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# ABORTION AND THE SPIRITUAL IMPERATIVE: ARE THE NEW ABORTION BANS SUSCEPTIBLE TO RELIGION CLAUSE CHALLENGES?

*Loren Jacobson*[1]

*Since the Supreme Court eliminated the right to abortion in* Dobbs v. Jackson Women's Health Organization*, many states have enacted pre-viability abortion bans. Unlike laws that use viability—a medically ascertainable point in pregnancy—as a basis for providing a fetus rights equal to the pregnant person carrying it, pre-viability abortion bans are based on religious views about when human life begins. Indeed, the legislators who have enacted these bans have been explicit about their religious motivations. Not only are these bans based on religious beliefs, but they are based on the religious beliefs of specific Christian denominations. Other Christian denominations and religions have different views about when life begins. Given the religious nature of these bans and the effect they have on the ability of pregnant people to act pursuant to their own religious beliefs, this Article examines whether challenges to these bans could be pursued pursuant to the First Amendment Free Exercise or Establishment Clauses. While courts have generally found abortion* regulations *not to violate the Free Exercise or Establishment Clause, this Article argues that abortion* bans *may be susceptible to challenge. Specifically, the Court has recently expanded the scope of the Free Exercise Clause, giving protection to secular conduct motivated by religious belief. This expansive view of the Free Exercise Clause could make abortion bans unconstitutional, particularly when they do not have exemptions for religiously influenced (or mandated) decisions to abort. The Establishment Clause may also provide a basis to challenge abortion bans, despite the Supreme Court's precedents finding abortion regulations not to violate the provision. However, the Supreme Court's decision in* Kennedy v. Bremerton School District *may limit the ability to use the Establishment Clause to challenge abortion bans.*

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1. Associate Professor of Law, University of Northern Texas at Dallas College of Law. Professor Jacobson thanks Dean Felecia Epps and University of Northern Texas at Dallas College of Law for the research grant that supported the work of researching and writing this Article. She is also grateful to Dean Edward Hart, Professor Stewart Caton, and Professor Tracy Eaton who assisted her research.

In *Dobbs v. Jackson Women's Health Organization*[2] the Supreme Court overturned *Roe v. Wade*,[3] eliminating the constitutional right to abortion.[4] At the time of publication of this article, twenty-three states have pre-viability abortion bans in place, banning abortion either from conception or from six weeks, eight weeks, or fifteen weeks after a woman's last missed period.[5] Many of these bans are more restrictive than the bans that existed prior to *Roe* and do not have exceptions for the health of the mother or for rape or incest.[6]

Unlike abortion regulations, which may seek to balance the pregnant person's[7] interests with that of the growing fetus, pre-viability abortion bans place the interests of the fetus above those of the pregnant person and consider abortion to be akin to murder. Such bans thus consider the fetus a person worthy of protection, worthier of protection than the pregnant person in some instances.[8] The problem, of course, is that whether the fetus is a person (and even what personhood means) cannot be ascertained. Science cannot provide empirical proof with respect to the moment when human life or personhood begins, since science deals with physical, rather than metaphysical, matters.[9]

Indeed, in *Roe*, the Court determined that the evidentiary record was insufficient to establish in science or in law when a human's life begins.[10] Some justifications for current abortion bans cloak themselves in science, claiming that science or medicine now establishes

2. 142 S. Ct. 2228 (2022).

3. 410 U.S. 113 (1973).

4. 142 S. Ct. at 2242 ("We hold that *Roe* . . . must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . .").

5. Caroline Kitchener et al., *Abortion is now banned or under threat in these states*, WASH. POST (Mar. 9, 2023, 10:42 AM), https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/ [https://perma.cc/M6UC-TWLL].

6. *See, e.g.*, ALA. CODE § 26-23H-4 (Alabama abortion ban with no exception for rape or incest).

7. Although the majority of individuals who get pregnant and therefore have abortions are women, girls, intersex individuals, and some transgender individuals whose gender is male can get pregnant. For this reason, I will often use the phrase "pregnant person" or "pregnant people" in recognition that not all individuals who get pregnant are women. However, recognizing that the majority of people who get pregnant are women and that abortion bans thus have a disparate negative effect on women and also because the religious doctrine I will be discussing explicitly references "mothers" in relation to abortion, I will also occasionally in this Article refer to "women" or "the mother" when discussing pregnancy and abortion.

8. Indeed, some of these bans do not provide exceptions for rape or incest, *see* ALA. CODE § 26-23H-4, or for medical reasons other than "substantial impairment of a major bodily function." TEX. HEALTH & SAFETY CODE § 170A.002(b)(3)(B).

9. *See* Leila Bronner, *Is Abortion Murder?* LILITH (Winter 1997-98), https://lilith.org/articles/is-abortion-murder/ [https://perma.cc/67AF-M4FS].

10. *Roe*, 410 U.S. at 159.

that life begins at conception.[11] But none of the science has changed since *Roe* was decided. In fact, the scientific facts that states have relied on to impose abortion bans were presented to the Supreme Court in *Roe* to justify Texas's abortion ban.

For example, Alabama has justified its fifteen-week ban based on "scientific evidence" that the fetus begins to have reflexes and therefore responds to pain. But this "scientific evidence" was presented in an amicus brief in *Roe*. The brief, filed by pro-life physicians, argued that at conception a "new and unique being is created" that is human.[12] In support of this position, the brief noted certain medical facts, including that the fetus has reflexes starting at the forty-second day and the "fetal heartbeat," which begins at five and a half weeks, "is essentially similar to that of an adult in general configuration."[13] Similar supposedly scientific justifications were also before the Court in *Webster v. Reproductive Health Services* and *Planned Parenthood v. Casey*.[14] In *Dobbs*, Mississippi argued that the medical literature has progressed and thus it is a scientific fact that fetuses react to stimuli, including pain, and feel pain. But nothing significant has changed medically or scientifically since *Roe*. Tellingly, the Court relied on none of these "scientific" justifications to find Mississippi's abortion ban rational in *Dobbs*.[15] The truth is that when a fetus becomes a "life" or a "person" whose interests should outweigh those of the living pregnant person carrying it is not scientifically or medically ascertainable. Instead, the idea of when "life" or "personhood" begins is largely influenced by religious views. Thus, the "adopti[on of] one the-

11. *See, e.g.*, Petition for Writ of Certiorari at 18, Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 15, 2020) (alleging that in vitro fertilization "has established for many, lay and scientific alike, that conception is the moment when human life begins.").

12. Motion & Brief Amicus Curiae of Certain Physicians, Professors & Fellows of the Am. Coll. Obstetrics & Gynecology in Support of Appellees, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1971 WL 12805710, at *8.

13. *Id.* at *11.

14. *See, e.g.*, Brief of the Am. Ass'n Prolife Obstetricians & Gynecologists (AAPLOG) et al., as Amici Curiae in Support of Respondents, Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006428 (discussing medical ethics); Brief of the Am. Acad. Med. Ethics as Amicus Curiae in Support of Respondents & Cross-Petitioners Robert P. Casey et al., Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006419 (urging Court to reconsider abortion jurisprudence in light of advancements in medical technology); Brief for Bernard N. Nathanson, M.D. as Amicus Curiae Supporting Appellants, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605), 1988 WL 1026213 (addressing fetal development, including fetal pain perception, and medical ethics).

15. *Dobbs*, 142 S. Ct. at 2284 (finding rational the state's interest in "protecting the life of the unborn" and banning dilation and evacuation procedures as "barbaric," "dangerous for the maternal patient," and "demeaning to the medical profession.").

ory of life,"[16] as the Court described it in *Roe*, to justify outright bans of abortion, is arguably the adoption of a *religious* theory.[17]

Justice Sotomayor recognized this during argument in *Dobbs*. She asked Scott Stewart, the Solicitor General for Mississippi:

> How is your [the State's] interest anything but a religious view? The issue of when life begins has been hotly debated by philosophers since the beginning of time. It's still debated in religions. So, when you say this is the only right that takes away from the state the ability to protect a life, that's a religious view, isn't it[?][18]

Indeed, looking at the statements of the legislators who sponsor and support pre-viability abortion bans reveals that Justice Sotomayor is correct: the recent abortion bans are motivated by legislators' *religious* (not scientific) belief in fetal personhood.[19] For example, Bryan Hughes, the author and sponsor of Senate Bill 8, a Texas law that bans abortion after the presence of a fetal heartbeat, is a member of The National Association of Christian Lawmakers.[20] The founder of that organization has explained its purpose as follows: "Our ultimate goal and intent is that we restore the Judeo-Christian foundations of our government that were intended from the very beginning."[21] Senator Hughes regularly tweets biblical phrases. On Sept. 5, 2021, he tweeted, "Before I formed you in the womb I knew you, before you were born I set you apart. Jeremiah 1:5."[22] Jonathan Mitchell, who drafted Senate Bill 8, attended Wheaton College, an evangelical liberal arts col-

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16. *Roe*, 410 U.S. at 162.

17. Peter S. Wenz has made this argument in his book *Abortion Rights as Religious Freedom*. *See* PETER S. WENZ, ABORTION RIGHTS AS RELIGIOUS FREEDOM (Temp. Univ. Press 1992).

18. *See generally* Oral Argument, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), https://www.oyez.org/cases/2021/19-1392 [https://perma.cc/3F4X-PLEQ]. Stewart acknowledged in response that if Sotomayor were right that the view that the fetus is a life is a religious one, it would run up against the Court's religious exercise jurisprudence. He said, "it's not tied to a religious view, and I don't think . . . were it otherwise, this Court's jurisprudence . . . on this issue would run right into some of its religious exercise jurisprudence." *Id*.

19. In *Dobbs*, Justice Alito said that "[a]bortion presents a profound moral issue on which Americans hold sharply conflicting views." 142 S. Ct. at 2240. It may indeed be a moral issue, but it is clear that the sponsors of abortion bans are motivated mainly by their *religious* views of when life begins.

20. Mya Jaradat, *These Christian lawmakers are on the offensive against abortion*, DESERT NEWS (July 20, 2021), https://www.deseret.com/2021/7/20/22583625/these-christian-lawmakers-are-on-the-offensive-against-abortion-rights-texas-heartbeat-bill-abortion [perma.cc/7E6K-PE4B].

21. Mya Jaradat, *How this new group for Christian lawmakers will try to remake American politics*, DESERT NEWS (July 9, 2021), https://www.deseret.com/faith/2021/7/9/22566116/meet-the-new-conservative-faith-based-organization-that-will-make-a-big-impact-on-american-politics [https://perma.cc/B9M9-7PNK].

22. @SenBryanHughes, TWITTER (Sept. 5, 2021, 9:32 AM), https://twitter.com/SenBryan Hughes/status/1434524741554081797 [https://perma.cc/K232-CKWA].

lege in Illinois. He served as a contract attorney for Texas Values, whose vision is "to stand for biblical, Judeo-Christian values by ensuring Texas is a state in which religious liberty flourishes, families prosper, and every human life is valued."[23] When Governor Greg Abbott signed Senate Bill 8, he claimed that "our creator endowed us with the right to life, and yet millions of children lose their right life every year because of abortion. In Texas we work to save those lives."[24]

During debate on Montana's House Bill 136, which bans abortions after twenty weeks and was signed into law in April 2021, the sponsor of the bill, Representative Lola Sheldon-Galloway, declared, "I stand today as a witness that this practice of infants dying because they are not wanted or not planned is an abomination in God's eyes, and I will continue to fight for the most invulnerable [*sic*]."[25] The sponsor of Arkansas Senate Bill 6, a near-total abortion ban without exceptions for rape or incest that was signed into law in March 2021, referred to the Bible to justify the bill, saying, "There's six things God hates, and one of those is people who shed innocent blood. I'm not going to be a part of any of that."[26] At the signing of Alabama's May 2019 abortion ban, which also provides no exceptions for rape or incest, Governor Kay Ivey released a statement that said: "To the bill's many supporters, this legislation stands as a powerful testament to Alabamians' deeply held belief that life is precious and that every life is a sacred gift from God."[27] As to the Mississippi bill at issue in *Dobbs*, one cosponsor said during debate on another anti-abortion bill, "I serve God who says life is in the blood. And this bill will protect those lives."[28]

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23. Mimi Swartz, *Meet the Legal Strategist Behind the Texas Abortion Ban*, TEX. MONTHLY (Sept. 5, 2021), https://www.texasmonthly.com/news-politics/meet-the-legal-strategist-behind-the-texas-abortion-ban/ [https://perma.cc/G6AZ-7ZGZ].

24. Linda Greenhouse, *God Has No Place in Supreme Court Opinions*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/2021/09/09/opinion/abortion-supreme-court-religion.html [https://perma.cc/KUE3-TFPX].

25. Brief Amicus Curiae of the Freedom from Religions Found., Ctr. for Inquiry & Am. Atheists in Support of Respondents at 9, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available at https://www.supremecourt.gov/DocketPDF/19/19-1392/192717/20210917120823669_Dobbs%20Final%20Brief.pdf [https://perma.cc/M7JS-VC2G]) (citing Zack Kaplan, *Abortion-related bills move closer to governor's desk,* KULR8 (Apr. 21, 2021), https://www.kulr8.com/regional/abortion-related-bills-move-closer-to-governors-desk/article_cfc681b6-19fb-5697-864f-f2971d989034.html)[https://perma.cc/M2JN-JCFV].

26. *Id.* at 10 (citing Austin Bailey, *Arkansas senators pass near-total abortion ban; it now goes to House*, ARK. TIMES (Feb. 22, 2021), https://arktimes.com/arkansas-blog/2021/02/22/arkansas-senators-pass-near-total-abortion-ban-it-now-goes-to-house [https://perma.cc/QGG7-NA84]).

27. *Id.* at 10–11 (citing *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act,* OFF. ALA. GOVERNOR (May 15, 2019), https://governor.alabama.gov/newsroom/2019/05/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/ [https://perma.cc/ZQ67-9P5B]).

28. *Id.* at 12.

Another of the bill's co-sponsors sent a letter to the governor, the lieutenant governor, state senate, and his fellow members of the state house of representatives in 2017, urging them to outlaw abortion after the detection of a heartbeat. In the letter he said:

> It is our duty as men and women of Christ to stand in the gap between tyranny and evil and those who are unable to defend themselves. There is one set of laws above all others and that is God's law in our land as well as the Constitution—for the latter cannot exist without the blessing of the first.[29]

Those who have drafted, sponsored, voted for and supported abortion bans have thus explicitly "invoke[d] God as their legislative drafting partner."[30] Laws that ban abortions pre-viability are therefore clearly religiously motivated. Moreover, as already discussed, these laws are based on the belief that a person is created at the moment of conception, which is a religious, not a scientific belief. As Sherry Colb has said, legislators who sponsor and vote for abortion bans "rest on their own religion . . . to impose what is to virtually all secular adults an absurd claim that an individual cell is a baby" and "when virtually everyone who believes in a proposition [that an individual cell is a baby] is a religious person and virtually every secular person rejects the same belief as absurd, it is clear that we have before us a religious and not a scientific belief."[31] Pre-viability abortion bans codify this particular religious belief—which is not a universal religious belief, but one of a few Christian denominations—into law.

Moreover, the decision *whether* to have an abortion is also often times informed by religious belief. Justice Kennedy acknowledged this in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, when he wrote that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her *spiritual* imperatives and her place in society."[32] Abortion bans may prevent pregnant people from making religiously-based decisions about abortion, and in some circumstances, may prevent them from abiding by religious imperatives. For example, in Judaism, a therapeutic abortion is *mandated* when the mother's life is in danger.[33] And some Jewish traditions broadly inter-

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29. *Id.*

30. Greenhouse, *supra* note 24.

31. Sherry F. Colb, *Why Free Exercise on Steroids Won't Benefit Progressive Religious People*, DORF ON L. (Jan. 3, 2022), http://www.dorfonlaw.org/2022/01/why-free-exercise-on-steroids-wont.html [https://perma.cc/D6HF-8QTG].

32. 505 U.S. 833, 852 (1992) (emphasis added).

33. *See* RABBI DAVID M. FELDMAN, ABORTION: THE JEWISH VIEW 803 (1983) (available at https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19861990/feldman_abortion.pdf [https://perma.cc/QHX7-LTZE]).

pret this mandate to include situations when the pregnant person's health, including her mental health, is in danger as well.[34] Thus, an abortion ban that does not provide a general exception for the health of the person carrying the pregnancy—like Texas's "trigger ban"[35]—could prevent a Jewish woman from abiding by a religious imperative to abort a fetus that is threatening her health.

Given that abortion bans are based on a specific religious view of when life begins, impose that view on the pregnant people subject to them, and may prevent some pregnant people from having religiously mandated or influenced abortions, this Article examines whether and how abortion bans could be challenged under the Constitution's First Amendment's Free Exercise and Establishment Clauses.

Early on, in fact, such challenges were brought to abortion regulations, including the Hyde Amendment, which bans Medicaid funds from being spent on most types of abortions.[36] But in *Harris v. McRae*, the Supreme Court found that the Hyde Amendment did not violate the Establishment Clause and dismissed the Free Exercise Clause claim for lack of standing. Several lower courts have also dismissed Religion Clause challenges to abortion regulations.[37]

However, since the Court's decision in *Harris* in 1980 and the lower court decisions following it in the early 1990s, the Supreme Court's Religion Clause jurisprudence has changed significantly. Most drastically, in the past three years, in a series of shadow docket cases and in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[38] and *Fulton v. City of Philadelphia*,[39] the Court has expanded the scope of the Free Exercise Clause in a way that has been described as placing it "on [s]teroids."[40] This Article therefore looks at whether this new, more expansive Free Exercise Clause could be used to challenge pre-viability abortion bans. The Article will also review the Supreme Court's Establishment Clause jurisprudence and will argue that although it may provide a basis to challenge pre-viability abortion bans,

34. *See, e.g.*, Dave Schechter, *Jewish Law and Abortion*, ATLANTA JEWISH TIMES (June 19, 2019), https://www.atlantajewishtimes.com/jewish-law-and-abortion/ [https://perma.cc/6LZ8-6JAQ] (quoting Rabbi Analia Bortz as saying, "[I]f the mother's life or health is at stake, then an abortion is required.").

35. Texas's abortion ban only provides exceptions for those placed at risk of death or those who have a "life-threatening physical condition" that poses "a serious risk of substantial impairment of a major bodily function." TEX. HEALTH & SAFETY CODE § 170A.002(b)(3).

36. Harris v. McRae, 448 U.S. 297, 308 (1980).

37. *See, e.g.*, Womens Servs., P.C. v. Thone, 636 F.2d 206, 208 (8th Cir. 1980); Jane L. v. Bangerter, 794 F. Supp. 1537, 1547 (D. Utah 1992).

38. 138 S. Ct. 1719, 1731 (2018).

39. 141 S. Ct. 1868, 1881 (2021).

40. Colb, *supra* note 31.

the Court's decision this term in *Kennedy v. Bremerton School District*[41] throws the viability of an Establishment Clause challenge into doubt.

In Part I of this Article, I will discuss different religious views on fetal personhood to establish that the idea that fetal personhood begins at or soon after conception is not just a religious view, but the religious view of a few particular Christian denominations. In Part II of this Article, I will discuss *Harris v. McRae* and the federal courts' treatment of challenges to abortion regulations based on the First Amendment's Religion Clauses. In Part III, I will look at the Court's current Free Exercise Clause jurisprudence and will argue that it provides more robust protection for conduct that is motivated by religious belief. It also gives religiously motivated conduct "favored-nation status," and requires any exemptions in the law to include religious exemptions. This new "on steroids" Free Exercise jurisprudence may provide a stronger basis to challenge abortion bans, especially because the Court has also made clear that it has no role measuring the reasonableness of religious belief, only its sincerity. Finally, in Part IV, I will revisit the Supreme Court's Establishment Clause cases and argue that, despite the Court's holding in *Harris v. McRae*, there may be room for pre-viability abortion bans (as opposed to abortion regulations) to be challenged as violating the Establishment Clause, although the *Kennedy* case throws such arguments into doubt. In Part V, I will do a reality check and ask whether it is realistic to believe the current Supreme Court will countenance these arguments. Ultimately, I conclude that challenges of pre-viability abortion bans pursuant to the Religion Clauses should be pursued.

## I. Different Religious Views on Fetal Personhood and Abortion

In *Roe v. Wade*, the Supreme Court acknowledged that there is a "wide divergence of thinking" on the "sensitive and difficult question" of "when life begins."[42] Certainly, beliefs about when a fetus becomes a person and thus whether abortion is murder differ from religion to religion and denomination to denomination. Even the Roman Catholic Church, which is often thought of as the source of the belief that fetal personhood begins at conception, did not always have this view. For Roman Catholics, the question of when the soul enters the body—

41. 142 S. Ct. 2407, 2428 (2022).

42. *Roe*, 410 U.S. at 159–60; *see also Dobbs*, 142 S. Ct. at 2320 (Breyer, J., dissenting) (describing the *Roe* Court as understanding "that different people's 'experiences,' 'values,' and 'religious training' and beliefs led to 'opposing views' about abortion.").

ensoulment—is crucial because the Church teaches that a soul that has not been baptized is condemned to eternal perdition.[43] In the Middle Ages, Catholics largely followed the teachings of St. Thomas Aquinas, who believed that male fetuses formed a soul at forty days and female fetuses at eighty days.[44] For that reason, the Council of Trent (1545–1563) restricted penalties for homicide to abortion of an animated fetus only.[45]

In the late nineteenth century, however, this view changed. In October 1869, Pope Pius IX issued his dogma of Immaculate Conception, which posited that it was possible that ensoulment occurred at conception and thus it was morally safer to protect fetal life from the moment of conception.[46] Earlier that year, in spring 1869, Bishop Spaulding of Baltimore released a pastoral condemnation of abortion that emanated from a council of bishops. He enunciated what has been considered the orthodox Catholic view of abortion ever since: "The murder of an infant before its birth is, in the sight of God and His Church, as great a crime, as would be the killing of a child after birth . . . . No mother is allowed, under any circumstances, to permit the death of her unborn infant, not even for the sake of preserving her own life."[47] After the Supreme Court's holding in *Roe v. Wade*, the Catholic Church issued a "Declaration on Abortion of the Sacred Congregation for the Doctrine of the Faith of November 18, 1974," which stated that life must be safeguarded from conception and that abortion and infanticide are crimes.[48] The Declaration also stated that human life begins with fertilization, and after this point, nothing can justify abortion.[49]

Protestant denominations differ in their view of when fetal personhood begins and thus their views on abortion. In 1976, the Southern Baptist Convention adopted a resolution affirming the biblical sacredness and dignity of all human life, including fetal life.[50] The

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43. Bronner, *supra* note 9.

44. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 566–68 (1989) (Stevens, J., dissenting). "Prior to Aquinas, St. Augustine, in the fourth century, asserted that God endowed a fetus with a soul only after its body was formed, which was between forty and eighty days into its development." Jia Tolentino, *Is Abortion Sacred?* NEW YORKER (July 16, 2022), https://www.newyorker.com/culture/essay/is-abortion-sacred [https://perma.cc/4URX-X4XQ].

45. *Id.*

46. Angel Lopez, *Pope Pius IX (1792-1878),* EMBRYO PROJECT ENCYCLOPEDIA (July 1, 2010), https://embryo.asu.edu/pages/pope-pius-ix-1792-1878 [https://perma.cc/BEF8-PW28].

47. JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 186 (Oxford Univ. Press 1978).

48. McRae v. Califano, 491 F. Supp. 630, 693 (E.D.N.Y. 1980).

49. *Id.*

50. *Id.* at 699.

United Methodist Church also believes in "the sanctity of unborn human life."[51] The Presbyterian Church generally does not take a position on when fetal life begins and instead leaves the decision up to the person making the decision whether to terminate the pregnancy.[52] The United Church of Christ also does not promote any specific belief about when fetal personhood begins and affirms its support for reproductive choice.[53]

The Shinto faith holds that a fetus becomes a human being only when it has "seen the light of day."[54] Hinduism is not concerned with whether the fetus is a human life. Its concern is non-violence and the belief in doing the least harm to all involved. Thus, Hinduism is generally opposed to abortion except where it is necessary to save the mother's life.[55] Buddhism believes in rebirth and teaches that individual human life begins at conception.[56] Buddhists also believe that no life, including non-human life, should be destroyed. However, different Buddhist traditions condone and allow abortion in some circumstances. For example, the Dalai Lama has suggested that if the birth would cause serious problems for the parent, abortion may be allowed.[57] He has said, "I think abortion should be approved or disapproved according to each circumstance."[58]

Islam has a nuanced view of abortion based on fetal development. The Islamic sacred text, the Qu'ran, condemns infanticide for the purposes of economic hardship, but this passage is generally believed to apply to live offspring, not abortion.[59] The Sunnah, which sets out the traditions and practices of the Prophet Mohammad, the central relig-

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51. *What is the UM position on abortion?*, PEOPLE OF THE UNITED METHODIST CHURCH, https://www.umc.org/en/content/ask-the-umc-what-is-the-united-methodist-position-on-abortion [https://perma.cc/3PU2-YY9U] (last visited Apr. 7, 2023).

52. *Abortion/Reproductive Choice Issues*, PRESBYTERIAN CHURCH (U.S.A.), https://www.presbyterianmission.org/what-we-believe/social-issues/abortion-issues/ [https://perma.cc/945V-3E6X] (last visited Apr. 7, 2023).

53. UNITED CHURCH OF CHRIST, GENERAL SYNOD STATEMENTS AND RESOLUTIONS REGARDING FREEDOM OF CHOICE 3 (available at https://www.uccfiles.com/pdf/GS-Resolutions-Freedom-of-Choice.pdf [https://perma.cc/C762-HBDQ]).

54. LAWRENCE LADER, ABORTION 94 (1966).

55. *Hinduism and abortion,* BBC Aug. 25, 2009), https://www.bbc.co.uk/religion/religions/hinduism/hinduethics/abortion_1.shtml [https://perma.cc/E64L-JTJU].

56. *Buddhism and abortion,* BBC (Nov. 23, 2009), https://www.bbc.co.uk/religion/religions/buddhism/buddhistethics/abortion.shtml [ https://perma.cc/KTM3-A2FZ].

57. *Id.*

58. *Id.*; *see also* Tolentino, *supra* note 44 (noting that the religious tradition of American Buddhists "casts abortion as the taking of human life and regards all forms of human life as sacred but also warns adherents against absolutism and urges them to consider the complexity of decreasing suffering, compelling them toward compassion and respect.").

59. Gilla K. Shapiro, *Abortion law in Muslim-majority countries: an overview of the Islamic discourse with policy implications*, 29 HEALTH POL'Y & PLAN. 483, 485 (2014).

ious figure in Islam, suggests that the fetus has some legal protections but is not considered a "full-fledged" human being.[60] In addition, the Prophet Muhammad explains fetal development in four stages: the first stage occurs from conception to 40 days at which time the fetus is considered to be merely seed; the second stage occurs from 40–80 days post conception at which time the fetus is considered to be a blood clot; the third stage occurs from 80–120 days at which time the fetus is considered to be an embryo; and then at 120 days ensoulment occurs.[61] Based on this conception of fetal development, some Islamic traditions ban abortion beginning at conception, some at 40 days post conception, and some at 120 days.[62] However, in all Islamic traditions and countries that base their laws on those traditions, there are exceptions to abortion bans, ranging from saving the life of the mother to social and economic reasons.[63]

The Hebrew Bible does not explicitly describe abortion as murder or explicitly oppose abortion.[64] Rather, the relevant text in Exodus makes clear that the mother is considered an independent life, while the fetus is not.[65] The Mishna, the written version of an oral legal commentary that describes and elucidates Jewish law and traditions, provides: "A woman that is having difficulty in giving birth is permitted to cut up the child inside her womb and take it out limb by limb because her life takes precedence."[66] According to Rashi, an esteemed eleventh-century Jewish scholar, the embryo can be sacrificed to save the mother because a fetus is considered to be a living being only when "its greatest part has emerged from the womb."[67] Thus, Jewish law makes clear that abortion is generally not considered to be murder, the fetus is not a soul or separate life independent of its mother prior to birth, and the life of the mother takes precedence over the life of the fetus.[68]

Thus, the basic Jewish position places the life and health of the mother above that of the fetus and believes that a fetus may be aborted for medical necessity, although even within the Jewish faith, there are disagreements as to when a person may have an abortion.[69]

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60. *Id.*
61. *Id.* at 486 T.2.
62. *Id.*
63. *Id.* at 489, 490 T.4.
64. Bronner, *supra* note 9.
65. *Id.*
66. LADER, *supra* note 54, at 97.
67. *Id.*
68. Bronner, *supra* note 9.
69. LADER, *supra* note 54, at 99.

For example, many Orthodox Jews believe that abortions are prohibited unless the mother's life is clearly threatened.[70] But some Jews, including Reform and Conservative Jews, interpret the ability to act to save the life of the mother more broadly, not just allowing, but mandating abortion to preserve the mother's life and also her health, including her mental health.[71] For example, in testimony given in the case challenging the Hyde Amendment, Rabbi David Feldman explained that when a woman's life or health is threatened, abortion becomes mandatory, meaning it becomes a religious duty.[72]

Given that different religions have different views on when life begins and thus whether abortion constitutes murder, abortion bans seem to violate the Religion Clauses because they codify into law "a religious tenet of some but by no means all Christian faiths."[73] But in 1980, in *Harris v. McRae*, the Supreme Court held that the Hyde Amendment, which prohibited federal funds from being spent on abortions, did not violate the Establishment Clause,[74] even though the legislative debate was full of references to the "immortal soul" of the fetus and to Herod's "slaughter of the innocents."[75]

In the next section I will discuss the Court's opinion in *Harris v. McRae*, as well as two other federal court cases that have considered whether abortion regulations can violate either the Establishment Clause or the Free Exercise Clause of the First Amendment. As this analysis will show, the arguments challenging abortion restrictions based on the Religion Clauses have not succeeded in gaining much traction, although Supreme Court jurisprudence has left open the question of whether abortion bans violate the Free Exercise Clause.

## II. The Courts' Treatment of Religion Clause Challenges to Abortion Regulations

The Supreme Court has only once considered whether abortion regulations violate either the Establishment Clause or the Free Exercise Clause and the federal courts have otherwise had little opportunity to

70. *McRae*, 491 F. Supp. at 695.

71. *Id.* at 696.

72. *Id.* This religious imperative is the basis of a current lawsuit brought by Congregation L'Dor Va-Dor, arguing that Florida's abortion ban violates Florida's Constitution, including the Florida Constitution's protections of religious freedom and guarantee of separation of church and state. *See generally* Generation to Generation, Inc. v. Florida (2d Cir. Fla., Leon Cnty.) (available at https://www.documentcloud.org/documents/22060281-complaint-ldor-va-dor-vs-state-of-florida-final?responsive=1&title=1).

73. *Webster*, 492 U.S. at 566–67 (Stevens, J., dissenting).

74. *Harris*, 448 U.S. at 301, 319.

75. *McRae*, 491 F. Supp. at 726.

consider whether abortion regulations violate the Religion Clauses. This section will discuss the Supreme Court's opinion in *Harris v. McRae* and two federal court cases that have held that abortion regulations do not violate the Religion Clauses.

In *Harris v. McRae*, decided in 1980, the Court found that the Hyde Amendment, which prohibits Medicaid funds from being spent on abortion except where the life of the mother is in danger or when the pregnancy arises from rape or incest, does not violate the Establishment Clause and left the Free Exercise Clause issue open.[76] To understand the Supreme Court's holding, it is helpful to have some familiarity with the district court's opinion, as the district court held a lengthy trial on the issues.

During the trial, there was evidence that during the legislative debates on the Hyde Amendment that language "seen in the Roman Catholic literature" that refers to fetuses as "defenseless" and "innocent" and that invokes Herod's "slaughter of the innocents"[77] was used repeatedly. The district court also documented at length the efforts of Catholic organizations to get the Amendment enacted.[78] Based on this evidence the district court found that the Hyde Amendment was certainly influenced by religious belief and action. The court said:

> What can be said is that an organized effort of institutional religion to influence the vote on the enactments in question on religious grounds was made, that it cannot be said that the effort did not influence a decisive number of votes through a combination of religious belief and principle on the part of some with a fear of political reprisal on the part of others, and that the narrow votes in both houses are open to the inference that in one or the other way the religious factor was decisive of the issue for enough legislators to affect the outcome of the voting.[79]

Nevertheless, the district court inexplicably concluded that the purpose of the Hyde Amendment was to prevent abortions, which is not "an identifiably religious purpose."[80] Despite explicitly finding that the enactment of the law was arguably due to the religious factor, the court found that the Hyde amendment reflected "a traditionalist view more accurately than any religious one."[81] Thus, the court held that the law did not violate the Establishment Clause.

76. *Harris*, 448 U.S. at 301, 319–20.
77. *McRae*, 491 F. Supp. at 726.
78. *See, e.g.*, *id.* at 702–10, 714–23.
79. *Id.* at 724–25.
80. *Id.* at 741.
81. *Id.*

The Supreme Court, adopting this view of the law—that it reflected traditionalist values rather than religious ones—affirmed the district court's conclusion that the law did not violate the Establishment Clause.[82] The Court stated that just because "the Judaeo [*sic*]-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact law prohibiting larceny."[83] In other words, the Court suggested that where the moral basis for a law is widely accepted by certain religions, the "purpose" of the law is the moral purpose, rather than the religious one. Thus, the Supreme Court held that although the Hyde Amendment's funding restrictions "coincide[d] with the religious tenets of the Roman Catholic Church," that coincidence was not sufficient to show that the law violated the Establishment Clause.[84]

The district court did find, without much legal analysis, that a woman's "conscientious decision . . . to terminate her pregnancy is doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment"[85] and thus that the Hyde Amendment violated the Free Exercise Clause.[86] On that issue, the Supreme Court punted, holding that no plaintiff had standing to raise the claim. Specifically, the Court, citing to *Abington School District v. Schempp*,[87] insisted that it is necessary in a Free Exercise Clause case "for one to show the coercive effect of the enactments as it operates against him in the practice of his religion."[88] Thus, the individual indigent pregnant plaintiff seeking an abortion had to show that "she sought an abortion under compulsion of religious belief."[89] The Court held that she failed to do so.[90] The other plaintiffs, who did show why their religion would compel an abortion in certain circumstances, failed to allege that they expected to fall pregnant or that they were eligible for Medicaid.[91] Thus, none of the plaintiffs had standing to challenge the Hyde Amendment under the Free Exercise Clause.[92]

Notably, then, in *Harris v. McRae*, the Court did not foreclose the possibility that a Free Exercise Challenge could be brought to an

82. *Harris*, 448 U.S. at 319–20.
83. *Id.*
84. *Id.* at 319–20.
85. *McRae*, 491 F. Supp. at 742; *see also Harris*, 448 U.S. at 305–06.
86. *See also Harris*, 448 U.S. at 305.
87. 374 U.S. 203, 223 (1963).
88. *Harris*, 448 U.S. at 321 (citing *Abington Sch. Dist.*, 374 U.S. at 223).
89. *Id.* at 320 (citing McGowan v. Maryland, 366 U.S. 420 (1961)).
90. *Id.*
91. *Id.* at 320.
92. *Id.* at 321.

abortion regulation. Instead, because there was no individual plaintiff who was pregnant or intended to be pregnant and who could claim that that her religious belief was infringed by the funding prohibition at issue in the case, the Court held that no plaintiff had standing to bring the Free Exercise claim.[93]

As stated, Establishment Clause and Free Exercise challenges otherwise have rarely been considered by the courts. However, in a 1980 per curiam opinion by the Eighth Circuit handed down shortly after *Harris v. McRae*, the court held that a Nebraska law that contained an informed consent provision and a 48-hour waiting period for abortions did not violate the Establishment Clause or the Free Exercise Clause.[94] The Eighth Circuit directly followed *Harris* and affirmed the district court's holding that the idea motivating the legislation was "as capable of being labeled philosophical as religious."[95] With respect to the Free Exercise claim, the Eighth Circuit, again following *Harris*, held that it is "necessary" in a Free Exercise case that the plaintiff "show the coercive effect of the enactment as it operates against him (as an individual) in the practice of his religion."[96] The court, relying on *Wisconsin v. Yoder*,[97] also suggested that the plaintiff would have "to establish that the decision to abort was 'fundamental to' their faith"[98] in order to be able to prevail on a Free Exercise claim. Because plaintiffs in the case had failed to show this, the court affirmed the district court's conclusion that the Nebraska law did not violate the Free Exercise Clause.

A district court in Utah also considered Establishment and Free Exercise challenges to a Utah law regulating abortion. The decision was handed down two years after the Supreme Court issued its decision in *Employment Division v. Smith*.[99] In *Jane L. v. Bangerter*, the district court held that the Utah law did not violate the Establishment Clause.[100] Following *Harris*, the court found that although there was some evidence that legislators in Utah were influenced by their Mormon faith to enact the law, the law nevertheless had a "secular purpose."[101] The court also found that the "primary effect" of the law was not a religious one. Similar to the *Harris* Court's reference to "tradi-

93. *Id.* at 320–321.

94. *Womens Servs.*, 636 F.2d at 207.

95. *Id.* at 208 (citing Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1036 (D. Neb. 1979)).

96. *Id.* at 209 (citing *Harris*, 448 U.S. at 321).

97. 406 U.S. 205, 216 (1972).

98. *Womens Servs.*, 483 F. Supp. at 209 (citing *Yoder*, 406 U.S. at 216).

99. 494 U.S. 872 (1990).

100. 794 F. Supp. 1528, 1528–29 (D. Utah 1992).

101. *Id.* at 1535 n.11. Interestingly, the court never stated what that secular purpose is.

tionalist values," the district court held that "[r]equiring women in certain circumstances to bear children they have conceived is as fully consistent with a traditional moral framework as it is with the view-point of any one or several religions."[102] For that reason, the court concluded that the Utah law did not "advance or inhibit" a particular religion as its primary effect.[103]

As to the Free Exercise claim, the court hewed closely to *Employment Division v. Smith*.[104] As described in more detail below, in *Smith*, the Supreme Court held that laws of general applicability that only incidentally burden religious practice will pass constitutional muster if they are rational. Following *Smith*, the court in *Bangerter* found that abortion laws do not ban "certain physical acts [that are] integrally tied up with the exercise of religions (such as assembling for worship, proselytizing, or abstaining from certain foods or transportation)."[105] Instead, since the abortion law seemed to be a neutral, generally applicable law, the court held it was valid because plaintiffs could not allege a concomitant violation of another constitutional protection.[106]

Thus far, then, the federal courts have not been amenable to challenges of abortion regulations based on the Religion Clauses. However, since these decisions, the Court's First Amendment jurisprudence, particularly its Free Exercise jurisprudence, has evolved considerably. First, *Smith* fundamentally changed how the Court views Free Exercise challenges—moving away from placing the burden on the plaintiff to show the law is coercive to the plaintiff's "fundamental" religious beliefs and towards an evaluation of whether the law has a purpose or effect of burdening religious belief or practice. Thus, to the extent that the *Harris* Court set out a standard by which Free Exercise challenges to abortion bans should be evaluated, its reliance on pre-*Smith* jurisprudence means that part of the opinion is no longer good law. Moreover, while the Court has not officially overruled *Smith*, it has arguably effectively done so. Certainly, the Court currently gives considerably more protection to religiously motivated conduct than it did when *Harris v. McRae* was decided, leaving room to challenge abortion bans under the Free Exercise Clause.

102. *Id.* at 1546.
103. *Id.*
104. 494 U.S. 872, 877 (1990).
105. *Bangerter*, 794 F. Supp. at 1546.
106. *Id*. at 1546–47.

## III. The Supreme Court's Recent Broadening of the Free Exercise Clause May Make Abortion Bans Susceptible to Challenge

### *A. The Free Exercise Clause Under Smith Means the Purported Religiously Influenced Conduct Need Not Be "Central" to Belief*

In *Employment Division v. Smith*, the Supreme Court held that facially neutral laws without a purpose to burden religious practice would be subject only to the rational basis test. In adopting this standard, the Court distinguished between "religious beliefs" and "the performance of . . . physical [religious] acts," such as assembling to worship, participating in sacramental use of bread and wine, proselytizing, and abstaining from certain foods."[107] The Court made clear that the First Amendment prohibits government regulation of "religious beliefs.' "[108] Likewise, the Court also made clear that if the purpose of a law is to suppress religious conduct—for example, a law banning a religious act "only when engaged in for religious reasons"—that too would be prohibited by the First Amendment.[109] However, the Court held that where a neutral law of general applicability only incidentally burdens religious conduct, the First Amendment "has not been offended."[110]

To a certain extent, *Smith* distinguishes between religious belief and religious conduct and gives a somewhat more favored status to religious *belief*. Indeed, citing *Reynolds v. United States*,[111] the Court noted, "laws . . . cannot interfere with mere religious belief and opinions, [but] they may with practices . . . ."[112] At issue in *Smith* was a law that burdened religious conduct—the religious use of peyote—not religious belief. And because the law criminalizing peyote use was neutral (its purpose was not to disfavor religious belief or practice) and was generally applicable because it criminalized all sorts of drug use, the Court found it did not violate the Free Exercise Clause.

After *Smith*, then, the Court's ostensible focus is not on whether a law has a coercive effect on conduct or belief that is fundamental to a person's faith. Instead, a court is supposed to consider whether the purpose or effect of a law is the suppression of religious belief or con-

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107. 494 U.S. 872, 877 (1990).
108. *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 402 (1963)).
109. *Id.*
110. *Id.* at 878.
111. 98 U.S. 145, 166 (1878).
112. 494 U.S. at 879.

duct.[113] Thus, the Court's analysis in *Harris*, which focused on the coercive effect of the law, is no longer good law after *Smith* and the Eighth Circuit's analysis in *Womens Services v. Thone*, which was based on the Court's older jurisprudence, also has no valence.

### *B. The Free Exercise Clause After Smith Protects a Much Broader Swath of Religiously Influenced Conduct*

Since *Smith*'s initial move away from evaluating either the "coerciveness" of a law or the "fundamentalness" of belief or conduct to religion, the Court has moved towards protecting more and more religiously influenced conduct, and therefore prohibiting more and more regulation of conduct, under the Free Exercise Clause. As Sherry Colb has explained, "[t]he Court sees discrimination against religion everywhere," making the *Smith* standard an illusion.[114] More specifically, recent cases show that the Court sees discrimination against religion everywhere because it sees religion everywhere: cases such as *Fulton v. City of Philadelphia* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* show the Court's willingness to give protection not just to religious belief and religious conduct, but to conduct that we might consider secular, but that is influenced by or motivated by religious belief.[115]

In *Fulton v. City of Philadelphia*, at issue was whether a city provision that prohibited foster care service entities that contracted with the city from discriminating on the basis of sexual orientation violated the Free Exercise Clause.[116] Catholic Social Services argued that the regulation required it to violate its belief that marriage is between a man and a woman and the Court agreed, holding that the City's failure to provide exceptions for Catholic Social Services violated the Free Exercise Clause.[117] Notably, the "religion" that the Court protected in this case was not pure religious belief nor religious conduct, what the Court described in *Smith* as "the performance of . . . physical [religious] acts," such as worship, proselytizing, or refraining from eating certain foods.[118] Instead, it was secular conduct—here the certifying of families as being eligible to be foster families—that was

113. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

114. Colb, *supra* note 31.

115. Justice Gorsuch affirmed this type of breadth of protection provided by the Free Exercise Clause in *Kennedy v. Bremerton*: he wrote in his opinion for the majority that the Free Exercise Clause does "its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." 142 S. Ct. at 2421.

116. 141 S. Ct. 1868, 1874 (2021).

117. *Id.* at 1875, 1882.

118. *Emp. Div.*, 494 U.S. at 877.

influenced or motivated by religious belief. Thus, *Fulton* seems to suggest that the Court is now willing to protect, under the Free Exercise Clause, secular conduct that is *informed* by religious views and will not require such conduct to be *compelled* by religious belief,[119] as it had previously in *Harris v. McRae*.[120]

The Court's decision in an earlier case, *Masterpiece Cake Shop Ltd. v. Colorado Civil Rights Commission*, supports this conclusion. In *Masterpiece Cakeshop*, at issue was whether the Colorado Civil Rights Commission's decision finding that a baker who refused to bake a cake for a gay couple based on his "sincere religious beliefs and convictions" infringed the couple's civil rights violated the Free Exercise Clause. Again, baking cakes is not a religious activity nor is it a religiously compelled activity. Instead, it is a secular activity that, in this case, was informed by the baker's religious beliefs. As the Court put it, at issue was whether the Colorado Civil Rights Commission showed "impermissible hostility toward the sincere religious beliefs that *motivated* [the baker's] objection [to baking a cake for a gay wedding]."[121]

In *Harris v. McRae*, the Court held that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him (as an individual) in the practice of religion."[122] But *Smith*, *Fulton*, and *Masterpiece* have extended the reach of the Free Exercise Clause to not require a coercive effect and to protect conduct way beyond just the "practice of religion." After all, Catholic Social Services, in its provision of foster care services, may have been engaged in conduct informed by its religious beliefs, but the actual provision of foster care services is not "the practice of religion." Likewise, baking and selling cakes is not "the practice of religion," and thus a statute preventing discrimination against LGBTQ individuals is not "coercive" as it "operates" against the baker in his "practice of religion." Instead, the regulation operates against the baker in his practice of secular conduct that is influenced by his religious beliefs. Indeed, the Court now seems to believe that the Free Exercise Clause applies not only when a law burdens religious belief or conduct that is inherently religious, but also when a law burdens or limits an individual engaging in secular conduct that is informed by religious beliefs.

119. *Fulton*, 141 S. Ct. at 1875 ("The religious views of CSS inform its work in this system.").

120. *Harris*, 448 U.S. at 320.

121. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1729 (2018) (emphasis added).

122. *Harris*, 448 U.S. at 321 (citing Abington Sch. Dist. v. Schempp, 374 U.S. at 223).

### C. *After* Smith*, the Court Will Not Scrutinize the Relationship Between Conduct and Belief so Long as the Belief Is Sincerely Held*

Moreover, after *Smith*, the Court will look only at whether the secular conduct involved is informed by "sincerely held belief" and will not scrutinize the relationship between the secular conduct and belief. In *Smith*, the Court made clear that "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"[123] We can see this precept play out in *Fulton* and *Masterpiece Cakeshop*.

In *Fulton*, in particular, the majority opinion never asks or considers whether providing foster care services is "compelled" by Catholicism or "fundamental" to the faith.[124] Instead, the Court takes Catholic Social Services at its word. This refusal to interrogate the relationship between the secular conduct being regulated and religious belief is also consistent with the Court's opinion in *Burwell v. Hobby Lobby*.[125] In that case the Supreme Court decided that a contraception mandate, which required employers to provide health insurance that covered contraception, violated the Religious Freedom Restoration Act with respect to several closely-held corporations whose ownership believed that covering certain forms of contraception violated their religious belief that life begins at conception. One of the arguments made in the case for why the mandate did not burden the exercise of religion was that there was too much of an attenuated connection between "what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg)" and the moral wrong.[126]

The Supreme Court refused to even countenance the issue, holding that "federal courts have no business addressing . . . whether the religious belief asserted . . . is reasonable."[127] In other words, the Court in *Hobby Lobby* refused to require a tight fit between the secular con-

123. Emp. Div. v. Smith, 494 U.S. at 887 (quoting United States v. Lee, 455 U.S. 252, 262 n.3 (1982) (Stevens, J., concurring)); *see also id.* ("[W]e have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.").

124. *Fulton*, 141 S. Ct. at 1868. Interestingly, Justice Alito, in his concurrence advocating for the overruling of *Smith*, spends several paragraphs arguing why the provision of foster care is central to the mission of the Catholic Church in the United States. *See id.* at 1883–85 (Alito, J., concurring).

125. 573 U.S. 682, 688–91 (2014).

126. *Id.* at 723.

127. *Id.* at 724.

duct being regulated (providing insurance that requires coverage for birth control) and the religious belief that is being burdened (that some forms of birth control constitute murder). In fact, it refused to scrutinize the "fit" at all.

The Court's current Free Exercise jurisprudence thus does not require any showing that the conduct the government is regulating is "compelled by" or "fundamental" to religious belief. Instead, arguably, under the Court's most recent case law, once the government regulates certain conduct, it cannot burden the free exercise of religion by any actor engaged in that conduct so long as the actor states that conduct is influenced by a sincerely held religious belief.

### *D. The Decision to Abort as Informed by Religious Belief Is Arguably Protected Under the Free Exercise Clause*

Under *Harris v. McRae*, it seemed that in order for a person to challenge an abortion regulation she would have to show that "she sought abortion under compulsion of religious belief"[128] or "that the decision to abort was 'fundamental to'" her faith.[129] Of course, some Jewish women could make this showing,[130] but most religions do not compel or mandate abortion. Instead, the decision about whether to have an abortion is a decision—a secular act—that is very often "informed by"[131] or made consistent with an individual's religious belief. Under the Court's reasoning in *Fulton* and *Masterpiece Cakeshop*, the Free Exercise Clause would seem to apply to these circumstances. The same way that Catholic Social Services desired to provide foster care services in concert with its religious beliefs, many individuals seeking abortion wish to terminate their pregnancies in concert with their religious beliefs. Obviously, seeking an abortion is not typical religious activity. But neither is certifying couples for foster care or baking cakes. Instead, the decision to have an abortion for some individuals can be said to be activity that is informed by religious belief. When a person seeking abortion does so after consultation with a religious advisor, religious texts, or by relying on her own religious beliefs, she is, as Justice Gorsuch has put it, "liv[ing] out [her] faith in daily life."[132] In *Fulton* and *Masterpiece Cakeshop*, the Court held that the Free Exercise Clause reaches such religiously-informed *secular* activity. Thus, under a broad view of the reasoning in these cases, abortion bans ar-

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128. *Harris*, 448 U.S. at 320.
129. *Womens Servs.*, 636 F.2d at 209.
130. *See* FELDMAN, *supra* note 33.
131. Fulton v. City of Phila., 141 S. Ct. 1868, 1901 (2021) (Alito, J., concurring).
132. *Kennedy*, 142 S. Ct. at 2421.

guably violate the Free Exercise Clause because they prohibit pregnant individuals from acting in concert with their religious beliefs.

Some of the broad language in the cases supports this interpretation that abortion fits within the Court's view of protected conduct under the Free Exercise Clause. In *Masterpiece Cakeshop*, the Court made clear that government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[133] Arguably, abortion bans are hostile to those whose religious beliefs do not consider the zygote, embryo, or fetus a life. Abortion bans also "presuppose" the illegitimacy of religious beliefs that consider an embryo to become a person or a life equal to the mother's only later in the pregnancy. And in *Fulton*, the Court noted that "C[atholic] S[ocial] S[ervices] seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner *consistent with its religious beliefs*; it does not seek to impose those beliefs on anyone else."[134] This could be said of individuals seeking abortion: they want to be able to seek abortion services consistent with their religious beliefs; they don't seek to impose those beliefs on anyone else.

Moreover, if a pregnant person challenges an abortion ban as prohibiting her from acting in concert with her sincerely held religious beliefs, the Court's jurisprudence after *Fulton*, *Masterpiece Cakeshop*, and *Hobby Lobby* prohibits a court from scrutinizing whether, in fact, the person's desire to get an abortion is closely related to her religious views. As long as the individual asserts she is acting pursuant to a sincerely held religious belief, a court cannot interrogate the underlying belief or the fit between the conduct and belief.[135] Thus, pursuant to *Fulton*, *Masterpiece Cakeshop*, and *Hobby Lobby* it seems that it would be sufficient for a person to sincerely assert that her decision to have an abortion is religiously motivated and the Court could inquire no further.

Because the Supreme Court has clearly broadened the type of conduct that it considers protected under the Free Exercise Clause and because the Court will not inquire as to the truthfulness or centrality of religious belief, abortion bans seem now susceptible to challenge pursuant to the clause. But that is not the only aspect of the Court's

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133. *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

134. *Fulton*, 141 S. Ct. at 1882 (emphasis added).

135. *See also Smith*, 494 U.S. at 886 (stating no "principle of law or logic [could] be brought to bear to contradict a believer's assertion that a particular act is 'central' to [her] personal faith[.]").

"Free Exercise on Steroids" jurisprudence that would seem to make abortion bans unconstitutional. In *Fulton* and several cases from the Supreme Court's shadow docket involving COVID regulations, the Court has made clear that a law cannot be considered one of "general applicability" and thus subject to the rational basis test if it provides exceptions or exemptions for secular purposes but not for religious ones.

### *E. Abortion Bans Without Religious Exemptions Violate the Court's Expansive Free Exercise Clause*

Recall that the protections of the Free Exercise Clause will apply after *Smith* if the law at issue is not a neutral law of general applicability, but instead discriminates against some or all religious beliefs.[136] Thus, the main issue that a court must resolve at the outset of a Free Exercise challenge is whether the law or policy at issue is a neutral one of general applicability or one that discriminates against religion. In *Fulton*, the Court held that "a law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing '"a mechanism for individualized exemptions."' "[137] The Court also said that a law lacks general applicability if "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[138] The City of Philadelphia's services contract in *Fulton* allowed for individual exemptions that could be made available at the discretion of the Commissioner, but the City had "made clear" that the Commissioner had no intention of exempting Catholic Social Services from the anti-discrimination provisions of the contract.[139] The Court saw this as religious discrimination and applied "the most rigorous of scrutiny."[140]

Similarly, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court held that a New York provision that allowed essential businesses to operate without capacity limitations but required houses of worship to limit their attendance numbers was likely to violate the Free Exercise Clause.[141] This was because in the Court's view, the reg-

136. *Church of the Lukumi Babalu Aye*, 508 U.S. at 532.

137. *Fulton*, 141 S. Ct. at 1877 (citing *Smith*, 494 U.S. at 884).

138. *Id.*; *see also Kennedy*, 142 S. Ct. at 2422 ("A government policy will fail the general applicability requirement if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way or if it provides a mechanism for individualized exemptions.") (internal citations omitted).

139. *Fulton*, 141 S. Ct. at 1878.

140. *Id.* at 1881.

141. Roman Cath. Diocese Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020).

ulations were not "neutral" and of "general applicability" since "they single[d] out houses of worship for especially harsh treatment."[142] The emergency orders at issue in the case treated houses of worship similarly to other public gatherings, such as "public lectures, concerts, and theatrical performances," and put them in a different category from essential businesses, where large groups of people never congregate at once for extended periods of time.[143] Nevertheless, even though the houses of worship were, from a scientific and epidemiological perspective, distinguishable from essential businesses, the Court didn't care. Essentially, the Court gave religion "most favored nation status,"[144] meaning that religiously informed activity has to be treated equally or better than secular activity. This in turn means that if there are exceptions in a law for *any* secular activity, even secular activity that is not comparable to the religious activity at issue, there have to be similar exceptions for religious activity. As Erwin Chemerinsky has explained, the shadow docket cases and *Fulton* mean that "any law that has the possibility of exceptions is going to have to be amenable to a challenge based on free exercise of religion and is going to have to meet strict scrutiny."[145]

Of course, almost all of the current abortion bans contain some exceptions. For example, the 15-week ban at issue in the *Dobbs* case bans all abortions after 15 weeks' gestational age except in medical emergencies or for reasons of severe fetal abnormality.[146] Texas's trigger law bans all abortions except when the person seeking the abortion is placed at risk of death or has a "life-threatening physical condition" that poses "a serious risk of substantial impairment of a major bodily function."[147] But none of the laws provide an exemption for a pregnant person to have an abortion where doing so is in concert with—or even mandated by—her religious beliefs or practice. This means that all, or almost all, abortion bans have individualized exemptions based on secular reasons and no exemptions that would encompass religiously-informed abortion decisions. Moreover, the exemptions that accompany most abortion bans "undermine the government's asserted interests"—the interest in protecting fetal life previability. As such, there is very little basis to distinguish abortion bans

142. *Id.* at 66–67.
143. *Id.* at 76 (Breyer, J., dissenting); *id.* at 79 (Sotomayor, J., dissenting).
144. Dahlia Lithwick, *The Supreme Court Moves the Shadow Docket Out Into the Light*, SLATE (June 21, 2021), https://slate.com/news-and-politics/2021/06/fulton-v-philadelphia-supreme-court-religious-freedom-discrimination.html [https://perma.cc/FE5H-L2UR].
145. *Id.*
146. 2018 Miss. Laws ch. 393 (codified at MISS. CODE ANN. 41-41-191).
147. TEX. HEALTH & SAFETY CODE § 170A.002(b)(3).

from the laws the Court has recently found violate the Free Exercise Clause. Under the Court's reasoning in *Fulton* and *Cuomo*, such bans should be subject to strict scrutiny, not the rational basis test.

In sum, the Supreme Court's recent Free Exercise Clause cases have greatly expanded the reach of the clause to protect secular activity that is informed by religious belief. Under the Court's reasoning in *Fulton* and *Masterpiece Cakeshop*, pre-viability abortion bans should be found to violate the Free Exercise Clause because they prohibit pregnant people whose religious views do not consider a zygote or embryo to be person from accessing abortion care. In addition, pre-viability abortion bans should be subject to strict scrutiny because they provide secular exemptions that undermine the government's asserted interests, but provide no exemptions for religiously-influenced abortion decisions. Abortion bans are thus susceptible to challenge under the Free Exercise Clause. Can the Establishment Clause also provide a basis to challenge these provisions?

## IV. Abortion Bans May Also Violate the Establishment Clause

Abortion bans may also be susceptible to challenge under the First Amendment's Establishment Clause, even after the Supreme Court's decision in *Harris v. McRae* holding the Hyde Amendment constitutional, although the Court's decision in *Kennedy v. Bremerton School District*, which explicitly abandoned the *Lemon* test,[148] may throw such a challenge into doubt. In this section, I will first look at why the Court's reasoning in *Harris v. McRae,* which involved a prohibition on government spending for abortion, is inapplicable to pre-viability abortion bans. I will also argue that reliance on *Harris v. McRae* to analyze pre-viability abortion bans would be misplaced because more relevant Establishment Clause precedent suggests that where there is evidence of a non-secular purpose for the law, the Court should scrutinize the law more carefully than it did in *Harris v. McRae* and uphold the principle of religious neutrality. I will then ask whether the Court's previous commitment to religious neutrality still exists after *Kennedy* and will discuss the ways in which *Kennedy* calls into question the ability to bring an Establishment Clause challenge to pre-viability abortion bans.

148. *Kennedy*, 142 S. Ct. at 2427–28.

### *A. Pre-Viability Abortion Bans Cannot Have a Secular Purpose Because They Are Based on a Religious View of When Human Life Begins and How Fetal Life Should Be Valued*

In *Harris v. McRae*, the Supreme Court did an analysis of whether the Hyde Amendment violated the Establishment Clause using the test set out in *Lemon v. Kurtzman*. In *Lemon v. Kurtzman*, the Court held that a legislative enactment does not contravene the Establishment Clause if it has "a secular legislative purpose," if "its principal or primary effect . . . neither advances nor inhibits religion," and if it does not "foster an excessive governmental entanglement with religion."[149] In *Kennedy*, the Court abandoned the *Lemon* test,[150] but it is not clear whether the Court has entirely cast aside the "purpose" prong.[151] If *Kennedy* can be read to have abandoned the *Lemon* test in its entirety and replaced it with another test,[152] then the Court's decision in *Harris* cannot be relied upon at all when pre-viability abortion bans are challenged under the Establishment Clause, because the analysis in *Harris* is based entirely on the *Lemon* test. If the Court believes an analysis of purpose is still relevant in some contexts (for example, where it is clear from the legislative history that the purpose of the law is to favor or adopt the view of a specific religious denomination), then *Harris* is still inapposite. In *Harris*, the Supreme Court concluded that the Hyde Amendment did not violate the Establishment Clause because it was based on secular "traditionalist" views and had a secular purpose—to protect the potentiality of life. But the Court's reasoning in *Harris* is not applicable to pre-viability abortion bans.

The Hyde Amendment was an abortion regulation, prohibiting the funding of most abortions using federal Medicaid monies.[153] The rationale underlying the Amendment was the federal government's interest in protecting "the potentiality of human life" and advancing childbirth.[154] Notably, the government's "interest" did not prevent a

149. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal citations omitted).

150. *See Kennedy*, 142 S. Ct. at 2427–28.

151. *Id.* In *Kennedy*, the Court confirmed that it had abandoned the *Lemon* test, particularly the offshoot of the test that looked at whether a reasonable observer would believe that the government has "endorsed" religion. *Id.* at 2428. This "endorsement" prong has historically applied when the religious activity is either occurring or is displayed in a public space, *see* Cnty. of Allegheny v. Am. Civ. Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989) or a government agent (such as a school employee) is engaged in the religious activity.

152. *See infra* Section IV.C.

153. *Harris*, 448 U.S. at 297.

154. *Id.* at 324.

woman from having an abortion. Thus, the government purpose, valuing "potential life," did not make a judgment about when human life begins or when fetal life can outweigh the life of the pregnant person carrying the fetus. This can be said of many abortion *regulations*, whether their purpose is to value "potential" human life or to ensure maternal health.

Pre-viability abortion *bans*, by comparison, cannot be based on any interest in protecting "the potentiality" of human life, because "potential" human life cannot outweigh the interests of an actual living human. Pre-viability abortion bans contain an implicit judgment that the fetus is a human life that has interests at least as worthy, if not more worthy, than the life and interests of the pregnant person carrying the fetus. To the extent the Hyde Amendment was motivated, then, by notions about the "potentiality" of human life and the value of childbirth, the Court's judgment that its purpose was not religious, but based on "traditionalist values"[155] may be valid, since many religions and cultures believe that a fetus is at least a "potential" life. But the same cannot be said for pre-viability abortion bans, which are not based on an interest in the "potentiality" of human life, but in an interest in protecting actual human life (i.e. "unborn children"[156]). And, as discussed above, this view that a fetus—sometimes from the moment of conception—is a human whose interests are at least equivalent to the person carrying it, is not universally or even generally held, but is inherently based on the beliefs of particular religious denominations.

Indeed, it is disingenuous to argue that pre-viability abortion bans are motivated by secular interests or "moral,"[157] "philosophical,"[158] or "traditionalist"[159] judgments. Leila Bronner makes this point when she says that "abortion is discussed under the guise of secularity but

155. *Id.* at 319.

156. The State of Missisippi's Petition for Certiorari in *Dobbs* asserts that the purpose of its fifteen-week abortion ban is to "protect[ ] . . . the dignity of unborn children" and uses this term to refer to the fetus throughout. *See* Petition for Writ of Certiorari at 1, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available at https://www.supremecourt.gov/DocketPDF/19/19-1392/145658/20200615170733513_FINAL%20Petition.pdf [https://perma.cc/A74Z-AARP]).

157. *See Dobbs*, 142 S. Ct., at 2240. State legislatures often try to justify religious purposes of a law by describing them as promoting moral values. In *Abington Sch. Dist. v. Schempp*, the Court held unconstitutional a statute "requiring the selection and reading at the opening of the school day of verses from the Holy Bible and recitation of the Lord's Prayer by students in unison" despite the proffer of such secular purposes as "promotion of moral values." 374 U.S. 203, 223 (1963).

158. *Womens Servs.*, 636 F.2d at 208 (describing why the district court found the abortion regulations at issue not to violate the Establishment Clause).

159. *Harris*, 448 U.S. at 319.

our opinions are shaped by religious teachings. The teachings of the Judaic and Christian traditions differ profoundly on the issue of abortion, and difficulties result when such difference are elided."[160] For this reason, characterizing the notion that abortion is murder as a secular moral or "traditionalist" view fails to "acknowledge that ensoulment is tied to a particular religious tradition."[161] We can see this elision in Justice Stewart's language in *Harris*. Justice Stewart argues that just because "Judaeo-Christian [*sic*] religions oppose stealing does not mean that a State . . . may not, consistent with the Establishment Clause, enact laws prohibiting larceny."[162] He then concludes that just like laws prohibiting larceny, the Hyde Amendment is based on "traditionalist" values towards abortion. While, as explained, that may be a valid assessment of a law that refuses to fund abortion, previability abortion bans are *not* based on so-called "Judeo-Christian" values—in fact, the Jewish view on abortion differs significantly from the Catholic or Southern Baptist view. Thus, unlike laws that criminalize larceny, which can accurately be described as being based on general morality, or even certain abortion regulations, which may be based on an interest in protecting the "potentiality" of life, laws that ban abortion pre-viability are based on the beliefs of particular religious denominations about when a fetus should be treated like a living, breathing person. When a pre-viability abortion ban seeks to protect the "dignity of unborn children,"[163] or refers to the fetus as a "living unborn child,"[164] it is taking the view of Catholics and some Protestants that the fetus is actually a "child" whose life is equal in value to the pregnant person carrying it—a view that is contrary to the conception that Judaism, Islam, the Shinto faith, and other Protestant denominations have of the fetus. For this reason, unlike abortion regulations, pre-viability abortion bans cannot honestly be said to have a secular purpose. Such bans, as Justice Stevens phrased it, are based on "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths and serve[ ] no identifiable secular purpose."[165] Thus, the Supreme Court's holding in *Harris* that the Hyde Amendment did not violate the Establishment Clause is inappo-

160. Bronner, *supra* note 9.

161. *Id.*

162. *Harris*, 448 U.S. at 319.

163. Petition for Writ of Certiorari at 5, 10, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available at https://www.supremecourt.gov/DocketPDF/19/19-1392/145658/20200615170733513_FINAL%20Petition.pdf [https://perma.cc/C3QS-QPBT]).

164. TEX. HEALTH & SAFETY CODE § 170A.002(b)(3).

165. *Webster*, 492 U.S. at 566–67 (Stevens, J., dissenting).

site to any decision regarding whether pre-viability abortion bans contravene the provision.

### B. Prior to Kennedy, Pre-Viability Abortion Bans Seemed Viable to Challenge Under the Establishment Clause Because of Their Explicit Religious Purpose and Violation of the Neutrality Principle

Prior to *Kennedy v. Bremerton School District*,[166] there was a strong argument that the *Harris* Court's extremely deferential approach to analyzing the purpose of the Hyde Amendment was also inapposite because such an approach is only appropriate when there is a purported secular purpose of the law. Because, as explained above, pre-viability abortion bans cannot be said to have such a secular purpose, and because legislators who support such laws have explicitly stated their support is based on religious belief, the cases that are more relevant to analyzing the bans involve laws that are religiously motivated. These cases show that when a law appears religiously motivated, the Court has been willing to more carefully scrutinize it and find it to violate the Establishment Clause.

In determining whether a law violates the Establishment Clause, the Court has traditionally looked at whether legislation has a proper, secular legislative purpose. This analysis asks whether "the government's *actual* purpose is to endorse or disapprove of religion."[167] While the Court has generally been deferential to a State's articulation of a secular purpose, the Court has said that the secular purpose "has to be genuine, not a sham, and not merely secondary to a religious objective."[168] To determine whether a law violates the Establishment Clause, then, the Court has asked "whether a reasonable observer would view the government action as enacted for the purpose of" favoring a religion.[169] In answering this question, the Court has generally "considered the text of the government policy, its operation, and any available evidence regarding 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by' the decisionmaker."[170] Thus, in Establishment Clause cases, the Court

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166. 142 S. Ct. 2407 (2022).

167. *Cnty. of Allegheny*, 492 U.S. at 620, *abrogated by* Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014).

168. McCreary Cnty. v. Am. Civ. Liberties Union Ky., 545 U.S. 844, 864 (2005).

169. Trump v. Hawaii, 138 S. Ct. 2392, 2434 (2018) (Sotomayor, J., dissenting).

170. *Id.* at 2434–35.

has given considered scrutiny to the record, looking at the legislative history, public statements of legislators, and other evidence to determine whether the law's purpose is a religious or secular one.[171]

The Court has also said that the Establishment Clause requires complete neutrality.[172] This means that government may not promote or affiliate itself with any religious doctrine or organization.[173] The Court has held that the government is also precluded from conveying a message that "a particular religious belief is *favored* or *preferred*."[174] This means that the government "may not aid, foster, or promote one religion or religious theory against another."[175] As the Court has said, "[t]he law . . . is committed to the support of no dogma, the establishment of no sect."[176] Any "government effort to favor a particular religious sect" has therefore been considered impermissible.[177] Thus, while a statute does not violate the Establishment Clause if it "happens to coincide or harmonize with the tenets of some or all religions,"[178] if there is evidence that the legislation's purpose is "advancement of a particular religious belief,"[179] this has been held to violate the Establishment Clause. Indeed, the Court has repeatedly said, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."[180]

Based on these precepts, in a long line of cases, including several decided after *Harris v. McRae*, the Court refused to follow *Harris*'s uncharacteristically deferential approach to the purpose question and has given more scrutiny to the purported purposes underlying the law. More specifically, when there is evidence to show that a law is motivated by a religious view held by a particular religious group, the Court has generally refused to give deference to any purported secular purpose.

For example, in *Epperson v. State of Arkansas*, a 1968 case, the Court considered whether an Arkansas law banning the teaching of

171. *See, e.g.*, *McCreary*, 545 U.S. at 846, 862; Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (considering expert testimony and public appeals related to the legislation in deciding whether the purpose is secular).

172. *Epperson*, 393 U.S. at 103–04.

173. *Cnty. of Allegheny*, 492 U.S. at 589–590.

174. *Id.* at 593.

175. *Epperson*, 393 U.S. at 104.

176. *Id.* (citing Watson v. Jones, 13 Wall. 679, 728 (1872)).

177. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring) (citing Van Orden v. Perry, 545 U.S. 677, 703 (2005)).

178. *Id.* (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

179. *Id.*

180. W. Va. Bd. Educ. v. Barnette, 319 U.S. 624, 642 (1943).

evolution violated the Establishment Clause.[181] Although the Arkansas antievolution law did not explicitly state its predominant religious purpose, the Court stated that it could not ignore that "[t]he statute was a product of the upsurge of 'fundamentalist' religious fervor" that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible.[182] In that case, there was no language in the law indicating a religious purpose. Nevertheless, the Court was willing to look at the outside forces that led to the law's enactment in determining whether it violated the Establishment Clause.[183] Specifically, the Court looked at the history of the enactment of anti-evolution laws, including in other states, in analyzing the purpose of the law.[184] And the Court even considered evidence quite far removed from the legislative history in determining its religious character—it looked at the public appeals made in newspaper advertisements in support of the law.[185] Considering all of this evidence, the Court concluded that "[i]t is clear that fundamentalist sectarian conviction was and is the law's reason for existence"[186] and found it thus violated the Establishment Clause.

The Court followed a similar approach in *Edwards v. Aguillard*, decided seven years after *Harris v. McRae*. In *Edwards*, the Court considered whether Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act" violated the Establishment Clause.[187] The Act forbid the teaching of evolution in public schools unless accompanied by instruction in "creation science." The state argued that the law had a secular purpose—the protection of academic freedom. But the Court gave little deference to the articulated secular rationale of the state, refusing to be "blind . . . to the legislature's preeminent religious purpose in enacting this statute."[188]

Instead, the Court scrutinized the purpose of the law and found the articulated secular rationale lacking. The Court noted that in determining the purpose of the law, it is appropriate for a court to consider "[t]he plain meaning of the statute's words, enlightened by their context and contemporaneous history,"[189] and "the historical context of

181. 393 U.S. 97 (1968).
182. *Id.* at 98.
183. *Id.* at 108–109.
184. *Id.* at 108-09.
185. *Id.* at 108 n.16.
186. *Id.* at 107–08.
187. Edwards v. Aguillard, 482 U.S. 578 (1987).
188. *Id.* at 590.
189. *Id.* at 594 (citing Wallace v. Jaffree, 472 U.S. 38, 74 (1985)).

the statute."[190] Thus, the Court looked not just at the language of the law, but also at its legislative history and the statements of its sponsor, who "explained during the legislative hearings that his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs."[191] Viewing this type of evidence, the Court noted the "historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution."[192] And it concluded that the "preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind."[193] The Court said: "The legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator."[194] The Court thus found that the Act violated the Establishment Clause because "it seeks to employ the symbolic support of government to achieve a religious purpose."[195]

The Court's close scrutiny of the law's purpose in *Edwards* is not an anomaly and is not just limited to cases involving school policies. In a more recent case, *McCreary County v. American Civil Liberties Union*, the Court, deciding whether a display of the Ten Commandments and other religious and civic documents at a county courthouse violated the Establishment Clause, refused to accept at face value the government's proffered secular purpose.[196] Instead, the Court looked at the content of the display, the history of the display, and the entire context in which the display was put in place—including the fact that the county executive who put the display up was accompanied by his pastor, "who testified to the certainty of the existence of God,"[197] to conclude that a "reasonable observer" would think that the purpose of the display was to emphasize a particular religious message.[198]

Under these precedents, the Supreme Court's approach in *Harris v. McRae* could be viewed as inapposite because the *Harris* Court was dealing with an abortion-related regulation that could be said to have a secular purpose and thus its deferential approach made sense. However, because, as I argue above, pre-viability abortion bans inherently are based on religious beliefs about life that belong to specific relig-

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190. *Id.* at 595.
191. *Id.* at 592.
192. *Id.* at 590.
193. *Edwards*, 482 U.S. at 591.
194. *Id*. at 593.
195. *Id.* at 597.
196. 545 U.S. 844 (2005).
197. *Id.* at 869.
198. *Id.*

ious denominations, they should not be given the deference the Court gave to the Hyde Amendment. Under *Epperson*, *Edwards*, and *McCreary*, if a pre-viability abortion ban is challenged as violating the Establishment Clause, courts should take seriously state officials' own statements about their purpose—after all, these precedents confirm that a court is supposed to look at the "actual" purpose of the law[199]—and should more carefully scrutinize them.

And the current abortion bans *are* explicitly motivated by the religious beliefs of specific religious denominations regarding when human life begins. Recall that the co-sponsor of the Mississippi bill at issue at *Dobbs* said during debate on another anti-abortion bill, "I serve God who says life is in the blood. And this bill will protect those lives."[200] The sponsor of Texas's six-week abortion ban is a member of a group whose purpose it is to "restore the Judeo-Christian foundations" of government[201]—in other words, to establish a theocracy. Alabama's governor said her state's abortion ban was "a powerful testament to Alabamians' deeply held belief that life is precious and that every life is a sacred gift from God."[202]

Under the Court's reasoning in *Epperson*, *Edwards*, and *McCreary*, there is a strong argument that courts should take into account these statements in determining the purpose of the law. Moreover, these precedents suggest that courts should also look carefully at the language of the statutes, which often refer to fetuses as "unborn children" or "living unborn children," again demonstrating that they have adopted the view of Catholics and some Protestant denominations that the fetus is actually a "child" whose life is equal in value to the pregnant person carrying it—a view that does not exist in Judaism, Islam, the Shinto faith, and other Protestant denominations.

199. *Cnty. of Allegheny*, 492 U.S. at 585, *abrogated by* Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014).

200. Brief Amicus Curiae of the Freedom from Religions Found., Ctr. for Inquiry & Am. Atheists in Support of Respondents at 12, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available at https://www.supremecourt.gov/DocketPDF/19/19-1392/192717/20210917120823669_Dobbs%20Final%20Brief.pdf [https://perma.cc/ZJ6L-RZAB]).

201. Jaradat, *supra* note 21.

202. Brief Amicus Curiae of the Freedom from Religions Found., Ctr. for Inquiry & Am. Atheists in Support of Respondents at 11–12, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available at https://www.supremecourt.gov/DocketPDF/19/19-1392/192717/20210917120823669_Dobbs%20Final%20Brief.pdf [https://perma.cc/YGG2-PA9N]) (citing *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act,* Off. Ala. Governor (May 15, 2019), https://governor.alabama.gov/newsroom/2019/05/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/ [https://perma.cc/KL6Q-W7D4]).

Before the *Kennedy* decision, then, under several Establishment Clause precedents, pre-viability abortion bans arguably violate the Establishment Clause based on legislators' own statements about the purpose of these laws and based on the language of the statutes, which show that the laws give preference to (and thus arguably establish) one particular religious view of when life begins. However, these precedents relied on the "endorsement" prong of the *Lemon* test, which the Court seemingly abandoned in *Kennedy*.[203] The question, therefore, is whether *Kennedy* now makes an Establishment Clause challenge to pre-viability abortion bans difficult or even impossible.

### *C. Does* Kennedy *Mean the Court Will No Longer Consider the Purpose of a Law When Analyzing Whether It Violates the Establishment Clause?*

After *Kennedy*, it is unclear whether statutes that are clearly motivated by legislators' religious beliefs and put in place to codify those beliefs would now be considered to violate the Establishment Clause. In *Kennedy*, the Court considered whether a public school's termination of a high school football coach for privately saying a prayer on the football field after games violated the Free Exercise Clause. The Court held that it did,[204] but in doing so, had to consider the school's argument that it had to prohibit the coach's praying and discipline him for failing to comply in order not to violate the Establishment Clause. Essentially, the school district argued that if it allowed the coach to pray it could be seen as "endorsing" religion.[205] In rejecting this argument, the majority in *Kennedy* held that "this Court long ago abandoned *Lemon* and its endorsement test offshoot," and has replaced the "endorsement" test with one that interprets the Establishment Clause by "reference to historical practices and understandings."[206]

The Court's language in *Kennedy* raises several issues. First, it is unclear how broad the Court's abandonment of the "endorsement test" is. Where the government is *allowing* the display of religious symbols *by others* or is allowing religious activity by agents, such as teachers, this is clearly "endorsement," and in those circumstances, it appears that the Court will look at whether the activity being allowed or the display is in line with "historical practices and understandings." But what about a situation in which the government itself actually *adopts* or promulgates a religious view or practice? This could be said

203. *Kennedy*, 142 S. Ct. at 2427.
204. *Id.* at 2422.
205. *Id.* at 2426.
206. *Id.* at 2427–28.

to be "endorsement," but more rightly seems to be "establishment." Under those circumstances, will the Court continue to look at the purpose of the law or policy? It certainly seems as if there is a difference between the government itself adopting a particular religious view and the government allowing others associated with it or acting in public spaces to exercise their religion. In the former case—where the government itself is adopting a religious view or practice—it seems as if it is absolutely appropriate for the Court to continue to look at the purpose of the law. If the law has no secular purpose, then even after *Kennedy* it should be considered to violate the Establishment Clause.

There also seems to be a difference between the government allowing private religious practice or treating religious organizations equally to secular ones and the government promoting, adopting, or affiliating itself with a particular religious doctrine or organization. One of the principles that the *Lemon* test was meant to enshrine was of religious neutrality.[207] Indeed, long prior to *Lemon*, the Court had made clear that the "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[208] The decision in *Epperson*, which was decided prior to *Lemon*, was based on this neutrality principle. As stated, this principle was subsumed under the *Lemon* test's "purpose" prong, which has sometimes been articulated as "endorsement." But surely the holding in *Kennedy* does not mean that the Court has abandoned the principle of neutrality? If a state government decided to prohibit the eating of pork because a majority of the state legislators were Jewish and Muslim and believed the eating of pork to be against God's will, it is hard to imagine that the Court would not look at the purpose of the law in evaluating whether it violates the Establishment Clause. Indeed, the Court has said that the neutrality principle is "rooted in the foundation soil of our Nation."[209] As such, although the neutrality principle was subsumed into the *Lemon* test, it should still be a basis to evaluate Establishment Clause claims even after *Kennedy*.

Finally, if the Court is abandoning not just the purpose prong or the even more narrow endorsement analysis of the *Lemon* test, but is abandoning the test completely and adopting a "historical practices and understanding" test, what does it mean for the Court to look at "historical practices and understandings"? In *Kennedy*, the Court explained that this test requires courts to draw lines between the "permissible and impermissible" in a way that "accord[s] with history and

207. *See Epperson*, 393 U.S. at 103–04.
208. Watson v. Jones, 80 U.S. 679, 728 (1871).
209. *Epperson*, 393 U.S. at 103.

faithfully reflec[ts] the understanding of the Founding Fathers."[210] The issue then becomes how broadly or narrowly will the Court consider the activity at issue. As already argued, the neutrality principle is deeply rooted in our nation's history and traditions and thus, to the extent that pre-viability abortion bans explicitly codify one particular religious denomination's view of life, under the deeply rooted neutrality principle, they should be considered to violate the Establishment Clause. To put it differently, if the Court accepts that the abortion bans are based on one view of life that belongs only to a few particular religious denominations and thus would violate the neutrality principle, then it would be proper for the Court to analyze whether the neutrality principle accords with history and the understanding of the Founding Fathers. Under this analysis, the Court would surely find the pre-viability abortion bans to violate the Establishment Clause since the neutrality principle is deeply rooted in our nation's history. But the Court could view the issue another way: it could look at whether historically and in the view of the Founding Fathers abortion bans would be considered to violate the Establishment Clause. Of course, under the current Court's view of the historical record, set out in *Dobbs* in the context of the Due Process Clause of the Fourteenth Amendment,[211] it is clear that if the Court were to take this approach to analyzing whether pre-viability abortion bans violate the Establishment Clause, the Court would find no violation.

In sum, I think we will have to wait for further cases to see whether the Court's repudiation of the *Lemon* test will only apply in very clear "endorsement cases," where the facts show the government actor is not itself promulgating a law or policy that is based on the beliefs of certain religious denominations, but is somehow making space for or supporting religious belief or practice. If the Court limits its abandonment of the *Lemon* test to only these latter types of cases, then the arguments made above about how pre-viability abortion bans violate the Establishment Clause are still colorable. If the Court more broadly repudiates the *Lemon* test and relies on "historical practices and understandings" to analyze *all* Establishment Clause cases, then such arguments are on substantially more precarious ground.

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210. *Kennedy*, 142 S. Ct. at 2428 (citing Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 577 (2014)).
211. *Dobbs*, 142 S. Ct. at 2248–54.

## V. Reality Check: Will the Current Court Be Sympathetic to Religion Clause Challenges to Pre-Viability Abortion Bans?

In sum, there may be a basis to challenge the new pre-viability abortion bans under the Establishment Clause and there is a strong argument that such bans are unconstitutional pursuant to the Court's now very broad Free Exercise Clause jurisprudence. But is there any hope that the current Supreme Court is likely to interpret the Free Exercise Clause or the Establishment Clause to prohibit such bans? Not much. The truth is, the Court is unlikely to consistently apply its Free Exercise or Establishment Clause jurisprudence because of its *own* religious views. As Geoffrey Stone has pointed out, Catholic appointees of Republican presidents consistently have voted to contract abortion rights, even when that means interpreting the law not to follow precedent.[212] His analysis of justices' decisions on abortion seems to suggest that the justices may be influenced by their own personal religious views.[213]

Sherry Colb has made similar arguments with respect to the justices' application of the Free Exercise Clause. She has said, "even when the Court is not expressly invoking religion, it is subtly relying on its members' religious beliefs."[214] And she has argued that "the five devout Justices are so mired in their own narrow version of their particular religious faith that they do not even realize (nor are they open to realizing) that they are inflicting that version on the population rather than neutrally protecting all practitioners of religion."[215] Even more forcefully, she contends that the five devout Catholic justices on the court "take their own religion as the primary religion

212. Geoffrey R. Stone, *Justice Sotomayor, Justice Scalia and Our Six Catholic Justices*, HUFFPOST (Sept. 28, 2009), https://www.huffpost.com/entry/justice-sotomayor-justice_b_271229 [https://perma.cc/AKF8-PNVP]. This conclusion makes Justice Alito's commentary about *Roe v. Wade* in the *Dobbs* opinion ironic. He said that "*Roe* and *Casey* have led the distortion of many important but unrelated legal doctrines." *Dobbs*, 142 S. Ct. at 2275. Of course, that distortion is largely due to the conservative religious members of the Court's hostility to abortion rights. *See* Loren Jacobson, *The First Amendment and the Female Listener*, 51 N.M. L. Rev. 70, 70–71 (2021). There is no doubt that should Religion Clause challenges be brought to the pre-viability abortion bans, the Court will again twist itself in knots and engage in distortions in order to find the provisions constitutional.

213. Stone, *supra* note 212.

214. Colb, *supra* note 31. *See also* Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the Dobbs Decision*, N.Y. Times (July 22, 2022), https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html [https://perma.cc/6GRM-CQ4A].

215. Colb, *supra* note 31.

under which people may exclude, refuse service to, or stigmatize others."[216]

It is likely that in the context of the Establishment Clause, the devout justices will also be unable to see or recognize that the new, previability abortion bans are based on the beliefs of certain religious denominations, since the religious basis for those views is their own. Instead, either they will continue to narrow the reach of the Establishment Clause and use a "historical approach" to find abortion bans constitutional or we are likely to see them characterize these laws as being based in "Judeo-Christian" or "moral" principles, just as the Court did in *Harris*. Indeed, it is telling that Justice Alito is very careful in his opinion in *Dobbs* to couch the debate over abortion as a "moral" rather than religious one.[217]

Justice Thomas does not even believe that the Establishment Clause applies to the states, and further believes that it only prevents government from coercing individuals to observe or support religion.[218] While the Court does not take such a clearly extreme position in *Kennedy*, its view of what the Establishment Clause prohibits has plainly narrowed. Moreover, it is reasonable to expect that many of the justices who joined Alito's opinion in *Dobbs* and also have shown extreme deference to religion in the Free Exercise Cases will also be willing to show extreme deference to the purported secular purposes underlying the new abortion bans.

Does that mean that Religion Clause challenges should not be brought to the pre-viability abortion bans? I don't believe that we should give up so easily. Justice Ginsburg, who was always the optimist about the arc of the moral universe bending towards justice,[219] often quoted Chief Justice Charles Evans Hughes, who said that a "dissent in a court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[220] Based on Justice Sotomayor's remarks during oral argument in *Dobbs*, it is likely that she may be amenable to the arguments presented here that pre-viability abortion bans violate the Religion Clauses. Her dissent—or perhaps ones written by Justice Kagan or

216. *Id.*

217. *Dobbs*, 142 S. Ct. at 2240.

218. *See* Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring).

219. Ruth Bader Ginsburg et al., My Own Words 296 (2016) (in her dissent from the bench in *Shelby Cnty. v. Holder*, Justice Ginsburg, calling Dr. Martin Luther King the "great man who led the march from Selma to Montgomery," quoted his famous statement that "the arc of the moral universe is long . . . but it bends toward justice.").

220. *Id.* at 282–83.

Justice Jackson—may be the basis for future majorities. At the very least, I believe it is worth holding the justices to account, to see whether they are willing to be consistent in their application of their Religion Clauses jurisprudence, especially their Free Exercise jurisprudence, or whether they are willing to contort and dissemble in order to reach an outcome that aligns with their personal religious beliefs.[221]

## VI. Conclusion

In *Roe v. Wade*[222] and *Planned Parenthood v. Casey*,[223] the Supreme Court crafted a constitutional right to abortion that allowed the states to regulate for reasons unrelated to a particular religious view of abortion. Indeed, while the Court acknowledged that there was no scientific way to determine when a human life began, its reliance on viability as the line where states could ban abortion meant that any abortion ban would essentially be grounded in a relatively objective, *scientific* or medical basis for when the fetus's rights can equal or outweigh the rights of the pregnant person. As medicine develops, the viability line may shift, but any ban based on viability is at least based on an objective, scientifically ascertainable foundation. Relying on viability thus obviates the State's ability to, as the Court said in *Roe*, "adopt one theory of life."[224]

Since *Roe* has been overturned, states are now free to adopt pre-viability abortion bans and many have. As set out above, the legislators who have sponsored and enacted these bans have been explicit about their motivations: these bans are based on religious dogma—the view of particular religious denominations of when human life begins and how fetal life should be valued. Although I have little hope that the Supreme Court will abandon its own religious biases, it should take these legislators at their word, carefully scrutinize the abortion bans, as it did anti-evolution laws, and recognize that they violate the neutrality principle essential to the Establishment Clause. Moreover, to the extent that the abortion bans prevent women from having abortions based on their own religious views or do not provide exemptions for women whose abortions are religiously influenced, the Court

221. In this regard, Justice Kavanaugh's claim that after *Dobbs*, "the difficult moral and policy questions" regarding abortion will only be resolved by the states is laughable. *Dobbs*, 142 S. Ct. at 2309 (2022) (Kavanaugh, J. concurring).

222. 410 U.S. 113 (1973).

223. 505 U.S. 833 (1992).

224. *Roe*, 410 U.S. at 162.

should consistently apply its expanded Free Exercise jurisprudence to find such bans unconstitutional.