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## Defining Fetal Life: An Establishment Clause Analysis of Religiously Motivated Informed Consent Provisions

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# Defining Fetal Life: An Establishment Clause Analysis of Religiously Motivated Informed Consent Provisions

JUSTIN R. OLSON\*

## INTRODUCTION

If a woman wants to get an abortion in the state of Indiana, she has to hear several things from her physician at least eighteen hours before the procedure. She will hear a list of the medical risks associated with an abortion, including “the risk of infection and hemorrhage; the potential danger to a subsequent pregnancy; . . . the potential danger of infertility”<sup>1</sup> and “[t]he probable gestational age of the fetus at the time the abortion is to be performed.”<sup>2</sup> Her physician must also tell her a variety of non-medical facts: that the state provides benefits for prenatal, childbirth, and neonatal care;<sup>3</sup> that the unborn child’s father is legally required to pay child support;<sup>4</sup> and that adoptive services are available.<sup>5</sup> She will also have to see “a picture or drawing of a fetus,”<sup>6</sup> and sometime before the abortion, unless she refuses in writing, she will have to view an ultrasound image of her unborn child.<sup>7</sup> All of these mandated disclosures are what Indiana considers necessary to ensure that a woman’s consent to the abortion procedure is both informed and voluntary.<sup>8</sup>

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\* J.D. Candidate, 2013, Indiana University Maurer School of Law; B.A., 2010, Grove City College. I would like to express my sincere appreciation to Professors Daniel Conkle, Jody Madeira, and Thomas Fisher for kindly critiquing earlier manifestations of this Note. I would also like to thank my dear wife Leah and the rest of my family for their unceasing support. Many thanks to the editors of the *Indiana Law Journal* for preparing this Note for publication.

1. IND. CODE § 16-34-2-1.1(a)(1)(D)(i)–(iii) (2012).

2. § 16-34-2-1.1(a)(1)(F).

3. See § 16-34-2-1.1(a)(2)(A) (stating that the benefits may be available from the “division of family resources”).

4. § 16-34-2-1.1(a)(2)(B). This clause also notes that “[i]n the case of rape, the information required under this clause may be omitted.” *Id.*

5. § 16-34-2-1.1(a)(2)(C).

6. § 16-34-2-1.1(a)(1)(F)(i).

7. § 16-34-2-1.1(b).

8. Certain disclosures mandated by states are more controversial than others. While abortion is a contested moral issue, it is also a medical procedure that presents real risk of physical harm to expecting mothers, such as “the risk of infection and hemorrhage.” § 16-34-2-1.1(a)(1)(D)(i). A risk of infection is less controversial than information on fetal pain, photographs of the fetus at different stages of development, the link between breast cancer and abortion, and the purported effects of an abortion on the mental health of the mother. See Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 15–25 (2012); see also Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 143 (2008) (discussing fetal pain statutes). Some scholars have argued that requiring such controversial disclosures are at odds with traditional informed consent doctrine, Rebecca Dresser, *From Double Standard to Double*

The U.S. Supreme Court permits states to fully inform women of the consequences of an abortion provided that what they require the doctors to say is “truthful,” “non-misleading,” and relevant to the abortion procedure.<sup>9</sup> This standard

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*Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1615 (2008) (arguing that disclosure laws aimed at discouraging abortions “are inconsistent with the values that support the traditional informed consent doctrine”); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 228 (2009) (arguing that “abortion law, although invoking ‘informed consent’ as a reason for abortion restrictions, has diverged far from the law of informed consent.”), because the disclosures interfere with the doctor-patient relationship, diverge from informed consent’s foundational values of autonomy and self-determination, and are based on conceptions of women as inherently mentally unstable. Evelyn Atkinson, *Abnormal Persons or Embedded Individuals?: Tracing the Development of Informed Consent Regulations for Abortion*, 34 HARV. J.L. & GENDER 617, 618–20 (2011) (footnote omitted) (“The current perversion of informed consent doctrine in the abortion context, which is focused on the mental health effects of abortion rather than the right to bodily autonomy or self-determination, is the result of a framework that has developed from entrenched conceptions of women both as mothers and as mentally unstable.”); Manian, *supra*, at 224–27; Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1030–36 (arguing that regulations that restrict abortion are based on paternalistic views of women’s capacity for decision-making); Amanda McMurray Roe, Note, *Not-So-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 CASE W. RES. L. REV. 205, 207 (2009) (arguing that “there is no place for medically unfounded statutes that interfere with the doctor-patient relationship by posing as requirements for informed consent”); *cf.* Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1689 (2008) (“I am prepared to argue that [antiabortion regulations that purport to protect women] violate[] forms of dignity and decisional autonomy guaranteed to women, not only by *Roe* and *Casey*, but also by the Supreme Court’s equal protection sex discrimination cases.”). Other scholars, however, are hesitant to quickly condemn controversial disclosures on traditional informed consent grounds. Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J.L. & PUB. POL’Y 1, 5 (2011) (“This Article contends that when viewed as a whole, the doctrine of informed consent does not impose nearly as significant a barrier to abortion disclosure laws as many critics claim.”). This Note does not take a position on whether such controversial disclosures violate certain principles of informed consent beyond recognizing the legitimacy of court decisions that have upheld these controversial disclosures against legal challenge. *E.g.*, *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc); *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011). *See generally infra* Part III. The purpose of this Note is not to support or disaffirm the merits of these mandated disclosures but to discuss the Establishment Clause implications of such disclosures that may have been motivated by religious beliefs.

9. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion) (“To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.”). Traditional informed consent doctrine requires five elements to be present in order for the informed consent to occur: competence of the patient to understand and decide;

is based upon the recognition that a state may inform a woman of the potential risks and consequences associated with the procedure<sup>10</sup> and must ensure the autonomy of a woman's decision.<sup>11</sup> At the same time, the Supreme Court tailored informed consent in the abortion context<sup>12</sup> to interests unique to that setting by holding that a state may use informed consent to communicate its profound respect for fetal life<sup>13</sup> and declare its preference for childbirth over abortion.<sup>14</sup>

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disclosure of information material to the procedure; understanding of such disclosure; voluntariness of the patient in deciding; and consent, that is a decision in favor of a plan and the patient's authorization of the chosen plan. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 79–80 (5th ed. 2001).

10. *Casey*, 505 U.S. at 882.

11. See BEAUCHAMP & CHILDRESS, *supra* note 9, at 78–79 (“An informed consent is an individual's *autonomous authorization* of a medical intervention . . . .” (emphasis in original)); Vandewalker, *supra* note 8, at 5 (“The fundamental value undergirding the doctrine [of informed consent] is generally considered to be patient autonomy.”).

12. See, e.g., Atkinson, *supra* note 8, at 620 (characterizing informed consent in the abortion context as a “perversion of informed consent doctrine”). *But see Casey*, 505 U.S. at 884 (plurality opinion) (“On its own, the doctor-patient relation [in the abortion context] is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.”).

13. *Casey*, 505 U.S. at 877 (plurality opinion); *Gonzalez v. Carhart*, 550 U.S. 124, 146, 160 (2007) (citing *Casey*, 505 U.S. at 877 (plurality opinion)); see *Casey*, 505 U.S. at 968 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (discussing the “State's legitimate interest in unborn human life”).

14. *Casey*, 505 U.S. at 883 (plurality opinion); *id.* at 916 (Stevens, J., concurring in part and dissenting in part) (“I agree with the joint opinion that the State may ‘expres[s] a preference for normal childbirth’” (internal quotation marks omitted) (alterations in original)); *id.* at 986 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); see *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (“States may take sides in the abortion debate and come down on the side of life, even life in the unborn . . . .” (citing *Casey*, 505 U.S. at 872 (plurality opinion)); *cf. Casey*, 505 U.S. at 933 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Like Justice Stevens, I agree that the State may take steps to ensure that a woman's choice ‘is thoughtful and informed,’ and that ‘States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.’” (citations omitted)). The Court's four conservative Justices implicitly agreed with the manner in which the *Casey* plurality articulated the state's interests in the abortion context. See *Casey*, 505 U.S. at 968 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (Justices White, Scalia and Thomas joined the opinion). Justices Stevens and Blackmun appeared to agree with the plurality as well, but they were both quick to disagree with the plurality that a state could enact measures “designed to persuade [a woman] to choose childbirth over abortion” so long as the measures “are not a substantial obstacle to the woman's exercise of the right to choose.” *Casey*, 505 U.S. at 877–88 (plurality opinion); *id.* at 916 (Stevens, J., concurring in part and dissenting in part); *id.* at 933 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Thus, it seems that all of the Justices on the *Casey* court agreed with the general proposition that a statute could, at the very least, articulate its profound respect for fetal life and declare its preference for childbirth over abortion so long as such articulations were not an attempt to persuade a woman not to choose abortion.

Several states have recently enacted some of the most controversial informed consent provisions<sup>15</sup> to date—statutes that require a physician to tell a woman seeking an abortion that fetal life is human life and that abortion terminates that life.<sup>16</sup> Two courts that have had the opportunity to examine such provisions—the Southern District of Indiana and the Eighth Circuit—have found that these new mandated disclosures do not violate the Supreme Court’s truthful, non-misleading, and relevant standard.<sup>17</sup>

Despite these holdings, mandated disclosures that equate fetal life with human life have produced polarized reactions. Supporters argue that the disclosures describe mere scientific fact.<sup>18</sup> Critics deny this assessment and assert that such provisions represent moral, ethical, ideological, or religious conclusions.<sup>19</sup>

15. Some commentators do not believe that requiring a doctor to state that fetal life is human life and that abortion terminates that life is within a doctor’s “duty to disclose medically relevant information.” See, e.g., Vandewalker, *supra* note 8, at 26. A doctor’s duty to disclose does not require discussing irrelevant information, and statutes that define fetal life as human life are arguably irrelevant because (1) the fact is “trivially true” and obvious, Richard Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 954 (citation omitted) (stating that informed consent in its standard formulation “does not require the disclosure of a risk that ‘is either known to the patient or is so obvious as to justify presumption of such knowledge’”); Vandewalker, *supra* note 8, at 27, and (2) the fact is a metaphysical or ideological assertion and irrelevant to informed consent on that basis. Post, *supra*, at 954–60; Vandewalker, *supra* note 8, at 26. This Note does not take a position about whether or not defining fetal life as human life is inappropriate in the informed consent context beyond recognizing the legitimacy of court decisions that have upheld these provisions against First Amendment challenges. E.g., *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc); *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011). See generally *infra* Part III. This Note’s only aim is the discussion of the Establishment Clause implications of legislative motivations that may undergird the enactment of such provisions. See *supra* note 8.

16. See, e.g., Act of May 10, 2011, P.L. 193-2011, 2011 Ind. Acts 2476, 2480 (codified as amended at IND. CODE § 16-34-2-1.1(a)(1)(E) (2011)) (“[H]uman physical life begins when a human ovum is fertilized by a human sperm.”); H.B. 2035, ch. 44, 2011 Kansas Sess. Laws 598, 611 (codified as amended at KAN. STAT. ANN. § 65-6709(b)(5) (Supp. 2011)) (“[T]he abortion will terminate the life of a whole, separate, unique, living human being.”); S.B. 793, 2010 Mo. Laws 958, 959 (codified at MO. ANN. STAT. § 188.027(1)(2) (West 2011)) (“The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being.”); N.D. CENT. CODE § 14-02.1-02(8)(a)(2) (Supp. 2011) (“[A]bortion will terminate the life of a whole, separate, unique, living human being.”); H.B. 1166, ch. 186, 2005 S.D. Sess. Laws 356, 358 (codified as amended at S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2011)) (“[T]he abortion will terminate the life of a whole, separate, unique, living human being.”).

17. *Rounds*, 530 F.3d 724; *Planned Parenthood of Ind.*, 794 F. Supp. 2d 892. Neither court reached an Establishment Clause question and each court only assessed the provisions to determine if the legislative definition of fetal life violated the free-speech rights of abortion physicians. *Rounds*, 530 F.3d at 733–38; *Planned Parenthood of Ind.*, 794 F. Supp. 2d at 913–19.

18. E.g., Defendants’ Memorandum in Opposition to the Motion for Preliminary Injunction at 32, *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (No. 1:11-cv-0630-TWP-DKL) (“[O]bjective scientific evidence plainly establishes that, when a human ovum is fertilized by a human sperm, a biological life begins.”).

19. E.g., *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 375 F. Supp. 2d 881, 887 (D.S.D. 2005), *vacated, and remanded sub nom. Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc). The district court in *Rounds*, in assessing whether a South Dakota law requiring a physician to tell a woman seeking an abortion that a fetus was a human

This Note will discuss the extent to which definitions of fetal life as human life are religious conclusions<sup>20</sup> and the possible Establishment Clause implications of such definitions. The Establishment Clause requires that legislatures refrain from enacting laws that advance a religious purpose.<sup>21</sup> The Supreme Court has not found that abortion regulations, in general, violate the clause simply because the regulations coincide with a particular religious doctrine.<sup>22</sup> But some have disagreed,<sup>23</sup> and others are beginning to argue that states violate the Establishment Clause when they pass abortion legislation premised on the belief that fetal life is human life.<sup>24</sup> This Note attempts to respond to this argument by explaining why statutes that define fetal life as human life do not violate the Establishment Clause.

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being, stated the following: “Unlike the truthful, non-misleading medical and legal information doctors were required to disclose in *Casey*, the South Dakota statute requires abortion doctors to enunciate the State’s viewpoint on an unsettled medical, philosophical, theological, and scientific issue, that is, whether a fetus is a human being.” *Id.* Although this assessment was overruled, it represents a view that is not uncommon. See *Acuna v. Turkish*, 940 A.2d 416, 425–26 (N.J. 2007); Post, *supra* note 15, at 954–55; Sawicki, *supra* note 8, at 16 (“The problem with such disclosure requirements [that define fetal life as human life], many argue, is that they blur the boundary between medical information and ideological information.”); Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to Be Learned from the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 COLUM. J. GENDER & L. 357, 390–91 (2011) (arguing that defining the fetal life as human is unethical); Vandewalker, *supra* note 8, at 26; Kaitlin Moredock, Note, “*Ensuring So Grave a Choice Is Well Informed*”: *The Use of Abortion Informed Consent Laws to Promote State Interests in Unborn Life*, 85 NOTRE DAME L. REV. 1973, 1984 n.73 (2010) (stating that a definition of fetal life that is incorporated into an informed consent provision is an extreme form of the kind of value judgments that states are allowed to make through their regulation of informed consent).

20. See generally Deanna Martin, *Abortion Consent Law Before Ind. Legislature; Doctor Would Say Conception Begins Life*, WASH. POST, Feb. 12, 2006, at A10; *State Abortion Proposal Defines Life as Beginning at Conception*, HERALD-TIMES (Bloomington, Ind.), Feb. 12, 2006, at A12; Tim Townsend, *New Mo. Abortion Law Counters Some Philosophy, Theology*, STLTODAY.COM (Aug. 22, 2010, 12:05 AM) [http://www.stltoday.com/lifestyles/faith-and-values/new-mo-abortion-law-counters-some-philosophy-theology/article\\_958b9f67-a92e-5a77-bc4d-ae780e73364c.html](http://www.stltoday.com/lifestyles/faith-and-values/new-mo-abortion-law-counters-some-philosophy-theology/article_958b9f67-a92e-5a77-bc4d-ae780e73364c.html).

21. See *infra* Part I.A.

22. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (“[A] statute [does not] violate[] the Establishment Clause because it ‘happens to coincide or harmonize with the tenets of some or all religions.’” (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961))).

23. See, e.g., John Morton Cummings, Jr., Comment, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1193 (1990) (arguing that antiabortion statutes “lack a secular purpose, benefit specific religious organizations, unnecessarily entangle church and state, and place the state on one side of a political issue which is divided along religious lines, thus violating the establishment clause”).

24. See Huseina Sulaimanee, Note, *Protecting the Right to Choose: Regulating Conscience Clauses in the Face of Moral Obligation*, 17 CARDOZO J.L. & GENDER 417, 431 (2011) (“This Note argues that in order to survive Establishment Clause analysis, a statute regulating abortion must not promote the inherently religious idea that life begins at conception, must not encourage childbirth over abortion by allowing federally-funded facilities to deny abortion services except to save the life of a woman, and must not grant constitutional rights to a fetus.”).

The definition of fetal life is central to the abortion debate.<sup>25</sup> And religious beliefs play an important role in this discussion for both ordinary individuals<sup>26</sup> and state legislators.<sup>27</sup> The significance that one assigns to fetal life—the question of

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25. See *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (“Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child . . . .”); *id.* at 957 (Kennedy, J., dissenting) (“The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life.”); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 982 (1992) (Scalia, J., dissenting in part) (“The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*.” (emphasis in original)); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 742 (8th Cir. 2008) (en banc) (Murphy, J., dissenting) (“In the context of abortion, the term ‘human being’ has an overwhelmingly subjective, normative meaning, in some sense encompassing the whole philosophical debate about the procedure.”); see also EVA R. RUBIN, *ABORTION, POLITICS, AND THE COURTS: ROE V. WADE AND ITS AFTERMATH* 77 (1987).

26. See John P. Hoffmann & Sherrie Mills Johnson, *Attitudes Toward Abortion Among Religious Traditions in the United States: Change or Continuity?*, 66 *SOC. RELIGION* 161, 162 (2005); Susan V. Stromberg, *Advice to a Potential Litigant: How to Challenge the Constitutionality of the “Choose Life” Specialty License Plate*, 33 *STETSON L. REV.* 623, 639–40 (2004); *35 Years After Roe Ruling, New Trends and Old Divisions*, *USA TODAY*, Jan. 22, 2008, at 11A (“No matter how sincere and heartfelt the beliefs of abortion opponents, banning it or curtailing access still imposes one group’s religious beliefs on other individuals.”); *supra* note 20.

The literature discussing the relationship between abortion and religion is not cohesive. Laura M. Gaydos, Alexandria Smith, Carol J. R. Hogue & John Blevins, *An Emerging Field in Religion and Reproductive Health*, 49 *J. RELIGION & HEALTH* 473 (2010). One can infer that religion plays a critical role in one’s view on the issue from the demographics of those who support and oppose abortion. But the statistical relationship remains inconclusive. For example, support for the legality of abortion diminishes as church attendance increases; however, the relationship varies from religious group to religious group. ROBERT P. JONES, DANIEL COX & RACHEL LASER, *COMMITTED TO AVAILABILITY, CONFLICTED ABOUT MORALITY: WHAT THE MILLENNIAL GENERATION TELLS US ABOUT THE FUTURE OF THE ABORTION DEBATE AND THE CULTURE WARS* 29 (2011). Fifty-two percent of Americans believe that having an abortion is morally wrong. *Id.* at 22. Yet, the role of religion in determining support for and against abortion is a complicated matter. This same study found that “more than one-third [of] [sic] those who believe having an abortion is morally wrong (36%) or having an abortion is a sin (35%) also nonetheless believe having an abortion is in some circumstances the most responsible decision a woman can make.” *Id.* at 25. Furthermore, religious believers do not necessarily agree with their religious leaders on the issue. Religious News Service, *Believers Hold Clear, Complicated Views on Abortion*, *NAT’L CATH. REP.*, June 24, 2011, at 3 (“Significant majorities of Americans say it is possible to disagree with their religion’s teachings on abortion and still remain in good standing with their faith.”). Moreover, the strength of one’s views on the issue differs based on a variety of other factors. Those who favor legalized abortion are more likely to give less importance to the issue than those who oppose legalization. Jacqueline Scott & Howard Schuman, *Attitude Strength and Social Action in the Abortion Dispute*, 53 *AM. SOC. REV.* 785, 792 (1988). And women assign greater importance to the issue than men. *Id.*

27. James T. Richardson & Sandie Wightman Fox, *Religious Affiliation as a Predictor of Voting Behavior in Abortion Reform Legislation*, 11 *J. FOR SCI. STUDY RELIGION* 347

when human life begins—is, for many abortion proponents and opponents, a function of their religious convictions or lack thereof.<sup>28</sup> This suggests that pro-life legislators do not necessarily come with religiously neutral motives when they seek to regulate abortion.<sup>29</sup> When those legislators collectively decide, as a representative assembly, to define fetal life as unmistakably human, they cannot help but encourage many Americans to make logical inferences about the ethical

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(1972) (finding that religious affiliation of state legislators is a stronger indicator of voting behavior on abortion than constituency, party, or age); James T. Richardson & Sandie Wightman Fox, *Religion and Voting on Abortion Reform: A Follow-Up Study*, 14 J. FOR SCI. STUDY RELIGION 159 (1975) (same); see also *supra* note 20. However, a legislator's support or lack thereof for abortion depends on their particular religious affiliation. Byron W. Daynes & Raymond Tatalovich, *Religious Influence and Congressional Voting on Abortion*, 23 J. FOR SCI. STUDY RELIGION 197 (1984). In particular, Catholic, Mormon, and Protestant legislators are "more likely to support restrictive abortion legislation after taking account of personal qualities such as party and ideology and the influence of the legislators' district." KENNETH D. WALD, *RELIGION AND POLITICS IN THE UNITED STATES* 148 (3d ed. 1997) (citing several studies). These studies noted above are now dated. A more recent study paints a much more complex relationship between abortion and religious support. See David Yamane & Elizabeth A. Oldmixon, *Religion in the Legislative Arena: Affiliation, Salience, Advocacy, and Public Policymaking*, 31 LEGIS. STUD. Q. 433 (2006). In a study to determine the effect of religious affiliation, religious salience (the importance of religion to the individual), and religious group advocacy for the roll-call vote of the Wisconsin state legislature on 1995 Assembly Bill 441 (imposing a twenty-four hour waiting period on women seeking abortions and enacting new informed consent procedures), the results indicated that while conservative Protestant identification was positively associated with pro-life voting, no religious variable had a significant, direct effect on abortion voting. *Id.* at 437–48. Party affiliation, rather, was the decisive factor. *Id.* at 449. Nonetheless, the study did indicate that "there are certainly religious undercurrents to th[e] issue." *Id.*

28. See *Casey*, 505 U.S. at 850 (plurality opinion) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and *spiritual implications* of terminating a pregnancy, even in its earliest stage." (emphasis added)); *Thornburg v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting) ("However one answers the metaphysical or *theological* question whether the fetus is a 'human being' . . ." (emphasis added)); *Roe v. Wade*, 410 U.S. 113, 116 (1973) ("One's . . . *religious training* [and other life experiences] . . . are all likely to influence and to color one's thinking and conclusions about abortion." (emphasis added)); *Rounds*, 530 F.3d at 742 (Murphy, J., dissenting) ("The philosophical or *religious question* of when a human life comes into existence . . ." (emphasis added)); *Acuna v. Turkish*, 930 A.2d 416, 425–26 (N.J. 2007) ("Clearly, there is no consensus in the medical community or society supporting plaintiff's position that a six- to eight-week-old embryo is, as a matter of biological fact—as opposed to a moral, *theological*, or philosophical judgment—'a complete, separate, unique and irreplaceable human being' . . ." (emphasis added)); see also RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 99–100 (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*].

29. See, e.g., Karen F.B. Gray, Comment, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399, 399 (1990) ("The issue of abortion in the United States has always been one that is seemingly inseparable from religion."); Ann Milliken Pederson, *South Dakota and Abortion: A Local Story About How Religion, Medical Science, and Culture Meet*, 42 ZYGON 123 (2007) (discussing the role of religion in science, medicine, and culture in South Dakota and how that has, in part, helped to shape the state's abortion legislation).

and moral beliefs of legislators,<sup>30</sup> which are often based upon religious beliefs.<sup>31</sup> Stated differently, the interests of legislators in passing an informed consent provision that specifically defines fetal life as human life may significantly overlap with the religious interests of those individual legislators.<sup>32</sup> One could argue that this overlap strongly suggests the presence of what professor Michael Perry calls “second-best solutions,” which are strategic acts of lawmaking that trumpet secular premises “aimed at making it appear that the . . . law would have been enacted even in the absence of the religious premises.”<sup>33</sup> Statutes that explicitly define fetal life as human life are particularly troublesome for certain individuals who may suspect that individual legislators may not be simply legislating from an unstated moral or ideological premise but may instead be explicitly codifying a religious conclusion. Even though this conclusion about the definition of human life is stated in purely medical and scientific terms, some may argue that the religious influence is unmistakable.<sup>34</sup> Whether this is of any constitutional significance is the primary question this Note seeks to answer.

Determining how to frame definitions of fetal life as human life within Establishment Clause jurisprudence is a tall order because the doctrine has grown increasingly incoherent.<sup>35</sup> The fact that the Supreme Court has rarely discussed abortion in terms of religion<sup>36</sup> only compounds the difficulty. This Note seeks to clarify the nexus between the Establishment Clause and abortion jurisprudence by discussing the implications of defining fetal life as human life.

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30. See *Rounds*, 530 F.3d at 745 (Murphy, J., dissenting) (noting that a physician’s statement that abortion terminates the life of a human being “taken in isolation . . . ‘certainly may be read to make a point in the debate about the ethics of abortion’”) (quoting *Rounds*, 530 F.3d at 735 (en banc)).

31. See *supra* notes 20, 26–27 and accompanying text.

32. See Daniel A. Crane, *Faith, Reason, and Bare Animosity*, 21 CAMPBELL L. REV. 125, 132 (1999) (“Justice Stevens, in particular, has voted to invalidate legislative acts because of their overly cozy fit with religious dogma.” (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 568 (1989) (Stevens, J., dissenting))).

33. Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 673 (2001); see also Crane, *supra* note 32, at 132–33.

34. Sulaimanee, *supra* note 24, at 431.

35. E.g., Mark Strasser, *Thou Shalt Not?*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 439, 439 (2006). Professor Strasser notes:

Given that the different tests articulated by the Court to determine Establishment Clause violations do not always yield similar dictates, it would seem important for the Court to announce clear guidelines with respect to the conditions under which the different tests should be used. Regrettably, no clear guidelines have been forthcoming from the Court.

That the Court has not made clear which test to apply in which situation does not preclude the possibility that certain basic themes run through the jurisprudence. Yet, there is no agreement about what those basic themes are.

*Id.* at 460.

36. See Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court’s Abortion Cases*, 23 REGENT U. L. REV. 1 (2010). Ronald Dworkin has argued that abortion can be understood as a First Amendment religious issue. See DWORKIN, *FREEDOM’S LAW*, *supra* note 28, at 104–10; RONALD DWORKIN, *LIFE’S DOMINION* 160–68 (1993).

The foundational premise of this Note is that a rigid distinction between the legislative purpose<sup>37</sup> of a statute and the personal motives of the individual legislators who enacted it must be maintained.<sup>38</sup> Individuals should never view the personal, religious motives of legislators as an interpretive gloss on a statute that is facially nonreligious<sup>39</sup> or for which a secular justification is reasonably available.<sup>40</sup> The Supreme Court has explicitly recognized that abortion regulations have a secular justification—they articulate traditionalist values about abortion, not merely religious conclusions.<sup>41</sup> Thus, abortion regulations should only be assessed

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37. Determining legislative purpose is a critical component of both Establishment Clause jurisprudence, *see, e.g.*, *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005), and certain schools of statutory interpretation. *See generally* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 248–337 (5th ed. 2009) (discussing “how external context in the sense of statutory purpose influences the meaning of a statute”).

38. Professor Richard C. Schragger notes the distinction as being between the stated purpose and the actual purpose. *See* Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 594–95 (2011); *see also* Caroline Mala Corbin, *The Continuing Relevance of the Establishment Clause: A Reply to Professor Richard C. Schragger*, 89 TEX. L. REV. SEE ALSO 125, 128 (2011), available at <http://www.texasirev.com/wp-content/uploads/Corbin-89-TLRSA-125.pdf> (describing the distinction noted by Professor Schragger as one between “objectively determined purpose rather than actual purpose”). Professor Schragger argues that the Establishment Clause requires an inquiry into the actual purpose, that is, the actual motives of the individual legislators. *See* Schragger, *supra*, at 588. Thus he states that,

[D]espite a doctrinal requirement that laws have a legitimate “secular legislative purpose,” the Court avoids inquiring too deeply into the actual provenance of legislative acts. Even if a law or government act is actually motivated by a particular religious constituency or religious belief, the Court will uphold it if it can be justified with reference to a plausible secular criteria. Thus, across a whole range of government policy making, religiously motivated decisions can be made, and the Court has little to say about it.

*Id.* (emphasis omitted) (footnotes omitted). For these reasons, Schragger argues that the Establishment Clause is under-enforced, *id.* at 587, implying that the Constitution prohibits more than what courts are willing to enforce. This Note rejects this argument and assumes that the Establishment Clause requires an inquiry that is no more thorough (and perhaps less so) than what the Supreme Court performs in practice. *See infra* Part I.B.1.

39. *See infra* Part I.B.1. Attempting to discern the motives of individual legislators, or what some have referred to as “actual purpose”—*see supra* note 38—is a difficult task at best and dubious at worst. As Professor Caroline Mala Corbin states,

Reliance on actual purpose would require pinpointing what counts as the actual purpose behind legislation passed by dozens of people, each of whom might have a different actual purpose. And this is assuming courts could determine what motivates particular legislators. Reliance on actual purpose would also create the dilemma of how to analyze legislation that had been passed anew with a different legislative history.

Corbin, *supra* note 38, at 128 n.18 (citation omitted).

40. *See infra* notes 108–15 and accompanying text.

41. *Harris v. McRae*, 448 U.S. 297, 319 (1980).

according to their objective purpose and not the personal religious motives of those who enacted them.

But are statutes that define fetal life as human life different from typical anti-abortion regulations? This Note argues that the Establishment Clause does not preclude a state from defining fetal life as human life because this definition has generally been a necessary premise for all legislation that may have the effect of discouraging abortion. Abortion is a distinctly moral issue<sup>42</sup> that hinges, to a large extent, upon the definition of human life.<sup>43</sup> While many pro-choice advocates have argued that the morality and legality of abortion is not contingent upon the moral status of the fetus,<sup>44</sup> the vast majority of pro-life legislators consider the definition of fetal life as human life *the* starting point for their anti-abortion arguments and consequently a necessary premise for many anti-abortion regulations.<sup>45</sup> Thus, if the definition of fetal life is a necessary premise for much anti-abortion legislation and if anti-abortion legislation is not considered a religious issue *per se*, then the Establishment Clause should not preclude a state from explicitly articulating that necessary premise.

Part I situates these informed consent statutes within the Supreme Court's Establishment Clause doctrine, in particular the objective observer test as

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42. See MICHAEL J. SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 122–23 (2005) (arguing that “[t]he justice (or injustice) of laws against abortion and homosexual conduct depends, at least in part, on the morality (or immorality) of those practices”).

43. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 982 (1992) (Scalia, J., dissenting) (“[The plurality opinion in *Casey*] describes the methodology of *Roe*, quite accurately, as weighing against the woman's interest the State's ‘important and legitimate interest in protecting the potentiality of human life.’ But ‘reasoned judgment’ does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere ‘potentiality of human life.’ The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*.” (quoting *Casey*, 505 U.S. at 974) (emphasis in original)); see also *supra* note 25.

44. E.g., Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (arguing that even if a fetus is a person (and consequently a human being), forcing a woman to carry a fetus to term is a form of servitude prohibited by the Thirteenth Amendment); Margaret Olivia Little, *Abortion, Intimacy, and the Duty to Gestate*, 2 ETHICAL THEORY & MORAL PRAC. 295, 299 (1999) (arguing that abortion does not hinge only upon weighing a fetus's “right to life” against a woman's right to choose, but also upon the relationship that exists between a woman and her fetus—whether that relationship is strong enough to create a duty to gestate and allow the fetus to occupy her womb); Soran Reader, *Abortion, Killing, and Maternal Moral Authority*, HYPATIA, Jan.–Mar. 2008, at 132, 144, 148) (arguing that motherhood, not the fact of conception itself, “confers moral authority on the mother as [the] creator” of personhood and that she alone can determine whether or not to bring the fetus into the world); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. (1971) (arguing that even if a fetus is a person, it does not follow that a woman must give aid to the fetus by carrying it to term); see also STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 257 (1993) (“[T]he conclusion of fetal humanity by no means ends the argument; it simply forces the striking of a balance.”).

45. See *Casey*, 505 U.S. at 982; see also Little, *supra* note 44, at 297–98.

articulated in *McCreary County v. ACLU of Kentucky*<sup>46</sup> along with the limits that test presents in determining the subjective motives of individual legislators. This Part also discusses the various approaches that scholars have used to determine the extent to which religious motivations are permissible in lawmaking. Part II describes the contours of the Supreme Court's abortion jurisprudence in order to demonstrate the precise secular purposes that a state may advance in the abortion context. Part III examines the informed consent provisions of South Dakota and Indiana, two states that require physicians to inform a woman seeking an abortion that she will be aborting a human being. This discussion illustrates how courts generally accept the claim of state legislatures that statutes that define fetal life do not articulate anything beyond a scientific conclusion that fetal life is human life. Part IV applies the conclusions of the previous Parts to the statutes at issue and argues that the Establishment Clause does not preclude informed consent provisions that define fetal life as human life.

#### I. THE ESTABLISHMENT CLAUSE AND THE SECULAR PURPOSE PRONG

The Supreme Court has interpreted the Establishment Clause to require that a state legislature act only on the basis of a secular purpose.<sup>47</sup> Distinguishing a secular purpose from a religious one is, thus, a threshold question. Unfortunately, this inquiry is complicated by the fact that many statutes articulate facially secular purposes but are enacted by legislators who are motivated by their religious beliefs. Anti-abortion legislation is a prime example of the kind of legislation for which religious beliefs impact voting by legislators.<sup>48</sup> The influence of religion in the civil rights movements is another example of how religion can drastically influence the political process.<sup>49</sup> And yet, as noted below, the Supreme Court has held the overlap between religious beliefs and the purpose of a piece of legislation does not violate the Establishment Clause.<sup>50</sup> This means that it is possible to distinguish a

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46. 545 U.S. 844 (2005).

47. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

48. WALD, *supra* note 27, at 148. *See generally supra* notes 20, 26–27.

49. *See* DAVIS W. HOUCK & DAVID E. DIXON, RHETORIC, RELIGION AND THE CIVIL RIGHTS MOVEMENT 1954–65 (2006) (demonstrating the centrality of religious belief to the civil rights movement); Johnny E. Williams, *Linking Beliefs to Collective Action: Politicized Religious Beliefs and the Civil Rights Movement*, 17 SOC. F. 203, 218 (2002) (arguing “that culture, particularly religious culture, has a direct and independent role in facilitating collective action,” in particular, the civil rights movement); Charles Marsh, 6 POL. THEOLOGY 266, 266 (2005) (reviewing DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* (2004)) (“[David Chappell] argues that the [civil rights] movement’s vitality was a result of ‘the prophetic religious tradition’ out of which it grew, rather than the secular liberal tradition, which floundered on civil rights.”).

50. *Harris v. McRae*, 448 U.S. 297, 319–20 (1980); *see also* *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting) (“Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage. Notwithstanding the majority’s implication to the contrary we do not

secular purpose from the unstated religious motives of the legislators.<sup>51</sup> This Part, beginning with a brief discussion of Establishment Clause doctrine, argues that the distinction between legislative purpose on the one hand and personal motivation of the legislator on the other best explains why the Supreme Court has not struck down religiously influenced legislation in the abortion context.<sup>52</sup>

*A. The Lemon Test and the Endorsement Test—The Objective Observer Inquiry*

The Supreme Court has articulated two doctrinal tests to apply the mandate of the Establishment Clause.<sup>53</sup> The Court formulated the first test in *Lemon v.*

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presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths. To do so would deprive religious men and women of their right to participate in the political process. Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims." (citations omitted)).

51. See CARTER, *supra* note 44, at 111 (stating that some courts mistake "the political purpose for which the statute is enacted with the religious sensibilities of legislators or their constituents"); Scott W. Breedlove & Victoria S. Salzman, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation Under the Establishment Clause*, 53 BAYLOR L. REV. 419, 422 (2001) ("Despite the courts' emphasis on motivation, only the effect of a law and the objective governmental interest in that law should be considered in determining whether it violates Establishment Clause prohibitions." (emphasis omitted)); Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 23 (2002) ("To summarize, the legislative utilization of religious premises categorically transgresses neither the requirement that there be a secular purpose nor the alternative prohibition on having the (primary) purpose of advancing religion, as long as the statute in question is today intended to achieve a *temporal objective* otherwise within the delegated or police power of the government." (emphasis added)); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 117 (2002) ("A purpose inquiry need not look to subjective motives; one can instead attempt to discern the objective purpose of the statute—the purpose that plainly appears from an examination of the face of the statute."); Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 803 (1993) ("But if a statute motivated by religion, or even intended to advance religion, is neutral in its effects on freedom of religious exercise and nonexercise, the Establishment Clause supplies no justification for outlawing it."); Mark Tushnet, *The Limits of the Involvement of Religion in the Body Politic*, in THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 191, 194 (James E. Wood, Jr. & Derek Davis eds., 1991) ("The Establishment Clause test of 'impermissible purpose' cannot sensibly mean 'impermissible motive' in a strong sense . . .").

52. Steven L. Skahn presented this same issue with regard to regulations that restrict abortion. Steven L. Skahn, Note, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 VAL. U. L. REV. 487, 501 (1980). Skahn's negative answer to this question was relatively inconclusive and requires further examination, especially in light of the Supreme Court's subsequent holdings in *Edwards*, 482 U.S. 578 (holding that a court may inquire beyond the stated purpose of a statute to identify an impermissible religious purpose) and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (holding that a court may examine the stated purpose of the legislature from the perspective of an objective observer, not just the language of the statute on its face).

53. A third test, the coercion test, is sometimes used by the Court to assess Establishment Clause claims. This test is triggered when an individual claims to have

*Kurtzman*,<sup>54</sup> which reads as follows: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive governmental entanglement with religion.’”<sup>55</sup> This test requires that the government ensure equality among particular religions and between religion and irreligion in both form and substance.<sup>56</sup>

The Court has adopted another test, commonly referred to as the endorsement test.<sup>57</sup> Justice O’Connor first articulated the endorsement test in her concurring opinion in *Lynch v. Donnelly*,<sup>58</sup> by stating that “[t]he proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion”<sup>59</sup> and that the proper inquiry under the effect prong of *Lemon* is “that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion”<sup>60</sup> either “intentionally or unintentionally.”<sup>61</sup> The Court applies the effect prong by asking whether an “objective observer” would perceive that a government’s message amounted to an endorsement of religion.<sup>62</sup> In most Establishment Clause cases, the Court generally applies both the *Lemon* test and the endorsement test as a “unitary inquiry.”<sup>63</sup> However, the endorsement test performs much of the heavy lifting when government communication plays a critical role in the state action in question.<sup>64</sup>

*McCreary County v. ACLU of Kentucky*<sup>65</sup> provides a recent example of how the Court applies both of these tests as a unitary inquiry. It also demonstrates how the Court has essentially melded the purpose prong into the effects prong under this

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suffered undue pressure to endorse a particular religion or religion in general. See KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 191 (2008) [hereinafter GREENAWALT, ESTABLISHMENT AND FAIRNESS]. This test is largely concerned with the government’s interference with religious voluntarism, DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 129 (2009), which makes it less helpful when analyzing legislative purpose and motivation. Also, while informed consent provisions may in one sense coerce a physician into articulating a view of fetal life with which she does not agree, analyzing such coercion does not play a large role in assessing the legislative purpose.

54. 403 U.S. 602 (1971).

55. *Id.* at 612–13 (citation omitted). See generally GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 53, at 158–80.

56. See CONKLE, *supra* note 53, at 122–24.

57. See *id.* at 125.

58. 465 U.S. 668 (1984).

59. *Id.* at 691 (O’Connor, J., concurring).

60. *Id.* at 692 (O’Connor, J., concurring). Professor Dan Conkle summarizes the test as follows: “[T]he government violates the Establishment Clause if it intends to communicate a message that endorses religion (either one religion or religion generally) or if, whatever the government’s intention, its action has the effect of communicating such a message.” CONKLE, *supra* note 53, at 125.

61. *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

62. *Id.* at 690 (O’Connor, J., concurring).

63. CONKLE, *supra* note 53, at 155.

64. See GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 53, at 182–83.

65. 545 U.S. 844 (2005).

unitary *Lemon*/endorsement analysis. In *McCreary*, the Supreme Court found that McCreary County had violated the Establishment Clause when it erected a Ten Commandments display in the county courthouse.<sup>66</sup> The Supreme Court analyzed the predominate purpose of installing the display through the eyes of an objective observer. The Court stated that “[t]he eyes that look to purpose belong to an ‘objective observer,’” and that this observer takes account of the traditional external signs that show up in the “text, legislative history, and implementation of the statute,” or comparable official act.<sup>67</sup> Analytically, this meant the Court had melded the first two prongs of the *Lemon* test into one single inquiry in which the *purpose* of the legislature is now judged by the *effect* of its legislative action as seen through the eyes of an objective observer.<sup>68</sup>

The practical consequence of this melding is that the Supreme Court now looks beyond the facial actions of legislatures and engages in a broader, more nuanced inquiry of the substantive meaning of a particular legislative action. The Court effectuates this more substantive analysis by using the objective observer standard to incorporate additional, relevant factors beyond a legislature’s facial purpose as explicated in a statute.<sup>69</sup> The practical effect of this test may be less expansive than one might imagine at first, given the limited instances in which the Court has struck down government action for violating the purpose prong.<sup>70</sup> Nonetheless, this is the manner in which the Court has articulated the secular purpose requirement at present.

The extent of this more nuanced inquiry described in *McCreary* hinges upon just *who* this objective observer is. Justice O’Connor has described the objective observer as “a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.”<sup>71</sup> Thus, the observer is not necessarily the reasonable religious skeptic or believer, nor is she any person who *may* think that a certain government act *could* be an endorsement of religion.<sup>72</sup> Nor is the objective observer standard about the “actual perception of individual observers.”<sup>73</sup> Rather, the objective observer is a person who comprehends the true meaning of the government action in question. She is educated and informed, and is

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66. *Id.* at 851–58. The Court did not hold that a sacred text could never be integrated into a government display, but only that such texts must be sufficiently integrated with other non-religious documents and materials so that “there is no risk that [such sacred materials] would strike an observer as evidence that the . . . [g]overnment was violating neutrality in religion.” *See id.* at 874.

67. *Id.* at 862 (internal quotation marks omitted).

68. *Id.*

69. *See* CONKLE, *supra* note 53, at 179.

70. *See* Schragger, *supra* note 38, at 594.

71. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (alteration in original) (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 175 (W. Page Keeton ed., 5th ed. 1984)).

72. *But see* CONKLE, *supra* note 53, at 179 (interpreting *McCreary* as reflecting “a concern for the symbolic impact of the government’s action, especially on dissenters, who may be affronted and alienated if the government appears to be endorsing religious beliefs they do not share”).

73. *Pinette*, 515 U.S. at 779.

aware of the history of the government's action, the context in which it occurs, and the reasons for it.<sup>74</sup> Defined in this way, the objective observer analysis takes the Establishment Clause analysis beyond a formal assessment of the discrete acts of the legislature by incorporating a more thorough inquiry of the substantive meaning of those acts.

When analyzing informed consent provisions, the endorsement analysis of the dual *Lemon*/endorsement test becomes particularly important. Informed consent provisions represent a special kind of medical regulation that requires the government to "communicate" a distinct message that is truthful, non-misleading, and relevant to the procedure.<sup>75</sup> Moreover, based upon the Court's reasoning in *McCreary*, a court may analyze a legislature's purpose for enacting a particular informed consent provision based upon the effects of that purpose as seen through the eyes of an objective observer.<sup>76</sup> This means that one must look beyond the merely biological language of definitions of fetal life and situate them within their broader legal context. Whether this analysis must go so far as to incorporate popular perceptions of the religious motives of legislatures is a question that the Supreme Court has not fully addressed.

#### *B. Religious Purposes Versus Religious Motives*

The Supreme Court has not clearly articulated whether a legislative purpose refers only to the objective end for which a statute is passed or whether it includes the subjective motivation of individual legislators.<sup>77</sup> This Note refers to the objective end of a piece of legislation as the "purpose" and the subjective motivations and reasons of legislators for enacting it as the "motivation" or "motives."<sup>78</sup> Understanding the role of legislative motivation is critical in the abortion context because of the distinctly moral and religious nature of the issue. While regulating abortion through informed consent is not a religious purpose,<sup>79</sup> religious motivations can overlap significantly with the purpose of informed consent laws in the abortion context.<sup>80</sup> In light of this overlap, state legislators who seek to regulate abortion heavily may be advancing legitimate secular purposes but may be doing so because of clandestine religious motives.<sup>81</sup>

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74. See Kirsten K. Wendela, Note, *Context Is in the Eye of the Beholder: Establishment Clause Violations and the More-Than-Reasonable Person*, 80 CHI.-KENT L. REV. 981, 987 (2005).

75. See GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 53, at 182–83.

76. See CONKLE, *supra* note 53, at 179.

77. See GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 53, at 164. *But see e.g.*, Breedlove & Salzmann, *supra* note 51, at 422 ("Despite the courts' emphasis on motivation, only the effect of a law and the objective governmental interest in that law should be considered in determining whether it violates Establishment Clause prohibitions." (emphasis omitted)).

78. See *supra* note 38 and accompanying text.

79. See *infra* Part II.

80. See *supra* notes 32–34 and accompanying text.

81. See KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 30 (1988) [hereinafter GREENAWALT, RELIGIOUS CONVICTIONS] ("Religious convictions of the sort

Distinguishing between religious purposes and motives is particularly relevant when applying the objective observer inquiry noted above. One can imagine certain instances in which a state legislature enacts a particular law for which there exists a facially secular purpose. An objective observer may even find that this secular purpose does not have the effect of advancing a particular religion in and of itself.<sup>82</sup> However, if an objective observer were to look underneath the stated purpose of the legislature and examine the reasons for which a legislature passed a law, she may very well identify a religious motivation. It may be reasonable for this observer to then find that this motivation so contaminates the law that the observer is forced to question the genuineness of the secular purpose articulated by the legislator. In light of this possibility, it is tempting to conclude that the Court in *McCreary* articulated this very concern when it explained, “although a legislature’s stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.”<sup>83</sup> As explained below, however, the Court in *McCreary* was concerned only with adopting a test to discern hidden, objective purposes of the legislature not hidden, subjective motives of individual legislators.

#### 1. Applying *McCreary*: Foreclosing an Inquiry into Subjective Motive

The mere fact that one can distinguish between motive and purpose does not mean that courts can necessarily identify both with equal certainty. Courts are accustomed to identifying legislative purpose. The purpose can be derived from the text<sup>84</sup> or is often stated in a statute’s preamble.<sup>85</sup> When the purpose is not clear from the text<sup>86</sup> or if a literal interpretation of the text would lead to absurd results,<sup>87</sup> judges may be willing to engage in a broader analysis by referencing committee reports, looking at previous versions of a bill, or assessing the historical and political landscape in which the statute was written.<sup>88</sup> Judges have even been willing to identify a broader, more general social aim of a particular piece of

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familiar in this society bear pervasively on people’s ethical choices, including choices about laws and government policies.”); *see also* WALD, *supra* note 27, at 287 (“Although abortion cannot be reduced to an exclusive Catholic issue, the most active opponents of liberalization [of abortion] have indeed been recruited from the Catholic community.”). *See generally supra* notes 20, 26–27.

82. *See* CONKLE, *supra* note 53, at 179.

83. *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005).

84. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b) (stating the purpose of the Act).

85. *See* *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation.”).

86. *Id.*

87. *Id.*; *see also* *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (“[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.”).

88. *See Am. Trucking Ass’ns*, 310 U.S. at 538–44; *see also* POPKIN, *supra* note 37, at 95–96.

legislation from which the court can reason in order to apply a statute to unanticipated situations.<sup>89</sup>

But courts are ill-equipped to uncover the motives of individual legislators.<sup>90</sup> The only tools available to judges are the text or sources external to the minds and psyches of the legislators. As Professor Reed Dickerson stated:

Whether we search for actual legislative purpose or for actual legislative intent, we can infer it only from external materials. Unfortunately, in the ascertainment of legislative purpose, it cannot always be assumed that there is in fact such a purpose or, if there is, that there is reliable evidence of it. For most state legislatures, there is only the statute and the backdrop of proper context. The statute normally includes no preamble or purpose clause, and there is little recorded legislative history. Even where they exist, there is no assurance that either will be relevant.<sup>91</sup>

The danger in attempting to discern subjective motive in the absence of much external evidence is that a judge may impose a motive that is not really there.<sup>92</sup> Others have noted the difficult and dubious task of attempting to discern legislative motives.<sup>93</sup>

The challenge that judges face in discerning legislative motive largely explains why the Supreme Court in *McCreary* assessed the legislative purpose of the government action by resorting to an analysis of its effects as seen through the eyes of an objective observer. This objective observer inquiry, while no less abstract, is an attempt by the Court to add more external material by which a court can meaningfully identify a clandestine religious purpose underlying a stated secular purpose.<sup>94</sup> Yet, as Justice Scalia noted in his *McCreary* dissent, this implies that the

89. See POPKIN, *supra* note 37, at 84, 248–50.

90. See Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 860–61 (criticizing the majority in *McCreary* for oversimplifying the process of discerning legislative intent).

91. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 92 (1975).

92. *Cf. id.*

93. See Corbin, *supra* note 38, at 128 n.18; Hasen, *supra* note 90, at 860–61. See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992). Chief Justice Warren stated the following about the difficulty of discerning legislative motive in *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968) (footnote omitted):

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress’ purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

94. See Koppelman, *supra* note 51, at 118.

constitutional wrong is no longer the “*actual purpose* of government action, but the ‘purpose apparent from government action.’”<sup>95</sup> The object of inquiry is not the actual, subjective motive of a legislator, but that legislator’s apparent purpose as seen through the eyes of an objective observer. The majority in *McCreary* explicitly acknowledged this when Justice Souter stated:

[A]n understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter’s heart of hearts. The eyes that look to purpose belong to an “objective observer,” one who takes account of the traditional external signs that show up in the “text, legislative history, and implementation of the statute,” or comparable official act.<sup>96</sup>

Thus, the majority acknowledged that judges cannot directly discern subjective motive, and any inquiry that is possible is only concerned with “apparent” purpose based upon external material, whether the text or otherwise.<sup>97</sup>

Apart from the inherent impossibility of discerning the actual, subjective motives of individual legislators, the Supreme Court has not struck down government action for violating the purpose prong unless the action involved a religious practice or religious doctrine.<sup>98</sup> This only strengthens the conclusion that the religious motives of individual legislators do not even enter the discussion unless the government action at issue involves some kind of religious subject-matter on its face.<sup>99</sup> This result is understandable; otherwise, the Establishment Clause would require an absurd inquiry into the legislative motives of non-facially religious government action that was nonetheless inspired by a compassionate disposition toward humanity, such as laws providing relief to the poor and hungry<sup>100</sup> or eliminating racial discrimination.<sup>101</sup> Purging such morally sound legislation of religious influence would be impossible and wrong.<sup>102</sup>

In sum, the *McCreary* analysis does not mandate an inquiry into the actual motives of individual legislators because the motives themselves are not detectable

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95. *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting) (emphasis in original) (citations omitted).

96. *Id.* at 862 (citations omitted).

97. *See id.*; *see also* Koppelman, *supra* note 51, at 118.

98. *McCreary*, 545 U.S. at 881 (Ten Commandments display case); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–09 (2000) (school prayer case); *Edwards v. Aguillard*, 482 U.S. 578, 586–94 (1987) (creationism case); *Wallace v. Jaffree*, 472 U.S. 38, 56–61 (1985) (school prayer case); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (Ten Commandments display case). *See generally* Schragger, *supra* note 38, at 593–95. The Court held that an antievolution statute lacked a secular purpose in *Epperson v. Arkansas*, 393 U.S. 97 (1968), but this was decided before the *Lemon* test was articulated. This case can be viewed as a creationism case.

99. *See* Schragger, *supra* note 38 at 595 (stating that the Court only enforces the secular purpose prong when the religious “intent is clear on the face of the law”).

100. *See Edwards*, 482 U.S. at 615 (Scalia, J., dissenting).

101. *See supra* note 49.

102. *See CARTER*, *supra* note 44, at 112–14.

by courts, and to require their categorical prohibition would be hopelessly unenforceable in practice.<sup>103</sup>

## 2. When Religious Motives are Impermissible (In Theory)

Despite the fact that religious motives are not an object of direct inquiry for Establishment Clause purposes and cannot be detected in practice, scholars have nonetheless identified unconstitutional legislative motives by referencing background principles that undergird the “spirit” of the Establishment Clause. Professor Kent Greenawalt describes this kind of unconstitutionality as follows:

The Constitution may actually prohibit certain actions that courts will not declare to be unconstitutional. . . . [This kind] of unconstitutionality may be raised . . . when individual legislators rely inappropriately on religious bases of judgment. Arguably, such reliance is itself at odds with constitutional premises whether or not it is discoverable by courts and whether or not the grounds on which individual legislators vote infect the validity of adopted statutes.<sup>104</sup>

Although actual religious motives are impossible to detect in practice, discussing the precise motives upon which legislators may theoretically act is nonetheless useful for fleshing out the true extent to which legislators may rely on religious motives in theory. By defining the very outer limit of constitutionality, one can more firmly identify what kinds of religious motives (if any) are impermissible in principle and which ones are not.

There are two basic approaches to defining the limits of legislative motive. The first approach holds that there is no limit.<sup>105</sup> Professor Michael Perry argues that the Establishment Clause, as interpreted by the Supreme Court, does not preclude the government from acting on the basis of a religiously grounded moral belief at all.<sup>106</sup> He argues that precluding religious motivation would result in “‘second best’ solutions” by the legislator—using secular purposes as mere pretexts.<sup>107</sup> Furthermore, he argues that it is inappropriate to invite the judiciary to substitute its own moral or secular values for those of the legislator.<sup>108</sup> Most importantly, Perry argues that precluding religious motivation would violate the equal citizenship of religious believers.<sup>109</sup> It would be unfair to allow the secularly motivated to act with sincerity and conviction while forcing the religiously motivated to abandon their theological authenticity.

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103. See *supra* note 51.

104. GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 81, at 8.

105. See CARTER, *supra* note 44, at 111–14; Breedlove & Salzmann, *supra* note 51, at 422; Perry, *supra* note 33, at 671.

106. Perry, *supra* note 33, at 671.

107. *Id.* at 673.

108. *Id.* at 674–75.

109. See *id.* at 675. For a thorough explanation of the equality of citizenship rationale, see Idleman, *supra* note 51, at 72–78.

The second approach holds that legislators may appeal to religious motives so long as a reasonable, secular justification is available.<sup>110</sup> Professor Mark Tushnet argues that the Establishment Clause does not prohibit an “impermissible motive” in a strong sense.<sup>111</sup> Rather, a legislator is not inappropriately influenced by religious views when he acts on the basis of those views in such cases where an alternative secular ground is available.<sup>112</sup> Tushnet defines “secular ground” as “one that does not make essential reference to a deity.”<sup>113</sup> Such a definition allows the religiously motivated legislator to base her decisions on such religious grounds so long as there are others who arrive at the same conclusion by other nonreligious means that do not require belief in a deity. A very general example of the kind of rationale that does not require one to believe in a deity might simply be that “the policy will increase the material well-being of the society.”<sup>114</sup> For Tushnet, this rationale would serve as a legitimate secular purpose.

Professor Kent Greenawalt argues a similar approach. He frames his argument in terms of motives for moral legislation, requiring that a moral law enacted with religious motives must involve secular indicia of harm. Greenawalt states: “If legislation is adopted on the basis that behavior is bad, judged from a religious perspective, but without belief that that bad behavior causes secular harm to entities deserving protection, then the legislation should be held to violate the establishment clause.”<sup>115</sup> In other words, other indicia of harm must exist besides a mere violation of purely religious principles. The rationale for Greenawalt’s rule is that principles of liberal political philosophy should discourage individuals from resorting to religious premises that contradict science and social science.<sup>116</sup> Nonetheless, the science and social science that may serve as a legitimate foundation for harm may be less than fool proof.

For Greenawalt, the secular harm that a legislator must articulate need not rest upon grounds that would satisfy every religious skeptic. Greenawalt provides helpful guidance regarding the sources legislators may use in deciding just what is harmful by offering an illustration:

Suppose it were also determined that many serious Roman Catholics believe . . . that the wrongness of . . . stem cell research can be established on nonreligious “scientific” or natural law grounds. A substantial number of citizens do believe the wrongness of research need not depend on religious convictions. Are we to label these citizens as dishonest or deluded, to say that their self-consciously nonreligious understanding doesn’t count because they have a religious understanding with the same import for legal regulation and we know that the latter drives from the former? That is not an approach that is

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110. Tushnet, *supra* note 51, at 194–95.

111. *Id.* at 194.

112. *Id.* at 195.

113. *Id.*

114. *Id.* at 210.

115. GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 81, at 247; *see also* GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 53, at 533–34.

116. GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 53, at 530 n.6 (citing GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 81, at 204–11).

very respectful of fellow citizens, and it is not the kind of judgment a court should be essaying.<sup>117</sup>

In short, shaky science and natural law provide legitimate grounds upon which a religious believer may premise her belief that an immoral act will result in secular harm.

In sum, the Establishment Clause requires that a state articulate a secular purpose for all of the legislation that it passes and that no statute may have the effect of advancing or endorsing religion in general or a particular religion. This secular purpose prong is assessed by applying an objective observer inquiry that determines legislative purpose based upon the effects of the law. Assessing religious motives assists the objective observer in spotting sham secular purposes. In order to avoid the appearance of a sham secular purpose, those who would argue that the “spirit” of the Establishment Clause limits the use of religious motivations—for example, Tushnet and Greenawalt—would require that religiously motivated officials locate either independent secular grounds or secular evidence of harm to justify their motives.<sup>118</sup>

## II. PERMISSIBLE SECULAR PURPOSES RECOGNIZED IN SUPREME COURT ABORTION CASES

From an Establishment Clause perspective, the abortion context is a unique and exceptional area of jurisprudence. Some commentators have argued that the Court has developed its abortion jurisprudence partly by means of unstated Establishment Clause concerns about the particularly religious nature surrounding the definition of fetal life.<sup>119</sup> The Supreme Court has articulated several state interests that are secular and nonreligious, which state legislatures may use to regulate the abortion procedure and informed consent without violating the Establishment Clause. This Part examines these unique secular purposes within abortion legislation.

When the Court in *Roe v. Wade*<sup>120</sup> held that substantive due process protects a woman’s liberty interest in obtaining an abortion,<sup>121</sup> the Court did not leave the states powerless to limit that interest. In its own words, the Court stated that the right to an abortion “is not absolute.”<sup>122</sup> Rather, a state may assert and act upon at least two important interests before a fetus reaches the point of viability: safeguarding the health of the mother and protecting potential life.<sup>123</sup> Subsequent decisions applying *Roe* have continued to recognize these state interests and have clarified their nature and breadth.<sup>124</sup>

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117. *Id.* at 536 (emphasis omitted).

118. *See supra* notes 112 & 115 and accompanying text.

119. *See supra* note 36.

120. 410 U.S. 113 (1973).

121. *Id.* at 113.

122. *Id.* at 155. The Court also recognized the legitimate state interest in “maintaining medical standards.” *Id.* at 154.

123. *Id.* at 154.

124. *See e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992); *see also Stenberg v. Carhart*, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting) (citations omitted)

In the past several years, the Court has also recognized that the fetal life that states are allowed to protect is more than just “potential.”<sup>125</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court referred to the interest as protecting the “life or potential life of the unborn.”<sup>126</sup> It also referred to this interest as “protecting . . . the life of the fetus that may become a child.”<sup>127</sup> With these statements, the Court demonstrated that it would not continue to refer to fetal life as only potential, but allowed for the fact that one could consider it to be actual human life.<sup>128</sup> The Court in *Gonzales v. Carhart*<sup>129</sup> continued to distance itself from *Roe*’s rhetoric of characterizing fetal life as merely “potential life” by describing it as “the life within the woman,”<sup>130</sup> “the life of the unborn,”<sup>131</sup> and “infant life.”<sup>132</sup> Furthermore, in both *Gonzales* and *Casey*, the Court held that states could do more than protect such life: they could “express profound respect for the life of the unborn”<sup>133</sup> rather than express profound respect for potential life. The manner in which the Supreme Court has referred to a fetus in these recent cases suggests that a state may likewise refer to a fetus not merely as potential human life but as actual human life.

This interest in protecting fetal life sits alongside the additional interest of protecting the woman’s health, and both are used to justify informed consent provisions within the abortion context. Before *Casey*, states were required to remain within the scope of the traditional doctrine of informed consent,<sup>134</sup> which only permitted the use of information that was medically relevant to the procedure itself.<sup>135</sup> Courts consistently ruled as unconstitutional certain informed consent measures that might discourage a woman from choosing an abortion.<sup>136</sup> For

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(“The political processes of the State[s] are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. The State[s]’ constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.”).

125. Martin Wishnatsky, *The Supreme Court’s Use of the Term “Potential Life”: Verbal Engineering and the Abortion Holocaust*, 6 LIBERTY U. L. REV. 327, 342 (2012) (“From ‘potential life,’ the Court has progressed to ‘unborn life,’ which is a significant step.”).

126. *Casey*, 505 U.S. at 870.

127. *Id.* at 846.

128. *But see* *Acuna v. Turkish*, 930 A.2d 416, 426 (N.J. 2007) (citations omitted) (“In *Casey*, the United States Supreme Court repeatedly refers, when speaking of a fetus or embryo, to the State’s ‘interest in potential life,’ and scrupulously avoids describing either a fetus or an embryo as an existing human being.”).

129. 550 U.S. 124 (2007).

130. *Id.* at 157.

131. *Id.* at 146.

132. *Id.* at 159. *Gonzales* also referred to fetal life as “her unborn child, a child assuming the human form.” *Id.* at 160. However, this was only in reference to a child aborted by means of intact dilation and evacuation and may not stand for the Court’s description of fetal life in all instances. *See id.* at 159–60.

133. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992); *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 877).

134. *See supra* note 9.

135. Dresser, *supra* note 8, at 1606–07.

136. *See, e.g., Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747

example, in *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>137</sup> the Court struck down an informed consent provision requiring that “the woman be informed by the physician of ‘detrimental physical and psychological effects’ and of all ‘particular medical risks.’”<sup>138</sup> The Court reasoned that this information “increase[d] the patient’s anxiety, and intrude[d] upon the physician’s exercise of proper professional judgment.”<sup>139</sup> *Thornburgh* was later overruled by *Casey* under the rationale that the information need not address the physical health of the mother alone but could include her mental health as well.<sup>140</sup> More importantly, the Court declared that informed consent instructions did not have to address the woman’s health—either physical or mental—at all, but could serve to announce a state’s preference for childbirth over abortion.<sup>141</sup>

The Supreme Court has even gone so far as to declare, theoretically, that a state may adopt a theory of when life begins. In *Webster v. Reproductive Health Services*,<sup>142</sup> the Court examined a legislative finding adopted by the Missouri legislature that found that “[t]he life of each human being begins at conception.”<sup>143</sup> The statute did not by its terms specifically regulate abortion.<sup>144</sup> Nonetheless, the Eighth Circuit held that the provision was unconstitutional because it circumvented the dictum pronounced in *Akron v. Akron Center for Reproductive Health, Inc.*<sup>145</sup> that “a State may not adopt one theory of when life begins to justify its regulation of abortions.”<sup>146</sup> The Supreme Court reversed the Eighth Circuit’s holding and clarified its statement in *Akron*. It said the “Court of Appeals misconceived the meaning of the *Akron* dictum, which was only that a State could not ‘justify’ an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State’s view about when life begins.”<sup>147</sup> What the *Webster* dictum<sup>148</sup> suggests is that so long as a state’s articulation of a theory of when life begins does not have the effect of proscribing a woman’s right to have an abortion, substantive due process does not preclude the state from articulating such theories explicitly.<sup>149</sup>

The Supreme Court’s openness to definitions of fetal life within the context of abortion is consistent with the Court’s statement in *Harris v. McRae*<sup>150</sup> that “a

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(1986), overruled by *Casey*, 505 U.S. 833; *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), overruled by *Casey*, 505 U.S. 833.

137. 476 U.S. 747.

138. *Id.* at 764 (quoting 18 PA. CONS. STAT. ANN. § 3205(a)(1)(ii) and (iii) (1982)).

139. *Id.*

140. See *Casey*, 505 U.S. at 882.

141. See *id.* at 882–83.

142. 492 U.S. 490 (1989).

143. *Id.* at 504 (quoting MO. REV. STAT. § 1.205.1(1) (1986)).

144. *Id.* at 506.

145. 462 U.S. 416 (1983).

146. *Reprod. Health Serv. v. Webster*, 851 F.2d 1071, 1075–77 (8th Cir. 1988) (quoting *Akron*, 462 U.S. at 444).

147. *Webster*, 492 U.S. at 506.

148. The Court in *Webster* only interpreted the meaning of the preamble itself as a “value judgment” favoring childbirth over abortion that did not have a legal effect upon abortion or medical practice. As a result, the court lacked jurisdiction to interpret its constitutional significance. *Id.* at 506–07; see *infra* note 150.

149. *Id.* at 506–07.

150. 448 U.S. 297 (1980). However, *Webster* does not foreclose the possibility that a

statute [does not] violate[] the Establishment Clause because it ‘happens to coincide or harmonize with the tenets of some or all religions.’”<sup>151</sup> In *Harris*, the Court upheld the Hyde Amendment, an appropriations rider precluding states from using Medicaid funds to pay for abortions (subject to a few exceptions),<sup>152</sup> against an Establishment Clause challenge. The Court refused to describe the values that undergirded the Hyde Amendment as merely religious. Rather, the Court said the statute was “as much a reflection of ‘traditionalist’ values towards abortion, as it is an embodiment of the views of any particular religion.”<sup>153</sup> If one reads *Harris* alongside *Webster*, it stands for the proposition that it is not unconstitutional for states to articulate theories of when human life begins because they are not stating a merely religious tenet but a traditionalist value about abortion.

The Court’s distinction between religious values and traditionalist values is particularly important because it explains why the Court has not struck down any abortion regulations as violations of the Establishment Clause. The Court’s silence is the most persuasive indication that beliefs on the morality of abortion and the nature and characteristics of fetal life, even if theologically founded, are not within the purview of “religion” for purposes of the Establishment Clause.<sup>154</sup>

While the Court has never defined religion outright, it has given some guidelines. One of the broader “definitions” of religion, found in a statute

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definition of fetal life could cause constitutional injury. The Court was unable to make a ruling upon the statute because there was no possible way for the state preamble to materially restrict a woman’s access to an abortion, nor did it “regulate abortion or any other aspect of [a] medical practice.” *Webster*, 492 U.S. at 506–07. Without any possibility for constitutional injury, the Court lacked jurisdiction to decide the case. *See id.* (“[T]his Court ‘is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.’” (citing *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900)) (alterations in original)). The Court noted that “[there] will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way.” *Id.* at 506. Inserting a theory of when life begins into an informed consent provision may very well lead to an allegation of concrete harm, *see, e.g., Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 748 (8th Cir. 2008) (“Under the Act a woman is given a Hobson’s choice: either to certify that she understands vague and ideological statements disguised as medical information or to carry her pregnancy to term. But ‘[a] Hobson’s choice, of this sort, is no choice at all.’ The Act’s procedural mandates thus likely place an undue burden on a woman’s ability to exercise her constitutional right to terminate her pregnancy.” (alterations in original) (internal citations omitted)), and, thereby, allow the Court to revisit the question raised in *Webster*.

151. *Harris*, 488 U.S. at 319 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

152. Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979) (“[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.”).

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

154. *See Skahn, supra* note 52, at 508 (“A finding, though, that legislation restricting the funding or performance of abortion can advance religion, would require a new conceptualization of the prohibition against laws advancing religion. The prohibition would have to be expanded to include laws which do not work towards the propagation of religious belief.”).

considered in *United States v. Seeger*,<sup>155</sup> would “include any ‘sincere and meaningful’ belief that ‘occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.’”<sup>156</sup> This definition would include deeply held moral beliefs<sup>157</sup> that arguably encompass beliefs about the immorality of abortion or theories about when life begins. Justice Stevens applied such a broad definition to the Missouri preamble in his vigorous dissent in *Webster*. His primary concern in *Webster* was that the state’s conclusion that conception occurred at fertilization (rather than upon implantation on the uterine wall) was a purely theological conclusion, lacking any real secular purpose.<sup>158</sup> Justice Stevens is not alone in his belief that the statute in *Webster* violated the Establishment Clause.<sup>159</sup> However, his view is a minority one; and as we have seen from the discussion of *Casey* and its progeny above, the Supreme Court has only continued to expand the interests of the state in protecting fetal life by means of regulating abortion through informed consent.<sup>160</sup>

In sum, the Supreme Court has consistently recognized the states’ legitimate interest in protecting fetal life.<sup>161</sup> It has even suggested that such life is not merely potential but actual human life.<sup>162</sup> Furthermore, states may articulate this interest in the informed consent context by declaring their preference for childbirth even if such an articulation has no implications for the physical or mental health of the mother.<sup>163</sup> Lastly, the Court has consistently failed to hold that beliefs about the moral status of abortion and fetal life are religious tenets or that they fit within the purview of a very expansive definition of religion.<sup>164</sup> Rather, they simply represent traditionalist values toward abortion.<sup>165</sup>

### III. ABORTION TERMINATES HUMAN LIFE, SAY SOUTH DAKOTA AND INDIANA

When one assesses these conclusions in light of the Supreme Court’s Establishment Clause doctrine, one can see that each of the interests articulated here serves as a legitimate secular purpose for both general abortion regulations and informed consent provisions. Outside of Justice Stevens’ dissent in *Webster*,<sup>166</sup> the Court has not come close to suggesting that the motives of legislators ought to be assessed in order to determine whether a state is truly advancing legitimate state

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155. 380 U.S. 163 (1965).

156. CONKLE, *supra* note 53, at 62–63 (quoting *Seeger*, 380 U.S. at 165).

157. *Id.* at 63.

158. *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 563–67 (1989) (Stevens, J., dissenting) (citing several medical texts).

159. Gray, *supra* note 29, at 401; Robert L. Maddox & Blaine Bortnick, *Webster v. Reproductive Health Services: Do Legislative Declarations that Life Begins at Conception Violate the Establishment Clause?*, 12 CAMPBELL L. REV. 1 (1989).

160. *See supra* notes 134–41 and accompanying text.

161. *See supra* note 123 and accompanying text.

162. *See supra* notes 125–33 and accompanying text.

163. *See supra* notes 140–41 and accompanying text.

164. *See supra* notes 142–53 and accompanying text.

165. *See supra* notes 150–53 and accompanying text.

166. *See supra* note 158 and accompanying text.

interests. This silence is deafening. Two decades after *Webster*, courts are still reluctant to ascribe much relevance to the ideological and religious motives of legislatures that define fetal life. The following Part discusses the two cases that have ruled on states' most recent attempts to define fetal life.

#### A. South Dakota

South Dakota was the first state to define fetal life as part of a mandated disclosure in the context of informed consent for abortion.<sup>167</sup> The state provision read as follows:

A consent to an abortion is not voluntary and informed, unless, in addition to any other information that must be disclosed under the common law doctrine, the physician provides that pregnant woman with the following information . . . [t]hat the abortion will terminate the life of a whole, separate, unique, living human being.<sup>168</sup>

In a separate provision, South Dakota defined "human being" as "an individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."<sup>169</sup> Notably, this definition was not included among the pieces of information that the physician was required to read to the patient.<sup>170</sup>

Critics soon challenged the constitutionality of this statute, alleging that it violated free-speech rights of the physicians who were required to say that abortion terminated the life of a human being.<sup>171</sup> In *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*,<sup>172</sup> the plaintiffs (Planned Parenthood) argued that the notion "that from the moment of conception, an embryo or fetus is a 'whole, separate, unique, living human being' . . . is not a scientific or medical fact, nor is there a scientific or medical consensus to that effect."<sup>173</sup> As a result, the statute required a physician to articulate a "statement[] of ideology and opinion."<sup>174</sup> The First Amendment protects individuals from compelled speech, that is, state

167. While South Dakota was the first to define fetal life using informed consent provisions, see Dawn Johnsen, "*TRAP*"ing Roe in Indiana and a Common-Ground Alternative, 118 YALE L.J. 1356, 1367 (2009), in 1986 Missouri had stated as part of legislative finding, that "(1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being; (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child." H.B. 1596, 83rd Gen. Assemb. 2d Reg. Sess. (Mo. 1986) (codified at MO. ANN. STAT. § 1.205 (West 2000)).

168. Ch. 16, § 7, 2005, S.D. Sess. Laws Ch. 356, 358 (codified at S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2011)).

169. S.D. CODIFIED LAWS § 34-23A-1(4) (2011).

170. See § 34-23A-10.1; *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 745 (8th Cir. 2008) (Murphy, J., dissenting).

171. *Rounds*, 530 F.3d at 727.

172. 530 F.3d 724.

173. *Id.* at 728.

174. *Id.* at 727.

action that violates an individual's right not to speak.<sup>175</sup> This right can only be overcome by a compelling government interest that is narrowly tailored to serve that interest.<sup>176</sup> This strict scrutiny standard is satisfied in the informed consent context so long as the information discussed by the physician is truthful, non-misleading, and relevant to the procedure in question.<sup>177</sup> The Eighth Circuit in *Rounds* held that the definition of fetal life within the South Dakota provision met the truthful, non-misleading and relevant standard because it was strictly "biology-based."<sup>178</sup> The court disagreed with Planned Parenthood's arguments and made clear that the statute in no way required a physician to comment on whether the fetus was a "'whole, separate, unique' 'human life' in the metaphysical sense."<sup>179</sup> The court referenced *Casey* and *Gonzales v. Carhart*, both of which held that a state could use the informed consent context to express its respect for fetal life and that only an untruthful and misleading statement would violate the free-speech rights of the physician.<sup>180</sup> It also noted that the provision was analogous to the Supreme Court's statement in *Gonzales* that a fetus was a "living organism."<sup>181</sup>

Despite the court's holding that the definition of fetal life was not ideologically problematic, Planned Parenthood argued that ordinary patients would misconstrue the meaning of a "whole, separate, unique, living human being" and not understand it as a strictly biological definition of fetal life.<sup>182</sup> It argued that "patients would understand the plain meaning of 'whole, separate, unique, living human being' to mean a 'person' in the fullest moral and legal sense and that this compelled disclosure that a fetus or embryo is a 'person' would violate *Roe v. Wade* and its progeny."<sup>183</sup> The dissent in *Rounds* similarly contended that

The medical fact that a unique set of DNA is present at conception, however, does not support a conclusion that the statutory adjectives preceding the word "human being" have scientific meaning. . . . The record is far from showing a medical consensus that a full set of DNA constitutes a "whole, separate, unique, living human being."<sup>184</sup>

In response, the majority stressed that South Dakota had clearly and satisfactorily defined the word "human being" in a separate provision.<sup>185</sup> Because

175. *Id.* at 733 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

176. *Id.* ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." (quoting *Wooley*, 430 U.S. at 716) (alteration in original)).

177. *See id.* at 735.

178. *Id.* at 736 n.9.

179. *Id.*

180. *Id.* at 733–35.

181. *Id.* at 736 ("[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." (citing *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007)) (alteration in original)).

182. *Id.* at 729.

183. *Id.* (internal citation omitted).

184. *Id.* at 744 (Murphy, J., dissenting).

185. *Id.* at 735.

this provision rested upon a purely biologically based definition of a human being as a “living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation,”<sup>186</sup> the state had satisfied the truthful, non-misleading, and relevant standard. Having shown that the provision did not require a physician to articulate an ideological statement of mere opinion, the court held that the provision did not violate the Free Speech clause of the Constitution.<sup>187</sup>

### B. Indiana

Following South Dakota’s lead, Indiana adopted a similar informed consent provision that required the physician to state the following: “[H]uman life begins when a human ovum is fertilized by a human sperm.”<sup>188</sup> Like the plaintiff in *Rounds*, Planned Parenthood of Indiana argued that the Indiana statute constituted compelled speech and, thus, violated the First Amendment free-speech rights of the abortion doctors.<sup>189</sup> In *Planned Parenthood of Indiana v. Commissioner of the Indiana Department of Health*, the District Court for the Southern District of Indiana rejected the plaintiff’s argument “that classifying the fertilized egg and subsequent organism as a ‘human physical life’ is an ideological statement that goes to the heart of the abortion debate and is thus impermissible compelled speech.”<sup>190</sup> The argument was almost identical to the arguments raised in *Rounds*.<sup>191</sup> However, Planned Parenthood of Indiana had a much steeper hill to climb. The Indiana legislature had inserted the word “physical” in between “human” and “life”<sup>192</sup> and did not include any modifying adjectives like “whole, separate, unique, [and] living.”<sup>193</sup> Although there was no separate provision specifying that “human physical life” referred to a strictly biological definition of a human fetus, the district court easily concluded that the state was not making a metaphysical assertion by identifying a human embryo or fetus as belonging to the genus and species *Homo sapiens*.<sup>194</sup> The court stated:

[T]he Court recognizes that the term “human being” may refer to a theological, ideological designation relating to the metaphysical characteristics of life[;] that is not the language found before the Court

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186. S.D. CODIFIED LAWS § 34-23A-1(4) (2011).

187. *Rounds*, 530 F.3d at 738.

188. Act of May 10, 2011, P.L. 193-2011, 2011 Ind. Acts 2476, 2480 (codified as amended at IND. CODE § 16-34-2-1.1(a)(1)(E) (2012)). A prior incarnation of this bill was nearly passed in 2006; only the Indiana House had approved the bill. H.R. 1172, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006) (as passed by Indiana House, Feb. 1, 2006). See generally Johnsen, *supra* note 167, at 1367–68.

189. *Planned Parenthood of Ind. v. Ind. Dep’t of Health*, 794 F. Supp. 2d 892, 913 (S.D. Ind. 2011).

190. *Id.* at 916.

191. See *Rounds*, 530 F.3d at 727–28.

192. *Planned Parenthood of Ind.*, 794 F. Supp. 2d at 916.

193. Ch. 16, § 7, 2005 S.D. Sess. Laws 356, 358 (codified as amended at S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2011)).

194. *Planned Parenthood of Ind.*, 794 F. Supp. 2d at 916–17.

today. Rather, the inclusion of the biology-based word “physical” is significant, narrowing this statement to biological characteristics. The adjectives “human” and “physical” reveal that the legislature mandated only that the Practitioner inform the woman that at conception, a living organism of the species *Homo sapiens* is created. When the statement is read *as a “whole”* it does not require a physician to address whether the embryo or fetus is a “human life” in the metaphysical sense.<sup>195</sup>

These two cases illustrate the polemical nature of definitions of fetal life. By deciding to alter informed consent in this manner, both South Dakota and Indiana were arguably motivated by their moral, metaphysical, and possibly religious, views on the propriety of abortion. Yet, both reaffirm the reluctance of judges to consider anti-abortion legislation as a religious issue.

#### IV. ESTABLISHMENT CLAUSE IMPLICATIONS OF RELIGIOUS MOTIVATIONS BEHIND INFORMED CONSENT PROVISIONS THAT DEFINE FETAL LIFE

*Rounds* and *Planned Parenthood of Indiana* are not decisive examples of how a court would rule on the issue of the definition of fetal life. But they do provide clues. These clues, combined with the Supreme Court’s Establishment Clause and abortion jurisprudence, demonstrate that informed consent provisions that define fetal life as human life will not be held unconstitutional because of the potentially religious motives of the legislators who enacted them.

##### *A. Secular Purposes for Defining Fetal Life in Informed Consent*

Abortion regulations, in general, do not violate the Establishment Clause for want of a secular purpose.<sup>196</sup> Based upon the Court’s articulation of the several interests available for states that wish to regulate abortion,<sup>197</sup> Justice O’Connor’s objective observer would have little difficulty recognizing that informed consent provisions that explicitly articulate a preference for childbirth enjoy legitimate recognition. Informed consent provisions, as a method for articulating the state’s preference for childbirth and the state’s profound respect for fetal life, at most represent, or at least reflect, traditionalist values toward abortion.<sup>198</sup> The objective observer would, therefore, not misconstrue a childbirth-friendly informed consent provision as a theologically founded regulation. As a result, a typical informed consent provision both advances and endorses a secular purpose.

Abortion regulations that define fetal life, on the other hand, pose a greater Establishment Clause concern. Justice O’Connor’s objective observer would have to pause for a moment and consider the South Dakota and Indiana provisions more thoroughly. An objective observer would recognize that the legitimate state interests of showing respect for fetal life and favoring childbirth do not necessarily rest upon a single definition of what fetal life is. Defining fetal life is not integral to

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195. *Id.* at 918 (emphasis added).

196. *Harris v. McRae*, 448 U.S. 297, 319 (1980).

197. *See supra* Part III.

198. *See Harris*, 448 U.S. at 319.

furthering the interests that the Court has recognized. At the very least, the objective observer may have lost the ability to connect South Dakota's and Indiana's legitimate purpose with a state interest explicitly articulated by the Supreme Court. As the dissent in *Rounds* stated,<sup>199</sup> an objective observer may mistake the giving of informed consent for imposing a particular religious theory of fetal life in an arguably coercive setting.

The concerns of the objective observer are allayed by the fact that the Supreme Court has steadily become more specific in the manner in which it describes fetal life. It no longer describes it as merely "potential" but at least acknowledges that one may consider fetal life as actual, human life.<sup>200</sup> This heightened specificity suggests that a state is not required to remain absolutely agnostic about the nature of fetal life. The court in *Rounds* picked up on the Supreme Court's specificity in defining fetal life by referencing the fact that the Court has described a fetus as a "living organism."<sup>201</sup> If the fetus is an actual organism, it only takes a small inference to recognize that this organism cannot belong to any other species but that of *Homo sapiens*.<sup>202</sup>

This inference is nothing extraordinary if one takes at face value the legitimate interests that a state may advance in anti-abortion regulation. One of the necessary premises of anti-abortion legislation is that fetal life is human life and that abortion terminates such life; this premise has been foundational for the pro-life argument in general.<sup>203</sup> The *Webster* dictum demonstrates how willing the Court has been to avoid meddling with such articulations, provided they do not restrict any other constitutional rights in the process.<sup>204</sup> An objective observer would be mindful of this along with the implications of the Supreme Court's "living organism" rhetoric. Therefore, a state should be allowed to recognize that the notion that fetal life as human life is a necessary premise that explains and justifies its preference for childbirth. A state should, therefore, be allowed to incorporate that premise into the informed consent context without fear of an Establishment Clause challenge.

### *B. Religious Motivations in Defining Fetal Life*

While the Supreme Court's abortion jurisprudence is enough to ensure that defining fetal life represents a secular purpose in practice, the South Dakota and

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199. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 746 (8th Cir. 2008) (Murphy, J., dissenting) ("The script physicians are compelled to give . . . incorporates a value judgment and therefore escapes scientific verification.").

200. *See Gonzales v. Carhart*, 550 U.S. 124, 157–59 (2007) (describing fetal life as not merely "potential life" but as "the life within the woman," "the life of the unborn," and "infant life"). *See generally supra* notes 125–33 and accompanying text.

201. *Rounds*, 530 F.3d at 736 (citing *Gonzales*, 550 U.S. at 147).

202. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting) ("However one answers the metaphysical or theological question whether the fetus is a 'human being' . . . one must at least recognize . . . that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* . . .").

203. *See supra* note 45 and accompanying text.

204. *See supra* note 147–49 and accompanying text.

Indiana statutes may, nonetheless, be unconstitutional in principle because of the religious motivations upon which they may have been based. An objective observer is mindful of the context in which government action occurs,<sup>205</sup> and in Indiana, where legislative history is not recorded, there is some evidence that religious motives were present.<sup>206</sup> While Indiana was successful in passing the informed consent laws in question in 2010, they had previously tried in 2006.<sup>207</sup> During the 2006 session, one Indiana legislator stated, “[t]o put our [religious] . . . beliefs into a statute that’s going to be law, without being able to back it up scientifically, I have real hard questions about doing that.”<sup>208</sup> Based upon this history, is it possible that an objector could find a purposeful endorsement of religion in principle?

To answer to this question one need look no further than the traditionalist values recognized in *Harris*. Under the two approaches for addressing legislative motivations discussed above, such traditionalist values would be sufficient secular grounds. Professor Perry certainly would not balk at a religious motivation because he would never preclude a legislator from making laws on that basis. The fact that the Supreme Court has refused to define fetal life also correlates with Perry’s belief that the Court should not substitute its own view of morality in the place of the legislator’s view.<sup>209</sup> Under Greenawalt’s approach,<sup>210</sup> traditionalist values would seem to be equivalent to his “shaky science” or natural law basis for articulating secular harm. To reference his example discussing the Catholic stem cell objector, a legislator ought to be able to reference his traditionalist values in the same way that a Catholic legislator ought to be able to appeal to natural law to defend the

205. See *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 861–63, 866 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987); see also Wendela, *supra* note 74 and accompanying text.

206. Any evidence of the religious motives of Indiana legislators would not be available through legislative history because the Indiana legislature does not keep a record of legislative history.

207. H.R. 1172, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006) (as reprinted on Jan. 31, 2006) (amending the bill to include the requirement that “[a]t least eighteen (18) hours before the abortion, the pregnant woman will be informed in writing . . . that human life begins when a human ovum is fertilized by a human sperm”).

208. *State Abortion Proposal Defines Life as Beginning at Conception*, HERALD TIMES (Bloomington, Ind.), Feb. 12, 2006, at A12; Deanna Martin, *Abortion Consent Law Before Ind. Legislature*, WASH. POST, Feb. 12, 2006, at A10.

209. See Perry, *supra* note 33, at 674–75.

210. Greenawalt has also articulated a specific justification for why state legislators may act from religious motives in adopting laws regulating abortion. He states, “my conclusion is that shared premises and publically accessible reasons cannot resolve the points at which a fetus is entitled to particular degrees of moral consideration or what should be done in case of uncertainty.” GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 81, at 125–26. In light of this fact, Greenawalt concludes:

[P]eople must resolve the status of the fetus on grounds that go beyond commonly accessible reasons. If this is inevitable, the religious believer has a powerful argument that he should be able to rely on his religiously informed bases for judgment if others are relying on other bases of judgment that reach beyond common premises and forms of reasoning.

*Id.* at 137.

proposition that human embryos have recognizable rights that must be protected from harm.<sup>211</sup> Under Tushnet's framework, traditionalism is a secular source of morality, especially given the fact that the Court has explicitly distinguished traditionalism from religious values as an independent basis for abortion regulation.<sup>212</sup> Moreover, Tushnet explicitly recognized that independent secular grounds certainly existed to support the belief that a fetus is a person, much less a human being.<sup>213</sup>

Beyond traditionalist values, the Supreme Court's abortion jurisprudence accounts for the fact that religious motivations are inevitable in this context. It seems quite odd for the Court to recognize the state interest of using informed consent to show respect for fetal life while at the same time disqualifying the religious beliefs that may motivate a legislator to act according to that interest. The state interests recognized by the Supreme Court would ring hollow if this were the case. A court would never strike down anti-poverty legislation because of the religiously informed compassion held by a devout legislator for her constituents. Likewise, by ensuring that abortion provisions can be justified as representing traditionalist values rather than religious beliefs, the Court recognizes that religious motives are in some sense inevitable.

#### CONCLUSION

The Supreme Court has allowed states to assign real value to fetal life and to express that value in the context of informed consent through provisions that articulate a state's preference for childbirth and its concern for the dignity of an unborn child. This regard for fetal life represents a secular state interest. Most importantly, this value need not remain groundless and unsubstantiated. States like South Dakota and Indiana do not exceed the boundaries of the Supreme Court's Establishment Clause doctrine by articulating the necessary premise underlying their regard for fetal life. This premise has remained implicit ever since *Roe v. Wade*: a fetus belongs to the species *Homo sapiens*. By allowing states to articulate a value for fetal life in the context of informed consent, the Supreme Court has necessarily implied that the premise for such a value need not remain unstated.

The potentially religious motivations that may have inspired lawmakers to enact this previously uncodified premise do not taint the otherwise legitimate secular purpose. The Supreme Court in *Harris* has recognized that traditionalist values, not merely religious premises, may describe the basis of regulation that promotes childbirth over abortion. The Court's statements in *Harris* would ring hollow if they did not also describe regulations that serve to articulate the foundational premise of much anti-abortion regulation. The uniqueness of the Supreme Court's jurisprudence in setting forth these legitimate secular purposes forecloses an expansive application of *McCreary's* objective observer analysis that might lead one to conclude that the motives of pro-life legislators are impermissibly religious.

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211. See GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 53 and accompanying text.

212. See *Harris v. McRae*, 448 U.S. 297, 319 (1980).

213. See Tushnet, *supra* note 51, at 211.

Legislators are, therefore, free to act sincerely upon their religious motives in the abortion context, even to the extent of defining fetal life as a whole, separate, unique, and living human being.