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## THE QUESTIONABLE CONSTITUTIONALITY OF CONSCIENTIOUS OBJECTION CLAUSES FOR PHARMACISTS

*Nancy K. Kubasek, Daniel C. Tagliarina & Corinne Staggs\**

### INTRODUCTION

What used to be a simple request is turning into a political firestorm. Increasingly, women seeking to fill prescriptions for birth control pills and emergency contraception are being turned away from pharmacy counters across the country as a result of “conscientious objection laws,” also referred to as “conscience clauses” or “refusal clauses.” Such clauses allow pro-life pharmacists to refuse to fill prescriptions that are against the pharmacist’s individual religious or moral beliefs.<sup>1</sup> While these clauses may appear to be benign clauses that simply give pharmacists the right to practice their profession in accordance with their conscience, conscientious objector clauses violate the Establishment Clause of the United States Constitution and present a dangerous interference with the fundamental right to privacy established by *Griswold v. Connecticut*<sup>2</sup> and its progeny.<sup>3</sup>

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<sup>1</sup> The first reported refusal of a pharmacist to fill a prescription for an emergency contraceptive was in 1991. Julie Cantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2008 (2004).

<sup>2</sup> 381 U.S. 479 (1965).

<sup>3</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (extending the right to protect

It is perhaps this interference with a woman's right to privacy, which protects her right to use emergency contraception, to practice birth control, and to make important family planning decisions with the advice of her physician, that has stimulated the growing outcry against these laws. The strongest legal argument against these laws is that they violate the Establishment Clause of the United States Constitution. This article contends that conscientious objection statutes must be struck down as unconstitutional because such laws violate the Establishment Clause, or alternatively, that the statute must be narrowly drawn to provide only extremely limited circumstances under which the right to object can be exercised.

Part I of this article examines conscientious objection laws often used by pharmacists who refuse to fill birth control and emergency contraception prescriptions. Part II delineates a historical backdrop to this issue and provides a background for understanding how the courts may examine this issue in the future. Part III examines why conscientious objection laws violate the First Amendment's Establishment Clause. Part IV discusses the balance of interests between the woman's right to privacy and the pharmacist's interest in fulfilling his obligations without violating his conscience. Finally, the article concludes that the state may support a pharmacist's right to refuse to fill lawfully prescribed prescriptions for birth control and emergency contraception only under the most limited of circumstances, and therefore most conscientious objection laws are unconstitutional.

## I. CONSCIENTIOUS OBJECTION LAWS

Many state legislatures have addressed the issue of conscientious objection in medical procedures relating to

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private sexual relations between consenting adults); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1998) (reaffirming the right); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (affirming the right and extending it to minors); *Roe v. Wade*, 410 U.S. 959 (1973) (extending the right to protect a woman's right to terminate a pregnancy during the first trimester, and under certain circumstances during the second and third trimesters); *Eisenstadt v. Baird*, 405 U.S. 438 (1967) (extending the right to non-married couples).

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reproductive choice.<sup>4</sup> Historically, these conscientious objection laws have applied to abortion procedures<sup>5</sup> and occasionally

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<sup>4</sup> ALASKA STAT. § 18.16.010 (2006); ARIZ. REV. STAT. ANN. § 36-2151 (2006); ARK. CODE ANN. § 20-16-304 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); COLO. REV. STAT. § 25-6-207 (2005); COLO. REV. STAT. § 25-6-102 (2005); DEL. CODE ANN. tit. 24, § 1791 (2006); FLA. STAT. § 381.0051 (2006); GA. CODE ANN. § 49-7-6 (2006); HAW. REV. STAT. § 453-16 (2006); IDAHO CODE § 18-612 (2006); 745 ILL. COMP. STAT. 70/4 (2005); IND. CODE ANN. § 16-34-1-5 (2006); IOWA CODE § 146.1 (2005); KAN. STAT. ANN. § 65-443 (2006); KY. REV. STAT. ANN. § 311.800 (West 2006); LA. REV. STAT. § 40:1299.31 (2006); ME. REV. STAT. ANN. tit. 22, § 1903 (2005); MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2006); MASS. ANN. LAWS ch. 112, § 12I (Lexis Nexis 2006); MICH. COMP. LAWS § 333.20181 (2006); MINN. STAT. § 145.414 (2005); MISS. CODE ANN. § 41-107-5 (2006); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. ANN. § 28-338 (2005); NEV. REV. STAT. ANN. § 632.475 (2006); N.J. STAT. ANN. § 2A:65A-1 (West 2006); N.M. STAT. ANN. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-I (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); N.D. CENT. CODE § 23-16-14 (2006); OHIO REV. CODE ANN. § 4731.91 (West 2006); OKLA. STAT. tit. 63, § 1-741 (2005); OR. REV. STAT. § 435.485 (2006); OR. REV. STAT. § 435.225 (2006); 18 PA. CONS. STAT. § 3213 (2005); R.I. GEN. LAWS § 23-17-11 (2006); S.C. CODE ANN. § 44-41-50 (2005); S.D. CODIFIED LAWS § 36-11-70 (2006); TENN. CODE ANN. § 68-34-104 (2005); TEX. OCC. CODE ANN. § 103.002 (Vernon 2007); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WASH. REV. CODE ANN. § 48.43.065 (2006); W. VA. CODE § 16-2B-4 (2006); WIS. STAT. § 253.09 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

<sup>5</sup> ALASKA STAT. § 18.16.010 (2006); ARIZ. REV. STAT. ANN. § 36-2151 (2006); ARK. CODE ANN. § 20-16-304 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); DEL. CODE ANN. tit. 24, § 1791 (2006); HAW. REV. STAT. § 453-16 (2006); IDAHO CODE ANN. § 18-612 (2006); 745 ILL. COMP. STAT. 70/4 (2005); IND. CODE § 16-34-1-5 (2006); IOWA CODE § 146.1 (2005); KAN. STAT. ANN. § 65-443 (2006); KY. REV. STAT. ANN. § 311.800 (West 2006); LA. REV. STAT. ANN. § 40:1299.31 (2006); MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2006); MASS. ANN. LAWS ch. 112, § 12I (Lexis Nexis 2006); MICH. COMP. LAWS § 333.20181 (2006); MINN. STAT. § 145.414 (2005); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. § 28-338 (2005); NEV. REV. STAT. § 632.475 (2006); N.J. STAT. ANN. § 2A:65A-1 (West 2006); N.M. STAT. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-I (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); N.D. CENT. CODE § 23-16-14 (2006); OHIO REV. CODE ANN. § 4731.91 (West 2006); OKLA. STAT. tit. 63, § 1-741 (2005); OR. REV.

sterilization.<sup>6</sup> More recently, these laws have been applied to pharmacists' refusal to fill prescriptions for birth control.<sup>7</sup> The various conscientious objection laws<sup>8</sup> that have been enacted within

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STAT. § 435.485 (2006); OR. REV. STAT. § 435.225 (2006); 18 PA. CONS. STAT. § 3213 (2005); R.I. GEN. LAWS § 23-17-11 (2006); S.C. CODE ANN. § 44-41-50 (2005); S.D. CODIFIED LAWS § 36-11-70 (2006); TEX. OCC. CODE ANN. § 103.002 (Vernon 2007); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WASH. REV. CODE § 48.43.065 (2006); WIS. STAT. § 253.09 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

<sup>6</sup> 745 ILL. COMP. STAT. 70/4 (2005); MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2006); MASS. ANN. LAWS ch. 112, § 12I (Lexis Nexis 2006); N.J. STAT. ANN. § 2A:65A-1 (West 2006); R.I. GEN. LAWS § 23-17-11 (2006); TENN. CODE ANN. § 68-34-104 (2005); WIS. STAT. § 253.09 (2006).

<sup>7</sup> See Karissa Eide, *Can a Pharmacist Refuse to Fill Birth Control Prescriptions on Moral or Religious Grounds?*, 42 CAL. W. L. REV. 121, 132-36 (2005) (describing the practice of pharmacists refusing to fill birth control prescriptions and arguing against this practice); see also Holly Teliska, *Recent Development: Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 240-43 (2005) (arguing that allowing pharmacists to refuse to fill birth control prescriptions is harmful to women).

<sup>8</sup> ALASKA STAT. § 18.16.010 (2006); ARIZ. REV. STAT. ANN. § 36-2151 (2006); ARK. CODE ANN. § 20-16-304 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); COLO. REV. STAT. § 25-6-207 (2005); COLO. REV. STAT. § 25-6-102 (2005); DEL. CODE ANN. tit. 24, § 1791 (2006); FLA. STAT. § 381.0051 (2006); GA. CODE ANN. § 49-7-6 (2006); HAW. REV. STAT. § 453-16 (2006); IDAHO CODE ANN. § 18-612 (2006); 745 ILL. COMP. STAT. 70/4 (2005); IND. CODE § 16-34-1-5 (2006); IOWA CODE § 146.1 (2005); KAN. STAT. ANN. § 65-443 (2006); KY. REV. STAT. ANN. § 311.800 (West 2006); LA. REV. STAT. ANN. § 40:1299.31 (2006); ME. REV. STAT. ANN. tit. 22, § 1903 (2005); MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2006); MASS. ANN. LAWS ch. 112, § 12I (Lexis Nexis 2006); MICH. COMP. LAWS § 333.20181 (2006); MINN. STAT. § 145.414 (2005); MISS. CODE ANN. § 41-107-5 (2006); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. § 28-338 (2005); NEV. REV. STAT. § 632.475 (2006); N.J. STAT. ANN. § 2A:65A-1 (West 2006); N.M. STAT. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-I (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); N.D. CENT. CODE § 23-16-14 (2006); OHIO REV. CODE ANN. § 4731.91 (West 2006); OKLA. STAT. tit. 63, § 1-741 (2005); OR. REV. STAT. § 435.485 (2006); OR. REV. STAT. § 435.225 (2006); 18 PA. CONS. STAT. § 3213 (2005); R.I. GEN. LAWS § 23-17-11 (2006); S.C. CODE ANN. § 44-41-50 (2005); S.D. CODIFIED LAWS § 36-11-70 (2006); TENN. CODE ANN. § 68-34-

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forty-six states can be categorized into four groups: (1) conscientious objection laws that do not apply to birth control;<sup>9</sup> (2) conscientious objection laws that could apply to birth control;<sup>10</sup> (3) statutes that apply to birth control but do not clearly apply to pharmacists;<sup>11</sup> and (4) statutes that clearly apply to both birth control and pharmacists.<sup>12</sup>

Conscientious objection laws which do not apply to birth control<sup>13</sup> nevertheless adopt the same principle as laws that permit

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104 (2005); TEX. OCC. CODE ANN. § 103.002 (Vernon 2007); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WASH. REV. CODE § 48.43.065 (2006); W. VA. CODE § 16-2B-4 (2006); WIS. STAT. § 253.09 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

<sup>9</sup> ALASKA STAT. § 18.16.010 (2006); ARIZ. REV. STAT. ANN. § 36-2151 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); HAW. REV. STAT. § 453-16 (2006); IDAHO CODE ANN. § 18-612 (2006); IND. CODE § 16-34-1-5 (2006); IOWA CODE § 146.1 (2005); KAN. STAT. ANN. § 65-443 (2006); KY. REV. STAT. ANN. § 311.800 (West 2006); LA. REV. STAT. ANN. § 40:1299.31 (2006); MASS. ANN. LAWS ch. 112, § 121 (Lexis Nexis 2006); MICH. COMP. LAWS § 333.20181 (2006); MINN. STAT. § 145.414 (2005); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. § 28-338 (2005); NEV. REV. STAT. § 632.475 (2006); N.J. STAT. ANN. § 2A:65A-1 (West 2006); N.M. STAT. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-1 (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); N.D. CENT. CODE § 23-16-14 (2006); OHIO REV. CODE ANN. § 4731.91 (West 2006); OKLA. STAT. tit. 63, § 1-741 (2005); 18 PA. CONS. STAT. § 3213 (2005); R.I. GEN. LAWS § 23-17-11 (2006); S.C. CODE ANN. § 44-41-50 (2005); TEX. OCC. CODE ANN. § 103.002 (Vernon 2007); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WIS. STAT. § 253.09 (2006).

<sup>10</sup> DEL. CODE ANN. tit. 24, § 1791 (West 2006); MD. CODE ANN., HEALTH-GEN. § 20-214 (2006).

<sup>11</sup> COLO. REV. STAT. § 25-6-207 (2005); COLO. REV. STAT. § 25-6-102 (2005); GA. CODE ANN. § 49-7-6 (2006); 745 ILL. COMP. STAT. 70/4 (2005); ME. REV. STAT. ANN. tit. 22, § 1903 (2005); OR. REV. STAT. § 435.225 (2006); TENN. CODE ANN. § 68-34-104 (2005); W. VA. CODE § 16-2B-4 (2006).

<sup>12</sup> ARK. CODE ANN. § 20-16-304 (2006); FLA. STAT. § 381.0051 (2006); MISS. CODE ANN. § 41-107-5 (2006); S.D. CODIFIED LAWS § 36-11-70 (2006); WASH. REV. CODE § 48.43.065 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

<sup>13</sup> ALASKA STAT. § 18.16.010 (2006); ARIZ. REV. STAT. § 36-2151 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); HAW. REV.

pharmacists to refuse to fill a customer's prescription—the idea that a person should not be forced to help another engage in conduct the person believes is wrong or immoral.<sup>14</sup> Most of these

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STAT. § 453-16 (2006); IDAHO CODE ANN. § 18-612 (2006); IND. CODE ANN. § 16-34-1-5 (2006); IOWA CODE § 146.1 (2005); KAN. STAT. ANN. § 65-443 (2006); KY. REV. STAT. ANN. § 311.800 (West 2006); LA. REV. STAT. ANN. § 40:1299.31 (2006); MASS. ANN. LAWS ch. 112, § 12I (Lexis Nexis 2006); MICH. COMP. LAWS § 333.20181 (2006); MINN. STAT. § 145.414 (2005); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. ANN. § 28-338 (2005); NEV. REV. STAT. ANN. § 632.475 (2006); N.J. STAT. ANN. § 2A:65A-1 (West 2006); N.M. STAT. ANN. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-1 (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); N.D. CENT. CODE § 23-16-14 (2006); OHIO REV. CODE ANN. § 4731.91 (West 2006); OKLA. STAT. tit. 63, § 1-741 (2005); 18 PA. CONS. STAT. § 3213 (2005); R.I. GEN. LAWS § 23-17-11 (2006); S.C. CODE ANN. § 44-41-50 (2005); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WIS. STAT. § 253.09 (2006).

<sup>14</sup> The conscientious objection laws for abortion and sterilization that do not apply to birth control came first, and many of the laws that do apply to birth control seem to use similar language to the earlier statutes. Also, most of the states with laws that apply to birth control first had laws that applied to abortion. The 31 states that have conscientious objection laws that do not apply to birth control are Alaska, Arizona, California, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin. ALASKA STAT. § 18.16.010 (2006); ARIZ. REV. STAT. § 36-2151 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); HAW. REV. STAT. § 453-16 (2006); IDAHO CODE ANN. § 18-612 (2006); IND. CODE ANN. § 16-34-1-5 (2006); IOWA CODE § 146.1 (2005); KAN. STAT. ANN. § 65-443 (2006); KY. REV. STAT. ANN. § 311.800 (West 2006); LA. REV. STAT. ANN. § 40:1299.31 (2006); MASS. ANN. LAWS ch. 112, § 12I (Lexis Nexis 2006); MICH. COMP. LAWS § 333.20181 (2006); MINN. STAT. § 145.414 (2005); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. ANN. § 28-338 (2005); NEV. REV. STAT. ANN. § 632.475 (2006); N.J. STAT. ANN. § 2A:65A-1 (West 2006); N.M. STAT. ANN. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-1 (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); N.D. CENT. CODE § 23-16-14 (2006); OHIO REV. CODE ANN. § 4731.91 (West 2006); OKLA. STAT. tit. 63, § 1-741 (2005); 18 PA. CONS. STAT. § 3213 (2005); R.I. GEN. LAWS § 23-17-11 (2006); S.C. CODE ANN. § 44-41-50 (2005); TEX. OCC. CODE ANN. § 103.002 (Vernon 2007); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WIS. STAT. § 253.09 (2006).

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laws allow physicians or any other person involved with an abortion procedure to refuse to participate without fear of legal or job-related consequences.<sup>15</sup> As a precondition to refusing, such laws generally require the conscientious objector to have some legitimate reason for objecting.<sup>16</sup> Acceptable reasons include some combination of moral, ethical, or religious conflict, or alternatively, personal reasons accompanied by the belief that it will cause the death of an unborn child.<sup>17</sup>

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<sup>15</sup> ALASKA STAT. § 18.16.010 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); HAW. REV. STAT. § 453-16 (2006); IDAHO CODE ANN. § 18-612 (2006); IND. CODE ANN. § 16-34-1-5 (2006); IOWA CODE § 146.1 (2005); KAN. STAT. ANN. § 65-443 (2006); KY. REV. STAT. ANN. § 311.800 (West 2006); LA. REV. STAT. ANN. § 40:1299.31 (2006); MASS. ANN. LAWS ch. 112, § 12I (Lexis Nexis 2006); MICH. COMP. LAWS § 333.20181 (2006); MINN. STAT. § 145.414 (2005); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. ANN. § 28-338 (2005); NEV. REV. STAT. ANN. § 632.475 (2006); N.M. STAT. ANN. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-I (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); N.D. CENT. CODE § 23-16-14 (2006); OHIO REV. CODE ANN. § 4731.91 (West 2006); OKLA. STAT. tit. 63, § 1-741 (2005); 18 PA. CONS. STAT. § 3213 (2005); R.I. GEN. LAWS § 23-17-11 (2006); S.C. CODE ANN. § 44-41-50 (2005); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WIS. STAT. § 253.09 (2006).

<sup>16</sup> ARIZ. REV. STAT. § 36-2151 (2006); ARK. CODE ANN. § 20-16-304 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); COLO. REV. STAT. § 25-6-207 (2005); COLO. REV. STAT. § 25-6-102 (2005); FLA. STAT. § 381.0051 (2006); GA. CODE ANN. § 49-7-6 (2006); IDAHO CODE ANN. § 18-612 (2006); 745 ILL. COMP. STAT. 70/4 (2005); IOWA CODE § 146.1 (2005); KY. REV. STAT. ANN. § 311.800 (West 2006); ME. REV. STAT. ANN. tit. 22, § 1903 (2005); MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2006); MASS. ANN. LAWS ch. 112, § 12I (Lexis Nexis 2006); MISS. CODE ANN. § 41-107-5 (2006); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEV. REV. STAT. ANN. § 632.475 (2006); N.M. STAT. ANN. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-I (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); OR. REV. STAT. § 435.485 (2006); OR. REV. STAT. § 435.225 (2006); R.I. GEN. LAWS § 23-17-11 (2006); S.D. CODIFIED LAWS § 36-11-70 (2006); TENN. CODE ANN. § 68-34-104 (2005); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WASH. REV. CODE ANN. § 48.43.065 (2006); W. VA. CODE § 16-2B-4 (2006); WIS. STAT. § 253.09 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

<sup>17</sup> ARIZ. REV. STAT. ANN. § 36-2151 (2006); ARK. CODE ANN. § 20-16-304 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); COLO.



The second category of statutes permit conscientious objection in circumstances involving the “termination of pregnancy” but do not include accompanying definitions of pregnancy.<sup>18</sup> The absence of a legal definition of pregnancy permits objecting pharmacists to use to their advantage the ambiguity of what constitutes “termination of pregnancy.” For example, despite the medical definition of pregnancy which occurs at implantation,<sup>19</sup> if a pharmacist believes pregnancy occurs at fertilization, the use of birth control could be considered a termination of pregnancy.<sup>20</sup>

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REV. STAT. § 25-6-207 (2005); COLO. REV. STAT. § 25-6-102 (2005); FLA. STAT. § 381.0051 (2006); GA. CODE ANN. § 49-7-6 (2006); IDAHO CODE ANN. § 18-612 (2006); 745 ILL. COMP. STAT. 70/4 (2005); IOWA CODE § 146.1 (2005); KY. REV. STAT. ANN. § 311.800 (West 2006); ME. REV. STAT. ANN. tit. 22, § 1903 (2005); MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2006); MASS. ANN. LAWS ch. 112, § 12I (LexisNexis 2006); MISS. CODE ANN. § 41-107-5 (2006); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEV. REV. STAT. ANN. § 632.475 (2006); N.M. STAT. ANN. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-1 (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); OR. REV. STAT. § 435.485 (2006); OR. REV. STAT. § 435.225 (2006); R.I. GEN. LAWS § 23-17-11 (2006); S.D. CODIFIED LAWS § 36-11-70 (2006); TENN. CODE ANN. § 68-34-104 (2005); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WASH. REV. CODE ANN. § 48.43.065 (2006); W. VA. CODE § 16-2B-4 (2006); WIS. STAT. § 253.09 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

<sup>18</sup> DEL. CODE ANN. tit. 24, § 1791 (2006); MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2006); OR. REV. STAT. § 435.485 (2006).

<sup>19</sup> BENJAMIN F. MILLER & CLAIRE BRACKMAN KEANE, *ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH* 406 (7th ed. 2003) (“Conception 1. The onset of pregnancy, marked by implantation of the blastocyst, the formation of a viable zygote.”); 1 *THE OXFORD COMPANION TO MEDICINE* 254 (John Walton et al. eds., 1986) (“Conception. The fertilization of an ovum by a spermatozoon and the implantation of the resulting zygote.”); *DORLAND’S ILLUSTRATED MEDICAL DICTIONARY* 365 (W.B. Saunders Co., 28th ed. 1994) (“Conception 1. The onset of pregnancy, marked by implantation of the blastocyst in the endometrium, the formation of a visible zygote.”).

<sup>20</sup> Teresa Menart, *The Challenge of Contraception for Those Who Respect Life*, <http://www.omsoul.com/pamview.php?idnum=105> (last visited Mar. 17, 2007); Russell Shorto, *Contra-Contraception*, *N.Y. TIMES*, May 7, 2006, available at [http://www.nytimes.com/2006/05/07/magazine/07contraception.html?ei=5070&en=e19e857aa8b70359&ex=1173758400&pagewanted=all](http://www.nytimes.com/2006/05/07/magazine/07contraception.html?ei=5070&en=e19e857aa8b70359&ex=1173758400&pagewanted=all;);

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Therefore, depending on the definition of pregnancy, these types of statutes may allow pharmacists to refuse to fill birth control prescriptions.

Other conscientious objection laws clearly apply to birth control but do not necessarily apply to pharmacists.<sup>21</sup> This category of conscientious objection laws permits medical personnel to conscientiously object to birth control. For example, Maine's and Tennessee's statutes apply to private physicians, institutions, and their staffs.<sup>22</sup> Any pharmacist who works for a private physician or institution would enjoy the benefit of the laws. Similarly, West Virginia's statute applies only to state employees and allows these pharmacists to refuse to fill birth control prescriptions.<sup>23</sup>

Finally, five states have conscientious objection laws that clearly apply to both birth control and pharmacists.<sup>24</sup> For example, Arkansas' conscientious objection law, ironically a provision of a statute ensuring access to contraception,<sup>25</sup> upholds

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ChristianAnswers.net, Can Birth Control Pills Kill Unborn Babies, <http://www.christiananswers.net/q-eden/edn-bcpill.html> (last visited Mar. 17, 2007); *see infra* Part III.A.

<sup>21</sup> COLO. REV. STAT. § 25-6-207 (2005); COLO. REV. STAT. § 25-6-102 (2005); GA. CODE ANN. § 49-7-6 (2006); 745 ILL. COMP. STAT. 70/4 (2005); ME. REV. STAT. ANN. tit. 22, § 1903 (2005); OR. REV. STAT. § 435.225 (2006); TENN. CODE ANN. § 68-34-104 (2005); W. VA. CODE § 16-2B-4 (2006).

<sup>22</sup> ME. REV. STAT. ANN. tit. 22, § 1903 (2005); TENN. CODE ANN. § 68-34-104(5) (2005) (“No private institution or physician, nor any agent or employee of such institution or physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when such refusal is based upon religious or conscientious objection, and no such institution, employee, agent, or physician shall be held liable for such refusal.”).

<sup>23</sup> W. VA. CODE § 16-2B-4 (2006). West Virginia's statute says in part: “Any employee of the State of West Virginia or any of its agencies or political subdivisions, including, but not limited to, local health or welfare agencies, may refuse to accept the duty of offering family planning services to the extent that such duty is contrary to his personal religious beliefs.” *Id.*

<sup>24</sup> ARK. CODE ANN. § 20-16-304 (2006); FLA. STAT. § 381.0051 (2006); S.D. CODIFIED LAWS § 36-11-70 (2006); WASH. REV. CODE ANN. § 48.43.065 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

<sup>25</sup> ARK. CODE ANN. § 20-16-304 (2006).

pharmacists' rights to object: "Nothing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information."<sup>26</sup>

Another clear, though more complex, statute is found in South Dakota's conscientious objection law. This law provides:

No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to:

- (1) Cause an abortion; or
- (2) Destroy an unborn child as defined in subdivision 22-1-2(50A); or
- (3) Cause the death of any person by means of an assisted suicide, euthanasia, or mercy killing.

No such refusal to dispense medication pursuant to this section may be the basis for any claim for damages against the pharmacist or the pharmacy of the pharmacist or the basis for any disciplinary, recriminatory, or discriminatory action against the pharmacist.<sup>27</sup>

Subsequent provisions of South Dakota's laws define "unborn child" as "an individual organism of the species homo sapiens from fertilization until live birth."<sup>28</sup> Because it has been maintained that the birth control pill can be used to prevent implantation,<sup>29</sup> the statute clearly permits pharmacists to refuse to fill birth control prescriptions.

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<sup>26</sup> *Id.*

<sup>27</sup> S.D. CODIFIED LAWS § 36-11-70 (2006).

<sup>28</sup> S.D. CODIFIED LAWS § 22-1-2(50A) (2006).

<sup>29</sup> Marian Block, & Marvin C. Rulin, *Managing Patients on Oral Contraceptives*, 32 AM. FAM. PHYSICIAN 154, 154-55 (1985); Jennifer Johnsen, *The Pill*, (Mar. 1, 2006), <http://www.plannedparenthood.org/birth-control-pregnancy/birth-control/the-pill.htm>; Ortho Women's Health and Urology, *Frequently Asked Questions*, <http://www.thepill.com/html/ppil/faq.jsp> (last visited Mar. 17, 2007).

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## II. THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE AND FREE EXERCISE OF RELIGION CLAUSE

This section explores the relationship between the Establishment Clause and conscientious objection statutes and the extent to which the Establishment Clause applies to such statutes. This section also provides a useful overview of Establishment Clause Supreme Court case law. Whether these conscientious objection clauses violate the Establishment Clause is particularly important because pharmacists often refuse to fill birth control prescriptions for religious reasons.<sup>30</sup> Accordingly, conscientious objector clauses violate the requirement of the separation of church and state.

*A. A History of Supreme Court Establishment Clause Case Law*

There are two clauses in the First Amendment related to the practice of religion: (1) the Establishment Clause and (2) the Free Exercise of Religion Clause.<sup>31</sup> It is commonly recognized that the Establishment Clause is intended to prevent the Federal or State governments from establishing an official church or religion.<sup>32</sup> The

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<sup>30</sup> See Cantor & Baum, *supra* note 1; Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 470–72 (2006); Jed Miller, *The Unconscionability of Conscience Clauses: Pharmacists' Consciences and Women's Access to Contraception*, 16 HEALTH MATRIX 237, 237–39 (2006).

<sup>31</sup> U.S. CONST. amend. I.

<sup>32</sup> See *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 530 U.S. 290, 301 (2000); *Agostini v. Felton*, 521 U.S. 203, 219 (1997); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839, 842 (1995); *Lee v. Weisman*, 505 U.S. 577, 587, 599 (1992); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 20 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 672, 673, 678 (1984); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Sch. Dist. of Abington, Pa. v. Schempp*, 374 U.S. 203, 215–16 (1963); *Engel v. Vitale*, 370 U.S. 421, 429–430 (1962); *McGowan v. Maryland*, 366 U.S. 420, 441–42 (1961); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); *Illinois ex Rel. McCollum v. Bd. of Educ. of Sch. Dist. No.71, Champaign, Ill.*, 333 U.S.

Free Exercise of Religion Clause is intended to protect individuals' rights to worship, provided individuals act within certain restrictions such as the practice of polygamy<sup>33</sup> or the use of peyote for religious purposes.<sup>34</sup> Notably, supporters of conscientious objector laws contend the Establishment Clause protects pharmacists' right to object.<sup>35</sup> This article focuses upon the Establishment Clause and the implications of Establishment Clause case law regarding the question of statutes, instead of focusing on the Free Exercise of Religion Clause.

In 1943, the Supreme Court decided the watershed case *Murdock v. Pennsylvania*.<sup>36</sup> Around the turn of the century, the city of Jeannette, Pennsylvania passed a law requiring that anyone canvassing or soliciting goods or orders for goods must first obtain a license from the government at a fee based upon the requested duration of the solicitation.<sup>37</sup> Without obtaining a license, Jehovah's Witnesses went door-to-door in Jeannette encouraging people to "purchase"<sup>38</sup> religious books and pamphlets.<sup>39</sup> None of

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203, 212 (1948); *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 14–15 (1947); *Reynolds v. United States*, 98 U.S. 145, 162 (1878); DANIEL DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 62, 66–67, 125–26 (2003).

<sup>33</sup> See *Reynolds*, 98 U.S. at 145 (upholding a federal law making polygamy illegal, despite a legal challenge from a Mormon who claimed it was his religious duty to practice polygamy).

<sup>34</sup> See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (arguing laws banning the use of peyote for any reason, religious or otherwise, do not unconstitutionally restrict one's right to the free exercise of religion).

<sup>35</sup> See, e.g., Tony J. Kriesel, *Pharmacists and the "Morning-After Pill": Creating Room for Conscience Behind the Counter*, 7 MINN. J.L. SCI. & TECH. 337 (2005); Courtney Miller, *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. & SOCIAL JUSTICE 327 (2006); Jessica J. Nelson, *Freedom of Choice for Everyone: The Need for Conscience Clause Legislation for Pharmacists*, 3 U. ST. THOMAS L.J. 139 (2005).

<sup>36</sup> 319 U.S. 105 (1943).

<sup>37</sup> *Id.* at 106.

<sup>38</sup> The word "purchase" in addition to the words "sales" and "contributions" was in quotes in the original opinion by Justice Douglas (belying the Court's ultimate opinion), and thus the use of quotes is maintained

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them had obtained the license, though they had “sold” the materials.<sup>40</sup> A group of them were convicted and fined for violating the ordinance, and the Superior Court of Pennsylvania affirmed the ruling.<sup>41</sup> The Jehovah’s Witnesses argued that their conviction under the ordinance “deprived them of the freedom of speech, press, and religion guaranteed by the First Amendment.”<sup>42</sup> Although the Supreme Court of Pennsylvania declined to hear their appeal, the United States Supreme Court granted a writ of certiorari to hear the case.<sup>43</sup>

The Supreme Court struck down the statute, holding that the law violated the appellants’ right to practice their religion.<sup>44</sup> Not only did *Murdock* unequivocally hold that the Establishment Clause protections of the First Amendment apply directly to the states,<sup>45</sup> it also held that a law not specifically directed at religious organizations could still violate the First Amendment’s protections of religion.<sup>46</sup> Writing for the Court, Justice Douglas reasoned that by evangelizing door-to-door, the Jehovah’s Witnesses were

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here.

<sup>39</sup> *Murdock*, 319 U.S. at 106.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 107.

<sup>43</sup> *Id.* The Court details a more robust version of the background events to the case. *See generally id.* at 106–07.

<sup>44</sup> *Murdock v. Pennsylvania*, 319 U.S. 105, 116–17 (1943).

<sup>45</sup> *Id.* at 108. Despite this discussion in *Murdock*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which precedes *Murdock* by three years, appears to be the first case in which the Supreme Court ruled that the 14th Amendment applies the 1st Amendment to the states. *Id.* at 303 (“The fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment.”) (footnote omitted). The fact pattern in *Cantwell* is similar to *Murdock*; however, the Establishment Clause discussion in *Murdock* is more robust for the purposes of this article. *Cantwell*, like *Murdock*, involves Jehovah’s Witnesses who went door-to-door with a record player spreading their religious message and selling religious books or collecting donations. *Id.* at 301. The Connecticut statute under which the Jehovah’s Witnesses were charged is substantially similar to the one at issue in *Murdock*. The court overturned the statute in *Cantwell*, as in *Murdock*. *Id.* at 301–02, 310–11.

<sup>46</sup> *Murdock*, 319 U.S. at 115–17.

engaging in a religious practice akin to going to church for other religious groups.<sup>47</sup> Although the Court recognized that state governments may constitutionally enforce financial regulations against religious organizations, the Court held that Jehovah's Witnesses presented a special case given their specific beliefs and thus deserved special protection in the present case.<sup>48</sup> The Court further explained that to tax Jehovah's Witnesses for their door-to-door solicitations would be akin to either taxing them for the right to worship or taxing a Minister for the right to preach to his or her congregation.<sup>49</sup>

The Court further elaborated on the meaning of separation of church and state in *Everson v. Board of Education of the Township of Ewing*.<sup>50</sup> The issue in *Everson* was whether a state could reimburse parents for public transportation used to carry children to school, regardless of whether the children attended public or Catholic school.<sup>51</sup> A taxpayer sued arguing that the reimbursement to the parents of Catholic school<sup>52</sup> kids constituted an impermissible establishment of religion under the First Amendment.<sup>53</sup> The Supreme Court of New Jersey struck down the law as unconstitutional, but the Court of Errors reversed.<sup>54</sup> Ultimately the United States Supreme Court affirmed the Court of Errors opinion, ruling that the law was enforceable as written.<sup>55</sup>

Justice Black, writing the majority opinion, reasoned that

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<sup>47</sup> *Id.* at 108–09.

<sup>48</sup> *Id.* at 112. According to Justice Douglas, the Jehovah's Witnesses represent a special case because they are a religious group that is being held exempt from a specific financial regulation due to their religious beliefs regarding one's religious duty to engage in "missionary evangelism." *Id.* Not all religions are exempt from financial regulations, just the Jehovah's Witnesses with respect to what had amounted to a tax on their ability to perform their religious duties. *Id.* The specific theological beliefs, combined with the impact of the tax, created the special case for Jehovah's Witnesses. *Id.*

<sup>49</sup> *Id.* at 113–14.

<sup>50</sup> 330 U.S. 1 (1947).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 3.

<sup>53</sup> *Id.* at 3–4.

<sup>54</sup> *Everson v. Bd. of Educ. of the Twp. of Ewing*, 44 A.2d 333 (N.J. 1945).

<sup>55</sup> *Everson*, 330 U.S. at 17–18.

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although “[t]he ‘establishment of religion’ clause of the First Amendment . . . [prohibits] the Federal Government [from setting] . . . up a church . . . [, it cannot] pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>56</sup> In other words, government legislation and policies must remain neutral regarding religion. Nevertheless, in limiting this holding, Black seemed to make the argument that legislation which has a “secular purpose” can be justified, apart from any effect it has on religion.<sup>57</sup> Hence, in *Everson*, because the purpose of the law was to ensure the safe transportation of children to school and had nothing to do with supporting the Catholic Church, it constituted a valid secular state concern regarding the public welfare.<sup>58</sup>

The Supreme Court further strengthened the line between church and state in 1948 with its decision in *Illinois Ex Rel. McCollum v. Board of Education of School District No. 71*.<sup>59</sup> The plaintiffs in *McCollum* were a taxpayer and mother of a student whose school permitted children, with their parents’ permission, to attend religious classes during the school day and on school property.<sup>60</sup> The Court struck down the law as violating both religious clauses of the First Amendment<sup>61</sup> and explained the connection between the state and religion was too close.<sup>62</sup> The Court warned that religious institutions and the state are best separated and that states could not “utilize [their] public school system[s] to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals . . . .”<sup>63</sup> The Court further reasoned that the law lacked a legitimate government purpose as justification for the practice in question.<sup>64</sup> *McCollum* serves to emphasize the Court’s disapproval of laws that allow state power to aid a religious sect in promoting its message.

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<sup>56</sup> *Id.* at 15.

<sup>57</sup> *Id.* at 18.

<sup>58</sup> *Id.*

<sup>59</sup> 333 U.S. 203 (1948).

<sup>60</sup> *Id.* at 205.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 212.

<sup>63</sup> *Id.* at 211.

<sup>64</sup> *Id.*



The Court limited the scope of the First Amendment four years later in *Zorach v. Clauson*.<sup>65</sup> Despite the consideration of a similar statute as was at issue in *McCullum*, the Court upheld the statute in *Zorach* because the religious instruction, though scheduled during school hours, occurred outside of school property.<sup>66</sup> Justice Douglas admitted that although the mere allowance of religious instruction during school hours did not amount to a constitutional violation, “[g]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person.”<sup>67</sup> While differentiating *Zorach* from *McCullum* and allowing the religious instruction in *Zorach*, the Court reaffirmed its disapproval of laws allowing state power to be used to aid religious instruction or the spreading of a specific religion’s beliefs.

In 1961, the Court examined the validity of the Sunday Blue Law—a statute prohibiting the sale of goods on Sunday.<sup>68</sup> The Court upheld the law and ruled that secular purposes—the furtherance of public health and economics—could justify such statutes.<sup>69</sup> In addition, the Court noted that the Blue Laws had no coercive effect upon people to go to church and be religious, and thus the law did not constitute state promotion of religion.<sup>70</sup> The

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<sup>65</sup> 343 U.S. 306 (1952).

<sup>66</sup> *Id.* at 311–12, 314–15.

<sup>67</sup> *Id.* at 314.

<sup>68</sup> *Id.* at 422.

<sup>69</sup> *Id.* at 433–35. Chief Justice Warren gives examples of public health and well-being arguments as having been historically used to justify Blue Laws. Here the argument is that a day of rest is good for public health and it provides time that families can spend together, which is also good for public well-being. In addition, Warren recounts an economic justification given for Blue Laws that claims a day of rest is good for workers as it allows them to recuperate from a week’s worth of work, and thus makes them more productive when they do work. Clearly the public health and well-being argument and the economic argument go well beyond the original religious justifications offered for the Blue Laws. *Id.*

<sup>70</sup> *Id.* at 452. Here, Warren makes explicit reference to *McCullum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948), discussed earlier in this section, as it is the only case in the then-scant Supreme Court jurisprudence finding a violation of the Establishment Clause of the First Amendment. In

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Court cautiously noted, however, that Blue Laws could violate the Establishment Clause if they promoted, or were intended to promote, a particular religion or religious belief.<sup>71</sup>

After years of a piecemeal approach to Establishment Clause analysis, the Court created its first test in *School District of Abington Township, Pennsylvania v. Schempp*.<sup>72</sup> In explaining the test, the Court wrote:

What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.<sup>73</sup>

The focus of an Establishment Clause inquiry is the purpose and intent of the law. A statute could only withstand the inquiry if it has a secular legislative purpose and an underlying nonreligious intent.<sup>74</sup> The Court then used the test to strike down two state statutes. The first statute required public school students to start school with a recitation from the Bible and a Christian prayer.<sup>75</sup> The other statute gave students the option to read from the Bible

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*McCullum*, the Court concluded that schools were being used as a governmental sanction of a specific religion and, more importantly, that the sanction provided coercive force toward pushing specific religious beliefs upon children. Unlike *McCullum*, Warren argues, *McGowan* had no coercive force in the Blue Laws. *Zorach v. Clauson*, 343 U.S. 306, 452 (1952).

<sup>71</sup> *Zorach*, 343 U.S. at 453.

<sup>72</sup> 374 U.S. 203, 222 (1963).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Recall the discussion of *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1 (1947), earlier in this section. At issue in *Everson* was the public support for busing children to public and parochial schools. The Court ruled that the busing had the secular purpose of transporting children safely to school and did not advance the interest of the Catholic faith by helping to transport children to Catholic schools. In this respect, Clark's test comports with the ruling in *Everson* and formalizes the Court's logic into its first attempt at a clearly delineated Establishment Clause test.

<sup>75</sup> *Schempp*, 374 U.S. at 206.

or recite the prayer.<sup>76</sup>

Building upon the *Schempp* test, the Court in *Lemon v. Kurtzman*<sup>77</sup> created the modern-day Establishment Clause standard.<sup>78</sup> First, the court cited three purposes behind the Establishment Clause: prevention of (1) state sponsorship of religion; (2) state financial support of religion; and (3) active state involvement in religious activity.<sup>79</sup> Next, the court established its three-pronged test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>80</sup>

The third part of the test is most central to the analysis. According to *Lemon*, to determine excessive entanglement, courts must “examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>81</sup> The court further elaborated that if a program required a large amount of government oversight or regulation of a religious body to maintain the separation of church and state, the oversight would be evidence of excessive entanglement; thus, the law would be unconstitutional pursuant to the first amendment.<sup>82</sup>

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<sup>76</sup> *Id.* at 203.

<sup>77</sup> 403 U.S. 602 (1971).

<sup>78</sup> See John Gay, *Bowen v. Kendrick: Establishing a New Relationship Between Church and State*, 39 AM. U.L. REV. 953 (1989); see also Matthew D. Donovan, *Religion, Neutrality, and the Public School Curriculum: Equal Treatment or Separation?*, 43 CATH. LAW. 187 (2004).

<sup>79</sup> *Lemon*, 403 U.S. at 612.

<sup>80</sup> *Id.* at 612–13. (internal citations omitted)

<sup>81</sup> *Id.* at 615.

<sup>82</sup> *Id.* at 620. It is important to notice that Burger’s stricture clearly limits states’ allowance of religious figures into public schools. However, the rule also limits excessive government regulation of religious schools. This is not to say that the government cannot place certain restrictions on parochial schools, rather it is to say that only the most basic restrictions can be placed on parochial schools. Apart from these basic restrictions, these religiously based schools have plenty of leeway to make their own governing rules. In this sense, although *Lemon* in some ways limits religious teachings (in public schools), it also

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One example of a subsequent application of the *Lemon* test is *Wallace v. Jaffree*.<sup>83</sup> Here, the Court struck down an Alabama law authorizing public school teachers to hold a one-minute period of silence for meditation or prayer and allowing teachers to lead willing children in prayer.<sup>84</sup> The Court wrote: “A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”<sup>85</sup> In other words, the religion clauses of the First Amendment work both to protect religion as well as to protect those who choose not to follow a particular religion.<sup>86</sup> The

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grants extra freedom to religious schools to govern their own institutions.

<sup>83</sup> 472 U.S. 38 (1985).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 51. Similarly, the Court stated, “[a]s is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience,” *id.* at 49, which further explains the Court’s take on governmental involvement with respect to religious issues or questions of conscience.

<sup>86</sup> In particular, the *Wallace* Court explained:

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual’s freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among “religions”—to encompass intolerance of the disbeliever and the uncertain.

Court concluded that the state clearly intended to endorse religion,<sup>87</sup> and given the law's allowance for teachers to lead prayer, it constituted the promotion of a specific religion against the wishes of those who chose not to participate in the prayer.<sup>88</sup> Thus, the Court held that the Alabama law failed the first prong of the *Lemon* test because the law did not have a secular purpose.

### III. THE *LEMON* TEST AND CONSCIENTIOUS OBJECTION STATUTES: A FIRST AMENDMENT ISSUE?

This section evaluates whether conscientious objection laws that explicitly allow pharmacists to refuse to fill birth control prescriptions violate the Establishment Clause as interpreted by the Supreme Court in *Lemon*.<sup>89</sup> The discussion applies the *Lemon* test to one of the most controversial of these statutes—that of South Dakota, outlined in Part I.<sup>90</sup> As applied to the *Lemon* test, the South Dakota conscientious objection law, as well as analogous statutes, should be struck down because such laws lack a secular purpose.<sup>91</sup>

Statutes which explicitly cite religion as permissible grounds for a pharmacist's refusal deserve the most scrutiny under the Establishment Clause.<sup>92</sup> The justification for an Establishment

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*Id.* at 52–54.

<sup>87</sup> *Id.* at 56–60. Indeed, the representative who introduced the bill said for the legislative record that it was his sole intent to bring back prayer in public schools. During its analysis, the Court determined the intent of the law was either to return prayer to public schools or the bill had no point at all, which was unlikely. Accordingly, the Court deemed the law to be unconstitutional.

<sup>88</sup> *Id.* at 56.

<sup>89</sup> 403 U.S. 602 (1971).

<sup>90</sup> South Dakota's statute, like the other statutes in the fourth category of statutes discussed in Part I, explicitly permits pharmacists to refuse to fill a birth control prescription on the grounds that it violates the pharmacist's religious beliefs.

<sup>91</sup> See *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1 (1947); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Lemon*, 403 U.S. 602.

<sup>92</sup> ARIZ. REV. STAT. ANN. § 36-2151 (2006); ARK. CODE. ANN. § 20-16-304 (2006); CAL. HEALTH & SAFETY CODE § 123420 (West 2006); COLO.

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Clause inquiry is less clear for less explicit statutes, such as that of South Dakota. Is this statute religious in nature, and therefore unconstitutional, or is it merely primarily *used* by religious

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REV. STAT. § 25-6-207 (2005), COLO. REV. STAT. § 25-6-102 (2005); FLA. STAT. § 381.0051 (2006); GA. CODE ANN. § 49-7-6 (2006); IDAHO CODE ANN. § 18-612 (2006); IOWA CODE § 146.1 (2005); KY. REV. STAT. ANN. § 311.800 (West 2006); ME. REV. STAT. ANN. tit. 22, § 1903 (2005); MASS. GEN. LAWS ch. 112, § 12I (2006); MO. REV. STAT. § 197.032 (2006); MONT. CODE ANN. § 50-20-111 (2005); NEV. REV. STAT. § 632.475 (2006); N.M. STAT. § 30-5-2 (2006); N.Y. CIV. RIGHTS LAW § 79-I (McKinney 2006); N.C. GEN. STAT. § 14-45.1 (2006); OR. REV. STAT. § 435.485 (2006); OR. REV. STAT. § 435.225 (2006); R.I. GEN. LAWS § 23-17-11 (2006); TENN. CODE ANN. § 68-34-104 (2005); UTAH CODE ANN. § 76-7-306 (2006); VA. CODE ANN. § 18.2-75 (2006); WASH. REV. CODE § 48.43.065 (2006); W. VA. CODE § 16-2B-4 (2006); WIS. STAT. § 253.09 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

Most of these 26 states provide multiple reasons for objection, one of which is a person's religious beliefs (but not all 26 statutes necessarily apply to pharmacists and birth control, as was discussed *supra* Part II). However, Georgia's and West Virginia's statutes list religious objections as being the only grounds upon which pharmacists may object to the filling of a birth control prescription. These two statutes are blatantly unconstitutional in that they place a premium on religious belief over non-belief, and they do not allow for conscientious objection based on personal or moral grounds. *See Everson*, 330 U.S. at 15 (stating "The 'establishment of religion' clause of the First Amendment means at least this: . . . Neither can pass laws which *aid one religion*, aid all religions, or *prefer one religion* over another.") (emphasis added); *see also Schempp*, 374 U.S. at 212 (quoting the plaintiff, in support, as saying the law in question in *Schempp* "violated [plaintiffs', who are atheists,] rights 'in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority . . . .'"); *Welsh v. United States*, 398 U.S. 333, 358-59 (1970) (Harlan, J., concurring) (stating "If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held. Common experience teaches that among 'religious' individuals some are weak and others strong adherents to tenets and this is no less true of individuals whose lives are guided by personal ethical considerations") (citations omitted). Nonetheless, the focus of this section, and the article as a whole, are not these two outliers but rather the other conscientious objection clauses for pharmacists. Accordingly, this section will focus on these other statutes to determine their constitutionality.

objectors as justification for their actions?

*A. The South Dakota Law Implicates the Establishment Clause*

Before examining the law under the *Lemon test*, it must be demonstrated that the Establishment Clause applies.<sup>93</sup> Essentially, there must be a religious aspect to the law.<sup>94</sup> One indication that the South Dakota statute relies upon religious motivation is that the definition of unborn child used in the accompanying statute is inconsistent with the standard medical definitions for when pregnancy has begun. For example, the American Medical Association (AMA) defines pregnancy as beginning with implantation rather than fertilization.<sup>95</sup> The American College of Obstetricians and Gynecologists' Committee on Ethics similarly defines pregnancy as beginning with implantation, not fertilization.<sup>96</sup> Indeed, the Committee defines pregnancy as occurring in the implantation stage because the embryo at the time of fertilization through implantation lacks clear "biologic

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<sup>93</sup> *Lemon*, 403 U.S. at 602. The *Lemon* test is an Establishment Clause test; therefore, without first demonstrating that the conscientious objector laws invoke Establishment Clause legal claims, any application of the *Lemon* test would seem inappropriate.

<sup>94</sup> *Id.*

<sup>95</sup> See 3 ENCYCLOPEDIA OF REPRODUCTION 986 (Ernst Knobil & Jimmy D. Neill eds., 1998) (explaining that "[f]ollowing implantation an orchestrated sequence of events occurs local to and distant from the fetoplacental unit leading to the altered physiological state of pregnancy."). Based on the quotation given, in addition to the accompanying section of the cited source, pregnancy is understood to be a vague state consistent of a number of physiological changes that occur within the woman's body. *Id.* As the text explains, and as the quoted section implies, these physiological changes occur over a protracted period of time, but the important changes constituting pregnancy do not occur until after implantation. *Id.* The implications are that pregnancy need not begin with implantation, but it certainly cannot be said to medically begin before implantation. *Id.*

<sup>96</sup> Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37, 44, n. 82 (2006) (citing AM. COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS COMMITTEE ON ETHICS, PREEMBRYONIC RESEARCH: HISTORY, SCIENTIFIC BACKGROUND, AND ETHICAL CONSIDERATION 1 (No. 136, Apr. 1994)).

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individuality necessary for a concrete potentiality to become a human person, even though it does possess a unique human genotype.”<sup>97</sup> Nothing exists which amounts to a full human life at the time of implantation.<sup>98</sup>

Departing from these definitions, South Dakota’s legislature defines “unborn child” as existing after fertilization rather than implantation.<sup>99</sup> Instead of following the medical definition, South Dakota’s definition is consistent with the beliefs of a majority of Christian sects.<sup>100</sup> More importantly, not only is the definition fairly characterized as Christian, but it is also contrary to Judaism’s and Islam’s beliefs about the use of contraception and the beginning of life.<sup>101</sup> Given the overlap between the Christian definition of life

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<sup>97</sup> *Id.*

<sup>98</sup> Given the similarity of definitions, one could argue the AMA agrees with the American College of Obstetricians and Gynecologists’ Committee on Ethics’ assessment, but the AMA has tried very hard not to make any definitive statements on such a controversial subject.

<sup>99</sup> S.D. CODIFIED LAWS § 22-1-2(50A) (2007). Technically, the South Dakota legislature chose not to use the medical definition of pregnancy, as the AMA and the American College of Obstetricians and Gynecologists do not define “life.” The AMA offers up qualifications for the beginning of a pregnancy, but they do not explicitly tackle the more philosophical question of the moment that life begins. *See* ENCYCLOPEDIA OF REPRODUCTION, *supra* note 95. The South Dakota legislature, however, has defined life, and has explicitly linked the definition of life to fertilization. In light of the medical profession’s failure to recognize a pregnancy at the point of fertilization, let alone a life, it seems fair to say the South Dakota legislature has rejected the medical definition of life. Were there to be a medical definition of life, it clearly would not be fertilization as this is not even a medical pregnancy yet.

<sup>100</sup> *See* Collins, *supra* note 96 at, 44–45. Collins points out that the most obvious example of a Christian sect that is anti-contraception is the Catholic Church. Collins associates the Catholic belief that life begins when the egg is fertilized with the Christian definition of life (fertilization of the egg), although Catholics are not the only Christian sect to hold this belief. Protestants also have a long tradition of opposing “unnatural” means of contraception. While some Protestant sects are now more open to birth control, this certainly does not apply to all Protestants. Presbyterians and Baptists, in particular, are still very much against the use of contraception. *See also* HAROLD SPEERT, OBSTETRICS AND GYNECOLOGY IN AMERICA, A HISTORY 445, 447 (1980).

<sup>101</sup> Collins, *supra* note 96, at 45–46. Collins argues that Orthodox Judaism allows the use of the Pill, although not surgical methods to prevent pregnancies.



and that used in the South Dakota statute, the statute furthers a religious purpose—the enforcement of Christian beliefs forbidding the use of birth control.<sup>102</sup> Therefore, the South Dakota conscientious objection law violates the Establishment Clause.

*B. The Application of the Lemon Test*

Because the statute is religious in nature, it warrants an Establishment Clause analysis.<sup>103</sup> Given the Court's primary reliance upon the three-pronged *Lemon* test,<sup>104</sup> the South Dakota conscientious objection law must satisfy the standard developed in *Lemon*.<sup>105</sup> Finally, it deserves mention that a valid statute must meet all three prongs of the *Lemon* test.<sup>106</sup>

*1. The First Prong of the Lemon Test*

The first prong of the *Lemon* test requires that “the statute must have a secular legislative purpose . . . .”<sup>107</sup> Stated otherwise, the statute must have a secular purpose that could justify using

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*Id.* at 44–45. Because the issue is the refusal to fill birth control prescriptions, the Pill is at issue, and the fact that the Orthodox Jewish idea of life and conception does not bar the use of the Pill further indicates that the definition used by South Dakota is not only non-medical, but it is not generic with respect to other religions. This religious bias is further emphasized by the fact that Islam “view[s] [an] embryo as potential, rather than an actual, life,” and thus affords it less consideration than a full life. *Id.* at 46. As such, there is nothing about the use of contraceptives, in particular the Pill, that would go against Islamic teachings, whereas some Christian sects do believe the use of contraceptives is against God's will, or at the very least religious doctrine. See ISLAMIC COUNCIL OF EUROPE, ISLAM AND CONTEMPORARY SOCIETY 116–17 (1982).

<sup>102</sup> Or at the very least the purpose could fairly be assessed as allowing Christian pharmacists and those that agree with the Christian definition of life to impose their views on customers with valid birth control prescriptions by refusing to fill such prescriptions.

<sup>103</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 612.

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what appears to be a Christian definition of life, instead of the medical definition.<sup>108</sup>

The relevant inquiry with respect to the first prong of the *Lemon* test is whether there is a secular justification for the South Dakota legislature's decision to link conception with fertilization and not with implantation.<sup>109</sup> Justice Stevens offers some guidance regarding this relevant inquiry in his dissent<sup>110</sup> in *Webster v. Reproductive Health Services*.<sup>111</sup> Justice Stevens' analysis—the

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<sup>108</sup> See *McGowan v. Maryland*, 366 U.S. 420, 431 (1961) (indicating that a law that is religious in origin is not necessarily unconstitutional if it has a secular purpose, such as the Maryland Blue Laws in question in *McGowan*).

<sup>109</sup> See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>110</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 560 (1989). Justice Stevens concurred in part (to the third holding, which was unanimous) and dissented in part (to holdings one and two, which were decided by a five to four margin). The discussion below reviews the plurality opinion and its holdings and discusses Stevens' dissent. This article relies on Justice Stevens' discussion in the dissent because the majority did not address the definition of life used in the Missouri state law. A plurality decided the case on other matters, but Justice Stevens, in his dissent, directly addressed the legality of the Missouri definition of life. *Id.* Given the similarity between the Missouri definition of life, and the definition at issue with the South Dakota statute (a Christian definition of life), it seems prudent to examine Justice Stevens' comments. Justice Stevens is also the only Justice to comment on this similar definition.

<sup>111</sup> *Id.* at 490. *Webster* is an interesting case that, although not directly about the Establishment Clause, has important implications for Establishment Clause case law, and potentially for contraceptive use. At issue in *Webster* is a Missouri state law that amended the current state abortion laws. *Id.* at 499–500. The preamble to the state law defined life as beginning at conception (however, the state legislature inadvertently used the wrong term and actually meant “fertilization”), and stated that “unborn children” had explicit rights for health, life, and well-being. *Id.* at 501. The law went so far as to guarantee full Constitutional rights to all “unborn children.” *Id.* The law also required viability tests for any fetus believed to be at least 20 weeks in gestational age and prevented public employees and facilities from being used for any abortion except to save the life of the mother. *Id.* In addition, the law prohibited the use of public funding to advise or counsel a woman to have an abortion unless necessary to save her life. *Id.* Lower courts overturned the law as unconstitutional and held the definition of life in the preamble is an unconstitutional attempt to define life as a means to support the state's new abortion laws. *Id.* at 503.

Court's only discussion of whether the Missouri legislature's preamble was constitutional—illustrates the pitfalls of such a definition and is therefore informative for the discussion at hand.<sup>112</sup> Moreover, Justice Stevens' comments demonstrate awareness of prior precedent and the potential ramifications of the definition used in the Missouri preamble.<sup>113</sup>

Justice Stevens' also asserted that the legislature improperly defined "conception."<sup>114</sup> Like the South Dakota statute, the Missouri statute linked conception with fertilization, despite the medical definition associating conception with implantation.<sup>115</sup> Upon determining that the statute was enacted solely for religious purposes, Stevens concluded that no "secular basis for

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The Supreme Court examined four portions of the Missouri law: (1) the preamble, (2) the ban on the use of public employees and facilities for non-life saving abortions, (3) the ban on public funding for non-life saving abortion counseling, and (4) the forced viability tests for all fetuses believed to be 20 weeks in gestational age. *Id.* at 504. The majority refused to rule on the Constitutionality of the preamble on the grounds that the preamble merely expressed a value judgment made by the state for protecting life over abortion, and had no actual bearing upon the practice of abortion. Accordingly, the time was not "correct" to rule either way regarding the preamble, and the preamble is to be understood as stating a preference and is non-binding. *Id.* at 505–07.

<sup>112</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 560 (Stevens, J., dissenting).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 563–72.

<sup>115</sup> See MILLER & BRACKMAN KEANE, *supra* note 19 and accompanying text. *Webster*, 492 U.S. at 563. Missouri's use of fertilization as the beginning of life is relevant to the discussion of state conscientious objector laws because South Dakota's definition of "unborn child," S.D. CODIFIED LAWS § 22-1-2(50A) (2006), implicitly uses the same definition of life beginning at fertilization. Accordingly, Justice Stevens' assessment of the Missouri statute at issue in *Webster* would thus also apply to South Dakota's conscientious objection statute and its definition of an "unborn child." It is important to realize that Justice Stevens' words, although written in a dissenting opinion, are part of a dissent because he took the Missouri statute on its face and actually engaged in the evaluation of the preamble that the rest of the Court refused to do at the time of *Webster*. Accordingly, the Court has not ruled against Stevens' interpretation of the preamble; it merely decided not to rule at the time of *Webster*, which renders Stevens the only member of the Supreme Court to directly address the constitutionality of the Missouri preamble.

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differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization” exists.<sup>116</sup> Hence, Stevens found that the law failed the first prong of the *Lemon* test and deemed it unconstitutional. In finding a violation of the Establishment Clause, Stevens made it clear that this violation resulted not from the overlap of a legal and religious definition, but rather from the lack of a secular purpose to justify the state’s use of one religion’s definition of life.<sup>117</sup>

Based on Steven’s assessment of the Missouri preamble, the South Dakota statute also has no secular purpose for allowing pharmacists to refuse to fill birth control prescriptions based on a Christian definition of life.<sup>118</sup> Since Stevens concluded that there could be no secular purpose that would justify protecting a fertilized egg as opposed to an implanted fertilized egg—distinctions which adhere to the Christian, rather than secular, medical definition—in the Missouri statute, there must be no secular purpose for the similarly worded South Dakota statute.<sup>119</sup>

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<sup>116</sup> *Webster*, 492 U.S. at 566.

<sup>117</sup> *Id.*

<sup>118</sup> Recall that the South Dakota statute does not permit refusals for personal, religious, or moral reasons, but rather limits the statutorily permissible reasons to fill a prescription, including one for birth control, because it will result in the death of an “unborn child,” the definition of which is one directly in line with mainstream Christian theology. Therefore, the state has codified a religious definition of life without a valid secular purpose.

<sup>119</sup> The South Dakota statutory definition of “unborn child” is: “an individual organism of the species homo sapiens from fertilization until live birth,” S.D. CODIFIED LAWS § 22-1-2(50A)(2006). For purposes of comparison, Missouri’s preamble states, in part, “(1) The life of each human being begins at conception; ... As used in this section, the term ‘unborn children’ or ‘unborn child’ shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.” MO. REV. STAT. §§ 1.205.1(1)–1.205.3 (2006). As can be seen, both the South Dakota and Missouri definitions employ remarkably similar language. One noticeable difference is that South Dakota uses “fertilization” whereas Missouri uses “conception.” However, the Missouri statute defines “conception” as “the fertilization of the ovum of a female by a sperm of a male,” MO. REV. STAT. § 188.015(3) (2006). As Justice Stevens points out, the Missouri statute improperly uses the medical term “conception,” which typically means implantation of a fertilized ovum, where what the Missouri

Without a valid secular purpose, the South Dakota law cannot pass the first prong of the *Lemon* test.<sup>120</sup>

## 2. *The Second Prong of the Lemon Test*

Although failing to satisfy even one prong of the test renders the law unconstitutional, an evaluation of each prong is valuable. The second prong of the *Lemon* test requires that the statute's "principal or primary effect . . . be one that neither advances nor inhibits religion . . ." <sup>121</sup> That is, the law must be neutral with regards to religion and neither help nor harm one particular religion.<sup>122</sup>

Establishment Clause case law has elaborated on the meaning of "advances" or "inhibits." In *Wallace v. Jaffree*, the Court found that one necessary inquiry for determining whether government "advances" or "inhibits" religion is "whether the government intends to convey a message of endorsement or disapproval of religion."<sup>123</sup> An extension of this definition includes direct monetary benefit, or harm, to a particular religion.<sup>124</sup> Indeed, as the

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statute defines is the medical definition of fertilization, the term used in the South Dakota statute. *Webster*, 492 U.S. at 563 (Stevens, J., dissenting). Accordingly, South Dakota and Missouri use statutes that are almost identical in language.

While Stevens' dissent is not controlling, his opinion is the only one rendered by the Court with regard to the issue of statutory definition of life that is clearly favoring Christianity over all other religions. In that Stevens' dissent is consistent with current Supreme Court Establishment Clause precedent, the specifics of his argument should be adopted by the Court as their official position with respect to religious definitions of life that do not, and cannot, have a secular purpose.

<sup>120</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>121</sup> *Id.* at 613.

<sup>122</sup> *Id.*

<sup>123</sup> *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690–91 (1984) (O'Connor, J., concurring)).

<sup>124</sup> *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989) (holding that "when confined exclusively to publications advancing the tenets of a religious faith," an exemption from sales tax violates the Establishment Clause, which prohibits the government from directly subsidizing religious messages while excluding secular publications from the same subsidy); *Lemon*,

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Court stated in *Zorach v. Clauson*, “[g]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education *nor use secular institutions to force one or some religion on any person.*”<sup>125</sup> Last, *Engel v. Vitale* held that although religious coercion would fit this definition, government action need not be coercive to provide a harm or benefit.<sup>126</sup>

In light of this case law, it is clear that the South Dakota statute implicitly benefits and advances Christianity by legally applying a Christian conception of life, thereby giving the arm of government to pharmacists who may force submission to their beliefs by refusing to fill one’s birth control prescription.<sup>127</sup> By using a

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403 U.S. at 606–07 (invalidating state salary subsidies to teachers of secular subjects at church-related educational institutions); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210 (1948) (holding that privately employed religious teachers who teach religion in public schools during school hours violates the Establishment Clause, in part, because the religions are benefiting from the expenditure of state money).

<sup>125</sup> 343 U.S. 306, 314 (1952) (emphasis added).

<sup>126</sup> 370 U.S. 421 (1962).

<sup>127</sup> By allowing pharmacists to refuse to fill birth control prescriptions in accordance with a legal definition that is consistent with one religion, but does not have a valid secular purpose, the state is acting in such a way as to lend support for one religion. Even if the state did not intend to support Christianity with its definition of life, this fact does not negate the reality that those who are Christian pharmacists now have the “right” to refuse to give people medication for which they have prescriptions; whereas non-Christians with other religious beliefs regarding life have no equivalent right to impose their beliefs on others. This scenario results in dissimilar treatment of various religions. To point out the unequal treatment of religions is not to say other religions deserve the same rights, but rather illustrates that the South Dakota government is not treating religions equally, and is in effect supporting one religion (Christianity) over all others. *See Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 15 (1947) (stating that “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which *aid one religion*, aid all religions, or *prefer one religion* over another.”) (emphasis added); *see also Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (stating that the “[g]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education *nor use secular institutions to force one or some religion on any person*” (emphasis added)); *Engel v. Vitale*, 370 U.S. 421, 433 (1962)

Christian definition of life, South Dakota allows pharmacists to use the Christian definition to refuse services, namely filling birth control prescriptions, to customers. By using the legislative process to promote the Christian definition,<sup>128</sup> and to protect pharmacists' ability to enforce their beliefs onto others, the state is directly supporting the Christian faith through advocacy and support for a theological belief. Therefore, the South Dakota statute unconstitutionally privileges one religion and fails the second prong of the Lemon test.<sup>129</sup>

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(equating the codification of religious principles to the religious persecution the Framers specifically tried to avoid when drafting the Constitution, Bill of Rights, and the law under both of these documents); *Wallace v. Jaffree*, 472 U.S. 38, 51–55 (1985) (articulating the Court's position that in order to preserve the right to free expression and freedom of conscience, the state cannot endeavor to enforce any religion's beliefs by means of state power, as to do so robs all of their liberties, complicates politics, and sullies religious beliefs). This forced compliance might not be as prevalent in a large city where women have numerous pharmacies in a reasonably close proximity, but these options are not always available. Indeed, within the context of one-pharmacy and one-pharmacist towns, the refusal to fill a woman's prescription for birth control is tantamount to enforcing this subtle theocracy unless the woman has the ability to travel to the next pharmacy that will fill her prescription. See Karissa Eide, *Can a Pharmacist Refuse to Fill Birth Control Prescriptions on Moral or Religious Grounds*, 42 CAL. W. L. REV. 121, 121–22 (2005); Holly Teliska, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 231 (2005); Collins, *supra* note 96, at 37.

<sup>128</sup> See Collins, *supra* note 101 and accompanying text.

<sup>129</sup> While the first prong of the *Lemon* test does not clearly apply to the states, other than South Dakota, that have conscientious objector statutes which clearly apply to pharmacists and birth control, the second prong is more applicable. Part of an analysis under the second prong of the *Lemon* test involves discussion of *Zorach*, 343 U.S. 306. Under *Zorach*, if a state institution, such as the legislature, tries to "use secular institutions to force one or some religion on any person," then the act, in this case a law, is unconstitutional. *Id.* at 314. By allowing pharmacists to refuse to fill birth control prescriptions based on religious reasons, Arkansas, ARK. CODE. ANN. § 20-16-304 (2006), Florida, FLA. STAT. § 381.0051 (2006), Washington, WASH. REV. CODE ANN. § 48.43.065 (2006), and Wyoming, WYO. STAT. ANN. § 42-5-101 (2006), permit the state to bolster specific religious beliefs against and to the detriment of those persons who do not hold the same beliefs.

*CONSCIENTIOUS OBJECTION CLAUSES* 2553. *THE THIRD PRONG OF THE LEMON TEST*

The third prong of the *Lemon* test requires that “the statute . . . not foster ‘an excessive government entanglement with religion.’”<sup>130</sup> The *Lemon* Court explained that courts must “examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>131</sup> Based on the explanation given in *Lemon*, an excessive government entanglement with religion arises when the state is actively involved in promoting a religious message, or when the state fails to distance itself from a religious message. For a “government entanglement with religion . . . [to be] excessive,” the state must take actions that are proactive in nature, such as lending the arm of the state in a manner that shows a relationship of support between the state and the religious message.<sup>132</sup>

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The problem is exacerbated by the governmental regulation of prescription medications such as birth control and the illegality of obtaining prescription drugs from a non-pharmacist. Therefore, when states such as Arkansas, Florida, Washington, and Wyoming allow pharmacists to refuse to fill birth control prescriptions, and these states neither allow legal recourse against these pharmacists nor provide a clear alternative for obtaining the medication (other than hoping to find a pharmacist that will fill the prescription), the state has used state power to directly advance religion at the cost of others. Therefore, Arkansas, Florida, South Dakota, Washington, and Wyoming all have conscientious objection statutes that fail the second prong of the *Lemon* test and are thus unconstitutional. Whether Mississippi’s statute is constitutional is less clear because Mississippi does not explicitly identify religion as the grounds for why a pharmacist may refuse to fill birth control prescriptions. *See* MISS. CODE ANN. § 41 107-5 (2006). However, the statute lists one’s “conscience” as a reason for refusing to fill prescriptions. *Id.* One’s conscience may include one’s religious beliefs. Therefore, it is likely, but unclear, whether Mississippi’s statute would be unconstitutional under the second prong of the *Lemon* test.

<sup>130</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

<sup>131</sup> *Id.* at 615.

<sup>132</sup> *Id. Compare Everson*, 330 U.S. at 17–19 (upholding the New Jersey law because the state bussed all students and did nothing to lend state power or support to the religious message of the Catholic schools that also had their students’ families reimbursed for bussing) *with* *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (holding that a Texas law that exempted religious



First, the “character and purposes of the institutions that are benefited” by the South Dakota law are, at first glance, ambiguous. Clearly, pharmacists who refuse to fill birth control prescriptions benefit. Although pharmacists are not necessarily a religious institution, their actions work to benefit Christianity. More specifically, the pharmacists who take advantage of the law are presumably Christian.<sup>133</sup> The conscientious objection law benefits the religion by providing pharmacists a legislatively supported mechanism for enforcing their religious beliefs onto others. Second, the law directly and specifically benefits Christianity by adopting its views on the beginning of life. By forgoing use of the medical definition of when a pregnancy begins in favor of one that is consistent with Christian theological beliefs, the state is lending its power and support to determine that the Christian definition (and not the medical, Islamic, Jewish, or other secular construction) is “correct.”

The “nature of the aid that the State provides” through the statute is also supportive of Christianity. Foremost, the statute offers legal protection to those pharmacists who refuse to fill a prescription based on their Christian beliefs.<sup>134</sup> The state also

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publications from state sales tax functioned as the government’s showing preferential treatment for religion, as opposed to secular publications, and thus the regulation involved active state support for a religious message).

<sup>133</sup> See Collins, *supra* note 96 at 44–46; see also LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 145–46 (1990); see also Donald Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist’s Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 85–88 (2003); Marilyn Gardner, *Pharmacists’ Moral Beliefs vs. Women’s Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11; Dennis Rambaud, *Prescription Contraceptives and the Pharmacist’s Right to Refuse: Examining the Efficacy of Conscience Law*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 195, 195–97 (2006); Teliska, *supra* note 7, at 235; Eide, *supra* note 7; Sarah Sturmon Dale, *Can a Pharmacist Refuse to Dispense Birth Control?*, TIME, June 7, 2004, at 22.

<sup>134</sup> S.D. CODIFIED LAWS § 36-11-70 (2006). Arkansas, Florida, Mississippi, Washington, and Wyoming all also offer protection from criminal and civil liability for any pharmacist who refuses to fill a birth control prescription; therefore, every statute in this relevant grouping has the same potential problem with respect to the third prong of the *Lemon* test. ARK. CODE. ANN. § 20-16-304 (2006); FLA. STAT. § 381.0051 (2006); MISS. CODE

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offers aid by endorsing the Christian view of life. As such, the law seems to lend significant state aid to the promotion of a Christian, as opposed to a secular, viewpoint and the furthering of a Christian message.

Although case law also directs courts to consider any “resulting relationship between the government and the religious authority,” the South Dakota statute does not explicitly create a relationship between the state government and Christianity.<sup>135</sup> Nevertheless, the absence of such a relationship does not render the South Dakota statute constitutional.<sup>136</sup> South Dakota does not require a religious authority to enforce its codified definition of life, nor is it necessary for the state to discuss the conscientious objection law with religious leaders.<sup>137</sup> It is not necessary for the state to maintain a relationship with a religious institution.<sup>138</sup> Hence, while there does not appear to be an explicit relationship, such a relationship is not necessary to conclude the law violates the First Amendment’s Establishment Clause.<sup>139</sup>

Finally, in attempting to piece together the excessive entanglement test, courts must examine whether the state is actively involved in spreading a religious message or if the state failed to distance itself from such a message.<sup>140</sup> First, by codifying a Christian definition of life and protecting pharmacists who refuse to fill prescriptions for religious reasons, South Dakota is actively working to spread a Christian message regarding in particular what defines life as well as what are “acceptable” sexual behaviors and choices. By codifying the Christian definition of life, and then using state power to protect those who refuse to fill medications

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ANN. § 41-107-5 (2006); WASH. REV. CODE § 48.43.065 (2006); WYO. STAT. ANN. § 42-5-101 (2006).

<sup>135</sup> S.D. CODIFIED LAWS § 36-11-70 (2006).

<sup>136</sup> See *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>137</sup> See *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.

<sup>138</sup> *Id.*

<sup>139</sup> See *Wallace*, 472 U.S. 38; *Tex. Monthly, Inc.*, 489 U.S. 1; *Lee*, 505 U.S. 577; *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.

<sup>140</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

because of this definition, the government is actively promoting the tenets of Christianity.<sup>141</sup> Accordingly, South Dakota has not distanced itself from the religious messages used by pharmacists, and the statute impermissibly entangles religion and government. Therefore, South Dakota's conscientious objection law fails the third prong of the *Lemon* test and violates the First Amendment's Establishment Clause.

#### IV. BALANCING THE RIGHTS OF WOMEN WITH THE STATE'S INTEREST IN PROTECTING PHARMACISTS' RIGHTS

Supporters of conscientious objection laws contend that pharmacists should have the right to decline to fill birth control prescriptions believed to violate the pharmacists' religious beliefs.<sup>142</sup> Nevertheless, the pharmacists' right to object is in direct conflict with women's constitutional right to privacy, including access to birth control.<sup>143</sup>

Even though a statute need not completely prohibit the use or sale of contraceptives to constitute an unlawful infringement on a person's right to privacy,<sup>144</sup> states should work to strike the proper balance between the rights of women and pharmacists. In trying to strike such a balance where two parties' rights are in conflict, states should minimize the interference with each of the conflicting parties' rights as much as possible.

Conscientious objection statutes impose a significant burden on a woman's right to obtain birth control and emergency

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<sup>141</sup> See *supra* note 136 and accompanying text.

<sup>142</sup> Cara Soloman, *Druggists Want the Right to Say No to Certain Medications*, Seattle Times, Mar. 11, 2006, at B1.

<sup>143</sup> See *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1998) (reaffirming the right); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (affirming the right and extending it to minors); *Eisenstadt v. Baird*, 405 U.S. 438 (1967) (extending the right to non-married couples); *Griswold v. Connecticut*, 348 U.S. 479 (1965) (establishing the right to privacy and stating that it protected the right of married couples to obtain birth control).

<sup>144</sup> See *Carey*, 431 U.S. 678 (holding that a statute forbidding the distribution of contraceptives to persons over 16 except by licensed pharmacists was unconstitutional because it would unduly limit access to contraceptives).

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contraceptives. Once a woman, in consultation with her physician, has determined that she wishes to use prescription contraceptives, she has the legal right to have that prescription filled at a pharmacy. For women who live in large metropolitan areas, where there are often multiple pharmacies located within minutes of each other and which employ multiple pharmacists, conscientious objection laws may not have as serious an effect on this right. In many cases, there may be another pharmacist at the pharmacy that can fill her prescription, or she may be able to travel to another close located pharmacy. On the other hand, even women who live in large metropolitan areas are not immune. An urban woman may not have access to other pharmacies because her insurance plan limits her to certain establishments.<sup>145</sup> Further, low-income women may endure substantial economic burdens if required to travel extensively to obtain their prescriptions from other pharmacies.

The problem is much more serious for the many women who live in small towns and rural areas. Only 12 percent of pharmacists nationwide practice in rural areas,<sup>146</sup> and rural areas have fewer pharmacists proportionally than urban areas.<sup>147</sup> Also, fewer pharmacists choose to practice in rural areas.<sup>148</sup> Given the limited number of pharmacies and pharmacists in rural areas, even a single objector may have serious consequences for women.<sup>149</sup> Women may be forced to travel miles to find a pharmacist who would be willing to serve them. This problem is exacerbated in the context of

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<sup>145</sup> Many insurance plans, for instance, provide greater coverage if you go to an “in-network” pharmacy. *See, e.g.* Military.com, Benefits, <http://www.military.com/benefits/tricare/tricare-pharmacy/tricare-pharmacy-program> (last visited Sept. 14, 2007) (highlighting the difference in purchasing prescriptions at in-network and non-network pharmacies and explaining that costs will not be covered to the same extent at non-network pharmacies). Many managed care insurance programs distinguish in-network and out-of-network pharmacies.

<sup>146</sup> NATIONAL ADVISORY COMMITTEE ON RURAL HEALTH AND HUMAN SERVICES, THE 2006 REPORT TO THE SECRETARY: RURAL HEALTH AND HUMAN SERVICE ISSUES (2006), *available at* <http://ruralcommittee.hrsa.gov/NAC06AReport.htm#Executive%20Summary>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> For a greater discussion of the obstacles faced by rural women, *see* Teliska, *supra* note 7.

emergency contraception, which must be taken within seventy-two hours of intercourse and requires a prescription in most states.<sup>150</sup>

Overall, the consequences are serious. One possible effect is unwanted pregnancies, and consequently, children being born to parents who have neither the emotional nor financial means to support them. In some cases, pharmacists may not only refuse to fill the prescription, but may very vocally refuse and lecture the woman, resulting in her humiliation and a breach of the confidentiality to which she is entitled should other customers be within earshot.<sup>151</sup> In other instances, the prescriptions are for medical reasons unrelated to birth control, and the woman's inability to obtain her prescription may lead to a worsening of the medical condition for which she received the prescription.

Although the negative consequences of these statutes are grave, there is also an important interest in protecting a pharmacist's right to follow his conscience and practice his profession in a way that does not conflict with his religious beliefs.<sup>152</sup> Advocates of a pharmacist's right of refusal argue that the state has an interest in protecting the pharmacist's first amendment right to the free

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<sup>150</sup> Jed Miller, *The Unconscionability of Conscience Clauses: Pharmacists Consciences and Women's Access to Contraception*, 16 HEALTH MATRIX 237, 246-47 (2006).

<sup>151</sup> Article VII of the Code of Ethics of the American Society of Consultant Pharmacists provides as follows: "The Consultant Pharmacist shall respect the confidentiality of all clinical records, professional notes, memoranda, reports and other records relating to any patient's medical condition or medication therapy; and shall in no case disclose such information without proper legal authorization." American Society of Consultant Pharmacists Code of Ethics, <http://ethics.iit.edu/codes/coe/amer.soc.consultant.pharmacists.html> (last visited Aug. 30, 2007). Similarly, this behavior would breach two separate articles within the Code of Ethics of the American Pharmacists' Association: Article II provides that "a pharmacist promotes the good of every patient in a caring, compassionate, and confidential manner," while Article III states that "A pharmacist respects the autonomy and dignity of each patient." Pharmacists.com, Code of Ethics for Pharmacists, <http://www.pharmacist.com/AM/Template.cfm?Section=Search1&template=/CM/HTMLDisplay.cfm&ContentID=2903> (last visited Aug. 30, 2007).

<sup>152</sup> Rob Stein, *Pharmacists' Rights at Front of New Debate*, WASH. POST, Mar. 28, 2005, at A1.

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exercise of religion,<sup>153</sup> including the refusal to engage in practices that would violate his fundamental religious beliefs.

In *Employment Division, Dept. of Human Resources of Oregon v. Smith*, the United States Supreme Court stated that:

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all “governmental regulation of religious *beliefs* as such.” The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.<sup>154</sup>

Consequently, supporters of conscientious objection laws contend the First Amendment demands pharmacists be able to decline to fill a prescription because to do otherwise would conflict with their religious belief that the prevention of conception is akin to taking a life.<sup>155</sup>

Despite any concern for pharmacists’ right to object, the constitutional right to privacy and potential obstacles to obtaining birth control outweigh pharmacists’ interest in exercising their religion. As a result, reform must be generated that protects pharmacists’ rights only to the extent that it does not pose such impossible obstacles to access for women. The consequences faced by pharmacists in the absence of such extreme statutes as that of South Dakota may be easier accommodated and, indeed, may even be foreseeable. Such legislative reform would serve as a political compromise and would be consistent with “the position

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<sup>153</sup> U.S. CONST. amend. I (“Congress shall make no law ... prohibiting the free exercise [of religion] ...”).

<sup>154</sup> *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595, 1599 (1990) (internal citations omitted).

<sup>155</sup> The Associated Press, *Board Questions Pharmacists’ Refusal to Disperse Birth-Control Pills*, Oct. 13, 2004, <http://www.firstamendmentcenter.org/news.aspx?id=14189>.

incorporated in the Conscience Clause of the American Pharmacists Association's Code of Ethics, which recognizes a pharmacist's right to exercise conscientious refusal but the simultaneous need to ensure patient access to prescribed drugs."<sup>156</sup> Thus, in becoming a pharmacist, one should perhaps be prepared to ensure patients' access to medications, even if it conflicts with one's beliefs.

No court has yet determined that following one's conscience constitutes a compelling state interest. Rather, in *Valley Hospital Association v. Mat Su Coalition for Choice*,<sup>157</sup> the Alaska State Supreme Court found that the "right of conscience" of individuals and institutions was not a compelling state interest under the Alaska constitution, and therefore did not supersede the rights of women to obtain a constitutionally protected abortion.<sup>158</sup>

Other courts have explained that the right to practice one's religious beliefs is not an absolute privilege.<sup>159</sup> For example, courts have held that an employer is not obligated to accommodate the religion of an employee if the accommodation requires more than a *de minimus* burden on the employer.<sup>160</sup> One example of a possible accommodation for pharmacists in absence of broad statutory protection of their objection rights would be to allow pharmacists to refuse to fill prescriptions for birth control or emergency contraception only when another pharmacist is on duty at the same pharmacy that will fill the prescription. This accommodation would seem to provide a means for a pharmacist to practice his profession in conformity with his religious beliefs while not

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<sup>156</sup> *Id.*

<sup>157</sup> 948 P.2d 963 (Alaska 1997).

<sup>158</sup> *Id.* at 971.

<sup>159</sup> See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 143 (5th Cir. 1982). This lack of an absolute right can also be inferred from the EEOC Guidelines, which, in explaining dealing with the problem of an employee who refuses to work during an employer's normal workweek due to his religion, states that an employer has an obligation under the statute to accommodate the reasonable religious needs of employees where such accommodation can be made without serious inconvenience to the conduct of the business. See 29 C.F.R. § 1605.1 (1967).

<sup>160</sup> *Id.*

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infringing on the privacy rights of women.<sup>161</sup> While such a statute may limit the total number of pharmacies at which a pharmacist would be able to seek employment, this consequence is not so harsh in light of the fact that many religions have practices that limit their practitioners' employment prospects.<sup>162</sup> Even in the absence of a protected right, pharmacists would still be allowed to voice their disapproval, seek jobs that do not require them to go against their religious beliefs, or to work at pharmacies that can accommodate their religious beliefs.<sup>163</sup>

Furthermore, the Court ruled in *Texas Monthly, Inc. v. Bullock*,<sup>164</sup> that a burden on a religion is not necessarily unconstitutional because a "state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."<sup>165</sup> Logically, one overriding governmental interest would be the ability of women to obtain medication they have been prescribed by their doctors. This governmental interest is especially applicable to birth control medication because such medication is prescribed for various medical conditions and does not only function as a contraceptive.

The appropriate solution may depend on the context. Conscientious objection statutes must be either struck down as unconstitutional or at least reformed to accommodate a woman's

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<sup>161</sup> Of course, the preservation of the pharmacists' rights are dependent upon his being able to find a pharmacy to work where he will be able to practice with another pharmacist who has no objection to filling all prescriptions.

<sup>162</sup> For example, if a person's religion requires him to attend church services on Sunday, his employment prospects would be limited to employers that did not require him to work regularly at the time of his worship services. Alternatively, if one's religion requires the wearing of certain items of clothing, there may be some jobs where the wearing of such religious garb would prevent employment, as in the case of *Goldman v. Weinberger*, 475 U.S. 503 (1988), in which the Supreme Court ruled that the Air Force did not violate the religious freedom of a Jewish officer when a regulation prohibited him from wearing a yarmulke while in uniform. The court recognized a compelling need for uniformity in the military with the subordination of personal identities to the overall group mission.

<sup>163</sup> Eide, *supra*, note 7, at 145.

<sup>164</sup> 489 U.S. 1, 19 (1989).

<sup>165</sup> *Id.*, citing *United States v. Lee*, 455 U.S. 252, 257-58 (1982).



rights to birth control. Appropriate reform requires a proper balance be struck: conscientious objection laws must be narrowly drawn so that women retain access to birth control medication, yet pharmacists should not necessarily be required to violate their own religion. Such reform requires many pharmacies to adopt policies which can accommodate their employers' beliefs while still providing essential services to women who need birth control and emergency contraception. Whatever the compromise, limitations must be made. In the meantime, pharmacists must proceed to fill these necessary prescriptions for women.

#### CONCLUSION

The Alan Guttmacher Institute estimates the number of women using birth control pills in the United States at 11.6 million.<sup>166</sup> The figure only includes birth control pills, however, and does not account for birth control injections, patches, diaphragms, or other control methods requiring a prescription from a doctor. Thus, a significant number of women are likely to be adversely affected if these conscientious objection laws are upheld without limitation. Indeed, many of these statutes, certainly that of South Dakota, not only interfere with a woman's constitutionally protected right to birth control, but also clearly violate the Establishment Clause of the Constitution. Until legislatures strike a proper balance in protecting pharmacists' rights and women's rights, these laws must not be upheld and pharmacists must be required to fulfill their professional responsibilities.

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<sup>166</sup> See Guttmacher Institute, *Contraceptive Use*, [http://www.guttmacher.org./pubs/fb\\_contr\\_use.html](http://www.guttmacher.org./pubs/fb_contr_use.html) (last visited June 17, 2006).