IS GOD PRO-CHOICE AS A MATTER OF LAW? THE ESTABLISHMENT CLAUSE AND STATE ABORTION BANS

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ABSTRACT

With the U.S. Supreme Court's 2022 reversal of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, the battle over abortion's legality purportedly shifted into the domain of state law—but not for some. A reinvigorated line of attack has emerged based on arguments under the Establishment Clauses of the First Amendment of the U.S. Constitution and also under state constitutions. Some legal scholars and constitutional litigators have argued that pre-viability bans on abortion—typically prohibiting abortion as early as six or fifteen weeks' gestation—promote religious views about when human life begins, in violation of establishment principles. These arguments are not new, but they have taken on new life in light of religion cases decided by the Supreme Court in the last decade. And some state judges have accepted these arguments, creating a new avenue to challenge state abortion laws.

This Article traces the historical track of these arguments since the 1970s and examines their premise in light of medical science and recent Supreme Court case law interpreting the Religion Clauses. Reviewing critical recent legal challenges in the states, this Article explores whether courts should invalidate abortion laws based on contested scientific evidence about prenatal life, and whether it is appropriate for courts to use the religious beliefs and speech of individual legislators to invalidate laws seemingly supported by some secular justifications.

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This Article concludes that proponents of these refurbished establishment-based attacks against pre-viability abortion laws have overlooked valid secular bases to regulate abortion and have underestimated the case law that cuts against these arguments. It concludes that courts will ultimately reject these reinvigorated establishment-based attacks.

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1. INTRODUCTION

On February 14, 2023—Saint Valentine's Day—the Satanic Temple (TST) opened *The Samuel Alito's Mom's Satanic Abortion Clinic*.[1] The clinic was named after United States Supreme Court Justice Samuel Alito, who penned the 2022 majority opinion in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade*[2] and found that the U.S. Constitution did not protect a right to abortion.[3] This Satanic "telehealth clinic" offers "free screening, virtual appointments, and medication abortion prescriptions by mail for pregnant women seeking an abortion."[4] The clinic contends that its right to provide such abortions is based in its religious exercise, which includes a "Satanic Abortion Ritual" created to assist women undergoing "religious abortions."[5]

With its clinic and related lawsuits against state abortion laws, the Satanic Temple joins a variety of self-professed Christians, Jews, and litigants from other religions who assert a right to abortion based on their

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1 Kelly McClure, *"The Samuel Alito's Mom's Satanic Abortion Clinic" is a Thing that Exists Now*, SALON.COM (Feb. 15, 2023, at 18:26 ET), https://perma.cc/PNS4-RMAA.

2 Roe v. Wade, 410 U.S. 113, 165–66 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

3 *Dobbs*, 597 U.S. at 223, 231, 301.

4 Katherine Drabiak, *The Satanic Temple Asserts Medication Abortion is a Religious Right*, THE PETRIE-FLOM CTR.: BILL OF HEALTH (Feb. 9, 2024), https://perma.cc/X29Q-BYRH.

5 The "Satanic Abortion Ritual" is described in the original complaint filed in *Satanic Temple, Inc. v. Young*, No. 23-20329, 2023 WL 9107299 (5th Cir. Sep. 7, 2023) (dismissing case pursuant to the Satanic Temple's unopposed motion). *See* Complaint Seeking Declaratory & Injunctive Relief at paras. 55–57, Satanic Temple Inc. v. Young, 681 F. Supp. 3d 685 (S.D. Tex. 2023) (No. 21-CV-00387) [hereinafter Satanic Temple Complaint].

religious beliefs.[6] Not only do these litigants assert that the free exercise of religion requires the voiding of a host of state laws limiting access to abortion, but they also argue that pre-viability state abortion laws unlawfully establish a religion in violation of federal and state constitutions because they "are based on the beliefs of particular religious denominations about when a fetus should be treated like a living, breathing person."[7] These arguments have been raised in several dozen recent state abortion cases, including those filed in Florida, Indiana, Kentucky, Missouri, New York, South Carolina, and Utah—all discussed throughout this Article.

This Article critically evaluates whether recent arguments based on federal and state establishment clauses are legally viable under federal case law and whether they should be successful under various state precedents.[8] Part 2 frames the issues raised by recent abortion challenges under state and federal establishment clauses, including a brief historical review of those clauses and a summary of the related arguments being used to further abortion rights. Parts 3 and 4 analyze the primary establishment line of attack against state pre-viability abortion laws, focusing on whether such laws are based on uniquely religious beliefs rather than science or other secular rationales. Part 5 assesses the alternative, secondary arguments used in establishment-based challenges, exploring whether some state legislatures have evinced an improper purpose to further religion and whether such intent violates federal and state establishment clauses. Key decisions from recent state and federal abortion challenges are explored throughout the course of this analysis. This Article concludes that establishment-based challenges raise important points of inquiry but—due to their factual and legal weaknesses—will ultimately prove to be ineffective vehicles for striking down state abortion laws.

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6 *See* Madeleine Carlisle & Abigail Abrams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi's Mission to Find Out*, TIME (July 7, 2022, at 18:51 ET), https://perma.cc/C2Z5-3JWG (discussing challenges to state abortion laws by various religious groups).

7 Loren Jacobson, *Abortion and the Spiritual Imperative: Are the New Abortion Bans Susceptible to Religion Clause Challenges?*, 72 DEPAUL L. REV. 663, 690 (2023).

8 A separate article could be written to address the Free Exercise Clause challenges raised in these cases. Other scholars have skillfully explored this topic in-depth. *See, e.g.*, Josh Blackman, Howard Slugh & Tal Fortgang, *Abortion and Religious Liberty*, 27 TEX. REV. L. & POL. 441, 458–60 (2023).

2. ABORTION LAWS AND THE ESTABLISHMENT CLAUSE: FRAMING THE ISSUE

This Article focuses on establishment-based challenges to state laws that prohibit or limit access to abortion. The U.S. Supreme Court upheld a federal ban on the gruesome, late-term "partial-birth abortion" procedure in 2007;[9] however, no other federal laws limiting abortion have passed since that time. In contrast, in the wake of the *Dobbs* decision in 2022, dozens of states limited access to abortion (with notable exceptions, such as when pregnancy threatens the life of the mother).[10] Almost immediately, those laws generated multiple state and federal lawsuits brought by abortion providers, women, and abortion-rights advocates.[11] Some of the plaintiffs in those cases argued that state pre-viability limitations on abortion created an "establishment of religion" in violation of the First Amendment of the U.S. Constitution and similar provisions in state constitutions.[12]

Part 2 of this Article briefly frames the issues presented in recent challenges to state abortion laws by reviewing the historical concerns with state establishments of religion, as well as the chaotic jurisprudence interpreting constitutional provisions meant to prevent such establishments. This Part concludes by summarizing the key arguments made in legal challenges to state abortion laws under establishment-based theories.

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9 *See* Gonzales v. Carhart, 550 U.S. 124, 141–42 (2007) (upholding 18 U.S.C. § 1531(b)(1), which prohibits physicians from knowingly performing "an abortion in which the person . . . deliberately and intentionally vaginally delivers a living fetus . . . [and then] performs the overt act . . . that kills the partially delivered living fetus").

10 Tasos C. Paindiris & Jennifer Ellerkamp, *The Aftermath of U.S. Supreme Court's* Dobbs*: Where Are the States in Fall 2022?*, JACKSON LEWIS (Oct. 28, 2022), https://perma.cc/39V8-F45H.

11 *State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF (June 6, 2025), https://perma.cc/7WH9-B4BF.

12 Mabel Felix, Laurie Sobel & Alina Salganicoff, *Legal Challenges to State Abortion Bans Since the* Dobbs *Decision*, KFF (Jan. 20, 2023), https://perma.cc/ZHE2-3JEL.

2.1. Historical Context

Faith and religion have been essential to the development of civilization in all parts of the world and in all phases of human history.[13] The founding generation of the United States was well familiar with the importance of religion, recognizing its necessity to the governance of a free people who are "created equal . . . [and] endowed by their Creator with certain unalienable Rights."[14] They held religious freedom in a place of preference in the panoply of fundamental human rights.[15] As descendants of those who experienced religious persecution in Europe and the colonies, they also understood the danger of too closely mixing the power of church and state.[16] For these reasons, they discouraged the oppression of religious liberty in the original text of the U.S. Constitution.[17] After ratification, the Bill of Rights further ensured that religion would be protected from government tyranny through what became the First Amendment.

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13 *See* MIRCEA ELIADE, THE SACRED AND THE PROFANE 137–38, 141–42, 144, 147–48 (Willard R. Trask trans., Harcourt, Brace & Co. 1959) (1957) (exploring universal aspects of mankind's connection to the divine); Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT'L L. REV. 807, 816−17 (2016) (recognizing the role of Christianity in the development of the European human rights regime).

14 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50−53, 51 n.(a) (reenacting the Northwest Ordinance, which declared that "[r]eligion, morality, and knowledge [are] necessary to good government and the happiness of mankind").

15 *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) (elaborating on why religion is the first freedom deserving "preferential treatment").

16 *See, e.g.*, THOMAS PAINE, THE RIGHTS OF MAN 81 (6th ed. 1791) ("Persecution is not an original feature in any religion; but it is always the strongly-marked feature of all law-religions . . . established by law." (emphasis omitted)); *see also* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 754–55, 757–58 (1984) (discussing methods for analyzing whether an activity or organization is religious in free exercise and establishment cases); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421–25, 1437–38 (1990) (discussing the history of free exercise provisions during the founding and the varying ideologies of the states).

17 U.S. CONST. art. VI, cl. 3 (requiring that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States").

2.2. Federal and State Establishment Clauses

To secure the protection of religious liberty, the First Amendment declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[18] The first of these two "religion clauses" is known as the "Establishment Clause," while the second is called the "Free Exercise Clause." The First Amendment also protects freedom of speech—including religious speech—providing a second layer of defense from oppression and demonstrating "the framers' distrust of government attempts to regulate religion and suppress dissent."[19] In addition, several of the newly founded states drafted disestablishment clauses in their own constitutions.[20]

2.2.1. The Federal Establishment Clause

Scholars debate the meaning and scope of the Establishment Clause found in the First Amendment to the U.S. Constitution. When the U.S. ratified that amendment in 1791, some states still maintained their own local establishments of religion.[21] These state establishments lasted at least until 1833, when Massachusetts disestablished its Congregational churches.[22] Thus, scholars generally agree that the original purpose of the Establishment Clause was to protect state establishments of religion from intrusion by the federal government, giving states a "space of self-determination in the field of religious freedom."[23] As Justice Clarence Thomas has explained, the

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18 U.S. CONST. amend. I.

19 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523–24 (2022) (citing JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* SELECTED WRITINGS OF JAMES MADISON 21, 25 (R. Ketcham ed., 2006)); *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

20 *See infra* Section 2.2.2.

21 *See* Rupal M. Doshi, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO. L.J. 459, 467 n.41 (2010) (discussing establishments in New England, as well as in Maryland and other states) (citing Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1458 (2004)).

22 *See* McConnell, *supra* note 16, at 1436–37.

23 *See* Andrea Pin, *(European) Stars or (American) Stripes: Are the European Court of Human Rights' Neutrality and the Supreme Court's Wall of Separation One and the Same?*,

Clause "protect[ed] state establishments from federal interference" and "preclude[d] the Federal Government from establishing a national religion," but it did not "create[] or protect[] any individual right."[24] That the Clause had this limited original scope is demonstrated by the fact that, in the first 150 years of the nation's history, the Clause was invoked in only three cases.[25]

All that changed in 1947, in *Everson v. Board of Education*, when the U.S. Supreme Court selectively incorporated the Establishment Clause against the states through the Due Process Clause of the Fourteenth Amendment.[26] The Court's decision to transform the Establishment Clause from a federalism principle into an individual right has been criticized as unwise and unreflective.[27] *Everson* not only incorporated the Clause, but it also articulated a "neutrality principle" requiring federal and state governments to be neutral in "relations with groups of religious believers and nonbelievers."[28] This new approach opened the floodgates of litigation under the Clause, leading the Supreme Court to develop a highly criticized "shambles" of jurisprudence interpreting the Clause unhinged from its original purpose.[29]

Perhaps the most significant controversy caused by the Establishment Clause's incorporation was the Supreme Court's ever-stricter interpretation of "neutrality," culminating in the three-pronged test developed in *Lemon v.*

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85 ST. JOHN'S L. REV. 627, 628–29 (2011); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 1–2 (2000).

24 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50–51 (2004) (Thomas, J., concurring).

25 *See* Doshi, *supra* note 21, at 470 n.62 (citing three Establishment Clause cases from 1899, 1908, and 1930, all of which upheld government support of religious organizations).

26 330 U.S. 1, 8 (1947). The decision to incorporate the Clause followed on the heels of the incorporation of the Free Exercise Clause. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

27 *See, e.g.*, *Elk Grove*, 542 U.S. at 51 (Thomas, J., concurring); *see also* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481 (1991) (noting a lack of "intellectual curiosity").

28 330 U.S. at 18.

29 Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 558 U.S. 175, 176 (2011) (Thomas, J., dissenting from denial of certiorari); *see* Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1, 33–34 (2008).

Kurtzman.[30] Especially as interpreted by the lower courts, this test seemed to squeeze religious persons and organizations out of the public square and prevent them from helping to fashion public policy. To some, this secularization of public spaces was inconsistent with the purpose of the First Amendment, which "was not to silence the religious voice, but to free religion from state control so that moral/religious values and principles could be taught and cultivated in the wider society."[31] The clash over the *Lemon* test—and its eventual demise—is discussed further below.[32]

2.2.2. State Disestablishment Clauses

Abortion advocates have not relied solely on the federal Establishment Clause when bringing legal attacks against state pre-viability abortion laws. They sometimes have found fertile ground in state disestablishment clauses, also.[33] As noted earlier, some states maintained local establishments of religion for half a century after the nation's founding.[34] Other states drafted disestablishment clauses into their state constitutions.[35] More than half the original states had no such provision at all,[36] and Massachusetts and New Hampshire merely forbade "subordinati[ng]" a "sect or denomination to another."[37] Still, four states prohibited the "establishment" of one religious sect or society "in preference to another."[38] Pennsylvania did more by not allowing "preference . . . to any religious establishments or modes of worship."[39] A similar situation existed with early state constitutional clauses that prohibited the compulsion of financial or other support of religion.

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30 403 U.S. 602, 612–13 (1971).

31 Brenda D. Hofman, *Political Theology: The Role of Organized Religion in the Anti-Abortion Movement*, 28 J. CHURCH & ST. 225, 227 (1986).

32 *See infra* notes 49–65 and accompanying text.

33 *See, e.g.*, Blackmon v. State, No. 2322-CC00120, slip op. at 2 (Mo. Cir. Ct. Aug. 13, 2024) (Amended Order and Judgment).

34 *See* Doshi, *supra* note 21, at 467 n.41; *see also* McConnell, *supra* note 16, at 1436–37.

35 *See* McConnell, *supra* note 16, at 1436.

36 *Id.* at 1437.

37 *See* MASS. CONST. of 1780, pt. 1, art. III; N.H. CONST. of 1784, pt. I, art. VI.

38 *See, e.g.*, DEL. CONST. of 1776, art. XXIX; GA. CONST. of 1798, art. IV, § 10; N.J. CONST. of 1776, art. XIX; N.C. CONST. of 1776, art. XXXIV.

39 PA. CONST. of 1790, art. IX, § 3. New states entering the Union in the 1790s adopted similar language. *See* KY. CONST. of 1792, art. XII, § 3; TENN. CONST. of 1796, art. XI, § 3.

Some states remained silent on the matter, while others focused on the compelled financial support of teachers from a different sect.[40] Several went further, stating that "no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent."[41]

As immigration increased in the 1800s, during the rise of Protestant-dominated public schools, clashes arose with the largely Catholic immigrant population, which began founding private, religious schools.[42] In an environment of "pervasive hostility to . . . Catholics,"[43] culminating in the failed efforts of James Blaine to amend the U.S. Constitution, many states adopted establishment-based no-school-aid amendments.[44]

State establishment clauses often contain more detail than the federal Clause. For example, three establishment provisions in Missouri's constitution were at issue in *Blackmon v. State*, a 2024 challenge to state abortion laws.[45] The key Missouri establishment clause ran almost 500 words long, providing all persons the "right to worship Almighty God according to the dictates of their own consciences," holding that "neither the state nor any of

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40 *See* GA. CONST. of 1777, art. LVI ("All persons . . . shall not, unless by consent, support any teacher, or teachers, except those of their own profession."); N. H. CONST. of 1784, pt. I, art. VI ("[N]o portion of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination.").

41 DEL. CONST. of 1792, art. I, § 1; *see also* GA. CONST. of 1798, art. IV, § 10 (similar); N.J. CONST. of 1776 art. XVIII (similar); N.C. CONST. of 1776, art. XXXIV (similar). Other States were more concise. *See* S.C. CONST. of 1778, art. XXXVIII (no "maintenance and support of [another sect's] religious worship"); PA. CONST. of 1790, art. IX, § 3 (no compulsion "to attend, erect, or support any place of worship, or to maintain any ministry"). Later, Kentucky and Tennessee used similar language. *See* KY. CONST. of 1792, art. XII, § 3; TENN. CONST. of 1796, art. XI, § 3.

42 *See* Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 503–04 (2020) (Alito, J., concurring) (citing 4 LIFE AND WORKS OF HORACE MANN 132, 134, 312 (1891)) (discussing the efforts of the "common-school movement" to "Americanize" Catholic immigrants through "daily reading from the King James Bible" in public schools).

43 Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion) (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992)).

44 *See* Green, *supra* note 43, at 38, 43. "Thirty-eight States still have these 'little Blaine Amendments' today." *Espinoza*, 591 U.S. at 498–99 (Alito, J., concurring).

45 No. 2322-CC00120, slip op. at 2 (Mo. Cir. Ct. Aug. 13, 2024) (Amended Order and Judgment).

its political subdivisions shall establish any official religion," and providing many religious freedoms, such as the right to serve in a public office or as a juror and the right to pray in many settings, including "on government premises and public property" and by "public school students."[46] A second provision protected all persons against being compelled to build a church or to support a sectarian minister or teacher.[47] A third provision forbade spending money from the public treasury "directly or indirectly, in aid of any church, sect or denomination," and protected against state "preference" or "discrimination" against any church or creed.[48]

2.3. The Lemon Test and Its On-Again-Off-Again Demise

Many challenges to state pre-viability abortion laws allege violations of the federal Establishment Clause, which has beguiled the U.S. Supreme Court since the Clause's incorporation against the states in 1947.[49] On the one hand, the Court affirmed the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," as well as "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers."[50] On the other hand, the Court sought to enforce the idea, articulated in *Lemon v. Kurtzman* in 1971, that the Clause forbade laws that might be "a step that could lead to such establishment."[51] As tough as it was for the Court to apply these precedents, hyper-vigilant lower courts struggled even more to apply the Clause to specific cases.[52]

The confusion deepened after the Supreme Court developed its three-pronged test in *Lemon*. The troublesome first prong of that test required courts to determine whether the state had a "secular legislative purpose"

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46 MO. CONST. art. I, § 5.

47 *Id.* art. I, § 6.

48 *Id.* art. I, § 7.

49 For a lengthier discussion on the difficulties in the Supreme Court's Establishment Clause jurisprudence, see generally Antony Barone Kolenc, *Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court*, 30 PACE INT'L L. REV. 43 (2017).

50 Lynch v. Donnelly, 465 U.S. 668, 674–75 (1984).

51 *See* 403 U.S. 602, 612 (1971).

52 *See* Luke Goodrich, *Will the Supreme Court Replace the* Lemon *Test?*, HARV. L. REV.: BLOG (Mar. 11, 2019), https://perma.cc/F9EB-UEKS.

when passing a law that triggered the broad umbrella of Establishment Clause cases.[53] Thus, if a government action was taken for religious purposes, such action could offend the Establishment Clause even if the action itself would not be offensive if taken for secular reasons. For instance, in *Wallace v. Jaffree*, the Court had no issue with an Alabama law authorizing a minute "of silence in all public schools 'for meditation,'" but it struck down another statute that authorized the exact same period of silence "for meditation or voluntary prayer" because it found that the state legislature hoped to promote prayer in public schools with that time of silence.[54]

The second prong of *Lemon* required courts to determine whether the "principal or primary effect" of a government action was one that either "advances" or "inhibits religion."[55] The Court used this prong to strike down public Christmas displays whose religious aspects were not watered down sufficiently.[56] *Lemon*'s third prong required courts to determine whether a government action fostered "an excessive government entanglement with religion"[57]—a concept derived from the Court's prior determination that New York could exempt churches from property taxes consistent with the Establishment Clause because such exemptions did not require the State to entangle itself so far into the church's activities as to create an intrusion or interference with religion.[58]

For decades, all three *Lemon* prongs sustained withering, relentless criticism from conservative Justices and scholars for being ahistorical and unworkable.[59] Yet, each time the *Lemon* test was declared dead, the Court would resurrect it for additional use. This on-again-off-again relationship with *Lemon* led Justice Antonin Scalia to famously quip in 1993 that the test

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53 *Lemon*, 403 U.S. at 612.

54 472 U.S. 38, 40–41, 61 (1985).

55 *Lemon*, 403 U.S. at 612 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

56 *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592, 599 (1989); Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

57 *Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).

58 *See Walz*, 397 U.S. at 669.

59 *See, e.g.*, Shurtleff v. City of Bos., 596 U.S. 243, 283–84 (2022) (Gorsuch, J., concurring) (detailing *Lemon*'s "unserious, results-oriented approach to constitutional interpretation," and discussing how judges had been able to "manipulate[]" the test "to produce" preferred "policy outcomes").

was like a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[60]

In 2022, in *Kennedy v. Bremerton School District*, the majority of a more conservative Supreme Court finally declared the death of *Lemon*.[61] The Court noted that the failed test had been an attempt to form "a 'grand unified theory' for assessing Establishment Clause claims."[62] The Court stated that it had "long ago abandoned *Lemon* and its endorsement test offshoot" because the test's faults had become so obvious, "'invit[ing] chaos' in lower courts, [leading] to 'differing results' in materially identical cases, and creat[ing] a 'minefield' for legislators."[63] The Court affirmed that the Establishment Clause does not "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'"[64] It instructed that the Establishment Clause was now to "be interpreted by 'reference to historical practices and understandings'" in a way that would "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'"[65]

Despite *Kennedy's* complete renunciation of *Lemon*, some abortion advocates and other scholars questioned whether all three prongs of the test were truly dead and buried. Some noted that "the [*Kennedy*] Court did not directly address its line of cases involving the secular purpose requirement," leading one to wonder whether the Court's historical approach might "support a secular purpose requirement, both from the Founding era and following ratification of the Fourteenth Amendment."[66] Others suggested that the Court has not "abandoned the principle of neutrality," and that, if a state were to "adopt[] a religious view or practice," it would be "absolutely

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60 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

61 597 U.S. 507, 534–35 (2022).

62 *Id.* at 534 (quoting Am. Legion v. Am. Humanist Ass'n., 588 U.S. 29, 60 (2019) (plurality opinion)).

63 *Id.* (quoting *Am. Legion*, 588 U.S. at 48–52; Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768–69 n.3 (1995) (plurality opinion)).

64 *Id.* at 535 (quoting Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment)).

65 *Id.* at 535–36 (alteration in original) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014)).

66 Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2306–07 (2023).

appropriate for the Court to continue to look at the purpose of the law. If the law has no secular purpose, then even after *Kennedy* it should be considered to violate the Establishment Clause."[67]

Regardless of *Kennedy* and *Lemon*, state courts are free to interpret their own establishment clauses any way they would like, theoretically leading to more favorable results in religion-based challenges than one might find in the federal courts. In reality, however, states often tie the interpretation of their own clauses to federal cases interpreting the First Amendment. Two recent abortion challenges illustrate this point.

First, in *Cameron v. EMW Women's Surgical Center*—a challenge to two Kentucky abortion laws—the court found that the State's free exercise clause was "co-extensive with" the U.S. Constitution, and the State's establishment clause provided no greater protections than the federal Clause.[68] Similarly, in *Blackmon v. State*—in a challenge to that State's abortion law—the court acknowledged that Missouri's establishment clauses provided greater specificity than in the federal constitution, but it located only one instance where the state clauses were more protective than the federal one.[69] The judge also noted that Missouri courts had generally adopted the federal *Lemon* test, though with a stronger history-and-tradition focus than sometimes seen in older federal cases.[70] Recognizing the abandonment of *Lemon* by the federal courts, the judge adopted the new *Kennedy* approach as consistent with Missouri's history-and-tradition approach, and he ruled in favor of the State using this more deferential analysis.[71]

Of course, not every state will so easily brush aside establishment-based claims. For instance, in 1984, in *Feminist Women's Health Center, Inc. v. Philibosian*, a California appellate court explained that the State's establishment "guarantees are not dependent on" federal ones, and that "California courts alone determine the rights guaranteed by the California Constitution."[72] Because "only three California cases ha[d] considered [the] state's

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67 Jacobson, *supra* note 7, at 697–98.

68 664 S.W.3d 633, 707–08 (Ky. 2023) (Nickell, J., concurring in part and dissenting in part) (citing Gingerich v. Commonwealth, 382 S.W.3d 835, 839 (Ky. 2012)).

69 No. 2322-CC00120, slip op. at 19 (Mo. Cir. Ct. Aug. 13, 2024) (Amended Order and Judgment).

70 *Id.* at 19–20.

71 *Id.* at 20.

72 203 Cal. Rptr. 918, 922 (Ct. App. 1984).

establishment clause," however, the court consulted "principles of federal cases as they seem compelling guides to uncharted state grounds."[73] Considering U.S. Supreme Court precedents, the court adopted "strict scrutiny" as the applicable test "when government activity shows a preference for one religion over another."[74] Using that analysis, the court found it would violate the state's establishment clause to allow a district attorney to bury aborted fetuses at a private Catholic cemetery because "[t]he primary effect . . . would be to give symbolic support to [Catholic] religious views."[75]

2.4. The Establishment Clause in Early Abortion Cases

Establishment-based legal attacks on state abortion laws are not new.[76] Similar arguments were made both before and during the period of *Roe v. Wade*.[77]

In *Nelson v. Planned Parenthood Center of Tucson, Inc.*, decided ten days before *Roe*, the plaintiffs argued that Arizona's abortion laws were a violation of "the free exercise of religion and an establishment of religion" under both the federal and state constitutions because they violated "liberty of conscience" and "sincerely held and deep-seated religious beliefs."[78] Rejecting that argument, the court cited a "deeper protoreligious 'natural metaphysic'" about the sacredness of life, and it found that "[a] great many of the statutes found in our criminal code have their roots in Judeo-Christian ethics. It would be absurd to claim that our statutes against larceny are an unconstitutional establishment of religion since 'Thou shalt not steal' is contained in the Decalogue."[79]

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73 *Id.* at 922–23.

74 *Id.* at 924.

75 *Id.* at 925–26.

76 *See, e.g.*, Young Women's Christian Ass'n of Princeton v. Kugler, 342 F. Supp. 1048, 1075 (D.N.J. 1972) (agreeing that when life begins is "beyond the competence of judicial resolution"); Comm. to Defend Reprod. Rts. v. Myers, 156 Cal. Rptr. 73, 83–84 (Ct. App. 1979), *vacated*, 625 P.2d 779 (Cal. 1981) (finding no establishment violation by state decision not to expend public funds on abortion because it had not denied benefits because of "religious principles").

77 410 U.S. 113 (1973).

78 Complaint at § VI(D), 505 P.2d 580 (Ariz. Ct. App. 1973) (No. 2 CA-CIV 1302).

79 Nelson v. Planned Parenthood Ctr. of Tucson, Inc., 505 P.2d 580, 588 (Ariz. Ct. App. 1973).

Further, in the original complaint in *Roe v. Wade*, the plaintiffs alleged that abortion laws in Texas "violate[d] the First Amendment's prohibition against laws respecting an establishment of religion."[80] Although that allegation did not generate any briefing, oral argument, or discussion during the litigation, the argument was presented to the U.S. Supreme Court in two *amici* briefs.[81] The more substantial of those briefs asserted that abortion laws were "a means of enforcing the religious concept that the soul is present in the body from the time of conception and therefore must be saved."[82] It argued that the fetus has "no legal personality or identity," throwing uncertainty on the concept "that every fetus is a human being equal in all respects to every living citizen from the moment of conception."[83] It continued: "Stripped of any religious definitions of when meaningful human life begins, that is when the soul enters the human organism, the various medical procedures for terminating pregnancy . . . are not significantly different from some current methods of birth control."[84] The brief then detailed efforts by the Roman Catholic Church to oppose the legalization of abortion based on its religious views, comparing those beliefs to asserted "Jewish law," where "the fetus does not become a person until the moment of birth."[85] The brief concluded that abortion laws "are in direct conflict with" the Supreme Court's neutrality principle in Establishment Clause cases, and that the improper fusion of church and state "deprives countless women each year of the most basic control over their bodies and their lives . . . in violation of the constitutional proscription against the establishment of religion."[86]

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80 Plaintiff's First Amended Complaint at § IV(4), Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (No. CA-3-3690).

81 Brief for New Women Laws. et al. as Amici Curiae Supporting Appellants at 47–54, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134283; Brief for Planned Parenthood Fed'n of Am., Inc. & Am. Ass'n of Planned Parenthood Physicians as Amici Curiae Supporting Appellants at 44–45, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128049.

82 Brief for New Women Laws., *supra* note 81, at 47.

83 *Id.* at 48, 50.

84 *Id.* at 50.

85 *Id.* at 51–53.

86 *Id.* at 53–54; *see also* Brief for Am. Ethical Union et al. as Amici Curiae Supporting Appellants at 31, Doe v. Bolton, 410 U.S. 179 (1973) (No. 70-40), 1971 WL 128051 (asserting an establishment violation but without extensive argument).

Because *Roe* struck down the State's abortion law under a new "right of privacy" under the Due Process Clause of the Fourteenth Amendment, the Supreme Court did not reach the plaintiff's establishment arguments.[87] Indeed, both *Roe* and *Planned Parenthood v. Casey*[88]—the critical case that modified *Roe*—"claimed to avoid deciding the moral status of abortion, or of the fetus, and thus claimed to avoid the moral or natural law questions raised by abortion."[89] Since that time, the U.S. Supreme Court has continued to avoid addressing establishment-based arguments regarding abortion laws.

Justice John Paul Stevens' partial concurrence in *Webster v. Reproductive Health Services* in 1989 stands as the most substantive discussion in any Supreme Court opinion regarding the Establishment Clause in the context of abortion.[90] In his analysis of the preamble to a Missouri abortion law—with its legislative findings that "'[t]he life of each human being begins at conception,' and that '[u]nborn children have protectable interests in life, health, and well-being'"[91]—Stevens struck familiar establishment themes that echo the legal attacks on state abortion laws today.

Stevens argued that the law's findings had no "secular purpose," making them "invalid under the Establishment Clause."[92] He rejected the idea that the preamble merely "happens to coincide with the tenets of certain religions,"[93] or that some Missouri legislators merely "may have been motivated by religious considerations."[94] Instead, he viewed the preamble as "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths."[95] He discussed the history of Roman Catholic thought

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87 *Roe*, 410 U.S. at 153.

88 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

89 David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 137–38 (1995).

90 492 U.S. 490, 566–72 (1989) (Stevens, J., concurring in part and dissenting in part); *see* John M. Breen, *Abortion, Religion, and the Accusation of Establishment: A Critique of Justice Stevens' Opinion in* Thornburgh*,* Webster*, and* Casey, 39 OHIO N.U. L. REV. 823, 831, 845 (2014).

91 *Webster*, 492 U.S. at 504 (majority opinion) (quoting MO. REV. STAT. §§ 1.205.1(1), (2) (1986)).

92 *Id.* at 566 (Stevens, J., concurring in part and dissenting in part).

93 *Id.* (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961); Harris v. McRae, 448 U.S. 297, 319–20 (1980)).

94 *Id.* (citing Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring)).

95 *Id.*

about ensoulment, including the opinion of St. Thomas Aquinas about when life begins.[96] Stevens opined that—if a legislature today were to enact the now-refuted medieval views of St. Thomas, including a "'finding' that female life begins 80 days after conception and male life begins 40 days after conception"—the Supreme Court "would promptly conclude that such an endorsement of a particular religious tenet is violative of the Establishment Clause."[97] He then argued that statute's preamble had endorsed "the theological position that there is the same secular interest in preserving the life of a fetus during the first 40 or 80 days of pregnancy as there is after viability."[98] Finally, Stevens recognized the "deeply held religious convictions of many participants in the debate," and concluded that Missouri could not "inject its endorsement of a particular religious tradition into this debate" consistent with the dictates of the Establishment Clause.[99]

The *Webster* Court did not debate Justice Stevens about the Establishment Clause implications of Missouri's law,[100] nor has the Court since that time engaged in any similar analysis in the context of abortion. Even in *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe* and *Casey* and determined that the Constitution did *not* actually protect a right to abortion, the Court barely mentioned religion.[101] Justice Alito's majority opinion in *Dobbs* hinted at the issue, stating, "While individuals are certainly free to think and to say what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free *to act* in accordance with those thoughts."[102] Even this comment, however, spoke more to the free exercise of religion than to the state endorsement of religious beliefs about when life begins in the womb.[103]

Although the Supreme Court has refused to engage with the Establishment Clause issue in abortion cases, some lower courts considering such

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96 *Id.* at 566–68.

97 *Id.*

98 *Id.* at 568.

99 *Id.* at 571. Justice Stevens' opinion in *Webster* has been critiqued by some scholars as flawed. *See generally* Breen, *supra* note 90.

100 Breen, *supra* note 90, at 834.

101 *See* 597 U.S. 215, 255–56 (2022).

102 *Id.*

103 *But see* Scott DeVito, *Anti-Abortion Statutes as Religious Beliefs*, 32 AM. U. J. GENDER SOC. POL'Y & L. 151, 154–55 (2023) (contending Alito's reference showed an unwillingness to address the Establishment Clause).

challenges have addressed the argument. Most notable, the district court in *Akron Center for Reproductive Health, Inc. v. City of Akron*[104]—a case eventually decided by the U.S. Supreme Court—*did* address an Establishment Clause issue, but that analysis was taken up by neither the Sixth Circuit nor the Supreme Court.[105] The district court applied *Lemon* to a claim that Akron's abortion law was unconstitutional, finding that it violated none of the three prongs.[106] Addressing the "secular purpose" prong, the court examined the law's "whereas" clause, which asserted that there was no point between conception and birth where the city could "say the unborn child is not a human life, and that the changes . . . are merely stages of development and maturation."[107] The court then addressed claims that these were "religious belief[s]" and that "the 'true' motivation" for the ordinance was "to 'establish' the belief that human life exists from the union of sperm and egg."[108] Rejecting the first argument, the court found that the city's view was "not clearly and singularly a 'religious belief'" because it could "be based upon scientific or philosophical belief rather than religious belief."[109] On the second argument, the court did not "agree with plaintiffs that it is necessary to look beyond any stated secular purpose in order to determine whether the 'true' legislative motivation for enactment of the challenged ordinance was such religious belief," noting that "the relevant inquiry . . . is whether there is a possible secular purpose," and "[c]learly, there are numerous such possible purposes, including the state's valid interests in maternal health and the potentiality of human life."[110]

A different lower court grappled with the establishment issue in 1992 in *Jane L. v. Bangerter*.[111] There, a federal judge in Utah considered whether a state abortion law violated establishment principles, where the preamble to the Utah law declared that "unborn children have inherent and inalienable

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104 479 F. Supp. 1172, 1188–95 (N.D. Ohio 1979), *aff'd in part*, *rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part*, *rev'd in part*, 462 U.S. 416 (1983).

105 *See Akron*, 651 F.2d at 1201 (noting "the district court gave full and thoughtful consideration" to the establishment claim and agreeing); *see also Akron*, 462 U.S. 416 (1983) (ignoring the establishment issue).

106 *See Akron*, 479 F. Supp. at 1188–95.

107 *Id.* at 1189.

108 *Id.*

109 *Id.*

110 *Id.* at 1189, 1194.

111 794 F. Supp. 1537, 1537 (D. Utah 1992).

rights that are entitled to protection by the State of Utah pursuant to the provisions of the Utah Constitution."[112] The plaintiffs alleged that the preamble was influenced by the Church of Jesus Christ of Latter-day Saints, and that it "embodie[d] a 'religious viewpoint' concerning rights of unborn children."[113] In rejecting that argument, the district court found "that the Utah Act has a secular purpose, even though it coincides with religious tenets."[114]

The discussion in these two older cases mirrors the analysis in more recent establishment-based challenges to state pre-viability abortion laws.[115]

2.5. A Word on Standing[116]

Parties challenging state abortion laws in federal court must first demonstrate that they have "standing" to bring the case under Article III of the U.S. Constitution[117] due to important separation-of-powers principles.[118] In the context of abortion, standing, and related ripeness issues can arise in purely state court claims too, especially if the party bringing the case is a woman claiming religion-based harms that have not yet arisen because she is not pregnant or not seeking an abortion.[119]

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112 *Id.* at 1542.

113 *Id.*

114 *Id.* at 1544–45 (adopting the reasoning of Harris v. McRae, 448 U.S. 297 (1980), discussed in this Article in Part 5). When assessing whether the plaintiffs' establishment arguments had been "frivolous" for purposes of assigning attorney fees, the Tenth Circuit found that it was not the case, partly due to Justice Stevens' dissenting opinion in *Webster*. *See* Jane L. v. Bangerter, 61 F.3d 1505, 1515–16 (10th Cir. 1995).

115 *See infra* Part 5 (discussing recent abortion cases addressing religion-based arguments).

116 The complicated issue of standing could generate an entire article in its own right. *See* Larry J. Obhof, *Assessing the Future of "Offended Observer" Standing in Establishment Clause Cases*, 72 CLEV. STATE L. REV. 395, 398–400 (2024) (discussing modern standing issues in Establishment Clause cases after the demise of *Lemon*).

117 *See* U.S. CONST. art. III, § 2, cl. 1 (authorizing federal courts to adjudicate only "cases" or "controversies").

118 In federal courts, the doctrine of "standing" requires a claimant to "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." Carney v. Adams, 592 U.S. 53, 58 (2020) (quoting Hollingsworth v. Perry, 570 U.S. 693, 704 (2013); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

119 *See* Blackman, Slugh & Fortgang, *supra* note 8, at 458–60 (arguing that some women lack standing); *see also* Jessie Hill, *Religious Freedom Claims Could Provide New Path to Protect Abortion Rights*, STATE CT. REP. (Sep. 18, 2024), https://perma.cc/R8E8-

For instance, in *Sobel v. Cameron* in 2022, a state judge in Kentucky found that women challenging the State's abortion laws lacked standing, applying guidance about standing from *Roe v. Wade* to make that decision.[120] Although the women alleged that the abortion laws were "impeding them from attempting to expand their families," none of them were pregnant at the time of the case, leading the judge to conclude that "the alleged injuries of the three Plaintiffs are hypothetical as none are currently pregnant or undergoing IVF at the present time."[121] Similarly, in *Hafner v. Florida*, a 2022 establishment challenge to a Florida abortion law, the state judge found that plaintiffs lacked standing because they could not demonstrate any actual fear of prosecution.[122]

In contrast, in *Cameron v. EMW Women's Surgical Center*, a 2023 abortion case, the Supreme Court of Kentucky found that abortion providers bringing cases on behalf of their patients lacked "third-party standing" to challenge the State's abortion laws; however, those same providers possessed "first-party standing to challenge [the law] . . . on the grounds that it was an unconstitutional delegation of the General Assembly's legislative power."[123] Similarly, an Indiana appellate court in 2024, in *Individual Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiff 1*, found a case ripe for decision for women-plaintiffs who were not pregnant but had made "changes to their sexual and reproductive activity" out of concerns for the state abortion law, noting that the plaintiffs were also "sexually active women capable of bearing children" who could be faced with "the prospect of pregnancy without the availability of a religiously directed abortion."[124]

JDB4 ("[W]hile standing is traditionally more relaxed for claims regarding separation of church and state, conservative courts are not as sympathetic to those claims.").

120 No. 22-CI-005189, slip op. at 8 (Ky. Cir. Ct. June 28, 2024) (opinion and order denying plaintiffs' motion for summary judgment and granting defendants' cross-motion for summary judgment). The court never reached the plaintiffs' establishment-based arguments due to this ruling. *Id.*

121 *Id.*

122 No. 2022-14370-CA-01, slip op. at 10 (Fla. Cir. Ct. Mar. 3, 2023) (order denying plaintiffs' motions for temporary injunction). The court never reached the establishment arguments due to dismissal. *Id.* at 9–10.

123 664 S.W.3d 633, 659 (Ky. 2023). The case was later dismissed without prejudice by the agreement of the parties on both sides. *See* EMW Women's Surgical Ctr. v. Cameron, No. 22-CI-003225, slip op. at 2 (Ky. Cir. Ct. June 27, 2023) (agreed order of dismissal).

124 233 N.E.3d 416, 441–42 (Ind. Ct. App.), *transfer denied*, 246 N.E.3d 271 (Ind. 2024).

In sum, standing issues may pose a problem in both federal and state courts.

2.6. Framing the Modern Establishment Clause Issue in Abortion Cases

Assuming that litigants who challenge state pre-viability abortion laws can overcome standing and ripeness procedural hurdles, what have their establishment-based arguments looked like in recent cases?[125] In truth, not much different than the unanswered assertions made in *Roe* and outlined by Justice Stevens in *Webster*.

In *Planned Parenthood Association of Utah v. Utah*—a 2022 challenge to Utah's abortion law, which prohibited most abortions prior to 18 weeks—the plaintiffs argued:

> [The law] impos[es] on Utahns a State-mandated view as to when life begins, which is an inherently religious and spiritual one. . . .
>
> By imposing its determination of when life begins on all Utahns, regardless of their religious beliefs or specific moral beliefs about abortion, the State of Utah has taken on a religious role strictly prohibited by the Utah Constitution and deprived Utahns of the ability to approach their family-planning decisions in accordance with their own religious and moral beliefs.[126]

Similarly, the complaint in *Sobel v. Cameron*, a 2022 challenge to Kentucky's abortion laws, alleged that the State had "adopted [the] politicized sectarian religious views" of "evangelical Christians," which the plaintiffs did "not share."[127] In other words, as asserted by one noted scholar, "Abortion

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125 For a summary of most of the religion-based abortion cases since the 1970s, see generally COLUMBIA L. SCH. RTS. & RELIGION PROJECT, A RELIGIOUS RIGHT TO ABORTION: LEGAL HISTORY & ANALYSIS (2022), https://perma.cc/8G99-Z46X.

126 Complaint for Declaratory & Injunctive Relief at paras. 88–89, No. 220903886 (Utah Dist. Ct. June 25, 2022). Although the state courts granted preliminary injunctions on various related abortion provisions, they did not reach the establishment-based arguments. *See* No. 220903886, 2022 WL 2314556, at *1 (Utah Dist. Ct. June 27, 2022).

127 Complaint for Declaratory Relief at paras. 88–89, No. 22-CI-005189 (Ky. Cir. Ct. Oct. 6, 2022).

bans . . . codify the views of religious conservatives, especially those of white evangelicals and conservative Catholics, in opposition to the convictions of most mainline Protestants, Reform and Conservative Jews, many Muslims, and other liberal or progressive believers."[128]

In essence, the establishment-based argument against state abortion laws breaks down into two distinct lines of attack: (1) pre-viability abortion laws codify discrete religious beliefs over the beliefs of others; and (2) even if abortion laws do *not* codify religious beliefs, they have been passed for a religious purpose. Parts 3 and 4 of this Article evaluate the strength of the primary line of attack, which requires a close analysis into what constitutes a "religious belief," as well as an investigation into scientific or other rationales that may underlie abortion laws. Then, Part 5 assesses the secondary line of attack, which requires an inquiry into whether the "secular purpose" prong of *Lemon* still has life, as well as an analysis into the validity of determining the purpose of a law based on statements made by legislators or officials.

3. Abortion and Religious Beliefs

The primary establishment-based line of attack asserts that pre-viability abortion laws codify the unique beliefs of certain sects over the sincere religious beliefs of others, in violation of federal and state establishment clauses. But in the United States' modern, diverse spiritual landscape, what are "religious beliefs," and can they include the views of those who profess that abortion is itself an exercise of religion? Part 3 of this Article addresses these questions, assuming legal challenges can survive a standing inquiry.[129]

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128 Schwartzman & Schragger, *supra* note 66, at 2304–05 (citing Geoffrey R. Stone, *Same-Sex Marriage and the Establishment Clause*, 54 VILL. L. REV. 617, 618 (2009)).

129 *See supra* notes 116–124 and accompanying text (discussing standing); *see also* Hill, *supra* note 119 (noting that state courts have "largely followed federal law on standing," leaving abortion cases "vulnerable").

3.1. "Religion" and "Religious Beliefs" in a Constitutional System[130]

If "religion" is to mean anything, it must remain distinct from "non-religion" or else it will lose the special protections afforded it in the U.S. Constitution[131]—safeguards based on a history of persecution. Recognizing this, the U.S. Supreme Court has tried to distinguish religion from secular philosophies, which are not protected by the religion clauses.[132] The Court has not always done this clearly,[133] but lower courts continue to apply the distinction.[134] Some argue "that 'religion' can have a different meaning depending on which religion clause of the First Amendment is at issue."[135] But this approach is inconsistent with the constitutional text, because "'[r]eligion' appears only once in the Amendment. . . . It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.'"[136]

The core of the issue involves the expansion of the meaning of "religion" over the past 75 years, broadening its definition from the traditional understanding accepted through most of the nation's history.[137] Starting in

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130 For a more in-depth discussion on how courts define religion, see generally Antony B. Kolenc, *Not "For God and Country": Atheist Military Chaplains and the Free Exercise Clause*, 48 U.S.F. L. REV. 395 (2014).

131 The evidence is strong suggesting that the founders rejected a version of the religion clauses that would have protected secular conscience rights, choosing instead to favor only "the narrower category of religion." Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 803 (1997).

132 *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

133 *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) (discussing the place of atheists and religionists in a secular state).

134 *See, e.g.*, United States v. Meyers, 95 F.3d 1475, 1480, 1482 (10th Cir. 1996) (finding the "Church of Marijuana" to be more like a philosophy than a religion); Hale v. Fed. Bureau of Prisons, 759 F. App'x 741, 743, 747 (10th Cir. 2019) (rejecting "The Church of the Creator" as a religion).

135 United States v. Allen, 760 F.2d 447, 450 (2d Cir. 1985).

136 *See* Everson v. Bd. of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

137 The founders viewed "religion" as theistic, and the Supreme Court has defined the term as "reference to one's views of his relations to his Creator," even calling the U.S. "a Christian people" with a duty to obey "the will of God." Davis v. Beason, 133 U.S. 333, 342 (1890); United States v. Macintosh, 283 U.S. 605, 625 (1931); *see also* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 338 (1996);

the mid-twentieth century, judges began to include both theistic and nontheistic faiths within the ambit of "religion" under state and federal constitutions.[138] Some courts have even found atheism to be a religion.[139] This expanding definition helped convince the Canadian Supreme Court to reject Canada's abortion laws as denying some of its citizens the "freedom of conscience."[140]

When assessing establishment-based challenges to state abortion laws, defining "religion" is critical because the challengers contend that persons along the spectrum of faith possess beliefs about the nature of abortion and its moral significance, including beliefs that support abortion rights. This has been part of the debate from its inception.[141] As these challengers frame the issue, abortion laws pit one set of religious beliefs against another in violation of the Establishment Clause. But what exactly *are* "religious beliefs?"

In an article critical of state abortion laws, Professor Scott DeVito has distilled four conditions that are needed to identify a religious belief: "(1) a belief, (2) arising not from reason, (3) about the existence of a non-physical world, (4) inhabited by non-physical beings—especially God."[142] The first prong of this test must necessarily include a "sincerity" component, otherwise it would be a sham belief (which is no belief at all). Using these criteria,

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Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1405 (2012).

138 *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (accepting nontheistic religions such as "Buddhism, Taoism, Ethical Culture, Secular Humanism and others"); United States v. Seeger, 380 U.S. 163, 165–66 (1965); Welsh v. United States, 398 U.S. 333, 339–40 (1970) (applying statutory definitions); *see also* Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1132–35 (2011) (discussing non-legal theories of religion).

139 *See* Soc'y of Separationists, Inc. v. Herman, 959 F.2d 1283 (5th Cir. 1992) (juror's affirmation sufficient).

140 *See* R. v. Morgentaler, 1 S.C.R. 30, 37 (S.C.C. 1988) (finding that "'[f]reedom of conscience and religion' should be broadly construed" to include "secular morality" and that Canada's abortion laws endorsed "one conscientiously-held view at the expense of another," thus "denying freedom of conscience to some").

141 *See, e.g.*, Hofman, *supra* note 31, at 227; Jessica L. Knopp, *The Unconstitutionality of Ohio's House Bill 125: The Heartbeat Bill*, 46 AKRON L. REV. 253, 280–84 (2013) (discussing religion and the abortion issue).

142 DeVito, *supra* note 103, at 153.

DeVito concluded that "right-to-life statutes are religious beliefs."[143] The next section will apply DeVito's factors to beliefs about abortion.

3.2. Religious Beliefs About Abortion

Is it possible to have sincere religious beliefs on both sides of the abortion issue? Unless that is the case, the religion-based arguments brought in recent state abortion challenges will immediately crumble. This section briefly discusses this important issue.

3.2.1. Religious Views Opposing Abortion

Abortion advocates argue that those who oppose abortion ground their opposition in their religious beliefs, often pointing to Catholic and Evangelical Christian beliefs.[144] No doubt, much of the organized opposition to abortion has come from the Roman Catholic Church, which has played a prominent role in crisis pregnancy centers, prayer outside abortion clinics, "sidewalk counseling," and the annual March for Life in D.C.[145]

But some contend that Christianity has been historically inconsistent in its views about the value of life before birth.[146] That claim is disputed by anti-abortion advocates, who cite historical evidence to support the position that Christianity has always been "pro-life."[147] These advocates point to early Church documents including, *The Didache* in the first century, the writings of Tertullian in the second, the works of Saint Hippolytus in the third, and the teachings of Saint Basil in the fourth century.[148] Regarding the Middle

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143 *Id.* at 166.

144 *See, e.g.*, Schwartzman & Schragger, *supra* note 66, at 2304.

145 *See, e.g.*, U.S. Conf. Cath. Bishops, *Pro-Life Activities*, https://perma.cc/FZY9-URXQ.

146 Jacobson, *supra* note 7, at 670–71.

147 Brief for Foundation for Moral Law, et al. as Amici Curiae Supporting Petitioners at 19–22, Moyle v. United States, 603 U.S. 324 (2024) (Nos. 23–726, 23–727), 2024 WL 849246.

148 *The Didache* forbid the "murder [of] a child by abortion"; Tertullian wrote that it was "not permissible" to "destroy the [unborn human] seed . . . once it has been conceived in the womb"; Saint Hippolytus called those murderers "who resorted to drugs 'so to expel what was being conceived on account of their not wishing to have a child'"; and Saint Basil judged that a "woman who purposely destroys her unborn child," including "the destruction of the embryo," would be "guilty of murder." *Id.*

Ages, advocates describe the teachings of the Roman Catholic Church[149] and demonstrate that even the leaders of the Protestant Reformation believed abortion to be immoral, especially Martin Luther and John Calvin.[150]

Applying Professor DeVito's criteria, there can be little doubt that these Christian views are "religious beliefs." First, the believers who oppose abortion hold a "[sincere] belief"—that taking the life of a fetus (an "unborn child," in their view) is the "murder" of a human being who became worthy of protection at conception or some other time prior to viability outside the mother's womb. Second, that belief arises from "faith" because—as Professor Loren Jacobson, another abortion advocate, argues—treating a fetus as fully human entails a moral judgment that the fetus possesses a soul, which is a "metaphysical[] matter[]" that "cannot be ascertained" by science or reason.[151] Third, because the human soul is not physical, a belief about its existence originates in the non-physical world. Fourth and finally, that non-physical world is the domain of God.

Therefore, using these criteria, some conclude that those who oppose abortion have grounded their opposition in religious beliefs. This is *partly* true: no doubt, sincere beliefs about unborn life *can* be "religious" in nature. But abortion advocates have generalized this principle to the much more dubious proposition that *all* beliefs that respect the unborn *must necessarily* be "religious"[152]—a hypothesis discussed in Part 4.[153]

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149 Roman Catholic Canon Law held that a person who "procures a completed abortion incurs a[n] . . . [automatic] excommunication." *Id.* at 20.

150 Martin Luther called those "who do not spare the tender fruit" of pregnancy "murderers," and John Calvin found it "more atrocious to destroy the unborn in the womb before it has come to light" than to "kill a man in his own house." *Id.* at 21–22.

151 Jacobson, *supra* note 7, at 664. Of course, many Christians do not believe that faith and reason are at odds. *See, e.g.*, Pope Pius XI, *Divini Illius Magistri*, para. 56 (1929) ("Not only is it impossible for faith and reason to be at variance with each other, they are on the contrary of mutual help. For while right reason establishes the foundations of Faith, and, by the help of its light, develops a knowledge of the things of God, Faith on the other hand frees and preserves reason from error and enriches it with varied knowledge.").

152 *See* DeVito, *supra* note 103, at 173; Jacobson, *supra* note 7, at 689.

153 *See infra* Section 4.3 (discussing whether pro-life beliefs are necessarily religious).

3.2.2. Religious Views Supporting Abortion

Those who oppose abortion based on the view that life begins at conception (or at least prior to viability or birth) sometimes find it difficult to believe that anyone could hold a sincere religious belief that would allow for or even require abortion. Still, the claim that many support abortion as a matter of faith is not a new position and has been strongly asserted at least since the 1950s, though it was not until 1963 that a church (the Unitarian Universalist Association) passed the first denominational policy statement in favor of abortion.[154] In *Roe v. Wade*, Justice Harry Blackmun referenced "strong support for the view that life does not begin until live birth," citing the Stoics, the "predominant . . . attitude of the Jewish faith," and "a large segment of the Protestant community."[155]

After *Dobbs*, some religious leaders became more vocal about their pro-abortion beliefs,[156] and some abortion providers have cited religion to support their actions.[157] As discussed earlier, the Satanic Temple has developed an "Abortion Ritual" to accompany abortions,[158] and one self-described former satanist "high wizard" has made the claim of having participated in over 140 satanic abortion ceremonies where spells were cast at the moment of fetal death to generate more power for the incantation.[159] Even many self-

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154 *See generally* Jennifer O'Rourke, *When Life Begins: A Case Study of the Unitarian Universalism Faith and Its Potential to Combat Anti-Abortion Legislation*, 91 U. CIN. L. REV. 1172, 1187–95 (2023) (discussing application of Unitarian Universalism ideology to combat anti-abortion legislation under the Religious Freedom Restoration Act).

155 410 U.S. 113, 160 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

156 *See, e.g.*, Julianne McShane, *Some Religions Support Abortion Rights. Their Leaders Are Speaking Up*, NBC NEWS (May 5, 2022, at 03:10 CT), https://perma.cc/5WLC-YLY2.

157 *See* Lisa H. Harris, *Recognizing Conscience in Abortion Provision*, 367 NEW ENG. J. MED. 981, 982 (2012) (contending that some abortion providers believe that their work is "right and good and important"); *see also* Rebecca J. Cook & Bernard Dickens, *Conscientious Commitment to Women's Health*, 113 INT'L J. GYNECOLOGY & OBSTETRICS 163 (2011) (arguing that performing an abortion can be a spiritual matter).

158 *See* Satanic Temple Complaint, *supra* note 5, at paras. 8–9, 55–57.

159 *See* Michael Hichborn, *Former Satanist: "I Performed Satanic Rituals Inside Abortion Clinics*," LIFESITE (Sep. 9, 2015, at 14:03 ET), https://perma.cc/EUD2-LJU5 (interviewing Zachary King). While not substantiated, Mr. King's claims speak to how abortion could potentially be a central part in some pagan religious practices.

professed Christians today affirm their support of abortion based on their own faith perspectives.[160]

Judaism has generated much scholarly discussion on abortion, with some scholars asserting that the Jewish faith does not believe a fetus is a human being until the moment of birth, and that Jewish women may have a moral obligation to obtain an abortion.[161] In *Roe*, Justice Blackmun made similar assertions, citing two Jewish sources for his position.[162] This was also the argument made in a 2022 case brought in Florida under both the federal and state establishment clauses, alleging that "when a grave fetal abnormality will subject the fetus to a hellish life, or if a problem pregnancy threatens the mother's life, health, or wellbeing" then "Jewish law deems the fetus a 'rodef' (pursuer) and requires abortion to protect the mother from the fetus."[163] Other scholars have argued the opposite, calling Judaism "the original pro-life religion" because it "sanctif[ied] human life from conception to natural death" and "prohibit[ed] child sacrifice."[164]

Diverse teachings of other religions—Islam, Buddhism, Shintoism, Hinduism—also generate similar debates, with some religions allegedly opposing abortion and others allowing it under certain circumstances.[165] One scholar has pointed out that debating whether certain religions support or oppose abortion is "unhelpful" because, "for purposes of the courts, the

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160 *See* Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1, 9–13 (2022) (listing the Unitarian Universalist Association, United Church of Christ, Presbyterian Church (USA), Metropolitan Community Churches, Disciples of Christ, Reform Judaism, and Conservative Judaism as examples); *see also* Schwartzman & Schragger, *supra* note 66, at 2305 (adding "many Muslims, and other liberal or progressive believers").

161 *See* David Schraub, *Liberal Jews and Religious Liberty*, 98 N.Y.U. L. REV. 1556, 1578–86 (2023) (discussing liberal and orthodox Jewish positions on abortion).

162 *See* Roe v. Wade, 410 U.S. 113, 159–60 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (citing DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 251–94 (1968); Immanuel Jakobovits, *Jewish Views on Abortion*, *in* ABORTION AND THE LAW 124 (D. Smith ed. 1967)).

163 *See* Third Amended Complaint for Declaratory Relief and for Temporary and Permanent Injunction Declaring House Bill 5 Invalid, Unconstitutional and Unenforceable at para. 93, Generation to Generation, Inc. v. Florda, No. CA-2022-980 (Fla. Cir. Ct. May 15, 2023). The complaint was later withdrawn voluntarily.

164 Brief of Jewish Pro-Life Foundation et al. as Amici Curiae Supporting Petitioners at 5, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 3169221.

165 *See* Jacobson, *supra* note 7, at 672.

answer doesn't matter. If a particular plaintiff sincerely holds the belief that her religion imposes such a duty, a court cannot say otherwise."[166]

It may be true that "the answer doesn't matter" in many cases, but one still must ask whether an asserted belief is in fact "religious." Depending on what belief is examined, the four criteria discussed earlier may be more or less easily met. For instance, applying the criteria to the Jewish debate above will likely yield similar results to the earlier Christian inquiry because the issue still revolves around when God ensouls the fetus, giving him or her moral rights of personhood. But what about the harder cases?

Consider those whose pro-abortion beliefs are not connected to Unitarian Universalism or some other organized religion. These are persons who believe that "because abortion 'respects the inherent worth and dignity of women, providing abortion is a spiritual and moral act.'"[167] This might be considered a "belief," but it might fail the other criteria discussed earlier because this belief might not find its origin in the "non-physical world" or the divine. These harder cases will lead to further discussion about the scope of "religion," leading some to apply the broader definitions noted earlier.[168] With a slight tweak to DeVito's fourth criterion, such beliefs may qualify as "religious."

In sum, those on both sides of the abortion debate can assert credible religious beliefs about abortion, assuming they can survive a sincerity analysis, as discussed below.

3.2.3. The Issue of Sincerity

Religious persons who oppose abortion sometimes express skepticism that there could be religious beliefs that genuinely support or even mandate abortion. As discussed earlier, for a belief to be truly "believed," it must be sincere by its holder.[169] These skeptics worry that the ever-expanding definition of "religion," and the strong desire to strike down abortion laws, "creates perverse incentives" by "[o]pportunistic individuals [who] can and

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166 Josh Blackman, *Tentative Thoughts on the Jewish Claim to a "Religious Abortion*," REASON: VOLOKH CONSPIRACY (June 20, 2022, at 17:04 CT), https://perma.cc/YPF6-D3SE.

167 Roat, *supra* note 160, at 30.

168 *See supra* notes 130–143 and accompanying text (discussing the definition of religion).

169 Blackman, Slugh & Fortgang, *supra* note 8, at 458.

sometimes do make up religions"—or religious beliefs, at least—"in order to seek faith-based exemptions from the law."[170] Some skeptical scholars suggest that the way to address such opportunists in abortion cases is for courts to "inquire whether the woman adheres to any other religious tenets that are not at issue in the case"—a suggestion that others scholars reject because, in their view, a person's faithfulness to "unrelated religious issues" is "not relevant" to their religious obligations about "abortion care."[171]

For purposes of this Article, it is understood that some might invent religious beliefs to challenge an abortion law (or *any* law, for that matter). But the facts demonstrate that religious persons of goodwill *do* genuinely link their support of abortion rights to their faith.[172] Rejecting the substance of those beliefs as repugnant will not make them go away—not in a democratic system founded on the principle of religious freedom for those of all faith traditions. Thus, the establishment concerns raised in these state abortion cases deserve to be addressed head-on. That is the focus of Parts 4 and 5, after a brief discussion about the "religious veto."

3.3. A Word on the "Religious Veto"

After *Dobbs* discarded the privacy right created in *Roe*, some advocates challenging state abortion laws adopted a tactic dubbed the "religious veto." This tactic arguably had its genesis in the U.S. Supreme Court's more recent Free Exercise Clause jurisprudence, where the Court found that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise"—an approach called the "most favored nation" theory of free exercise.[173] In an

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170 *Id.* (citing the founder of the Church of Marijuana, whose "religious" beliefs "neatly justif[ied] his desire to smoke marijuana"); *see also* United States v. Quaintance, 608 F.3d 717, 718 (10th Cir. 2010) (finding another marijuana-based church to not be a sincere religion).

171 Elizabeth Reiner Platt, *The Abortion Exception: A Response to "Abortion and Religious Liberty*," 104 COLUMB. L. REV. F. 83, 96 (2024) (criticizing the sincerity suggestions of Blackman, Slugh & Fortgang).

172 *See supra* Section 3.2.1 (discussing religious views opposing abortion).

173 Caroline Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WIS. L. REV. 475, 484–85 (2023) (emphasis omitted) (quoting Tandon v. Newsom, 593 U.S. 61, 62 (2021)).

abortion-related case in 2024, the Court of Appeals of New York rejected this kind of argument when brought by a Catholic diocese seeking an exemption from a state requirement that all health insurance policies "cover[] medically necessary abortion services."[174]

Some challengers to state abortion laws have attempted to expand this "most favored nation" theory into a full-blown religious veto. These advocates have argued that abortion laws must be struck down because they contain so few exceptions that they might prevent a woman "from abiding by religious imperatives" to abort a fetus.[175] This type of argument was alleged in a 2022 Wyoming case in which the plaintiffs sought a declaration that the law was "unlawful, invalid, and unenforceable."[176] A more appropriate remedy in these cases would be to limit an injunction against a state abortion law only to instances where a person's religious freedom is actually impacted. This was the approach taken in a 2024 case from Indiana, where an appellate court remanded a preliminary injunction against the State's abortion law to be "narrowed" because the injunction had been too broad by "enjoin[ing] future government action that . . . would bar the State from preventing Plaintiffs from obtaining abortions that are outlawed by the Abortion Law but that are not directed by Plaintiffs' sincere religious beliefs."[177]

Some abortion advocates go further, contending that a woman need not wait for a "crisis pregnancy" before she can sue to strike down enforcement of a law (for everyone in the state) if her religion gives her the right to abort a healthy fetus—"not just in the case of medical complication . . . but any time 'a pregnancy or the birth of another child would not allow her to

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174 *See* Roman Cath. Diocese of Albany v. Vullo, 242 N.E.3d 1174, 1187 (N.Y. 2024), *cert. granted, judgment vacated sub nom.*, Roman Catholic Diocese v. Harris, 145 S. Ct. 2794 (2025) (mem.) (rejecting challenge to State's exemption definition of "religious employer" based on the Diocese's theory that the definition was not neutral and generally applicable "because it targets certain beliefs and activities and not others").

175 Jacobson, *supra* note 7, at 668.

176 *See* Complaint for Declaratory and Injunctive Relief at para. 96, Johnson v. State, No. 18732 (Wyo. Dist. Ct. July 25, 2022). A Wyoming court struck down the abortion law but not on any religion issues. Johnson v. State, No. 2023–CV–18853, slip op. at 4 (Wyo. Dist. Ct. Nov. 18, 2024) (summary judgment order).

177 Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, 233 N.E.3d 416, 459 (Ind. Ct. App. 2024), *transfer denied*, 246 N.E.3d 271 (Ind. 2024).

fully realize her humanity and inherent dignity.'"[178] Defenders of these abortion laws respond that a single person cannot "veto" enforcement of the law for everyone else due to the possible need for a future religious accommodation.[179]

The topic of the religious veto is relevant to this Article's discussion about the Establishment Clause. Ironically, if taken literally, a religious veto could lead to another kind of establishment of religion. "[If] religious adherents could block the state from pursuing any policy that they objected to—even as to those Americans who do not share the religious objection," then the "professed doctrine[]" of those adherents' religion would become "superior to the law of the land."[180]

Consider the abortion-related case of *Bella Health and Wellness v. Weiser*, brought in a federal court in Colorado in 2023 by Christian medical providers with a "religious duty to try to help women who wish to try to reverse a medication abortion."[181] In their challenge to a state law prohibiting doctors from offering abortion-reversal treatment, the doctors alleged the law would violate their right to freely exercise their religion.[182] The court granted a very narrow injunction, stopping enforcement of the law "against Plaintiffs and all those acting in concert with them."[183] But imagine if the doctors had sought to strike down the right to medical abortions for every woman in Colorado because the doctors might one day need an accommodation to reverse such abortions. No doubt, abortion advocates would accuse those doctors of imposing their religious beliefs on everyone else, and if the courts were to force the State to adopt that Christian view, it might be fairly said that the State had established the doctors' religion as policy.

In short, religious vetoes are not acceptable as part of *any* valid exercise of religion, whether wielded by "conservative" or "progressive" believers seeking to veto laws.

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178 Platt, *supra* note 171, at 90 (quoting an affidavit filed by a woman in a challenge to a state abortion law).

179 Blackman, Slugh & Fortgang, *supra* note 8, at 444.

180 Brief for Jewish Coalition for Religious Liberty as an Amicus Curiae Supporting Petitioners at 16, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 3192478 (quoting Emp. Div. v. Smith, 494 U.S. 872, 879 (1990)) (emphasis omitted) (internal quotation marks omitted).

181 699 F. Supp. 3d 1189, 1196 (D. Colo. 2023).

182 *Id.* at 1211–12.

183 *Id.* at 1219.

4. THE RELIGIOUS (OR SECULAR) BASIS OF STATE ABORTION LAWS

In Part 3, this Article concluded that there are sincerely held religious beliefs on both sides of the abortion issue. It is not the province of law journals to declare which religious beliefs are right or wrong, good or evil, believable or incredible. It is enough to conclude that there is a clash of religious values related to abortion—a conflict that now requires addressing the main allegation brought by challengers to state abortion laws: that such laws unconstitutionally "codify the views of religious conservatives" over "liberal or progressive believers."[184] This establishment-based argument's primary line of attack centers on the metaphysical issue of when "human" life begins: "[W]hen a fetus becomes a 'life' is not scientifically or medically ascertainable[, but] . . . is largely influenced by religious views. Thus, the 'adoption of one theory of life . . . to justify outright bans of abortion, is arguably the adoption of a *religious* theory."[185]

The logical steps in this argument proceed as follows: (1) the question of when human life begins is wrapped up in the metaphysical issue of "ensoulment"—when a soul is infused in a fetus, making it "human"; (2) because science cannot speak to "ensoulment" or when human life begins, it is a distinctly religious question that yields various answers, depending on one's religious perspective; (3) by choosing the religious belief that human life begins at conception (or at some other time prior to viability or birth), state abortion laws have adopted the beliefs of "conservative" religious persons over those of "progressive" believers; (4) in making that choice, the state has preferred one religion over another in violation of federal and state establishment clauses.

This Part will critically evaluate the various links in that argument.

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184 Schwartzman & Schragger, *supra* note 66, at 2304–05; *see also* Paul D. Simmons, *Religious Liberty and Abortion Policy: Casey as "Catch-22,"* 42 J. CHURCH & ST. 69, 69–88 (2000) (arguing that the "pro-life" position is exclusively a religious one).

185 Jacobson, *supra* note 7, at 665–66 (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)) (cleaned up); *see also* Teresa Stanton Collett, *The Religious Question and Abortion*, FEDEARLIST SOC'Y: FEDSOC BLOG (Dec. 20, 2021), https://perma.cc/H4FV-2UAR (Justice Sonia Sotomayor's challenge to Mississippi in the *Dobbs* oral argument: "The issue of when life begins has been hotly debated by philosophers since the beginning of time. It's still debated in religions. So, when you say this is the only right that takes away from the state the ability to protect a life, that's a religious view, isn't it--").

4.1. The Secular Pro-Life Stumbling Block

"When does human life begin?" Establishment-based challenges are premised on the notion that this question is purely metaphysical, dealing with "ensoulment." The existence of secular anti-abortion activists is a stumbling block to that premise.

A "small but boisterous niche" in the pro-life movement,[186] these secularists include people like Kelsey Hazzard, the founder of *Secular Pro-Life*. Hazzard describes herself as "an atheist, a 29-year-old woman, well-educated at secular institutions . . . [who] lean[s] liberal on many issues, including same-sex marriage and climate change. I am also a dedicated pro-life activist, working to make abortion unthinkable."[187] That there *are* secular pro-life activists raises two issues for the establishment case: (1) is it necessarily true that the issue of when human life begins *must* involve the metaphysical belief about "ensoulment" by a divine being?; and (2) might there be non-religious, philosophical reasons to support state limits on abortion regardless of whether the unborn have souls?

The first question involves the theological issue of ensoulment. In an anti-abortion article, famed atheist activist Christopher Hitchens explained the situation this way:

> As a materialist, I hold that we don't *have* bodies, we *are* bodies. . . . All the nonsense we hear about . . . the point where a soul enters the unborn and so on, is at best beside the point. It has in common with the sectarian feminist view a complete contempt for science and the theory of evolution—which establishes beyond reasonable doubt that life is a continuum that begins at conception because it can't begin anywhere else.[188]

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186 Ruth Graham, *'The Pro-Life Generation': Young Women Fight Against Abortion Rights*, N.Y. TIMES (July 3, 2022), https://perma.cc/T8RX-WXRT.

187 Kelsey Hazzard, *The Atheist's Case Against Abortion: Respect for Human Rights*, AM. THE JESUIT REV. (Oct. 19, 2017), https://perma.cc/45T2-AMCW; *see also* Mary Fiorito, *Atheists and the Pro-Life Movement*, EPPC (July 31, 2022), https://perma.cc/C3T8-XTW5 (listing other atheist groups, to include Rehumanize International, the Equal Rights Institute, and the Progressive Anti-Abortion Uprising).

188 Christopher Hitchens, *A Left-Wing Atheist's Case Against Abortion*, CRISIS (Dec. 5, 2019), https://perma.cc/K9K5-5242.

Hitchens' views are not unique. Herb Geraghty—a "member of the LGBTQ community" and executive director of *Rehumanize International*—has advocated for a "consistent life ethic," which includes the secular belief that "all human beings, by virtue of their humanity, deserve to live free from all aggressive violence, from the moment of conception to natural death."[189] Geraghty and other pro-life secularists believe that "human life is intrinsically valuable without God's help."[190] In the words of Matt Wallace, another atheist who started a pro-life group in 1999, "I think there is nothing beyond this life—but life in and of itself is unique and special."[191]

If accepted, the pro-life secular position set forth by Hitchens and other atheists could undermine the premise that states must necessarily make determinations about the ensoulment of the unborn when determining if abortion should be prohibited. Those advocates making establishment-based arguments against state abortion laws rarely mention these pro-life secularists, however, instead frame their premise so that it is impossible to avoid the conflict of religious beliefs. But Pope Francis—leader of the Roman Catholic Church—seemed to agree with these atheists on at least one point. In a 2019 letter to a priest in Argentina, the Pope wrote, "For me[,] the deformation in the understanding of abortion is born mainly in considering it a religious issue. The issue of abortion is not essentially religious. It is a human problem prior to any religious option. The abortion issue must be addressed scientifically."[192] Whether scientific and medical evidence exists to support pro-life laws will be the topic of Section 4.2 of this Article.

The second fundamental issue posed by the existence of pro-life secularists is whether non-religious philosophical ideas could support abortion limits even if there *were* no God or soul. Atheist pro-life activists have suggested reasons to legislate limits on abortion, mostly focusing on notions of human rights. Herb Geraghty has explained, "Many atheists, like myself, who embrace a consistent ethic of life, oppose abortion for the same reasons we oppose things like the death penalty, war and police brutality. Abortion

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189 Zachary Schermele, *For Anti-abortion LGBTQ groups, Roe's Reversal Is a 'Human Rights Victory,'* NBC NEWS (June 29, 2022, at 12:39 CT), https://perma.cc/6AXD-LHNG.

190 Lisa Miller, *Beliefwatch: Pro-Life Atheists*, NEWSWEEK (Mar. 13, 2010, at 16:38 ET), https://perma.cc/X72H-VWYF.

191 *Id.*

192 Fiorito, *supra* note 187 (quoting the letter from Pope Francis).

is a human rights violation, and everyone should be working to end it."[193] For that reason, Geraghty's group, *Rehumanize International*, views the overturning of *Roe* as a "monumental expansion of human rights protections to a marginalized group."[194]

Professor Francis Beckwith detailed a philosophical argument similar to the views of Hitchens and Geraghty, positing that "each kind of living organism or substance, including the human being, maintains identity through change."[195] To illustrate, he used a German Shepherd with "the ultimate capacity to develop the ability to bark . . . [but who] may die as a puppy and never develop that ability. Regardless, it is still a German Shepherd dog as long as it exists because it possesses a particular nature."[196] Applying that principle to humans, "if you are a valuable human person now, then you were a valuable human person at every moment in your past including when you were in your mother's womb, for you are identical to yourself throughout the changes you undergo from the moment you come into existence."[197] As Hitchens explained, "I think that by now we know where babies come from. And dialectics will tell you that you can't be meaningfully inhuman unless you are actually or potentially human as well."[198]

These non-religious pro-life philosophical arguments are not new. For instance, in 1980, in *Women's Services, P.C. v. Thone*, the federal Eighth Circuit rejected an argument challenging Nebraskan abortion regulations based on the Establishment Clause.[199] Affirming the lower court's findings, the Eighth Circuit agreed with the district judge that "the idea that life begins at conception was a motivating principal of the legislation, but this idea was 'as capable of being labeled philosophical as religious.'"[200] This philosophical approach is in keeping with a variety of pro-life arguments that rely on

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193 *Id.*

194 Schermele, *supra* note 189; *see also* Graham, *supra* note 186 (discussing Kristin Turner—"a feminist, an atheist and a leftist" who works with Progressive Anti-Abortion Uprising—and "educat[es] the public about 'the exploitative influence of the Abortion Industrial Complex through an anti-capitalist lens'").

195 Francis J. Beckwith, *Law, Religion, and the Metaphysics of Abortion: A Reply to Simmons*, 43 J. CHURCH & ST. 19, 29–30 (2001) (emphasis omitted).

196 *Id.* at 29 (emphasis omitted).

197 *Id.* at 30.

198 Hitchens, *supra* note 188.

199 636 F.2d 206, 209 (8th Cir. 1980), *vacated*, 452 U.S. 911 (1981).

200 *Id.* at 208.

"reasoning processes, empirical observation, and widely shared moral principles."[201]

Scholars who are skeptical of these proposed non-religious theories often assert that the "motivations that accompany these [pro-life] 'secular' arguments are, at least in the American context, overwhelmingly religious . . . [and] undergirded for theists by the belief that human beings are defined relationally as the image of God, regardless of consciousness or capacity to function."[202] While that criticism may hold true for religious persons, it surely would not apply to the pro-life atheists discussed above. In any event, this skepticism does not reject the proposed arguments on their merits but rather questions the motivations of those who employ them—an issue for Part 5, below.

Other scholars who question the sincerity of the pro-life position draw comparisons to animal rights when raising theoretical obstacles to the "insufficient" state interests for protecting "potential life" in the womb.[203] They reason that "[n]on-human animals also feel pain" and have heartbeats, "but are not afforded rights under the Constitution.[204] If feeling pain is sufficient to grant an entity the rights of a child, then non-human animals must be granted those rights too."[205] But this argument entirely misses the point. The state does not need to grant constitutional rights to a fetus to protect it from pain or to allow it to live after detecting a heartbeat, just as animals do not require constitutional rights to be protected by the many animal cruelty laws in the nation today.

In sum, one can reject the logic of these pro-life secular theories, but if a state were to use those ideas to support abortion limits, would it lead to an establishment of religion? Of course not—and that is a problem for the primary establishment-based line of attack.

4.2. Following the Science in Abortion Cases

The debate over the scientific evidence related to prenatal life poses another threat to the premise of establishment-based pre-viability abortion

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201 Smolin, *supra* note 89, at 122–23.
202 *Id.*
203 DeVito, *supra* note 103, at 172–73.
204 *Id.* at 172.
205 *Id.*

challenges. Opponents to these laws have argued that "[s]cience cannot provide empirical proof with respect to the moment when human life or personhood begins, since science deals with physical, rather than metaphysical, matters."[206] This section addresses the debate over science in the context of *Roe v. Wade* and later cases, as well as the importance of such evidence today.

4.2.1. Science or Metaphysics?

Setting aside the possibility raised in the previous section—that the existence of pro-life secular philosophies can derail the primary establishment-based argument—a related question arises. Are opponents to pre-viability abortion laws correct in framing this issue as *solely* one about metaphysics and religion instead of scientific fact?

This purely metaphysical framing of the issue has been accepted by some courts, to great effect. In *EMW Women's Surgical Center v. Cameron* in 2022, a state judge found that Kentucky's laws—based on the premise "that life begins at the very moment of fertilization"—had adopted a "distinctly Christian and Catholic belief."[207] Similarly, in *Planned Parenthood South Atlantic v. State*, also in 2022, the South Carolina Supreme Court opined, "When life begins is a theoretical and religious question upon which there is no universal agreement among various religious faiths."[208] It then contrasted this "question of when life begins" with the "constitutional question" about "whether a woman has the right to make her own medical decisions . . . based on scientific evidence[]."[209]

A more nuanced conclusion was reached by a New Jersey Superior Court in 1979 in *Right To Choose v. Byrne*, a challenge to state limits on Medicaid funding for abortions.[210] That court concluded from "conflicting testimony" that "life begins at conception in the sense that a new living

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206 Jacobson, *supra* note 7, at 664.

207 No. 22CI03225, 2022 WL 20554487, at *10 (Ky. Cir. Ct. July 22, 2022) (Opinion & Order Granting Temporary Injunction), *rev'd sub nom.*, Cameron v. EMW Women's Surgical Ctr., P.S.C., 664 S.W.3d 633, 641 (Ky. 2023).

208 *See* 882 S.E.2d 770, 785–86 (S.C. 2023) (finding that a "right to privacy" in the state constitution guaranteed abortion but not presented with any religion claims).

209 *Id.*

210 398 A.2d 587, 595 (N.J. Super. Ct. Ch. Div. 1979).

embryo is created," but "whether this life is to be designated 'human life' is not a biological question but a theological or philosophical question."[211] The court then found it "untenable" to accept the argument that "the only legislative purpose" for the New Jersey law was "to adopt and further a religious belief," explaining that the State's criminalization of abortion since 1849 "must have been based upon a widespread public view of the moral wrongfulness of abortion, apart from [religion]."[212]

Yet another pre-*Dobbs* case identified the problem that would arise from the strict adherence to a purely metaphysical approach to the question of prenatal life. In *Doe v. Parson*, a federal case from 2020, the Eighth Circuit considered establishment-based arguments from a female satanist against a requirement that "every woman seeking an abortion in Missouri must first receive a state-authored informed-consent booklet."[213] The court recognized that, on the issue of life, "[s]ome religions, including Catholicism," would *always* conflict with "[o]thers, like Doe's Satanism," which meant that "under Doe's theory, Missouri's only option would be to avoid legislating in this area [of abortion] altogether."[214] The court realized that it would be unacceptable for a state to have its hands tied in legislating about a major policy issue such as abortion based on the truism that different religions viewed this controversial, moral issue in different ways.[215]

Others also have disagreed with framing the "life" issue solely as metaphysical, including Monica Snyder from *Secular Pro-Life*, who has contended that the issue of when life begins involves "a fact of biology" because "[a]s organisms, we begin as zygotes. . . . It is those who defend elective abortion who want to make this debate about religion, because biology doesn't support the pro-choice position at all."[216] Other anti-abortion advocates have cited "the clear, long-established medical fact that human life begins at the moment of conception."[217] Still others have pointed to

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211 *Id.*

212 *Id.*

213 *See* Doe v. Parson, 960 F.3d 1115, 1117–18 (8th Cir. 2020).

214 *Id.* at 1118 (noting that *Doe* was arguing for a result where states may never adopt a "theory of when life begins," and rejecting that argument as having been overruled in *Casey*).

215 *See Right To Choose*, 398 A.2d at 595.

216 Fiorito, *supra* note 187.

217 These advocates cite to medical textbooks that explain, "Fertilization is an important landmark, because under ordinary circumstances, a new, genetically distinct human

advancements in medicine, such as progress in the early nineteenth century that proved "preborn children" are alive; the American Medical Association's 1857 report stating, "The independent and actual existence of the child before birth as a living being is a matter of objective science"; and additional developments, such as the discovery of chromosomes in the 1890s and the understanding of DNA beginning in the 1920s.[218]

So, what, if anything, does science have to say on the issue of prenatal life, and how have the courts viewed the significance of that data from the time of *Roe* until today?

4.2.2. Scientific Evidence in *Roe*

The majority opinion in *Roe v. Wade* was always more nuanced than some abortion advocates would have liked, focusing on a lack of "consensus" within the scientific disciplines, rather than a flat-out rejection of the merits of pro-life theories.[219] The *Roe* Court collected medical data on all sides of the abortion issue, mostly through *amicus* briefs, and expressed ignorance on "the difficult question of when life begins," noting that "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[220]

Significantly, the *Roe* Court recognized that medical evidence supported valid state interests related to abortion regulation. It found that "a legitimate state interest in [protecting prenatal life] need not stand or fall

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organism is thereby formed." *Id.* (quoting RONAN R. O'RAHILLY & FABIOLA MÜLLER, HUMAN EMBRYOLOGY & TERATOLOGY (3d ed. 2001)).

218 Brief for Foundation for Moral Law, *supra* note 147, at 24; *see also* Planned Parenthood Great Northwest v. State, 522 P.3d 1132, 1147 (Idaho 2023) (denying declaratory relief against Idaho abortion laws based on historical analysis of scientific evidence).

219 410 U.S. 113, 159–60 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

220 *Id. But see* Richard S. Myers, *Reflections on "Looking Back on* Planned Parenthood v. Casey*," in* LIFE AND LEARNING XIII: THE PROCEEDINGS OF THE THIRTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 3, 12 (Joseph W. Koterski ed., 2004) (calling the *Roe* majority's statement a "false gesture of humility" because "the Court, in fact, made a decision about the status of the unborn" when it concluded they had no legal rights).

on acceptance of the belief that life begins at conception or at some other point prior to live birth."[221] The Court affirmed that "recognition may be given to the [State's] less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."[222] In fact, the Court found it "reasonable and appropriate" for a state to protect "potential human life."[223] But because *Roe* articulated a new right to abortion—a decision specifically cast aside in *Dobbs*—the *Roe* Court prevented the State from acting on its interest in "potential life" too early in the pregnancy.[224] After *Dobbs*, however, there is no longer a woman's fundamental right of privacy to balance against the state's interest in the "potential life" in the womb.[225] Thus, even under *Roe*'s assessment of the medical evidence in 1971, states are able to argue that scientific fact supports abortion limitations.

It is notable that medical science at the time of *Roe* was well-developed and largely consistent with today's prenatal understanding. To demonstrate how little has changed, it is worth outlining some medical evidence that Texas presented to the *Roe* Court in its *Brief for Appellee*.[226] First, using scientific medical terms, Texas rejected the notion that the fetus is nothing more than "a blob of protoplasm," arguing that the fetus "deserves respect as human life" at least "from the stage of differentiation, after which neither twinning nor re-combination will occur [and] the fetus [is] implanted in the uterine wall."[227] At that point, the fetus "shows evidence of individual animate existence," "has the ability to reproduce dying cells," and "can be distinguished from other non-human species," requiring "only nutrition and time to develop into one of us."[228] Noting the "autonomy of the unborn child . . . from the earliest stages of the pregnancy," Texas cited a renowned pediatrician who had "perfected the intrauterine transfusion" to debunk the

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221 *Roe*, 410 U.S. at 150.
222 *Id.*
223 *Id.* at 159.
224 *Id.* at 164.
225 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).
226 *See* Brief for Appellee, Roe v. Wade, 410 U.S. 113 (1971), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 70-18), 1971 WL 134281.
227 *Id.* at 29–30.
228 *Id.* at 30.

"medical fallacy" that a "pregnant woman can be treated as a patient alone."[229]

Next, Texas differentiated the parents' "sperm" and "ovum" from the "new and unique being" created at fertilization, "receiving one-half of its chromosomes" from each parent, although being "unlike either" one.[230] Texas explained that by "nine days after conception, . . . implantation begins," with the heart developing "as early as 18 days" and, by seven and a half weeks "present[ing] the existence of a functionally complete cardiac system and the possible existence of a myoneurol or humoral regulatory mechanism."[231] Texas described how an embryo at five weeks showed "the classical elements of the ECG tracing of an adult," with "the foundation of the child's brain, spinal cord" established "[b]y the end of the 20th day."[232] It then detailed various systems, including the nervous system "controlling the movements of the baby's muscles" by the "6th week after conception," and eyes forming "at 19 days," with complete formation of the "brain, spinal cord, nerves and sense organs" by the "end of the first month."[233]

After describing the first month of the development of the fetus in detail, Texas continued for another four pages depicting other stages of development: formation of the "eyes, ears, and nasal organs"; "[e]arliest reflexes begin[ning] as early as the 42nd day"; "all the internal organs of the adult" by the "end of the seventh week"; and "brain waves . . . noted at 43 days."[234] With diagrams and images, Texas explained that "[a]fter the eighth week no further primordia will form; everything is already present that will be found in the full term baby," commenting that "[f]rom this point until adulthood . . . the changes in the body will be mainly in dimension."[235]

Over another twelve pages, Texas described the continued "development of the child," whose "genetic pattern set down in the first day of life instructs the development of a specific anatomy," with the unique formation

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229 *Id.* at 30–31 (quoting H.M.I. LILEY, MODERN MOTHERHOOD (rev. ed. 1969)); *see also id.* at 31 ("[W]hat we know makes it possible to demonstrate clearly that separability begins at conception." (quoting Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (App. Div. 1953))).

230 Brief for Appellee, *supra* note at 226, at 32.

231 *Id.*

232 *Id.* at 33.

233 *Id.*

234 *Id.* at 34–38.

235 *Id.* at 39–41.

of the child's ears "by seven weeks" and "lines in the hands . . . by eight weeks.[236] At three months, "the child . . . can kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his wrist, turn his head, squint, frown, open his mouth, press his lips tightly together, . . . swallow and drink[] the amniotic fluid that surrounds him" and suck his thumb, with movements "of the child on film" recorded by a "famous embryologist."[237] In this way, Texas presented a scientific account of fetal development from conception through six months' gestation, even noting that "the child hiccough[s]," as well as sleeps in "his favorite position" and "move[s] about freely in the buoyant fluid turning from side to side," while also "hear[ing] and recogniz[ing] his mother's voice."[238]

With so much scientific data about this "potential human life," it is remarkable that *Roe* focused on the metaphysical issue of "ensoulment" as the deciding factor in whether a fetus was human. Perhaps that decision is more understandable in light of *Roe*'s creation of the mother's now-defunct fundamental right of privacy, which pitted her bodily autonomy against the "potential life" within her womb. Placed in the position of weighing these competing rights, the Court may have felt it necessary to focus on "the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid," as the relevant time when the rights of the "potential human life" within her womb would outweigh her right of privacy.[239]

Roe's recognition that the medical evidence supported a state interest in "potential life" is admitted even by those who oppose state abortion laws today.[240] *Roe*'s finding was also significant to atheist pro-life activists such as Hitchens: "[O]nce you allow that the occupant of the womb is even potentially a life, it cuts athwart any glib invocation of 'the woman's right to choose.' If the unborn is a candidate member of the next generation, it means that it is society's responsibility."[241] As the *Dobbs* Court noted: because "[a]bortion destroys what [*Roe* and *Casey*] call 'potential life' and what the

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236 *Id.* at 41.

237 *Id.* at 41–42 (citing the famous embryologist as Davenport Hooker, M.D.).

238 *Id.* at 29–54.

239 Roe v. Wade, 410 U.S. 113, 160–61 (1971).

240 *See, e.g.*, Jacobson, *supra* note 7, at 690 (implying that "certain abortion regulations" are appropriately "based on an interest in protecting the 'potentiality' of life").

241 Hitchens, *supra* note 188.

[Mississippi] law at issue in this case regards as the life of an 'unborn human being,'" it is "different" than other alleged rights the Court has encountered in substantive due process cases.[242]

4.2.3. Scientific Evidence Leading to the *Dobbs* Decision

With manifold abortion cases making their way to the Supreme Court between *Roe* in 1971 and *Dobbs* in 2022, along with countless *amici* filing briefs on all sides of the associated issues, suffice it to say that pro-life voices continued to urge the Court to reconsider the significance of the scientific evidence in favor of the "potential life" in the womb. While most of those pleas went unaddressed, at times, individual Justices would take up their banner. Perhaps the best example of this is a dissenting opinion in the 1986 *Thornburgh v. American College of Obstetrics and Gynecology* case, which argued that—metaphysical, theological, and legal questions aside—

> [O]ne must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being.[243]

An amicus in *Planned Parenthood of Southeastern Pennsylvania v. Casey* similarly argued that biological and medical science "indisputably show[ed]" as "an accepted fact that the life of *any* individual organism reproducing by sexual reproduction begins at conception, or fertilization—the time when the egg cell from the female and sperm cell from the male join to form a single new cell, the zygote."[244] This was consistent with the

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242 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022); *see also* Scott Devito, Dobbs *is, Historically, Right*, 37 REGENT U. L. REV. 1, 7 (2024) ("Dobbs was right on history.").

243 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists., 476 U.S. 747, 792 (1986) (White, J., dissenting).

244 Brief of Catholics United for Life et al. as Amici Curiae supporting Respondents and Cross-Petitioners at 14, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (Nos. 91-744 & 91-902), 1992 WL 12006411 (citing Herbert T. Krimmel & Martin J. Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U. CIN. L. REV. 725, 744–62 (1977)) (detailing an

dissertation of a researcher who surveyed 5,577 biologists in 2019, reporting that 96% of them affirmed "that a human life begins at fertilization."[245] Abortion opponents also changed tactics during this period, focusing the science on narrower ways to address specific concerns, such as the desire to "mitigat[e] 'fetal pain'"[246] or the need to address particularly gruesome abortion procedures, such as late-term "partial birth abortions."[247] These tactics met with some success, most notably when the Supreme Court upheld the federal ban on partial birth abortion in *Gonzales v. Carhart* and affirmed that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty," even if that uncertainty exists in the context of the abortion issue.[248]

Despite these pro-life efforts, abortion advocates continued to question whether these scientific "facts" were anything more than a clever disguise for metaphysical arguments. As one scholar explained, "many evangelicals believe that a strict anti-abortion position is nonsectarian and can be supported by 'secular' argumentation" because they "do not perceive their anti-abortion position as principally relying on a specific text of scripture or church pronouncement, but rather as a virtually self-evident combination of the commandment not to kill with the clear biological facts."[249] Put another way, "abortion bans cloak themselves in science, claiming that science or medicine now establishes that life begins at conception. . . . But nothing significant has changed medically or scientifically since *Roe*."[250] It may be accurate to suggest that scientists in the 1970s understood many of the same prenatal principles accepted today, but few would doubt the scientific advances over the past fifty years in that field, as in every other medical specialty. For instance, in the twenty-first century, hospitals in major cities in the United States "can now perform surgeries on genetically abnormal

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"analysis of biochemical and genetic evidence" showing "the life of a specific human being begins at conception").

245 Steve Jacobs, *I Asked Thousands of Biologists When Life Begins. The Answer Wasn't Popular*, QUILLETTE (Oct. 16, 2019), https://perma.cc/AX75-ARSD.

246 *See* Ari Berman, Note*, The Religious Exception to Abortion Bans: A Litigation Guide to State RFRAs*, 76 STAN. L. REV. 1129, 1173 (2024) (discussing justifications for abortion limitations in various States).

247 U.S. Conf. Cath. Bishops, *Partial-Birth Abortion*, https://perma.cc/QE8W-ENVD.

248 550 U.S. 124, 163–64 (2007).

249 Smolin, *supra* note 89, at 122.

250 Jacobson, *supra* note 7, at 664–65.

fetuses while they're still in the womb. Many are the same age as the small number of fetuses aborted in the second or third trimesters of a mother's pregnancy."[251]

In any event, the debate about the sufficiency of the evidence arguably came to an end in *Dobbs*. While overruling *Roe* and *Casey*, the *Dobbs* Court recounted Mississippi's legislative findings about the medical science regarding the development of the fetus:

> [A]t 5 or 6 weeks' gestational age an "unborn human being's heart begins beating"; at 8 weeks the "unborn human being begins to move about in the womb"; at 9 weeks "all basic physiological functions are present"; at 10 weeks "vital organs begin to function," and "[h]air, fingernails, and toenails . . . begin to form"; at 11 weeks "an unborn human being's diaphragm is developing," and he or she may "move about freely in the womb"; and at 12 weeks the "unborn human being" has "taken on 'the human form' in all relevant respects."[252]

While these modern findings were not far removed from the data presented in the 1971 Texas brief, the *Dobbs* Court accepted them as sufficient, whereas the *Roe* Court had not:

> The [Mississippi] findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.[253]

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251 Emma Green, *Science is Giving the Pro-Life Movement a Boost*, ATLANTIC (Jan. 22, 2022), https://perma.cc/JDX5-SPXW.

252 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232–33 (2022) (alteration in original) (quoting MISS. CODE § 2(b)(i)).

253 *Id.* at 301 (citations omitted).

More significant, the *Dobbs* Court went further in affirming the fact that abortion "destroy[s] a 'potential life,'" even chiding the dissenting opinion's apparent disregard for a "[s]tate's interest in protecting fetal life" and the improper "implication" that "[t]he Constitution does not permit the [s]tates to regard the destruction of a 'potential life' as a matter of any significance."[254] Finally, in addressing the issue of when life begins, the Court made it clear that this metaphysical question did not need to derail pro-life laws:

> Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "theory of life."[255]

This clarity in *Dobbs* authoritatively repelled at the federal level any notion that pro-life laws are not (at least partly) based on scientific fact, as well as any argument that the *sole* reason to limit abortion would be metaphysical or religious in nature. The Court invited debate at the state level to continue, however, as described in the next section.

4.3. Drawing Conclusions About the Primary Establishment Argument

Thus far, this Article has described the logical steps in the modern establishment-based argument against state abortion laws. The major premise of that argument, as set forth in the first two links in that chain, proposed that the question of when human life begins is necessarily wrapped up in the issue of "ensoulment," a distinctly religious and metaphysical question that science cannot answer. Part 4 discussed enough secular, philosophical, and scientific data to throw doubt on the validity of that major premise, setting aside the issue of religious legislative motivations, discussed fully in Part 5.

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254 *Id.* at 262.

255 *Id.* at 263 (citation omitted).

Focusing solely on the federal Establishment Clause, it is unlikely that the primary line of attack against abortion laws can succeed today. *Roe* acknowledged that scientific evidence regarding fetal development supported at least a legitimate state interest to protect "potential human life" in the womb,[256] and *Dobbs* further found that—in light of the demise of *Roe's* abortion-related "right of privacy"—this scientific evidence was sufficient to prohibit abortions pre-viability.[257] Combined with the philosophical arguments of pro-life atheists, there is ample weighty non-religious data available for a state to regulate abortion without resorting to metaphysical arguments about when a fetus gets its soul.[258]

But what about the states? Simply describing fetal development and pointing out scientific facts, such as that a human zygote is a member of the species *homo sapiens*, does not create a federal *requirement* that every state prohibit abortion at every stage of fetal development. To the contrary, *Dobbs* granted significant leeway to state and federal legislators to decide when to protect the human life growing within the womb.[259] Thus, at the state level, the primary establishment-based line of attack becomes a closer question.

The Kentucky case of *Cameron v. EMW Women's Surgical Center*[260] provides a revealing case study about how these questions could play out in state courts. In that case, abortion providers challenged Kentucky's "trigger ban" and "six-week ban" on abortion, meeting with early success at the trial level, only to have those victories reversed on appeal due to standing issues and a voluntary dismissal without prejudice.[261]

In *Cameron*'s early litigation, the metaphysics-religion argument scored a big win when a "judicially active" judge *sua sponte* raised the establishment-based argument despite the complaint not even mentioning

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256 Roe v. Wade, 410 U.S. 113, 159 (1973).

257 *Dobbs*, 597 U.S. at 279–80, 301.

258 *See* Blackman, Slugh & Fortgang, *supra* note 8, at 467–68 (noting that "[e]ven *Casey* held that 'the State has legitimate interests from the outset of the pregnancy in protecting the . . . life of the fetus'").

259 *Dobbs*, 597 U.S. at 292.

260 *See* 664 S.W.3d 633, 640–44, 659 (Ky. 2023).

261 *See* EMW Women's Surgical Ctr., P.S.C. v. Cameron, No. 22CI03225, 2023 WL 5392436, at *1 (Ky. Cir. Ct. June 27, 2023) (Agreed Order of Dismissal).

religion.[262] The judge concluded that the State's view "that life begins at the very moment of fertilization" was a "distinctly Christian and Catholic belief."[263] The judge further found that "[o]ther faiths hold a wide variety of views on when life begins," including about "the concept of 'ensoulment,'" such as "when and how this transformation occurs."[264] In granting a temporary injunction against the law, the judge found that Kentucky had "adopt[ed] the view embraced by some, but not all, religious traditions, that life begins at the moment of conception," making the injunction "not a particularly close call" because of this "arguable violation" of the state constitution's "prohibition on the establishment of religion."[265]

At the Supreme Court of Kentucky, the justices in *Cameron* concluded that the trial judge had erred in granting third-party standing to the abortion providers, although the justices did agree that first-party standing existed for the providers to challenge the trigger ban on the much narrower ground of whether it "was an unlawful delegation of legislative authority."[266] In a partly concurring opinion, Justice Christopher Nickell castigated the trial court's *sua sponte* raising and treatment of the establishment clause issue, demonstrating that the lower court's conclusions were inconsistent with Kentucky case law.[267] Justice Nickell contended that the trial court had "erroneously ignored or overlooked" binding state court precedent from 1972 that had rejected "an establishment challenge to Kentucky's former abortion statute."[268] The Court of Appeals of Kentucky had previously ruled that "[t]he State is certainly competent to recognize that the embryo or fetus is potential human life," and that, while "the precise determination of when the embryo or fetus becomes a human life in being, is . . . a question beyond judicial competence," that argument was "simply not of constitutional proportions."[269]

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262 *See Cameron*, 664 S.W.3d at 706 (Nickell, J., concurring in part and dissenting in part) ("[T]he trial court sua sponte raised additional . . . free exercise of religion challenges. . . . [which was] inappropriate . . . .").

263 EMW Womens Surgical Ctr. v. Cameron, 2022 No. 22CI03225, 2022 WL 20554487, at *10 (Ky. Cir. Ct. July 22, 2022) (Order Granting Temporary Injunction).

264 *Id.* (footnote omitted).

265 *Id.* at *10, *12 (footnote omitted).

266 *See Cameron*, 664 S.W.3d at 661.

267 *See id.* at 708 (Nickell, J., concurring in part and dissenting in part).

268 *Id.* (citing Sasaki v. Commonwealth, 485 S.W.2d 897, 903 (Ky. 1972)).

269 *Id.* (quoting *Sasaki*, 485 S.W.2d at 903).

In Missouri, the primary establishment-based argument fared even worse in a recent abortion challenge. In *Blackmon v. State* in 2024, the judge granted the State judgment on the pleadings in the face of an establishment argument under Missouri's constitution.[270] In ruling for the State—expressly and implicitly channeling *Dobbs* and other federal cases—the judge addressed the challengers' contention that Missouri's abortion laws were religious in nature.[271] He agreed with the challengers that the "determination that life begins at conception is . . . sometimes a religious belief"; however, it was not "necessarily and only a religious belief" because that view was "neither exclusive to nor solely held by adherents to Catholicism or evangelical Christianity."[272] This conclusion highlighted the logical weaknesses already discussed in this Article due to the existence of pro-life secular activists, as well as the objective scientific data accepted in both *Roe* and *Dobbs*.

In sum, the most reasonable conclusion to draw is that—if legislators were to protect the unborn based *solely* on religious beliefs about "ensoulment"—perhaps the premise of the primary line of attack would hold some weight. In reality, however, in light of the scientific and philosophical evidence (and especially the way the *Dobbs* Court and most state courts view that data), the premise of the primary establishment-based assault is so feeble as to risk bringing the entire argument down upon itself.

5. Abortion, Legislative Intent, and the Establishment Clause

Part 3 of this Article demonstrated that people on opposing sides of the abortion issue possess sincere religious beliefs about abortion, opening the door to the primary establishment-based line of attack against abortion laws: that some states codify the beliefs of certain religions over the beliefs of others. Part 4 revealed the weakness of that premise by exploring secular reasons why a state might limit abortion, including the ample scientific evidence accepted in *Roe* and *Dobbs*. Part 4 found it unlikely that the *sole* reason

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270 No. 2322-CC00120, slip op. at 3, 43 (Mo. Cir. Ct. Aug. 13, 2024) (Amended Order and Judgment).

271 *Id.* at 27–33.

272 *Id.* at 37 (quoting Doe v. Parson, 368 F. Supp. 3d 1345, 1351 (E.D. Mo. 2019), *aff'd*, 960 F.3d 1115 (8th Cir. 2020)).

for limiting abortion pre-viability must *necessarily* be the adoption of sectarian views about the metaphysical question of when human life begins. But that does not end the inquiry into whether state abortion laws violate federal or state establishment clauses.

Part 5 assesses an alternative establishment-based issue used against pre-viability laws: whether state legislators had "improper government motivation" when passing abortion laws, and whether a law that is "facially neutral with respect to religion" violates establishment clauses if "the purpose, intent, or motivation for the law is theological . . . [and] aims to promote religious values."[273] Abortion advocates point to instances where "legislators who support such laws have explicitly stated their support is based on religious belief," as well as instances where the text of a law allegedly belies a religious purpose, such as when it states an intent "to protect the 'dignity of unborn children,' or refers to the fetus as a 'living unborn child.'"[274] This Part addresses these arguments, discussing the place of religion in public life and the theory that legislators have protected rights to express their religious beliefs when advocating and voting for legislation. Should individual expressions of faith by legislators automatically create a violation of establishment principles? Is it possible to uphold abortion laws that have both religious *and* secular motivations, especially in the face of conflicting scientific theories that apply?

5.1. The Place of Religion and Morality in Legislative Actions

From the beginning of the United States, the founders recognized that religion would be essential to the success of the fledgling republic. In 1798, John Adams famously wrote that, for the U.S. Constitution to be successful, it must govern "a moral and religious people."[275] The U.S. Supreme Court has cataloged how, throughout their history, all three branches of the federal government have recognized the role of religion and morality in public life

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273 Schwartzman & Schragger, *supra* note 66, at 2305–06.

274 Jacobson, *supra* note 7, at 690–91; DeVito, *supra* note 103, at 171 (finding religious motives of legislators revealed when they use the "Constitutionally incorrect" term "children" to describe fetuses).

275 Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts, NAT'L ARCHIVES: FOUNDERS ONLINE (Oct. 11, 1798), https://perma.cc/5K82-GS4H.

to accomplish the goals of the nation.[276] But to what extent can the government "legislate morality," especially on the abortion issue? And do legislators need to suppress their individual religious beliefs when passing pro-life laws?

5.1.1. Legislating Morality?

Legislatures make moral choices with nearly every law they pass. When murder, theft, or perjury are criminalized, the state upholds and transmits moral values believed to be critical to the survival and advancement of society. But if legislating morality is so common and necessary, why is it often treated as a "dirty" phrase?[277] Partly, it has to do with the controversial context in which many of these questions arise, often dealing with sexual liberty and privacy rights created under the oft-criticized umbrella of "substantive due process."[278] Partly, it has to do with concerns that passing a "moral" law is a way for government to impose the views of one religious group on the rest of society—in other words, Establishment Clause concerns. Each of these issues is addressed in turn.

On the first issue—the one involving substantive due process—a fascinating debate about "legislating morality" occurred in *Lawrence v. Texas*, when the Supreme Court struck down a law criminalizing homosexual sodomy.[279] Writing for the Court, Justice Anthony Kennedy embraced the idea that, even if a majority of people believe that a "particular practice [is] immoral," that reasoning alone is insufficient "for upholding a law prohibiting

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276 The Supreme Court as a whole, or in various opinions by individual Justices, has outlined frequent times in history when official government actions affirmed the role of religion as proper and necessary. *See* Lynch v. Donnelly, 465 U.S. 668, 673–78 (1984); Zorach v. Clauson, 343 U.S. 306, 311–15 (1952); Church of the Holy Trinity v. United States, 143 U.S. 457, 458–59 (1892); Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); McCreary Cnty. v. ACLU, 545 U.S. 844, 885–912 (2005) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting).

277 *See, e.g.*, Michael D. Bayles, *Legislating Morality*, 22 WAYNE L. REV. 759, 759–60 (1976).

278 For a good discussion about the concerns with the Court's approach to substantive due process, see Obergefell v. Hodges, 576 U.S. 644, 694–96 (2015) (Roberts, C.J., dissenting).

279 539 U.S. 558, 562, 569–73, 576–79 (2003).

the practice."[280] In dissent, Justice Antonin Scalia predicted that the Court's decision would "effectively decree[] the end of all morals legislation" and result in the reversal of "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity," which were based on the same legitimate state interest to discourage "immoral and unacceptable" behavior.[281] The "morals legislation" debate between Kennedy and Scalia continued in subsequent cases, with Scalia maintaining that "the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol."[282] In 2015, Scalia's position seemed defeated when the Court struck down federal and state laws related to same-sex marriage.[283]

By the time of *Dobbs*, however, a newly energized, more conservative Supreme Court gave states leeway to legislate on the "substantive due process" issue of abortion, which posed a "critical moral question" due to the unborn life at risk.[284] This was consistent with the Court's past approach in allowing states to legislate morality. For instance, in the field of medicine, the Court permitted legislatures to pass laws based on the moral "interest in protecting the integrity and ethics of the medical profession."[285] This included outlawing assisted suicide based on the "fear" that permitting the practice could start society "down the path to voluntary and perhaps even involuntary euthanasia."[286] It also included singling out brutal medical procedures, such as partial birth abortion, based on the "ethical and moral concern" about "draw[ing] a bright line that clearly distinguishes abortion and infanticide."[287]

On the second issue—the one involving the Establishment Clause—the debate continues, especially if legislating "morality" means legislating religious views. That argument is the secondary line of attack raised in recent

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280 *Id.* at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

281 *Id.* at 599 (Scalia, J., dissenting).

282 United States v. Windsor, 570 U.S. 744, 795 (2013) (Scalia, J., dissenting).

283 *See Obergefell*, 576 U.S. at 680–81.

284 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022).

285 Washington v. Glucksberg, 521 U.S. 702, 731 (1997) (upholding assisted-suicide laws).

286 *Id.* at 732–35.

287 Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (citation omitted).

challenges to state abortion laws. It rests on the principle—the first prong of the now-defunct *Lemon* test—that every valid law must have a "secular" rationale. Under this view, although "enforcing moral or ethical values" can be a compelling state interest, such morals "must be grounded in cultural values rather than religious values"[288] to comport with establishment principles.

Some have stretched this idea of a "secular rationale," contending that legislation cannot even *consider* religious views.[289] Officials with religious beliefs must check them at the door when governing, legislating, or judging.[290] Scholars such as Professor Michael McConnell have rejected this idea, arguing that its logical destination would mean that a person could not "urge Congress to . . . increase welfare spending because of Christ's admonitions to feed the poor—though the same policy could be supported on other grounds."[291] Democratic New York Governor Mario Cuomo expressed a similar concept:

> The values derived from religious belief will not, and should not, be accepted as part of the public morality unless they are shared by the pluralistic community at large, by consensus.
>
> That values happen to be religious values does not deny them acceptability as a part of this consensus. But it does not require their acceptability, either.[292]

The question remains: how much "religion" can be considered within the legislative process without violating establishment principles? Rejecting the "secular rationale" principle (and praising a similar rejection by "secular leftist" Michael Walzer), Professor McConnell argued that it would be a "fundamental violation of democratic principle to 'keep out of politics' any citizens on the basis of their religious, philosophical, epistemological, or moral standpoint," and that the Establishment Clause "was not designed to make religion irrelevant to politics . . . but to protect the right of the people to

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288 David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479, 495 (1990).

289 *See* Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 640 (1999).

290 *Id.*

291 *Id.* at 641–42.

292 Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 18 (1984).

make religious decisions . . . without government interference or favoritism."[293]

Other scholars have disagreed, even while acknowledging that most conservative Supreme Court justices "accept that religious convictions are appropriate grounds for legislation."[294] In opposing pre-viability abortion laws, those scholars have cautioned against discarding the secular rationale requirement because "religious ends might serve not only as rational bases for legislation, but they might also be invoked as compelling interests, sufficient to override others' constitutional rights."[295] Those scholars have also argued that pre-viability abortion laws "reflect orthodox religious values rather than cultural values," and that viability is the appropriate demarcation of life because "*[i]t*, and not the moment of conception, has been vested by our culture with import."[296]

This debate looms large in the arguments involving pre-viability abortion laws, as discussed below. Still, in light of history and tradition, a reasonable balance should be possible to strike by including religious values in the broader political dialogue while also ensuring that laws are based on permissible state interests.

5.1.2. The Right of Legislators to Legislate Morality?

Depending on one's position about the scope of the "secular rationale" principle, one will consider it more or less problematic if state legislators use religious beliefs to inform their lawmaking on pre-viability abortion limits. Those who affirm that religion can play a role in legislation will argue that "[a]s a nation we are constitutionally committed to the separation of Church and State, but not to the separation of religious and moral values from public life."[297] Those who believe in a stricter separation will contend that abortion

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293 McConnell, *supra* note 291, at 642–43; *see also* Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619, 619–20 (1999) (arguing that excluding religious people from politics is not possible in a democratic society); Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation*, 1 J.L. PHIL. & CULTURE 159, 160 (2007) (criticizing secular rationale).

294 Schwartzman & Schragger, *supra* note 66, at 2313.

295 *Id.* at 2313–14 (footnote omitted).

296 Dow, *supra* note 288, at 499–500 (emphasis added).

297 Hofman, *supra* note 31, at 227 (1986) (quoting Bishop James Malone).

laws based on a "view of life that belongs only to a few particular religious denominations" will "surely" violate the Establishment Clause.[298]

Some scholars have gone a step further, arguing in favor of religion in government, focusing on the individual rights of the legislators themselves to express religious beliefs:

> Legislators do not shed their First Amendment rights at the capitol gates. Disabling legislators from enacting laws that coincide with their sincerely held religious beliefs would likely violate the religious liberty of state government officials. If courts were to adopt such a prohibition, they would effectively be barring religious believers from office.[299]

Governor Cuomo expressed a similar idea, contending that his right to exercise his religion allowed him to "argue that [his] religious belief would serve well as an article of our universal public morality," and to "use . . . the legislative and executive and judicial processes[] to convince [his] fellow citizens" to accept those beliefs as public morals "even apart from their specific religious base or context."[300] Under this position—the traditional understanding of religion in government from the founding until at least the middle of the twentieth century—individual expressions of religion by legislators passing state abortion laws would not be as problematic as asserted by those challenging such laws.

Professors Schwartzman and Schragger have criticized the traditional position, however, suggesting that its natural endpoint is "the tidy conclusion that interpreting the Establishment Clause to include a secular purpose requirement violates the Free Exercise Clause."[301] Asserting that this argument is "especially" likely to arise in state court challenges to abortion laws, they suggest it would be "radical . . . to reject a secular purpose requirement on the grounds that religious reasons must be treated no differently from other justifications for state action."[302] They worry that "[t]he implications would be far-reaching, opening possibilities for morals legislation that were

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298 Jacobson, *supra* note 7, at 698.

299 Blackman, Slugh & Fortgang, *supra* note 8, at 469–70 (noting that "vigorous enforcement of state-constitution establishment clauses may run afoul of the Free Exercise Clause of the federal Constitution").

300 Cuomo, *supra* note 292, at 16–17.

301 Schwartzman & Schragger, *supra* note 66, at 2313 (footnote omitted).

302 *Id.*

previously foreclosed," perhaps even leading "religious majorities" to "reject same-sex marriage, impose religious restrictions on divorce, prohibit blasphemy, reinstate Sabbath laws, require school prayer, and much else—all without having to show that any of these policies are, or could be, justified by secular or public reasons."[303]

It is doubtful that the courts would ever go as far as these scholars fear, and it is not clear that the asserted "parade of horribles" would actually occur even if the courts *did* go that far. More relevant to this Article, it is unlikely that the pre-viability abortion cases will require courts to push the "secular rationale" envelope to uphold state laws. As noted in Part 4, there are ample tried-and-true secular rationales available to support pre-viability abortion limits. The narrower question presented by these cases is what establishment-based limits, if any, would prevent passage of a law based on both secular *and* religious rationales. To answer this question, it is necessary to first explore the issue of legislating in the face of medical uncertainty—the focus of the next section.

5.2. Legislating in the Presence of Scientific Uncertainty

Every decision in government is a policy choice: to fund one item instead of another, to support one theory over another, to encourage one type of behavior over another, and a million other controverted choices. Even if evidence related to a particular problem has no consensus in the relevant field, the government may still need to act to address a matter. This is part of the political process. And sometimes those who lose such arguments actually have more evidence and better theories to support their position than the winning side, but the losing side, nonetheless, is rejected by the majority, for good or ill. If the losing side believes it has the stronger argument and evidence, it can take that case to "the People" and hope for a victory in the next election cycle to allow the "better" policy to be implemented. That is how government and democracy are supposed to work.

In the context of pre-viability laws, challengers often argue that abortion limits are improperly based on a lack of scientific consensus on critical issues, such as when fetuses can feel pain or when human life begins. Abortion advocates contend that the state cannot make policies that limit

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303 *Id.* at 2314 (footnotes omitted).

abortion access until a medical consensus is reached due to the significant intrusion on the bodily integrity of pregnant women.[304] These arguments largely succeeded in *Roe*, with the Court striking down abortion laws partly due to a lack of scientific consensus.[305] As discussed in Part 4, however, the *Roe* Court needed to weigh controverted medical evidence against a fundamental abortion right the Court created (but *Dobbs* later discarded as a mistake).[306] Thus, the remaining issue is whether states can legislate abortion limits today based on "uncertain" evidence about prenatal life.

An inquiry in this area might consider two crucial points. First, how important is it for the state to act on the matter at this time? Issues requiring public action may receive judicial deference in the face of conflicting data because legislatures have little choice but to act when presented with pressing problems. Here, the *Dobbs* Court found that abortion posed a "critical moral question" due to the unborn life at risk, and it further found that states could treat the destruction of unborn life as a "significan[t]" matter.[307] Even before *Dobbs*, in both *Casey* and *Gonzales*, the Court had "confirm[ed] the State's interest in promoting respect for human life at all stages in the pregnancy."[308] And few would dispute that "reproductive rights for women" or "protecting unborn children" are not critical issues. Thus, it is likely that courts would find the abortion issue to be a pressing matter deserving legislative attention, one way or the other. Waiting until consensus exists on this issue would be unconscionable. After all, a failure to act could mean the death of countless unborn lives or the loss of reproductive rights for women.

The second point weighs the level of controversy around the facts at issue and the amount of division within the scientific community.[309] The U.S.

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304 *See* Jacobson, *supra* note 7, at 663–65.

305 *See supra* notes 219–224 and accompanying text.

306 *See supra* notes 219–224 and accompanying text (discussing *Roe*'s rationale).

307 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257, 262 (2022).

308 Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022)).

309 *See generally* Antony B. Kolenc, *Easing Abortion's Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Fact-Finding?*, 10 TEX. REV. L. & POL. 171 (2005) (evaluating several factors on this point).

Supreme Court addressed this issue in several older cases.[310] In *Jacobson v. Massachusetts*, the Court upheld the State's mandatory smallpox vaccination requirement in the face of "opposing theories" in medicine regarding the effect and danger of the vaccine.[311] The Court explained that the legislature "was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. . . . It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease."[312] Five years later, in *Collins v. Texas*, the Court considered controverted licensing requirements for osteopathy, an undertaking that the parties disputed fell under the practice of medicine.[313] In an opinion written by Justice Oliver Wendell Holmes, the Court held that the State had a right to "adopt a policy" about this "medical matter[]" despite the "difference of opinion and dispute."[314]

In 1997, in *Kansas v. Hendricks*, one of the most significant cases in this area, the Court addressed whether a civil-commitment statute could consider pedophilia to be "a mental abnormality" where the medical community was split on that question.[315] The Court sided with Kansas, noting that the State's hands were not "tie[d]," and that "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes" because these are "areas fraught with medical and scientific uncertainties."[316] Upholding the federal ban on partial birth abortion in *Gonzales v. Carhart*, in 2007, the Supreme Court cited the above cases and more while explaining that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty" and that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."[317]

When it comes to the science of prenatal life, there is little real disagreement about the stages of fetal development, and there is no real "split"

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310 *See* Stenberg v. Carhart, 530 U.S. 914, 970 (2000) (Kennedy, J., dissenting) (discussing the history of cases that permitted legislatures to make policy despite disputed scientific evidence).

311 197 U.S. 11, 30, 37–39 (1905).

312 *Id.* at 30.

313 223 U.S. 288, 294–96 (1912).

314 *Id.* at 297–98.

315 521 U.S. 346, 350, 358–59 (1997).

316 *Id.* at 360 n.3.

317 550 U.S. 124, 163–64 (2007) (citing *Hendricks*, 521 U.S. at 360 n.3).

in the medical community about the facts asserted by Texas in *Roe* or Mississippi in *Dobbs*. What "splits" this issue is the non-legal question about "ensoulment" and the policy question about what to *do* with the medical facts of prenatal life when it comes to protecting "potential human life" (or the "unborn child") in the womb. That issue is not a scientific divide so much as a philosophical one, and with so much supportive discussion in federal cases (especially *Gonzales* and *Dobbs*), courts are likely to defer to the judgment of legislatures in the absence of consensus on these policy matters. This means that some states will allow abortion during all nine months, while others will cut it off at a six-week heartbeat.

Does that mean that legislators have a free hand to use medical findings as cover to disguise their true motives to codify religious beliefs? That question is addressed next.

5.3. Legislator Religiosity and Abortion Bans

The secondary line of attack on pre-viability abortion laws mostly focuses on the alleged religious motives of state legislators. Scholars advocating against these laws have called it "disingenuous to argue that pre-viability abortion bans are motivated by secular interests or 'moral,' 'philosophical,' or 'traditionalist' judgments."[318] While some of these scholars acknowledge the existence of those "who oppose abortion for secular reasons," they credit "Christian organizations" with overturning *Roe* and assert that "the anti-abortion movement" has admitted that it is a "faith-based movement."[319]

Is it true that pro-life legislators view themselves as merely enacting God's will, and that the text of some of their laws expressly codifies religious beliefs? Even if that were the case, would that necessarily mean that state abortion laws violate establishment principles and must be struck down? That is the inquiry for this final section.

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318 Jacobson, *supra* note 7, at 689 (footnotes omitted); *see also* Sherry F. Colb, *Why Free Exercise on Steroids Won't Benefit Progressive Religious People*, DORF ON L. (Jan. 3, 2022), https://perma.cc/3F6E-882V (alleging that legislators "rest on their own religion" to impose pre-viability laws).

319 Carlisle & Abrams, *supra* note 6.

5.3.1. Facial Challenges to the Text of Abortion Laws

Those who oppose pre-viability laws assert that some state abortion laws are facially religious, in violation of federal and state establishment clauses. Although this allegation has been made, challengers have struggled to find any solid examples.

The strongest argument—though not very strong—targeted Missouri's "Right to Life of the Unborn Child Act," which prohibited abortion "except in cases of medical emergency."[320] In a section titled "Intent of [the] general assembly," the law stated, "In recognition that Almighty God is the author of life, that all men and women are 'endowed by their Creator with certain unalienable Rights, that among these are Life' . . . it is the intention of the general assembly of the state of Missouri to [regulate abortion]."[321] In *Blackmon v. State*, decided in 2024, challengers asserted that this preamble violated the state's establishment clauses, alleging that the legislators "openly invoked their personal religious beliefs as the reason for the law" by placing that language in the preamble.[322] Professor DeVito has also discussed the offending language, calling it "a direct and indisputable statement of a religious belief—a nonrational belief in the existence of an immaterial entity who is the author of all life."[323]

The judge in *Blackmon* disagreed, noting that the allegedly offending phrase was "precatory and imposed no substantive restrictions on abortions," with some of the text being mere "paraphrased language from the Declaration of Independence."[324] More significant, the portion about "Almighty God [being] the author of life"—the "only potentially problematic part" of the lengthy statute—was "similar to the language in the Preamble to the Missouri Constitution," and it mirrored a reference to "Almighty God" contained in "one of the Missouri Constitution's Establishment Clauses,

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320 MO. REV. STAT. § 188.017(1)–(2); *see also* DeVito, *supra* note 103, at 166–69 (discussing the statute).

321 MO. REV. STAT. § 188.010.

322 First Amended Petition for Injunctive and Declaratory Relief at para. 4, No. 2322-CC00120 (Mo. Cir. Ct. Mar. 14, 2023).

323 DeVito, *supra* note 103, at 167.

324 *Blackmon*, No. 2322-CC00120, slip op. at 34–35 (Mo. Cir. Ct. Aug. 13, 2024) (Amended Order and Judgment) (citing several federal cases holding similarly).

Article I, Section 5."[325] Thus, it would not be possible for the cited reference to offend the State's establishment clause because that "would call into question whether the Missouri Constitution itself violates its Establishment Clauses, and that cannot be the case."[326]

Considering the analysis in *Blackmon*, and the text of the Missouri constitution, it is difficult to imagine an establishment-based argument prevailing under these facts. Establishment principles were never intended to pressure-wash all signs of religion from the nation's public life. Further, the reality of modern abortion legislation is that politicians have gotten savvy about the language they place in statutes to avoid the kind of issues that used to generate litigation under the Establishment Clause. That is likely why there are no other notable examples of facially religious abortion laws.

The other substantive example raised by Professor DeVito involves Alabama's "Human Life Protection Act," where one of the Act's many legislative findings mentioned an intent to protect "the *sanctity* of unborn life."[327] Here, Professor DeVito focused on the one word with religious overtones ("sanctity") in an otherwise in-depth list of secular legislative findings nearly 550 words long, and which set forth mostly legal and scientific reasons for the law.[328] Defining "sanctity" as being related to "holiness" or "being holy or sacred," Professor DeVito concluded the law must be "founded in an irrational belief in invisible causes."[329] This argument is too attenuated to be plausible. Even if the word "sanctity" could be loaded with that much religious meaning, it would be asking that single word to bear too much of the labor needed to pull down a statute that is otherwise solidly secular, at least on its face.

In sum, with no realistic examples of facially religious abortion laws to choose from, it appears that a facial establishment-based line of attack has little chance of success against the pre-viability abortion laws currently on the books in the states.

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325 *Id.* at 34.

326 *Id.* at 35.

327 DeVito, *supra* note 104, at 169 (quoting ALA. CODE §§ 26-23H-1 to -2 (2019) (emphasis added)).

328 *See id.* (citing ALA. CODE §§ 26-23H-2(b)) (with DeVito citing a word in sub-section (b) in a section that contains (a) through (j)).

329 DeVito, *supra* note 103, at 169.

5.3.2. Challenges to Individual Legislator Comments

As discussed earlier, differing views about the scope of the "secular rationale" principle will lead to differing levels of toleration of religious influence when legislatures are legislating.[330] Both extremes of the spectrum should be ruled out by the courts as beyond the pale. The idea that religious legislators must check their beliefs at the door—or worse, never be allowed inside the door—is unacceptable considering the history and tradition of the nation. It is equally untenable, however, that religious legislators should be allowed to legislate whatever religious beliefs they want without any legitimate public interest in doing so. It seems that an acceptable middle ground exists where legislators are free to bring their own worldviews into the mix—experiential, philosophical, and religious included—so long as there are legitimate state interests being furthered, whether that interest involves protecting "potential life" or "reproductive rights" or both.

With this in mind, when assessing arguments brought against state abortion laws, it seems clear that concerns about legislative intent are truly at the heart of the matter. Challengers to these laws cite instances where legislators allegedly have passed facially neutral abortion laws for religious purposes, and where individual comments show the *true* intent of the laws: to codify distinctly sectarian beliefs about "ensoulment."[331]

For instance, in the *Blackmon* case in Missouri, challengers to the State's abortion laws spent "[l]arge portions" of their argument "centered around comments made by legislators concerning their religious motivations for supporting the Challenged Provisions."[332] The state judge was unimpressed, finding "that the individual comments by legislators should be given little to no consideration" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."[333]

The judge in *Blackmon* was referencing the longstanding judicial concern about attributing legislative purpose by looking at the motive of

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330 *See supra* Section 5.1.2 (discussing legislator comments and free exercise).

331 *See infra* notes 335–342 and accompanying text (discussing alleged religious legislative motives).

332 Blackmon v. State, No. 2322-CC00120, slip op. at 23 (Mo. Cir. Ct. Aug. 13, 2024) (Amended Order and Judgment).

333 *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)).

individual legislators. The *Dobbs* Court revisited that same concern, making it clear that the Court still "disfavored arguments based on alleged legislative motives" because such inquiries are "'a hazardous matter.' Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole."[334] States have generally followed federal law on this issue for the same reasons. Therefore, even if relevant legislator statements were available and clearly religious in these abortion cases, they might not be useful.

What *is* surprising—considering the controversy surrounding abortion, and with all its religious implications—is that attempts to catalog official comments have not turned up egregious examples of religious zealotry. In a recent law journal article, one scholar inventoried the most offending official religious statements that could be located in support of state previability abortion laws.[335] The list was underwhelming.

Two state senators who drafted the Texas "heartbeat bill" were at the top of the article's list—not because of comments they made about the law, but simply because one belonged to an activist Christian group and the other went to a devout Christian college.[336] But merely being a practicing Christian is not enough to show improper legislative motive. Next up was a state representative who sponsored a 2021 Montana House Bill that banned abortions after twenty weeks, and who stated that "this practice of infants dying because they are not wanted or not planned is an abomination in God's eyes."[337] Clearly, this representative believed that God disapproved of abortion, but her statement sheds little light on what really matters in this inquiry. For instance, the scientific data discussed in Part 4 may have been the driving force behind her belief that the fetus is a human life, even if her religious beliefs about murder provided the moral revulsion at the death of these defenseless "unborn children." The point is that her motives for

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334 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 253–54 (2022) (citing Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (plurality opinion); Turner Broad. Sy., Inc. v. FCC, 512 U.S. 622, 652 (1994); *O'Brien*, 391 U.S. at 383; Arizona v. California, 283 U.S. 423, 455 (1931) (collecting cases)).

335 Jacobson, *supra* note 7, at 666–67.

336 *Id.* at 666.

337 *Id.* at 667 (quoting Representative Lola Sheldon-Galloway).

sponsoring the law might have had nothing to do with religion or might at least have been a mixed bag of both secular and religious motivations.

The article also reported three other comments from legislators, each statement as unrevealing as the first on the motive inquiry that mattered. One reported statement came from an Arkansas abortion debate,[338] while the other two came from co-sponsors of the Mississippi law upheld in *Dobbs*.[339] None of the comments established a purely religious motive for protecting fetuses. Two other reported statements in the article came not from legislators but from governors. When signing an abortion bill, Texas Governor Greg Abbott stated, "[O]ur creator endowed us with the right to life, and yet millions of children lose their right [to] life every year because of abortion. In Texas we work to save those lives."[340] Similarly, Alabama Governor Kay Ivey wrote, "[T]his legislation stands as a powerful testament to Alabamians' deeply held belief that life is precious and that every life is a sacred gift from God."[341] These comments give no insight into the legislative processes that produced these bills. Further, while these officials attributed life to God, their statements lacked specificity about their reasons for protecting the unborn. Their views may have been formed by science and philosophy, as well as religion. Finally, their words said little more than what is written in the Declaration of Independence and what the Supreme Court has cataloged throughout the nation's history.[342]

In sum, the evidence is weak in support of theories that pre-viability abortion laws are based solely on religion instead of the philosophical and scientific data in Part 4. But even if a reasonable person could conclude that some of the legislators who voted for these laws were partly motivated by religion, would that be enough to strike them down?

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338 *Id.* ("There's six things God hates, and one of those is people who shed innocent blood. I'm not going to be a part of any of that.").

339 *Id.* at 667 ("I serve God who says life is in the blood. And this bill will protect those lives."); *id.* at 668 ("It is our duty as men and women of Christ to stand in the gap between tyranny and evil and those who are unable to defend themselves. There is one set of laws above all others and that is God's law in our land as well as the Constitution—for the latter cannot exist without the blessing of the first.").

340 *Id.* at 667.

341 *Id.*

342 *See* Lynch v. Donnelly, 465 U.S. 668, 674–75 (discussing government acknowledgement of religion).

5.3.3. Legislator Comments and *McRae v. Harris*

What if an abortion law is partly based on religious ideals, in addition to valid scientific or philosophical theories that support it? Must such a law be struck down? That question is raised by the understandable argument from abortion advocates that the comments of some legislators demonstrate that they were at least partly influenced by their religious beliefs when passing pre-viability abortion laws.

On this question, *Harris v. McRae* in 1980 stands as a major obstacle to those who challenge such abortion laws.[343] In that case, the U.S. Supreme Court addressed "whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravenes . . . the Religion Clauses."[344] The challengers to the amendment had argued that it "violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences."[345] Unlike recent abortion cases, this allegation was not lacking in strong proof. The district court made lengthy findings after a trial, concluding there had been much influence by the Catholic Church.[346]

Applying *Lemon*, the Supreme Court found no violation in *Harris* because "it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'"[347] The Court went on to declare, "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny."[348] The Court considered the Hyde Amendment to be a mixed bag of both secular and religious purposes, calling the amendment "as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment

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343 448 U.S. 297 (1980).

344 *Id.* at 301.

345 *Id.* at 319.

346 *See* Jacobson, *supra* note 7, at 675 (explaining that the district court in *Harris* uncovered "evidence that during the legislative debates on the Hyde Amendment" Roman Catholic views were "used repeatedly" and that Catholic organizations had taken great pains "to get the Amendment enacted.").

347 *Harris*, 448 U.S. at 319 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

348 *Id.* (quoting *McGowan*, 366 U.S. at 442)

of the views of any particular religion."[349] In sum, the Court held that the mere fact that the funding restrictions "may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[350]

In 2020, in *Doe v. Parson*, the Eighth Circuit followed *Harris* in rejecting a challenge to Missouri's abortion informed consent law.[351] Challengers to the law had argued that there was "something 'more' than just alignment" with religion present in the case because Missouri had "publish[ed] its views on this topic, even though it is 'highly divisive.'"[352] But the Eighth Circuit found that "taking sides on a divisive issue, even when it breaks down 'along religious lines,' does not establish religion,"[353] especially because a state is permitted under Supreme Court case precedents to "use '*its voice* . . . to show its profound respect for' life."[354] In other words, even in the face of divided opinions about abortion and the issue of when life begins, the federal courts permit states to choose to voice support for "potential life" in the womb.

In addition, in 1992, in *Jane L. v. Bangerter*, a federal court in Utah followed *Harris* when considering whether a pro-life preamble to a Utah law violated the Establishment Clause due to the influence of the Church of Jesus Christ of Latter-day Saints.[355] The court faced the familiar argument that the law's true motive was based in religion.[356] In rejecting that argument, the court read the preamble "to express . . . [a] value judgment" about the potential life in the womb.[357] The court also noted that *Harris* had involved a much more severe set of facts, with "[t]he trial judge . . . [writing] a 12 page summary of Roman Catholic efforts to obtain support for passage of the Hyde Amendment."[358] Applying *Harris* to the less severe facts in *Jane L.*, the

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349 *Id.* (citing McRae v. Califano, 491 F. Supp. 630, 741 (E.D.N.Y. 1980); Roe v. Wade, 410 U.S. 113, 138–41 (1973)).

350 *Id.* at 319–20 (also holding that no party had standing to bring a Free Exercise Clause challenge); *see also* Knopp, *supra* note 141, at 278–79 (discussing *Harris*).

351 *See* 960 F.3d 1115, 1118 (8th Cir. 2020).

352 *Id.* (citing *Harris*, 448 U.S. at 320).

353 *Id.* (quoting Clayton *ex rel.* Clayton v. Place, 884 F.2d 376, 378–79 (8th Cir. 1989)).

354 *Id.* (alteration in original) (quoting Gonzales v. Carhart, 550 U.S. 124, 157 (2007)).

355 794 F. Supp. 1537, 1542, 1545 (D. Utah 1992).

356 *Id.* at 1542.

357 *Id.* at 1543 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989)).

358 *Id.* at 1545 (citing McRae v. Califano, 491 F. Supp. 630, 702–15 (E.D.N.Y. 1980)).

court concluded "that the Utah Act has a secular purpose, even though it coincides with religious tenets."[359]

Some scholars point out that *Harris* does not bind state courts in interpreting the scope of their own establishment clauses, and that the states "could apply a more searching standard of review to religiously motivated laws."[360] That might be true, but states often use similar reasoning when interpreting their own constitutions. For instance, in the *Blackmon* case from 2024, a Missouri judge rejected an establishment-based challenge to state abortion laws based on provisions in the state constitution.[361] In so doing, the judge followed *Harris* when conducting his analysis, citing the case for the proposition that a statute does not violate the state's establishment clauses merely "because it happens to coincide or harmonize with the tenets of some or all religions."[362]

In addition, in 1979, in *Committee to Defend Reproductive Rights v. Myers*, a California appellate court intuited a similar result in a pre-*Harris* case addressing whether the State should publicly fund abortions.[363] The challengers had "suggest[ed] that this funding decision was the result of pressures on legislators by members of particular religious denominations which oppose abortion on religious grounds."[364] Rejecting this argument, the court stated, "[I]t is a long established and well settled legal principle that the constitutionality of legislation must be measured by the terms of the legislation itself, and not by the motives of or influences upon legislators who enacted the measure."[365]

What does this all mean for the arguments presented in state previability abortion cases? Considering the meager evidence of religious legislative statements associated with these more recent cases—especially in comparison to the extensive record that the district court amassed in *Harris*—the chances of success are slim. There is ample secular evidence on

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359 *Id.*

360 Schwartzman & Schragger, *supra* note 66, at 2307.

361 Blackmon v. State, No. 2322-CC00120, slip op. at 19 (Mo. Cir. Ct. Aug. 13, 2024) (Amended Order and Judgment).

362 *Id.* at 32 (quoting Harris v. McRae, 448 U.S. 297, 319 (1980)).

363 156 Cal. Rptr. 73, 83–84 (Ct. App. 1979), *vacated*, 625 P.2d 779 (Cal. 1981).

364 *Id.* at 83.

365 *Id.* (citation omitted); *see also* Cuomo, *supra* note 292, at 18 ("The agnostics who joined the civil rights struggle were not deterred because that crusade's values had been nurtured and sustained in black Christian churches.").

which to base limitations on abortion, as discussed throughout this Article, and even a mixed religious-secular approach to abortion legislation is unlikely to violate most standard establishment clauses in light of the reasoning in *Harris*. While the establishment-based line of attack cannot be entirely foreclosed due to the variances in state laws, state judges, and state constitutions, the chances are strong that pre-viability laws should survive these types of legal assaults.

6. CONCLUSION

Pregnancy, abortion, and reproductive rights are controversial subjects with life, death, health, and economic ramifications for all parties involved. It is an area ripe for government interest and regulation. For some states, these issues result in significant limitations on abortion access.[366] For other states, the life growing in a mother's womb has almost no protection.[367] When enacted, the reason to limit abortion access is almost always to protect the life growing within the woman—a living being that, from the moment of conception, is programmed in its DNA to develop into a fetus who will become an infant who will eventually become an adult—all "human" (i.e., of the species *homo sapiens*).

When legislators decide what kind of limitations, if any, to place on the abortion procedure, they bring to that discussion their life experiences, personal values, and (yes) their religious beliefs. Some legislators will be atheists, while others will have religious beliefs that support a mother's right to terminate her pregnancy. Others will believe that God has created that "unborn child" from the moment of conception, and that "terminating" it at any stage is tantamount to murder. When the legislation on this thorny issue finally passes and is signed into law, it will face many political and legal obstacles, including challenges under constitutional clauses that prevent the government from establishing a religion or preferring one religion over another.

This Article has assessed whether recent arguments based on federal and state establishment clauses are legally viable. It reviewed the history of

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366 Paindiris & Ellerkamp, *supra* note 10; DeVito, *supra* note 103, at 152.

367 *See* David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 5 (2023).

establishment clauses in this nation and summarized the arguments being brought against pre-viability abortion laws under these clauses.[368] Considering the nature of "religious beliefs," it concluded that religious people on both sides of the abortion issue hold sincere religious beliefs about abortion.[369] This Article then examined the primary argument being used to challenge state abortion limitations and concluded that it cannot be plausibly maintained that the *sole reason* for limiting abortion pre-viability would be the adoption of distinctly sectarian views about the metaphysical question of when human life begins. This is especially so where there are multiple genuinely secular reasons why a state might choose to limit abortion, including well-documented scientific evidence about fetal development that the U.S. Supreme Court accepted to varying degrees in *Roe* and *Dobbs*.[370]

Finally, this Article examined an alternative, secondary argument used in recent abortion challenges, inquiring whether these pre-viability laws are either facially religious or enacted with an improper religious purpose that violates establishment principles.[371] That argument was also found wanting due to a dearth of evidence supporting its premise, and a string of cases at both the federal and state levels that accept the presence of some religious purpose within these laws, so long as they also have a secular rationale.[372] In short, while other arguments might succeed in striking down state pre-viability abortion laws, the establishment-based challenges to these laws will ultimately prove to be ineffective vehicles for striking them down.

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368 *See supra* Part 2.
369 *See supra* Part 3.
370 *See supra* Part 4.
371 *See supra* Part 5.
372 *See supra* Section 5.3.