FROM *DOBBS* TO *LEPAGE*: EXPLORING THE IMPLICATIONS OF FETAL PERSONHOOD UNDER THE ESTABLISHMENT CLAUSE

*LAUREN N. PEREZ**

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* Lauren N. Perez, J.D., 2024, New York University School of Law; B.A., 2020, George Washington University. I would like to thank the editors of the NYU Annual Survey of American Law for their feedback and edits, Dean Emeritus John Sexton and Professor Zalman Rothschild for an amazing semester in their Religion Clauses seminar and guidance throughout writing this note, and as always, thank you to my family for their constant support.

I.
INTRODUCTION

Following the recent decision in *Dobbs v. Jackson Women's Health Organization*, there has been increasing discussion about when life begins and the government's role in that determination. During the *Dobbs* oral arguments, Justice Sotomayor posed the following question to the Missouri Solicitor General: "How is your interest anything but a religious view?"[1] Justice Sotomayor vocalized a concern that many legal scholars, and now judges, are thinking about: what are the implications of shaping law based on the religious interests of some?[2] However, the path to a successful First Amendment argument is not a clear or easy one.

The question is looming of whether state fetal personhood laws[3] and state constitutional amendments are subject to challenge under the Establishment Clause of the First Amendment, or similar provisions in state constitutions.[4] The increasing debate surrounding this question is based on the fact that fetal personhood laws are rooted in controversial theological claims about when life begins and when to associate constitutional rights with a fetus.[5] The core argument against these laws is that fetal personhood legislation essentially adopts and imposes a specific religious doctrine by stating that life begins at conception which thus grants rights to the fetus.

The Supreme Court has actively avoided answering the question of when life begins, and it seems as though no answer or guidance will be provided anytime soon.[6] Different religions and even various

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1. Transcript of Oral Argument at 29, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392).

2. *See, e.g.*, EMW Women's Surgical Ctr. v. Cameron, No. 22-CI-3225, 2022 WL 20554487, at *10 (Ky. Cir. Ct. July 22, 2022) (describing the notion that life begins at conception as a "distinctly Christian and Catholic belief" and observing that "[o]ther faiths hold a wide variety of views on when life begins").

3. Throughout this paper, the terms "fetal personhood laws" and "fetal personhood legislation" are used as general phrases to reference the different forms these laws may take, such as an amendment to a state constitution, a standalone law, or a definition section of a new or existing law.

4. This paper will focus on the federal Establishment Clause. However, the analysis may also apply to actions based on state constitutional claims. If a state has its own version of the Establishment Clause and follows its own doctrine, a plaintiff's claims may be stronger when challenging under state constitutional provisions compared to challenging under the Establishment Clause of the First Amendment.

5. Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 Iowa L. Rev. 2299, 2301 (2023).

6. Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the

sects within the same religion all have different answers to this theological question of when life begins. White evangelical Christians and conservative Catholics believe that life begins at conception, while other religions, such as Judaism, teach that life begins at birth.[7] In addition, many Muslims and most Protestants have differing views on when life begins, ranging from 120 days after conception up to birth.[8] Thus, the controversy arises when a state law seemingly adopts just one of these distinct religious viewpoints.

Personhood is a constitutional rights argument.[9] When reference is made to personhood, it is not limited to a specific area of the law. Instead, it means a fetus is a person for all legal purposes and for all time. This paper is focused on the possible First Amendment and Establishment Clause violations that fetal personhood laws present,[10]

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judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

7. Joseph G. Schenker, *The Beginning of Human Life: Status of Embryo. Perspectives in Halakha (Jewish Religious Law)*, 25 J. Assisted Reprod. & Genetics 271 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2582082/ [https://perma.cc/5YB7-N2UA].

8. Mohammad Ali Shomali, *Islamic Bioethics: A General Scheme*, 1 J. Med. Ethics & Hist. Med., 2008, at 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3713653 [https://perma.cc/JS3P-22HD]; *see also* Sarah McCammon, *When Does Life Begin? Religions Don't Agree*, NPR (May 8, 2022, 8:02 AM), https://www.npr.org/2022/05/08/1097274169/when-does-life-begin-religions-dont-agree [https://perma.cc/YZ64-MPNF].

9. Currently, there is a debate about whether states have the constitutional right to define when personhood begins under the Thirteenth or Fourteenth Amendment in response to abortion opponents saying that fetuses are persons under the Fourteenth Amendment. This is a timely and interesting argument that has been debated before and during the current fetal personhood litigation. However, this paper will not be dealing with that debate. *See generally* Carliss Chatman, *We Shouldn't Need Roe*, 29 UCLA J. Gender & L. 81 (2022).

10. Since most of the current fetal personhood litigation is not based on a violation of the Establishment Clause or the Free Exercise Clause, I wanted to acknowledge the current constitutional arguments that are challenging abortion bans. Although this paper is focused on fetal personhood legislation and not abortion bans, many of the ongoing lawsuits after *Dobbs* have challenged abortion bans under the Religion Clauses. A possible explanation for why there have been more religion-based constitutional claims post-*Dobbs* is that since *Roe* and *Casey* did not take up the religious arguments that were being made in those cases, attorneys in subsequent abortion cases stopped arguing that abortion bans violated either the Establishment Clause or the Free Exercise Clause. However, now that *Roe* and *Casey* have been overturned, there has been an increase in religion-based arguments in the abortion ban context. For example, multiple lawsuits currently challenge Florida's H.B. 5 law, and they all have religion-based constitutional claims in them and are brought by religious leaders. Noting these cases, their legal arguments, and the success rate so far could be a good indicator for the future outcomes of the fetal personhood cases. *See, e.g.*, Amended Complaint for Declaratory Relief & for Temporary and Permanent Injunction Declaring House Bill 5, Invalid Unconstitutional and

and it concludes that the likelihood of a successful challenge to a fetal personhood law based on the Establishment Clause is low.

Part II of this paper examines the Personhood Movement in the United States and its religious roots, how the *Dobbs* decision changed the trajectory of the Movement, and the differences between anti-abortion legislation and personhood legislation. Part III examines four current state fetal personhood laws and the ongoing litigation surrounding them. Part IV analyzes the Establishment Clause and its application to fetal personhood laws by considering neutrality and purpose. This Part argues that fetal personhood laws should be vulnerable to Establishment Clause challenges but acknowledges that the argument is unlikely to succeed in current federal courts. Part V discusses the future of both the Establishment Clause and fetal personhood laws and proposes an alternative mode of analysis for the Supreme Court to use in these types of cases.

II.
EVOLUTION OF FETAL PERSONHOOD LAWS

A. The Personhood Movement

The personhood movement in the United States predates the *Roe v. Wade* decision in 1973.[11] The push for the recognition of fetal personhood stemmed from Catholics who were upset that states were loosening their abortion restrictions and thus allowing exceptions in cases of incest or rape, or to protect the life of the pregnant woman.[12] The landmark decision of *Roe v. Wade*,[13] which established a constitutional right to abortion through the Fourteenth Amendment, only fueled the personhood movement even further. In *Roe*, the Court stated that "[i]f this suggestion of personhood is established, [Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[14] The Court found that "the word 'person,' as used in the Fourteenth

Unenforceable, Generation to Generation, Inc. v. State, No. 2022 CA 000980 (Fla. Cir. Ct. June 16, 2022), 2022 WL 2388239; Verified Complaint, Hafner v. State, No. 2022-014370-CA-01 (Fla. Cir. Ct. Aug. 1, 2022), 2022 WL 3155354.

11. *The Personhood Movement*, ProPublica, https://www.propublica.org/article/the-personhood-movement-timeline [https://perma.cc/CJQ9-EW4X].

12. Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. Times (June 21, 2023), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/R7TE-XXXY].

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

14. *Id.* at 156–57.

Amendment, does not include the unborn."[15] This decision clearly conflicts with the beliefs of the personhood movement that "personhood includes fertilized eggs, embryos[,] and fetuses that should be considered people with the same rights as those already born."[16]

Not only has personhood been debated in our courts, but it has also been debated in the legislature. A few months following the *Roe v. Wade* decision, a Maryland congressman proposed the Human Life Amendment to the U.S. Constitution which would have reversed *Roe* and incorporated the right to life into the Constitution.[17] This amendment was the first of more than 330 versions introduced or proposed over the next forty years.[18] Although the proposed amendment failed, that failure highlighted the need to shift strategy from attempting to get a federal amendment to changing state laws.

In 2008, Kristine and Michael Burton proposed a first-of-its-kind ballot initiative in Colorado (Amendment 48) which defined a constitutionally protected person as "any human being from the moment of fertilization."[19] Amendment 48 was rejected by voters, but the group Personhood USA soon developed and lead the way for the new personhood movement.[20] Similarly, in 2011, personhood proponents successfully got a Mississippi constitutional amendment (Initiative 26) onto the state ballot; the amendment would have granted full legal rights to fertilized eggs by defining the term "'person' or 'persons' to 'include every human being from the moment of fertilization, cloning, or the functional equivalent thereof.'"[21] In

15. *Id.* at 158.

16. Jeff Amy, *Explainer: What's the Role of Personhood in Abortion Debate?*, Associated Press (July 30, 2022, 10:51 AM), https://apnews.com/article/abortion-us-supreme-court-health-government-and-politics-constitutions-93c27f3132ecc78e913120fe4d6c0977 [https://perma.cc/8RRY-AA35].

17. *The Personhood Movement*, *supra* note 11.

18. *Human Life Amendment*, Hum. Life Action, https://www.humanlifeaction.org/issues/human-life-amendment/ [https://perma.cc/Z9LB-36JE].

19. Amendment 48: Definition of Person (2008) (proposed Colo. Const. art. II, § 31), *available at* https://www.leg.state.co.us/LCS/InitRefr/0708InitRefr.nsf/89fb842d0401c52087256cbc00650696/16f403e0c19126f98725744b0050fd4d/$FILE/Amendment%2048.pdf [https://perma.cc/9RKM-Y2SN]; *Colorado Voters Reject Amendment Defining a Fertilized Egg as a Person*, Nat'l Abortion Fed'n (Nov. 5, 2008), https://prochoice.org/colorado-voters-reject-amendment-defining-a-fertilized-egg-as-a-person/ [https://perma.cc/YC5Z-VMQ6]; Press Release, Mike Coffman, Colo. Sec'y of State, Proposed Ballot Measure Deemed Sufficient (May 29, 2008), https://www.sos.state.co.us/pubs/elections/Results/2008/48StatementofSufficiency.pdf [https://perma.cc/52PU-GKRV].

20. Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 Am. J.L. & Med. 573, 580 (2013).

21. *Id.* at 584 (citing Miss. Initiative 26 (2011) (proposed Miss. Const. art. III, § 33)). North Dakota also attempted this with Measure 1 in 2013, but it was not

addition to Personhood USA, groups began to form such as Georgia Right to Life and The National Personhood Alliance.[22] The National Personhood Alliance formed in 2014 and "describes itself as 'Christ-centered' and 'biblically informed . . . dedicated to the non-violent advancement of the recognition and protection of the God-given, inalienable right to life of all innocent human beings as legal persons at every stage of their biological development.'"[23] All of the groups share a similar underlying goal: "To end abortion in *all* instances, with no exceptions for rape, incest, fatal fetal abnormalities, or the life of the mother."[24] Americans United for Life have been promoting a personhood executive order, with the hopes that a Republican President will be elected in 2024.[25] Even though the proposed executive order would not change the definition of personhood, it would turn the executive branch into an anti-abortion enforcement agency, since in many cases executive orders set the policy aims and direction for agencies.[26]

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ratified by voters. It would have altered the state constitution to say, "The inalienable right to life of every human being at any stage of development must be recognized and protected." Constitutional Measure No. 1 (2013) (proposed N.D. Const. art. I, § 25), *available at* https://vip.sos.nd.gov/pdfs/measures%20Info/2014%20General/Full%20Text%20Measure%201.pdf [https://perma.cc/HD9R-D8Z6]. In 2014, another failed attempt took place in Colorado with Amendment 67 (Brady's Amendment) which sought to amend the state constitution to include unborn human beings under the definition of "person" and "child" throughout the state's criminal code. Amendment 67: Definition of Person and Child (2014) (proposed Colo. Const. art. XVIII, § 17), *available at* https://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/d31e5a7cb62d156d87257cbb006dd9db/$FILE/Amendment%2067%20-%20Definition%20of%20Person%20and%20Child.pdf [https://perma.cc/K29K-SSNH].

22. Zemmie Fleck, *Georgia Right to Life Director: Let Us Celebrate the End of* Roe, Augusta Chron. (June 24, 2022, 3:58 PM), https://www.augustachronicle.com/story/opinion/2022/06/23/pray-end-roe-v-wade-and-establish-personhood-amendment-georgia-right-life-director/7699245001/ [https://perma.cc/J359-9CSU].

23. *The Personhood Movement*, *supra* note 11.

24. Wendy Davis, *The Next Big Battle in America's Abortion Fight Will Be Over Fetal Personhood*, NBC News (Oct. 23, 2022, 11:00 AM), https://www.nbcnews.com/think/opinion/americas-abortion-law-fight-will-fetal-personhood-rcna53477 [https://perma.cc/6PKQ-MU6Q].

25. *Lincoln Proposal: A Constitutional Vision for an Executive Order to Restore Constitutional Rights to All Human Beings*, Ams. United for Life, https://aul.org/law-and-policy/lincoln-proposal/ [https://perma.cc/3SFL-D6VP].

26. Catherine Glenn Foster et al., Ams. United for Life, A Constitutional Vision: Lincoln Proposal, An Executive Order to Restore Constitutional Rights to All Human Beings 6 (n.d.), https://aul.org/wp-content/uploads/2021/09/Lincoln-Proposal.pdf [https://perma.cc/D9US-9JAC].

B. How Dobbs Changed the Trajectory of the Personhood Movement

Fifty years after *Roe* was decided, the Supreme Court overruled it in *Dobbs v. Jackson Women's Health Organization*, in which the Court determined that there was no Fourteenth Amendment protection for abortion.[27] This decision triggered many state abortion bans to go into effect and removed the barrier preventing states from enacting personhood amendments and legislation.[28] This was because not only did *Roe* establish a constitutional right to abortion, but the decision also explicitly banned state laws from establishing fetal personhood before the "viability" line.

Again, the *Dobbs* Court refused to answer the question of when a fetus becomes a person. Justice Alito explained that the majority "opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth" or "about when a State should regard prenatal life as having rights or legally cognizable interests."[29] The Court also dodged the question of when personhood begins in *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[30] In *Casey*, the Justices used language such as "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child"[31] and "many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive,"[32] in both instances suggesting that a fetus is not a person.

After *Dobbs*, the Court faced another opportunity to answer this long-awaited question. A Catholic group and two pregnant women sued the state of Rhode Island on behalf of their unborn fetuses.[33] The state court allowed the Rhode Island abortion rights statute to

27. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

28. *State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, Guttmacher Inst. (Jan. 15, 2024), https://www.guttmacher.org/state-legislation-tracker [https://perma.cc/MKT5-6DDL]; Elizabeth Nash & Peter Ephross, *State Policy Trends 2022: In a Devastating Year, US Supreme Court's Decision to Overturn* Roe *Leads to Bans, Confusion and Chaos*, Guttmacher Inst. (Dec. 19, 2022), https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads [https://perma.cc/MW5S-BD6Y]; Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle Over Reproductive Rights*, Time (June 28, 2022, 4:40 PM), https://time.com/6191886/fetal-personhood-laws-roe-abortion [https://perma.cc/94SS-ERSA].

29. *Dobbs*, 597 U.S. at 254, 263.

30. Roe v. Wade, 410 U.S. 113, 159 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

31. *Casey*, 505 U.S. at 846 (plurality opinion).

32. *Id.* at 915 (Stevens, J., concurring in part and dissenting in part).

33. Benson v. McKee, 273 A.3d 121, 124 (R.I.), *cert denied sub nom.* Doe *ex rel.* Doe v. McKee, 143 S. Ct. 309 (2022).

remain intact and found that the unborn babies did not have legal standing to challenge the law because they were not "persons" under the Fourteenth Amendment.[34] The Supreme Court declined to hear the case.[35]

C. Distinction Between Anti-Abortion Legislation and Fetal Personhood Legislation

It is important to acknowledge the differences between state abortion ban legislation, like the trigger bans, and fetal personhood legislation. On the surface, the effect of both appears the same—to ban abortions. However, the Personhood Movement is choosing to push for the passage of fetal personhood legislation as opposed to abortion ban legislation *because* there is a distinction between the two.

Following *Dobbs*, each of the fifty states can, in effect, have a different answer to the question of when a fetus becomes a person.[36] States have already begun pushing for fetal personhood legislation as a way to go beyond abortion bans. The personhood movement's goal of adopting a right to life in each state has taken slightly different variations. For example, even before *Dobbs*, some states have been attempting to amend their state constitutions. However, this is a heavy task since almost every state requires constitutional amendments to be ratified by the people during an election,[37] and historically these amendments have been unsuccessful.[38] Other states have been trying to amend definition sections either within current legislation or the definition section of their state constitution. Lastly, some states have attempted to implement individual pieces of fetal personhood legislation.[39] Despite the different forms that fetal personhood laws can take, states also have different motivations for their implementation. For example, some states want to enforce and

34. *Id.* at 131.

35. *Doe ex rel. Doe*, 143 S. Ct. 309; Ariane de Vogue & Devan Cole, *Supreme Court Declines to Hear Fetal Personhood Case*, CNN (Oct. 11, 2022, 4:16 PM), https://www.cnn.com/2022/10/11/politics/fetal-personhood-case-supreme-court/index.html [https://perma.cc/A5ZW-HN7B].

36. M. Cathleen Kaveny, *Dobbs and Fetal Personhood*, Religion & Pol. (July 19, 2022), https://religionandpolitics.org/2022/07/19/dobbs-and-fetal-personhood/ [https://perma.cc/RHH7-4EVY].

37. John Dinan, *Constitutional Amendment Processes in the 50 States*, State Ct. Rep. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/QT6Z-X5BS].

38. *See supra* notes 20–21 and accompanying text.

39. *See, e.g.*, *State Legislation Tracker*, *supra* note 28.

implement personhood by passing laws and constitutional amendments. Other states, however, use fetal personhood language to get the vote out or as a symbolic measure.[40] This usually takes the form of a preamble or something else that is not legally enforceable.[41]

Fetal personhood laws extend beyond classifying abortions as murder and conferring constitutional rights on fetuses. They decide when life begins, which not only has far-reaching ramifications within the abortion context but also in tax law, reproductive healthcare, and even the High Occupancy Vehicle lane.[42] A bigger problem is that state legislatures do not know the scope of these laws because they have never been in play before. The vagueness and lack of specificity in fetal personhood laws leave open the possibility of differences in interpretation and enforcement.

Even though each state's abortion ban may differ, their scope is much narrower than fetal personhood laws and the consequences from abortion bans do not bleed over into other areas of state law. Another important distinction is that abortion bans make clearer the circumstances and timing of when doctors can perform abortions. Meanwhile, fetal personhood laws are vaguer, leaving open the possibility that doctors could be prosecuted for murder if the state interprets or understands the operative text differently than doctors. Furthermore, if a fetus or fertilized egg is treated as a person, then bans on birth control pills, criminalization or increased regulation of in vitro fertilization (IVF), and limitations on stem cell research could easily follow. This same reasoning also applies to pregnant women who miscarry. If a fetus is defined as a legal person and a woman miscarries, she may be implicated in the death of a legal person; what is stopping the state with charging these women with murder?[43]

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40. *See* Tonya Mosley, *Abortion Opponents Push for 'Fetal Personhood' Laws, Giving Rights to Embryos*, NPR (Apr. 4, 2024, 3:12 PM), https://www.npr.org/2024/04/04/1242774406/abortion-opponents-push-for-fetal-personhood-laws-giving-rights-to-embryos [https://perma.cc/K3VE-H7DE] (articulating the GOP's reliance on anti-abortion votes despite the backlash that the party has faced among other segments of the population for taking a hardline stance on abortion).

41. *Cf.* Webster v. Reprod. Health Servs., 492 U.S. 490, 504–07 (1989) (describing the legal effect of one such preamble and noting that it "can be read simply to express [a] sort of value judgment").

42. *See When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond*, Pregnancy Just. (Aug. 17, 2022), https://www.pregnancyjusticeus.org/wp-content/uploads/2023/05/fetal-personhood-with-appendix-UPDATED-1.pdf [https://perma.cc/9NWQ-VY3H].

43. *See* Cary Aspinwall, *'They Railroad Them': The States Using 'Fetal Personhood' Laws to Criminalize Mothers*, The Guardian (July 25, 2023, 1:47 PM), https://www.

III.
EXAMINATION OF CURRENT FETAL PERSONHOOD LITIGATION

Courts across the country are grappling with how to define the word "person." This section will present the existing fetal personhood laws and ongoing litigation in Alabama, Arizona, Georgia, and Kentucky, while also assessing the arguments made in each case.

A. Alabama

First and foremost, the Alabama Supreme Court recently decided *LePage v. Center for Reproductive Medicine, P.C.*[44] This was the first time that a court ruled that frozen embryos are considered children under state law.[45] The Plaintiffs asserted claims under Alabama's Wrongful Death of a Minor Act.[46] The law was enacted in 1876 and allowed the parents of a deceased child to bring a claim for punitive damages "[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person," provided that they do so within six months of the child's passing.[47] This decision will greatly impact miscarriage management and in vitro fertilization in Alabama.

This decision exemplifies the fetal personhood movement post *Dobbs*. According to Mary Ziegler, a historian of the abortion debate and a law professor at UC Davis, "[T]he [personhood] movement was never just getting rid of *Roe* . . . [i]t was always to achieve fetal personhood."[48]

Furthermore, the court did not seem to hide its reliance on religious ideology in its decision. The Chief Justice in his concurrence cited verses from Christian theologians and the Bible. He wrote that human life "cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an

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theguardian.com/world/2023/jul/25/states-using-fetal-personhood-laws-to-criminalize-mothers [https://perma.cc/6QGY-T2V8].

44. LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024).

45. The Supreme Court in *Dobbs* and *Roe* declined to answer what level of protections are offered to fetuses. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Roe v. Wade, 410 U.S. 113 (1973).

46. Ala. Code § 6-5-391 (2023).

47. *Id.* § 6-5-391(a).

48. Peter Smith & Tiffany Stanley, *Chief Justice's Christian Reasoning in IVF Opinion Sparks Alarm over Church-State Separation,* Associated Press (Feb. 23, 2024, 3:08 PM), https://apnews.com/article/alabama-frozen-embryos-conservative-christian-views-ruling-d9b7f720b5ef865ab35205ad36061f2d [https://perma.cc/4HZ3-69EA].

affront to Himself."[49] His concurrence "also quoted a Bible verse that is legendary within the anti-abortion movement, in which God told the prophet Jeremiah, 'Before I formed you in the womb, I knew you.'"[50] This decision will progress the movement's goal to recognize fetuses, and now embryos, as persons under the Fourteenth Amendment.

B. Arizona

In 2021, Arizona enacted title 1, section 219 of the Arizona Revised Statutes, otherwise referred to as the "Interpretation Policy," which states:

> A. The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court.
> B. This section does not create a cause of action against:
>
> 1. A person who performs in vitro fertilization procedures as authorized under the laws of this state.
> 2. A woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.
>
> C. For the purposes of this section, "unborn child" has the same meaning prescribed in § 36-2151.[51]

The Interpretation Policy is part of the General Rules of Statutory Construction, so it seems likely that it would apply broadly. However, there is a gray area regarding whether this is different from amending the definition of personhood provided by the state.[52]

The sponsor of the bill, Nancy Barto, is a Republican who has taken a strong anti-abortion stance and has often allied with the Center for Arizona Policy.[53] This organization is known as an

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49. *LePage*, 2024 WL 656591, at *13 (Parker, C.J., concurring specially).

50. Smith & Stanley, *supra* note 48; *id.* at *16 (quoting *Jeremiah* 1:5).

51. Ariz. Rev. Stat. Ann. § 1-219 (2022). Section 36-2151 defines an "unborn child" as "the offspring of human beings from conception until birth" and further defines "conception" as "the fusion of a human spermatozoon with a human ovum." *Id.* § 36-2151(4), (16).

52. *See id.* § 1-215(29).

53. *See* Julia Shumway, *Barto Holds Slim Lead in LD15 Showdown*, Ariz. Capitol Times (Aug. 4, 2020), https://azcapitoltimes.com/news/2020/08/04/barto-holds-slim-lead-in-ld15-showdown/ [https://perma.cc/YD28-TM4F].

influential right-wing Christian group, and Barto is "always willing to do [their] bidding."[54] During Barto's introduction of the bill in a committee hearing, the only purpose that she stated for the bill was a health and safety one, and she did not specifically address why human life should be defined at conception but instead emphasized health and safety as an overarching general theme of the bill.[55]

During the committee hearing, multiple religious speakers testified that the Legislature should not be legislating on such a matter because of the separation between church and state.[56] Rabbi Bonnie Sharfman explained that Judaism teaches "a profound appreciation for life," that "Jewish law is clear that life begins at birth and not prior," and that "the mother's life takes precedence over the life of an unborn child and there is no personhood until birth."[57] The religious speakers were not the only ones expressing concern and hesitancy for the passage of this bill. State Senator Kirsten Engel posed a question to a reverend which asked, "Can you maybe explain to us the dangers of the Legislature legislating some answers . . . to matters of people like you, to our people of faith."[58]

Furthermore, the Interpretation Policy is interestingly placed within the section of Arizona law called the "General Rules of Statutory Construction."[59] This means, "[s]tanding alone, the Interpretation Policy is neither a criminal nor a civil statute" and that "Arizona law categorizes it as a rule of statutory construction, one directing that all other provisions of Arizona law be interpreted to acknowledge the equal rights of the unborn."[60] Therefore, the Interpretation Policy inevitably suffers from multiple layers of ambiguity; not only is the word "acknowledge" ambiguous, but it is unclear what the Interpretation Policy achieves if it is not equivalent to amending the definition of "person" under Arizona law.[61] In addition, section 15 of the bill, which lays out legislative findings and intent, does not mention Section 1-219, otherwise known as the

54. *Id.*

55. *Consideration of Bills: Hearing on S.B. 1457 Before the S. Judiciary Comm.*, 55th Leg., 1st Reg. Sess. (Ariz. 2021), https://www.azleg.gov/videoplayer/?eventID=2021021015&startStreamAt=346 [https://perma.cc/JWL7-56RV].

56. *Id.*

57. *Id.*

58. *Id.*

59. Ariz. Rev. Stat. Ann. §§ 1-211 to -219 (2022).

60. Isaacson v. Brnovich, 610 F. Supp. 3d 1243, 1251 (D. Ariz. 2022).

61. *Id.* (noting that the Interpretation Policy is similarly unclear to the Missouri preamble).

personhood provision. The findings regarding health and safety are limited solely to other aspects of the bill.[62]

In *Isaacson v. Brnovich*, the Plaintiffs challenged the constitutionality of the Interpretation Policy in federal court on the ground of vagueness.[63] The Plaintiffs argued that "the Personhood Provision fails to provide adequate notice of prohibited conduct and invites arbitrary and discriminatory enforcement against the Plaintiffs and their patients."[64] The court granted the Plaintiffs' motion for a preliminary injunction of the enforcement of the Interpretation Policy as applied to otherwise lawful abortion care while the lawsuit is pending.[65] The court found the Interpretation Policy unconstitutionally vague and explained that its decision did not preclude Arizona from amending statutes with the definition of "person" in them to include a fetus or unborn human.[66] There are many places in Arizona law that currently define the word "person" without including the "unborn," such as title 1, section 215 of the Arizona Revised Statutes and the Arizona criminal code's definition of person.[67] On the other hand, Arizona has also included the unborn within the reach of some statutes. For example, Arizona homicide statutes indicate that the unborn are included in the categories of people who can be victims of such crimes.[68] The court explained that this leaves the Interpretation Policy in a gray area, which is "anyone's guess," since it does not amend a definition section of the term "person" or include the unborn within the reach of a statute.[69]

C. Georgia

In 2019, Georgia passed the Living Infants Fairness and Equality (LIFE) Act, which prohibits abortions after the detection of a fetal heartbeat.[70] Section 3 of the LIFE Act amends title 1, chapter 2,

62. S.B. 1457, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

63. *Brnovich*, 610 F. Supp. 3d at 1248.

64. Complaint at 3, Isaacson v. Brnovich, 610 F. Supp. 3d 1243 (D. Ariz. 2022) (No. 2:21-cv-01417-DLR).

65. *Brnovich*, 610 F. Supp. 3d at 1257. The court clarified the difference between a facial and an as-applied challenge. *Id.* at 1248. The Plaintiffs previously made a facial challenge to the Interpretation Policy (challenging the policy in all of its applications), whereas the Plaintiffs' renewed motion made an as-applied challenge. *Id.*

66. *Id.* at 1257.

67. ARIZ. REV. STAT. ANN. § 1-215(29) (2022); *id.* § 13-105(30).

68. *Brnovich*, 610 F. Supp. 3d at 1257 (explaining that the laws also "carve out exceptions for lawfully performed abortions"); *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-1102 (2024).

69. *Brnovich*, 610 F. Supp. 3d at 1253–54.

70. H.B. 481, 155th Gen. Assemb., 1st Reg. Sess. (Ga. 2019).

section 1 of the Georgia Code, which defines "persons and their rights" applicable throughout the criminal and civil Georgia Code.[71] Section 3 redefines "natural person" as "any human being including an unborn child."[72] "Unborn child" is defined as an embryo or fetus "at any stage of development who is carried in the womb."[73]

In *SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*, reproductive health care clinics, physicians, and non-profit organizations sued the State of Georgia to challenge the constitutionality of the LIFE Act and its various abortion provisions.[74] With regard to the Act's definition of "natural person," the court held that it was "not facially void for vagueness" under the Due Process Clause.[75] However, the court left open the possibility that an as-applied challenge could be brought, which would include specific challenges to "applications of that definition in other provisions of the Georgia Code."[76]

D. Kentucky

In Kentucky, there are two lawsuits, *EMW Women's Surgical Center v. Cameron* and *Sobel v. Cameron*, which differ slightly from the personhood litigation happening in Arizona and Georgia. Both lawsuits involve religious claims and discussion of religious issues alongside the personhood law. These legal arguments have not been seen before. The judge in one case came to the conclusion that the abortion ban at issue favored one set of religious beliefs over another.

In *EMW Women's Surgical Center v. Cameron*,[77] the Plaintiffs challenged two Kentucky abortion laws, the "Trigger Ban" and the "Six Week Ban," for violating the Kentucky Constitution.[78] Both laws were passed by the General Assembly in 2019.[79] Both the Six Week Ban and the Trigger Ban used the terms "unborn human beings" or "unborn human individual" to refer to fetal personhood.[80] To

71. *Id.* § 3.
72. *Id.*
73. *Id.*
74. SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320 (11th Cir. 2022).
75. *Id.* at 1325.
76. *Id.* at 1328.
77. EMW Women's Surgical Ctr. v. Cameron, No. 22-CI-3225, 2022 WL 20554487 (Ky. Cir. Ct. July 22, 2022).
78. Ky. Rev. Stat. Ann. § 311.772 (West 2024) ("Trigger Ban"); *id.* §§ 311.7701–.7711 ("Six Week Ban").
79. *EMW Women's Surgical Ctr.*, 2022 WL 20554487, at *3.
80. *Id.* at *10 n.9; *see also* Ky. Rev. Stat. Ann. § 311.7701(16) (using the phrase "unborn child").

help give meaning to what fetal personhood means in these laws, the Defendants' witnesses argued at a prior hearing "that life begins at the very moment of fertilization and [is thus] entitled to full constitutional protection" from that moment onwards.[81] The claims brought by the Plaintiffs, however, did not include an Establishment Clause or a Free Exercise Claim.[82]

Judge Perry temporarily blocked the abortion bans, which include the personhood provision, but did so by not sticking to the arguments presented to him.[83] His decision stated that the laws "impermissibly establish[ed] a distinctly Christian doctrine of the beginning of life, and [] unduly interfer[ed] with the free exercise of other religions that do not share the same belief."[84] Judge Perry reasoned that these laws therefore established religion, because they favored one set of religious beliefs (the belief that life begins at fertilization) to the exclusion of other religious beliefs, which express a variety of views about when life begins during a pregnancy.[85] This part of the decision caused some controversy, however, from the Kentucky Attorney General's office who said that Judge Perry was "out of line to insert new claims into the case 'unprompted.'"[86]

The Kentucky Attorney General appealed the decision. A Kentucky Court of Appeals judge then granted the Kentucky Attorney General's motion for emergency relief which dissolved the lower court's temporary injunction and reinstated the abortion laws.[87] The Plaintiffs then appealed to the Kentucky Supreme Court. The Kentucky Supreme Court denied the emergency request and later held that the Plaintiffs did not have standing to challenge the Six Week Ban and that the trial court abused its discretion in granting the temporary injunction.[88] On June 27, 2023, the Jefferson County Circuit Court dismissed the case without prejudice.[89] The Kentucky

81. *EMW Women's Surgical Ctr.*, 2022 WL 20554487, at *10.

82. *See id.* at *1–3.

83. *See id.* at *10–12.

84. *Id.* at *10.

85. *Id.*; *see* David Masci, *Where Major Religious Groups Stand on Abortion*, Pew Rsch. Ctr. (June 21, 2016), https://www.pewresearch.org/short-reads/2016/06/21/where-major-religious-groups-stand-on-abortion/ [https://perma.cc/5263-UHX6].

86. Jack Karp, *Religious Freedom Arguments Gain Ground in Abortion Fights*, Law360 (Aug. 10, 2022, 4:37 PM), https://www.law360.com/pulse/articles/1519708/religious-freedom-arguments-gain-ground-in-abortion-fights [https://perma.cc/DPR3-UCKQ].

87. Cameron v. EMW Women's Surgical Ctr., P.S.C., No. 2022-CA-0906-I (Ky. Ct. App. Aug. 1, 2022), https://www.aclu.org/cases/emw-womens-surgical-center-psc-et-al-v-daniel-cameron-et-al [https://perma.cc/A862-3VL9].

88. Cameron v. EMW Women's Surgical Ctr., P.S.C., 664 S.W.3d 633, 661 (Ky. 2023).

89. EMW Women's Surgical Ctr., P.S.C. v. Cameron, No. 22-CI-003225, 2023 WL 5392436 (Ky. Cir. Ct. June 27, 2023).

Supreme Court left open the possibility for individual residents of Kentucky to challenge the abortion bans by asserting their personal state constitutional rights to privacy and self-determination.[90]

In another Kentucky lawsuit, *Sobel v. Cameron*, the Plaintiffs were Jewish women who claimed that Kentucky's abortion laws violate the Kentucky Constitution.[91] The Plaintiffs claimed that it is unclear whether choosing to discard embryos during IVF is a prohibited capital offense under Kentucky law, since it is normal for people who have gone through IVF to discard their embryos.[92] The Plaintiffs claimed that the Kentucky laws are unconstitutional and diminish their "privileges, rights, and capacities on account of their Jewish faith and beliefs, and their disbelief of the sectarian views currently encoded in KRS Chapter 311."[93] The complaint stated, "Judaism has never defined life beginning at conception. Jewish views on the beginning of life originate in the Torah . . . . Under Jewish law, a fetus does not become a human being or child until birth."[94]

Even though the lawsuit challenged the state laws under the Kentucky Constitution and not the federal Establishment Clause, it will still be interesting to see the arguments unfold and whether the arguments could be replicated in a similar federal case.

IV.
THE ESTABLISHMENT CLAUSE AND ITS APPLICATION TO FETAL PERSONHOOD LAWS

A. The History of Establishment Clause Jurisprudence

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"[95] In 1947, the Supreme Court decided *Everson v. Board of Education*, a landmark decision that defined the prohibitions of the Establishment Clause as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all

90. *See Cameron*, 664 S.W.3d at 658.

91. Complaint for Declaratory Relief at 2–3, Sobel v. Cameron, 645 F. Supp. 3d 691 (W.D. Ky. 2022) (No. 3:22-cv-570-RGJ).

92. *Id.* at 9–11.

93. *Id.* at 18.

94. *Id.* at 6.

95. U.S. Const. amend. I.

> religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[96]

As illustrated in the quote above, the Establishment Clause was thus incorporated into the Fourteenth Amendment, making it applicable to both the federal and state governments. The phrase "separation of church and state" has become widely used in American society, to the point where one might think this language is in the First Amendment itself. Furthermore, the *Everson* Court also discussed the idea of state neutrality when it comes to religious groups.[97]

Twenty-four years later, the Court decided *Lemon v. Kurtzman*.[98] The Court offered what is now famously known as the "*Lemon* Test" as a way to "grapple[] with how to determine whether any given government action is sufficiently 'neutral' towards religion."[99] The test required that: (1) government actions have a secular purpose, (2) its "primary effect must be one that neither advances nor inhibits religion," and (3) it "must not foster 'an excessive government entanglement with religion.'"[100] The *Lemon* Test was seen as advancing a separationist interpretation of the Establishment Clause from where *Everson* left it. However, the *Lemon* Test did not have much success. For forty years, the *Lemon* Test produced mixed results, and the Court on various occasions refused to apply the test at all, like in *Lee v. Weisman*.[101] In addition, many justices, including Justice Scalia, were vocal opponents of the *Lemon* Test. Justice Scalia described the test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[102] The Justices' criticism didn't stem only from the mixed results produced by the test but also the argument that the *Lemon*

96. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

97. *Id.* at 18.

98. Lemon v. Kurtzman, 403 U.S. 602 (1971).

99. Valerie C. Brannon, Cong. Rsch. Serv., LSB10315, No More Lemon Law? Supreme Court Rethinks Religious Establishment Analysis 2 (2019).

100. *Lemon*, 403 U.S. at 612–13.

101. Lee v. Weisman, 505 U.S. 577 (1992) (using the coercion test).

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

Test is not based on the intent or the language of the Founders who drafted the First Amendment.[103]

Another test that was used by the Court, but no longer, is the endorsement test, which was first proposed by Justice O'Connor. The endorsement test first came about as a clarification of or variation to the *Lemon* Test in *Lynch v. Donnelly*.[104] Justice O'Connor believed that the Establishment Clause prohibits "government endorsement or disapproval of religion."[105] The endorsement test asks whether the government action has the purpose or effect of endorsing religion.[106] The endorsement test was stretched further in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter* when the Court asked whether a "reasonable observer" would consider the government's challenged action to be an "endorsement" of religion.[107] This test, along with the *Lemon* Test, has been slowly abandoned over the years by judicial decisions, although never explicitly overturned.

The Court recently decided *Kennedy v. Bremerton School District*.[108] Here, the Court eroded the separation of church and state even further by holding that the Bremerton School District violated Coach Kennedy's rights to free exercise and free speech when he was disciplined for praying after football games.[109] The School District asked Kennedy to stop praying after games to protect the school from an Establishment Clause lawsuit, however Kennedy continued to pray. The decision focused heavily on the Free Exercise Clause's protections for individuals and paid little attention to the Establishment Clause's bar on the government's establishment of religion.[110]

The Court produced even more confusion on the status and future of Establishment Clause jurisprudence. The Court simply stated that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[111] Clearly, the Court did not explicitly overrule either the *Lemon* or the endorsement test. Interestingly, the Court

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103. *See* Daniel L. Chen, Kennedy v. Bremerton School District: *The Final Demise of* Lemon *and the Future of the Establishment Clause*, Harv. J.L. & Pub. Pol'y Per Curiam, Summer 2022, at 1, 1–3.

104. Lynch v. Donnelly, 465 U.S. 668 (1984).

105. *Id.* at 688 (O'Connor, J., concurring).

106. *See id.* at 690.

107. Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989) (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J, concurring)).

108. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

109. *Id.* at 515, 543–44.

110. *Id.* at 546 (Sotomayor, J., dissenting).

111. *Id.* at 534.

cited the case *American Legion v. American Humanist Ass'n* for its proposition regarding the abandonment of the tests.[112] However, looking to *American Legion*, the Court did not officially overturn the *Lemon* or the endorsement test in that decision either. The Court instead stated that it "relies on a more modest, historically sensitive approach, recognizing that 'the Establishment Clause must be interpreted by reference to historical practices and understandings.'"[113] This should not be seen as the Court rejecting or overruling *Lemon* because, as discussed above, the Court on many occasions chose not to apply *Lemon* or did so in tandem with other tests, which was never seen as officially overruling the doctrine.[114]

However, despite not explicitly overturning *Lemon* or its offshoot endorsement test, it seems clear that the majority has abandoned both tests, which have been used for several decades by the Court. This raises the question, what test or approach should be used for Establishment Clause analysis going forward? The Court suggests that "[a]n analysis focused on original meaning and history . . . has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'"[115] Although the Court has considered history and tradition when deciding Establishment Clause cases, it has never announced that it was adopting a history and tradition test.[116] This brief statement from the Court came with no explanation of what the history and tradition analysis should look like or the effects of this new rule in future cases.[117] The problem is that there are many different views about what should count as "history and tradition" for an

112. *Id.*

113. Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 85 (2019) (Gorsuch, J., concurring in judgment) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)); *see also id.* at 60 (plurality opinion) ("[W]e have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.").

114. *See* BRANNON, *supra* note 99, at 5. The Court has chosen not to apply *Lemon* in specific types of Establishment Clause cases. For example, in monuments, symbols, and legislative meeting cases, the Court would look to historical practices instead. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565 (2014).

115. *Kennedy*, 597 U.S. at 536 (quoting *Town of Greece*, 572 U.S. at 575).

116. *Am. Legion*, 588 U.S. at 68 (Breyer, J., concurring) (stating that the Court was "appropriately 'look[ing] to history for guidance,'" but was not "adopt[ing] a 'history and tradition test'" (quoting *Am. Legion*, 588 U.S. at 60 (plurality opinion); *id.* at 68 (Kavanaugh, J., concurring))).

117. *See Kennedy*, 597 U.S. at 573 (Sotomayor, J., dissenting) ("It should not escape notice, however, that the effects of the majority's new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented.").

Establishment Clause analysis. Kent Greenawalt in his book, *Religion and the Constitution: Establishment and Fairness*, explains that scholars and Justices are conflicted and divided on this question of "how much historical practices and attitudes should count," by explaining three competing views.[118]

B. Lack of Establishment Clause Abortion Cases

The Establishment Clause and the many modes of analysis that have been used throughout the years are complicated on their own as seen in the previous section.[119] However, what complicates things even more is that there has been very little discussion of the Establishment Clause in the abortion or personhood context.[120] Courts have consistently avoided addressing how the Establishment Clause and abortion or personhood cases interact, or if they do at all. For example, the Court has avoided addressing the Establishment Clause issue,[121] has decided the case on other grounds, or has chosen not to grant certiorari to a case that could raise Establishment Clause issues.[122] Is it a coincidence that the Court has avoided this issue, or is it a more purposeful decision? One possible explanation is that there is an "underground Establishment Clause" that has motivated the Court in past abortion decisions to avoid answering the question of when life begins.[123] Despite the challenge of not having precedent on the issue or clear guidance about how to analyze such a case, this paper will attempt to do so through the Court's principles of purpose and neutrality.

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118. 2 Kent Greenawalt, Religion and the Constitution: Establishment and Fairness 191–92 (2008).

119. *See* discussion *supra* Section IV.A.

120. *But see* Harris v. McRae, 448 U.S. 297, 319–20 (1980); Webster v. Reprod. Health Servs., 492 U.S. 490, 523–26 (1989) (O'Connor, J. concurring in part) (discussing the constitutionality of a presumption of viability).

121. *See* Roe v. Wade, 410 U.S. 113 (1973) (the Court avoided discussing the Establishment Clause); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 932 (1992) (Blackmun, J., concurring in part and dissenting in part) ("Nor, consistent with our Establishment Clause, can [protecting fetal life] be a theological or sectarian interest." (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring))). *Cf.* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008).

122. *See* Benson v. McKee, 273 A.3d 121, 131 (R.I.), *cert. denied sub nom.* Doe *ex rel.* Doe v. McKee, 143 S. Ct. 309 (2022) (holding that unborn plaintiffs lacked standing).

123. Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court's Abortion Cases*, 23 Regent U. L. Rev. 1, 3–5 (2010).

C. Application of the Neutrality Principle

Although various tests have been used and rejected throughout the years when the Court has performed its Establishment Clause analysis, the principle of neutrality has remained consistent and impactful throughout its decisions.[124] Even landmark cases like *Everson* incorporated the idea of government neutrality into the Establishment Clause analysis. In addition, neutrality was present in each prong of the *Lemon* Test and the endorsement test. The prongs all sought to promote an aspect of neutrality by not allowing the government "either to endorse or to disfavor religion."[125] This principle of neutrality is explained well by the following quote: "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."[126]

This Section will look at past Establishment Clause cases that discussed neutrality, consider its application to fetal personhood laws, and then analyze the challenges that an Establishment Clause challenge brought against a fetal personhood law would likely face.

Establishment Clause cases have taken many different forms, but in the context of a possible fetal personhood law case, the relevant state action that may establish religion is the law itself. However, most Establishment Clause cases have not been about the possibility of a specific law establishing religion. The recognition of the different forms Establishment Clause cases can take is important because the analysis and discussion in this paper are structured with fetal personhood laws in mind and how a court might approach the constitutional challenge of that state law.

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124. Mark Strasser, *Neutrality, Accommodation, and Conscience Clause Legislation*, 8 Ala. C.R. & C.L. L. Rev. 197, 209–10 (2017); *see also* Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 Lewis & Clark L. Rev. 1537, 1551 (2010) ("Neutrality has been the justification for Establishment Clause tests that emphasize separation of religion and government tests that favor accommodation.").

125. Rebecca G. Rees, *"If We Recant, Would We Qualify?": Exclusion of Religious Providers from State Social Service Voucher Programs*, 56 Wash. & Lee L. Rev. 1291, 1333 (1999).

126. McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005) (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987)).

1. Secular Purpose

Determining whether a valid secular purpose exists is a way to decide whether the principle of neutrality has been met. Although the Court has abandoned *Lemon*, it has not directly overruled or addressed the status of previous cases, including those from the last two decades involving a secular purpose requirement.[127] Continuing to use this same framework of analysis here, the question then becomes: What secular purposes have states put forward for deciding that life begins at conception and thus granting constitutional rights to this "person"?

Looking to abortion bans first, it has long been established, dating back to *Roe v. Wade*, that states can have a valid secular compelling interest in regulating abortions.[128] The state has an interest in the protection "of the health and safety of the pregnant woman, and protection of the potential future human life within her."[129] The personhood movement has used this to its advantage when framing the need for personhood legislation and constitutional amendments, all while ignoring the differences between abortion bans and personhood laws.

Generally, most judicial interpretations of a challenged law begin with the text. Despite that norm, in the context of personhood laws, the secular purpose is rarely found on the face of the text. Maybe this relaxed approach to providing textual secular purposes stems from the Court's traditional deference to a state's articulation of a secular purpose.[130] For example, in the Georgia law discussed above in Section III.C, there was no mention of or explanation for the decision to define life as beginning at conception.[131] Even in the findings and intent section of the bill, there was no mention of or explanation for this decision.[132] The findings and intent section cited, among other sources, the Declaration of Independence and the Fourteenth Amendment to aid in the interpretation of other parts of the bill.[133] This seems to be the situation with most personhood laws or amendments. The purpose for deciding when life begins is not going to be found directly in the text.

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127. *See id.*; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306–08 (2000).

128. Roe v. Wade, 410 U.S. 113, 154 (1973).

129. *Id.* at 168–70 (Stewart, J., concurring).

130. *See* Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

131. *See* H.B. 481, 155th Gen. Assemb., 1st Reg. Sess. (Ga. 2019).

132. *See id.* § 2.

133. *See id.*

Some may argue, though, that the text itself is a secular justification. However, that seems to be a weak argument since defining a fetus as a person at conception is more of a declaration than a purpose or justification. Regardless, states and the personhood movement have used similar secular justifications for personhood laws as for abortion bans. This seems potentially problematic due to the fact that, as discussed above, abortion bans and personhood laws differ and have different effects. Fetal personhood laws on their face determine when life begins, which is a theological question that courts have avoided answering. On the other hand, courts have consistently felt comfortable parsing out the state's interests in the context of abortion bans, which do not on their face answer a theological question. Thus, these differences alone between abortion bans and fetal personhood laws strike me as enough to require additional and more targeted secular purposes for fetal personhood challenges.

a. Extrinsic Evidence

Requiring a secular purpose for these laws usually then requires courts to use extrinsic evidence to determine whether the law was actually religiously motivated. The use of extrinsic evidence is not unusual in Establishment Clause cases. From the late nineteenth century to the present day, extrinsic evidence has been an "integral part" of the Court's analysis (whether the *Lemon* Test was used or not) when looking at the intersection of government action and religion.[134] Past cases such as *McGowan v. Maryland*,[135] *Edwards v. Aguillard*,[136] *Wallace v. Jaffree*,[137] and *McCreary County v. ACLU of Kentucky*[138] all show the Court's willingness to question a state's motives through the use of extrinsic evidence.[139]

In *McGowan* (a pre-*Lemon* case), the Court examined both the legislative history of the state's Sunday closing law and the history of Sunday closing laws writ large to determine whether the purpose of the challenged law violated the Establishment Clause.[140] The Court held that the Sunday closing law was constitutional; however, a law would be unconstitutional if "it can be demonstrated that its

134. Mark DeForrest, *The Use and Scope of Extrinsic Evidence in Evaluating Establishment Clause Cases in Light of the* Lemon *Test's Secular Purpose Requirement*, 20 Regent U. L. Rev. 219, 238 (2008).

135. 366 U.S. 420 (1961).

136. 482 U.S. 578 (1987).

137. 472 U.S. 38 (1985).

138. 545 U.S. 844 (2005).

139. DeForrest, *supra* note 134, at 233–34.

140. *McGowan*, 366 U.S. at 431–35.

purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion."[141] Similarly in *McCreary County*, a case involving the Ten Commandments,[142] the Court, when trying to determine whether a sham purpose was present, looked and relied on "numerous sources, including the language of the government enactment establishing the display, the display's history, the documents contained within it, and the general circumstances surrounding the display."[143] However, unlike in *McGowan*, the Court in *McCreary County* held that the Establishment Clause was violated because there lacked a secular purpose after considering the extrinsic evidence.[144]

In the personhood context, extrinsic evidence should also be considered to determine whether the state's purposes are secular or religiously motivated. In one case, Justice Stevens in partial dissent expressed his belief that a Missouri preamble stating that "the life of each human being begins at conception"[145] did violate the Establishment Clause. The majority, on the other hand, did not entertain or employ an Establishment Clause analysis at all.[146] Instead, the majority decided that the preamble simply stated a "value judgment" as to when life begins.[147] The majority cross-referenced and criticized the concurrences and dissenting opinions throughout, yet was silent on the Establishment Clause issue raised in Justice Stevens' partial dissent.[148] Justice Stevens, in the only SCOTUS opinion to ever link abortion with the Establishment Clause, argued that the

141. *Id.* at 453.

142. *McCreary County*, 545 U.S. 844. In *Van Orden v. Perry*, 545 U.S. 677, 700–04 (2005)—decided the same day as *McCreary County*—the Court also used extrinsic evidence in a case involving the Ten Commandments. However, the display was upheld as constitutional under the Establishment Clause. The Court looked to extrinsic evidence in a more historical way. "Justice Breyer looked at extrinsic evidence involving the circumstances surrounding the Texas display: the physical setting of the display amid the other monuments reflecting Texas' history . . . ." DeForrest, *supra* note 134, at 238.

143. DeForrest, *supra* note 134, at 236.

144. *McCreary County*, 545 U.S. at 881.

145. Webster v. Reprod. Health Servs., 492 U.S. 490, 566 (1989) (Stevens, J., concurring in part and dissenting in part) ("Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception . . . makes the relevant portion of the preamble invalid under the Establishment Clause . . . ."); Mo. Rev. Stat. § 1.205.1(1) (2023).

146. *Webster*, 492 U.S. at 506 (plurality opinion).

147. *Id.*; Karen F.B. Gray, *An Establishment Clause Analysis of* Webster v. Reproductive Health Services, 24 Ga. L. Rev. 399, 405 (1990).

148. Gray, *supra* note 147, at 407.

preamble violated the Establishment Clause because the preamble was "(1) an unequivocal endorsement of a religious tenet of some Christian groups, and (2) that the preamble served no identifiable secular purpose."[149] By highlighting that the preamble addressed the beginning of life—a statement "certain to provoke intense religious feelings"—Justice Stevens' partial dissent asserted that the actual goal of the preamble was to impose a specific group's religious beliefs about when life begins onto all residents of Missouri.[150] Justice Stevens rejected the possibility that Missouri could claim a secular state interest under this statute, such as an economic interest or population growth.[151] Even if the state did have a proper secular interest in the unborn that could withstand a constitutional challenge, there is an obvious difference between a state's interest in the potential life of a fertilized egg and a nine-month gestated fetus. He further emphasized that the state should have "the burden of identifying the secular interests that differentiate the first 40 days of pregnancy from the period immediately before or after fertilization."[152] States have not yet explained or met this "burden" in their personhood legislation.

The argument that states have an interest in protecting vulnerable fetuses and thus they can determine when life begins is weak; it is further undermined by states' attempts to suppress their true religious motivations. The secular interest in protecting a vulnerable class is already achieved by state abortion bans and can be furthered without deciding when life begins. As Justice Stevens explained in *Webster*, the state's interest is at its lowest at the moment of conception compared to a nine-month fetus; "[t]here can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist."[153] Extrinsic evidence such as legislative history, including committee meeting transcripts and the circumstances surrounding the bill's introduction, should all be considered when evaluating these laws. Although a "single legislator's statement . . . is not necessarily sufficient to establish purpose,"[154] if the religious purpose is manifested

149. *Id.* (citing *Webster*, 492 U.S. at 566–67 (Stevens, J., concurring in part and dissenting in part)).

150. *Id.* at 408; *Webster*, 492 U.S. at 571 n. 16 (noting that many religious groups filed amicus briefs on either side of the issue).

151. *Webster*, 492 U.S. at 569.

152. *Id.* at 568–69.

153. *Id.* at 569. Justice Stevens continued, "respecting a developed fetus, however, that interest is valid." *Id.*

154. Wallace v. Jaffree, 472 U.S. 38, 65 (1985) (Powell, J., concurring).

in other evidence, such as a direct mention of God during a floor debate, then that should be sufficient.

It could be argued that religious motivation only matters when a law has overtly religious content, like the Ten Commandments, but not when it is otherwise facially neutral. Despite this, facially neutral laws that do not take a position on religion could still clearly violate the Establishment Clause as illustrated by this example: a law that outlaws the sale or consumption of pork would be unconstitutional if it were adopted on the grounds or with the purpose that such a ban is required by the tenets of a particular religion.[155] Thus, if this theological or religious purpose could be proven with extrinsic evidence, then the law would be treading in unconstitutional waters even though it is facially neutral.

Although *McGowan* seems to indicate that at least some religious motivation on the part of lawmakers is acceptable, this is still distinguishable from fetal personhood laws. In *McGowan*, the Court was able to find neutrality despite the religious origins of the Sunday closing law because these laws had lost much of their religious "flavor" over the years and evolved into laws furthering secular ends instead of religious ones.[156] The clear purpose in *McGowan* was to provide a uniform day of rest for its citizens. This is distinguishable from fetal personhood legislation, which also has religious roots and origins but has not evolved into laws with a clear secular purpose.

2. Challenges to the Fetal Personhood Establishment Clause Argument

While there is a valid constitutional argument that fetal personhood laws are religiously motivated and lack a secular purpose, there are major challenges to bringing this type of challenge. The first is that the Court has decided that "[t]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[157] In *Harris v. McRae*, the Court ruled that "the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[158] The case focused on the Hyde Amendment, which restricted the use of federal funds for

155. *See* Micah Schwartzman, *Must Laws Be Motivated by Public Reason?*, *in* PUBLIC REASONS AND COURTS 45, 60 (Silje A. Langvatn et al. eds., 2020).

156. McGowan v. Maryland, 366 U.S. 420, 433–34 (1961).

157. *Id.* at 442.

158. 448 U.S. 297, 319–20 (1980).

abortion.[159] To demonstrate its point, the Court reasoned "[t]hat the Judaeo-Christian [sic] religions oppose stealing does not mean that a State . . . may not, consistent with the Establishment Clause, enact laws prohibiting larceny."[160] This reasoning would presumably apply to abortion bans and fetal personhood laws in addition to funding restrictions.[161] However, it has been argued that the Court should have instead looked deeper for a clearly secular purpose and asked whether the Hyde Amendment "entangled church and state."[162] Although the *McRae* Court stated the statute would have to do more than "coincide or harmonize" with religious tenets for a successful Establishment Clause challenge,[163] it seems as though the Hyde Amendment did just that. The lower court detailed the Roman Catholic Church's extensive involvement in the creation of the Hyde Amendment.[164]

Despite the possibility that the Establishment Clause issue in *McRae* was wrongly decided, it is unlikely for the current Court to overturn the decision.[165] Therefore, it is still necessary to distinguish *McRae*'s reasoning from the context of fetal personhood laws. One possible way to distinguish the two is to argue that a state saying in one form or another that a fetus is a person at conception more than "merely coincides" with a religious tenet—it *is* a theological statement. Such a statement does not have a correct moral, medical, or scientific answer.[166] Furthermore, the district court in *McRae* noted that the passage of the Hyde Amendment, which prohibited the use of federal funds for abortion, "d[id] not in truth turn on whether an embryo or fetus or, indeed, a zygote or blastocyst is a 'human being.'"[167] On the other hand, if a legislature were to predicate its

159. *Id.*

160. *Id.* at 319.

161. Schwartzman & Schragger, *supra* note 5, at 2306.

162. John Morton Cummings, Jr., *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1217 (1990).

163. Harris v. McRae, 448 U.S. 297, 319 (1980) (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

164. Cummings, Jr., *supra* note 162, at 1218.

165. In subsequent cases, the Court seemed to back away from the *McRae* Court's "uncharacteristically deferential approach to the purpose question." Loren Jacobson, *Abortion and the Spiritual Imperative: Are the New Abortion Bans Susceptible to Religion Clause Challenges?*, 72 DEPAUL L. REV. 663, 692 (2023).

166. Brief of Ams. United for Separation of Church & State as Amicus Curiae in Support of Appellees at 5, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) ("[T]he Missouri legislature . . . determined that human life or personhood is conferred at the time of conception. Such an idea is not subject to scientific or medical confirmation and always has been viewed as theological in character.").

167. McRae v. Califano, 491 F. Supp. 630, 715 (E.D.N.Y. 1980).

law on a purely theological finding, that is distinguishable from the facts of *McRae*.[168]

In addition, to the difficulties posed by cases like *McRae*, the current makeup of the Supreme Court presents a challenge. The current Court leans in favor of Free Exercise Clause claims over Establishment Clause claims. This is evident in *Kennedy v. Bremerton School District* and the Court's recent invalidation of COVID-related public health regulations, illustrating a shrinking of the gap between church and state.[169] When the Court does reach potential Establishment Clause issues, it has not found an Establishment Clause violation.[170] Although Justice Sotomayor has suggested a possible Establishment Clause violation when states decide when life begins, it would be unlikely for a majority of the Court to agree with her on the issue.[171]

Another consideration with regard to challenges posed by the current makeup of the Court is that Justice Gorsuch and other conservative Justices have expressly disfavored a secular purpose requirement.[172] Although "historical practices and understandings" may bolster the justification for a secular purpose requirement, based on both the Founding Era and post-ratification of the Fourteenth Amendment,[173] this is unlikely to sway the Court because a majority of the Justices have either rejected a secular purpose requirement as part of abandoning *Lemon* or will likely do so in a future case.[174]

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168. Gray, *supra* note 147, at 415 ("[I]f the plaintiff's case in *McRae* failed due to a factual, instead of a legal, inadequacy, then sufficient proof of overwhelming religious influence at the legislative and judicial levels would form grounds to invalidate abortion legislation for its lack of secular purpose.")

169. Schwartzman & Schragger, *supra* note 5, at 2306 (expounding on the effect of *Kennedy* on the secular purpose test); *id.* at 2336–37 (discussing Trump era government funding for religious charities). Loren Jacobson argues that *Kennedy* represents a potential shift in the Court's Establishment Clause jurisprudence toward the standard articulated in *McRae*. Jacobson, *supra* note 165, at 691–98.

170. Shurtleff v. City of Boston, 596 U.S. 243 (2022).

171. Transcript of Oral Argument at 29–31, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392).

172. Schwartzman & Schragger, *supra* note 5, at 2307; *Shurtleff*, 596 U.S. at 277 (Gorsuch, J., concurring). Justice Gorsuch criticized *Lemon* and its secular purpose requirement by asking, "[h]ow much religion-promoting purpose is too much?" *Id.*

173. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 383 (2002).

174. Schwartzman & Schragger, *supra* note 5, at 2306–07. *See generally* Alex Pilla, Exploring an Establishment Clause Challenge to State Abortion Bans 6 (2024) (unpublished manuscript), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2564&context=student_scholarship [https://perma.cc/E5UX-2TRG] (arguing that an Establishment Clause challenge to fetal personhood laws would be successful).

Another potential obstacle to successfully challenging fetal personhood laws under the Establishment Clause is the likelihood that the Court will persist in not providing a direct response to the question. The decision in *Webster* offers a useful example; the majority did not even discuss the Establishment Clause in relation to the preamble's personhood language and just stated that the "preamble can be read simply to express . . . [a] value judgment" as to when life begins, and that it does not by its terms regulate abortion.[175] Although, due to the fact-specific nature of the where a personhood definition may appear, in *Webster* it was a preamble and in another case it could be an amendment to the state constitution, the same general idea holds: The Court will likely find a way to either avoid mentioning the Establishment Clause at all or say it does not need to reach the issue because it can decide the case on another claim or issue. Therefore, challenging a fetal personhood law under the Establishment Clause is unlikely to be successful.

V.
THE FUTURE OF FETAL PERSONHOOD AND ESTABLISHMENT CLAUSE JURISPRUDENCE

As illustrated in the previous section, under the neutrality principle considering secular purpose, an Establishment Clause challenge against a fetal personhood law is unlikely to succeed. This is a signal for change, not only because the doctrine as it stands is unclear and muddled with conflicting views, but also because it is important for states to see that the Establishment Clause still has bite and can prevent state legislatures from injecting religion into their laws and imposing it onto their citizens. Fetal personhood laws are the perfect example of state conduct that should be seriously considered under the First Amendment without being dismissed. Since personhood laws are unlikely to violate the Establishment Clause under current doctrine, there is a strong need for change within the jurisprudence. All in all, a push for change is easier said than done; this is why the Court has struggled for so long to adhere to a single approach for analyzing the Establishment Clause. The distillation between religious and secular motivations is a difficult and complicated task—one that can only be properly addressed with a flexible model of analysis.

175. Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989).

A. History and Tradition Are Not Perfect Solutions

Recently, Justices and scholars have argued that the proper mode of analysis for Establishment Clause cases is through a history and tradition approach. The Court in *Kennedy* did not expand on this, but some scholars have taken a stab at interpreting what Justice Gorsuch meant by history and tradition and how to apply it going forward.[176] Daniel Chen has referred to footnote five of the *Kennedy* majority opinion as a "cipher for interpreting how the Court interprets the Establishment Clause by reference to history and tradition."[177] The footnote includes four citations: the first to a portion of Justice Scalia's dissent in *Lee v. Weisman*, the second to James Madison's statements during the ratification debates, the third to Justice Gorsuch's concurrence in *Shurtleff v. City of Boston*, and the fourth to scholarship authored by Professor Michael McConnell.[178] Chen suggests that *Kennedy* "makes clear that government conduct violates the Establishment Clause only when that conduct exhibits these historical characteristics of a religious establishment."[179] This reading, however, could easily turn out to be problematic.

Kennedy footnote five may have pointed the reader's attention to portions of cases and scholarship that further the adoption of a historical approach, but that does not erase years of binding precedent that have used secular purpose to analyze Establishment Clause cases. Perhaps a better approach is one combining both history and purpose, since looking to history can, in many cases, help parse through the difficult task of determining whether a purpose is religious or secular. If the Court were to strictly adhere to Professor McConnell's six categories, there may in fact be more predictability, but the consequences would outweigh the benefits. The historical characteristics of a religious establishment elaborated by Professor McConnell include:

> (1) "the government exerted control over the doctrine and personnel of the established church," (2) "the government mandated attendance in the established church and punished people for failing to participate," (3) "the government punished dissenting churches and individuals for their religious exercise," (4) "the government restricted political participation by dissenters," (5) "the government provided financial support for the established church, often in a way that preferred the established denomination over other churches," and

176. *See* Chen, *supra* note 103, at 9–10.
177. *Id.* at 9.
178. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 537 n.5 (2022).
179. Chen, *supra* note 103, at 10.

(6) "the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function."[180]

Under this framework, many valid Establishment Clause challenges would be categorically excluded, and this would result in a further reduction of the separation between church and state.[181] There is no defined set of historical practices that has been widely accepted throughout the nation's history and that has been consistent with a historical meaning of the Establishment Clause, because there is no consensus on the historical meaning of the Establishment Clause.[182]

The legislative history and debates on the Establishment Clause "do not meaningfully limit or define the scope or meaning of the Clause" or point to a specific way to analyze such issues.[183] Looking to the historical record of the enactment of the Establishment Clause, the Framers did not just forbid Congress from establishing religion but also from making laws respecting such establishments. The modifier "respecting" enlarges the scope of the phrase "establishment of religion," which is already vague. What is left unclear is how far the word "respecting" expands the scope of the prohibition.[184] Without evidence to the contrary, it should be assumed that the Framers purposely chose this general language, evoking broad-based principles and standards as opposed to a bright-line rule, to give effect to the Clause. If they had in fact intended a more detailed or targeted meaning, they could have used such language.[185]

B. Refinement of the Neutrality Principle Going Forward

As an alternative to the history and tradition approach, I suggest that the Court should follow its Free Exercise and Equal Protection decisions which outline relevant factors to consider when determining government objective under a neutrality analysis. As explained above, the constitutional value and principle of neutrality have been referenced in Establishment Clause cases and have been entangled throughout the many tests over the years. However, "neutrality" was

180. *Id.* (quoting Shurtleff v. City of Boston, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring)). *See also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131–81 (2003).

181. This could present severe challenges to Establishment Clause challenges to fetal personhood laws. *See* Jacobson, *supra* note 165, at 698.

182. *See* Christopher J. Roederer, *The Establishment Clause: An Empty Vessel Filled with* Lemon[s]*?*, 47 U. Dayton L. Rev. 483 (2022).

183. *Id.* at 486.

184. *Id.* at 484–86.

185. *Id.* at 532.

never applied under the Establishment Clause as a test with prongs or factors of its own.

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, a Free Exercise Clause case, the Supreme Court analyzed an ordinance passed by the City of Hialeah, Florida.[186] To determine whether the ordinance departed from neutrality, the court outlined and considered factors including the historical background, the events leading up to the enactment or official policy in question, and any legislative or administrative history, including statements made by the decision-making body.[187] The Court rejected the argument that their inquiry should end with the text of the ordinance, but rather "[f]acial neutrality is not determinative," and "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination."[188] Although the Court ended up deciding the case under the Free Exercise Clause, it mentioned that the neutrality analysis under the Establishment Clause is the same as under the Free Exercise Clause.[189]

Recently, in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, six Justices agreed on the application of *Lukumi*'s multi-factor assessment of government neutrality.[190] Similarly to *Lukumi*, nothing in the reasoning of *Masterpiece* restricts the Court's approach to only Free Exercise cases.[191] In addition, the Court in *McCreary County v. ACLU of Kentucky* cited the Free Exercise analysis in *Lukumi*, holding that the same doctrine applies "when a court enquires into [government] purpose after a claim is raised under the Establishment Clause."[192] Thus, the multi-factor inquiry used in *Arlington Heights*, *Lukumi*, and *Masterpiece* has a broad and generalized scope, "applying to legislative, executive, and judicial decisions."[193]

The Supreme Court should be consistent when applying the principle of religious neutrality across both Religion Clauses. This holistic approach would not only help to discern government purpose when laws are and are not facially neutral but would also reject laws that are motivated by religious purposes despite the state providing independent secular justifications. Where public officials make statements suggesting their actions are religiously motivated, such as

186. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
187. *Id.* at 540.
188. *Id.* at 534.
189. *Id.* at 534, 540.
190. Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 638–40 (2018).
191. Schwartzman & Schragger, *supra* note 5, at 2309.
192. McCreary County v. ACLU of Ky., 545 U.S. 844, 862 (2005).
193. Schwartzman & Schragger, *supra* note 5, at 2309.

mentioning God as a reason for the legislation, this approach would help, in the fetal personhood law context, to determine whether their conduct is neutral towards religion. If their statements suggest that their legislative actions are religiously motivated and those motivations are not neutral to people with different religions (those who do not believe that life begins at conception), then the law might be "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[194]

C. A Future with Fetal Personhood Laws

There is no denying that in recent years the Establishment Clause has noticeably shrunk in its use, scope, and power. Therefore, even if the Establishment Clause is not currently the best means to achieve the end of striking down fetal personhood laws, all Americans should consider religion's current impact on public policy. It is difficult to imagine a world in which every state has a different definition of when life begins and the effects that stem from such a decision. However, this scenario is quickly becoming a reality.

It is clear from the states that have already adopted some form of fetal personhood law that the legislatures do not understand the extent or the scope of granting constitutional rights at conception to a zygote and saying life begins at conception. Lawsuits will continue to challenge the scope and dangerous effects of these laws, but many plaintiffs might be scared to bring a case in federal courts right now.[195]

The personhood movement, after achieving success with state fetal personhood laws, will begin to pursue changes on the federal level,[196] like promoting a personhood executive order[197] and trying once again to enact a constitutional amendment.

VI.
CONCLUSION

Considering the arguments, fetal personhood legislation should be vulnerable under the Establishment Clause due to both the lack of secular purpose presented by the states and the theological declaration that life begins at conception. However, the present

194. *Id.* (quoting *Masterpiece Cakeshop*, 584 U.S. at 640).

195. The lack of success in fetal personhood litigation so far may bolster this effect. *See generally supra* Part III.

196. *Lincoln Proposal*, *supra* note 25.

197. *See* FOSTER, *supra* note 26.

likelihood of success for this type of claim is low. This conclusion suggests a need for change in Establishment Clause jurisprudence.

The increasing discussion about whether there is anything left of the Establishment Clause is even more reason to continue to try and bring it to the forefront of judges and lawyers' minds. If there is going to be a push for change in Establishment Clause jurisprudence, it must start somewhere. Even though the current Supreme Court would not be receptive to certain Establishment Clause arguments, it does not mean that all hope is lost in state, district, or circuit courts. As we have seen with the *Dobbs* and *Kennedy* decisions, the Supreme Court can and is willing to overturn years of precedent—thus the robust Establishment Clause jurisprudence from the past could return in the future.