

# Rights of Conscience vs. Peer-Driven Medical Ethics: ACOG and Abortion

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ABSTRACT: Each generation must rediscover the foundational principles upon which our democracy is built, including respect for rights of conscience. ACOG Opinion No. 385 is moderate in tone and recognizes the ethical dilemma of physicians with conscience objections to patient requests for controversial provisions. However, the substance of the Opinion is biased against rights of conscience, presents a weakened version of the physicians' right-of-conscience position, assumes away the real dilemmas, presents ethical arguments for only one side of the issue, and portrays the controversy as a toggle-switch matter, fails to consider many relevant considerations and alternative solutions, and is conclusory throughout. The history of the settling of America and the founding of our nation show the importance of protecting rights of conscience. The Founders viewed conscience as protected by right, not by tolerance. The First Amendment was intended to protect rights of conscience. By fostering virtue, protecting conscience protects our constitutional liberties.

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## I. TEN GENERATIONS OF REDISCOVERY OF BASIC VALUES

Each generation must discover for itself the value and worth of the principles and liberties that it has inherited from preceding generations. Each generation must, in effect, fight anew the War of Independence, and debate and decide anew, as in Philadelphia in 1787, the fundamental principles upon which its government will be founded and the fundamental freedoms that will be protected and perpetuated. Each generation must study the past in order to preserve for the future the legacy of liberties and of effective constitutional government that the Founders of the United States of America established for themselves and their posterity more than two hundred twenty years ago.<sup>2</sup>

For over two centuries, protection for rights of conscience—not just rights of belief or of worship but the right to live and act according to the deepest principles of religious and moral belief—has been among the core values and central liberties protected by the Constitution of the United States. It is amazing that so many consecutive generations of Americans have been able to rediscover, revive, and renew strong commitment to the principle of protection of rights of conscience. However, there have been numerous lapses and exceptions, some of which served as painful reminders of the importance of protecting rights of conscience.

It should, therefore, come as no surprise that in our day we are experiencing another controversy over rights of conscience—in this instance the rights of health care professionals not to participate in the provision of elective abortions and other medical services that they believe to be deeply immoral and to be avoided as the result of what they believe to be a fundamental moral duty imposed by God. While

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<sup>2</sup> Neal A. Maxwell, “Some Thoughts about our Constitution and Government” in *By the Hands of Wise Men: Essays on the U.S. Constitution*, ed. Ray C. Hiram (Provo UT: Brigham Young Univ. Press, 1979), pp. 111, 114: “The Constitution depend[ed] on a sufficient number of strong citizens for its very establishment; it will depend, likewise, on a crucial mass of strong and able citizens for its preservation.... Societies composed of strong citizens willing and able to maintain freedom and to cope with its frustrations are not common.”

there are many dimensions of the current controversy, if we are to be true to our legacy of liberty we must remember the history of protection for rights of conscience in our legal system and decide the current controversies according to the principles that undergird and sustain our constitutional system of liberties.

## II. CURRENT CONTROVERSY OVER ACOG ETHICS OPINION NO. 385

### A. *Background of the Current Controversy*

The tension between the rights of patients and the rights and responsibilities of healthcare providers is as old as the history of medicine. Hypocrites attempted to address and resolve the tension over 2400 years ago with his famous Oath.<sup>3</sup> In recent years, developments making abortion safer and assisted reproduction more effective have increased the occasion for such conflicts in the provision of “reproductive” medicine.<sup>4</sup>

The current rights-of-conscience controversy came to a head in November 2007 when the Committee on Ethics of the American College of Obstetricians and Gynecologists published its Opinion No. 385, entitled “The Limits of Conscientious Refusal in Reproductive

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<sup>3</sup> See, e.g., *Encyclopedia Britannica Online*, “Hippocratic oath,” available at <http://www.britannica.com/eb/article-9040542/Hippocratic-oath> (last seen 14 May 2008); NOVA Online, “Hippocratic Oath—Classical Version,” available at [http://www.pbs.org/wgbh/nova/doctors/oath\\_classical.html](http://www.pbs.org/wgbh/nova/doctors/oath_classical.html) (last seen 14 May 2008).

<sup>4</sup> See generally Lynn D. Wardle, “Protecting the Rights of Conscience of Health Care Providers,” 14 *Journal of Legal Medicine* (1993): 177; Robin Fretwell Wilson, “The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures,” 34 *American Journal of Law & Medicine* 41 (2008); Jessica D. Yoder, Note, “Pharmacists’ Right of Conscience: Strategies for Showing Respect for Pharmacists’ Beliefs While Maintaining Adequate Care for Patients,” 41 *Valparaiso University Law Review* 975, 1009 (2006).

Medicine.”<sup>5</sup> The Opinion strongly curtails exercise of the rights of conscience of healthcare providers involving reproductive medicine.

*B. Some Positive Aspects of Opinion No. 385*

There are some positive aspects of Opinion No. 385. First, it is a public acknowledgment by an influential professional organization, the American College of Obstetricians and Gynecologists (herein “ACOG”), of the existence of some of the ethical dilemmas in this area. Second, it gives some tacit recognition (if weak and superficial) to the existence of moral claims of conscience by healthcare providers in some of these dilemmas. Third, it purports to try to balance and protect the interests conscience of healthcare providers. Fourth, the opinion avoids nasty hyperbole and name-calling and generally is professional in tone. All of these points represent important, if small, steps in the right direction for which ACOG deserves due credit.

*C. Some of the Flaws of ACOG Ethics Opinion No. 385*

The flaws and failings of Opinion No. 385, however, are substantial and far outweigh its few and slender merits.<sup>6</sup> First, the language of the Opinion No. 385 is heavily slanted. For example, a computer search of the document reveals that the term “right” appears in the five-page text of the Opinion ten times; seven times in reference to (unqualified)

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<sup>5</sup> American College of Obstetricians and Gynecologists, Committee on Ethics, Committee Opinion No. 385, “The Limits of Conscientious Refusal in Reproductive Medicine” (Nov. 2007), available [http://www.acog.org/from\\_home/publications/ethics/co385.pdf](http://www.acog.org/from_home/publications/ethics/co385.pdf) (last seen 12 May 2010).

<sup>6</sup> For some additional critiques of the ACOG Opinion, see, e.g., Christopher Kaczor, “Pro-Life Doctors: A New Oxymoron,” *First Things* (online), April 8, 2008, available at <http://www.firstthings.com/onthesquare/?p=1021> (last seen 12 May 2008); “Letter written to ACOG President from Christian Medical and Dental Association (CMDA) President” (7 December 2007) [http://www.cmda.org/AM/Template.cfm?Section=Right\\_of\\_Conscience&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11270](http://www.cmda.org/AM/Template.cfm?Section=Right_of_Conscience&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11270) (last seen 12 May 2008); Felipe E. Vizcarrondo, “Physicians Freedom of Conscience Threatened,” available at <http://www.physiciansforlife.org/content/view/1548/83/> (last seen 12 May 2008).

“patients’ rights” (including “women’s rights” and “reproductive rights”); twice in reference to physician’s *claimed* right to refuse to provide abortion services (not even acknowledging that healthcare providers actually have a *bona fide* right of conscience, but only that they claim such a right),<sup>7</sup> and once in suggestively warning that healthcare providers’ “[r]ights to withdraw from caring for an individual should not be a *pretext* for interfering with patients’ rights to healthcare services”<sup>8</sup> (rhetorically labeling the exercise of a right of conscience to refuse to provide abortion service, for example, as a “*withdraw[al] of caring for an individual*” and suggesting that it may be a mere “*pretext for interfering with patient’s rights*”). This is hardly the language of honest, fair, even-handed, unbiased (or ethical) analysis.

The substance of Opinion No. 385 is seriously flawed, incomplete, and profoundly prejudiced. Paragraph two gives four examples of cases where healthcare providers declined to provide service but casts three of the four as toggle-switch either-or dilemmas, without even mentioning any possible alternative.<sup>9</sup> Two of the examples involved pharmacists who declined to provide “emergency contraception,” but the Opinion failed to indicate whether other pharmacists in the pharmacy were available to provide the service, or whether other pharmacies were nearby that were willing to fill the prescriptions. Another example involved a doctor who declined to provide artificial insemination for a lesbian seeking to become a mother with her same-sex partner, but the Opinion failed to indicate whether other doctors were available in the area who might be willing to provide the

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<sup>7</sup> *Id.* at 1 (“claim a right to refuse”); *id.* at 2 (“the particular claim to a provider’s right to protect his or her moral integrity...”).

<sup>8</sup> Opinion No. 385, at 5 (emphasis added). This is the only time that genuine right-versus-right is acknowledged, and it is coupled with the biased suggestion that the physician’s conscience claim may be “pretextual.”

<sup>9</sup> *Id.* at 1.

service.<sup>10</sup> This failure is important because it means that the Opinion initially casts the issue as one in which the alternatives available and the burdens involved are largely irrelevant to professional ethics; the only significant variables are the patient's desire for a medical service that is legal and that a healthcare provider is competent to provide. For persons seriously interested in analyzing real moral conflicts, the ability to resolve a dilemma with only minor inconvenience to the patient (such as a patient making a telephone call to ascertain the facts, or driving down the street to another pharmacy or another ob/gyn clinic) or to the provider (such as expecting the provider to clearly post and advertise the moral policy boundaries and practical limits of the services offered) is not insignificant. The extent of the burden or damage caused or avoided is a legitimate moral consideration.

The Opinion states its intent to “maximize accommodation of an individual's religious or moral beliefs *while avoiding* impositions of these beliefs on others or interfering with the safe, timely, and financially feasible access to reproductive health care that all women deserve.”<sup>11</sup> However, the qualification of the initial stated objective—“to maximize accommodation”—creates a very different objective—one in which “accommodation” is guaranteed to lose. The poison is in the “while avoiding” language, which states an absolute condition—namely, “avoiding” what follows. The “imposition of beliefs upon others” and “interfering with the safe, timely, and financially feasible access to reproductive health care” are absolutely to be avoided. To “avoid” means “to remove, to quit,”<sup>12</sup> “to clear out, put away,

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<sup>10</sup> The fourth example did mention that the patient was transferred to another hospital where the abortion was performed, thus acknowledging an alternative, but it emphasized hardship (transfer by ambulance), delay (“ultimately”) and health risk (“a life-threatening pulmonary embolism”).

<sup>11</sup> *Id.* at 2 (emphasis added).

<sup>12</sup> Oxford English Dictionary online, *avoid*, v., at II, available at [http://diction.ary.oed.com.proxlaw.byu.edu/cgi/entry/50015569?query\\_type=word&queryword=avoid&first=1&max\\_to\\_show=10&sort\\_type=alpha&result\\_place=3&search\\_id=KrhO-PFyVLV-10753&hilite=50015569](http://diction.ary.oed.com.proxlaw.byu.edu/cgi/entry/50015569?query_type=word&queryword=avoid&first=1&max_to_show=10&sort_type=alpha&result_place=3&search_id=KrhO-PFyVLV-10753&hilite=50015569) (last seen 14 May 2008).

remove,”<sup>13</sup> “to get rid of, clear away, do away with, put an end to,”<sup>14</sup> to “expel, banish, dismiss, send or drive away,”<sup>15</sup> “to “keep away from, keep from,”<sup>16</sup> and “to prevent, to obviate, to keep off.”<sup>17</sup> Thus, the conscience of providers is to be accommodated only to the (“maximum”) point at which such accommodation prevents, keeps away from, removes, quits, puts an end to, gets rid of, banishes, and obviates imposing beliefs upon patients or interference with a patient’s safe, timely, and financially feasible access to abortion, for example. Taking those assumptions as “givens” that must be avoided, the result of “accommodation” of the rights of conscience of providers—namely, subordination and sacrifice of conscience to the dominant goal of insuring easy access to abortion—is assured.

The Opinion posits that failure of a particular healthcare provider to facilitate or provide a particular service to a particular patient at a particular time for an affordable price constitutes an act of interference. That is a flawed assumption. For example, it fails altogether to consider whether the distinction between active and passive behavior, long recognized in moral and ethical discourse, might be relevant to the moral analysis.<sup>18</sup> Moreover, why should a person who qualifies for

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<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 4.c.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.* at III.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> See, e.g., Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics* (New York NY: Oxford University Press, 1979), pp. 82-85; James Rachels, “Active and Passive Euthanasia” in *Ethical Issues in Death and Dying*, ed. Tom L. Beauchamp & Seymour Perlin (Englewood Cliffs NJ: Prentice-Hall, 1978), p. 240; Tom L. Beauchamp, “A Reply to Rachels on Active and Passive Euthanasia,” *id.* at p. 246; John A. Robertson & Norman Frost, “Passive Euthanasia of Defective Newborn Infants: Legal and Moral Considerations,” *id.* at p. 259; but see Barry Furrow, et al., *Health Law* No. 17-74 at 762 (1995) (distinction is vague and anachronistic).

a medical license be morally or ethically required to provide any patient with any service the patient wants if it is legal? Do all state-licensed anesthetists have an ethical duty if called upon (or if employed) by the government to administer lethal drugs to fulfill a death sentence imposed by a court? Do all gynecologists or family doctors have an ethical duty to perform female circumcision at the behest of parents where it is legal? Do all surgeons have a duty to perform sex-change surgery when their patients want it? Does the failure to provide those requested medical services constitute acts of interference? Why? The Opinion simply assumes the answer without analyzing it.

The Opinion also assumes a broad “right” of patients to physician assistance in obtaining abortions. In fact, the Supreme Court has never held that there is a constitutional right to abortion, only that other general constitutional rights (such as the right of privacy, the right to “liberty,” or, arguably, a right to “autonomy”) prevent the state from criminally prohibiting or unduly burdening access to abortion services. Abortion is merely a means to that constitutionally protected end, not the end “right” itself.<sup>19</sup> Nor has the Court ever held that healthcare providers have general legal or constitutional duty to perform, assist, or facilitate abortion, as Opinion Number No. 385 mistakenly assumes.

The notion that all obstetricians and all gynecologists have a duty to avoid interference with a patient’s safe, timely, and financially feasible access to reproductive healthcare is, at the least, a very tenuous and highly debatable proposition. For example, Congress has generally prohibited (and the Supreme Court has upheld those restrictions on) “partial birth abortion,”<sup>20</sup> which ACOG officially considers to be legitimate reproductive healthcare. ACOG’s leaders adopted a formal policy opposing laws restricting partial-birth

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<sup>19</sup> See *Planned Parenthood of Southern Pennsylvania v. Casey* 510 US 1309 (1994), *Planned Parenthood of Central Missouri v. Danforth* 428 US 52 (1976), and *Roe v. Wade* 412 US 113 (1973).

<sup>20</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).



abortion.<sup>21</sup> ACOG also filed an unsuccessful brief with the Supreme Court of the United States in the *Gonzales v. Carhart* case arguing that the federal law restricting partial-birth abortion was unconstitutional.<sup>22</sup> ACOG's brief argued that not only the Act of Congress prohibiting partial-birth abortion was unconstitutional, but noted that ACOG has "consistently opposed bans such as the Act [of Congress],"<sup>23</sup> on the basis of health-risk allegations that the Supreme Court resoundingly rejected as unconvincing as applied to women seeking partial-birth abortions generally.<sup>24</sup>

There are numerous other flaws in the ACOG Ethics Opinion. The definition of "conscience" given in the Opinion is a weak, subjective version (e.g., "I wouldn't be able to sleep at night").<sup>25</sup> It fails even to consider the much stronger matter of divine or moral compulsion claimed by healthcare providers of faith (e.g., "I will disobey God and be eternally damned"). Opinion No. 385 adds a cheap, if politically obligatory, suggestion that claims of conscience "are not always genuine." That diversion simply evades consideration of the real dilemma and suggests a fallacious justification for failure to adequately protect rights of conscience (one that is repeated in the recommendations of the Opinion). Because "referral to another provider *need not be* conceptualized as a repudiation or compromise of one's own values,"<sup>26</sup> the Opinion declines to analyze the issue morally. Of course, the moral dilemma arises because it *can be* so

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<sup>21</sup> "ACOG Statement of Policy, Abortion Policy" (July 2004), reprinted in ACOG, *2006 Compendium of Selected Publications* (2006), cited in Brief of the American College of Obstetricians and Gynecologists, *infra* note 18.

<sup>22</sup> Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, in *Gonzales v. Carhart* (Sept. 20, 2006), available in Westlaw at 2007 WL 1135596 (last seen 14 May 2008).

<sup>23</sup> *Id.* at 1.

<sup>24</sup> 127 S.Ct. at 1635-37.

<sup>25</sup> ACOG Opinion, *supra* note 5, at 2.

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

conceptualized; it adds nothing to serious moral analysis to dismiss an argument just because “it need not be” so viewed, or just because other people can view it differently.

In defining the limits upon healthcare providers’ exercise of conscience, the Opinion, again, assumes the answer to the question it is asking. It states that in all cases in which a providers’ “conscientious refusals conflict with moral obligations that are central to the ethical practice of medicine, ethical care requires either that the physician provide care despite reservations or that there be resources in place to allow the patient to gain access to care...”<sup>27</sup> That is because the provider’s conscience “is only a *prima facie* value, which means it can and should be overridden” when necessary to protect patient autonomy.<sup>28</sup> Why do consumer-patient claims to specific medical services (particularly elective services) override the moral claim of a particular healthcare provider to exercise her right of conscience not to engage in what she considers morally reprehensible practices? Again, the Opinion fails to analyze (let alone justify) the conclusion, but merely asserts a set of conclusory assumptions.

This section of the Opinion discusses four criteria that ACOG advises should be considered in the ethical analysis: potential for imposition on the autonomy of patients, effect on the health of the patient, consistency of the moral claim with scientific integrity and knowledge, and potential for discrimination in the distribution of medical services to the poor and members of unpopular groups. These are valid considerations, but all fall on only one side of the ledger—in favor of subordination of health provider’s rights of conscience.<sup>29</sup> There is no discussion of similar considerations on the other side of the question, such as degree of imposition on the conscience of the provider, effect on the moral self-identify and human dignity of the

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<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.*

<sup>29</sup> See generally Letter, *supra* note 6 (emphasizing one-sided bias in the Opinion).

provider, consistency of claims of access with medical knowledge about the necessity of the service to the health of the patient and upon the welfare of others affected (such as co-parents of the embryo or fetus, or the children created by Artificial Reproductive Techniques (ART), and the potential for discrimination against unpopular or minority groups (such as doctors of faith, or of a particular faith). The analysis in this section of the Opinion is not merely incomplete, it is blatantly dishonest and biased (presenting the case for one side of the issue but not presenting the other side of the issue). It fails the minimum ethical standards for serious academic or professional analysis. It is nothing more than an advocacy brief for one side of a complex issue.

The next section posits that institutions and organizations should work to “ensure nondiscriminatory access” to all professional services.<sup>30</sup> Rather than attempting to implement its asserted concern for “accommodation” of provider conscience, the Opinion boldly suggests that “individuals and organizations should support” discriminatory hiring, assignment, and institutional approval practices that would deny individual and institutional healthcare providers of faith or moral conscience the opportunity to provide healthcare services.<sup>31</sup> The easiest way to resolve the dilemma is to eliminate from medical practice those who claim rights of conscience, according to the Opinion. That may be cynical, but it is hardly a responsible ethical position.

The final section recommends seven principles, including a call for legal action “ensuring timely, effective, evidence-based and safe access to all women seeking reproductive services.”<sup>32</sup> That is fine political rhetoric but shabby moral analysis. The first principle, not surprisingly, is that:

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<sup>30</sup> *Id.* at 4-5.

<sup>31</sup> *Id.* at 5.

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

In the provision of reproductive services, the patient's well-being must be paramount. Any conscientious refusal that conflicts with a patient's well-being should be accommodated only if the primary duty to the patient can be fulfilled.<sup>33</sup>

So much for "maximum accommodation" of rights of conscience. Actually, if the standard of "patient's well-being" were not defined on the basis of such avidly pro-abortion ideological assumptions, and if the living human embryo or fetus ("unborn child" as we like to say) were included within the class covered by the term "patients," this principle would merit serious consideration. However, in the context of Opinion No. 385, this high-sounding language amounts to little more than political code words for pressuring and marginalizing healthcare providers with moral objections to abortion-on-demand. The rhetoric simply masks and deceives by assumption and definition but without analysis.

The Opinion also recommends that healthcare providers have a duty to "disclose" information that conforms to ACOG's value-based characterizations, to give prior notice of their conscience commitments, to refer patients to providers who will provide services that the first provider will not provide, to provide all "emergency" case "regardless of the provider's personal moral objections,"<sup>34</sup> and a duty of providers in resource poor areas to practice near providers who will provide the morally offensive services, or by referral to "ensure...that patients have access to the service..."<sup>35</sup> In short, all of the elements necessary to facilitate full access to abortion-on-demand at the hands of all medical professionals are dressed up as principles to justify the suppression and elimination of the rights of conscience of healthcare providers to object to performing or facilitating abortion-on-demand. It seeks to compel all members of ACOG to become accessories to abortion regardless of their moral convictions.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at number 5.

<sup>35</sup> *Id.* at number 6.

Thus, the flaws of ACOG Ethics Opinion No. 385 are numerous. As a matter of ethical analysis, it is weak, biased, evades the central issues, filled with conclusory assumptions and provides little serious analysis. It is written more like a press release for the advocates of a political campaign than a careful consideration of the competing concerns underlying the moral and ethical issues.

Perhaps the most serious defect of the ACOG Opinion is its failure to grasp, let alone to analyze, the nature, depth and dimensions of the claim for protection of healthcare providers' rights of conscience. ACOG presents that merely as a claim for accommodation, based on principles of professional expediency. That flies in the face of the legal positions that can be traced back to critical decisions made by the Founders of the American Republic. The Founders of our Constitution recognize that protection for rights of conscience involves a matter of basic human *rights*, not mere policy expediency.

When our nation was established, the Founders had two different models for protecting conscience. One addressed the issue as a matter of political balancing, accommodation, and toleration. The other saw it as a matter of protection of inalienable *rights*. The Founders chose the latter, and our Nation has flourished to the extent it has been true to that vision of *rights* of conscience. The drafters of the ACOG Opinion espouse a position about protecting conscience that has been rejected and repudiated for over two centuries in our legal tradition.

### III. THE PRE-CONSTITUTIONAL AND CONSTITUTIONAL FOUNDATIONS FOR PROTECTION OF CONSCIENCE

The wide swath of protection of conscience in the history of the settling of America and the founding of the Constitution is directly relevant to the protection of rights of conscience of healthcare providers today. In at least six ways the history of rights of conscience in colonial- and founding-era America have profound implication for protection of rights of conscience in healthcare provision by constitutional values if not constitutional rights today.

First, the settling of America by many colonies of religious communities and individuals seeking freedom of conscience provided the moral foundation for the rights and structures of the Constitution of the United States that evolved out of those experiences. That history gives our current system of constitutional liberties coherent meaning. “Stories of origins have great significance in any society....”<sup>36</sup> From the Pilgrims, the Puritans and other religious groups who immigrated to and congregated in America that they might live according the precepts of their dissenting religious consciences, to Roger William’s remarkably successful attempt to establish a colony in which rights of conscience were fully protected, to the establishment of Maryland as a place where other unpopular religious communities could live the tenets their religions unmolested, to the founding of Pennsylvania as a place where Quakers could freely practice their beliefs, to the amazing influx of Anabaptists, Dutch Calvinists, Scotch Irish Presbyterians, Quakers, and others, the story of the settling of America is in very significant part the story of a quest for a place, a community, and a polity in which rights of conscience would be fully protected.<sup>37</sup> Protection of religious conscience was a major reason for the settling

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<sup>36</sup> Aviam Soifer, “Full and Equal Rights of Conscience,” 22 *University of Hawaii Law Review* 469, 473-77 (2000), reviewing story of importance of rights of conscience in the Founding of America. See also Timothy L. Hall, “Roger Williams and the Foundations of Religious Liberty,” 71 *Brigham Young University Law Review* 455 (1991), reviewing the importance of Roger Williams’s contribution to religious liberty, how it contrasted with the approach of Thomas Jefferson).

<sup>37</sup> Michael W. McConnell, “The Origins and Historical Understanding of Free Exercise of Religion,” 103 *Harvard Law Review* 1409, 1421-1430 (1990), reviewing colonial history of protection of rights of conscience; see generally Harrop A. Freeman, “A Remonstrance for Conscience,” 106 *University of Pennsylvania Law Review* 806, 806 n.1 (1958), describing incident that led to the Flushing Remonstrance of 1657 in which citizens of that New York community defied their governor to protect their rights of conscience and those of the persecuted Quakers who came to preach among them, and sequel incident involving the conviction, ordered deportation, and subsequent acquittal of John Bowne who joined the Quakers and let them meet in his home.

of America and central concern in colonial America.<sup>38</sup> Six of the American colonies (not counting any of the New England settlements) had been initially founded to provide havens for religious dissenters.<sup>39</sup> As young John Adams explained, “[s]oon after the Reformation a few people came over into the new world *for conscience sake*.”<sup>40</sup> From that foundation in pursuit of conscience, the nineteen year-old Harvard College student presciently predicted that “*this (apparently) trivial incident may transfer the great seat of empire into America*.”<sup>41</sup> Adams, like his contemporaries, saw a direct link between protection of conscience and political-economic progress and prosperity.

Second, recent scholarship by Noah Feldman sheds light on the tremendous influence of liberty of conscience, derived from Lockean philosophy, in the colonial and founding eras.<sup>42</sup> Feldman shows that Locke’s argument for liberty of conscience had religious roots

in the Protestant idea of the primacy of the individual conscience in decisions about matters of religious faith. Its philosophical roots lay in the division of the world into differently-constituted temporal and spiritual realms. Under this division, the temporal power lacked legitimate authority to compel dissenters’ conscience in the realm of religion, because no one had alienated to the temporal government their rights in matters of religion....<sup>43</sup>

Professor Feldman’s article traces “the archeology” of the idea of liberty of conscience in Western thought, from biblical text and

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<sup>38</sup> See “Bloudy Tenent of Persecution for Cause of Conscience Discussed” (Roger Williams, 1644), and “The Great Cause of the Liberty of Conscience” (William Penn, 1650) cited in Freeman, *supra* note 37, at 808.

<sup>39</sup> McConnell, *supra* note 37, at 1424-1425, citing Rhode Island, Maryland, Pennsylvania (and its offshoot, Delaware) and the Carolinas.

<sup>40</sup> David McCullough, *John Adams* (New York NY: Simon & Schuster, 2001), p. 39 (emphasis added).

<sup>41</sup> *Id.* (Emphasis added).

<sup>42</sup> Noah Feldman, “The Intellectual Origins of the Establishment Clause,” 77 *New York University Law Review* 346 (2002).

<sup>43</sup> Feldman, *supra* note 42, at 350–51.

exegesis,<sup>44</sup> through the foundational Christian theologians,<sup>45</sup> through the Reformation,<sup>46</sup> and into arguments for government toleration of dissenting religions in seventeenth-century England and America.<sup>47</sup> Locke's powerful *A Letter Concerning Toleration* built an argument from the premises that governments are formed by individuals to protect their life, liberty, and property and have no authority over other matters, including religion or conscience, and that since "no man can, if he would, conform his faith to the dictates of another," because salvation results only from freely-made choices, so government has no authority to compel religion even for the salvation of souls.<sup>48</sup> Feldman points out that Locke's "dependence on religious arguments, grounded in reason," presented what had previously been articulated as a theological principle of Christian liberty in political and legal terms, laying the foundation for the later recognition of personal conscience as a natural right.<sup>49</sup> He shows that despite centuries of differing interpretations and theologies, by the founding era Americans of all

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<sup>44</sup> Feldman, *supra* note 42, at 355-56, Jerome's commentary on Ezekiel 1:14.

<sup>45</sup> Feldman, *supra* note 42, at 356-57, emphasizing Thomas Aquinas's notion that acting against conscience was to sin.

<sup>46</sup> Feldman, *supra* note 42, at 358-63, noting Luther's notion of Christian liberty through Christ to follow conscience instead of law, Calvin's doctrine primacy of internal conscience in religious matters over "indifferent" external things like law, and Cambridge Puritan William Perkin's teaching that only God could bind conscience regarding matters of salvation.

<sup>47</sup> Feldman, *supra* note 42, at 363-67, noting Baptist pamphlets, the Westminster Confession chapter "Of Christian Liberty, and Liberty of Conscience" declaring that "God alone is Lord of the Conscience" and that human law only may restrain conscience according to God's word or as to indifferent things, and the debate between John Cotton and Roger Williams, who argued that his expulsion and the punishment of dissenting religionists was a denial of liberty of conscience.

<sup>48</sup> Feldman, *supra* note 42, at 368-69. Locke's influence on American ideas also came through his drafting of the "Fundamental Constitutions" of Carolina for Lord Ashby, which broadly protected rights of conscience not only of mainstream and dissenting Christians, but also of Jews and heathens. McConnell, *supra* note 37, at 1428-30.

<sup>49</sup> Feldman, *supra* note 42, at 369-72.



creeds and persuasions had united in the belief, based on Lockean principles, that in matters of religious duty the state had no authority to compel individual conscience.<sup>50</sup> With Locke, the protection of rights of conscience took a giant step forward.

Third, it is critical to understand that in America in the late eighteenth century, two different views about matters of conscience and religion were competing.<sup>51</sup> One view was that protection of conscience was a matter of utilitarian tolerance, just policy, and prudent political accommodation.<sup>52</sup> In some of his early writing, at least, Thomas Jefferson advocated this approach: Respect matters of conscience and religion was a matter of *toleration*—sound public policy, neighborliness, good will, and expedient politics. As Jefferson wrote in his draft of the Virginia Bill for Establishing Religious Freedom:

Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether unsusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, *tend only to beget habits of hypocrisy and meanness*, and are a departure from the plan of the holy author of our religion.<sup>53</sup>

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<sup>50</sup> Feldman, *supra* note 42, at 350–51. “Major portions of Jefferson’s Bill for Establishing Religious Freedom derived from passages in Locke’s first *Letter Concerning Toleration*.” McConnell, *supra* note 37, at 1430-31.

<sup>51</sup> Dawn Hendrickson Steadman, “The Free Exercise Clause and Original Intent: A View Toward Exemptions,” for *Origins of the Constitution*, Winter Semester 2000.

<sup>52</sup> “Locke recognized that religious intolerance was inconsistent with both public peace and good government, and deemed religious revelry and intolerance to be among the most severe political problems of his day.... The way to avoid such strife[, wrote Locke,] is by assuring toleration and liberty of religious practice for all.” J. David Bleich, “The Physician as a Conscientious Objector,” 30 *Fordham Urban Law Journal* 245, 248-49 (2002). However, Locke advocated “legislative supremacy with respect to conflicts between public power and individual conscience and reject[ed] religious exemptions.” McConnell, *supra* note 37, at 1433.

<sup>53</sup> Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), reprinted in *The Papers of Thomas Jefferson*, vol. 2, ed. Julian P. Boyd (Princeton NJ: Princeton University Press, 1950), pp. 545-56, cited in Feldman, *infra*, note 42, at 392.

From this perspective, liberty of conscience should be respected to avoid “hypocrisy and meanness.”

On the other hand, James Madison spoke of matters of conscience and religion not merely as toleration but as fundamental, natural *rights*.<sup>54</sup> It makes a big difference whether respect for another’s moral convictions is given simply as a matter of tolerance (to be suspended when outweighed by other political considerations, for example, in time of emergency), or whether it is a matter of your neighbor’s basic civil rights. Fortunately, Madison’s view prevailed and the Founders ultimately concluded that protection for conscience was a matter of fundamental right. Early colonial charters and state constitutions spoke of it as a right.<sup>55</sup> The Virginia Declaration of Rights was initially drafted to guarantee “fullest toleration” of religion; but Madison amended it and when it passed, it provided that “all men are *entitled to the full and free exercise of [religion] according to the dictates of conscience.*” Madison’s *Memorial and Remonstrance* expressed the language of rights, not toleration: “The equal *right* of every citizen to the free exercise of his Religion according to the dictates of conscience is *held by the same tenure with all our other rights.*”<sup>56</sup> He explained:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.... It is

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<sup>54</sup> McConnell, *supra* note 37, at 1449, contrasting Jefferson’s and Madison’s views of conscience protection.

<sup>55</sup> McConnell, *supra* note 37, at 1449, Locke’s view of tolerance of conscience took the view of the government, while the American proponents of rights of conscience took the view of the believer; Founders took the latter view also.

<sup>56</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶15, reprinted in *Everson v. Bd. of Ed.*, 330 U.S. 1, 65-66 (Rutledge, J., dissenting) (emphasis added). *Id.* at ¶ 1: “The Religion then of every man must be left to the conviction and *conscience* of every man; and it is the *right* of every man to exercise it as these may dictate. This *right* is in its nature an *unalienable right*” (emphasis added).

the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.<sup>57</sup>

Madison saw the individual's right of conscience tied to and derive from his pre-existing and superior duty to God.<sup>58</sup>

In Federalist No. 10 Madison further acknowledged that one way to prevent the abusive influence of "factions" in government would be "by giving to every citizen the same opinions, the same passions, and the same interest."<sup>59</sup> But he summarily rejected this solution as both unwise and impractical because he considered "[t]he protection" of such "diversity" of "faculties," "interests," and "views" to be "the first object of government...."<sup>60</sup> The principal duty of government in Madison's view is to protect not only the difference in talents, interests, and abilities that produce differences in wealth, education, and influence, but also to protect the different "sentiments and views of the respective proprietors [that] ensures a division of the society into different interests and parties."<sup>61</sup> He also noted that the "liberty" that produces factions "is to faction what air is to fire...."<sup>62</sup> but to eliminate liberty in order to control faction would be a "remedy that...was worse than the disease."<sup>63</sup>

Fortunately, the protection-of-conscience-as-a-policy-of-tolerance was superseded by protection-of-conscience-as-a-fundamental-right.<sup>64</sup>

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<sup>57</sup> *Id.* at ¶ 1.

<sup>58</sup> See *supra* note 56 and accompanying text. See also McConnell, *supra* note 37, at 1494-1500.

<sup>59</sup> *The Federalist Papers* No. 10 (Madison), ¶4 (New York NY: New American Library 1961), p. 78.

<sup>60</sup> *Id.* at ¶6.

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

<sup>62</sup> *Id.* ¶5.

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

<sup>64</sup> "George Washington, in his famous address to the Hebrew Congregation of

(Ironically, some courts and most commentators today have slipped into using the language of toleration and accommodation. It is time for us to reassert emphatically the language of rights.)

Fourth, protection for rights of conscience underlay and historically preceded the First Amendment.<sup>65</sup> The Revolutionary War spurred the quest for protection of rights of conscience in several ways. In June 1776, even before the Declaration of Independence, the Virginia Declaration of Rights provided, *inter alia*, that “all men are equally entitled to the free exercise of religion, according to the dictates of conscience....”<sup>66</sup> During the War of Independence, rather than suspend respect for divergent moral views, many states granted exemptions from conscription to persons with religious scruples against war, such as Quakers and Mennonites.<sup>67</sup> In 1775, the Continental Congress granted a general exemption from military conscription to religious groups.<sup>68</sup> Also, the main established church

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Newport, RI, stated: ‘It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. More pungently, Thomas Paine commented: ‘Toleration is not the *opposite* of intolerance, but is the *counterfeit* of it. Both are despotisms. One assumes to itself the right of withholding liberty of conscience, and the other of granting it.’” McConnell, *supra* note 37, at 1434-44.

<sup>65</sup> Joseph L. Hassan, “Freedom of Conscience in Early Virginia: A Precursor to the Religion Clauses of the First Amendment,” paper submitted for *Origins of the Constitution*, Apr. 17, 1998 (copy in author’s possession).

<sup>66</sup> Kermit Hall, et al., *American Legal History: Cases and Materials* 70 (1996).

<sup>67</sup> This was not the first time conscientious objection from military service had been recognized. Many of the 600 colonial laws establishing and regulating militias had “regularly embodied clauses exempting conscientious objectors, either absolutely or conditionally.” Freeman, *supra* note 37, at 809.

<sup>68</sup> “General recognition of the importance of conscience at the time of the Revolution is illustrated by the resolution of the Continental Congress, July 18, 1775: “As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed country, which they can consistently with their religious principles.”

in America (Anglican), which had opposed rights of conscience, was associated with the oppressive enemy, and the break with England enhanced the status of the fiercely patriotic dissenting religious communities who advocated protection for their rights of religious conscience, such as the Baptists.<sup>69</sup> After centuries of government support for the state church in Virginia, the Baptists led a petition campaign demanding that “every tax upon conscience...be abolished.”<sup>70</sup> In 1779, Thomas Jefferson introduced his Bill for Establishing Religious Freedom in the Virginia Legislature (House of Burgesses). It declared that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”<sup>71</sup> (If Jefferson thought that about merely funding things against one’s will, one can imagine what he would say about being compelled to perform, provide, or facilitate delivery of services or products like abortion or the “morning after pill” (MAP) against one’s conscience!) Jefferson’s Bill did not pass for over six years, but in December 1785, while Jefferson was Minister to France, James Madison engineered passage of Jefferson’s Bill. As finally enacted it declared that “no man shall be...molested or burdened in his body or his good, nor shall otherwise suffer on account of his religious opinions or belief...and that the same shall in no wise diminish, enlarge

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Freeman, *supra* note 37, at 809.

<sup>69</sup> McConnell, *supra* note 37, at 1436-42.

<sup>70</sup> Hassan, *supra* note 65, at 12.

<sup>71</sup> Preamble to the Virginia Bill for Religious Liberty, cited in *Everson v. Bd. of Ed.*, 330 U.S. 1, 12-13 (1946).

or effect their civil capacity.”<sup>72</sup> Thus, it provided expansive protection for rights of religious conscience.

Professor John Witte concurs that at the time of the Founding of America freedom of conscience guaranteed “a freedom and exemption from human impositions and legal restraints in matters of religion and conscience,”<sup>73</sup> and that it required that persons be exempt or immune from civil duties and restrictions that they could not, in good conscience, accept or obey.<sup>74</sup> Professor Michael W. McConnell has noted that before the Constitution was adopted, every state except Connecticut had adopted state constitutional protection for rights of religious exercise “in terms of the conscience of the individual believer and the actions that flow from that conscience.”<sup>75</sup>

Thus, protection of rights of conscience is deeply rooted in and intertwined with the fundamental First Amendment rights guaranteeing free exercise of religion and no establishment of religion.<sup>76</sup> Of course, the best example is the protection of conscience as a right is inclusion of the right to free exercise of religion in the First Amendment of the Bill of Rights.<sup>77</sup> While there is room for debate over the degree to

<sup>72</sup> Thomas Jefferson, “A Bill for Establishing Religious Freedom – June 12, 1779,” in *The Founders' Constitution*, vol. 5, ed. P. Kurland and R. Lerner (Chicago IL: Univ. of Chicago Press, 1987), p. 77. So proud was Jefferson of his role in securing protection for rights of conscience that he asked that his gravestone be inscribed: “Thomas Jefferson, Author of the Declaration of Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia.”

<sup>73</sup> John Witte, “The Essential Rights and Liberties in the American Constitutional Experiment,” 71 *Notre Dame Law Review* 371, 391, quoting John Mellen, *The Great and Happy Doctrine of Liberty* (1795), p. 17.

<sup>74</sup> Witte, *supra* note 73, at 391-92.

<sup>75</sup> McConnell, *supra* note 37, at 1458-59; see generally *id.* at 1455-66.

<sup>76</sup> See generally McConnell, *supra* note 37, at 1466-1500, reviewing history of Free Exercise clause.

<sup>77</sup> James Madison was the Father of the Bill of Rights. See generally Richard G. Wilkins, “The Structural Role of the Bill of Rights,” 6 *Brigham Young University Journal of Public Law* 525 (1992).

which the “free exercise” of religion clause of the First Amendment protects rights of conscience,<sup>78</sup> it is clear that

[t]he phrase “liberty of conscience” was often conflated with the phrase “free exercise of religion,” “religious freedom,” “religious liberty,” “religious privileges,” or “religious rights.” James Madison, for example, simply rolled into one linguistic heap “religious freedom” or “the free exercise of religion according to the dictates of conscience.”<sup>79</sup>

Indeed, the state “conciliatory amendments” (ratifying the Constitution but asking that it be amended to explicitly protect certain fundamental rights) which led to the drafting of the First Amendment expressly asked for “rights of conscience” to be protected in the Bill of Rights.<sup>80</sup> That is the purpose for which the religion clauses of the First Amendment were drafted.

Even the Establishment Clause was intended to protect rights of conscience. Noah Feldman has challenged the conventional wisdom about the reasons for the Establishment Clause of the Constitution (i.e., that rationalists thought state control of churches was bad for the state, religionists thought it bad for churches, even though republicans generally believed civic virtue essential and looked to religion to cultivate virtue).<sup>81</sup> Instead he makes a strong case that the Lockean

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<sup>78</sup> The history of the writing of the First Amendment and the differing language used in the various drafts “casts doubt on the suggestion of some commentators that the constitutional term “religion” should be broadly interpreted in order to encompass secular claims of conscience. Regardless of whether such a broad interpretation would be a good idea, such a step would constitute an amendment, not an interpretation, of the First Amendment, and one that the Framers specifically considered, debated, and ultimately rejected.” Michael W. McConnell, “The Problem of Singling Out Religion,” 50 *DePaul Law Review* 1, 12 (2000)(citations omitted). See also *id.* at 1494-1500.

<sup>79</sup> Witte, *supra* note 73, at 390, quoting Va. Bill of Rights of 1776, art. XVI.

<sup>80</sup> Freeman, *supra* note 37, at 810, citing language from the New Hampshire, Virginia, North Carolina, Rhode Island, and New York ratifying conventions.

<sup>81</sup> Feldman, *supra* note 42, at 349-50.

value of “[l]iberty of conscience... was the central value invoked by the states that proposed constitutional amendments on the question of religion, and the purpose that underlay the Establishment Clause when it was enacted.”<sup>82</sup> He shows that “by the late eighteenth century, American rationalists and evangelicals alike argued, in terms identifiably derived from Locke, that the purpose of non-establishment was to protect the liberty of conscience of religious dissenters from the coercive power of government.”<sup>83</sup> Despite earlier differences in ideology and policy among the communities and colonies, “*by the late eighteenth century it was broadly agreed in the colonies that there was a basic, indeed natural, right called liberty of conscience.*”<sup>84</sup> “[O]n the eve of the Constitution” regardless of religious or ideological faction, Americans all “shared a basic theory of religious liberty and drew on the same sources and Lockean ideas to express their views.”<sup>85</sup> From 1787, when the Constitution was proposed, to 1789 when the Bill of Rights was proposed by the First Congress, “the predominant, not to say exclusive, argument against established churches was that they had

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<sup>82</sup> Feldman, *supra* note 42, at 351.

<sup>83</sup> Feldman, *supra* note 42, at 350–51. Feldman’s article suggests that Howe’s taxonomy of competing strands of religious thought in colonial America has obscured “the broad agreement in post-revolutionary America on a Lockean concept of liberty of conscience.” *Id.* at 373. Feldman traces the development of consensus on the right of conscience from about 1690 until “by the late eighteenth century, some version of Locke’s basic view of the nature of the liberty of conscience had been formally embraced by nearly every politically active American writing on the subject of religion and the state.” *Id.* at 378. Reviewing the well-documented differences in state patterns of creating and supporting established churches in the eighteenth century are reviewed, Feldman notes that “liberty of conscience” was invoked in the battles over support of established churches in Massachusetts and Virginia. *Id.* at 379–84.

<sup>84</sup> Feldman, *supra* note 42, at 374 (emphasis added).

<sup>85</sup> Feldman, *supra* note 42, at 384. Writings of eighteenth-century Puritans (both criticizing and defending the New England Way), Baptists (John Leland, Isaac Backus, William McLoughlin, and others), Enlightened Deists (Thomas Jefferson and James Madison), and Civil Republicans (whose purported endorsement of government support for established religion is questioned by Feldman) broadly agreed that liberty of conscience was the key to church-state relations. *Id.* at 384–98.



the potential to violate liberty of conscience.”<sup>86</sup> The Virginia ratifying convention proposed an amendment to the Constitution linking protection of conscience directly to non-establishment:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force of violence; and therefore all men have an equal, natural, and unalienable *right to the free exercise of religion, according to the dictates of conscience*, and that no particular religious sect of society ought to be favored or establish, by law, in preference to others.<sup>87</sup>

Likewise, multiple drafts of the First Amendment in Congress reflected the linkage among conscience, freedom of religion, and establishment.<sup>88</sup> While the term “conscience” was dropped from the final version of the First Amendment, the inclusion of free exercise of religion and no establishment of religion together “were thought to cover all the ground required to protect the liberty of conscience,”<sup>89</sup> and the theoretical basis for both religion clauses in protection of rights of conscience remained “even after the word “conscience” disappeared from the draft language.”<sup>90</sup> There was “broad agreement that liberty of conscience was a basic, inalienable right,” and “[l]iberty of conscience was the basic principle that underlay the arguments for non-establishment at the federal level.”<sup>91</sup> Other scholars agree that the

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<sup>86</sup> Feldman, *supra* note 42, at 398.

<sup>87</sup> Feldman, *supra* note 42, at 401, quoting *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, vol. 3, ed. Jonathan Elliot (Philadelphia PA: J.B. Lippincott, 1901), p. 659. North Carolina and Rhode Island “proposed almost identical language.” Feldman, *supra* note 42, at 401.

<sup>88</sup> Feldman, *supra* note 42, at 401-04.

<sup>89</sup> Feldman, *supra* note 42, at 404.

<sup>90</sup> *Id.*

<sup>91</sup> Feldman, *supra* note 42, at 405. Likewise, both neo-federalist and post-modern structuralist arguments that the First Amendment was intended to bar Congress for interfering with state establishment of religion or to take any position on the problem

ultimate dropping of the term “conscience” from the First Amendment resulted from “later revisions [that] were revisions only of language which all agreed carried out the [intent to protect religious conscience].”<sup>92</sup>

Professor Feldman’s work places liberty of conscience at the core of First Amendment jurisprudence, especially central to the Establishment Clause.<sup>93</sup> While it does not guarantee outcomes in particular cases,<sup>94</sup> and while the modern conception of liberty of conscience includes some deeply held secular principles as well as purely religious principles,<sup>95</sup> “knowing how these ideas got their start in our constitutional context makes all the difference in the world.”<sup>96</sup> Certainly, it holds significance for the debate over protecting rights of conscience of healthcare providers.

Fifth, the principle of liberty of conscience underlay the notion of a self-governing republic. Thus, when an effort to revive the religion tax in Virginia was made after the War of Independence, James Madison drafted his famous *Memorial and Remonstrance* declaring that certain things like religious duties “must be left to the conviction and conscience of every man; and it is the right of every man to

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of funding of religion fail the test of historical evidence. *Id.* at 406-12.

<sup>92</sup> Freeman, *supra* note 37, at 812. Professor McConnell suggests that “conscience” was dropped to limit the protection to religiously-motivated acts. McConnell, *supra* note 37, at 1494-1500.

<sup>93</sup> Feldman, *supra* note 42, at 412-17, examining “coercion” as possible test for Establishment suggesting advantages with caution.

<sup>94</sup> “While the Framers certainly understood protection of liberty of conscience to undergird the Establishment Clause, and all agreed that, in principle, coercion of conscience was wrong, there was, we have seen, no clear consensus on hard questions of whether certain forms of government support of religion should be understood as coercing conscience.” Feldman, *supra* note 42, at 416. *Id.* at 416-27, examining funding of religious institutions.

<sup>95</sup> Feldman, *supra* note 42, at 424-27, noting trend toward and historical and logical problems of secularizing the protection of conscience.

<sup>96</sup> Feldman, *supra* note 42, at 428.

exercise it as these may dictate.”<sup>97</sup> He explained why in terms that underscore the foundational nature of rights of conscience:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of a Civil Society, who enters into any subordinate Association, must always do it with reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.<sup>98</sup>

Here Madison brilliantly linked the moral tradition of a right to tolerance traceable from John Locke with the basic human rights tradition that had blossomed and evolved powerfully in America, especially since the Declaration of Independence. Madison clearly understood that if men are not loyal to themselves, to their conscience, to their God and their moral duty as they see it, it is utterly irrational folly to expect them to be loyal to less compelling moral obligations of legal rules, statutes, judicial orders, or the claims of citizenship and civic virtue, much less professional duties.<sup>99</sup> If you demand that a man betray his conscience, you have eliminated the only moral basis for his fidelity to the rule of law and have destroyed the moral foundation for democracy.<sup>100</sup>

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

<sup>98</sup> James Madison, *Memorial and Remonstrance*, *supra* note 56, at ¶1.

<sup>99</sup> “[T]he evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison’s writings, is that the claims of the “universal sovereign” precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by the nature and scope of religious duty.” McConnell, *supra* note 37, at 1512.

<sup>100</sup> Jefferson agreed. He famously explained: “The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.” Thomas Jefferson, “Notes on Virginia,” in *The Life and Selected Writings of Thomas Jefferson*, ed. Adrienne Koch & William Peden (New York NY: Modern Writings

Seventh, the founders understood that requiring men to violate and disregard their conscience resulted in the loss of virtue, which undermined the basis for self-government.<sup>101</sup> Most of the political traditions the Founders consulted emphasized that no self-governing republic could exist without a high degree of virtue in the citizenry.<sup>102</sup> Thus, the founders of the American Constitution were convinced that virtue in the citizenry was absolutely essential, indispensable for this system of government to function and survive. A few quotes from the Founders makes this point.

George Washington famously noted: “Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of Free Government. Who then is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?”<sup>103</sup>

Samuel Adams agreed that “neither the wisest constitution nor the wisest laws will secure the liberty and happiness of a people whose manners are universally corrupt.”<sup>104</sup>

Benjamin Franklin, in the Constitution Convention of 1787, voiced his concern that although the new government would likely “be well administered for a course of years,” it would “end in Despotism, as other forms have done before it, when the people have become so corrupted as to need some despotic Government, being incapable of

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1944), p. 275, cited in Steven D. Smith, “The Rise and Fall of Religious Freedom in Constitutional Discourse,” 140 *University of Pennsylvania Law Review* 149, 164 n. 58 (1991).

<sup>101</sup> Richard Vetterli & Gary Bryner, *In Search of the Republic, Public Virtue and the Roots of American Government*, rev. ed. (Totowa NJ: Rowman & Littlefield, 1996).

<sup>102</sup> Charles L. de Secondat (Baron de Montesquieu), *The Spirit of the Laws*, Book 3, ch. 3, tr. T. Nugent (New York NY: Hafner, 1952): “[I]n a popular state, one spring more is necessary..., namely, *virtue*.”

<sup>103</sup> George Washington, Washington’s Farewell Address from Saul Padover, *The Washington Papers* (searched Sept. 9, 1999).

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

any other.” On another occasion, he said: “Only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”<sup>105</sup>

James Madison told delegates to Virginia’s ratifying convention: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”<sup>106</sup> He also wrote in *Federalist* No. 57: “The aim of every political Constitution is or ought to be first to obtain for rules men who possess most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”

John Adams clearly warned: “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”<sup>107</sup> He also said: “Liberty can no more exist without virtue and independence than the body can live and move without a soul.”<sup>108</sup>

Edmund Burke, the English contemporary of and sympathizer with the American Founders, may have explained it best when he wrote:

Men are qualified for civil liberty in exact proportion to their disposition to put moral chains on their own appetites; in proportion as their love of justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the councils of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon the will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the

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<sup>105</sup> Richard Vetterli & Gary Bryner, “Public Virtue and the Roots of American Government,” 27 *BYU Studies*, 29, 41 (Summer 1987).

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

<sup>107</sup> J. Howe, *The Changing Political Thought of John Adams* (Princeton NJ: Princeton Univ. Press, 1966), p. 165.

<sup>108</sup> *The Works of John Adams*, vol. 10, p. 284.

eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters.<sup>109</sup>

The political philosophy of the Founding directly linked virtue with republication (self-) government; if the constitutional republic was to survive, virtue had to be cultivated in the populace. If virtue were to be cultivated, individual conscience had to be nurtured and protected, for only the free exercise of conscience can generate the virtue necessary to sustain a free republic. Thus, protection of the rights of conscience went to the core of the Constitution.

This also explains the limitation on protection of conscience from the colonial era, through the Founding era, and down to the present. That is a limitation for acts that are licentious and contrary to good morals or disruptive of the public peace or safety.<sup>110</sup> The protection of conscience to cultivate virtue does not provide a “wild card” to let people engage in behavior that is destructive of the political community.

## V. CONCLUSION

There are good utilitarian reasons for protecting the rights of conscience of all healthcare providers. As one commentator put it, “a physician’s professional conscience, derived from personal and professional experiences, plays a vital role in the way in which a doctor interacts with his or her patients.”<sup>111</sup> Of course, this is not

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<sup>109</sup> R. Vetterli & G. Bryner, “Introduction: Public Virtue and the Roots of Republican Government,” *In Search of the Republic, Public Virtue and the Roots of American Government* at p. 1, quoting from *The Works of the Right Honorable Edmund Burke* (Boston MA: Little, Brown & Co., 1866), pp. 51-52.

<sup>110</sup> McConnell, *supra* note 37, at 1461, describing state constitutional protections of conscience’ “nine of the states limited the free exercise right to actions that were ‘peaceable’ or that would not disturb the ‘peace’ or ‘safety’ of the state.”; see generally *id.* at 1461-1466, describing the limitations in state constitutions on protection of religious conscience.

<sup>111</sup> Judith F. Daar, “A Clash at the Bedside: Patient Autonomy v. A Physician’s Professional Conscience,” 44 *Hastings Law Journal* 1241, 1245 (1993), suggesting

limited to physicians; the same principle is true of other healthcare providers as well. Likewise, “[i]f patient autonomy is to have meaning, recognition must also be given to a physician’s moral autonomy,” because without protection of conscience medical response is constrained.<sup>112</sup>

But the more important reason why rights of conscience of healthcare providers must be protected is much deeper and much more fundamental than optimizing medical service. It is because rights of conscience are basic human rights, and protection of rights of conscience goes to the very core of the history, purpose, and structure of our system of liberties and of our constitutional government. As one commentator put it: “Integrity of conscience and professional judgment are moral rights of physicians. Society and patients have an obligation to respect them.”<sup>113</sup>

In an infamous law review article about the marginalization of religion and toleration only of innocuous religious practices in the public square, Professor Michael W. McConnell identified one reason why such blatant disregard of the rights of conscience of healthcare providers seems to be so rampant today. It relates to the cultural values that dominate our time:

In *Thus Spake Zarathustra*, Nietzsche’s mythic hero carries the... message—“God is dead!”—throughout the earth, in a parody of the gospels, calling it his “gift” to mankind. But there is one exception. The book begins with an encounter between Zarathustra and a holy man living alone in the forest. Zarathustra asks the hermit

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need to hear, recognize and address health providers moral concerns, and favoring transfer when possible; at 1245; see also Bryan A. Dykes, Note, “Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and other Health Care Providers,” 36 *Georgia Law Review* 565, 565 (2002): “the emphasis on patient autonomy has created an environment in which some patients request and expect to receive whatever treatments they desire.”

<sup>112</sup> Daar, *supra* note 111, at 1289.

<sup>113</sup> Edmund D. Pellegrino, “Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship,” 10 *Journal of Contemporary Health Law & Policy* 47, 68 (1993).

what he does in the forest, and the hermit replies: "I make hymns and sing them; and in making hymns I laugh and weep and mumble: thus do I praise God. With singing, weeping, laughing, and mumbling do I praise the God who is my God." The hermit then asks Zarathustra what he had brought as a "gift." Zarathustra, surprisingly, does not take up this invitation to tell the hermit the terrible truth of the death of God. Instead he says, evasively, "What should I have to give thee! Let me rather hurry hence lest I take aught away from thee!" And Zarathustra leaves the old man to worship in peace. This is the story of religious freedom in the post-modern world...

Zarathustra's toleration was toward one who neither participated in public life nor entered public discourse. No such forbearance was shown to anyone in the village. If the hermit left the forest and attempted to enter into public discussion and debate, he would be given the news of God's death like everyone else.

Can we recognize in Zarathustra the enlightened attitude toward religious faith in our age? Religious freedom is to be protected, strongly protected—so long as it is irrelevant to the life of the wider community. But allow religion to affect the law pertaining to, say, abortion; or allow religion to affect the way we educate our children in our communities' schools; even allow religion to affect the way we celebrate holidays in public, and there is trouble. When these quaint and discredited beliefs spill over into the life of the community, we have crossed the line. Religion, the Supreme Court has told us on more than one occasion, is "a private matter for the individual, the family, and the institutions of private choice." Religion in public is at best a breach of etiquette, at worst a violation of the law. Religion is privatized and marginalized. It has nothing to offer to the public sphere. We will not interfere with solitary hermits in the forest, but they must stay out of the public square.<sup>114</sup>

Healthcare providers who assert rights of conscience are not like the quaint and impotent hermit in Nietzsche's tale. Rather, their exercise of their beliefs can upset and threaten the worldview and the plans of those who seek to normalize and facilitate controversial medical procedures such as abortion (to name one practice) as much as the abolitionists' exercise of their beliefs upset and threatened the worldview and wishes of slave-owners in 1859. So it is unlikely that those who oppose protection of rights of conscience for healthcare providers will simply change their minds and cease their attacks in the near future.

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<sup>114</sup> Michael W. McConnell, "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age," 1993 *Brigham Young University Law Review* 163, 163-65.



The history of the founding of our nation and the intellectual history of the ideas upon which it was erected reveal that protection of rights of conscience is the keystone in the arch of our constitutional system. Conscience and the virtue it nurtures hold the entire system of constitutional rights together. Thus, what ultimately is at stake in the growing disputes over healthcare providers' rights of conscience, and concerning ACOG Ethics Opinion No. 385, is more than just the interests of those individuals and that industry. The structure of our system of individual liberties is founded on respect for liberty of conscience.

Thomas Jefferson said: "We may consider each generation as a distinct nation, with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country."<sup>115</sup> It was also Jefferson who said: "Nothing...is unchangeable but the inherent and inalienable rights of man."<sup>116</sup> Jefferson apparently believed that each generation would have to discover for itself those unchangeable, inherent, and inalienable basic human rights, such as rights of conscience. Our generation must discover those truths. We must defend rights of conscience of healthcare providers against attacks such as that presented by ACOG Ethics Opinion No. 385 not only to protect those individuals, and not merely to be faithful to the legacy of liberty we have inherited, but we must do so for the sake of future generations whose constitutional liberties depends upon preservation of rights of conscience.

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<sup>115</sup> Thomas Jefferson to John Wayles Eppes, 1813, in *Favorite Jefferson Quotes*, available at <http://www.whatreallyhappened.com/RANCHO/POLITICS/DOCUMENTS/JEFFERSON/jeff1.html> (last seen 12 May 2008).

<sup>116</sup> Thomas Jefferson to John Cartwright, 1824, in *Favorite Jefferson Quotes*, *id.*

