

Prescribing Morality: The Constitutionality of Pharmacist Conscience Clauses

by TAYLOR GENOVESE*

I. Introduction

“Julee Lacey . . . went to her local CVS drugstore for a last-minute Pill refill. She had been getting her prescription filled there for a year, so she was astonished when the pharmacist told her, ‘I personally don’t believe in birth control and therefore I’m not going to fill your prescription.’ Lacey, an elementary school teacher, was shocked. ‘The pharmacist had no idea why I was even taking the Pill.’”¹

Lacey’s story received national media attention and represents the bigger national debate over whether pharmacists should have the right to refuse to fill prescriptions that are against their religious or moral beliefs.² Karen Brauer, RPh, president of the pro-life group Pharmacists for Life International, says pharmacists have every right to make such refusals: “Our job is to enhance life We shouldn’t have to dispense a medication that we think takes lives.”³ To this end, state and federal legislatures have passed and proposed legislation specifically addressing a pharmacist’s right to make such refusals.

This paper will focus on the constitutional issues raised by such legislation. Part II will provide a brief background of the history of conscience clauses. Part III will discuss the importance of contraceptives and the differences between various contraceptive methods and the drug

* I graduated from UCSB in 2002 with a BA in film studies. I expect to obtain my J.D. May 2007. I would like to thank my family and friends for their support in all my law school endeavors.

1. Caroline Bollinger, *Access Denied*, <http://www.prevention.com/article/0,5788,s1-1-93-35-4130-1-P,00.html> (last visited Mar. 19, 2006).

2. *Id.*

3. *Id.*

mifepristone (also known as RU-486). Part IV will address current state laws and proposed legislation that specifically establish a pharmacist's right to refuse to fill prescriptions that are against his or her religious or moral beliefs. Part V will focus on the constitutional issues raised by pharmacist conscience clauses, specifically the First Amendment's Free Exercise Clause and Establishment Clause as well as the Fourteenth Amendment's right to privacy. Part VI will describe proposed federal legislation, the Access to Legal Pharmaceuticals Act ("ALPHA"), and how it addresses a pharmacist's right to refuse.⁴ Finally, Part VII will conclude with the argument that ALPHA should be passed by Congress because it reconciles both the constitutionally guaranteed right to exercise one's religious beliefs with the right to have access to contraceptives.

II. History of Conscience Clauses

Health provider "conscience clauses" were first enacted in response to the United States Supreme Court decision in *Roe v. Wade*⁵ and were specifically related to religious or moral objections to abortion.⁶ Currently, forty-six states have enacted legislation that allows some health services providers to refuse to provide or participate in abortions.⁷ Such conscience clauses typically cover doctors, other direct providers of health care, and hospitals.⁸ Generally these conscience clauses provide "varying" levels of legal protection for health providers who refuse to perform services that are against their religious or moral beliefs.⁹ Some conscience clauses are broader and "include the right to opt out of assisted reproductive technologies, human embryonic or fetal research, and in vitro fertilization."¹⁰ Other states have extremely broad conscience clauses, such as Illinois' Health Care Right of Conscience Act, which states:

It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to

4. S. 809, 109th Cong. (2005); H.R. 1652, 109th Cong. (2005).

5. 410 U.S. 113 (1973).

6. See 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, 233 (2005).

7. Bryan A. Dykes, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565, 569 (2002).

8. See Teliska, *supra* note 6, at 234.

9. See Dykes, *supra* note 7, at 567.

10. See Teliska, *supra* note 6, at 234.

prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.¹¹

Although the Illinois conscience clause could be viewed as implicitly providing for a pharmacist's right to refuse to fill a prescription against his or her "conscience," Illinois Governor Rod Blagojevich issued an emergency rule that requires pharmacies in the state to dispense FDA approved contraceptives.¹² In 1998, South Dakota became the first state to *explicitly* state that a pharmacist has the right to refuse to dispense medication if he or she believes that it may be used to cause an abortion.¹³

III. Contraceptives

A. Oral Contraceptives

The Food and Drug Administration ("FDA") approved the birth control pill for use as a contraceptive in 1960.¹⁴ Five years later, in 1965, the United States Supreme Court first recognized the constitutional right to use contraceptives.¹⁵ Contraceptives have become an extremely important part of many women's lives. Of the sixty-million American women in their childbearing years, only five percent "who do not want to become pregnant and could become pregnant do not use contraception."¹⁶ In 2002, 11.6 million American women were taking oral contraceptives, making them the most popular form of birth control after the male condom.¹⁷ Pharmacists play a key role in dispensing the birth control monthly to these millions of women.¹⁸ Thus, a woman's decision whether to use oral contraceptives may be decided for her by a pharmacist who refuses dispense the birth control pill to her pursuant to pharmacist clause legislation that is either

11. 745 ILL. COMP. STAT. ANN. 70/2 (2005).

12. Press Release, Illinois Governor Blagojevich's Office, Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives (Apr. 1, 2005), *available at* <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3805>.

13. S.D. CODIFIED LAWS § 36-11-70 (2006).

14. U.S. Food and Drug Administration, Birth Control Guide, <http://www.fda.gov/fdac/features/1997/babytabl.html> (last visited Mar. 19, 2006).

15. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

16. Teliska, *supra* note 6, at 233.

17. William D. Mosher, et. al., *Use of Contraception and Use of Family Planning Services in the United States: 1982-2002*, ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, Dec. 10, 2004, *available at* <http://www.cdc.gov/nchs/data/ad/ad350.pdf>.

18. *See* Teliska, *supra* note 6, at 233.

written or interpreted broadly enough to grant the pharmacist the right to refuse to fill such prescriptions.

Women with prescriptions for oral contraceptives take one pill per day. Each pill contains the hormones estrogen and progestin, which are similar to the hormones produced in the ovaries.¹⁹ The hormones contained in the oral contraceptive prevent a woman from ovulating. That is, the hormones prevent the ovaries from releasing their eggs.²⁰ In the event ovulation does occur, the hormones also act to thicken the cervical mucus, which prevents sperm from reaching the egg and fertilizing it.²¹ Because oral contraceptives affect the lining of the uterus, implantation of a fertilized egg will be hindered.²² It is this possibility—that an egg may be fertilized and yet not implant in the uterus—that has led to the moral and religious objections to the use of oral contraceptives.²³ These objections will be addressed shortly.

B. Emergency Contraceptives

1. History and Background

In 2000, the FDA approved the drug mifepristone, also known as RU-486, for use in the United States.²⁴ Mifepristone blocks progesterone, the hormone that prepares the lining of the uterus for the implantation of a fertilized egg.²⁵ Once progesterone is blocked, “the uterine lining softens, breaks down and bleeding begins.”²⁶ The lining also secretes prostaglandin, “which causes the uterus to contract and expel the egg.”²⁷ To induce the equivalent of a miscarriage, a patient must ingest six-hundred milligrams of mifepristone at the first doctor’s visit.²⁸ Two days later the patient must take four-hundred micrograms of a second drug,

19. Planned Parenthood, Facts About Birth Control: Reversible Prescription Methods, <http://www.plannedparenthood.org/birth-control-pregnancy/birth-control/the-pill.htm> [hereinafter Planned Parenthood] (last visited Jan. 1, 2007).

20. *Id.*

21. *Id.*

22. *Id.*

23. J.T. Finn, “*Birth Control*” Pills Cause Early Abortions, <http://www.prolife.com/BIRTHCNT.html> (last visited Mar. 19, 2006).

24. See Paige Kremser, Griswold, *the FDA, and the State Legislator: The Regulation of Mifeprex*, 8 WM. & MARY J. WOMEN & L. 443, 443 (2002).

25. *Id.* at 444.

26. *Id.*

27. *Id.*

28. *Id.*

misoprostol, which completes the process of expelling the egg.²⁹ On the third visit, twelve days later, the physician will determine whether the pregnancy has been terminated.³⁰ The FDA approved mifepristone for “the termination of early pregnancy, defined as 49 days or less, counting from the beginning of the last menstrual period.”³¹ Currently, only a physician may dispense mifepristone.³² Because mifepristone has been approved and marketed for the termination of pregnancy, it is not commonly thought of as an emergency contraceptive. Recent studies, however, have found that it can also be used as a postcoital contraceptive in much the same way as “morning after pills” and as an alternative to daily birth control pills.³³ Although access to mifepristone will not be affected by legislative protection of a pharmacist’s right to refuse to fill contraceptive prescriptions, it is worth distinguishing the drug from emergency contraceptives because some people erroneously believe that the “morning after pill” and mifepristone act in the same fashion.

Emergency contraceptives, commonly referred to as “morning after pills,” are used postcoitus when normal contraceptives either failed or were not used.³⁴ Emergency contraceptives contain either or both estrogen and progestin.³⁵ In 1999, the FDA approved Plan B as an emergency contraceptive.³⁶ Plan B works by stopping the release of an egg from the ovary, or if an egg has already been released, it stops the union of the sperm and egg.³⁷ The drug is most effective when taken within the first seventy-two hours after unprotected sex.³⁸ It is also possible that Plan B will prevent the implantation of a fertilized egg in the uterus.³⁹ But, if the drug is taken after a fertilized egg has implanted in the uterus, the drug will not harm the fetus.⁴⁰ This distinguishes emergency contraception from the

29. *Id.*

30. *Id.*

31. *Id.*

32. Denise A. Copelton, *Assessing the Social Impact of Mifepristone in the United States – a Pro-Choice Perspective*, 11 KAN. J.L. & PUB. POL’Y 333, 336 (2002).

33. See Kremser, *supra* note 24, at 446.

34. See Tania Khan & Megan Arvad McCoy, *Access to Contraception*, 6 GEO. J. GENDER & L. 785, 788 (2005).

35. *Id.*

36. See Donald W. 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, 80 (2002-03).

37. *Id.*

38. *Id.*

39. *Id.* at 79-80.

40. *Id.* at 79.

drug mifepristone. It is also possible to use modified doses of regular oral contraceptives as a form of emergency contraceptive.⁴¹

2. *Special Issue—Are Contraceptives Abortifacients?*

Moral and religious objections to oral contraceptives and emergency contraceptives are primarily based on the belief that life begins when an egg is fertilized. It is the official teaching of the Roman Catholic Church “that life begins, and conception occurs, at fertilization.”⁴² The belief that life begins at fertilization is not limited to Catholics, but shared by many Americans who think that any contraceptive method that prevents a fertilized egg from implantation is wrong.⁴³ However, the American Medical Association and most of the medical community define conception as the implantation of the fertilized egg in a woman’s uterus rather than mere fertilization.⁴⁴ Thus, by the medical community’s standards, emergency contraceptives and oral contraceptives are not abortifacient (abortion causing). But if one believes that life begins at fertilization, and if in theory it is possible that oral contraceptives may prevent the implantation of a fertilized egg in the uterus, it is understandable that some pharmacists may have moral or religious objections to providing the drugs to women.⁴⁵ Although in theory it is possible that oral contraceptives may prevent the implantation of a fertilized egg, there is no conclusive evidence either way.⁴⁶ The chances that emergency contraceptives may prevent the implantation of a fertilized egg in a woman’s uterus are similarly uncertain.⁴⁷ However, because emergency contraceptives are taken after unprotected sex, some people may believe that an egg has a better chance of being fertilized in this scenario than when regular oral contraceptives are used. Objections to the use of emergency contraceptives may also be due in part to the common misunderstanding that they act similarly to drugs like mifepristone.⁴⁸ Regardless, under either the religious or medical definition of conception, mifepristone would be considered an abortifacient when taken to expel a fertilized egg from a woman’s uterus.

41. *Id.* at 80.

42. *Id.* at 86.

43. *Id.* at 87.

44. *Id.* at 86.

45. Planned Parenthood, *supra* note 19.

46. Caroline Bollinger, *The Post-Fertilization Effect: Fact or Fiction?*, <http://www.prevention.com/article/0,,s1-1-93-35-4166-1,00.html> (last visited Jan. 1, 2007).

47. Planned Parenthood, *supra* note 19.

48. *See* Teliska, *supra* note 6, at 235.

3. *Conscience Clauses Potentially Cover Both Oral Contraception and Emergency Contraception*

Three states—Arkansas, South Dakota, and Mississippi—arguably would protect a pharmacist who refuses to fill a prescription for either oral or emergency contraceptives. Arkansas law provides: “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.”⁴⁹ While the law does not explicitly grant pharmacists the right to refuse to dispense contraceptives, it leaves open that possibility. Further, it is possible to interpret Arkansas’ general conscience clause to include pharmacists.⁵⁰ That law provides that “[n]o person shall be required to perform or participate in medical procedures which result in the termination of pregnancy,” and a pharmacist is certainly a “person” under the statute.⁵¹ A pharmacist who believes that oral or emergency contraceptives terminate a pregnancy—due to the possibility that the contraceptive may prevent the implantation of a fertilized egg—may find protection under this statute. South Dakota’s statute provides that “[n]o pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to: (1) [c]ause an abortion; or (2) [d]estroy an unborn child as defined in subdivision 22-1-2(50A).”⁵² Subdivision 22-1-2(50A) states that an unborn child is “an individual organism of the species homo sapiens from fertilization until live birth.”⁵³ South Dakota law consequently would protect a pharmacist who believed that either oral or emergency contraceptives destroy an unborn child (a fertilized egg) by preventing its uterine implantation. Mississippi’s Health Care Rights of Conscience Act provides that “[a] health-care provider may decline to comply with an individual instruction or health-care decision for reasons of conscience.”⁵⁴ In addition, Mississippi law includes pharmacists in its definition of health care providers.⁵⁵ Thus, Mississippi law would arguably protect a pharmacist from liability if the pharmacist claims that it is against his or her conscience to fill a prescription for oral or emergency contraceptives.

49. ARK. CODE ANN. § 20-16-304(4) (2006).

50. ARK. CODE ANN. § 20-16-601(a) (2006).

51. *See id.*

52. S.D. CODIFIED LAWS § 36-11-70 (2006).

53. S.D. CODIFIED LAWS § 22-1-2(50A) (2006).

54. MISS. CODE ANN. § 41-41-215(5) (2005).

55. MISS. CODE ANN. § 41-107-3(b) (2005).

IV. State Laws

State legislatures have proposed or passed legislation specifically addressing the rights of pharmacists to refuse to dispense emergency contraception.⁵⁶ Four states—South Dakota, Arkansas, Georgia, and Mississippi—allow pharmacists to refuse to dispense emergency contraception.⁵⁷ Four more states have broad refusal clauses that may include pharmacists—Colorado, Florida, Maine, and Tennessee.⁵⁸ California law, on the other hand, provides that pharmacists have a duty to dispense prescriptions unless their employer approves the refusal to dispense and the woman can still obtain her prescription in a timely manner.⁵⁹

Although only five states have actually passed laws explicitly concerning a pharmacist's right to refuse to dispense emergency contraception, a survey of recently proposed and introduced legislation makes it apparent that the issue is of increasing importance to state legislatures.⁶⁰ Twenty-one state legislatures have proposed legislation dealing specifically with pharmacist refusal clauses.⁶¹ Legislatures have approached the issue in several different ways. Most legislation allows pharmacists to refuse to dispense prescriptions that violate their religious or moral beliefs and exempts them from liability for doing so.⁶² Some proposed legislation, such as in Missouri, is similar to California's approach and allows a pharmacist to refuse to fill a prescription only after certain requirements are met.⁶³ Other proposed legislation, such as in New Jersey and West Virginia, completely prohibits a pharmacist from refusing to fill prescriptions for philosophical, moral, or religious reasons.⁶⁴ Legislation that specifically permits or specifically denies a pharmacist the right to refuse filling a contraceptive prescription based on the pharmacist's religious or moral beliefs, may conflict with constitutional safeguards. What then is the proper balance?

56. Pharmacist Conscience Clauses: Law and Legislation 2005, <http://www.ncsl.org/programs/health/conscienceclauses.htm> (last visited Jan. 1, 2007) [hereinafter National Conference].

57. *Id.*

58. *Id.*

59. *Id.*; see S.B. 644, 2005 Leg., 2005-06 Reg. Sess. (Cal. 2005).

60. National Conference, *supra* note 56.

61. *Id.*

62. *Id.*

63. *Id.*; see S. 458, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005).

64. National Conference, *supra* note 56; see Gen. Assem. 3772, 211th Leg., 2d Ann. Sess. (N.J. 2005); S. 2178, 211th Leg., 2d Ann. Sess. (N.J. 2005); H.D. 2807, 79th Leg., 2005 Reg. Sess. (W. Va. 2005).

V. Constitutional Issues

A. Religious Beliefs Against Abortion

Pharmacist conscience clauses are designed to protect a pharmacist who is religiously or morally opposed to filling certain prescriptions. This note has already addressed pharmacists' religious and moral objections to oral and emergency contraceptives. The primary objection is that these contraceptive methods prevent a fertilized egg from implanting in a woman's uterus. Because some pharmacists believe that life begins at fertilization, drugs that may prevent a fertilized egg from implantation are arguably religiously or morally objectionable. Are pharmacist conscience clauses thus constitutionally necessary to protect the pharmacists' free exercise of their religious beliefs? Or are they unconstitutional because they go too far in their protection?

The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁶⁵ These two clauses are referred to as the "Establishment Clause" and the "Free Exercise Clause." The Free Exercise Clause was first incorporated into the Due Process Clause of the Fourteenth Amendment, and thus made effective against the states, in *Cantwell v. Connecticut*.⁶⁶ In addition, the Establishment Clause was incorporated in *Everson v. Board of Education*.⁶⁷ Therefore, both clauses would apply to state legislation regarding pharmacist conscience clauses.

1. *What Is Religion?*

The Court has not formulated a definition of "religion" for purposes of the First Amendment.⁶⁸ However, the Court has decided cases involving statutory interpretations of the term "religion" that prove useful in determining what the term "religion" encompasses under the First Amendment.⁶⁹ In *United States v. Seeger*, the Court construed a statute that exempted individuals from military service "who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."⁷⁰ Under the statute, "religious training and belief" was defined as an "individual's belief in relation to a Supreme Being involving

65. U.S. CONST. amend. I.

66. 310 U.S. 296, 303 (1940).

67. 330 U.S. 1, 15-17 (1947).

68. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1144 (Aspen Publishers 2d ed. 2002).

69. *Id.* at 1145-46.

70. 380 U.S. 163, 164-65 (1965).

duties superior to those arising from any human relation”⁷¹ Excluded from the definition were “political, sociological, or philosophical views” and more generally a person’s “moral code.”⁷² *Seeger* dealt with an individual who did not believe in a “Supreme Being” but a “Supreme Reality” and still sought to be exempted from military service through the religious exemption.⁷³ Justice Clark’s opinion for the Court stated that the test that should be used to determine if the exemption applies is whether “a belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”⁷⁴ The Court dealt with a similar fact pattern in *Welsh v. United States* where a person sought a religious exemption from military service but could not point to a specific religion or belief in a “Supreme Being” to support his conscientious objection.⁷⁵ Justice Black said that the critical question is “whether these beliefs play the role of a religion and function as a religion” for the individual.⁷⁶ Thus, *Seeger* and *Welsh* define religious beliefs fairly broadly and seem to include moral beliefs that are not necessarily based on a particular recognized religion so long as the individual treats their moral beliefs as religious ones. Accordingly, those pharmacists who object to contraceptives but are not members of a religion that specifies when life begins would still find protection under *Seeger* and *Welsh*. Under the *Seeger* and *Welsh* tests, a pharmacist’s belief that life begins at fertilization, and that a drug that prevents the fertilization of an egg in a woman’s uterus kills a living thing, is a religious belief so long as it sincerely and meaningful occupies a place in the person’s life parallel to that filled by religion.

The determination of whether or not a belief qualifies as a religious belief is a difficult one to make. In *United States v. Ballard*, the Court stated that it may only inquire into whether an individual’s religious beliefs are sincerely held, not whether they are true or false.⁷⁷ Therefore, any counterargument that life does not actually begin at fertilization is irrelevant to the inquiry. The Court further stated that an individual can claim a religious belief even if it is inconsistent with the doctrines or

71. *Id.* at 165.

72. *Id.*

73. *Id.*

74. *Id.* at 165-66.

75. 398 U.S. 333, 335-36 (1970).

76. *Id.* at 339.

77. 322 U.S. 78, 86 (1944).

practice of his or her religion.⁷⁸ Thus a pharmacist who adheres to a particular religious faith and believes that life begins at fertilization does not have to establish that others in his religion share his or her beliefs or that his or her particular religion teaches that life begins at fertilization. It is, therefore, quite possible that the beliefs that life begins at conception and that any drug that prevents implantation of a fertilized egg kills a living thing, would be treated as religious beliefs under the First Amendment.

2. *Free Exercise Clause*

Assuming conscience clauses protect a pharmacist's religious beliefs, it must be determined whether or not legislation prohibiting a pharmacist's refusal to fill a prescription violates the Free Exercise Clause. The Free Exercise Clause is invoked: "when the government prohibits behavior that a person's religion requires;" "when the government requires conduct that a person's religion prohibits;" and when an individual claims that a law makes religious observance more difficult.⁷⁹ Proposed state legislation that completely prohibits a pharmacist from refusing to fill a prescription on religious grounds may trigger the Free Exercise Clause because it requires behavior—the filling of the prescription—that a person's religion prohibits, because the prescription may kill the fertilized egg.

The Court's interpretation of the Free Exercise Clause has undergone some changes in recent years.⁸⁰ In *Sherbert v. Verner*, the Court held that strict scrutiny should be used when evaluating laws that burden the free exercise of religion.⁸¹ The Court continued to apply strict scrutiny to free exercise claims until its 1990 decision in *Employment Division v. Smith*.⁸² In *Smith*, the Court held the Free Exercise Clause inapplicable to neutral laws of general applicability. This means that "no matter how much a law burdens religious practices, it is constitutional . . . so long as it does not single out religious behavior for punishment and was not motivated by a desire to interfere with religion."⁸³ In *Smith*, the Court determined that a law prohibiting the use of peyote did not violate the Constitution, despite the fact that some Native Americans religiously required its use, because the law applied to everyone in the state and did not punish peyote consumption specifically because its use was religiously motivated.⁸⁴

78. *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981).

79. CHEMERINSKY, *supra* note 68, at 1200.

80. *Id.* at 1201.

81. 374 U.S. 398, 406 (1963).

82. 494 U.S. 872 (1990).

83. CHEMERINSKY, *supra* note 68, at 1201.

84. 494 U.S. at 882.

However, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, the Court held that a city ordinance was unconstitutional because its prohibition on the ritual sacrifice of animals was directed at a particular religious sect.⁸⁵ Under these cases, “a neutral law of general applicability only has to meet rational basis review, but laws that are directed at religious practices have to meet strict scrutiny.”⁸⁶ Congress attempted to reverse the effects of *Smith* by requiring courts to apply strict scrutiny to free exercise claims by passing the Religious Freedom Restoration Act (“RFRA”) of 1993.⁸⁷ The Court responded in *City of Boerne v. Flores* by declaring the RFRA unconstitutional as exceeding the scope of Congress’ powers under the Fourteenth Amendment.⁸⁸ The result is that strict scrutiny applies to federal legislation under the RFRA, while *Smith* continues to apply to the states.

Legislators should consider whether proposed legislation that denies a pharmacist the right to refuse to fill prescriptions that are against his or her religious beliefs is a constitutional violation of the Free Exercise Clause. Such legislation would not be generally applicable under *Smith* because it would specifically target pharmacists who have religious or moral objection to the use contraceptive methods. Additionally, such legislation would most likely not be neutral. In *Hialeah*, the Court stated that a city ordinance that prohibited the ritual sacrifice of animals was not neutral because its clear object was to prohibit the religious practice of the Santerias.⁸⁹ Can the refusal to fill a prescription be properly characterized as a religious practice under the Free Exercise Clause? An argument can certainly be made that refraining from the use of contraceptive methods that one believes may potentially kill a fertilized egg is part of a religious practice and that refraining from assisting others in their contraceptive use is equally a part of that religious practice. If a challenged law is neither neutral nor generally applicable, the Court will apply strict scrutiny.⁹⁰

When applying strict scrutiny, a law can only survive if it is justified by a compelling state interest and is narrowly tailored to achieve that interest.⁹¹ Most likely, a state would argue that it has an interest in ensuring its citizens have unburdened access to contraceptives. Moreover, because there is a constitutional right to contraceptives, a strong argument

85. 508 U.S. 520, 534 (1993).

86. CHEMERINSKY, *supra* note 68, at 1202.

87. 42 U.S.C. § 2000bb (2006).

88. 521 U.S. 507, 536 (1997).

89. 508 U.S. at 534.

90. *Id.* at 531-32.

91. See CHEMERINSKY, *supra* note 68, at 520.

can be made that such an interest is compelling. The next question is whether legislation that prohibits a pharmacist from refusing to fill prescriptions against his religious or moral beliefs is narrowly tailored to the state government's interest in ensuring a woman has access to contraceptives. Such legislation is most likely not narrowly tailored. A state could presumably and adequately accomplish its goals in ways that do not target pharmacists who have religious or moral objections to the use of contraceptives. For example, a state could pass legislation that accommodates a pharmacist's religious objections while placing the burden of ensuring that a woman has access to contraceptives on the pharmacy itself.

3. *Establishment Clause*

Legislation that allows a pharmacist to refuse to fill a prescription for contraceptives based on the pharmacist's religious beliefs may also violate the Establishment Clause of the First Amendment. The Supreme Court has laid out three different modes of analysis with respect to the Establishment Clause.⁹² First, "strict separation," which urges that government and religion should be separated to the greatest extent possible.⁹³ Second, government must be neutral toward religion.⁹⁴ Several Supreme Court Justices have used a "symbolic endorsement" test to evaluate whether the government's actions are neutral, which holds that "the government violates the Establishment Clause if it symbolically endorses a particular religion or if it generally endorses either religion or secularism."⁹⁵ Third, the accommodation approach,⁹⁶ which suggests that government should be accommodating to religion.⁹⁷ Under the accommodation approach, the government only violates the Establishment Clause if it "literally establishes a church, coerces religious participation, or favors one religion over others."⁹⁸

Despite these varying modes of analysis, certain principles regarding the establishment clause are settled. For example, when the government favors one religious group over another, such discrimination will be subject to strict scrutiny.⁹⁹ On the other hand, for non-discriminatory laws, the

92. *Id.* at 1149.

93. *Id.*

94. *Id.* at 1151.

95. *Id.*

96. *Id.* at 1153.

97. *Id.*

98. *Id.*

99. *Id.* at 1156.

Court applies the three-part test articulated in *Lemon v. Kurtzman*.¹⁰⁰ The *Lemon* test is often formulated as: “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.’”¹⁰¹ The *Lemon* test is used by Justices taking the separationist approach and by Justices who favor the neutrality approach (although they add that the legislative purpose or effect is to symbolically endorse religion).¹⁰² Justices who advocate the accommodation approach recommend ending the use of the *Lemon* test.¹⁰³ Although the *Lemon* test has not been officially discarded, current Justices have advocated the use of an alternative analysis, such as whether the government’s action “symbolically endorses religion.”¹⁰⁴ In, *McCreary County v. ACLU of Kentucky*, the Court used both the *Lemon* test and the neutrality approach to determine that a display of the Ten Commandments did not have a secular purpose and therefore violated the Establishment Clause.¹⁰⁵ In *McCreary*, the Court said: “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”¹⁰⁶ The Court went on to state: “Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause.”¹⁰⁷

The three prongs of the *Lemon* test would presumably be applied to determine if pharmacist conscience clause legislation violated the Establishment Clause. The first prong is whether there is a secular purpose for the law. A strong argument could be made that the sole purpose of a pharmacist conscience clause is to allow pharmacists to practice their religious beliefs by refraining from assisting others in using contraceptive methods. As such, the legislation would have a religious, not secular, purpose. The government could respond that its purpose was to guarantee

100. 403 U.S. 602, 612-13 (1971).

101. *Id.* (citation omitted).

102. CHEMERINSKY, *supra* note 68, at 1159.

103. *Id.*

104. *Id.*

105. 125 S.Ct. 2722 (2005).

106. *Id.* at 2733 (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987)).

107. *Id.* at 2742.

that pharmacists would not be punished for exercising their religion, a right that is protected by the Constitution. This argument, however, is rather weak because, in protecting the constitutional right to free exercise of religion, such legislation ignores another important constitutional right, the right to obtain and use contraceptives. Without including alternative ways for a woman to fill her prescription once a pharmacist has refused her, the state is favoring one constitutional right over another. This favoritism makes doubtful the argument that the state enacted a pharmacist conscience clause with the secular purpose of merely protecting an individual's constitutional rights.

In *Edwards v. Aguillard*, the Court ruled unconstitutional a state law that required public schools to teach creationism if evolution was also taught.¹⁰⁸ The *Aguillard* Court stated that "because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the First Amendment."¹⁰⁹ Applying this reasoning to conscience clause legislation, it could be argued that the primary purpose of conscience clause legislation is the state's endorsement of the religious doctrine that life begins at fertilization in violation of the establishment clause. As discussed above, in contrast to the religious belief that life begins at fertilization, the medical community believes that conception does not occur until a fertilized egg is implanted in a woman's uterus.¹¹⁰

The second prong of the *Lemon* test requires that the principal effect of a law must not advance nor inhibit religion.¹¹¹ The Court used the second prong of the *Lemon* test to invalidate a Connecticut law that created an absolute right for individuals to not work for religious reasons because "the statute goes beyond having an incidental or remote effect of advancing religion. The statute has a primary effect that impermissibly advances a particular religious practice."¹¹² However, the primary effect of conscience clause legislation is not to advance a particular religious practice. Instead, the primary effect appears to be accommodation of religious belief. Unfortunately, this accommodation also has the potential effect of making it more difficult for some women to have their contraceptive prescriptions filled. Alternatively, if the neutrality approach is taken, the Court phrases the question as whether the law is a symbolic endorsement of a religious

108. 482 U.S. 578, 596-97 (1987).

109. *Id.* at 593.

110. *See* Herbe, *supra* note 36, at 45.

111. 403 U.S. 602, 612 (1971).

112. *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985) (citations omitted).

practice.¹¹³ Under this approach, it seems more likely that conscience clause legislation would be found to be a symbolic endorsement of a religious practice.

The third prong of the *Lemon* test forbids excessive government entanglement with religion.¹¹⁴ The Court has held that an entanglement occurs when a law requires “comprehensive, discriminating, and continuing state surveillance” of religion.¹¹⁵ It is possible that the third prong does not have much relevance with regards to conscience clause legislation; a state government may pass legislation including a pharmacist conscience clause and not participate any further. On the other hand, it is possible that the state would have to enforce the law if it is not being obeyed, or defend the law from claims of unconstitutionality.

In sum, it is possible that legislation protecting a pharmacist’s right to refuse to prescribe contraceptives violates the Establishment Clause of the First Amendment. Accordingly, legislators should be wary of passing potentially unconstitutional legislation.

B. Right to Privacy

Pharmacist conscience clause legislation creates a conflict between the constitutionally protected right to the free exercise of religious beliefs and the constitutionally protected right to contraceptives. *Griswold v. Connecticut* established that a married couple’s decision to have children was constitutionally protected by the penumbras of several constitutional amendments.¹¹⁶ In *Griswold*, the defendants were charged with giving information regarding contraceptives and prescribing contraceptives to a married couple in violation of a Connecticut statute.¹¹⁷ The Court held that the constitutional right to privacy extends to the use of contraceptives for married persons.¹¹⁸ The Court said: “We deal with a right to privacy older than the Bill of Rights . . . marriage is a coming together for better or for worse, hopefully enduring, and intimate to a degree of being sacred.”¹¹⁹ Additionally, the Court was concerned that the Connecticut statute invaded

113. CHEMERINSKY, *supra* note 68, at 1161.

114. 403 U.S. at 612.

115. *Id.* at 619.

116. 381 U.S. 479, 485 (1965). More specifically, the Court found this constitutional protection in a right to privacy embodied in the Third, Fourth, Fifth, and Ninth Amendments. *Id.* at 484.

117. *Id.* at 480.

118. *See id.* at 486.

119. *Id.*

the privacy of the marital bedroom, an idea “repulsive to the notions of privacy surrounding the marriage relationship.”¹²⁰

The constitutional right to contraceptives was extended to single individuals in *Eisenstadt v. Baird*.¹²¹ In *Eisenstadt*, the Supreme Court declared that a Massachusetts law that prohibited the distribution of contraceptives to unmarried persons was unconstitutional.¹²² The Court agreed that *Griswold* only determined that the right of privacy regarding contraceptives “inhered in the marital relationship.”¹²³ However, the Court went on to state that “the marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”¹²⁴ The Court concluded: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting person as the decision whether to bear or beget a child.”¹²⁵ Thus, the Court recognized that the right to contraceptives is a fundamental right. Another important aspect of *Eisenstadt* is the determination that prohibiting the distribution of contraceptives served no legitimate governmental purpose.¹²⁶ In addition, the Court stated that laws limiting access to contraceptives could not be defended as health measures.¹²⁷

In *Carey v. Population Services, International*, the Court established that strict scrutiny applies to a law that restricts access to contraceptives.¹²⁸ The Court determined that any regulation that limits the right to contraception may only be justified by a narrowly drawn compelling state interest.¹²⁹ In *Carey*, the Court invalidated a New York law that criminalized three activities: (1) the sale or distribution of contraceptives to minors; (2) the distribution of contraceptives (even nonprescription ones) to persons over age fifteen by anyone other than a licensed pharmacist; and (3) advertising or displaying contraceptives.¹³⁰ Where the “fundamental”

120. *Id.*

121. 405 U.S. 438, 453-54 (1972).

122. *Id.*

123. *Id.* at 453.

124. *Id.*

125. *Id.* (emphasis added).

126. *Id.* at 448 (“It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication.”).

127. *Id.* at 450.

128. 431 U.S. 678, 696-97 (1977).

129. *Id.* at 688.

130. *Id.* at 682.

decision whether to beget children is involved, regulations that impose a burden on that decision, “may be justified only by compelling state interests, and must be narrowly drawn to express those interests.”¹³¹ Turning specifically to the requirement that a licensed pharmacist dispense contraceptives to those over the age of fifteen, the Court said that even though such a requirement is not as great of a burden as a total ban, “the restriction of distribution to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public.”¹³²

The state laws that have been proposed and passed which permit a pharmacist to refuse to prescribe contraceptives without providing any other alternatives or detailing the situations in which pharmacists may refuse are most likely unconstitutional under *Carey*.¹³³ It is not much of a leap to suppose that in certain pharmacies, in certain areas of this country, allowing pharmacists to refuse to fill prescriptions would act as an actual impairment to one’s constitutional right to access contraceptives. In such circumstances, the state would be obligated to show that its laws regarding pharmacists’ right to refuse was “narrowly drawn” to satisfy a legitimate state interest. Under *Eisenstadt*, health measures and the state’s desire to prohibit fornication cannot constitute a compelling interest.¹³⁴ However, states could argue that it is an important state interest to allow its residents the right to adhere to their religious beliefs.

The real question then is whether state legislation that does not address the circumstances in which such a refusal is appropriate and does not provide any alternatives for persons with valid prescriptions is “narrowly drawn.” I argue that they are not. Without limiting the effects of a pharmacist’s refusal to prescribe contraceptives, it is quite possible that contraceptives will be unavailable in a number of markets—either because the pharmacy does not employ pharmacists who will fill such prescriptions or because the pharmacy’s policy is to not carry such contraceptives. What good is a fundamental right to contraceptives if there is nowhere to obtain them and no one to obtain them from? The California law and the proposed federal law, ALPHA,¹³⁵ fair much better constitutionally. Both laws allow a pharmacist to object based on their constitutionally protected freedom of religion and belief—a valid state interest—and are narrowly

131. *Id.* at 686 (citations omitted).

132. *Id.* at 689.

133. *See id.*

134. *Eisenstadt v. Baird*, 405 U.S. 438, 448-50 (1972).

135. S. 809, 109th Cong. (2005); H.R. 1652, 109th Cong. (2005).

drawn so as not to substantially interfere with the constitutionally protected right to contraceptives.¹³⁶

However, the inquiry does not end there. The constitutional determination is based in large part on whether one applies the Court's contraceptive analysis or abortion analysis. *Roe v. Wade* provides that there is a fundamental right to an abortion in the first trimester.¹³⁷ *Roe* also locates this right in the Fourteenth Amendment.¹³⁸ If the use of emergency contraceptives is determined to be more like abortion than regular contraceptives, *Roe* and its progeny would be used to determine whether the state law is unconstitutional. In the Supreme Court's most recent pronouncement on abortion, *Stenberg v. Carhart*, a state law designed to further the state's interest in fetal life imposed an undue burden on the woman's decision before viability and was unconstitutional.¹³⁹ The analysis under *Carhart* becomes tricky with respect to pharmacist conscience clauses; can the state argue that the clauses have dual objectives, protecting the rights of pharmacists and protecting fetal life? And if so, is it then harder to show that such clauses are a "substantial burden?" Under this analysis, an individual challenging a pharmacist conscience clause might find it difficult to show that such a law substantially burdened her access to contraceptives.¹⁴⁰ Regardless, it is likely that state legislation that allows pharmacists to refuse to fill valid prescriptions for contraceptives is unconstitutional. How the Court would deal with certain aspects of the law is open to debate. It should be noted however, that the Court is unlikely to apply its abortion jurisprudence based on the theory that either oral contraceptives or emergency contraceptives are abortion because they may decrease the likelihood of the implantation of a fertilized egg in the uterus. This is because in *Roe* the Court stated: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in any position to speculate as to the answer."¹⁴¹

136. *See id.*; S.B. 644, 2005 Leg., 2005-06 Reg. Sess. (Cal. 2005).

137. 410 U.S. 113, 113, 155 (1973).

138. *Id.* at 153.

139. 530 U.S. 914, 921 (2000).

140. For example, how many different pharmacists and pharmacies must refuse to fill her prescription before a court will determine that there was a burden to her getting access to the contraceptive?

141. 410 U.S. at 159.

VI. Federal Legislation—Access to Legal Pharmaceuticals Act

ALPHA was introduced into both the House and Senate on April 14, 2005.¹⁴² Both versions of the bill are currently in committee.¹⁴³ ALPHA, like California law, takes a middle ground approach to pharmacist conscientious clauses. Rather than completely permit or deny the right of pharmacists to refuse to fulfill prescriptions that are against their religious or moral beliefs, ALPHA focuses on those circumstances when such a refusal would be permissible.

The Findings sections of ALPHA suggests an awareness of the constitutional issue at stake by finding both that “an individual’s right to religious belief and worship is a protected, fundamental right” and that “an individual’s right to access legal contraception is a protected fundamental right.”¹⁴⁴ The legislators are aware of the potential conflict between these two fundamental rights: “An individual’s right to religious belief and worship cannot impede an individual’s access to legal prescriptions, including contraception.”¹⁴⁵ It is with an awareness of competing constitutional interests that ALPHA attempts to address the debate and establish national uniformity regarding this particularly thorny debate.

The goal of ALPHA is to explicitly “establish certain duties for pharmacies when pharmacists employed by the pharmacy refuse to fill valid prescriptions . . . on the basis of personal beliefs.”¹⁴⁶ The legislation allows a pharmacist to refuse to fill a prescription, thereby safeguarding against any First Amendment restrictions, while at the same time establishing that it is the pharmacy’s duty to ensure that valid prescriptions will be filled despite a particular pharmacist’s refusal. This second objective is fulfilled in three ways. First, when a product is in stock and a pharmacist refuses to fill a valid prescription, the pharmacy must ensure that another pharmacist employed at the pharmacy will fill the prescription.¹⁴⁷ Second, if the product is not in stock and a pharmacist refuses to order the product, it must be ordered by another pharmacist.¹⁴⁸ Third, the pharmacy may not employ any pharmacist who engages in any conduct intended to “prevent or deter an individual from filling a valid prescription for a product or from ordering the product.”¹⁴⁹

142. S. 809, 109th Cong. (2005); H.R. 1652, 109th Cong. (2005).

143. S. 809, 109th Cong. (2005).

144. *Id.* at § 2(2).

145. *Id.* at § 2(1).

146. *Id.* at Preamble.

147. *Id.* § 249(a)(1).

148. *Id.* § 249(a)(2).

149. *Id.* § 249(a)(3).

The bill contains an enforcement mechanism as well.¹⁵⁰ A pharmacy that violates the requirements of subsection (a) is liable for a civil penalty of \$5,000 per day but not exceeding \$500,000 for the same proceeding.¹⁵¹ Additionally a person harmed by a violation of subsection (a) may sue the pharmacy and be awarded appropriate relief, including if necessary, punitive damages, injunctive relief, and attorney's fees and costs.¹⁵²

ALPHA allows pharmacists the right to refuse to fill prescriptions because of their religious or moral beliefs, which are protected under the First Amendment. At the same time, ALPHA places the burden on the pharmacy to ensure that persons with valid prescriptions get their constitutionally protected access to contraceptives. ALPHA attempts to ensure that neither constitutional right is violated when a pharmacist is faced with the possibility of filling a prescription, the nature of which he or she believes is morally wrong. However, certain issues still remain: What happens if a pharmacy is unable to find enough pharmacists to guarantee that there will be at least one pharmacist who will fill the prescriptions; is it fair to impose such a burden on a pharmacy; and what about a pharmacy's right to determine its policy?

VII. Conclusion

Legislation that provides pharmacists an absolute right to refuse to fill valid prescriptions based on the pharmacist's religious or moral beliefs threatens an individual's constitutionally protected right to contraceptives. Likewise, legislation that prohibits a pharmacist from refraining from filling prescriptions he or she finds religiously or morally objectionable may go too far in denying the constitutional right to the free exercise of religious belief as guaranteed by the First Amendment. Though not a perfect solution, the ALPHA legislation reconciles both the free exercise of religious belief and the right to privacy provisions of the U.S. Constitution by allowing pharmacists to refrain from filling prescriptions against their conscience so long as a woman impacted by this refusal can still obtain her prescription. Even if ALPHA does not pass, state and federal legislatures should still keep these constitutional issues in mind when considering legislation regarding pharmacist conscience clauses and should attempt a similar reconciliation for these potentially conflicting constitutional interests.

150. *Id.* § 249(c).

151. *Id.* § 249(c)(1).

152. *Id.* § 249(c)(2).
