

## Whose Conscience Is It Anyway? The State's Role in Conscience Clause Creation and the Denial of Contraception

*This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting facts and weighing circumstances" on a case-by-case basis can a "nonobvious involvement of the State in private conduct be attributed its true significance."*<sup>1</sup>

### I. INTRODUCTION

As medical technologies and legal theories have advanced, conscience clauses have likewise evolved to protect the rights of medical providers.<sup>2</sup> Generally, a conscience clause is any legislation that allows a medical provider to refuse to perform certain services because of a moral objection.<sup>3</sup> Recently, in addition to protecting physicians, legislators have started expanding the reach of conscience clauses to protect pharmacists.<sup>4</sup> As legislators increasingly focus on protecting pharmacists who exercise their moral objections by refusing to fill prescriptions, conscience clauses protecting pharmacists' actions are also receiving increased attention.<sup>5</sup>

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1. *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). The *Reitman* Court examined the constitutionality of a proposed amendment to the California constitution revoking all prior anti-discrimination legislation in the housing market. *Id.* at 372-74.

2. Hollie J. Paine, Note, *The Catholic Merger Crusade*, 2 J. HEALTH CARE L. & POL'Y 371, 393 n.126 (1999) (explaining Church Amendment as reaction to *Roe v. Wade* decision). The Church Amendment is a federal statute allowing physicians to refuse to perform abortions and sterilizations if their objection to the procedure is based on moral beliefs. *Id.* at 392-93; *see also* 42 U.S.C. § 300a-7 (2000) (codifying Church Amendment).

3. Jason Green, *Refusal Clauses and the Weldon Amendment: Inherently Unconstitutional and a Dangerous Precedent*, 26 J. LEGAL MED. 401, 404-05 (2005) (discussing different types of state conscience clauses); *see also infra* Part III (detailing various conscience clauses).

4. Jacob M. Appel, 'Conscience' vs. *Care: How Refusal Clauses are Reshaping the Rights Revolution*, MED. & HEALTH R.I., Aug. 1, 2005, at 279 (discussing expansion of conscience clauses to include protection for pharmacists); *see also* Donald W. Herbe, Note, *The Right To Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 77-79 (2002) (advocating increased protection of pharmacists' moral beliefs). *But see* Holly Teliska, Note, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUSTICE 229, 229-32 (2005) (explaining problems with allowing pharmacists to refuse prescriptions).

5. *See* Bryan A. Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565, 569-83 (2002) (discussing conscience

A conscience clause does not mandate the action or inaction of medical providers, rather, it grants legal protection to those providers after they act.<sup>6</sup> By granting this protection, the conscience clause denies a remedy to those parties harmed by the moral decisions of their medical provider.<sup>7</sup> If conscience clause protection denies recovery, the only option for the injured party may be to claim that the statute itself is unconstitutional.<sup>8</sup>

A constitutional conflict of this nature requires an examination of the Fourteenth Amendment.<sup>9</sup> It provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>10</sup> Although the Fourteenth Amendment protects individuals from discrimination and the deprivation of due process, a violation of these rights must result from state action in order to bring a proper constitutional challenge.<sup>11</sup> Identifying state action where a state passively permits private behavior is not an easy task, but is exactly what any constitutional challenge to a conscience clause requires.<sup>12</sup>

This Note will examine whether, by protecting pharmacists from legal repercussions, a State acts for purposes of a Fourteenth Amendment violation.<sup>13</sup> Current case law reveals that courts generally do not accept arguments claiming the State has acted by passing statutes that merely permit

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clause protection as applied in various states); Herbe, *supra* note 4, at 77-79 (promoting extension of conscience clause protection for pharmacists). Beyond legal journals, the debate over pharmacist denial of prescriptions has occurred in the “mainstream” media as well. See, e.g., Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 9, 2004, at 3A (explaining pharmacist objections to contraceptives); Carol Jouzaitis, *FDA Backs The Pill For Next-Day Use; Within 72 Hours, Double Dose Can Block Pregnancy*, CHI. TRIB., Feb. 25, 1997, § N, at 1 (detailing pharmacist refusal to distribute emergency contraception); Correy E. Stephenson, *Increasing Number of Health Care Providers Refusing to Give Treatment Based on Religious Beliefs*, KAN. CITY DAILY REC., Apr. 26, 2005 (highlighting increasing numbers of pharmacists following moral beliefs when dispensing drugs).

6. See *infra* Part III (detailing origins of conscience clauses).

7. See *infra* Part III (comparing various conscience clauses).

8. Betsy Malloy, *Dispensing Morality: Refusal Clauses, Religious Exemptions and Conscience Clauses*, TEX. LAW., June 13, 2005, at 38 (discussing possible constitutional challenges to conscience clause legislation).

9. *Id.* (explaining possible objection on either due process or equal protection grounds).

10. U.S. CONST. amend. XIV. § 1.

11. The Civil Rights Cases, 109 U.S. 3, 13 (1883) (requiring state action to proceed with Fourteenth Amendment challenge).

12. See, e.g., Jackson v. Metro. Edison Co., 419 U.S. 345, 357 (1974) (holding state-approved private actions not sufficient to satisfy state action requirement); Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967) (concluding state action present in repeal of anti-discrimination legislation); Gritchen v. Collier, 254 F.3d 807, 813 (9th Cir. 2001) (declaring existence of enabling statute insufficient to recognize state action).

13. See *infra* Part VI. This analysis differs from prior pieces examining constitutional challenges to conscience clause legislation because it will not presume that state action is present. Compare *infra* Part V (determining whether state action exists in conscience clause legislation), with Maryam T. Afif, Note, *Prescription Ethics: Can States Protect Pharmacists Who Refuse to Dispense Contraceptive Prescriptions?*, 26 PACE L. REV. 243, 268 (2005) (presuming presence of state action when claiming Fourteenth Amendment violation), and Green, *supra* note 3, at 409-11 (discussing constitutional problems of conscience clauses without establishing presence of state action).

an action to occur.<sup>14</sup> There is some case law, however, recognizing state action where the State has established a custom or practice of adopting otherwise passive legislation.<sup>15</sup> This theory, combined with the Supreme Court's requirement for a fact-specific analysis, may persuade a court to declare unconstitutional the conscience clause in question.<sup>16</sup>

Part II of this Note will detail the history of conscience clause legislation by specifically focusing on the various forms of contraceptives at issue and the duties of pharmacists to dispense them. Part III will discuss how state governments adopt conscience clauses by examining provisions common among the states and provisions unique to various states. Part IV will then examine the issues surrounding Fourteenth Amendment claims, including the requirements that a claimant must meet to satisfy a constitutional claim and the available remedies. Finally, Part V will analyze the current state action doctrines and will propose that, while a conscience clause is seemingly passive legislation, such clauses do constitute state action for the purposes of a Fourteenth Amendment challenge.

## II. THE HISTORY OF THE CONSCIENCE CLAUSE

Currently in the United States, the primary method of contraception women use is oral contraception, otherwise known as "the pill."<sup>17</sup> Although popular and generally safe, a user of the pill must present a valid prescription to obtain it.<sup>18</sup> In addition to requiring prescriptions for proactive (pre-coitus) birth control, women under the age of eighteen also need prescriptions to obtain reactive (post-coitus) birth control, also known as "emergency contraception."<sup>19</sup> Emergency contraception functions by releasing an anti-

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14. *Jackson*, 419 U.S. at 357 (explaining state-approved private decision will not satisfy state action requirement); *Gritchen*, 254 F.3d at 813 (holding enabling statute insufficient to qualify as state action).

15. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 173 (1970) (holding state-enforced custom encouraged private action); *Reitman* 387 U.S. at 375 (concluding state's encouragement of private action was state action).

16. *Supra* note 1 and accompanying text (refusing to create absolute test for state action).

17. See GUTTMACHER INSTITUTE, FACTS IN BRIEF: CONTRACEPTIVE USE, [http://www.guttmacher.org/pubs/fb\\_contr\\_use](http://www.guttmacher.org/pubs/fb_contr_use) (last visited Sept. 24, 2006) (listing various types of birth control methods used in America). Thirty percent of women who use birth control, or approximately 11.6 million women, choose the pill as their primary method of contraception. *Id.* Oral contraceptives work by stopping the release of mature eggs, making it more difficult for the sperm to reach the egg, and reducing the likelihood that a fertilized egg will attach to the wall of the uterus. TRACEE CORNFORTH, Q. HOW DOES THE BIRTH CONTROL PILL WORK?, <http://womenshealth.about.com/od/thepill/f/howpillworks.htm> (last visited Sept. 24, 2006) (discussing functioning and use of oral contraceptives).

18. See THE PILL—ORAL CONTRACEPTIVE, <http://www.fwhc.org/birth-control/thepill.htm> (last updated Jan. 29, 2006) (highlighting need for prescription as one disadvantage of oral contraception); Seven Myths About The Pill, <http://66.151.111.132/pp2/portal/files/portal/medicalinfo/birthcontrol/pub-contraception-pill-myths.xml> (last visited Sept. 24, 2006) (answering questions regarding common myths about health effects of birth control pills).

19. See Gardiner Harris, *F.D.A. Approves Broader Access to Next-Day Pill*, N.Y. TIMES, Aug. 25, 2006, at A1 (explaining FDA's approval of over-the-counter sale of Plan B to those over eighteen years old).

hormone that prevents a fertilized egg from implanting on the uterine wall.<sup>20</sup> While separate medications exist to serve pre-coital and post-coital contraceptive functions, regular birth control pills can also serve as emergency contraception in “off label” use.<sup>21</sup>

Prior to 1999, off label use of the pill was the only method of post-coital contraception because emergency contraception, as its own drug, is a recent addition to the market.<sup>22</sup> It was not until 1999 that the FDA approved “Plan B,” a unique product designed specifically for use as an emergency contraceptive.<sup>23</sup> Plan B and traditional pre-coital contraception now allow women to prevent pregnancy both before and after sexual intercourse.<sup>24</sup> The distribution of these drugs, however, has created new moral and ethical conflicts for many pharmacists.<sup>25</sup>

The teachings of the Catholic Church, which is generally opposed to any form of contraception or abortion, are one source for this moral dilemma.<sup>26</sup> The Church grounds its objection to contraception in both Church-generated doctrine and the Old Testament.<sup>27</sup> In contrast to numerous theological sources supporting the Church’s ban on contraception, its objection to abortion originates primarily from papal declaration.<sup>28</sup>

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20. Herbe, *supra* note 4, at 79 (discussing function of emergency contraceptives). A Post-coital drug acts as an anti-hormone to block progesterone, which is required to retain a fertilized egg. *Id.* Emergency contraception is not, however, identical to an “abortion pill” like RU-486. WOMENSHEALTH.GOV, FREQUENTLY ASKED QUESTIONS: EMERGENCY CONTRACEPTION 3 (Aug. 2006), available at <http://womenshealth.gov/faq/econtracep.pdf> (distinguishing emergency contraception and abortion pills). Drugs such as Mifepristone and RU-486 cause the uterus to expel an egg that has previously attached to the uterine wall, while emergency contraception prevents attachment and does not have any effect if the woman is already pregnant at the time she ingests the pill. *Id.* at 1, 3.

21. EMERGENCY CONTRACEPTION (ALSO KNOWN AS THE “MORNING AFTER” PILL OR “PLAN B”), <http://www.fwhc.org/birth-control/ecinfo.htm> (last updated Sept. 18, 2006) (explaining use of regular birth control pills as emergency contraception). Birth control pills can act as emergency contraceptives if ingested in quantities exceeding the usual dosage required to provide regular and proactive birth control. *Id.*

22. See AMERICAN PHARMACEUTICAL ASSOCIATION, SPECIAL REPORT, EMERGENCY CONTRACEPTION: THE PHARMACIST’S ROLE 2 (2000), available at [http://www.pharmacist.com/pdf/emer\\_contra.pdf](http://www.pharmacist.com/pdf/emer_contra.pdf) (explaining use of birth control as emergency contraception). In 1974, Albert Yuzpe developed a method to use the pill as emergency contraception. *Id.* at 1. This regimen was the primary means for achieving post-coital contraception until 1998 when the FDA approved the Preven Emergency Contraceptive Kit, which was modeled after Yuzpe’s regimen. *Id.* at 2.

23. See *id.* (highlighting approval of Plan B drug).

24. See *supra* note 20 and accompanying text (describing how emergency contraception functions).

25. See Herbe, *supra* note 4, at 88 (discussing moral conflict of pro-life pharmacists required to dispense emergency contraception).

26. Kate Spota, Note, *In Good Conscience: The Legal Trend to Include Prescription Contraceptives in Employer Insurance Plans and Catholic Charities’ “Conscience Clause” Objection*, 52 CATH. U. L. REV. 1081, 1084 (2003) (describing sources for Catholic Church rejection of artificial contraception).

27. *Id.* at 1084 n.19. Pope John Paul VI’s, “Humanae Vitae” is a church doctrine that establishes procreation as one of two distinct, yet inseparable, purposes of sex between a married couple. *Id.*

28. See Herbe, *supra* note 4, at 86-87 (discussing Catholic Church’s declarations regarding abortions). In 1974, Pope Paul VI issued the Declaration on Procured Abortion that asserted an abortion is never a legitimate means of birth control. THE SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION, ¶ 18 (Nov. 18, 1974), available at

An issue arises when doctors and pharmacists try to classify emergency contraception as a contraceptive or an abortifacient.<sup>29</sup> Pharmacists who view emergency contraception as an abortifacient may face a moral dilemma when dispensing a drug that directly conflicts with their religious beliefs.<sup>30</sup> That pharmacist, therefore, may refuse to dispense the drug on the grounds that he or she does not want to facilitate an abortion.<sup>31</sup>

While pharmacists' personal beliefs are important, they also have a code of ethical duties to which they must adhere.<sup>32</sup> This code does not provide specific instructions for how to act, but rather is a general guideline for ethical behavior that often balances the moral values of the patient, the pharmacist, and society.<sup>33</sup> Some of the guidelines are unclear as to how pharmacists should balance personal moral beliefs with their duties to the patient.<sup>34</sup> Parts of the

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[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19741118\\_declaration-abortion\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html) (explaining problems associated with procured abortion).

29. See THE PILL – HOW IT WORKS AND FAILS (Oct. 1998), available at [http://www.pfli.org/faq\\_oc.html](http://www.pfli.org/faq_oc.html) (explaining how birth control pills function). Pharmacists For Life International does not view the pill as contraception because it does not actually stop the sperm from penetrating the egg. *Id.* Instead, the organization views conception as the moment of fertilization and not implantation. *Id.* By preventing the implantation of a fertilized egg, the pill acts as an abortifacient. *Id.* This line of thought contrasts with other doctors who believe that the pill acts as a contraceptive and not an abortifacient. Cornforth, *supra* note 17 (stating emergency contraception stops pregnancy). A publication by the National Women's Health Center maintains that conception occurs at implantation, and therefore, considers emergency contraception as similar to other contraceptives. *Id.*; see also *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal. Rptr. 240, 244-45 (Ct. App. 1989) (holding California conscience clause statute not applicable because emergency contraception prevented, not terminated, pregnancy); PLANNED PARENTHOOD, EMERGENCY CONTRACEPTION (Aug. 1, 2006), <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/emergency-contraception-6549.htm> (claiming emergency contraception prevents pregnancy).

30. See Stephenson, *supra* note 5 (relaying stories of pharmacists objecting to distribution due to moral conflict). A common theme among all pharmacists who refuse to distribute contraception is a conflict with their religious beliefs. *Id.* See generally Pharmacists For Life International, <http://www.pfli.org> (last visited Sept. 24, 2006) (promoting group as organization of pro-life pharmacists).

31. See Stephenson, *supra* note 5 (elaborating on why pharmacists deny contraception prescriptions).

32. CODE OF ETHICS FOR PHARMACISTS, pmbl. (1994), available at <http://www.aphanet.org/pharmcare/ethics.html> (listing ethical guidelines for pharmacists). The American Pharmacists Association (APhA) adopted this code in 1994 with the purpose of "guid[ing] pharmacists in relationships with patients, health professionals, and society." *Id.* The APhA is a private association with more than 50,000 members, and though its Code of Ethics is not legally binding, it does represent the intentions of a large cross-section of American Pharmacists. ABOUT APhA (2006), [http://www.aphanet.org/AM/Template.cfm?Section=About\\_APhA](http://www.aphanet.org/AM/Template.cfm?Section=About_APhA) (describing nature of American Pharmacists Association).

33. See CODE OF ETHICS FOR PHARMACISTS, *supra* note 32, at arts. I, II, IV (explaining duties of pharmacists to act with intention of providing patient satisfaction). Articles I, II, and IV impose a number of duties on pharmacists: the duty to commit to the patient's welfare; the duty to maintain the patient's trust; the duty to serve the patient's confidentially; the duty to consider the patient's medical needs; the duty to avoid discrimination; the duty to avoid impairing professional judgment; the duty to act with conviction of conscience; and the duty not to compromise the best interests of the patient. *Id.*

34. See CODE OF ETHICS FOR PHARMACISTS, *supra* note 32, at arts. VII-VIII (highlighting pharmacists' duty to society). Article VII states that pharmacists' duties extend beyond their patient to include a general duty to society. *Id.* The article does not, however, state which duty shall supersede if the patient's interest and society's interest conflict. *Id.*

pharmacists' code of ethics arguably favor the pharmacist's beliefs more than other professions' codes of ethics allow.<sup>35</sup> There are, however, some states that require doctors and pharmacists to act in certain ways when performing their duties in order to prevent discrimination on the basis of race or sex.<sup>36</sup>

If a pharmacist does not perform his or her duties competently, he or she may violate the code of ethics and may be subject to various forms of liability.<sup>37</sup> Initially, the pharmacist may be terminated from his or her position.<sup>38</sup> Next, the pharmacist may be subject to tort liability if his or her actions harmed a patient.<sup>39</sup> Finally, the pharmacist may be subject to disciplinary proceedings if the state's pharmacy board decides to perform an inquiry.<sup>40</sup> To protect pharmacists and allow them to make professional

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35. Compare CODE OF ETHICS FOR PHARMACISTS, *supra* note 32, at arts. IV, VII (allowing pharmacists to follow conscience and consider impact to society when treating patients), with PRINCIPLES OF MEDICAL ETHICS, art. VIII (June 17, 2001), available at <http://www.ama-assn.org/ama/pub/category/2512.html> (viewing duty to patient as paramount), and MODEL RULES OF PROF'L CONDUCT, pmb. ¶ 9 (2003) (demanding consideration of client's best interest when resolving conflicts between client's interest and attorney values).

36. See FLA. STAT. § 397.501(2) (2002) (incorporating patient's right to nondiscriminatory treatment when receiving substance abuse services); TENN. CODE ANN. § 68-140-511(12) (2001) (prohibiting discrimination with regard to emergency care services); see also CAL. BUS. & PROF. CODE § 733(a) (West Supp. 2006) (stating obstruction of patient's ability to obtain prescription constitutes unprofessional conduct); CAL. CIV. CODE § 51 (West 1982) (establishing state policy prohibiting discrimination). But see CAL. BUS. & PROF. CODE § 733(b)(3) (West Supp. 2006) (allowing pharmacist to refuse filling of prescription if it conflicts with pharmacist's moral values).

37. See Laura W. Smalley, *Cause of Action Against Pharmacist for Injury or Death Caused by Prescription Drugs*, 13 CAUSES OF ACTION 2D 91, § 1 (1999) [hereinafter *Causes of Action*] (illustrating acts of pharmacists leading to legal liability). Pharmacists have been legally liable to their patients when they have provided the wrong drug, dosage, or instructions. *Id.*

38. Herbe, *supra* note 4, at 89 (explaining perils of employment-at-will contracts for pharmacists). An example of pharmacist termination is the story of Karen Brauer, who had a history of refusing to fill contraception prescriptions. Stephenson, *supra* note 5 (detailing Brauer's firing from K-Mart); KAREN L. BRAUER, KMART FIRES PHARMACIST FOR NOT DISTRIBUTING ABORTIFACIENT BIRTH CONTROL METHODS, <http://www.gargaro.com/kmart/> (last visited May 20, 2006) (recounting story of pharmacist terminated for refusal to fill prescriptions for contraceptives). After a customer complained that Brauer lied to her by stating the pharmacy was out of her prescribed contraceptive, K-Mart fired Brauer when she refused to agree to fill contraceptive prescriptions in the future. *Id.* If a similarly-situated pharmacist tried to find protection in title VII of the 1964 Civil Rights Act, which requires employers to reasonably accommodate the religious observances of their employees, a court would have to determine if the remedial measures necessary to accommodate this pharmacist would result in more than minimal costs to the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (declining to extend responsibility to airlines for accommodating religious observances if resulting costs are excessive).

39. See *Causes of Action*, *supra* note 37, at §§ 2.5, 3 (elaborating on causes of action against pharmacists, including wrongful life). Wrongful life cases arise when a parent sues a pharmacist or a doctor for negligently performing a sterilization or dispensing a contraceptive, thereby resulting in the unplanned birth of a child. *Id.* at § 2.5 (Supp. 2005) (citing *Willis v. Wu*, 607 S.E.2d 63 (S.C. 2004)). Thirty states currently recognize this type of claim, making it a definite concern for pharmacists and doctors. Johanna L. Frantz, *The Ramifications of Rejecting Wrongful Birth: A Closer Look at Grubbs v. Barbourville Family Health Center*, 93 KY. L.J. 507, 514 (2004-2005) (discussing state policies on wrongful birth claims).

40. See *Pharmacist Liability*, 32 AM. JUR. TRIALS 375, § 3 (1985) (explaining extensive state and federal regulatory schemes composing standard of care); see also Charisse Jones, *Druggists Refuse to Give out Pill*, USA TODAY, Nov. 9, 2004, at 3A (describing story of Neil Noesen). The story of Neil Noesen is particularly noteworthy because when a customer presented a valid prescription for birth control, Mr. Noesen not only

decisions that do not conflict with their moral or ethical beliefs, some states have instituted "conscience clauses."<sup>41</sup>

### III. CONSCIENCE CLAUSE LEGISLATION

In 1973, Congress enacted the Church Amendment which was the first federal conscience clause.<sup>42</sup> The Supreme Court's decision in *Roe v. Wade*<sup>43</sup> prompted Congress to enact this amendment.<sup>44</sup> The amendment states that providers receiving federal funds do not have to participate in sterilizations or abortions that would conflict with their religious beliefs.<sup>45</sup> The statute also provides that institutions cannot discriminate against individuals based on their performance of, or refusal to perform, certain procedures prohibited by their religious or moral standards.<sup>46</sup> The Church Amendment is somewhat limited in its protection, however, because it gives only medical providers, and not pharmacists, a right to object to performance of sterilizations and abortions.<sup>47</sup>

Some states limited the impact of the Church Amendment and enacted legislation requiring pharmacists to distribute medication regardless of their moral beliefs.<sup>48</sup> Other states have not yet enacted legislation, but have

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refused to fill it, but also refused to transfer or return it. Jones, *supra*, at 3A. Noeson's actions did not result in private legal action, but rather, resulted in a Wisconsin Department of Regulation and Licensing hearing where the department revoked his license. *Id.*

41. See Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 Hous. L. Rev. 1429, 1481-82 (1995) (explaining conscience clause protection for physicians refusing to perform procedures conflicting with moral beliefs); Malloy, *supra* note 8, at 38 (detailing extension of conscience clauses to protect pharmacists).

42. Christine Vargas, Note, *The EPICC Quest for Prescription Contraceptive Insurance Coverage*, 28 AM. J.L. & MED. 455, 459 (2002) (describing Federal Church Amendment). Although the amendment's name may suggest a religious connotation, the statute received its title from its sponsor, Frank Church of Idaho. Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135, 144-45 (2003). While the statute may have religious overtones, it managed to survive an establishment clause challenge. *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 310-11 (9th Cir. 1974) (holding Church Amendment does not violate establishment clause of United States Constitution). See generally 42 U.S.C. § 300a-7 (2000) (explaining requirements for compliance with Church Amendment).

43. 410 U.S. 113 (1973).

44. Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 208 (1993) (describing enactment of Church Amendment as response to *Roe v. Wade*).

45. 42 U.S.C. § 300a-7(b)(1) (stating receipt of federal funds not dependent upon performance of abortion or sterilization procedures).

46. 42 U.S.C. § 300a-7(b)(2) (declaring receipt of federal funds not dependent upon facility providing abortion or sterilization procedures).

47. See 42 U.S.C. § 300a-7 (listing physicians and hospitals, but not pharmacists, as protected parties); Paine, *supra* note 2, at 392-93 (explaining limitations of Church Amendment). The reason for the limitation arises from the Church Amendment's origin as a response to *Roe v. Wade*. See Wardle, *supra* note 44, at 208.

48. See GUARANTEE WOMEN'S ACCESS TO PRESCRIPTIONS 2 (Aug. 28, 2006) [hereinafter NARAL], available at <http://www.prochoiceamerica.org/assets/files/Birth-Control-Pharmacy-Access.pdf> (detailing actions of Illinois Governor Rod Blagojevich). When pharmacists refused to fill Plan B prescriptions for two Illinois women, Governor Blagojevich filed an emergency rule to protect women's access to contraceptives. *Id.*; see also *id.* at 5 (listing states proposing legislation to guarantee access to prescription contraceptives). *But*

proposed measures guaranteeing access to prescriptions.<sup>49</sup> Even in states without legislation requiring the distribution of prescriptions in all cases, there is legislation mandating the distribution of emergency contraception to rape victims if demanded.<sup>50</sup> Finally, in an effort to exclude pharmacists from protection under the Church Amendment, pending federal legislation would require pharmacists to fill promptly all legal prescriptions.<sup>51</sup>

Currently, only four states have enacted legislation to protect pharmacists whose conscience conflicts with the duties required of their jobs.<sup>52</sup> These statutes are, however, a recent phenomenon.<sup>53</sup> Furthermore, once enacted, the statutes can vary in their requirements for a pharmacist who refuses to distribute medication.<sup>54</sup> For example, some states do not require any written notification of intent to refuse distribution while others do require a writing if a pharmacist is to receive statutory protection.<sup>55</sup> Additionally, protection may

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*see* H.R. 473 Gen. Assem., 94th Sess. (Ill. 2005) (encouraging Governor Blagojevich to repeal emergency rule).

49. *See* NARAL, *supra* note 48, at 5 (stating twelve states have proposed legislation aimed to guarantee women access to prescriptions).

50. *See, e.g.*, CAL. PENAL CODE § 13823.11(e)(1) (West 2002) (granting rape survivor option of emergency contraception as provided by physician or other medical provider); N.Y. PUB. HEALTH LAW § 2805-p(2c) (McKinney 2004) (mandating physicians provide emergency contraception to rape survivor if requested); WASH. REV. CODE § 70.41.350(1)(c) (2004) (requiring physician to inform rape survivor of emergency contraception and provide if requested).

51. *See* NARAL, *supra* note 48, at 5 (highlighting introduction of the Access to Legal Pharmaceuticals Act). In 2005, Senator Frank Lautenberg, and Representatives Carolyn Maloney and Chris Shays proposed the Access to Legal Pharmaceuticals Act to guarantee that pharmacies fill all prescriptions customers present to them. *Id.* Senator Barbara Boxer proposed further legislation, entitled the Pharmacy Consumer Protection Act, which would require pharmacies receiving funds from Medicare and Medicaid to fill all prescriptions without “unnecessary delay or interference.” *Id.*

52. *See* S.B. 123, 148th Gen. Assem., Reg. Sess. (Ga. 2005) (adding pharmacists into previously enacted conscience clause legislation); ARK. CODE ANN. § 20-16-304 (1987) (outlining terms of Arkansas conscience clause); MISS. CODE ANN. § 41-107-5 (Supp. 2005) (granting protection for Mississippi health care providers who refuse to perform medical procedures); S.D. CODIFIED LAWS § 36-11-70 (1999) (outlining South Dakota’s conscience clause requirements). In addition to these states, four others have broadly worded clauses that may apply to denial of prescriptions for contraception. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 2 (Sept. 1, 2006), *available at* [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (listing different restrictions in fifty states). Additionally, while California law imposes a duty on pharmacists to dispense medication when presented with a valid prescription, a pharmacist may refuse to dispense if their employer approves and the patient can still access medication in a timely manner. *Id.*; *see also* CAL. BUS. & PROF. CODE §§ 733(a), (b)(3) (West Supp. 2006).

53. *See* Dykes, *supra* note 5, at 571 (highlighting South Dakota as sole state to offer protection to pharmacists). A pharmacist in South Dakota who refuses, based upon a moral objection, to fill a prescription, is protected from: claims for damages, disciplinary action, and any retaliatory action by their employer. *Id.* at 572.

54. *Compare* S.D. CODIFIED LAWS § 36-11-70 (1999) (excluding requirement to give notice of refusal), *and* ARK. CODE ANN. § 20-16-304 (1987) (establishing right to refuse treatment yet detailing no specific requirements to engage right), *with* CAL. BUS. & PROF. CODE § 733(a), (b)(3) (West Supp. 2006) (allowing refusal only with prior written notification and employer acceptance) *and*, GA. CODE ANN. § 16-12-142 (Supp. 2006) (mandating pharmacists working in Georgia provide prior written notification of intent to reject).

55. *Compare* MISS. CODE ANN. § 41-107-5 (Supp. 2005) (requiring no special action on behalf of

vary among the statutes because of different requirements related to a pharmacist's belief.<sup>56</sup> For example, some states require that a pharmacist refuse treatment because of a conscientious belief against the use of contraception, while other states require pharmacists to believe that the medication is an abortifacient.<sup>57</sup> Despite these differences, states commonly offer general forms of protection to the pharmacists including: the protection from employment termination for failure to distribute medication; the protection from a patient's private suits; and the protection from state disciplinary board action.<sup>58</sup>

#### IV. POSSIBLE REMEDIES FOR THOSE IMPACTED BY CONSCIENCE CLAUSES

##### A. Due Process Analysis

The Fourteenth Amendment provides in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."<sup>59</sup> The Supreme Court has interpreted this language to mean that there are certain fundamental rights the government cannot restrict absent a showing of a compelling state interest.<sup>60</sup> One of those fundamental rights is the right to privacy.<sup>61</sup> The Court has viewed the right to privacy as an umbrella which,

physician or pharmacist to refuse treatment), with GA. CODE ANN. § 16-12-142 (Supp. 2006) (requiring prior written notification of intent to reject).

56. Compare MISS. CODE ANN. § 41-107-5 (Supp. 2005) (mandating objection based upon conscience), with S.D. CODIFIED LAWS § 36-11-70 (1999) (necessitating belief medication will abort pregnancy to receive protection).

57. Compare ARK. CODE ANN. § 20-16-304 (1987) (establishing protection when objection based upon religious belief or conscience), with GA. CODE ANN. § 16-12-142 (Supp. 2006) (declaring belief medication will cause abortion as basis for objection). While in many cases the beliefs may coincide with each other, the law may not protect a Catholic pharmacist who is morally opposed to contraception but does not believe that it causes an abortion. See *supra* note 26 and accompanying text.

58. See ARK. CODE ANN. § 20-16-304(5) (1987) (granting broad protection in stating pharmacist "shall not be held liable for the refusal"); MISS. CODE ANN. § 41-107-5(2) (Supp. 2005) (granting immunity from liability in civil, criminal, and administrative matters); S.D. CODIFIED LAWS § 36-11-70 (1999) (including protection from any claim of damages or "recriminatory" action).

59. U.S. CONST. amend. XIV.

60. See *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (listing rights Court declares as fundamental). The Court concluded that a right is fundamental only when three criteria are met: the right is "deeply rooted in the Nation's history and tradition;" the right is "implicit in the concept of ordered liberty;" and there is a "careful description" of the right in question. *Id.* at 720-21. Among the rights the Court has found to be fundamental are: the right to marry, the right to have children, and the right to control the education and upbringing of such children. *Id.* at 720 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

61. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding Constitution guarantees fundamental right to privacy). The Court reasoned that the combined effect of the First, Third, Fourth, Fifth, and Ninth Amendments created a constitutionally protected fundamental right to privacy. *Id.* at 484-86; see also *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (explaining origin of constitutional right to privacy). But see *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting) (declaring right to privacy not in Fourth Amendment).

protected underneath it, is the right to contraception.<sup>62</sup> Because an individual's right to contraception is a fundamental right, the State may not limit it unless the infringement is narrowly tailored to serve a compelling state interest.<sup>63</sup>

Despite the Court's strict scrutiny standard, States have tried to limit access to contraception in multiple ways.<sup>64</sup> In *Griswold v. Connecticut*,<sup>65</sup> the Court examined whether the State could criminalize the purchase of contraception.<sup>66</sup> The Court declared that the State's interest in discouraging "extra-marital relations" was neither sufficiently compelling, nor sufficiently tailored to abridge the rights of married individuals.<sup>67</sup> Later, in *Eisenstadt v. Baird*,<sup>68</sup> the Court deemed that restrictions based on marital status violated the constitutional protection of the right to contraception.<sup>69</sup> Finally, in *Carey v. Population Services International*,<sup>70</sup> the Court held that minors have a fundamental right to contraception, and age restrictions placed upon the sale of contraceptives violated that right.<sup>71</sup> The result of these three decisions is a grant of broad access to contraception regardless of the age or marital status of the purchaser.<sup>72</sup>

Within the context of privacy and reproductive rights, the Court views the right to an abortion differently than rights associated with the use and purchase of contraception.<sup>73</sup> According to the Court's decision in *Roe*, a state may not

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62. *Griswold*, 381 U.S. at 485-86 (holding right to contraception protected under fundamental right to marital privacy); see also Katherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1734 (1999) (finding strict scrutiny standard still applied to family planning decisions).

63. See *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (declaring courts must analyze restrictions of fundamental rights under strict scrutiny standard).

64. See *infra* notes 66-71 and accompanying text (explaining failed attempts to limit access to contraception).

65. 381 U.S. 479 (1965).

66. *Id.* at 480 (recounting statute's restriction on use of contraceptives). Although the appellant only counseled others in contraceptive use, the statute criminalized his actions as if he were the principal party. *Id.*

67. *Id.* at 497-98 (holding Connecticut's purpose for enacting statute not sufficient to pass strict scrutiny test). The Court pointed out the inconsistency in prohibiting the sale of contraceptives when used for birth-control purposes while making contraceptives available for disease-prevention purposes. *Id.* at 498.

68. 405 U.S. 438 (1972).

69. *Id.* at 453 (reasoning if married persons have access to contraception, unmarried persons must also have access). The Court did not view the marital couple as a unique entity with its own unique set of rights. *Id.* Instead, the Court reasoned that the rights of a married couple derived from the rights of the individuals in the marriage. *Id.* Therefore, the court held that single individuals should have the same fundamental rights as married individuals to avoid governmental intrusion into their personal decisions. *Id.*

70. 431 U.S. 678 (1977).

71. *Carey*, 431 U.S. at 693 (declaring minor's right to contraceptives no different than adult's right). The *Carey* Court held the fundamental right to contraception belongs to both adults and minors. *Id.* The Court explained that the interests the government advanced in support of the law would not be sufficiently compelling, nor narrowly tailored enough, to justify the restriction of a minor's fundamental rights. *Id.* at 690-92.

72. See *supra* notes 66-71 and accompanying text (showing difficulty of imposing restrictions and limitations upon contraception distribution).

73. Compare *infra* note 77 (discussing use of undue burden test), with *supra* note 63 (arguing strict

restrict abortions during the first trimester.<sup>74</sup> The state does, however, have compelling interests that an abortion potentially affects.<sup>75</sup> Consequently, to balance the interests of the mother with those of the state, the Court declared that while the State cannot completely restrict abortions prior to the third trimester, a total prohibition of any restriction on abortion is also inappropriate.<sup>76</sup> In a subsequent decision, the Court eliminated the trimester framework and held that prior to viability the government cannot prohibit abortion, although it may regulate it so long as the regulation does not place an undue burden on the ability to access an abortion.<sup>77</sup>

### B. Equal Protection Analysis

While the Fourteenth Amendment protects a person's due process rights to control family planning decisions, the equal protection clause also guards the right of freedom from discrimination based on gender.<sup>78</sup> In analyzing a case of potential gender discrimination, courts should first look to whether the statute is facially discriminatory.<sup>79</sup> If it is, the statute will not stand unless the proponent can show the classification is substantially related to an important government interest.<sup>80</sup>

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scrutiny as standard when evaluating restrictions on access to contraception).

74. *Roe v. Wade*, 410 U.S. 113, 163 (1973) (preventing states from interfering with abortions before completion of first trimester).

75. *Id.* at 154 (explaining compelling interest of State). The Court agreed with the State's arguments that it could validly claim interests "in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.*

76. *Id.* at 153 (determining argument for unrestricted abortion at all stages of pregnancy unpersuasive). The Court established a system where the length of pregnancy determined the ability of a state to restrict an abortion. *Id.* at 163-64. During the first trimester, a state could not enforce any restrictions on abortion because the mortality rate of women undergoing an abortion was less than the mortality rate of women that gave birth. *Id.* at 163. The Court then held that during the second trimester, a state could permissibly restrict abortions with the intended purpose of preserving and protecting maternal health. *Id.* Finally, the Court held that at the point of viability—the third trimester—a state had an interest in protecting potential life and could therefore prohibit abortions, except in cases where the pregnancy threatened the health of the mother. *Id.* at 163-64.

77. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (establishing undue burden test as standard of review for laws restricting abortion). The Court did not define what creates an undue burden, but explained only that a statute making it more expensive or more difficult to procure an abortion is not a sufficient reason to invalidate the statute. *Id.*

78. U.S. CONST. amend. XIV. (declaring no person shall be denied equal protection under law); *Reed v. Reed*, 404 U.S. 71, 74 (1971) (holding state statute favoring males violated Fourteenth Amendment). The Court expanded the holding in *Reed* when it later declared a classification based on sex as inherently suspect, and therefore subject to heightened scrutiny by the courts. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973); *see also Orr v. Orr*, 440 U.S. 268, 273 (1979) (holding discrimination against men in favor of women impermissible).

79. *See Reed*, 404 U.S. at 74 (finding facial discrimination in statute preferring men over women as administrators). The statute in question favored men in deciding who shall administer a deceased relative's estate. *Id.* at 73. The Court held the statute was unconstitutional, reasoning that its preference for male administrators was facially discriminatory. *Id.* at 76-77.

80. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Wengler v. Druggists Mut.*

If, however, the statute as written is facially gender neutral, the Fourteenth Amendment may still provide protection if the injured party can show that the law's adverse effect "reflects invidious gender-based discrimination."<sup>81</sup> If a party can show that the legislature drafted a statute for the purpose of creating a disparate impact for one sex, courts will review the statute using the intermediate scrutiny standard.<sup>82</sup> The statute will only withstand an attack if the court determines it is substantially related to an important government purpose.<sup>83</sup> This standard requires the proponent to show the law has an exceedingly persuasive justification and is narrowly tailored to the intended purpose.<sup>84</sup> If, however, a party can only prove that the law creates a disparate impact, the courts will review the statute using the more lenient rational basis standard.<sup>85</sup> This standard of review allows the law to stand so long as it is rationally related to a legitimate government purpose.<sup>86</sup>

### C. State Action Requirement

Regardless of whether a law is facially discriminatory or facially neutral, any claim brought under the Fourteenth Amendment must involve state

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Ins. Co., 446 U.S. 142, 150 (1980)) (explaining intermediate scrutiny standard).

81. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (explaining Court's approach to searching gender-neutral statutes for gender-based discrimination). In *Feeney*, the Court held that a statute preferring veterans to nonveterans for civil service appointments did not violate the Equal Protection Clause of the Fourteenth Amendment because the statute preferred veterans of either sex over nonveterans of either sex. *Id.* at 279-80.

82. Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After Deshaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393, 1399 (1990) (explaining criteria courts use to determine when gender-neutral statute will receive intermediate scrutiny review). When trying to find a discriminatory purpose, the courts will look to a number of factors such as the impact of the law, whether the law affects one race (or sex) more severely than another, the official actions surrounding the law that create the historical background for its enactment, and the law's legislative history. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (listing factors to review for discriminatory purpose but deeming list not exhaustive); see also *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (holding no reason to redraw district lines other than for purpose of excluding minority voters). See generally *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (using statistics to prove discriminatory intent).

83. See Harper, *supra* note 82, at 1398-99 (explaining intermediate scrutiny standard of review).

84. See *Hogan*, 458 U.S. at 724 (setting forth method of analysis for intermediate scrutiny standard). The law need not be the absolute best means to an end, but the higher the standard of review, the more narrowly tailored the law must be to achieve the stated goal. *Nguyen v. I.N.S.*, 533 U.S. 53, 77-78 (2001) (holding availability of better solutions need not invalidate current law).

85. See Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 454 (2003) (explaining use of rational basis test in sex discrimination cases); see also *Feeney*, 442 U.S. at 280-81 (describing law as unwise but not violation of Fourteenth Amendment). The Court ruled there was no discriminatory purpose in the law. *Feeney*, 442 U.S. at 279. Without a discriminatory purpose, the Court only reviewed the statute for a rational basis, and though the statute reflected an unwise policy, it did not violate the principles of the equal protection clause of the Fourteenth Amendment. *Id.* at 280-81.

86. See Dashiell Shapiro, Comment, *Superdumb Discrimination in Superfund: CERCLA Section 107 Violates Equal Protection*, 2002 U. CHI. LEGAL F. 331, 350-51 (2002) (explaining requirements to survive challenge under rational basis standard of review).

action.<sup>87</sup> A person cannot claim that a private citizen or a corporation violated his or her Fourteenth Amendment rights because the Amendment only protects citizens from state-sponsored activity.<sup>88</sup> Regardless of the severity of the discrimination, the Court has repeatedly refused to find constitutional violations when private actors initiated the discrimination.<sup>89</sup> Because of the severe consequences of attributing an action to the State rather than to a private actor, the courts perform an independent, fact-based analysis each time they must determine whether the State is acting.<sup>90</sup>

A court may consider the act of a private person or entity as an act of the State in three situations.<sup>91</sup> First, when the actor performs a traditional state function that is governmental in nature.<sup>92</sup> Examples of traditional state functions may include the maintenance of a municipal park, the maintenance of a city, or the running of an election.<sup>93</sup> Second, when a “sufficiently close nexus” exists between the private action and the State’s involvement, the private action should be regarded as that of the State.<sup>94</sup> To find this nexus, the

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87. U.S. CONST. amend. XIV (declaring “No state shall make or enforce any law . . . .”); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (establishing interpretation of Fourteenth Amendment requiring state action). The Court held that “[i]ndividual invasion of individual rights is not the subject-matter of the amendment.” *The Civil Rights Cases*, 109 U.S. at 11. Although *The Civil Rights Cases* are usually cited as the origin of the state action requirement, the Court previously recognized the requirement in two earlier cases. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 508 n.17 (1985) (citing *Virginia v. Rives*, 100 U.S. 313, 318 (1879) and *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875) as origins of state action doctrine).

88. See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding Fourteenth Amendment does not protect from offensive private conduct); Chemerinsky, *supra* note 87, at 506 (stating conduct of private citizens not controlled by constitution).

89. See Chemerinsky, *supra* note 87, at 509-10 (providing examples of discrimination allowed by Supreme Court). Chemerinsky gives examples where the Court has allowed private offensive behavior including: discrimination on the basis of age, sex, race, or alienage; eviction of tenants because of race or religion; refusal by hospitals to perform constitutionally protected abortions or sterilizations; and termination of employees because of their speech or political beliefs. Chemerinsky, *supra* note 87, at 509-10.

90. *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)) (describing need for fact-based analysis to determine existence of state action). A court must look at the individual facts and circumstances of each case to determine if there is a valid Fourteenth Amendment claim. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (detailing fact-sensitive nature of each Fourteenth Amendment inquiry).

91. See *infra* notes 92-101 (illustrating cases where Court finds state action).

92. *Evans v. Newton*, 382 U.S. 296, 299 (1966) (outlining scenarios where private action treated as government action). The courts may look to see if the actor performs a “public function,” which is any service that is traditionally reserved to the State. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (describing public function doctrine). The definition of a public function is not, however, simply met when the State licenses a party to provide a service to the public. *Id.* at 354. The purpose of the public function doctrine is to prevent a state from escaping its constitutional requirements by hiring a private entity to perform a traditionally state-run function. *N.Y. City Jaycees, Inc. v. U.S. Jaycees, Inc.*, 512 F.2d 856, 860 (2d Cir. 1975).

93. See *Jackson*, 419 U.S. at 352 (citing *Evans*, 382 U.S. 296 (1966); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Nixon v. Condon*, 286 U.S. 73 (1932)). But see *Prescription Drug Products; Patient Labeling Requirements*, 44 Fed. Reg. 40,016, 40,032 (Jul. 6, 1979) (to be codified at 21 C.F.R. pt. 203) (establishing pharmacists as traditional distributors of prescription medication).

94. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (describing “close nexus” standard requirement to find state action (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974))).

courts will determine whether the actor is coerced, or so significantly encouraged by the State, that the courts could treat the act as governmental in nature.<sup>95</sup> Finally, when the State takes action to facilitate or authorize private discrimination, it is state action.<sup>96</sup> An example of this occurs in *Reitman v. Mulkey*,<sup>97</sup> where the Supreme Court examined the Fourteenth Amendment's state action requirement in the context of a racial discrimination case.<sup>98</sup> In reviewing the California Supreme Court's decision, the United States Supreme Court agreed that the state amendment authorized private individuals to racially discriminate in their housing decisions.<sup>99</sup> The Court reasoned that the discriminatory effect of the amendment allowed the California Supreme Court to find state action and invalidate the state amendment under the Fourteenth Amendment of the United States Constitution.<sup>100</sup> The Court later determined that a State can facilitate and authorize private action when a private party is motivated by a state-enforced custom.<sup>101</sup> The state action promoting this

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95. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (describing how courts find relationship between state and private actor); see also *Blum*, 457 U.S. at 1004 (holding state responsible when using coercion to influence decisions of private citizens).

96. See *Reitman v. Mulkey*, 387 U.S. 369, 378-79 (1967) (holding article of California Constitution which repealed anti-discrimination legislation would facilitate future discrimination); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961) (holding state action in seemingly private discrimination). The actual holding in *Burton* was extremely narrow because the Court did not want to create a specific formula for finding state discrimination within private actions. *Burton*, 365 U.S. at 725-26. The Court has, however, subsequently interpreted the case to stand for the proposition that "significant state involvement in private discriminations could amount to unconstitutional state action." *Reitman*, 387 U.S. at 375.

97. 387 U.S. 369 (1967).

98. See *id.* at 371 (setting forth issue as examination of state constitution under Fourteenth Amendment of United States Constitution). In 1964 the California voters passed Proposition 14 providing, in part, that:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

*Id.* (quoting Proposition 14 on 1964 California ballot). This proposition effectively repealed all prior state-enacted anti-discrimination housing legislation. *Id.* at 380-81. When presented with the case, a majority of the justices on the Supreme Court were concerned with the racial discrimination that would likely occur in California's housing market if this proposed amendment survived its constitutional challenge. *Id.* The effect of the Court's decision was to uphold equal opportunity for housing to all races, but the case's central issue involved the Fourteenth Amendment's state action requirement. *Id.* at 373 (granting certiorari due to important Fourteenth Amendment issue implications); see also *infra* Part IV (discussing state action requirement of Fourteenth Amendment).

99. *Reitman*, 387 U.S. at 375-76 (observing state amendment had broader effect than repealing prior statutes).

100. *Id.* at 380-81 (affirming holding of California Supreme Court).

101. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 171 (1970) (explaining situations where petitioner could show state action). In *Adickes*, a restaurant refused to serve a woman because she was in the company of African-Americans. *Id.* at 146. Although the restaurant was under private ownership, the Court found that the refusal of service, if motivated by a state-enforced custom, would qualify as a violation of her Fourteenth Amendment rights. *Id.* at 173-74. The effect of the Court's decision was to prohibit states from imposing a custom that promotes the segregation of different races in eating establishments. *Id.*

custom, however, must be affirmative.<sup>102</sup>

Certain actions by the State, however, will not lead to a finding of state action performed by private parties. If the State simply permits an action to occur or gives a private party the opportunity to exercise a choice, the courts will most likely not find state action.<sup>103</sup> Additionally, the courts will not attribute actions of a private party who performs on public contracts with the State.<sup>104</sup> Moreover, approval of an action by a state regulatory body does not by itself indicate the approved action qualifies as state action.<sup>105</sup> The Court concisely summarized its view of private action turned state action when it declared, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' in order for the discriminatory action to fall within the ambit of the constitutional prohibition."<sup>106</sup>

## V. ANALYSIS

Individuals harmed as a result of a pharmacist's refusal to fill their prescriptions may have legal claims against the pharmacist.<sup>107</sup> If the state where the injury occurred has a conscience clause, however, the patient may first have to challenge the constitutionality of that clause to gain access to the court system.<sup>108</sup> Persons living in Arkansas, Georgia, Mississippi, South Dakota, or any other state that enacts a conscience clause protecting pharmacists, will be unable to sue that pharmacist for damages unless they can prove the unconstitutionality of the conscience clause.<sup>109</sup> To hold a conscience clause unconstitutional, a court must first determine that the State acted.<sup>110</sup> Regardless of the possible discrimination that may result, courts will have to

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102. See *supra* note 12 and accompanying text (explaining requirement for finding state action when state contradicts prior declared policy).

103. See *supra* note 12 and accompanying text (illustrating no state action for passive legislation).

104. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43 (1982) (establishing private school's actions did not satisfy state action requirement of Fourteenth Amendment). The Court did not find state action in the decision to discharge the petitioners, although the state extensively regulated the school. *Id.* at 841-42. The mere fact that the school worked under a public contract was not enough to impute state action to the acts of a private contractor. *Id.* at 840-41.

105. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974) (observing regulatory body approval does not satisfy state-action requirement).

106. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (holding no state action because state regulator neither established nor enforced discriminatory action) (internal citation omitted).

107. See *supra* note 39 and accompanying text (identifying possible causes of action against pharmacists refusing to dispense contraceptives).

108. See *supra* note 58 and accompanying text (detailing protections offered by conscience clauses).

109. See *supra* notes 52, 58 and accompanying text (listing states currently enforcing conscience clauses). While the specifics of each conscience clause may differ slightly, the referenced statutes all bar private lawsuits against pharmacists who refuse to fill prescriptions for contraception. See *supra* note 58 and accompanying text.

110. See *supra* notes 87-89 and accompanying text (discussing state action requirement for any Fourteenth Amendment claims).

perform a fact-based analysis to determine whether the private pharmacist refusal is actually state action.<sup>111</sup> Although the analysis depends on the particular facts of each case, those opposing the conscience clause will have to show that the State acted in one of three ways.<sup>112</sup>

An injured party might first claim that the pharmacist is performing a traditional state function that is governmental in nature.<sup>113</sup> Specific regulations, however, declare that pharmacists traditionally serve as the dispensers of drugs and, therefore, courts would likely conclude that dispensing medication is not a traditional state function which is governmental in nature.<sup>114</sup> A counter-argument would be that because the State licenses pharmacists, it is equivalent to state action, but this contention would be unsuccessful.<sup>115</sup> The Supreme Court has clearly held that when the State merely licenses a person or entity, the licensed party is not necessarily performing a traditional state function.<sup>116</sup> Furthermore, the inclusion of all state-licensed activities in the definition of state action would associate the state with almost every element of daily activity.<sup>117</sup>

Next, the injured party may claim that a “sufficiently close nexus exists” between the pharmacist’s actions and the state’s involvement.<sup>118</sup> To establish that nexus, the court must determine whether there was coercion or encouragement on the part of the State.<sup>119</sup> The wording of the statute will make this argument difficult to prove.<sup>120</sup> None of the conscience clauses

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111. See *supra* note 90 and accompanying text (explaining need for fact-based analysis in every state action claim)

112. See *supra* notes 92-101 and accompanying text (discussing methods for a party to establish private action as state action).

113. See *supra* note 92 and accompanying text (detailing traditional public function test for finding state action).

114. See Prescription Drug Products; Patient Labeling Requirements, 44 Fed. Reg. 40,016, 40,032 (Jul. 6, 1979) (to be codified at 21 C.F.R. pt. 203) (stating pharmacists traditionally serve as dispensers of prescription drugs); see also *Evans v. Newton*, 382 U.S. 296, 299 (1966) (listing circumstances where Supreme Court has recognized state action). The Court explained several scenarios where private action can assume a governmental nature, including: a state serving as a trustee under a private will, a private company owning and managing a town, and a private company helping run an election. *Evans*, 382 U.S. at 299. The Court does acknowledge that there are many activities in which the government is involved, but “the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.” *Id.* at 300.

115. See *infra* notes 116-117 and accompanying text (providing reasons why licensing does not equate to state action).

116. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 354 (1974) (holding licensing alone not sufficient to qualify private action as state action).

117. See *id.* (citing examples of regulated businesses). The Court declared that “[d]octors, optometrists, lawyers . . . and Nebbia’s upstate New York grocery selling a quart of milk” are all state-licensed, yet their actions are not attributed to the state merely because of that regulation. *Id.*; see also *Chemerinsky*, *supra* note 87, at 509-10 (explaining Supreme Court has allowed private discrimination instead of recognizing state action).

118. See *supra* notes 94-95 and accompanying text (illustrating “close nexus” test).

119. See *supra* note 95 (explaining requirement for coercion).

120. See *infra* note 122 (showing conscience clause language does not involve coercion or

currently enacted are written to affirm an opposition to abortion or contraception.<sup>121</sup> None of the language in the statutes requires pharmacists to deny medication, nor is there any State-sponsored reward for doing so.<sup>122</sup> The wording of the statutes is thus merely permissive and grants protection to pharmacists if they choose to exercise their moral beliefs.<sup>123</sup>

The last option for claiming that a conscience clause involves state action is to show that the statute facilitates or authorizes private discrimination.<sup>124</sup> Based upon the *Reitman* decision, a court must find that the State previously established some official policy promoting the nondiscriminatory distribution of medicine or access to healthcare.<sup>125</sup> Under this theory, the repealing of prior state policy, and the resulting endorsement of discriminatory behavior, would constitute state action.<sup>126</sup> Essentially, an injured party could argue that when a State repeals an anti-discrimination policy, it is actually promoting discrimination.<sup>127</sup> This argument, however, will not succeed in any of the states currently enforcing conscience clauses.<sup>128</sup>

Of the four states that have enacted conscience clauses protecting pharmacists, only Arkansas's statute discusses a policy of nondiscrimination regarding medical care and treatment.<sup>129</sup> Although anti-discrimination language appears in the statute, there is also mitigating language declaring the

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encouragement).

121. See ARK. CODE ANN. § 20-16-304 (1987) (providing no indication of preference for pharmacist's decision to distribute medication or not); GA. CODE ANN. § 16-12-142 (Supp. 2006) (lacking statement of policy regarding contraception or abortion); MISS. CODE ANN. § 41-107-5 (Supp. 2005) (stating no opinion on decision to refuse); S.D. CODIFIED LAWS § 36-11-70 (1999) (detailing State's conscience clause requirements lack preferential language).

122. See ARK. CODE ANN. § 20-16-304 (1987) (mandating neither mandatory distribution nor mandatory refusal); MISS. CODE ANN. § 41-107-5 (Supp. 2005) (imposing no fines for decision to deny or provide medication); S.D. CODIFIED LAWS § 36-11-70 (1999) (finding no language within statute to require any action). *But see* GA. CODE ANN. § 16-12-142 (Supp. 2006) (stating statute does not allow pharmacist to deny filling prescriptions for FDA approved birth control).

123. See *infra* notes 121-122 (noting permissive language of statutes).

124. See *supra* note 96 and accompanying text (explaining additional method for assigning actions of private individuals to State).

125. See *Reitman v. Mulkey*, 387 U.S. 369, 378-79 (1967) (recognizing state action in repeal of legislation designed to provide racial equality). Although the Court dealt with an issue surrounding racial discrimination, the holding did not indicate that the Court's reasoning was unique to statutes dealing with racial equality. *Id.* at 378-81.

126. *Id.* at 378 (explaining reasoning to support holding). The Court examined the existence of a nondiscrimination policy and the effect of subsequent legislation upon it. *Id.*

127. See *id.* at 378; see also *infra* notes 125-126 (outlining requisite circumstances to impute private action to the state).

128. See *infra* notes 129-133 and accompanying text (detailing reasons *Reitman* holding does not apply to states currently enforcing conscience clauses).

129. Compare ARK. CODE ANN. § 20-16-304(1) (1987) (outlining state preference for nondiscriminatory administration of medical care), with GA. CODE ANN. § 16-12-142 (Supp. 2006) (stating no preference for nondiscriminatory medical treatment), and MISS. CODE ANN. § 41-107-5 (Supp. 2005) (establishing no policy for equal access to medical care), and S.D. CODIFIED LAWS § 36-11-70 (1999) (providing no reference to equal access to treatment).

State's *preference* in maintaining a pharmacist's right of refusal.<sup>130</sup> This is not the type of state policy that *Reitman* examined.<sup>131</sup> In *Reitman*, the California policy against discrimination was explicit and not coupled with any other state preferences or policies.<sup>132</sup> In Arkansas, however, the State has established a policy that is coupled with a preference.<sup>133</sup> If one equates a preference with a choice, then a pharmacist's action conforming to that preference cannot violate the Fourteenth Amendment because the Court has already declared that the offering of a choice is not state action.<sup>134</sup>

Although the Court in *Reitman* dealt with repealing a state nondiscrimination policy, any court evaluating a conscience clause should perform a fact-based analysis.<sup>135</sup> In so doing, a court may look for types of prior policies that the conscience clause repeals and new policies that the clause enforces.<sup>136</sup> Depending on where the challenge takes place, the court may take note of statutes that require hospitals to provide emergency contraception to rape victims.<sup>137</sup> Generally, these statutes demand that physicians provide information about emergency contraception and a prescription, if requested, to those patients who indicate they have been raped.<sup>138</sup> Any woman who receives a prescription as a result of this statute must nonetheless fill that prescription at

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130. See ARK. CODE ANN. § 20-16-304(1) (1987) (establishing state preference for nondiscrimination). The statute states that "[a]ll medically acceptable contraceptive procedures, supplies, and information shall be available through legally recognized channels to each and every person desirous of the procedures, supplies, and information regardless of sex, race, age, income, number of children, marital status, citizenship, or motive . . ." *Id.* The legislature then indicates its preference for pharmacist's rights when it declares "[n]othing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information . . ." *Id.* at § 20-16-304(4).

131. See *Reitman v. Mulkey*, 387 U.S. 369, 371 (1967) (explaining nature of affected statutes). The *Reitman* Court examined the Unruh and Rumford acts, which were both written in order to prevent discriminatory behavior. *Id.*

132. See *id.* at 374 (referring to effect of Unruh and Rumford acts).

133. See ARK. CODE ANN. § 20-16-304(4) (1987) (granting medical providers exception from requirement to dispense contraceptives). By granting the exception near the end of the statute, it is a clear indication that the legislature intended to protect the moral beliefs of a medical provider over a person's access to contraceptives via legal channels. *Id.*

134. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974) (holding state-facilitated exercise of choice as private action). In *Jackson*, the state-issued certificate allowed a utility company to discontinue service, but only if it found there was nonpayment, fraud, or meter tampering. *Id.* at 346 n.1. Although the certificate allowed for termination, it did not bar customers from bringing suit if they believed the utility company wrongfully denied service. *Id.* at 348-49 (holding no state action, yet not foreclosing plaintiff's right to bring suit).

135. See *Reitman*, 387 U.S. at 378 (describing need for fact-specific analysis of each state action claim).

136. See *supra* notes 50, 121-122 and accompanying text (explaining conscience clauses may effectively repeal additional state policies); see also *infra* notes 140-141 (detailing consequences of enacting conscience clause).

137. *Supra* note 50 (listing states requiring access to contraception for rape victims).

138. *Supra* note 50 (discussing state statutes requiring medical providers to discuss contraception options and furnish medication if requested). Although Plan B will be available without a prescription to women who are over eighteen, a seventeen-year-old rape victim must still obtain a prescription to access the drug. See Gardiner Harris, *F.D.A. Approves Broader Access to Next-Day Pill*, N.Y. TIMES, Aug. 25, 2006, at A1.

a pharmacy.<sup>139</sup> A conscience clause would then allow a pharmacist to deny the doctor's prescription.<sup>140</sup> If a rape victim can access the prescription, but not the contraception itself, then courts may conclude that the conscience clause has repealed a prior piece of legislation protecting women, thus encouraging pharmacists to discriminate against that class.<sup>141</sup>

Alternatively, if a court views the conscience clause in a light similar to the constitutional amendment in *Reitman*, that court may attribute state action to private discrimination even without prior policies of nondiscrimination or equal access to medical care.<sup>142</sup> By eliminating the ability to sue, reprimand, or terminate the employment of pharmacists who refuse to dispense medication, various states have offered protection to those pharmacists.<sup>143</sup> Although the courts have held that enabling a party to bring a suit is not state action, restricting a party from litigating presents a much different scenario.<sup>144</sup> If the State permits court action, a private party must still choose to initiate the suit.<sup>145</sup> This private decision does not constitute state action even though the state's own statute facilitated the decision.<sup>146</sup>

The conscience clause, however, prohibits the private party's choice regarding whether or not to sue.<sup>147</sup> A court may see this prohibition as an

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139. *Supra* note 18 and accompanying text (explaining prescription required to access birth-control pills).

140. *See supra* notes 121-122 (examining permissive nature of conscience clauses). No language in any of the statutes appears to mandate the distribution of contraception when a rape victim presents a prescription. *See* ARK. CODE ANN. § 20-16-304 (1987); MISS. CODE ANN. § 41-107-5 (Supp. 2005); S.D. CODIFIED LAWS § 36-11-70 (1999). *But see* GA. CODE ANN. § 16-12-142 (Supp. 2006) (stating no protection of pharmacist for denial of FDA approved birth control medication). The language in the Georgia statute states that "[n]othing in this subsection shall be construed to authorize a pharmacist to refuse to fill a prescription for birth control medication, including any process, device, or method to prevent pregnancy." *Id.* If a pharmacist argues that birth control pills and Plan B function as an abortifacient rather than a contraceptive, it is conceivable that the statute could provide them with protection. *See supra* note 29 and accompanying text. If, however, a state mandated distribution only if the holder of the prescription was raped, the victim would be in the uncomfortable position of first having to disclose the rape to a physician and then to a pharmacist with whom she may have no prior relationship.

141. *See Reitman v. Mulkey*, 387 U.S. 369, 376-77 (1967) (discussing rationale for California amendment's state action qualification). The *Reitman* Court clearly pointed out that repealing a statute was not sufficient to qualify as state action. *Id.* at 376. The Court found, however, that repealing the statute, coupled with the State's apparent support of future discriminatory behavior, was sufficient to create state action. *Id.* at 376-77.

142. *See id.* at 376-77 (holding amendment's protection of discrimination as important as its repeal of prior state policy).

143. *See supra* note 58 and accompanying text (discussing protections provided by conscience clauses); *see also Reitman*, 387 U.S. at 376-77 (holding protection offered by amendment elevates status of discriminatory action).

144. *Compare* *Gritchen v. Collier*, 254 F.3d 807, 813 (9th Cir. 2001) (holding private party bringing legal action pursuant to statutory authority not state action), *with Reitman*, 387 U.S. at 376-77 (discussing importance of state-sanctioned protections when analyzing state action).

145. *See Gritchen*, 254 F.3d at 813-14 (stating statute created right to act but not obligation to act); *see also* *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974) (emphasizing individual choice in bringing suit).

146. *See supra* note 134 and accompanying text (describing private choice does not constitute state action).

147. *See supra* note 58 and accompanying text (listing immunity from private litigation as one form of protection states offer to pharmacists). By prohibiting the initiation of any private lawsuits against a pharmacist

endorsement of discrimination because the State has eliminated all consequences of the pharmacist's decision.<sup>148</sup> Pharmacists may deny a prescription because of their knowledge that no party will bring a suit as a result of their actions.<sup>149</sup> The pharmacist, therefore, does not risk having to defend a suit and bear the costs of litigation.<sup>150</sup> By removing all negative consequences of the decision, a court may find that the State has actively promoted the decision itself.<sup>151</sup>

## VI. CONCLUSION

When pharmacists enter the profession, they are certainly aware of the perils of their job. If pharmacists fail to properly count or label a drug, they may be subject to regulatory discipline. If pharmacists are rude to their customers, their employers may fire them. If pharmacists are careless and provide the wrong medication, patients may sue them for negligence. The consequences that pharmacists will suffer if they deny a prescription due to moral objections will, however, depend on the state in which they practice. Pharmacists may be subject to liability, discipline, job termination; or they may suffer no penalties because the State has enacted a conscience clause.

It is neither a secret nor a surprise that the threat of litigation influences many decisions of individuals and businesses. When a State exercises its power and closes its courtrooms to claims against pharmacists, those pharmacists no longer have to fear the litigious consequences of their actions. This is not an act of the State permitting a decision; rather it is the state facilitating an action. By removing all potential repercussions of a pharmacist's actions, the State has cleared the way for that pharmacist's refusal to fill a prescription.

Some may argue that the decision to deny a prescription ultimately rests with individual pharmacists, and that the conscience clause merely permits them to act on their moral beliefs. This may be true, but why should pharmacists be immune from liability if they base their decisions on a conscientious objection? What if the morals of the patient conflict with the morals of the pharmacist? The conscience clause is the State's declaration that pharmacists' right to exercise their moral beliefs is superior to patients' ability

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for his or her failure to dispense prescriptions, the conscience clauses remove any legal option to those who are harmed. *See id.*

148. *See* *Reitman v. Mulkey*, 387 U.S. 369, 376-77 (1967) (recognizing state action in amendment's protection offered to discriminating parties). The Court held in *Reitman* that "the right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." *Id.*

149. *See supra* note 41 and accompanying text (discussing reasoning for implementation of conscience clauses).

150. *See supra* note 58 and accompanying text (listing conscience clause protections).

151. *See Reitman*, 387 U.S. at 376-77 (holding state action where amendment offered constitutional protection to discriminating parties).

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to exercise that same right. The State has indicated a preference, and thereby taken action to ensure that pharmacists can conform to that preference. Exercising this preference may be enough governmental involvement to satisfy the state action requirement of the Fourteenth Amendment.

*Aaron Rozenek*