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ARTICLES

WEBSTER v. REPRODUCTIVE HEALTH SERVICES: DO LEGISLATIVE DECLARATIONS THAT LIFE BEGINS AT CONCEPTION VIOLATE THE ESTABLISHMENT CLAUSE?

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Editor's Note: The Board of Editors of the Campbell Law Review recognizes that the abortion issue generates a substantial amount of commentary and debate. Therefore, one view of the issue is presented in this number of the Campbell Law Review. A subsequent Article propounding a different perspective on the abortion issue will appear in Volume 12, Number 2, of the Campbell Law Review.
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I. INTRODUCTION

In 1986 Missouri passed a statute which stated that "[t]he life of each human being begins at conception" and required that the "laws of...[Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to all other persons..." In enacting the statute, the legislature stated

2. Mo. Rev. Stat.§ 1.205.2 (1986). Section 1.205 provides in full:
   1. The general assembly of this state finds 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.
   2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
   3. As used in this section, the term 'unborn children' or 'unborn child' shall include all unborn child or [sic] children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
   4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

The statute also raised several other issues decided by the Supreme Court, most notably the issues of public funding of abortion, use of public facilities for abortion, and mandated testing for fetus viability. Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989). This article takes no position on any of these other issues. Its sole concern is the legislative determination that human life
that "[i]t is the intention of the general assembly of the state of Missouri to grant the right of life to all humans, born and unborn...."

The effect of this statute is to declare that personhood is conferred at the moment of conception and that all existing and future legislation in Missouri must be interpreted from this viewpoint. This article contends that the Missouri legislative statement is a theologically derived finding that personhood begins at the moment of conception. Such an inherently theological and controversial determination violates a core purpose of the establishment clause of the first amendment, the absolute prohibition against government preference of one religious sect or denomination over another and the placing of the state’s imprimatur on a particular religious dogma. What follows is a synopsis of the religious debate over whether human life begins at conception. Next is a discussion of the statute in light of this debate in the context of establishment clause jurisprudence. The article will then conclude with a review of the Supreme Court decision and its implications.

II. The Religious Controversy

Although the statements by the U.S. Catholic Conference, Missouri Synod Lutherans, segments of the Southern Baptist Convention and evangelicals in Missouri may present a uniform theological view about when human life or personhood commences, other denominations and religious traditions reject the theological concept that human life or personhood begins at the time of conception.

For example, Rabbis Raymond Zwerin and Richard I. Shapiro

begins at conception.


4. This interpretation of the effect of the statutory language is not a minority position. See Brief for 127 Members of the Missouri General Assembly as Amicus Curiae supporting Appellants at 10; Brief of the Lutheran Church-Missouri Synod, the Christian Life Commission of the Southern Baptist Convention, and the National Association of Evangelicals as Amici Curiae in Support of Appellants at 4; Brief of Amicus Curiae Missouri Catholic Conference in Support of Appellants at 1-2. The Missouri Catholic Conference is one of two organizations that actually prepared the language of the statute. See State Paid Abortions—Not Here, 30 May MCC Messenger 1986 at 1. The other organization responsible for the language is Missouri Citizens for Life. See Abortion Law was Work of Christians, 23 Jan. Kansas City Times 1989.

5. See supra note 4.
write that "according to Jewish law, a fetus is not considered a full human being and has no juridical personality of its own . . . . The Talmud contains the expression Ubar yereah imo — the fetus is as the thigh of its mother, i.e., the fetus is deemed to be part and parcel of the pregnant woman's body."8 Another prominent Jewish leader, Rabbi Henry Siegman, Executive Director of the American Jewish Congress, testified before Congress that "the fetus is not a person, in the Jewish tradition, until the moment of birth . . . ."9

Professor Paul D. Simmons, Professor of Christian Ethics at the Southern Baptist Theological Seminary, notes:

Perhaps the major issue in the abortion debate centers on the question of the personhood of the fetus. Those who are working for a constitutional "human life" amendment to ban abortion in America argue that the Bible teaches (1) that the fetus is a human being and (2) that abortion is murder and thus should be legally prohibited.8

Adding that some traditional religious communities do not agree with the proposition that human life or personhood begins at the moment of conception, Professor Simmons explains:

Not all scholars are convinced that the Bible teaches that abortion is murder or that the fetus is a person. John Stott, for instance, rejects the notion that a fetus is a human being; he believes that at best, it may be regarded as potentially a person.

Several things might be noted about these statements. First, writers use the terms "human," "human life," "life," "person," and "human being" as if they were synonymous terms and thus interchangeable. Second, each statement reveals certain assumptions about what it means to be a human being or person. Third, each writer brings the teaching of the Bible as that writer understands it to buttress the argument. Finally, there is apparently no single teaching or definition in the Bible regarding personhood, or there would presumably be universal agreement among biblical scholars on this question. To understand the question of the personhood of the fetus and relate the teachings of the Bible more clearly to the question presented, it may prove helpful to deal with some of the assumptions involved.9

9. Id. at 79.
After reviewing the Biblical view of personhood, Simmons concludes:

The Biblical portrait of person, therefore, is that of a complex, many-sided creature with the godlike ability and responsibility of making choices. The fetus — certainly in the early stages of gestation, hardly meets those characteristics. At best, it begins to attain those biological basics which are necessary to show capacities no earlier than the latter part of gestation. The "burden of proof" argument used by those who would equate fetus with person needs to be turned around. Brown argued, for instance, that the burden of proof is on those who say that the fetus is not a human being. "We must be able to say we are sure it is not human . . . . How can we be sure it is not a human being?" No one can disagree with him that the fetus is human. That is a simple statement that acknowledges the species to which the fetus belongs. Human is an adjective. The fetus is not bovine (cow), or feline (cat), but a human conceptus. The problem is asserting that the fetus is a person or human being. The terms are not synonymous. "Human being" is a noun and designates or names a living entity with the qualities of personality and life that distinguishes Homo Sapiens from all other creatures. Plainly the presence of life or animation is not a sufficient distinction, since all animals have life in that sense. The uniqueness of being person is reflecting the qualities of the image of God.

Even the Catholic tradition presents conflicting though acceptable theological views as to the beginning of human life or personhood. Reviewing historic Roman Catholic writings on the subject, Whittier states:

For St. Thomas, "Seed and what is not seed is determined by sensation of movement." What is destroyed in abortion of the unformed fetus is seed, not man (emphasis added). This distinction received its most careful analysis in St. Thomas. It was the general belief of Christendom, reflected, for example, in the Council of Trent (1545-1563), which restricted penalties for homicide to abortion of animated fetus only.

Whittier further notes:

In 1869 in his Apostolic Constitution Apostolicae Sedis Pope

10. Id. at 87-88.
Pius IX broke with the older tradition by omitting all distinctions in canonical penalties between the unformed and the formed fetus. The effect was implicitly to accept the theory of immediate ensoulment or, at least, to provide for it as a likely possibility. In 1917, with the promulgation of the new Code of Canon Law by Benedict XV (1854-1922), the 40-80 day animation determination, still in effect for dealing with irregularities, was completely eliminated. The definition of abortion as the ejection of an immature or non-viable fetus by deliberate intent and efficacious means derives from Sixtus V. By fetus is meant the human organization in the womb after conception and before birth. In effect, the teaching of Effraenatatem and the Council of Elvira has become the officially sanctioned position of the Church.13

Whittier concludes:

The official teaching of the Catholic Church at present was stated in 1970 by the United States Catholic Bishops: 'from the moment of conception the child is a complex and rapidly-growing being endowed with the characteristics of human life'; in brief, 'the child in the womb is human.' This simply reasserts the judgment of Vatican Council II: "From the moment of its conception, life must be guarded with the greatest of care." Thus, in 1964, Pope Paul VI cited the words of Pius XII 13 years before: "Innocent human life, in whatever condition it is found, is to be secure from the very first moment of its existence from any direct deliberate attacks . . . Whatever foundation there may be for the distinction between these various phases of the development of life that is born or still unborn, in profane or ecclesiastical law, and as regards certain civil and penal consequences, all these cases involve a grave and unlawful attack upon the inviolability of human life."

In conclusion, the pastoral and penitential practice of the Catholic Church regarding abortion today is to act as if the soul were present from the conception, assuming the possibility, if not the probability, of fully human life or at least its unique potentiality in the conceptus. This represents a significant change from the dominant tradition in the past, which distinguished the unformed from the formed fetus in terms of canonical definition of abortion and of appropriate penalties.14

In a similar vein, ecumenical dialogue sponsored by the Catholic Bishops Committee for Ecumenical and Interreligious Affairs of

13. Id. at 20.
14. Id. at 34-35.
the National Conference of Catholic Bishops and the Caribbean and North American Area Council of the World Alliance of Reformed Churches (Presbyterian and Congregational) issued a statement on Ethics and Christian Unity, A Statement on Abortion that notes substantial agreement on certain basic principles concerning abortion but indicated substantial differences on "the moment and meaning of personhood," "the rights of the unborn in situations where rights are in conflict," "the role of civil law in matters pertaining to abortion," and "the interrelation of individual versus communal factors in decision-making." 15

III. ESTABLISHMENT CLAUSE JURISPRUDENCE

The developing establishment clause jurisprudence clearly accepts the proposition that mere parallelism between religious dogma and legislative action does not in and of itself result in an establishment clause violation. 16 In fact, many traditional religious

15. Id. at 39.
16. Nothing stated in this article should be construed as criticizing the right of religious organizations to speak out on important issues of moral and ethical concern. As Justice Brennan wrote in McDaniel v. Paty:

That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."


Justice Brennan in his same concurrence added that "[t]he Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion . . . . It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." Id. at 641. However, the fact that religious organizations and their clergy have first amendment rights to speak out on public issues and to seek to influence the political process in no way detracts from the establishment clause proscription against government adopting a sectarian belief on issues that are essentially religious. As Justice Brennan concluded in McDaniel v. Paty:

Our decisions under the Establishment Clause prevent government from supporting or involving itself in religion or from being drawn into ecclesiastical disputes. These prohibitions naturally tend, as they were designed
teachings may properly be the fountainhead from which community morals may spring. However, disputed sectarian dogma may not receive the imprimatur of the state as the stated purpose or predicate for governmental legislative action.

A. Harris v. McRae

In Harris v. McRae, the Court stated:

It is well settled that 'a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion.' Committee for Public Education v. Regan, 444 U.S. 646, 653. Applying this standard, the district court properly concluded that the Hyde Amendment does not run afoul of the Establishment Clause. Although neither a state nor the federal government can constitutionally 'pass laws which aid one religion, aid all religions, or prefer one religion over another,' Everson v. Board of Education, 330 U.S. 1, 15, it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' McGowan v. Maryland, 366 U.S. 420, 442. . . . The Hyde Amendment, as the district court noted, is as much a reflection of

to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. Beyond enforcing these prohibitions, however, government may not go. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.

Id. at 642.

In addition, Justice Blackmun concluded in his dissent in Bowen v. Kendrick, 108 S.Ct. 2562, 2590 (1988), that secular values may be properly promoted by legislation: "Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a religious nature."

Thus, although religious organizations have the constitutional right to speak out on public questions, the ultimate protection remains within the political process and with the courts to enforce the guarantee against establishment of religion.

“traditionalist values towards abortion, as it is an embodiment of the views of any particular religion.”... In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.18

Justice Stewart based part of his *Harris v. McRae* analysis on the Court’s decision in *McGowan v. Maryland*19. In that case, this Court specifically stated that a law may violate the establishment clause “if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State’s coercive power to aid religion.”20

In *Harris v. McRae*, the Court, although finding that a secular legislative purpose may properly parallel a sectarian interest, implied that a legislative body may nevertheless transgress the Establishment Clause when enacting anti-abortion legislation. In *Harris* the Court merely acknowledged that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church and would not, “without more,” violate the establishment clause.21

The Missouri legislation, however, does not merely coincide with a sectarian teaching. Rather, the text of the statute itself results in a breach of the wall between church and state erected by the establishment clause of the first amendment because the statute is predicated upon a theologically derived legislative finding that “[t]he life of each human being begins at conception”22 and a requirement that “laws of ... [Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to all other persons ... .”23 The legislature, in enacting the statute, said its legislative purpose was “to grant the right of life to all humans, born and unborn ... .”24

These legislative findings and statement of purpose go beyond a statement of “traditionalist values” represented by the Hyde

18. *Id.* at 319-20.
20. *Id.* at 453.
23. *Id.* § 1.205.2.
24. *Id.* § 188.010.
Amendment, embrace theological dogma and are an attempt to place the imprimatur of the state on one side of the theological argument as to the "personhood" of a fetus.

In McRae v. Califano, the district court carefully observed that the consensus of the legislative opinion that gave rise to the passage of the Hyde Amendment prohibiting the use of federal funds for abortion "did not in truth turn on whether an embryo or fetus or, indeed, a zygote or blastocyst is a "human being." The Missouri legislature, however, clearly predicated its legislation on a purely theological finding—a finding which has not been validated by a consensus within the medical or scientific community.

B. The Lemon Test

The Court, over the years, has used a three-part test to analyze establishment clause challenges: "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 entanglement with religion.'"


27. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). Appellants (Webster et al.) and their supporting amici argued that the legislative finding is not an operative portion of the statute but merely contributes to a general understanding of the statute. Whatever merit that argument may have, the legislative declaration nevertheless does clearly demonstrate that the legislative purpose was religiously based. Even though the purpose prong of the Lemon test usually looks to the subjective intent of the legislature, intent may be deduced from the face of the statute. Edwards v. Aguillard, 107 S.Ct. 2573, 2585 (1987). Therefore, if the legislative finding concerning when life begins is unnecessary to further the state's legitimate interests, as claimed by appellants, an improper intent may be inferred. It may be concluded that if the legislative declaration is unnecessary for the regulation of abortion, then Missouri is not "parallelizing" a religious belief, but adopting and encouraging one.

Appellants also argued that the state has a legitimate secular interest in regulating all trimesters of a pregnancy. If this is so, there is no reason for a legislative body to take the extra step and declare that life has in fact begun at the moment of conception, particularly when this issue has not been decided by the medical or scientific community and is the subject of continuing theological debate. Such a legislative finding, therefore, serves no secular purpose but does demonstrate that the legislative purpose is religiously based.
1. The Purpose and Effect Prongs

More recently Justice O'Connor has suggested additional refinements to the traditional Lemon test which are helpful in the analysis of the establishment clause issue present in Webster. In Lynch v. Donnelly, Justice O'Connor, concurring, suggested that the purpose prong goes to the issue of what government intended to communicate by its action (the "objective" meaning of the statement in the community), while the effects prong relates to what message governmental action actually conveyed regardless of whether it was intended (the "subjective" meaning of the statement). Justice O'Connor analyzed the issue:

The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is thereby necessary to determine whether the action carries a forbidden meaning.

The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Justice O'Connor further suggested in Lynch v. Donnelly that in reviewing the question of whether the action of government

29. Id.
"was understood to place its imprimatur on the religious content" and thereby "communicates endorsement of religion is not a question of simple historical fact." Rather, the question, "like the question whether racial or sex-based classifications communicate an invidious message," is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." Further, Justice O'Connor suggested that, in making such an analysis:

Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.

In Wallace v. Jaffree, Justice O'Connor, in applying her refined Lemon test analysis to an issue substantially the same as the question addressed here — that is, whether the purpose of the "moment of silence" legislation enacted by the Alabama legislature had the purpose of advancing religion — stated:

The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.

In Wallace, Justice O'Connor also suggested that any inquiry into the legislative purpose to determine establishment clause violations "should be deferential and limited" without attempting "to psychoanalyze the legislators." In Webster, however, that portion of the text of the statute setting forth the aforementioned legislative finding and purpose of the legislation is inherently religious in character. This, coupled with the acknowledgement that the legis-

32. Id. at 694.
33. Id.
35. Id. at 73-74.
36. Id. at 74.
loration actually was co-drafted by the Missouri Catholic Conference, should have relieved the Court of any need for an intensive investigation of legislative motive.

The establishment clause is violated by the advancement of a particular religious belief. In Epperson v. Arkansas, the Court stated that a law should not "be tailored to the principles or prohibitions of any religious sect or dogma." Nevertheless, this is exactly what the Missouri legislature has done.

In Wallace v. Jaffree, Justice O'Connor in her concurrence stated: "It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that government not intentionally endorse religion or religious practice."

It seems clear, as demonstrated earlier in this article, that a historic and contemporaneous link exists between the teachings of certain religious groups and the human "life begins at the time of conception" finding of the Missouri legislature. In Edwards v. Aguillard, the Court stated: "Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment."

The Court also stated that "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose." In Larson v. Valente, the Court stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." In Wallace v. Jaffree, Justice O'Connor reviewed her suggested modifications of the Lemon test and stated:

Direct government action endorsing religion or a particular

38. 393 U.S. 97 (1968).
39. Id. at 106.
40. Wallace, 472 U.S. at 75.
41. 482 U.S. 578 (1987)
42. Id. at 593.
44. 456 U.S. 228 (1982).
45. Id. at 244.
religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." . . . Under this view, Lemon's inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.48

Justice O'Connor continued:

A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every statute were invalid under the Establishment Clause. For example, the state could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.47

Justice O'Connor further stated:

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred (emphasis added). Such an endorsement infringes religious liberty of the non-adherents for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."48

Here the power and direct coercive pressure of the state are exercised on behalf of a sectarian teaching as to "personhood."

Under Justice O'Connor's "endorsement test," courts must examine whether a statute under review "in fact conveys a message of endorsement," irrespective of the state's actual intent.49 As Justice O'Connor added in her concurrence in Presiding Bishop v. Amos, "To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an

46. Wallace 472 U.S. at 69-70.
47. Id.
48. Id. at 70 (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).
objective observer acquainted with the text, legislative history, and implementation of the statute." 50

Not only were Missouri Catholics informed through their own church newspaper, the MCC Messenger, that the Missouri Catholic Conference had co-authored, not merely promoted, the anti-abortion statute enacted into law, but the general public was also informed in the public newspaper that the Executive Director of the Missouri Catholic Conference and the State Legislative Chairman of Missouri Citizens for Life had "ghost written" the legislation. 51 In The Kansas City Times it was noted that the role played by the Missouri Catholic Conference was no secret and quoted the Executive Director to the effect that "some critics of the proposal at the time noted his involvement and charged that religious beliefs were being advanced in the form of state legislation." 52

Also, if an objective observer reading the text of the Missouri statute considers the declaration of personhood contained in the legislative findings as being unnecessary to achieve a valid state interest, then the effect of the statement would be to convey a message that the particular theological theory of life is "favored or preferred." 53 In essence, if the legislative finding does not further the state's interest, and is in fact an encroachment into a religious area, then both the actual purpose and effect must be to endorse a particular religious viewpoint.

At the very least, the legislative finding made by the Missouri legislature sets forth a legislative preference for a specific theological idea. As Justice Blackmun stated recently, "A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." 54

In Thomas v. Review Board, 55 the Court reasserted the principle that "[c]ourts are not arbiters of scriptural interpretation." 56 If this is beyond the competence of the Judicial Branch, it is equally outside the domain of the Legislative Branch.

Although noting in Wallace v. Jaffree that it is possible that a

51. See supra, note 4.
52. See supra, note 4.
56. Id. at 716.
legislature will enunciate a sham secular purpose for a statute, nevertheless Justice O'Connor had "little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the Lemon inquiry into the effect of an enactment would help decide those close cases where the validity of an express secular purpose is in doubt." Arguments that the legislative purpose was based upon secular concerns are belied by the sectarian foundation of the legislative action. According to Justice O'Connor, "While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share."

The Missouri legislature specifically stated that its finding that "the life of each human being begins at conception" is to be utilized in interpreting and construing the laws of the state. Thus, the suggestion that the findings and purpose portion of the statute is not operative is pure fiction. Apparently such a mandated interpretation would apply to both existing and prospective legislation. The legislature specifically stated that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and construction of this state."

2. The Entanglement Prong

It is clear that the legislature in this case went beyond restricting the use of public funds or facilities in abortions. It attempted to place a theological interpretation on all existing and future legislation touching on "the unborn child at every stage of development." Such a statutory requirement portends a myriad of unpredictable ways for wreaking havoc in the future.

In Committee for Public Education & Religious Liberty v.

57. Wallace, 472 U.S. at 75.
58. Id. at 75-76.
Nyquist, the Court indicated that the "potential for political divisiveness" was relevant in determining whether legislation created excessive entanglement between church and state. In Nyquist this Court noted that: "while the prospects for such divisiveness may not alone warrant the invalidation of state laws . . ., it is certainly a 'warning signal' not to be ignored."^

In Lynch v. Donnelly, Justice O'Connor in her concurring opinion stated that "[p]olitical divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion."

62. Id. at 797-98.
63. Lynch, 465 U.S. at 689. There also was one other issue raised in some of the briefs supporting the appellants that deserves attention. In Roe v. Wade, 410 U.S. 113, 132-33 (1973), the Court recognized that "abortion performed before 'quickening' was not an indictable offense at common law and that "[t]he absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins."

The Court also acknowledged that "the law in effect until mid-nineteenth century was the pre-existing English common law" and that by the end of the 1950's a large majority of jurisdictions banned abortion "unless done to save or preserve the life of the mother." Id. at 138-39. The Court also noted that "at the time of the adoption of our Constitution, and throughout the major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes" in effect at the time of the Roe v. Wade decision. Id. at 140.

A number of amicus briefs filed in Webster in support of the appellants argued that the Fourteenth Amendment to the United States Constitution somehow changed the common law and somehow included a fetus as a "person" who could neither be deprived of "life, liberty, or property without due process of law" nor be denied the "equal protection of the law." For instance, the brief of a number of religious pro-life groups addresses "the personhood, under the Fourteenth Amendment, of human beings conceived but not yet born." Amicus Brief of Catholics United for Life at 4. That brief argues that the "absence or death of case support for unborn personhood is irrelevant" and takes a gigantic leap in logic by citing Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) tying such a concept to the proposition that the framers of the Fourteenth Amendment intended that "in the eyes of the Constitution, every human being within its sphere . . . from the President to the slave, is a person." Id. at 7, 14.

Similarly, the amicus brief of the Knights of Columbus argues that "viability is an invalid benchmark for construing the meaning of 'person' in the Fourteenth Amendment because it has nothing to do with attributes of personhood, or a particularized state of being, but only the state of medical technology." Brief of the Knights of Columbus at 2. In effect, the Knights of Columbus would have this Court substitute Roman Catholic theology for "medical technology," the sectarian
IV. THE SUPREME COURT DECISION

In a plurality opinion of the Court Justice Renquist upheld the statutory language as constitutionally permissible. Ignoring the establishment clause issue altogether, he interpreted the language as representing a value judgment favoring childbirth over abortion, permissible under abortion law jurisprudence. He did not view it as a regulation of abortion based on the idea that life begins at conception. Noting that under state law the fetus may receive certain protections and rights that meet constitutional criteria, he held that unborn children under the Missouri statute could receive protection in tort and probate law, but that the statute could be "interpreted to do no more than that." If, however, the Missouri courts later interpret the language to restrict the "activities of the appellees in some concrete way," then the federal courts would take up that issue at that time.

Justice Stevens, dissenting, was the only member of the Court

for the secular.

Even the Knights of Columbus brief admits, however, that "the legislative history of the [Fourteenth] Amendment make no explicit reference to unborn or to abortion." Id. at 18. Whether the term "human being" includes all unborn children to the time of their conception also is not demonstrated in any Fourteenth Amendment generated case law, and, therefore, would rest solely on church dogma or teaching.

The amicus briefs of Catholics United for Life and Knights of Columbus focus on what they perceive to have been the prevailing mood of the nation and the existing abortion laws at the time the Fourteenth Amendment was adopted. Then, ipse dixit, they engraft on the Fourteenth Amendment the concept that its protection of "persons" includes a fetus. This argument ignores the fact that the common law and the prevailing view at the time of the adoption of our Constitution and the Bill of Rights fails to support any such notion.

The Fifth Amendment contains the same type of language and restraint as does the Fourteenth Amendment. Both provide that a "person" shall not be deprived of "life, liberty, or property, without the due process of law." The only difference is that the Fifth Amendment proscribes actions by the federal government, and the Fourteenth prevents similar action by state governments. How ironic it would be if the same language within the Constitution could produce distinctly different results according to whether the action is federal or state. It is more logical to believe that the authors of the Fourteenth Amendment, in using the word "persons," had in mind the same definition of persons as used by the drafters of the Bill of Rights.

65. Id.
66. Id. at 3050.
67. Id.
to address the establishment clause issue. His attack on the statute was two pronged, though each prong would be sufficient in itself to overturn the statute as a violation of the establishment clause.

The first attack concerns the limiting effect the statute conceivably would have on a woman's choice of contraception, in violation of Griswold v. Connecticut and its progeny. He reasoned that the statute makes a distinction between those contraceptive procedures that are effective immediately before fertilization and those immediately after fertilization. This reasoning follows from the statute's definition of conception, which defines it as "the fertilization of the ovum of a female by the sperm of a male," even though "standard medical texts equate 'conception' with implantation in the uterus, occurring about six days after fertilization." Thus contraceptive devices such as the morning-after pill or the IUD (which works primarily by preventing a fertilized egg from implanting) would be at least regulated in some unconstitutional way if not altogether prohibited. Since the distinction between the pre and post fertilization contraceptive methods is theological and not secular, then Stevens concludes that the language is invalid under Griswold and its progeny, since legislation requires a secular basis.

The second prong, a more direct attack using the Establishment Clause as support, is in many ways a continuation of the first argument. The distinction is that the first argument is based mostly on the privacy issue raised in Griswold and its progeny. The secular purpose discussion is very brief and seems to be included as an afterthought, and it certainly is not necessary to make the argument that the narrowing of contraceptive choice violates the privacy doctrine. Anyhow, it is the second prong in which Jus-

68. Id. at 3079 (Stevens, J., Dissenting).
69. 381 U.S. 479 (1965).
70. Webster, 109 S. Ct. at 3081.
72. Webster, 109 S. Ct. at 3080.
73. It would be improper to infer that the pre and post fertilization distinction with regard to contraception would include abortion. Though there are people who view abortion as another form of contraception, Stevens makes it clear that he is talking about contraceptives that take effect immediately after fertilization, before the egg implants itself into the wall of the uterus.
74. Webster, 109 S.Ct. at 3082 (citing Stone v. Graham, 449 U.S. 39, 40 (1980) (per curiam)). This case held that the establishment clause is violated by the advancement of a particular religious belief. Id. at 3040.
tice Stevens directly uses the Establishment Clause to dissent from the majority holding.

In this argument Stevens readily admits that his conclusion does not follow from the fact that the language happens to coincide with the tenets of certain religions, nor does it follow from the fact that the motivations of the legislature may have been religious. It does, however, follow directly from the fact that it is an "unequivocal endorsement of a religious tenet of some but by no means all Christian faiths...[serving] no identifiable secular purpose." Citing Whittier, he focuses on St. Thomas's distinction of a fetus that was younger than forty days old and one that was older. Before the forty days, abortion was not the destruction of human life but of its "seed". Stevens argues that it is clear that the Court would not have upheld legislation stating life begins at forty days; that would be an endorsement of a particular religious tenet. Therefore, this Missouri statute should also be held unconstitutional since there is no principled secular distinction between St. Thomas's forty days and Missouri's declaration that human life begins at conception; the distinction is merely theological.

Indeed Stevens readily admits that the language would be constitutional if there was some identifiable secular purpose. He briefly discusses a few possibilities but ends up rejecting them. Even the plurality's decision that the language is in effect an amendment to tort, property, and criminal laws is rejected as not persuasive. On one hand, none of these "amendments" is fur-

76. Id. (citing Washington v. Davis, 426 U.S. 229, 253 (1956) (Stevens, J., concurring)).
77. Id. at 3082. It is unclear from this statement whether Stevens would accept a statute that was an endorsement of Judeo-Christian beliefs but not of others, such as Islam.
78. Id. at 3083 (citing C, Whittier, Catholic Teaching on Abortion: Its Origin and Later Development. Actually, the forty day distinction was only applicable to males. For females, it was eighty days.
79. Id.
80. Id.
81. Id. at 3083- 84.
82. Id. at 3084.
83. Id. For example, the often stated secular interest of preventing fetus pain or mental anguish is not valid for a one cell fetus. Nor can it be argued that there is a secular interest in bolstering the human population in the United States. Indeed, national policy is the opposite with respect to unmarried adolescents.
84. Id.
thered by the theological determination of when human life begins. On the other, the Missouri state constitution specifically prohibits legislative enactments on more than one subject matter. Finally, Stevens argues that the language violates the establishment clause by noting: the intensely divisive character of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate. The Missouri Legislature may not inject its endorsement of a particular religious tradition into this debate, for “[t]he Establishment Clause does not allow public bodies to foment such disagreement.”

In conclusion, Stevens writes:

Contrary to the theological “finding” of the Missouri Legislature, a woman’s constitutionally protected liberty encompasses the right to act on her own belief that— to paraphrase St. Thomas Aquinas— until a seed has acquired the powers of sensation and movement, the life of a human being has not begun.

V. Conclusion

It is both puzzling and disturbing that eight of the nine Justices of the Court did not even address the establishment clause issue. Though it seems clear that the language of the Missouri statute directly conflicts with the first amendment provision, only Justice Stevens takes up the issue. Whatever their reasons, the Supreme Court has apparently abdicated establishment clause jurisprudence in order to set forth its various views pertaining to abortion without any other jurisprudential “distractions.” This type of neglect by our highest court only serves to undermine confidence in its current composition to uphold fundamental and inalienable provisions of the Constitution. While the Court viciously debates abortion, Missouri has made significant intrusions into the basic right of no religious establishment. The Court must not be distracted by other important issues to the point of permitting an “end run” on our most basic and fundamental liberties.

85. Id. at 3085
86. Id. at 3084-85.
87. Id. at 3085.
88. Id.
89. Id.