

## PROTECTION OF HEALTH-CARE PROVIDERS' RIGHTS OF CONSCIENCE IN AMERICAN LAW: PRESENT, PAST, AND FUTURE

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### I. INTRODUCTION: THREE PERSPECTIVES ON PROTECTING THE RIGHTS OF CONSCIENCE OF HEALTH-CARE PROVIDERS

This Article will briefly review legal protection for a health-care provider's right of conscience in three historical periods or from three broad and overlapping chronological perspectives, which, for simplicity's sake, are labeled past, present, and future. This review will address several questions: Does legal protection for a health-care provider's right of conscience have significance as a matter of foundational principles of republican constitutionalism? Is legal protection for rights of conscience of health-care providers constitutionally permissible? Is it constitutionally required? Are current legal protections for rights of conscience of health-care providers adequate? Will they be adequate in the future? Are protections for providers' rights of conscience and patients' rights to seek legal treatments reconcilable?

Part II of this Article reviews how protection of rights of conscience is deeply embedded in the foundational republican principles that undergird the American Constitution. Protection for rights of conscience is a fundamental human right in the American legal tradition as a matter of core principles. This part also considers the constitutional history of the validity of statutory and administrative provisions that

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provide protection for rights of conscience of health-care providers, and it shows that the constitutional doctrine of abortion privacy or liberty itself assumes and allows protection for the rights of conscience of providers to decline providing services that are morally troubling (to them).

Part III briefly considers the present policy—the current panoply of legal protections of rights of conscience of health-care providers in American (mostly federal) law. The congressional enactments as well as the Provider Conscience Rule adopted by the Department of Health and Human Services in 2008, and the debate over the necessity for protection of rights of conscience in law in America today are particularly considered. Some deficiencies of the current regime of legal protections are noted.

In Part IV, protection for rights of conscience of health-care providers in the future is considered. This part focuses particularly on the proposal to rescind the 2008 Provider Conscience Rule.

Part V concludes that health-care providers' rights of conscience have been and can be fully protected, while patient access to services is accommodated, but only if there is full commitment to protecting, not sacrificing or giving nominal respect for, rights of conscience.

This Article focuses primarily upon rights of conscience in the abortion context because that is where the issue has been raised, discussed, and contended most thoroughly for the past four decades. However, the issue extends far beyond the practice of elective abortion. Today, a growing number of health-care practices, procedures, medications, and methods raise serious moral concerns for at least some health-care providers. These include such issues as: human stem cell research; cloning; genetic engineering (including gender pre-selection); DNA screening and medical treatment for various genetic disorders; surgical abortion (by a variety of procedures including so-called "partial-birth abortion"); pharmaceutical abortion (by such pills as RU-486 and the "morning after pill" (MAP)); sterilization; capital punishment; assisted suicide; sex-change procedures; provision of contraceptives to minors; and provision of assisted reproduction technologies to unmarried persons and couples including gay, lesbian, and transgendered couples,<sup>1</sup> to name just a few of the currently controversial biomedical practices that raise profound moral

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1. *E.g.*, *Thomas Beatie Pregnant with Third Child*, ADVOCATE.COM (Feb. 10, 2010), [http://www.advocate.com/News/Daily\\_News/2010/02/10/Thomas\\_Beatie\\_Pregnant\\_Man\\_Expecting\\_Third\\_Child/](http://www.advocate.com/News/Daily_News/2010/02/10/Thomas_Beatie_Pregnant_Man_Expecting_Third_Child/) (reporting the third artificial reproductive technology pregnancy of a female-to-male transsexual married to a female).

implications for at least some members of our society. The principles established herein with specific reference to abortion are intended to be generally applicable in non-abortion contexts in which health-care providers may decline to provide or assist in technically possible biomedical experiments, procedures, or treatments for reasons of conscience. Of course, this discussion also has implications for questions of respect for and protection of rights of conscience (especially religious conscience) in non-biomedical contexts as well.

## II. PRINCIPLES FROM THE PAST: PROTECTION FOR RIGHTS OF CONSCIENCE IS DEEPLY EMBEDDED IN THE CORE PRINCIPLES UPON WHICH THE CONSTITUTION IS FOUNDED

Respect for rights of conscience of individuals is deeply embedded in the architecture of our Constitution and in the core principles upon which our constitutional government is based. In at least seven ways the protection of rights of conscience was historically and conceptually critical to, a part of, and embedded in the foundational principles out of which emerged the United States Constitution. The context of the origins of the Constitution gives great weight to the value of protection of rights of conscience.

First, at the time of the founding of the Constitution, it was universally believed that virtue in people was an essential pre-constitutional foundation for any “republican” (representative democracy) form of government. Certain “habits of the heart,” as Alexis de Tocqueville later called them, were considered to be necessary “preconditions” for maintaining the constitutional republic.<sup>2</sup>

The idea of virtue was central to the political thought of the Founders of the American republic. Every body of thought they encountered, every intellectual tradition they consulted, every major theory of republican government by which they were influenced emphasized the importance of personal and public virtue. It was understood by the Founders to be the *precondition* for republican government, the base upon which the structure of government would be built.<sup>3</sup>

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2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287 (J.P. Mayer ed., George Lawrence trans., HarperCollins 2000) (1835) (referring to the “habits of the heart” as the American character traits which form the foundation for American democracy).

3. RICHARD VETTERLI & GARY BRYNER, *IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT* 1 (1987).

This appears to have been a universal belief in the Founding Era, held by Federalists and Anti-Federalists alike. For example, Benjamin Franklin wrote that “only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”<sup>4</sup> Samuel Adams believed that “neither the wisest constitution nor the wisest laws will secure the liberty and happiness of a people whose manners are universally corrupt.”<sup>5</sup> John Adams acknowledged: “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”<sup>6</sup> He also observed: “Liberty can no more exist without virtue and independence, than the body can live and move without a soul.”<sup>7</sup> In a letter to Zabdiel Adams he wrote that “it is religion and morality alone, which can establish the principles upon which freedom can securely stand. The only foundation of a free constitution is pure virtue . . . .”<sup>8</sup> Patrick Henry declared:

Bad men cannot make good citizens. . . . It is when a people forget God, that tyrants forge their chains. A vitiated state of morals, a corrupted public conscience, is incompatible with freedom.

No free government, or the blessings of liberty can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles.<sup>9</sup>

George Washington, in his Farewell Address, stated (in his typical, understated way) that: “‘T is substantially true, that virtue or morality is a necessary spring of popular government.”<sup>10</sup>

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4. Letter from Benjamin Franklin to Messrs., *The Abbés Chalut and Arnaud* (Apr. 17, 1787), reprinted in 9 THE WRITINGS OF BENJAMIN FRANKLIN 569 (Albert Henry Smyth ed. 1906).

5. 1 WILLIAM V. WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 22 (Boston, Little, Brown & Co. 1865).

6. JOHN R. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 185 (1966).

7. JOHN ADAMS, NOVANGLUS, in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 3, 31 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1851), cited in Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 909 n.340 (1995).

8. 9 ADAMS, *supra* note 7, at 399, 401. See also *id.* at 636 (“[R]eligion and virtue are the only foundations, not only of republicanism and of all free government, but of social felicity under all governments and in all the combinations of human society.”).

9. TRYON EDWARDS, A DICTIONARY OF THOUGHTS 300 (F.B. Dickerson Co. 1908) (1897) (quoting Patrick Henry).

10. President George Washington, Farewell Address (Sept. 19, 1796), in THE WASHINGTON PAPERS 309, 319 (Saul K. Padover ed., Universal Library 1967) (1955).

Thus, virtue was commonly understood in the Founding Era to be the substructure upon which the superstructure of constitutional rights and government was built. If that foundation slipped, the government and the liberties it protects would not survive.<sup>11</sup>

Francis Grund, an Austrian immigrant and contemporary of Alexis de Tocqueville, expressed the concept well when he wrote:

I consider the domestic virtue of the Americans as the principal source of all their other qualities. . . .

No government could be established on the same principle as that of the United States, with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter of the Constitution in order to vary the whole form of their government.<sup>12</sup>

The Founders' concept of *virtue* required the exercise of free will, not forced submission. The fight for religious liberty in the Founding Era was not just to protect minority churches and their members, but to protect the political society as a whole by nurturing the conditions needed for citizens to develop the quality of virtue which could not ripen in the people without their informed, free choices. The republic required virtue in the citizens to survive and thrive; and for virtue to grow and develop, liberty was essential—especially liberty to follow one's conscience and religion.

Thus, the first point is that in the political theory of the Founding Fathers and the political principles undergirding the Constitution, protection of rights of conscience was essential, for without it virtue

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11. During the War for Independence,

Britain came to be increasingly seen as both corrupt and determined to spread that corruption to America . . . [American clergy and revolutionaries] referred to the American Colonies as a troubled Israel facing a corrupting force, which sought to destroy their freedom and virtue. . . . [W]arnings against . . . corrupting influence[s]. . . were also discussed in terms of virtue versus corruption, freedom versus slavery.

VETTERLI & BRYNER, *supra* note 3, at 77.

12. FRANCIS J. GRUND, *THE AMERICANS, IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS* 171 (Boston, Marsh, Capen & Lyon 1837).

in the people could not develop.<sup>13</sup> And without virtue in the people, republican government (our Constitutional government) could not survive. Protection of rights of conscience and religious liberty had structural significance for the Constitution, for liberty is the soil in which virtue grows, and virtue is the precondition for our constitutional system of republican government.

Second, fostering virtue was generally considered to be beyond the direct power, role, ability, competence, and safe control of the national government.<sup>14</sup> Virtue in the people had to be cultivated by other mediating institutions that stood between the individual and the state. Those included, primarily, the home and religion. Thus, George Mason believed that republican government depended upon both “altars and firesides” to inculcate virtue in the new nation and its future generations.<sup>15</sup> Such mediating institutions were critical to protect and prepare the soil in which the seeds of self-government were sown. Protection of rights of conscience was attendant to and necessary to protect the important role of such critical mediating structures and institutions as churches and families. Those institutions only could survive and thrive in an environment rich in liberty of conscience and freedom of religion.

Note the interconnectedness of virtue, republican government, liberty, and religion. Republican government requires virtue in the people; in order for virtue to develop in people, there must be liberty—especially freedom of religion and conscience (as well as private institutions of churches to teach people how to exercise and discipline their liberty to develop virtue); and for secure protection of individual liberty, including liberty of religion and conscience, and for protection of churches and families, a republican government is needed.<sup>16</sup> Thus,

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13. In *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring), Justice Brandeis famously emphasized: “Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .”

14. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1826–35 (1995).

15. Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 946–47 (1995) (citing George Mason, *Opposition to a Unitary Executive* (June 4, 1787), reprinted in THE ANTI-FEDERALIST PAPERS 47 (Ralph Ketcham ed. 2003)) (“Only good men could be free; men learned how to be good in a variety of local institutions—by the firesides as well as at the altar . . . . [The Founders believed that] individuals learned virtue in their families, churches, and schools.”).

16. The history of the First Amendment underscores the importance the Founders attributed to protecting the rights of individuals collectively, in churches and religious societies, to practice their beliefs.

protection of rights of conscience was essential to foster the mediating institutions which were essential to foster the quality of virtue needed for the constitutional republic to survive.

Third, before and in the Founding Era there were conflicting views about protection of rights of conscience. For centuries before the founding of the American Constitution, in most legal systems there were no general protections of rights of conscience. The historical belief of rulers and their advisors for centuries had been that uniformity of religious views within the *polis* was necessary (or at least highly desirable) to nurture and preserve political unity within a nation. However, England, her colonies in the New World, and a few other nations, had begun to experiment with various degrees of tolerance of religious differences prior to the drafting of the Constitution of the United States.

By the last quarter of the eighteenth century, tolerance of rights of conscience was widely considered appropriate in most cases, as a matter of prudent political policy. But in America, a more radical view took hold, embraced and espoused most eloquently by James Madison, the “Father” of the Constitution and the “Father” of the Bill of Rights. Madison’s view was that protection of rights of conscience was a matter of individual, inalienable right. Thus, for example, the Virginia Declaration of Rights was initially drafted to guarantee “full-est Toleration” of religion; but Madison amended it, and when it passed, it provided that “all men are equally *entitled* to the full and free exercise of religion, according to the dictates of conscience.”<sup>17</sup> Madison’s *Memorial and Remonstrance* expressed the language of rights, not toleration: “[T]he equal *right* of every citizen to the free exercise of his Religion according to the dictates of conscience’ is *held by the same tenure with all our other rights*.”<sup>18</sup> It makes a big difference whether the protection of rights of conscience is a matter of toleration, to be suspended or superseded when political or other circumstances warrant, or whether it is a fundamental, inalienable human right. Thus, the Madisonian (and the American constitutional)

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17. Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 248–49 (1990) (emphasis added); Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 311 (1990) (emphasis added).

18. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 64 (Rutledge, J., dissenting) (emphasis added). See also *id.* ¶ 1 (“The Religion then of every man must be left to the conviction and *conscience* of every man; and it is the *right* of every man to exercise it as these may dictate. This *right* is in its nature an *unalienable right*.” (emphasis added)).

view holds that rights of conscience are among those inalienable human rights which the patriots of 1776 fought to establish, and which are a part of the fabric from which our Constitution was sewn.

Fourth, in his famous *Memorial and Remonstrance*, James Madison declared that religious duties “must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”<sup>19</sup> He explained why in terms that underscore the foundational nature of rights of conscience:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.<sup>20</sup>

Madison clearly understood that if men are not loyal to their duty to their God and their conscience, it is folly to expect them to be loyal to mere legal rules, statutes, judicial orders, or professional duties.<sup>21</sup> If you demand that a man betray his conscience, you have eliminated the only moral basis for his fidelity to the rule of law, and have destroyed the moral foundation for democracy.<sup>22</sup>

Thus, protection of rights of conscience is necessary for the rule of law in a republican form of government. Without protection for rights of conscience, the moral basis for the rule of law, obedience to the unenforceable, and voluntary submission to rules of political and social order, are missing or meaningless and insecure.

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19. *Id.* ¶ 1.

20. *Id.*

21. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990) (“[T]he evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison’s writings, is that the claims of the ‘universal sovereign’ precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by the nature and scope of religious duty.”).

22. Jefferson agreed. He famously explained: “The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.” THOMAS JEFFERSON, NOTES ON VIRGINIA, reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, 187, 275 (Adrienne Koch & William Peden eds., 1944), cited in Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 164 n.58 (1991).

Fifth, this concept of a prior duty to God and the need to protect the individual's right to follow conscience was not original to Madison. It is an idea that was firmly rooted in covenant theology for two centuries prior to Madison's time. Covenant theology, sometimes called federal theology (from the Latin *foedus*, meaning *covenant*), underlies such political notions as social contract, in which the Constitution is grounded, and also undergirds specific protection for rights of conscience.<sup>23</sup> It is said that the "influence of covenant theology in the New World was so broad that 'it could be received with minor variations, by almost the entire spectrum of American Protestantism.'"<sup>24</sup> Covenant theology was revolutionary for its time, emphasizing individual rights and challenging established order. In structural ways (such as organization by covenant), procedural concepts (such as the necessity of a written charter or constitution), and in substantive principles (belief in individual rights, duty to resist usurpation by authorities, popular sovereignty, limited government, supreme law, and God-given inalienable rights), many concepts derived from covenant theory were reflected in the U.S. Constitution.<sup>25</sup>

Of particular relevance, "[c]ovenant theology put individual rights of conscience (obedience to God) at the top of the list of moral duties where prior philosophies had put obedience to established authority."<sup>26</sup> Not only did the very notion of inalienable individual liberties germinate and grow in the soil of covenant theology, but "the struggle of American dissenters for religious liberty contribute[d] to the development of constitutional protection for the freedom to worship, and protection against an established church, as well as recognition of the right of assembly, the right to petition, and other specific rights guaranteed by the Bill of Rights."<sup>27</sup> Protection of rights of conscience was a core precept of covenant theology and the parallel political ideas that emerged from it, which culminated in the drafting of the U.S. Constitution and Bill of Rights.

Sixth, protection for rights of religious conscience was part of the solution to the general dilemma of controlling factions, which Madison analyzed so brilliantly in Federalist No. 10. He explained:

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23. Lynn D. Wardle, *The Constitution as Covenant*, B.Y.U. STUDIES, Summer 1987, at 11, 20.

24. *Id.* at 12 (quoting BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 32 (1967)).

25. *Id.* at 22–25.

26. *Id.* at 18 (citing CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* 54 (1953)).

27. *Id.* at 18.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it [was] worse than the disease. Liberty is to faction what air is to fire, an aliment, without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable, as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. . . . The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties . . . ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man . . . .

. . . .

The inference to which we are brought, is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*.<sup>28</sup>

Madison's solution to the danger of factions was to

[e]xtend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

. . . [G]reater security [is] afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest[.]<sup>29</sup>

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28. THE FEDERALIST NO. 10, at 61–64 (James Madison) (Cynthia Brantley Johnson ed., 2004).

In Federalist No. 51, Madison returned to the theme which he described as “[the] policy of supplying by opposite and rival interests, the defect of better motives” and so “that each may be a check on the other.”<sup>30</sup>

Application of that principle to the rights of conscience in health care highlights the value of liberating conscience to cultivate wide diversity, so that no one viewpoint on the moral issue (such as the morality of dispensing pharmaceutical abortifacients or of participating in surgical abortions) excludes all others. Rights of conscience or moral pluralism produce greater liberty for all views of any particular moral issue. Thus, the sixth point is that protection of rights of conscience is part of the “extended sphere” the Founders believed was necessary to weaken and to overcome the influence of factions.

There is no need to speculate about whether Madison would include protection for rights of conscience of individual health-care providers, for he applied the solution of pluralism *specifically* to the problem of religious factions (different denominations and belief systems). In Federalist No. 10, he observed: “A zeal for *different opinions concerning religion*, concerning Government[,] and many other points . . . have . . . *divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other*, than to co-operate for their common good.”<sup>31</sup> As the remedy, Madison advocated cultivating religious liberty and protecting rights of religious conscience. He recognized that although religious liberty was the cause of religious contention, it also was necessary to foster the virtue essential for a free republican form of government.<sup>32</sup>

Like his contemporaries, Madison believed that virtue was the essential foundation of republican government (what we would call liberal democracy). During the Virginia ratifying convention, Madison

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29. *Id.* at 67–68. The dilemma of delegation also troubled Madison. The “filter” of representation in representative democracy may result in good representatives formulating public policy that “will be more consonant to the public good” than in a pure democracy, or “the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption or by other means, first obtain the suffrages, and then betray the interests of the people.” *Id.* at 66. Madison saw the solution, in part, lay in federalism. *Id.* at 67 (“The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the state legislatures.”). However, the solution primarily was to “[e]xtend the sphere” to allow diversity of faction to flourish and allow faction to cancel faction. *Id.* at 67.

30. THE FEDERALIST NO. 51, *supra* note 28, at 372 (James Madison).

31. THE FEDERALIST NO. 10, *supra* note 28, at 62 (James Madison) (emphasis added).

32. *Id.*

declared: "To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea."<sup>33</sup> So rather than attempting to remove the cause of the problem (religious liberty), and with it destroy the form of government that would best secure the legitimate purposes of government (republican democracy), Madison advocated "extending the sphere," by broadly protecting rights of conscience. He did so, not just because that would diminish the likelihood of any one religious faction gaining abusive amounts of power or influence, but because protection of rights of conscience would produce the antidote to the problem—the development of virtue in men and in society whereby individuals would restrain themselves out of respect for the rights of others which they shared in common as citizens of this republic. All citizens interested in the survival of the republic would share a common interest in preserving the republic, and many different religions and worldviews would contribute competitively to foster virtue and preserve individual liberty under the republican government. Madison believed that one of the principal purposes of government was to protect human liberties.<sup>34</sup> Liberty, pluralism, religion, virtue, and constitutional government connected in protecting rights of conscience.

Seventh, Madison believed human goodness alone was not sufficient protection for rights, but specific structural and substantive protections were crucial. "If men were angels, no [protection for rights of conscience] would be necessary," to paraphrase Madison within the context of protecting health-care providers.<sup>35</sup> Certainly "[a] dependence on the [good will of] people" to protect rights of conscience of health-care providers in the long run, in the historical view, is the "primary" means of preventing abuses, but "experience has taught . . . the necessity of auxiliary precautions" such as laws protecting rights of conscience of health-care providers.<sup>36</sup> Protecting rights of conscience is required as an "auxiliary precaution" and is part of the Madisonian solution to the dilemma of conflict between rights of con-

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33. James Madison, Power of Judiciary (June 20, 1788), in 5 THE WRITINGS OF JAMES MADISON, 1787–1790, at 216, 223 (Gaillard Hunt ed., 1904).

34. For example, Madison explained that he and the other delegates to the Constitutional Convention were devoted to "devising and proposing a constitutional system which would . . . best secure the permanent liberty and happiness of their country." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 19 (Adrienne Koch ed., Bicentennial ed. 1987); see also THE FEDERALIST NO. 1, *supra* note 28, at 5–6 (Alexander Hamilton) (noting that vigorous government is necessary to secure liberty).

35. THE FEDERALIST NO. 51, *supra* note 28, at 372 (James Madison).

36. *Id.*

science of health-care providers and patient access to legal therapies and medicines.

Thus, the intellectual environment in which the Constitution was fashioned—the very conceptual elements from which it was formed, the core values in the thinking of the key founders of, and the principles they embedded in the foundations of the Constitution—gives great symbolic weight to protecting rights of conscience. The Constitution was created in the shadow of and reflected this clear respect for rights of conscience.

### III. PRESENT LEGAL PROTECTIONS FOR RIGHTS OF CONSCIENCE OF HEALTH-CARE PROVIDERS IN AMERICAN LAW: NECESSITY OR POLITICAL IDEOLOGY?

Not only was the Constitution formed in the penumbra of existing recognition of rights of conscience as basic human rights, but protection of rights of conscience today clearly is within the penumbras of constitutional protections that are well established, including, ironically, the Supreme Court decisions establishing constitutional protection for the right of women to choose to have elective abortions without undue governmental restriction or burden.

The seminal twin cases on the issue of abortion, *Roe v. Wade*,<sup>37</sup> and *Doe v. Bolton*,<sup>38</sup> decided the same day (Jan. 22, 1973), show that

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37. 410 U.S. 113 (1973).

38. 410 U.S. 179 (1973). *Roe* and *Doe* were first argued in 1971, just a month after the Court heard argument in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (restrictions on distribution of contraceptives to unmarried adults were invalidated as unconstitutional). However, *Roe* and *Doe* were held over for reargument during the following term. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1111 n.49 (2004). Compare *Roe*, 410 U.S. at 113 and *Doe*, 410 U.S. at 179, with *Eisenstadt*, 405 U.S. at 438. Justice Douglas criticized the decision to hold over the cases for reargument, and saw “manipulation” by the Chief Justice in assigning the case to Justice Blackmun. Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1730 & n.4 (2006). Allegedly, Chief Justice Burger wanted to hold over the abortion cases because he anticipated that two new Republican Justices would then be on the Court, but Justice Powell was one of the appointees, and Justice Blackmun used the extra time to write a much longer, presumably broader, opinion. Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 567 n.299 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998)) (citing BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 234–35 (1996)). The appeals in *Roe v. Wade* and *Doe v. Bolton* were accepted for argument on May 3, 1971, *Roe v. Wade*, 402 U.S. 941 (1971), the State of Texas’ motion to postpone oral argument was denied on December 7, 1971, *Roe v. Wade*, 404 U.S. 981 (1971), and both cases were argued on December 13, 1971. However, they were held over until the next term, and on June 26, 1972, the two cases were restored to the calendar for reargument in the 1972 term. They were decided January 22, 1973. *Roe*, 410 U.S. at 113; *Doe*, 410 U.S. at 179;

the positive legal protection (by statute or regulation) of rights of conscience is constitutionally valid and proper. It also shows that the foundational 1973 Supreme Court decisions that established generally the constitutional right of a pregnant woman to choose to terminate her pregnancy for elective (nontherapeutic) reasons, without state prohibition or undue restriction, also established the necessity for and constitutionality of protection for rights of conscience of health-care providers to refuse to provide or participate in providing elective (nontherapeutic) abortion. Thus, Part III.A. of this Article answers the questions whether protection of rights of conscience is constitutionally permissible (yes), and whether it is constitutionally required (probably to a minimum extent). Part III.B. then provides a quick snapshot of the current status of the law regarding protection of rights of conscience of health-care providers.

The decision of the Supreme Court in *Roe v. Wade* has been criticized by many, including the author of this article, as being illegitimate as a matter of constitutional structure and doctrine, judicial authority, and constitutional interpretation; deeply flawed, erroneous; and incompetent as to matters of legal history, precedent, legal analysis, policy, and judicial craftsmanship.<sup>39</sup> *Roe* and *Doe* are still illegitimate and deeply flawed. But today, more than thirty-seven years after they were announced, they are still the law, still binding, and still enforced.

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William Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884, 896 n.53 (1985).

39. See, e.g., LYNN D. WARDLE, *THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES* (1981); LYNN D. WARDLE & MARY ANNE Q. WOOD, *A LAWYER LOOKS AT ABORTION* (1982); Lynn D. Wardle, "Crying Stones": *A Comparison of Abortion in Japan and the United States*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 183 (1993); Lynn D. Wardle, *The Effects of a Human Life Amendment on Federal and State Law*, in *RESTORING THE RIGHT TO LIFE: THE HUMAN LIFE AMENDMENT*, at 53–80 (J. Bopp ed. 1984); Lynn D. Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 BYU L. REV. 811; Lynn D. Wardle, *Judicial Appointments to the Lower Federal Courts: The Ultimate Arbiters of the Abortion Doctrine*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 215 (Dennis J. Horan et al. eds., 1987); Lynn D. Wardle, *The Quandary of Pro-life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853–966 (1999); Lynn D. Wardle, *Rethinking Roe v. Wade*, 1985 BYU L. REV. 231; Lynn D. Wardle, *The Road to Moderation: The Significance of Webster for Legislation Restricting Abortion*, 17 L., MED. & HEALTH CARE 376 (1989); Lynn D. Wardle, *Roe v. Wade: Effects of Twenty-Five Years of Constitutionalized Abortion on Demand*, LIFE & LEARNING, June 1998, at 149; Lynn D. Wardle, *Thomas Jefferson v. Casey*, HUM. LIFE REV., Summer 1994, at 49; Lynn D. Wardle, "Time Enough": *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881 (1989).

This Article addresses an issue (protection of rights of conscience) that has been created and shaped in large part by *Roe* and *Doe*, and it is to *Roe* and *Doe* that we may turn, at least in part, to find a solution. Since *Roe* and *Doe* are still the law, it behooves judges and lawmakers to recognize that those cases extend to and constitutionally require some protection of rights of conscience of health-care providers. That is a clear component of the doctrinal right of privacy established by *Roe*. Also, *Doe* upheld unequivocally the constitutional validity of a statutory provision protecting rights of conscience of both health-care institutions and individual health-care providers (including protection for rights of conscience of indirect facilitating employees (non-physician employees of health-care providers)).

As a matter of constitutional doctrine, is positive legal (statutory or regulatory) protection for the rights of conscience of health-care providers constitutionally permissible? As the debate over rights of conscience becomes sharper, increasingly claims are being made that it is impermissible to legislate or administratively, by rule or regulation, protect rights of conscience.<sup>40</sup> Claims have been asserted under the First, Fourth, Ninth, and Fourteenth Amendments that such legal protections are constitutionally impermissible.<sup>41</sup>

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40. See, e.g., Maria Cirincione, *Maryland's Conscience Clause: Leaving a Woman's Right to a Health Care Provider's Choice*, 13 J. HEALTH CARE L. & POL'Y 171, 189–90 (2010).

41. See, e.g., *Baldwin v. Sebelius*, No. 10-1033, 2010 WL 2384588, at \*1 (S.D. Cal. June 10, 2010); see also Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 475 (2006) (“[R]efusal clauses for pharmacists are indefensible from a legal, ethical and public policy perspective.”); *id.* at 527–37 (conscience clauses not protected by Free Exercise, but those that impose significant burdens violate the Establishment and Due Process clauses); Martha S. Swartz, “Conscience Clauses” or “Unconscionable Clauses”: *Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL'Y L. & ETHICS 269 (2006); Georgia Chudoba, Comment, *Conscience in America: The Slippery Slope of Mixing Morality with Medicine*, 36 SW. U. L. REV. 85 (2007) (arguing that conscience clauses are becoming overly broad, endangering the health of those who are refused treatment); Lora Cicconi, Comment, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709 (2007); Laura J. Tepich, Note, *Gonzales v. Carhart: The Partial Termination of the Right to Choose*, 63 U. MIAMI L. REV. 339, 356–57 (2008); but see Kristen L. Burge, Comment, *When It Rains, It Pours: A Comprehensive Analysis of the Freedom of Choice Act and Its Potential Fallout on Abortion Jurisprudence and Legislation*, 40 CUMB. L. REV. 181 (2009).

A. *Express Statutory Protection for Rights of Conscience of Health-Care Providers Is Constitutional and the Court Has Recognized It as Such Since 1973*

It has been clear since the day that *Roe v. Wade* was decided that explicit legal protection for rights of conscience of health-care providers is constitutionally permissible. In *Doe v. Bolton*,<sup>42</sup> the companion case of *Roe* and the first case the Court decided in which the Court applied the new *Roe* doctrine, the constitutionality of statutory protection for rights of conscience of health-care providers was challenged, noted, and explicitly upheld. In *Doe* the Court applied the privacy analysis of *Roe* to invalidate many parts of Georgia's abortion law, which, unlike the nineteenth-century Texas abortion law, were of very recent vintage, and were "patterned upon the American Law Institute's Model Penal Code."<sup>43</sup> Adopted by the Georgia legislature in 1968, less than five years earlier, those progressive abortion provisions (which expanded the previous exceptions to the general prohibition of abortion and provided greater access to abortion in "hard cases") replaced stricter abortion provisions (similar to Texas' abortion law) that had been in effect in Georgia for nearly a century.<sup>44</sup>

Nevertheless, in 1970, a group of plaintiffs (including a pregnant woman and doctors) filed suit in federal court claiming that Georgia's new, liberal abortion laws were "unconstitutional *in their entirety*."<sup>45</sup> Among the newly-adopted Georgia criminal abortion law provisions challenged in *Doe*, was Georgia Statute § 26-1202,<sup>46</sup> subsection (e) which provided:

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion,

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42. 410 U.S. at 197-98 (1973).

43. *Id.* at 182.

44. *Id.* at 182-83.

45. *Id.* at 184-85 (emphasis added); *Doe v. Bolton*, 319 F. Supp. 1048, 1051 (N.D. Ga. 1970).

46. *Doe*, 410 U.S. at 184.

and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.<sup>47</sup>

Thus, even the provision protecting the rights of conscience was challenged and it was alleged that the Georgia laws allegedly “deterred hospitals and doctors from performing abortions,” and “‘chilled and deterred’ them [doctors wishing to perform abortions] from practicing their respective professions and deprived them of rights guaranteed by the First, Fourth, and Fourteenth Amendments.”<sup>48</sup> A three-judge U.S. District Court declared that the parts of Ga. Code Ann. § 26-1202 that limited reasons for abortion and restrictions on abortion in cases of rape were unconstitutional, but upheld the other sections and sub-sections of the law.<sup>49</sup>

Plaintiffs took direct appeal to the United States Supreme Court challenging the other sections, seeking broader relief and also seeking an injunctive remedy.<sup>50</sup> Defendants also appealed to the Supreme Court, but because they had filed an alternative appeal in the Court of Appeals that was still pending, their appeal was dismissed for want of jurisdiction.<sup>51</sup> So technically, the State’s appeal of the district court ruling that the part of the statute that limited the reasons for abortion was unconstitutional was not before the Supreme Court in *Doe*.<sup>52</sup>

Writing for the Court again, Justice Blackmun, author of the Opinion of the Court in *Roe*, suggested that the Georgia statute limiting the reasons for abortion, which the lower court struck down, was unconstitutional under *Roe* (though that issue was not precisely before the Court in *Doe*).<sup>53</sup> Then, for the majority, he went on to strike down several additional requirements of the Georgia Abortion Statute that the lower court had upheld, including the requirement that abortions be performed in hospitals, confirmation of the abortion

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47. *Id.* at 205.

48. *Doe*, 410 U.S. at 186; *Doe*, 319 F. Supp. at 1051.

49. *Doe*, 319 F. Supp. at 1056, *aff’d in part, rev’d in part by Doe*, 410 U.S. at 186, 194–201 (invalidating sections limiting the reasons for which abortion could be authorized at the district court level).

50. *Doe*, 410 U.S. at 187.

51. *Doe v. Bolton*, 402 U.S. 936 (1971).

52. *Id.* See also *Doe*, 410 U.S. at 187 & n.8. (“What we decide today [an obvious allusion to *Roe*] obviously has implications for the issues raised in the defendants’ appeal pending in the Fifth Circuit.”).

53. *Doe*, 410 U.S. at 187 (“[T]he extent to which portions of the Georgia statutes were held to be unconstitutional, technically is not now before us.”).

request by another physician, requiring approval of a hospital abortion committee, and limiting abortions to Georgia residents.<sup>54</sup>

One reason that the hospital committee approval provisions were struck down was that the hospital's legitimate interests were adequately protected by subsection (e), the "rights of conscience" provisions. The requirement of approval by a hospital review committee was particularly relevant in the Court's analysis. The Court recognized this provision, § 26-1202(e), as protecting rights of conscience. Justice Blackmun summarized this provision as "giving a hospital the right not to admit an abortion patient and giving any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure."<sup>55</sup> The Court noted that those provisions protected both the institutional right to refuse to admit patients for purposes of abortion, and also the individual right of doctors and other employees to decline to participate in abortions, and they "obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital."<sup>56</sup> Thus, the Court unanimously upheld the provision whereby "the hospital is free not to admit a patient for an abortion."<sup>57</sup> This confirmed the constitutionality of statutory protections for the institutional right to refuse to provide abortions. The Court opined that: "Section 26-1202(e) affords adequate protection to the hospital, and little more is provided by the committee prescribed by § 26-1202(b)(5)."<sup>58</sup> Moreover, the Court majority also explicitly described the provision, which it upheld as constitutional, as providing that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure."<sup>59</sup> This also represented the unanimous view of the Court (even the dissenters who objected to invalidating some provisions agreed in upholding these provisions).<sup>60</sup>

Thus, not merely the author of *Roe*, Justice Blackmun, and not merely the majority of justices on the Court, but all nine justices in the seminal abortion cases, expressed clearly that statutory conscience

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54. *Id.* at 187–201.

55. *Id.* at 184.

56. *Id.* at 198.

57. *Id.* at 197, 201.

58. *Id.* at 198.

59. *Id.* at 197–98.

60. *Id.* (majority opinion); *id.* at 207–08 (Burger, C.J., concurring); *id.* at 209 (Douglas, J., concurring); *id.* at 221–23 (White, J., dissenting); *id.* at 223 (Rehnquist, J., dissenting).

protections for both individual and institutional health-care providers are constitutionally permissible.<sup>61</sup> The constitutionality of “conscience clause” legislation in principle cannot be in doubt as a matter of general constitutional principle after *Doe*. So long as it is competently drafted, legislative and administrative provisions protecting rights of conscience are and will be upheld as valid against constitutional challenges. The constitutionality of positive statutory and regulatory law protection for rights of conscience protection of health-care providers is clearly established in and as well established as *Roe* and *Doe* themselves.

B. *Constitutional Protection of Rights of Conscience Is a Part of the Constitutional Right of Privacy Established in 1973 in Roe and Doe*

Respect for and protection of different worldviews about abortion was the fundamental premise behind an essential link in the Court’s analysis and holding in *Roe*. At least four passages in the *Roe* majority opinion plus Justice Douglas’s concurring opinion, underscore the integral importance of protecting rights of conscience in order to sustain a constitutional right of women to choose to have abortion.

First, Texas had argued that “life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life . . . .”<sup>62</sup> However, Section X of Justice Blackmun’s opinion for the Court in *Roe* rejected that claim because of his view that the Constitution demands respect for various and divergent views about when life begins. “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”<sup>63</sup> He expressly noted (erroneously in some cases) “the wide divergence of thinking on this most sensitive and difficult question,” mentioning the beliefs of the Stoics, the Jewish faith, the

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61. See Jacob M. Appel, “Conscience” vs. *Care: How Refusal Clauses Are Reshaping the Rights Revolution*, 88 MED. & HEALTH R.I. 279 (2005) (citing *Doe*, 410 U.S. at 179); Daniel Allott & Matt Bowman, *The Right of Conscience in the Age of Obama*, THE AM. SPECTATOR, Nov. 2009, at 22, 26.

62. *Roe*, 410 U.S. at 159. Moreover, since the Fourteenth Amendment protects the “right to life” of “persons,” Texas also argued that the existence of prenatal human life had constitutional significance to justify the Texas abortion law directly, but the Court said that the unborn were not “persons” for purposes of that amendment and did not reach the question of whether the human fetus or embryo had “life” protected by that Amendment. *Id.* at 158.

63. *Id.* at 159.

Protestant community, the American Ethical Union, the National Council of Churches, many non-Catholics, and many physicians.<sup>64</sup> He contrasted the “‘ensoulment’ theory” of the Catholic Church and “the Aristotelian theory of ‘mediate animation,’ that held sway throughout the Middle Ages.”<sup>65</sup> The Court in *Roe* did not explicitly adopt any theory but took an agnostic position that when viewpoints were in such conflict, the state may not endorse any of them.

It is still the law that lawmakers may not constitutionally “speculate as to the answer” to the question of when life begins by enacting a criminal law that adopts one specific position. Putting aside the transparent pseudo-neutrality of Justice Blackmun’s denial that his opinion adopted a particular worldview about when life begins, respect for divergent views about a matter of such deep personal significance as the effect of abortion (to terminate or not terminate a prenatal human life) is the principle upon which Part X of the *Roe* opinion rests. Thus, the Court took a “right of conscience” position in Section X of *Roe*. It compels official governmental neutrality by protecting the “right of conscience” to hold unpopular positions on such controversial issues as when life begins. If the holding of the opinion is that pregnant women enjoy such rights of conscience that the state cannot abridge, nothing in the opinion suggests that protection of rights of conscience is limited to women or does not extend also to doctors and other health-care providers. So the holding of Section X in *Roe* appears to provide precedent for the claim (perhaps for a constitutional claim) that the state (or its agencies, funding, certification, licensing, or hiring offices) may not restrict or discriminate against health-care providers who wish not to participate in, assist, or facilitate abortion (surgical or pharmaceutical) because of their beliefs about when life begins.

Second, an even clearer example of rationale and language in the *Roe* opinion that implies protection for “rights of conscience” is in Section VIII, in which the Court determined that the Texas abortion law infringed upon a fundamental constitutional right, thus triggering strict scrutiny.<sup>66</sup> Citing cases that went back more than eighty years, Justice Blackmun observed that “the Court has recognized . . . a right of personal privacy” with roots in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>67</sup> The precedents showed that the consti-

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64. *Id.* at 160–61 & n.58.

65. *Id.* at 160–61.

66. *Id.* at 152–56.

67. *Id.* at 152–53.

tutional right of “personal privacy”<sup>68</sup> extended to “activities relating to marriage . . . procreation . . . [and] contraception . . . . This right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>69</sup>

Nothing in *Roe* suggests that doctors and other health-care providers do not also enjoy the same privacy protection for their rights to choose whether or not to engage in activities concerning procreation, contraception, and abortion. While the majority opinion in *Roe* noted that privacy protects the tangible interests of the pregnant woman in preventing “[s]pecific and direct harm medically diagnosable” as well as “distress[]” and “psychological harm,”<sup>70</sup> when the Supreme Court reaffirmed *Roe* nineteen years later in *Planned Parenthood v. Casey*,<sup>71</sup> the plurality opinion of Justices O’Connor, Kennedy, and Souter poetically opined that the fundamental right of privacy covered matters of belief and identity as well. The fundamental right of privacy protects the private realm of

the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . . 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. Beliefs about these matters . . . [may not be] under compulsion of the State.<sup>72</sup>

So a more-than-plausible claim exists that the constitutional liberty (to use *Casey*’s preferred terminology) and fundamental right of privacy (to use *Roe*’s preferred terminology) established in *Roe* and its judicial progeny (including *Casey*) also provides constitutional protection for decisions by health-care providers to decline to provide or assist in providing controversial medical procedures that impact significantly upon “the most intimate and personal choices a person may make in a lifetime,” or that implicate “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>73</sup> Since matters such as having to kill or assist or facilitate killing humans undeniably could be among the

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68. *Id.* at 152.

69. *Id.* at 152–53.

70. *Id.* at 153.

71. 505 U.S. 833 (1992).

72. *Id.* at 851.

73. *Id.*

most intimate and personal and existence-universe-defining matters that a person of faith might face, it is clear that Section VIII of *Roe* and the opinion in *Casey* cover and extend a degree of constitutional protection to health-care providers' rights of conscience.<sup>74</sup>

Third, the *Roe* opinion itself acknowledges that respect for rights of conscience was the environment in which the claim to a woman's right of privacy (liberty) to choose to obtain an abortion was born. Reviewing the views of various professional organizations concerning abortion, Justice Blackmun's majority opinion in *Roe* noted that the American Medical Association ("AMA") House of Delegates in June 1970 (less than two and one-half years before the Supreme Court's *Roe* decision) adopted resolutions to liberalize abortion laws, but also saying that "no party to the [abortion] procedure should be required to violate personally held moral principles."<sup>75</sup> Moreover, the Court further acknowledged that the AMA had adopted a resolution that: "Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice."<sup>76</sup> So undeniably, *Roe* was decided in the context of and with the explicit judicial acknowledgement of strong existing official professional protection for rights of conscience of health-care providers.

A fourth dimension of the *Roe* decision that supports protection for rights of conscience is the concurring opinion of Justice Douglas, whose rationale for the result in *Roe* and *Doe* is more coherent and more solidly grounded in existing jurisprudence than Justice Blackmun's

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74. See *id.* at 851-52; *Roe*, 410 U.S. at 152-53 (the right of privacy has some extension to activities relating to marriage, procreation, contraception, family relationships, childrearing, and education); Richard W. Garnett, *Francis Bacon Takes on the Ghouls*, 3 GREEN BAG 2D 447, 455-56 (2000) (reviewing JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000)); Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 225 (1993); Nell O. Kromhout, Note, *Crushed at the Counter: Protection for a Pharmacist's Right of Conscience*, 6 AVE MARIA L. REV. 265 (2007); Courtney Miller, Note, *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. CAL. REV. L. & WOMEN'S STUD. 327 (2006); see also Wayne McCormack, *Lochner, Liberty, Property, and Human Rights*, 1 N.Y.U. J. L. & LIBERTY 432, pt. I (2005) (discussing the development of the concept of "fundamental rights" in Supreme Court jurisprudence).

75. *Roe*, 410 U.S. at 143. I am indebted to my student, Alisa Rogers, for bringing this cite to my attention in her directed research paper, *Abortion and Health Care: A Matter of Conscience* (2010) (unpublished directed research paper).

76. *Roe*, 410 U.S. at 144 n.38.

majority opinions. Justice Douglas articulated the inclusive scope of the liberty interest protected by the “right to privacy” established in those cases:

The right to seek advice on one’s health and the right to place reliance on the physician of one’s choice are basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the “liberty” and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of *group controls over the physician-patient relationship* is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on *the physician and patient in abortion cases denies them their “liberty,” viz., their right of privacy, without any compelling, discernible state interest.*<sup>77</sup>

Justice Douglas emphasized that the “physician-patient relationship” was specially protected by the Fourteenth Amendment, not just the one small aspect of it that covered the woman’s decision to get an abortion. If laws restricting abortion are invalid constitutionally because “[t]he oversight imposed on the physician and patient . . . denies them their ‘liberty,’ viz., their right of privacy,” to choose to participate in effectuating an abortion, the denial of either party’s right to choose not to participate in effectuating an abortion would equally deny “their ‘liberty,’ viz., their right of privacy . . . .”<sup>78</sup> He emphasized that “*freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children*” are “fundamental” constitutional rights.<sup>79</sup> As the physician-patient relationship that Justice Douglas described as being constitutionally protected by *Roe* has two sides, and both sides are protected by the freedom of choice principle, the rights of conscience of physicians (and other health-care providers) to be free from government or government-sanctioned retaliation for refusing to participate in medical procedures that violate their basic belief systems is just as protected as the right of a woman to choose to have an abortion.

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77. *Doe v. Bolton*, 410 U.S. 179, 219–20 (1973) (Douglas, J., concurring) (emphasis added).

78. *Id.* at 220.

79. *Id.* at 211.

C. *The Right of Privacy Established in Roe Has Long Been Understood to Encompass the Right of Providers to Be Not Forced to Provide Abortion Services or Assistance*

*Roe* has been understood for decades as establishing or containing constitutional protection for rights of conscience. “When the state denies her the right to make this choice, so crucial to her personal life, when it seeks to force upon her the moral and religious views of others, this at least raises a question [about] her *rights of conscience and belief*. . . .”<sup>80</sup> More broadly,

[t]he underlying premise that supports contraceptive use [and/or abortion] is the right of privacy or the ability to control one’s own body. The underlying premise that supports [provider conscience refusal based on] religious beliefs is the freedom to possess different views, ideas and beliefs about life. . . . [T]he right to privacy only exists because the freedom to have differing views, ideas, and beliefs exists. As such, *the value of conscience could be viewed as a foundation on which other rights build upon*.”<sup>81</sup>

Thus, protection of rights of conscience underlies, and is essential to, protection for the right to abortion privacy. “It is the freedom to rationalize one’s existence and his or her relation to others that leads to any other principle of ‘rights.’ . . . Consequently, privacy becomes an ‘end’ only because the freedom to express differing beliefs and ideas in society is the ‘means’ to that end.”<sup>82</sup> Thus, one constitutional jurisprudence commentator has posited: “[i]f one follows the trajectory of the right of decisional privacy from *Griswold* to *Lawrence*, one sees a consistent affirmation of one clear view: individual conscience as protected by decisional privacy becomes a key decisional principle.”<sup>83</sup>

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80. Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 357 (1986) (emphasis added). While I do not agree with the conclusion reached by Professor Garfield, her article shows that *Roe* has been interpreted to protect rights of conscience. See *id.* Not all agree. See Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 89 (1989).

81. Suzanne Davis & Paul Lansing, *When Two Fundamental Rights Collide at the Pharmacy: The Struggle to Balance the Consumer’s Right to Access Contraception and the Pharmacist’s Right of Conscience*, 12 DEPAUL J. HEALTH CARE L. 67, 92 (2009) (emphasis added).

82. *Id.* at 93.

83. Lorenzo Zucca, *The Place of Religion in Constitutional Goods*, 22 CAN. J.L. & JURIS. 205, 212 (2009). The notion of a constitutionally protected right of privacy has at times been

The justification in *Roe* for interpreting the Constitution as requiring states to allow unrestricted access to medical abortion, at least until the third trimester of pregnancy (or when “unduly burden[some]” of a pregnant woman’s right to choose abortion)<sup>84</sup> clearly assumes and implies that the Constitution provides similar protection for the private decisions of health-care personnel and organizations whether to participate in providing abortions. However, the direct constitutional protection for rights of conscience is not so clear because it is based, as I have indicated, on an interpretation of the rationale, the logic, the assumptions, and the implications of *Roe*. It is reasonable and sound, but it is not definitively established in constitutional doctrine by *Roe* alone.

As noted above,<sup>85</sup> nineteen years after *Roe* was decided, the Court reviewed and reaffirmed the basic principles of *Roe* in *Casey*. Concurring and dissenting, Justice Stevens articulated the *Roe*

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conceived of as a hybrid concept involving overlapping “penumbras” of several amendments in the Bill of Rights, *see* *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing right of woman to choose abortion is protected by penumbras of several amendments); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the constitutional right of privacy inherent in a marital relationship extends to individuals); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (recognizing zone of privacy within the penumbra of rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments), but the predominant strain in the Supreme Court doctrine has evolved to holding that the right of privacy itself is an independent constitutional right grounded in the Fourteenth Amendment (and perhaps others). *See* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the Fourteenth Amendment’s constitutional right of privacy protects homosexual relations between consenting adults in private homes); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (recognizing no fundamental right to assistance in committing suicide); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–48 (1992) (holding that the woman’s privacy right to terminate pregnancy arises out of Ninth and Fourteenth Amendments); *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 281–284 (1990) (recognizing the Fourteenth Amendment protects constitutional right of privacy but it does not include right of life-sustaining treatment from incompetent patient without clear and convincing evidence of intent or by substituted judgment of close family members); *see also* *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 & n.10 (1977) (recognizing different tests for “discovering” non-textual rights). For some of the standard canon on privacy, *see* Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 459–71 (1980); Louis Henkin, *Privacy and Autonomy*, 74 *COLUM. L. REV.* 1410, 1424–29 (1974); Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 *CAL. L. REV.* 857, 862–70 (1992); Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 *DUQ. L. REV.* 1, 14–16 (1985); Thomas Wm. Mayo, *Constitutionalizing the “Right to Die,”* 49 *MD. L. REV.* 103 (1990); Linda C. McClain, *Toleration, Autonomy and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 *OHIO ST. L.J.* 19, 23–27 (1998); Marc Spindelman, *Are the Similarities Between a Woman’s Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?*, 29 *U. MICH. J.L. REFORM* 775 (1996).

84. *Casey*, 505 U.S. at 876 (adopting an “undue burden” test in lieu of *Roe*’s trimester-based privacy test).

85. *See* Part III.B. (discussion of *Casey*).

principle in terms of protecting rights of conscience. Arguing that a 24-hour waiting period before performance of abortion was not constitutional, he explained:

Those who disagree vehemently about the legality and morality of abortion agree about one thing: The decision to terminate a pregnancy is profound and difficult. No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.<sup>86</sup>

Justice Stevens also emphasized personal conscience in his general conceptualization of the constitutional right involved.

The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. . . . A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul." *Thornburgh*, 476 U.S., at 781. The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is *nothing less than a matter of conscience*.<sup>87</sup>

Later, the *Casey* plurality language about dignity and choice was repeated in 2003 when the Court struck down another Texas law that criminalized homosexual sodomy.<sup>88</sup> In *Lawrence v. Texas*, the Court reiterated that the fundamental right of privacy protects the private realm of

the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy. . . . 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

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86. *Casey*, 505 U.S. at 919 (Stevens, J., concurring and dissenting in part).

87. *Id.* at 915–16 (emphasis added) (citation omitted).

88. *Lawrence*, 539 U.S. at 574.

life. Beliefs about these matters . . . [may not be] under compulsion of the State.”<sup>89</sup>

This underscores that the right created and defined in *Roe* and its progeny is not limited to deciding to have an abortion, but to all significantly deep personal choices a person makes about core defining issues.

Other precedents for protecting decisions that an individual believes are critical to his or her integrity as a free person are deeply established in Supreme Court jurisprudence. For example, the Court stated in *Jacobson v. Massachusetts*<sup>90</sup>: “There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.” “The inviolability of the person,” to use a term from *Union Pacific Ry. Co. v. Botsford*,<sup>91</sup> that is protected by the constitutional right of privacy is now understood to protect against more than physical invasion.<sup>92</sup> Just four years after *Roe* was decided, the Court declared that “in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”<sup>93</sup>

#### D. *Current Status of the Law*

Over the past four decades, there has been much legislation protecting health-care providers’ conscience-based decisions by both federal and state governments. This trend demonstrates that protection of rights of conscience in health care has been a continuing matter of public policy interest for many years. At the state level, at least forty-seven states and the District of Columbia have conscience protection laws.<sup>94</sup> Most state conscience protection laws are very

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89. *Id.* (quoting *Casey*, 505 U.S. at 851).

90. 197 U.S. 11, 29 (1905).

91. 141 U.S. 250, 252 (1891).

92. *See generally id.*; *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968) (“personal security”); *Katz v. United States*, 389 U.S. 347, 350 (1967) (Constitution protects “individual privacy against certain kinds of governmental intrusion”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Fourteenth Amendment protection of liberty safeguards decisions, activities and “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

93. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).

94. *See, e.g., Courtney Miller, supra* note 74, at 329 (citing NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN’S REPRODUCTIVE RIGHTS IN THE UNITED STATES (2006), [http://www.naral.org/choice-action-center/in\\_your\\_state/who-decides/maps-and-charts/](http://www.naral.org/choice-action-center/in_your_state/who-decides/maps-and-charts/)

narrow—focused on specific procedures and particular work groups (such as doctors or nurses), and most state laws have been construed very narrowly and grudgingly.<sup>95</sup>

Federal legislation to protect rights of conscience of health-care providers has come in multiple installments over the past thirty-seven years.<sup>96</sup> The landmark conscience-protecting federal laws have been contained in at least five major pieces of congressional legislation or enactments.

First, just months after the Supreme Court mandated the national legalization of abortion-on-demand in *Roe v. Wade*, Congress enacted the first modern federal law designed to protect rights of conscience of health-care providers. It had quickly become apparent that one effect of *Roe* on existing federal law would be to compel hospitals and other institutional health-care providers that receive federal funds. That was the explicit ruling of a federal district court in *Taylor v. St. Vincent's Hospital*,<sup>97</sup> which held that by accepting federal (Hill-Burton) funds, a private, church-affiliated, charitable hospital (founded by the Sisters of Charity of Leavenworth) had become a “state actor,” and that as such it could not refuse to perform sterilizations, even

map.jsp?mapID=11); see also Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 47–52 (2008) (describing the origins of federal and state conscience protection statutes).

95. See, e.g., Wardle, *supra* note 74, at 178–99 (showing most conscience protection laws are very limited); Matthew White, Comment, *Conscience Clauses for Pharmacists: The Struggle to Balance Conscience Rights with the Rights of Patients and Institutions*, 2005 WIS. L. REV. 1611, 1631–36 (discussing problems with narrow conscience laws); see also Wilson, *supra* note 94, at 45 (supporting some narrow protections for conscience that do not interfere with the patient’s right to care).

96. There have been many good discussions of federal protections of rights of conscience of health-care providers. See generally Julie D. Cantor, *Conscientious Objection Gone Awry—Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484, 1484–85 (Apr. 9, 2009); JODY FEDER, CONG. RESEARCH SERV., RS2148, THE HISTORY AND EFFECT OF ABORTION CONSCIENCE CLAUSE LAWS (2006); Rachel Reibman, Comment, *The Patient Wanted the Doctor to Treat Her in the Closet, but the Janitor Wouldn’t Open the Door: Healthcare Provider Rights of Refusal Versus LGB Rights to Reproductive and Elder Healthcare*, 28 TEMP. J. SCI., TECH. & ENVTL. L. 65 (2009); Wardle, *supra* note 74; Wilson, *supra* note 94.

97. 369 F. Supp. 948 (D. Mont. 1973). After the Church Amendment was enacted, the district court dissolved its prior injunction, and, on appeal, the Ninth Circuit affirmed, noting that even “[i]f the hospital’s refusal to perform sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals with religious or moral scruples against sterilizations and abortions.” *Taylor v. St. Vincent’s Hosp.*, 523 F.2d 75, 77 (9th Cir. 1975) (internal quotation marks omitted) (citing *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 312 (9th Cir. 1974)); *Doe v. Bolton*, 410 U.S. 179, 197–98, (1973); *Doe v. Bellin Mem’l Hosp.*, 479 F.2d 756, 759–60 (7th Cir. 1973); *Allen v. Sisters of St. Joseph*, 361 F. Supp. 1212 (N.D. Texas 1973), *appeal dismissed*, 490 F.2d 81 (5th Cir. 1974); *Watkins v. Mercy Med. Ctr.*, 364 F. Supp. 799 (D. Idaho 1973).

though that practice was deemed immoral and impermissible under the religious and ethical standards governing the hospital. Congress immediately enacted the Church Amendment (named after the Idaho Senator who sponsored the measure) which not only explicitly provided that receipt of federal Hill-Burton and certain other federal health funds did not subject a recipient to a duty “to perform or assist in the performance” or “make its facilities available” or “provide any personnel” for abortion or sterilization “contrary to the religious beliefs or moral convictions” of the individual or institution.<sup>98</sup> The Church Amendment also prohibited entities receiving certain federal health funds, contracts, grants, or loans, or receiving similar funds from conducting biomedical or behavioral research, or from discriminating in employment or extension of staff privileges “because [the person] refused to perform or assist in the performance of [a lawful sterilization] procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions . . . .”<sup>99</sup> It further prohibits any “health service program or research activity funded . . . under a program administered by the Secretary of Health and Human Services” from requiring any individual “to perform or assist in the performance” of a program or activity that would be “contrary to his religious beliefs or moral convictions.”<sup>100</sup> Finally, in 1979, just six years after its initial enactment, subsection (e) was added to the Church Amendment which prohibits discrimination in admission for medical training or study “because of the applicant’s reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant’s religious beliefs or moral convictions.”<sup>101</sup> Thus, just six years after the passage of the original Church Amendment, Congress’ concern had turned to focus on discrimination and pressure in medical education.

The second major installment of federal protection for rights of conscience of health-care providers came fifteen years after the original

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98. Section 401 of the Health Programs Extension Act, Pub. L. No. 93-45, 87 Stat. 91, 95 (June 18, 1973) (codified at 42 U.S.C. § 300a-7(b) (2006)). Modest modifications and expansions of the programs covered by the Church Amendment were added in 1974, 1979, and 2000 by Pub. L. 93-348, § 214, 88 Stat. 353 (July 12, 1974); Pub. L. 96-76, § 208, 93 Stat. 583 (Sept. 29, 1979); Pub. L. 96-88, § 509(b), 93 Stat. 695 (Oct. 17, 1979); Pub. L. 106-402, § 401(b)(5), 114 Stat. 1738 (Oct. 30, 2000). See 42 U.S.C. § 300a-7 (2006), Credit(s).

99. 42 U.S.C. § 300a-7(c)(1); *id.* at (c)(2).

100. *Id.* at § 300a-7(d).

101. *Id.* at § 300a-7(e), added by Pub. L. 96-76, § 208, 93 Stat. 583 (Sept. 29, 1979).

Church Amendment.<sup>102</sup> In enacting the Civil Rights Restoration Act of 1988, Congress included the Danforth Amendment, often called the “abortion neutrality” provision,<sup>103</sup> which mandated that Title IX of the Education Amendments of 1972 may not be interpreted to prohibit or require any individual or institution to pay for or penalize for abortion-related services.<sup>104</sup> Thus, concerns about rights of conscience began to turn to those involved in education, including medical and other health-care students.<sup>105</sup>

Third, concerns about pressuring medical students to do abortions continued to grow. In 1995, the Accreditation Council for Graduate Medical Education (ACGME) adopted new accreditation standards requiring obstetrics and gynecology residency programs to provide abortion training.<sup>106</sup> That meant that all fifty Catholic hospitals with OB/GYN residency programs, as well as other religiously-affiliated hospitals, would have to provide abortion training or lose accreditation to train OB/GYN residents. Congress responded the following year by passing the third major federal enactment, the Coats (or Coats-Snowe) Amendment to the Omnibus Consolidated Rescissions Appropriations Act of 1996.<sup>107</sup> “The Coats Amendment prohibits any federal, state, or local government from discriminating against any entity or individual that refuses to receive or to provide abortion training, refuses to perform abortions, or refuses to provide abortion

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102. See FEDER, *supra* note 96, at 2.

103. See Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance, 64 Fed. Reg. 58,567, 58,571–73 (Oct. 29, 1999).

104. Pub. L. No. 100-259, § 3(b), 102 Stat. 29 (Mar. 22, 1988) (codified at 20 U.S.C. § 1688 (2006)) (“Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.”); see generally William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 633–36 (1991) (reviewing history of 1988 Act).

105. Davis & Lansing, *supra* note 81, at 76 (reporting, perhaps erroneously, that the Danforth Amendment also “prohibited discriminatory action against doctors, medical students, and health training programs by a state or local government due to any refusal to provide a wide range of abortion related services for any reason whether it be religious/moral or not.”). While the Danforth Amendment did include students, this description seems to apply to the Coats Amendment better than the Danforth Amendment.

106. See Reibman, *supra* note 96, at 72–73 (citing Angel M. Foster et al., *Educational and Legislative Initiatives Affecting Residency Training in Abortion*, 290 J. AM. MED. ASS’N 1777, 1777–78 (2003)).

107. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (Apr. 26, 1996) (codified at 42 U.S.C. 238n (2006)).

referrals or referrals for abortion training.”<sup>108</sup> Residency programs that choose not to provide abortion training are protected from the loss of federal funds, and state and local governments that receive federal funds must treat these programs as properly accredited.<sup>109</sup> The Public Health Service Act § 245,<sup>110</sup> prohibits federal, state, and local governments that receive federal funding from discriminating against any health-care entity that 1) refuses to receive, require, or provide abortion training, 2) refuses to make arrangement for such, or 3) attends or attended an institution that did not require or provide for such.<sup>111</sup>

Fourth, in 1997, newly-enacted budgetary provisions strengthened protection for providers’ rights of conscience with funding limitations. The Balanced Budget Act of 1997 contained an amendment to the federal Medicaid and Medicare programs to prohibit managed-care plans from restricting the ability of health-care providers to discuss treatment options, but it also exempted managed-care providers from the requirement to provide, reimburse, or cover counseling or

108. Reibman, *supra* note 96, at 73.

109. Foster, et al., *supra* note 106, at 1777. After the Coats Amendment was enacted, ACGME “rewrote its guidelines to require that residency programs with a moral or religious objection to abortion not impede students from seeking abortion training elsewhere.” *Id.*

110. 42 U.S.C. § 238n (2006).

111. Omnibus Consolidated Rescissions and Appropriations Act of 1996. It provides, in relevant part:

(a) In general

The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that—

- (1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;
- (2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); or
- (3) the entity attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

42 U.S.C. § 238n(a) (2006); *see also* Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072, 78,073 (Dec. 19, 2008) (codified at 45 C.F.R. pt. 88 (2009)) (proposing a rule to enforce the Omnibus Consolidated Rescissions and Appropriations Act of 1996).

referral services if they objected on moral or religious grounds.<sup>112</sup> The effect of this was “to extend the coverage of conscience clause laws beyond the individuals who provide medical care to the companies that pay for such care under the Medicaid and Medicare programs.”<sup>113</sup>

Fifth, beginning in 2004, following years of pro-life efforts to extend statutory conscience protections,<sup>114</sup> Congress exerted its fiscal power and enacted the Weldon Amendment to the Appropriations Act of 2004.<sup>115</sup> It provided that any appropriations made available under the act may not be made available to a federal agency, state government, or local government if such organization subjects an individual or entity to discrimination based on the fact that it “does not provide, pay for, provide coverage of, or refer for abortions.”<sup>116</sup> The definition of health-care entity was defined to include “an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility,

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112. Pub. L. No. 105-33, 111 Stat. 251, 295–96 (Aug. 25, 1997) (codified at 42 U.S.C. § 1395w-22(j)(3)(B) and 42 U.S.C. § 1396u-2(b)(3)(B)).

113. FEDER, *supra* note 96, at 3.

114. *See* Miller, *supra* note 94, at 334–35.

During the 107th Congress, pro-life groups and their allies in Congress backed the Abortion Non-Discrimination Act (ANDA), which would have amended 42 U.S.C. § 238n to prohibit the government from discriminating against any health care provider who does not wish to participate in an abortion. The bill passed the House with a vote of 229 to 189, but the 107th term expired before the Senate took up the bill, thus killing the measure. Pro-life legislators renewed their efforts in the 108th Congress by introducing the ANDA of 2003, also known as the Hyde-Weldon Amendment, which would have expanded 42 U.S.C. § 238n to cover not just “training and licensing of physicians” but “training, licensing, and practice of physicians and other health care entities.” The Act would have also replaced language that confined the Act’s coverage to physicians with language that would protect both physicians and “other health professional[s].” Unable to pass the ANDA alone, the legislature instead enacted it as part of the omnibus spending bill for 2005, which was passed on December 8, 2004 and signed into law by President Bush the same day. The bill’s sponsor, Dave Weldon (R- Fl.), explained that the bill expands the old statute to specify that clinics and hospitals have the same right to refuse to perform or counsel abortion as doctors and nurses do. Federal, state and local laws that prevent providers from refusing to participate in abortion services carry the consequence of loss of federal funding for health, education and labor programs. Lawsuits have already been filed to challenge it.

*Id.* (alteration in original) (citations omitted).

115. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (Dec. 26, 2007).

116. *Id.*

organization, or plan.”<sup>117</sup> The Weldon conscience protection provision in the federal spending bill was also reenacted in 2006, 2007, 2008, and 2009.<sup>118</sup>

Thus, by at least four separate pieces of legislation and one continuing series of funding restrictions, Congress has acted to protect rights of conscience of health-care providers against new threats to religious liberty for nearly forty years. Legislation to protect provider rights of conscience has

tracked the introduction of a new contraceptive into the America [sic] healthcare market and, most recently, . . . responded to both this scientific advancement and the influence of professional medical organizations. In each instance, then, social or cultural advancements posed new challenges to distributing healthcare according to one’s religious or moral beliefs and, in each instance, the federal government exerted its power to insulate providers and entities from these difficult decisions.<sup>119</sup>

The persistent federal effort to see that new developments in medicine, law, regulation, and the economy do not result in erosion of legal protection for the rights of conscience of health-care providers is strong evidence that the principle of protection of rights of conscience for health-care providers is deeply embedded in our political consciousness, and a continuing concern in the American people.

#### E. *The DHHS Conscience Protection Regulations*

The latest addition to the panoply of current protections for rights of conscience of health-care providers came in 2008. In the summer of 2008, Secretary Michael Leavitt, Secretary of the Department of Health and Human Services, announced that his department would be pro-

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117. *Id.* See also *Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law*, 73 Fed. Reg. at 78,073 (discussing the Weldon Amendment).

118. See *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act*, Pub. L. No. 109-149, § 508(d) (2005), 119 Stat. 2833, 2879-80; *Revised Continuing Appropriations Resolution, 2007*, Pub. L. No. 110-5, § 2, 121 Stat. 8, 9; *Consolidated Appropriations Act*, Pub. L. No. 110-161, § 508(d) (2007), 121 Stat. 1844, 2209; *Omnibus Appropriations Act, 2009*, Pub. L. No. 111-8, § 508(d) (Mar. 11, 2009); see also Burge, *supra* note 41, at 219.

119. Kimberly A. Parr, Note, *Beyond Politics: A Social and Cultural History of Federal Healthcare Conscience Protections*, 35 AM. J. L. & MED. 620, 646 (2009).

posing rules to enforce federal laws that protect rights of conscience.<sup>120</sup> The timing of the proposed regulations provoked immediate criticism from opponents of the regulations who labeled them “midnight” regulations as they were being enacted in the waning months of the Bush Administration.<sup>121</sup> The timing, combined with prior Bush Administration initiatives to prevent public funding of abortion and supporting pro-life policies, made critics also complain that it was too partisan or ideological.<sup>122</sup> Other criticisms were that it was too broad (revising the definition of abortion), extended protections too far (even to janitors and clerks), would reduce legal access to abortion services, violated federalism, and was unnecessary as there were adequate legislative protections in federal and state laws.<sup>123</sup>

Two major criticisms reflected a proposed sea-change in, and official acceptance of, a diminution of the concept of protection for rights of conscience since the Church Amendment was adopted thirty-five years earlier. One criticism was that persons with moral or religious objections to providing the full panoply of medical services that are, or may become, available needs to exercise his or her rights of conscience *before entering* the medical profession. Thus, Julie Cantor argued:

Conscientious objection makes sense with conscription, but it is worrisome when professionals who freely chose their field parse care and withhold information that patients need. As the gatekeepers to medicine, physicians and other health care providers have an obligation to choose specialties that are not moral minefields for them. Qualms about abortion, sterilization, and birth control? Do

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120. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50,274 (Aug. 26, 2008) (subsequently codified at 45 C.F.R. pt. 88 (2009)).

121. Cantor, *supra* note 96, at 1484.

122. *Id.*

123. *Id.* See Kim Worobec & Jennifer Gray, *HHS' New Provider Conscience Regulations*, THE HEALTH LAWYER, Apr. 2009, at 35. (“Although [federal conscience protection] statutes have existed for several decades, the new regulations significantly expand their scope by broadly defining terms to potentially allow a greater number of entities, employees and volunteers to refuse, on religious and moral grounds, to participate in a wider variety of healthcare activities, including medical services, research, training, referrals and potentially even janitorial services.”); see also Andrew Draxton & Jessica Andrew, Note, *From Pre-School Aides to Presidents: Themes and Scenes of the Abortion Debate*, 2009 UTAH L. REV. 505, 510 (discussing the constitutional criticisms of the regulation); Jason R. Mau, Comment, *Stormans and the Pharmacists: Where Have All the Conscientious Rx Gone?*, 114 PENN. ST. L. REV. 293, 307 (2009) (discussing the regulation’s definition of abortion).

not practice women's health. Believe that the human body should be buried intact? Do not become a transplant surgeon.<sup>124</sup>

Likewise, "[t]he American Medical Association's September journal for medical students states that 'conscientious objection should be made when he or she chooses a specialty—not when he or she faces a patient.'"<sup>125</sup> Of course, it is both impossible to foresee at the time of entry all medical developments that could come in the course of one's career, and impossible to predict the social changes that will occur and the patients that will come and the requests that will be made. The model that one may serve well as a part, but not the entire whole of all potential future patients in order to protect the value of rights of conscience shared within a particular community is put in jeopardy by this claim.

The second position that would effectively erase all existing protections for rights of conscience of health-care providers is that the ethic of the hired medical gunslinger must prevail—whatever the patient wants that is not illegal must be provided by all medical professionals. The professional, qua professional, has a duty to subordinate personal moral values to the mores of the patient, professional organizations, and society in general. Thus, as one doctor-lawyer opposed to the Provide Conscience Rule wrote: "Conscience is a burden that belongs to the individual professional; patients should not have to shoulder it."<sup>126</sup>

The administration responded that there was great need for the regulations to ensure compliance with the existing federal laws, citing a number of instances in which rights of conscience of doctors, medical students, and other health-care providers had been threatened and coerced.<sup>127</sup> Probably the single most significant event to trigger the proposal of the Provider Conscience Rule was the publication in November 2007 by the American College of Obstetricians and

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124. Cantor, *supra* note 96, at 1485.

125. Allott & Bowman, *supra* note 61, at 26.

126. Cantor, *supra* note 96, at 1485. Related to this is the argument that "the power dynamics between patients and providers are so skewed, and the time pressure often so great, that there is little opportunity to negotiate. And there is little recourse when care is obstructed—patients have no notice, no process, and no advocate to whom they can turn." *Id.* Power imbalance is a serious issue but in most medical contexts it is resolved by the requirement of full disclosure and informed consent, not subordination of rights of conscience.

127. Allott & Bowman, *supra* note 61, at 23 ("And over the past decade, New York, Massachusetts, and California have considered laws to force private hospitals to provide abortion and other services.").

Gynecologists (ACOG) of its position that health-care providers may not exercise their right of conscience if it might “constitute an imposition of religious or moral beliefs on patients,”<sup>128</sup> and the endorsing policy declaration by the American Board of Obstetrics and Gynecology (ABOG) that same month that board certification could be revoked if there is a “violation of ABOG or ACOG rules and/or ethics principles or felony convictions.”<sup>129</sup> Reading these two statements together, Secretary Leavitt was concerned that “by refusing to refer a patient for an abortion, a board certified physician [who conscientiously objects to elective abortion] could lose his or her certification,”<sup>130</sup> and he wrote a letter to these two organizations “expressing his concern that this could lead to discrimination in violation of federal refusal law, not by ABOG itself (ABOG is a private institution that does not receive HHS funds), but by institutions covered by the federal refusal clauses that, in turn, require their physicians to be board certified.”<sup>131</sup> The response from the ABOG Director, that the recommendations included in the ACOG Committee Opinion are not considered “binding” and promising that they “would not be considered in a decision to grant or revoke a particular physician’s board certification,” echoed too much of a “trust-me” position, especially given the unwillingness of ACOG to formally amend their Committee Opinion and of ABOG to amend or clarify their Bulletin.<sup>132</sup> Secretary Leavitt summed up the medical establishment’s position: “[I]f a person goes to medical school, they lose their right of conscience.”<sup>133</sup>

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128. *The Limits of Conscientious Refusal in Reproductive Medicine*, ACOG COMMITTEE OPINION NO. 385 (Am. C. Obstetricians & Gynecologists, Washington, D.C.), Nov. 2007, at 1–3.

129. *Maintenance of Certification: Voluntary Recertification Certificate Renewal*, ABOG BULL. FOR 2008 (Am. Bd. of Obstetrics & Gynecology, Dall., Tex.), Nov. 2007, at 10, available at <http://abog.org/bulletins/MOC2008.pdf>; see Letter from Donna J. Harrison, President, Am. Ass’n of Pro-Life Obstetricians & Gynecologists, to Norman F. Gant, Exec. Dir., Am. Bd. of Obstetrics & Gynecology (Sept. 9, 2008), available at <http://aaplog.octoberblue.com/wp-content/uploads/2010/02/AAPLOG-to-ABOG-9-9-08-copy.pdf>.

130. Jane W. Walker, Comment, *The Bush Administration’s Midnight Provider Refusal Rule: Upsetting the Emerging Balance in State Pharmacist Refusal Laws*, 46 HOUS. L. REV. 939, 964–65 (2009).

131. *Id.* at 965 (citing Press Release, U.S. Dep’t of Health & Human Servs., HHS Secretary Calls on Certification Group to Protect Conscience Rights (Mar. 14, 2008), available at <http://www.hhs.gov/news/press/2008pres/03/20080314a.html>).

132. *Id.* at 965 & n.143 (citing Letter from Norman Gant, Exec. Dir., Am. Bd. of Obstetrics & Gynecology, to Michael O. Leavitt, Sec’y, U.S. Dep’t of Health & Human Servs. (Aug. 22, 2008)).

133. Allott & Bowman, *supra* note 61, at 23–24 (alteration in original).

While many organizations of medical professionals formally opposed the Provider Conscience Rule, some health-care professional organizations appeared to support the proposed rule. For example, the American Pharmacist Association's (APhA) "recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal." The APhA Committee Report expressly allows for 'stepping away' from an activity that violates the pharmacist's conscience."<sup>134</sup>

The American Medical Association opposed the rule. However,

The AMA Professional Code of Ethics describes the doctor-patient relationship as contractual, and asserts that in general, a patient or a doctor can accept or decline to enter that relationship. AMA states a physician can ethically decline to enter into a doctor-patient relationship with a patient if the "specific treatment" requested conflicts with the physician's religious, personal, or moral beliefs. However, AMA expressly states that physicians providing their services to the public may not refuse to treat patients "because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination." These tenets indicate AMA recognizes a physician can ethically refuse to provide a treatment because he objects to the nature of the treatment, but a physician cannot ethically refuse to treat a specific patient because he objects to a characteristic of the patient.<sup>135</sup>

There were practical reasons for the regulations, as well. There is no doubt that awareness with the health-care industry of the scope and extent of protection or rights of conscience under federal law has been minimal; that there has been a need for clarification and education. As one group supporting the Provider Conscience Rule has noted:

Despite current law that has protected conscience rights for over 30 years, the lack of regulations resulted in confusion and a lack of

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134. Davis & Lansing, *supra* note 81, at 84–85 (footnote omitted) ("However, the APhA has not specifically directed how a pharmacist should balance the competing interests of serving patients and conscience protection.").

135. Reibman, *supra* note 96, at 91 n.207. This seems very superficial; obviously personal conditions of the patient may be relevant to treatment decisions made by physicians (such as age, gender, health condition, purposes—whether therapeutic or not—etc.).

awareness within the health care community, leaving health care personnel vulnerable to discrimination and forcing them to drop their specialties at a crucial time of health care scarcity.<sup>136</sup>

Moreover, the absence of any system of accountability and the lack of enforcement mechanisms, procedures, and officials reduce the conscience protection rules in most circumstances to mere hortatory and empty rhetoric.

The final rule, entitled the Provider Conscience Rule, became law when it was published after the lengthy administrative promulgation process by the lame duck Republican administration in December 2008, just a month before President Obama took office.<sup>137</sup> The new regulations were promulgated in order to achieve four policy objectives:

(1) [E]ducate the public and health care providers on the obligations imposed, and protections afforded, by federal law; (2) work with State and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the Church Amendments, PHS Act § 245, and the Weldon Amendment; (3) when such compliance efforts prove unsuccessful, enforce these health care conscience protection laws through the various Department mechanisms currently in existence, to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law; and (4) otherwise take an active role in promoting open communication within the health care field, and between providers and patients, fostering a more inclusive, tolerant environment in the health care industry than may currently exist.<sup>138</sup>

The final rule asserts that it is not meant to change the long-established ability of patients to access health-care services—including abortion and reproductive health services. But rather, the new rule is said to

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136. Press Release, Family Research Council, FRC Deplores Obama's Expected Action Against Conscience Protections (Feb. 27, 2009), <http://www.bioportfolio.com/news/pdf/67064/Frc-Deplores-Obama-s-Expected-Action-Against-Conscience-Protections.pdf>.

137. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072 (Dec. 19, 2008) (subsequently codified at 45 C.F.R. pt. 88 (2009)).

138. Draxton & Andrew, *supra* note 123, at 509 (alteration in original) (quoting Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. at 78,074).

implement[] federal laws protecting health care workers and institutions from being compelled to participate in, or from being discriminated against for refusal to participate in, health services or research activities that may violate their consciences, including abortion and sterilization, by entities that receive certain funding from the Department. . . . This rule should help generate greater transparency between patients and providers and foster open discussion, which should strengthen relationships between patients and providers, as well as those between entities and their employees.<sup>139</sup>

For the most part, the Provider Conscience Rule provisions merely “restate the provisions of the federal refusal clauses . . . .”<sup>140</sup> The summary and consolidation setting for the requirements and prohibitions embodied in the Church Amendment, Public Health Service § 245, and the Weldon Amendment, is not an insignificant convenience for those seeking to understand the scope and extent of protections afforded to them by federal laws, or vindicate their rights under federal law, or to comprehend the duties and responsibilities which they must respect, obey, or provide.<sup>141</sup> Perhaps the most significant contribution of the Rule to advancing protection for rights of conscience is the certification requirement, 42 C.F.R. § 88.5. It requires all individuals and entities receiving funds from HHS, including state and local governments, to certify in writing that they will not:

discriminate against any physician or other health care professional in the employment, promotion, termination, or extension of staff or other privileges because he performed or assisted in the performance, or refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that doing so would be contrary to his religious beliefs or moral convictions. The rule defines “assist in the performance” to mean . . . not just the actual performance of such an activity, but also the “referral, training, and other arrangements for the procedure, health service, or research activity.”<sup>142</sup>

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139. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. at 78,074. While some critics labeled the new regulations as “sweeping” expansions of the existing conscience protections, see Cantor, *supra* note 96, at 1484, “the regulation simply recited the underlying statutes verbatim and required fund recipients to promise to comply.” Allott & Bowman, *supra* note 61, at 24.

140. Walker, *supra* note 130, at 963.

141. See 45 C.F.R. § 88.4 (2009).

142. Walker, *supra* note 130, at 962 (footnote omitted) (quoting 45 C.F.R. § 88.4 (2009)).

It also requires that “[c]ertification provides a demonstrable way of ensuring that the recipients of such funding know of, and attest that they will comply with, the applicable nondiscrimination provisions.”<sup>143</sup>

In addition to setting up a method for monitoring of and accountability for compliance, the rule also establishes a clear procedure and system and office for enforcement.

[T]he HHS Office for Civil Rights (OCR) has been designated to receive complaints of discrimination and coercion based on the health care conscience protection statutes and this regulation. OCR will coordinate handling of complaints with the staff of the Departmental programs from which the entity, with respect to which a complaint has been filed, receives funding . . . .<sup>144</sup>

The Provider Conscience Rule is just the latest in a long line of federal laws since 1973 attempting to protect rights of conscience of health-care providers. This shows clearly that there has been and is a perceived need to provide explicit positive statutory or legal protection for rights of conscience in the context of health-care provision. Overwhelming enactment by nearly all states and multiple federal enactments shows widespread concern that rights of conscience of health-care providers are at risk in the current legal environment.

Finally, it is worth noting that there seems to be solid, grassroots support for the new Provider Conscience Rule. For example, a poll conducted on behalf of the Christian Medical Association (CMA), on March 23–25, 2009, found that eighty-seven percent of adults surveyed believe it is important to “make sure that healthcare professionals in America are not forced to participate in procedures and practices to which they have moral objections.”<sup>145</sup> Additionally, the survey “showed majority support even among self-identified ‘pro-choice’ respondents for the two-month-old conscience protection regulation [then] at risk of being rescinded by the [HHS].”<sup>146</sup>

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143. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. at 78,092.

144. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 45 C.F.R. § 88.6 (2009).

145. Press Release, U.S. Conf. of Catholic Bishops, New Poll Shows Strong Support for Conscience Rights in Health Care (Apr. 8, 2009), <http://www.usccb.org/comm/archives/2009/09-077.shtml>.

146. *Id.*

## IV. THE FUTURE OF PROTECTION FOR RIGHTS OF CONSCIENCE OF HEALTH-CARE PROVIDERS IN AMERICA

Immediately upon assuming office, the new Democratic administration of President Barack Obama announced that it was going to rescind the new conscience regulations.<sup>147</sup> The proposed rule was published in March 2009, just two months after the inauguration of the President.<sup>148</sup> The new rule would “rescind in its entirety” the Provider Conscience Rule that was adopted just three months earlier.<sup>149</sup> The official reasons given for the proposed rescission are because “[c]ommenters asserted that the rule would limit access to patient care and raised concerns that individuals could be denied access to services . . . [especially] in rural areas” and because the new administration, skeptical of the need for federal conscience protection monitoring or enforcement, wished to “reevaluate the necessity” for the new rule.<sup>150</sup>

The Comment period for the proposed rescission has ended, and the final rule of rescission could be published, but it has not yet been published.<sup>151</sup> The delay in issuing the final rule rescinding the Provider Conscience Rule probably has been due to two factors. The first cause for delay was debate over health-care reform; the Obama Administration wisely held off raising another, related, controversial issue regarding health care until after it had achieved some success with its overall health-care reform legislation.<sup>152</sup> Raising a second contentious health-care issue while trying to push through the health insurance bill could have been the “straw to break the camel’s back” and reduce the chances of success for the health reform bill. However, the health-care insurance reform bills were enacted in March 2010. That impediment to moving ahead with repeal of the 2008 conscience protection regulations has been removed. After the passage of a decent period of time to allow the controversy about health issues to settle and pass out of the mind of voters, it may be politically safe for the Obama

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147. See Parr, *supra* note 119, at 621.

148. Rescission of the Regulation Entitled “Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,” 74 Fed. Reg. 10,207 (Mar. 10, 2009).

149. *Id.* at 10,209.

150. *Id.*

151. *Id.* at 10,207.

152. See generally *Health Reform Puts American Families and Small Business Owners in Control of Their Own Health Care*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/health-care-meeting/proposal> (last visited Feb. 7, 2011).

Administration to proceed with rescission of the Bush Administration conscience protection regulations.

The other reason for delay may have to do with the compromise the White House had to make to obtain congressional passage of its important health-care reform legislation in 2010. Abortion issues were “seen as key” to passage of the President’s health-care reform, which passed in the House of Representatives by a very narrow 219-212 margin.<sup>153</sup> To secure support for his legislation from crucial pro-life democrats, on March 21, 2010, the President announced that he would issue an executive order upon passage of the health insurance reform bill that would reaffirm that it would not reduce “long-standing restrictions on the use of federal funds for abortion.”<sup>154</sup> On March 24, 2010, President Obama issued an Executive Order Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act.<sup>155</sup> The order declares that the new health-care insurance bill not only “maintains current Hyde Amendment [funding] restrictions governing abortion policy,”<sup>156</sup> but also that “[u]nder the Act, longstanding Federal laws to protect conscience (such as the Church Amendment . . . and the Weldon Amendment . . .) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.”<sup>157</sup> The order specifically acknowledges the need “to make certain that all relevant actors . . . are aware of their responsibilities, new and old.”<sup>158</sup> It declares the need for (and states the new act’s provision for) “[s]trict [c]ompliance” with such prior laws.<sup>159</sup> For the Obama Administration to proceed to repeal the Provider Conscience Rule so soon after promising so sincerely to preserve the congressional legislative protection, which the rule is designed to implement, would raise not only the anger of the pro-life community, but could raise credibility and integrity issues in the minds of ordinary voters, who

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153. Ed Hornick, *Abortion Issue Seen as Key to Health Care Reform Passage*, CNN.COM (Mar. 22, 2010), <http://www.cnn.com/2010/POLITICS/03/22/abortion.health.care.vote/index.html>.

154. Dan Pfeiffer, *One More Step Towards Health Insurance Reform*, THE WHITE HOUSE BLOG, (Mar. 21, 2010, 4:26 PM), <http://whitehouse.gov/blog/2010/03/21/one-more-step-towards-health-insurance-reform>.

155. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

156. *Id.* § 1.

157. *Id.*

158. *Id.*

159. *Id.* § 2.

would perhaps view the administration's anticipated defense that it was only repealing the "regulatory" protections but still preserving the "legislative" protections as it had promised, as a mere technical dodge for a broken promise.

The main rationale given by the new administration for the proposed repeal of the Provider Conscience Rule is that the new regulations are not necessary.<sup>160</sup> The alleged detrimental impact upon access to abortion simply begs the question. It simply means that if a provider does not want to provide an abortion, it is harder (at least more difficult or awkward) for his or her patient or prospective patient to conveniently get an abortion. That, of course, raises the issue of priority between and balance of the competing rights of providers' conscience and patients' access to abortion; it does not suggest the solution to the conflict, unless one approaches the issue with *a priori* assumptions, where the purpose of the discussion is to examine and illuminate, not conceal or ignore.

Thus, the core point of dispute over the proposed new rescission rule is whether the Bush Administration Provider Conscience Rule provisions really are necessary to protect rights of conscience of health-care providers, or whether they are unnecessary bureaucratic burdens on access to abortion and related controversial services. Part of the delicacy of the issue for the Obama Administration is that the President's March 24, 2010, Executive Order conceded the validity of many of the conditions which the Bush Administration cited to justify enactment of the Provider Conscience Rule.<sup>161</sup>

There is evidence to support both positions on the question of necessity, depending on the circumstances. Also, the evidence can be interpreted differently, depending on one's perspective. It is not surprising that persons whose rights of conscience are at stake might view the issue somewhat differently than persons who have profit or ideological interests in disregarding providers' conscience and in facilitating convenient access to abortion. To some extent, it is a question of how much empathy there is for health-care providers who do not wish to perform or assist in procedures which they consider

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160. Proposed Rescission of the Regulation Entitled "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," 74 Fed. Reg. 10,207, 10,210 (Mar. 10, 2009).

161. Compare Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 29, 2010), with Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,073-74 (Dec. 19, 2008) (subsequently codified at 45 C.F.R. pt. 88 (2009)).

deeply immoral and deeply offensive to their God, on one hand, and how much sympathy there is for women whose access to abortion services will be inconvenienced, and how severely the patients will be burdened. It also is a question of how much burden providers should have to bear before mechanisms to monitor and ensure compliance with existing conscience protection laws are enacted, and how much burden or inconvenience such compliance reports and enforcement procedures will have upon abortion providers and upon women seeking abortion. Line-drawing of that sort is normative, but depends upon the value-lenses through which the evidence is viewed. The value-lenses of the Obama Administration obviously are different than the value-lenses of the prior Bush Administration. And it is not unlikely that those differences will result in different administrative regulatory rules and policies concerning protection of rights of conscience of health-care providers over the next few years.

Finally, it is not unlikely that the principal reason for opposition to the Provider Conscience Rule, and the core practical reason behind the move to rescind it, may lie in the desire to avoid reporting and escape accountability. As the symposium essay by Professor Wilson (published in this issue) clearly shows,<sup>162</sup> private individuals in health-care professions have little means for vindicating and redressing violations of their personal rights of conscience. Likewise, the current legislative conscience clauses provide very few meaningful mechanisms for ascertaining compliance, and little meaningful mechanisms even for institutional private enforcement of the promises of conscience rights protection. For opponents of serious protection of civil rights, that is the ideal situation—legal rhetoric that comforts those concerned about abuses of rights of conscience, but provides no application or practical means for accountability or enforcement. However, for providers with conscientious objection to elective abortion, it is a very troubling and unsatisfactory situation.

Thus, the short-term prospects for the future of protection for rights of conscience does not look encouraging for supporters of those protections. Nonenforcement, if not repeal, of the HHS Provider Conscience Rule by the current administration is likely. Narrow interpretation and under-enforcement or nonenforcement of state and federal conscience protection laws will continue. The likelihood of congressional passage of expanded protection for rights of conscience

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162. Robert Fretwell Wilson, *Empowering Private Protection of Conscience*, 9 AVE MARIA L. REV. 103 (2010).

depends upon which party controls which house of Congress, and certainly the current Congress is unlikely to expand protections for rights of conscience. Attempts to quietly or tacitly repeal or ignore protections for rights of conscience in various health-care reforms will continue. Pressures from those pushing to maximize access to services such as nontherapeutic abortion will continue to create conflicts with the rights of conscience of individual and institutional health-care providers. Abuses will continue and eventually examples of abuses will be publicized. The tensions will create both counter-actions (reactions) such as political issues and campaigns—and that may generate some political pressure to find some compromise or balance. It is that prospect that appears to hold the greatest hope for the future of protection of rights of conscience in health care in America.

#### V. CONCLUSION: BALANCING RIGHTS OF CONSCIENCE WITH ACCOMMODATION OF ACCESS

It is possible to protect both rights of conscience and rights of patients to contract controversial but legal medical procedures. For example, the American Pharmaceutical Association adopted a balanced policy in 1998 that includes protecting the rights of conscience of pharmacists and also supports the establishment of “systems to ensure [the] patient’s access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal,” such as toll-free telephone access to information about pharmacies and pharmacists who will fill controversial prescriptions that may violate the conscience of some other pharmacists.<sup>163</sup> “The Association of Reproductive Health Professionals operates a [toll-free] national hotline . . . that allows patients to find a listing of providers who provide emergency contraception services.”<sup>164</sup> In rural Washington State, such a toll-free referral system has been operated successfully since 1997, and by 2005 nearly 5,000 emergency contraception interventions were being done annually in Washington chain pharmacies in forty-three locations.<sup>165</sup> The success of this system is that no pharmacist with moral objections to dispensing what are called “emergency con-

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163. *Freedom of Conscience for Small Pharmacies: Hearing Before H. Small Business Comm.*, 109th Cong. 2–3 (2005) (statement of Linda Garrelts MacLean, American Pharmacists Association) (alteration in original), available at <http://www.pharmacist.com/AM/Template.cfm?Section=Home2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=14489>.

164. *Id.* at 3.

165. *Id.* at 3–5.

traceptives" is forced to violate his or her conscience to do so, while patients and their physicians who prescribe the potential abortifacient medications have a means to instantly identify and locate pharmacists who have no objection to dispensing the legal medication. By similar notice, through information and communication systems established in advance, other health-care providers and patients could in most cases achieve respect for both rights of conscience of providers and access of patients to legal treatment options that are morally objectionable to some providers.

Thus, Professor Kent Greenawalt has written:

In principle, people should not have to render services that they believe are forbidden directly by God or are deeply immoral. However, any privilege to refuse needs to be compatible with individuals being informed about and being able to acquire standard medical services and drugs, and with health care institutions and pharmacies not having to turn handsprings to have personnel on hand to provide what is needed.<sup>166</sup>

He also counsels that "people who can get treatment or drugs elsewhere and have adequate information about alternative possibilities have a much less powerful claim that refusal impinges on them to an impermissible degree."<sup>167</sup> As noted above, such an approach has been implemented successfully, showing that it is possible to protect rights of conscience without eliminating or unduly burdening the rights of patients to controversial medical procedures in most cases.

Protection for rights of conscience of health-care providers balanced with practical provision for the access interests of patients and other providers to useful available information previously disclosed and easily accessible can vindicate both values. Whether such reasonable, balanced, and practical solutions are politically acceptable at particular times and in particular political circumstances remains to be seen.

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166. Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 823–24.

167. *Id.* at 823. See also Katherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1748–49 (1999).