THE RIGHT TO CONSCIENCE AND THE FIRST AMENDMENT

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INTRODUCTION[1]

As of January 1, 2010, Wisconsin law requires that employers who provide health insurance plans that cover prescription drugs also provide coverage for contraceptives, even when providing such coverage violates the employers' religious beliefs.[2] This law was strongly opposed by the Wisconsin Catholic Conference, which stated: "[W]e strongly object to this blatant insensitivity to our moral values and legal rights."[3] After efforts to offer a self-insured plan were abandoned, in August 2010, the Diocese of Madison began offering coverage for contraceptives. The Diocese, however, warned its employees that using the benefit could lead to their termination.[4]

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1. This paper draws from several previously published articles of mine on the right to conscience in health care. *See* Richard S. Myers, *Assessing the Legal Bases for Conscientious Objection in Healthcare*, *in* LIFE AND LEARNING XVIII: THE PROCEEDINGS OF THE EIGHTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE (forthcoming) [hereinafter *Legal Bases for Conscientious Objection*]; Richard S. Myers, *Current Legal Issues Regarding Rights to Conscience in Health Care*, 16 JOSEPHINUM J. THEOLOGY 394, 394–410 (2009) [hereinafter *Current Legal Issues*]; Richard S. Myers, *United States Law and Conscientious Objection in Healthcare*, *in* COOPERATION, COMPLICITY AND CONSCIENCE: PROBLEMS IN HEALTHCARE, SCIENCE, LAW AND PUBLIC POLICY 296, 296–315 (Helen Watt ed., 2005). To avoid multiplying footnotes, I will not always indicate when I have drawn from these articles. The right to conscience can extend beyond claims rooted in religious belief but I will limit my treatment to religious conscience.

2. *See Insurance Coverage for Contraception Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 2010), http://www.ncsl.org/default.aspx?tabid=14384.

3. Wis. Catholic Conf., *Statement on Insurance Mandate for Contraceptive Services* 1 (2009), http://www.dioceseoflacrosse.com/ministry_resources/ministries/NEW_site/social%20Concerns/Pro-Life/Statement%2520on%2520Contraceptive%2520Mandate%252008-17-09%2520final[1].pdf. *See also* Press Release, Wis. Catholic Conf., Bishops Write Joint Letter on Insurance Mandate to Cover Contraception 1 (Aug. 17, 2009), http://www.wisconsincatholic.org/Insurance%20Mandate%20August%2017,%202009.pdf.

4. Peter J. Smith, *Wisc. Catholic Diocese Will Fire Employees Using State-Mandated Birth Control Services*, LIFESITENEWS.COM, (Aug. 12, 2010) http://www.lifesitenews.com/ldn/2010/aug/10081210.html.

As this example illustrates, the issue of the right to conscience in health care is among the most contentious in American society. Health-care professionals and institutions with traditional moral views on issues such as abortion and contraception are increasingly under attack. These professionals and institutions are finding it increasingly difficult to both comply with their legal and professional responsibilities and adhere to their moral beliefs. These professionals and institutions are increasingly asserting a right to conscience as a way of seeking an exemption from various mandates.

This paper explores the current state of the right to conscience in health care. Most of the paper focuses on the First Amendment law on this topic. It has become increasingly clear that the United States Constitution provides very little protection for religious liberty in this context. Although I support conscience rights under certain circumstances, I largely agree that the source of these rights should not be the First Amendment. Properly interpreted, the First Amendment does not generally provide a basis for conscience rights.

In addition, I think the push for a broad right to conscience, as a matter of federal constitutional law, might be counterproductive. Such advocacy may contribute to the privatization of religion and to the undermining of sound ideas of public morality.

Nevertheless, there are sound arguments to support legal (if not federal constitutional) protection for conscience rights. The source of these rights should rather be based on sub-constitutional protection developed on a case-by-case basis. These protections—largely statutory protections adopted on a case-by-case basis—do offer hope for significant protection for conscience and advocacy. The moral views reflected in these claims of conscience may in the long run help to largely eliminate the need for conscience rights.

I. FREE EXERCISE ARGUMENTS FOR CONSCIENCE

A. *Supreme Court Case Law*

The First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[5] It is due in part to this constitutional

5. U.S. CONST. amend. I.

amendment that the United States is associated with the idea of religious liberty.[6]

Yet, as a matter of constitutional law there is very little support for the idea that the First Amendment provides a basis for a right to conscience. There is little support for the idea that there is a right to constitutionally compelled exemption when a state mandate burdens religious liberty. *Reynolds v. United States*,[7] the 1879 case in which the U.S. Supreme Court rejected a religious defense to a bigamy prosecution, provides a good example. The Court stated that as a result of the First Amendment "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[8] The Court thought it clear that it was within the scope of governmental powers to set forth rules regulating marriage. The Court stated: "[I]t is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."[9] "[T]he only question [the Court posed] . . . is[] whether those who make polygamy a part of their religion are excepted from the operation of the statute."[10] According to the Court, to allow a religious defense "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[11] This basic position—that the free exercise clause does not require an exemption from laws prohibiting "acts inimical to the peace, good order and morals of society"[12] —remained good law until the early 1960s.[13]

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6. *See Current Legal Issues*, *supra* note 1, at 395–96.

7. 98 U.S. 145, 145 (1879).

8. *Id.* at 164.

9. *Id.* at 166.

10. *Id.*

11. *Id.* at 167.

12. Davis v. Beason, 133 U.S. 333, 342 (1890).

13. *See* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 500–01 (2009); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 561 (1998); Lino Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 8–9 (1996). As Professor Graglia concludes, "[a]t this point [1961], …the Court's position remained consistent with the original understanding of the Free Exercise Clause as described in *Reynolds*." *Id.* at 9. By 1961, though, the Court seemed to be moving away from *Reynolds*. In *Braunfield v. Brown, Commissioner of Police of Philadelphia*, 366 U.S. 599, 607 (1961) (plurality opinion), the Court, in rejecting a claim that Orthodox Jewish merchants ought to be exempt from a Sunday closing law, stated:

The Court's approach changed markedly in the 1960s and early 1970s with cases such as *Sherbert v. Verner*[14] and *Wisconsin v. Yoder*.[15] The dates are significant. This development with regard to free exercise occurred at the time of cases such as *Griswold v. Connecticut*[16] and *Roe v. Wade*.[17] This was an era when philosophical liberalism had a profound influence on Supreme Court decision-making.[18] In fact, Professor Bradley concludes that the constitutionally compelled exemption doctrine of *Sherbert* is properly understood as "one aspect of the post-World War II takeover of our civil liberties corpus by the political morality of liberal individualism."[19]

In *Sherbert v. Verner*,[20] the Court held that it violated the free exercise clause to deny unemployment compensation benefits to a Seventh-Day Adventist who refused to work on Saturday—the Sabbath Day of her faith.[21] The Court found that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[22] The Court then found that this penalty could not be justified. In so holding, the Court applied strict scrutiny. This meant that the Court said that it was necessary to "consider whe-

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> If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. at 607. The opinion by Chief Justice Warren seemed to be adopting a balancing approach to free exercise issues, although in 1961 this was still far removed from the strict scrutiny approach the Court would adopt in 1963. *See Braunfield*, 366 U.S. at 610–16 (Brennan, J., concurring and dissenting) (criticizing Chief Justice Warren's opinion for adopting an excessively deferential approach to the religious exemption issue).

14. 374 U.S. 398 (1963).

15. 406 U.S. 205 (1972).

16. 381 U.S. 479 (1965).

17. 410 U.S. 113 (1973).

18. *See* Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law,* 6 AVE MARIA L. REV. 61, 67–68 (2007) [hereinafter Myers, *Pope John Paul II*]; Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 60–79 (1991); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 301–18 (1991).

19. Bradley, *supra* note 18, at 248.

20. 374 U.S. 398 (1963).

21. *Id.* at 399, 406.

22. *Id.* at 406.

ther some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."[23] Justice Harlan's dissent maintained that the Court held "that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions."[24] Since that time, the Court has adhered to *Sherbert* in other similar cases involving unemployment compensation.[25]

In *Wisconsin v. Yoder*,[26] the Court held that Wisconsin's compulsory school-attendance law (which required children of ages between 7 and 16 to attend school) was unconstitutional as applied to Amish parents who refused to send their children to public schools after they completed the eighth grade.[27] The Court again applied strict scrutiny.[28] "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[29] Some have celebrated *Wisconsin v. Yoder*'s broad language. For example, Judge Noonan stated: "Conscience won, exempted from compliance with the rule that everyone else had to follow. The trajectory towards the absolute was evident."[30] Yet, although *Yoder* is viewed as the high watermark of free exercise protection, the ruling was in reality quite narrow. The *Yoder* Court mentioned that,

> [i]n light of this convincing showing [of the impact the statute had on the Amish way of life and the adequacy of the educational alternatives the Amish provided to their children], one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory

23. *Id.*

24. *Id.* at 420 (Harlan, J., dissenting).

25. *See* Frazee v. Ill. Dep't. of Emp't Sec., 489 U.S. 829, 831–33 (1989); Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 136, 139–46 (1987); Thomas v. Review Bd., 450 U.S. 707, 713, 716–720 (1981).

26. 406 U.S. 205 (1972).

27. *Id.* at 207–08, 230–36.

28. *Id.* at 214.

29. *Id.* at 215.

30. John T. Noonan, Jr., *Religious Liberty at the Stake*, 84 VA. L. REV. 459, 467 (1998).

> education would be adversely affected by granting an exemption to the Amish.[31]

Even in the context of parental control of education, *Yoder* has had limited impact.[32]

Sherbert and *Yoder*, which used strict scrutiny and concluded that the states' actions violated the free exercise clause, are the principal supports for the idea that the free exercise clause provides strong protection for a right to conscience. Under *Sherbert* and *Yoder*, religious claimants are sometimes entitled to a constitutionally compelled exemption from state mandates. Yet, despite the Court's ostensible use of the most demanding constitutional scrutiny, most free exercise claimants, even during the heyday of the *Sherbert-Yoder* regime, lost their suits. As one commentator described the situation, during this era this test was "strict in theory, but ever-so-gentle in fact . . . ."[33]

Prior to 1990, the Court consistently rejected free exercise claims. Sometimes the Court found that the government was able to satisfy the strict scrutiny standard,[34] even though the Court's treatment in these cases seemed less demanding than the typical view of what that standard contemplated.[35] Sometimes the Court did not apply strict scrutiny because it concluded that the claimant had not satisfied the

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31. *Yoder*, 406 U.S. at 235–36.

32. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1067 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066, 1066 (1988), provides a good illustration of *Yoder*'s limited impact. In *Mozert*, a federal district court concluded that a public school requirement that all students use prescribed reading books violated the constitutional rights of objecting parents and students. Mozert v. Hawkins Cnty. Pub. Sch., 647 F. Supp. 1194, 1204 (E.D. Tenn. 1986). The Sixth Circuit reversed on the grounds that being forced to read the series did not constitute a burden. *Mozert*, 827 F.2d at 1070. *See also* Parker v. Hurley, 514 F.3d 87, 98–100 (1st Cir. 2008) (recognizing no cognizable burden when children were required to be exposed to books promoting gay marriage). Even if they regard a government mandate as a burden, the courts are willing to find that the government's interest is strong enough to outweigh the free exercise interest. *See Mozert*, 827 F.2d at 1070–71 (Kennedy, J., concurring). *See generally* Richard S. Myers, *Same-Sex Marriage, Education, and Parental Rights*, BYU EDUC. & L.J. (forthcoming Summer 2011); Richard S. Myers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63, 84–87 (1996).

33. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992); *see* Richard S. Myers, *Curriculum in the Public Schools: The Need for an Emphasis on Parental Control*, 24 VAL. U. L. REV. 431, 436 (1990).

34. Bob Jones Univ. v. United States, 461 U.S. 574, 592–96 (1983); United States v. Lee, 455 U.S. 252, 257–60 (1982).

35. *See, e.g.*, Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 323–25.

threshold requirement of demonstrating a cognizable burden.[36] Sometimes the Court refused to apply strict scrutiny because the case arose in a special context such as the military[37] or a prison.[38] Whatever the rationale, the basic message of these cases seemed clear to most observers—strict scrutiny under the free exercise clause was not being used in a rigorous manner.[39] The constitutionally compelled exemption doctrine was given a very limited scope.

Thus, the Court's landmark 1990 decision in *Employment Division v. Smith*[40] was not as momentous as it is sometimes claimed.[41] "The Court in *Smith* did abandon strict scrutiny in most cases but the practical impact of the decision was not that dramatic because free exercise claimants typically lost even when the Court purportedly applied strict scrutiny."[42]

In *Smith*, the Court made it clear that the free exercise clause provides very little judicially enforceable protection against laws that mandate conduct that might be viewed as interfering with the religious liberty of an individual or an institution. If the state mandate is a "neutral law of general applicability,"[43] then (under current law) there is no realistic argument that the Constitution provides any basis to resist the mandate. *Smith* involved two individuals who were denied unemployment compensation because of work-related misconduct. The workers were fired from their jobs with a drug rehabilitation organization due to their use of peyote, an illegal drug, even though they used peyote for religious purposes. The Court, in an opinion by Justice Scalia, concluded that Oregon could "include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug . . . ."[44] To allow an exemption from laws prohib-

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36. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447–54 (1988), Bowen v. Roy, 476 U.S. 693, 699–704 (1986).

37. Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (military context).

38. O'Lone v. Estate of Shabazz, 482 U.S. 342, 344–45 (1987) (prison context).

39. As Michael McConnell stated: "The doctrine was supportive, but its enforcement was half-hearted or worse." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127–28 (1992).

40. 494 U.S. 872 (1990).

41. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (claiming that the decision was "undoubtedly the most important development in the law of religious freedom in decades.").

42. *See Current Legal Issues*, *supra* note 1, at 397.

43. *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

44. *Id.* at 874.

iting "socially harmful conduct"[45] would allow an individual with a religious objection to such laws "to become a law unto himself."[46]

Justice O'Connor's concurring opinion in *Smith* demonstrates the weakness of the test the Court used in the *Sherbert-Yoder* era. Justice O'Connor disagreed with the majority's rejection of the constitutionally compelled exemption doctrine and applied the strict scrutiny test of *Sherbert* and *Yoder*. Under this approach, Justice O'Connor rejected the free exercise claim because she concluded that Oregon had "a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct 'will unduly interfere with fulfillment of the governmental interest.'"[47] As Justice Blackmun's dissent, joined by Justices Brennan and Marshall, made clear, a more conventional application of strict scrutiny would have led to a different result.[48]

Under the approach of the majority in *Smith*, so long as the state mandate is a neutral law of general applicability, there is no prospect of a court finding that someone with a religious objection to the mandate is entitled to an exemption.[49] One seeking an exemption from such a mandate would be limited to seeking relief from the legislature. Justice Scalia noted that

> leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; [he concluded, though] . . . [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.[50]

If a state mandate is not viewed as a "neutral law of general applicability," then the state must satisfy the strict scrutiny test, which means (as *Sherbert* and *Yoder* stated) that the mandate must be narrowly tailored to meet a compelling government interest. How to

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45. *Id.* at 885.

46. *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

47. *Id.* at 907 (O'Connor, J., concurring) (quoting *Lee*, 455 U.S. at 259).

48. *Id.* at 907–21 (Blackmun, J., dissenting).

49. *See also* Christian Legal Society v. Martinez, No. 08-1371, 2010 U.S. LEXIS 5367 (June 28, 2010), in which the Court summarily rejected a free exercise argument. The Court noted claims for religious exemptions are without merit because under the view set forth in *Smith* "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct." *Id.* at *64 n. 27.

50. *Smith*, 494 U.S. at 890.

decide whether a law falls outside the "neutral law of general applicability" category is an unsettled question.[51] The one Supreme Court case on the issue—*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[52]—involved local laws that a unanimous Supreme Court thought were directed at outlawing animal sacrifice as practiced by the Santeria religion.[53] Under the local laws, one could kill an animal for almost any reason except for a religious one, and the laws, therefore, were treated and invalidated as a transparent effort to shut down a religion. Most courts have interpreted *Lukumi* narrowly, and so this escape from the *Smith* rule does not provide much support for a right to conscience in health care.[54]

B. *Recent Lower Court Cases*

As a result of *Smith*, it is clear that most constitutional claims to a right to conscience in health care will be rejected. A few examples will suffice to make the point. Many states now require that employers that provide their employees with health or disability insurance coverage that includes prescription drug benefits must also include prescription contraceptives in the coverage. These laws typically apply even to most employers with a religious objection to providing such coverage. As long as the contraceptive mandate is applied across the board, those employers with a religious objection to providing such coverage do not have much of a chance of resisting these mandates. In separate suits brought by Catholic Charities of Sacramento and Catholic Charities of the Diocese of Albany, the highest courts of California and New York rejected the religious freedom claims.[55] Both courts rejected claims under the United States Constitution on the authority of *Smith*.[56] The courts viewed the contraceptive mandates as neutral laws of general applicability.[57] The California Supreme Court rejected significant evidence that the mandate was targeted at the Catholic Church and applied *Smith* in easily rejecting the federal

51. *See Current Legal Issues*, *supra* note 1, at 398 & n.25.

52. 508 U.S. 520 (1993).

53. *Id.* at 524. *But see* Graglia, *supra* note 13, at 31–32.

54. *See Current Legal Issues*, *supra* note 1, at 398.

55. Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento Cnty., 85 P.3d 67, 81–84 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 463–65 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007).

56. *Charities of Sacramento*, 85 P.3d at 81–89; *Charities of Albany*, 859 N.E.2d at 463–65.

57. *Charities of Sacramento*, 85 P.3d at 82–87; *Charities of Albany*, 859 N.E.2d at 463–65.

constitutional claim.[58] The courts also rejected claims under their respective state constitutions, which were thought to provide stronger protection for religious liberty than is available under the *Smith* case.[59] The state courts concluded that the state interest involved (in eradicating gender discrimination with regard to health care) was sufficient to outweigh any burden on religious freedom.[60]

There are two other recent cases that deserve to be mentioned. In *Storman's Inc. v. Selecky*,[61] the United States Court of Appeals for the Ninth Circuit refused to enjoin the enforcement of regulations in the State of Washington that required pharmacies to dispense Plan B contraceptives, the so-called "morning after pill."[62] The federal district court had enjoined the regulations because the court thought that the regulations targeted religious practice and therefore fell outside the *Smith* rule.[63] The federal court of appeals reversed this ruling. In so holding, the court emphasized that the regulations were not focused only on those with a religious objection to filling the prescriptions in question. As the court of appeals explained, under current law it does not matter if those with religious objections are disproportionately affected. In addition, the court did not believe that the legislative history supported the claim that state regulations were enacted with a single purpose of burdening religious practice.[64]

In *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*,[65] the California Supreme Court rejected the argument that there was a free exercise defense to compliance with California's law prohibiting discrimination based on a person's sexual orientation.[66] The facts of the case are in dispute but the California

58. *Charities of Sacramento*, 85 P.3d at 84–87.

59. *Charities of Sacramento*, 85 P.3d at 89–94; *Charities of Albany*, 859 N.E.2d at 465–68.

60. *Charities of Sacramento*, 85 P.3d at 91–94; *Charities of Albany*, 859 N.E.2d at 468.

61. 586 F.3d 1109 (9th Cir. 2009).

62. *Id.* at 1140–42.

63. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1257 (W.D. Wash. 2007), *rev'd*, 586 F.3d 1109 (9th Cir. 2009).

64. *Stormans*, 586 F.3d at 1133–34. The Ninth Circuit remanded for application of the rational basis test. *Id.* at 1137–38, 41. In July 2010, the parties asked the federal district court judge to whom the case had been remanded to stay the trial. The Washington Board of Pharmacy is considering revising its regulations to reduce the impact on pharmacists with a conscientious objection to dispensing Plan B contraceptives. According to press reports, the revised regulations would permit pharmacists to refer a patient to a different pharmacy. Joel Connelly, *Rights in Conflict: At Your Drugstore*, SEATTLEPI.COM (Aug. 5, 2010), http://www.seattlepi.com/connelly/424625_JOEL06.html.

65. 189 P.3d 959 (Cal. 2008).

66. *Id.* at 962.

Supreme Court considered the legal argument that there was a free exercise defense that would permit physicians to refuse to provide artificial insemination to a lesbian.[67] The court rejected the federal constitutional defense based on *Smith*.[68] The court also rejected state constitutional arguments because it summarily concluded that the civil rights law "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal."[69]

These cases make it clear that the United States Constitution, as presently interpreted, offers very little protection for the right to conscience in health care.

II. AN EVALUATION OF THE CURRENT STATE OF AFFAIRS

Although I have supported conscience rights (in testimony at legislative hearings, for example),[70] I think the current law is the best interpretation of the free exercise clause. I agree with scholars such as Gerry Bradley,[71] Lino Graglia,[72] Philip Hamburger,[73] and John Harrison,[74] all of whom agree with the result, if not everything in the

67. *Id.* at 963–64.

68. *Id.* at 965–68.

69. *Id.* at 968. *See also* Keeton v. Anderson-Wiley, No. 110-099, 2010 U.S. Dist. LEXIS 85959 (S.D. Ga. Aug. 20, 2010); Ward v. Wilbanks, No. 09-11237, 2010 WL 3026428, *1–*2 (E.D. Mich. July 26, 2010). In *Ward*, the court rejected the free exercise claim of a plaintiff who was dismissed from a graduate program in counseling because (the plaintiff claimed) of her religious beliefs regarding homosexuality. The court concluded that the plaintiff's free exercise claim should be rejected because the plaintiff was refusing to adhere to "a neutral, generally applicable" requirement that students abide by a Code of Ethics that prohibited discrimination against protected groups. In *Keeton*, which raises facts similar to those in *Ward*, the plaintiff was threatened with dismissal from a graduate counseling program because (she claimed) of her beliefs about sexual morality. *Keeton*, 2010 U.S. Dist. LEXIS 85959, at *4–*6. The court denied plaintiff's motion for a preliminary injunction. *Id.* at *33. The court's free exercise discussion was based on *Smith* and the reasoning set forth in *Ward*. *Id.* at *31–*32.

70. *See, e.g.*, Richard S. Myers, Testimony Before the Committee on Health Policy of the Michigan Senate on S.B. 894, S.B. 895, S.B. 896, and S.B. 972 (Sept. 22, 2004).

71. Bradley, *supra* note 18, at 248.

72. Graglia, *supra* note 13, at 1.

73. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

74. John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J.L. & PUB. POL'Y 169 (1992).

opinion, in *Smith*.[75] The free exercise clause prohibits laws that intentionally discriminate against religion, not laws that have the effect of interfering with the free exercise of religion. *Smith* is, and I agree with this view, the free exercise counterpart to *Washington v. Davis*.[76]

This view of the free exercise clause is the one with the most support in the text and history of the Constitution and with the current emphasis in constitutional law on the almost always-decisive importance of legislative purpose.[77] It is also the view that has prevailed for most of the long history of judicial interpretation of the clause. The exception here, of course, is the period between 1963 and 1990, but, it is worth remembering, that relatively brief interlude did not provide significant protection for religious practice. Under *Sherbert* and *Yoder*, review was "strict in theory but feeble in fact."[78]

This conclusion does not mean that there should not be protection for conscience. With our society increasingly treating acts such as abortion as fundamental rights that sometimes require the forced participation of conscientious objectors, the need for exemptions becomes clear. The failure to allow an exemption has the potential to lead to a whole range of serious injustices.[79] I think, though, that such protection ought to be based on other sources. It is worth remembering that legislative protection for conscience is long-standing and, I think it is clear, more secure.[80] This is true in the area of parental rights. There, *Yoder* has had limited impact and the best protection for parental

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75. The same view is set forth in an article by Ellis West that was published prior to *Smith*. *See* Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 593–94 (1990).

76. 426 U.S. 229, 230–31 (1976). *See Smith*, 494 U.S. 872, 886 n.3 (1990).

77. *See, e.g.*, Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1785–86 (2008). When present-day courts review the constitutionality of statutes, they often inquire into the possibility that the enacting legislature had hidden purposes. Statutes that seem innocuous on their face will nonetheless be held unconstitutional if the court concludes that the legislature enacted them in order to disadvantage African-Americans, or to restrict an unpopular religion, or to punish a disfavored individual. Indeed, scholars persuasively argue that a host of constitutional doctrines, as currently applied by the courts, are best understood as being *primarily* concerned with the detection of illicit purpose. *Id.* (citations omitted).

78. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (citing Lupu, *supra* note 33, at 756).

79. *See Current Legal Issues*, *supra* note 1, at 405–07.

80. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413 (1992) ("In short, the evidence demonstrates that faith in the courts in this area is misplaced, and that religious groups and individuals fared better in the legislatures than in the courts before the *Smith* decision.").

rights has come from legislative protection for parental rights.[81] I think that we sometimes forget that constitutional decisions such as *Smith* and *Goldman v. Weinberger* were overturned by statutes.[82] One of the most successful protections for conscience in health care is the long-standing federal law that provides strong protection for doctors and nurses who do not wish to perform or participate in abortions.[83] Although the federal law is not perfect,[84] and although the implementing regulations are under review by the Obama Administration,[85] the core legislative protection seems secure.[86]

Legislative protections are not perfect. Some argue that judges are better able to make these decisions,[87] although there are some who do

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81. For example, parents have been unsuccessful in arguing that the constitution requires that public schools exempt their children from portions of the curriculum that interfere with the parental rights (including the free exercise rights) of the parents. *See* Richard S. Myers, *Same-Sex Marriage, Education, and Parental Rights*, *supra* note 32 (discussing cases). Yet, these cases typically also note that state law sometimes provides exemptions. *See* Parker v. Hurley, 514 F.3d 87, 96 n.8 (1st Cir. 2008) (noting that Massachusetts provides an exemption for sex education); Leebaert v. Harrington, 332 F.3d 134, 136 (2d Cir. 2003) (noting that parents had a statutory right to exempt their children from certain classes relating to family-life instruction).

The situation with regard to homeschooling provides another example. Several decades ago, homeschooling was largely illegal due to compulsory attendance laws. *See, e.g.*, Duro v. Dist. Attorney, Second Judicial Dist. of N.C., 712 F.2d 96, 99 (4th Cir. 1983) (rejecting constitutional challenge to compulsory attendance law brought by a father who wanted to home-school his children). Today, homeschooling is legal in every state. Most of this transformation was not the result of constitutional mandates. Although there has been much discussion about the existence of the constitutional right to home-school, *see generally* Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991 (2010), it seems that the constitutional protection for homeschooling is quite narrow. *See, e.g.*, Combs v. Homer-Center School District, 540 F.3d 231, 247 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1013 (2009) ("Although Parents assert the fundamental nature of their general right, it is a limited one.").

82. *See* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 82, 160–65 (2006) (discussing legislative overrides of *Smith* and *Goldman*). *See* N. Coast Women's Care Med. Group, Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959 (Cal. 2008) (addressing the developments in the *Catholic Charities of Sacremento* case).

83. Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 27–33 (2010) (discussing federal laws).

84. *See Legal Bases for Conscientious Objection*, *supra* note 1, at 22–24.

85. Wardle, *supra* note 83, at 41–45; Daniel Allott & Matt Bowman, *The Right of Conscience in the Age of Obama*, AM. SPECTATOR, Nov. 2009, at 22, 24, *available at* http://spectator.org/archives/2009/11/18/the-right-of-conscience-in-the.

86. There is a possibility that a legislative exemption might violate the Establishment Clause, but recent Supreme Court decisions indicate that the Court is willing to uphold the constitutionality of legislative exemptions. *See* Cutter v. Wilkinson, 544 U.S. 709, 724–26 (2005).

87. *See, e.g.*, Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 161–63 (2009).

not have the same faith in the courts.[88] But, experience has shown that legislatures have been more protective than the courts.[89]

I think the most successful protections for conscience are the case-by-case exemptions, such as the Church Amendment. Broader, more general protections (such as state constitutional protections) tend to have the same problem we saw during the *Sherbert-Yoder* era. That is, the theoretically strong protections tend to be scaled back by judicial interpretation. I think that point is demonstrated by the judicial treatment of the state constitutional arguments in the *Catholic Charities* cases and in the *North Coast* case (the lesbian/artificial insemination case).[90]

Moreover, an emphasis on a presumptive right to religious conscience has some potentially serious drawbacks. For example, an appeal to religious conscience may well promote the privatization of religion.[91] "Religious" objections to abortion or contraceptives may be discounted because there are powerful trends in our society that view "religious"

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88. *See* Bradley, *supra* note 18, at 319.

> I insist, however, that judges are not well suited to make these calculations. The calculation here is not "public versus private," as it is for the conduct exemption. The calculation is, rather, that of determining the ensemble of social conditions most conducive to realization by everyone of the diverse, basic human goods. This complex, prudential judgment will not be properly done by politically isolated persons, employing the restricted reasoning of law to facts adduced in the course of litigation.

Id. *See also* Graglia, *supra* note 13, at 66–69.

89. *See* Ryan, *supra* note 80, at 1456 ("*Smith* can be seen as providing the final proof that cheery faith in the courts, in this context as in others, is misplaced. *Smith* simply made obvious what was true all along: courts have done little to aid or protect the religious adherent, and certainly have done less than legislatures.").

90. *See supra* text accompanying notes 55–69. There is some indication that RFRA is being interpreted to protect religious liberty in a more significant way than the earlier constitutional decisions did. That is, the courts seem to be applying the strict scrutiny standard incorporated in the statute in a more conventional way. Ari B. Fontecchio, *Compelling the Courts to Question* Gonzales v. O Centro*: A Public Harms Approach to Free Exercise Analysis*, 14 RICH. J.L. & PUB. INT. 227 (2010) (forthcoming), *but see* Matthew Nicholson, Note, *Is* O Centro *a Sign of Hope for RFRA Claimants?* 95 VA. L. REV. 1281 (2009) (raising questions about whether *O Centro* will significantly help religious liberty claimants). This is likely because the RFRA standard comes before the courts with the clear endorsement of the democratic branch.

91. *See generally* Richard S. Myers, *The Privatization of Religion and Catholic Justices*, 47 J. CATH. LEG. STUD. 157 (2008); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991) [hereinafter Myers, *Privatization of Religion*]. In fact, the constitutionally compelled exemption doctrine is another, albeit infrequently noted, manifestation of the privatization thesis. Myers, *Privatization of Religion*, *supra*, at 59–60. *See also* Bradley, *supra* note 18, at 248 ("The conduct exemption is liberal political morality that, while hospitable to certain kinds of religious commitment (basically, any religion that is 'privatized') and subversive of others, contains no doctrine of religious liberty as such.").

reasons for action as an inappropriate basis for public action.[92] In addition, appeals to religious conscience help to promote the autonomy perspective most famously expressed in the "sweet-mystery-of-life passage"[93] in *Planned Parenthood v. Casey*.[94] This autonomy perspective raises doubts about whether public morality is a legitimate state interest.[95] This autonomy perspective reflects a subjectivism that is ultimately threatening to the idea of public morality and to human rights.[96] The principal strategy ought to be to support a proper understanding of the content of public morality. This will reduce the clashes between state mandates and traditional moral views. In addition, strong and effective advocacy for laws reflecting, for example, a pro-life moral perspective makes the claim for a right to conscience, when that proves necessary to pursue, more likely to succeed. For example, the strong advocacy for pro-life laws in the area of abortion has had an impact. The laws on abortion have improved to a modest degree and pro-life views seem to be gaining ground in the broader society.[97] All of this makes the claim for conscience more likely to succeed. Most

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92. *See Current Legal Issues*, *supra* note 1, at 407–08. In his recent speech at Westminster Hall, Pope Benedict XVI stated:

> I cannot but voice my concern at the increasing marginalization of religion, particularly of Christianity, that is taking place in some quarters, even in nations which place a great emphasis on tolerance. There are those who would advocate that the voice of religion be silenced, or at least relegated to the purely private sphere.

Pope Benedict XVI, Address at the Meeting with the Representatives of British Society, Including the Diplomatic Corps, Politicians, Academics and Business Leaders (Sept. 17, 2010), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_ben-xvi_spe_20100917_societa-civile_en.html.

93. Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

94. 505 U.S. 833, 851 (1992). In *Casey* the joint opinion stated:

> [M]atters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Id. See generally Myers, *Pope John Paul II*, *supra* note 18.

95. *See* Myers, *John Paul II*, *supra* note 18, at 72–77. *See also* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997–98 (N.D. Cal 2010) (holding the California ban on same-sex marriage known as "Proposition 8" as unconstitutional); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 389–90 (D. Mass. 2010) (holding that denial of some federal marriage benefits from same-sex marriages under the Defense of Marriage Act unconstitutional).

96. Myers, *John Paul II*, *supra* note 18, at 81–82.

97. Lydia Saad, *The New Normal on Abortion: Americans More "Pro-Life"*, GALLUP.COM (May 14, 2010), http://www.gallup.com/poll/128036/new-normal-abortion-americans-pro-life.aspx?version.

people, even those who support *Roe v. Wade* and *Planned Parenthood v. Casey*, can understand a pro-life doctor's claim for conscience in the area of abortion. With regard to contraception, claims for conscience seem to fall on deaf ears. Opposition to contraception, which was a mainstream view 100 years ago, is now held by so few and is not even comprehensible to most people. That may help to explain why the claims for conscience in the area of contraceptive mandates have been so unsuccessful.[98]

Protection for conscience ought not, therefore, to be viewed as the best strategy. But the moral vision of health care that was held in common by most religions 100 years ago does not exist on a widespread basis any longer. And so, although those with pro-life views ought to attempt to advance a vision of health care that is consistent with their moral views, it may also be necessary to seek protection for a right to conscience. That effort should be directed at trying to obtain protection for conscience on a case-by-case basis.[99] An emphasis on the "retail" level as opposed to the "wholesale" level is far more likely to be effective.

CONCLUSION

The issue of a right to conscience in health care is one of the most pressing public issues of our time. There is, perhaps surprisingly, very little constitutional protection for a right to conscience in the United States. Under certain circumstances, an appeal to the right to conscience may prove necessary. This advocacy is important and needed but it carries significant risks. The best strategy is to build up a proper

98. In their August 2009 statement, the bishops of the Wisconsin Catholic Conference seemed to recognize this reality. They stated: "We know that many of you find the teaching of our faith on contraception difficult to accept or live out in practice." The bishops also noted the broader cultural challenge: "Many fail to recognize the truth of our conviction, not because they are irrational, but because, in our day and age, the fashionable proposition that there is no objective truth renders human reason itself directionless." Wis. Catholic Conf., *Statement on Insurance Mandate for Contraceptive Services*, *supra* note 3, at 2.

99. *See* Ryan, *supra* note 80, at 1456–57.

> [Religious groups] should continue to seek broad based exemptions in specific pieces of legislation, and force legislatures to confront and discuss such exemptions. If the courts need to be relied upon at all, they can serve as useful forums for determining whether a particular religion or religious adherent fits within a statutory exemption. The pursuit of such a strategy, one that entails open discussion of how religion and religious groups should fit within society, holds potential rewards not only for religious adherents but for democratic government as well.

Id.

understanding of the demands of the natural law and it is important that appeals to conscience do not frustrate that objective.