

## Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context

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### Introduction

It is difficult to ignore the parallels emerging between same-sex marriage and the recently renewed debates about the limits of conscience in healthcare sparked by refusals to dispense emergency contraceptive.<sup>1</sup> Both subjects are deeply divisive and in both, persons of good will (and perhaps bad) are saying “why should I have to give up my convictions so that you can have yours?”

In the Netherlands, a registrar was dismissed after refusing for religious reasons to solemnize the wedding of a same-sex couple.<sup>2</sup> In Manitoba, Canada, twelve officials empowered to perform marriage ceremonies “quit because they refused to perform same-sex marriages as required by” provincial law.<sup>3</sup> This led to provisions in Canada’s same-sex marriage legislation to insulate individuals from making the decision to go along or leave.<sup>4</sup> In January,

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<sup>1</sup> Emergency contraceptives—like “Plan B,” the “morning after pill”—contain progestins that inhibit or delay ovulation and disrupt embryo transplant and implantation, although the precise mechanism by which post-coital oral contraception works “is not well understood.” Bartell Drugs, Drug Information and Details, Levonorgestrel, <http://www.bartelldrugs.com/cpdruginfo/showMono.jsp?cpnum=346&gname=Levonorgestrel> (last visited on Feb. 2, 2006). Some see this as tantamount to abortion. 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](http://www.usatoday.com/news/nation/2004-11-08-druggists-pill_x.htm) (noting that some pharmacists believe that preventing the implantation of a fertilized egg is a form of abortion). By 2003, three million American women had used Plan B while approximately one million had used Preven, an “older estrogen-progestin product” that acts in much the same way. See Sharon L. Camp et al., *The Benefits and Risks of Over-the-Counter Availability of Levonorgestrel Emergency Contraception*, 68 *CONTRACEPTION* 309, 309 (2003).

<sup>2</sup> European Union Network of Independent Experts on Human Rights, Opinion No. 4-2005: The Right to Conscientious Objection and the Conclusion by EU Member States Of Concordats with the Holy See 14 (Dec. 14, 2005), available at [http://europa.eu.int/comm/justice\\_home/cfr\\_cdf/doc/avis/2005\\_4\\_en.pdf](http://europa.eu.int/comm/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf) [hereinafter EU Network Opinion No. 4-2005] (noting that the Netherlands’ Commissie Gelijke Behandeling, which enforces that country’s General Equal Treatment Act, found insufficient reasons for the refusal to renew the registrar’s contract since “other public servants were prepared to celebrate same-sex marriages”).

<sup>3</sup> Bill Graveland, *Alberta Allowing Same-Sex Marriage but Adding Protection to Opponents*, CANADIAN PRESS, July 12, 2005, <http://www.recorder.ca/cp/National/050712/n071251A.html>.

<sup>4</sup> Legislative accommodations appeared in both Canada’s federal legislation and its provincial laws authorizing same-sex marriage. See The Civil Marriage Act, 2005 S.C., ch. 33 §3 (Can.) (specifying that under the Canadian Charter of Rights and Freedom, officials of religious groups may refuse to perform marriages that are not in accordance with their religious beliefs and that no person or organization may be sanctioned or deprived of any benefits for exercising their freedom of conscience and religious beliefs or for expressing their belief regarding marriage); Graveland, *supra* note 3 (observing that “Alberta will allow same-sex marriage but not force ministers or marriage commissioners to perform the ceremonies if they don’t want to”).

2006, the European Union’s Network of Independent Experts on Human Rights issued a final report concluding that a clergy member’s interests in not performing same-sex marriages must be subordinated to the couple’s “right of access.”<sup>5</sup> And in the wake of *Goodridge v. Department of Public Health*,<sup>6</sup> which recognized same-sex marriage for Massachusetts couples, bloggers and editorialists have argued recently that churches will be forced to marry same-sex couples because of the significant government benefits that churches receive.<sup>7</sup>

In December, 2005, the Catholic Action League of Massachusetts urged the state’s Roman Catholic hospitals to defy Massachusetts’ new emergency contraception law.<sup>8</sup> That legislation, which took effect on December 14, 2005, requires all hospitals, even private ones, to offer the morning-after pill to rape victims.<sup>9</sup> In July, 2004, eleven Alabama nurses resigned

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Canada also insulates people of conscience from the application of hate-speech prohibitions. *See, e.g.*, R.S.C., ch. C-46 § 319(3) (1985) (“No person shall be convicted of an offence under subsection (2) . . . if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text”).

<sup>5</sup> EU Network Opinion No. 4-2005, *supra* note 2 (explaining that while individual clergy and clerks may object to participation in same-sex marriage if permitted by law, “it would be unacceptable [for] marriage [to be] unavailable to the couple concerned,” which would result “from the refusal to celebrate a marriage between two persons of the same sex where this institution is recognized,” and concluding that “public authorities should ensure in such circumstances that other officers will be available and willing to celebrate those unions”).

Prompted by a draft treaty on abortion between the Vatican and the Slovak Republic, an EU member, the EU requested that Network of Independent Experts on Human Rights examine legislative accommodations for refusals to participate in abortion. The Network expanded its review to include refusals to participate in other deeply divisive healthcare procedures, like euthanasia and the dispensing of birth control, as well as in the solemnizing of same-sex marriages. George Conger, *EU Ruling Worry For Clergy Over Same Sex Marriage*, CHURCH OF ENGLAND NEWSPAPER, Jan. 13, 2006, [http://www.churchnewspaper.com/news.php?read=on&number\\_key=5802&title=EU%20ruling%20worry%20for%20clergy%20over%20same%20sex%20marriage](http://www.churchnewspaper.com/news.php?read=on&number_key=5802&title=EU%20ruling%20worry%20for%20clergy%20over%20same%20sex%20marriage).

<sup>6</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>7</sup> Anton N. Marco, Same-Sex “Marriage:” Should America Allow “Gay Rights” Activists to Cross The Last Frontier?, <http://www.leaderu.com/marco/marriage/gaymarriage5.html> (last visited Feb. 2, 2006) (asserting that “same-sex ‘marriage’ recognition would indeed ‘legislate private tolerance’ of ‘gay rights’ by religious organizations,” and that “[t]he legal ‘machinery’ is already in place to compel . . . clergy to recognize and perform same-sex ‘marriages’ or forfeit licensure”).

Scholars also worry about the implications of same-sex marriage for religious freedom. *See* Mary Ann Glendon, Editorial, *For Better or for Worse?*, WALL ST. J., Feb. 25, 2004, at A14:

Religious freedom, too, is at stake. As much as one may wish to live and let live, the experience in other countries reveals that once these arrangements become law, there will be no live-and-let live policy for those who differ. Gay-marriage proponents use the language of openness, tolerance and diversity, yet one foreseeable effect of their success will be to usher in an era of intolerance and discrimination the likes of which we have rarely seen before. Every person and every religion that disagrees will be labeled as bigoted and openly discriminated against. The ax will fall most heavily on religious persons and groups that don’t go along. Religious institutions will be hit with lawsuits if they refuse to compromise their principles.

<sup>8</sup> *Health – Emergency Contraception*, BROADCAST NEWS, Dec. 14, 2005, 2005 WL 20105347.

<sup>9</sup> MASS. GEN. LAWS ANN. ch. 111, § 70E(o) (YEAR) (providing that every female rape victim of childbearing age has the right to receive accurate written information about emergency contraception from any facility, including any private or state run hospital, and to be promptly offered the same and to be provided with emergency contraception

positions at state clinics rather than provide emergency contraceptives against their moral convictions.<sup>10</sup>

A number of states have now carved out a space for medical providers to continue in their professional roles without participating in acts they find immoral. In fact, nearly every state in the nation now has a conscience clause that authorizes individual providers or entities to refuse to participate in certain procedures, usually abortion, sterilization, physician-assisted suicide, and, increasingly, the dispensing of emergency contraceptives.<sup>11</sup> Thus, even the very strong constitutional rights to abortion and contraception established in *Roe v. Wade*<sup>12</sup> and *Griswold v. Connecticut*<sup>13</sup> have yielded to the convictions of others not to facilitate a woman's reproductive choices.

These struggles over conscience in medicine suggests where the next skirmish in the struggle over same-sex marriage will likely lead:<sup>14</sup> a concerted effort to take same-sex marriage from a negative right to be free of state interference to a positive entitlement to assistance by others. Although *Roe* and *Griswold* established only the right to non-interference by the state in a woman's contraceptive and abortion decisions,<sup>15</sup> family planning advocates have worked strenuously to extend these non-interference rights into affirmative entitlements to another's assistance. This was done in the healthcare arena in two ways, both through attempts to force *individual institutions* to provide controversial services, and to force *individual healthcare providers* to participate in them.

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upon request). See also Scott Helman, *Romney Says No Hospitals Are Exempt from Pill Law: He Reverses Stand on Plan B*, BOSTON GLOBE, Dec. 9, 2005, at A1 (noting that Massachusetts Governor Mitt Romney overturned an initial ruling by the State Department of Public Health, which would have allowed privately run hospitals to opt out of the emergency contraception requirement if they objected on religious or moral grounds).

<sup>10</sup> Julie Cantor & Ken Baum, *The Limits of Conscientious Objection: May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2012 (2004) (arguing that “although health professionals may have a right to object, they should not have a right to obstruct,” and asserting therefore that “[p]harmacists who object to filling prescriptions for emergency contraception should arrange for another pharmacist to provide this service to customers promptly”).

<sup>11</sup> See Part \_\_ *infra*.

<sup>12</sup> 410 U.S. 171 (1973). Many see abortion as the one constitutional right that is virtually impervious to being overruled. See *The Supreme Court*, PBS RELIGION & ETHICS NEWSWEEKLY, Episode no. 410, Nov. 3, 2000, <http://www.pbs.org/wnet/religionandethics/week410/feature.html> (describing the decision in *Roe* as the “among the least likely to be overruled”).

<sup>13</sup> 381 U.S. at 479 (1965) (viewing decisions regarding reproduction as “intimate to the degree of being sacred” and holding that a married couple's decision to use contraception falls in a zone of privacy in which the state cannot interfere); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right of contraceptive use to single persons because “[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”).

<sup>14</sup> Of course, supporters of same-sex marriage may also act upon their convictions and assist couples to marry even when the law does not permit such unions. See *Mayor to Face Trial for Trying to Gay Weddings*, CHI. TRIB., May 29, 2005, at 16 (reporting that the mayor of New Paltz, New York “faces 24 misdemeanor counts of violating the state's domestic relations law by marrying couples without licenses in late February 2004”).

<sup>15</sup> Douglas Kmiec, this volume.

The lever used in efforts to force both public and private facilities to provide sterilization and abortion services was the receipt of public benefits. This approach had considerable success until Congress stepped in with the primogenitor of healthcare conscience clauses, the Church Amendment.<sup>16</sup> The Church Amendment prohibits a court from using receipt of federal monies as a basis for making an individual or institution perform an abortion or sterilization contrary to their “religious beliefs or moral convictions.”<sup>17</sup>

This litigation after *Roe* to force access to services provides a convincing prediction about the trajectory that litigation after *Goodridge* will take. Like *Roe* and *Griswold*, *Goodridge* recognizes a dramatically new right, at least for some persons. Unlike entitlements hatched in legislation, which lends itself to accommodating the interests of third persons, civil rights cases rarely accommodate the interests of non-plaintiffs. Civil rights litigation produces an entitlement of the plaintiffs vis-à-vis the state, rather than of plaintiffs vis-à-vis other persons.<sup>18</sup>

In this volume, Professor Feldblum argues that the pending moral collision between the religious free exercise rights of some individuals and the equal protection rights of others is a “zero-sum game.”<sup>19</sup> She is right. It is likely that a stream of litigation is on the horizon designed to resolve competing claims of individuals who want to enter same-sex marriage and those who want to have nothing to do with facilitating this. Given the status of most churches as state non-profits and federally tax-exempt organizations, public support arguments will surely be advanced to compel churches to participate in same-sex marriage. Thus, churches in Massachusetts (and perhaps soon other states)<sup>20</sup> may have much to worry about.

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<sup>16</sup> 42 U.S.C.A. § 300a-7 (2003).

<sup>17</sup> *Id.*

<sup>18</sup> Of course, the courts sometimes choose to consider the interests of a third party, as in *Roe v. Wade*.

<sup>19</sup> Feldblum, this volume, at 6. She foresees collisions in the commercial context where, for instance, one landlord or one restaurant owner denies a same-sex couple the right to rent an apartment or eat at their restaurant. *Id.* at 10-11. If the government is silent on the morality of same-sex relationships, she argues, then it effectively sides against homosexuality because it permits opponents of same-sex relationships to burden those relationships legally; conversely if laws are adopted mandating equality between heterosexual and homosexual relationships the government effectively sides with same-sex relationships. *Id.* at 6-7. For this reason, Professor Feldblum believes that we have an “ethical imperative to state the moral conflict” and cannot dodge the question about which view should prevail as a matter of public policy. *Id.* at 8. Professor Feldblum acknowledges that an individual’s religious belief may be burdened if the law mandates equality, but argues nonetheless that legislative accommodations directly undermine the personal dignity of Lesbian, Gay, Bisexual and Transgender people. *Id.* at 10. Further, such accommodations are inconsistent with society’s new moral stance as evinced in non-discrimination laws. *Id.* Any burden to religious persons would be justified “because it is the only way to ensure full dignity for gay people in our society.” *Id.* at 9.

<sup>20</sup> A Baltimore City Circuit Court declared on January 20, 2006 that Maryland’s 33-year-old ban on same-sex marriage was discriminatory. *Dean v. Conaway*, No. 24-C-04-005390 (Balt. City Cir. Ct. Jan. 20, 2006), available at [http://www.baltocts.state.md.us/civil/highlighted\\_trials/Memorandum.pdf](http://www.baltocts.state.md.us/civil/highlighted_trials/Memorandum.pdf). Of course, such developments frequently spur legislative activity in the other direction. See, e.g., Chris L. Jenkins, *Gay Marriage Ban Advances Toward Va. Referendum; Md. Lawmakers Offer Similar Bill*, WASH. POST, Jan. 26, 2006, at A1 (noting that Maryland Republicans introduced legislation in the Maryland Senate to bar same-sex marriages following the Baltimore City Circuit Court ruling, while the Virginia Senate voted in favor for a November 7, 2006 referendum on whether to amend its 230 year old Bill of Rights to bar same-sex marriages).

Not only does the experience of healthcare providers after *Roe* provide a cautionary tale, it can also tell us a great deal about the scope of protection that can be made available. Legislative accommodations vary from state to state, especially in the strength of the protection given to individuals and facilities that refuse to participate. Many insulate providers from suit by patients, others from coercion by the government itself.

This Chapter explores the risks facing churches, clergy, and state officials who, as a matter of conscience or religious conviction, feel that they can neither support nor participate in same-sex marriage unions. It examines how legislative accommodations in medicine offer a number of approaches for resolving the clash between those who want a service and those who do not to perform it.

## **I. Matters of Conscience in the Healthcare Arena**

Questions of conscience have great urgency in the healthcare context for a number of reasons. Religiously-affiliated, denominational hospitals comprise the largest group of non-profit healthcare providers in the United States.<sup>21</sup> Without conscience clause protection, hospitals have been unsuccessful in defending their choice limit services on free exercise grounds under the First Amendment. A law does not violate or infringe on free exercise rights when it is neutral, generally applicable, and not targeted at religious practices.<sup>22</sup> For example, in *St. Agnes Hospital, Inc. v. Riddick*,<sup>23</sup> the United States District Court for the District of Maryland upheld a state requirement that all accredited obstetrics and gynecology programs provide clinical training in family planning procedures. The requirement did not violate the Catholic hospital's free exercise of religion because it "was not motivated by a discriminatory purpose" and applied equally to all facilities.<sup>24</sup>

The history of conscience clauses in medicine have followed a well-worn path: advocates file and sometimes win lawsuits seeking to compel the performance of services by individuals or facilities. Congress or the state legislature then steps in to provide a protected space for persons or facilities that might otherwise be compelled to provide such procedures. The history and development of these conscience clauses in medicine provide an important lens for examining how the strongly held beliefs of individual churches, clergy or state officials opposed to same-sex marriage can be accommodated through legislation.

### **A. Protecting Institutions from Coercion by Patients or Governments**

Efforts to compel the provision of controversial medicine services focused first on facilities. In this litigation, the bludgeon of choice against facilities was the receipt of public

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<sup>21</sup> See Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1703 (1999).

<sup>22</sup> See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>23</sup> 748 F. Supp. 319 (D. Md. 1990).

<sup>24</sup> See *id.* at 333.

benefits or federal funds.<sup>25</sup>

Shortly before the US Supreme Court’s decision in *Roe*, the United States District Court for the District of Montana in *Taylor v. St. Vincent’s Hospital*<sup>26</sup> enjoined a private, non-profit, charitable hospital in Billings, Montana, from refusing to perform a tubal ligation. In *Taylor*, the hospital prohibited Mrs. Taylor’s physician from doing a sterilization procedure on her during the delivery of her baby by Caesarian section.

Mrs. Taylor brought suit under 42 U.S.C. § 1983, which prohibits entities acting under color of state law from subjecting “any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”<sup>27</sup> In denying the hospital’s motion to dismiss for lack of jurisdiction, “the court stated that ‘the fact that the [hospital received] Hill-Burton Act . . . funds is alone sufficient to support an assumption of jurisdiction . . . .’”<sup>28</sup> Hill-Burton funds are federal monies that were made available to hospitals to modernize and construct medical facilities.<sup>29</sup> The hospital’s tax immunity and licensing by the State also established, in the court’s view, a connection between the hospital and the State sufficient to support jurisdiction.

Almost before the ink could dry on the injunction, Congress acted to shut it down with the Church Amendment.<sup>30</sup> The Church Amendment provided that:

- (b) The receipt of any grant, contract, loan, or loan guarantee under the [act that created the Hill-Burton funds and other acts] by any individual or entity does not authorize any court or any public official or public authority to require—
  - (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if [it] would be contrary to his religious beliefs or moral convictions; or
  - (2) Such entity to—
    - (A) make its facilities available for the performance of any sterilization procedure or abortion if [it] is prohibited by the entity on the

<sup>25</sup> The popularity of this approach has not diminished. Advocates of increased access to emergency contraception have once more homed in on federal funding as a stick. In 2003, Representative James C. Greenwood (Pa.) introduced a bill that would withhold federal funding to any hospital that did not provide emergency contraception to sexual assault victims or provide victims with medically and factually accurate and unbiased information about emergency contraception, including an explanation that it does not cause an abortion. H.R. 2527, 108th Cong. (2003). See also H.R. 4113, 107th Cong. (2002) (making nearly identical requirements). Both bills were referred to the House Subcommittee on Health after introduction.

<sup>26</sup> See *Taylor v. St. Vincent’s Hospital*, 369 F. Supp. 948, 950 n.1 (D. Mont. 1973) (citing H.R. No. 93-227; and quoting H.R. Rep. No. 93-227 (1973), as reprinted in 1973 U.S.C.C.A.N. 1464, 1553 [sic; actually 1473]).

<sup>27</sup> 42 U.S.C. § 1983 (2000).

<sup>28</sup> H.R. Rep. No. 93-227 (1973), as reprinted in 1973 U.S.C.C.A.N. 1464, 1473 (discussing the preliminary injunction granted by the District Court of Montana in *Taylor*).

<sup>29</sup> Hospital and Medical Facilities Amendments of 1964, Pub. L. No. 88-443, 78 Stat. 447 (codified at 42 U.S.C. § 291).

<sup>30</sup> The Church Amendment appears in Section 401 of the Health Programs Extension Act, which President Nixon signed into law in June 1973. Pub. L. No. 93-45, 87 Stat. 91, 95.

basis of religious beliefs or moral convictions, or  
 (B) provide any personnel for [such services] if [their performance] would be contrary to the religious beliefs or moral convictions of such personnel.<sup>31</sup>

Like many of the conscience clauses that have followed it, the Church Amendment protects both individual providers and facilities from compelled participation. Importantly, it provides protection not only in the “horizontal relationship” between the patient and individual facility or provider, but it also protects individual providers in “vertical relationships” against coercion from an employer or facility:

(c) No entity which receives [certain grant, contract, loan, or loan guarantees] may—  
 (1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or  
 (2) discriminate in the extension of . . . privileges to [them],  
 because he performed . . . a lawful sterilization procedure or abortion, [or] refused to perform [one due to] his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.<sup>32</sup>

After the Church Amendment’s passage, the *Taylor* court dissolved its original injunction.<sup>33</sup> The court found that the effect of the Church Amendment was to prohibit courts and public officials from compelling individuals or institutions to perform or assist in abortions or sterilizations.<sup>34</sup> Consequently, the plaintiffs were denied all relief.

Despite the Church Amendment, litigation continued along the same lines for several more years. Family planning advocates continued to file suits to force hospitals to provide abortions and sterilizations, and the Church Amendment figured prominently in the rejection of these claims. For instance, in *Chrisman v. Sisters of St. Joseph of Peace*,<sup>35</sup> a married woman sued for a writ of mandamus and injunction against a private, non-profit hospital that refused to do a tubal ligation for her. She alleged that the hospital acted under color of state law since it received Hill-Burton construction funds, enjoyed some state tax-exemption, and was generally under state regulation.<sup>36</sup> In affirming the district court’s dismissal, the United States Court of Appeals for the Ninth Circuit noted that “this argument has been seriously limited by [Congress’s] action” in the Church Amendment, which “was clearly intended by Congress to

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Taylor v. St. Vincent’s Hospital*, 369 F. Supp. 948, 951 (D. Mont. 1973).

<sup>34</sup> *Id.* at 950. The court refused to examine the Church Amendment’s constitutionality, finding that the issue was not before the court. *Id.* at 951. The court also rejected a challenge based on retroactive application. *See id.*

<sup>35</sup> 506 F.2d 308 (9th Cir. 1974).

<sup>36</sup> *Id.* at 310.

prevent suits such as that advanced by Appellant.”<sup>37</sup> Courts in many jurisdictions have held that receipt of Hill-Burton funds, and participation in other federal or state programs, cannot be used to compel private institutions to make their facilities available for the performance of abortions.<sup>38</sup>

Some courts believe that a different result should obtain when a public hospital refuses to provide abortion services. In *Nyberg v. City of Virginia*, the United States Court of Appeals for the Eighth Circuit invalidated a public hospital’s ban on all non-therapeutic abortions in its facilities.<sup>39</sup> The court found that this ban would not serve the interest of the hospital or the state and that “the performance of abortions [would not] interfere with the hospital’s normal routine.”<sup>40</sup> The court reasoned: “Once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights.”<sup>41</sup> Because the hospital would not have to hire new staff or establish new facilities in order to perform abortions, the hospital could not “arbitrarily preclude abortions from the variety of services offered which require no greater expenditure of available facilities and skills.”<sup>42</sup> The decision rested in part on *Roe*: the hospital’s ban “unduly restricts what the United States Supreme Court has held to be a fundamental right.”<sup>43</sup> Following *Nyberg*, both federal and state courts have held that public medical facilities could not forbid elective abortions when the facility offered medically indistinguishable procedures.<sup>44</sup>

Significantly, the U.S. Supreme Court considered whether a hospital’s refusal to provide abortion services infringes upon a woman’s right in *Webster v. Reproductive Health Services*.<sup>45</sup>

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

<sup>38</sup> See *Greco v. Orange Mem’l Hosp. Corp.*, 513 F.2d 873 (5th Cir. 1975) (rejecting plaintiff’s claim that hospital’s refusal to allow abortions to be performed was unconstitutional); *Watkins v. Mercy Med. Ctr.*, 520 F.2d 894 (9th Cir. 1975) (rejecting plaintiff’s claim that exclusion from staff privileges violated plaintiff’s rights under First, Fifth, and Fourteenth Amendments); *Doe v. Bellin Mem’l Hosp.*, 479 F.2d 756 (7th Cir. 1973) (rejecting plaintiff’s claim that hospital’s refusal to perform abortions violated 42 U.S.C. § 1983); *Doe v. Charleston Area Med. Ctr.*, 529 F.2d 638, 643 (4th Cir. 1975) (rejecting plaintiff’s claim that non-profit hospital’s refusal to perform abortions violated 42 U.S.C. § 1983).

<sup>39</sup> 495 F.2d 1342 (8th Cir. 1974).

<sup>40</sup> *Id.* at 1346.

<sup>41</sup> *Id.* (quoting *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 706 (1973)).

<sup>42</sup> *Nyberg*, 495 F.2d at 1346.

<sup>43</sup> *Id.* at 1343.

<sup>44</sup> See *Doe v. Hale Hosp.*, 500 F.2d 144 (1st Cir. 1974) (holding that a traditional public hospital owned by the city of Haverhill, Massachusetts could not forbid therapeutic abortions if it offers medically indistinguishable procedures); *Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974) (holding that the right to privacy included the right to be free from government regulation affecting the abortion decision during the first trimester of pregnancy, so that hospital corporation that sought to do abortions could not be limited in this by the Chicago Board of Health); *Orr v. Koefoot*, 377 F. Supp. 673 (D. Neb. 1974) (finding that a University Medical Hospital functions as a public hospital and therefore could not limit the number of nontherapeutic abortions performed per week to only those necessary to maintain a conservative medical teaching program).

<sup>45</sup> 492 U.S. 490 (1989).

In *Webster*, the Court upheld a Missouri statute that prohibited public employees from performing abortions in public hospitals. The Court stated that “Nothing in the Constitution requires states to enter or remain in the business of performing abortions. Nor . . . do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions.”<sup>46</sup> The Court noted, however, that the case “might . . . be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose,” or if all medicine was socialized.<sup>47</sup>

In *Doe v. Bolton*,<sup>48</sup> the companion case to *Roe*, the Supreme Court recognized the need for protection against forced participation in abortions. There, the Court struck down Georgia’s criminal abortion statute that required, among other things, advance approval of abortions by a mandatory abortion screening committee.<sup>49</sup> The Court considered whether the committee was necessary as a means of protecting the rights of individual physicians and denominational hospitals.<sup>50</sup> Although this was an appropriate goal, the Court noted that this was unnecessary in light of Georgia’s existing statutory protections for providers:

Under [Georgia law] the hospital is free not to admit a patient for an abortion. . . . Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford *appropriate protection* to the individual and to the denominational hospital.<sup>51</sup>

In a similar vein, lower courts have noted that the Church Amendment properly exempted denominational hospitals since “[t]o hold otherwise would violate the religious rights of the hospital.”<sup>52</sup>

## **B. Protecting Providers from the Government Pressure: The Second Wave of Conscience Protections**

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<sup>46</sup> *Id.* at 510.

<sup>47</sup> *Id.* at 510, n.8.

<sup>48</sup> 410 U.S. 179 (1973). State courts have reached similar results. In *Roe v. Arizona Board of Regents*, 549 P.2d 150 (Ariz. 1976), the Arizona Supreme Court upheld an Arizona statute allowing hospitals to refuse to admit patients seeking an abortion even as applied to a university teaching hospital, reasoning that “[t]he sole and exclusive responsibility for the hospitalization and medical care of the indigent rests with the county. Pima County, where plaintiff resides, has established a county hospital. There is no suggestion that this facility would not have been available to the plaintiff for the abortion procedure”).

<sup>49</sup> *Id.* at 198 (concluding that “the interposition of the hospital abortion committee is unduly restrictive of the patient’s rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State”).

<sup>50</sup> *Id.* at 197.

<sup>51</sup> *Id.* at 197-98 (emphasis added).

<sup>52</sup> *Watkins v. Mercy Med. Ctr.*, 364 F. Supp. 799, 803 (D. Id. 1973). *See also Doe v. Bellin Mem’l Hosp.*, 479 F.2d 756, 759-60 (7th Cir. 1973) (“There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions.”).

Receipt of benefits may be used not only as a wedge by private parties, but also by state, local and federal governments to coerce participation in abortion and other controversial services. A favored tool of government for extracting certain behavior is the denial of participation in certain government programs.

After the Church Amendment, Congress expanded the scope of conscience clause protections in successive pieces of legislation, culminating most recently in the Weldon Amendment in 2004, which was tucked into an appropriations bill.<sup>53</sup> These enactments were designed to protect entities and individuals from punishments at the hands of the government. In 1996, for example, Congress prohibited federal, state and local governments from discriminating against healthcare entities that refuse to (1) undergo abortion training, (2) provide such training, (3) perform abortions, or (4) provide referrals for training or abortions.<sup>54</sup> Specifically, it protected doctors, medical students, and health training programs from being denied federal financial assistance, or certification or license they would otherwise receive, but for their refusal.<sup>55</sup> This protection was not limited to refusals for religious or moral reasons; instead it extends to refusals for any reason.

Congress put teeth into this protection against government coercion in 2004.<sup>56</sup> The Weldon Amendment now provides that

None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if [it] subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.<sup>57</sup>

The Weldon Amendment carved out certain abortions from application of this financial penalty.<sup>58</sup> It also broadened significantly the kind of entities embraced by the conscience

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<sup>53</sup> Dep'ts of Labor, Health & Hum. Servs., and Educ., and Related Agencies Appropriations Act of 2004. Pub. L. No. 108-447, § 507, 118 Stat. 2809, 3164 (2004).

These conscience clauses expanded the scope of covered services, allowing providers to opt out of not only the abortion of sterilization service, but also out of providing counseling and referral for such services. For instance, in 1988, the Danforth Amendment of the Civil Rights Restoration Act of 1987 extended conscience protections to include “abortion-related services.” *See* Pub. L. No. 100-259, § 909, 28 Stat. 28, 29 (codified at 20 U.S.C. 1688) (providing that the receipt of monies under Title IX, which prohibits sex discrimination in federally-funded education programs, may not be construed to require an individual or entity to provide or pay for abortion-related services).

<sup>54</sup> 42 U.S.C. 238n(a)(1) (2000).

<sup>55</sup> 42 U.S.C. 238n(a)(1) (2000).

<sup>56</sup> Pub. L. No. 108-447, § 507, 118 Stat. 2809, 3164 (2004).

<sup>57</sup> Pub. L. No. 108-447, § 509(d)(1). For a listing of funds affected by the Act, see Nat'l Family Planning & Reproductive Health Ass'n, FY 2005 Funding for Select Public Health Programs, <http://www.nfprha.org/uploads/FY2005Funding.pdf> (last visited Feb. 6, 2006).

<sup>58</sup> Pub. L. No. 108-447, § 508(a) provides that:

The limitations established in the preceding section shall not apply to an abortion—(1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical

protection. Under the Weldon Amendment, a “health care entity” includes an individual physician or other healthcare professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of healthcare facility, organization, or plan.<sup>59</sup> The Weldon Amendment is the proverbial 600-pound gorilla. California alone stands to lose \$49 billion in federal funds if it discriminates in this way.<sup>60</sup>

Just as family planning advocates have tried to force private hospitals to do abortions and sterilizations, advocates of same-sex marriage may bring similar challenges to preside over same-sex marriages. It is possible, of course, that such attempts would not succeed, but it would seem preferable to deflect this risk in advance. The healthcare context gives us a model for doing that. In fact, the Church Amendment itself influenced the outcomes of that litigation in important and material ways and presumably the Weldon Amendment will have similar effect.

### C. Credible Threat to Tax-Exempt Churches in States that Legalize Same-Sex Marriage

As the second wave of conscience clause protections recognize, the risk of coercion extends beyond private litigation. Thus, churches that oppose same-sex marriage today may perceive a credible, palpable threat to their tax-exempt status,<sup>61</sup> the benefits of which are substantial.<sup>62</sup>

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condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

<sup>59</sup> *Id.* § 509(d)(2). States have also [sought to expand][expanded] the range of entities covered by conscience clauses protection. For instance, in May 2004, the Michigan legislature’s House passed a bill that would exempt health insurers from covering healthcare items that violated ethical, moral or religious principles reflected in their bylaws or mission statements. *Michigan House Votes to Protect Conscience Rights in Health Care*, STATE & LOCAL HEALTH LAW WEEKLY, May 13, 2004. This bill passed the House but not the Senate.

<sup>60</sup> Bob Egelko, *California Suit Hits Antiabortion Amendment*, S.F. CHRON. Jan. 26, 2005, at B3.

States are challenging the constitutionality of the Weldon Amendment on the grounds that it “effectively nullifies state Medicaid requirements in regard to abortion referrals and coverage and it could prohibit state and local governments from enforcing a wide range of their own laws and constitutional mandates that ensure access to abortion services and referrals.” National Family Planning and Reproductive Health Association, *Weldon Federal Refusal Clause*, (Dec. 8, 2004), <http://www.nfprha.org/pac/factsheets/anda.asp>. Any state that enforces its own laws risks the loss of all federal funds if such enforcement constitutes discrimination. *See California v. United States*, No. C 05-00328 JSW, 2005 U.S. Dist. LEXIS 30872 (N.D. Cal. Nov. 17, 2005) (refusing to permit the State of California to intervene in a suit alleging that the Weldon Amendment is in conflict with California law requiring emergency healthcare facilities to provide medically necessary emergency abortions, since the question presented concerned the Constitutionality of California law, not the Weldon Amendment); *see also Nat’l Family Planning & Reproductive Health Ass’n, Inc. v. Gonzales*, 391 F. Supp.2d 200 (D.D.C. 2005) (denying plaintiffs a preliminary injunction against imposing the Weldon Amendment, concluding that it was within Congress’ spending powers).

<sup>61</sup> Section 501(c)(3) of the Internal Revenue Code (Code) provides federal tax-exempt status for organizations “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to animals.” 26 U.S.C.A. 501(c)(3) (West Supp. 2005).

<sup>62</sup> 501(c)(3) churches are exempt from federal income tax and federal unemployment tax. 26 U.S.C.A. 501(a)-(c) (West Supp. 2005). Church contributions may also qualify for tax exemption from income, estate, and gift tax. Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATHOLIC LAW. 29, 43 (2004). Churches may also issue tax-

The threat is credible because to be recognized as a tax-exempt organization under Section 501(c) (3) of the Internal Revenue Code (“Code”), an organization’s purposes and activities may not violate fundamental public policy. Under the public policy doctrine, a church or other tax-exempt organization may lose its tax-exempt status<sup>63</sup> even if it does nothing illegal and never violates the non-discrimination provisions contained in Section 501.<sup>64</sup> Instead, the organization must only transgress the loose confines of “established public policy,” a concept that neither the US Supreme Court nor the IRS has fully fleshed out, as explained more fully below.

This public policy limitation has its genesis in *Bob Jones University v. United States*.<sup>65</sup> In that case, the IRS revoked the federal tax exemption of two private schools: Goldsboro Christian Schools, which admitted only Caucasian descendants, and Bob Jones University, which prohibited interracial marriage and dating among its students and would not admit students who advocated interracial relationships or participated in them.<sup>66</sup> The Supreme Court upheld the IRS’

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exempt bonds to finance activities, benefit from preferential postal rates, provide tax-deferred retirement plans, qualify for state and local tax exemption, and be exempt under “labor, bankruptcy, and other regulatory regimes.” *Id.*

Massachusetts automatically qualifies as a tax-exempt organization “any religious corporation, trust, foundation, association or organization incorporated or established for religious purposes, . . .” MASS. GEN. LAWS ANN. ch. 68, § 20 (West 2001). For a list of all Massachusetts statutes pertaining to tax exempt/charitable organizations, see Office of the Mass. Attorney General, Charities: Statutes and Regulations, <http://www.ago.state.ma.us/sp.cfm?pageid=1217> (last visited Feb. 2, 2006). Recognition as a not-for-profit or religious organization under state law exempts an entity from ad valorem or property taxes, state sales tax, use tax and income taxes and provides taxpayers a deduction on their state taxes for donations to the entity [check]. For instance, the General Laws of Massachusetts Title IX Chapter 59 section 5 exempts from property taxes “houses of religious worship owned by, or held in trust for the use of, any religious organization.” MASS. GEN. LAWS ANN. ch. 59, § 5 (West YEAR).

<sup>63</sup> Exempt status under section 501(c)(3) requires that “(1) the organization must be organized and operated exclusively for certain purposes; (2) there must not be private inurement to organization insiders; (3) there must be no more than an incidental private benefit to private persons who are not organization insiders; (4) no substantial part of the organization’s activities may be lobbying; and (5) the organization may not participate or intervene in political activities.” JOINT COMMITTEE ON TAXATION, HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 7 (2005), available at <http://www.house.gov/jct/x-29-05.pdf>. Once recognized by the IRS as tax-exempt, a church generally will only jeopardize this tax-exempt status by violating one of the qualifying factors or taking other prohibited actions—chief among these is the restriction that the organization’s purposes and activities may not be illegal or violate fundamental public policy. INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS (2003), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

<sup>64</sup> The only non-discrimination provision in the Code permits the revocation of the tax-exempt status of social clubs that discrimination “on the basis of race, color, or religion.” See 26 U.S.C. § 501(i) (2005) (prohibiting discrimination by certain social clubs).

<sup>65</sup> 461 U.S. 574, 578 (1983).

<sup>66</sup> The IRS relied on Revenue Ruling 71-447, which concluded that racially discriminatory policies in educational settings are “contrary to Federal public policy.” Rev. Rul.71-447, 1971-2 C.B. 230 (addressing whether a private school that otherwise meets the requirements of Section 501(c)(3) qualifies for exemption if it does not have a “racially nondiscriminatory policy as to students”). The IRS reiterated that “all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.” *Id.* at 3.

decision since the schools “prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine”<sup>67</sup> in violation of established public policy. In reaching this decision, the Court found “Congress’ intention was to provide tax benefits to organizations serving charitable purposes.”<sup>68</sup> This is important because, under the common law, “the purpose of a charitable trust may not be illegal or violate established public policy.”<sup>69</sup> Thus the “purpose [of the organization] must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”<sup>70</sup>

Although the schools’ admission standards were not illegal, they nevertheless violated an established public policy. The Court discerned this in “[a]n unbroken line of cases following *Brown v. Board of Education* establish[ing] . . . that racial discrimination in education violates a most fundamental national public policy, as well as the rights of individuals,”<sup>71</sup> Congressional actions that “testify to the public policy against racial discrimination,” like the Voting Rights Act of 1965 and the Civil Rights Act of 1968, and certain Executive Orders prohibiting racial discrimination in federal employment and Selective Service.<sup>72</sup>

The Court made short work of the Schools’ claim that the prohibition on interracial dating was religiously grounded. Denying tax benefits to the schools, the Court noted, would not prevent them “from observing their religious tenets.”<sup>73</sup>

Although Professor Kmiec correctly observes that *Bob Jones* dealt “only with religious schools—not with churches or other purely religious institutions,”<sup>74</sup> later IRS guidance sheds

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Revenue Rulings are similar to legal opinions and “represent policy positions and, unlike private letter rulings, may be used as precedents.” MICHAEL ROSE & JOHN CHOMMIE, *FEDERAL INCOME TAXATION* § 13.05 (3d ed. 1998). However, Revenue Rulings are not substantive authority or “binding on . . . the courts.” *Stubbs, Overbeck & Assocs., Inc. v. United States*, 445 F.2d 1142 (5th Cir. 1971) (stating that a revenue ruling “is merely the opinion of a lawyer in the agency and must be accepted as such. It may be helpful in interpreting a statute, but it is not binding on . . . the courts. It does not have the effect of a regulation . . .”).

<sup>67</sup> See 461 U.S. at 578.

<sup>68</sup> *Id.* at 587.

<sup>69</sup> See *id.* at 591.

<sup>70</sup> *Id.* at 592.

<sup>71</sup> See *id.* at 593-95 (citing numerous examples of legislative, judicial, and executive branch expressions of the idea that racial discrimination in education violates public policy).

<sup>72</sup> *Id.* at 593-94.

<sup>73</sup> *Id.* at 603-04 (“Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.”). Significantly, for purposes of its decision, the Court assumed the legitimacy of racial exclusivity as a religious tenet. See *Bob Jones*, 461 U.S. at 580 (noting that the sponsors of Bob Jones University “genuinely believe that the Bible forbids interracial dating and marriage”).

<sup>74</sup> *Bob Jones*, 461 U.S. at 604. Importantly, nothing in the decision clearly exempts churches from the public policy doctrine. The IRS does distinguish churches from religious organizations and applies slightly different tax rules to each. Douglas Kmiec, this volume; INTERNAL REVENUE SERVICE, *supra* note 63, at 2. Unlike churches, recognized tax exempt religious organizations are not automatically considered tax exempt, but must apply to the IRS unless their gross receipts do not normally exceed \$5,000 annually. *Id.* at 3. While other 501(c)(3) entities must report

some light on the wide swath that established public policy cuts. In a General Counsel Memorandum, the IRS maintains that the *Bob Jones* decision “leave[s] little doubt” that racial discrimination, “whether in an educational context or otherwise,” violates public policy in such a fundamental way to justify revocation of an entities tax-exempt status.<sup>75</sup> A court must therefore assess whether “there is a public policy against a particular activity and, second, whether that public policy is so fundamental as to require the denial or revocation of exempt status for organizations participating in that activity.”<sup>76</sup> In a Private Letter Ruling issued in 1989, the IRS likewise concluded that, “Although applying on its face only to race discrimination in education, the implication of the *Bob Jones* decision extends to any organization claiming exempt status under section 501(c)(3) and to any activity violating a clear public policy.”<sup>77</sup> The Tax Court has also stated, “We believe the *Bob Jones* opinion unqualifiedly held that all organizations seeking exemption under 501(c)(3) must comply with fundamental standards of public policy.”<sup>78</sup> Finally, tax guidance issued by the IRS suggests that conduct that would constitute a violation of law when performed by a state actor may be sufficient to revoke or deny a non-profit’s tax exempt status.<sup>79</sup>

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their financial status, activities, and compensation paid to directors and officers on an Annual Information Report (Form 990), churches are exempt from filing annual informational returns. 26 U.S.C.A. § 6033 (a)(2) (West Supp. 2005). Congress imposed special limitations on how and when the IRS may audit churches. The IRS can only examine the church’s religious activities to the extent necessary to determine whether the organization qualifies for church status, and may examine the church’s records only to the extent necessary to determine whether it is liable for any additional internal revenue tax. See I.R.C. § 7611(b)(1)(A); Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise*, 11 Va. Tax Rev. 71, 75 (1991). Although the Court in *Bob Jones* dealt “only with religious *schools*—not with churches or other purely religious institutions,” (*Bob Jones University v. United States*, 461 U.S. 574 (1983)), nothing in the decision clearly exempts churches from the public policy doctrine.

<sup>75</sup> I.R.S. Gen. Couns. Mem. 39,792, at 11-12 (June 30, 1989) (holding that a perpetual charitable trust’s racially restrictive provision “foster[ed] racial discrimination” and was “inconsistent with established public policy”). In that decision, the trust instrument provided “. . . for the benefit and relief of worthy and deserving white persons . . .” and the trust provided goods and services to needy senior Caucasian citizens over the age of sixty. *Id.* at 5, 14. Since the trust denied eligibility based solely because of race, it aggravated the “burdens placed on those who have traditionally been the subject of discrimination” and consequentially fostered racial discrimination. *Id.* The trust’s activities were contrary to a “clearly defined federal public policy against racial discrimination” and did not fall within section 501(c)(3) or section 4947(a)(1). *Id.* at 15-16.

<sup>76</sup> *Id.* at 8-9.

<sup>77</sup> I.R.S. Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988) (holding that a privately administered trust for general goods and services with a governing instrument restricting beneficiaries to “worthy and deserving white persons” did not qualify for tax-exemption under section 501(c)(3) since the trust “aggravate[ed] the burdens placed on those who have traditionally been the subject of discrimination and thereby fosters racial discrimination” and, consequently, its activities were “contrary to a clearly defined public policy” against discrimination).

<sup>78</sup> *Church of Scientology v. Commissioner*, 83 T.C. 381, 503 n.74 (1984), *aff’d*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied*, (486 U.S. 1015) (holding that the Church of Scientology of California was not operated exclusively for religious purposes under section 501(c)(3)).

<sup>79</sup> At least one commentator reads IRS tax guidance as suggesting that conduct that would constitute a violation of law when performed by a state actor may be sufficient to revoke or deny a non-profit’s tax exempt status. “In the Bishop Estate technical advice memorandum, the IRS appears to maintain that activities that are unconstitutional if committed by the state also violate the public policy doctrine if committed by a private, charitable entity.” Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397, 420 (2005). In that memorandum, the IRS permitted the Bishop Estate, which admitted only Hawaiian descendents, to continue its tax exemption, finding that the Estate’s policies were consonant with U.S. Supreme Court decisions upholding certain race-based

The public policy formulation in *Bob Jones* raises a number of threshold questions. First, what defines the contours of public policy? The Supreme Court’s decision in *Bob Jones* and tax guidance on this point variously describe the relevant yardstick as “‘established’ or ‘fundamental’ public policy,”<sup>80</sup> “fundamental national public policy,”<sup>81</sup> the “common community conscience,”<sup>82</sup> “fundamental standards of public policy,”<sup>83</sup> “clear public policy,”<sup>84</sup> and “national public policy.”<sup>85</sup> One important question here is whether state or local law may shape or comprise public policy. Commentators have argued that:

[O]ne can readily construct at least a superficially appealing case for looking to state law under the public policy doctrine. Some commentators appear willing to do just that in certain contexts.<sup>86</sup>

Thus, Professor Brennan believes that the IRS could engage in “a type of analysis that considers a variety of sources constitutional, non-constitutional, federal and non-federal,” in deciding whether a violation of established public policy exists.<sup>87</sup>

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governmental programs. The IRS advised the Estate, however, to seek a private letter ruling on the memorandum’s application following the then-pending Supreme Court decision in *Rice v. Cayetano*, 528 U.S. 495, 524 (2000), which struck down “Hawaii’s law prohibiting persons of non-native ancestry from voting in an election for trustees of a state agency charged with bettering conditions for native Hawaiians.” Buckles, *supra*, at 407 n.54. As Professor Buckles observed, the Bishop Estate ruling “arguably reflects the position of the IRS that action by the state which are unconstitutional also violate the public policy doctrine when committed not by the state but by private charitable entities.” *Id.*

<sup>80</sup> See Buckles, *supra* note 79, at 432 (“tax-exempt charities need comply only with ‘established’ or ‘fundamental’ public policy”).

<sup>81</sup> *Bob Jones*, 461 U.S. at 593.

<sup>82</sup> *Id.* at 592.

<sup>83</sup> *Church of Scientology v. Commissioner*, 83 T.C. 381, 503 n.74 (1984).

<sup>84</sup> I.R.S. Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988).

<sup>85</sup> Rev. Rul. 71-447, 1971-2 C.B. 230 (concluding that a private school that otherwise meets the requirements of Section 501(c)(3) qualifies for exemption if it has a “racially nondiscriminatory policy as to students” since Titles IV and VI, The Civil Rights Act of 1964, *Brown v. Board of Education*, and numerous Federal court cases “demonstrate a national policy to discourage racial discrimination in education, whether public or private”). The IRS reiterated that “all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.” *Id.* at 3.

<sup>86</sup> Buckles, *supra* note 79, at 427 (citing David A. Brennan, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law’s Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779, 841 (2002)).

<sup>87</sup> Brennan, *supra* note 86, at 848 (arguing that because the public policy doctrine emanates from Section 501(c)(3) of the Code and is a statutory principle, “it is entirely inappropriate” for the IRS to look “almost exclusively” to constitutional law principles rather than alternative sources such as state law to decide when a charity violates established public policy”). See also Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998) (conceptualizing exemption under 501(c)(3) as premised on the notion that charitable entities are “co-sovereigns” with the state); but see Buckles, *supra* note 79, at 430-33 (maintaining that limiting the public policy doctrine only to federal public policy is a more rational approach).

Even those academics who question the applicability of state law to the public policy analysis concede that “[f]or now, it is sufficient to observe that state law should not be deemed entirely irrelevant in the quest for shaping the public policy doctrine.”<sup>88</sup>

In short, within the loose confines of “established public policy,” churches that oppose same-sex marriage in the United States today could reasonably conclude that they face a credible, palpable threat to their federal tax-exemption, and possibly to state-level exemptions as well. While we might conclude that the risk is not great,<sup>89</sup> conscience clauses are helpful in muting this risk, especially those patterned after the Weldon Amendment.

#### D. Degree of Protection Conferred by Conscience Clauses

The recognition of same-sex marriage also poses a second level of risk, this one facing individuals. While individual clergy presumably will not suffer repercussions for refusing to marry same-sex couples, at least if consistent with church tenets,<sup>90</sup> individual clerks at state offices who refuse to complete a license for a same-sex couple may face real consequences.

Prior to the legislative accommodation in conscience clauses, healthcare providers who did not want to perform controversial services did so at great risk to themselves. Thus, individual physicians and pharmacists have been disciplined, dismissed, sued and retaliated against for not going along, either with their employers or with patient demands to participate in abortions or other services.<sup>91</sup> The legislative responses to these risks demonstrate the range of

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<sup>88</sup> Buckles, *supra* note 79, at 432. The public policy doctrine raises other questions as well. Is a pattern of behavior is required or will a single violation suffice? Professor Buckles speculates that “determining whether public policy is ‘established’ may be something like a game of darts:”

Acting in a manner that plainly violates (or causes another to violate) a statute, the Constitution, or an Executive Order is like hitting the “bull’s eye”; it constitutes a breach of public policy. Acting in a manner that does not technically defy (or cause another to defy) any such authority is like hitting one of the concentric circles surrounding the bull’s eye; one hit is not worth as much as striking the center-most point on the board, but multiple hits in one of the larger circles may equate to a single strike to the bull’s eye.

*Id.* at 433. Also unclear is whether an organization that “commit[s] some illegal acts but still confer[s] an overall public benefit . . . would violate the public policy doctrine. This judicial silence poses no small problem to those seeking clarity in the public policy doctrine.” *Id.* at 410.

<sup>89</sup> Even if punishing churches that oppose same-sex marriage is unlikely to be tax policy in the current administration, see Laura Spitz, *At the Intersection of North American Free Trade and Same-Sex Marriage*, 9 UCLA J. INT’L L. & FOREIGN AFF. 163, 178 & n.48 (2004) (“White House political adviser Karl Rove said after the November 2004 election that President Bush intends to continue seeking a constitutional amendment defining marriage as between a man and a woman.”) (internal citations omitted), the public policy doctrine as constructed in *Bob Jones* does not foreclose future administrations from taking this position.

<sup>90</sup> [Pamela]

<sup>91</sup> Firing and other disciplinary action against pharmacists who refuse to provide emergency contraceptives have dominated the news recently. See, e.g., Leah Thorsen, *Druggists Suspended in Debate over Pill*, ST. LOUIS POST-DISPATCH, Nov. 30, 2005, at A1 (reporting that Walgreen’s placed four Illinois pharmacists in the St. Louis area on unpaid leave for refusing to fill prescriptions for emergency contraception in violation of a rule imposed by Illinois Gov. Rod Blagojevich in April of 2005 that requires Illinois pharmacies that sell contraceptives approved by the

protection available to individuals and institutions and offer us one way to manage the clash between competing moral views.

Although nearly every state has a healthcare conscience clause encompassing some service, states vary dramatically in the strength of the protection given to individuals and facilities that refuse to participate. Some states provide no protection for the invoker.<sup>92</sup> Others permit an objection only if the invoker “shows proof” or states the reasons for objecting in writing.<sup>93</sup>

Some states burden the refusal hardly at all, requiring only notice to the patient beforehand.<sup>94</sup> Some jurisdictions permit the invoker to object so long as they do not pose a “road block” to the patient’s ability to access the desired service from another provider.<sup>95</sup> Other statutes require the doctor or institution to facilitate the patient’s ability to get the service from another provider.<sup>96</sup>

Some of these clauses simply parrot the protection afforded by the Church Amendment.<sup>97</sup> But many also insulate providers from punishment at the hands of the state and local government, as the Weldon Amendment does.<sup>98</sup>

Like the Church Amendment, many state conscience clauses address an individual’s risk of coercion by her employer. Others recognize the burden that individual refusal can place on an employer. Thus, employees hired for the express purpose of performing a specific service are not

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FDA to fill prescriptions for emergency birth control); Marilyn Gardner, *Pharmacist’s Moral beliefs vs. Women’s legal rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11, available at <http://www.csmonitor.com/2004/0426/p11s01-usju.html> (reporting that a K-Mart pharmacist faced disciplinary hearings in Wisconsin after refusing to fill or transfer a woman’s prescription for birth-control pills on the basis on the pharmacist’s religious beliefs).

As of 2005, South Dakota, Arkansas, Mississippi, and Georgia have laws specifically protecting a pharmacists’ right to refuse to dispense medicines. Tresa Baldas, *Attorneys Fear Repercussions of Refusal-to-treat Trend*, RECORDER, Feb. 8, 2005, at 3; Kari Lydersen, *Illinois Pharmacies Required to Fill Prescriptions for Birth Control*, WASH. POST, Apr. 2, 2005, at A2. Twenty-two states last year considered legislation that would allow pharmacists to deny prescriptions. See Kaiser Family Foundation, *U.S. Lawmakers Introduce Legislation Requiring Pharmacies To Fill All Prescriptions, Including Contraceptives*, DAILY WOMEN’S HEALTH POL’Y REP., Apr. 15, 2005, at [http://www.kaisernetwork.org/daily\\_reports/rep\\_repro\\_recent\\_reports.cfm?dr\\_cat=2&show=yes&dr\\_DateTime=15-Apr-05#29373](http://www.kaisernetwork.org/daily_reports/rep_repro_recent_reports.cfm?dr_cat=2&show=yes&dr_DateTime=15-Apr-05#29373) (reporting that states proposing such legislation include Arizona, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin).

<sup>92</sup> See Appendix A, Number 1.

<sup>93</sup> See *id.*, Number 2.

<sup>94</sup> See *id.*, Number 3.

<sup>95</sup> See *id.*, Number 4.

<sup>96</sup> See *id.*, Number 5.

<sup>97</sup> See *id.*, Number 6.

<sup>98</sup> See *id.*, Number 7.

exempted, nor are employees who work for facilities that exclusively provide abortions.<sup>99</sup> Other states limit this encroachment on individual consciences to employers that will experience an undue hardship as a result.<sup>100</sup> In contrast, other states prohibit employers from asking prospective employees about refusal to participate.<sup>101</sup>

Importantly, these clauses sometimes accommodate matters of conscience in both directions—think of the physician who performs abortions outside the Catholic hospital but wants privileges in it. The “renegade” physician may worry that she is at risk for a denial of privileges at the Catholic hospital or other sanction. California removes this risk: a person associated with a medical facility that does not permit abortion “may not be subject to any penalty or discipline on account of the person’s participation in the performance of an abortion in other than the [facility].”<sup>102</sup>

Some states extend the right to refuse to grounds other than religion or morality.<sup>103</sup> Some limit the ability to refuse only to denominational hospitals.<sup>104</sup> Others have expanded the right to refuse even to insurers and other healthcare entities.<sup>105</sup> Many states recognize the hardship that handing out the right to refuse may pose for patients in need of the service.<sup>106</sup> For this reason, some states limit the ability to refuse only to non-emergencies.<sup>107</sup>

In short, states have structured legislative accommodations in a variety of ways to provide greater or lesser protection for persons of conscience.

## II. The Limits of State Conscience Clauses

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<sup>99</sup> *See id.*, Number 8.

<sup>100</sup> *See id.*, Number 9.

<sup>101</sup> *See id.*, Number 10.

<sup>102</sup> *See id.*, Number 11.

<sup>103</sup> *See id.*, Number 12.

<sup>104</sup> *See id.*, Number 13.

<sup>105</sup> *See id.*, Number 14.

<sup>106</sup> Critics of conscience clauses lament that in many rural and traditionally conservative areas, the next closest pharmacy or hospital is miles away and not easily accessible. Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider “Conscience,” Patient Needs*, THE GUTTMACHER REPORT (August 2004), available at <http://www.guttmacher.org/pubs/tgr/07/3/gr070301.pdf>.

Recognizing that access issues are the dark underside of conscience clauses, some professional pharmacy groups believe we should do more to direct patients to willing providers. The American Pharmaceutical Association “recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure patient access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal.” American Pharmacists Ass’n, 2004 House of Delegates, Report of the Policy Review Committee, available at [http://www.aphanet.org/AM/Template.cfm?Section=Search&section=About\\_APhA1&template=/CM/ContentDisplay.cfm&ContentFileID=224](http://www.aphanet.org/AM/Template.cfm?Section=Search&section=About_APhA1&template=/CM/ContentDisplay.cfm&ContentFileID=224) (last visited Feb. 2, 2006).

<sup>107</sup> *See* Appendix A, Number 15.

Even though they provide important and real insulation for persons of conscience, if the healthcare context is any indicator, state legislative accommodations may not be a panacea. As more and more professionals invoke them, courts, regulators, and policymakers have pushed back from this moral fault line.

### A. State Constitutional Provisions Trump Legislative Accommodations

An Alaska Supreme Court case, *Valley Hospital Association*,<sup>108</sup> demonstrates one important limit of conscience clause protection: It must yield to the state constitution. Valley Hospital, a non-profit corporation, prohibited abortions unless there was documentation that the fetus had a condition incompatible with life, the mother's life was threatened, or the pregnancy was the result of incest.<sup>109</sup> The lower court ruled this unconstitutional and the Supreme Court agreed. The Court first found that Alaska's state constitution protects reproductive autonomy more broadly than the US Constitution.<sup>110</sup> It then found that the hospital was "quasi public"<sup>111</sup> and therefore could not infringe on a woman's fundamental right unless there was a compelling interest for doing so.

The Court gave little weight to Alaska's conscience clause, which provided that "Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital liable for refusing to participate in an abortion . . ." The hospital's "sincere moral belief," the Court wrote, could not outweigh the ability to procure an abortion.<sup>112</sup> In their view, constitutional rights "cannot be allowed to yield simply because of disagreement with them." The Court concluded that Valley Hospital, as a non-denominational hospital, had "at most a statutory right," which the legislature may not balance against "constitutional ones."<sup>113</sup> Thus, conscience clauses, the Court held, are unconstitutional as applied to public entities.<sup>114</sup>

The question then became whether Valley Hospital—a private, not-for-profit community hospital—was sufficiently public to preclude application of the state's conscience clause. The Supreme Court held that the hospital was quasi-public for a number of reasons: it was the only hospital serving the community; the hospital's construction was funded in significant part by state and federal grants; and a substantial percentage of the funds received for hospital services came from governmental sources. In addition, the hospital had a "special relationship" with the

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<sup>108</sup> *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 966 (Alaska 1997).

<sup>109</sup> *Id.* at 965.

<sup>110</sup> *Id.* at 966.

<sup>111</sup> The hospital was quasi-public because: it was the only hospital serving the community; the hospital's construction was funded in significant part by State and federal grants; and a substantial percentage of the funds received for hospital services came from governmental sources. In addition, hospital had a "special relationship" with the state through the State's Certificate of Need program, and as was a "community hospital" whose board was elected by a public membership.

<sup>112</sup> *Id.* at 972.

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

<sup>114</sup> *Id.*

state through the State’s Certificate of Need program, and as a “community hospital,” its board was elected by public membership.

## **B. Discounting the Objections of Some**

As more and more professionals invoke conscience clauses, regulators and policymakers have pushed back from this moral fault line, cabining earlier, broader protections. For instance, an Iowa Attorney General Opinion concluded that the state’s conscience clause exception did not extend to those not “recommending, performing, or assisting in an abortion procedure.”<sup>115</sup> Consequently, nurses asked to provide comfort to a patient or pharmacists asked to make up the saline solution used in abortions could not use the conscience clause to refrain from doing their job. The opinion emphasized the “slippery slope” that a contrary decision would create: “one could eventually get to the point where the man who mines the iron ore that goes to make the steel, which is used by a factory to make instruments used in abortions could refuse to work on conscientious grounds.”

This decision that some actions are too remote departs from the US Supreme Court’s treatment of conscientious objections about war. In that context, the Supreme Court has said that invokers get to decide how offensive a task is, not the rest of the world. In *Thomas v. Review Board*,<sup>116</sup> the Court found Indiana’s denial of unemployment compensation benefits to the plaintiff violated his First Amendment right to free exercise of religion. Thomas, a Jehovah’s Witness, resigned from his position at the Blaw-Knox Machinery Company when he was transferred to a department that fabricated turrets for military tanks. Thomas maintained that his religious beliefs prevented him from participating in the production of war materials, although he previously worked in another department for Blaw-Knox making sheet steel for industrial use. He was denied unemployment compensation under Indiana’s Employment Security Act. Both the Review Board and the Indiana Supreme Court concluded that Thomas made a personal choice rather than a religious choice and, consequently, that his termination was not based upon “good cause arising in connection with his work.” The Indiana court gave “significant weight to the fact that another Jehovah’s Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was ‘scripturally’ acceptable.”<sup>117</sup>

Reversing the Indiana Supreme Court, the Supreme Court noted that it is not the role of the Court to “dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.”<sup>118</sup> Although the Indiana compensation statute did not compel a violation of conscience, the Court concluded that even a facially neutral regulation may offend the constitutional requirement for government neutrality if it “unduly burdens the free exercise of religion.” Here, the Court found that Thomas was left with no alternative but to resign.

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<sup>115</sup> 41 Iowa Op. Att’y Gen. 478 (1976).

<sup>116</sup> 450 U.S. 707 (1981).

<sup>117</sup> Id. at 715.

<sup>118</sup> Id. at 707-708.

### III. What Do Healthcare Conscience Clauses Offer to the Moral Clash over Same-Sex Marriage?

What can these healthcare statutes tell us about how to navigate the impending collision over same-sex marriage? First, the deeply divisive nature of same-sex marriage surely will raise horizontal claims like those we have seen in healthcare, between same-sex couples and those who object to performing same-sex marriage ceremonies. Vertical clashes are also conceivable, between individual clerks or clergy and their parent institutions, the state or the church.

Second, until the legislature acts, it is likely that churches, clergy and state clerks will face litigation designed to resolve the question of their participation in same-sex marriage or, conversely, their right to refrain. As Professor Feldblum points out in this volume, state anti-discrimination laws are already in place in many states and place a big thumb on the scale against the right to refrain from facilitating same-sex marriage. Anti-discrimination laws have figured prominently in a related context, adoption. The Catholic Bishops of Massachusetts is seeking permission from the state to exclude gay and lesbian parents from adopting children through their social service agencies. Massachusetts Governor Mitt Romney recently indicated that he did not have the authority to grant such an exemption. Any exemption, Governor Romney has said, would have to come from the legislature or through a judicial ruling.<sup>119</sup>

Third, legislative accommodations can affect the outcome of litigation, as the Church Amendment illustrates. Now, it may be that an exemption will be ultimately unnecessary with respect to churches or individual clergy, since the prohibition against excessive entanglement between church and state under the First Amendment already provides considerable insulation.<sup>120</sup> For example, courts have refused to reach a determination on the merits in a lawsuit over a pastor's claims regarding her appointment and discharge because they were "fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives" for discharge.<sup>121</sup> Here, one can easily imagine clashes between a

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<sup>119</sup> Patricia Wen, *Bishops Dealt Setback in Pursuit of Gay Adoption Exemption*, THE BOSTON GLOBE, February 17, 2006, at B3.

<sup>120</sup> Churches already receive considerable insulation from the first risk as result of the prohibition against excessive entanglement between church and state under the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The entanglement doctrine provides that the exercise of government authority is valid if (1) it has a secular purpose; (2) the primary effect is one that neither advances nor inhibits religion; and (3) it does not foster excessive entanglement between church and state. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and applies to both legislative and judicial power, *Kreshnik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960). The state may not inquire into or review the internal decision-making or governance of a religious institution. *Jones v. Wolf*, 443 U.S. 595, 602, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979).

Legislative exemptions from certain laws for religious organizations have survived establishment clause attacks. In *Amos*, for example, the US Supreme Court concluded that an exception for religious organizations in a law prohibiting religious discrimination in the workplace did not violate the Establishment Clause. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987).

<sup>121</sup> *Black v. Snyder*, 471 N.W.2d 715, 720 (Minn.App.1991), review denied (Minn. Aug. 29, 1991). Similarly, a pastor's appointment and discharge were not reviewable because adjudication of the pastor's claims would require an evaluation of scripture, doctrine, and moral principles. *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 611-12 (Minn.App.1996), review denied (Minn. Mar. 19, 1996). Likewise, individuals fired by church-owned corporations because of non-affiliation with the church's particular religion received no

same-sex couple and a church or individual clergy who refuses to marry the couple. Any claim against the church or clergy presumably is doomed to fail since it would require an inquiry into the internal decision-making of a religious institution, be fundamentally connected to issues of church doctrine and governance, and require evaluation of scriptures and church doctrine.<sup>122</sup> In this instance, a legislative accommodation may accomplish little more than the entanglement doctrine already provides. But state clerks are a different matter entirely. For them, legislative accommodations are crucial to the ability to refuse to complete the necessary paperwork or solemnize marriages, as clerks do in some states.<sup>123</sup>

Fourth, legislative accommodations affect not only the outcome of litigation, but its likelihood as well. Here is the real value of legislative accommodations even for churches and clergy. An accommodation that encompasses not only clerks, but churches and clergy, may forestall individual suits against individual churches or persons premised on the notion that they receive public benefits or serve a public function—solemnizing marriage—and so must provide access to a public good. Broad legislative accommodations may also forestall efforts by local governments to pressure churches into performing same-sex marriages, using the same “public benefits” club. Moreover, a federal Weldon-like legislative accommodation would make it more expensive for state and local governments to punish churches, clergy or (more likely) state clerks that refuse to participate in same-sex marriage.

Fifth, in this contest over competing values, there will be winners and losers. How we respond to the question of which person’s claim should take precedence reflects how deeply committed society is to safeguarding the religious and moral convictions of some at the expense of others. For instance, when the Alaska Supreme Court held that a private, not-for-profit hospital could not burden the ability to procure an abortion,<sup>124</sup> it was saying that the right to abortion matters more than an invoker’s interest in not participating. That decision is tantamount to saying that “not only do I deserve an abortion, but you’re going to perform it.” Legislatures that refuse to enact conscience clauses may well be saying the same thing about same-sex marriage.

Sixth, the lesson of *Roe* and *Griswold* is that the individual's right to be free from the state's interference with reproductive and contraceptive choices is just that – the right to be free from interference. It does not translate directly into a right to assistance, something that legislatures have chosen to make clear by statute. Now it may be that nature of marriage is different from these non-interference rights, given the fact that marriage is a fundamental right.<sup>125</sup> Because they stand as an entry way into marriage, with all its personal and financial benefits, churches, clergy and clerks who refuse to authenticate a marriage may be taking a right away since the same-

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protection from dismissal. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987).

<sup>122</sup> See *Doe v. Lutheran High School of Greater Minneapolis* 702 N.W.2d 322 (Minn. App. 2005) (citing *Lemon*).

<sup>123</sup> For example, in addition to religious officials, Maryland state law allows a marriage ceremony to be performed by a clerk, a deputy clerk designated by the county administrative judge of the circuit court for the county, or a judge. Md. Code Ann., Fam. Law §§ 2-406 (conduct of ceremonies); 2-410 (fees).

<sup>124</sup> *Id.* at 972.

<sup>125</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“[T]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. ... Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.” (quoting *Skinner v. State of Oklahoma*).

sex couple cannot secure this good in any other way. Here, too, the abortion analogy is helpful. Unlike abortion, where the state does not have to be in the business of performing abortions, the state IS in the business of performing marriages. But, because so many different persons can marry couples in any one state, a state might nonetheless choose to ignore the state's special role with respect to marriage. In other words, access to the services of any one individual or church should matter only when it effectively bars access to the institution of marriage. Of course, in remote parts of a state, the ability to object may frustrate the ability of same-sex couples to exercise their right to marry, and for this reason, states may choose to create hardship exceptions to any conscience clause protection they enact, as is done with abortion.

Seventh, the power of the state legislatures is not unlimited. Any legislative effort will necessarily yield to the state and federal constitution.

Significantly, the healthcare model for legislative accommodation is one that has been used outside the United States with respect to the deeply divisive questions raised by same-sex marriage. Canada's new legislation authorizing gay marriage in all Canadian provinces included legislative provisions to "ensure the rights of religious officials and [others] who hold social or cultural beliefs or values, whether religious or non-religious," that may be offended by participation in gay marriage.

But this is hardly new. These questions have arisen since churches first struggled with what to do about remarriage. Like the healthcare examples within the United States, the legislative accommodation experimented with outside the US provides a guide for regulating the boundary between competing views of same-sex marriage. For instance, British Parliament in 1857 addressed the obligation of clergymen to solemnize the marriage of remarried persons, a question hastened by Parliament's decision to permit once married persons to marry again. It provided that "no Clergyman in Holy Orders of the United Church of *England and Ireland* shall be compelled to solemnize the Marriage of any Person whose former Marriage may have been dissolved on the Ground of his or her Adultery, or shall be liable to any Suit, Penalty, or Censure for solemnizing or refusing to solemnize the Marriage of any such Person" provided that "such Minister shall permit any other Minister in Holy Orders of the said United Church, entitled to officiate within the Diocese in which such Church or Chapel is situate, to perform such Marriage Service in such Church or Chapel."<sup>126</sup> This, then is a variant on the transfer statutes in the

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<sup>126</sup> An Act to amend the Law relating to Divorce and Matrimonial Causes in England, 1857, 20 & 21 Vict., c. 85, §§ 57-58 (Eng.). It provided:

§ 57. When the Time hereby limited for appealing against any Decree dissolving a Marriage shall have expired, and no Appeal shall have been presented against such Decree, or when any such Appeal shall have been dismissed, or when in the Result of any Appeal any Marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective Parties thereto to marry again, as if the prior Marriage had been dissolved by Death: Provided always, that no Clergyman in Holy Orders of the United Church of *England and Ireland* shall be compelled to solemnize the Marriage of any Person whose former Marriage may have been dissolved on the Ground of his or her Adultery, or shall be liable to any Suit, Penalty, or Censure for solemnizing or refusing to solemnize the Marriage of any such Person.

§ 58. Provided always, That when any Minister of any Church or Chapel of the United Church of *England and Ireland* shall refuse to perform such Marriage Service between any Persons who but

abortion context: A clergyman doesn't have to perform the ceremony himself, but he cannot stop anyone else from doing so.

More recently, Great Britain enacted the Gender Recognition Act of 2004 to address issues that arise when a person re-establishes his or her own gender.<sup>127</sup> Under the act, a person over the age of 18 may apply to the panel charged with granting recognition of a gender change.<sup>128</sup> If the person is in a heterosexual marriage that would become homosexual when the change is recognized, the panel will issue an interim gender recognition certificate and the marriage may be annulled. Once a full gender recognition certificate is awarded, the person's gender is recognized as the acquired gender for all purposes. The act amended prior law to provide that clergymen and clerks are not obligated to perform marriages of people who have changed genders, even those recognized under the Gender Recognition Act.<sup>129</sup>

#### IV. Conclusion

The decision in *Roe* did not force anyone to perform abortions; despite this, this question was repeatedly re-visited in lawsuit after lawsuit. Even after the Church Amendment, private, not-for-profit hospitals were forced to defend their choice not to make their facilities available for the performance of abortions. Although courts turned back a number of these claims, the history of this litigation after *Roe* provides a convincing prediction about the trajectory that litigation after *Goodridge* will take. States can deflect this litigation as they have with abortion and other deeply divisive questions by deciding now whether issues of conscience matter.

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for such Refusal would be entitled to have the same Service performed in such Church or Chapel, such Minister shall permit any other Minister in Holy Orders of the said United Church, entitled to officiate within the Diocese in which such Church or Chapel is situate, to perform such Marriage Service in such Church or Chapel.

<sup>127</sup> Gender Recognition Act, 2004, c. 7.

<sup>128</sup> The panel examines, among other things, whether the person has lived as the opposite gender for at least two years and intends to continue living as the opposite gender. Once the panel grants an application, it must issue a gender recognition certificate formerly recognizing the person as the opposite gender.

<sup>129</sup> Amending the Marriage Act of 1949, 1949, 12, 13 & 14 Geo. 6, c. 76: (“5B Marriages involving person of acquired gender: (1) A clergyman is not obliged to solemnise the marriage of a person if the clergyman reasonably believes that the person's gender has become the acquired gender under the Gender Recognition Act 2004. (2) A clerk in Holy Orders of the Church in Wales is not obliged to permit the marriage of a person to be solemnised in the church or chapel of which the clerk is the minister if the clerk reasonably believes that the person's gender has become the acquired gender under that Act.”).



## APPENDIX A: EXCEPRTS FROM SELECTED STATE STATUTES

## 1. STATES PROVIDING NO CONSCIENCE CLAUSE PROTECTION

Three states provide no conscience clause protection at all, Alabama, New Hampshire and Vermont.

## 2. STATES WHICH PERMIT AN OBJECTION ONLY IF INVOKER SHOWS PROOF OR STATES REASONS FOR OBJECTING IN WRITING.

ARIZ. REV. STAT. ANN. § 36-2151 (2003):

A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital, doctor, clinic, or other medical or surgical facility in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical or surgical procedures which will result in the abortion.

CAL. HEALTH & SAFETY CODE § 123420(a) (West 1996):

No employer or other person shall require a physician [or other health care provider] to directly participate in the induction or performance of an abortion, if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate in the abortion.

COLO. REV. STAT. ANN. § 18-6-104 (West 2004):

A person who is a member of or associated with the staff of a hospital or any employee of a hospital in which a justified medical termination has been authorized and who states in writing an objection to the termination on moral or religious grounds is not required to participate in the medical procedures which result in the termination of a pregnancy . . . .

GA. CODE ANN. § 16-12-142 (2003) (“[A]ny person who states in writing an objection to any abortion or all abortions on moral or religious grounds shall not be required to participate in procedures which will result in such abortion . . . .”); IDAHO CODE ANN. § 18-612 (2004) (“Any physician [or other health care provider] shall be deemed to have sufficiently objected to participation in such procedures only if he or she has advised such hospital in writing that he or she generally or specifically objects to assisting or otherwise participating in such procedures.”); 720 ILL. COMP. STAT. ANN. 510/13 (West 2003) (“No physician, hospital, ambulatory surgical center, nor employee thereof, shall be required against his or its conscience declared in writing to perform, permit or participate in any abortion . . . .”); KY. REV. STAT. ANN. § 311.800 (West 2005) (“No physician [or other health care provider] who shall state in writing to such hospital or health care facility his objection to performing . . . [an] abortion on moral, religious or professional grounds, be required to, or held liable for refusal to, perform, participate in, or cooperate in such abortion”); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 2003) (A physician or other health care provider in a facility where an abortion is scheduled, “who shall state in

writing an objection to such abortion or sterilization procedure on moral or religious grounds, shall not be required to participate in the medical procedures which result in such abortion or sterilization . . . .”); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992) (“When the performing of an abortion . . . is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefor with the appropriate and responsible [institution or person] . . . .”); 43 PA. CONS. STAT. ANN. § 955.2 (West 1991) (“No physician, [or other health care provider], who shall state in writing to [his or her] hospital or health care facility an objection . . . on moral, religious, or professional grounds, shall be required to or held liable for refusal to, perform, participate in, or cooperate in such abortion . . . .”); VA. CODE ANN. § 18.2-75 (2004) (“Any person who shall state in writing an objection to any abortion or all abortions on personal, ethical, moral or religious grounds shall not be required to participate in procedures which will result in such abortion . . . .”).

For a variation on this, Rhode Island provides an exception for scheduled abortions only:

A physician or [other health care provider] or any employee of a health care facility in which an abortion . . . is scheduled, and who shall state in writing an objection to the abortion . . . on moral or religious grounds, shall not be required to participate in the medical procedures which result in the abortion . . . .

R.I. GEN. LAWS § 23-17-11 (1996).

### 3. STATES WITH MINIMAL BURDENS ON REFUSALS, REQUIRING ONLY NOTICE TO THE PATIENT BEFOREHAND

*See, e.g.*, CAL. HEALTH & SAFETY CODE § 123420(c) (West 1996) (“Any such facility or clinic that does not permit the performance of abortions on its premises shall post notice of that proscription in an area of the facility or clinic that is open to patients and prospective admittees.”); NEB. REV. STAT. §§ 28-337 (1995) (“No [health care] facility in this state shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein, but the [health care] facility shall inform the patient of its policy not to participate in abortion procedures.”); OR. REV. STAT. § 435.475 (2003) (providing that “[n]o hospital is liable for its failure or refusal to participate in such termination if the hospital has adopted a policy not to admit patients for the purposes of terminating pregnancies. However, the hospital must notify the person seeking admission to the hospital of its policy.”); 16 PA. CODE §§ 51.1 - 51.61 (YEAR) (“When . . . objections [to abortion or sterilization] are so stated, they shall be reprinted and made known to all persons employed by or participating in medical or other services provided by such institution and shall be made freely available and conspicuously posted for public inspection”).

In a variant on this, some states allow physicians to refuse to give patients information about an abortion, but the physician must let the patient know about the refusal. *See, e.g.*, OR. REV. STAT. § 435.485 (2003) (“No physician is required to give advice with respect to or participate in any termination of a pregnancy if the refusal to do so is based on an election not to give such advice or to participate in such terminations and the physician so advises the patient.”)

### 4. STATES PERMITTING THE INVOKER TO OBJECT SO LONG AS THEY DO NOT POSE A ROAD BLOCK TO PATIENT'S ACCESS FROM ANOTHER PROVIDER.

These statutes allow providers to tell patients “to find someone else.” ARK. CODE ANN. § 20-16-601(a) (2005) (“No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy.”); CONN. AGENCIES REGS. § 19-13-D54(f) (YEAR) (“No person shall be required to participate in any phase of an abortion that violates his or her judgment, philosophical, moral or religious beliefs.”); DEL. CODE ANN. tit. 24, § 1791 (2005) (“No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy”); FLA. STAT. ANN. § 390.0111(8) (West 2002):

No person who is a member of, or associated with, the staff of a hospital, nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds shall be required to participate in the procedure which will result in the termination of pregnancy;

HAW. REV. STAT. ANN. § 453-16(d) (LexisNexis 2005) (“Nothing in this section shall require any hospital or any person to participate in such abortion nor shall any hospital or any person be liable for such refusal.”); IND. CODE ANN. §§ 16-34-1-4 (LexisNexis 1993) (“No physician or [other health care employee] shall be required to perform an abortion or to assist or participate in the medical procedures resulting in or intended to result in an abortion, if that individual objects to such procedures on ethical, moral, or religious grounds.”); IOWA CODE ANN. §§ 146.1 (West 2005) (“An individual who may lawfully . . . participate in medical procedures which will result in an abortion shall not be required against that individual’s religious beliefs or moral convictions to . . . participate in such procedures.”); KAN. STAT. ANN. §§ 65-443 (2002) (“No person shall be required to . . . participate in medical procedures that result in the termination of a pregnancy, and the refusal of any person to . . . participate . . . shall not be a basis for civil liability to any person.”); ME. REV. STAT. ANN. tit. 22, §§ 1591, 1592 (2004) (“No physician, nurse or other person who refuses to perform or assist in the performance of an abortion, and no hospital or health care facility that refuses to permit the performance of an abortion on its premises, shall be liable to any person . . .”); MICH. COMP. LAWS ANN. §§ 333.20181 (West 2001) (“A hospital, clinic, institution, teaching institution, or other health facility or a physician, member, or associate of the staff, or other person connected therewith, may refuse to perform, participate in, or allow to be performed on its premises an abortion.”); MINN. STAT. ANN. § 145.414 (West 2005) (“No person and no hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, or assist or submit to an abortion for any reason.”); N.M. STAT. ANN. § 30-5-2 (LexisNexis 2003) (“A person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital . . . who objects on moral or religious grounds shall not be required to participate in medical procedures which will result in the termination of a pregnancy . . .”); N.C. GEN. STAT. § 14-45.1(e), (f) (2005) (“Nothing in this section shall require a physician licensed to practice medicine in the North Carolina or any nurse who shall state an objection to abortion on moral, ethical, or religious grounds, to perform or participate in medical procedures which result in an abortion.”); N.D. CENT. CODE § 23-16-14 (2002) (“No hospital, physician, nurse, hospital employee, nor any other person is under any duty, by law or contract, nor may such hospital or person in any circumstances be required to participate in an abortion, if such hospital or person objects to such abortion.”); OHIO REV. CODE ANN. § 4731.91 (LexisNexis 2003) (“No person is required to perform or participate in medical procedures which result in abortion, and refusal to perform or participate in the medical procedures is not grounds for civil liability nor a basis for disciplinary or other recriminatory action.”); S.D. CODIFIED LAWS §§ 34- 23A-11 (1994) (“No

counselor, social worker, or anyone else who may be in such a position to where the abortion question may appear as a part of [the] workday routine, shall be liable . . . for damages arising from advising or helping to arrange for or for refusal to arrange or encourage abortion . . .”); S.D. CODIFIED LAWS §§ 34- 23A-12 (1994) (“No physician, nurse, or other person who refuses to perform or assist in the performance of an abortion shall be liable to any person for damages arising from that refusal.”); TENN. CODE ANN. §§ 39-15-204 (2003) (“No physician shall be required to perform an abortion and no person shall be required to participate in the performance of an abortion. No hospital shall be required to permit abortions to be performed therein.”); WYO. STAT. ANN. § 35-6-106 (2005) (“No person shall . . . be required to . . . participate in any abortion . . .”); 18 PA. CONS. STAT. ANN. § 3213(d) (West 2000):

Except for a facility devoted exclusively to the performance of abortions, no medical personnel or medical facility, nor any employee, agent or student thereof, shall be required against his or its conscience to aid, abet or facilitate performance or an abortion or dispensing of an abortifacient and failure or refusal to do so shall not be a basis for any civil, criminal, administrative or disciplinary action, penalty or proceeding, nor may it be the basis for refusing to hire or admit anyone.

These statutes tend not to distinguish between private and public hospitals; instead they insulate any hospital. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2151 (2003) (“No hospital is required to admit any patient for the purpose of performing an abortion.”).

#### 5. STATES REQUIRING DOCTOR/FACILITY TO FACILITATE PATIENT'S ABILITY TO GET SERVICE FROM ANOTHER PROVIDER.

The New England Journal of Medicine’s Sounding Board recommended that with respect to emergency contraceptive, the objecting pharmacist must find a willing provider. [CITE] *But see* MD. CODE ANN., HEALTH-GEN. § 20-214 (LexisNexis 2005) (“A licensed hospital . . . may not be required to permit, within the hospital, the performance of any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy; or to refer to any source for these medical procedures.”).

#### 6. STATES WITH SIMILAR PROTECTION AS THE CHURCH AMENDMENT.

WIS. STAT. ANN. §§ 253.09 (West 2004) (No individual or entity may be required to participate in or make its facilities available for abortion contrary to religious beliefs or moral convictions because of “the receipt of any grant, contract, loan or loan guarantee under any state or federal law”).

#### 7. STATES THAT INSULATE PROVIDERS FROM PUNISHMENT BY STATE AND LOCAL GOVERNMENTS.

LA. REV. STAT. ANN. §§ 40:1299.33 (2001) (“No [health care] facility, whether public or private, shall ever be denied governmental assistance . . . for refusing to permit its facilities, staff or employees to be used in any way for the purpose of performing an abortion.”); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 2003) (“Conscientious objection to abortion shall not be grounds for . . . refusal to grant financial assistance under any state aided project . . .”) MO. ANN. STAT. §§ 197.032 (West 2004) (“No person or institution may be denied . . . any public benefit . . . on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.”); MONT. CODE ANN. § 50-20-111 (2005) (“[The] refusal by any hospital

or health care facility or person [to provide advice] shall not be grounds for loss of any privileges or immunities . . . or for the loss of any public benefits.”)

**8. STATES IN WHICH EMPLOYEES HIRED FOR EXPRESS PURPOSE OF PERFORMING SPECIFIC SERVICE OR EMPLOYED BY FACILITIES WHICH EXCLUSIVELY PROVIDE ABORTIONS ARE NOT EXEMPTED.**

745 ILL. COMP. STAT. ANN. 70/13 (West 2002):

Nothing in this Act shall be construed as excusing any person, public or private institution, or public official from liability for refusal to permit or provide a particular form of health care service if . . . the person, public or private institution or public official has entered into a contract specifically to provide that particular form of health care service; or the person, public or private institution or public official has accepted federal or state funds for the sole purpose of, and specifically conditioned upon, permitting or providing that particular form of health care service.

KY. REV. STAT. ANN. § 311.800(5)(c) (West 2005) (“It shall be unlawful discriminatory practice . . . for any [person or institution] to discriminate against any person . . . on account of the willingness or refusal of such [person] to . . . participate in abortion or sterilization. . . if that health care facility is not operated exclusively for the purpose of performing abortions.”);

Except for a facility devoted exclusively to the performance of abortions, no medical personnel or medical facility, nor any employee, agent or student thereof, shall be required against his or its conscience to aid, abet or facilitate performance or an abortion or dispensing of an abortifacient and failure or refusal to do so shall not be a basis for any civil, criminal, administrative or disciplinary action, penalty or proceeding, nor may it be the basis for refusing to hire or admit anyone.

18 PA. CONS. STAT. ANN. § 3213 (West 2000).

**9. STATES WHICH LIMIT ENCROACHMENT BASED ON RESULTING UNDUE HARDSHIP.**

MO. ANN. STAT. § 188.105 (West 2004):

[Discrimination against one who has an objection] shall not be unlawful if there can be demonstrated an inability to reasonably accommodate an individual’s refusal to participate in abortion without undue hardship on the conduct of that particular business or enterprise, or in those certain instances where participation in abortion is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise;

16 PA. CODE §§ 51.51 (2000) (allowing a facility that provides abortions to seek a temporary exemption to the conscience clause protections):

A public hospital or public health care facility and all other medical facilities which elect to provide abortion or sterilization services have the duty to employ and assign sufficient numbers of medical and other staff persons and provide the necessary equipment and facilities to offer the services on a medically-safe and professional basis. It is imperative that the institutions obtain the services of responsible physicians and other necessary personnel whose personal views on

abortion do not prohibit them from providing or participating in abortions or sterilizations.

#### 10. STATES WHICH PROHIBIT EMPLOYERS FROM ASKING PROSPECTIVE EMPLOYERS ABOUT REFUSAL TO PARTICIPATE.

*See* 745 ILL. COMP. STAT. ANN. 70/7 (West 2002):

It shall be unlawful for any public or private employer, training institution [or other such entity] to place any reference in its application form concerning, to orally question about . . . any applicant . . . on account of the applicant's refusal to . . . participate in any way in any form of health care services contrary to his or her conscience.

#### 11. STATES WITH RENEGRADE PHYSICIAN PROTECTION.

CAL. HEALTH & SAFETY CODE § 123420 (West 1996). *See also* MICH. COMP. LAWS ANN. §§ 333.20184 (West 2001) (“A hospital . . . or other health facility which refuses to allow abortions to be performed on its premises shall not deny staff privileges or employment to an individual for the sole reason that the individual previously participated in . . . a termination of pregnancy.”); TEX. OCC. CODE ANN. § 103.002 (b) (Vernon 2004) (“A hospital or health care facility may not discriminate against a physician, nurse, staff member, or employee because of the person's willingness to participate in an abortion procedure in another facility.”).

#### 12. STATES WHICH EXTEND RIGHT TO REFUSE BEYOND RELIGION/MORALITY.

*Compare* 43 PA. CONS. STAT. ANN. § 955.2 (West 1991) (“No physician, nurse, staff member, or employe of a . . . health care facility, who object[s]. . . on moral, religious, or professional grounds, shall be required to, or held liable for refusal to, perform, participate in, or cooperate in . . . abortion.”) *with* N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992) (“When the performing of an abortion . . . is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion . . .”).

#### 13. STATES WHICH LIMIT RIGHT TO REFUSE ONLY TO DENOMINATIONAL HOSPITALS

*See* IND. CODE ANN. §§ 16-34-1-3 (LexisNexis 1993) (“No private or denominational hospital shall be required to permit its facilities to be utilized for the performance of abortions.”); IOWA CODE ANN. §§ 146.2 (West 2005) (“A hospital, which is not controlled, maintained, and supported by a public authority, shall not be required to permit the performance of an abortion.”); KY. REV. STAT. ANN. § 311.800 (3) (West 2005) (“No private health care facility or private hospital shall be required to . . . permit the performance of abortion contrary to its stated ethical policy.”) [NOTE: Ky does not allow abortion in public facilities at all, *id.* at (1) ]; OR. REV. STAT. § 435.475(3) (2003) (“No hospital operated by this state or by a political subdivision in this state is authorized to adopt a policy of excluding or denying admission to any person seeking termination of a pregnancy.”); S.C. CODE ANN. §§ 44-41-40 (2002) (“No private or nongovernmental hospital or clinic shall be required to admit any patient for the purpose of terminating a pregnancy, nor shall such institutions be required to permit their facilities to be utilized for the performance of abortions.”); TEX. OCC. CODE ANN. §§ 103.004 (Vernon 2004) (“A private hospital or private health care facility is not required to make its facilities available

for the performance of abortion unless a physician determines that the life of the mother is immediately endangered.”); UTAH CODE ANN. § 76-7-306 (2003) (No “private and/or denominational hospital” shall be required “to admit any patient for the purpose of performing an abortion.”); WASH. REV. CODE ANN. § 9.02.150 (West 2003) (“No person or private medical facility may be required by law or contract in any circumstances to participate in the performance of an abortion if such person or private medical facility objects to so doing.”); WYO. STAT. ANN. § 35-6-105 (2005) (“No private hospital, clinic, institution or other private facility in this state is required to admit any patient for the purpose of performing an abortion not to allow the performance of an abortion therein.”).

In other jurisdictions, case law limits application of the statutory exemption to denominational hospitals. *See* N.J. STAT. ANN. §§ 2A: 65A-2 (West 2000) (“No hospital or other health care facility shall be required to provide abortion . . . services or procedures.”). New Jersey’s Supreme Court held these provisions unconstitutional as applied to non-sectarian, nonprofit hospitals. *Doe v. Bridgeton Hosp. Ass’n*, 366 A.2d 641 (N.J. 1976).

#### 14. STATES WHICH HAVE EXPANDED THE RIGHT TO REFUSE INSURERS AND OTHER ENTITIES.

MINN. STAT. ANN. §§ 145.414 (West 2005) (“[N]o health plan company . . . or health care cooperative . . . shall be required to provide or provide coverage for an abortion.”); MO. ANN. STAT. § 376.1199(1) (West 2002) (“Nothing in this subsection shall be construed to require a health carrier to perform, induce, pay for, reimburse, guarantee, arrange, provide any resources for or refer a patient for an abortion” unless necessary to “prevent the death of the female upon whom the abortion is performed.”).

#### 15. STATES WHICH LIMIT RIGHT TO REFUSE TO NON-EMERGENCIES.

MO. ANN. STAT. § 376.1199(1) (West 2002) (“Nothing in this subsection shall be construed to require a health carrier to perform, induce, pay for, reimburse, guarantee, arrange, provide any resources for or refer a patient for an abortion” unless necessary to preserve the woman’s life.); NEV. REV. STAT. ANN. § 449.191 (LexisNexis 2004) (“A hospital or other medical facility . . . which is not operated by the state or a local government or an agency of either is not required to permit the use of its facilities for the induction or performance of an abortion, except in a medical emergency.”); S.C. CODE ANN. §§ 44-41-40, -50 (2002) (No private or non-governmental hospital or clinic shall be required to permit the use of its facility for abortion “*provided*, that no hospital or clinic shall refuse an emergency admittance”); TEX. OCC. CODE ANN. §§ 103.004 (Vernon 2004) (“A private hospital or private health care facility is not required to make its facilities available for the performance of abortion unless a physician determines that the life of the mother is immediately endangered.”).