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Leslie C. Griffin

University of Nevada, Las Vegas -- William S. Boyd School of Law

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CONSCIENCE AND EMERGENCY CONTRACEPTION

Leslie C. Griffin, J.D., Ph.D.*

Emergency contraception is the most recent example of a health law policy that is deeply influenced by the religious beliefs of politicians, citizens, and health care providers. That influence is evident in two significant areas of the law. The first is conscience clause legislation, which allows health care providers to refuse participation in abortion, sterilization, contraception, or other medical procedures for religious and moral reasons. The second is the substantive content of health law and policy. Legislators and members of the executive branch may choose to make contraception available—or not—based on their own religious beliefs or those of their constituents.

On the subject of emergency contraception, pharmacists in several states have recently demanded conscience clause protection for their refusal to dispense emergency contraception. In Part I of this paper, I examine those claims of conscience, and the states' response to them. In Part II, I identify the substantive law and policy by reviewing state and federal attempts to regulate the availability of emergency contraception. Those efforts include legislative and regulatory attempts both to require pharmacists to dispense emergency contraception and to make it available over-the-counter, without a prescription. In Part III, I discuss the implications of these debates about contraception for the Religion Clauses of the First Amendment, arguing that both conscience clause and emergency contraception legislation must respect the balance of the Free Exercise and Establishment Clauses of the First Amendment.

I. CONSCIENCE CLAUSES

Emergency contraception—also known as the morning-after pill or Plan B—is a heavy dose of hormones that should be taken

* Larry & Joanne Doherty Chair in Legal Ethics, University of Houston Law Center, lgriffin@uh.edu.

within seventy-two hours of unprotected sexual intercourse.¹ It protects against pregnancy by stopping ovulation, preventing fertilization of the egg, or blocking implantation of the embryo in the uterus.² Unlike RU-486, Plan B is not effective if implantation or pregnancy has already occurred.³ The Food and Drug Administration (FDA) approved Plan B in 1999 as a contraceptive method for use after sexual intercourse.⁴ Plan B has been controversial because many Christians, especially Roman Catholics, believe that life begins at conception; in their eyes, preventing implantation is morally equivalent to abortion.⁵ An intense debate has occurred between such opponents of Plan B, who believe it causes abortion, and supporters of the drug, who deny its abortifacient quality and insist that women are entitled to access to drugs approved by the FDA.⁶

During the past two years, several pharmacists have expressed their moral opposition to filling prescriptions for emergency contraception or Plan B. In Illinois, for example, after a pharmacist working at the Loop Osco refused to fill two Plan B prescriptions on moral grounds, Governor Rod R. Blagojevich issued an emergency order directing all pharmacies (but not individual pharmacists) to fill prescriptions for all contraceptives "without delay."⁷ In Wisconsin, pharmacist Neil Noesen not only refused to fill a patient's prescription because of his religious opposition to contraception, but

¹ FEMINIST WOMAN'S HEALTH CTR., EMERGENCY CONTRACEPTION (also known as The "Morning After" Pill or "Plan B") (2006), available at <http://www.fwhc.org/birth-control/ecinfo.htm> (last visited June 22, 2006).

² See *id.*

³ For details of the scientific basis of emergency contraception, see Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?* 15 ANN. HEALTH L. 37 (2006).

⁴ Scott S. Greenberger, *Lawmakers Override Governor's Contraception Veto*, BOSTON GLOBE, Sept. 16, 2005, at B4.

⁵ See, e.g., Keith A. Fournier, *Let's Make the Right Choice and Reject the "Kill Pill,"* CATHOLIC ONLINE, Dec. 21, 2003, available at <http://www.catholic.org/featured/headline.php?ID=591> (last visited June 25, 2006).

⁶ See Greenberger, *supra* note 4, at B4; Gala M. Pierce, *The Moral Dilemma for Pharmacists*, CHI. DAILY HERALD, Oct. 24, 2005, at 1; see also Yuliya Fisher Schaper, *Emergency Contraception for Rape Victims*, 20 RUTGERS L. REC. 1, 7 (2005). But see *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405, 412-13 (Cal. App. 2d 1989) ("Abortion, as it is commonly understood, does not include the IUD, the 'morning-after' pill, or, for example, birth control pills . . . [T]he morning-after pill [i]s a 'pregnancy prevention' treatment, a birth control method rather than a method of terminating a pregnancy.").

⁷ ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005); Gretchen Ruethling, *Illinois Pharmacist Sues Over Contraceptive Rules*, N.Y. TIMES, June 10, 2005, at A18; Pierce, *supra* note 6, at 1.

also declined to transfer the prescription to another pharmacist or to return it to the patient.⁸

Glenn Kosirog and Luke Vander Bleek dispense regular contraception in their Illinois drugstores but are morally opposed to Plan B.⁹ According to Kosirog: "What we're saying is that a fertilized egg is a human baby."¹⁰ From Vander Bleek's perspective: "If there was some way to know with certainty if the woman has ovulated, then it would be [a] very, very different situation. But we can't so we don't know if human life is hanging in the balance."¹¹ The two men refused to dispense Plan B and filed a lawsuit challenging the governor's order.¹² Their complaint alleges that the Illinois Health Care Right of Conscience Act forbids the governor to force pharmacists to fill prescriptions that violate their conscience.¹³

Vander Bleek's language about emergency contraception is telling because he claims a right to conscientious objection to the law:

Prior to this rule, I had always practiced pharmacy using my judgment and my conscience and the law as my guide. . . . Here comes this grenade thrown in here that says you're going to have to do things that are morally objectionable. . . . Simply stated, this individual's interest in getting this prescription is not greater than my interest in preserving my right to *conscientious objection*.¹⁴

Vander Bleek and other pharmacists believe that the law should protect their rights of conscience against the governor's orders.¹⁵

Many health care providers already enjoy the protections of conscience afforded by numerous refusal or conscience clauses that were enacted into federal and state law in response to the United States Supreme Court's decision legalizing abortion in *Roe v. Wade*.¹⁶ Such statutes protect employees who refuse to perform abortion and other contested procedures from firing or demotion.¹⁷ Other conscience clauses protect religious hospitals and health care insti-

⁸ *Conscience Clauses: Giving Doctors an 'Out,'* MED. ETHICS ADVISOR, June 2005, at 68-9 [hereinafter *Conscience Clauses*, MEDICAL ETHICS ADVISOR].

⁹ Pierce, *supra* note 6, at 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See *id.*

¹⁴ Ruethling, *supra* note 7, at A18 (emphasis added).

¹⁵ Pierce, *supra* note 6, at 1.

¹⁶ 410 U.S. 113 (1973); Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 182 (1993).

¹⁷ Wardle, *supra* note 16, at 182.

tutions from any obligation to perform the contested services.¹⁸ Individuals and institutions can be shielded from criminal and civil liability for refusal to provide abortion, sterilization, and other protected procedures.¹⁹

In 1972, for example, after a patient who was denied a sterilization operation filed a lawsuit against a Catholic hospital that received federal funding, Congress passed the Church Amendments to the Health Programs Extension Act of 1973.²⁰ Those amendments provided that a hospital that receives federal funding under the Hill-Burton Act²¹ cannot be forced by the courts to "make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions."²²

The Church Amendments were only the beginning of the government's support for the claims of individual conscience. In the following years, forty-seven states passed legislation protecting hospitals and health care personnel opposed to abortion, sterilization, and/or contraception.²³ Thirty-seven states offer conscience clause protection on abortion and contraception.²⁴ Ten states offer protection on abortion, contraception, and sterilization.²⁵ The West Virginia statute covers sterilization only.²⁶ Only Alabama, Vermont, and New Hampshire lack such legislation.²⁷

Although the early conscience clauses involved abortion, or, occasionally, sterilization, since 1973 conscience clause protection has grown to include numerous medical procedures and providers.²⁸ In 1974, for example, the Church Amendments were expanded to include protection for religious or moral objection to *any*

¹⁸ *Id.* at 184-85.

¹⁹ *Id.* at 182.

²⁰ See *id.* at 208; *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948, 951 (D. Mont. 1973).

²¹ 42 U.S.C. § 291 (West 2006).

²² See *Taylor*, 369 F. Supp. at 951. Thorough treatment of the development of conscience clauses is provided by Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703 (1999).

²³ *Conscience Clauses*, MEDICAL ETHICS ADVISOR, *supra* note 8.

²⁴ Wardle, *supra* note 16, at 180.

²⁵ HENRY J. KAISER FAM. FOUND., STATES THAT ALLOW INDIVIDUAL PROVIDERS TO REFUSE WOMEN'S HEALTH SERVICES, available at <http://www.statehealthfacts.org> (last visited Apr. 21, 2006).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Wardle, *supra* note 16, at 180.

health service in which funds were received from the Secretary of Health, Education and Welfare.²⁹ They were broadened to include Medicare and Medicaid managed care plans in 1997,³⁰ and health maintenance organizations and health insurance plans in 2005.³¹ Nonetheless, conscience clause legislation has been piecemeal, providing different coverage from state to state.³² Most state conscience clauses cover a few procedures instead of providing a blanket exemption for any objectionable health service.³³ After their heyday from 1973 to 1982, conscience clauses drifted into the quiet years during the 1980s and 1990s, until legislative focus returned to conscience clauses at the end of the 1990s.³⁴ The recurring issue is how to strike a proper balance between the needs of patients and medical providers.³⁵

In 2005, pharmacists' complaints refocused attention on the adequacy of conscience clauses.³⁶ Should Plan B, which is FDA-approved for emergency contraception, but which is viewed by its opponents as an abortifacient, be included in state statutes that cover abortion but not contraception? Should pharmacists be afforded protection under these statutes? Illinois, for example, contains abortion, sterilization, and contraception in its Health Care Right of Conscience Act, but does not explicitly mention pharmacists among the health care personnel who are included in the Act's coverage.³⁷

²⁹ Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 Hous. L. Rev. 1429, 1481-82, 1516 nn.251 & 253 (1995).

³⁰ Jody Feder, *The History and Effect of Abortion Conscience Clause Laws*, CRS REPORT FOR CONGRESS, at 3, Jan. 14, 2005.

³¹ Collins, *supra* note 3, at 48.

³² See Wardle, *supra* note 16, at 178-80.

³³ *Id.* at 179-80.

³⁴ *Id.* at 180; White, *supra* note 22, at 1708.

³⁵ *Conscience Clauses*, MEDICAL ETHICS ADVISOR, *supra* note 8.

³⁶ Rebecca Dresser, *Professionals, Conformity, and Conscience; at Law*, 35 HASTINGS CTR. REP. 9 (Nov. 1, 2005).

³⁷ 745 ILL. COMP. STAT. 70/3 (1977).

(a) "Health care" means any phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons; (b) "Physician" means any person who is licensed by the State of Illinois under the Medical Practice Act of 1987; (c) "Health care personnel" means any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services; (d) "Health care facility" means any public or private hospital,

While the Illinois courts resolve the scope of its existing Right of Conscience Act and the legality of the governor's order, other states have introduced or passed legislation addressing the pharmacists' dilemma.³⁸ In 1988, South Dakota was the first state to allow pharmacists to refuse prescriptions.³⁹ Arkansas, Georgia, and Mississippi also protect the right of pharmacists to refuse to dispense emergency contraceptives for moral and religious reasons.⁴⁰ Recently, nineteen more state legislatures introduced pharmacist refusal clauses.⁴¹ Even Vermont, which did not have a post-*Roe* conscience clause, saw the introduction of a general health care rights of conscience bill that explicitly included pharmacists among the health care personnel protected from civil, criminal, or administrative liability.⁴²

Some fired pharmacists may sue their employers for religious discrimination under Title VII of the 1964 Civil Rights Act, which prohibits discrimination by public and private employers on the basis of religion.⁴³ To establish a *prima facie* case of religious discrimination, the plaintiff must establish that she has a bona fide religious belief that conflicts with her employment, that she brought that belief to her employer's attention, and that she was disciplined for not complying with the employment requirement.⁴⁴ The burden then

clinic, center, medical school, medical training institution, laboratory or diagnostic facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location wherein health care services are provided to any person, including physician organizations and associations, networks, joint ventures, and all other combinations of those organizations.

³⁸ Feder, *supra* note 30, at 3.

³⁹ National Conference of State Legislatures, Pharmacist Conscience Clauses: Laws and Legislation, June 2005, available at <http://www.ncsl.org/programs/health/conscienceclauses.htm> (last visited June 29, 2006) [hereinafter NCSL Website Report]; Wardle, *supra* note 16, at 179 n.5, 182 n.20 (for 1980s statistics).

⁴⁰ Feder, *supra* note 30, at 4; NCSL Website Report, *supra* note 39 (Four states have refusal clauses already written into law: ARK. CODE ANN. § 20-16-304 (West 2005); GA. COMP. R. & REGS. 480-5-.03 (2006); MISS. CODE ANN. § 41-41-215 (2005); S.D. CODIFIED LAWS § 36-11-70 (2005)).

⁴¹ NCSL Website Report, *supra* note 39. See also PLANNED PARENTHOOD FED'N OF AM., SUMMARY OF STATE ACTIONS RELATED TO PHARMACIST REFUSALS, available at <http://www.plannedparenthood.org/pp2/portal/files/portal/media/factsreports/fact-050418-pharmacist-refusals.xml> (last visited May 20, 2006).

⁴² H.B. 183, 2005 Leg. (Vt. 2005), available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/intro/H-183.htm> (introduced in the House but not passed as of this writing) (last visited June 25, 2006).

⁴³ 42 U.S.C. § 2000e-2(a)(1) (2000).

⁴⁴ Sidney A. Rosenzweig, *Restoring Religious Freedom in the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2517 (1996).

shifts to the employer to show either that it offered a reasonable accommodation or that accommodation would pose an undue burden.⁴⁵ The Illinois emergency contraception lawsuits should test the limits of how far a pharmacy must go to accommodate a pharmacist who refuses to dispense a legal drug, especially a legal drug whose availability is required by state regulation.⁴⁶ For example, are employers always required to have back-up pharmacists available to dispense emergency contraception at any hour, or would that pose an undue burden on employers?

II. CONTRACEPTIVE AVAILABILITY

The legislative developments about emergency contraception have not been one-sided, however. Several state legislatures have followed the policy of Governor Blagojevich and introduced legislation that increases access to emergency contraception.⁴⁷ As noted above, the Illinois rule requires any pharmacy that dispenses contraception to distribute emergency contraception without delay.⁴⁸ Four states (California, Missouri, New Jersey, and West Virginia) introduced legislation *requiring* pharmacies to fill prescriptions.⁴⁹ In June 2005, the American Medical Association (AMA) backed such legislation, arguing that “if the pharmacist has objections, pharmacies should provide for an ‘immediate referral to an appropriate alternative dispensing pharmacy without interference.’”⁵⁰ The American Pharmacists Association supports a “refuse-and-refer policy” that protects the rights of both pharmacists and patients.⁵¹ Some pharmacies have adopted similar policies, by which the patient is sent to another pharmacist or pharmacy, in order to ensure patient access

⁴⁵ 42 U.S.C. § 2000e(j) (2000). See Rosenzweig, *supra* note 44, at 2517; Robert A. Caplen, *A Struggle of Biblical Proportions: The Campaign to Enact the Workplace Religious Freedom Act of 2003*, 16 U. FLA. J. L. & PUB. POL’Y 579, 616 (2005) (citing ACLJ Wins Religious Discrimination Case Over “Morning-After” Pill, May 29, 2002, available at http://www.acljlife.org/news/abortion/_aclj_wins_morning_after_suit.asp).

⁴⁶ See Caplen, *supra* note 45, at 617-21 (discussing meaning of religious accommodation in Title VII cases in reproductive health care context); *id.* at 616 (discussing ACLJ lawsuit won by nurse who refused to provide emergency contraception).

⁴⁷ NCSL Website Report, *supra* note 39.

⁴⁸ Feder, *supra* note 30, at 3.

⁴⁹ NCSL Website Report, *supra* note 39.

⁵⁰ Bruce Japsen, *AMA Seeks ‘Must-Fill’ Laws to Force Pharmacists to Accept All Prescriptions*, CHI. TRIB., June 21, 2005, at 3.

⁵¹ Sid Cassese & Ridgely Ochs, *Pushing Pharmacy Referrals*, NEWSDAY, Aug. 23, 2005, at A26.

to their prescriptions.⁵² General state pharmacy laws may also require pharmacists to fill all valid prescriptions.⁵³

These laws have put pressure on some pharmacies. Wal-Mart, for example, had a company policy not to carry Plan B.⁵⁴ Then it was sued in Massachusetts by three women who argued that Wal-Mart's policy violated the Massachusetts Consumer Protection Act, which requires pharmacies to provide "commonly prescribed" medications.⁵⁵ The Massachusetts Board of Pharmacy then ordered all state Wal-Marts to carry emergency contraception,⁵⁶ and Wal-Mart decided it would carry Plan B in all its pharmacies, while allowing pharmacist-employees to refer the prescription to another pharmacist or pharmacy.⁵⁷

In an alternative approach to making emergency contraception more available to consumers, eight states now allow pharmacists to provide emergency contraception without a doctor's prescription.⁵⁸ Those pharmacists usually undergo some additional training or record-keeping to ensure patient safety.⁵⁹ The AMA has also recom-

⁵² *Id.*

⁵³ Feder, *supra* note 30, at 2.

⁵⁴ Michael Barbaro, *Wal-Mart Will Carry Plan B Contraceptive*, HOUS. CHRON., Mar. 4, 2006, at A6.

⁵⁵ See *Registration, Management and Operation of a Pharmacy or Pharmacy Department*, 247 CMR 6.02(4) (2006). ("The pharmacy or pharmacy department shall maintain on the premises at all times a sufficient variety and supply of medicinal chemicals and preparations which are necessary to compound and dispense commonly prescribed medications in accordance with the usual needs of the community."); Bruce Mohl, *Mass. Regulators Examine Chain's Policy on Plan B*, BOSTON GLOBE, Feb. 3, 2006, at E2; Bruce Mohl, *Women File Complaint Against Wal-Mart; Group also Sues Over Failure to Sell Morning-After Pill*, BOSTON GLOBE, Feb. 2, 2006, at D3.

⁵⁶ Andrew Wood, *Wal-Mart Ordered to Carry Emergency Contraceptive Pills in Massachusetts*, Feb. 14, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/02/wal-mart-ordered-to-carry-emergency.php> (last visited June 29, 2006).

⁵⁷ Barbaro, *supra* note 54, at A6.

⁵⁸ States Pass Laws Allowing Pharmacists to Prescribe Plan B, FDA WEEK, Nov. 25, 2005, at 47 (stating that Hawaii, Alaska, Washington, California, New Mexico, New Hampshire, Massachusetts, and Maine allow Plan B Prescriptions); David Goldstein, *Battle over 'Morning-after Pill' Another Collision of Politics, Religion*, THE MERCURY NEWS, Nov. 20, 2005, available at <http://www.mercurynews.com/mlid/mercurynews/news/politics/13220321.htm>; HENRY J. KAISER FAM. FOUND., PHARMACY PROVISION OF EMERGENCY CONTRACEPTION TO WOMEN WITHOUT A DOCTOR'S PRESCRIPTION, Jan. 1, 2006, http://www.statehealthfacts.org/cgi-bin/healthfacts.cgi?action=compare&category=women%27s+Health&subcategory=Emergency+Contraception&topic=Pharmacist+Provision+of+EC&link_category=&link_subcategory=&link_topic=&viewas=&showregions=0&&sortby=&datatype=&welcome=0 (last visited May 24, 2006).

⁵⁹ States Pass Laws Allowing Pharmacists to Prescribe Plan B, FDA WEEK, Nov. 25, 2005, at 47.

mended that physicians be allowed to distribute medicine when pharmacists are not available to do so.⁶⁰

The state disputes also attracted the attention of the United States Congress, where bills protecting consumer access to contraceptives were introduced in both the House and the Senate.⁶¹ These "Access to Legal Pharmaceuticals Acts" required pharmacies to find another pharmacist to fill the prescription without delay or within four hours of the first pharmacist's refusal and created a private right of action for individuals denied contraception.⁶² While recognizing both the individual's right to belief and worship and to access legal contraception, the bills found that "an individual's right to religious belief and worship cannot impede an individual's access to legal prescriptions, including contraception."⁶³ As in the states, however, the congressional reaction has not been one-sided; an Illinois congressman who disagreed with the governor's order began an investigation of the policy because it may unfairly coerce pharmacists to act against their consciences.⁶⁴

The easiest way to make emergency contraception available to consumers without delay is to sell it over-the-counter, without a prescription.⁶⁵ This allows more women access to use the drug the morning after. Plan B is most effective if used within twenty-four hours of sexual intercourse.⁶⁶ In 2003, Barr Pharmaceuticals applied for FDA approval to make Plan B available over-the-counter.⁶⁷ Although an FDA advisory panel voted 23-4 to grant the application, the FDA rejected it.⁶⁸ That rejection was controversial, sparking complaints that the FDA directors had acted politically instead of

⁶⁰ Carol Ukens, *Docs Want To Dispense if Pharmacists Won't*, 149 DRUG TOPICS 14, July 25, 2005, at 20.

⁶¹ Feder, *supra* note 30, at 1.

⁶² *Id.* at 2 (stating the intended purposes for H.R. 1539—a pharmacist must ensure that a refused prescription be filled elsewhere within four hours and H.R. 1652 and S. 809—pharmacists must fill prescriptions without delay).

⁶³ 151 Cong. Rec. 83655.53685 (2005).

⁶⁴ See U.S. House Investigates Government Coercion Violating Pharmacists' Conscience Rights, LifeSiteNews.com, July 26, 2005, available at <http://www.lifesite.net/ldn/2005/jul/05072607.html> (last visited June 25, 2006).

⁶⁵ Mike Dorning, *Morning-After Pill Fight Pits Science vs. Policy*, CHI. TRIB., Nov. 14, 2005, at CN 1.

⁶⁶ *Id.*

⁶⁷ Todd Ackerman, *FDA Choice On Morning-After Pill Imminent*, HOUS. CHRON., Aug. 22, 2005, at A1.

⁶⁸ *Id.*

scientifically.⁶⁹ After Barr resubmitted its application, including a new provision requiring a prescription for girls age sixteen and under, the FDA delayed any decision on Plan B for a period of further study.⁷⁰ The director of women's health at the FDA, Susan Wood, resigned to protest the agency's rejection of the staff's scientific findings.⁷¹ She later accused the Acting Commissioner of the FDA, Andrew C. von Eschenbach, of being "unable or unwilling to let the science and the scientists guide FDA policy and decisions."⁷² In December 2005, Wisconsin Governor Jim Doyle authorized a lawsuit against the FDA for delaying approval of Plan B,⁷³ and a Brooklyn judge refused to dismiss a lawsuit by the Manhattan Center for Reproductive Rights, arguing that the FDA violated women's rights to privacy and equal protection and missed a statutory deadline for its decision.⁷⁴

Additional questions of conscience have arisen from legislation protecting sexual assault victims' access to emergency contraception, especially in hospital emergency rooms.⁷⁵ Nine states have passed such legislation, which usually provides that the morning-after pill must be available to these victims upon request.⁷⁶ In New York, however, a rape victim was denied emergency contraception at a Catholic hospital because the medication violated the teachings of the Catholic Church.⁷⁷ In Massachusetts, the Bill Providing Timely Access to Emergency Contraception requires hospitals to give victims of sexual assault information about and access to emergency contraception.⁷⁸ Immediately after the legislation passed over the governor's veto, however, the State Department of Public

⁶⁹ Goldstein, *supra* note 58.

⁷⁰ Dorning, *supra* note 65, at CN 1.

⁷¹ Goldstein, *supra* note 58; Jonathan D. Rockoff, *FDA Vet Named to Women's Issues Post; Last Director Quit Over "Morning-After" Pill*, CHI. TRI., Nov. 22, 2005, at C9.

⁷² Susan F. Wood, *Enough of Sorry Politics on Plan B Birth Control*, HOUS. CHRON., Mar. 6, 2006, at B9.

⁷³ Doyle OKs Plan B Suit Against FDA, THE CAPITAL TIMES, Dec. 9, 2005, at 3A.

⁷⁴ Kathleen Kerr, *Contraceptive Suit Still Alive*, NEWSDAY, Dec. 23, 2005, at A54.

⁷⁵ HENRY J. KAISER FAM. FOUND., EMERGENCY ROOM MANDATES TO OFFER/PROVIDE SEXUAL ASSAULT SURVIVORS WITH EMERGENCY CONTRACEPTION, available at <http://statehealthfacts.org/cgi-bin/healthfacts.cgi?action=compare&category=Women's+Health&subcategory=Emergency+Contraception&topic=Emergency+Room+EC+Requirements&gsaview=1> (last visited June 22, 2006).

⁷⁶ *Id.*

⁷⁷ 60 Minutes: Plan B (CBS television broadcast Nov. 27, 2005).

⁷⁸ Scott Helman, *Private Hospitals Exempt on Pill Law*, BOSTON GLOBE, Dec. 7, 2005, at A1; See M.G.L.A. 94C § 19A (2005).

Health ruled that it did not apply to private hospitals.⁷⁹ According to the Department, private hospitals could opt out of coverage because they were governed by an earlier Massachusetts conscience clause that allows private hospitals to refuse for moral or religious reasons to perform abortions.⁸⁰

In Massachusetts, it is uncertain if the new bill invalidates the earlier conscience clause legislation or if hospitals retain the right to opt out of providing emergency contraception to victims of sexual assault.⁸¹ Initially, Governor Mitt Romney sided with the Department of Public Health.⁸² However, when his legal counsel decided that the new law supersedes the old, the governor expressed support for requiring all hospitals to provide access to emergency contraception.⁸³ Litigation is expected to resolve the controversy.⁸⁴

Catholic hospital administrators expressed particular concern about the Massachusetts law.⁸⁵ Because Catholicism teaches that life begins at conception, Plan B's possible prevention of implantation can be viewed as an abortion under church teaching, and therefore distributing Plan B is immoral.⁸⁶ A spokesman for the Massachusetts Catholic Conference argues that the old statute is still valid, while legislators and Massachusetts Attorney General Thomas Reilly believe that all hospitals must follow the new law.⁸⁷

This dispute between Catholic hospitals and Massachusetts state lawmakers is only the latest in a series of Catholic challenges to laws about contraception.⁸⁸ As noted above, abortion was the major focus of the conscience clauses passed during the years immediately after *Roe v. Wade*.⁸⁹ Some states included contraception in their conscience clauses, but most did not.⁹⁰ During the 1990s, however, con-

⁷⁹ Helman, *supra* note 78, at A1.

⁸⁰ MASS. GEN. LAWS ANN. ch. 112, § 12I (West 2005); MASS. GEN. LAWS ANN. ch. 272, § 21B (West 2005).

⁸¹ Helman, *supra* note 78, at A1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Helman, *supra* note 78, at A1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Susan Berke Fogel & Lourdes A. Rivera, *The Current State of Abortion Law and Reproductive Rights: Saying Roe is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 746 (2004).

⁹⁰ See notes 23-26 and accompanying text.

trapection and conscience received renewed attention.⁹¹ After the FDA approved Viagra in 1996, many health insurance policies covered this new drug for men's sexual problems, but health insurance policies still did not cover prescription contraceptives for women.⁹² As a matter of gender equity, about twenty states passed and Congress considered legislation that required employers who provide prescription drug coverage to include contraception in their insurance plans.⁹³ Such legislation provoked demands from employers conscientiously opposed to contraception to be exempt from the laws' requirements.⁹⁴

Most of the state laws included exemptions for religious organizations that are morally opposed to contraception.⁹⁵ California, for example, "exempts from compliance religious employers for whom 'the inculcation of religious values is the purpose of the entity.'"⁹⁶ This means that a Catholic church could qualify for an exemption, while a Catholic hospital would likely not qualify.⁹⁷ Many other states have a broader religious exemption,⁹⁸ while four

⁹¹ Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 741 (2005).

⁹² *Id.* at 746.

⁹³ *Id.* at 747-49.

⁹⁴ Christine Vargas, Note and Comment, *The EPICC Quest for Prescription Contraceptive Insurance Coverage*, 28 AM. J. L. & MED. 455, 463 (2002); HENRY J. KAISER FAM. FOUND., STATE MANDATED BENEFITS: CONTRACEPTIVES (2004), available at <http://statehealthfacts.org/cgi-bin/healthfacts.cgi?action=compare&category=Women's+Health&subcategory=Mandated+Benefits+in+Private+Insurance&topic=contraceptives&gsaview=1> (last visited June 22, 2006). Similar issues were raised by the mergers of Catholic and non-Catholic hospitals. There are now at least seventy-six Catholic hospitals in twenty-six states that are "sole providers," the only accessible hospital in the region. See Stabile, *supra* note 91, at 751; Jason M. Kellhofer, *The Misperception and Misapplication of the First Amendment in the American Pluralistic System? Mergers between Catholic and Non-Catholic Healthcare Systems*, 16 J. OF L. & HEALTH 107 (2001-2002). When Catholic hospitals are involved in these mergers, they usually insist that the church's ethical directives governing health care, including opposition to abortion, sterilization and contraception, govern their conduct. "In about half of the mergers over the past decade, all or some reproductive health services previously provided by the non-Catholic institution have been eliminated." Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 684 (2001). Many communities have seen mergers between Catholic affiliated hospitals and governmental, local hospital districts. For a comprehensive analysis of issues faced when litigation arose in similar situations in Newport, Oregon, see Arthur B. LaFrance, *Merger of Religious and Public Hospitals: Render Unto Caesar* . . . , 3 SEATTLE J. FOR SOC. JUST. 229 (2004).

⁹⁵ Vargas, *supra* note 94, at 461.

⁹⁶ *Id.*; CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(A) (West 2002).

⁹⁷ *Id.*; CAL. HEALTH & SAFETY CODE § 1367.25 (West 2002).

⁹⁸ Vargas, *supra* note 94, at 461-63.

states have no religious exemption.⁹⁹ In North Carolina, religious organizations were exempt from the law, except that they were required to provide Preven, an emergency contraceptive.¹⁰⁰ These exemptions have been challenged in court, not, surprisingly, by proponents of contraception, but by religious groups arguing that the exemptions are too narrow.

Both supporters and opponents of emergency contraception have raised constitutional challenges to all these emergency contraception laws under the Religion Clauses of the First Amendment, which I consider in Part III.

III. CONSTITUTIONAL IMPLICATIONS

A. Free Exercise

Since 1990, free exercise jurisprudence has been dominated by the United States Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁰¹ In that case, the Court denied the Native American petitioners' argument that the State of Oregon violated their Free Exercise rights when it refused to give them unemployment benefits after they were fired for their religious use of peyote.¹⁰² Rejecting the employees' claim that the First Amendment required an exemption from the drug laws for religious practice, Justice Scalia concluded that "the right of Free Exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"¹⁰³ *Smith* put to rest the idea that free exercise requires exemptions of conscience for religious believers.¹⁰⁴ Although Illinois pharmacist Luke Vander Bleek claims a right to conscientious objection to the law, for example, it is not a constitutional right of Free Exercise as long as contraceptive laws are valid and neutral laws of general applicability.¹⁰⁵ According to *Smith*,

⁹⁹ *Id.* at 463. The states are New Hampshire, Georgia, Vermont, and Washington. *Id.*

¹⁰⁰ *Id.* at 462.

¹⁰¹ *Employment Div., Dep't. of Human Res. v. Smith*, 494 U.S. 872 (1990).

¹⁰² *Id.* at 879.

¹⁰³ *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

¹⁰⁴ *Id.* at 890.

¹⁰⁵ See notes 9-13 and accompanying text; Vargas, *supra* note 94, at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

each conscience must not become a "law unto itself," but is instead obligated to follow the law.¹⁰⁶

Despite *Smith*, Catholic Charities, a Roman Catholic social services organization, attacked the state statutes that required employers to provide contraceptive coverage in their insurance plans as a violation of free exercise.¹⁰⁷ According to one of Charities' defenders:

Religious organizations cannot condemn something as immoral, and then fund that very immoral act through their institutions. Indeed, they have a right not to propound a view contrary to their beliefs. . . . Regulatory mandates, if upheld, would void this constitutional tenet by forcing Catholic agencies to fund something that contravenes its body of Catholic teaching.¹⁰⁸

Courts in New York and California rejected those Free Exercise challenges, however, because the women's health laws were neutral laws of general applicability under *Smith*.¹⁰⁹ Neither individual pharmacists nor religious organizations possess a constitutional right to exemption from the law.

Under *Smith*, however, legislatures, not courts, may still grant religious believers exemptions.¹¹⁰ Justice Scalia argued in *Smith* that such exemptions are accommodations of religion that are appropriately granted by the legislature:

It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹¹¹

Thus, the Court's Free Exercise jurisprudence does not automatically prevent Congress and the state legislatures from exempting religious institutions and individuals from the law of abortion,

¹⁰⁶ *Smith*, 494 U.S. at 893.

¹⁰⁷ Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125 (2003).

¹⁰⁸ *Id.*

¹⁰⁹ See *Catholic Charities of the Diocese of Albany v. Serio*, 808 N.Y.S.2d 447, 454-55 (2006). See also *Catholic Charities of Sacramento v. Superior Court*, 32 Cal. 4th 527, 549-52 (Cal. 2004).

¹¹⁰ *Smith*, 494 U.S. at 890.

¹¹¹ *Id.*

sterilization, or contraception, as they have done since *Roe v. Wade* in the conscience clauses reviewed in Part I.

Ironically, it was Catholic Charities, not the contraception supporters, that challenged the religious exemption that the state legislatures wrote into the women's health acts, arguing that it was too narrow and unconstitutionally excluded Catholic Charities from coverage.¹¹² The acts contained an exemption for the religious employer, defined as:

an entity for which each of the following is true: (A) The inculcation of religious values is the purpose of the entity. (B) The entity primarily employs persons who share the religious tenets of the entity. (C) The entity serves primarily persons who share the religious tenets of the entity. (D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii of the Internal Revenue Code.¹¹³

The exemption thus covered churches, mosques and synagogues, but not all the hospitals and other service agencies run by religious groups. Because Catholic Charities, which hires and serves numerous non-Catholics in its social services agencies, did not qualify for the exemption, it challenged the statute's constitutionality, arguing both that it was not neutral because it defined religion and that it was enacted with an animus against Roman Catholicism.¹¹⁴ The California Supreme Court, however, rejected that Free Exercise argument, ruling that constitutional challenges to exemptions should be brought under the Establishment Clause.¹¹⁵

B. Establishment

The Establishment argument against exemptions is that they give religions special benefits that non-religious individuals and organizations do not enjoy, and therefore violate "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion."¹¹⁶ The Supreme Court has upheld some accommodations of religion against Establishment challenge because they promote Free Exercise, the competing First Amendment value. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, a building janitor

¹¹² See *supra* note 109.

¹¹³ *Catholic Charities*, 32 Cal. 4th at 539. See also *Serio*, 808 N.Y.S.2d at 452.

¹¹⁴ *Catholic Charities*, 32 Cal. 4th at 538-43.

¹¹⁵ *Id.* at 551.

¹¹⁶ Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 703 (1994) (citing *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1963); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 216-17 (1968)).

who worked for a gymnasium run by the Mormon Church was fired because he did not qualify as a member of the church.¹¹⁷ He then sued for religious discrimination under Title VII, making the same claim that today's fired pharmacists allege, namely that he was discriminated against because of his religious beliefs.¹¹⁸

At issue in *Amos* was the provision of Title VII that exempts religious organizations from lawsuits for religious discrimination and thus allows them to favor members of their own religion in hiring.¹¹⁹ In *Amos*, the Court upheld the exemption that forbade Mayson to sue for religious discrimination, explaining that "[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."¹²⁰ For this reason, many legislative accommodations of religion, including conscience clauses, have been upheld under the Establishment Clause, even though Free Exercise does not require them. In *Amos*, the Court accepted the validity of Congress' purpose to prevent the government from interfering too much in religious organizations' decisions about hiring.¹²¹ Both Congress and the Court believed that to force the Mormon Church to hire Catholics or Jews instead of Mormons would violate religious liberty.¹²² The California Supreme Court relied on *Amos* to reach its conclusion that allowing the prescription contraception exemption to churches, but not social service organizations, was an accommodation of religion that did not violate Establishment or Free Exercise.¹²³

Both *Amos* and *Catholic Charities* involved exemptions of *all* religions from the law that applied to non-religious organizations; it would clearly violate the Establishment Clause for Congress to exempt only the Mormon Church from Title VII, or for New York or California to free only the Catholic Church from the requirements of the women's health acts.¹²⁴ Catholic Charities lost its argument that the definition of religion in the exemption discriminated against re-

¹¹⁷ Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987).

¹¹⁸ See *id.* at 331.

¹¹⁹ *Id.* at 327; 42 U.S.C. § 2000e-1 (West 2006).

¹²⁰ *Amos*, 483 U.S. at 334 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987)).

¹²¹ *Id.*

¹²² *Id.* at 340.

¹²³ *Catholic Charities of Sacramento v. Superior Court*, 32 Cal. 4th 527, 551-52 (2004).

¹²⁴ See note 117.

ligions that have service ministries and favored religions that do not, but the argument was colorable because the government is not allowed to favor some religions over others.¹²⁵

Instead of the exemption chosen, the California and New York legislatures could have passed exemptions broad enough to include Catholic Charities. This would have freed all religious social service organizations, including hospitals, from any obligation to comply with the laws affecting women's reproductive health. *Amos* upheld the exemption of the secular, nonprofit activities of a religious organization from Title VII, finding no Establishment Clause violation in the dismissal of the building engineer's lawsuit at a gymnasium.¹²⁶ Several justices in *Amos* emphasized that the gymnasium was *non-profit*, and that a different constitutional rule might apply to the *for-profit* activities of religions. Catholic Charities is a nonprofit organization, and, therefore, an exemption that included Catholic Charities would appear to be constitutional under *Amos*. However, if the religions were operating for-profit organizations, they would seem to fall outside of *Amos*' protection and, therefore, be subject to discrimination suits.¹²⁷

Justice O'Connor's concurrence in *Amos* explained the significance of the non-profit and for-profit distinction when she wrote that "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause.¹²⁸ In order to clarify when such unlawful fostering of religion occurs, she identified two legal extremes to be avoided, namely the invalidation of all accommodations of religion (which would "undermine Free Exercise") and "judicial deference to all legislation that purports to facilitate the free exercise of religion, [which] would completely vitiate the Establishment Clause."¹²⁹ O'Connor worried that *Amos* leaned toward the latter option of too much deference.¹³⁰ At some point the accommodation of religion allowed under Free Exer-

¹²⁵ See *Catholic Charities*, 32 Cal. 4th. at 544-45.

¹²⁶ *Amos*, 483 U.S. at 339.

¹²⁷ See *Amos* language emphasizing non-profit point, including Brennan and O'Connor concurrences, 483 U.S. at 348-49. O'Connor writes, "While I express no opinion on the issue, I emphasize that under the holding of the Court, and under my view of the appropriate Establishment Clause analysis, the question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open." *Id.*

¹²⁸ *Id.* at 334-35 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)).

¹²⁹ *Id.* at 346-47 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring in judgment)).

¹³⁰ *Id.* at 347.

cise crosses the line to advance religion in a manner prohibited by the Establishment Clause.¹³¹

For Justice O'Connor, that line is crossed when an objective observer would perceive that the government is endorsing religion.¹³² This "endorsement" test was her interpretation of the Court's earlier *Lemon* standard, a three-part test used to determine if the government's action violates the Establishment Clause.¹³³ "To pass constitutional muster under *Lemon* a statute must not only have a secular purpose and not foster excessive entanglement of government with religion, its primary effect must not advance or inhibit religion."¹³⁴

Recall that *Amos* involved the accommodation of the firing decisions of a religious organization.¹³⁵ The accommodation of pharmacists' consciences takes place in secular pharmacies, where religious individuals claim religious discrimination if they are fired or demoted for refusal to fill or refer their client's prescriptions for emergency contraception. In the secular employment context, the Supreme Court has held, in *Estate of Thornton v. Caldor*, that a statute that gives an employee an "absolute and unqualified right not to work on their Sabbath" violates the Establishment Clause.¹³⁶ The context was a Connecticut law stating that no employee who identified a Sabbath could be required by an employer to work on that day.¹³⁷ That statute was unconstitutional because it impermissibly advanced religion under *Lemon* by absolutely preferring the employee's religious interest to the employer's secular interest.¹³⁸ Under *Caldor*, a religious pharmacist should not be given absolute preference over the pharmacist's employment decisions and fellow employees. To do so would unduly favor, or establish, religion.

In her *Caldor* concurrence, Justice O'Connor observed that the religious discrimination provisions of Title VII,¹³⁹ the ones that allow employees to sue employers for religious discrimination, could withstand constitutional scrutiny:

¹³¹ *Id.* at 346-47.

¹³² *Id.* at 348.

¹³³ *Id.* at 133.

¹³⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹³⁵ *Amos*, 483 U.S. at 330.

¹³⁶ *Caldor*, 472 U.S. at 708-709.

¹³⁷ *Id.*

¹³⁸ See *Caldor*, 472 U.S. at 708, 710.

¹³⁹ See *supra* notes 43-45 and accompanying text.

[s]ince Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.¹⁴⁰

Is Title VII an anti-discrimination law, or is it an endorsement of religion or a particular religious practice? Could protections of conscience cross the line to the endorsement or advancing of religion prohibited by the Establishment Clause? They could. The dispute about emergency contraception pits scientific data about legal pharmaceuticals against theological interpretations of when life begins, the constitutional right of privacy (under *Griswold*) against free exercise. Recall Dr. Wood's complaint that the FDA was not basing its policy decisions about emergency contraception on science; link that situation to the growing popularity of conscience clauses for religious employees. If the state and federal governments employ conscience clause protection to undermine secular employment and privacy laws, then an objective observer may witness, not the passage of anti-discrimination laws, but the endorsement of a particular religious practice, or the advancing of religion, or the favoring of one religious view (that life begins at conception) over others—under any test vitiating the Establishment Clause.

Moreover, extensive exemptions would liberate religious pharmacists from neutral laws of general applicability and thus make each pharmacist a law unto himself, precisely the opposite of what *Smith* desired. Although *Smith* permits legislative accommodations, they should remain limited by the demands of the Establishment Clause. With the expansion of conscience clauses since the 1990s¹⁴¹ and the new demand for pharmacists' conscience clauses in 2005,¹⁴² the risk is growing that the law of emergency contraception will become the law of refusal to provide emergency contraception, and that the accommodation of conscience may devolve into a fostering of religion.

For this reason, there is constitutional sense, as well as common sense, to state requirements, such as Illinois', that pharmacies must, at a minimum, have procedures in place that provide for another pharmacist who can fill the prescription "without delay,"¹⁴³ so

¹⁴⁰ See *Caldor*, 472 U.S. at 712.

¹⁴¹ See Wardle, *supra* note 16.

¹⁴² See *supra* Part I.

¹⁴³ ILL. ADMIN. CODE tit. 68 § 1330.91(j)(1) (2006).

that no individual pharmacist may become a “law unto himself”¹⁴⁴ by blocking the law of emergency contraception.

¹⁴⁴ *Employment Div., Dep't. of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)).