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Divine Law or Constitutional Flaw: The Clash of Religious Belief and Legal Neutrality in Missouri's Abortion Ban

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DIVINE LAW OR CONSTITUTIONAL FLAW: THE CLASH OF RELIGIOUS BELIEF AND LEGAL NEUTRALITY IN MISSOURI'S ABORTION BAN

ABSTRACT

This Note explores the constitutional implications of Missouri's recent abortion ban enacted in the wake of the Dobbs v. Jackson Women's Health Organization *decision, which overturned* Roe v. Wade *and* Planned Parenthood v. Casey. *This Note examines the clash of religious beliefs and the law by dissecting the legislative history and intent behind Missouri's abortion ban. The ban, known as House Bill 126 or the "Missouri Stands for the Unborn Act," took effect immediately upon certification by State Attorney General Eric Schmitt and prohibits nearly all abortions, except in cases of a narrowly defined "medical emergency." Notably, the law invokes religious language, asserting that "Almighty God" is the author of life and framing the state as a "sanctuary of life." Through an analysis of the historical background, legislative series of events, and contemporaneous statements made by lawmakers, this Note argues that Missouri's abortion ban unconstitutionally establishes Christian beliefs into law.*

This Note analyzes a hypothetical Establishment Clause-based challenge to Missouri's abortion ban, arguing that the ban infringes upon the neutrality required by the First Amendment. It scrutinizes the religious undertones in the legislative process, which seemingly favor Christian beliefs over other faith traditions or non-religious perspectives. Ultimately, this Note offers a critical examination of the implications of Missouri's abortion ban within the context of religious freedom and constitutional law. It contends that the ban, rooted in religious ideals, violates the Establishment Clause by imposing religiously motivated legislation on all citizens, regardless of their personal beliefs or traditions.

"Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects"? – James Madison[1], author of the First Amendment 'Religion Clauses'

"Persecution is not an original feature in any religion; but it is always the strongly-marked feature of all law-religions, or religions established by law." – Thomas Paine, The Rights of Man Part I[2]

I. INTRODUCTION

On June 24, 2022, Missouri State Attorney General Eric Schmitt made Missouri the first state in the country to effectively ban abortion[3] by certifying the state's trigger ban[4] within minutes of the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[5]

At the same moment, U.S. Department of Health and Human Services Secretary Xavier Becerra, Missouri Representative Cori Bush, and other reproductive rights advocates gathered at Missouri's last remaining abortion clinic, located on Forest Park Avenue in St. Louis, for a roundtable discussion on abortion access.[6] When they gathered that morning, *Roe v. Wade* was the law of the land, as it had been for nearly fifty years. Before their conversation was over, *Roe* had been overruled by *Dobbs* and Missouri's abortion ban, House Bill 126 (also known as the "Missouri Stands for the Unborn Act"), became the effective law of the land in Missouri.[7]

1. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGION ASSESSMENTS (Robert A. Rutland & William M. E. Rachal eds., 1785), *in Founders Online*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Apr. 20, 2024).

2. THOMAS PAIN, RIGHTS OF MAN Part I 40 (1791).

3. Kate Zernike, *Abortion-Rights Backers in Missouri Start Ballot Initiative to Undo Ban*, N.Y. TIMES (Jan. 18, 2024), https://www.nytimes.com/2024/01/18/us/abortion-missouri-ballot-initiative.html#:~:text=Missouri%20was%20the%20first%20state,reverses%20a%20near%2Dtotal%20ban.

4. "Trigger bans" are dormant and codified laws that ban abortion at any stage of pregnancy with only limited exceptions. These laws become active and take effect when "triggered" by a specific legal action or decision (here, if *Roe v. Wade* is overturned). Jesus Jiménez, *What is a Trigger Law? And Which States Have them?*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html.

5. Greg Dailey, *Gov. Parson, AG Schmitt File Paperwork Effectively Ending Abortion in Missouri*, 12 NEWS (June 24, 2022, 9:38 AM), https://www.kwch.com/2022/06/24/ag-eric-schmitt-signs-opinion-effectively-ending-abortion-missouri/.

6. Annika Merrilees & Dana Rieck, *At Missouri's Last Abortion Clinic, St. Louisans Reckon with the Fall of* Roe v. Wade, ST. LOUIS POST-DISPATCH (June 25, 2022), https://www.stltoday.com/news/local/govt-and-politics/at-missouri-s-last-abortion-clinic-st-louisans-reckon-with-the-fall-of-roe-v/article_65624774-111e-5376-b2e1-49e38449ff6c.html.

7. *Id*.

There is wide support across many faith traditions for reproductive autonomy—including the right to access an abortion. For example, Presbyterian and Jewish faith organizations have been working together since the 1970s to achieve this goal[8] when they established the Clergy Consultation Service to help women obtain abortions.[9] Both Conservative and Reform sects of Judaism teach that life is sacred, and the faith's teachings affirm that protecting *existing* life is paramount at all stages of pregnancy and throughout life.[10] Where the life of the mother is in jeopardy because of the unborn child, abortion is mandatory; where the physical or mental wellness of the mother is in jeopardy, abortion is sanctioned.[11] "Jewish law requires an abortion to protect the mother's life because the mother's life always takes precedence over the potential life of the fetus within her."[12] Jewish law favors abortions performed as early as possible, but late-term abortions are permissible, particularly where complications can endanger a woman's life or cause health problems impacting her ability to bear children in the future.[13] "Jewish law has long recognized a woman's overall health includes her mental health. Thus, an abortion may be performed to protect a woman from emotional distress."[14] "It is considered a *mitzvah*, a commandment, to save the life of a mother when she is at risk of life-threatening complications, such as ectopic pregnancy or an incomplete spontaneous miscarriage."[15] Many Jewish health care providers and spiritual leaders consider the work of providing abortion care and counseling a *mitzvah* and refer to it as way to honor a commitment to their faith, or as service to the divine.[16]

8. David Masci, *Where Major Religious Groups Stand on Abortion*, PEW RSCH. CTR. (June 21, 2016), https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/.

9. Gillian Frank, *The Religious Network That Made Abortion Safe When It Was Illegal*, UNIV. OF MINN. (Aug. 17, 2022), https://genderpolicyreport.umn.edu/the-religious-network-that-made-abortion-safe-when-it-was-illegal/.

10. Rabbi Susan Grossman & Rabbi Avram Reisner, *Understanding Jewish Views of Abortion: An Overview*, RABBINICAL ASSEMBLY 1, 1, 3 (Nov. 28, 2023), https://www.rabbinicalassembly.org/sites/default/files/2023-12/jewish-view-of-abortion.pdf.

11. *Id.* at 7.

12. *Id.* at 3.

13. *Id.* at 4.

14. *Id.*

15. Lisa Fishbayn Joffe, *Do Abortion Bans Violate Jews' Religious Rights?*, BRANDEIS UNIV. (June 16, 2022), https://www.brandeis.edu/jewish-experience/social-justice/2022/june/abortion-judaism-joffe.html.

16. *See, e.g.*, Rep. Andy Levin, *Pikuach Nefesh and the Jewish Commitment to Reproductive Justice*, HILL CONG. BLOG (Mar. 9, 2022, 5:00 PM), https://thehill.com/blogs/congress-blog/healthcare/597567-pikuach-nefesh-and-the-jewish-commitment-to-reproductive/; Dayna Ruttenberg, *My Religion Makes Me Pro-abortion*, ATLANTIC (June 14, 2022), https://www.theatlantic.com/family/archive/2022/06/judaism-abortion-rights-religious-freedom/661264/.

In contrast, and perhaps more prevalent, is religious opposition to abortion. Many evangelical Christian and Catholic organizations[17] have led the charge against abortion over the past half-century.[18] Despite evangelical Christians being among the most vocal anti-choice advocates today,[19] they did not mobilize against abortion in the wake of *Roe v. Wade*, considering it to be primarily a "Catholic issue."[20] Instead, in the late 1960s, evangelical Christians and *Christianity Today*, the flagship magazine of evangelicalism, organized a conference with the Christian Medical Society and twenty-six "heavyweight theologians from throughout the evangelical world."[21] After debating the issue for several days, the conference released a statement acknowledging the "ambiguities surrounding the issue [of abortion]," which allow for "many different approaches."[22] The statement further explained: "[w]hether the performance of an induced abortion is sinful we are not agreed, but about the necessity of it and permissibility for it under certain circumstances we are in accord."[23] Carl F. H. Henry, founder and editor of *Christianity Today*, asserted that "a woman's body is not the domain and property of others."[24] His successor, Harold Lindsell, stated that, "if there are compelling psychiatric reasons from a Christian point of view, mercy and prudence may favor a therapeutic abortion."[25] Even Billy Graham, the most famous evangelical Christian of the 20th century, declined to get involved when Francis Schaeffer, "the intellectual godfather of the Religious Right," tried to enlist Graham in his "antiabortion crusade" in the late 1970s.[26] "James Dobson, founder of Focus on the Family, who later became an implacable foe of abortion, acknowledged in 1973 that the

17. This Note refers to different faiths in reference to the organizations that are often the most visual representatives of the various faiths practiced in this country. In no way does this Note attempt to allege that individuals of various faiths do not hold their own, nuanced opinions on such issues. For example, roughly half of U.S. Catholics support legal access to abortion, generally, despite the strong opposition to the issue from the institutions of the Catholic Church. Masci, *supra* note 8.

18. *Id.*; *see, e.g.*, *Respect for Unborn Human Life: The Church's Constant Teaching*, U.S. CONF. CATH. BISHOPS, https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/respect-for-unborn-human-life (last visited Feb. 5, 2024).

19. Brent Leatherwood, X (June 24, 2022, 9:15 AM), https://twitter.com/LeatherwoodERLC/status/1540337699772678149; Albert Mohler, X (June 24, 2022, 9:25 AM), https://twitter.com/albertmohler/status/1540340240145072129.

20. Randall Balmer, *The Real Origins of the Religious Right*, POLITICO (May 27, 2014), https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133/.

21. Randall Balmer, *The Religious Right and the Abortion Myth*, POLITICO (May 10, 2022), https://www.politico.com/news/magazine/2022/05/10/abortion-history-right-white-evangelical-1970s-00031480.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Balmer, *supra* note 21.

Bible was silent on the matter and therefore it was plausible for an evangelical to believe that "a developing embryo or fetus was not regarded as a full human being."[27] In 1971, delegates to the Southern Baptist Convention passed a resolution calling for the legalization of abortion, which they reaffirmed in 1974–a year after *Roe*–and again two years later in 1976.[28] The resolution reads, in part, "[W]e call upon Southern Baptists to work for legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of severe fetal deformity, and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother."[29] Following the Supreme Court's decision in *Roe*, former president of the Southern Baptist Convention and pastor of the First Baptist Church in Dallas, Texas W.A. Criswell—another famous fundamentalist of the 20th century—was "pleased" and stated: "I have always felt that it was only after a child was born and had a life separate from its mother that it became an individual person . . . and it has always, therefore, seemed to me that what is best for the mother and for the future should be allowed."[30]

Abortion has not always been a religious issue[31] but the contemporary abortion debate is decidedly so. Anti-choice advocates have conflated access to a safe and widely supported medical procedure with a religious and moral imperative.[32] This conflation has resulted in a culture where women, particularly women who do not adhere to the mainstream beliefs and practices of Christianity,[33] are deprived of access to critical healthcare in the name of a God or a faith preference they may not believe in, support, or interact with. Abortion bans rooted in religious ideals, such as life beginning at conception or being conferred upon individuals by an 'Almighty God' or 'Creator,' etch these religious beliefs into law.[34]

The codification of such religious views is diametrically opposed to the non-secular values on which this country was built. The United States is commonly called a melting pot, blending diverse cultures, ethnicities, and faiths,[35] and is

27. *Id.*

28. *Southern Baptist Convention Resolutions on Abortion*, https://www.johnstonsarchive.net/baptist/sbcabres.html (last updated Nov. 7, 2010).

29. *1971 Annual Meeting: Resolution on Abortion*, SOUTHERN BAPTIST CONVENTION (June 1, 1971), https://www.sbc.net/resource-library/resolutions/resolution-on-abortion-2/.

30. Balmer, *supra* note 20.

31. Garry Wills, *Abortion Isn't a Religious Issue*, L.A. TIMES (Nov. 4, 2007), https://www.latimes.com/la-op-wills4nov04-story.html.

32. Catherine Weiss et al., *Religious Refusals and Reproductive Rights*, ACLU REPROD. FREEDOM PROJECT (2002), https://www.aclu.org/sites/default/files/FilesPDFs/ACF911.pdf.

33. *See, e.g.,* Sarah Seltzer, *Not All Religious People Oppose Abortion*, N.Y. TIMES (Nov. 18, 2021), https://www.nytimes.com/2021/11/18/opinion/abortion-rights-judaism.html.

34. *See, e.g.,* MO. REV. STAT. § 188.017 (2022).

35. *Why is America Called the Melting Pot?*, GOLDEN BEACON USA (Oct. 30, 2020), https://goldenbeaconusa.com/why-is-america-called-the-melting-pot.

also considered a haven for religious freedom.[36] The Bill of Rights begins by prohibiting the establishment or preferential treatment of one faith over another by the government.[37] However, challenges to these religiously-motivated abortion bans will be difficult, for there is a long legal tradition of recognizing the permeable nature of the wall that separates church from state.

This Note presents a hypothetical Establishment Clause-based challenge to Missouri's abortion ban and reviews the viability of such a legal strategy. Following the overturning of nearly fifty years of precedent protecting the right to an abortion, pro-choice advocates are now considering a framework for new challenges to abortion bans in various states.[38] This Note argues that Missouri's abortion ban is an unconstitutional establishment of the Christian stance on abortion into law and that there are plausible Establishment Clause grounds to challenge Missouri's abortion ban based on its language. Ultimately, such a challenge could succeed given the inherently religious statements contemporaneously made by Missouri lawmakers when passing the legislation and the history surrounding abortion bans in the state. However, considering its recent First Amendment decisions, the Supreme Court's jurisprudence for determining such an issue is unclear. As such, there is uncertainty that an Establishment Clause challenge to Missouri's abortion ban would result in success.

II. LEGAL FRAMEWORK

Abortion was legal at the nation's founding and for much of the century after. "Official abortion laws did not appear on the books in the United States until 1821, and abortion before quickening[39] did not become illegal until the 1860s. If a woman living in New England in the 17th or 18th centuries wanted an abortion, no legal, social, or religious force would have stopped her."[40]

The most recent Supreme Court decision on abortion is *Dobbs v. Jackson Women's Health Organization*, which was decided in June 2022.[41] *Dobbs* overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania*

36. *Religious Freedom*, MOUNT VERNON LADIES' ASS'N (Feb. 6, 2024), https://www.mountvernon.org/george-washington/religion/religious-freedom.

37. U.S. CONST. amend. I.

38. Mabel Felix et al., *Legal Challenges to State Abortion Bans Since the* Dobbs *Decision*, KFF (Jan. 20, 2023), https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/.

39. Quickening is "the point at which a pregnant woman can first feel the movements of the growing embryo or fetus." Katherine Brind'Amour, *Quickening*, EMBRYO PROJECT ENCYCLOPEDIA (Oct. 30, 2007), https://embryo.asu.edu/pages/quickening.

40. Ranana Dine, *Scarlet Letters: Getting the History of Abortion and Contraception Right,* CTR. FOR AM. PROGRESS (Aug. 8, 2013), https://www.americanprogress.org/article/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/.

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

v. Casey,[42] which, respectively, established a right to abortion under the Constitution[43] and prohibited regulations that place an undue burden on a woman seeking an abortion before viability.[44] *Dobbs* held the Constitution does not protect the right to an abortion, and states may restrict abortion without limit.[45]

A. Missouri's Abortion Ban

Nearly one-quarter of states in the country, including Missouri, already had trigger bans in place when the *Dobbs* decision was handed down.[46] Missouri's abortion ban became effective the day of the decision, upon certification by Missouri Attorney General Eric Schmitt that the triggering condition—the overturning of *Roe*—had been met.[47]

Missouri's abortion ban prohibits the procedure with limited exception for a qualifying "medical emergency," which is narrowly defined as "a condition which . . . so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert death of the pregnant woman" or for which delay of the procedure creates a severe risk of substantial or irreversible harm to the pregnant woman.[48] This provision does not shield providers from criminal prosecution, but offers an affirmative defense that may be raised in the event of prosecution.[49] The burden of proof for this affirmative defense is carried by the provider to show by a preponderance of the evidence that the medical emergency provision was satisfied.[50]

Qualification for the medical emergency exception depends on a physician's "good faith clinical judgment."[51] Violation of the ban by a provider is punishable by at five to fifteen years in prison, and may result in suspension or revocation of the physician's medical license.[52] Further, Missouri's Department of Health and Senior Services may refuse or revoke a clinic's operating license for violating the ban.[53] Because the abortion ban is a criminal statute to which medical emergencies are an affirmative defense, many physicians are hesitant to

42. *Id.* at 292.

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

44. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

45. *See Dobbs*, 597 U.S. at 231, 292, 302.

46. MO. REV. STAT. § 188.017 (2022); Elizabeth Nash et al., *12 States Have Abortion Trigger Bans—Here's What Happens When* Roe *is Overturned*, GUTTMACHER INSTITUTE (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

47. Nash et al., *supra* note 46.

48. MO. REV. STAT. §188.015(7) (2019).

49. MO. REV. STAT. §188.017(3) (2022).

50. *Id*.

51. MO. REV. STAT. §188.039(1) (2017).

52. MO. REV. STAT. §188.017(2) (2022).

53. MO. REV. STAT. §197.220(1) (2016) (effective Oct. 24, 2017).

declare a medical emergency, fearing criminal sanctions.[54] This has caused turmoil for patients like Mylissa Farmer, who needed an emergency abortion but could not legally obtain one in Missouri.[55] When Farmer was nearly five months pregnant, her water broke prematurely and she sought emergency care at a hospital in Joplin, Missouri.[56] Farmer was told she needed to terminate her pregnancy, but would have to seek such care out-of-state due to the Missouri's abortion ban.[57] Farmer successfully obtained care at a clinic in neighboring Illinois (where the procedure is legal) and is supporting a federal investigation of the incident at the Joplin hospital.[58]

Missouri's abortion ban is rooted in a legislative statement of intent, found in §188.010, which states:

> In recognition that *Almighty God* is the *author of life*, that all men and women are *"endowed by their Creator* with certain unalienable Rights, that among these are Life", and that…the Constitution of Missouri provides that all persons have a natural right to life, it is the intention of the general assembly of the state of Missouri to: (1) defend the right to life of all humans, born and unborn; (2) declare that the state and all of its political subdivisions are a "sanctuary of life" that protects pregnant women and their unborn children; and (3) regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.[59]

Statements like these found in Missouri's abortion law blatantly and unabashedly invoke religious beliefs. These beliefs are often associated with or espoused by those who oppose the right to abortion. The plain text of Missouri's abortion ban is an unconstitutional establishment of religion because private religious beliefs have been codified into the law and imposed upon the lives of all citizens of the state. This establishment must be challenged as an impermissible establishment of religion into law. But would the Supreme Court say the same?

III. ANALYSIS

To challenge Missouri's abortion ban as an unconstitutional enshrinement of religion into law, a plaintiff could sue the state of Missouri, the governor of Missouri, and Missouri's attorney general under the U.S. Constitution's

54. Michelle Oberman & Lisa Soleymani Lehmann, *Doctors' Duty to Provide Abortion Information*, 10 J. L. BIOSCI., July–Dec. 2023, at 1, 4.

55. Rudi Keller, *Missouri Hospital the First Confirmed Federal Investigation of Denied Emergency Abortion Access*, MISSOURI INDEP. (Nov. 2, 2022, 2:45 PM), https://missouriindependent.com/2022/11/02/missouri-hospital-the-first-confirmed-federal-investigation-of-denied-emergency-abortion/.

56. *Id.*

57. *Id.*

58. *Id.*

59. MO. REV. STAT. §188.010 (2016) (effective Aug. 28, 2019) (emphasis added).

Establishment Clause. If the Supreme Court took up such a challenge, the Court could decide the case according to the *Lemon* test,[60] or it may employ its increasingly favored 'history and tradition' analysis.[61]

A. Religious Liberty and The First Amendment

From its inception, the United States has promoted the ideal of religious liberty. The Colonists left Europe and settled in America "to escape the bondage of laws which compelled them to support and attend government-favored churches."[62] James Madison, co-author of the Constitution and the First Amendment, stated that the First Amendment aims to prevent one or multiple sects from "establish[ing] a religion to which they would compel others to conform."[63] Religious liberty was of such importance to the Framers that its principles are enshrined in the first words of the Constitution's First Amendment.

The First Amendment states, "[C]ongress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[64] In the first 150 years of the country's existence, there was little to no debate over the Establishment Clause. Not until 1940 was the Supreme Court called upon to interpret the meaning of the Clause.[65] The protections afforded by the Establishment and Free Exercise Clauses (together, the "Religion Clauses") were held to be fundamental liberties subject to the Due Process Clause of the Fourteenth Amendment.[66] Under the principle of incorporation, the Establishment Clause applies to state laws and local ordinances, as well as to federal laws and regulations.[67] The Religion Clauses are widely held to be the provisions of the Constitution that guarantee the "wall of separation" between church and state.[68]

The "wall of separation" often employed as a metaphor for the Religion Clauses should not be taken literally; it is permeable. The Supreme Court has provided on multiple occasions that "[i]t has never been thought either possible

60. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

61. The "History and Tradition" analysis seeks to determine whether there is a historical tradition of regulating the conduct in question and relies on history as a limit on the scope of individual rights. Erwin Chemerinsky, *History, Tradition, The Supreme Court, and the First Amendment*, 44 U.C. HASTINGS L. J. 901, 903 (1993).

62. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 8 (1947).

63. 1 ANNALS OF CONG. 758 (1789); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L REV. 2105, 2144–2146 (2003).

64. U.S. CONST. amend. I.

65. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

66. *Id*.

67. *Id*.

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

or desirable to enforce a regime of total separation."[69] The Establishment Clause requires accommodation of different faiths and prohibits hostility toward any.[70] Federal or state "[r]egulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions" is not forbidden.[71]

B. Supreme Court Jurisprudence on the Establishment Clause

As Establishment Clause jurisprudence developed, various tests emerged for determining when the Clause is violated. In 1963, the Supreme Court struck down a statute requiring Pennsylvania public schools to open each school day with readings from the Bible and a classroom recitation of the Lord's Prayer.[72] The statute lacked the "secular legislative purpose and primary effect that neither advances nor inhibits religion" required to withstand scrutiny under the Establishment Clause.[73] The Court found this standard appropriate in light of its position of neutrality, reasoning that, "[w]e have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard."[74] Justice Clark, writing for the majority, noted that, although the practices may appear to be relatively minor encroachments, "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent."[75]

In *Board of Education of Central School District No. 1 v. Allen*, the Court upheld a statute requiring public school districts to lend textbooks at no charge to parochial schools.[76] The Court determined that the statute's primary purpose or effect did not advance or inhibit religion because the requirement applied to all schoolchildren regardless of the school they attended.[77] Therefore, it could not be said that the requirement "exceed[ed] the scope of legislative power as circumscribed by the Constitution."[78]

In *Walz v. Tax Commission of the City of New York*, the Court considered whether granting property tax exemptions to religious organizations violated the Establishment Clause.[79] The Court held that property tax exemptions neither

69. Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)); *see also* Lee v. Weisman, 505 U.S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.").

70. Salazar v. Buono, 599 U.S. 700, 719 (2010).

71. McGowan v. Maryland, 366 U.S. 420, 442 (1961).

72. Abington School District v. Schempp, 374 U.S. 203, 205 (1963).

73. *Id.* at 222.

74. *Id.* at 226.

75. *Id.* at 225.

76. Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968).

77. *Id.*

78. *Id.* (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)).

79. Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664 (1970).

establish nor interfere with religion and create only minimal entanglement between the religious entity and the state (as opposed to enforcing taxes, which would be a much greater entanglement).[80] In its opinion, the Court noted that "'benevolent neutrality' toward churches and religious exercise [was] deeply embedded in the fabric of our national life."[81]

Taken altogether, Supreme Court jurisprudence on the Establishment Clause spanning more than sixty years finds that legislation should be secular in purpose, have a primary effect that neither advances nor inhibits religion, creates only minimal entanglement between the religious entity and the state, and does not exceed the scope of legislative power set forth in the Constitution.

C. Battle of the Legal Tests: Lemon vs. History and Tradition

In the landmark case *Lemon v, Kurtzman*, the Court integrated the standards developed in the cases mentioned above to create a single, formulaic analysis under which government actions would be scrutinized for adherence to the Establishment Clause.[82] The opinion set forth a sequential and conjunctive test requiring a determination of: (1) whether the statute has a secular legislative purpose, (2) whether its primary effect is one that neither advances nor inhibits religion, and (3) whether it fosters "excessive government entanglement with religion."[83] The framework for assessing the effects of a challenged action would later be introduced by the Court as an inquiry into whether a "reasonable observer" would infer that the action amounts to an "endorsement" of religion.[84]

However, the test established in *Lemon* failed to provide analytical uniformity or predictability in Establishment Clause cases reviewing government action, and the Supreme Court itself often ignored *Lemon*.[85] The *Lemon* test has often been criticized among the lower courts as not being "a particularly useful test,"[86] and "a jurisprudence of minutiae that leaves [government officials] to rely on little more than intuition and a tape measure to ensure the constitutionality of public holiday displays."[87] Over the last few decades, various members of the Supreme Court have regularly made similar criticisms of the test as well.[88]

80. *Id.* at 676.

81. *Id.* at 676–77.

82. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

83. *Id*.

84. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 618, 620, 630 (1989).

85. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (collecting cases where Supreme Court either expressly declined to apply the test or simply ignored it).

86. Cooper v. U.S. Postal Serv., 577 F.3d 479, 494–95 (2d Cir. 2009).

87. Skoros v. New York, 437 F.3d 1, 15 (2d Cir. 2006).

88. Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) (describing the test as having a "checkered career in the decisional law of this Court").

The Court recently declared in *Kennedy v. Bremerton School District* that it "long ago abandoned" the *Lemon* test and its later-added offshoot: the "reasonable observer" test.[89] The Court's decision instead stated that courts should interpret the Establishment Clause by "reference to historical practices and understandings."[90] In *Kennedy*, the Court determined that a school district's firing of an employee for leading prayers in order to avoid the appearance of the school's preference or establishment of a particular religion was improper, reasoning that the members of Congress responsible for drafting the First Amendment found that such public prayer was permissible.[91] But the Court's decision in *Kennedy* to abandon the *Lemon* test altogether leaves little guidance on how such Establishment Clause interpretations are to be conducted in all but a few factually similar cases.

The Court in *Kennedy* refers to its 2015 decision in *Town of Greece v. Galloway* and its 2019 plurality opinion in *American Legion v. American Humanist Association* as support for its contention that the *Lemon* test was "long ago abandoned."[92] The opinion in *Town of Greece v. Galloway*, however, did not mention *Lemon*.[93] There, the Court stated "the formal 'tests' that have traditionally structured" the analysis of government action under the Establishment Clause were unnecessary where history shows that a specific practice is permitted.[94] The Court held that the *Greece* town board's practice of opening meetings with a prayer did not violate the Establishment Clause because tolerance for such activity is shown by a review of history, not the least of which being that the First Congress, which drafted the First Amendment, regularly held invocations with explicitly religious themes from visiting chaplains—a practice that continues to this day.[95]

The Court's decision in *American Legion v. American Humanist Association* also does little to show that the *Lemon* test was abandoned before *Kennedy* or demonstrate how government action should be analyzed outside of the factual example provided by the case.[96] Regarding the *Lemon* test, the plurality opinion states only that the Court can, and has, declined to use the test, and provides four reasons it finds the test ill-equipped for cases "that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with

89. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022).

90. *Id*. at 510 (citing Town of Greece v. Galloway, 572 U.S. 565, 575–77 (2014); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019)).

91. *Kennedy*. 597 U.S. at 512–13.

92. *Id*. at 510 (citing Town of Greece v. Galloway, 572 U.S. 565, 575–77 (2014); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019)).

93. *See generally Galloway*, 572 U.S.

94. *Id.* at 575–77 (citing Marsh v. Chambers, 463 U.S. 783, 796 (1983)).

95. *Id.* at 578–79.

96. *Am. Legion*, 139 S. Ct. at 2067.

religious associations."[97] The Court specified six general categories of cases that raise Establishment Clause issues, and identified *American Legion* in the category about "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies."[98] The Court found that the display of a large cross on public land memorializing veterans of World War I did not violate the Establishment Clause, reasoning that longstanding monuments, symbols, and practices are given a presumption of constitutionality because of their extensive history.[99] The Court further held that the same acts of the First Congress allowing legislative prayer discussed in *Galloway* were analogous to the cross here.[100] The cross, despite being a Christian symbol, represented more than just its religious meaning to the public, in particular the sacrifice of the veterans it memorialized.[101]

While the *Kennedy* decision made clear that, going forward, "the Establishment Clause must be interpreted by 'reference to historical practices and understandings,'"[102] the decision did not elaborate on how the standard would apply to other factual scenarios. In her dissent, Justice Sotomayor admonished that the Court "reserve[d] any meaningful explanation of its history-and-tradition test for another day."[103]

Even without an explicit explanation of this new standard for circumstances outside of public prayer or monuments, future decisions will likely review Establishment Clause challenges with an eye toward history. Such historical perspectives are taken into consideration in other analyses the Court prescribes for interpreting the Establishment Clause, particularly the over-arching standard that has remained unchanged: government neutrality.[104] Neutrality regarding religion is the cornerstone of the Establishment Clause.[105] Faithful interpretations of the Clause must center neutrality toward religion and not favor one religion over others, or favor religious adherents over non-adherents.[106] A government that acts to advance religion invalidates the value of the Establishment Clause's religious neutrality because there can be "no neutrality when the government's ostensible object is to take sides."[107]

97. *Id.* at 2081.
98. *Id.* at 2081 n.16.
99. *Id.* at 2085–89.
100. *Id.*
101. *Am. Legion*, 139 S. Ct. at 2090.
102. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535 (2022).
103. *Id*. at 573 (Sotomayor, J., dissenting).
104. Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n, 548 U.S. 617 (2018).
105. McCreary Cnty. v. Am. C. L. Union of Ky., 545 U.S. 844, 860 (2005).
106. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994); *see also* Harris v. McRae, 448 U.S. 297, 319–20 (1980) (finding the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause).
107. *McCreary Cnty.*, 545 U.S. at 860.

"Factors relevant to the assessment of governmental neutrality include "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 members of the decisionmaking body."[108]

D. How Would Such an Analysis Play Out in Missouri?

In any challenge to Missouri's abortion ban and the religious language in its statement of intent, under *American Legion*'s historical analysis of neutrality the first relevant factor to consider is the historical background of the decision: here, Missouri's abortion ban and the religious language in its statement of intent. Missouri has a long and rich history of outlawing abortion. The state's first abortion regulations date back to 1825, at which time the law stated:

> [E]very person who shall willfully and maliciously administer or cause to be administered … any poison, or other noxious, poisonous or destructive substance or liquid…to cause or procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall suffer imprisonment not exceeding seven years, and be fined not exceeding three thousand dollars.[109]

The law, like many others enacted, was a "poison control" measure rather than a law expressly banning or criminalizing abortion.[110] Such measures were enacted to protect pregnant women by regulating the sale of abortifacients, however they often killed the women who took them.[111] The dividing line in the 1825 law, and other state laws, was the point of quickening, or when the pregnant woman begins feeling movement from the fetus.[112] Abortions procured before quickening were not illegal under the 1825 law.[113]

A decade later, in 1835, the law was updated to make abortion illegal regardless of the method used.[114] The 1835 law included only one exception to the abortion ban: to save the life of the mother.[115] The 1835 law remained in place for nearly 140 years, until *Roe v. Wade* was decided in 1973.

It was not immediately clear what effect *Roe* would have in Missouri. Mayors in metropolitan areas planned to offer abortion services at local hospitals but remained confused and uncertain until then-Missouri Attorney General John

108. *Masterpiece Cakeshop*, 584 U.S. at 619.

109. MO. REV. STAT. VOL 1 CH. 11 SEC. 12 (1825) (repealed in 1835).

110. Jonathan Shorman, *Abortion Has Only Been Legal in Missouri For 49 years. Here's What Came Before* Roe v. Wade, KANSAS CITY STAR (May 13, 2022), https://www.kansascity.com /news/politics-government/article261377422.html.

111. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 8, 10 (Univ. of Cal. Press 1997).

112. Shorman, *supra* note 110.

113. *Id.*

114. *Id.*

115. *Id.*

Danforth issued an opinion on the ruling.[116] In 1976, the Supreme Court struck down Missouri's abortion regulation requiring written consent for an abortion from a woman's husband if she was married.[117] In 2019, Governor Mike Parson signed the state's trigger ban, which bans abortion after eight weeks of pregnancy.[118]

The historical background leading to enactment of Missouri's abortion ban appears neutral regarding religion. However, the second and third factors of neutrality, which consider the specific series of events that led to the challenged enactment and the legislative history, including statements made by lawmakers, show the ban is anything but neutral.

The second factor of neutrality to consider is the series of events leading to the law's enactment. Missouri has a "deeply rooted history and proud tradition of respecting, protecting, and promoting the life of the unborn" and was among the first states to comprehensively ban abortion.[119] Laws passed throughout the state's history reflect this history and tradition. The state has banned abortion in some form or another since 1825. However, these laws did not reflect a religious element until the late 1980s. In 1986, the state enacted a law providing that "the life of each human being begins at conception."[120] That law also provides that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state."[121] Litigation around this time supported the belief that life begins at conception.[122] In 2019, Missouri Governor Mike Parson signed the state's trigger ban to come into effect if *Roe* and *Casey* were overturned.[123] The floor debates of this bill were deeply underscored by the religious preferences and stances of the state's legislators, as discussed below.

The third factor of neutrality to consider is the legislative history of the enactment, including contemporaneous statements made by members of the decision-making body. This prong of the analysis is the most likely to fail the

116. *Id.*

117. Planned Parenthood v. Danforth, 428 U.S. 52, 71–72 (1976).

118. Shorman, *supra* note 110.

119. Katherine Fung, *Missouri Bans All Abortions Minutes After SCOTUS Ruling*, NEWSWEEK (June 24, 2022), https://www.newsweek.com/missouri-bans-all-abortions-minutes-after-scotus-ruling-overturning-roe-1718967.

120. MO. REV. STAT. § 1.205.1(1) (1986)

121. MO. REV. STAT. § 1.205.2 (1986).

122. *See* Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. 1972) (en banc); *see also* Steggall v. Morris, 258 S.W.2d 577, 579 (Mo. 1953) (en banc) (stating the Supreme Court of Missouri has "long recognized that "biologically speaking, the life of a human being begins at the moment of conception in the mother's womb" and that "from the viewpoint of the civil law and the law of property" an unborn child "is not only regarded as a human being, but as such from the moment of conception—which it is in fact.").

123. Shorman, *supra* note 110.

neutrality test because the legislative history of this enactment is notably religious.

In enacting its abortion ban, the Missouri legislature unequivocally enshrined religious precepts into law. The legislation declares that "the intention of the general assembly of Missouri" is to "regulate abortion…in recognition that *Almighty God* is the author of life."[124] The passage of this law explicitly recognizes a belief held by one religion, Christianity, and enshrines those beliefs into law.

Throughout legislative debates over the bill, lawmakers expressed their intent to enshrine such Christian beliefs into law. The bill's lead sponsor, Representative Nick Schroer, stated "as a Catholic I do believe life begins at conception and that is built into our legislative findings."[125] Representative Ben Baker culled support from his colleagues by stating:

> Ladies and gentlemen, from the one-cell stage at the moment of conception, you were already there. We just couldn't see you yet. And what makes you valuable is that you equally share the image of our Creator. You are His work of art. And the masterpiece of your life will only happen if you allow it to develop.[126]

Yet another co-sponsor, Representative Barry Hovis, explained his rationale for supporting the bill by stating, "[s]o I had to make a decision on when I believe that life was present. And being from the Biblical side of it, I've always believed that life does occur at the point of conception."[127] Another proponent of the bill, Representative Holly Thompson Rehder, beseeched her fellow legislators: "God doesn't give us a choice in this area. He is the Creator of life. And I, being made in His image and likeness, don't get to choose to take that away…"[128] Representative Rehder continued later in the debate by saying:

> Life begins at conception. Psalms 119 says 'Your hands made me and formed me.' That's the very initial stages…to stand on the floor and say 'How could we make someone look at a child from rape or incest, and to care for them? I can say how we can do that. We can do that with the love of God that he puts in our hearts for those children.'[129]

124. MO. REV. STAT. §188.010 (2019) (emphasis added).

125. Rob Boston & Liz Hayes, *Restoring Reproductive Rights: Missouri Lawmakers Used Religion to Justify Banning Abortion. In A New Lawsuit, Americans United and Its Allies Intend to Show Them Why They're Wrong*, CHURCH & STATE MAG. (Feb. 1, 2023), https://www.au.org/the-latest/church-and-state/articles/restoring-reproductive-rights-missouri-lawmakers-used-religion-to-justify-banning-abortion-in-a-new-lawsuit-americans-united-and-its-allies-intend-to-show-them-why-theyre-wrong/.

126. *Id.*

127. Petition for Injunctive and Declaratory Relief, Blackmon v. Missouri, No. 2322-CC00120 at 42 (Mo. Cir. Ct. Mar. 14, 2023).

128. *Id*. at 43.

129. *Id*. at 43–44.

Opponents of the bill also noted the religious slant of the legislation. Representative Ian Mackey questioned whether "our constituents agree with the statement that God is the author of life."[130] He warned colleagues that the bill "itself is in violation of the separation of church and state" calling it "an anti-constitutional statement in and of itself."[131] In response, Republican Representative Adam Schnelting urged his colleagues to ignore the principle of separating church and state, saying:

> Just to touch on something someone had mentioned yesterday that this is unconstitutional separation of church and state. Well, fact of the matter is, I know of no greater way of affirming the natural rights of man than to declare that they are a gift from our Creator that neither man nor government can abridge.[132]

Taken altogether, the law's plain language and the legislators' statements demonstrate the religious nature of the ban and elucidate the legislature's intent in enacting this legislation: to enshrine the Christian belief that life begins at conception and is conferred upon everyone by God into law.

The actions taken to implement this ban, namely codifying an invocation of "Almighty God" as justification for regulating abortion, is an impermissible establishment of religion.[133] Section 188.010, and the statutes surrounding it that regulate abortion, foists upon all Missouri citizens a religiously-imposed restriction to which they must comport—even if they do not believe in it.

Missouri's legislative findings establish a dominant religious tradition: Christianity. Under Missouri's abortion ban, a woman cannot seek an abortion for reasons related to her mental health, or for another reason affecting her well-being that does not constitute a medical emergency or situation necessary for saving the mother's life, which is permitted, for instance, under Jewish law.[134] Thus, Missouri's abortion ban infringes upon a person's access to medical care by limiting abortion access to instances only permissible under the Christian ideology. This legislation erodes the fundamental protections guaranteed by the Establishment Clause of the First Amendment by enshrining one religion into law.

IV. RECOMMENDATION

If presented with an Establishment Clause challenge, as discussed above, the Court should strike down Missouri's abortion ban based on the law's improper religious justifications. The challenge would not be precluded by the previous

130. *Id.* at 42.

131. *Id*.

132. Petition for Injunctive and Declaratory Relief, Blackmon v. Missouri, No. 2322-CC00120 at 43 (Mo. Cir. Ct. Mar. 14, 2023).

133. MO. REV. STAT. § 188.010 (2019).

134. Grossman & Reisner, *supra* note 10, at 4.

Supreme Court case, *Webster*, which reviewed—and ultimately declined to make a ruling on—a separate Missouri statute determining when life begins.[135] If the Court adheres to the neutrality principle that considers the history surrounding Missouri's abortion ban and the actions of the legislators responsible for its passing, the statute will likely be found in violation of the Establishment Clause.

Nevertheless, the Court could find the ban as simply harmonizing with the Christian viewpoint on abortion and having a separate valid purpose found in the history of such bans. The wall between church and state is, after all, permeable, and the Court will not interfere with an enactment that otherwise services a legitimate state purpose, even if such an enactment overlaps with religious practice and exercise.

But perhaps the Court should put more stock into what lawmakers actually say rather than their cursory statements that such a ban "protects women's health."[136] The motivations driving Missouri lawmakers in passing this ban were manifestly based on religion, which constitutes an imposition of those beliefs onto all Missouri citizens. Even if Missouri could easily replace its ban if struck down by the Court as in violation of the First Amendment, striking such a law would serve to remind legislators of the appropriate considerations in making policy for all Missourians, including those who do not subscribe to their Christian beliefs. It would also serve to begin the process of rebuilding the public trust in the Supreme Court on which the Court relies—a trust that many feel was

135. The United States Supreme Court has previously reviewed similar language from a Missouri statute providing that life begins at conception, in *Webster v. Reproductive Health Services*. Webster v. Reproductive Health Services, 492 U.S. 490, 504–07 (1989). The statute at issue in that case, however, did not make overt religious references like those found in Missouri's abortion ban's legislative statement of intent. In *Webster*, the Court passed on making a ruling on the constitutionality of the provision because it was not yet determined to what extent the provision was used to interpret other statutes or regulations. The Court was also persuaded to pass on making a ruling by the fact that the provision at issue in *Webster* did not by its own terms regulate any activity. As such, the justifications of the Court to decline addressing the Missouri statute at issue in *Webster* would not be present in a challenge to Missouri's abortion ban on Establishment Clause grounds. Therefore, the challenge to Missouri's abortion ban would not be precluded by *Webster*.

136. Limited evidence exists to support the assertion that abortion bans protect women's health, while a wealth of research shows that abortion bans actually harm women's health. *See, e.g.*, Amanda Jean et al., *The Maternal Mortality Consequences of Losing Abortion Access*, SOCARXIV (June 29, 2022), https://doi.org/10.31235/osf.io/7g29k; Elyssa Spitzer et al., *Abortion Bans Will Result in More Women Dying*, CTR. FOR AM. PROGRESS (Nov. 2, 2022), https://www.americanprogress.org/article/abortion-bans-will-result-in-more-women-dying/; Annalies Winny, *Abortion Restrictions and the Threat to Women's Health*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (May 19, 2023), https://publichealth.jhu.edu/2023/a-year-without-roe#:~:text=%E2%80%9CWe%20have%20maternal%20mortality%20rates,health%20care%2C%E2%80%9D%20Bell%20said.

shattered in the wake of the *Dobbs* decision,[137] and after explicit statements from the Conservative Justices (then-Supreme Court nominees) during nomination hearings and at other points that they supported the principle of stare decisis, and would honor *Roe*'s longstanding precedent.[138]

To build on, or rebuild, the Supreme Court's image of neutrality and restore lost credibility, the Court should clarify its use of the history and tradition test. Clarifying the contours of the history and tradition test helps all players in the legal system understand *which* history and traditions to look to when analyzing these issues, and the test's contextual place among canons of constitutional interpretation. An overview of recent Supreme Court decisions involving the history and tradition analysis shows a trend of the current Court's Conservative-Catholic majority limiting the history and tradition that informs constitutional rights to only the Founders' beliefs on the issues presented—beliefs that are often conjectural.[139] Rulings in which the Court employed the history and tradition test in the past two years alone have struck down restrictions on gun ownership,[140] strengthened First Amendment protections for religious speech by government officials,[141] found that the First Amendment allows individual retailers to refuse to services for LGBTQ+ couples if doing so would defy the retailer's conscience and personal convictions[142]—and, of course, overturned the constitutional right to abortion based on the 1868 history and tradition of most states at the time (twenty-eight out of thirty seven, or seventy-five percent)

137. A Gallup poll conducted in September 2022 found a sharp drop in trust in the federal judicial branch, noting that "twenty-five percent of Democrats, down from [fifty percent] a year ago, have a great deal or fair amount of trust in the [C]ourt." Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx#:~:text=The%20drop%20in%20trust%20in,of%20trust%20in%20the%20court. One month later, a poll conducted by the University of Pennsylvania found that just over half (fifty-three percent) of U.S. adults "disapprove of how the [C]ourt handles its job." *Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, UNIVERSITY OF PENNSYLVANIA ANNENBERG POLICY CENTER (Oct. 10, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets. The survey also found a breakdown between the qualities people most value in judges (i.e. fairness, impartiality), and the traits they perceive in the Justices currently on the Supreme Court. *Id*.

138. Becky Sullivan, *What Conservative Justices Said—and Didn't Say—About* Roe *at Their Confirmations*, NPR (June 24, 2022, 3:44 PM), https://www.npr.org/2022/05/03/1096108319/roe-v-wade-alito-conservative-justices-confirmation-hearings.

139. Emily Bazelon, *How 'History and Tradition' Rulings Are Changing American Law*, N.Y. TIMES (Apr. 29, 2024), https://www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html.

140. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 70–71 (2022).

141. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543–44 (2022).

142. 303 Creative LLC v. Elenis, 600 U.S. 570, 602–03 (2023).

to criminalize abortion.[143] It is worth noting that the theory of selective judicial activism does account for all constitutional rulings, nor cover all rulings under the Roberts Court.[144] The pattern, however, appears "too consistent to admit of any conclusion other than that the Justices abhor judicial activism, except when it serves to produce the political goals that they support. Judicial activism may or may not be a proper way to understand the Constitution, but it should at least be applied evenly across all cases."[145]

The current Supreme Court's approach to history and tradition serves to replace an evolving and expanding standard of liberty with a backward-looking and ambiguous standard that fosters an environment ripe for selective judicial activism.[146] Judge Carlton Reeves, an Obama nominee, shares Justice Sotomayor's frustration with the ambiguity and potential for bias surrounding the history and tradition test.[147] In an opinion, Judge Reeves underscored the issues presented by a lack of direction from the Supreme Court's Conservative majority on the test; Reeves stated that his court is "not a trained historian," nor are the "distinguished" Justices of the Supreme Court, and that such history-based analyses are better performed by those who are trained to undertake such a broad—and speculative—analysis.[148] Reeves went on to state that "we are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791."[149] The current Supreme Court's penchant for glossing over the three centuries between the nation's founding and present day, in favor of eighteenth-century history, is more than a mere thorn in the side of progressives; the shift towards this amorphous test is leaving judges at all levels of the judiciary frustrated as to the unpredictability of the test's use.[150]

143. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 248–50, 292 (2022). According to Aaron Tang, a law professor at the University of California, Davis, the twenty-eight state majority relied upon by Justice Alito in the *Dobbs* majority is inflated. "Substantial evidence suggests that as many as 12 of the 28 states" continued to permit abortions before quickening. Aaron Tang, *After* Dobbs, 75 STAN. L. REV. 1091, 1128 (2023). Justice Alito further ignored pro-choice history and tradition by omitting any reference to or analysis of other moments in history, including "steps some states took before and after *Roe* to ensure that abortion would be legal within their borders under certain circumstances." Bazelon, *supra* note 139.

144. Alan B. Morrison, *Selective Judicial Activism in the Roberts Court*, AM. CONST. SOC'Y 2 (6th ed. 2022).

145. *Id*.

146. *Id.* at 1–3.

147. United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175 at *3 (S.D. Miss. Oct. 27, 2022).

148. *Id.*

149. *Id.*

150. Clara Fong et al., *Judges Find Supreme Court's* Bruen *Test Unworkable*, BRENNAN CTR. FOR JUST. (June 26, 2023), https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable; Adam Liptak, *A Conservative Judge's Critique of the Supreme Court's Reliance on Tradition*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/us/supreme-court-originalism-tradition-conservative.html.

Ironically, the main selling point of the history and tradition test—"fix[ing] the meaning of the Constitution to the moment in which it was written, to prevent judges from substituting their values for the wisdom of the nation's founders"—has been so bastardized as to now having the exact opposite effect: judges can—and do—use the test "inconsistently or to reach the results they prefer[]."[151] In theory, the originalist approach limits judicial discretion, thereby preventing judges from deciding cases in accordance with their own political views. But originalism has failed to deliver on this promise. Instead, we are left with an inflexible and flawed method of constitutional interpretation that relies on conjecture about the Founders' beliefs, and that allows judges to "ventriloquize historical sources"[152] to achieve a desired outcome. Using the history and tradition test, judges are empowered to sift through the nation's past and cherry-pick the histories and traditions the best serve their purpose.[153] Even Conservative Supreme Court Justices see the flaws inherent in using this test; while speaking about originalism at The Catholic University of America's law school in September 2023—just three months after *Dobbs* was decided—Justice Amy Coney Barrett warned that judges should be "very, very careful" about how historical evidence is used in constitutional adjudication and quoted Justice Scalia, who has been called originalism's "chief architect," on how the practice of legislative history involves little more than "looking over a crowd and picking out your friends."[154]

A closer look at the instances in which the history and tradition analysis is employed—or not employed—reveals the subjective nature of this test. Joseph Fishkin, law professor at the University of California, Los Angeles, said the test is "basically a fancy way of saying, 'if men in power didn't recognize this right as fundamental in ye olde times, we won't recognize it now.'"[155] A fundamental question that *Dobbs* steers clear of is why nineteenth-century abortion laws should limit a modern, twenty-first century understanding of the Constitution. Fixing the meaning of the Constitution to this limited window in the nation's past is an issue because, according to Justices Breyer, Sotomayor, and Kagan, "the men who ratified the Fourteenth Amendment and wrote the state laws of

151. Bazelon, *supra* note 139.

152. Reva Siegel, *Memory Games:* Dobbs' *Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance,* 101 TEXAS L. REV. 1127, 1184 (2023).

153. *See generally id.*

154. Jimmy Hoover, *Justice Barrett on Originalism and Why She Doesn't Write So Many Opinions,* BLOOMBERG LAW (Sept. 21, 2023), https://www.bloomberglaw.com/document/XAHA8BK0000000?jcsearch=gml45eekdjg#jcite; Jeff Neal, *Was Antonin Scalia Originally an Originalist?,* HARVARD LAW TODAY (Oct. 26, 2022), https://hls.harvard.edu/today/was-antonin-scalia-originally-an-originalist/.

155. Bazelon, *supra* note 139.

the time did not view women as full and equal citizens."[156] "The *Dobbs* majority signed on to an opinion in which decisions and laws written by men were presented as America's history and traditions, without a single woman's voice represented, and which claimed those traditions were sufficient to justify stripping women today of a half-century of constitutional rights."[157] "This is not an account of history that is 'conceptually quite separate from the preferences of the judge himself.'"[158] Yale law professor Reva Siegel discusses how Originalist interpretations of the Constitution, such as the history and tradition test, create and leverage an appeal to the mythologized ideal of the Founders' Constitution, thereby creating a "claim on constitutional memory" that "transmute[s] politics into law."[159] This claim purports to create order and structure in constitutional interpretation, but the deeper impact is that Justices and scholars face significant difficulty in establishing original meaning due to the sheer number and diversity of historical and legal sources, and the fact that the Constitution's contemporaries could not have conceived of some of the situations that would arise in modern times. In the landmark decision of *Obergefell v. Hodges*, Justice Anthony Kennedy, a Reagan nominee, stated that the "generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[160] The opportunities presented in using the history and tradition test are not inherently negative or overly skewed, but they become so when the body vested with decision-making authority is comprised of an ideological majority and fewer dissenting minorities—as is the case with the current Supreme Court.[161] The tendency for the current Court's Conservative two-thirds majority to use the unclear history and tradition test is a microcosm of the larger trend *towards* Conservative religious beliefs being codified into law and upheld in courts, despite the public's trend *away* from such beliefs.[162] This disconnect fosters an environment where biased legislation and policy of all kinds is ripe to proliferate.

156. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 381 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

157. Siegel, *supra* note 152, at 1193.

158. *Id.*

159. *Id.* at 1133.

160. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

161. Oriana González & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS (July 3, 2023), https://www.axios.com/2019/06/01/supreme-court-justices-ideology.

162. Stephen Jesse et al., *A Decade-Long Longitudinal Survey Shows that the Supreme Court is Now Much More Conservative than the Public*, PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S., June 6, 2022, at 3.

V. CONCLUSION

Different religions believe that human life begins at different stages of development. Science can explain developmental timelines, but philosophic and religious viewpoints largely determine what defines 'life' or 'personhood.' The "sharply conflicting views" on the "profound moral issue" of abortion mentioned by Justice Alito in the *Dobbs* majority opinion are philosophic and religious disagreements on these issues. That is all they should be, though: philosophic and religious disagreements—not law.

Abortion bans rooted in the notion that life begins at conception are religious, establishing one dominant religion's ideology into law and infringing upon the First Amendment's Establishment Clause. Missouri's abortion ban creates such a violation because the law is based on Christian findings that an 'Almighty God' is the 'Creator' of life, and that life begins at conception. Such a law cannot be deemed neutral due to its plain language and the law's legislative intent, as evidenced by statements made by lawmakers during the debate and passage of the Missouri legislation. Ultimately, these abortion bans amount to an unconstitutional establishment of the Christian stance on abortion into law.

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