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Anti-Abortion Statutes As Religious Beliefs

Scott DeVito

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ANTI-ABORTION STATUTES AS RELIGIOUS BELIEFS

SCOTT DEVITO, J.D. PH.D. *

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I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.

— Thomas Jefferson, Letter of January 1, 1802, to Danbury Baptists

ABSTRACT

In *Dobbs v. Jackson Women’s Health Organization*, Justice Alito ruled there is no right, under the U.S. Constitution, for a woman to have an abortion. Since then, eleven states have either enacted or activated statutes that forbid the performance of an abortion. Others may soon follow suit. This Article does not attempt to dispute the reasoning of the *Dobbs* decision. Instead, it asks whether the eleven state statutes, now construed as constitutionally permitted, are, in fact impermissible intrusions into the constitutionally required separation of church and state. This Article approaches this problem from both a historical and philosophical perspective. First, it uses the over 4,000-year-long history of the church-state interrelationship (including U.S. Supreme Court opinions) to define when a belief is a “religious belief.” Second, using that definition, the Article engages in a careful logical analysis of the eleven statutes to argue both that they promote religious beliefs in contravention of the First Amendment’s Establishment Clause and that they do not fall under the exception the Court has carved out in *Kennedy v. Bremerton*.

I. INTRODUCTION

After reading the *Dobbs v. Jackson Women’s Health Organization* decision, which declared that women¹ do not have a U.S. Constitutional right to an abortion,² I became concerned that the decision ignored key constitutional issues. This Article does not attempt to unpick and argue against the reasoning of the Court in *Dobbs*; instead, this Article argues current state statutes granting fetuses rights violate the U.S. Constitution’s Establishment Clause³ and do not fall within the exception carved out in

1. The *Dobbs* decision expressly uses the words “woman” and “women” in its discussion of abortion law. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240 (2022). At the same time, it is clear that not all persons with uteruses are cis-gendered women. While this article will use those same terms, their scope should be understood broadly to include all persons with uteruses.

2. *Id.* at 2242.

3. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

Kennedy v. Bremerton.⁴ The *Dobbs* decision makes clear that Justice Alito was aware of such an argument but chose not to address it.⁵ In arguing for this position, this Article provides a unique approach to the problem because it develops a definition of “religious belief” based on the over 4,000-year history of state-religion interaction, followed by a rigorous philosophical analysis demonstrating that current state statutes forbidding abortion are impermissibly imposing religious beliefs on citizens.

The essential argument of this Article is that a proper understanding of the history of the distinction between religion and state, in general and relative to the Constitution, entails that current state efforts to adopt anti-abortion laws can only be seen as the impermissible imposition of religion and as violations of the Establishment Clause. In Part II, this Article reviews the rationale for the *Dobbs* decision and notes that *Dobbs* itself indicates that there may be an Establishment Clause problem for anti-abortion statutes.⁶ Part III analyzes the long history of the state-religion relationship, from the ancient Sumerians to the Founders of the United States, and through the holdings of the Supreme Court, to develop a set of necessary and sufficient conditions for something to be a religious belief.⁷ Those conditions are (1) a belief, (2) arising not from reason, (3) about the existence of a non-physical world, (4) inhabited by non-physical beings—especially God. Part IV establishes that current anti-abortion statutes are efforts to promote a religious belief and practice.⁸ Finally, Part V demonstrates that such efforts are not protected by the *Kennedy* exception to the Establishment Clause and, therefore, these anti-abortion statutes are prohibited government intrusions into the religious sphere.⁹

4. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

5. *Dobbs* has precisely one paragraph that can be seen as relating to the Establishment Clause but it forms no part of any argument the Court makes. *See Dobbs*, 142 S. Ct. at 2257.

6. *Infra* Section II.

7. *Infra* Section III.

8. *Infra* Section IV.

9. *Infra* Section V.

II. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

In 2022, the Supreme Court issued its *Dobbs* decision, overturning the Court's prior precedent on the right for a woman to seek an abortion.¹⁰ The Court justified its conclusion using a three-step argument.¹¹ First, the Court focused its attention on the argument in *Roe v. Wade*¹² and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹³ that the right to have an abortion is part of the Fourteenth Amendment's protections of liberties.¹⁴ Such liberties fall under a list of "fundamental rights" inferred from the text of the Constitution.¹⁵ To determine if a fundamental right exists, the Court looks to whether that right is "deeply rooted in [American] history and tradition."¹⁶ Second, after recognizing that the Constitution does not, on its face, grant or deny a right to abortion, the *Dobbs* Court analyzed the issue using a historical analysis of the common law around the time of the founding and concluded that the right to an abortion is not deeply rooted in our history and traditions.¹⁷ Finally, the Court argued that the precedent relied upon to justify granting women the right to abort a fetus does not, in fact, support that right.¹⁸

The *Dobbs* decision obliquely addressed an Establishment Clause concern in a short paragraph, where Justice Alito noted, "[w]hile individuals are certainly free to think and to say what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free to act in accordance with those thoughts."¹⁹ From his use of "existence," "meaning," "universe," and "mystery," we can infer Justice Alito is thinking about freedom of conscience and freedom of religion.²⁰ But

10. *Dobbs*, 142 S. Ct. at 2242.

11. *See id.* at 2244.

12. *Roe v. Wade*, 410 U.S. 111, 113 (1973).

13. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 833 (1992)

14. *See Dobbs*, 142 S. Ct. at 2245.

15. *Id.* at 2246.

16. *Id.*

17. *Id.* at 2248-49.

18. *See id.* at 2257-58 (referring to the right to marry a person of a different race, the right to marry while in prison, the right to obtain contraceptives, the right to reside with relatives, the right to make decisions concerning the education of one's children, the right not to be sterilized without consent, the right not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, as well as the right to engage in private consensual acts and to marry a person of the same sex).

19. *Id.* at 2257 (emphasis in original).

20. *Id.*

the paragraph lacks any language or citation tying it directly to precedent relating to the Establishment Clause, freedom of conscience, or freedom of religion.²¹ In addition, this is one of the few paragraphs in the opinion that lacks *any* reference to precedent or authority.²² The lack of reference to precedent is strange given the multitude of sources available on the topic. The natural inference from this lack of citations is that Justice Alito had reason not to discuss the Establishment Clause in the *Dobbs* decision.

III. WHEN IS BELIEF *RELIGIOUS* BELIEF?

To argue anti-abortion legislation is an impermissible establishment of a religious belief, we must first understand when a belief is a *religious* belief. This article develops a definition of “religious belief” by examining the state-religion relationship across a four-thousand-year period—from the ancient Sumerians to the modern U.S. Supreme Court. There are three distinct periods representing three distinct approaches to distinguishing the domain of the state from the domain of religion: the classical approach merging church and state; the Judeo-Christian approach in which church and state have separate domains but remain firmly intermixed; and the Enlightenment approach that leads to the development of our modern conception of separation of church and state.

A. *Classical Religions: Civil Authority as Derived from Religion*

During the earliest recorded periods, law was seen as derived from religion and gained its authority from the gods.²³ Given this understanding, religious law and secular law were unified. For example, the ancient Sumerian king Lipit-Ishtar, who ruled the city of Isin in Lower Mesopotamia from 1936-1926 B.C.,²⁴ attested that the gods Utu and Enlil commanded Lipit-Ishtar to establish justice in the lands and to have fair judicial procedure.²⁵ The later²⁶

21. *Id.*

22. *Id.*

23. See HAIM H. COHN, *The Secularization of Divine Law*, in *JEWISH LAW IN ANCIENT AND MODERN ISRAEL* 8, 7 (1971).

24. MARC VAN DE MIEROOP, *A HISTORY OF THE ANCIENT NEAR EAST CA. 3000-323 B.C.* 72, 349 (3d ed. 2016) (listing Lipit-Ishtar as the fifth king in the First Dynasty of Isin from 1936-1926 B.C.).

25. MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 25, 33 (2d ed. 1997).

26. The laws of Lipit-Ishtar precede the code of Hammurabi by nearly two centuries. See Francis R. Steele, *The Lipit-Ishtar Law Code*, 51 *AM. J. ARCHAEOLOGY* 158, 159 (1947). The consensus today is that the Code of Hammurabi is not a legal code but rather

Babylonian King Hammurabi (1792-1750 B.C.)²⁷ attested the gods Anu and Enlil had selected him “to make justice prevail in the land” and the god Shamash granted Hammurabi insight into the truth.²⁸ Similarly, the ancient Egyptians saw justice arising out of ma’at—a concept of order, as well as the name of a goddess.²⁹ The king’s officials acted as judges and were considered priests of the goddess Ma’at.³⁰ From Egypt to the upper reaches of the Fertile Crescent, law, government, and religion were one.

Like the Sumerians and Egyptians, the ancient Greeks saw civil authority as coming from the gods.³¹ Greek law required citizens to participate in the religious life of the State.³² Greek citizens could be prosecuted for impiety if they honored religions other than those recognized by the State.³³ And they could be civilly prosecuted for not believing in the gods.³⁴ For the ancient Sumerians, Egyptians, and Greeks, law and religion were fundamentally unified. As such, it was not possible to define “religious law” differently from “civic law.” They were one and the same.

a monument in which Hammurabi is presented as “an exemplary king of justice.” See VAN DE MIEROOP, *supra* note 24, at 121.

27. See VAN DE MIEROOP, *supra* note 24, at 352 (listing Hammurabi as the fifth king in the First Dynasty of Babylon).

28. ROTH, *supra* note 25, at 76-, 135.

29. See, e.g., RUSS VERSTEEG, LAW IN ANCIENT EGYPT 20-21 (2002).

30. See *id.* at 21.

31. See Will Herberg, *America’s Civil Religion: What It Is and Whence It Comes*, in AMERICAN CIVIL RELIGION 76, 76 (Russell E. Richey & Donald G. Jones eds., 1974); COLEMAN PHILLIPSON, THE TRIAL OF SOCRATES 213 (1929); see also PLATO, THE LAWS 125-26 (Trevor J. Saunders trans., 2004).

32. See PHILLIPSON, *supra* note 31, at 215. Missing FNs 32 above and 34 below!

33. RUSS VERSTEEG, THE ESSENTIALS OF GREEK AND ROMAN LAW 74 (2009); *s. ee* also PHILLIPSON, *supra* note 31, at 215 (noting that the failure of citizen to observe the national religion was impiety and therefore treason).

34. See, e.g., MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW, SOCIETY, AND POLITICS IN FIFTH-CENTURY ATHENS 196 (1986) (discussing the Decree of Diopieithes); see also PLUTARCH, THE RISE AND FALL OF ATHENS: NINE GREEK LIVES 198 (Ian Scott-Kilvert trans., 1960).

B. Judaism, Rome, and Christianity: Separating Church and State

The notion of unity of state and religion was not present in all ancient states.³⁵ For example, ancient Judea/Israel and Rome created separate religious and secular authorities.³⁶ These two traditions were reinforced later by Christian views on freedom and separation of religion from the state.³⁷

Like most religions of its time, ancient Judaism saw law as deriving from God.³⁸ At the same time, Judaism created a division of authority between the state (the king) and religion (the high priest).³⁹ Religious authority applied to the making of sacrifices,⁴⁰ “matters of the lord,”⁴¹ and offerings to God.⁴² Civic authority included the power to levy taxes, fix duties on goods, conscript soldiers, conscript tradesmen and craftsmen, appoint civic leaders, use and take other people’s land and crops, take spoil from enemies, and

35. See Dennis C. Mueller, *The State and Religion*, 71 REV. SOC. ECON. 1, 3 (2013) (discussing the first division of religion and politics in ancient civilization).

36. See Susan Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157, 1159-60 (1990) (discussing how the Noahidic system concerned civil life while the Sinaitic system concerned religious life); See ALAN WATSON, *THE LAW OF THE ANCIENT ROMANS* 6-7 (1970) (noting that religious sanctions differed from civil sanctions).

37. EDICT OF MILAN 313 A.D. (313), <https://www.cobnet.org/church/freespring/learn/edict-of-milan.pdf>.

38. The Torah states that Jewish law was given to the Jewish people, by God, in personal communication with Moses and other prophets. See *Exodus* 19:20; *Leviticus* 24:10-23; *Numbers* 15:32-36, 27:1-11; *Jeremiah* 17:19-27. This is similar to the Babylonia, Sumerian, and Egyptian religions of the time. See, e.g., ROTH, *supra* note 25, at 25-, 33-, 76-, 135; see also VERSTEEG, *supra* note 29, at 20-21.

39. See, e.g., 1 *Samuel* 13 (King Saul was admonished by the Prophet Samuel for offering a religious sacrifice); 2 *Chronicles* 19:11 (Jehu counseled King Jehoshaphat: “And, behold, Amariah the chief priest is over you in all matters of the Lord; and Zebadiah the son of Ishmael, the ruler of the house of Judah, for all the king’s matters: also the Levites shall be officers before you. Deal courageously, and the Lord shall be with the good.”); 2 *Chronicles* 26 (King Uzziah was admonished by Azariah the priest for trespassing in the temple to burn incense, and was judged with leprosy). See also Stone, *supra* note 36, at 1159-60.

40. Before a battle with the Philistines, King Saul sought the Lord’s favor by offering up the sacrifice himself. He was immediately admonished by the Prophet Samuel who said “[y]ou have not kept the command the Lord your God gave you.” 1 *Samuel* 13.

41. “And, behold, Amariah the chief priest is over you in all matters of the Lord; and Zebadiah the son of Ishmael, the ruler of the house of Judah, for all the king’s matters.” 2 *Chronicles* 19:11.

42. Uzziah, the king of Judea, was afflicted by leprosy by “the Lord” when he attempted to burn the incense in the sanctuary. 2 *Chronicles* 26.

transfer title to conquered lands.⁴³ While the king had the authority to punish a person for violating Torah law by committing murder, the king's authority did not extend to "enforce[ing] purely religious laws between man and God, such as those concerning the Sabbath [or] idolatry."⁴⁴

The Romans, like the ancient Judeans, also separated church and state.⁴⁵ For example, in response to Roman persecution, Tertullian contended that it is a "fundamental human right, a privilege of nature, that every man should worship according to his own convictions."⁴⁶ The separation of church and state was also present in early Christian teaching, which limited state jurisdiction to civil matters and religious jurisdiction to religious matters.⁴⁷ However, throughout the pre-Christian period, ancient Rome required subject nations to worship the emperor as a precondition to worshipping their own local gods.⁴⁸

Initially, Christianity was disfavored in Imperial Rome.⁴⁹ This began to change when, in 311 A.D., Emperor Galerius issued the Edict of Toleration pardoning Christians for not worshipping pagan gods.⁵⁰ Two years later, the

43. RABBI MOSHE BEN MAIMON ("MAIMONIDES"), THE CODE OF MOSES MAIMONIDES (MISHNEH TORAH), THE BOOK OF JUDGES, LAWS OF KINGS AND THEIR WARS 4:1-10 (Eliyahu Touger trans., 1998), https://www.chabad.org/library/article_cdo/aid/1188348/jewish/Melachim-uMilchamot-Chapter-4.htm.

44. Arnold N. Enker, *Aspects of Interaction Between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1142 (1991).

45. See ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 6-7 (1970).

46. THE APOLOGY OF TERTULLIAN 89 (Wm. Reeve trans., 1900).

47. See E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN. STATE L. REV. 485, 496 (2009). For example, Jesus taught his followers to "give to Caesar what is Caesar's, and to God What is God's." *Luke* 20:25. The Apostle Paul considered civil authorities to be agents of God who should be obeyed (whenever possible). *Romans* 13:1; *1 Peter* 2:17. And, the Apostle Peter taught believers to "Fear God. Honor the King." *1 Peter* 2:17.

48. John A. Coleman, *Civil Religion*, 31 SOCIO. ANALYSIS 67, 71 (1970). Although, at least for a time, Roman subjects in Judea were exempted from this requirement due to Judea providing aid to Caesar in battle. See, e.g., H. WHEELER ROBINSON, HISTORY OF ISRAEL: ITS FACTS AND FACTORS 194 (1938); PAUL GOODMAN, HISTORY OF THE JEWS 53, (1951); MICHAEL GRANT, THE JEWS IN THE ROMAN WORLD 31 (1973); see also Robert A. Friedlander, *Jews: The European and American Historical Experience*, 28 CHITTY'S L. J. 75, 77 (1980).

49. See, e.g., Thomas E. Simmons, *Saint Paul's Trial Narrative in Acts: Imperium Römānum vs. Vasileia Tou Theou*, 65 S.D. L. REV. 317, 320 (2020).

50. Galerius, *Edict Of Toleration 311 A.D.*, in MEDIEVAL SOURCEBOOK: GALERIUS AND CONSTANTINE: EDICTS OF TOLERATION 311/313 (Paul Halsall ed., 1996) (on file at <https://fransamaltngvongeousau.com/documents/cw.EH/2a.pdf>).

Edict of Milan provided universal freedom for individuals to practice their chosen religion and specifically guaranteed Christians the right to worship without the threat of persecution.⁵¹

This open-minded approach to religion ended in 380 A.D. when the Edict of Thessalonica made the Catholicism of Nicene Christians the Roman Empire's state religion and punished those who adopted other forms of Christianity.⁵² The Code of Justinian, circa 529-534 A.D., repeated and reinforced this approach.⁵³ Additionally the Byzantine emperors Arcadius, Honorius, Theodosius II, Marcian, and Leo I the Thracian (395-567), all adopted legal bans on pagan religious rites and sacrifices and increased the penalties for their practice.⁵⁴

The movement toward controlling which religions were allowed was the result of the intermixing of the Catholic Church and the Roman Empire. For example, in the mid-fifth century, Bishops of the Church were authorized to settle secular disputes.⁵⁵ Emperors considered themselves Christian monarchs who saw ensuring unity of the empire and unity of religion as essential to their success and also as having the power to mediate ecclesiastical disputes.⁵⁶ As a result, members of the Church gained positions in government and Emperors gained power over the church.⁵⁷ Despite intermixing, the two domains continued to be separate in the eyes of the Church. Pope Gelasius I, pontiff from 492-496, argued religion and state governed different aspects of the world and each should defer to the other in matters within the other's purview.⁵⁸ This view is called the "Gelasian

51. EDICT OF MILAN 313 A.D. (313), <https://www.cob-net.org/church/freespring/learn/edict-of-milan.pdf>.

52. EDICT OF THESSALONICA 380 A.D. (380), <https://www.cob-net.org/church/freespring/learn/edict-of-thessalonica.pdf>.

53. CODE OF JUSTINIAN, Book 1, Section 1, *in* 3 THE LIBRARY OF ORIGINAL SOURCES 100 (Oliver J. Thatcher ed., 1907) ("Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust.").

54. *See* HEINRICH BRUECK, 1 HISTORY OF THE CATHOLIC CHURCH: FOR USE IN SEMINARIES AND COLLEGES 123-24 (1884).

55. WARREN TREADGOLD, A HISTORY OF THE BYZANTINE STATE AND SOCIETY 122 (1997).

56. WALTER ULLMANN, THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES 17 (2012); TREADGOLD, *supra* note 56, at 122.

57. *See, e.g.*, STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS 21-23 (1997).

58. *See* Aloysius K. Ziegler, *Pope Gelasius I and His Teaching on the Relation of Church and State*, 27 THE CATH. HIST. REV. 412, 430-32 (1942).

approach.”⁵⁹

Over time, the church began to disentangle itself from the state. Pope Gregory VII’s Decree of 1075 prohibited lay investiture—secular monarchs appointing persons to an office of church officials and positions of clergy.⁶⁰ A century later, Stephen of Tournai (1128-1203) revised the Gelasian approach by arguing Church and State were two different orders of people, clerics and laymen.⁶¹ The Protestant Reformation in the sixteenth century continued efforts to disentangle church and state.⁶² The move to limit state control over religion reinforced the Gelasian view of the church and state as “two communities, two cities, two powers, two swords.”⁶³

Given this history, we can form an initial definition of “religious” belief that distinguishes it from other beliefs. A belief is religious if (1) it relates to the existence of God or, (2) practices relating to one’s relationship with God.

C. *Religion and State in the Enlightenment Period*

Our definition of religious belief will take on a more defined shape because of Enlightenment views on the separation of church and state. During the Enlightenment period, there was a change in the understanding of religious beliefs as Enlightenment thinkers began to distinguish beliefs based on reason, science, and philosophy, from those derived from non-rational sources, religion.⁶⁴ Thomas Hobbes, a 17th-century English philosopher, argued the idea of God arose out of people’s need to explain effects by their causes and the lack of visible causes for certain effects, which led people to infer *invisible* causes.⁶⁵ This need to explain why a particular outcome occurs combines with people’s anxiety about causal chains that go on infinitely, causing them to believe in a first (invisible) cause—God.⁶⁶ For

59 See, e.g., E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 Penn St. L. Rev. 485, 527 (2009) (discussing the Gelasian formula).

60. EWART KELLOGG LEWIS, *MEDIAEVAL POLITICAL IDEAS* 509 (1959).

61. ALEXANDER JAMES CARLYLE, 2 *A HISTORY OF MEDIAEVAL POLITICAL THEORY IN THE WEST* 198 (1909).

62. John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH & STATE 15, 21 (2006).

63. *Id.* at 21-25.

64. See THOMAS HOBBS, *LEVIATHAN* 70-72 (J.C.A. Gaskin ed., 1996); see also DAVID HUME, *Of Superstition and Enthusiasm*, in *WRITINGS ON RELIGION* 73, 73-75 (Antony Flew ed. 1992).

65. See HOBBS, *supra* note 64, at 72.

66. See *id.* at 71-73 (showing that man’s “inquisitive[ness] into the causes of the

Hobbes, religious beliefs were about unseen causes or powers that expressed “reverence” and included “gifts, petitions, thanks, submission of body, considerate addresses, sober behavior, premeditated words, [and making solemn promises] . . . by invoking” unseen powers.⁶⁷

In contrast to Thomas Hobbes, John Locke, a 17th-century English philosopher, argued the government should limit its reach to “procuring, preserving, and advancing” the civil interests in “life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.”⁶⁸ For Locke, reason was the search for truth using deduction from sense perception, while faith was the assertion of a proposition based upon the credibility of the proposer of the proposition as speaking for God.⁶⁹ Locke also argued civil society should not be extended to the “salvation of souls.”⁷⁰ He defined a church as “a voluntary Society of Men, joining themselves together of their own accord, in order to the public worshipping of God, in such a manner as they judge acceptable to him and effectual to the Salvation of their Souls.”⁷¹

In contrast, David Hume, the 18th-century Scottish philosopher, identified religion with superstition—a response to imaginary, immaterial, and unknown enemies.⁷² He argued superstition leads people to adopt “methods [that] are equally unaccountable, and consist in ceremonies, observances, mortifications, sacrifices, presents, or in any practice, however absurd or frivolous, which either folly or knavery recommends to a blind and terrified credulity.”⁷³

For Hobbes, Locke, and Hume, religious beliefs were not derived from reason and concerned an immaterial world inhabited by immaterial beings. They give a new definition of “religious belief” as: (1) a belief, (2) arising not from reason, (3) about a non-physical world, (4) inhabited by non-physical beings. Such beliefs included those about the practices mediating

Events they see” with the “sight of any thing that hath a Beginning” together “make Anxiety”).

67. *Id.* at 74.

68. JOHN LOCKE, A LETTER CONCERNING TOLERATION 26 (1689) (James H. Tully ed., 1983).

69. JOHN LOCKE, 2 AN ESSAY CONCERNING HUMAN TOLERATION 416 (1689) (Alexander Campbell Fraser collator & annotator, 1959).

70. Locke, *Letter*, *supra* note 68, at 27.

71. *Id.* at 28.

72. DAVID HUME, *Of Superstition and Enthusiasm* 3-4, in WRITINGS ON RELIGION (Antony Flew ed. 1992).

73. *Id.* at 3-4.

the relationship between living people and this non-physical world.⁷⁴

D. The Founders qua Enlightenment Thinkers

The Founders of the United States were well acquainted with the work of Hobbes, Locke, and Hume.⁷⁵ As Enlightenment thinkers in their own right, the Founders also focused on the distinction between belief and reason. For example, Thomas Jefferson drafted the Virginia Statute for Religious Freedom, stating “the *opinions* of men are not the object of civil government” and that no one:

shall be compelled to frequent or support any religious worship, place, or ministry, nor shall be enforced, restrained, molested, or burthened in his body or goods nor shall otherwise suffer, on account of his religious *opinions or belief* but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion.⁷⁶

In his letter to Samuel Miller, Jefferson concluded it would be inappropriate for his government to recommend a day of prayer and fasting because prayer and fasting are religious exercises.⁷⁷ In this letter, Jefferson also made clear that the Constitution prohibits “intermeddling with religious institutions, their doctrines, discipline, or exercises.”⁷⁸

In arguing against a proposed bill in Virginia, requiring citizens to pay

74. See Russel Kraal et al., *Hume on Religion*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2021 ed.), <https://plato.stanford.edu/archives/win2021/entries/hume-religion/> (noting that polytheists attempt to anthropomorphize the gods in hopes of controlling or placating them).

75. Letter from Thomas Jefferson to George Gilpin (Sept. 7, 1809) (on file with the National Archives) [hereinafter Jefferson, Letter] (<https://founders.archives.gov/documents/Jefferson/03-01-02-0403>) (discussing Hobbes’ principle of the *bellum omnium in omnia*); Letter from Thomas Jefferson to John Adams (Oct. 14, 1816), in THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 490, 492 (Lester J. Capon ed., 1987) [hereinafter “CORRESPONDENCE”] (discussing how Hobbes identifies justice with contract); Letter of John Adams to Thomas Jefferson, June 28, 1813, in CORRESPONDENCE 340 (discussing how Adams could quote Hume and Locke to support his view of the Principles of Christianity); THE FEDERALIST No. 85, at 444 (Alexander Hamilton) (quoting from Hume’s *Of the Rise and Progress of the Arts and Sciences* (1742)).

76. John A. Ragosta, *Virginia Statute for Religious Freedom*, THOMAS JEFFERSON FOUNDATION (Feb. 21, 2018), <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/virginia-statute-religious-freedom/> (providing an unabridged text of the original act as drafted by Jefferson) (emphasis added).

77. Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1898), <https://founders.archives.gov/documents/Jefferson/99-01-02-7257>.

78. *Id.*

taxes to support the Anglican Church, James Madison justified the need for religious freedom because “the *opinions* of men, depending only on the evidence contemplated by their *own minds*, cannot follow the dictates of other men.”⁷⁹ Moreover, he believed one’s duty toward God is defined by *one’s beliefs* as to God.⁸⁰ From these two views, Madison concluded that religious duty has precedence “to the claims of Civil Society.”⁸¹ Furthermore, in Federalist No. 10, Madison argued that because man’s reason is fallible, different opinions will be formed, and these opinions will be driven by man’s passions (self-love), not the truth.⁸² Such opinions can form the basis for factions that are harmful to the rights of other citizens.⁸³ Madison believed religious differences were one of the main causes of factionalism⁸⁴ and a strong federal government could help to mitigate these differences by bringing together many factions under one civil government.⁸⁵ Madison played a key role in the inclusion of religious freedom in the First Amendment to the United States Constitution.⁸⁶ In his support for the amendment, Madison argued “the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”⁸⁷

Both Jefferson and Madison focus on the notion of opinion and on conscience. As Enlightenment thinkers who had read Hobbes, Hume, and Locke, the use of opinion, as opposed to fact or reason, was intentional.⁸⁸ They understood that religious beliefs are not based on reason.⁸⁹ Thus,

79. See James Madison, *Memorial and Remonstrance Against Religious Assessments*, in BASIC DOCUMENTS RELATING TO THE RELIGIOUS CLAUSES OF THE FIRST AMENDMENT 7 (1965) (emphasis added).

80. *Id.* (emphasis added).

81. *Id.*

82. THE FEDERALIST NO. 10, at 48 (James Madison) (Clinton Rossiter ed., 2003).

83. *Id.* at 48, 49.

84. *Id.* at 48, 53.

85. THE FEDERALIST NO. 10, at 52, 53; THE FEDERALIST NO. 51, at 320-21 (James Madison) (Clinton Rossiter ed., 2003).

86. See Letter from Thomas Jefferson to Joseph Priestley (June 19, 1802) (on file with the National Archives). [hereinafter Jefferson, *Letter to Joseph Priestley*]. (<https://founders.archives.gov/documents/Jefferson/01-37-02-0515>).

87. JAMES MADISON, AMENDMENTS TO THE CONSTITUTION, in 1 THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 758 (Joseph Gales ed., 1834) [hereinafter Madison, *Amendments to the Constitutions*.]

88. THE FEDERALIST NO. 10, at 48-49; Ragosta, *supra* note 76 (providing an unabridged text of the original act as drafted by Jefferson).

89. THE FEDERALIST NO. 10, at 48 -49; Ragosta, *supra* note 76.

Jefferson and Adams' understanding of religious beliefs agrees with our definition of a religious belief as (1) a belief, (2) arising not from reason, (3) about a non-physical world, (4) inhabited by non-physical beings.

E. Religion as Defined by the U.S. Supreme Court

The U.S. Supreme Court has sometimes been called upon to decide whether a belief or practice constitutes a religion.⁹⁰ For example, in 1890, the Court identified religious beliefs as those that pertain to a person's "views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."⁹¹ Forty years later, the Court held "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."⁹² The updated approach is similar to our initial historical definition of religious belief as a belief that (1) relates to the existence of God or (2) practices relating to one's relationship with God.⁹³

Following the early attempt to define religion, the Circuit Courts were required to determine which beliefs are sufficiently "religious" to fall under statutory conscientious observer's exemptions from military service.⁹⁴ In this context, the Second Circuit focused on the nonrational status of religious beliefs when it found:

[r]eligious belief arises from a sense of the *inadequacy of reason* as a means of relating the individual to his fellow-men in the most primitive and in the most highly civilized societies. It *accepts the aid of logic but refuses to be limited by it*. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.⁹⁵

The Ninth Circuit noted the nonrational aspect of religious belief when it held that "religion" in "religious training" relates to a "conscientious social belief ... based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one" not upon an individual's "*sincere devotion to a high moralistic philosophy*."⁹⁶ If we understand

90. See, e.g., *Davis v. Beason*, 133 U.S. 333 (1890); *United States v. Macintosh*, 283 U.S. 605 (1931).

91. *Davis*, 133 U.S. at 342.

92. *Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

93. See discussion *supra* Section III.B.

94. See, e.g., *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943); see also *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946).

95. *Kauten*, 133 F.2d at 705, 708 (emphasis added).

96. *Berman*, 156 F.2d at 379-80 (discussing documents provided in which Berman is described as having a social belief or philosophy) (emphasis added).

philosophy as the rational inquiry into the natural world, then the Ninth Circuit is clearly saying religious belief is nonrational and relates to an invisible, otherworldly set of entities. This interpretation was approved by Congress with the Universal Military Training and Service Act of 1948, which required “religious training and belief” be related to “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.”⁹⁷ These early conscientious-objector-cases are consistent with our post-Enlightenment definition of “religious belief.”⁹⁸

In a series of opinions concerning conscientious observer status during the Vietnam War, the Court showed a progressive evolution of what constitutes “religion.”⁹⁹ In *United States v. Seeger*, the Court held Congress’s use of the term “Supreme Being,” as opposed to “God,” meant Congress intended to “embrace all religious and to exclude essentially political, sociological, or philosophical views.”¹⁰⁰ The inclusion of all religions and exclusion of political, sociological, or philosophical views was a clear statement that religious beliefs do not arise directly from reason but have a different, non-rational source.¹⁰¹ The Court in *Welsh v. United States* attempted to expand this definition to include rational (secular) viewpoints by holding “religious beliefs” include any ethical or moral beliefs that are deeply and sincerely held by an individual that also occupy “a place parallel to that filled by God in traditionally religious persons.”¹⁰² However, within a few years, the expansive reading of religious belief as including rational beliefs was rejected in *Wisconsin v. Yoder*, which noted the purely secular values adopted by Thoreau, based on philosophical and personal reasons, were not religious beliefs.¹⁰³

Finally, in *Engel v. Vitale*, the Court held the invocation of God in a prayer violated the Establishment Clause because it was “a solemn avowal of divine faith and supplication for the blessings of the Almighty.”¹⁰⁴ The Court

97. 50 U.S.C.A. app. § 456(j).

98. *Supra* Section III.C.

99. See *United States v. Seeger*, 380 U.S. 163 (1965) (explaining the case considers whether Seeger’s practices allow him to conscientiously object based on religion); see also *Welsh v. United States*, 398 U.S. 333 (1970) (considering whether Welsh’s practices were sufficiently religious to allow him to conscientiously object).

100. *Seeger*, 380 U.S. at 165.

101. *Id.*

102. *Welsh*, 398 U.S. at 340.

103. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1973).

104. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

disapprovingly compared the mandating of school prayer to the implementation of the Book of Common Prayer, approved by Acts of Parliament in 1548 and 1549,¹⁰⁵ that set out in minute detail the accepted form and content of prayer.¹⁰⁶

Our Enlightenment-era definition of religious belief is supported by these U.S. Supreme Court and Circuit Court decisions. A religious belief is (1) a belief, (2) arising not from reason, (3) about the existence of a non-physical world, (4) inhabited by non-physical beings. Beliefs associated with a religion's practices are themselves religious beliefs. The Enlightenment and post-Enlightenment understanding that religious beliefs center on non-physical beings and for non-rational reasons creates a clear demarcation between church and state and suggests that right-to-life statutes are religious beliefs.

IV. RIGHT-TO-LIFE STATUTES IMPOSE RELIGIOUS BELIEFS ON OTHERS

To ascertain whether anti-abortion statutes violate the Establishment Clause, we must first determine if anti-abortion statutes are founded in religious belief and, consequently, force people to adopt religious beliefs or engage in religious practices against their conscience. Anti-abortion statutes can be read as declarations affirming religious beliefs and imposing a practice (the carrying of a fetus to term) for the very purpose of imposing a religious belief.¹⁰⁷ With this reading, the statutes impose a particular religious viewpoint and religious practice on American citizens.

A. *Facially Religious Statutes*

Two recent state anti-abortion statutes facially impose religious beliefs and practices on U.S. citizens. First, Missouri enacted its "Right to Life of the Unborn Child Act,"¹⁰⁸ making abortion illegal "except in cases of medical emergency."¹⁰⁹ As part of this Act, the legislature adopted the following statement of legislative intent: "Almighty God is the author of life, that all men and women are 'endowed by their Creator with certain

105. 2 & 3 Edward VI, c. 1, entitled "An Act for Uniformity of Service and Administration of the Sacraments throughout the Realm"; 3 & 4 Edward VI, c. 10, entitled "An Act for the abolishing and putting away of divers Books and Images."

106. *Engel*, 370 U.S. at 426-27.

107. Brenda D. Hofman, *Political Theology: the Role of Organized Religion in the Anti-Abortion Movement*, 28 J. CHURCH & STATE 225, 226 (1986); see e.g., MO. REV. STAT. § 188.010 (2019).

108. MO. REV. STAT. § 188.017.1 (2022).

109. § 188.017.2.

unalienable Rights, that among these are Life.”¹¹⁰ This legislative intent is a direct and indisputable statement of a religious belief—a nonrational belief in the existence of an immaterial entity who is the author of all life. This language echoes the language of the school prayer that violated the Establishment Clause in *Engel v. Vitale*: “Almighty God, we acknowledge our dependence upon Thee, and We beg Thy blessings upon us, our parents, our teachers, and our Country.”¹¹¹ The statute is both an expression of a religious belief and a mandate to engage in a particular religious practice, thereby forcing people to accede to a religious belief they may not hold.

Christianity is a religious practice one engages in *because of* one’s relationship to God (an immaterial entity who Christians, and other theists, believe in for nonrational reasons).¹¹² Under the statute, a pregnant person is required to carry a fetus to term, absent a medical emergency, *because* God granted the fetus a right to life upon conception.¹¹³ Pregnant people in Missouri are forced, without regard to whether they hold a different religious belief about the fetus, to act in accord with another’s religious belief about the fetus and another person’s relationship to God.¹¹⁴ Similarly, doctors and allied medical professionals are forced to engage in those same religious practices because they are prevented from terminating the fetus, as doing so would be contrary to the will of God.¹¹⁵

In addition, the imposed religious belief and its associated practices are directly contrary to the views of non-religious people.¹¹⁶ For example, a

110. MO. REV. STAT. § 188.010 (2019).

111. *Engel*, 370 U.S. at 438 (1962).

112. See *Christianity*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/christianity> (last visited June 22, 2023); *God*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/god> (last visited June 22, 2023).

113. See MO. REV. STAT. § 188.017.2 (2022).

114. See *id.*

115. For example, the Missouri legislature limits the performance of an abortion to physicians. MO. REV. STAT. § 188.010-.020 (2019 & 2022). In addition, the Missouri legislature requires any doctor who prescribed, administered, or dispensed the drug to the patient to be “in the same room and in the physical presence” of the patient when the initial dose is given. MO. REV. STAT. § 188.021. Finally, and most importantly, doctors and allied medical professionals are barred from performing therapeutic, but not life-saving, abortions. MO. REV. STAT. § 188.017.2.

116. See Domenico Montanaro, *Poll: Americans Want Abortion Restrictions, But Not As Far As Red States Are Going*, NPR (Apr. 26, 2023), <https://www.npr.org/2023/04/26/1171863775/poll-americans-want-abortion-restrictions-but-not-as-far-as-red-states-are-going> (providing statistics to show Republicans in red states may be pushing abortion policies that are out of step with the majority of Americans).

pregnant atheist would be forced to keep a fetus to term *because of* others' religious beliefs about the fetus, and the pregnant person's relationship to God—an immaterial being the pregnant person does not believe exists.

Moreover, these statutes express the religious belief that God has granted the fetus inalienable rights, including the right to life,¹¹⁷ which is contrary to the views of other religions.¹¹⁸ For example, under Judaism, when a person assaults a pregnant woman resulting in a miscarriage and does not kill the mother, the person responsible must pay a fine; but if the mother dies, the penalty is death.¹¹⁹ Because abortion incurs a financial penalty while causing the mother's death results in capital punishment, the Jewish perspective is that the fetus does not have a right to life.¹²⁰ The position that life worth protecting arises only at or after birth is further supported by Maimonides in the *Mishnah*, which notes that if a woman is giving birth but is at risk of harm, it is permissible to kill the fetus to save the woman, but only if the fetus has not been born.¹²¹ Similarly, if a pregnant woman is sentenced to death, the execution must be delayed only if she is in the process of giving

117. See § 188.010 (referencing “God’s grant of unalienable rights” to claim that the State of Missouri has an obligation to “[d]efend the right to life of all humans, born and unborn.”).

118. See Julianne McShane, *Some Religions Support Abortion Rights. Their Leaders are Speaking up*, NBC NEWS (May 5, 2022, 4:10 AM), <https://www.nbcnews.com/news/us-news/religions-support-abortion-rights-leaders-are-speaking-rcna27194>.

119. See *Exodus* 21:22-23 (“When men strive together and hit a pregnant woman, so that her children come out, but there is no harm, the one who hit her shall surely be fined, as the woman’s husband shall impose on him, and he shall pay as the judges determine. But if there is harm, then you shall pay life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe”); See also IMMANUEL JAKOBOVITS, *JEWISH MEDICAL ETHICS* 180-181 (1959) (noting that “[a]ccording to the rabbinic interpretation of the assault in the Bible, compensation is payable to the husband for the loss of his offspring only if the mother survived, Otherwise the attacker suffers the death penalty for killing the mother, but he is not liable to any fine”).

120. See JAKOBOVITS, *supra* note 119, at 180-85 (explaining that “[i]n Jewish law, the right to destroy a human fruit before birth is entirely unrelated to theological considerations. Neither the question of the entry of the soul before birth nor the claim to salvation after death have any practical bearing on the subject.”).

121. See JAKOBOVITS, *supra* note 119, at 184; see also MISHNAH OHOLOT 7, https://www.sefaria.org/Mishnah_Oholot.7.4?lang=bi (last visited June 22, 2023); MISHNAH SANHEDRIN 72b, <https://www.sefaria.org/Sanhedrin.72b?lang=bi> (last visited June 22, 2023).

birth.¹²² The Missouri legislation promotes a religious belief that the fetus has a right to life at the moment of conception which is precisely opposed to the Jewish view that a fetus has a right to life only at or after birth.¹²³

A second statute with a facially religious intent is Alabama's "Human Life Protection Act,"¹²⁴ which intends to protect "the *sanctity* of unborn life."¹²⁵ Here, sanctity is defined as the "holiness of life and character," and "the quality or state of being holy or sacred."¹²⁶ The belief in the *sanctity* of anything is a religious belief—one founded in an irrational belief in invisible causes. Consequently, like the Missouri legislation, Alabama's statute endorses a specific religious belief, compelling individuals to participate in a religious practice aligned with a belief they might strongly oppose. We can see this in the legislature's findings which attempt to justify raising the fetus's status by calling it an unborn *child*, claiming that it is developing into a *human being*, and comparing abortion to past mass genocides.¹²⁷

B. *The Failure of Physical Bases to Support a Fetus Having Rights Under the Constitution*

Several state statutes avoid the problem of facially adopting religious beliefs by relying upon the physical characteristics of the fetus to argue that it has rights.¹²⁸ But, each of these efforts fails because they provide no rational justification for concluding that the fetus has rights under the Constitution.¹²⁹ And, because these statutes rely on nonreason and reference to invisible features of the world, we must see these approaches as promoting religious beliefs and practices.¹³⁰

Several states attempt to justify their anti-abortion statutes by describing the fetus as an unborn "child."¹³¹ For example, the title of the Missouri Statute is the "Right to Life of the Unborn *Child* Act."¹³² The legislative

122. See JAKOBOVITS, *supra* note 119, at 185; see also MISHNAH ARAKHIN 1:4, www.sefaria.org/Mishnah_Arakhin.1.4 (last visited June 22, 2023).

123. See MO. REV. STAT. § 188.010 (2019).

124. ALA. CODE § 26-23H-1 (2019).

125. See *id.* (emphasis added).

126. See *Sanctity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sanctity> (last visited July 19, 2023).

127. ALA. CODE § 26-23H-2(d), (e), (g), (i) (2019).

128. See, e.g., § 26-23H-1.

129. See *When Does a Fetus Get the Right to Life?*, BBC NEWS, https://www.bbc.co.uk/ethics/abortion/child/alive_1.shtml (last visited June 22, 2023).

130. See *id.*

131. See, e.g., MO. REV. STAT. § 188.010 (2019); ALA. CODE § 26-23H-2(b) (2019).

132. § 188.010 (emphasis added).

findings of “The Alabama Human Life Protection Act”¹³³ provides “the public policy of the state [is] to recognize and support . . . the rights of unborn *children*.”¹³⁴ In addition, the Alabama legislature found “[a]bortion advocates speak to women’s rights, but they ignore the unborn *child*, while medical science has increasingly recognized the humanity of the unborn *child*.”¹³⁵ In its legislative findings for the Arkansas Human Life Protection Act,¹³⁶ the Arkansas legislature found it is “[t]he policy of Arkansas . . . to protect the life of every unborn *child* from conception until birth”¹³⁷

Recently, the Idaho Supreme Court upheld an anti-abortion law as legally valid under the state constitution.¹³⁸ In the State’s Opposition to Petitioners’ Brief, Idaho pointed out that the “life of each human being begins at fertilization; that a preborn child’s life, health, and well-being should be protected.”¹³⁹ In the Idaho Legislature’s Brief, it distinguished abortion from all other medical procedures where “[o]nly abortion sets out intentionally to terminate the life of a preborn *child*.”¹⁴⁰ We find similar references to the fetus as a child in anti-abortion statutes in Kentucky,¹⁴¹ Louisiana,¹⁴² Oklahoma,¹⁴³ and Tennessee.¹⁴⁴

133. § 26-23H-1 (emphasis added).

134. § 26-23H-2(b) (emphasis added).

135. § 26-23H-2(e) (emphasis added).

136. ARK. CODE ANN. § 5-61-301 (2019).

137. ARK. CODE ANN. § 5-61-302(a)(8) (2019) (emphasis added).

138. *See Planned Parenthood of the Great Nw. v. State*, 522 P.3d 1132, 1148 (Idaho 2023).

139. *See Resp’t State of Idaho’s Opp’n to Pet’rs [‘] Br. at 3, Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (Idaho 2023) (No. 49615-2022), 2022 WL 1462982, at *3 (emphasis added).

140. *Br. of Idaho Legislature at 36-37, Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (Idaho 2023) (No. 49615), 2022 WL 1462987, at *36-37 (emphasis in original).

141. KY. REV. STAT. ANN. § 311.710(1) (LexisNexis 1982).

142. LA. STAT. ANN. § 40:1061.1.3(A) (2022).

143. After the *Dobbs* decision, Governor Stitt noted that the Oklahoma law was a pro-life law and that the elimination of the right to abortion came “after the deaths of over 60 million children.” Governor Stitt, *AG O’Connor Celebrate Oklahoma Becoming a Pro-Life State*, OKLAHOMA.GOV (June 24, 2022), <https://oklahoma.gov/governor/newsroom/newsroom/2022/june2022/governor-stitt-ag-o-connor-celebrate-oklahoma-becoming-a-pro-li.html>.

144. TENN. CODE ANN. § 39-15-216(c)(2) (2020).

The use of “children” to describe fetuses is Constitutionally incorrect. Constitutional law does not consider the fetus to be a person.¹⁴⁵ At the same time, Constitutional law does see children as persons.¹⁴⁶ We can use a categorical syllogism to see the consequence of this:

All children are legal persons.

No fetus is a legal person.

Therefore, no fetus is a child.¹⁴⁷

In other words, as a matter of simple logic, fetuses are not children for the purpose of having rights under the Constitution. We must presume that the state legislators who voted in favor of their state anti-abortion statutes know the law.¹⁴⁸ So why would they make this connection?

One explanation would be that they are using the term “children” for rhetorical purposes.¹⁴⁹ However, the fact remains that once the statute is enacted, it conveys the State’s authority and perspective, and that perspective must be that fetuses and children share a common bond such that the fetus has the same rights as a child.¹⁵⁰

145. See *Roe v. Wade*, 410 U.S. 113, 158 (1973) (concluding that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring) (reaffirming the Court’s conclusion that the word “person” does not apply before birth); *McGarvey v. Magee-Women’s Hosp.*, 340 F. Supp. 751, 754 (W.D. Pa. 1972) (concluding that “a fetus has not been considered a person for . . . purposes of the law”); *Byrn v. N. Y. C. Health & Hosp. Corp.*, 286 N.E.2d 887, 890 (N.Y. 1972) (noting that “[m]ost systems lay down the rule that, in cases where legal personality is granted to human beings, personality begins at birth and ends with death”) (quoting GEORGE WHITECROSS PATON, A TEXT-BOOK OF JURISPRUDENCE 353 (3rd. ed. 1964)); *Abele v. Markle*, 351 F. Supp. 224, 228 (D. Conn. 1972) (holding that a fetus is not a person). In addition, while the *Dobbs* decision overturned *Roe* and *Casey*, it did so relative to abortion being a fundamental right, not the fetus being a person. See, e.g., *Dobbs*, 142 S.Ct. at 2261 (referencing “the States’ interest in protecting fetal life”). As such, that legal precedent survives.

146. Children are persons under the U.S. Constitution who have Constitutional rights. See *in re Gault*, 387 U.S. 1, 13 (1967) (holding that “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

147. See *Roe*, 410 U.S. at 158; see also *In re Gault*, 387 U.S. at 13.

148. See, e.g., *Director, Office of Workers’ Comp. Prog. v. Perini North River Assoc.*, 459 U.S. 297, 319 (1983); *In re Recorder’s Court Bar Ass’n v. Wayne Circuit Court*, 503 N.W.2d 885, 893 (Mich. 1993); *Urbain Pottier v. Hotel Plaza Las Delicias, Inc.*, 379 F.Supp.3d 130, 136-137 (D.P.R. 2019).

149. See Br. For Pet’r, *Planned Parenthood Great Nw. v. Idaho*, 522 P.3d 1132 (Idaho 2023), (No. 49615-2022), 2022 WL 1462987, at * 36-37 (noting that “only abortion sets out intentionally to terminate the . . . indisputably human life.”).

150. See ALA. CODE § 26-23H-2(b) (2019) (stating that (“the public policy of the state [is to] recognize and support . . . the rights of unborn children.”)) (emphasis added).

A review of the various anti-abortion statutes implies three possible connections legislatures are making between the fetus and a child—none of which succeed. First, both fetuses and children are “human beings” because some state statutes describe the fetus as a “human being.”¹⁵¹ The problem with drawing this connection is not all human beings have rights under the Constitution. For example, in the *Insular Cases*, the Court held the rights of the people do not automatically extend to people living outside of the United States while still under the jurisdiction of the United States (e.g., in territories of the United States).¹⁵² Thus, being a “human being” in itself does not justify granting a fetus the rights of a child.¹⁵³

Second, some statutes justify a ban on abortion due to the ability of the fetus to feel pain.¹⁵⁴ Even if we assume the fetus at some point in time can feel pain, just like a child, that commonality is not sufficient to grant the fetus the right to life. Non-human animals also feel pain but are not afforded rights under the Constitution. If feeling pain is sufficient to grant an entity the rights of a child, then non-human animals must be granted those rights too. These conclusions make clear that the ability to feel pain does not make a fetus a child with rights under the Constitution. One could attempt to avoid this inter-species rights argument by noting that the fetus is both a human being and feels pain. But such a connection is insufficient because it is simply a rehashing of the failed argument that fetuses are “human beings”

151. See, e.g., ARK. CODE ANN. § 5-61-301 (2019); see also *Br. For Res’t, Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (Idaho 2023) (No. 49615-2022) 2022 WL 1462982, at *3 (arguing that the “life of each human being begins at fertilization”); LA. STAT. ANN. § 40:1061.1. A(1) (finding “that every unborn child is a human being”); S.D. CODIFIED LAWS § 34-23A-1.2 (2021) (finding that “all abortions . . . terminate the life of a whole, separate, unique, living human being”); TENN. CODE ANN. § 39-15-214(a)(6) (2020) (finding that “[t]he state has a legitimate, substantial, and compelling interest in protecting the rights of . . . unborn human beings”).

152. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); see also *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (holding Sixth Amendment right to jury trial inapplicable in Puerto Rico); see also *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (holding Fifth Amendment grand jury provision inapplicable in Philippines); see also *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding jury trial provision inapplicable in Philippines); see also *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding Revenue Clauses of Constitution inapplicable to Puerto Rico).

153. See *Verdugo-Urquidez*, 494 U.S. at 269 (noting that there is no extraterritorial application of the organic law to persons under the Fifth Amendment and pointing out that the application of those rights is further decreased for the Fourth Amendment which applies “to the people”).

154. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 171.043 (West 2020); see also TENN. CODE ANN. § 39-15-214(a)(17)-(31) (2020).

and therefore have the rights of children.¹⁵⁵

Third, some statutes justify a ban on abortion because of the presence of a heartbeat.¹⁵⁶ However, such a justification fails for precisely the same reasons that equating a fetus to a child due to its ability to feel pain fails—it leads to conclusions that either limit fetal rights to the rights of non-human animals or grant non-human animals rights under the Constitution.

The States are imposing religious beliefs on pregnant individuals and their medical providers despite the legal fragility of the claim that fetuses have rights under the Constitution.¹⁵⁷ Nevertheless, the States persist in asserting these rights for fetuses. As Sherlock Holmes aptly said, “when you have eliminated the impossible, whatever remains, no matter how improbable, must be the truth.”¹⁵⁸ When states express a belief that a non-physical feature of the fetus grants it rights, they use religion to justify its personhood. Moreover, such a belief arises irrationally because its foundation is a religious and not a legal one. As a result, the States are both favoring a particular religious belief and imposing that religious belief on others.

V. ANTI-ABORTION STATUTES VIOLATE THE ESTABLISHMENT CLAUSE

That anti-abortion statutes are state efforts to promote a particular religious belief,¹⁵⁹ they violate the plain language of the Establishment Clause. The Establishment Clause states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁶⁰ The Court has held the Establishment Clause was intended to afford protection against “sponsorship, financial support, and active involvement of the sovereign in religious activity.”¹⁶¹ The government is

155. See LA. STAT. ANN. § 40:1061.1. A(1) (2022) (finding “that every unborn child is a human being.”).

156. See, e.g., ARK. CODE ANN. § 20-16-1301 (2013); see also TENN. CODE ANN. § 39-15-214(a)(7)–(16) (2020).

157. See *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“the word ‘person,’ as used in the Fourteenth Amendment does not include the unborn.”); see also TENN. CODE ANN. § 39-15-214(a)(6) (2020) (finding that “[t]he state has a legitimate, substantial, and compelling interest in protecting the rights of . . . unborn human beings”).

158. See ARTHUR CONAN DOYLE, *THE COMPLETE SHERLOCK HOLMES* 118 (1930).

159. *Supra* Section IV.

160. See U.S. CONST. amend. I. (applying the Establishment Clause only to the Federal Government); *ACLU v. Rabun Cnty. Chamber Com., Inc.*, 510 F. Supp. 886, 891 (N.D. Ga. 1981) (noting that the Establishment Clause applied to the states’ governmental action under the 14th Amendment); *Everson v. Bd. of Ed.*, 330 U.S. 1, 15-16 (1947).

161. See *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

also forbidden from coercing people to support or participate “in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so.”¹⁶² Because anti-abortion laws force people to act in accordance with a specific religious belief, they violate the Establishment Clause.

A. Kennedy’s Exception: When the Founders Tolerated Religious Activity

In *Kennedy v. Bremerton*, the Court created a safe harbor from the Establishment Clause that allowed the State to engage in a religious activity if that activity was tolerated by the “Founding Fathers” as a religious activity.¹⁶³ The existence of such a safe harbor is evident from the precedent relied upon by the Court—all of which relates to activity that the founders would have seen as religious in nature. For example, *Marsh v. Chambers*,¹⁶⁴ *Town of Greece, N.Y. v. Galloway*,¹⁶⁵ and *Lee v. Weisman*¹⁶⁶ all concern state-sponsored prayer. *Zorach v. Clauson* concerns allowing public school students to leave early to engage in religious instruction.¹⁶⁷ Both prayer and religious instruction are, by definition, religious activities. Thus, the precedent grants safe harbor only for actions the Founders tolerated as religious activities.

Furthermore, if it were enough to demonstrate that the Founders merely tolerated certain activities without considering whether they tolerated them as religious practices, Justice Kennedy’s “safe harbor” proposition would effectively undermine the principles of the Establishment Clause.¹⁶⁸ Any current State religious action would be permissible provided that early Congress tolerated a similar action from a secular or religious perspective.¹⁶⁹ For example, smoking tobacco was permitted in the House Chamber at the time of the Founding.¹⁷⁰ If we read *Kennedy* as saying anything tolerated by

162. See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (internal citations omitted).

163. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415, 2428 (2022) (concerning a high school football coach who lost his job because he knelt at midfield at the conclusion of games to offer a quiet prayer of thanks).

164. See *Marsh v. Chambers*, 463 U.S. 783, 784-85 (1983).

165. See *Town of Greece v. Galloway*, 572 U.S. 565, 569-70 (2014).

166. *Lee*, 505 U.S. at 580.

167. See *Zorach v. Clauson*, 343 U.S. 306, 308-09 (1952).

168. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

169. See *id.*

170. *Early Efforts to Ban Smoking in the House Chamber*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1851-1900/Early-efforts-to-ban-smoking-in-the-House-Chamber/> (last visited June 16, 2023) (explaining that smoking of Tobacco was banned in the House Chamber starting in 1871).

the Founders escapes the Establishment Clause, then Congress could, today, adopt a law mandating that each session begin with the smoking of tobacco as a religious practice.¹⁷¹ The only way to avoid such results is to conclude that *Kennedy* stands for the proposition that present-day government involvement in religion is permitted only when the early Congress tolerated that activity as *religious* activity.

B. *The Absence of Evidence in Dobbs*

To enter *Kennedy*'s safe harbor, we must engage in a historical analysis demonstrating the Founders tolerated such religious activity.¹⁷² While there are four historical analyses in *Dobbs*,¹⁷³ three concern the wrong time and all four provide no evidence of the religiosity of anti-abortion laws. The Court's first historical analysis demonstrates that "at the time of *Roe*, 30 states still prohibited abortion at all stages."¹⁷⁴ The second historical analysis centers on "the latter part of the 20th century" to conclude that "there was no support in American law for a constitutional right to obtain an abortion."¹⁷⁵ The third historical analysis simply tells us that "abortion had long been a crime in every single state."¹⁷⁶ These three historical analyses fail to gain the anti-abortion statutes entry into *Kennedy*'s safe harbor because they concern the recent past, not the time of the Founding, and they say nothing as to whether these activities were seen as *religious* activities by the Founders.¹⁷⁷

The Court's fourth analysis concerns the right time period (the time of the Founding), but that analysis only establishes that some people at the time of the Founding thought abortion should be illegal.¹⁷⁸ The safe harbor in *Kennedy v. Bremerton*, requires analysis of the intent of the Founding Fathers.¹⁷⁹ As a result, the failure to establish that, at the time of the Founding, anti-abortion laws were seen as religious practices means this fourth analysis fails to provide a safe harbor, under *Kennedy*, for anti-abortion statutes.

171. See *Kennedy*, 142 S. Ct. at 2428.

172. See *id.*

173. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2241, 2248-53 (2022).

174. *Id.* at 2241.

175. *Id.* at 2248.

176. *Id.*

177. See *id.* at 2241, 2248-49.

178. *Id.* at 2249-53.

179. *Kennedy v. Bremerton*, 142 S.Ct. 2428.

VI. THE ABSENCE OF EVIDENCE IN HISTORICAL CASES PROSECUTING THE DEATH OF THE FETUS

It is possible that the *Dobbs* court simply did not discuss the religiosity of anti-abortion laws because it was not relevant to the rationale for the decision in *Dobbs*.¹⁸⁰ If that is the case, then a proper historical analysis requires looking at the sources the Court relied upon in *Dobbs* to see if those sources indicate that these historical anti-abortion laws were religious in nature.

We begin with Blackstone, Coke, and Hale, the three “eminent common-law authorities” relied upon by the *Dobbs* decision in support of the position that during the relevant historical period, anti-abortion statutes were permitted.¹⁸¹ Both Blackstone and Hale explain that abortion is a crime, but neither link that crime to a religious belief or practice. For example, Sir Matthew Hale stated that:

If a woman be quick or great with child, if she takes or another gives her any potion to make an abortion, or if a man strikes her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in *rerum natura*, tho it be a great crime.¹⁸²

Similarly, Blackstone stated:

To kill a child in its mother’s womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.¹⁸³

While Hale and Blackstone do make clear their view that abortion is criminal, they do not justify that claim by reference to a religious belief or practice. Each author’s use of legal language (e.g., murder, manslaughter) combined with the lack of religious language makes clear that these statements of law are secular.

Edward Coke, on the other hand, reports that the killing of a fetus is illegal and references God in the same paragraph:

If a woman be quick with childe, and by a potion or othwise killith it in her wombe; or if a man beat her, whereby the childe die in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, batter, or other

180. Although I find that highly unlikely given Justice Alito’s aforementioned citation-free paragraph relating to freedom of thought and religion. See *Dobbs*, 142 S. Ct. at 2257.

181. See *id.* at 2249.

182. SIR MATTHEW HALE, 1 HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 433 (1778).

183. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 198 (1768).

cause, this is murder: for in law it is accounted a reasonable create, *in rerum natura*, when it is born alive....the law is grounded upon the law of God, which faith, [*whoever sheds human blood, his blood shall be shed, for it is for the image. Man was created by God*].¹⁸⁴

We could, naïvely, read this as evidence that Coke sees anti-abortion laws as promoting religious beliefs and practices. But for Coke, all law is based on or justified by religion.¹⁸⁵ For example, Coke stated that “*Lex orta est cum mente divina*” (law arose by the divine mind—i.e., from God) and describes God as “the fountaine and founder of all good Lawes and constitutions.”¹⁸⁶ Hale also believed that all law was based upon religion and God.¹⁸⁷ For example, in *Taylor’s Case*, Hale, serving as Lord Chief Justice of England, declared that:

Blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.¹⁸⁸

Concluding a secular law is religious simply because its proponent sees the law in general as founded on God’s law is inconsistent with the Western understanding that state and religion are different domains¹⁸⁹ and, as our tobacco example demonstrates, leads to logical fallacies.¹⁹⁰

The mere fact that these common law luminaries saw religion as the base of the law and reported that abortion was illegal tells us nothing as to whether *Kennedy* provides safe harbor for current anti-abortion laws. Something more is required. *Kennedy*’s safe harbor requires that we show that Blackstone, Hale, and Coke saw anti-abortion laws as fundamentally religious in nature—like prayer or religious instruction. But we find no such evidence in Blackstone, Hale, or Coke.

184. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 50 (1797). Here, the italicized portion of the quote is my translation of Coke’s Latin: “*Quicumque effuderit humanum sanguinem, fundetur sanguis illius, ad imaginem quippe. Dei creatus est homo.*”

185. *Id.* at 50.

186. EDWARD COKE, THIRD PART OF THE REPORTS OF EDWARD COKE, PREFACE (1602), reprinted in 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 59-60 (Steve Sheppard ed. 2003) [hereinafter COKE, *Reports*].

187. *Taylor’s Case*, 86 Eng. Rep. 189 (1676).

188. *Id.*

189. See discussion *supra* Section III.B-E.

190. See discussion *supra* Section V.A.

A proponent of anti-abortion laws might argue that evidence that Blackstone, Hale, or Coke understood anti-abortion laws to be religious in nature can be found in the cases *Dobbs* references in support of the proposition that anti-abortion laws existed. *Dobbs* only directly references one pre-colonial U.S. case, *Proprietary v. Mitchell*, in support of this proposition.¹⁹¹ But, examination of that case provides no basis for concluding that the state saw anti-abortion laws as religious laws. The case only describes the facts: that Captain William Mitchell “hath Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren.”¹⁹² As *Dobbs* correctly implies, this case supports only the proposition that there are a “few cases available from the early colonial period [that] corroborate that abortion was a crime,”¹⁹³ but it provides no evidence that that crime was construed as religious in nature.

The *Dobbs* decision also references a set of cases through the work of Joseph Dellapenna, who collected cases concerning abortion and the death of the fetus at the time of the founding.¹⁹⁴ The Court provides no analysis of these cases other than to note that they “corroborate that abortion was a crime” around the time of the Founding.¹⁹⁵ In addition, the Court does not provide us with a list of these cases.¹⁹⁶ Thus, we must turn to Dellapenna to identify this precedent as:¹⁹⁷

1. Rex v. Powell (1653),¹⁹⁸
2. Proprietary v. Robins (1658),¹⁹⁹
3. Robins v. Robins (1658),²⁰⁰
4. Proprietary v. Mitchell (1652),²⁰¹

191. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2251 (2022) (citing *Proprietary v. Mitchell*, 10 Md. Archives 80, 183 (1652))

192. *Proprietary*, 10 Md. Archives at 183.

193. *Dobbs*, 142 S. Ct. 2251.

194. *Id.* (supporting the position that “[t]he few cases available from the early colonial period corroborate that abortion was a crime” by citing Dellapenna generally and without discussion of the authorities upon which Dellapenna relies).

195. *See id.*

196. *See id.*

197. JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 215, 220-21 (revised 2023).

198. *See* Roy M. Merksey & Gary R. Hartman, *Documentary History of the Legal Aspects of Abortion in the United States: Webster v. Reproductive Health Services* 268, 300 (1990).

199. 41 Md. Archives 20 (1658).

200. 41 Md. Archives 85 (1658).

201. 10 Md. Archives 80, 183 (1652).

5. *Proprietary v. Lumbrozo* (1663),²⁰²
6. *Proprietary v. Brooke* (1656),²⁰³
7. *Rex v. Allen* (1683),²⁰⁴
8. *Rex v. Hendricks* (1679),²⁰⁵
9. *King v. Anna Maria Cockin* (1719),²⁰⁶ and
10. *Rex v. Hallowell* (1742).²⁰⁷

Dellapenna does not claim that any of these cases promote a particular religious belief or practice; rather he presents them to support the notion that abortion laws did, in fact, exist at this time.²⁰⁸ In addition, a review of each case demonstrates that the cases themselves do not assert that the anti-abortion laws promote a particular religious belief or practice. For example, all we know is that charges were brought in *Rex v. Powell* because of an allegation that Elizabeth Powell beat Wealthy Evens so badly that she miscarried.²⁰⁹ In *Proprietary v. Robins*, the report of the Provincial Court simply states Elizabeth Robins took “Savin” for worms, and she had a dead child within her.²¹⁰ The next case, *Robins v. Robins*, is a suit between the husband and wife relating to *Proprietary v. Robins* that does not include any indication that anti-abortion laws are religious in nature.²¹¹ *Proprietary v. Mitchell* only states that Captain William Mitchell “hath Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren.”²¹² *Proprietary v. Lumbrozo* consists primarily of testimony about how a doctor had given his pregnant maid (Elisabeth Wild)²¹³ a “phisick” that appears to have induced the death of the fetus.²¹⁴ *Proprietary v. Brooke* concerns a rather sad case of domestic abuse resulting

202. 53 Md. Archives 387, 387-91 (1663).

203. 10 Md. Archives 464, 464-65 (1656).

204. See Merksey & Hartman, *supra* note 198, at 300.

205. *Id.*

206. See DELLAPENNA, *supra* note 197, at 220.

207. See Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 WM. & MARY Q. 19, 19-20 (1991).

208. See DELLAPENNA, *supra* note 197, at 214-28.

209. *County Court Records of Accomack-Northampton, Virginia, 1632-1640*, 7 AM. L. REC. 43 (Susie M. Ames ed., 1954).

210. See *Robins*, 41 Md. Archives at 20.

211. See *Robins v. Robins*, 41 Md. Archives at 85.

212. *Mitchell*, 10 Md. Archives at 183.

213. It is not possible from the document to determine precisely what Elisabeth’s last name was. The recordings of the deposition use Wild, Wilds, Wiles, and Weales. *Lumbrozo*, 53 Md. Archives at 388, 390-91.

214. *Id.*

in the death of the fetus/child.²¹⁵ *Rex v. Allen* involves an indictment against Deborah Allen for “indeavoruring the destruction of the Child in her womb.”²¹⁶ *Rex v. Hendricks* is another example of domestic violence in which a pregnant woman was badly beaten, resulting in the death of the fetus in utero.²¹⁷ Dellapenna also references the case of Anna Maria Cockin.²¹⁸ This 1719 case only tells us that Anna Maria Cockin was accused of murdering her newly born infant.²¹⁹ Similarly, *Rex v. Hallowell* only discusses the prosecution of Mr. John Hallowell for abortion.²²⁰ None of these cases discuss anti-abortion laws as promoting religious beliefs or practices. They are all limited to statements of the facts and law.

The entirety of the *Dobbs* Court’s historical analysis is limited to cases that solely demonstrate that anti-abortion laws existed at and around the time of the Founding. They provide no evidence whatsoever that anti-abortion laws were enacted to promote a particular religious belief or practice.

VII. STATE ANTI-ABORTION STATUTES VIOLATE THE ESTABLISHMENT CLAUSE

Under Establishment Clause jurisprudence, neither a State nor the Federal government may (1) “prefer one religion to another, or religion to irreligion;”²²¹ (2) force a person “to profess a belief or disbelief in any religion;”²²² (3) “convey[] or attempt[] to convey a message that religion or a particular religious belief is favored or preferred;”²²³ nor can (4) a government official require a religious act.²²⁴ Yet that is precisely what the anti-abortion statutes do. They prefer religious belief to secular belief, force people to profess a belief in religion by requiring women to carry their fetuses to term, empower government officials to require a religious act, and make clear that a particular religious belief—that a fetus has a right to life—

215. It is not clear from the testimony presented whether the fetus was born alive, then died, or died in utero. *Brooke*, 10 Md. Archives at 464-65.

216. *At the Gen Court of Tryalls Held in his Majities Name at Newport the 4th day of September 1683*, in RHODE ISLAND GENERAL COURT OF TRIALS, 1671-1704, 119, 121 (Jane Fletcher Fiske transcriber, 1998).

217. Merksey & Hartman, *supra* note 198, at 300.

218. DELLAPENNA, *supra* note 197, at 220.

219. DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 117-18 (1976).

220. See DAYTON, *supra* note 207, at 19-20.

221. See *Bd. of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687, 703 (1994).

222. See *Ill. ex rel. McCollum v. Bd. of Ed.*, 333 U.S. 203, 210 (1948).

223. See *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring).

224. See *Doe v. Phillips*, 81 F.3d 1204, 1210 (2d Cir. 1996).

is favored by the state.

Thus, contemporary anti-abortion statutes, arising in relationship to the *Dobbs* decision, violate the Establishment Clause. Moreover, anti-abortion statutes are not protected from the Establishment Clause's prohibitions under the *Kennedy* safe harbor because there is no historical evidence that anti-abortion laws at the time of the Founding were built to promote religious beliefs or practices.