

Assessing the Legal Bases for Conscientious Objection in Healthcare

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ABSTRACT: The problem of rights of conscience in healthcare is one of the most serious religious freedom issues in the United States. There are increasing pressures on healthcare professionals to conform their conduct to a secular vision of healthcare, even in situations when such professionals have a conscientious objection to facilitating, participating in, or performing various procedures. This paper evaluates the legal bases for conscientious objection in healthcare. Under current law, there is inadequate protection for those healthcare professionals who have religious and moral objections to governmental mandates. There is a pressing need for comprehensive protection for rights of conscience. Perhaps paradoxically, an effort to protect religious conscience has some risks because of the current pressures to privatize religion. In the long run, rebuilding a pro-life culture is the only sure protection for pro-life healthcare professionals.

I. INTRODUCTION

It is a pleasure for me to serve as one of the commentators on Lynn Wardle's paper.¹ Lynn has been one of the leading legal commentators on these issues for quite some time; he wrote an influential article on this topic back in 1993.² His most recent paper is another very helpful contribution to the debate on rights of conscience. I think the principal virtue of the paper is its very effective and

¹ Lynn D. Wardle, "Rights of Conscience Versus Peer-Driven Medical Ethics: ACOG and Abortion," in *Life & Learning XVIII: Proceedings of the Eighteenth University Faculty for Life Conference*, ed. J. Koterski (2011), pp. 21-51.

² Lynn D. Wardle, "Protecting the Rights of Conscience of Healthcare Providers," 14 *Journal of Legal Medicine* 177 (1993).

compelling critique of the ACOG statement.³ That statement is being re-evaluated and I believe that criticisms such as Lynn's will prompt a revision in that statement. Lynn's paper also is quite effective in detailing the historical background and support for rights of conscience.

One thing that is noteworthy about Professor Wardle's paper is that he says very little about the current legal situation. That may be because the news is so depressing. Despite the historical support for conscience, the current situation provides very little protection, at least not as a matter of constitutional law.⁴

In these comments, I will explain the current legal situation. I will also explain why the movement to protect religious conscience has some risks. I will explain why I think this effort to protect conscience ought still to be pursued while we also pursue the strategy of rebuilding a pro-life culture, which in the long-run is the only sure protection for healthcare professionals who are pro-life.

II. BACKGROUND: THREATS TO CONSCIENCE

The problem of rights of conscience in healthcare is one of the most serious religious freedom issues that now exists in the United States. In many ways, there are profound ironies about this. The

³ In November 2007, the Committee on Ethics of the American College of Obstetricians and Gynecologists issued an Opinion (No. 385) entitled "The Limits of Conscientious Refusal in Reproductive Medicine." http://www.acog.org/from_home/publications/ethics/co385.pdf.

⁴ See generally, Richard S. Myers, "United States Law and Conscientious Objection in Healthcare," in *Cooperation, Complicity, and Conscience: Moral Problems in Healthcare, Science, Law, and Public Policy*, ed. Helen Watt (London UK: Linacre, 2005), pp. 296-315. [Hereinafter Myers, Linacre paper.] This paper is largely drawn from my earlier treatment of the topic in the Linacre paper. I will update the analysis here as appropriate. For a more extended treatment of recent developments, see also Richard S. Myers, "Current Legal Issues Regarding Rights to Conscience in Healthcare," *Josephinum Journal of Theology* 16/2 (2009): 394-410.

legal system in the United States has been characterized as “A Republic of Choice.”⁵ Appeals to choice (and personal autonomy) tend to dominate public policy debates. The rhetoric of choice is exceedingly powerful, and it is difficult to resist its appeal. I think this point is evidenced by the way in which “choice” is invoked by all sides of the political spectrum. It is no accident that those in favor of abortion rights and those in favor of school vouchers both refer to themselves as movements of “choice.”⁶

Appeals to choice are very common in bioethics. Perhaps the most infamous judicial example occurred in the Court’s decision in *Planned Parenthood v. Casey*.⁷ There the Court noted: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁸

This line of thinking has also played a role in the assisted suicide area. In the mid-1990s, one of the lower court opinions addressed the constitutionality of the State of Washington’s ban on assisted suicide thus: “This Court finds the reasoning in *Casey* highly instructive and almost prescriptive on the...issue [of a terminally ill person’s choice to commit suicide]. Like the abortion decision, the decision of a terminally ill person to end his or her life ‘involv[es] the most intimate and personal choices a person may make in a lifetime’ and constitutes a ‘choice...central to personal

⁵ Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge MA: Harvard University Press, 1990).

⁶ For a discussion of choice in education, see Richard S. Myers, “School Choice: The Constitutional Issues,” *Catholic Social Science Review* 8 (2003): 167. It is noteworthy that in early 2003, one of the major abortion rights organizations, the National Abortion and Reproductive Rights Action League, changed its name to NARAL Pro-Choice America. See <http://www.naral.org>.

⁷ 505 U. S. 833 (1992). For criticism of *Casey*, see Michael Stokes Paulsen, “The Worst Constitutional Decision of All Time,” 78 *Notre Dame Law Review* 995 (2003).

⁸ 505 U. S. at 851.

dignity and autonomy.”⁹

In its 1997 decisions on assisted suicide,¹⁰ the Supreme Court did reject reliance on this broad language from *Casey* in concluding that there was no federal constitutional right to assisted suicide.¹¹ The Court’s majority there seemed to confine the use of the language to the limited context of abortion.¹²

Somewhat surprisingly, however, the Supreme Court resurrected this language in its decision in *Lawrence v. Texas*.¹³ In *Lawrence*, the Texas case involving homosexual sodomy, the Court relied on *Casey*’s more expansive approach without so much as mentioning the assisted suicide cases.¹⁴ As Justice Scalia pointed out in his *Lawrence* dissent, this language (which he described as

⁹ *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459-1460 (W. D. Wash. 1994)(quoting *Casey*, 505 U. S. at 851), rev’d, 49 F. 3d 586 (9th Cir. 1995), rev’d, 79 F. 3d 790 (9th Cir. 1996)(en banc), rev’d sub nom. *Washington v. Glucksberg*, 521 U. S. 702 (1997).

¹⁰ See *Washington v. Glucksberg*, 521 U. S. 702 (1997); *Vacco v. Quill*, 521 U. S. 793 (1997).

¹¹ *Glucksberg*, 521 U. S. at 728.

¹² *Id.* The *Glucksberg* Court seemed to adopt a far more restrained approach to judicial review. See Richard S. Myers, “Physician-assisted Suicide: A Current Legal Perspective,” *National Catholic Bioethics Quarterly* 1 (2001): 349; Michael W. McConnell, “The Right to Die and the Jurisprudence of Tradition,” 1997 *Utah Law Review* 665.

¹³ 539 U. S. 558, 573-574 (2003).

¹⁴In Justice Kennedy’s majority opinion, there is neither a citation to nor a discussion of the assisted suicide cases. In his dissenting opinion, Justice Scalia noted that “Roe and Casey have been equally ‘eroded’ by *Washington v. Glucksberg*, ...which held that *only* fundamental rights which are ‘deeply rooted in this Nation’s history and tradition’ qualify for anything other than rational basis scrutiny under the doctrine of ‘substantive due process.’” 539 U. S. at 588 (Scalia, J., dissenting). For a detailed discussion of the ways in which *Lawrence* departs from *Glucksberg*, see Robert C. Post, “Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law,” 117 *Harvard Law Review* 4, 91-107 (2003).

the Court's "famed sweet-mystery-of-life passage"¹⁵) threatens the constitutionality of nearly all morals legislation.¹⁶ We see, yet again, the almost overwhelmingly powerful appeal of the language of choice and of "an autonomy of self."¹⁷

The idea is, of course, that the state must remain neutral on these basic moral choices. In fact, some even celebrated the statement in *Casey* as support for the idea that moral relativism is a constitutional command.¹⁸ Under this view, morality is purely private, purely subjective. The state must remain neutral about the content of the individual's choice. The state must remain indifferent toward whether the pregnant woman chooses life or death.¹⁹ It is considered a sufficient answer to these questions to leave these matters entirely to the realm of subjective choice. You see this on bumper stickers: "Don't like abortion, don't have one"—as if that adequately resolved the underlying moral question.

Yet, this is a false neutrality. On the issue of abortion, for example, the state must decide whether an unborn child is a person entitled to the full protection of the law. This is not a matter that can adequately be dealt with by falsely pretending not to decide whether an unborn child is a human being entitled to legal protection.²⁰ For

¹⁵ 539 U. S. at 588 (Scalia, J., dissenting).

¹⁶ Justice Scalia noted that the Court's approach "effectively decrees the end of all morals legislation." 539 U. S. at 599 (Scalia, J., dissenting).

¹⁷ See generally Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," 6 *Ave Maria Law Review* 61 (2007). This article comments critically on the Supreme Court's cases that embody the extreme autonomy view. The article discusses the impact of *Lawrence v. Texas* and notes that most subsequent lower court opinions have not yet read *Lawrence* broadly. Myers, *supra*, at 72-77.

¹⁸ See Stephen G. Gey, "Is Moral Relativism a Constitutional Command?," 70 *Indiana Law Journal* 331 (1995).

¹⁹ Myers, *supra* note 12, at 346.

²⁰ This error is common. In *Roe v. Wade*, 410 U. S. 113 (1973), Justice Blackmun

as Pope John Paul II stated in *Evangelium Vitae*, “when freedom is detached from objective truth it becomes impossible to establish personal rights on a firm rational basis; and the ground is laid for society to be at the mercy of the unrestrained will of individuals or the oppressive totalitarianism of public authority.”²¹ Cardinal Ratzinger, before he became Pope Benedict XVI, made this point with great force a number of years ago. He stated: “One sees...that the idea of an absolute tolerance of freedom of choice for some destroys the very foundation of a just life for men together. The separation of politics from any natural content of right, which is the inalienable patrimony of everyone’s moral conscience, deprives social life of its ethical substance and leaves it defenseless before

noted: “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at a consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” 410 U. S. at 159. In an article published several years ago, Professor Whitman made the same error. She stated: “The constitutional question posed by abortion cannot be ‘when does life begin.’ Legal analysis cannot answer that question, so it cannot be the test or doctrinal structure on which the right to abortion hinges.” Chris Whitman, “Looking Back on *Planned Parenthood v. Casey*,” 100 *Michigan Law Review* 1791, 1995 (2002). The problem with this false gesture of humility is that a decision is being made about the status of the unborn. The *Roe* Court later noted that “we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.” 410 U. S. at 162. The Court reached this conclusion because it had its own theory of human life that it enshrined into the law. The Court in *Roe* was in fact concluding that the unborn child could not legally be regarded as a human person entitled to the full protection of the law. Whatever this is, it is assuredly not a failure to decide the question. For a critique of Professor Whitman’s article, see Richard S. Myers, “Reflections on “Looking Back on *Planned Parenthood v. Casey*,” in *Life and Learning XIII: The Proceedings of the Thirteenth University Faculty for Life Conference*, ed. J. Koterski (Washington, D.C.: UFL, 2003), pp. 3-19.

²¹ Pope John Paul II, *Evangelium Vitae* (1995) §96, available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp_ii_enc_2503_1995_evangelium-vitae_en.html.

the will of the strongest.”²²

We see this playing out in the United States. What begins with an appeal to “choice” and to freedom quickly moves to the will of the strongest prevailing, in large part by certain powerful individuals turning to the “oppressive totalitarianism of public authority.” We have seen this in dramatic fashion with regard to abortion. Defended first as a private choice, we quickly saw moves to require that taxpayers (even those with a moral objection) pay for abortions.²³ Although the Supreme Court rejected the view that this was required by the Constitution,²⁴ this has been mandated by a number of states.²⁵ We have also increasingly seen moves to make participation in or facilitation of abortion mandatory.²⁶ We now see “choice” becoming compulsory.²⁷ These efforts to violate con-

²² Joseph Cardinal Ratzinger, “Doctrinal Document on Threats to Life Proposed,” *Origins* 20 (1991): 757, available at <http://www.priestsforlife.org/magisterium/threatstohumanlife.htm#ratzinger>.

²³ John T. Noonan, Jr., *A Private Choice: Abortion in America in the Seventies* (New York NY: Free Press, 1979), p. 191.

²⁴ *Harris v. McRae*, 448 U. S. 297 (1980); *Maher v. Roe*, 432 U. S. 464 (1977).

²⁵ In *Humphreys v. Clinic for Women, Inc.*, 796 N. E. 2d 247 (Ind. 2003), the Indiana Supreme Court concluded that the Indiana Constitution required the funding of abortions in certain limited cases. One Justice, who thought that the majority’s opinion did not go far enough, noted that “[t]welve of the seventeen state courts that have considered the issue in published opinions have concluded that denial of benefits to indigent women for medically necessary abortions is a violation of their state constitutions. Under prevailing constitutional doctrine in this state, I would reach the same result.” *Id.* at 264-65 (footnote omitted)(Boehm, J., concurring in part and dissenting in part). As Justice Boehm notes, this conclusion has been rejected by some states. See, e.g., *Bell v. Low Income Women of Texas*, 95 S. W. 3d 253 (Tex. 2002).

²⁶ See, e.g., “The Campaign to Force Hospitals to Provide Abortion” (September 2003), Fact Sheet prepared by United States Conference of Catholic Bishops, Secretariat for Pro-Life Activities, available at <http://www.usccb.org/prolife/issues/abortion/threat.pdf>.

²⁷ See Myers, Linacre paper, *supra* note 4, at 300.

science are becoming increasingly widespread, as the ACOG statement illustrates.²⁸

The trends in this area are quite troublesome.²⁹ There is an increasing pressure to conform to the secular vision of healthcare and morality. While some of these initiatives have been defeated and while some of these measures contain exemptions for those with an objection to being forced to participate in these procedures, the plight of those who adhere to a moral vision that was widely shared a hundred years ago is becoming more and more serious.

III. CURRENT LEGAL SITUATION

We are increasingly witnessing a comprehensive assault on religious freedom in healthcare. The protection for religious freedom in the United States is, perhaps surprisingly, not comprehensive. The United States is associated with religious freedom. Yet, in most of the situations described above, constitutional protections for religious freedom in the United States provide little protection.

A. *Free Exercise Clause*

To demonstrate this point, I will provide a brief summary of the law in the United States on religious liberty, with a primary focus on the Constitution of the United States. In general, the free exercise clause of the First Amendment provides very little judicially enforceable protection against state laws that mandate conduct that

²⁸ See Christopher Kaczor, "Pro-Life Doctors: A New Oxymoron?," (blog post of April 8, 2008), <http://www.firstthings.com/onthesquare/?p=1021>. Kaczor notes that under the ACOG Ethics Committee's Opinion, *supra* note 3, doctors would in certain cases be required to perform abortions despite a conscientious objection.

²⁹ See Myers, Linacre paper, *supra* note 4, at 300-02; see also Wesley J. Smith, "Pulling the Plug on the Conscience Clause," *First Things* 198 (Dec. 2009): 41-44.

might be viewed as interfering with the religious liberty of an individual or an institution. If the state requirement is a “neutral law of general applicability,” then (under current law) there is no realistic argument that the Constitution provides any basis to resist the mandate.

The leading case is *Employment Division v. Smith*.³⁰ *Smith* involved two individuals who were denied unemployment compensation because of work-related misconduct. The workers were fired from their jobs with a drug rehabilitation organization due to their use of peyote, an illegal drug, even though they used peyote for religious purposes. The Supreme Court, in an opinion by Justice Scalia, concluded that Oregon could “include religiously inspired peyote use within the reach of its general criminal prohibitions on use of that drug....”³¹ To allow an exemption from laws prohibiting “socially harmful conduct”³² would allow an individual with a religious objection to such laws “to become a law unto himself.”³³

Under this approach, so long as the state mandate is a neutral

³⁰ 494 U. S. 872 (1990). The *Smith* decision was tremendously controversial. For support of the outcome in *Smith*, see Gerard V. Bradley, “Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism,” 20 *Hofstra Law Review* 245 (1991); Lino A. Graglia, “Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution,” 85 *Georgetown Law Journal* 1 (1996); Philip A. Hamburger, “A Constitutional Right of Religious Exemption: An Historical Perspective,” 60 *George Washington Law Review* 915 (1992); John Harrison, “The Free Exercise Clause as a Rule about Rules,” 15 *Harvard Journal of Law & Public Policy* 169 (1992); William P. Marshall, “In Defense of *Smith* and Free Exercise Revisionism,” 58 *University of Chicago Law Review* 308 (1991). For criticism, see, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1; Michael W. McConnell, “Free Exercise Revisionism and the *Smith* Decision,” 57 *University of Chicago Law Review* 1109 (1990); Michael W. McConnell, “The Origins and Historical Understanding of Free Exercise of Religion,” 103 *Harvard Law Review* 1409 (1990).

³¹ 494 U. S. at 874.

³² *Id.* at 885.

³³ *Id.*, quoting *Reynolds v. United States*, 98 U. S. 145, 167 (1879).

law of general applicability, then there is no prospect of a court finding that someone with a religious objection to the mandate is exempted from the mandate.

One seeking an exemption from such a mandate would be limited to seeking an exemption from the legislature. Justice Scalia noted that “leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; [he concluded, though]...that [that] unavoidable consequence of democratic government must be preferred to a system in which conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”³⁴

*B. Free Exercise Clause: Recent litigation
involving conscientious objection in healthcare*

Most of the recent litigation dealing with claims of conscience in the area of healthcare has involved the contraceptive mandate issue.³⁵ Many states have required that employers that provide their employees with health insurance or disability insurance coverage that includes prescription drug benefits must include prescription

³⁴ 494 U. S. at 890.

³⁵ There has also been much focus on the plight of pharmacists. See generally Jennifer E. Spreng, “Pharmacists and the ‘Duty’ to Dispense Emergency Contraceptives,” 23 *Issues in Law & Medicine* 215 (2008); Nell O. Kromhout, Note, “Crushed at the Counter: Protection for a Pharmacist’s Right of Conscience,” 6 *Ave Maria Law Review* 265 (2007). Another significant recent case involved doctors who asserted a religious basis for refusing to provide artificial insemination to a lesbian couple. In *North Coast Women’s Care Medical Group, Inc. v. San Diego Count Superior Court*, 189 P. 3d 959 (Cal. 2008), the California Supreme Court rejected the argument that the doctors had a free exercise defense to California’s law prohibiting discrimination based on a person’s sexual orientation. For discussion of this case, see Richard S. Myers, “Current Legal Issues Regarding Rights to Conscience in Healthcare,” *Josephinum Journal of Theology* 16/2 (2009): 399-400.

contraceptives in the coverage. These laws typically apply even to most employers with a religious objection to providing such coverage. As long as the contraceptive mandate is applied across the board, those employers with a religious objection to providing such coverage do not have much of a chance of resisting these mandates under the U.S. Constitution. The highest courts of New York and California have rejected religious freedom claims in cases brought by Catholic Charities of the Diocese of Albany and Catholic Charities of Sacramento.³⁶

If the mandate is not viewed as a neutral law of general applicability, then the state must satisfy the “strict scrutiny” test, which means that the mandate must be narrowly tailored to meet a compelling government interest. How to decide whether a law fails this “neutral law of general applicability” requirement is an unsettled question.³⁷ The one Supreme Court case on the issue—*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*³⁸—involved local laws that were directed at outlawing animal sacrifice as practiced by the Santeria religion. Under the local laws, one could kill an animal for almost any reason except for a religious one,³⁹ and the laws therefore, were treated and invalidated as a transparent effort to shut down a religion.⁴⁰

³⁶ *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P. 3d 67 (Cal.), cert. denied, 543 U. S. 816 (2004); *Catholic Charities of Diocese of Albany v. Serio*, 859 N. E. 2d 459 (N. Y. 2006), cert. denied, 128 S. Ct. 97 (2007). See generally Myers, Linacre paper, *supra* note 4, at 305-07.

³⁷ See generally Christopher C. Lund, “A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence,” 26 *Harvard Journal of Law & Public Policy* 627 (2003). This article provides citations to the voluminous literature on this topic.

³⁸ 508 U. S. 520 (1993).

³⁹ The Supreme Court stated: “[T]he ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.” 508 U. S. at 543.

⁴⁰ The Court stated: “We conclude, in sum, that each of Hialeah’s ordinances

In the California and New York cases noted above, the plaintiffs argued that the contraceptive mandates ought to be regarded as transparent efforts to target particular religions (principally the Catholic Church) and that therefore employers with religious objections to these mandates ought to be entitled to an exemption.⁴¹ There were two basic arguments, and the arguments were so closely related that they were really just different versions of the same argument. One argument relied on the fact that the contraceptive mandates contain legislative exemptions, and so arguably the laws fail the “neutral law of general applicability” requirement.⁴² The other argument was based on “legislative intent.” According to this view, these contraceptive mandates (with or without legislative exemptions) are in reality efforts to attack the Catholic Church and should be viewed as failing the “neutral law of

pursues the city’s governmental interests only against conduct motivated by religious belief. The ordinances ‘have every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.’” *Id.* at 545 (quoting *Florida Star v. B. J. F.*, 491 U. S. 525, 542 (1989)(Scalia, J., concurring in part and concurring in the judgment)). There is a great deal of debate in the literature about whether laws will fail the “general applicability” requirement only in cases that are as extreme as *Lukumi*. For example, Professor Gedicks interprets *Smith* and *Lukumi* narrowly. He has stated: “a religiously neutral law does not fail the test of general applicability merely by being modestly or even substantially underinclusive; rather, the law must be so dramatically underinclusive that religious conduct is virtually the only conduct to which the law applies. The Court will tolerate a tremendous amount of underinclusion before finding that a law is not generally applicable, so long as the underinclusion stops short of religious targeting.” Frederick Mark Gedicks, “The Normalized Free Exercise Clause: Three Abnormalities,” 75 *Indiana Law Journal* 77, 114 (2000)(footnote omitted). Others take a far broader view. See Richard F. Duncan, “Free Exercise is Dead, Long Live Free Exercise: *Smith*, *Lukumi* and the General Applicability Requirement,” 3 *University of Pennsylvania Journal of Constitutional Law* 850 (2001).

⁴¹ *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P. 3d at 82-87 (describing and rejecting this argument); *Catholic Charities of the Diocese of Albany*, 859 N. E. 2d at 463-64.

⁴² *Catholic Charities of Sacramento, Inc.*, 85 P. 3d at 82-84.

general applicability” requirement.⁴³

Both aspects of this argument were considered and rejected in the lawsuit involving California’s contraceptive mandate.⁴⁴ The law requires that employers that provide their employees with health insurance that includes prescription-drug benefits must include prescription contraceptives in the coverage.⁴⁵ The law does contain an exemption for religious employers, but the exemption is basically a smokescreen. In order to qualify for this exemption, an employer needs to satisfy each of the following requirements: (1) the inculcation of religious values is the purpose of the entity, (2) the entity primarily employs persons who share the religious tenets of the entity, (3) the entity serves primarily persons who share the religious tenets of the entity, and (4) the entity is a non-profit organization pursuant to the Internal Revenue Code.⁴⁶ It is quite clear that this exemption, which has been characterized as “narrow” by those supporting such mandates,⁴⁷ would cover very few—if any—Catholic organizations. It is doubtful, for example, whether many Catholic organizations that provide social services would be able to maintain that the purpose of their entity was to inculcate religious values. Many of these organizations do not employ or serve primarily persons who share the religious tenets of the entity. Think about a hospital or a parish elementary school in the inner city or a

⁴³ *Id.* at 84-87.

⁴⁴ *Id.* See also *Catholic Charities of the Diocese of Albany*, 859 N. E. 2d at 463-64.

⁴⁵ *Catholic Charities of Sacramento*, 85 P. 3d at 73-75 (describing California’s statute).

⁴⁶ *Id.*

⁴⁷ See “Protecting the Rights of Conscience of Healthcare Providers and a Parent’s Right to Know: Hearing on H. R. 4691 Before the House Committee on Energy and Commerce, 107th Cong.” (2002)(statement of Catherine Weiss, Director, ACLU Reproductive Freedom Project), available at <http://energycommerce.house.gov/107/hearings/07112002Hearing632/Weiss1088print.htm>.

soup kitchen or a homeless shelter, none of which likely serves primarily persons who share the religious tenets of the entity. Moreover, the exemption would be very difficult to administer—is the Capuchin soup kitchen supposed to inquire whether the individuals it serves “share the religious tenets of the entity?”⁴⁸

Catholic Charities of Sacramento filed a lawsuit challenging the constitutionality of the California law. As the suit explained, Catholic Charities is not covered by the law’s religious exemption. The suit contended that the strict scrutiny test ought to apply because the law should not be treated as a “neutral law of general applicability” since the law, unlike Oregon’s prohibition on peyote use involved in the *Smith* case, does contain an exemption and since the law allegedly was “gerrymandered” to reach only Catholic employers.⁴⁹ The California courts rejected these arguments,⁵⁰ and the Supreme Court refused to intervene.⁵¹

The California court rulings are not in any way idiosyncratic. I think most courts in the United States would reach the same conclusion.⁵² Most courts would agree that the contraceptive

⁴⁸ In the California litigation, the California Supreme Court explained that “Catholic Charities does not qualify as a ‘religious employer’ under the...[Act] because it does not meet any of the [statutory] definition’s four criteria.” *Catholic Charities of Sacramento*, 85 P. 3d at 76. Catholic Charities admitted that it didn’t qualify for the exemption. *Id.* The same conclusion was reached in the New York litigation. *Catholic Charities of the Diocese of Albany*, 859 N. E. 2d at 463.

⁴⁹ *Catholic Charities of Sacramento*, 85 P. 3d at 84-87.

⁵⁰ *Id.*

⁵¹ 543 U. S. 816 (2004).

⁵² The New York case confirms this view. See *Catholic Charities of the Diocese of Albany*, 859 N. E. 2d 459. For discussions of the New York situation, see Edward T. Mechmann, “Illusion of Protection? Free Exercise Rights and Laws Mandating Insurance Coverage of Contraception,” 41 *Catholic Lawyer* 145 (2001); Susan J. Stabile, “State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers,” 28 *Harvard Journal of Law & Public Policy* 741 (2005);

coverage mandate is a “neutral law of general applicability,”⁵³ and therefore would fall outside First Amendment protection altogether. Even if a court found that a mandate failed this test (because of the way it evaluated the relevance of any exemptions, for example), it might still conclude that a law passed the strict scrutiny test.⁵⁴ This is a test that sounds demanding but did not prove to be so in the religious freedom area prior to the *Smith* case in 1990. As one commentator described the situation, during this era this test was “strict in theory, but ever-so-gentle in fact...”⁵⁵

Susan J. Stabile, “When Conscience Clashes with State Policy: Catholic Institutions,” 46 *Journal of Catholic Legal Studies* 137 (2007); Piero A. Tozzi, “When Conscience Clashes with State Policy: Catholic Institutions: A Response to Susan Stabile,” 46 *Journal of Catholic Legal Studies* 161 (2007).

⁵³ *Catholic Charities of the Diocese of Albany*, 859 N. E. 2d at 463-464.

⁵⁴ For additional discussion of this issue, see Inimai M. Chettiar, Comment, “Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?,” 69 *University of Chicago Law Review* 1867 (2002). See also *Catholic Charities of Sacramento*, 85 P. 3d at 89-94 (finding that the California statute survived strict scrutiny under the California Constitution); *Catholic Charities of the Diocese of Albany*, 859 N. E. 2d at 465-468 (finding that the New York statute survived the balancing test applicable under the New York Constitution).

⁵⁵ Ira C. Lupu, “The Trouble with Accommodation,” 60 *George Washington Law Review* 743, 756 (1992). See Richard S. Myers, “Curriculum in the Public Schools: The Need for an Emphasis on Parental Control,” 24 *Valparaiso University Law Review* 431, 436 (1990); see also Michael J. Frank, Note, “Safeguarding the Consciences of Hospitals and Healthcare Personnel: How the Graduate Medical Education Guidelines Demonstrate a Continued Need for Protective Jurisprudence and Legislation,” 41 *St. Louis Law Journal* 311, 328-37 (1996), discussing a case in which the court rejected the religious freedom arguments of a Catholic hospital that had its accreditation withdrawn because it refused to provide abortion or sterilization training for its ob/gyn residents. The Supreme Court’s decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U. S. 418 (2006) suggests that there may be some renewed vigor to the test applicable in this area. For commentary, see Richard Garnett and Joshua D. Dunlap, “Taking Accommodation Seriously: Religious Freedom and the *O Centro* Case,” 2006 *Cato Supreme Court Review* 257 (2006).

Another recent case that confirms this assessment is *Storman's Inc. v. Selecky*.⁵⁶ In *Storman's*, the Ninth Circuit refused to enjoin the enforcement of regulations in the state of Washington that required pharmacies to dispense Plan B Contraceptives, the so-called morning after pill. The federal district court had enjoined the regulations because the court thought that the regulations targeted religious practice and therefore fell outside the *Smith* rule.⁵⁷ The federal court of appeals reversed this ruling. In so holding, the court of appeals emphasized that the regulations were not focused only on those with a religious objection to filling the prescriptions in question. As the court of appeals explained, under current law it does not matter if those with religious objections are disproportionately affected. In addition, the court did not believe that the legislative history supported the claim that the state regulations were enacted with a single purpose of burdening religious practice.⁵⁸

An important reason why the religious freedom claims are likely to fail is that courts in the United States tend to have a very restricted view of religious liberty, even in those situations when the Constitution provides any protection at all. Religion only receives much protection in areas such as religious belief and worship. But when religion is out in the world—running schools or hospitals or homeless shelters—the courts tend to say that it must be treated just like any other entity. Under this view, there is very little room for religious entities to be faithful to their religious identities when they venture out into the public realm; these entities must bow to the

⁵⁶ 586 F. 3d 1109 (9th Cir. 2009).

⁵⁷ 524 F. Supp. 2d 1245 (W. D. Wash. 2007), rev'd, 586 F. 3d 1109 (9th Cir. 2009).

⁵⁸ 596 F. 3d at 1131-1134. The court of appeals noted that there is a dispute in the cases about the extent to which courts are permitted to rely on legislative history in free exercise cases. The court did not believe it was necessary to resolve this issue to decide the case. *Id.*

demands of the secular state.

The opinions of the California courts in the *Catholic Charities* case are good examples. For example, the California Supreme Court was untroubled by the statement of the law's sponsor who noted that the law's narrow exemption was intended to cover only the "religious" activities of employers. As the sponsor explained, "[t]he more secular the activity gets, the less religiously based it is, and the more we believe that they should be required to cover prescription drug benefits for contraception."⁵⁹ Although the courts typically will say that they will assume that religious individuals and institutions are sincere in claiming a religious basis for objection to a government mandate, the underlying tone of the opinion is that Catholic Charities is not really engaged in a religious practice at all. This is apparent from the testimony at a legislative hearing dealing with rights of conscience in healthcare. An ACLU official stated: "When, however, religiously affiliated organizations move into secular pursuits—such as providing medical care or social services to the public or running a business—they should no longer be insulated from secular laws that apply to these secular pursuits. In the public world, they should play by public rules."⁶⁰ The ACLU has issued an official report on this topic entitled "Religious Refusals and Reproductive Rights," and the choice to characterize claims of conscience with the far less appealing label of "religious

⁵⁹ *Catholic Charities of Sacramento*, 85 P. 3d at 87. Justice Brown's dissenting opinion objected because she correctly concluded that "[t]he government is not accidentally or incidentally interfering with religious practice; it is doing so willfully by making a judgment about what is or is not religious." *Id.* at 102 (Brown, J., dissenting).

⁶⁰ "Protecting the Rights of Conscience of Healthcare Providers and a Parent's Right to Know: Hearing on H. R. 4691 Before the House Committee on Energy and Commerce, 107th Congress" (2002), statement of Catherine Weiss, Director, ACLU Reproductive Freedom Project, available at <http://energycommerce.house.gov/107/hearings/07112002Hearing632/Weiss1088print.htm>.

refusals” was surely no accident.⁶¹ This Report says that it supports “protecting the religious practices of insular, sectarian institutions while insisting on compliance with general rules in the public, secular world.”⁶² This is obviously far from any sort of broad acceptance for hospitals and individuals maintaining a strong sense of their religiously informed identities.

Although this separation between religious and secular sides of life is foreign to the self-understanding of many religious men and women, the courts commonly draw this distinction. We have seen this in areas outside the healthcare context. Thus, landlords have been forced to rent to unmarried couples, even when so doing violates the landlord’s religious beliefs.⁶³ The courts that have ruled against these landlords reflect the view that this kind of “commercial” activity is not really religious, or is at any rate not entitled to the protection afforded to “core” religious activity.⁶⁴ The cases

⁶¹ “Religious Refusals and Reproductive Rights” (2002), available at <http://www.aclu.org/files/FilesPDFs/ACF911.pdf>.

⁶² *Id.* This ACLU Report was updated in 2007. See “Religious Refusals and Reproductive Rights: Accessing Birth Control at the Pharmacy” (April 17, 2007), available at <http://www.aclu.org/reproductive-freedom/religious-refusals-and-reproductive-rights-accessing-birth-control-pharmacy>. The 2007 Report takes the same basic approach.

⁶³ See, e.g., *Smith v. Fair Employment and Housing Commission*, 913 P. 2d 909 (Cal. 1996), cert. denied, 521 U. S. 1129 (1997); *Swanner v. Anchorage Equal Rights Commission*, 874 P. 2d 274 (Alaska), cert. denied, 513 U. S. 979 (1994).

⁶⁴ The *Swanner* case is illustrative. There, the Supreme Court of Alaska stated: “*Swanner* has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or ‘Hobson’s choice,’ of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. *Swanner* is voluntarily engaging in property management. The law and ordinance regulate unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. Voluntary commercial activity does not receive the same status accorded to directly religious activity.” *Swanner*, 874 P. 2d at 283 (citation omitted).

candidly state that if these landlords do not want to follow the prevailing secular wisdom that they can just get out of the business of being a landlord.⁶⁵ The net result is that religious institutions and individuals are being forced to abandon their distinctive missions—either “secularize” their operations or get out of the healthcare field altogether.

C. Other Legal Bases for Protection of Conscience

It seems clear that there is no solid basis for claiming that the U.S. Constitution, as currently interpreted, provides significant protection for those with a religious objection to being forced to comply with legislative mandates. There are, however, still some religious freedom arguments that can be made. In certain situations, with respect to federal laws, there are certain statutory protections for religious freedom. In 1993, Congress passed The Religious Freedom Restoration Act as an effort to “overrule” the *Smith* decision.⁶⁶ In 1997 the Supreme Court invalidated RFRA as applied to state and local laws,⁶⁷ but RFRA still provides a basis to argue for a religious exemption when faced with a federal mandate,⁶⁸ although such claims still may not succeed in a court of law.⁶⁹ With respect to state and local laws, there may be other possible bases to

⁶⁵ *Smith*, 913 P. 2d at 925, 928-929.

⁶⁶ *City of Boerne v. Flores*, 521 U. S. 507, 512-516 (1997)(describing the Religious Freedom Restoration Act).

⁶⁷ *City of Boerne v. Flores*, 521 U. S. 507 (1997).

⁶⁸ See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U. S. 418 (2006). In the *O Centro* case, the Court made it clear the RFRA applied to federal statutes. See Lund, *supra* note 37, at 632 n. 26, citing the prior cases that have so held and briefly discussing the controversy about this.

⁶⁹ See generally Ira C. Lupu, “The Failure of RFRA,” 20 *University of Arkansas Little Rock Law Journal* 575, 585-597 (1998). Professor Lupu’s study concluded that “at least insofar as the litigation record demonstrates, RFRA resulted in surprisingly little protection for religion.” *Id.* at 597.

argue for a religious exemption. State constitutions sometimes provide broader protection for religious freedom than the federal Constitution, and some states have passed state legislative counterparts to the Religious Freedom Restoration Act.

The other protection for religious conscience arises on a case-by-case basis pursuant to other statutes. In certain contexts, Congress or individual states have provided protections for those with conscientious objection to compliance with legislative mandates. So, for example, in the United States there is fairly strong protection for doctors and nurses who do not wish to perform or participate in abortions.⁷⁰

These case-by-case exemptions have very serious limitations.⁷¹ They tend to only apply with respect to certain procedures and the procedures covered may be interpreted narrowly (so that the morning after pill may not be considered to cause an abortion if the pill acts prior to implantation). These exemptions only cover certain medical personnel. Sometimes these exemptions are limited to institutions and do not even potentially extend to individuals (a Catholic doctor who employs five or six people, for example). These exemptions rarely deal with the serious issues involved in funding of healthcare, which, as the California and New York cases involving contraceptive mandates demonstrate, is more and more

⁷⁰ See “Protecting the Rights of Conscience of Healthcare Providers and a Parent’s Right to Know: Hearing on H. R. 4691 Before the House Committee on Energy and Commerce, 107th Congress” (2002), statement of Lynn Wardle[hereinafter Wardle Testimony], available at <http://energycommerce.house.gov/107/hearings/07112002Hearings632/Wardle1089print.htm>; Katherine A. White, Note, “Crisis of Conscience: Reconciling Religious Healthcare Providers’ Beliefs and Patients’ Rights,” 51 *Stanford Law Review* 1703, 1705-1711 (1999). But, it is important to note that this strong protection is largely a matter of legislative grace. See Richard S. Myers, “Current Legal Issues Regarding Rights to Conscience in Healthcare,” *Josephinum Journal of Theology* 16/2 (2009): 400.

⁷¹ Wardle Testimony, *supra* note 70.

becoming the focal point of the debate. With the exception of the states such as Illinois and Mississippi, which have comprehensive statutes protecting the right of conscience in healthcare, there is no comprehensive protection in the United States. Even in these states, the protection for conscience is not secure because the protection for conscience can be overridden, as we have seen in Illinois with the Governor's actions with respect to requiring pharmacists to dispense Plan B contraceptives.⁷²

In sum, the law on conscientious objection is not at all satisfactory. There are some bright spots in narrow areas, but there is no comprehensive protection for religious freedom in healthcare. There is a pressing need for a more comprehensive strategy. One solution would be for a federal law that would provide legal protection for those with a conscientious objection to being forced to comply with a governmental mandate. This has been a non-starter. Even narrower conscience protections are often resisted because they allegedly interfere with the provision of mainstream medical care. These efforts to seek protection for those with a conscientious objection to these mandates are important. In the current legal environment, these efforts to preserve the religious vision of healthcare by invoking the democratic process to protect religious liberty are about all that is available, given the narrow scope of the constitutional law in this area. There are, perhaps paradoxically, some risks to invoking this religious vision, at least in the way this tends to be articulated.

IV. RISKS TO CLAIMS FOR PROTECTING RELIGIOUS CONSCIENCE

The argument in favor of conscience is often made in terms of the need to promote a genuine pluralism in healthcare—a vision that would protect Catholic or Jewish or Mormon visions of healthcare. I have a lot of sympathy for this view, but I have concerns about

⁷² See Kromhout, *supra* note 35, at 268-73.

this as well. In many legal or policy discussions on these issues, a “religious” reason for acting is taken as inappropriate.⁷³ Such a vision is considered to be nonrational⁷⁴ or “irrational superstitious nonsense,”⁷⁵ in the words of the one of the leading constitutional scholars in the United States. Certainly such a view cannot be the fit subject of public action.

There are many Supreme Court opinions that refer disparagingly to religiously informed moral judgments. Justice Stevens, for example, has expressed the view that the preamble to the Missouri abortion statute, which stated that “the life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and well-being,” violated the Establishment Clause.⁷⁶ That conclusion was based on the view “that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose.”⁷⁷

His opinion in the *Boy Scouts* case is similar. Justice Stevens

⁷³ See Richard S. Myers, “The Privatization of Religion and Catholic Justices,” 47 *Journal of Catholic Legal Studies* 157, 163-65 (2008); Myers, *supra* note 17, at 73; Richard S. Myers, “The United States Supreme Court and the Privatization of Religion,” *Catholic Social Science Review* 6 (2001): 228-30. See also Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington DE: ISI, 2001).

⁷⁴ See Steven G. Gey, “Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment,” 52 *University of Pittsburgh Law Review* 75 (1990). In this article, Professor Gey stated: “religion is an alternative system of nonrational and unprovable beliefs. As such, religion is fundamentally incompatible with the critical rationality on which democracy depends.” *Id.* at 176.

⁷⁵ Suzaanna Sherry, “Outlaw Blues,” 87 *Michigan Law Review* 1418, 1427 (1989).

⁷⁶ *Webster v. Reproductive Health Services*, 492 U. S. 490, 566 (1989)(Stevens, J, concurring in part and dissenting in part).

⁷⁷ *Id.* at 566-567 (footnote omitted)(Stevens, J., concurring in part and dissenting in part).

referred to the Boy Scouts' views about homosexuality as "atavistic opinions...[whose] roots have been nourished by sectarian doctrine."⁷⁸ According to this opinion, it was not appropriate for the Court to permit the Boy Scouts to rely on such "prejudices;" "the light of reason" required that these prejudices be eradicated.⁷⁹

The *Lawrence* opinion is to the same effect. The Court, in a majority opinion by Justice Kennedy, again referred to moral disapproval of homosexual conduct as evidencing unreflective animosity.⁸⁰ Justice Kennedy noted that the condemnation of homosexual conduct had "been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." "These views" were swept aside in favor of the extreme individual autonomy view expressed in *Casey*: "Our obligation is to define the liberty of all, not to mandate our own moral code."⁸¹

This way of thinking is increasingly common,⁸² and potentially threatening to invoking "religious pluralism" in this effort to seek an exemption for conscientious objectors to healthcare mandates. It is risky to have issues such as abortion or contraception viewed as if they were "religious" issues.

⁷⁸ *Boy Scouts of America v. Dale*, 530 U. S. 640, 698 (2000)(Stevens, J., dissenting).

⁷⁹ *Id.* at 700 (Stevens, J., dissenting). See Richard S. Myers, "The Supreme Court and the Privatization of Religion," 41 *Catholic University Law Review* 19, 60 n. 232 (1991), noting that Justice Stevens seems to be hostile to religion). See also Robert F. Nagel, "Justice Stevens' Religion Problem," *First Things* (June/July 2003), at 9.

⁸⁰ *Lawrence*, 539 U. S. at 575, 578. See also *Goodrich v. Department of Public Health*, 798 N. E. 2d 941 (Mass. 2003).

⁸¹ *Lawrence*, 539 U. S. at 571, quoting *Planned Parenthood v. Casey*, 505 U. S. 833, 850 (1992).

⁸² See Richard S. Myers, "The Privatization of Religion and Catholic Justices," 47 *Journal of Catholic Legal Studies* 157 (2008).

We saw this working itself out in the *Catholic Charities* case in California. There, the California court did not think that the contraceptive mandate impermissibly inhibited religion. The California Supreme Court was not even sure that Catholic Charities' religious beliefs were implicated at all. Catholic Charities had explained that paying its workers a just wage included, as a matter of justice and charity, coverage for prescription drugs. The Court could not seem to comprehend how "justice and charity" could be considered "religious."⁸³ In any event, these beliefs were entitled to little weight because Catholic Charities had entered "the general labor market."⁸⁴ We see here a very disturbing approach on the part of the court—simultaneously concluding that Catholic Charities is not really engaged in something "religious" when it provides social services, while also claiming that Catholic Charities' "religious" views on contraception are entitled to little weight.

These views are quite commonplace, and that is why I am concerned when people who are sympathetic to the rights of conscience describe issues such as abortion, euthanasia, human cloning, and stem cell research as "profoundly religious issues."⁸⁵ I understand why the religious vision of healthcare is invoked, but there are real risks because such views may be considered as idiosyncratic, nonrational, irrational, not publicly accessible, or what have you. (I want to make it clear that I do not accept any of these characterizations.⁸⁶) On the disputed issues in play, we are not talking about "theological" issues at all, such as the nature of the Trinity or the Eucharist. We are talking about moral questions, and

⁸³ *Catholic Charities of Sacramento*, 85 P. 3d at 92.

⁸⁴ *Id.* at 93.

⁸⁵ Edmund D. Pellegrino, "The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective," 30 *Fordham Urban Law Journal* 221, 224 (2002).

⁸⁶ See Myers, *supra* note 82; Myers, *supra* note 79.

for many Catholics and others that means drawing on a rich tradition of natural law. But to the extent religious people persist in describing their moral vision of healthcare as “religious” they risk having this vision privatized and marginalized. It will only be protected when it does not matter very much. The moral vision will not be permitted to influence public business. Religion may be protected if practiced in one’s home or in a house of worship, but that will be it.

While the appeal to religious pluralism taps into the attractiveness many find in this “republic of choice,” it risks being marginalized in the face of the onslaught of the secular vision of healthcare, which is becoming increasingly aggressive in mandating its vision of the world. As a matter of first principle, then, an appeal to choice and in particular to religious choice has grave risks. The most desirable strategy is to promote a vision of healthcare that furthers a public morality with the substantive vision that promotes the truth about the dignity of the human person. On matters about which we are confident (that it is wrong to sexually abuse minors, for example), we are perfectly willing to limit choice. We should also be willing to do so on life and death issues in healthcare, where neutrality is really not possible. On these matters, it is imperative that we work to restore norms such as that it is wrong to intentionally take the life of an innocent human person. This is necessary, I believe, even though many hold this “moral” position because of the influence of deep theological commitments. Such moral positions, though, are the fit subjects of public action, and in some areas—the prohibition against taking the life of an innocent human person—ought to be mandatory.

V. CONCLUSION

An appeal to religious choice has serious risks. The task ought to be to build up a public morality on these issues, so as to eliminate the clash between legislative mandates and traditional moral teachings;

unfortunately, claiming a “religious” basis for acting may jeopardize this broader cultural effort. Building up the culture on these issues will also make the claim for conscientious objection, when that proves necessary to pursue, more likely to succeed, because the claims for conscience are more likely to succeed the more support for the underlying moral position there is in the broader society. So, the conscience claims in the area of abortion are more successful than those in the area of contraception, where the opposition to contraception is held by so few and is not even comprehensible to most people.

But, we are not just considering this from a position of first principles. We also ought to take account of the current cultural realities. The moral vision of healthcare that would have been held in common by most religions in the United States a hundred years ago does not exist on a widespread basis any longer. We need to work to advance our moral vision, and it is altogether fitting and proper that we do so.⁸⁷ But in the interim, we also need to pursue a second-best approach. The individuals and groups who dissent from the public orthodoxy in areas such as abortion need to have the ability to preserve their distinctive witness. This requires protection for conscience—not as the best or most desirable strategy but because in the face of the increasing demands of the secular vision of healthcare—that is all that we are going to be permitted in the foreseeable future.

The choice is to pursue this second-best strategy of conscience—or go out of the vocation of healthcare altogether. The choice is really that stark.

⁸⁷ Cf. Abraham Lincoln, “Address Delivered at the Dedication of the Cemetery at Gettysburg,” reprinted in *Collected Works of Abraham Lincoln*, vol. 7, ed. Roy P. Basler (New Brunswick NJ: Rutgers University Press, 1953), p. 23.