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Pharmacy Conscience Clause Statutes: Constitutional Religious "Accommodations" or Unconstitutional "Substantial Burdens" on Women?

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Pharmacy Conscience Clause Statutes: Constitutional Religious "Accommodations" or Unconstitutional "Substantial Burdens" on Women?

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Conscience Clause, Religion Clauses, Religion Accommodation, Pharmacy Conscience Clause, legislation

PHARMACY CONSCIENCE CLAUSE STATUTES: CONSTITUTIONAL RELIGIOUS “ACCOMMODATIONS” OR UNCONSTITUTIONAL “SUBSTANTIAL BURDENS” ON WOMEN?

MELISSA DUVALL*

TABLE OF CONTENTS

| | |
|--|------|
| Introduction | 1486 |
| I. Background | 1491 |
| A. Evolution of Conscience Clause Legislation | 1491 |
| B. Judicial Response to Conscience Clause Challenges..... | 1496 |
| II. Religious Accommodation and its Place Among the Religion Clauses | 1500 |
| A. The Free Exercise Clause does not “Compel” Legislatures to Pass Conscience Clause Statutes..... | 1502 |
| B. The Establishment Clause does not Automatically “Prohibit” Conscience Clause Legislation | 1504 |
| III. Applying the “Religious Accommodation” Framework to Pharmacy Conscience Clause Legislation | 1506 |
| A. Nature of the Burden Imposed on Women | 1510 |
| B. Magnitude of the Burden Imposed on Women | 1512 |
| C. Disproportionality of the Burden Imposed on Women | 1516 |
| Conclusion | 1521 |

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INTRODUCTION

As Americans increasingly integrate religion into their daily lives,¹ “conscience clause” statutes are proliferating and influencing professional conduct across the United States.² Conscience clauses allow Americans to practice religion not only in their homes and places of worship, but also in their professions.³ These statutes exempt individuals and entities from legal requirements that conflict with their religious beliefs,⁴ and they often become controversial when they pit one citizen’s religious freedom against another’s health or safety.⁵

1. See Adele Rapport & Omar Weaver, *Religious Discrimination Claims: Current Trends and Practical Advice*, SL018 A.L.I.-A.B.A. 597, 599-600 (2005) (acknowledging that religious discrimination claims, mainly where employers are refusing to accommodate employees’ Sabbath worship schedules or are forcing employees to perform job duties that conflict with their religious beliefs, have increased sixteen percent since 1994); see also Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, §1, at 21 (observing that judges who morally or religiously oppose abortion are opting out of their legal duty to hear abortion application cases in states where the law requires a minor to have either parental consent or a judge’s permission before she can legally obtain an abortion); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2746 (2005) (O’Connor, J., concurring) (“Americans attend their places of worship more often than do citizens of other developed nations, and describe religion as playing an especially important role in their lives.”) (citations omitted); Kevin Eckstrom & Adelle M. Banks, *Most Back Teaching Creation But Local Control Over Decision Has Support of 49 Percent*, ST. PAUL PIONEER PRESS, Aug. 31, 2005, at 10A (reporting that a poll released by the Pew Forum found that three-quarters of Americans believe God created life on Earth, and sixty-four percent support teaching both evolution and creationism in public schools).

2. See CATHERINE WEISS ET AL., RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACLU REPRODUCTIVE FREEDOM PROJECT 1 (ACLU ed., 2002), available at <http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=10946&c=224> (click “Download”) (noting that conscience clause legislation expanded in the 1990s to cover more medical procedures and more health care providers); see also Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 177 (1993) (arguing that legislatures should pass more expansive conscience clause provisions as healthcare providers increasingly raise moral concerns about “abortion, contraception, euthanasia, withdrawal of feeding, assisted suicide, blood transfusions, organ transplants and autopsies”).

3. See Barry Sullivan, *Naked Fitzies and Iron Cages: Individual Values, Professional Virtues, and the Struggles for Public Space*, 78 TUL. L. REV. 1687, 1710 (2004) (charging that thirty or forty years ago, Americans were more likely to complete mandatory civic duties that conflicted with their religious beliefs not because they were less religious, but because they did not believe that it was the government’s job to design public responsibilities to accommodate their personal views).

4. See, e.g., Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe is not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 727 (2004) [hereinafter *Saving Roe is not Enough*] (defining the purpose of conscience clause provisions).

5. See SEAN MURPHY, SERVICE OR SERVITUDE: REFLECTIONS ON FREEDOM OF CONSCIENCE FOR HEALTH CARE WORKERS 3 (Dec. 20, 2004), <http://www.conscience.laws.org/Conscience-Archive/Documents/Service%20or%20Servitude.pdf> (arguing that conscience clauses cannot balance patients’ interests in receiving a particular service with health care providers’ interests in working according to their personal convictions because they are competing fundamental “goods”); see also Susan Berke

Pharmacists are one of the latest groups of professionals to seek conscience clause protection.⁶ State laws generally mandate that pharmacists dispense all safe, legal prescriptions and put the best interests of their customers ahead of their own.⁷ While pharmacists legally can refuse to fill prescriptions that pose health risks to individuals,⁸ they cannot refuse to dispense medications based upon their own religious beliefs.⁹ However, pharmacists across the country have risked potential legal exposure by refusing to fill women's emergency contraceptive prescriptions, claiming filling them would conflict with their religious beliefs.¹⁰ As a result, some state pharmacy

Fogel & Lourdes A. Rivera, *Religious Beliefs and Healthcare Necessities*, HUM. RTS., Spring 2003, at 8, 22 (concluding that a direct conflict exists between a health care provider's decision not to provide a particular service and a patient's medical needs in rural areas where no alternate source of care exists).

6. See, e.g., Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, at A1 (discussing how pharmacists across the country have refused to dispense emergency contraception prescriptions because they believe that emergency contraception is a form of abortion and dispensing the medication violates their religious or moral beliefs).

7. See Heather M. Field, Note, *Increasing Access to Emergency Contraception Pills Through State Law Enabled Dependent Pharmacist Prescribers*, 11 UCLA WOMEN'S L.J. 141, 224 (2000) (stating that a pharmacist's traditional role under state law is to dispense medications on the basis of prescriptions); see also Donald W. Herbe, Note, *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, 87-88 (2002-03) (providing that pharmacists have an ethical duty to promote patients' best interests).

8. See Press Release, Am. Pharmacists Ass'n, *Robots at the Pharmacy*, <http://www.aphanet.org/AM/Template.cfm?Template=/CM/ContentDisplay.cfm&ContentID=3159> (last visited Apr. 1, 2006) [hereinafter *Robots at the Pharmacy*] (explaining that a pharmacist's duty to help patients obtain medicine goes beyond filling lawful prescriptions because many "lawful" prescriptions can be fatal to patients based on their medical history).

9. See NAT'L WOMEN'S L. CTR., PHARMACY REFUSALS 101 1 (2005), available at http://www.nwlc.org/pdf/11-05Update_PharmacyRefusal101.pdf [hereinafter PHARMACY REFUSALS 101] (highlighting pharmacists' implicit duty to dispense emergency contraceptive prescriptions under current state pharmacy laws); see also Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 8, 2004, at 3A, available at http://www.usatoday.com/news/nation/2004-11-08-druggists-pill_x.htm (discussing how a pharmacist in Wisconsin faced disciplinary action from the Wisconsin Pharmacy Board for refusing to dispense oral contraceptives based upon his religious beliefs).

10. See PHARMACY REFUSALS 101, *supra* note 9, at 1 (emphasizing that pharmacists in California, Georgia, Illinois, Louisiana, Massachusetts, Minnesota, Missouri, New Hampshire, New York, North Carolina, Ohio, Rhode Island, Texas, Washington and Wisconsin have refused to fill birth control prescriptions, including emergency contraceptives, based upon their religious beliefs). These refusals began when the FDA approved emergency contraceptives in 1998. See Herbe, *supra* note 7, at 80 (explaining that the U.S. Food and Drug Administration ("FDA") approved and began marketing Preven and Plan B as safe and effective emergency contraceptives in 1998 and 1999 respectively). The FDA indefinitely postponed its promised September 1, 2005 vote to approve a plan that would allow over-the-counter sales of the "morning after" pill. Joyce Howard Price, *FDA Delays 'Morning-After' Pill*, WASH. TIMES, Aug. 27, 2005, at A2. As a result, Susan F. Wood, Assistant FDA Commissioner for Women's Health and Director of the Office of Women's Health resigned, stating

boards have penalized these pharmacists¹¹ and are mandating that they dispense these prescriptions.¹²

Legislators in twenty-nine states have responded by introducing conscience clause legislation that permits pharmacists to decline filling patients' prescriptions for moral or religious reasons.¹³ Three states have already passed such laws.¹⁴ Many Americans object to conscience clause legislation because they see it as interfering with a woman's right to access health care.¹⁵ Since emergency contraceptives are extremely time-sensitive,¹⁶ these clauses may cause significant risks to women's health and ability to make autonomous reproductive decisions.¹⁷ This controversy, pitting a pharmacist's

"I can no longer serve as staff when scientific and clinical evidence, fully evaluated and recommended for approval by the professional staff here, has been overruled." Marc Kaufman, *FDA Official Quits Over Delay on Plan B: Women's Health Chief Says Commissioner's Decision on Contraceptive was Political*, WASH. POST, Sept. 1, 2005, at A8.

11. See Herbe, *supra* note 7, at 89 (arguing that pharmacists who refuse to dispense prescriptions based on their personal beliefs can face serious consequences including disciplinary action from state pharmacy boards).

12. See PHARMACY REFUSALS 101, *supra* note 9, at 3 (stating that State Pharmacy Boards in Massachusetts, North Carolina, and Oregon have issued policy statements supporting patients' rights to have prescriptions filled, and five other states have introduced legislation mandating that pharmacists fill prescriptions for contraceptives). Illinois Governor Rod Blagojevich imposed a 150 day emergency rule, effective as of April 1, 2005, that states

Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy must dispense the contraceptive, or a suitable alternative permitted by the prescriber If the contraceptive . . . is not in stock, the pharmacy must obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs However, if the patient prefers, the prescription must be transferred . . . or returned to the patient, as the patient directs.

29 Ill. Reg. 5586, 5596 (Apr. 15, 2005). This emergency rule became law effective as of August 25, 2005. 29 Ill. Reg. 13639, 13663-64 (Sept. 9, 2005), *codified at* ILL. ADMIN. CODE tit. 68, § 1330.91(j)(1) (2005).

13. See PHARMACY REFUSALS 101, *supra* note 9, at 2 (recognizing that twenty-nine states have introduced pharmacy "refusal laws", and in the 2005 legislative session, fifteen states have introduced conscience clause bills).

14. See *id.* at 3 (providing that Arkansas, Mississippi, and South Dakota have already passed pharmacy conscience clause statutes and Georgia passed a statute that may protect pharmacists).

15. See NAT'L WOMEN'S L. CTR., COMBATING PHARMACIST REFUSAL BILLS: MESSAGING, Mar. 4, 2005, [hereinafter COMBATING PHARMACIST REFUSAL BILLS] (highlighting a CBS News/New York Times poll finding that "8 out of 10 Americans believe that pharmacists should not be permitted to refuse to dispense birth control pills."); *cf.* Weiss, *supra* note 2, at 20 (according to an ACLU poll, seventy-six percent of American women oppose "giving hospitals an exemption from the law allowing them to refuse to provide medical services they object to on religious grounds").

16. See Field, *supra* note 7, at 152-53 (establishing that a woman must begin an emergency contraceptive prescription regimen within seventy-two hours of sexual intercourse for it to succeed in preventing pregnancy, but it is most effective if she starts it as soon as possible); see also PHARMACY REFUSALS 101, *supra* note 9, at 1 (stating that emergency contraceptives are most effective if women take them within twelve to twenty-four hours after having unprotected sex).

17. See *infra* Part III.A-C (arguing that many pharmacy conscience clause statutes

right to practice a particular religion against a woman's right to make autonomous reproductive decisions, illustrates the importance of determining the proper scope and place of conscience clause legislation in our society today.¹⁸

Some legal scholars argue that the scope of conscience clause provisions is strictly a policy matter and that the delicate balancing of fundamental rights lies solely in the hands of our legislators.¹⁹ These scholars maintain that this issue lies outside of the courtroom because the Due Process Clause does not protect a woman's right to access reproductive services without interference,²⁰ and the Free Exercise Clause does not *require* legislatures to exempt pharmacists from their duty to dispense all valid prescriptions.²¹ However, this Comment argues that even though the First and Fourteenth Amendments may not protect either of these competing interests directly, the debate over the scope of conscience clause legislation poses more than a policy issue. Instead, the permissible scope of these statutes is a legal question that courts should analyze under the evolving law of "religious accommodation."²² The Supreme Court has recently affirmed that legislatures can exempt religious adherents from generally applicable laws, even though these accommodations

create a substantial burden on women's health and reproductive rights, especially for indigent women living in rural areas who will be unable to access alternative pharmacies in a timely manner).

18. See Weiss, *supra* note 2, at 10 (explaining that conscience clause laws offer important religious protections for healthcare providers but may endanger patients); cf. Brietta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 OR. L. REV. 625, 627-30 (2003) (emphasizing the importance of determining the proper scope of Free Exercise exemptions as they often conflict with government regulations designed to protect citizen's health and safety).

19. See, e.g., Weiss, *supra* note 2, at 6-7 (arguing that the legislature is responsible for determining the existence and scope of conscience clause legislation because the Constitution does not require or forbid it); Heather Rae Skeeles, Note, *Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?*, 60 WASH. & LEE L. REV. 1007, 1032 (2003) (asserting that a constitutional analysis does not provide an answer for how states should balance patients' reproductive rights with the religious rights of Catholic hospitals, and that determining the extent of conscience clause legislation is a public policy issue).

20. See *infra* Part I.B (arguing that the Supreme Court is unlikely to find conscience clause legislation unconstitutional under the Due Process Clause, but explaining that many state courts have given women greater protection against these conscience clauses).

21. See *infra* Part II.A (discussing that pharmacists have a legal duty to dispense prescriptions, and the Free Exercise Clause does not require states to exempt them from this duty even when it conflicts with their religious beliefs).

22. See *infra* Part III (explaining that the Supreme Court uses the religious accommodation framework for determining whether religious exemptions, which would include conscience clause legislation, infringe upon the Establishment Clause).

are beyond Free Exercise requirements.²³ However, these religious exemptions have limits, for if a religious exemption “substantially” burdens non-beneficiaries, then it will infringe upon the Establishment Clause, rendering it unconstitutional.²⁴ This Comment analyzes the proper scope of pharmacy conscience clause statutes using this religious accommodation legal framework. It argues that this framework can provide individuals with a legal tool for combating pharmacy conscience clause statutes that fail to include provisions ensuring that they receive valid prescriptions without unnecessary delay or interference.

Part I briefly discusses the evolution of conscience clause legislation in the health care industry and the scope of conscience clause provisions governing pharmacists. It also reviews various courts’ responses to Due Process challenges of conscience clause statutes. Part II explores the doctrine of religious accommodation and discusses why legislatures and courts should apply this framework to analyze the constitutional scope of pharmacy conscience clause legislation. Part III examines the constitutional limitations on religious exemptions and analyzes the factors that the Supreme Court uses to determine when an exemption “substantially” burdens a non-beneficiary. Part III then applies these factors to pharmacy conscience clause statutes and concludes that these statutes, to survive facial and as-applied Establishment Clause challenges, must contain provisions allowing women to access emergency contraceptives in a timely manner. Further, it recommends conscience clause provisions that would offer protection to individual pharmacists’ religious beliefs while not imposing a “substantial” burden on women’s fundamental reproductive rights and health care needs.

23. See *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (unanimous decision) (reemphasizing that “there is room for play in the joints” between what the Free Exercise Clause mandates and what the Establishment Clause prohibits allowing for the existence of statutes that merely alleviate a government burden on religious practices).

24. See *id.* at 2115 (“[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”); see also *Tex. Monthly v. Bullock*, 489 U.S. 1, 2, 18 n.8 (1989) (finding that a religious accommodation will infringe upon the Establishment Clause when it “burdens non-beneficiaries markedly” or creates a “substantial burden” on non-beneficiaries).

I. BACKGROUND

A. *Evolution of Conscience Clause Legislation*

Conscience clause legislation first emerged in the mid-1970s following the Supreme Court's landmark decision in *Roe v. Wade*.²⁵ Congress began this crusade for health care providers' Free Exercise rights when it passed the Church Amendment²⁶ in 1973.²⁷ This statute prohibits local courts and government officials from mandating that health care facilities provide abortion or sterilization procedures.²⁸ It also shields health care professionals who take advantage of conscience clause exemptions from employer retaliation.²⁹ Many states followed Congress's lead, and by the end of 1978, more than forty states had passed conscience clause statutes allowing health care providers to opt out of providing abortion and sterilization procedures.³⁰

Today, Congress is again passing conscience clause legislation,³¹ but with a broader scope than this initial flurry of legislation.³² For example, Congress recently passed the Weldon Amendment,³³ prohibiting state and local authorities from "discriminating" against any health care entity that will not "pay for, provide coverage for or

25. 410 U.S. 113 (1973); *Saving Roe is not Enough*, *supra* note 4, at 746.

26. 42 U.S.C. § 300a-7 (2000).

27. See, e.g., Katherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1707 (1999) (noting that Congress passed the Church Amendment in response to a Montana federal district court decision requiring a Catholic hospital to sterilize a patient even though this procedure conflicted with Catholic principles).

28. See 42 U.S.C. § 300a-7(b) (providing that the government cannot require an individual or entity to perform or assist in performing a sterilization or abortion if the procedure is against the individual or entity's religious beliefs or moral convictions).

29. See *Saving Roe is not Enough*, *supra* note 4, at 746 (discussing that the Church Amendment mainly protects individual health care providers' religious beliefs in comparison with more recent conscience clause statutes that permit entire corporate health care systems to refuse supplying services that conflict with their organizations' religious missions).

30. See WEISS, *supra* note 2, at 1 (citing THE GUTTMACHER REPORT ON PUBLIC POLICY 1 (Alan Guttmacher Inst., New York, N.Y. 1998)).

31. See *id.* at 1-3 (determining that the resurgence of conscience clause legislation beginning in the mid-1990s resulted from four factors: first, the rise of sectarian health systems in the U.S. health care market; second, the managed care revolution; third, an increase in reproductive technologies including emergency contraceptives; and fourth, heightened attention by advocates on both sides of the argument).

32. See *Saving Roe is not Enough*, *supra* note 4, at 746-47 (recognizing that refusal clauses have expanded dramatically by also allowing corporate health systems and individuals to opt out of providing referrals or counseling services).

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

refer for abortions.”³⁴ This provision allows a hospital to legally turn away a woman who is in need of an emergency abortion, even if the state law requires abortion coverage in such an emergency situation.³⁵ Additionally, many recent conscience clause statutes expand their coverage beyond abortion services to include all medical procedures that conflict with providers’ moral or religious beliefs.³⁶

Pharmacists are the latest group of health care professionals seeking this broad conscience clause protection.³⁷ Most current state pharmacy laws and Pharmacy Board regulations³⁸ require pharmacists to dispense all legally and medically appropriate prescriptions, even if the pharmacist finds the prescription morally objectionable.³⁹ Many pharmacists are lobbying state legislatures to adopt conscience clause provisions that exempt them, for moral or religious reasons, from their current duty under state law to dispense all valid prescriptions.⁴⁰

34. *Id.*

35. *See, e.g.,* CAL. HEALTH & SAFETY CODE § 1317 (West 2000) (providing that California cannot require health care facilities or individuals to participate in abortion services if these services conflict with the providers’ beliefs, but this provision does not apply in emergency situations). The State of California filed a complaint in federal district court contesting the constitutionality of the Weldon Amendment. *See generally* Complaint for Declaratory and Injunctive Relief, Cal. v. United States, No. C 05 00328 (N.D. Cal. Jan. 25, 2005), *available at* <http://www.nfprha.org/uploads/CAcomplaint.pdf>. The State argued that the Weldon Amendment has a constitutional defect because it does not contain an emergency exception to protect a woman’s life or health. *Id.* at 2. The State urges the court to strike the law as unconstitutional, unless it finds that the Weldon Amendment implicitly contains a medical emergency exception similar to the one that exists under California law. *Id.*

36. *See, e.g.,* Medicaid Managed Care Balanced Budget Act of 1997, 42 U.S.C. § 1396u-2(b)(3)(B) (2000) (allowing managed care providers to opt out of providing, reimbursing or referring Medicaid patients for any services that contradict the organization’s religious or moral beliefs).

37. *See* Stein, *supra* note 6, at A1 (observing that the conscience clause trend has spread to pharmacists because of the FDA’s approval of emergency contraceptives and physician assisted suicide in Oregon).

38. *See id.* at 92 (explaining that individual states regulate the practice of pharmacy through statutes and regulations, and state legislatures often delegate authority to enforce these statutes to statutorily created state Pharmacy Boards).

39. *See* PHARMACY REFUSALS 101, *supra* note 9, at 1 (discussing that under current state pharmacy laws pharmacists’ have an implicit duty to dispense emergency contraceptives). For example, Section 14 of the Illinois Pharmacy Practice Act requires a pharmacy to have in stock sufficient drugs to protect and serve the public. 225 ILL. COMP. STAT. ANN. 85, § 14 (West 2000). This legal mandate aligns with the American Pharmacists Association’s (“APhA”) ethical and professional guidelines promoting patient access to all legally prescribed medications. *See* Robots at the Pharmacy, *supra* note 8, at 1-2 (recommending a compromise solution that protects individual pharmacists’ Free Exercise rights while ensuring that patients’ continue to access legally prescribed medications in a timely manner).

40. *See* Herbe, *supra* note 7, at 97-98 (asserting that many current conscience clause provisions do not adequately protect pharmacists because the provisions specifically protect health care professionals from refusing to participate in abortion, and many courts and states do not define dispensing emergency contraceptives as participating in abortion).

Even with these laws in place, some pharmacies and pharmacists across the country have refused to stock, dispense or transfer emergency contraceptives.⁴¹ These refusals have occurred, regardless of state law and company policy, at outlets of large drugstore chains, such as Walgreens, Osco, K-Mart, CVS, and Eckerd, as well as at small independent pharmacies.⁴² In one instance, a pharmacist not only refused to dispense a birth-control prescription, but he did not transfer it to another pharmacy or return the prescription to the patient.⁴³

Most women do not report these incidents or file complaints with state pharmacy boards.⁴⁴ However, pharmacists could face disciplinary action,⁴⁵ employment ramifications,⁴⁶ or tort liability⁴⁷ if patients decide to come forward and file complaints. As a result, legislators have introduced conscience clause legislation protecting these pharmacists.⁴⁸ South Dakota,⁴⁹ Arkansas,⁵⁰ and Mississippi⁵¹ have

41. See Jones, *supra* note 9 (reporting instances of pharmacists refusing to dispense prescriptions for religious reasons); see also Stein, *supra* note 6, at A1 (discussing the trend across the country of pharmacists refusing to dispense birth control and emergency contraceptive medications).

42. See Press Release, Nat'l Women's L. Ctr., Statement of Judy Waxman, NWLC Vice President for Health and Reproductive Rights (Apr. 14, 2005), available at <http://www.nwlc.org/details.cfm?id=2216§ion=newsroom> (discussing the importance of federal legislation that would stop pharmacies of all sizes from denying patients medications).

43. See Stein, *supra* note 6, at A1 (detailing an incident where the Wisconsin Pharmacy Board reprimanded a Kmart pharmacist who refused to dispense or transfer a college student's birth control prescription elsewhere). An administrative judge recommended that the pharmacist take ethics classes, alert future employers of his beliefs, and pay as much as \$20,000 to cover the cost of the legal proceeding. *Id.*

44. See *id.* (stating that advocates on both sides believe that pharmacists' refusals are increasing even though women rarely file complaints).

45. See *supra* note 43 (discussing that the Wisconsin Pharmacy Board disciplined a pharmacist for refusing to dispense a prescription based upon his religious beliefs).

46. See Herbe, *supra* note 7, at 89 (arguing that pharmacists need conscience clause protection because pharmacists are at-will employees, and drugstores may terminate their employment because of their refusal to dispense medications that conflict with their religious beliefs).

47. See *id.* at 90 (acknowledging that pharmacists have a duty to exercise reasonable care in practicing their profession, and many states may find that a pharmacist's refusal to dispense or refer a prescription breaches this duty).

48. See Judith Davidoff, *Democrats Unveil Their Bill on the Pill*, CAP. TIMES, June 7, 2005, at 3A (declaring that Republicans have introduced legislation protecting pharmacists' Free Exercise rights because the Wisconsin Pharmacy Board disciplined a Kmart pharmacist for refusing to fill, refer or return a woman's prescription for birth control pills). Wisconsin is one of twenty-nine states that have introduced pharmacy "refusal law" legislation. See *supra* note 13 and accompanying text.

49. See S.D. CODIFIED LAWS § 36-11-70(1)-(2) (2005) (permitting pharmacists to refuse to dispense medication if they believe that a patient will use the medication to cause an abortion or to destroy an unborn child).

50. See ARK. CODE ANN. § 20-16-304 (2005) (allowing pharmacists to refuse to supply contraceptive procedures, supplies, or information).

51. See MISS. CODE ANN. § 41-107-5 (2005) (protecting health care providers,

already passed pharmacy conscience clause legislation that expressly exempts pharmacists from their legal duty to fill safe and legal prescriptions. These statutes do not require pharmacists to transfer prescriptions they refuse to fill or to fill prescriptions in an emergency situation.⁵²

Because these laws pose a serious health care risk, as well as an inconvenience to women in rural and low-income areas,⁵³ federal legislators have introduced bills to offset these state actions.⁵⁴ Specifically, Senator Barbara Boxer introduced the Pharmacy Consumer Protection Act of 2005,⁵⁵ which requires pharmacies to fill all valid prescriptions in a timely manner.⁵⁶ According to the Act, if a pharmacy does not have a desired medication in stock, it must order the medication, transfer the prescription or return the prescription to the patient, depending on the patient's preference.⁵⁷ Senator Frank Lautenberg also introduced the Access to Legal Pharmaceuticals Act of 2005,⁵⁸ which is directed at pharmacies instead of individual pharmacists.⁵⁹ This Act requires pharmacies to dispense all valid prescriptions even if their individual employees

including pharmacists, from participating in any health care procedure that they morally oppose).

52. See 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, 241-43 (2005) (acknowledging that Mississippi, Arkansas and South Dakota's pharmacy conscience clause provisions do not require pharmacists to transfer patients' prescriptions to other pharmacists and because of the large rural population in these states, they arguably need these provisions the most).

53. See *infra* Part III.A-C (noting that women in rural areas often only have access to one pharmacy, and if it refuses to dispense their prescriptions, they would have to travel great distances).

54. See Press Release, Nat'l Family Planning & Reprod. Health Ass'n, Family Planning Association Leader Calls Access to Legal Pharmaceuticals Act a "Fair Compromise" (Apr. 14, 2005), available at <http://www.nfprha.org/media/index.asp?ID=36> (arguing that proposed federal legislation, such as the Access to Legal Pharmaceuticals Act, is a fair conscience clause solution because it requires pharmacies, not necessarily individual pharmacists, to dispense emergency contraceptives, which eliminates states or pharmacists from imposing their religious beliefs on others).

55. S. 778, 109th Cong. (2005).

56. See *id.* § 2 (providing that if a pharmacy receives payments or has contracts under the Medicaid and Medicare programs, it must ensure that "each valid prescription is filled without unnecessary delay or other interference, consistent with the normal timeframe for filling prescriptions").

57. *Id.*

58. S. 809, 109th Cong. (2005); see H.R. 1652, 109th Cong. (2005) (introducing the Access to Legal Pharmaceuticals Act in the House of Representatives).

59. See Access to Legal Pharmaceuticals Act, S. 809 ("establish[ing] certain duties for pharmacies when pharmacists employed by the pharmacies refuse to fill valid prescriptions for drugs or devices on the basis of personal beliefs, and for other purposes").

refuse.⁶⁰ It also requires pharmacies not to hire pharmacists who deter individuals from having their valid prescriptions filled; such actions would include refusing to return a patient's prescription, refusing to transfer a prescription, subjecting a patient to humiliation or harassment, or breaching the pharmacist's duty to keep a patient's medical treatment confidential.⁶¹

Local legislatures and the American Pharmacist's Association ("APhA") also have attempted to assist individuals through other provisions. For example, New York City legislation requires pharmacies to post whether or not they stock emergency contraceptives.⁶² While requiring pharmacies to disclose this information can help women in metropolitan areas, it will not protect women in rural areas who have limited access to multiple pharmacies.⁶³ APhA also has a policy that if pharmacists refuse to fill prescriptions on moral grounds, they must arrange for patients to receive the prescription from another pharmacist.⁶⁴ However, many pharmacists who refuse to dispense emergency contraceptives based on their religious beliefs also refuse to transfer the prescriptions to other pharmacists, because they believe that they are still indirectly participating in immoral activities.⁶⁵

Thus, in many states, a woman's ability to make autonomous reproductive decisions continues to lie in the hands of local pharmacists. This vulnerability will continue unless individuals can convince their state or federal legislatures to pass laws requiring pharmacists to fill all valid prescriptions,⁶⁶ or they successfully challenge the constitutionality of pharmacy conscience clause provisions in court.

60. *Id.* § 3.

61. *Id.*

62. See STOP PHARMACY REFUSALS, *supra* note 9, at 1 (discussing legislative and administrative responses to pharmacists refusing to dispense prescriptions including New York City's notice requirement and others ranging from proposed legislation requiring pharmacists to fill all contraceptive prescriptions to pharmacy boards issuing policy statements advocating for consumers' rights to have their legal prescriptions filled by pharmacists).

63. See Teliska, *supra* note 52, at 239-40 (observing how many women in the United States live in rural communities and have access to only one pharmacy).

64. See Robots at the Pharmacy, *supra* note 8, at 1 (charging that compromise solutions, balancing pharmacists' Free Exercise rights and women's rights to access emergency contraceptives, are possible).

65. See, e.g., Murphy, *supra* note 5, at 3-4 (arguing that conscience clause statutes that require pharmacists who refuse to fill a prescription to transfer it also compromises these pharmacists' religious beliefs because transferring or referring patients seeking emergency contraceptives to other pharmacists still facilitates the use of "drugs to be used for torture").

66. See *supra* note 12 and accompanying text (mentioning a few states that have passed laws requiring pharmacists to fill prescriptions).

B. Judicial Response to Conscience Clause Challenges

The Supreme Court has never ruled on conscience clause legislation per se, although its decisions in *Webster v. Reproductive Health Services*⁶⁷ and *Harris v. McRae*⁶⁸ leave little doubt that such legislation does not violate the Due Process Clause.⁶⁹ In these decisions, the Supreme Court announced that the Due Process Clause does not guarantee a woman's access to an abortion or other reproductive health services.⁷⁰

67. See 492 U.S. 490, 509-10 (1989) (establishing that a state ban on abortions in public hospitals was constitutional because women could still receive this service at private health care facilities).

68. See 448 U.S. 297, 315-17 (1980) (holding that the Hyde Amendment, which eliminated most Medicaid funding for abortions, did not create an unconstitutional obstacle for indigent women seeking abortions because it left them with "the same range of choice[s] . . . as [they] would have had if Congress had chosen to subsidize no health care costs at all").

69. See, e.g., ACLU, CONFLICTS BETWEEN RELIGIOUS REFUSALS AND WOMEN'S HEALTH: HOW THE COURTS RESPOND 1 (2002), <http://www.aclu.org/FilesPDFs/refusalconflicts.pdf> [hereinafter CONFLICTS BETWEEN RELIGIOUS REFUSALS] (arguing that Due Process challenges to conscience clause statutes will be unsuccessful because hospitals do not have a duty to provide reproductive health care under *Webster* and *McRae*). The statutes in *Webster* and *McRae* both contained exceptions for abortions in order to save the life of a mother. See *Webster*, 492 U.S. at 500 (stating that the Missouri Act in question prohibited the use of public employees and facilities for abortions only when the abortions were not necessary to save the life of the mother); *McRae*, 448 U.S. at 325 n.27 (noting that the Hyde Amendment in question prohibited the use of federal funds to reimburse abortion costs except where an abortion was necessary to save the life of a mother). Under the Supreme Court's holding in *Stenberg v. Carhart*, statutes that regulate abortion must also provide an exception for the health of the mother. 530 U.S. 914, 931 (2000). Therefore, the Court will likely find conscience clause legislation constitutional unless it does not contain an exception for the life or health of the mother. See *supra* note 33 (mentioning that California is challenging the constitutionality of the Weldon Amendment because it does not contain an explicit exception to protect women's lives and health).

70. See *Webster*, 492 U.S. at 509 (arguing that the Missouri statute in question only limited a woman's ability to obtain an abortion "to the extent that she [chose] to use a physician affiliated with a public hospital"). Similarly, the Court likely would find that conscience clause legislation only limits a woman's ability to obtain an abortion to the extent that she chooses a physician or hospital that takes advantage of a conscience clause exemption. However, the Court did acknowledge that if the United States had socialized medicine and public hospitals were the only ones available to the public, then a different analysis may apply. *Id.* at 510 n.8; cf. *Boddie v. Conn.*, 401 U.S. 371, 382-83 (1971) (holding that the Due Process Clause prohibits states from denying indigent citizens, who cannot afford to pay the fee, a divorce because the state monopolizes the only means for citizens to dissolve their marriage). While the Court did not address as-applied challenges in *Webster*, using the Court's reasoning above, women in rural areas who only have access to public facilities for reproductive services may have valid as-applied challenges. 492 U.S. at 523 (O'Connor, J., concurring). These as-applied challenges would pertain to all statutes, including conscience clause legislation, which limits these women's ability to obtain reproductive services. These women likely would have to show that traveling to receive reproductive services from private actors created an "undue burden" on their ability to make autonomous reproductive decisions. See *infra* notes 74-77 (explaining that statutes creating undue burdens on women are unconstitutional).

The Supreme Court acknowledges that citizens' privacy rights encompass reproductive decisions,⁷¹ but it has also suggested that these rights are not absolute.⁷² The Court has repeatedly held that states can institute policies and restrictions favoring childbirth over abortion.⁷³ While these restrictions cannot place an "undue burden" on women's abilities to make autonomous reproductive decisions,⁷⁴ the Court has upheld many statutes that are "particularly burdensome" to women, such as twenty-four-hour waiting periods.⁷⁵ Since most conscience clause legislation will create similar burdens, such as "increased costs and potential delays,"⁷⁶ it is likely that most Due Process challenges would be unsuccessful under this standard.⁷⁷

However, Due Process challenges to pharmacy conscience clause statutes may be more successful.⁷⁸ Since the medical community

71. See, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (clarifying that a woman's right to privacy prevents the government from placing an "undue burden" on her ability to make family planning and reproductive decisions); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (declaring that the Fourteenth Amendment provides women with a fundamental right to privacy to determine whether or not to have an abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (arguing that "[i]f 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 a person as the decision whether to bear or beget a child"); *Griswold v. Conn.*, 381 U.S. 479, 485-86 (1965) (announcing a fundamental right of privacy to make family planning and contraception decisions).

72. See *Casey*, 505 U.S. at 875-76 (settling that women do not have an absolute right to decide whether to have an abortion before a fetus is viable because the government has an interest in protecting a fetus' potential life).

73. See, e.g., *id.* at 878 (arguing that states can design statutes intended to persuade women to choose childbirth over abortion); *Webster*, 492 U.S. at 506 ("The Court has emphasized that *Roe v. Wade* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.'" (quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977))).

74. See *Casey*, 505 U.S. at 876-77 (announcing that a statute is unconstitutional when it places an "undue burden" on a woman, and this occurs when it has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

75. See *id.* at 886-87 (determining that even though the district court found that a twenty-four-hour waiting period would be "particularly burdensome" on women who do not have the resources to travel or must explain their whereabouts to others, these "increased costs and potential delays [did not] amount to substantial obstacles").

76. *Id.*

77. However, individuals challenging pharmacy conscience clause provisions may have somewhat more success due to the time constraints of emergency contraceptives. See *supra* note 16 (discussing that emergency contraceptives are most effective within the first twelve to twenty-four hours). A potential delay in their situation may amount to a "substantial obstacle" or "undue burden" on their ability to make autonomous reproductive decisions. *Id.* But see *Webster*, 492 U.S. at 563 n.6 (Stevens, J., dissenting) (quoting *Post Coital Contraception*, *THE LANCET*, Apr. 16, 1983, at 856 ("[O]nly 50 percent of fertilized ova ultimately become implanted.")).

78. Please note, however, that individuals challenging pharmacy conscience clause statutes must show conscience clause statutes constitute state action because the Due Process Clause governs state actors. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 378-80

defines emergency contraceptives as contraception and not abortion,⁷⁹ the Supreme Court could analyze pharmacy conscience clause statutes under *Eisenstadt v. Baird*⁸⁰ and *Griswold v. Connecticut*,⁸¹ rather than under *Casey* and *Webster*. Applying *Eisenstadt* and *Griswold*, which hold that citizens have a fundamental right to contraceptives and to “be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,”⁸² women may have more success challenging the constitutionality of pharmacy conscience clause statutes.⁸³

Many religions, however, believe that life begins at conception, leading them to define emergency contraceptives as a form of abortion.⁸⁴ Whether the Court decides to afford emergency contraceptives greater protection than abortion will depend on the legal definition of when life begins.⁸⁵ Because the Court refused to

(1967) (stating that a successful Fourteenth Amendment challenge must involve state actors, and finding the State guilty of racial discrimination when it passed a provision to a state housing law that authorized racial discrimination in the housing market). Some state courts have found that conscience clause statutes constitute state involvement in Due Process violations. See, e.g., *Doe v. Bridgeon Hosp. Ass’n, Inc.*, 366 A.2d 641, 647 (1976) (recognizing that conscience clause statutes that permit non-sectarian facilities to refuse to provide elective abortions “would clearly constitute state action”). This analysis is very fact-specific. See *Reitman*, 387 U.S. at 378 (“Only by sifting facts and weighing circumstances’ on a case-by-case basis can a ‘nonobvious involvement of the State in private conduct be attributed its true significance.’” (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961))). It is beyond the scope of this Comment whether pharmacy conscience clauses constitute state action.

79. See Field, *supra* note 7, at 187-88 (arguing that emergency contraceptives are not abortion devices according to the FDA and the American College of Obstetricians and Gynecologists, which define pregnancy as beginning when a fertilized egg implants itself in a woman’s uterus); Herbe, *supra* note 7, at 85-86 (discussing that the American Medical Association and medical dictionaries define the “beginning of life” as the moment of implementation of a blastocyst in a woman’s uterus, which occurs approximately seven days after intercourse and four days after emergency contraceptives are effective).

80. See 405 U.S. 438, 453 (1972) (extending *Griswold*’s holding that married couples have an equally fundamental right to access contraceptives to single persons on equal protection grounds).

81. See 381 U.S. 479, 485-86 (1965) (finding that the Bill of Rights protects a married couple’s privacy right to make family planning and reproductive decisions without state interference).

82. *Eisenstadt*, 405 U.S. at 453.

83. See *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 523 (1989) (O’Connor, J., concurring) (acknowledging that “[i]t may be correct that the use of postfertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny”).

84. See, e.g., Herbe, *supra* note 7, at 86 (“The Roman Catholic Church’s official teaching and belief is that life begins, and conception occurs, at fertilization.”).

85. See Jason Green, Commentary, *Refusal Clauses and the Weldon Amendment: Inherently Unconstitutional and a Dangerous Precedent*, 26 J. LEGAL MED. 401, 405 (2005) (arguing that when pharmacists have refused to fill emergency contraceptives, it is generally because they believe it is a form of abortion or that they are killing potential life; therefore the question of when life begins is at the center of this conscience clause controversy).

address this question in *Roe v. Wade*⁸⁶ and its progeny,⁸⁷ it remains unclear whether the Due Process Clause provides more protection to women seeking access to emergency contraceptives rather than traditional reproductive services, such as abortion or sterilization.⁸⁸

Unlike the Supreme Court, some state courts have directly addressed the constitutionality of conscience clause statutes on a state level.⁸⁹ For example, the Supreme Court of New Jersey and the Alaska Supreme Court both found their state conscience clauses unconstitutional as applied to nonsectarian hospitals because they infringed upon constitutionally protected reproductive rights.⁹⁰ Some state courts that did not reach the constitutional question also protected women by strictly construing conscience clause statutes.⁹¹ While these state court decisions illustrate that state law may provide women protection against conscience clause legislation, these courts

86. See 410 U.S. 113, 159 (1973) (“When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer [of when life begins].”).

87. In *Webster*, the Court refused to decide upon the constitutionality of Missouri’s definition that “[t]he life of each human being begins at conception.” MO. ANN. STAT. § 1.205.1(1) (West 2006); see *Webster*, 492 U.S. at 506-07 (arguing that because Missouri’s definition of when life begins was in the statute’s preamble, it did not have regulatory authority and instead was merely a constitutional value judgment by the state favoring childbirth over abortion). But see *Webster*, 492 U.S. at 563-64 (Stevens, J., dissenting) (insisting that the Court should have determined the constitutionality of the preamble because it threatened the privacy rights of health care workers and women under *Griswold*).

88. Full analysis of Due Process challenges to pharmacy conscience clause statutes is beyond the scope of this Comment.

89. See CONFLICTS BETWEEN RELIGIOUS REFUSALS, *supra* note 69, at 1-3 (describing women’s successful challenges to state conscience clause statutes in Alaska and New Jersey).

90. See *id.* (observing that the Alaska and New Jersey Supreme Courts required private, nonsectarian hospitals to provide abortion services, even though these services conflicted with religious beliefs, because the state constitutions protect women’s rights to abortion more broadly than the U.S. Constitution). The New Jersey and Alaska Supreme Courts followed Justice Blackmun’s holding in *Doe v. Bolton*, 410 U.S. 179 (1973), when they found that their state conscience clause statutes only protected sectarian facilities. Wardle, *supra* note 2, at 200-01. Justice Blackmun held that a Georgia conscience clause “obviously” protected only individuals and denominational institutions, and it did not apply to nonsectarian hospitals. *Id.* at 201 (quoting *Bolton*, 410 U.S. at 198).

91. See Wardle, *supra* note 2, at 199-200 (arguing that conscience clause statutes only provide health care physicians with “token protection” because courts have strictly interpreted the clauses). For example, in *Catholic Charities v. Superior Court*, the California Supreme Court found that the narrow criterion used to find a religious employer exempt from the Women’s Contraceptive Equity Act, title 1367, section 25 of the California Health and Safety Code, was permissible. See 85 P.3d 67, 80 (Cal. 2004) (clarifying that, in limited circumstances, a state may pass laws that make distinctions between secular and religious activities and entities).

have not found that sectarian hospitals must provide services that conflict with their religious directives.⁹²

Since neither federal courts nor all state courts have found that women's rights to privacy under the Due Process Clause ensure them access to reproductive services,⁹³ most women do not have guaranteed constitutional protection against conscience clause legislation. While this leads some scholars to argue that conscience clause legislation is a policy issue,⁹⁴ individuals may have more success challenging the constitutionality of these provisions on Establishment Clause grounds, using the law of religious accommodation, rather than lobbying their state legislatures.⁹⁵ Analysis of pharmacy conscience clause legislation through a religious accommodation lens may help resolve the ongoing battle between health care providers' religious freedom rights and women's constitutionally protected reproductive rights.⁹⁶

II. RELIGIOUS ACCOMMODATION AND ITS PLACE AMONG THE RELIGION CLAUSES

The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁹⁷ The first clause, commonly known as the Establishment Clause, "commands a separation of church and state."⁹⁸ The second clause, commonly known as the Free Exercise Clause, allows citizens to practice their religious beliefs freely without government interference.⁹⁹ These clauses hold

92. See, e.g., CONFLICTS BETWEEN RELIGIOUS REFUSALS, *supra* note 69, at 2-3 (recognizing that both the Alaska and New Jersey Supreme Courts only declared that non-sectarian hospitals must provide abortion services, they did not reach the issue of whether religious hospitals must also supply abortion services).

93. See, e.g., *Swanson v. St. John's Lutheran Hosp.*, 597 P.2d 702 (Mont. 1979) (declining to assess the burden a refusal placed on an individual because Montana has a conscience clause).

94. See WEISS, *supra* note 2, at 7 (conceding that "constitutional challenges are of limited utility . . . [therefore] legislative advocacy is of paramount importance in this area"); see also Skeeles, *supra* note 19, at 1032 (arguing that a constitutional analysis does not answer the question of how to balance health care providers' free exercise rights with women's reproductive rights).

95. Cf. STOP PHARMACY REFUSALS, *supra* note 9, at 2 (reporting that twenty-eight states have introduced conscience clause provisions favoring pharmacists' free exercise rights whereas only five states have introduced laws protecting women's reproductive rights by mandating that pharmacists dispense all valid prescriptions).

96. See *infra* Parts II, III (explaining the legal theory of religious accommodation and applying it to determine whether pharmacy conscience clause legislation violates the Establishment Clause).

97. U.S. CONST. amend. I.

98. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

99. See *id.* (defining free exercise of religion as government "respect for" and "noninterference with" citizens' religious beliefs and practices).

complementary guarantees,¹⁰⁰ but over the past century the Court has struggled to navigate its way between the two and clearly define how government and religion should interact.¹⁰¹ Consequently, the Court often interpreted the corridor of neutrality between the two clauses very narrowly, and it held a strict separationist stance for fear that citizens would view laws accommodating religion as an endorsement of religion.¹⁰²

This strict separationist logic, stemming from the Court's century-long references to "[Thomas] Jefferson's metaphorical wall" separating church and state,¹⁰³ has begun to unravel and give rise to an expanded corridor of government neutrality.¹⁰⁴ This neutrality allows the government to accommodate religious beliefs without necessarily endorsing religion and infringing upon the Establishment Clause. In *Walz v. Tax Comm'n of New York*,¹⁰⁵ the Court found that there is some "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause requires.¹⁰⁶ Similarly, in *Cutter v. Wilkinson*,¹⁰⁷ the Court unanimously reaffirmed this idea, stating that "[there is] some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the

100. See *id.* (determining that while the two religious clauses of the First Amendment are complementary, they often produce inconsistent demands on the government).

101. See *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

102. See FIRST AMENDMENT CTR., RELIGIOUS LIBERTY OVERVIEW, <http://www.firstamendmentcenter.org> (under "First Amendment Topics" click on "Religious Liberty" hyperlink; then click on "Establishment Clause" hyperlink) (last visited on Mar. 27, 2006) (discussing how the Court's *Lemon v. Kurtzman* Establishment Clause test created a strict separation between church and state). But see *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) ("The constitutional obligation of 'neutrality' is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." (citing *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963))).

103. See Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 555 (1991) (arguing that the Supreme Court created the popular perception that the religion clauses command a strict separation of church and state through repeated use of Jefferson's "metaphorical wall").

104. See *id.* at 556 (explaining that the doctrine of "separation of church and state" is headed for a fate similar to the extinct doctrine of "separate but equal").

105. 397 U.S. 664 (1970).

106. See *id.* at 669 (introducing the idea that "there is room for play in the joints" between the Religion Clauses); see also *Locke v. Davey*, 540 U.S. 712, 718-19 (2004) (finding that it was constitutional for the State of Washington to deny scholarship benefits to a student who chose to major in theology, because although the Establishment Clause permitted Washington to provide the scholarship, it did not require the State to fund religious training).

107. 544 U.S. 709 (2005).

Establishment Clause.”¹⁰⁸ Scholars have termed this “play in the joints” between the two clauses “religious accommodation,”¹⁰⁹ and it is at the forefront of religious clause jurisprudence today.¹¹⁰

This zone of accommodation that joins the two religion clauses encompasses laws that remove certain burdens on citizens’ abilities to practice their religious beliefs.¹¹¹ Legislatures have the discretion to grant these religious exemptions,¹¹² but they must remain cognizant of the Establishment Clause and ensure that these exemptions do not endorse religion.¹¹³ The question is what types of pharmacy conscience clauses, if any, reside within this zone of accommodation, where the Free Exercise Clause does not “compel” them and the Establishment Clause does not automatically “prohibit” them.

*A. The Free Exercise Clause Does Not “Compel” Legislatures to Pass
Conscience Clause Statutes*

The Free Exercise Clause does not command state legislatures to pass conscience clause statutes protecting pharmacists from dispensing emergency contraceptives.¹¹⁴ While Free Exercise

108. *Id.* at 2121; see Richard W. Garnett, *Unanimous! The Supreme Court Breaks from the Standard on a Religion Case*, NATIONAL REVIEW ONLINE, June 1, 2005, <http://www.nationalreview.com/comment/garnett200506010801.asp> (explaining that *Cutter* analyzed the “flip-side” of the “play in the joints” argument that the Court examined in *Locke*).

109. See Lupu, *supra* note 103, at 559-60 (defining “accommodation” as religious exemption from government regulation that is not required by the Free Exercise Clause or any other constitutional provision). But see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992) (arguing that accommodation encompasses both discretionary actions that the Free Exercise Clause does not require and accommodations that the Constitution compels).

110. See, e.g., Lupu, *supra* note 103, at 556 (acknowledging that accommodation has become the predominant topic of religious clause scholarship and jurisprudence).

111. See McConnell, *supra* note 109, at 686 (discussing government policies that facilitate the exercise of religion, such as the extension of unemployment benefits to those who are jobless due to religious reasons, and providing chaplains for those who are unable to attend religious services due to military duty).

112. See, e.g., James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL L. REV. 91, 111-12 (1991) (clarifying that legislatures decide when to grant conscience clause laws or religious accommodations because the Free Exercise Clause no longer compels them).

113. See McConnell, *supra* note 109, at 686 (distinguishing permissible religious accommodations from forbidden religious establishments, explaining that accommodations remove “obstacles to the exercise of a religious conviction adopted for reasons independent of the government’s action, while the latter creates an incentive . . . to adopt that practice or conviction”).

114. Cf. White, *supra* note 27, at 1728 (maintaining that under a rational basis test, the Free Exercise Clause does not require a conscience clause exemption for health care insurers who are legally required to cover abortion, family planning, HIV prevention counseling and infertility treatments).

jurisprudence clearly protects individuals against laws that intentionally burden their religious practices,¹¹⁵ it does not currently exempt religious adherents from generally applicable laws that inadvertently encumber their religious conduct.¹¹⁶

The level of protection that the Free Exercise Clause affords citizens against generally applicable laws has fluctuated over time.¹¹⁷ In the Court's first influential Free Exercise decision in the late 1800s,¹¹⁸ the Court distinguished religious beliefs from religious conduct, and held that the Free Exercise Clause does not protect religious practices to the same degree that it guards religious beliefs.¹¹⁹ The Court held that federal laws unintentionally burdening religious conduct were constitutional, and the Free Exercise Clause did not require legislatures to make exemptions for religious adherents.¹²⁰ While the Court deviated from this precedent in the early 1960s by applying a strict scrutiny standard in *Sherbert v. Verner*,¹²¹ the Court returned to its roots in 1990, in the seminal case *Employment Div. v. Smith*.¹²² In *Smith*, the Court again held that generally applicable laws that unintentionally burden religious conduct do not violate the Free Exercise Clause.¹²³ The Court

115. See James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525, 537-38 (2004) (acknowledging consensus among religious and legal scholars, as well as the Supreme Court, that the Free Exercise Clause protects religious adherents from laws that intentionally burden religious conduct).

116. See *infra* text accompanying notes 123 and 124.

117. See, e.g., White, *supra* note 27, at 1725-28 (examining the evolution of the Supreme Court's standards for determining when religious exemptions from general laws were constitutional over the last century); see *infra* notes 118-125 and accompanying text (discussing how the Court's Free Exercise jurisprudence has come full circle back to its original view in the late 1800s that the Free Exercise Clause does not protect religious conduct to the same degree as religious beliefs).

118. *Reynolds v. United States*, 98 U.S. 145, 162 (1878) (refusing to accept the defendant's religious beliefs as justification for committing the crime of polygamy).

119. See *id.* at 166-67 ("To permit this [religious exemption] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself.").

120. See *id.* (explaining that while Congress could not pass a law interfering with religious belief and opinions, it could enact legislation that curtailed certain religious practices, such as polygamy).

121. See 374 U.S. 398, 403 (1963) (holding that a South Carolina law burdened the plaintiff's religious conduct, and that South Carolina did not have a compelling reason for inflicting this burden); see also White, *supra* note 27, at 1726 (explaining that the *Sherbert* Court departed from its prior rational basis standard and instead applied a strict scrutiny test to determine whether a generally applicable law could constitutionally burden a religious adherent's conduct).

122. 494 U.S. 872 (1990).

123. See *id.* at 882 ("[T]he rule to which we have adhered ever since *Reynolds* plainly controls. 'Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.'") (citation omitted).

determined that elected officials, not the courts, should decide whether or not to enact religious exemptions.¹²⁴

In the post-*Smith* landscape, it appears clear that the Free Exercise Clause does not require state legislatures to pass pharmacy conscience clause statutes.¹²⁵ State laws requiring pharmacists to dispense all valid prescriptions do not intentionally burden pharmacists' religious beliefs. Since these statutes are generally applicable laws, the legislatures can determine whether or not to exempt pharmacists from their duty.¹²⁶ When determining whether or not to grant a pharmacy conscience clause exemption, each state must weigh patient's health interests against the pharmacist's interests in adhering to religious principles while practicing his or her profession.¹²⁷ While pharmacists can lobby their elected officials to pass conscience clause legislation, legislators and state officials have strong policy reasons for ensuring that they protect women's reproductive rights and that women have access to health care and legal prescriptions.¹²⁸

B. The Establishment Clause Does Not Automatically "Prohibit" Conscience Clause Legislation

While the Free Exercise Clause does not require states to pass pharmacy conscience clause legislation, there are many ways that states can choose to do so without infringing upon the Establishment Clause. In *Cutter v. Wilkinson*,¹²⁹ the Court held that legislative religious exemptions from generally applicable laws are not

124. *Id.* at 890. *But see* Gordon, *supra* note 112, at 109-10 (arguing that the Court's decision in *Smith* to leave Free Exercise protections in the hands of democratically elected legislatures does not protect the religious interests of "discrete and insular minorities").

125. *See generally* Gordon, *supra* note 112, at 91 (arguing that after the *Smith* decision the Free Exercise Clause has no independent significance).

126. *See supra* text accompanying notes 123 and 124.

127. Press Release, Ctr. for L. & Religious Freedom, Center for Law and Religious Freedom Sues Illinois Governor Over "Emergency Rule" Targeting Pro-Life Pharmacists (Apr. 15, 2005), http://www.clsnet.org/clrfPages/pr_ScimiovBlagojevich1.php (explaining that the organization filed a law suit on behalf of an Illinois pro-life pharmacist so that he could "carry out his profession consistent with his Christian beliefs").

128. *See, e.g.*, Press Release, Office of the Governor of Ill., Governor Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005), <http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?SubjectID=3&RecNum=3862> ("Pharmacies have an obligation to carry out the health care needs of their customers. Filling prescriptions for birth control is about protecting a women's right to have access to medicine her doctor says she needs. . . . We will vigorously protect that right.").

129. 544 U.S. 709 (2005).

automatically unconstitutional.¹³⁰ In *Cutter*, the Court emphasized that a distinction exists between government actions that promote or endorse religion and actions that merely alleviate a government burden on religious conduct.¹³¹

When applying this accommodation principle, the Court dismissed a facial Establishment Clause challenge to Congress's Religious Land Use and Institutionalized Persons Act ("RLUIPA").¹³² The Court found that RLUIPA does not endorse religion but instead removes a government-imposed burden on institutionalized persons' abilities to meet their religious needs.¹³³ Just as the Court found that RLUIPA, on its face, was merely an accommodation and not an establishment of religion, it likely would perceive pharmacy conscience clause statutes in the same light.¹³⁴ Legislatures are recommending these statutes to alleviate the burden state laws place on pharmacists' abilities to practice their religious beliefs while maintaining their profession.¹³⁵ While it is unlikely that legislatures are violating the Establishment Clause by acknowledging the burden that traditional pharmacy laws may place on religious pharmacists,¹³⁶ there are clearly defined Establishment Clause limits that permissible religious exemptions must not surpass. These limits are contained within the Court's evolving religious accommodation framework, and challengers should use this framework as a legal tool for combating broad¹³⁷ pharmacy conscience clause provisions that exceed these limits.¹³⁸

130. See *id.* at 2121 ("On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.").

131. *Id.*; see *supra* note 113 (distinguishing religious accommodation from religious establishment).

132. 42 U.S.C. § 2000cc-1(a)(1)-(2) (2000). RLUIPA follows *Sherbert's* strict scrutiny mandate and forbids state and local governments from imposing a substantial burden on the religious practices of institutionalized persons unless the burdens further a "compelling governmental interest" and the state does so using "the least restrictive means" possible. *Id.*

133. See *Cutter*, 544 U.S. at 720-21 (arguing that the exercise of religion includes not only the exercise of beliefs, but also the performance of physical acts, and RLUIPA merely relieves the burdens that prison systems place on the performance of these religious acts).

134. See *White*, *supra* note 27, at 1729 (observing that conscience clause statutes fall in the "gray zone" between what the Free Exercise Clause requires and what the Establishment Clause prohibits).

135. See Press Release, Am. Ctr. for L. and Justice ("ACLJ"), ACLJ Files Suit Against Illinois Governor Over Directive Discriminating Against Pro-Life Pharmacists (Apr. 13, 2005), <http://www.aclj.org/news/Read.aspx?ID=1475> (arguing that the law should not place pharmacists in the "untenable position of having to choose between adhering to their religious beliefs and violating a law that could cost them their jobs").

136. See *supra* text accompanying note 131.

137. See *supra* notes 49-52 and accompanying text (defining broad pharmacy

III. APPLYING THE "RELIGIOUS ACCOMMODATION" FRAMEWORK TO PHARMACY CONSCIENCE CLAUSE LEGISLATION

The Supreme Court recognizes that state legislatures can exempt religious adherents from generally applicable laws that burden their ability to practice their religion, but the Court has limited the scope of these exemptions.¹³⁹ The Court incorporated these limits into its evolving law of religious accommodation,¹⁴⁰ and this framework has implicitly overtaken the *Lemon v. Kurtzman*¹⁴¹ test for analyzing when religious exemptions infringe upon the Establishment Clause.¹⁴²

Before applying the religious accommodation framework, the Court first must determine whether the statute is a religious exemption implicating the religion clauses or whether it has a legitimate secular purpose.¹⁴³ If the statute has a legitimate secular purpose, then it likely is not a religious accommodation and the Court will discontinue its Establishment Clause analysis.¹⁴⁴ If a statute benefits a broad array of citizens, both religious and non-religious, the statute is often found to have a legitimate secular purpose.¹⁴⁵

conscience clauses as those that do not mandate that pharmacies and pharmacists fill or transfer valid prescriptions so that patients can receive their medication in a timely manner).

138. Cf. *Cutter*, 544 U.S. at 726 (explaining that even though RLUIPA survived a facial constitutional challenge, if requests for religious accommodations become excessive and unjustifiably burden non-beneficiaries in practice, then an as-applied challenge would be appropriate).

139. See, e.g., *id.* at 2121 (requiring lower courts to assess the potential burden a religious accommodation may pose to non-beneficiaries and ensure that legislatures administer these exemptions neutrally across different faiths).

140. See generally McConnell, *supra* note 109, at 698-712 (providing an overview of the Supreme Court's Establishment Clause test in religious accommodation cases).

141. 403 U.S. 602, 612-13 (1971). In order to survive an Establishment Clause challenge, a statute must pass all three prongs of the *Lemon* test: (1) the statute must have a secular legislative purpose, (2) the statute's primary effect must neither advance nor inhibit religion, and (3) the statute must not facilitate an excessive entanglement with religion. *Id.*

142. See *Cutter*, 544 U.S. at 713 (reversing the Sixth Circuit's use of the *Lemon* Test in finding RLUIPA unconstitutional); see generally McConnell, *supra* note 109, at 685-86 (explaining that the Court replaced the *Lemon* test with a "much less ambiguous" accommodation test).

143. See McConnell, *supra* note 109, at 698 (recommending a four-part Establishment Clause test to determine the constitutionality of a religious accommodation statute beginning with the threshold question of whether the statute benefits both religious and secular groups). But see Richard Albert, *Popular Will and the Establishment Clause: Rethinking Public Funding to Religious Schools*, 35 U. MEM. L. REV. 199, 200, 207 (2005) (critiquing the Court's Establishment Clause jurisprudence, and recommending that the legislatures, not the courts, define religious neutrality).

144. See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989) (announcing that if a state provides a subsidy for a broad array of beneficiaries in pursuit of a valid secular purpose, it does not infringe upon the Establishment Clause even if it incidentally benefits religion).

145. See McConnell, *supra* note 111, at 698-99 ("To satisfy the first stage of this

However, in *Wallace v. Jaffree*,¹⁴⁶ the Court declared a statute unconstitutional that provided a moment of silence for either prayer or meditation.¹⁴⁷ Although the statute benefited both religious and non-religious students, the Court found that the legislature enacted it primarily for religious purposes.¹⁴⁸

Most pharmacy conscience clause statutes that legislators have introduced and passed are broad and allow pharmacists to refuse to dispense medication based on moral beliefs,¹⁴⁹ which benefits both secular as well as religious pharmacists.¹⁵⁰ However, the majority of pharmacists who have refused to dispense prescriptions have done so because it conflicts with their religious beliefs.¹⁵¹ Further, some pharmacy conscience clause provisions¹⁵² which specifically exempt pharmacists from dispensing medication that they believe will cause an abortion, clearly remove the burden that pharmacy laws impose on Catholic and other religious pharmacists who believe that life begins at conception.¹⁵³ Thus, similar to the statute in *Wallace*, the

analysis, it is not necessary that *every* conceivable nonreligious analog to religion be included, but simply that the array be broad enough to show that religion is not being singled out.”).

146. 472 U.S. 38 (1985).

147. *Id.* at 60-61.

148. *See id.* (reviewing the legislative history and noting that prayer was explicitly recognized as the favored activity during the moment of silence).

149. *See* PHARMACY REFUSALS 101, *supra* note 9, at 2 (acknowledging that most of the pharmacy conscience clause bills introduced by state legislators permit pharmacists to refuse to fill prescriptions because of their personal beliefs).

150. *See id.* at 2 (explaining that conscience clauses apply to the personal, moral, and religious objections of pharmacists). *But cf.* *Welsh v. United States*, 398 U.S. 333, 357-59 (1970) (arguing that deeply held “moral, ethical, or philosophical” convictions are religious beliefs even though they are not motivated by the teachings of a theistic or organized religion).

151. *See* White, *supra* note 27, at 1704-05 (reviewing Catholic Directives that oppose abortion, sterilization and the morning-after pill, and discussing the conflict between those directives and federal and state laws that require health care providers to make these “sensitive services” available); Green, *supra* note 85, at 405 (explaining that pharmacists refuse to dispense emergency contraceptives because they believe that it is the equivalent of killing a potential life based on their religious views of when life begins); *see also* Jones, *supra* note 9 (noting that the Wisconsin Pharmacy Board reprimanded a Wisconsin pharmacist who refused to dispense oral contraceptives based upon his religious beliefs); *infra* note 240 (discussing a lawsuit filed by an Illinois pharmacist challenging a mandate that requires him to dispense emergency contraceptives on the ground that it conflicts with his religious beliefs); *see generally* Stein, *supra* note 6, at A1 (reporting that pharmacists across the country are refusing to dispense emergency contraceptives because their religious beliefs teach that emergency contraceptives are a form of abortion).

152. *See, e.g.*, S.D. CODIFIED LAWS § 36-11-70(1)-(2) (2005) (permitting pharmacists to refuse to dispense medication if they believe that a patient will use the medication to cause an abortion or to destroy an unborn child).

153. *See* Herbe, *supra* note 7, at 87 (explaining that pharmacists who follow the Roman Catholic Church’s belief that life begins at fertilization will find emergency contraceptives to be an early form of abortion).

Court would likely find that many pharmacy conscience clause statutes have the primary purpose of relieving religious adherents of their legal duty to dispense prescriptions that conflict with their religious beliefs.¹⁵⁴

Once the Court determines that a statute is a religious accommodation, then it will analyze whether it infringes upon the Establishment Clause by looking at three factors.¹⁵⁵ First, the Court will declare a religious accommodation unconstitutional if it creates a religious inducement.¹⁵⁶ This factor is unlikely to impact pharmacy conscience clause legislation because the only benefit conferred upon pharmacists through this legislation is the ability to opt out of serving particular customer needs.¹⁵⁷ Because pharmacists are in the business of assisting customers with medical treatment,¹⁵⁸ it is unlikely that non-beneficiary pharmacists will view conscience clause legislation as a religious inducement. Second, a religious accommodation must provide a benefit to all similarly situated religions without favoritism or discrimination.¹⁵⁹ This factor is also unlikely to threaten pharmacy conscience clause legislation because many pharmacy conscience clauses permit refusals for any drug that may conflict with any religious belief.¹⁶⁰

154. *But see* White, *supra* note 27, at 1729-30 (arguing that since conscience clauses apply to both moral and religious objections, defenders could argue that they do not single out religion for favorable treatment).

155. *See* Cutter v. Wilkinson, 544 U.S. 709, 720-21 (2005) (analyzing the RLUIPA statute by looking at three factors: whether it "alleviate(s) exceptional government-created burdens on religious exercise," whether state officials administer the Act neutrally among different faiths, and whether the Act imposes a burden on non-beneficiaries).

156. *See, e.g.,* Cutter, 544 U.S. at 721 n.10 (considering whether RLUIPA's religious accommodations induce prisoners to become religious adherents).

157. *See supra* Part I.A (discussing the scope of pharmacy conscience clause provisions).

158. *See* Herbe, *supra* note 7, at 87-88 (defining the role of pharmacists as implementing and dispensing drug therapies).

159. *See* Cutter, 544 U.S. at 724 (explaining that a religious accommodation will be unconstitutional if it "single[s] out a particular religious sect for special treatment" (citing Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 706 (1994)); *see also* McConnell, *supra* note 109, at 706 ("One of the most firmly ingrained principles of the Religion Clauses is that all religious faiths must enjoy an equality of rights.")).

160. *See supra* notes 149-154 and accompanying text (explaining that pharmacy conscience clause statutes are broad and allow pharmacists to refuse dispensing any prescription based on any deeply held religious or moral belief). *See, e.g.,* MISS. CODE ANN. § 41-107-3-7 (2005) (protecting health care providers, including pharmacists, from participating in any health care procedure that they morally oppose). *But see* ARK. CODE ANN. § 20-16-304(4) (2005) (allowing pharmacists to refuse to supply contraceptive procedures, supplies, or information); S.D. CODIFIED LAWS § 36-11-70(1)-(2) (2005) (permitting pharmacists to refuse to dispense medication if they believe that a patient will use the medication to cause an abortion or to destroy an unborn child). Specifying medications and procedures in a conscience clause statute usually reflects the moral or religious concerns of the majority. Wardle, *supra* note 2,

Unlike the other two limiting factors, the final factor likely will pose an Establishment Clause obstacle for broad¹⁶¹ pharmacy conscience clause statutes. This factor considers whether a religious accommodation “imposes substantial burdens on non-beneficiaries while allowing others to act according to their religious beliefs.”¹⁶² This factor ensures that legislatures do not favor religious interests over all other citizen interests, particularly other interests protected by the Constitution.¹⁶³ Therefore, while legislatures can accommodate pharmacists’ religious beliefs through conscience clause legislation, the Court likely will find these statutes unconstitutional if they “substantially” burden a woman’s constitutionally protected reproductive rights or her health care interests.¹⁶⁴

The Court has not fully defined this “substantial” burden standard.¹⁶⁵ However, it is likely that the Court will use a combination of three factors to determine if a burden is “substantial” enough to find a religious accommodation unconstitutional. The Court likely will assess the nature of the burden imposed on a non-beneficiary, the magnitude of the burden, and its disproportionality.¹⁶⁶

at 198.

161. See *supra* notes 49-52 and accompanying text (defining broad pharmacy conscience clauses as those that do not mandate that pharmacies and pharmacists fill or transfer valid prescriptions so that patients can receive their medication in a timely manner).

162. *Tex. Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

163. See *Cutter*, 544 U.S. at 722 (holding that a Connecticut law infringed upon the Establishment Clause because it “‘unyielding[ly] weigh[ted]’ the interests of Sabbatarians ‘over all other interests’” (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985))); see also Posting of Marty Lederman to SCOTUSblog, <http://www.scotusblog.com> (May 31, 2005, 14:24 EST) (arguing that the Court has been extremely clear in its recent Religion Clause cases that harms to third parties will substantially impact the constitutionality of an accommodation). But see Marci A. Hamilton, *Religious Institutions, The No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1114-15 (2004) (emphasizing that, based on religious clause jurisprudence, the courts should defer to legislatures when an accommodation creates a legally recognizable harm to another party).

164. Cf. Staci D. Lowell, Note, *Striking a Balance: Finding a Place for Religious Conscience Clauses in Contraceptive Equity Legislation*, 52 CLEV. ST. L. REV. 441, 458-59 (2004-05) (arguing that courts likely will strike down broad conscience clause exemptions allowing religious employers not to provide prescription contraceptives to their employees because they will inflict harm on others).

165. See Lederman, *supra* note 163 (contending that the Court has not fleshed out the role that the “burden on third parties” plays in religious accommodation jurisprudence).

166. See McConnell, *supra* note 109, at 702-06 (analyzing the Court’s “substantial” burden on non-beneficiaries limitation using this framework, which focuses on the nature, magnitude and disproportionality of the burden that a religious exemption imposes upon a non-beneficiary to determine if the exemption infringes upon the Establishment Clause).

A. Nature of the Burden Imposed on Women

The Court should take into account the nature of the burden imposed on women when determining if a pharmacy conscience clause statute violates the Establishment Clause. When analyzing the nature of the burden imposed on women by religious exemptions for pharmacists, it would analyze to what extent the Constitution protects a woman's burdened interest and weigh it against the burden that pharmacists would face without this exemption. Judge McConnell, who was a leading scholar and advocate of religious accommodation, argued that the Court should weight this factor heavily and not find a religious accommodation unconstitutional if it merely imposes an economic burden on a non-beneficiary.¹⁶⁷ He argued that because the Constitution does not afford economic interests any protection against legislative encumbrances¹⁶⁸ while it expressly affords religious rights that protection,¹⁶⁹ the Court should not find these legislative accommodations unconstitutional. He contended that assessing the economic impact of legislative accommodations resurrects economic substantive due process.¹⁷⁰ The Court, however, has not found the nature of a burden determinative in past religious accommodation cases. Instead, in *Texas Monthly*¹⁷¹ and *Estate of Thornton v. Caldor*,¹⁷² the Court found that even if an accommodation imposes only an economic burden on a non-beneficiary—an interest not protected by the Constitution—the accommodation can still unconstitutionally infringe upon the Establishment Clause.¹⁷³

167. See *id.* at 704-05 (arguing that the courts should only declare an accommodation unconstitutional if it infringes upon constitutionally protected non-beneficiary interests, such as their religious rights).

168. See McConnell, *supra* note 109, at 702 (declaring that economic interests should not be considered when evaluating constitutionality because the Due Process Clause has not protected economic interests since the *Lochner* era).

169. See U.S. CONST. amend. I (providing that "Congress shall make no law . . . prohibiting the free exercise [of religion]").

170. See McConnell, *supra* note 109, at 702-05 (arguing that the Court should not take into consideration economic burdens that accommodations impose because the constitution does not protect these interests and they have fair representation in the legislature).

171. 489 U.S. 1 (1989).

172. 472 U.S. 703 (1985).

173. See *Tex. Monthly*, 489 U.S. at 18 n.8 (emphasizing that Texas' religious accommodation would pose an unconstitutional economic burden on other tax payers because they would have to pay more in taxes); *Caldor*, 472 U.S. at 709-10 (declaring that a Connecticut statutory accommodation was flawed because it put the religious adherents interests in front of all others, including substantial economic burdens that the employers may face to accommodate religious employees' scheduling needs).

Pharmacy conscience clause legislation not only imposes economic burdens on women,¹⁷⁴ it also imposes a burden on women's personal autonomy rights. Although the Court in *Planned Parenthood v. Casey*¹⁷⁵ watered down the fundamental status of women's reproductive rights established in *Roe v. Wade*,¹⁷⁶ it specifically reaffirmed that women's rights to personal autonomy encompass choices about family planning.¹⁷⁷ Further, the Court reiterated that states cannot interfere with a woman's access to abortion and family planning services when her life or health is in danger.¹⁷⁸ This qualified protection that the Constitution provides to reproductive rights is more robust than the protection it affords to the economic interests that the Court has given weight to in past religious accommodation cases.

Based on the Court's precedent of protecting economic interests in applying the nature of the burden standard, the Court should, a fortiori, protect women's personal autonomy interests against burdens imposed by legislative religious accommodations.¹⁷⁹ Therefore, courts should find statutes that do not require pharmacies to guarantee that patients will receive prescriptions in a timely manner, even if individual pharmacists refuse to dispense it, unconstitutional because of the large burden they create on women's personal autonomy interests.¹⁸⁰ Courts also should find statutes that do not contain provisions requiring pharmacists to serve women if their lives or health are in immediate danger or would be in danger from a resulting pregnancy unconstitutional due to the nature of the burden that they impose on women. Unfortunately, thus far, none of

174. See *infra* Part III.B (examining the financial implications of pharmacy conscience clause legislation on women, particularly those living in rural areas).

175. See 505 U.S. 833, 874 (1992) (announcing that states can adopt regulations that incidentally burden a woman's ability to obtain an abortion but they cannot impose an "undue burden" on a woman's ability to make reproductive decisions).

176. See 410 U.S. 113, 152-54 (1973) (declaring that abortion is a fundamental right, and states must have a compelling interest to interfere with this right).

177. See *Casey*, 505 U.S. at 851 ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

178. See *id.* at 879 (reaffirming *Roe*'s holding that "the State . . . may . . . regulate, and even proscribe abortion, except where it is necessary . . . for the preservation of the life or health of the mother.") (citation omitted).

179. See McConnell, *supra* note 109, at 704-05 (discussing the different types of burdens that legislatures can inflict on individuals, and stating that Free Exercise rights are analogous to women's personal autonomy reproductive rights).

180. See COMBATING PHARMACIST REFUSAL BILLS, *supra* note 15, at 1-2 (discussing that refusal laws generally do not require transfers or referrals to ensure that women receive their emergency contraceptive prescriptions within the mandatory seventy-two hour timeframe).

the pharmacy conscience clauses that the states have passed or introduced include these emergency provisions.¹⁸¹

B. Magnitude of the Burden Imposed on Women

The Court also could focus its substantial burden analysis on the magnitude of the burden that pharmacy conscience clause statutes impose on women. The Court focused its Establishment Clause analysis on this factor in *Texas Monthly v. Bullock*.¹⁸² In *Texas Monthly*, Justice Brennan stated that an exemption is unconstitutional if it imposes “substantial burdens on non-beneficiaries.”¹⁸³ The Court did not further define “substantial,” but it used this standard to find a Texas statute exempting religious publications from paying taxes unconstitutional.¹⁸⁴ The Court held that this tax exemption “substantially” burdened other magazines “by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications.”¹⁸⁵ In this case, the Court focused on the magnitude of the burden, and even though the financial burden was very low, the Court still held that the statute was unconstitutional.¹⁸⁶ This definition of a “substantial” burden, amounting to any financial cost on a non-beneficiary, represents the lowest measure of the magnitude standard that the Court could formally adopt.¹⁸⁷

The *Texas Monthly* standard limiting legislative religious accommodations mirrors the “more than *de minimis* cost” standard set forth in *TWA v. Hardison*,¹⁸⁸ limiting Title VII’s¹⁸⁹ mandate on

181. See *id.* at 1 (addressing that refusal laws do not have emergency exceptions to protect the health or life of a woman).

182. 489 U.S. 1, 14-16 (1989); see McConnell, *supra* note 109, at 703 (arguing that Justice Brennan did not choose his language well in *Texas Monthly* because his “substantial burden” standard measures the burden by absolute magnitude rather than by the disproportionality between the burden imposed and the burden alleviated).

183. 489 U.S. at 18 n.8.

184. See *id.* at 25 (concluding that Texas’ sales tax exemption for religious publications violates the Establishment Clause). The Court’s non-beneficiary burden analysis was only one factor in finding the statute unconstitutional.

185. *Tex. Monthly*, 489 U.S. at 18 n.8.

186. The Court did not calculate the burden and determine it was low. *Id.* at 24. However, requiring other publications to pay additional taxes to make-up for religious publications not having to pay tax likely will not amount to a large cost for these other publications.

187. See McConnell, *supra* note 109, at 703-04 (arguing that while the Supreme Court could adopt the *Texas Monthly* standard in theory, it could not adopt such a standard in practice because all accommodations likely will impose some minimal financial costs on non-beneficiaries).

188. 432 U.S. 63, 84 (1977).

189. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000 e-2000e-17 (2000).

employers to accommodate their employees' religious practices. The Court in *Hardison* severely limited employers' religious accommodation duties by watering down Title VII's "undue hardship" standard.¹⁹⁰ Title VII's religious-accommodation provision¹⁹¹ declares that employers must make "reasonable accommodations to the religious needs of employees" unless these accommodations would cause "undue hardship" on employers' businesses.¹⁹² The *Hardison* Court declared that an accommodation causes "undue hardship" whenever it results in "more than *de minimis* cost" to the employer.¹⁹³ Further, it announced that religious accommodations are not reasonable if they infringe on other employees' rights.¹⁹⁴ The Court stated, "[i]t would be anomalous to conclude that by 'reasonable accommodations' Congress meant that an employer must deny the shift and job preferences of some employees . . . to accommodate or prefer the religious needs of others. Title VII does not require an employer to go that far."¹⁹⁵

After *Hardison*, lower courts have applied this "more than *de minimis* cost" standard and have consistently ruled against requiring accommodations that generate any financial costs to employers or impose burdens on other employees.¹⁹⁶ This greatly decreased Title VII's legal significance in religious freedom cases, except for cases involving non-monetary accommodations such as dress code.¹⁹⁷ As a

190. See, e.g., Oleske, *supra* note 115, at 533 (declaring the Court's weak "undue hardship" standard the most controversial limitation placed on Title VII's religious-accommodation provision).

191. 42 U.S.C. § 2000e(j) (2000).

192. See 29 C.F.R. § 1605.1 (1967) ("[Employers must] make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.").

193. See 432 U.S. at 84 (holding that replacing *Hardison* by paying other employees a premium rate or replacing him with supervisory personnel both caused TWA "undue hardship").

194. *Id.* at 81. The Court further limited this provision by allowing an employer to satisfy its duty by merely providing any reasonable accommodation even if an alternative accommodation would better protect the interests of the affected employee. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986).

195. *Hardison*, 432 U.S. at 81.

196. See Oleske, *supra* note 115, at 533-34 (concluding that the lower courts have used the Supreme Court's watered down "undue hardship" standard to preclude most accommodations that impose financial costs on employers).

197. See *id.* at 534 (observing that "dress codes and grooming rules, scheduling changes that can be accomplished without overtime pay and without infringing on other employees, and approved absences for occasional holidays or special events" are the only accommodations that Title VII mandates). But see *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 138 (1st Cir. 2004) (holding that Costco did not have to waive its no facial jewelry policy for an employee who belonged to the Church of Body Modification because waiving the policy would create an undue hardship for Costco).

result, Congress introduced a new amendment to Title VII replacing the “undue hardship” standard with a “significant difficulty or expense” standard.¹⁹⁸ If passed, this standard would bolster the legal significance of Title VII’s reasonable-accommodation provision.¹⁹⁹

Based on the Court’s increased receptivity toward religious accommodations,²⁰⁰ it is unlikely that the Court will continue to use a minimal magnitude standard, such as *Texas Monthly* or *Hardison*, for defining when legislative religious accommodations create “substantial” burdens on non-beneficiaries. However, if the Court does use this standard going forward, it is likely that lower courts will find most pharmacy conscience clause statutes unconstitutional. Similar to the increased costs that employers face when they have to accommodate employees’ religious beliefs,²⁰¹ women likely will have increased costs as a result of pharmacist refusals.²⁰² Women residing in rural areas likely will have increased expenses because they will have to travel to nearby towns or perhaps the closest metropolitan area to get their prescriptions filled.²⁰³ Even women residing in urban areas may have to spend additional time and money visiting multiple pharmacies, or making repeat visits to the same pharmacy to get their prescriptions filled, because most refusal laws do not require

198. Senator Santorum introduced the Workplace Religious Freedom Act (“WRFA”) on April 11, 2003 to make the “undue hardship” standard more stringent and change its language to “significant difficulty or expense.” See Oleske, *supra* note 115, at 536-37. The Senate has read the bill twice and it was sent to the Committee on Health, Education, Labor and Pensions. Bill Summary and Status for S. 893, 108th Cong. (2003), <http://thomas.loc.gov/home/thomas.html>. The bill was reintroduced on March 17, 2005 for the 109th Congress under H.R. 1445 and S. 677, in the House and Senate respectively. Bill Summary and Status for H.R. 1445 & S. 677, 109th Cong. (2005), <http://thomas.loc.gov/home/thomas.html>.

199. See Oleske, *supra* note 115, at 537 (stating that this is the same standard used in the ADA’s accommodation provision and it is much more rigorous than the current *Hardison* standard). Some scholars and politicians, however, are concerned that this heightened standard would infringe upon the Establishment Clause. See *id.* (charging that WRFA’s new standard would increase the number of Establishment Clause challenges to Title VII).

200. See JOHN WITTE JR., FIRST AMENDMENT CENTER, OVERVIEW: RELIGIOUS LIBERTY IN AMERICA, http://www.firstamendmentcenter.org/rel_liberty/overview.aspx?printer-friendly=y (last visited Apr. 1, 2006) (contending that the Supreme Court’s weakening of Establishment Clause law has created an emergence of statutorily created religious accommodations).

201. See *supra* note 193 and accompanying text (discussing that if employers face “more than *de minimis* costs,” Title VII does not require them to accommodate their employee’s religious beliefs).

202. Cf. COMBATING PHARMACIST REFUSAL BILLS, *supra* note 15, at 1 (asserting that refusals almost always require women to travel to another pharmacy).

203. See JILL MORRISON, NAT’L WOMEN’S LAW CTR., DON’T TAKE “NO” FOR AN ANSWER 7 (2005), available at http://www.nwlc.org/pdf/8-2005_Don'tTakeNo.pdf (maintaining that transfers to other pharmacies are even more burdensome for women living in rural communities who may only have access to one pharmacy).

pharmacists to notify patients or employers about their religious conflicts.²⁰⁴

If the Court instead adopts a more stringent magnitude of the burden standard, similar to the proposed Title VII “significant difficulty or expense” standard,²⁰⁵ then it is likely that the courts will find only certain conscience clause statutes unconstitutional as a result of specific as-applied challenges.²⁰⁶ Courts will likely be receptive to these as-applied challenges in states such as Mississippi and South Dakota, where legislatures have passed broad conscience clause statutes, and where many women live in rural communities.²⁰⁷

These statutes face the greatest challenges from low-income women who could argue that they face “significant difficulty and expense” because these statutes force them to travel to distant communities to find pharmacists who will dispense their prescriptions.²⁰⁸ In South Dakota, for example, where the population is only 9.9 persons per square mile, many communities have only one pharmacy.²⁰⁹ Many of these women also need public assistance to meet their prescription needs,²¹⁰ suggesting that traveling to another

204. See, e.g., Teliska, *supra* note 52, at 240 (discussing a 2004 study conducted by The Alan Guttmacher Institute which found that twenty-five percent of pharmacies surveyed in New York City did not carry emergency contraceptives). After The Alan Guttmacher Institute published this study, the New York City Council enacted a provision requiring New York City pharmacies to post a notice stating whether or not they carry emergency contraceptives. See PHARMACY REFUSALS 101, *supra* note 9, at 3 (noting that advocates of the policy claim that this regulation has led to a twenty percent increase in the number of New York City pharmacies that stock emergency contraceptives).

205. See CHARLES HAYNES, RELIGION IN THE WORKPLACE: KEEP YOUR FAITH, LOSE YOUR JOB 2 (First Amendment Center ed., 2003), available at <http://www.firstamendmentcenter.org/commentary.aspx?id=11948&printer-friendly=y> (conceding that the WRFA standard would raise employers duties beyond the current *de minimis* standard set by the Court).

206. Cf. Garnett, *supra* note 108 (addressing that the *Cutter* Court left open the possibility of hearing as-applied challenges to RLUIPA even though the law itself didn’t violate the First Amendment).

207. See Teliska, *supra* note 52, at 240-41 (declaring that the three states where legislatures have passed pharmacy conscience clause legislation are the areas where the statutes will do the most damage because many women in these states live in rural communities and have neither the “time, money, nor ability to go to another pharmacy”).

208. See NAT’L WOMEN’S LAW CTR., HEALTH AND REPRODUCTIVE RIGHTS, THE PHARMACY REFUSAL PROJECT (2005), available at <http://www.nwlc.org/details.cfm?id=2185§ion=health> (arguing that pharmacy refusals create the largest burden on low-income women living in rural areas because there are often no other pharmacies they can access without having to travel a great distance).

209. See Teliska, *supra* note 52, at 245 (reporting that the South Dakota Planned Parenthood director stated that “the pharmacist refusal clause law is ‘very hurtful’ to women throughout the state because many communities have only one pharmacy”).

210. See *id.* at 246 (observing that of the approximately 82,000 South Dakota women who need contraception services, over one half of these women need public assistance to meet their family planning needs).

city would impose a large economic burden on them. Alternatively, if these women cannot afford to travel at all or cannot find an alternative pharmacy in a timely manner, they also face “significant difficulty or expense.” In these situations, women face significant health risks from not receiving their prescribed medication, and any resulting prolonged medical care will further increase their financial burdens.²¹¹

C. Disproportionality of the Burden Imposed on Women

The Court is likely to factor the disproportionality of the burden imposed on women most heavily into its substantial burden analysis of pharmacy conscience clause statutes.²¹² The Court introduced this measure in *Estate of Thornton v. Caldor*,²¹³ and unanimously reiterated it in *Cutter v. Wilkinson*.²¹⁴ This standard assesses whether an accommodation benefits a religious interest at the expense of all other interests.²¹⁵ A religious accommodation disproportionately burdens non-beneficiaries when it dictates that non-beneficiaries must accommodate religious adherents’ interests at the expense of their own significant interests, without any exceptions.²¹⁶

In *Caldor*, the Court found that a Connecticut statute disproportionately burdened employers by prohibiting them from requiring their employees to work on the employees’ designated

211. See COMBATING PHARMACY REFUSAL BILLS, *supra* note 15, at 1 (asserting that pharmacy refusals place more than an inconvenience on women, instead they can create serious health implications for women who can not get their emergency contraceptive prescription filled within seventy-two hours). But see Webster v. Reprod. Health Serv., 492 U.S. 490, 563 n.6 (1989) (Stevens, J., dissenting) (“[O]nly 50 percent of fertilized ova ultimately become implanted.” (quoting *Post Coital Contraception*, THE LANCET, Apr. 16, 1983, at 856)).

212. See *infra* text accompanying notes 237-38.

213. 472 U.S. 703 (1985).

214. 544 U.S. 709 (2005); see Lederman, *supra* note 163 (arguing that the Court still has not completely fleshed out the *Caldor* standard; however, the Court’s use of it again in *Cutter* shows its affinity for the standard); see also THE PEW FORUM ON RELIGION & PUBLIC LIFE, THE CONSTITUTIONAL STATUS OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT: CUTTER V. WILKINSON 6 (*The Pew Research Ctr.*, ed., Mar. 2005) (suggesting that the Court will adopt a religious accommodation test in *Cutter* and “confront its own uneven path in prior cases involving government accommodation of religion”). Since the Court unanimously agreed upon using the *Caldor* standard in *Cutter*, and this rarely occurs in religious accommodation cases, it appears that this will be the religious accommodation standard going forward. Cf. *infra* note 252.

215. See McConnell, *supra* note 109, at 703 (articulating that when applying this standard, the court will find an accommodation unconstitutional when the non-beneficiary’s burden is disproportionate to the benefit received by the religious adherent).

216. See *id.* (asserting that “absolute and unqualified” accommodations disproportionately burden non-beneficiaries compared to the benefit received by religious believers).

Sabbath days.²¹⁷ The Court determined that this statute infringed upon the Establishment Clause because it provided Sabbath observers with an “absolute and unqualified right” not to work, placing their religious interests ahead of “all other interests.”²¹⁸ The Court explained that because the statute did not provide any exceptions to this Sabbath observation accommodation, it may “cause the employer substantial economic burdens or . . . require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.”²¹⁹

The Court recently affirmed and applied this standard in *Cutter*,²²⁰ finding that Section 3 of RLUIPA²²¹ was constitutional because Congress specifically stated that a prisoner’s religious accommodation is not required if it compromises the safety interests of other prisoners.²²² Since the statute does not unconstitutionally place religious interests ahead of all other interests, it does not disproportionately burden non-beneficiaries.²²³ However, the Court stated that if granting a specific prisoner’s religious accommodation imposes an unjustified burden on other institutionalized persons, then the Court would grant an as-applied constitutional challenge to the statute.²²⁴

Since courts likely would weigh this factor most heavily in determining whether a pharmacy conscience clause statute creates an unconstitutional “substantial” burden on women,²²⁵ legislatures should enact pharmacy conscience clause statutes that account for this limiting factor to allow these statutes to survive Establishment

217. See 472 U.S. at 710-11 (holding that the statute violated the Establishment Clause of the First Amendment).

218. *Id.*

219. *Id.* at 710.

220. 544 U.S. 709 (2005).

221. 42 U.S.C. § 2000cc-1(a)(1)-(2) (2000).

222. See *Cutter*, 544 U.S. at 2123 (acknowledging that Congress was particularly mindful of the health and safety interests of the other prisoners when it drafted the statute).

223. See *id.* at 2123 (holding that laws are invalid if they weigh religious interests over all other interests, but RLUIPA did not do this).

224. See *id.* at 2125 (“Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution In that event, adjudication in as-applied challenges would be in order.”).

225. See *infra* note 214 and accompanying text; cf. Garnett, *supra* note 108 (noting that *Cutter* is important because the Court unanimously agreed on religious accommodation limitations set forth in the decision which is rare for religion clause cases); McConnell, *supra* note 109, at 705 (contending that courts likely will limit their religious accommodation “significant” burden analysis to assessing the disproportionality of the burden).

Clause challenges.²²⁶ Unfortunately, the pharmacy conscience clause statutes that states already have passed do not contain referral or even emergency provisions.²²⁷ Since legislation without such provisions would unconstitutionally place pharmacists' religious interests ahead of women's reproductive rights or health and safety interests without exception,²²⁸ courts should find this legislation unconstitutional.²²⁹ Unlike RLUIPA, which provides an exception for the safety interests of prisoners, these statutes do not provide exceptions for the health and safety interests of patients.²³⁰ These statutes do not take into

226. See *Cutter*, 544 U.S. at 723 (analyzing whether lawmakers were mindful of other important institutional interests such as safety when they were drafting RLUIPA). RLUIPA survived a facial challenge because Congress did not elevate religious accommodation interests above other institutional interests when it drafted the statute, but these considerations will not necessarily protect religious accommodation statutes from as-applied challenges if they pose significant burdens on non-beneficiaries in practice. See Garnett, *supra* note 108 (acknowledging that the Court determined only that the law itself did not violate the Establishment Clause, and it likely will confront as-applied challenges to the statute in the future).

227. See *supra* note 180 and accompanying text (explaining that most refusal laws do not require pharmacists to transfer or refer a patient's prescription to another pharmacist or pharmacy).

228. See, e.g., Teliska, *supra* note 52, at 231 (maintaining that the pharmacy conscience clause provisions passed in South Dakota, Arkansas and Mississippi place pharmacists religious beliefs ahead of all other interests, including women's health and safety interests, because they do not contain provisions requiring pharmacists to fill or transfer prescriptions in an emergency situation).

229. Some scholars argue that all religious exemptions are constitutional based on the Court's opinion in *Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints*, 483 U.S. 327, 340 (1987), which held that a provision exempting religious employers from Title VII did not violate the Establishment Clause. See, e.g., Laycock, *supra* 163, at 900 (arguing that judges do not get to "second guess" religious exemptions because the Court found that religious exemptions do not violate the Establishment Clause in *Amos*). In *Amos*, the Court distinguished the burden imposed on non-beneficiaries by Title VII's religious employer exemption from *Caldor's* mandatory religious accommodation by stating that "[here], the appellee . . . was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute." *Amos*, 483 U.S. at 337 n.15. However, Justice O'Connor argued in her concurrence that the majority's distinction between government imposed burdens and burdens imposed by private actors under religious exemptions was insincere because "almost any government benefit to religion could be re-characterized as simply 'allowing' [versus requiring] a religion to better advance itself." *Id.* at 347 (O'Connor, J., concurring). Scholars have also argued that this distinction was disingenuous. See Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1255 (1997) (contending that, "[o]bviously, benefits are made available by government with the full expectation that those eligible will make use of them"); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 379-80 (1996) (asserting that legislatures should exempt religious adherents from laws that cause substantial burdens on their ability to practice their religion except for when these exemptions impose substantial costs on the state or third parties). The Court did not address this distinction in its most recent religious accommodation case, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), even though it applied *Caldor's* substantial burden standard.

230. See *supra* note 181 and accompanying text (stating that refusal laws do not have emergency exceptions to protect the health or life of a woman).

consideration the health risks that women may face if pharmacists refuse to dispense or transfer their prescriptions for emergency contraceptives.²³¹ Similar to how the Connecticut statute in *Caldor* weighed the religious interests of employees “over all other interests,”²³² these conscience clauses statutes unconstitutionally place pharmacists’ religious interests ahead of all other interests, including women’s economic, health and safety, and reproductive interests.

Pharmacy conscience clause statutes that contain provisions requiring pharmacies, not necessarily individual pharmacists, to ensure that patients receive all valid prescriptions without unnecessary delay or interference will best accommodate pharmacists’ religious beliefs while not inflicting a disproportionate burden on women’s reproductive rights and health and safety interests.²³³ This type of provision shifts the burden of accommodating individual pharmacists’ religious beliefs from women to pharmacies. However, it may impose “more than *de minimis* cost” to a pharmacy if it results in it having to hire or staff more pharmacists per shift.²³⁴ Because *Hardison* does not require employers to accommodate employees’ religious beliefs if doing so will impose “more than a *de minimis* cost” to an employer,²³⁵ this provision would cause religious adherent pharmacists’ jobs to be at risk.

231. See *supra* note 16 and accompanying text (stating that emergency contraceptives are only preventative within seventy-two hours of intercourse, and they are most effective within the first twelve to twenty-four hours). But see *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 563 n.6 (1989) (Stevens, J., dissenting) (“[O]nly 50 percent of fertilized ova ultimately become implanted.” (quoting *Post Coital Contraception*, *THE LANCET*, Apr. 16, 1983, at 856)).

232. 472 U.S. 703, 710 (1985).

233. These provisions would mirror ones found in the Pharmacy Consumer Protection Act of 2005 and the Access to Legal Pharmaceuticals Act. See Pharmacy Consumer Protection Act of 2005, S. 778, 109th Cong. (2005) (“[T]o require a pharmacy . . . to ensure that all valid prescriptions are filled without unnecessary delay or interference”); Access to Legal Pharmaceuticals Act, S. 809/H.R. 1652, 109th Cong. (2005) (“[T]o establish [dispensing] duties for pharmacies who employ pharmacists who refuse to dispense prescriptions based on their religious beliefs”). See, e.g., Press Release, Nat’l Women’s L. Ctr., Statement of Judy Waxman, NWLC Vice President for Health and Reproductive Rights (Apr. 14, 2005), available at <http://www.nwlc.org/details.cfm?id=2216§ion=newsroom> (applauding Senator Lautenberg and Representative Maloney’s introduction of the Access to Legal Pharmaceuticals Act because it would ensure that women would receive proper medical care without being subjected to a moralistic lecture at pharmacies).

234. See, e.g., *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (1977) (holding that a pharmacy would suffer from “more than *de minimis* costs” as a result of accommodating a religious pharmacist’s shift requests, and the pharmacy did not need to accommodate the pharmacist’s shift requests so that he could observe his Sabbath Day).

235. See *supra* notes 188-99 and accompanying text (discussing the “more than *de minimis* cost” standard used by the Court to determine if a Title VII religious-accommodation illegally burdens employers or other employees).

If legislatures want to better accommodate pharmacists interests, they could include language mandating that pharmacies employ pharmacists who refuse to dispense prescriptions based upon religious beliefs unless it would create a “significant difficulty or expense.”²³⁶ This would place a larger economic burden on pharmacies, but it would likely not create a disproportionate burden on them because it would not be an absolute mandate to maintain all religious adherent pharmacists despite significant economic costs.²³⁷ Pharmacies may challenge this burden, but of the three sets of interests at stake in this conscience clause battle, the Constitution affords economic interests the least amount of protection,²³⁸ less than both free exercise and reproductive rights.²³⁹

Unfortunately, this compromise solution may impact more than a pharmacy’s economic interests when a pharmacy refuses to stock particular medications based upon the owner’s religious beliefs.²⁴⁰ However, some states require pharmacies to have in stock and maintain sufficient drugs to protect the public.²⁴¹ Therefore, in these states, even though it will impinge upon pharmacy owner’s Free Exercise rights, conscience clause statutes should require that these pharmacies provide patients with their prescriptions in a timely manner, even if this requires a pharmacy to order or refer a prescription for a health condition that it currently does not treat for religious reasons.²⁴²

236. See *supra* note 198 and accompanying text (explaining that the “significant difficulty or expense” standard is greater than the current “more than *de minimis* cost” standard used in Title VII religious-accommodation cases).

237. See Oleske, *supra* note 115, at 536 (discussing that WRFA’s “significant difficulty or expense” standard is the same as the ADA’s accommodation provision, and while it is more difficult to meet than the current “more than *de minimis* cost” standard, it is not absolute).

238. See *supra* Part III.A (discussing that the Court has afforded economic interests protection against religious accommodations even though the Constitution does not protect these interests).

239. See *supra* Part III.A (explaining that the Constitution protects these rights, even though it is not absolute).

240. See, e.g., *CNN NewsNight Aaron Brown: Some Pharmacists Morally Opposed to Filling Prescriptions for Contraceptives; Benedict XVI’s First Months as Pope—Part I* (FDCH-eMedia, Inc. broadcast June 9, 2005) (discussing how Vander Bleek, an Illinois pharmacy owner challenging the Illinois Governor’s Emergency Rule requiring pharmacies to dispense emergency contraceptives, opened his own pharmacy solely so he would not have to stock or dispense medications that conflict with his religious beliefs).

241. See, e.g., 225 ILL. COMP. STAT. ANN. 85, § 14 (West 2005) (“No person shall establish or move to a new location any pharmacy unless the pharmacy is licensed with the Department and has on file with the Department a verified statement that: (1) such pharmacy is or will be engaged in the practice of pharmacy; and (2) . . . such pharmacy will have in stock and shall maintain sufficient drugs and materials as to protect the public it serves . . .”).

242. See Pharmacy Consumer Protection Act, S. 778, 109th Cong. § 2(a) (2005)

Further, even if state law does not require pharmacies to have sufficient drugs in stock to protect the public, if a pharmacy has a monopoly over a rural community,²⁴³ the state or federal government nevertheless should require these pharmacies to stock prescriptions to meet all of their patients' medical needs, even if they morally object to certain medications. These provisions align with APhA's ethical guidelines,²⁴⁴ requiring pharmacists to place patients' well-being ahead of their own interests,²⁴⁵ and they would ensure that pharmacy conscience clause statutes do not create a disproportionate burden on women by placing pharmacists' religious interests ahead of women's reproductive rights and health and safety interests.²⁴⁶

CONCLUSION

Amid growing demands by pharmacists, doctors, judges, policemen and other professionals to be exempt from legal civic duties that conflict with their religious beliefs, it is increasingly important for legislatures and courts to determine the proper scope of conscience clause provisions in our society. While the Supreme Court announced in *Cutter* that religious accommodations are constitutional, the reach of these accommodations is not strictly a policy question. The Court instead declared that these accommodations will infringe upon the Establishment Clause if they disproportionately burden non-beneficiaries by weighing religious adherents' interests over all other significant interests.

This religious accommodation limitation can provide individuals with a new legal tool for challenging pharmacy conscience clause legislation. As legislators continue to craft pharmacy conscience

(mandating that all pharmacies order or transfer valid prescriptions even if the pharmacy does not routinely carry the requested medication). *But see* Access to Legal Pharmaceuticals Act, S. 809/H.R. 1652, 109th Cong. § 3(a) (2005) (exempting pharmacies from ordering medications for health conditions that they do not ordinarily stock).

243. *See, e.g.,* Teliska, *supra* note 52, at 240 (asserting that Wal-Mart's "business decision" not to carry emergency contraceptives is unacceptable because Wal-Mart is the only pharmacy provider for many rural communities).

244. *See* AM. PHARMACIST'S ASS'N, PHARMACISTS CODE OF ETHICS (1994), *available at* <http://www.aphanet.org/pharmcare/ethics.html> (providing a standard of care for its 50,000 members, however this code is not legally enforceable unless states pass specific laws that incorporate its provisions).

245. *See id.* (emphasizing that pharmacists have a moral obligation to serve patients' needs because of the trust given to the profession to serve the public as the gatekeepers of prescription drugs in our country).

246. *See* Teliska, *supra* note 52, at 240-41 (discussing how broad pharmacy conscience clause statutes will pose an "alarming threat" to women's access to reproductive health services, especially for women who do not have time, money or an ability to travel great distances to find an accommodating pharmacist).

clause statutes, they should account for potential Establishment Clause violations and include provisions ensuring that pharmacists' religious interests do not disproportionately impinge on other significant interests, such as women's reproductive rights or patients' health and safety interests. This religious accommodation framework can provide legislatures with a scale as they seek to balance their citizen's competing interests through conscience clause legislation.