PROTECTING THE OTHER RIGHT TO CHOOSE: THE HYDE-WELDON AMENDMENT

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Consider a person who has undergone the necessary training to join the ranks of emergency medical technicians ("EMTs") who are committed to saving lives across the nation.[1] Now consider that this person is asked to respond to a non-emergency call to transport a patient from a hospital to an abortion clinic for an elective abortion.[2] The EMT informs her employer that transporting the patient to an abortion clinic for an elective abortion directly contravenes her moral convictions. In response, the employer immediately fires her.

This Note discusses the conflict surrounding a law designed to protect those who, like the EMT, are discriminated against because of their conscientious objections to abortion. The provision that affords this protection is known as the Hyde-Weldon Conscience Protection Amendment ("Hyde-Weldon Amendment," "Amendment," or "Hyde-Weldon"),[3] named after the two Republican Congressmen who sponsored the Amendment, Representative Henry Hyde of

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† Juris Doctor, Ave Maria School of Law, 2007. I would like to recognize my father, Mark Gallagher, for the essential role he played in the passage of the Hyde-Weldon Amendment and for heroically dedicating his career to protecting the unborn. I would also like to thank Casey Mattox of CLS for providing me with helpful resources regarding the legal challenges to the Amendment.

1. EMTs are highly trained and share with physicians the direct responsibility for patient care. *Paramedical Personnel*, *in* 9 THE NEW ENCYCLOPÆDIA BRITANNICA 144 (15th ed. 2002). Estimates in the United States market suggest that firefighters alone may constitute close to one million of the trained EMTs in the United States. National Association of EMTs, EMS FAQ, http://www.naemt.org/aboutEMSAndCareers/ems_faq.htm (last visited Mar. 17, 2007). The EMT's job is to respond to the scene of an emergency, assess the individuals, and make a determination as to the nature and extent of personal injuries. *Id.* She is trained to provide both basic and advanced medical care to deal with a variety of emergencies, including "heart attack, difficulty breathing, falls, accidents, drowning, cardiac arrest, stroke, drug overdose and acute illnesses." *Id.*

2. An elective abortion is one "without medical justification but done in a legal way." PDR MEDICAL DICTIONARY 4 (Marjory Spraycar ed., 1995).

3. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)–(2), 118 Stat. 2809, 3163 (2004).

Illinois and Representative Dave Weldon, a Florida physician.[4] The Amendment, which passed in December of 2004 as part of an appropriations act,[5] prohibits the disbursement of Labor, Health, and Human Services-Education ("Labor-HHS-ED") funds to federal agencies, federal programs, and state and local governments that "discrimin[ate] on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[6] In other words, it is anti-discrimination legislation. Now, a government agency wishing to force a hospital, doctor, or similarly situated health care entity to provide, pay for, or refer for abortions cannot do so if it wishes to receive federal funding. The provision is strictly limited to these circumstances. Representative Weldon noted "that the provision applies only when a 'healthcare entity' refuses to provide abortion services, and a government tries to force it to do so. 'Therefore this provision will not affect access to abortion or the provision of abortion-related information by willing providers.'"[7]

Part I of this Note details some of the background to the Hyde-Weldon Amendment, specifically the gap in "conscience protection" provisions of federal law prior to Hyde-Weldon. Part II discusses the anomalous opposition to this anti-discrimination law, including legal challenges to the Amendment. In response to these challenges, Part III of this Note explains the constitutional legitimacy of the Hyde-Weldon Amendment as applied under Congress's spending power and the Tenth Amendment and argues that Hyde-Weldon survives facial challenges because it is not vague or overbroad. The Note concludes that the Amendment represents an important step in protecting the rights of health care workers who refuse to act contrary to the dictates of their consciences.

I. BACKGROUND OF THE HYDE-WELDON AMENDMENT

Other federal laws that afford certain conscience protections for health care entities existed prior to the enactment of the Hyde-Weldon Amendment.[8] Those laws, however, suffered from a perceived

4. Lynn Vincent, *License Not to Kill*, WORLD, Dec. 4, 2004, at 11.

5. Consolidated Appropriations Act, § 508(d)(1)–(2).

6. *Id.*

7. Vincent, *supra* note 4 (quoting Rep. Weldon).

8. *Id.* *See* 42 U.S.C. § 238n(a)(1), (c)(2) (2000) (prohibiting discrimination regarding abortions against "any health care entity," defined to "include[] an individual physician, a

ambiguity and subsequent court challenges over the meaning of the words "healthcare entities."[9] It was successfully argued that the term "healthcare entities" applied only to individuals and not to institutions;[10] this distinction, in turn, opened the door for the implementation of coercive measures to be used to require institutional health care providers to participate in abortion. For example, in the case of *Valley Hospital Ass'n v. Mat-Su Coalition for Choice*,[11] the Alaska Supreme Court forced a "quasi-public" community hospital to provide abortions despite the hospital's policy and the sentiment of the community.[12]

A hospital in St. Petersburg, Florida, felt the brunt of similar pressure. Bayfront Medical Center is a private hospital that leases land from the City of St. Petersburg for ten dollars a year.[13] In 1997, Bayfront joined a number of other hospitals in the area to form BayCare Health System and, by 1999, Bayfront had ceased providing abortions and had made other changes to meet requirements of two Catholic partners.[14] The City Council subsequently sued Bayfront, and eventually the two entered into a settlement.[15] As a part of the settlement terms, Bayfront was compelled to "remain free of all Catholic influence on its staff, policies, procedures and patients."[16]

Other examples of such coercion abounded under the pre-Hyde-Weldon understanding of "healthcare entities." In New Jersey, there

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postgraduate physician training program, and a participant in a program of training in the health professions"); § 300a-7(c)(1) (prohibiting discrimination against "health care personnel" in the administration of grants, contracts, loans, and loan guarantees under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act); § 300a-7(c)(2) (same for grants or contracts "for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services"); § 300a-7(d) (affirming the right of an "individual" to refuse, on grounds of conscience, to participate in any activity funded under administration by the Secretary of Health and Human Services).

9. Vincent, *supra* note 4.

10. *Id.*

11. 948 P.2d 963 (Alaska 1997).

12. *Id.* at 965. The policy in *Valley Hospital Ass'n* prohibited abortions unless the fetus had "a condition . . . incompatible with life," the mother's life was in danger, or the pregnancy resulted from rape or incest. *Id.* The court held unconstitutional an Alaska statute prohibiting the requirement of a hospital to participate in an abortion "to the extent [the statute] applies to quasi-public institutions." *Id.*

13. Wes Allison, *City, Bayfront Settle Suit*, ST. PETERSBURG TIMES, Apr. 11, 2001, at 1A.

14. *Id.*

15. *Id.*

16. *Id.*

was an attempt to require a Catholic hospital to build an abortion clinic and pay for abortions.[17] In New York, a state comptroller and gubernatorial candidate threatened a Catholic-operated health maintenance organization ("HMO") with the loss of state contracts because it chose not to pay for abortions.[18] In addition, California recently enacted legislation that prohibits even nonprofit hospitals from ensuring that the property they sell is not used for particular types or levels of "medical services."[19]

The narrowly defined meaning of "healthcare entities" enabled federally funded government entities to continue forcing institutional health care providers to participate in abortions. With the enactment of the Hyde-Weldon Amendment, the gap between individuals and institutions has been filled. The Hyde-Weldon Amendment provides that:

> None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.
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> . . . [T]he term "health care entity" includes 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, organization, or plan.[20]

The Amendment effectively eliminates the uncertainty in the definition of "health care entity" by explicitly including any kind of heath care facility, organization, or plan within the term. As a result, the Amendment forbids federally funded entities from coercing a broad range of health care providers.

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17. *See* Transcript of Notion of Motion at 13–21, *In re* Allegheny Hosps., No. BUR-L-3541-98 (N.J. Super. Ct. Oct. 24, 2002).

18. *N.Y. Insurance Denies Access to Reproductive Healthcare*, WOMEN'S ENEWS, Jan. 31, 2002, http://womensenews.org/article.cfm/dyn/aid/801.

19. CAL. CORP. CODE § 5917.5 (West Supp. 2007).

20. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)–(2), 118 Stat. 2809, 3163 (2004).

II. CURRENT CHALLENGES TO THE LAW

There are several arguments challenging the legitimacy of the Hyde-Weldon Amendment. Senator Barbara Boxer, a California Democrat, and nine other senators articulated three of the most prevalent challenges in a letter signed in the fall of 2004.[21] The senators first argued that "[t]his provision . . . would allow a broad range of health-care companies to refuse to comply with federal, state, and local laws and regulations pertaining to abortion services."[22] The letter next outlined the concern that "[t]his will mean that medical providers in hospitals and clinics across the country will likely be victims of demonstrations and intimidations as this provision allows that they be forbidden from providing abortion care to women who need it."[23] Finally, the senators maintained that the Amendment "is harmful to women and denies women access to reproductive health services."[24]

These claims are not persuasive. In response to the first assertion, that Hyde-Weldon allows companies to refuse to comply with state and federal laws, the United States Conference of Catholic Bishops ("USCCB") observed that Senator Boxer's letter cites no laws to support that charge.[25] In fact, there is no federal law requiring health care providers to participate in abortions, and forty-seven states actually prohibit that type of coercion (generally through a state-enacted "Right of Conscience Act").[26] Second, in response to the claim that hospitals will become the subject of intimidation because they are "forbidden" to provide abortions, the USCCB noted that, in reality, the Amendment "empowers no one to 'forbid' providers to provide abortions—rather, it leaves each provider the freedom to choose to do so or not."[27] Finally, the USCCB demonstrated that the claim that the Amendment denies women access to reproductive

21. 150 CONG. REC. S11722–23 (daily ed. Nov. 20, 2004) (letter to Chairman of Senate Committee on Appropriations from Sens. Feinstein, Boxer, Snowe, Clinton, Lincoln, Milkuski, Stabenow, Murray, Cantwell, and Collins).

22. *Id.* at S11722.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* The response continued by asking if "the signers [of the letter] really think that their allies will mount public demonstrations and intimidations against the 86% of U.S. hospitals that choose not to perform abortions." *Id.*

health services is inaccurate as well. The Amendment only addresses abortions, not all reproductive health services. Further, it does not prohibit health care institutions from providing access to abortion if they so choose.[28] The Amendment merely recognizes that providing access to abortion certainly can, and should, be done "without coercing the consciences of health care providers who disagree."[29]

In addition to legislative opposition, Hyde-Weldon has been challenged on constitutional grounds. In the wake of the December 8, 2004, passage of the Appropriations Act that included the Amendment,[30] the National Family Planning and Reproductive Health Association ("NFPRHA") filed a lawsuit in the United States District Court for the District of Columbia seeking declaratory judgment that the Amendment is unconstitutionally vague and seeking an injunction prohibiting its implementation and enforcement.[31] At its core, the lawsuit "alleges that by requiring the state to refuse to protect women's constitutional rights in order to avoid stiff fiscal punishment, the provision impermissibly infringes on state sovereignty in violation of the 10th Amendment to the U.S. Constitution."[32] The premise of NFPRHA's argument is that the provision is more coercive than those previously considered by the courts.[33]

Similarly, on January 25, 2005, California Attorney General Bill Lockyer filed a lawsuit in the Northern District of California, alleging that the Hyde-Weldon Amendment threatens billions of dollars coming to California under the Labor-HHS-ED appropriations bill.[34] As of March 2007, this case was still in pretrial motions in the district court.

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28. *Id.*

29. *Id.*

30. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)–(2), 118 Stat. 2809, 3163 (2004).

31. Complaint for Declaratory & Injunctive Relief at 13–14, Nat'l Family Planning & Reprod. Health Ass'n v. Ashcroft, No. 1:04-cv-02148-HHK (D.D.C. Dec. 13, 2004), *tried sub nom.* Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales, 391 F. Supp. 2d 200 (D.D.C. 2005), *vacated by* 468 F.3d 826 (D.C. Cir. 2006).

32. NAT'L FAMILY PLANNING & REPROD. HEALTH ASS'N, BACKGROUND INFORMATION ON THE WELDON FEDERAL REFUSAL LAW AND PENDING LEGAL CHALLENGES 3 (2006), *available at* http://www.nfprha.org/atf/cf/%7BC342E09A-9DD8-4743-8E8C-EBDC304DF4B8%7D/WeldonLawsuitBackgrounderMarch2006FINAL.pdf [hereinafter NFPRHA BACKGROUND INFORMATION].

33. *Id.*

34. Complaint for Declaratory & Injunctive Relief at 2, 5–6, California *ex rel.* Lockyer v. United States, No. C-05-00328-JSW (N.D. Cal. Jan. 25, 2005).

NFPRHA is a Washington, D.C.-based nonprofit association that represents providers, administrators, researchers, educators, and consumers in the family planning field.[35] It represents clinics that receive federal funding under Title X of the Public Health Service Act "to provide subsidized, voluntary, family-planning services to low-income Americans."[36] NFPRHA contended that the Hyde-Weldon Amendment "arguably overrides a fundamental principle of the Title X program which ensures that pregnant women who request information about all their medical options, including abortion, are given that information, including a referral upon patient request."[37] NFPRHA's request for immediate injunctive relief to prevent enforcement of the Amendment was denied on December 20, 2004.[38] On September 28, 2005, Judge Henry H. Kennedy, Jr., of the United States District Court for the District of Columbia, issued an opinion rejecting the claims that the Hyde-Weldon Amendment violated the Spending Clause, was unconstitutionally vague, and constituted an impermissible delegation of legislative power.[39] On November 14, 2006, the United States Court of Appeals for the District of Columbia vacated the district judge's ruling and remanded the case for dismissal, holding that NFPRHA had no standing to bring the suit in the first place.[40]

The basis for California's challenge centers on a concern that Hyde-Weldon will coerce the state to refrain from taking disciplinary action, pursuant to the state's police powers, against a health care professional who refuses to provide "medically necessary" emergency abortion services.[41] California's Reproductive Privacy Act places no restrictions on the availability of abortion prior to viability, and after viability it permits surgical abortion by an authorized health care provider through the full term under two circumstances: (1) "the

35. Complaint for Declaratory & Injunctive Relief, *supra* note 31, at 3.

36. Nat'l Family Planning & Reprod. Health Ass'n, http://www.nfprha.org/ (follow "Mission Statement" hyperlink) (last visited Mar. 20, 2007).

37. NFPRHA BACKGROUND INFORMATION, *supra* note 32, at 2.

38. *Id.*

39. Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales, 391 F. Supp. 2d 200, 209–10 (D.D.C. 2005), *vacated by* 468 F.3d 826 (D.C. Cir. 2006).

40. 468 F.3d at 831.

41. Notice of Motion & Motion to Intervene as Party Defendants; Memorandum of Points & Authorities at 5, California *ex rel* Lockyer v. United States, No. C-05-00328-JSW (N.D. Cal. June 16, 2005) [hereinafter Notice of Motion] (citing Complaint for Declaratory & Injunctive Relief, *supra* note 34, at 2).

physician lacked a good-faith medical judgment that the fetus was viable," or (2) the physician knew the fetus was viable, but he "lacked a good-faith medical judgment that 'continuation of the pregnancy posed *no risk* to the life or health of the pregnant woman.'"[42] Given agreement among medical authorities that there is always *some risk* to the life or health of the mother that accompanies carrying and or delivering a child, a physician in California can virtually always certify that continuation of the pregnancy poses *some risk* and is therefore "medically necessary."[43] Currently, California "has the discretion under state law to take disciplinary action against . . . health-care professionals who refuse to provide abortion related services in emergency situations *where such services are necessary to protect the life or health of a woman*."[44] Lockyer alleged that because the Hyde-Weldon Amendment contains no express exception for situations where the life or health of the woman is *at risk*, the Hyde-Weldon Amendment will be coercive and infringe on state sovereignty unless the court finds that it impliedly contains the medical emergency exception that exists under California law.[45]

The ability of the State of California to impose disciplinary sanctions—one of the issues in the California case—is precisely what the Amendment is designed to prevent. The way the state interprets the phrases "medically necessary" and "emergency situations" would compel health care professionals, under threat of punishment, to provide abortion services at virtually all times because the standard is to "preserve the 'life or health' of the mother from *any* degree of 'risk' to her, however quantified."[46] Therefore, health care professionals are put in the unjust position of "either declining to provide emergency services and care or transfer services to women seeking therapeutic abortions and thereby risking regulatory or criminal action against them, or foregoing [sic] their constitutional, statutory and ethical rights to decline participation in procedures that violate their

42. *Id.* at 3–4 (quoting CAL. HEALTH & SAFETY CODE § 123468(b)(1)–(2) (Deering Supp. 2006) (emphasis added)).

43. *Id.* at 10.

44. *Id.* at 13 (citing Complaint for Declaratory & Injunctive Relief, *supra* note 34, at 15).

45. Complaint for Declaratory & Injunctive Relief, *supra* note 34, at 2, 18–19.

46. Notice of Motion, *supra* note 41, at 7 (emphasis added).

conscience."[47] This coercion takes place despite the fact that the Amendment *does not* prohibit willing providers and willing health care professionals from providing access to abortion and abortion-related services.

Both the NFPRHA and *Lockyer* lawsuits ignore the fact that women will still have access to all of the previously accessible abortion-related services. The goal of these two lawsuits is to force all health care professionals and health care institutions to provide abortion services. The Amendment merely prohibits the state and federal governments from forcing conscientious objectors to facilitate these services.

III. THE HYDE-WELDON AMENDMENT IS CONSTITUTIONAL

Despite the legislative and constitutional challenges to the Hyde-Weldon Amendment, it is indeed constitutional under current Supreme Court jurisprudence, and accordingly it should be upheld. First, the Amendment is a valid exercise of Congress's spending power. Second, the Hyde-Weldon Amendment is constitutional on its face because it (1) does not infringe upon constitutionally protected conduct and (2) is not "impermissibly vague in all of its applications."[48]

A. *The Hyde-Weldon Amendment Is a Valid Exercise of Congress's Spending Power and Does Not Impermissibly Infringe on State Sovereignty in Violation of the Tenth Amendment*

Congress is permitted to attach conditions to the receipt of federal funds and has repeatedly employed the power to "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[49] The United States Supreme Court held in *South Dakota v. Dole* that while Congress's spending power is not unlimited, it is a legitimate exercise of power if it meets four requirements.[50] The first

47. *Id.* at 8. A therapeutic abortion is one "induced because of the mother's physical or mental health, or to prevent birth of a deformed child or a child resulting from rape." PDR MEDICAL DICTIONARY, *supra* note 2, at 4.

48. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982).

49. Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

50. 483 U.S. 203, 207–08 (1987).

general restriction is, in the language of the Court, "derived from the language of the Constitution" and dictates that "the exercise of the spending power must be in pursuit of the general welfare."[51] Importantly, the Court noted that in determining whether a particular expenditure is intended to serve the general welfare, "courts should defer substantially to the judgment of Congress."[52] Second, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[53] Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[54] Finally, there must not be any other constitutional provision that provides "an independent bar to the conditional grant of federal funds."[55]

The Hyde-Weldon Amendment satisfies the four requirements of *Dole* for conditional spending. First, the Amendment is designed to serve the general welfare. Generally, the Court will give an extremely high level of deference to a congressional decision that an exercise of the spending power is in pursuit of the general welfare.[56] The Supreme Court has stated that "the concept of welfare or the opposite is shaped by Congress."[57] Indeed, the Supreme Court has "questioned whether 'general welfare' is a judicially enforceable restriction at all."[58] Initially, the Supreme Court's decision in *Harris v. McRae*[59] is strongly indicative of the fact that the Hyde-Weldon Amendment serves the general welfare. In *Harris*, the Supreme Court was faced with determining the statutory and constitutional validity of the Hyde Amendment.[60] The Hyde Amendment, like the Hyde-Weldon Amendment, is a rider to the annual Labor-HHS-ED appropriations bill. It prevents Medicaid and any other programs funded under these departments from funding abortions, except in

51. *Id.* at 207 (citations and internal quotation marks omitted).

52. *Id.* (citing Helvering v. Davis, 301 U.S. 619, 640, 645 (1937)).

53. *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

54. *Id.* (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

55. *Id.* at 208.

56. *Id.* at 207 (stating that "courts should defer substantially to the judgment of Congress").

57. Helvering v. Davis, 301 U.S. 619, 645 (1937).

58. *Dole*, 483 U.S. at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 91 (per curiam) ("whether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant").

59. Harris v. McRae, 448 U.S. 297 (1980).

60. *Id.* at 301.

limited cases. While the decision in *Harris* came down years before *Dole*, the Court addressed the question of whether the Hyde Amendment is rationally related to a legitimate government interest, which implicitly answers the question of whether it serves the general welfare.[61] The constitutional question the Court addressed was "whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravenes the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment, or either of the Religion Clauses of the First Amendment."[62] In light of the equal protection question, the Court stated that the Hyde Amendment bears a rational relationship to the government's interest in protecting the potential life of the fetus.[63] Citing *Roe v. Wade*,[64] the Court recognized that the state has an "important and legitimate interest in protecting the potentiality of human life."[65] The Court reasoned that because the Hyde Amendment encourages childbirth, except in the most urgent circumstances, it is rationally related to the legitimate governmental objective of protecting potential life.[66] This conclusion tends to indicate that an amendment preventing discrimination against health care individuals and providers for refusing to participate in or provide abortions, also promotes the general welfare. Moreover, the Hyde-Weldon Amendment mirrors other federal laws that categorically prohibit discrimination on one ground or another. In this way, the Hyde-Weldon Amendment falls squarely in line with a widely applied, well-developed concept of prohibited discrimination that is certainly not considered against the general welfare. For example, Title VII of the Civil Rights Act of 1964 forbids employers to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[67] Title VI of the Civil Rights Act of 1964 and the Age

61. *Id.* at 324.

62. *Id.*

63. *Id.* at 324.

64. 410 U.S. 113 (1972).

65. *Harris*, 448 U.S. at 324 (citing Roe v. Wade, 410 U.S. 113, 162 (1972)).

66. *Id. See also* Poelker v. Doe, 432 U.S. 519 (1977) (holding that a city's refusal to provide publicly financed hospital services for nontherapeutic abortions, while providing such services for childbirth, did not deny equal protection).

67. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000).

Discrimination Act of 1975 provide that "[n]o person . . . shall . . . be excluded from participation in, be denied the benefits of, or be *subjected to discrimination* under any program or activity receiving Federal financial assistance" on the ground of race, color, national origin, or age.[68] Furthermore, since 1990, the Americans with Disabilities Act has provided that qualified individuals with disabilities shall not be subject to discrimination by a "covered entity," which means "an employer, employment agency, labor organization, or joint labor-management committee."[69] Thus, with respect to this first condition, the Hyde-Weldon Amendment is almost certainly a valid exercise of Congress's spending power.

Second, the conditions of the Hyde-Weldon Amendment are unambiguous, allowing the states to make their choices with full knowledge of the consequences of their decisions. The Amendment applies to clearly defined situations: when a health care entity decides not to (1) provide for, (2) pay for, (3) provide coverage of, or (4) refer for abortion.[70] If any federal or state agency, program, or government attempts to force a heath care provider to perform any of the above four functions, that entity will not receive any of the funding that it otherwise would have received under the Labor-HHS-ED appropriations bill.[71] Therefore, Congress has clearly stated the conditions the states must meet in order to receive funds.

Third, the *Dole* Court noted that past court decisions suggested that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[72] However, the Court has also stated that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public

68. *Id.* § 2000d (emphasis added); Age Discrimination Act of 1975, 42 U.S.C. § 6102 (2000) (emphasis added). For another example, see Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2000) (prohibiting, with certain exceptions, discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance").

69. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–12112 (2000). For another example, see the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000) (providing that qualified individuals with disabilities shall not be "subjected to discrimination under any program or activity receiving Federal financial assistance").

70. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004).

71. *Id.*

72. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

interest."[73] Congress has long exhibited a national interest in protecting the derivative rights of the First Amendment's guarantee of freedom of religion. Indeed, federal law consistently recognizes the policy of protecting conscience rights.[74] For example, several conscience protections in Title X of the Public Health Service Act (PHSA), which predates the Hyde-Weldon Amendment, seek to prevent discrimination against those who would choose not to assist in or perform an abortion.[75] The congressional enactment of the Religious Freedom Restoration Act of 1993 ("RFRA")[76] provides a further example.[77] Under RFRA, Congress determined that the

73. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

74. Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 FORDHAM URB. L.J. 783, 802 & n.124 (2004).

75. 42 U.S.C. § 238n(a)(1), (c)(2) (2000) (Since 1996, federal law has also provided that "[t]he Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity [including an individual physician] to discrimination on the basis that . . . the entity refuses . . . to provide referrals for . . . abortions."). Similarly, Congress has indicated that:

> No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act . . . may—(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel . . . because he refused to perform or assist in the performance of . . . [an] abortion on the grounds that . . . [it] would be contrary to his religious beliefs or moral convictions . . . .

Id. § 300a-7(c)(1). Elsewhere, federal statutes protect employees in the biomedical or behavioral research context:

> No entity which receives . . . a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may . . . discriminate [against] . . . any physician or other health care personnel . . . because he refused to perform or assist in the performance of [any lawful health service] on the grounds that . . . [it] would be contrary to his religious beliefs or moral convictions . . . .

Id. § 300a-7(c)(2). Finally, employees may find refuge in general conscience protection clauses:

> No individual shall be required to perform or assist in the performance *of any part of a health service program* . . . funded in whole or in part under a program administered by the Secretary of Health and Human Services if [doing so] would be contrary to his religious beliefs or moral convictions.

Id. § 300a-7(d) (emphasis added).

76. *Id.* §§ 2000bb to bb-4.

77. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court determined that the statute was unconstitutional insofar as Congress lacked the power under the Fourteenth Amendment's enforcement clause to enact the RFRA, and thus invalidated it as applied to state and local governments. This holding, however, does not negate the point for which the author references RFRA, namely, to demonstrate that Congress has made a determination that there is a national

government may not substantially burden the rights of individuals to religious exercise absent "a compelling justification, even if the burden results from a rule of general applicability"; such a burden is lawful only if the government "can demonstrate that its regulation is the least restrictive means of furthering a compelling government interest."[78] Indeed, the federal government has an interest in preventing an individual from being compelled to engage in acts that she regards as killing.[79] Laws that attempt to discourage discrimination against an individual because of a conscientious objection to participating in a particular activity are certainly related to this federal interest. Thus, the Hyde-Weldon Amendment operates within the framework of a well-developed concept of prohibited discrimination.

Fourth, the Hyde-Weldon Amendment does not violate a woman's right to be free from governmental intrusion when deciding whether to terminate her pregnancy; therefore, there is no constitutional provision that provides an independent bar to the conditional grant of these federal funds. Hyde-Weldon does not affect abortion rights announced in *Roe v. Wade*[80] or subsequent abortion jurisprudence. The Court has consistently held that the government is obliged not to interfere in an abortion decision, but it is not required to facilitate abortion or to fund it.[81] The Amendment

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interest in protecting the derivative rights of the First Amendment's guarantee of freedom of religion.

78. Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act (42 U.S.C.S. §§ 2000bb* et seq*)*, 135 A.L.R. FED. 121, 121 (1996).

79. *See infra* note 142 and accompanying text.

80. 410 U.S. 113 (1973).

81. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court noted:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings . . . , not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

Id. at 198. Similarly, in *Harris v. McRae*, 448 U.S. 297 (1980), the Court stated:

> By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions . . . Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life.

does not restrict the activities of any willing abortion provider to perform abortions—and, notably, more than one million abortions are performed each year by willing abortion providers.[82] Furthermore, the Amendment prohibits neither the dissemination of information about abortion nor counseling about abortion. Rather, the Amendment protects hospitals and other health care providers who object to abortion and would choose not to participate in abortion.

This fourth requirement of *Dole*, that there must not be an "independent [constitutional] bar to the conditional grant of federal funds,"[83] apparently is a main issue in *California ex rel. Lockyer v. United States*.[84] The California Attorney General's argument that the Hyde-Weldon Amendment impermissibly infringes on state sovereignty because it is more coercive than other congressional spending laws[85] is presumably articulated to give the Ninth Circuit a justifiable means by which to circumvent clearly established Supreme Court jurisprudence. The Supreme Court has found that the Tenth Amendment[86] "does not restrict the federal spending power to the same degree as it might restrict the federal power to regulate the activities of state and local governments."[87] In *Dole*, the Court found that state sovereignty was not implicated when Congress "fix[es] the terms upon which its money allotments to states shall be disbursed."[88] The California challenge, however, concerns other language in the Court's opinion that suggests there might be some circumstances in which a "financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into

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Id. at 325. *See also* Maher v. Roe, 432 U.S. 464, 473–74 (1977) ("*Roe* did not declare an unqualified constitutional right to an abortion . . . . It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." (internal quotation marks omitted)); *cf.* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.").

82. Guttmacher Inst., Get "In the Know": Questions about Pregnancy, Contraception and Abortion, http://www.guttmacher.org/in-the-know/incidence.html (last visited Mar. 17, 2007).

83. Dole v. South Dakota, 483 U.S. 203, 208 (1987) (citations omitted).

84. No. C-05-00328 JSW (N.D. Cal. Jan. 25, 2005).

85. *See* Complaint for Declaratory & Injunctive Relief, *supra* note 34, at 18–19.

86. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

87. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 212 n.99 (7th ed. 2004).

88. *Dole*, 483 U.S. at 210 (internal quotation marks omitted).

compulsion.'"[89] The Court observed, for example, that Congress could not condition a grant of federal funds to states by requiring them to engage in activities that would otherwise be unconstitutional, such as engaging in invidious discrimination.[90] As noted in the immediately preceding paragraph, however, the Hyde-Weldon Amendment does not require a state to "restrict a woman's right to choose to carry a pregnancy to term [or] to terminate it."[91]

California argues that the Hyde-Weldon Amendment "requir[es] the state to refuse to protect women's constitutional rights."[92] Regardless of whether this is true, California's argument has no constitutional import. In *DeShaney v. Winnebago County Department of Social Services*,[93] the United States Supreme Court affirmed that:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.[94]

Supreme Court jurisprudence recognizes "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[95] The state may not "*support* a prohibition of abortion" or "*impos[e]* . . . a substantial obstacle to the woman's effective right to elect the procedure" before viability.[96] In other words, a state, as a governmental entity, may not take any *affirmative action* to prohibit a woman from obtaining an abortion before viability. It does not follow from this premise that a state has a constitutional right or obligation to provide abortions and, therefore, to take action against those who will not facilitate this right.[97] The states are not required to provide abortion or to facilitate a woman's

89. *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).
90. *Id.* at 210–11. *See also* NOWAK & ROTUNDA, *supra* note 87, at 212 n.99.
91. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 859 (1992).
92. NFPRHA BACKGROUND INFORMATION, *supra* note 32, at 3.
93. 489 U.S. 189 (1989).
94. *Id.* at 195.
95. *Casey*, 505 U.S. at 846.
96. *Id.* (emphasis added).
97. *See infra* note 120 and accompanying text.

abortion decision. In fact, "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus."[98] Therefore, while California may argue that Hyde-Weldon is "coercive"—in the sense that it does not allow the state to enforce a state law that facilitates the woman's abortion decision—the Tenth Amendment is not offended because the Hyde-Weldon Amendment does not force the state to engage in otherwise unconstitutional activities, such as interfering with the abortion decision.[99]

B. *The Hyde-Weldon Amendment Is Constitutional on Its Face*

Facial challenges to the Hyde-Weldon Amendment allege that it is unconstitutionally vague or overbroad.[100] In assessing these challenges, a court must first determine "whether the enactment reaches a substantial amount of constitutionally protected conduct."[101] If it does not, the challenge on the basis of overbreadth fails.[102] The court must then determine whether the law is void for vagueness—more precisely, whether the law is impermissibly vague in all of its applications.[103] The complainant, in order to prove this, must demonstrate that the enactment is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."[104] In other words, the void-for-vagueness doctrine requires statutes first to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and second to "provide

98. *Casey*, 505 U.S. at 846.

99. *See* NOWAK & ROTUNDA, *supra* note 87, at 212 n.99.

100. *See* Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales, 391 F. Supp. 2d 200, 203–04 (D.D.C. 2005), *vacated by* 468 F.3d 826 (D.C. Cir. 2006); Complaint for Declaratory & Injunctive Relief, *supra* note 34, at 16–17.

101. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982) (footnote omitted).

102. *Id.*

103. *Id.* at 494–95.

104. Smith v. Goguen, 415 U.S. 566, 578 (1974) (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

explicit standards" to prevent "arbitrary and discriminatory application."[105]

The Hyde-Weldon Amendment does not implicate a constitutionally protected right. This Note has already established the reality that the Amendment does not violate a woman's right to be free from governmental intrusion when deciding whether to terminate her pregnancy.[106] Yet, the Supreme Court has found that a "more stringent vagueness test" may be called for where a law might affect the exercise of a constitutionally protected right;[107] therefore, it is worthwhile exploring other arguably constitutionally protected rights that might be affected.

As an initial matter, nothing in the Constitution requires the government to subsidize the activities of organizations that discriminate against individuals based on matters of conscience.[108] From this basic premise, "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[109] The Court has repeatedly acknowledged that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."[110] The Court has also pointed out that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[111] With respect to Hyde-Weldon, the alternative activity is the ability of individuals to act in accordance with their consciences. This activity certainly falls in line with legislative policy, as is evidenced by conscience protection laws at both the federal and state levels.[112]

Furthermore, from a constitutional standpoint, no conflict exists between conscience protection and abortion law.[113] In *Doe v. Bolton*,[114] the Supreme Court left intact a conscience clause in

105. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); *see also Hoffman Estates*, 455 U.S. at 498 (quoting *Grayned*, 408 U.S. at 108–09).

106. *See supra* text accompanying notes 79–81.

107. *Hoffman Estates*, 455 U.S. at 499.

108. Rust v. Sullivan, 500 U.S. 173, 192–94 (1991).

109. Harris v. McRae, 448 U.S. 297, 316 (1980).

110. *Id.* at 317 n.19.

111. Maher v. Roe, 432 U.S. 464, 475 (1977) (footnote omitted).

112. *See supra* text accompanying note 26; *see also supra* note 75.

113. *See* Kramlich, *supra* note 74, at 797.

114. 410 U.S. 179 (1973).

Georgia's abortion statute while striking down other provisions of the law.[115] Under the Georgia statute at issue in *Doe*, "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure."[116] The Court understood the implications of the provision when it chose to uphold it, noting that, under the statute:

> A hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital.[117]

This language is particularly telling, as *Doe* was decided by the Supreme Court on the same day as *Roe v. Wade*,[118] the decision that created the right of a woman seeking an abortion to be free from governmental interference.[119] As evidenced by its language, the Court did not believe that the right to be free from governmental interference was inconsistent with the right to conscience.[120] Since the Hyde-Weldon Amendment does not reach a substantial amount of constitutionally protected conduct—or any, for that matter—the only remaining inquiry is whether the statute is void for vagueness.

A law is considered vague if "men of common intelligence must necessarily guess at its meaning."[121] Yet we are "[c]ondemned to the use of words [and] can never expect mathematical certainty from our language."[122] The Supreme Court has paraphrased the standard in a variety of different cases, but the standard remains focused on

115. *Id.* at 201, 204–05.

116. *Id.* at 197–98.

117. *Id.*

118. 410 U.S. 113 (1973).

119. *Id.* at 153; *see* Kramlich, *supra* note 74, at 793 ("This remains true even after *Roe* was modified by *Planned Parenthood v. Casey*, which allows the government to interfere with abortion access before viability so long as the interference does not create an undue burden." (footnotes omitted)).

120. For a discussion of why the right to an abortion is a "negative right" and not an "affirmative right," see Kramlich, *supra* note 74, at 793–801.

121. Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926).

122. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

whether a statute is impermissibly vague in all of its applications.[123] This, in and of itself, is a very high threshold to meet. The Hyde-Weldon Amendment lays out what type of conduct is prohibited in plain language and enunciates clearly the repercussions of violating the statute. The Hyde-Weldon Amendment provides that no funds appropriated under the 2005 Health and Human Services appropriations bill—and now the 2007 HHS appropriations bill[124]—will be made available to any federal agency or program, or to a state or local government, that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[125] In sum, the Hyde-Weldon Conscience Protection Amendment prohibits discrimination against health care providers who decline to "provide, pay for, provide coverage of, or refer for abortions."[126]

Hyde-Weldon's prohibition against discrimination is not unlike—and, in fact, is of the very same character as—numerous laws, already on the books and enforced throughout the United States, that broadly prohibit discrimination in a variety of contexts.[127] The concept of prohibiting discrimination is ingrained in our culture. For example, since 1964, Title VII of the Civil Rights Act has prohibited employment discrimination based on "race, color, religion, sex, or national origin."[128] Since 1967, the Age Discrimination in Employment Act has prohibited an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[129] In 1990, another comprehensive discrimination law was

123. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982); *see* Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 211 (1982) (rejecting a vagueness challenge to a statute even though "the statute may leave room for uncertainty at the periphery"); United States v. Harriss, 347 U.S. 612, 618 (1954) ("[A] statute will not be struck down as vague even though marginal cases could be put where doubts might arise.").

124. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, § 508(d)(1), 119 Stat. 2833, 2880 (2005); Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8 (2007) (continuing the appropriations through the 2007 fiscal year).

125. Consolidated Appropriations Act, § 508(d)(1).

126. *Id.*

127. *See supra* notes 67–69.

128. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000).

129. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2000).

passed—the Americans with Disabilities Act.[130] One of the findings supporting the Act was that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."[131] This belief that all people have the right to compete on an equal basis and pursue the opportunities that mark a free society without suffering discrimination is a sentiment this nation embraces and is not unlike the Hyde-Weldon Amendment itself.

In addition to the above-stated anti-discrimination laws, Congress has enacted several "conscience protection" laws akin to the Hyde-Weldon Amendment.[132] These laws, instead of prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, or disability, prohibit employment discrimination with respect to religious beliefs or moral convictions about performing or participating in the abortion procedure.[133] Thus, all of these congressionally enacted "discrimination laws"—whether on the basis of race, gender, conscientious objection, or otherwise—liberally prohibit discrimination on a particular ground, and, to date, not one of these has been determined to be unconstitutionally vague in any of its applications, much less "impermissibly vague in all of [its] applications."[134]

Additionally, many of the prohibitions, like those in the Hyde-Weldon Amendment, are linked to receiving federal financial assistance. The purpose of the Age Discrimination Act of 1975 is specifically "to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance."[135] Likewise, the rationale of the Rehabilitation Act of 1973 was to make sure that no otherwise qualified person with a disability would, by reason of that disability, "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

130. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

131. *Id.* § 12101(a)(9).

132. *See supra* notes 8 & 75.

133. *Id.*

134. Defendants' Memorandum of Points & Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction at 31, Nat'l Family Planning & Reprod. Health Ass'n v. Ashcroft, No. 04-2148-HHK (D.D.C. Dec. 24, 2004) [hereinafter Defendants' Memorandum of Points] (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)).

135. Age Discrimination Act of 1975, 42 U.S.C. § 6101 (2000).

program or activity receiving Federal financial assistance."[136] If the courts were to find that the Hyde-Weldon Amendment is facially invalid, it would call into serious question the numerous other laws that categorically prohibit discrimination.

Furthermore, the grounds for the California challenge to the Hyde-Weldon Amendment indicate that the prohibitions and penalties enunciated by the Amendment are anything but vague. California is asking that Hyde-Weldon be declared invalid and is trying to prohibit its enforcement because the State does not want to suffer the financial penalties that will result if it enforces a state law that prohibits hospitals from refusing to perform abortions for women in "emergency" or "life-threatening" situations.[137] The challenge, in and of itself, reveals that the plaintiff is perfectly aware of what conduct is prohibited and knows how to act accordingly but does not want to be required to do so. As the Court observed in a different context, "[s]urely, there seemed to be little question in the minds of the plaintiffs who brought this lawsuit as to the meaning of the law, or as to whether or not the conduct in which they desire to engage was or was not prohibited by the Act."[138] Therefore, at a bare minimum, the Hyde-Weldon Amendment cannot be said to be impermissibly vague in all of its applications, and it must be upheld.[139]

IV. THE HYDE-WELDON AMENDMENT PROVIDES IMPORTANT PROTECTIONS FOR HEALTH CARE WORKERS TO REFUSE TO ACT CONTRARY TO THE DICTATES OF THEIR CONSCIENCE

In an article for the *Fordham Urban Law Journal*, Maureen Kramlich, a public policy analyst, observed that currently the federal and state governments are free to protect conscience rights.[140] At the

136. Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000).

137. *See* Complaint for Declaratory & Injunctive Relief, *supra* note 34, at 2, 15, 21. See *supra* text accompanying notes 42–43 for an explanation as to why, under current California law, "emergency" and "life-threatening" situations apply to virtually every pregnancy, therefore requiring hospitals to perform abortions in almost all circumstances.

138. U. S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 579 (1973).

139. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982) ("The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.").

140. *See* Kramlich, *supra* note 74, at 798.

same time, she recognized that there is a movement by the American Civil Liberties Union ("ACLU") and similar groups that "effectively calls for the abolition of laws protecting the rights of health care providers who decline involvement in abortion."[141] Kramlich then observed that "[i]f the state were to compel a health care provider to kill or to engage in acts that the provider regards as killing, such compulsion may be so objectionable that it takes on constitutional dimensions, such that protections against this injustice are 'implicit in the concept of ordered liberty.'"[142] In citing *Palko v. Connecticut*,[143] she contended that the Due Process Clause of the Fourteenth Amendment[144] may make it unlawful for a state to abridge, by its statutes, the *freedom of religion* that the First Amendment safeguards against encroachment by the Congress.[145]

The premises of the First Amendment protections are, in a sense, well established. Beginning with *Cantwell v. Connecticut*,[146] the Supreme Court has repeatedly held that the First Amendment "embraces two concepts,—freedom to believe and freedom to act."[147] Regarding these freedoms, "[t]he first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[148] The Supreme Court most recently revisited this proposition in *Employment Division, Department of Human Resources v. Smith*.[149] There, the Court held that expressive

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141. *Id.* at 786 (citing CATHERINE WEISS ET AL., ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS 10 (2002), *available at* http://www.aclu.org/FilesPDFs/ACF911.pdf ("[W]hatever their religious or moral scruples, doctors and other health professionals should give complete and accurate information and make appropriate referrals.")); *see also* Sylvia A. Law, *Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. REV. L. & SOC. CHANGE 279, 282 (1995) ("General principles of medical malpractice and medical ethics require responsible physicians to provide the medical information that is relevant to patient choice and to make referrals for medical services that the treating physician is unable or unwilling to provide.").

142. Kramlich, *supra* note 74, at 798 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969)).

143. 302 U.S. 319 (1937).

144. U.S. CONST. amend. XIV, § 1.

145. *Palko*, 302 U.S. at 324 ("[T]he due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the *freedom of speech* which the First Amendment safeguards against encroachment by the Congress." (emphasis added)).

146. 310 U.S. 296 (1940).

147. *Id.* at 303.

148. *Id.* at 303–04.

149. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488–89 (codified at 42 U.S.C. §§ 2000bb to bb-4 (2000)).

conduct motivated by religion is still constitutionally protected so long as it does not conflict with a neutral law of general application.[150] The Court noted that "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."[151] The Court in that case dealt with affirmative "physical acts" taken by individuals pursuant to their religious inclinations.[152] The Court determined the circumstances under which an individual might be prohibited from acting in accord with his religious tenets.[153]

With respect to conscience-protection provisions, the concern is not with "physical acts," but rather with the refusal to act. This idea of a right of refusal is novel in one sense. The state conscience-protection provisions allow, under varying circumstances and to varying degrees, a physician, someone similarly situated, or a hospital to refuse to participate in abortion.[154] As already mentioned, the federal government and state governments are currently free to enact laws protecting conscience rights of health care providers who object to participation in abortion.[155] The question then becomes two-fold: first, whether the right of refusal can be denied (i.e., could the ACLU prevail in arguing that these laws should be abolished?); second, and ultimately more important, whether the right of refusal is even necessary. In other words, is it a valid exercise of a state's police powers to punish individuals for *refusing to act* contrary to the dictates of their consciences?

Taking the second inquiry first, the powers of a state, unlike those of Congress, are not enumerated but are always thought to encompass general "police powers." Since the formation of this country, the Supreme Court has viewed this power as relevant to morality and general welfare:

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150. *Id.* at 877, 879.

151. *Id.* at 882 (quoting Gillette v. United States, 401 U.S. 437, 461 (1971)).

152. *Id.* at 877–78.

153. *Id.* at 890 (holding that the Free Exercise Clause permits Oregon to prohibit religious use of peyote and thus to deny unemployment benefits to persons discharged for such use).

154. *See* The Protection of Conscience Project, United States Protection of Conscience Laws, http://www.consciencelaws.org/Conscience-Laws-USA/Conscience-Laws-USA-01a.html (last visited Mar. 17, 2007).

155. *See* Kramlich, *supra* note 74, at 798.

> The means of social improvement, the success of all institutions of learning and religion, depend on the preservation of this power. We look to the States for the exercise of their authority in aid of all institutions which tend to improve and elevate the moral and intellectual character of the people.[156]

While no real list of "police powers" exists, such powers are generally held to include the public health, welfare, safety, order, and public morals.[157] In wielding this power, "[s]tates traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."[158]

Assume for the sake of argument that there is no objection among health care professionals to providing emergency services and care involving cases of "emergency medical conditions" when defined along the lines of an acute physical condition that imminently jeopardizes a patient's life or health, or in cases of "medically necessary abortions"—those performed in a case where childbirth would more likely than not lead to the death of the mother.[159] In the absence of a true emergency situation, the utilization of the police power to force individuals to perform abortions should be viewed in light of the countervailing interests. More simply, the focus should center on protecting those citizens who conscientiously object to performing abortions because the police power of the state should not be used to favor some citizens of the state over others—that is, the woman's choice over the physician's choice—but rather to promote the *general welfare*. Because more than one million abortions are

156. The License Cases, 46 U.S. (5 How.) 504, 553 (1847).

157. *Id.* at 527–28; Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996).

158. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (internal quotation marks omitted).

159. *See* Notice of Motion, *supra* note 41, at 7. The proposed interveners in the case of *California* ex rel *Lockyer v. United States*, No. C-05-00328-JSW (N.D. Cal. Jan. 25, 2005), who consisted of the Christian Medical Association, the American Association of Pro-Life Obstetricians and Gynecologists, and the Fellowship of Christian Physician Assistants, do not object to providing *emergency* services and care but they do "possess a conscientious objection to providing abortions or abortion referrals for therapeutic abortions recommended by a physician under the authority of the [California] Reproductive Privacy Act to preserve the 'life or health' of the mother from any degree of 'risk' to her, however quantified." *Id.* at 7. The court denied petitioners' motion to intervene on November 17, 2005. Order Denying Motions to Intervene at 1, California *ex rel* Lockyer v. United States, No. C-05-00328-JSW (N.D. Cal. Nov. 17, 2005).

performed each year by willing providers,[160] there is no necessity for utilizing the police power to force health care providers with objections into the practice of abortion.

The police powers of the state may also be considered with respect to the first inquiry: could the right of refusal be denied? States that have made policy decisions to support and protect the rights of conscience of the persons within their borders should not be pressured by groups like the ACLU to abolish those protections.[161] Within the police power is the prerogative to support and enforce public morals and to discourage discrimination.[162] If a state legislature makes a policy decision that it is in the best interests of its citizens to provide special protections for those with moral or religious objections to abortion, these protections should not be abolished unless they run counter to constitutional protections.

CONCLUSION

The Hyde-Weldon Amendment is a legitimate exercise of Congress's spending power and is constitutional under current Supreme Court jurisprudence. First, challenges to the Amendment on congressional spending grounds should easily withstand constitutional scrutiny. Congress has a "legitimate interest in withholding the benefits of federal financial assistance from agencies, programs, or State and local governments that fail to respect . . . exercises of conscience."[163] Congress based its enactment of the Hyde-Weldon Amendment on a valid concern that the federal government should not subsidize those who would discriminate against institutional or individual health care entities solely because they object to providing, funding, or referring for abortions.[164] An equally valid corresponding concern is to dissuade states from placing health care individuals and institutions in the iniquitous position of having to choose between suffering potential penalties and acting against the dictates of their consciences.[165] Furthermore, the Amendment falls squarely in line with a widely applied, well-developed concept of

160. *See* Guttmacher Inst., *supra* note 82.

161. *See supra* note 141 and accompanying text.

162. *See* The License Cases, 46 U.S. (5 How.) 504, 528 (1847).

163. Defendants' Memorandum of Points, *supra* note 134, at 38.

164. *Id.*

165. *See, e.g.*, CAL. BUS. & PROF. §§ 17206–17209 (West 1997 & Supp. 2007).

prohibited discrimination. Perhaps most importantly, one must consider the right of refusal and its relation to the state's police power because, ultimately, whether the individual's right of conscience is protected will fall within the prerogative of the state.

While individuals may have specific causes of action under state and federal law for violations of specific rights, the Hyde-Weldon Amendment may be critical in deterring federal and state agencies from committing constitutional violations. The case of the EMT in the introduction of this Note is not a hypothetical one. It is the story of Stephanie Adamson, who was employed by the Superior Ambulance Service in Elmhurst, Illinois.[166] In August of 2003, when Adamson refused to transport a patient for an elective abortion, she lost her job.[167] If the Superior Ambulance Service relied on federal funding, and if the Hyde-Weldon Amendment had been in place, this injustice might never have occurred. Not only is the Amendment a constitutional exercise of congressional power, it is also an important protection for health care entities because of the potential repercussions of noncompliance.

166. The Protection of Conscience Project, Repression of Conscience, http://www.conscience laws.org/Repression-Conscience/Conscience-Repression-34.htm (last visited Mar. 17, 2007).

167. *Id.*

> As required by law, Adamson . . . took her grievance first to the Equal Employment Opportunity Commission, which issued her a Notice of Right to Sue in February 2004. The lawsuit contends that the ambulance company violated Title VII of the Civil Rights Act of 1964 and the Illinois Health Care Right of Conscience Act. The suit requests a jury trial and is seeking damages for loss of income and benefits, as well as compensatory and punitive damages.

Id.