CAN MISSOURI OUTLAW ABORTION BECAUSE "ALMIGHTY GOD" COMMANDS IT?: ABORTION AND THE ESTABLISHMENT CLAUSE

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Abstract

INTRODUCTION

"In recognition that Almighty God is the author of life." These are the first words of Missouri §188, also known as the "Missouri Stands for the Unborn" Act,[1] a 2022 law that declares life begins at conception and, therefore, abortion must be outlawed to the extent allowed by the federal and state constitutions.[2] These words and their connection to outlawing abortion may, on their face, leave some readers feeling uneasy, especially considering that many organized religions and religious people do not agree with the view that life begins at conception.[3] The majority of Americans support both a right to abortion and the separation of church and state.[4] The support for separation of church and state is not particularly surprising — the very concept of such separation is ingrained into foundational ideas of the United States.[5] Prevalent in teachings in schools across the country is the narrative that America is the land of religious freedom, that the Framers founded the country in response to repressive religious systems in Europe, and that the pilgrims came to the United States seeking religious freedom.[6] The core ideas of the Establishment

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[1] MO. REV. STAT. § 188.010 (2022); MO. REV. STAT. § 188.026 (2022).

[2] MO. REV. STAT. § 188.026 (2022) (4); MO. REV. STAT. § 188.017 (2022).

[3] *A Religious Right to Abortion: Legal History and Analysis*, COLUMBIA L. SCH. L., RIGHTS, AND RELIGION PROJECT 2-4 (Aug. 2022), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/LRRP%20Religious%20Liberty%20%26%20Abortion%20Rights%20memo.pdf.

[4] *In U.S., Far More Support Than Oppose Separation of Church and State*, PEW RSCH. CTR. (Oct. 28, 2021), https://www.pewresearch.org/religion/2021/10/28/in-u-s-far-more-support-than-oppose-separation-of-church-and-state/; Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should be Legal in all or Most Cases*, PEW RSCH. CTR. (June 13, 2022), https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/.

[5] *Freedom of Religion*, HISTORY (July 28, 2023), https://www.history.com/topics/united-states-constitution/freedom-of-religion#:~:text=Freedom%20of%20religion%20is%20protected,exclude%20religion%20from%20public%20life.

[6] *See, e.g.*, *Pilgrim Facts: Lessons for Kids*, STUDY, https://study.com/academy/lesson/pilgrim-facts-lesson-for-kids.html (last visited Dec. 29, 2022); *The Quest for Religious Freedom*, PBS, https://ninepbs.pbslearningmedia.org/resource/fyr12.socst.us.1950pres.lpquesfr/the-quest-for-religious-freedom/ (last visited Nov. 11, 2023).

Clause appeared in the Virginia Statute for Religious Freedom, which was drafted by Thomas Jefferson in 1777.[7] This statute declared that no person should be "compelled to frequent or support any religious worship, place, or ministry whatsoever."[8]

The Constitution's First Amendment embodies this idea of religious freedom. The Amendment begins by stating, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[9] The provisions are known collectively as the Religion Clauses and individually as the Establishment Clause and the Free Exercise Clause, respectively.[10] The provisions work together to promote religious freedom and individually to "forbid two quite different kinds of governmental encroachment upon religious freedom."[11] The Establishment Clause, the focus of this Article, has a winding and complex legal trail.[12]

The Supreme Court set out a test for evaluating the boundaries of the Establishment Clause in 1971 in *Lemon v. Kurtzman* and engaged with the scope of the Clause throughout the 1980s and 1990s.[13] In 2022, however, the Court's summer term changed the face of the American legal system on multiple fronts. [14] The conservative majority abandoned long-standing precedents with shocking speed — a trend to which Establishment Clause jurisprudence was not immune.[15] On June 27, 2022, the Court issued an opinion in *Kennedy v. Bremerton School District.*[16] The opinion replaced the longstanding three-part legal test for Establishment Clause cases, the *Lemon* test, which analyzed the statute's purpose and effect, as well as the

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[7] Thomas Jefferson, *Virginia Statute for Religious Freedom*, UNIV. OF MARY WASH., https://cas.umw.edu/cprd/files/2011/09/Jefferson-Statute-2-versions.pdf (last visited Nov. 21, 2023).

[8] *Id.*

[9] *Relationship Between the Establishment and Free Exercise Clauses*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-5/ALDE_00000039/#:~:text=First%20Amendment%3A,for%20a%20redress%20of%20grievances (last visited Feb. 16, 2023).

[10] *Id.*

[11] *Id.* (quoting Engel v. Vitale, 370 U.S. 421, 430 (1962)).

[12] Benjamin S. Genshaft, *With History, All Things Are Secular: The Establishment Clause and the Use of History*, 52 CASE W. RSRV. L. REV. 573, 573 (2001) ("Establishment Clause jurisprudence has developed into a confusing state of affairs, resulting in inconsistent, unpredictable, and highly subjective lower court decisions.").

[13] This test attempted to clarify and streamline the various tests that were in existence at the time. *See*, *e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Richard L. Pacelle Jr., *Lemon Test*, FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/article/834/lemon-test (last visited July 9, 2024).

[14] Ann E. Marimow, et al., *How the Supreme Court Ruled in the Major Decisions of 2022,* WASH. POST (June 30, 2022, 2:40 PM), https://www.washingtonpost.com/politics/interactive/2022/significant-supreme-court-decisions-2022/.

[15] *Id.*

[16] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

relationship created between the religion and government,[17] instead stating that Establishment Clause cases must be decided by looking to historical practices and the understanding of the Constitution's framers.[18] The Court, however, has not clarified what it views as the historical meaning of the Establishment Clause, and academics studying the subject have vastly different ideas about what the history of the Clause suggests.[19] The evolution of Establishment Clause jurisprudence will be discussed at length in Part B. This upheaval of Establishment Clause jurisprudence was largely overshadowed by the bombshell decision in *Dobbs v. Jackson Women's Health* just three days before.[20] *Dobbs* rescinded the right to abortion that people in the United States had relied upon for nearly fifty years.[21] After *Dobbs*, individual states can decide to regulate abortion as they see fit, subject to limitations within each state's constitution.[22]

State officials in Missouri rejoiced at the *Dobbs* decision.[23] Prior to *Dobbs*, Missouri regulated abortion to an extent that could be permitted under *Roe* (or, more accurately, Missouri regulated to push the limits on what *Roe* permitted),[24] prohibiting abortions after eight weeks.[25] But, the overruling of *Dobbs* meant that the "trigger provision" of the Missouri Stands for the Unborn Act — a portion of the law outlawing abortion in nearly all cases except medical emergencies, waiting to become binding if *Roe* was ever overruled — could take effect.[26] Thus, when the *Dobbs* decision was issued, abortion effectively became illegal in Missouri.[27]

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[17] *See infra* notes 81-83 and accompanying text.

[18] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022).

[19] *See, e.g.*, Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895 (1987).

[20] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[21] *Id*.

[22] *Id*.

[23] Eric Schmitt (@Eric_Schmitt), TWITTER (June 24, 2022, 7:28 AM), https://twitter.com/eric_schmitt/status/1540341139156439040?lang=en; Cassidy Bowen, *Missouri Reacts to SCOTUS Overturning Roe v. Wade*, KEEP WATCHING THE OZARKS (June 24, 2022), https://933kwto.com/missouri-reacts-to-scotus-overturning-roe-v-wade/.

[24] Although Missouri insisted that the eight-week ban was consistent with Roe v. Wade, a district court in Missouri disagreed and issued a preliminary injunction. The Eighth Circuit affirmed. *See* Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 389 F. Supp. 3d 631 (W.D. Mo. 2019); *see also* Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552 (8th Cir. 2021).

[25] MO. REV. STAT. § 188.010, 188.026 (2022).

[26] *Opinion Letter No. 22-2022 from Attorney General Eric Schmitt, Immediate Efficacy of Section 188.017*, *RSMO,* (June 24, 2022), https://ago.mo.gov/docs/default-source/press-releases/22-2022.pdf?sfvrsn=39ffd2d_2/; MO. REV. STAT. § 188.017 (2022).

[27] *Missouri*, CENTER FOR REPRODUCTIVE RIGHTS, https://reproductiverights.org/maps/state/missouri/ (last visited Nov. 23, 2022).

The decisions in *Dobbs* and *Kennedy* have put laws like §188 in Missouri in a startling legal position. Due to *Dobbs*, Missouri now has the ability to restrict abortion with few limits — a task it takes on gleefully and mercilessly.[28] The Missouri law's explicit reference to God also reveals its roots in religious doctrine, a fact that could lead to Establishment Clause concerns.[29] Under *Kennedy*, the permissibility of such a law under the federal Constitution must be decided based on an appeal to history and tradition — a test that is new and unclear.[30]

This Article uses Missouri's abortion law as a case study to investigate the relationship between abortion and religion. Thus, this Article analyzes whether Missouri's abortion law is compatible with the federal Establishment Clause and concludes that §188 is at odds with multiple interpretations of the Clause. In Part I, the Article investigates the origins of the law and the connections between abortion and religious beliefs, then looks to Establishment Clause doctrine, including the *Lemon* test, and general historical approaches to the Establishment Clause. Part II applies the Establishment Clause tests to Missouri's law, finding that under most tests, including the now abandoned *Lemon* test and several historical understandings of the Establishment Clause, the law likely violates the Establishment Clause due to its religious origins. Finally, Part III discusses the broader implications of Missouri's law and abortion as a religious freedom issue, specifically looking to the increased privileging of conservative Christian views at the highest court and how viewing reproductive rights as a religious issue may require transforming how religious freedom has been utilized in recent years.

I. BACKGROUND

A. The "Missouri Stands for the Unborn" Act

Missouri, like many U.S. states, has a long history of regulating abortion, a practice which has culminated in the passing of the "Missouri Stands for the Unborn" Act.[31] Abortion is a topic that, for some people, is closely informed by their religious beliefs.[32]

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[28] Cassidy Bowen, *Missouri Reacts to SCOTUS Overturning Roe v. Wade*, KEEPING WATCH OVER THE OZARKS (June 24, 2022), https://933kwto.com/missouri-reacts-to-scotus-overturning-roe-v-wade/.

[29] *See infra* Part I.

[30] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

[31] Kate Smith, *Missouri Just Passed "One of the Strongest" Anti-Abortion Bills in the United States*, CBS NEWS (May 17, 2019), https://www.cbsnews.com/news/missouri-abortion-bill-vote-missouri-passed-one-of-the-strongest-anti-abortion-bills-2019-05-17-live-updates/.

[32] Abortion can be tied to a person's religious beliefs, but it does not need to be. It is important to recognize that some people of faith and nonreligious people inform their opinion on abortion based on other criteria, such as, for example, bodily autonomy, healthcare, or other practical concerns. Abortion has become an

1. Missouri: A Leader in Anti-Choice Innovation

When news broke that the official decision in *Dobbs v. Jackson Women's Health Organization*[33] had been released, the State of Missouri wasted no time in using its newfound authority to regulate abortion.[34] Missouri's trigger law, enshrined as Missouri §188 as part of the "Missouri Stands for the Unborn" Act, outlawed all abortion "except in cases of medical emergency" and provides no exceptions for rape or incest.[35] The trigger ban declared it would only become effective if "[t]he United States Supreme Court has overruled, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973), restoring or granting to the state of Missouri the authority to regulate abortion to the extent set forth in this section."[36] A mere ten minutes after the release of the *Dobbs* decision, Missouri's Attorney General, Eric Schmitt, released a statement that Missouri's abortion trigger law, which had remained dormant on the books for nearly three years awaiting the overruling of *Roe v. Wade*, was now in effect — making Missouri the first State to certify its trigger ban following *Dobbs*.[37] Schmitt's statement reaffirmed Missouri's pride in being "a national leader in the pro-life movement."[38]

This is not the first time Missouri has placed itself in the foreground of the abortion discussion; Missouri has long pushed the boundaries of

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issue closely tied with religion, but for many people, abortion and religion are not tethered to one another.

[33] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[34] Schmitt, *supra* note 23; Katherine Fung, *Missouri Bans All Abortions Minutes After SCOTUS Ruling Overturning Roe*, NEWSWEEK (June 24, 2022 at 11:05 AM), https://www.newsweek.com/missouri-bans-all-abortions-minutes-after-scotus-ruling-overturning-roe-1718967.

[35] MO. REV. STAT. § 188.017 (2022). Some questioned whether this law also bans certain types of contraceptives. A Kansas City Area health system refused to administer emergency contraception after the trigger ban came into effect. Jonathan Shorman*, Kansas City Area Health System Stops Providing Plan B in Missouri Because of Abortion Ban,* THE KANSAS CITY STAR (July 1, 2022), https://www.kansascity.com/news/politics-government/article262988028.html#storylink=cpy. It was later clarified by the Attorney General that the law did not ban emergency contraception. Tessa Weinberg & Allison Kite, *Missouri AG Says State Abortion Ban Does Not Prohibit Plan B or Contraception,* MISSOURI INDEPENDENT (June 29, 2022), https://missouriindependent.com/2022/06/29/missouri-ag-says-state-abortion-ban-does-not-prohibit-plan-b-or-contraception/. "Medical emergency" is defined as "a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman." MO. REV. STAT. § 188.015 (2019).

[36] MO. REV. STAT. § 188.017 (2022).

[37] Schmitt, *supra* note 23; Fung, *supra* note 34.

[38] Schmitt, *supra* note 23.

constitutionality in its abortion restrictions.[39] Before *Dobbs* reversed a legal right to abortion, crackdowns within Missouri led to the closure of all but one abortion clinic. In order to receive an abortion, patients were required to make two trips to the clinic at least seventy-two hours apart and get a medically unnecessary pelvic exam.[40] Patients were forced to read a medical pamphlet "filled with medical inaccuracies" and sign a form confirming that they see the heartbeat on the ultrasound — a procedure the State forced them to receive before getting an abortion.[41] Missouri had been working tirelessly to strip away the rights promised by *Roe* piece-by-piece far before the Supreme Court did so through *Dobbs*.[42] Recently, Missouri lawmakers made national news again by proposing a law to ban traveling to other states to receive abortions.[43] Overruling *Roe* made the path for Missouri's crusade against abortion easier, but Missouri has long worked to outlaw abortion to the extent allowed by the state even with the *Roe* right to abortion in affect.[44]

2. Abortion and Religion

For some, theories of when life begins touch closely on religious beliefs and personal morality, and many people's personal beliefs about when life begins are informed by their religion.[45] Many religions and religious people differ on their ideas of when life begins and on abortion.[46]

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[39] Kathryn Diss, *The Last Clinic,* ABC (Aug. 5, 2021 at 5:29am), https://www.abc.net.au/news/2021-08-05/missouris-last-abortion-clinic-dr-colleen-mcnicholas/100342294.

[40] *Id*.

[41] *Id.*

[42] Anna North, *Missouri Could Become the First State with Zero Abortion Clinics. How Did We Get Here?*, VOX (May 31, 2019), https://www.vox.com/2019/5/30/18644611/missouri-last-abortion-clinic-2019-planned-parenthood.

[43] Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents from Obtaining Abortions Out of State,* WASHINGTON POST (Mar. 8, 2022 at 2:21 p.m.), https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court/.

[44] *See, e.g.*, Diss, *supra* note 39.

[45] *A Religious Right to Abortion: Legal History and Analysis*, COLUMBIA LAW SCHOOL LAW, RIGHTS, AND RELIGION Project 2-4 (Aug. 2022), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/LRRP%20Religious%20Liberty%20%26%20Abortion%20Rights%20memo.pdf.

[46] One must be cautious in generalizing about the beliefs of religions on the topic of abortion. Some religious organizations have made official statements on abortion, but many others have not. Even in faiths that have declared a view on abortion, people within the faith community may disagree. Thus, efforts to distill stances on abortion by religions should be taken with the necessary caveat that this stance may not represent all members of the faith. For example, the Catholic Church has outspoken about opposing abortion, but not all Catholics believe that

Some religions teach that life begins at conception and see preventing abortion as part of their religious mission.[47] Other faith traditions, however, teach that life begins at various points after conception, such as Judaism and some branches of Islam.[48]

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abortion should be illegal. Gregory Smith, *Like Americans Overall, Catholics Vary in their Abortion Views, with Regular Mass Attenders Most Opposed,* PEW RESEARCH (May 23, 2022), https://www.pewresearch.org/fact-tank/2022/05/23/like-americans-overall-catholics-vary-in-their-abortion-views-with-regular-mass-attenders-most-opposed/.

[47]*See e.g.,* John R. Ling, *When Does Human Life Begin*, THE CHRISTIAN INSTITUTE 8, https://www.christian.org.uk/wp-content/uploads/when-does-human-life-begin.pdf ("[A]ll human life is made in the image of God and therefore special and intrinsically valuable from conception"); Vivian Bricker, W*hen Does Life Begin According to the Bible?,* CHRISTIANITY.COM (Sept. 1, 2022), https://www.christianity.com/wiki/bible/when-does-life-begin-according-to-the-bible.html ("The Bible clearly tells us every single person is made in God's image . . . This means from the time a child is conceived, the child is made in God's image. Therefore, aborting a baby is the same as killing a person made in the image of God.").

[48] By some accounts, Jewish law teaches that the fetus is "mere water" for the first forty days of gestation, and most denominations of Judaism believe the fetus gains personhood at birth*. See, e.g., Judaism and Abortion,* NATIONAL COUNCIL OF JEWISH WOMEN, https://www.ncjw.org/wp-content/uploads/2019/05/Judaism-and-Abortion-FINAL.pdf; Dr. Fred Rosner, T*he Fetus in Jewish Law,* MY JEWISH LEARNING, https://www.myjewishlearning.com/article/the-fetus-in-jewish-law/ ("An unborn fetus in Jewish law is not considered a person . . . until it has been born. The fetus is regarded as a part of the mother's body and not a separate being until it begins to egress from the womb during parturition (childbirth). In fact, until forty days after conception, the fertilized egg is considered as "mere fluid."); *Conservative Rabbis Strongly Condemn U.S. Supreme Court Decision to Overturn Abortion Rights,* RABBINICAL ASSEMBLY (June 24, 2022), https://www.rabbinicalassembly.org/story/conservative-rabbis-strongly-condemn-us-supreme-court-decision-overturn-abortion-rights ("The Committee on Jewish Law and Standards of the Rabbinical Assembly has repeatedly affirmed the right of a pregnant person to choose an abortion in cases where 'continuation of a pregnancy might cause severe physical or psychological harm, or where the fetus is judged by competent medical opinion as severely defective.' This position is based on our members' understanding of relevant biblical and rabbinic sources, which compel us to cherish the sanctity of life, including the potential of life during pregnancy, and does not indicate that personhood and human rights begin with conception, but rather with birth as indicated by Exodus 21:22-23."). Some Islamic religious scholars believe life begins at conception, and some believe life begins when the "soul breathes." There is disagreement about when the "soul breathes," but estimates are far after conception – somewhere in between 40 and 120 days of gestation. Abortion before this point is generally accepted, but after that point it is only allowed in certain circumstances, such as to save the life of the mother. Mohammad Ghaly, *The Beginning of Human Life: Islamic Bioethical Perspectives,* ZYGON: J. REL. & SCI. (Mar. 2012) (recounting an Islamic bioethics symposium on when human life begins);

Even within religions that hold a specific view on when life begins, this belief may not translate to each member of the religion holding the same view on abortion. Religion is a deeply personal matter, so people who are members of the same religious denomination may hold different views about abortion based on differing interpretations of sacred texts or religious tenets.[49] Several mainstream faiths publicly support legal access to abortion, and several other religions have taken no public stance.[50] Many religious groups, such as the National Council of Jewish Women, Catholics for Choice, Spiritual Alliance of Communities for Reproductive Dignity, and the Religious Coalition for Reproductive Choice, also support legal abortion.[51] Some religious people offer reproductive services *due to* their religious beliefs.[52] For example, before *Roe v. Wade*, a group of faith leaders created the Clergy Consultation Service, a service through which faith leaders connected thousands of people to abortion providers.[53]

Mohammah Albar, I*nduced Abortion from an Islamic Perspective: Is it Criminal or Just Elective?* 8 J. FAMILY AND COMM. MED. 25, 31 (2001); Khalel Mohammad, *Islam and Reproductive Choice*, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, https://rcrc.org/muslim/ (last visited Jan. 24, 2023) ("There is consensus that abortion is allowed if the life of the woman is endangered at any period during pregnancy. Some scholars have now taken the position that the fetus is to be treated as a person from the moment of conception, and as such, any abortion is forbidden. This, however, contradicts with the classical Islamic practice in which the fetus was never seen as a legal person before birth.").

[49] Samira Mehta, T*here is No One 'Religious View' on Abortion: A Scholar of Religion, Gender and Sexuality Explains,* COLORADO ARTS AND SCIENCES MAGAZINE (June 24, 2022), https://www.colorado.edu/asmagazine/2022/06/24/there-no-one-religious-view-abortion-scholar-religion-gender-and-sexuality-explains.

[50] *Comment on Proposed HHS Rule,* COLUMBIA LAW SCHOOL PUBLIC RIGHTS / PRIVATE CONSCIENCE PROJECT 2-3 (Mar. 27, 2018), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Policy%20Analyses/Policy_HHSRule_3.27.18.pdf/ ("A number of mainstream faiths, including the Presbyterian Church, Reform and Conservative Judaism, the United Church of Christ, and the Unitarian Universalist Association, support a legal right to abortion in most or all Circumstances. Other faiths, such Buddhism, Orthodox Judaism, and the National Baptist Convention, take no official stance on abortion rights.").

[51] *See A Religious Right to Abortion: Legal History and Analysis*, *supra* note 3, at 3; *see also Religious Groups' Official Positions on Abortion*, PEW RSCH. CTR. (Jan. 16, 2013), https://www.pewresearch.org/religion/2013/01/16/religious-groups-official-positions-on-abortion/ (discussing the views of various religious groups on abortion).

[52] *See A Religious Right to Abortion: Legal History and Analysis*, *supra* note 3, at 3-4 ("Dr. LeRory Carhart, an abortion provider and observant Methodist, stated in an interview, 'I think what I'm doing is because of God, not in spite of God.'").

[53] *Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right*, COLUM. L. SCH. L., RTS., & RELIGION PROJECT 37 (Nov. 2019),

Dr. George Tiller, an abortion provider who was later murdered by an anti-abortion activist, referred to providing abortion care as "ministry."[54] Many providers see giving abortion care as a religious duty. For example, Dr. Sara Imershein describes it as a "mitzvah,"[55] and Dr. Leah Torres calls doing so her "moral and ethical obligation." Similarly, Dr. Curtis Boyd was initially asked to perform abortions by a minister even though they were illegal, and stated that, in providing abortion services, "[m]y religious ideals became immediate and personal."[56]

3. Missouri, Religion, and Abortion

Missouri's legislation on abortion has long been religious in nature. In fact, the State of Missouri has entangled religion with its legislation in the past.[57] Examples include a "Bible literacy" resolution which encouraged schools to offer elective classes on the Bible and recommended they require that literature courses include "wisdom literature" from the Bible[58] and a proposal to include signs reading "In God We Trust" in all schools.[59] These legislative actions received criticism for closely mirroring model bills from Project Blitz, a right-wing Christian nationalist playbook.[60]

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https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Images/Whose%20Faith%20Matters%20Full%20Report%2012.12.19.pdf; Gillian Frank, *The Surprising Role of Clergy in the Abortion Fight Before* Roe v. Wade, TIME (May 2, 2017), https://time.com/4758285/clergy-consultation-abortion/ (estimating that in 1971 the Clergy Consultation Service had over 2,000 ministers as members). In its six years of existence, it is estimated that the clergy members referred half of a million women to safe abortions. Bridgette Dunlap, *How Clergy Set the Standard for Abortion Care*, THE ATLANTIC (May 29, 2016), https://www.theatlantic.com/politics/archive/2016/05/how-the-clergy-innovated-abortion-services/484517/.

[54] Columbia Law School Public Rights/ Private Conscience Project, Comment Letter on Proposed HHS Rule*,* 6 (Mar. 27, 2018), https://www.regulations.gov/comment/HHS-OCR-2018-0002-70101.

[55] *Id*.

[56] *Id*.

[57] *See, e.g.*, Elizabeth Elkin, *Bible Literacy Elective Bill Goes to Governor for Signature*, COLUM. MISSOURIAN (May 16, 2019), https://www.columbiamissourian.com/news/k12_education/bible-literacy-elective-bill-goes-to-governor-for-signature/article_0c15012e-77fc-11e9-851a-6f7edf512e19.html; Kathryn Palmer, *Should 'In God We Trust' Signs be Required in Missouri Schools?*, COLUM. MISSOURIAN, (Apr. 30, 2019), https://www.columbiamissourian.com/news/state_news/should-in-god-we-trust-signs-be-required-in-missouri-schools/article_0e08a9f0-6b5d-11e9-82cf-e7af13fc14a1.html.

[58] Elkin, *supra* note 57.

[59] Palmer, *supra* note 57.

[60] Madison McVan, *Compared to Other States, Missouri's Bible Elective Bill is Not One of a Kind*, COLUM. MISSOURIAN (Apr. 3, 2019), https://www.columbiamissourian.com/news/state_news/compared-to-other-states-missouris-bible-elective-bill-is-not-one-of-a-kind/article_4362df54-4753-11e9-8db8-

Missouri's actions on abortion have been similarly religious in nature. The State has explicitly based its legislation on one particular belief about abortion: the belief that life begins at conception. Missouri's legislation on this belief has previously been challenged in court based on its religious undertones. In *Doe v. Parson*, a woman seeking an abortion challenged Missouri's abortion law, which required reviewing a pamphlet containing the statement that "[t]he life of each human being begins at conception" prior to receiving an abortion.[61] She argued the law violated the Establishment Clause by preferring Catholicism over other religions.[62] The Eighth Circuit, following Supreme Court precedent, ruled that a law does not violate the Establishment Clause when it "happens to coincide or harmonize with the tenets of some or all religions."[63] The Supreme Court ruled on an earlier version of Missouri's abortion law in 1989 in *Webster v. Reproductive Health Services*. The law contained a preamble declaring that life begins at conception, and Justice Stevens argued in a partial concurrence, partial dissent that the preamble did more than just coincide with religious tenets.[64] Stevens argued that the law was an "unequivocal endorsement of a religious tenet of some but by no means all Christian faiths," which served no discernable secular purpose.[65] Though the plurality in *Webster* declined to rule on the constitutionality of the preamble's statement that life begins at conception, one Justice believed that even this version, which does not go as far as Missouri's current abortion law's preamble, posed a Constitutional issue.[66]

8f493cbe4ff1.html; *Project Blitz: The Christian Nationalist Attack on America*, BLITZ WATCH, https://www.blitzwatch.org/ (last visited Jan. 23, 2023).

[61] Doe v. Parson, 960 F.3d 1115, 1118 (8th Cir. 2020). Note that the law in question in *Doe* was a different version of the law in Missouri today. The current version of the law is MO. REV. STAT. § 188.017 (2022) (effective June 24, 2022).

[62] Doe v. Parson, 960 F.3d 1115, 1118 (8th Cir. 2020).

[63] *Id*. The Eighth Circuit in *Doe* was quoting *McGowan*. McGowan v. State of Md., 366 U.S. 420, 442 (1961) ("[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."); *see also* Harris v. McRae, 448 U.S. 297, 319 (1980) (citing *McGowan* to hold that the Hyde Amendment, which restricted funds for abortion, did not violate the Establishment Clause because it coincided with religious tenets of the Roman Catholic Church).

[64] Webster v. Reprod. Health Servs., 492 U.S. 490, 566–67 (1989) (Stevens, J., concurring in part and dissenting in part).

[65] *Id*.

[66] The Court found that the preamble itself did not regulate the terms of abortion, and the Court could not rule on the preamble unless it was applied in a way that restricted the activities of appellees. It was the responsibility of the courts of Missouri to decide how the preamble would be applied to other statutes or regulations. So, until such a concrete showing could be made, the Court declined to rule. *Id*. at 506 (majority opinion).

In the new version of the law passed in 2019, Missouri no longer forces citizens to speculate about its basis for concluding that life begins at conception – the State tells readers upfront that its motivations are religious.[67] The "Missouri Stands for the Unborn" Act contains a section entitled "Intent of the General Assembly." The section reads:

> 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", and that Article I, Section 2 of the Constitution of Missouri provides that all persons have a natural right to life, it is the intention of the general assembly of the state of Missouri to:
>
> 1. Defend the right to life of all humans, born and unborn;
> 2. Declare that the state and all of its political subdivisions are a "sanctuary of life" that protects pregnant women and their unborn children; and
> 3. Regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.[68]

In its section of definitions, the law goes on to define "unborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus."[69] In this law, unlike in previous iterations of Missouri's abortion law, the legislature explicitly draws the line from God to the idea that life begins at conception by stating that its reason behind the legislation is Almighty God. It is not a common practice in Missouri to open a law with a reference to God. A search through the Missouri Revisor of Statutes reveals that the preamble of the "Missouri Stands for the Unborn" Act is the only law to explicitly refer to God or the Almighty.[70] By going out of its way to reference God on an issue so closely tied to religious beliefs, the Missouri Legislature illuminates its religious motivations in prohibiting abortion.

Beyond explicitly naming God in the law, the sponsors of the "Missouri Stands for the Unborn" Act have been clear their motivation for

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[67] MO. REV. STAT. § 188.010 (2022).

[68] *Id*.

[69] MO. REV. STAT. § 188.015 (2022).

[70] *Missouri Revisor of Statutes*, https://revisor.mo.gov/main/Home.aspx (last visited Feb. 16, 2023). The word God appears in other statutes, but it appears through the inclusion of "[s]o help me God" in oaths and "acts of God" in other obligations. *See* MO. REV. STAT. § 41.080 (2018) for an example of an oath and MO. REV. STAT. § 227.558 (2006) for example of a law mentioning an "act of God."

prohibiting abortion stems from their Christian faith. The first sponsor of the Bill, Nick Schroer, states on his website,

> As a Christian, I was educated from an early age on just how precious life is, at any stage. Whether within the womb or in a [m]other's arms, I firmly believe that life is a gift from God and should be preserved. As a voice for the voiceless, I will fight for the unborn.[71]

Here, Representative Schroer explicitly ties his desire to prohibit abortion with his Christian faith. Another sponsor of the Bill, Mike Moon, stated in a campaign video,

> Life is precious, and in Missouri I've been on the front lines of the battle for life. I introduced a bill to abolish abortion in Missouri and call it what it is: murder. The left will stop at nothing to stomp out our Christian faith and strip conservative values from our culture. And you know, it's about time we fought back![72]

Representative Moon shows that he too sees the fact that life begins at conception as an inherently Christian view, and he sees abortion as an affront to his personal religious beliefs.[73]

The debate in the legislature over the law when it was a Bill was also overtly religious. Representative Barry Hovis, a co-sponsor of the Bill, stated "from the Biblical side of it, . . . life does occur at the point of conception."[74] Representative Ben Baker, another co-sponsor, stated that "[f]rom the one-cell stage at the moment of conception, you were already there . . . you equally share the image of our Creator . . . you are His work of art."[75] Representative Holly Thompson Rehder, also a co-sponsor of the Bill, declared

> God doesn't give us a choice in this area. He is the creator of life. And I, being made in His image and likeness, don't get to choose to take that away, no matter how that child came to be. To me, life begins at conception, and my God doesn't give that option.[76]

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[71] *Nick Schroer for State Senate*, https://www.nickschroer.com/beliefs (last visited Dec. 29, 2022).

[72] Mike Moon, *Fighting for Life*, YOUTUBE (Nov. 15, 2021), https://www.youtube.com/watch?v=F7tVlr_u_6M.

[73] *Id*.

[74] Complaint at 7, Rev. Blackmon v. Missouri, (No. 2322-CC00120) (Jan. 19, 2023), https://www.au.org/wp-content/uploads/2023/01/Rev.-Blackmon-v.-Missouri-Amended-Complaint-3.14.23.pdf [hereinafter Blackmon Complaint].

[75] *Id*.

[76] *Id*.

The legislators repeatedly debated and enshrined into the law the idea that life begins at conception and fetuses are "unborn children," and they tied this view to their religion.[77]

B. The "Serpentine Wall" of the Establishment Clause

1. The Road to Kennedy v. Bremerton School District

The First Amendment provides important protections for religion in the United States. As one Supreme Court decision explained, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."[78] Though the meaning of Establishment Clause is the subject of great disagreement,[79] one fact can be agreed upon: the Supreme Court's Establishment Clause jurisprudence has been historically unclear.[80] One professor called the Court's Establishment Clause jurisprudence a "serpentine wall," a riff on the famous "wall of separation between church and state" that Thomas Jefferson envisioned, meaning that the dividing line between permissible and impermissible action under the Establishment Clause is far from clear.[81]

For decades, the Court used the *Lemon* test to evaluate Establishment Clause claims. The *Lemon* test, born out of the case *Lemon v. Kurtzman,*[82] establishes three factors that must be met in order to survive an Establishment Clause challenge: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[83] Justice O'Connor later attempted to "clarify" the *Lemon* test by adding the analysis of

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[77] *Id*. at 7-8; MO. REV. STAT. § 188.015 (2019) ("Unborn child, the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus."); MO. REV. STAT. § 188.010 (2019) ("[T]he state and all of its political subdivisions are a 'sanctuary of life' that protects pregnant women and their unborn children"); MO. REV. STAT. § 188.017 (2022) ("Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony.").

[78] Lee v. Weisman, 505 U.S. 577, 589 (1992).

[79] There are several general schools of thought on the meaning and application of the Establishment Clause which have generated scholarly debate. *See infra* Part I.B.2.ii.

[80] Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 76 (2005).

[81] *Id.* (citing A. E. Dick Howard, *The Supreme Court and the Serpentine Wall, in the Virginia Statute for Religious Freedom: Its Evolution and Consequences for American History* (Merrill D. Peterson & Robert C. Vaughn eds., 1988)); John Witte Jr., *The Serpentine Wall of Separation*, 101 MICH. L. REV. 1869 (2003).

[82] 403 U.S. 602, 612-13 (1971).

[83] *Id*. (quotations omitted).

whether the "government practice is perceived as an endorsement of religion."[84] Some examples of cases that failed the *Lemon* test, and therefore violated the Establishment Clause, include a law mandating schools give students one minute of silence a day to voluntarily pray,[85] a law requiring the Ten Commandments in every public school classroom,[86] and a crèche inside of a county courthouse.[87] But, over the next fifty years, *Lemon* was criticized, modified, and applied less rigorously by the Court.[88]

On June 27, 2022, the Court decided to do away with the *Lemon* test in *Kennedy v. Bremerton School District*.[89] The majority stated that the *Lemon* test, including O'Connor's supplementary endorsement test, "'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators."[90] The majority stated that the Court had long ago moved away from the *Lemon* test, but dissenters urge this holding is "erroneous and, despite the Court's assurances, novel."[91] The majority instead stated that the Court has instructed "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[92] The Court goes on to say, "the line that courts and governments must draw between the permissible and the impermissible has to accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers."[93] This aligns with the Court's other cases in the Summer 2022 term, which trended toward reliance on history.[94] Critics of the *Lemon* test have not been shy in colorfully expressing their disdain for the legal test. For example, Justice Gorsuch once called *Lemon* a "dog's breakfast," showing disapproval due to the alleged confusion created by

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[84] Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

[85] Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (finding the law had no secular purpose, thus failing the first prong of the test).

[86] Stone v. Graham, 449 U.S. 39, 41 (1980) (finding the law had no secular purpose).

[87] Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 601 (1989) (finding that the display crossed a line into endorsing a Christian message). But the analysis is fact intensive. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 682 (1984) (reaching opposite result).

[88] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535 n.4 (2022).

[89] *Id*. at 533.

[90] *Id*.

[91] *Id*. at 567 (Sotomayor, J., dissenting).

[92] *Id*. at 535 (majority opinion).

[93] *Id*. (internal quotations omitted).

[94] *Dobbs* and *Bruen*, decided respectively on June 24, 2022 and June 23, 2022, both also turned to history. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 230 (2022) (stating, in discussion about whether abortion is a constitutionally protected right, "[a]ny such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 22 (2022) (stating, in evaluating gun regulation, "we assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition.").

the test's subjectivity and unpredictability.[95] Some justices claimed that the test was difficult for lower courts to apply.[96] Other judges, however, pushed back against the depiction of the *Lemon* test presented in *Kennedy v. Bremerton*.[97] For example, after *Kennedy*, John E. Jones III, a former U.S. district court judge appointed by President George W. Bush, wrote that he found the *Lemon* test to be a "sound and logical" way to evaluate Establishment Clause cases based on his experience presiding over a controversial and lengthy Establishment Clause case.[98]

2. What is the Historical Understanding of the Establishment Clause?

Even if confusion did exist over the *Lemon* test, *Kennedy's* turn to history would not solve it — an analysis based on history also "invites chaos" in lower courts. The questions left unanswered by the historical analysis are vast: What point in history matters? What historical figures speak persuasively on the matter? How similar must the historical analogies be? *Kennedy* leaves these questions unanswered, and lower courts are already struggling to make sense of the historical analysis approach to Establishment Clause issues.[99] One difficulty is that historical interpretations

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[95] Luke Goodrich, *Will the Supreme Court Replace the Lemon Test?,* HARV. L. REV. (Mar. 11, 2019), https://blog.harvardlawreview.org/will-the-supreme-court-replace-the-_lemon_-test/. Justice Scalia also analogized the *Lemon* test to a ghost haunting Establishment Clause jurisprudence. Another commenter stated, "all of *Lemon's* constitutional juice has been squeezed out." Iiya Shapiro, *There's No Juice Left in Lemon*, CATO INSTITUTE (June 22, 2021), https://www.cato.org/commentary/theres-no-juice-left-lemon/.

[96] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022)("The Court has explained that these tests 'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators.").

[97] John E. Jones III, *This Supreme Court Will Blur the Line Between Church and State*, SMERCONISH (July 5, 2022), https://www.smerconish.com/exclusive-content/this-supreme-court-will-blur-the-line-between-church-and-state/.

[98] Judge Jones presided over *Kitzmiller v. Dover* in which he eventually ruled, using the *Lemon* test, that teaching intelligent design in public school science classes violated the Establishment Clause. *Id*. Jones, a conservative judge, faced legal backlash from conservative commentators after the *Kitzmiller* decision, including from Phyllis Schlafly, who dramatically claimed that he "stuck the knife in the backs of those who brought [him] to the dance." John E. Jones III, *Inexorably toward Trial: Reflections on the Dover Case and the "Least Dangerous Branch"*, HUMANIST (Dec. 17, 2008), https://thehumanist.com/magazine/january-february-2009/features/inexorably-toward-trial-reflections-on-the-dover-case-and-the-least-dangerous-branch/.

[99] *See, e.g*., Firewalker-Fields v. Lee, No. 19-7497, 2023 WL 192737, at *1 (4th Cir. Jan. 17, 2023) (remanding back to district court "to grapple with the history-and-tradition test in the first instance"); Freedom From Religion Found., Inc. v. Mack, 49 F.4th 941, 954 (5th Cir. 2022) (upholding practice of opening court with prayer despite plaintiff's critique of "law-office history"); St. Augustine Sch. v. Underly, No. 16-C-0575, 2022 WL 4357454, at *11 (E.D. Wis. Sept.

of the Establishment Clause could, and do, fill entire books.[100] Unsurprisingly, the history of the Establishment Clause does not lead to an uncontroversial conclusion about what the Clause does or does not allow, and academics have widely criticized relying on history in Establishment Clause cases.[101] When analyzing the Court's understanding of the history of the Establishment Clause, one can observe "different versions of the same purported history, none of which speak directly to each other aside from predictable retorts about the beliefs of Thomas Jefferson or James Madison."[102] The conclusions based on these facts are "dramatically different."[103] These variations of outcomes leave the Court open to critique of what one professor called "law-office history," the selection of data favorable to your position without proper evaluation.[104] But the critics of history in Establishment Clause analysis have not carried the day and, after *Kennedy*, history and tradition now guide what is permissible in Establishment Clause cases.[105] Therefore, we now must look at what considerations to keep in mind when doing historical analysis.

19, 2022) (applying the excessive entanglement prong of the *Lemon* test instead of a history and tradition analysis).

[100] *See, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (Univ. of N.C. Press, 1994); PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harv. Univ. Press, 2002).

[101] There are a variety of reasons that academics disapprove of using history in interpreting the Establishment Clause. First, as one academic says, "[t]he historical evidence on this matter does not speak in a single voice with clarity and insistence." LEVY, *supra* note 100, at xviii. The historical record does not lead to an uncontroversial vision of the Establishment Clause, and, in fact, the historical record often contradicts itself. Additionally, there are questions of what history is relevant. Whose actions can illuminate the intent of the clause? From when? There is no clear answer of how to put forth a reliable history test in the Establishment Clause. Alex J. Luchenitser & Sarah R. Goetz, *A Hollow History Test: Why Establishment Clause Cases Should Not Be Decided through Comparisons with Historical Practices*, 68 CATH. U. L. REV. 653 (2019); Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide*, 2004 BYU L. REV. 1617 (2004).

[102] Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform,* 112 PA. ST. L. REV. 683, 685-86 (2008); Erwin Chemerinsky, *Why Church and State Should be Separate*, 49 WM. & MARY L. REV. 2193, 2196 (2008) (referring to this phenomenon as "competing quotations").

[103] Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PA. ST. L. REV. 683, 685-86 (2008).

[104] Alfred H. Kelley, *Clio and the Court: An Illicit Love Affair,* 1965 SUPER. CT. REV. 119, 122 (1965).

[105] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

i. Considerations in Historical Analysis

Historical Establishment Clause analysis is challenging because the framers said very little about the actual intent.[106] Deliberations about the Clause were mostly secret, and thus, academics must use other sources to deduce what the framers intended with the Clause.[107] This leads to some important questions about how to employ a faithful historical analysis in this context. First, given the lack of a definitive record, what history do we look to?[108] As alluded to above, some academics find the writings of Jefferson and Madison, the "leading architects" of the Clause,[109] instructive in unraveling the intent of the framers.[110] Others reject Madison and Jefferson as the voice of the Establishment Clause[111] and look more generally to political history,[112] intellectual history,[113] or what "establishment" would have meant to the public at the time the Constitution was written.[114]

Determining the relevant time in history is also important.[115] One academic argues "New Originalism" must maintain a laser-like focus on September 1789, the end of the deliberation period of the First Federal Congress, to deduce the final meaning of the Clause.[116] Another argues a broader range of time, though centered in the same time period. The author states,

> Any action beyond the immediate proximity of Congress's approval of the First Amendment on September 25, 1789 must be considered with some doubt. Any action after the conclusion of the term of the First Congress in March 1791 should be considered with much greater

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[106] John C. Jeffries Jr. & James E. Ryan, *The Political History of the Establishment Clause,* 100 MICH. L. REV. 279, 296 (2001) ("The Framers said almost nothing about the Establishment Clause, and the authors of the Fourteenth Amendment even less.").

[107] Nicole Molee, *The Use of History in Religion Clause Cases and Constitutional Interpretation*, 2 POL. SCI. J. B.C. 32, 33 (2018); Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22, 33 FEDERALIST SOC'Y REV. 26 (2021).

[108] Luchenitser & Goetz, *supra* note 101, at 654.

[109] *Id.* at 679.

[110] *Id.*

[111] Molee, *supra* note 107, at 46; Natelson, *supra* note 80, at 78; Esbeck, *supra* note 107, at 25.

[112] Jeffries Jr. & Ryan, *supra* note 106, at 370.

[113] Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. REV. 346 (2002).

[114] Esbeck, *supra* note 107, at 26-27.

[115] Luchenitser & Goetz, *supra* note 101, at 655.

[116] Esbeck, *supra* note 107, at 4.

> doubt. And conduct that occurred by 1798. . . should not be considered a reliable guide.[117]

But even so, some look to extensive histories of the relationship between religion and state governments far before 1789, in both the United States and Europe, both as a way to show what "establishment" the legislators may have been reacting against[118] or to show what was thought of as acceptable at the time.[119] Regardless of the exact line drawn, the focal point of historical analysis is September 1789, the time the Establishment Clause was passed.[120]

Additionally, it is unclear if courts should look to specific history, general history, or some combination of the two.[121] Some academics state that specific historical analogues are required — for example, the specific historical record of legislative prayer.[122] But others believe a general historical practice, such as a general tradition of religion playing a role in public life, is sufficient.[123] If looking to specific history, some academics believe that there are not enough helpful examples from the relevant time period.[124] Even if there were relevant examples, an appeal to tradition, without clear guidelines, does not clearly tell us if the practice in question is sufficiently similar to the historical practice.[125]

Traditions are also part of the analysis that *Kennedy* lays out.[126] One academic splits tradition into two distinct concepts to show the role that tradition plays in Establishment Clause analysis.[127] First, tradition of a continuous practice can be used to establish constitutionality, leading to a long line of Supreme Court Cases where the Court used an unbroken history to establish constitutionality.[128] The second approach is that constitutionality can be established if the practice has become part of the "fabric of society."[129] This approach means that if a practice has taken on social or cultural significance, it is more likely to be constitutional.[130] Thus,

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[117] Luchenitser & Goetz, *supra* note 101, at 670-71 (noting that the 1798 boundary is when Congress passed the Sedition Act, an act that was widely criticized as being unconstitutional, and therefore, the argument is that by this point the Congress cannot be the guide on constitutionality).

[118] LEVY, *supra* note 100, at 27-51.

[119] Natelson, *supra* note 80, at 87.

[120] Esbeck, *supra* note 107, at 13, 16.

[121] Genshaft, *supra* note 12, at 585.

[122] *Id.* at 629.

[123] *Id.* at 585.

[124] Luchenitser & Goetz, *supra* note 101, at 656.

[125] *Id*.

[126] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 514-16 (2022).

[127] Genshaft, *supra* note 12, at 585.

[128] *Id*. at 579, 582; *see, e.g.*, Town of Greece v. Galloway, 572 U.S. 565 (2014); Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

[129] Genshaft, *supra* note 12, at 579.

[130] *Id*.

through these approaches, one can show that a practice has become a tradition of the country.

The analysis of how history applies to a particular case is also a necessarily fact-sensitive matter that will vary depending on the details of the case.[131] The way the analysis proceeds and the type of history deemed relevant may depend on the specific context of each challenged practice. These considerations in forming historical analyses are necessary to raise before assessing history about the Establishment Clause or formulating a historical argument about Missouri's law.

ii. General Intent of the Religion Clauses

Lawmaking is a collective task, and it is therefore hard to distill a singular intent of the Establishment Clause.[132] This task becomes especially difficult due to the lack of record about the Establishment Clause debates.[133] Historical accounts of the features of an "established church" at the time of the founding are relatively uncontroversial — established churches around the time of the founding[134] often included mandatory church attendance, government control over the structure of the state church, and taxes levied in support of the church.[135] But, the implications of these establishments on the driving factors behind the Clause differ.[136] Schools of thought surrounding the intent of the Establishment Clause can generally be split into a few groups.[137] These groups include those who believe the Establishment Clause only sought to prevent coercion (anti-

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[131] Lee v. Weisman, 505 U.S. 577, 597 (1992); *Galloway*, 572 U.S. at 587 (2014).

[132] Esbeck, *supra* note 107, at 27.

[133] The Senate records from the debate surrounding the religion clauses are missing, and Madison describes the House records as "unreliable." Molee, *supra* note 107, at 35; Esbeck, *supra* note 107, at 33.

[134] *See* LEVY, *supra* note 100, at 27-78 (discussing establishment and disestablishment in states near the time of the founding).

[135] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003) ("Although the laws constituting the establishment were ad hoc and unsystematic, they can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."); LEVY, *supra* note 100, at 5.

[136] *See* Chemerinsky, *supra* note 102, at 2196-98.

[137] Note that, of course, not everyone will fit neatly into one camp and many thinkers have views that may possibly categorize them into multiple or no camps - these groupings are just meant to give an overview. Other people use different dividing lines for the schools of thought. For example, Chemerinsky divides by separation, neutrality, and accommodation (these divisions are very similar to the ones drawn here, just under different names). *Id*.

coercion),[138] those who believe the Clause was meant to prohibit only aid that is preferential to a particular religion over other religions (nonpreferentialist)[139] or to religion over nonreligion (neutrality),[140] and those who believe the Clause was meant to promote strict separation (strict-separationist).[141] These approaches can shed light on the sources of disagreement about the Establishment Clause and possible approaches the Court may take to appeal to the history of the Establishment Clause.[142]

The anti-coercion camp believes that, because at the time of founding state-established religions coerced people into conforming to their religious beliefs under threat of penalty, strict coercion — mandating practice of a specific religion — must be what the framers sought to prohibit.[143] Thus, they believe coercion is an essential element of establishment.[144] Anti-coercionists also believe that at the time of the creation of the First Amendment, the framers themselves took actions that intermingled the government with religion, such as finding chaplains for legislative prayer.[145] Therefore, some believe coercion is an essential element of Establishment Clause claims. This is a very narrow view of the Establishment Clause because formal intermingling of government and religion is permitted as long as individuals are not literally forced to participate in worship.[146] For example, under this view, a large religious shrine on government property would likely not violate the Establishment Clause as long as people were not forced to worship it, and prayer in schools may be allowed as long as children were permitted to opt out.

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[138] *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) [hereinafter *Coercion*].

[139] *See* LEVY, *supra* note 100, at xv.

[140] Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 151 (1987).

[141] *See* Chemerinsky, *supra* note 102, at 2196.

[142] *Id*. at 2198 ("[A]ny issue of the Establishment Clause that you can think of . . . comes down to these . . . approaches.").

[143] *See Coercion*, *supra* note 138, at 938 ("It is difficult to see, on this evidence, how an establishment could exist in the absence of some form of coercion.").

[144] Charles Adside, III, *The Establishment Clause Forbids Coercion, Not Cooperation, Between Church and State: How the Direct Coercion Test Should Replace the Lemon Test*, 95 N.D. L. REV. 533, 533 (2020) ("The ideal remedy is the adoption of the direct coercion test, which only forbids government action that requires citizens to conform to a religious practice by force of law or threat of penalty.").

[145] *Id*. at 559.

[146] *Id*. at 533. This approach has been criticized for being too similar to the Free Exercise Clause. Ronald C. Kahn, *Comment: God Save Us from the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom*, 43 CASE W. RSRV. L. REV. 983, 995-96 (1993).

Nonpreferentialists, however, believe that the government can support religion, as long as it supports religion generally and does not benefit any particular religion.[147] This view has been largely abandoned with appeals to history, considering many states at the time of the Establishment Clause's creation had several established churches, a sign that the framers would have accepted government supporting religion, as long as more than one religion, in this case Christianity, was established.[148] A similar, and more accepted, view is those who believe the government should be neutral: both between religions and between religious and secular matters.[149] This view laid the foundation for Justice O'Connor's endorsement test — if an action could be seen as symbolically endorsing religion, the action was not neutral.[150]

Lastly, the strict-separationist viewpoint is closely tied to the views of Jefferson and Madison,[151] invoking Jefferson's famous words about the "wall of separation."[152] One professor stated, "Strict separationists both, neither Jefferson nor Madison accepted any formal intermeddling of the

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[147]John R. Vile, *Nonpreferentialism*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/881/nonpreferentialism (last visited Jan. 3, 2023) ("The nonpreferentialist position may have been best articulated by Justice William H. Rehnquist in his dissent in *Wallace v. Jaffree* (1985) . . . . According to Rehnquist, the establishment clause had two central purposes: preventing the establishment of a single national religion and preventing favoritism of one religion over another.").

[148] Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 876 (1986) ("The theory that the establishment clause forbids only preferential aid has long been a favorite of those who support government aid to religion. It does not go away despite repeated rejection by the United States Supreme Court."); LEVY, *supra* note 100, at xix ("[T]he nonpreferentialist account is historically groundless and without constitutional merit."); Andrew M. Koppelman, *Phony Originalism and the Establishment Clause* 6 (NW. U. L. Faculty Working Papers, Paper No. 3, 2011) ("Subsequent historical scholarship showed, however, that the nonpreferentialist interpretation of the First Amendment was mistaken.").

[149] *See* Chemerinsky, *supra* note 102, at 2197.

[150] *Id.*

[151] *See* Cord & Ball, *supra* note 19. Even Phillip Hamburger, a passionate critic of the strict separation approach, acknowledges that Madison's Memorial and Remonstrance favored strict separation (even though he does not believe this is the view eventually adopted into the Establishment Clause). *See* Stephanie H. Barclay et. al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 522 (2019) (citing PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE 105 (2002)).

[152] *See* Chemerinsky, *supra* note 102, at 2196 ("Those who believe that this is the right interpretation of the Establishment Clause think that Thomas Jefferson got it right when he coined the phrase that there should be 'a wall of separation between church and state' — a wall that the Supreme Court later declared both 'high and impregnable.'").

state in the affairs of religion."[153] The separation was designed both to protect the government from religion and to protect religion from the government,[154] with religion viewed as delegated to a "private sphere" and public life as secular.[155] Leonard Levy, author of an influential historical account of the First Amendment, also takes the separation approach, stating:

> [T]he Establishment Clause prohibits even laws respecting (concerning) an establishment of religion, so that any law on the subject, even if falling short of an establishment of religion, is unconstitutional . . . . [T]he clause meant to its framers and ratifiers that there should be no government aid for religion, whether for all religions or one church; it meant no government sponsorship or promotion or endorsement of religious beliefs or practices.[156]

Out of the main approaches, the strict-separation approach leaves the least amount of room for religion in government.

II. IN NEARLY ALL APPROACHES, MISSOURI §188 LIKELY VIOLATES THE ESTABLISHMENT CLAUSE

Under the many possible interpretations of the Establishment Clause — the *Lemon* test, a specific historical test, or versions of a general historical test — the "Missouri Stands for the Unborn" Act likely violates the Clause.

A. Missouri §188 Likely Fails the Lemon *Test*

Although *Kennedy* decided that *Lemon* was no longer the test to evaluate Establishment Clause claims, the *Lemon* test was the method of evaluating these claims for nearly fifty years and was the legal test at the time that the "Missouri Stands for the Unborn" Act came into effect in 2019.[157] To show that the Missouri law is unconstitutional under this long-utilized Establishment Clause test, this Article will first demonstrate that MO §188 likely fails the three-part *Lemon* test. Using the *Lemon* test, a law must

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[153] Cord & Ball, *supra* note 19, at 915.

[154] *See* Feldman, *supra* note 113, at 383 ("Madison began by explaining that religion 'must be left to the conviction and conscience of every man' and that the jurisdiction of civil society therefore does not extend to matters of religion. He went on to argue that the extension of civil government beyond its proper sphere threatened all liberties."); *see also* Ruti Teitel, *Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 818 (1993) ("The interjection of religious claims in public life will erode religious equality and religious pluralism.").

[155] Jeffries & Ryan, *supra* note 106, at 281.

[156] LEVY, *supra* note 100, at xvii.

[157] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

meet three factors in order to be found constitutional under the Establishment Clause: (1) the law has a secular legislative purpose, (2) the law has a principle or primary effect that does not advance or inhibit religion, and (3) the law does not foster an excessive entanglement between religion and government. Failing to meet any one prong means the law is unconstitutional.[158]

1. Missouri §188 Does Not Have a Secular Legislative Purpose

In order to pass the *Lemon* test, the law must have a secular legislative purpose.[159] The Court has invalidated legislation or action for lack of secular purpose "only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."[160] But the Supreme Court stated, "[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[161] Essentially, the stated purpose must be the sincere purpose of the law.[162]

In *McCreary County v. ACLU*, for example, the Court found that the posting of the Ten Commandments in a courthouse had a predominantly religious motivation because the context of the display's physical presentation and its purpose did not support the County's stated intent of presenting a story of the country's religious tradition.[163] In a similar case decided on the same day as *McCreary County,* however, posting of the Ten Commandments on public property was found to have a secular purpose.[164] In *Van Orden v. Perry*, the Court concluded that a Ten Commandments monument had a secular purpose due to its context — one marker among many with the purpose of recognizing the efforts of a local group, by "highlight[ing] the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency."[165] These two similar but subtly different examples show that discerning whether there is a secular purpose is context driven — context surrounding the purpose of the religious thing, how it was adopted, or the physical setting into which it was introduced.[166] Another example in which no

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[158] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[159] *Id.*

[160] Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

[161] McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 864 (2005); *see also* Stone v. Graham, 449 U.S. 39, 41, (1980) (finding that a statute requiring the Ten Commandments be posted in classrooms failed the secular purpose prong by rejecting the proffered secular reasons and stating context showed the law was based on religious purposes).

[162] *McCreary Cnty.,* 545 U.S. at 864.

[163] *Id.* at 871.

[164] Van Orden v. Perry, 545 U.S. 677, 677 (2005).

[165] *Id.* at 701-02.

[166] *Compare* Van Orden v. Perry, 545 U.S. 677 (2005), *with* McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844 (2005).

secular purpose was found, *School District of Abington Township v. Schempp*, involved a state law requiring public schools to read passages from the Bible at the beginning of each day.[167] The State gave secular justifications such as promoting moral values, combating materialism, and teaching literature.[168] The Court found that "even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid . . ."[169] The Court also looked to the context of the law, finding that facts such as allowing students to leave the room for the exercise and permitting the use of different denominations of Bibles showed that the State was aware that the practice was religious in nature.[170]

But it is difficult to prove a lack of secular purpose under the *Lemon* test.[171] For example, the Court found that a Christmas crèche in a government building had a secular purpose when considered in the context of the Christmas holiday season and that the main purpose of the crèche was to celebrate tradition.[172] Most relevant to abortion laws, the Court also upheld a District Court's finding of a secular purpose in the Hyde Amendment, which limited the amount of federal funds that could be used to reimburse abortion under Medicaid.[173] The Court found that a statute does not violate the Establishment Clause just because it "happens to coincide or harmonize with the tenets of some or all religions."[174] The Court went on to find that the Hyde Amendment reflected "traditionalist" views about abortion, not religious ones, and therefore the law has a secular purpose.[175]

Thus, in assessing whether the Missouri abortion law has a secular purpose, courts would look to the reasons given by the State for the law

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[167] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

[168] *Id.* at 223.

[169] *Id.* at 224.

[170] *Id.* ("[T]he State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.").

[171] *See generally Lemon's Purpose Prong,* CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-1/ALDE_00013083/ (last visited Feb. 17, 2023) (noting the rarity of instances in which the Supreme Court found that a law failed *Lemon*'s first factor and explaining the reasons for such rarity).

[172] Lynch v. Donnelly, 465 U.S. 668, 680-81 (1984).

[173] Harris v. McRae, 448 U.S. 297, 302 (1980).

[174] *Id.* at 319. Note that this quotation and idea has come up numerous times in the Supreme Court, as well as the Eighth Circuit when discussing reproductive rights related measures. See *supra* note 63 and accompanying text for examples.

[175] *Id*. at 319-20.

and the context surrounding the law.[176] It is true that, removed from context, the Missouri abortion law may be less religious than some other practices that the Court found to have a secular purpose, such as overtly religious monuments on public grounds[177] or laws prohibiting commercial activities on Sundays.[178] It is also true that Missouri will certainly be able to provide some secular reasons for the abortion law.[179] Yet, despite the difficulty of showing that the law does not have a secular purpose, it is possible that, due to the nature of Missouri's abortion law, a court would find that the law lacks a secular purpose.

As it did in *Doe v. Parson* and *Webster v. Reproductive Health Services*, Missouri would likely argue that the purpose of Section 188 is to encourage childbirth over abortion, an acceptable, secular purpose.[180] Like the government did in the Hyde Amendment case, the State can also argue that it is pursuing traditional values about abortion, not religious ones.[181] The opinion letter by the Attorney General of Missouri announcing that the trigger law was taking effect declares that Missouri has a "deeply rooted history and proud tradition of respecting, protecting, and promoting the life of the unborn."[182] The letter also pointed to decisions from the Missouri courts that refer to the point of conception as the beginning of life, medically speaking.[183]

In context, however, it is clear that these proffered reasons are not the genuine motivation for the law. The context of the law shows that the purpose of Section 188 was primarily to promote a religious belief. First, the law explicitly begins by stating that it takes its position "[i]n recognition that Almighty God is the author of life,"[184] a statement that, on its face, should signal to readers that the law is religious in nature. Statements by sponsors of the bill evidencing their religious motivations for prohibiting

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[176] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 677 (2005); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224 (1963).

[177] Van Orden v. Perry, 545 U.S. at 677 (finding a Ten Commandments monument had a secular purpose); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 29 (2019) (finding that a thirty-two foot cross on public land had a secular purpose).

[178] McGowan v. Maryland, 366 U.S. 420, 444 (1961) (note that this decision occurred before the *Lemon* test was distilled in *Lemon v. Kurtzman*, but it is still relevant because the Court discusses secular purposes at length).

[179] *See supra* p. 26.

[180] Doe v. Parson, 960 F.3d 1115, 1118 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 874 (2020); Webster v. Reprod. Health Servs., 492 U.S. 490, 491 and 520-21 (1989) ("This Court has emphasized that *Roe* [*v. Wade*] implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion").

[181] Harris v. McRae, 448 U.S. 297, 319-20 (1980).

[182] *Op. Letter No. 22-2022 from Atty. Gen. Eric Schmitt, Immediate Efficacy of Section 188.017*, *RSMo* (June 24, 2022), https://ago.mo.gov/docs/default-source/press-releases/22-2022.pdf?sfvrsn=39ffd2d_2/.

[183] *Id.*

[184] MO. REV. STAT. § 188.010 (2022).

abortion and their strong ties to organized religion further support that the bill was passed to promote a specific religious belief.[185] Statements like "[a]s a Christian, I was educated from an early age on just how precious life is, at any stage"[186] and "from the Biblical side of it, . . . life does occur at the point of conception"[187] point directly to religion, not medicine, informing when life begins. Moreover, the desire to promote childbirth is not mentioned in statements about the law at the time of its passage, but God repeatedly is.[188]

The proffered secular purpose must be the genuine purpose of the law to survive the secular purpose prong,[189] but the overt religious ties of the Missouri law demonstrate that the secular purpose given by the State is not the true purpose. A court should take an approach similar to the one taken in *School District of Abington Township v. Schempp,* where the Court looked beyond the proffered reasons to the greater context of the law in order to discern the purpose of the law.[190] The Court can review the record of statements by the legislators in discussing the law and the text of the law itself to see that the motivation is religious.[191] This overtly religious context could be used to differentiate the Missouri law from the Hyde Amendment case.[192] The Court emphasized that the Hyde Amendment could not violate the Establishment Clause because it "happen[ed] to coincide or harmonize with the tenets of some or all religions."[193] Missouri legislators, through their overtly religious advocacy for the law, demonstrate that it is not a coincidence that the law aligns with a particular religion.[194]

2. Missouri §188 Has the Primary Effect of Advancing a Specific Religion

If a court found that Missouri's law had a genuine secular purpose, the court would then look to whether the law had the primary effect of

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[185] *See*, *e.g.*, Mike Moon, *Fighting for Life,* YOUTUBE (Nov. 15, 2021), https://www.youtube.com/watch?v=F7tVlr_u_6M; *Beliefs*, NICK SCHROER FOR STATE SENATE, https://www.nickschroer.com/beliefs (last visited Dec. 29, 2022).

[186] *Beliefs*, NICK SCHROER FOR STATE SENATE, https://www.nickschroer.com/beliefs (last visited Dec. 29, 2022).

[187] Amended Complaint at 5, Rev. Blackmon v. Missouri, No. 2322-CC00120 (Mar. 14, 2023).

[188] *See supra* notes 71-77 and accompanying text.

[189] McCreary Cnty. v. Am. C.L. Union, 545 U.S. 844, 864 (2005); Stone v. Graham, 449 U.S. 39, 41 (1980) (finding that a statute requiring the Ten Commandments be posted in classrooms failed the secular purpose prong by rejecting the proffered secular reasons and stating context showed the law was based on religious purposes).

[190] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224 (1963).

[191] *See supra* Part I.A.3.

[192] *See* Harris v. McRae, 448 U.S. 297, 319-20 (1980).

[193] *Id*.

[194] *See supra* Part I.A.3.

advancing religion.[195] Even if a law or practice has a secular purpose, the "propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State."[196] In order to survive the primary effects prong, the law's "principal or primary effect must be one that neither advances nor inhibits religion."[197] "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[198]

In *Larkin v. Grendel's Den*, the Court found that a law effectively giving churches and schools veto power on applications for liquor licenses of restaurants and bars within five hundred feet of the church or school had the primary effect of advancing religion.[199] The Court argued that the veto power could be used by the churches for religious goals, and the "the mere appearance of a joint exercise of legislative authority" by the religious institution and the government provided symbolic benefit to the religious groups.[200] Similarly, the Court found that a law allowing public funding to go to the maintenance and repair of religious schools with no restriction that the money be used for secular purposes had a primary effect of advancing religion.[201] In contrast, in *Lynch v. Donnelly*, the Court found that a crèche on government property did not have the effect of impermissibly benefitting religion.[202] In doing so, the Court looked to other cases where no impermissible effects had been found, such as programs that pay for textbooks at religious schools with public money or use public money to transport children to religious schools,[203] Sunday Closing Laws, or legislative prayer.[204] The Court reasoned that a crèche on government property

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[195] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[196] Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973).

[197] Lemon v. Kurtzman, 403 U.S. at 612.

[198] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987).

[199] Larkin v. Grendel's Den, Inc., 459 U.S. 116, 177; 126 (1982).

[200] *Id*. at 125.

[201] Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973).

[202] Lynch v. Donnelly, 465 U.S. 668, 683 (1984).

[203] These funding programs were distinguished on their facts from the *Nyquist* case because in those cases, the funding was aimed at purely secular activities. Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973).

[204] Lynch v. Donnelly, 465 U.S. 668, 681-82 (1984) (citing Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968); Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1 (1947); McGowan v. Maryland*,* 366 U.S. 420 (1961); Marsh v. Chambers, 463 U.S. 783 (1983)).

did not lend greater support to religion than these cases in which the Court had found the law permissible.[205]

It is true that the cases in which the Supreme Court has found that a law has the effect of advancing religion, the aid has appeared more directly, such as through funding or a veto power.[206] This fact could pose a hurdle for arguing that Missouri's abortion law has the primary effect of advancing religion. However, Missouri's abortion law still advances religion by purposefully enshrining a principle of Christianity into law — a principle with which many people (both religious and secular) do not agree.[207] Prohibiting abortion has been a religious mission of sorts by some religions,[208] and by outlawing abortion on religious terms, the State of Missouri has advanced this mission.

3. Missouri §188 Promotes Excessive Entanglement with Religion

The Supreme Court stated that to assess whether something promotes excessive entanglement with religion, "we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[209] Under this standard, excessive entanglement is satisfied by excessive government surveillance of religion or the potential of the law or practice to create political divisiveness.[210] The Court stated, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[211] Though it is a relevant factor, the Court has held, that political divisiveness is not enough to invalidate an otherwise acceptable action.[212] In the namesake case of the *Lemon* test, the Court found that a program involving funding to religious schools failed the entanglement prong because administration of the program would involve a "comprehensive, discriminating, and continuing state surveillance," such as inspection and evaluation of the

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[205] Lynch v. Donnelly, 465 U.S. 668, 682 (1984)("We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause.").

[206] Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 (1982); Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973).

[207] *See supra* Part I.A.2.

[208] *See, e.g.,* Pro Life Action Ministries, https://plam.org/ (last visited July 8, 2024) (stating the organization is "[a]nswering God's call to courageous action for our unborn brothers and sisters").

[209] Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

[210] *Lemon's Entanglement Prong*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-5/ALDE_00013087/ (last visited July 8, 2024).

[211] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

[212] Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

religious schools by the government.[213] In the case of the crèche, on the other hand, the Court did not find excessive administrative entangling because there was no evidence of contact between religious groups and the government regarding the crèche.[214]

The Missouri law does not present the type of administrative intermingling that the Court has most often found to violate this prong.[215] It is likely that a court would find that the intermingling of religion in §188 — the language of the law and the legislative history —is not of the "comprehensive, discriminating, and continuing state surveillance" that the prong was aimed at preventing.[216] Nonetheless, the law could be viewed as improperly politically divisive. The bill is written with a particular kind of religion in mind, a religion that believes life begins at conception.[217] All people in the State of Missouri must therefore follow the views of one particular religion, including those who follow a different religion or no religion at all. This seems ripe to cause the type of political and religious fragmentation that the Court warned against.[218] However, if a court finds that there was not administrative intermingling between religion and government, the court may not reach the question of political divisiveness because, as stated above, this factor alone is not enough to invalidate a law.[219]

4. §188 Likely Fails the *Lemon* Test

It is likely that §188 fails the *Lemon* test. In order to survive the *Lemon* test, a law or practice must survive each individual prong of the test.[220] Failing any one of the *Lemon* prongs means that the law or practice violates the federal Establishment Clause.[221] A court should find that the

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[213] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

[214] Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

[215] *Lemon's Entanglement Prong*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-5/ALDE_00013087/ (last visited July 8, 2024).

[216] Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 46-47 (2019) (citing Lemon v. Kurtzman, 403 U.S. 602, 619, (1971)).

[217] The Missouri Stands for the Unborn Act states that life begins at conception and does so in the midst of references to God in the law and personal ties between religion and abortion outside the law. *See* MO. REV. STAT. § 188 (2022); *see e.g*. *Beliefs*, Nick Schroer for State Senate, https://www.nickschroer.com/beliefs (last visited July 8, 2024). But recall that not all religions believe that life begins at conception. *See, e.g.* Sarah McCammon, *When Does Life Begin? Religions Don't Agree*, NPR (last visited July 8, 2024), https://www.npr.org/2022/05/08/1097274169/when-does-life-begin-religions-dont-agree.

[218] Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

[219] *Id*. at 684 ("This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for.").

[220] Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 46 (2019).

[221] *Id*.

Missouri abortion law fails at least one prong of the *Lemon* test. There is a strong argument that the law's proffered secular purpose is a sham due to the religious nature of the Missouri legislature's statements and the wording of the law. It appears that the purpose behind the law was to promote the core tenant of a type of Christianity that life begins at conception, *as* a tenant of Christianity, *because* it is a tenant of Christianity. The law also primarily confers a benefit onto a particular subsection of religious groups by allowing their belief to be enshrined in law and punishing those who do not act in accordance with it. Admittedly, the Missouri law likely does not lead to the administrative relationship between the state and religious institutions that courts often look for in the entanglement prong. However, the law must only violate one prong to fail the *Lemon* test, so if the court believed that the law lacked a secular purpose or conferred an improper benefit to religion, the law would fail the *Lemon* test.

B. Missouri §188 Runs Contrary to the History and Tradition of the Establishment Clause

For fifty years, and at the time § 188 was passed, the *Lemon* test was the controlling Establishment Clause test. Thus, the *Lemon* test is useful in understanding the Constitutionality of the law at the time it was passed, under longstanding Establishment Clause jurisprudence. However, after *Kennedy*, *Lemon* is no longer the test that courts use to evaluate Establishment Clause claims.[222] Now, courts must look to whether the law "'accor[ds] with history and faithfully reflec[ts] the understanding of the Founding Fathers."[223] As expounded in Part I, there are many opinions on what this should mean, such as what time in history is relevant, whose ideas matter, and whether specific or general history is ideal.[224] The Article will offer potential historical analysis for evaluating the Missouri law, beginning with specific history and then moving to three different theories about general Establishment Clause history. This analysis will show that, under many Establishment Clause conceptions, the Missouri law is unconstitutional.

1. Specific History

First, the history and tradition analysis looks for specific historical analogues. Consistent with the critique of some academics that there are very few, if any, helpful historical analogues in evaluating Establishment Clause cases,[225] I have not found a specific situation that fully depicts the history of religiously motivated abortion laws. Instead, I will look to other

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[222] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022).
[223] *Id*.
[224] *See supra* Part I.
[225] Luchenitser & Goetz, *supra* note 101, at 664.

relevant issues around the time of the founding, around the time the Constitution was drafted, that may be helpful in evaluating Missouri §188.

i. Historical and Traditional Analogues

Religious Language in Law and Government

The most related issue in the historical record is that of religious language similar to "Almighty God" in laws. It is likely that proponents of the Missouri law would point to examples such as, "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . ." in the Declaration of Independence,[226] the fact that God is referenced in nearly all State Constitutions,[227] or the phrase "one nation under God" in the Pledge of Allegiance.[228] However, these examples fall short of providing meaningful historical analogues in favor of keeping "Almighty God" in law.

First, the Declaration of Independence was written about a decade earlier than the Establishment Clause, so it cannot be used to indicate the Founders' intention behind the Establishment Clause.[229] Recall that academics agree that September 1789, the time of the Amendment's passing, is the epicenter of relevance for historical comparison on Establishment Cause issues.[230] The Declaration of Independence, written in 1776, was drafted to signal rebellion against Great Britain, and a transformative war would need to be fought after the Declaration's drafting before the Establishment Clause enshrined in the Constitution could even be considered.[231] Thus, language in the Declaration cannot be a reliable guide for the meaning of the First Amendment.

State constitutions similarly cannot be instructive. State constitutions were adopted over a range of years.[232] The first Constitutions — Delaware,

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[226]*Declaration of Independence: A Transcription*, NATIONAL ARCHIVES, https://www.archives.gov/founding-docs/declaration-transcript (last visited Jan. 4, 2023).

[227]Aleksandra Sandstrom, *God or the Divine is Referenced in Every State Constitution,* PEW RSCH. CTR. (Aug.17,2017), www.pewresearch.org/fact-tank/2017/08/17/god-or-the-divine-is-referenced-in-every-state-constitution/.

[228]*The Pledge of Allegiance*, US HISTORY, https://www.ushistory.org/documents/pledge.htm (last visited Jan. 4, 2023).

[229] *See* Luchenitser & Goetz, *supra* note 101, at 670-71; Molee, *supra* note 107, at 33; Esbeck, *supra* note 107, at 27.

[230] Luchenitser & Goetz, *supra* note 101, at 655 ("The further past the 1789 enactment of the First Amendment one looks, the less likely it is that federal-government action can be treated as consistent with the First Amendment's intent.").

[231] *See Declaration of Independence: A Transcription*, *supra* note 226.

[232] Brenda Erickson, *Your State's Constitution,* NATIONAL CONFERENCE OF STATE LEGISLATURES BLOG https://www.ncsl.org/blog/2017/11/17/your-states-constitution-the-peoples-

Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia — were passed in 1776, and the latest, the current Rhode Island Constitution, was adopted in 1986.[233] Neither of these periods explain the intent of the Establishment Clause.[234] Additionally, the Establishment Clause was not originally applicable to the states, and, around the time of the founding, many states had established churches.[235] But through the Fourteenth Amendment, the Establishment Clause was made applicable to the states.[236] State constitutions cannot be a meaningful example of acceptable language because the Establishment Clause was not thought to apply to States at the time of the founding.[237]

Similarly, the Pledge of Allegiance cannot be a reliable guide for the meaning of the Establishment Clause. The first version of the Pledge of Allegiance was written in 1892, long after the period of the Constitution's

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document.aspx#:~:text=The%20first%20state%20constitutions%20were,Pennsylvania%2C%20South%20Carolina%20and%20Virginia (last visited Jan. 4, 2023).

[233] *Id*.

[234] Esbeck, *supra* note 107, at 26 (stating September of 1789 is the epicenter of relevance for Establishment Clause history).

[235] *See* LEVY, *supra* note 100, at 27-78 (discussing establishment and disestablishment in States near the time of the founding).

[236] Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 5 (1947) (incorporating the Establishment Clause). Some scholars believe that incorporation of the Establishment Clause to the States was erroneous and ahistorical. In his concurrence in *Newdow*, for example, Justice Thomas stated, "the Establishment Clause is a federalism provision, which, for this reason, resists incorporation." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004). For more information on these arguments, *see* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation,* 39 DEPAUL L. REV. 1191 (1990); Melissa A. Dalziel, *The Tension between a Godless Constitution and a Culture of Belief in an Age of Reason*, 1999 B.Y.U. L. REV. 861, 875-80 (1999); Vincent P. Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006). This Article chooses not to address these arguments in order to not lend credence to their legitimacy — regardless of whether the original intent of the Clause at the time of the founding was only to bind the states, the passing of the Fourteenth Amendment made incorporation possible. Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 5 (1947). Also, the principle of *stare decisis* mandates recognizing incorporation. As Carl Esbeck stated on the subject, "[w]ith *Everson*, the Supreme Court made the policing of the church-state boundary much more energetic than was ever contemplated in 1789 . . . Nonetheless, New Originalists should accept incorporation as settled law by virtue of stare decisis. Americans have already worked their way through incorporation's many difficulties, many citizens have come to rely on it, and its reversal would be disruptive." Esbeck, *supra* note 107, at 39.

[237] Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 13 (1947) ("Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states."); *see also* Luchenitser & Goetz, *supra* note 101, at 654 ("Only actions of the federal government should matter, not actions by state or local governments.").

drafting, and it did not contain the words "under God."[238] The reference to God was added to the Pledge in 1954 at the urging of President Eisenhower as a response to the rising panic over communism.[239] This reference to God, added centuries after the drafting of the Constitution, is not a viable historical example due to its later adoption. One could argue that the Pledge represents one example of a larger tradition of referencing God in public life as a civic and patriotic symbol, a tradition that has become core to the "fabric of society."[240] This was part of the argument in a case arguing that "under God" in the Pledge of Allegiance violated the Establishment Clause in which the Supreme Court found that, examining the Pledge as a whole, "the Pledge is one of allegiance to our Republic, not of allegiance to the God or to any religion."[241]

Although it is true that there is a tradition of referencing God to promote the solemn nature of civic duty, like in the Pledge,[242] this is not the purpose of Missouri §188's reference to God. By stating, "[i]n recognition that Almighty God is the author of life,"[243] then going on to announce life begins at conception — a view held by some, but not all religions[244] — the law is not promoting a civic duty. Instead, it is promoting adherence to a particular religious tenant. This is not a tradition of the United States.

Though the Declaration of Independence referred to God, the Declaration is not from the correct time period to illuminate the intent of the Establishment Clause.[245] The United States Constitution is a specific historical example from the correct time period, which clearly implicates the beliefs of the Founding Fathers.[246] There is no meaningful mention of God in the Constitution — not as "Almighty God," not as a giver of rights, not

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[238] *The Pledge of Allegiance*, *supra* note 228.

[239] *Id.*

[240] Genshaft, *supra* note 12, at 579.

[241] Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1014 (9th Cir. 2010). The Supreme Court granted certiorari to say the plaintiff did not have standing; thus, "[i]nstead of addressing this question, the Court 'took the easy way out and sidestepped the substantive issue by concluding that the plaintiff, Michael Newdow, did not have standing to bring his claim.'"(quoting Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1014 (9th Cir. 2010)); *see also* James A. Campbell, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's Actual Legal Coercion Standard Provides the Necessary Renovation,* 39 AKRON L. REV. 541 (2006).

[242] *See generally* LEVY, *supra* note 100, at xiv. For example, when Presidents have sworn their oath of office with one hand on a Bible, and "So help me God" being included in many oaths, including the oath to testify in court.

[243] MO. REV. STAT. § 188.010 (2022).

[244] *Comment on Proposed HHS Rule*, COLUMBIA LAW SCHOOL PUBLIC RIGHTS/ PRIVATE CONSCIENCE PROJECT 2-3 (Mar. 27, 2018), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Policy%20Analyses/Policy_HHSRule_3.27.18.pdf/.

[245] *See* THE DECLARATION OF Independence (U.S. 1776).

[246] *See generally* U.S. CONST.

in any capacity.[247] The only religious-sounding language in the Constitution is that describing the date it was written, found below Article Seven.[248] It reads, "DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven."[249] Despite arguments by some that this is a signal that the Constitution is not intended to be godless,[250] the phrase "year of our lord" is nothing more than an "anachronistic dating convention," and it contains no legal or historical value.[251] In fact, the phrase is likely not even part of the official legal Constitution, as it occurs after the Articles, and it is unlikely the Constitutional Convention proposed or debated the inclusion of the phrase.[252] Thus, the inclusion of "year of our Lord" in signaling the date of the Constitution does not indicate a religious association with God.

Although we have no way of knowing why the framers did not include a reference to God in the Constitution, the fact that God was not mentioned, along with the eventual passing of the First Amendment, implies that they intended to keep government and religion separate — even in preambular statements like the one in the Declaration of Independence. After all, the Constitution was the document that set up the government of the newly formed country and served as the foundation of the United States.[253] The lack of meaningful reference to God in the Constitution can signal that the Founders intended to make government secular — a foundational principle that §188 violates.[254]

Legislative Prayer

Another historical example that sheds light on the relationship between government and religion at the time of founding is legislative

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[247] *Id*. *See* Andrew L. Seidel, *Dating God: What Is "Year of Our Lord" Doing in the U.S. Constitution?,* CON. STUD. 129, 136 (2018). The fact that God is not meaningfully mentioned, however, does not mean everyone accepts that the Constitution is a godless instrument. Despite on its face appearing godless, some argue that beneath the surface, it is not. *Contra* Stephen Flick, *The Godless Constitution,* CHRISTIAN HERITAGE FELLOWSHIP (Sept. 17, 2022), https://christianheritagefellowship.com/the-godless-constitution/.

[248] U.S. CONST. at. VII.

[249] *Id.*

[250] Seidel, *supra* note 247, at 137 (quoting Daniel Dreisbach as stating, "[I]f the Constitution was deliberately secular or hostile to traditional religion, the reference to Jesus Christ could have been avoided.").

[251] *Id*. at 131.

[252] *Id.* at 132.

[253] *The Constitution: What Does it Say?*, NATIONAL ARCHIVES, https://www.archives.gov/founding-docs/constitution/what-does-it-say (last visited Jan. 4, 2023).

[254] Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: Chapter One*, WASH. POST (1996), https://www.washingtonpost.com/wp-srv/style/longterm/books/chap1/godlessconstitution.htm.

prayer. The Supreme Court has held that legislative prayer is acceptable because, in 1789, three days before approving the final language of the First Amendment, Congress authorized the funding of legislative chaplains.[255] Thus, the Court reasoned that the Founders could not believe that this conduct was prohibited by the First Amendment if they approved it so close to finalizing the amendment.[256] The Court in *Marsh v. Chambers* stated, "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[257] Later, the Court in *Town of Greece v. Galloway* continued, "If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort," finding the *Town of Greece* prayer did not cross that line.[258] The Supreme Court in *Town of Greece* and the district court in *Marsh* also clarify that the audience of prayer is the legislators themselves.[259] The Court stated that the main purpose of the prayer was "to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the framers."[260]

There are no clear historical analogues from 1789 that relate to the language of §188 as directly as Congress's approval of chaplains related to legislative prayer.[261] Thus, one could try to analogize the relationship between legislative prayer and government to broader relationships between religion and government like the one displayed in the "Missouri Stands for the Unborn" Act. But legislative prayer is different from the religious nature of §188 in important ways.

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[255] Luchenitser & Goetz, *supra* note 101, at 654; Town of Greece. v. Galloway, 572 U.S. 565, 602 (2014); Marsh v. Chambers, 463 U.S. 783, 788 (1983) ("Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.").

[256] Luchenitser & Goetz, *supra* note 101, at 654; Town of Greece v. Galloway, 572 U.S. 565, 602 (2014); Marsh v. Chambers, 463 U.S. 783, 788 (1983).

[257] Marsh v. Chambers, 463 U.S. 783, 792 (1983).

[258] Town of Greece v. Galloway, 572 U.S. 565, 583 (2014).

[259] *Id*. at 587 ("The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing."); Chambers v. Marsh, 504 F. Supp. 585, 588 (D. Neb. 1980).

[260] Town of Greece v. Galloway, 572 U.S. 565, 588 (2014).

[261] Luchenitser & Goetz, *supra* note 101, at 671 ("[T[here are no examples of federal actions that could legitimately provide courts with guidance under a historical-practice test in most kinds of Establishment Clause cases.").

First, the reference to "Almighty God" in §188 is not directed at the legislators like the legislative prayer in *Marsh* or *Town of Greece*.[262] The statute is outward facing, and the reference to God serves to enlighten the public on the purpose of the law.[263] The reference also can be viewed as denigrating nonbelievers and believers of other religions because the law forces them to conform to Christian views and penalizes them if they disobey.[264] The character of the religious message is also fundamentally different in the abortion law than in legislative prayer. Legislative prayer is a mostly live, oral expression of religion that is for the benefit of legislators and does not coerce participation.[265] The Missouri law, on the other hand, is currently the law of the land — all people in the State must follow it, regardless of their own religious beliefs, or risk punishment.[266]

It is difficult to find a specific historical example within the relevant time-period that helps show whether Missouri's abortion law violates the Establishment Clause. As some academics feared, the dearth of specific historical examples directly at the time of the First Amendment's drafting means it is not an option for analyzing Missouri's law.[267] Thus, the Court will need to take a broader approach to history.

2. General History

Due to the lack of relevant specific history, the Court should look to general history to shed light on the purpose of the Establishment Clause and whether §188 violates that purpose. As explained above, there are four main perspectives on the intention behind the Establishment Clause: coercion, preferentialism, neutrality, and strict separation.[268] Under multiple of these approaches, Missouri §188 likely violates the spirit of the Clause.

i. Missouri §188 and Coercion

Drawing upon quotations from James Madison, one academic who believes the Establishment Clause was designed to prevent coercion of religious practice, argued "[r]ecognition of the centrality of coercion – or, more precisely, its opposite, religious choice — to [E]stablishment [C]lause analysis would lead to a proscription of all government action that has the purpose and effect of coercing or altering religious belief or action."[269] Another academic said that the Founders created the

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[262] *See generally* Town of Greece v. Galloway, 572 U.S. 565 (2014); *see also* Marsh v. Chambers, 463 U.S. 783 (1983).

[263] MO. REV. STAT. § 188.010 (2022).

[264] MO. REV. STAT. § 188.017 (2022).

[265] *See generally* Town of Greece v. Galloway, 572 U.S. 565 (2014); *see also* Marsh v. Chambers, 463 U.S. 783 (1983).

[266] MO. REV. STAT. § 188.017 (2022).

[267] Luchenitser & Goetz, *supra* note 101, at 656.

[268] *See* Chemerinsky, *supra* note 102, at 2196-98.

[269] Michael W. McConnell, *Coercion: The Lost Element of Establishment,* 27 WM. & MARY L. REV. 933, 940 (1986); *see* Adside, *supra* note 144, at 533.

Establishment Clause to protect against established churches like the Church of England, but they did not intend to fully remove religion from public life.[270] Instead, the Founders were trying to prohibit "mandatory church attendance, taxation for the direct support of a particular religious sect, and punishment of nonbelievers."[271]

When Missouri states that life begins at conception and references religion in doing so, non-Christians are being coerced to act on a tenant of Christianity, which was pursued by the legislature *because* it is a tenant of Christianity. Many religions or non-religious people do not believe that life begins at conception.[272] In fact, in some religions, it is encouraged or mandatory to receive an abortion in certain circumstances.[273] By forcing individuals to act on beliefs that are not their own, they are being coerced to behave within the confines of another religion. This coercion has been alleged in recent lawsuits against restrictive abortion laws under the Free Exercise Clause.[274] This fact demonstrates a critique of the coercion approach — if forcing someone to exercise a religion is required to violate the Establishment Clause, the Establishment Clause becomes redundant of the Free Exercise Clause, which requires the same.[275]

ii. Missouri §188, Preferentialism, and Neutrality

If the Court took a nonpreferential approach that government can aid religion as long as it does not prefer a religion, it would look at whether or not the law was preferential to one religion over another.[276] Under this approach, one could argue that the law is constitutional because it broadly mentions "Almighty God," a nondenominational phrase that does not single out any particular religion.[277] However, despite the potential for "Almighty God" to be nonpreferential, taken in the context of the "Missouri Stands for the Unborn" Act, the law clearly favors one sect of Christianity. Not everyone's "God" mandates prohibiting abortion or declares that life begins at conception; recall that many faith groups or people of faith hold a different view.[278] "Almighty God" here represents the Christian God of

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[270] Campbell, *supra* note 241, at 546.

[271] *Id*. at 550.

[272] *See supra* Part I.A.2.

[273] *Id.*

[274] Micah J. Schwartzman & Richard C. Schragger, *Religious Freedom and Abortion,* 108 IOWA L. REV. 2299, 2303 (2023).

[275] Kahn, *supra* note 146, at 984-85.

[276] LEVY, *supra* note 100, at xvi.

[277] MO. REV. STAT. §§ 188.010, 188.026 (2022).

[278] *See* MO. REV. STAT. § 188.026 (stating the law ensures "respect for all human life from conception to natural death," indicating a presupposition that life begins at conception); *see A Religious Right to Abortion: Legal History and Analysis*, *supra* note 3, at 3; *see also Religious Groups' Official Positions on Abortion*, PEW RSCH. CTR. (Jan. 16, 2013),

the sponsors of this Bill, and the Missouri legislators tell us so.[279] Left out and subordinated are members of the many religious groups who take a different view of when life begins.

On the other hand, if the Court took Justice O'Connor's neutrality approach, the Court would look to see if a reasonable observer would perceive the practice as an endorsement of religion generally over nonreligion.[280] In *Lynch v. Donnelly,* Justice O'Connor stated, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[281] If the Court took this general approach to the historical intent of the religion clauses, the law is likely unconstitutional. Here, the words "Almighty God" would signify to a reasonable observer that the State of Missouri endorses the Christian view that life begins at conception and legislated accordingly. This tells members of other religions that their views are not valid in the State of Missouri, and they cannot behave according to those beliefs. In fact, behaving according to their beliefs would put them at risk of punishment.

iii. Missouri §188 and Separatism

Separatists believe the now famous words of Thomas Jefferson's 1802 letter illustrate the meaning of the Establishment Clause, that the First Amendment built "a wall of separation between Church & State."[282] The Supreme Court referred to this wall as "high and impregnable."[283] Thus, the Establishment Clause meant to ensure certain government powers could not be utilized in "forbidden fields, such as religion."[284]

Most clearly of any approach, the Missouri law is unconstitutional when analyzed through a separatist lens. Missouri §188 conjoins the State and religion — a relationship that the Founders specifically wanted to prevent when they declared there should be a "wall of separation between

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https://www.pewresearch.org/religion/2013/01/16/religious-groups-official-positions-on-abortion/ (discussing the views of various religious groups on abortion).

[279] For example, Mike Moon and Nick Schroer, co-sponsors of the Bill, have explicitly declared that they legislate about abortion due to their faith. Mike Moon, *Fighting for Life,* YOUTUBE (Nov. 15, 2021), https://www.youtube.com/watch?v=F7tVlr_u_6M; *Beliefs*, NICK SCHROER FOR STATE SENATE, https://www.nickschroer.com/beliefs (last visited Dec. 29, 2022).

[280] Beschle, *supra* note 140, at 151.

[281] *Lynch*, 465 U.S. at 688.

[282] *Letters Between Thomas Jefferson and the Danbury Baptists*, BILL OF RIGHTS INSTITUTE, https://billofrightsinstitute.org/primary-sources/danburybaptists (last visited Feb. 15, 2023).

[283] *Everson*, 330 U.S. 1, 18 (1947).

[284] LEVY, *supra* note 100, at 104.

church and state."[285] Any law that respects an establishment of religion, promotes religion, or endorses religion would be unconstitutional.[286] The "Missouri Stands for the Unborn Act," its clearly religious message, and its roots in promoting Christianity show that it does not respect the wall between church and state — it moves toward enshrining and enforcing a particular belief system in law.[287]

III. IMPLICATIONS AND CONCLUSIONS

Missouri's abortion law, which references God to support its abortion ban based on the view that life begins at conception, runs contrary to most ideas about the intent and history of the Establishment Clause. The Missouri Stands for the Unborn Act is a law unabashedly passed by devout conservative Christians to enshrine a tenant of their religion in law.[288] This is not to say that legislators must legislate as if they do not have religious beliefs. Legislators may have religious convictions, and religion has long played a role in life in the United States, but legislators cannot inject their personal religious beliefs into the law of the land.[289] The context of a law must be examined to determine if a law impermissibly respects an establishment of religion. To argue that §188 is unconstitutional is not to argue that legislators may never allow their religious beliefs to guide their legislative actions. However, a line must be drawn when legislators use their role as lawmakers to impose the tenets of their faith on others or enshrine them into government — regardless of one's approach to the First Amendment, this idea should offend it. To hold true to the spirit of the First Amendment, legislators cannot use their positions to be state-sanctioned missionaries.

This Article used Missouri as a case study, but there is an increasing understanding of abortion as a religious freedom issue both in Missouri and across the United States.[290] After *Dobbs*, religious objections to abortion laws were filed in states including Indiana, Florida, Idaho, Kentucky,

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[285] *See* Chemerinsky, *supra* note 102, at 2196.

[286] *See* LEVY, *supra* note 100, at xvii ("[T]he Establishment Clause prohibits even laws respecting (concerning) an establishment of religion, so that any law on the subject, even if falling short of an establishment of religion, is unconstitutional. . .").

[287] *See id.* at 1-26.

[288] *See supra* notes 71-77 and accompanying text.

[289] Some academics fear that prohibiting legislators from making laws based on their own religious beliefs would be a form of discrimination against religious lawmakers. They fear the Court may adopt a Free Exercise approach that gives lawmakers a right to adopt "religiously motivated laws." Schwartzman & Schragger, *supra* note 274, at 2300.

[290] *See id.*; *Protecting reproductive freedom by ensuring religion isn't used to deny anyone health care,* AMERICANS UNITED, https://www.au.org/how-we-protect-religious-freedom/issues/reproductive-rights/ (last visited Jan. 4, 2022).

and Texas.[291] The intersection of religion and reproductive rights is likely to become an important part of the post-*Dobbs* legal landscape. The federal Establishment Clause is also not the only way, or perhaps even the most effective way, to challenge abortion laws based on religious freedom; many lawsuits have also challenged religious abortion laws under State Establishment Clauses or State Religious Freedom Restoration Acts.[292]

In accordance with this general trend towards litigating under state constitutions, on January 19, 2023, Americans United for Separation of Church and State and The National Women's Law Center filed a lawsuit in Missouri on behalf of thirteen clergy members, alleging that the "Missouri Stands for the Unborn" Act violates the Establishment Clause of the Missouri State Constitution.[293] Richard Katskee, Vice President and Legal Director of Americans United for Separation of Church and State, explained that Missouri's law was likely to face this type of claim, both because of the severity of Missouri's abortion law and because the Missouri courts have found that the Missouri Establishment Clause is even more protective than the federal Establishment Clause.[294] Additionally, Mr. Katskee stated that the plaintiffs were eager to challenge the law, as they did not want to be forced to live in accordance with the religious views of others.[295] He stated that numerous clergy members and others in Missouri reached out asking for help; the energy to stop the law came from the people of Missouri.[296] The complaint recounted the extensive evidence that the Missouri legislature was legislating based on religious tenets, and Mr. Katskee argued that the law violates the strict separation required by the Missouri Constitution's Establishment Clause.[297] As the lawsuits across the country proceed, proponents of church-state separation will begin to learn how likely it is to succeed in challenges to abortion laws under the religion clauses.

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[291] Schwartzman & Schragger, *supra* note 274, at 2304.

[292] Laura Kusisto, *State Abortion Bans Face Religious-Liberty Lawsuits From the Left*, WALL ST. J. (Sept. 16, 2022), https://www.wsj.com/articles/state-abortion-bans-face-religious-liberty-lawsuits-from-the-left-11663343259.

[293] *See generally* Blackmon Complaint, *supra* note 74. The complaint in the case suggests that the Missouri Establishment Clause is even more protective than the Federal Establishment Clause. *Rev. Blackmon v. Missouri*, AMERICANS UNITED (Jan. 19, 2023), https://www.au.org/how-we-protect-religious-freedom/legal-cases/cases/rev-blackmon-v-missouri/. However, on June 14, 2024, a Missouri circuit court granted the State's Motion for Judgment on the Pleadings. *See* Order and Judgment, Rev. Blackmon v. Missouri, https://ago.mo.gov/wp-content/uploads/Blackmon-order.pdf (June 14, 2024).

[294] Zoom Interview, Richard Katskee, Vice President and Legal Dir. of Ams. United for Separation of Church and State (Feb. 8, 2023).

[295] *Id.*

[296] *Id.*

[297] *See generally* Blackmon Complaint, *supra* note 74, at 7.

Challenging abortion laws under religious freedom shifts the perspective of what religious freedom means.[298] One study showed that the five most pro-religion justices in the history of the Supreme Court are all currently on the Court.[299] But in the United States, religious freedom has historically appeared synonymous with Christian freedom, and the Clauses have been used of late to circumvent laws meant to protect LGBTQ+ people, religious minorities, or women, usually through religious exemptions to generally applicable laws.[300] As one author put it, "[u]nless we stop it and undo the damage done, the First Amendment will mean supremacy for conservative Christians."[301] Since John Roberts became Chief Justice, religious organizations — almost exclusively conservative Christian groups — have prevailed in religious cases about eighty-one percent of the time, an increase of over fifty percent.[302] It is unclear if the winning streak would extend to claims by religious minorities, but some are doubtful, especially on religious claims related to abortion.[303]

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[298] Challenging abortion laws through religious freedom changes the perspective because it requires recognizing the religious rights of those other than conservative Christians. As one professor stated, "At present, an overwhelmingly white and conservative Christian movement has effectively laid claim to the cultural value of religious freedom. This tactic enables a certain slippage, an easy identification between one brand of Christianity and *religion* writ large." Tisa Wenger, *How Conservative Christians Co-Opted the Rhetoric of Religious Freedom,* ZOCALO PUB. SQUARE (Jan. 23, 2018), https://www.zocalopublicsquare.org/2018/01/23/conservative-christians-co-opted-rhetoric-religious-freedom/ideas/essay/.

[299] Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html.

[300] *See generally* Jared Goldstein, *How the Constitution Became Christian*, 68 HASTINGS L. J. 259 (2017); *see generally* ANDREW L. SEIDEL, AMERICAN CRUSADE (2022); Guthrie Graves-Fitzsimmons & Maggie Siddiqi, *Christian Nationalism Is 'Single Biggest Threat' to America's Religious Freedom: An Interview With Amanda Tyler of the Baptist Joint Committee*, AM. PROGRESS (Apr. 13, 2022), https://www.americanprogress.org/article/christian-nationalism-is-single-biggest-threat-to-americas-religious-freedom/ (discussing how Christian nationalism is a tool used to circumvent laws meant to protect pluralistic democracy and how the Supreme Court appears more willing to hear religious liberty cases based on Christian nationalist arguments than in the past).

[301] ANDREW L. SEIDEL, AMERICAN CRUSADE 3 (2022).

[302] William C. Duncan, *What's Behind the 'Winning Streak' for Religious Freedom at the Supreme Court?*, SUTHERLAND INST. (Apr. 27, 2021), https://sutherlandinstitute.org/whats-behind-the-winning-streak-for-religious-freedom-at-the-supreme-court.

[303] *See generally* ANDREW L. SEIDEL, AMERICAN CRUSADE (2022).

These doubts are amplified by recent allegations of improper conduct by Supreme Court justices with religious groups.[304] Longtime anti-abortion activist turned whistleblower, Reverend Rob Schenck, alleges that he successfully masterminded a conservative Christian campaign to influence Supreme Court justices – resulting in the Supreme Court disclosing the decision in *Hobby Lobby v. Burwell,* a case about a religious objection to reproductive rights, to him before its release to the public.[305] Others have argued that the Supreme Court and some lower courts have reverse-engineered decisions in favor of conservative Christians by emphasizing, ignoring, or arguably misrepresenting facts in order to reach a desired outcome.[306] In a *Kennedy v. Bremerton School District* concurrence*,* for example, a Ninth Circuit judge took the extraordinary step of creating a chart, one side titled "the unmoored claim" and the other "what the record actually shows."[307] Thus, it is not certain that the Establishment Clause operates in practice to support people of all faiths.

It is important to recognize that, although this Article has argued that the "Missouri Stands for the Unborn" Act likely violates the Establishment Clause under nearly any understanding of it, it is highly unlikely that the current Supreme Court would rule favorably on an Establishment Clause challenge to the law. Holding §188 unconstitutional would mean curtailing an action of conservative Christians – a move that the current Supreme Court is unlikely to take.[308] It is also important to recognize that

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[304] Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach,* N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html.

[305] *Id*.

[306] "In Kennedy v. Bremerton School District, the Court took the remarkable step of rewriting the facts of the case, ignoring what actually happened (as found by both the district court and the court of appeals and documented with photographs), and writing its own (false) set of facts to tell a more favorable story for the outcome it wanted to reach." Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 107-08 (2022). In discussing Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014), another commenter finds that the Court was determined to "squeeze square facts into round doctrinal holes" to reach the desired legal conclusion. Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in Town of Greece v. Galloway*, 48 LOY. L. REV. 371, 398 (2015).

[307] Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 916-920 (9th Cir. 2021) (The court cited nine instances in which the claim about the facts of the case was untrue to the record. In chastising another judge who accepted the "unmoored claim(s)," Judge Smith stated, "Judge O'Scannlain, appears to have succumbed to the Siren song of a deceitful narrative of this case spun by counsel for Appellant, to the effect that Joseph Kennedy, a Bremerton High School (BHS) football coach, was disciplined for holding silent, private prayers. That narrative is false.").

[308] ANDREW L. SEIDEL, AMERICAN CRUSADE 27 (2022) ("The message [of Robert's Court jurisprudence] was unmistakable: Christianity first, the Constitution second, if at all."); Schwartzman & Schragger, *supra* note 274, at 2304

the individuals who will feel the consequences of these unconstitutional laws most starkly are pregnant people — many of whom will be forced to carry unwanted pregnancies to term or face other potentially traumatic outcomes – and not the individuals who made helped bring them into law.

Despite the hurdles to success, religious challenges to abortion laws are not a waste of resources. Drawing attention to religious freedom implications of abortion laws is essential to both religious freedom and reproductive freedom. First, there are opportunities to challenge laws under state constitutions or other laws that may have more likelihood of success than challenges in federal court.[309] Second, Establishment Clause claims on abortion reshape the conversation about abortion. Public discourse often presents abortion and religion as opposing sides.[310] Cases challenging abortion laws under the Establishment Clause shift the narrative by reinforcing that religious people hold a variety of views about abortion and that religion and abortion are not always incompatible.[311] As stated by Richard Katskee,[312] an individual on the front-lines of religious freedom litigation in the United States, "it's a tough time, but some battles are worth fighting."[313]

CONCLUSION

This Article has served to discuss Missouri's abortion law, its religious origins, and its position in a legal environment after *Dobbs* and *Kennedy*. Part OI explained the background of abortion in Missouri, Missouri §188

(recognizing that, although religious arguments against abortion bans are stronger than one may think, the arguments are unlikely to succeed in the current Conservative-majority Supreme Court).

[309] *See, e.g.,* Blackmon Complaint, *supra* note 74.

[310] *See, e.g.,* Ian Lopez, *Reproductive Rights Clash With Religious Ones in Abortion Wars*, HEALTH LAW & BUSINESS, Jan. 30, 2023, at BLOOMBERG LAW, https://news.bloomberglaw.com/health-law-and-business/reproductive-rights-clash-with-religious-ones-in-abortion-wars; Barbara Alvarez, *Guide to Religious War Against Abortion*, FREEDOM FROM RELIGION FOUND., https://ffrf.org/campaigns/guide-to-religious-war-against-abortion (last visited Feb. 9, 2023).

[311] *See* Access Podcast, *Abortion and Religion: Reclaiming the Narrative*, (Jan. 28, 2022), https://www.apodcastaboutabortion.com/episodes/abortion-religion-reclaiming-narrative; Zoom Interview with Richard Katskee, Former Vice President and Legal Director, Americans United for Separation of Church and State (Feb. 8, 2023).

[312] In addition to being on the legal team in *Rev. Blackmon v. Missouri,* Mr. Katskee also argued *Kennedy v. Bremerton School District* in the U.S. Supreme Court. He has litigated cases under the Establishment and Free Exercise Clauses in courts throughout the country. For more information on Mr. Katskee, *see Richard Katskee*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, https://www.au.org/about-au/people/richard-b-katskee/ (last visited Feb. 9, 2023).

[313] Zoom Interview with Richard Katskee, Former Vice President and Legal Director, Americans United for Separation of Church and State (Feb. 8, 2023).

and its religious origins, the confusing jurisprudence of the Establishment Clause, and some general schools of thought about its origins. Part II applied various interpretations of the Establishment Clause to the Missouri law, finding that under nearly every framework, the "Missouri Stands for the Unborn" Act violated the Federal Establishment Clause. Finally, Part III discussed broader implications of religious abortion laws and Establishment Clause jurisprudence.

Analysis of the relationship between abortion and religion will become increasingly important in the post-*Roe* and post-*Lemon* era.[314] States now have the ability to regulate abortion however they want,[315] and states like Missouri will continue to race to exercise that power to restrict abortion rights.[316] In implementing the "Missouri Stands for the Unborn" Act, Missouri has become emboldened, both to prohibit abortion in all forms and lay bare its religious motivation to do so. However, advocates working to protect the fundamental right to religious freedom must adjust to the shifting legal landscape and a Supreme Court unlikely to decide against conservative Christians. Time will tell, through the adjudications of lawsuits in Missouri and elsewhere, how many pregnant individuals in the United States will be forced to carry unwanted pregnancies in the name of someone else's religion.

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[314] *See e.g.*, Eliott C. McLaughlin, *How the Supreme Court Recalibrated the Abortion Debate in Just 3 Words*, CNN, https://www.cnn.com/2022/07/17/us/abortion-religion-dobbs-roe/index.html (July 17, 2022, 11:02 AM).

[315] Subject to the constraints of their state constitutions.

[316] Missouri has made clear that it will "[r]egulate abortion to the full extent permitted by the Constitution cof the United States, decisions of the United States Supreme Court, and federal statutes." MO. REV. STAT. § 188.010 (3) (2022). Reproductive rights advocates worry that anti-choice states like Missouri will move to ban other reproductive health measures such as contraception or in vitro fertilization (IVF). Michelle Jokisch Polo, *Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment,* NPR (July 21, 2022, 5:04 AM), https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment; Tessa Weinberg, *Missouri Legislature May Limit Access to Birth Control after Roe Falls: 'Anything's on the Table,'* NPR KANSAS CITY (May 20, 2022, 9:36 AM), https://www.kcur.org/politics-elections-and-government/2022-05-20/missouri-legislature-limit-birth-control-after-roe-v-wade-abortion.