform the proposed intervention through the planned workshops and to record responses through this series of survey questions. The questions will evaluate the participants’ sentiments regarding the separation of church from state as well as the broader questions concerning political typology. The project will assess intervention efficacy through pre- and post-workshop surveys during the course of the project’s twelve-month timeframe. Simple t-tests will be performed to compare the mean percentages of responses for both the pre- and post-intervention surveys. More granular data can be assessed with individual percentage changes, to be tracked by anonymous participant numbers.

The analysis will be a simple calculation of percentages regarding the either/or statements. For example, a “Solid Liberal” in the topology survey was much more likely (92 percent) to support the proposition “Religion should be kept separate from government policies.” If after the presentations, someone’s position shifts their

¹⁶⁶ Pew Research Center, *Political Topology*.

preference to “Government policies should support religious values,” under this analysis the attitude shift would be attributed to the intervention in which it will be expressly argued that liberal and progressive “religious values” should be considered as a crucial aspect of a broader sense of religious freedom in the U.S.

Conclusions

The goal of this project is to assist liberals and progressives who are reluctant to speak out publicly on religious questions so that they can advance their moral values and protect their religious liberties by encouraging and educating them to use legal protections under the First Amendment. This will be achieved through a legal and educational foundation. The initial phase of the project will be presentation of workshops to Unitarian Universalist individuals, congregations, and other organizations. The workshop is designed to be informative and persuasive regarding questions of religious freedom and the concept of separation between church and state in the United States. The pre- and post-intervention surveys will be conducted to assess the efficacy of the workshops and hopefully will show a shift in attitudes towards greater willingness to express liberal and progressive religious values on questions of social justice. The goal is *not* to make people give up on the ideal of a wall of separation between church and state, but to help them appreciate a strategy of using the strong legal protections afforded to religious groups in the United States.

The strategic outcome therefore would be to bring about desired social change and to protect the religious rights of UUs as well as other liberal and religious liberals and those of vulnerable minority religious groups. This intervention is intended to take advantage of a once in a generation change happening within the Unitarian Universalist Association, as the organization seeks to amend its bylaws to embrace more progressive and spiritual values and to move away from its historically humanistic, rationalistic, and individualistic outlook. It is believed that such theological changes will also help to bring

about the desired shift in attitudes on the question of the separation of church and state in the United States.

Appendix A – Religious Freedom Workshop Script

The following is the text for a proposed workshop to be given at the General Assembly of the Unitarian Universalist Association. The format could be in-person, remote, or hybrid.

Welcome to my workshop: *Liberals, Progressives, and the Fight for Religious Freedom*. My name is Mark Caggiano. I am the minister serving at the First Church in Chestnut Hill outside of Boston.

Prior to my ordination a decade or so ago, I was a lawyer. Technically, I still am a member of the bar, though I generally limit myself to writing and teaching these days. In 2021, I published a book about religion and the law with Skinner House [*a UU denominational publisher*]. The book is entitled *Faith on Trial: Religion and the Law in American Society*. The origins of the book were from my lectures in a course I taught at Boston College Law School, “Church and State.”

The purpose of this workshop is to give you fine folks a grounding in the framework of the laws that protect religious rights in the United States. The ultimate goal is to give you some familiarity with the way things work, but not, *not*, *NOT* for this conversation to be the legal advice you rely upon if and when you decide to do something. This is a very tricky area of the law, one that is constantly changing. Read the newspaper, and you might see the Supreme Court discussing yet another case about religious freedom.

In the past few years, there have been a series of cases in which religious organizations or individuals have challenged government restrictions on a variety of religious activities. Some of these limitations arose in response to the coronavirus

pandemic. Sometimes these restrictions were specific to religious gatherings and other times they were more general in their wording but had a particular effect on religious activity.

One case that captures much of the controversy over religious freedom is the Supreme Court case, *Roman Catholic Diocese of Brooklyn v. Cuomo*. The State of New York placed significant emergency restrictions on public gatherings, including houses of worship, such that no more than ten people could be admitted to indoor gatherings regardless of the size of the building. Essential businesses were not subject to that same set of narrow restrictions, with the definition of “essential” including acupuncture facilities, bicycle shops, and lawyers’ offices to name a few. Put another way, these restrictions affected religious organizations while other secular groups were subject to less stringent rules. This disparate treatment was problematic to the Supreme Court and the applicability of the restrictions to religious uses was halted. There have been several similar cases along the same legal lines and the Court has grown quick to step in when it feels that religious activities are being unfairly burdened.

Now if you were another type of business, say a movie theatre, and you tried to make the same argument about unfair treatment, you would probably not get very far. But, you might ask, what about my First Amendment right to freedom of speech, in the form of showing movies? Historically, however, the government can impose emergency limits in a time of national crisis and such restrictions have been honored by the courts. So why do houses of worship get this special level of consideration? Because they do. They do indeed get special treatment.

But before we get too far into the details, I want to emphasize that these remarks are *not intended as legal advice*. They are not advice that you can jot down, offer up to a government official or a judge, and expect to win your day in court. The laws involved and the court cases concerning religious rights are *complicated*. They are complicated for lawyers who work in the field. My hope is to alert people to the issues so you can seek out legal guidance as needed.

The best generic answer I can offer to any legal question is one painfully familiar to most lawyers. The answer is “*It depends.*” It depends upon the issues, of course. But it also depends upon the state you are in. The place that something happened. How long ago it occurred. Who was involved. The same question may have a different answer if you are standing in Hartford, Connecticut or if you are standing in Boston, Massachusetts, notwithstanding their geographic proximity and perceptions of common “liberalness.”

Here is an example I use in my book. A man is selling a late model car, notably with a manual transmission. A new driver comes by, looks at the car, and buys it. A few days later, the buyer calls to complain that the car is not working. The seller goes to look at the car and realizes that the buyer had burned out the clutch and so he refuses to return the money paid or to take back the car. The buyer sues the seller in small claims court. The judge in the case listens to the story of the burned-out clutch. The judge turns to the *seller* and orders him to return the money and take back the car. The seller is upset and asks the judge how that was possibly right. The judge responds that if the buyer had

driven the car into a wall, the judge would still have ordered the return of the money.

How could that be fair?

In the story there was one significant detail that changes everything. The buyer was a “new driver.” This all happened in Massachusetts and new drivers can get their licenses at the age of 16 ½. Massachusetts also defines adulthood as beginning at age 18. Adults can make legally binding contracts. Minors, someone under 18 years of age, cannot. There was never a legally binding contract between the parties.

That is one example of why the answer to a legal question often depends upon complex and unexpected factors. And that is why when you or your congregation decide to take up a legal challenge, it is important to obtain legal guidance. See what trouble can crop up just selling a used car. If you are doing something more technically challenging, like say filing a lawsuit regarding First Amendment law, you need to work with someone familiar with the area of the law. You should not rely upon some well-intended volunteer lawyer from your congregation who is in over their head. Simply put, make sure to lawyer up, and to lawyer up with a knowledgeable practitioner, even after listening to my enormously engaging offerings to you.

The premise of this workshop is to encourage religious liberals and progressives not to shy away from pursuing *religious* challenges to laws or government policies. This does not mean that no one does—many religious conservatives do so all the time. There are many conservative religious legal foundations funded with millions of dollars for this purpose. One group, the Alliance Defending Freedom, had nearly \$100 million in revenues in 2021.

Far fewer liberals and progressives choose to take this route when compared to more conservative religious groups and therefore resources are far more limited. Why is that? I am guessing it has to do with some inherent tendencies of liberals and progressives.

What do I mean when I use those terms, liberal and progressive? The definition for *liberalism* I use is “a tradition of rebellion against inherited authority that seeks to free individuals and communities from bondage of the body, mind, and spirit.” This was a definition drawn from a conference involving various UU luminaries, such as our new UUA President Sofia Betancourt and Harvard Divinity School Professor Dan McKanan. Liberalism in this sense is rights oriented, focusing on liberty. In comparison, progressives tend to be more influenced by the liberating mindset, as in liberation theology, and concerned with broader forms of solidarity with others. If you consider the evolving conversations around the Article II amendments, you might detect a shift from a liberal to a progressive outlook.

And, I would strongly argue, that UUs are shifting into a more progressive religious mindset. Not that they are no longer liberal, but that the scope of concern is far broader than our individual outlooks. We might distinguish liberalism from progressivism because one is more focused on individual concerns or rights while the other is more focused on collective effects. So, when we compare “liberal” versus “liberating,” it is in a sense about the concern for the freedom for the one versus the freedom for the many. Now, of course, the liberal perspective can slide over into the

progressive, while the progressive view can also become rights focused. These are broad generalizations, but the tendencies are there.

And one such tendency is that liberals are often, if not always, uncomfortable speaking in religious terms. It is like the old saying that you do not discuss money, politics, or religion at the dinner table. This may be a generational difference.

Conversely, progressives are often, if not always, distrustful of institutions. This may be eminently understandable, but it also can limit the ability of progressives to respond to some of the social problems they seek to address.

That self-imposed limitation may be because of a lack of awareness in the religious rights under the U.S. Constitution. There are other rights more frequently embraced from a liberal perspective, such as freedom of speech. But such rights are not equal. For example, the freedom to speak does not extend to the freedom to *act*. I can say “No more income taxes!” and face little consequence, but the minute I stop paying income taxes, there might be trouble with the IRS. Religious freedom, however, often provides wider and more significant protections for *behavior*.

But first let’s talk about a wall. The idea of a wall separating church and state is a concept perhaps first coined by Thomas Jefferson. In 1801, Jefferson became President of the United States’ then decades old federal government. He received a letter from the Danbury Baptist Association in Connecticut. The group had written to him about their religious liberty concerns, with 19th century Baptists often suffering as religious outsiders in various areas around the country. Jefferson wrote to them in 1802, so please forgive the dated language:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.

A wall seems to have been built by Jefferson, at least rhetorically. But what did that mean? How is it structured? Is it a barrier, tall and wide, or does it have gaps? Something ornamental in wrought iron through which you might wriggle through if you were so inclined?

Jefferson noted in his letter that the government could reach *only* actions, not opinions. In one sense that is helpful, assuming you were only worried about expressing your religious opinions. But how is that different from the right to free speech? And if actions can be controlled by the government, as suggested by Jefferson, doesn’t that make a lot of religious *practice* open to government interference? Jefferson also stated that natural rights, like religious rights, do not stand in opposition to one’s *social* duties. Social duties meaning the civic obligations one owes to the society and to the nation. Does that social debt mean there can be no objection to fighting in a war? No objection to how the government controls its borders? No objection to how a society treats certain of its members? Probably so in each of those cases, though Jefferson would not have a 21st century outlook and two centuries of hindsight on such questions.

This letter was written in 1802. Slavery was legal and Jefferson owned enslaved people. Colonization was commonplace and ongoing around the world and in the United States. The social and political subjugation of women was the norm. So, civic duties as

described by Jefferson in that moment could easily swamp the moral outlook that people had then and that people have now. That is unless there was more to religious liberty than Jefferson was suggesting. Otherwise, the wall separating church and state does not seem particularly effective.

The United States Constitution was set down in 1787, ratified in 1788, and made effective 1789. A list of amendments to the original constitution were proposed later in 1789, originally submitted by James Madison. These would come to be known as the Bill of Rights. Here is the final text of the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

When I hear “First Amendment,” I often equate it to freedom of speech. Which form of freedom is in there, along with a slew of other rights. And notice that it is specifically *Congress* that is prohibited from doing something. Not local governments. Not the various states. Not ordinary friends or neighbors, not employers or shop owners, not social media companies or Facebook groups. Freedom of speech was and is limited.

The first two clauses of the First Amendment are about religion. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” There is no reference to a wall of any kind because that was Jefferson’s creation, not Madison’s idea. Establishment of religion is about setting up or selecting a state religion. It is about the government supporting one religion or group of religions over another. It is about government preferences when it comes to religion.

Back in merry old England, the Anglican Church was the established church: official, formal, and state-supported. In 1789, there were various established churches in the 13 colonies. Massachusetts notably had established the Congregational church in the Reformed Protestant tradition. These were the religious ancestors to the Unitarians, the Puritans who sought to *purify* the practices of the Church of England in the colonies. Other states, like Virginia, established the Church of England. This meant you had to pay taxes that supported a particular church and pay its minister. And the church chosen could and did vary from state to state. But you still had to pay for its upkeep even if your preferred church was down the street.

When the Connecticut Baptists wrote to Thomas Jefferson, these differences were likely in the back of their minds. Baptists were typically forced to pay taxes to support churches they did not go to. In Connecticut in 1802, that would have been the local Congregational church. Connecticut disestablished the Congregational Church in 1818, meaning it stopped funding the church. The First Amendment did not forbid state churches and in fact it was supported by some of these new states, such as Massachusetts, specifically because it served to enshrine the local right to establish churches rather than the federal government.

The second clause of the First Amendment prevents the federal government from prohibiting the free exercise of religion. Jefferson states that this is a natural right, but he also suggests that such a natural right is *not* to be considered in conflict with one's social duties. What would a conflict between that right and that duty look like?

Take for example a court trial. Someone has been issued a subpoena, which is a court order that requires you to appear to give testimony. In the 18th century, courthouses were often only legally closed on Sundays, the traditional Christian sabbath day. Meaning they were potentially open on Saturdays. Meaning they were open on the Jewish sabbath day. Meaning Christians did not have to testify on their sabbath day while Jews could be required to do so. In case you were wondering, that was not a hypothetical, but an actual case from Pennsylvania: *Stansbury v. Marks*, 2 Dall. 213 (Pa. 1793). A Jewish witness was fined for failing to show up to testify on his sabbath day.

Jefferson highlighted a distinction between religious opinions and religious behavior. And that distinction has legal significance. If I can hold religious opinions but not engage in religious behavior, what exactly have I gained in comparison to the First Amendment protection of free speech? If the free exercise of religious does not extend to how I practice my religion, it is not terribly free. And yet for many years, religious behavior was subject to various restrictions.

For example, Catholic priests might be forced to testify as to something they were told during the sacrament of confession, or face imprisonment. For those unfamiliar with that practice, it involves the confession of sins to a priest for the granting of forgiveness by God. It is the most sacred of confidences in Catholicism and the priest would have no choice but to maintain it or be removed from ministry and possibly be excommunicated. And atheists could be and were often excluded from holding state office or serve as lawyers if they refused to take a religious oath of office. The federal constitution

prohibits such a requirement, but many state constitutions did not offer the same protection.

Eventually, this seemingly odd separation of opinion from behavior began to shift. It happened roughly after the American Civil War when the U.S. Constitution was amended significantly. Those amendments were put in place to protect formerly enslaved Blacks. That was the intent, at least. The full effect of those amendments was long delayed, in some sense until at least the 1960s and in another sense, well, we are still waiting.

But the Fourteenth Amendment was on the books. And that amendment sought to protect citizens from discrimination *by the states*. It reads in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” That broad set of safeguards becomes critically important within the topic of religious freedom. Those protections against established churches and against interference with the exercise of religion are eventually applied against the states. This happened in the 1940s, so when you look back over American history there are many incidents that seem to run counter to the idea of religious liberty. Sometimes that was because of this long-delayed application of the Constitution to the states. Sometimes sadly that was because the government flatly ignored its own laws.

How might this history lesson be useful for a modern audience? Perhaps for a person or a congregation interested in protecting their religious rights or living out their

moral truths in the world? Say, for example, your congregation wishes to give food and water to people who are hungry and thirsty. However, a local ordinance prohibits you from helping the homeless, helping migrant families, helping someone standing in line waiting to vote in an election. These are once again *not* hypothetical cases. An ordinance restricting the feeding of the homeless was adopted in Miami several years ago. An Arizona group associated with the Unitarian Universalist Church of Tucson, No More Deaths, was charged with the crime of abandoning property in wilderness areas, which meant they were leaving food and water for people in the desert. Several individuals were charged and threatened with incarceration. And the State of Georgia passed a law in 2021 prohibiting giving food and water to people waiting in line to vote.

In each of those cases, you can argue that the government was overstepping its appropriate powers and attacking behaviors, or people, it does not like. You can say it is inhumane, you can say that it is infringing upon the freedom of the people offering the food and water and the well-being of those receiving them. You can say a lot of things, but if there is no protection for your behavior, what you can say has little meaning. However, if you want a legal argument to challenge these laws, the free exercise of religion is a place to start rather than the freedom to speak. Take for example this passage from the Bible, Matthew 25:35-36: *[F]or I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me, I was naked and you gave me clothing, I was sick and you took care of me, I was in prison and you visited me.*

Now, you do not have to agree with this Biblical passage or the Bible generally. But that passage is an ancient religious argument about what a good person would do when faced with those hungry and thirsty, those in need of our care and compassion. And both religious opinions and behaviors were given special weight under the First Amendment and, quite significantly, by the current and rather conservative members of the U.S. Supreme Court. By the way, could a UU make the exact same religious argument without quoting the Bible? Yes indeed.

Let's set up a hypothetical example, shall we? And then we can figure out what legal tools might be available to address the problem. I am going to use a situation in Massachusetts, which is the location I know best, but each state will require its own analysis. The hypothetical: you are in a Unitarian Universalist congregation. It is in a lovely historic building on the lovely main drag of a lovely Massachusetts town. You have decided that you wish to put up a banner on the outside of the building. Such a banner presents a moral message of some sort from the congregation to the wider world. What does it say about who you are? It could be about Black Lives Matter. It could be about climate change. It could be about marriage equality, the rights of transgender kids, or something more specific to that town at that time. It is your "Wayside Pulpit" to the world.

You apply for a permit to put up the banner. The plan is to have it stay up indefinitely. You must go to the building department. Perhaps you need permission from the town council or the Mayor's Office. Are you in a historic district? In any case, better pop by the municipal offices. Why not just hang it up there without all that fuss? Better to

ask forgiveness than permission, you might be saying to yourself. Because someone complains. Someone drops a dime on the congregation for flouting the rules and besmirching the pastoral beauty of this New England postcard setting. You didn't think you were getting out of my hypothetical that easily?

As you might have guessed, there are issues. You are asking to display the sign by a public road, possibly distracting motorists. Oh dear, oh dear. You are doing so in a historic district, obscuring the enduring beauty of the white clapboard building. Gasp. And you already have one permanent sign up as it is, admittedly an old sign which has probably been in place since the Taft Administration. Why would you need another sign?

What do you do? First, as I have emphasized, be prepared to lawyer up. Second, with their help, look around for any handy tools to make this job easier. Obviously read your local zoning ordinance. The First Amendment is also such a legal device to use, but it is a bit broad for this stage of the job. If you head into court waving the Constitution, and nothing else, the judge will have a tension headache and little patience for your concerns.

If for some reason, there is a zoning rule specifically against church signs, that might be applicable in this case. It is not likely, but I have seen crazier laws. There could be a restriction on having a church in a certain zone of the town. If so, there is a specific law against doing that in Massachusetts. If the zoning bylaw prohibits religious uses in some way, that would be a problem for the town. But let's assume for the moment that this is just about garden-variety rules for signs. There are two important federal laws that might help you to protect your religious rights in this case and in many other cases.

The first is the Religious Freedom Restoration Act of 1993, also called RFRA. It is a sweeping law that essentially prohibits the *federal* government from directly or indirectly hindering the religious freedom of individuals or organizations. It is surprisingly broad and powerful, but it is limited to the effects of the federal government or federal legislation. For example, if there was some federal grant program that helped restore historic buildings, but it had limiting language about offering grants for use in churches.

Why did RFRA come into being? This law was originally put in place in response to a Supreme Court case that had limited protections for religious minorities. Someone was trying to challenge a law that infringed upon their religious freedom. In that case, a man in Oregon was denied unemployment benefits. He had lost his job when he tested positive for drugs and the state refused to offer unemployment benefits under that scenario. The drug in question was peyote, a psychedelic substance. The man was a member of the Klamath tribe in Oregon and he was also a member of the Native American Church in which the ritual use of peyote was a religious practice. The man sued to get his benefits, relying upon several earlier Supreme Court cases that clearly suggested that he had been subjected to improper discrimination.

However, he lost. That landmark case is *Employment Div. v. Smith*, 494 U.S. 872 (1990). The Supreme Court sidestepped many years of cases that had protected religious minorities from the effects of state and federal interference. Why did they do this? I could speculate. The case was decided in 1990 and the War on Drugs was in full swing. The plaintiff was a member of an Indigenous tribe and the concerns of Indigenous peoples

have never been a high governmental priority. More technically, the government was seeking to enforce a general rule about controlled substances, and it was not expressly intending to negatively affect religious groups with its efforts. Pick and blend those possibilities with any of your own.

Congress was not happy with the decision. And so, Congress passed RFRA to overrule the Supreme Court. RFRA, when it was passed, was arguably a *liberal* effort to protect the rights of minority religious groups. However, the statute can be interpreted far more broadly than that initial goal. It has been used by many religious groups, ones far more numerous, far more mainstream, and far more conservative. It has even been used by *for profit* corporations, seeking to avoid the effects of government policies and programs, such as reproductive health requirements under the Affordable Care Act, under the banner of religious freedom. Yes, this law has been used by for profit corporations with conservative religious owners. If only some *employees* had objected and done so using the same religious freedom arguments. That was an untried possibility. And yet it remains a possibility.

The federal RFRA statute¹⁶⁷ provides that:

- (a) In general – Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
- (b) Exception -- Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—
is in furtherance of a compelling governmental interest; and
is the least restrictive means of furthering that compelling governmental interest.

¹⁶⁷ 42 U.S. Code § 2000bb-1

This is a tough standard for the government to meet. It first needs to offer a “compelling” reason for the law and second that there are no less restrictive ways to reach that same goal. This is where granting any statutory exceptions creates problems for the government. And the government frequently grants exceptions in the process of making legislation. The logic goes as follows under the statute: if the government can make an exception for one group, why not make an exception for a religious group? If a bicycle shop can be open during the pandemic, why can’t my church, my synagogue, my religious school be open? Why are those businesses more essential? Why are you granting special treatment for one group and not others?

Now you might be saying to yourself, separation between church and state. That term does not apply because of this statute. Religious behavior was potentially being targeted and religious behavior gets special treatment. That is the current state of the law. RFRA limits the federal government’s direct or indirect effects on religious activities. For example, the Supreme Court relied upon the RFRA statute in a case in which a Brazilian church was accused of importing illegal psychedelic drugs for ritual use. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006). Notice the powerful reach of RFRA: the importation of controlled substances is a *criminal* act and yet RFRA limited the federal government’s reach even in an area of the law that traditionally is granted wide latitude by the courts. And what is true of the War on Drugs is true for the War on Covid.

Which brings up the next permutation of these powerful laws. Because RFRA was limited to the federal level, some states have passed their own versions of RFRA.

Going back to our food and water examples, some states that prohibit those actions have local versions of RFRA, like Florida and Arizona. Massachusetts does not have a local version of RFRA, but it has some similar laws and policies. As I mentioned, religious uses cannot be prohibited, but reasonable restrictions may be applied as to certain aspects of buildings or structures. Signs are not specifically mentioned, but it is certainly applicable.

Is there any other assistance to be found for helping us put up our sign or banner?

Well, we are in luck. There is the Religious Land Use and Institutionalized Person Act. 42 U.S.C. § 2000cc, lovingly known as RLUIPA. This statute is much narrower than RFRA, which only limits the federal government. RLUIPA seeks to limit the effects of zoning laws that target or negatively affect religious uses. I will focus on the religious zoning part, but bear in mind that the federal law also extends to prisons and other communal institutions.

The RLUIPA statute, as it is known, states that:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government can demonstrate that imposition of the burden on that person, assembly or institution

- a. is in furtherance of a compelling governmental interest; and
- b. is the least restrictive means of furthering that compelling governmental interest.¹⁶⁸

This clearly might help us with our church sign scenario. What is the *reason* for the sign restriction? Is it the *least restrictive* means for meeting that purpose? And if you

¹⁶⁸ 42 U.S.C. §§ 2000cc, et seq.

are allowing exceptions for one group, say the local fraternal club or the corner store or even the municipality itself, why not the UU church?

What about other uses for a building? What if you wanted to install solar panels on the sanctuary roof or place a wind turbine on your land? Again, you would need to look at all the relevant land use regulations. In the case of solar panels, however, a UU congregation in Bedford, Massachusetts dealt with this very situation and they were eventually able to install their solar panels in an historic district over the objections of the town.

This example is about structures and buildings. What about *activities*? Say, you want to use your land and buildings to host a food pantry. Say, you want to serve hot meals to the homeless or to establish a shelter. You would go through the same analysis. And, not insignificantly, you would need to make the case that the activity in question is religious.

Well, how would you describe these various structures, buildings, or activities as religious? The signs are obvious types of religious education or information—practically any sign would be. For solar panels and wind turbines, there is of course the Seventh Principle for UUs and a long-standing connection between the UU religious tradition and concern for the environment. Be prepared to articulate a moral argument and ground it in religious terms. Feel free to quote Thoreau with abandon.

And those various ministries are all religious. As I previously mentioned, there are clear religious connections to helping the hungry and the homeless, the sick and those in need. The Bible is filled with them. World religions are filled with them. The historic links between the Bible and both traditions of Unitarianism and Universalism are well-documented, and consistent with a concern for the inherent worth, dignity, and well-being of all persons. The proposed changes to Article II are no less supportive, though they are still being developed. *[Note: this is the bylaw of the UUA regarding religious purposes.]* It would in fact be difficult to argue that these are not religious questions.

Let's consider a more complicated subject, *immigration*. What if my congregation wishes to become a sanctuary location? Can I simply fall back on these federal and local laws? Potentially, but with careful consideration and planning. Can I house people in my church building, which was not intended for residential use? Is housing a religious activity and are the government's laws infringing upon such rights? Are they the *least* restrictive means for achieving that goal? Does a congregation have the right to close its doors to the government?

It all depends, though many of the arguments I have mentioned could be considered to support these activities. Becoming a sanctuary location is not a project to undertake without careful and specific planning, coordination, and legal analysis. You could for example be able to pass all these legal hurdles and then have your insurance company cancel your policy for allowing activities outside the scope of coverage. The First Amendment cannot help you there.

And yet, religiously based efforts to protect and to help migrants might be able to draw upon these First Amendment protections. But you must also bear in mind that a violation of immigration laws might subject someone to criminal penalties. There is a considerable difference between providing food and water to people crossing the deserts in the southwest and helping them cross into the country directly.

In the 1980s in the United States, a movement began in response to civil wars plaguing Central America. Refugees from the conflicts sought asylum in the U.S. The risk of returning home to war-torn countries was so great that religious communities sought ways of helping refugees. And thus, the Sanctuary Movement was born. Church buildings were opened to asylum seekers, who lived for varying periods in seclusion. Immigration officials, then called the Immigration and Naturalization Service, had to contend with a growing movement of houses of worship across the political spectrum opening their doors to migrants fleeing.

The federal government did not simply let this movement unfold, as evidenced by the case of *U.S. v. Aguilar*, 883 F.2d 662 (1989). A network of Americans had developed a system for finding and sheltering Central American refugees, in association with churches in the U.S. Southwest. The sanctuary movement was in many ways patterned after the Underground Railroad movement of the nineteenth century, whose mission was to liberate enslaved people to Northern states. And, like the Underground Railroad in the 19th century, the Sanctuary Movement in the 1980s was considered by the government to

be illegal. Notably, the organization in the *Aguilar* case was infiltrated by federal law enforcement, leading to prosecutions and convictions.

The legal representatives for the defendants tried to explain the moral and theological bases for the Sanctuary Movement, but those arguments were suppressed during the court proceedings. They were deemed irrelevant as to the primary question of whether the accused intentionally violated federal law.

But that was in 1989. The Religious Freedom Restoration Act of 1993 potentially changes the situation greatly. The suppression of religious arguments would face a different and perhaps stiffer response in the courts. The federal government broadly limited its powers under RFRA. This has not been tested in the case of immigration laws, though the issue of religious convictions was apparently brought up in the case of Dr. Scott Warren and the No More Deaths organization in Tucson, Arizona [*e.g. an organization with strong UU connections that provided support and care to migrants*].

Those are examples of trying to do something—to perform some action or service. What if you are looking to *object* to some government action that seems to choose one religion over another? For example, what about the town council starting its meetings with a prayer? That has become a more complicated effort in recent years. The Supreme Court has allowed prayers to be said at such public meetings. In doing so, they have invoked historical examples of public prayer such as the long-standing example of Congress which has its own chaplain.

What about a Ten Commandments monument on the courthouse steps? What about a big white cross on top of a veterans' memorial on public lands? What about a

nativity scene on the town common? The Supreme Court has in certain situations allowed such displays to occur and to continue. Sometimes it is because there are so many other monuments or displays in the same place that one religious monument does not suggest an endorsement of a particular religion. *Van Orden v. Perry*, 545 U.S. 677 (2005) (Texas State house monuments); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (nativity scene in holiday display allowed). Or, a monument has existed for such a long time that it has somehow lost its religious character and has taken on a more of a landmark status. *American Legion v. American Humanist Association*, 588 U.S. ___; 139 S. Ct. 2067 (2019). Again, a giant cross was somehow deemed not a religious symbol.

There may not be a clear option for having a monument or display removed. There may not be a way to stop the recitation of prayers before a public meeting. However, another tactic might be that if you cannot beat them, you join them. One of the theories for allowing a monument or display is that it does not suggest a government preference for a particular religious tradition because it has been placed in a broader context. For example, there are many monuments on the grounds of the Texas State House, so a display of the Ten Commandments there is now just one of many.

Using this legal logic, someone installed a similar monument of the Ten Commandments on the steps of a courthouse in Oklahoma, which notably had many fewer monuments. Other Oklahoma religious groups then petitioned to have their *own* religiously themed monuments installed right next to the Ten Commandments. One such group was the Satanic Temple, a non-Satan worshipping group of arch-humanists with a flare for public display. They requested the right to install a statue of Satan on the

courthouse steps, next to the new monument. They were not the only ones to make a request, but they were the one who garnered the most attention, relying upon the moral panic inspired by their name and the nature of the statue. The Oklahoma Supreme Court quietly ordered the removal of that Ten Commandments monument. That same statue of Satan has been offered up in other states in other similar situations.

You might be asking yourself, what about freedom *from* religion? Can't we just have a quiet time without all this religious turmoil? Well, like any legal question, the answer is "It depends." It depends upon what do you mean by freedom from? Do you mean freedom from hearing prayers said at the beginning of public meetings? Then you might not be entirely free from that. Do you mean free from depictions of religious symbols or religious figures in public places? Then you might be out of luck at the Texas State House or the Supreme Court itself – Moses makes an appearance on a mural in the main court room.

But if there is a Nativity scene in a municipal park, there had better be a Frosty the Snowman nearby or some other collection of non-religious displays. There is a legal doctrine tartly known as the "Three Plastic Animals" rule when it comes to religious holiday displays. There cannot be one display that would convey a religious preference against the federal Establishment Clause. And so, the displays are often holiday composites with animals and candy canes, mangers and menorahs, Christmas trees and Rudolph the Red Nosed Reindeer. Put those together, and you are probably going to pass legal muster.

The Constitution focuses on prohibiting the establishment of a religion by the government and prohibiting interfering with the free exercise of religion. That pairing of legal rights does not guarantee anything like freedom *from* religion if that happens to be your preference. You cannot be forced to say prayers, but others might say them at a public meeting you wish to attend. You cannot be forced to say the Pledge of Allegiance. That happened even before they added “under God” to the pledge in the 1950s. But public officials could stand at a meeting and take the pledge within earshot. Well, surely, I do not have to subsidize religious activities with my tax dollars? Well...sometimes, yes.

The Supreme Court has over a series of cases made it easier to use school vouchers to pay for religious school education. Public funds set aside for college scholarships can be used to study religious subjects or majors, provided such funds are *directly* awarded to a student. State grant programs to help build or refurbish things like playgrounds can potentially be accessed by religious organizations. These are just a few examples of how the wall separating church and state has developed a few wide-open gaps.

The Supreme Court has methodically shifted the trajectory of religious rights cases. The exercise of religious preferences is strongly protected, by both federal law and federal court cases. And barriers against state financial support to religion, not to any specific religion mind you, those barriers are less sturdy. One might describe this trend as a slow-moving version of establishment, one that covers a wide swath of religious territory. This time, the government is not choosing *a* religion to support but it is

supporting *religion*. Religion as a generally good factor in the wider society, at least in the estimation of those legislating.

How might someone respond to that trend? As I argue in my book, it is important to fight the right battles. For example, many people will be familiar with the *Masterpiece Cake* case. It involved a Christian baker who refused to provide a cake for a same-sex wedding couple. The case was decided in favor of the baker. Many UUs were understandably outraged by this. But, I will offer you an unpopular opinion from my legal experience. That was not a case about religious freedom. It was primarily a case about *freedom of speech*. The baker had the right not to design a cake that suggested a message that he did not agree with religiously. It is the same logic that prevents someone from being forced to say the Pledge of Allegiance. Freedom of speech includes the freedom to remain silent.

I am not saying I agree with what happened, but that case was about a legal right that we UUs also cherish and one that we would be reluctant to see taken away. What I am trying to say is that there are situations that we will be able to address legally or legislatively, but there will be others that we will not only have a hard time disputing, but that might even be important to our own sense of civil liberties. That Christian baker's right not to make that cake is the same for a UU baker who does not want to make a cake that celebrates anti-LGBTQ themes and symbols.

And there are other similar problematic areas of the law. If you want to stop any and all school funding from going to religious schools, it might be a steep challenge—even a constitutional provision in the State of Missouri was overruled by the Supreme

Court.¹⁶⁹ If you instead sought to have those funds used for other religious schools, perhaps liberal or progressive ones, perhaps for liberal and progressive homeschooling, you might have a clearer line to follow. That may be a dissatisfying result but, barring the repeal of the Religious Freedom Restoration Act, that may continue to be the case.

There has been a concerted effort spanning decades trying to expand the rights of religious groups and individuals. At first, this might have been described as a liberal effort to protect minority religious groups, ones with less political power or social influence. But over time, those protections have been adapted to protect *religion from government*, religion from the secular influences within the culture. And because religion is protected in different ways than freedom of speech or freedom of the press, there is untapped power behind these claims of religious freedom. These claims are far more often made by conservative groups rather than liberal or progressive religious folks. And one challenge for such liberals and progressives is to embrace these religious arguments to effectuate their moral vision in the world.

But what about the wall of separation between church and state? It is getting easier year after year to hop right over. And I would argue, this makes it imperative to be able to articulate religious arguments that reflect the moral convictions at the core of our faith tradition. The UUA has recently been reviewing the possibility of changing Article II of its bylaws. This article notably contains the Seven Principles and the Six Sources. The new proposal changes that content and focuses instead on key terms such as Interdependence, Justice, and Pluralism around a central concept of Love.

¹⁶⁹ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___; 137 S. Ct. 2012 (2017).

One concept implicit to these changes is the notion of *covenant*. There has been a shift over the past few decades within the UUA from a historic focus on individualism to a more collective understanding of our religious commitment to one another. In this sense, a “liberal” faith tradition has become more “progressive.” Arguably, liberalness is not disappearing, but it is being understood in a community context. How we act in congregations and in the wider world is changing from a focus on “me” to a concern for “us.” If we are to advocate for anti-racism, anti-oppression, and multi-culturalism in our outlook, we cannot only concern ourselves with an individualistic focus on rights at the expense of the wider possible liberation within our society.

So, covenant matters. It matters inside our congregations, and it matters out in the world. That covenant we are undertaking is about a closer sense of connection, marked by words like Interdependence and Justice, but primarily about Love. About love, care, and compassion for others. And that means we are not leaving the Seven Principles or the Six Sources behind but understanding them as a more collective response to the challenges we face as religious folks trying to live good lives and trying to help others do the same.

And that also means we need to be more active in pursuing the moral values we hold dear. We need to press for greater recognition of our religious views in public as important and worthy of protection. Protection of the environment is a religious value. Protecting the right to reproductive freedom is a religious value. Protecting the rights of LGBTQ folks to live and love freely is a religious value. But many people see religion as a conservative influence in society and a negative one at that. We can help change that.

We have pursued many important social causes over the years, such as the Civil Rights movement in the 1960s and Marriage Equality in the early 2000s. We have often pursued those goals as matters of social justice. But there is power in claiming those goals as *religious liberty*, as moral claims we hold to be sacred. There is persuasive power in that language but there is also legal power to support those ideals. We need to claim that power. Power to reject conservative religious values dressed up as legislation. Power to claim rights to be free from government restrictions on healthcare, whether that is gender re-assignment surgery or access to birth control or abortion. Power to reject environmental damaging projects that infringe upon Indigenous religious lands and sensibilities. There is power in these claims, and it is time for UUs to consider the power we have, or that we can claim, to bring about change in the world around us.

And that is a big step. That may be a hard set of changes to make if one has a deeply held belief that church and state should always be separated. I acknowledge the struggle and I cannot pretend it would be a step taken without grief for some. But I also firmly believe that the moral and ethical convictions we hold dear are as precious to us as those expressed in the public square by religious conservatives. If we are to embrace change, if we are to oppose oppression, if we are to challenge systemic racism, sexism, and bigotry in all their forms, I feel it is important for us to use all the tools available to achieve those goals. And that begins with expressing and acting upon all that we hold sacred. What better use for the First Amendment?

I offer these arguments to help people get a sense of these issues. I wrote my book to spell out the history and evolution of these fundamental American rights. And I would

urge liberals and progressive religious folks, Unitarian Universalists one and all, to be prepared to defend the moral vision and the moral truths we seek to live out in this nation and this world. As I said, the answer to every legal question is basically the same: It depends. And in this case the answer to these questions might well depend upon us.

Many thanks for listening and good wishes to you all.

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