Protection of Health Care Providers’ Rights of Conscience in American Law:

Present, Past, and Future

by

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I. Introduction: Three Perspectives on Protecting the Rights of Conscience of Health Care Providers

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1 The valuable research assistance of Victoria Anderson, Joseph Shapiro, Adrienne Jack is gratefully acknowledged.
In this paper I am going to briefly review legal protection for rights of conscience of health care providers in three stages or from three broad and overlapping perspectives which, for simplicity sake, are labeled past, present, and future. In doing so, I will addresses several questions: Is legal protection for rights of conscience of health care providers practically necessary? Is it constitutionally permissible? Is it constitutionally required? Does it have structural significance as a matter of foundational principles of republican constitutionalism? Are current legal protections for rights of conscience of health care providers secure? Are protections for providers’ rights of conscience and patients rights to seek legal treatments reconcilable?

In Part II, I briefly consider the present policy –the current panoply of legal protections of rights of conscience of health care providers in American (federal and state) law, focusing in particular on the Rights of Conscience Regulations adopted by the Department of Health and Human Services in 2008, and on the debate over the necessity for protection of rights of conscience in law in America today. I consider the constitutional validity of statutory and administrative provisions that provide protection for rights of conscience of health care providers, and I review the precedent, historical evidence and reasoning that suggests that the constitutional doctrine of privacy itself protects rights of conscience. In Part III, I suggest that the core Republican principles embodied in and undergirding the Constitution, protect rights of conscience as a fundamental human right, and requires states to provide adequate protection for such rights of conscience of health care providers. In Part IV, I briefly consider whether rights of conscience of health care providers in the future will be protected in law. I conclude in Part V that providers rights of conscience have been and can be achieved protected while patient access
to services can be accommodated, but only if there is full commitment to protecting, not sacrificing or giving nominal respect for, rights of conscience.

I focus primarily upon rights of conscience in the abortion context, because that is where the issue has been raised, discussed, and contended most thoroughly for the past four decades. However, the issue extends far beyond the practice of elective abortion. Today a growing number of health care practices, procedures, medications and methods raise serious moral concerns for at least some health care providers. These include such issues as human stem cell research, cloning, genetic engineering (including gender preselection), DNA screening and medical treatment for various genetic disorders, surgical abortion (by a variety of procedure including so-called “partial birth abortion”), pharmaceutical abortion (by such pills as R.U. 486, and the “morning after pill” (MAP)), sterilization, sex-change procedures, provision of contraceptives to minors, provision of assisted reproduction technologies to unmarried persons and couples including gay, lesbian, and transgendered couples, capital punishment, DNA testing for some forensic uses, organ removal and transplantation, and assisted suicide to name just a few of the currently controversial biomedical practices that raise profound moral implications for at least some members of our society. The principles I hope to establish with specific reference to abortion are intended to be generally applicable to these (and many other) non-abortion contexts in which health care providers may for reasons of conscience wish to decline to provide or assist in providing technically possible bio-medical experiments, procedures or treatments. Of course, this discussion also has implications for questions of respect for and protection of rights of conscience (especially religious conscience) in non-bio-medical contexts as well.

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I have long been a critic of decisions of the Supreme Court of the United States in *Roe v. Wade*, 3 and *Doe v. Bolton*. 4 In at least two books and several other law review articles, book chapters, and other writings, I have criticized the Court’s opinions in *Roe* and *Doe* as deeply flawed, erroneous, incompetent and illegitimate as a matter of constitutional structure and doctrine, judicial authority, constitutional interpretation, legal history, precedent, analysis, policy, and judicial craftsmanship. 5 *Roe* and *Doe* still are illegitimate and deeply flawed, but

3 410 U.S. 113 (1973). *Roe* and *Doe* were first argued in 1971, just a month after the Court heard argument in Eisenstadt v. Baird, 405 U.S. 438 (1972) (restrictions on distribution of contraceptives to unmarried adults were invalidated as unconstitutional). However, *Roe* and *Doe* were held over for reargument during the following term. See 410 U.S. 113 (1973); Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. Pa. L. Rev. 1729, 1730 (2006) (Justice Douglas criticized the decision to hold over the cases for reargument, seeing “manipulation” by the Chief Justice in assigning the case to Justice Blackmun; he ultimately withdrew his dissenting opinion and simply noted his dissent. *Id.* at 1730, n. 4, citing, *inter alia*, *Roe v. Wade*, 408 U.S. 919, 919 (1972) (Douglas, J., dissenting)); Nan Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103, 1111, n. 49. (2004). Allegedly, Chief Justice Burger wanted to hold over the abortion cases because he anticipated that two new Republican Justices would then be on the Court, but Justice Powell was one of the appointees, and Justice Blackmun used the extra time to write a much longer, presumably broader, opinion. Frank B. Cross, *The Justices of Strategy* 48 Duke L. J. 511, 567 n. 299 (1998) (citing Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* 234-235 (1996)). The appeals in *Roe v. Wade* and *Doe v. Bolton* were accepted for argument on May 3, 1971, 402 U.S. 941, the State of Texas’ motion to postpone oral argument was denied on December 7, 1971, 404 U.S. 981 (1971) and both cases were argued on December 13, 1971. However, they were held over until the next term, and on June 26, 1972, the two cases were restored to the calendar for reargument in the 1972 term. 408 U.S. 919 (1972). They were decided January 22, 1973. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). See William Cohen, *Is Equal Protection Like Oakland? Equality As A Surrogate for Other Rights*, 59 Tulane L. Rev. 884, 896 n. 53 (1985).


today, more than thirty-seven years after they were announced, they are still the law, still binding, still enforced.

My paper addresses an issue (protection of rights of conscience) that has been created and shaped in large part by Roe and Doe, and it is to Roe and Doe that I turn, in part, to find a solution. Since Roe and Doe are still the law, it behooves judges and lawmakers to recognize that those cases extend to and can be read to require protection of rights of conscience of health care providers. That is a clear component of the doctrinal right of privacy established by Roe. Also, Doe upheld unequivocally the constitutional validity of a statutory provision protecting rights of conscience of both health care institutions and individual health care providers (including protection for rights of conscience of non-direct facilitating employees (non-physician employees of health care providers).

This paper will give three examples from the seminal abortion cases that show that the positive law protection (by statute or regulation) of rights of conscience is constitutionally valid

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and proper, and that the foundational 1973 Supreme Court decisions that established generally the constitutional right of a pregnant woman to choose to terminate her pregnancy for elective (non-therapeutic) reasons, without state prohibition or restriction, also established the necessity for and validity of protection of rights of conscience of health care providers to refuse to provide or participate in providing elective (non-therapeutic) abortion.

II. Present Legal Protections for Rights of Conscience of Health Care Providers in American Law: Necessity or Political Ideology?

A. Current Status of the Law

B. Statutory and Administrative Protection of Rights of Conscience is Clearly Constitutionally Permissible under the Seminal Supreme Court Abortion Cases.

As a matter constitutional doctrine is positive legal (statutory or regulatory) protection for the rights of conscience of health care providers constitutionally permissible? As the debate over rights of conscience becomes sharper, increasingly claims are being made that it is impermissible to legislate or administratively by rule or regulation protect rights of conscience. Claims have been asserted under the First, Fourth, Ninth, and Fourteenth Amendments that such legal protections are constitutionally impermissible.

It has been largely overlooked that the cases decided January 22, 1973 by the Supreme Court of the United States held and established that positive statutory protection for rights of health care providers to decline to provide or participate in abortion (and by implication

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similarly controversial health care treatments, procedures and provisions) is constitutional
against challenges based on the First, Fourth and Fourteenth Amendments, and particularly valid
under the “right to privacy” doctrine established that day in Roe. In Doe v. Bolton, the
companion case to Roe, decided the same day, the Court applied the privacy analysis of Roe to
invalidate many parts of Georgia’s abortion law, which, unlike the nineteenth-century Texas
abortion law, were of very recent vintage, and were “patterned upon the American Law
Institute’s Model Penal Code.” Adopted by the Georgia legislature in 1968, less than five years
earlier, those progressive abortion provisions (which expanded the previous exceptions to the
general prohibition of abortion and provided greater access to abortion in more “hard cases”)
replaced stricter abortion provisions that had been in effect in Georgia for nearly a century. Among the Georgia criminal abortion law provisions challenged in Doe was section Georgia
Statutes § 26-1202, subsection (e) of which provided:

(e) Nothing in this section shall require a hospital to admit any patient under the
provisions hereof for the purpose of performing an abortion, nor shall any hospital
be required to appoint a committee such as contemplated under subsection (b)(5).
A physician, or any other person who is a member of or associated with the staff
of a hospital, or any employee of a hospital in which an abortion has been
authorized, who shall state in writing an objection to such abortion on moral or
religious grounds shall not be required to participate in the medical procedures
which will result in the abortion, and the refusal of any such person to participate

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9 410 U.S. at 182.
10 410 U.S. at 182.
11 410 U.S. at 184, id. at 202-205.
therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person. 12

The Court recognized this provision as protecting rights of conscience. Justice Blackmun summarized this provision as “giving a hospital the right not to admit an abortion patient and giving any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure.” 13

In 1970, a group of plaintiffs (including a pregnant woman, doctors, and others) filed suit in federal court claiming that the new, liberal Georgia abortion laws were “unconstitutional in their entirety.” 14 Thus, even the provision protecting the rights of conscience was challenged and it was alleged that the Georgia laws allegedly “deterred hospitals and doctors from performing abortions,” and “chilled and deterred [doctors wishing to perform abortions] from practicing their respective professions and deprived them of rights guaranteed by the First, Fourth and Fourteenth Amendments.” 15 A three-judge U.S. District Court declared that the parts of Georgia Code Ann. § 26-1202 that limited reasons for abortion and restrictions on abortion in cases of rape were unconstitutional, but upheld the other sections and sub-sections of the law. 16 Plaintiffs took direct appeal to the Supreme Court of the United States challenging the other sections, seeking broader relief and also seeking an injunctive remedy. 17 Defendants’ also appealed to the Supreme Court, but because they had filed an alternative appeal in the Court of

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12 410 U.S. at 184, id. at 202-205 (App. A).
13 410 U.S. at 184.
16 See Doe v. Bolton, 319 F.Supp. at 1056, aff’d in part, reversed in part, 410 U.S. 179, 186. (The district court invalidated sections limiting the reasons for which abortion could be authorized,
17 410 U.S. at 187.

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Appeal that was still pending, their appeal was dismissed for want of jurisdiction. \(^{18}\) (So technically the State’s appeal of the district court ruling that limiting the reasons for abortion was unconstitutional was not before the Supreme Court in *Doe.*\(^ {19}\)

Writing for the Court, again, Justice Blackmun, author of the Opinion of the Court in *Roe,* correctly hinted that the Georgia statute limiting the of reasons for abortion that the lower court struck down was unconstitutional under the *Roe* holding, though that issue was not before the Court). \(^{20}\) Then, for the majority, he went on to strike down several additional requirements of the Georgia Abortion Statute that the lower court had upheld, including the requirement that abortions be performed in hospitals, confirmation of the abortion request by another physician, requiring approval of a hospital abortion committee, and limiting abortions to Georgia residents. \(^{21}\)

The requirement of approval by a hospital review committee was very One reason was that the hospital committee approval provisions were struck down was because the Court concluded that the legitimate interests of the hospital could be adequately protected by subsection (e), the “rights of conscience” provisions. The court noted that those provisions protected both the institutional right to refuse to admit patients for purposes of abortion, and also the individual right of doctors and other employees to decline to participate in abortion, and they “obviously are in the statute in order to afford appropriate protection to the individual and to the

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\(^{19}\) *Id.* See also *id.* at 187, n.8. (“What we decide today [an obvious allusion to *Roe*] obviously has implications for the issues raised in the defendants’ appeal pending in the Fifth Circuit.”).

\(^{20}\) 410 U.S. at 187 (“the extent to which portions of the Georgia statutes were held to be unconstitution, technically is not now before us.”).

\(^{21}\) 410 U.S. at 187-201.
denominational hospital.” 22 Thus, the Court unanimously upheld the provision whereby “the hospital is free not to admit a patient for an abortion.” 23 That protected the institutional right to refuse to provide abortion. The Court opined that: “Section 26-1202(e) affords adequate protection to the hospital and little more is provided by the committee prescribed by § 26-1202(b)(5).” 24 Moreover, the Court majority also explicitly held that: “[A] physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.” 25 That also represented the unanimous view of the Court (even the dissenters who objected to invalidating some provisions agreed in upholding these provisions). 26

Thus, not merely the author of Roe, Justice Blackmun, and not merely the majority of justices on the Court, but all nine justices in the seminal abortion cases, expressed clear support for conscience protections for both individual and institutional health care providers. 27 The constitutionality of “conscience clause” legislation in principle cannot be in doubt as a matter of general constitutional principle after Doe. That means that so long as it is competently drafted, legislative and administrative provisions protecting rights of conscience are and will be upheld as valid against constitutional challenges. The constitutionality of positive statutory and regulatory

22 410 U.S. at 198.
23 410 U.S. at 198.
24 410 U.S. at 198.
25 410 U.S. at 197-198.
26 Id (majority opinion); 410 U.S. 207-08 (Berger, C.J., concurring); 410 U.S. at 209 (Douglas, J., concurring); 410 U.S. at 221, 223 (White, J., dissenting); 410 U.S. at 207 (Rehnquist, J., dissenting).
law protection for rights of conscience protection of health care providers is as clear and well-established as *Roe* and *Doe* themselves.

C. Constitutional Protection of Rights of Conscience Is A Part of the Constitutional Right of Privacy Liberty Established in the Seminal Supreme Court Abortion Cases.

Respect for and protection of different world-views was the fundamental premise behind the Court’s holding in *Roe v. Wade* that the Texas legislature could not protect the unborn child by barring all abortions. Texas had argued that “life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life . . . .” However, Section X of Justice Blackmun’s opinion for the Court in *Roe* rejected that claim because of his view that the constitutional demands respect for various and divergent views about when life begins. “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” He expressly noted (erroneously in many cases) “the wide divergence in thinking on this most sensitive and difficult question,” mentioning the beliefs of “the Stoics,” “the Jewish faith,” “the Protestant community,” “the American Ethical Union,” “the National Council of Churches,” “many non-Catholics,” and “many physicians.” He contrasted “the ‘ensoulment’ theory” of

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28 410 U.S. at 159. Moreover, since the Fourteenth Amendment protects the “right to life” of “persons,” Texas also argued that the existence of prenatal human life had constitutional significance to justify the Texas abortion law directly, but the Court said that the unborn were not “persons” for purposes of that amendment and did not reach the question of whether the human fetus or embryo had “life” protected by that Amendment. *Id.* at 158.

29 *Id.* at 159.
30 *Id.* at 160.
“the Catholic Church,” and “the Aristotelian theory of ‘mediate animation,’ that held sway throughout the Middle Ages.” 31 The Court in Roe did not explicitly adopt any theory, but took an agnostic position that when viewpoints were in such conflict, the Court could not endorse any of them. Putting aside Justice Blackmun’s transparent denial of adopting a particular theological or other world view about when life begins, we must accept on its face the Court’s insistence that “the judiciary” -- and the Texas legislature -- could not constitutionally “speculate as to the answer” to the question of when life begins by enacting a criminal abortion law that adopted one specific position as the official state-approved position.

This position the Court took in Section X of Roe is a “rights of conscience” position. It compels official governmental neutrality by protecting the “right of conscience” to hold unpopular positions on such controversial issues as when life begins. If the holding of the opinion is that pregnant women enjoy such rights of conscience that the state cannot abridge, nothing in the opinion suggests that protection of rights of conscience is limited to women, or does not extend also to doctors (or either gender) and other health care providers. So this passage and holding in Roe appears to provide precedent for the claim (perhaps for a constitutional claim) that the state (or state agencies or state funding or state certification or licensing or hiring) may not restrict and discriminate against health care providers who wish not to participate in, assist or facilitate abortion (surgical or pharmaceutical) because of their belief about when life begins.

An even clearer example of rationale and language in the Roe opinion that implies protection for “rights of conscience” is in Section VIII, in which the Court determined that the Texas abortion law infringed upon a fundamental constitutional right, thus triggering strict

31 Id. at 160.
Citing cases that went back more than eighty years, Justice Blackmun observed that “the Court has recognized a right of personal privacy” with roots in the First, Fourth, Fifth, Ninth, and Fourteenth amendments. The precedents showed that the constitutional right of “personal privacy” extended to “activities relating to marriage . . . procreation . . . and contraception . . . .” “The right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Nothing in Roe suggests that doctors and other health care providers do not also enjoy under the right of privacy protection for their rights to choose whether or not to engage in activities concerning procreation, contraception and abortion.

While the majority opinion in Roe noted that privacy protect the tangible interests of the pregnant woman in preventing “specific and direct harm medically diagnosable” as well as “distress[]” and “psychological harm,” when the Supreme Court reaffirmed Roe nineteen years later in Planned Parenthood v. Casey, the plurality opinion of Justices O’Connor, Kennedy and Souter poetically opined that the fundamental right of privacy covered matters of belief and identity as well. The fundamental right of privacy protects the private realm of “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . . 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. Beliefs about these matters . . . [may not be] under compulsion of the state.” Later, this language was repeated

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32 410 U.S. at 152-156.
33 410 U.S. at 152-153.
34 410 U.S. at 152.
35 410 U.S. at 153.
36 Id.
38 505 U.S. at 851
when the Court struck down another Texas law -- criminalizing homosexual sodomy. 39 So a more than plausible claim exists that the constitutional liberty (to use the Casey preferred terminology) and the fundamental right of privacy (to use Roe’s preferred terminology) established in Roe and its judicial offspring, also provides constitutional protection for decisions by health care providers to decline to provide or assist in providing controversial medical procedures, such as would covered by the concept of “rights of conscience.” 40 Justice Douglas, concurring, in Roe and Doe articulated the inclusive scope of the liberty interest protected by the “right to privacy” established in those cases:

The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the ‘liberty’ and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relationship is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their ‘liberty,’ viz., their right of privacy, without any compelling, discernible state interest. 41

Justice Douglas emphasized that the “physician-patient relationship” was specially protected by the Fourteenth Amendment, not just the one small aspect of it that covered the woman’s decision to get an abortion. If laws restricting abortion are invalid constitutionally

40 See generally
41 410 U.S. at 209, 219-220 (Douglas, J., concurring).
because “[t]he oversight imposed on the physician and patient . . . denies them their ‘liberty,’ viz., their right of privacy,” to choose to participate in effectuating an abortion, the denial of either party’s right to choose not to participate in effectuating an abortion would equally deny “their ‘liberty,’ viz., their right of privacy . . . .”  

He emphasized that “freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children,” and are “fundamental” constitutional rights.

Thus, Roe has been understood as establishing or containing constitutional protection for rights of conscience. “When the state denies her the right to make this choice, so crucial to her personal life, when it seeks to force upon her the moral and religious views of others, this at least raises a question whether her rights of conscience and belief . . . .”

More broadly,

[t]he underlying premise that supports contraceptive use [and/or abortion] is the right of privacy or the ability to control one's own body. The underlying premise that supports [provider conscience refusal based on] religious beliefs is the freedom to possess different views, ideas and beliefs about life . . . [T]he right to privacy only exists because the freedom to have differing views, ideas, and beliefs

42 410 U.S. at 220 (Douglas, J., concurring).
43 410 U.S. at 211 (Douglas, J., concurring).
44 Helen Garfield, Privacy, Abortion, and Judicial Review; Haunted by the Ghost of Lochner, 61 Wash. L. Rev. 293, 357 (1986). While I do not agree with the conclusion reached by Professor Garfield, her article shows that Roe has been interpreted to protect rights of conscience. Not all agree. See Walter Dellinger, Abortion and the Supreme Court: The Retreat from Roe v. Wade, 138 U. Pa. L. Rev. 83 (1989).
exists. As such, the value of conscience could be viewed as a foundation on which other rights build upon.”45

Thus, protection of rights of conscience underlies and is essential to protection for the right to privacy. “It is the freedom to rationalize one's existence and his or her relation to others that leads to any other principle of ‘rights’…Consequently, privacy becomes an "end" only because the freedom to express differing beliefs and ideas in society is the "means" to that end.”46

Thus, protection for rights of conscience of health care providers was not only conceptually a predicate condition for the ruling in Roe, but it was an explicit holding in the companion case of Doe, which was the first case decided by the Court in which it applied the new Roe doctrine. Doe is clear precedent holding that protection for rights of conscience of health care providers a legitimate policy which states constitutionally may adopt. Moreover, the justification in Roe for interpreting the Constitution as mandating that states allow unrestricted access to medical abortion, at least until the third trimester of pregnancy (or when “unduly burden[some] of a pregnant woman’s right to choose abortion)47 clearly assumes and implies that the Constitution provides similar protection for the private decisions of health care personnel and organizations whether to participate in providing abortions, or not. However, the direct constitutional protection for rights of conscience is not so clear because it is based, as I have indicated, on an interpretation of the rationale, the logic, the assumptions and the implications of

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47 Casey, 505 U.S. at ___ (adopting an “undue burden” test in lieu of Roe’s trimester-based privacy test).
It is reasonable and sound, but it is not definitively established in constitutional doctrine by Roe alone.

Fortunately, other precedents for protecting decisions that an individual believes are critical to his or her integrity as a free person is deeply established in Supreme Court jurisprudence. For example, the Court stated in Jacobson v. Massachusetts:48 “There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.” “The inviolability of the person,” to use a term used in Union Pacific R. Co. v. Botsford) 49 that is protected by the constitutional right of privacy is now understood to protect against more than physical invasion.50

*ADD LAWRENCE & OLD & CONTEMPORARY PRIVACY PRECEDENTS *

IV. Principles from the Past: Protection for Rights of Conscience Is Deeply Imbedded in the Core Principles Upon Which the Constitution Is Founded.

Respect for rights of conscience of individuals has an important dimension in the architecture of our constitutional structure and in the core principles upon which our constitutional government is based. At the time of the founding of the Constitution of the United States, it was universally believed that “virtue” in the people was an essential pre-constitutional

48 197 U.S. 11, 29 (19**)
49 141 U.S. 250, 252 (18**).
50 See generally Id.; Terry v. Ohio, 392 U.S. 1, 8-9 (19**) (“personal security”); Katz v. United States, 389 U.S. 347, 350 (Constitution protects “invididual privacy . . . against certain kinds of governmental intrusion”); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (Fourteenth Amendment protection of liberty protections decisions, activities and “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).
foundation for any “republican” (representative democracy) form of government. Certain
“habits of the heart,” as Tocqueville later called them, were considered to be necessary
“preconditions” for maintaining the constitutional Republic.51

The idea of virtue was central to the political thought of the Founders of the American republic. Every body of thought they encountered, every intellectual tradition they consulted, every major theory of republican government by which they were influenced emphasized the importance of personal and public virtue. It was understood by the Founders to be the precondition for republican government, the base upon which the structure of government would be built.52

This appears to have been a ubiquitous belief, held by Federalists and Anti-Federalists alike. For example, Benjamin Franklin wrote that “only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”53 Samuel Adams believed that “neither the wisest constitution nor the wisest laws will secure the liberty and happiness of a people whose manners are universally corrupt.”54 John Adams acknowledged: “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”55 He also observed: “Liberty can no more exist without virtue and independence than the body can live and move without a soul.”56 In a letter

51 See 1 Alexis de Tocqueville, Democracy in America, at 310 (referring to the “habits of the heart” as the American character traits which form the foundation for American democracy).
54 1 The Life and Public Services of Samuel Adams 22-23 (William V. Wells ed., 1865).
56 John Adams, Novanglus, in 4 The Works of John Adams, Second President of the United States: With A Life of the Author, Notes and Illustrations 3, 31 (Charles F. Adams ed., 1850),
to Zabdiel Adams he wrote that “it is Religion and Morality alone, which can establish the Principles upon which Freedom can securely stand....The only foundation of a free Constitution, is pure Virtue . . . .”

Patrick Henry declared: "Bad men cannot make good citizens. It is when a people forget God that tyrants forge their chains. A vitiated state of morals, a corrupted public conscience, is incompatible with freedom. No free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue; and by a frequent recurrence to fundamental principles.”

George Washington in his Farewell Address stated (in his typical understate way) that: “Tis substantially true, that virtue or morality is a necessary spring of popular government.”

Thus, virtue was unanimously understood to be the substructure upon which the superstructure of constitutional rights and government was built. If that foundation slipped, the government and the liberties it protects would not survive.

Francis Grund an Austrian immigrant and contemporary of Alexis de Tocqueville, expressed the concept well when he wrote:

I consider the domestic virtue of the Americans as the principal source of all their other qualities. . . . No government could be established on the same principle as that of the United States, with a different code of morals. The American


57 John Adams, Letter to Zabdiel Adams, June 21, 1776 available at http://www.heritage.org/research/features/almanac/ (seen 23 February 2010). See also Id. ("[R]eligion and virtue are the only foundations, not of republicanism and of all free government, but of social felicity under all government and in all the combinations of human society.").

58 ___ (see generally http://quotes.liberty-tree.ca/quotes_by/patrick+henry ).

Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.  

During the War for Independence,

Britain came to be increasingly seen as both corrupt and determined to spread that corruption to America . . . . [American clergy and revolutionaries] referred to the American Colonies as a troubled Israel facing a corrupting force, which sought to destroy freedom and virtue. . . . Warnings against . . . corrupting influence[s] . . . were also discussed in terms of virtue versus corruption, freedom versus slavery. 

The Founders’ concept of virtue required the exercise of free will, not forced submission. The fight for religious liberty in the Founding era was not just to protect minority churches and their members, but to protect the conditions needed for citizens to develop the quality of “virtue” which could not ripen and expand in the people without their informed, free choices. The republic required virtue to survive and thrive, and virtue requires liberty to grow and develop, especially liberty of conscience and religion.

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60 Francis Grund, Aristocracy in America 212-13 (1837, 1839 reprinted 1959); see also Francis J. Grund, The Americans, in the Moral. Social, and Political Relations 171 (1837); id. at 306-07.
Thus, the first point is that in the political theory of the Founding, the political principles undergirding the Constitution, protection of rights of conscience was essential for without it “virtue” in the people could not develop. And without virtue in the people, republican government (our Constitutional government) could not survive.

In his famous *Memorial and Remonstrance*, James Madison declared that religious duties “must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”⁶² He explained why in terms that underscore the foundational nature of rights of conscience:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of a Civil Society, who enters into any subordinate Association, must always do it with reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.⁶³ Madison clearly understood that if men are not loyal to their duty to their God, their conscience, it is folly to expect them to be loyal to mere legal rules, statutes, judicial orders, or professional duties.⁶⁴ If you demand that a man betray his conscience, you have eliminated the only moral basis for his fidelity to the rule of law, and have destroyed the moral foundation for democracy.⁶⁵

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⁶²*Id.*


⁶⁴[The evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison’s writings, is that the claims of the “universal sovereign” precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but*
Thus, the second point is that protection of rights of conscience is necessary for the rule of
law in a republican form of government. Without protection for rights of conscience, the moral
basis for the rule of law, for obedience to the unenforceable, for voluntary submission to rules of
political and social order, are meaningless and insecure.

But fostering “virtue” was beyond the direct power, role, ability, competence and safe
control of the national government. Virtues in the people had to be cultivated by other
institutions, primarily the home and by religion, they believed. Thus, George Mason believed
that republican government depended upon both “altars and firesides” to inculcate virtue in the
new nation and its future generations. Such mediating institutions were critical to protect and
prepare the soil in which the seeds of self-government were sown. The history of the First
Amendment underscores the importance the Founders attributed to protecting the rights of
individuals collectively, in churches and religious societies, to practice the beliefs.

Thus, the third point is the protection of rights of conscience was attendant to and necessary
to protect the important role of such mediating structures and institutions as churches and

by the nature and scope of religious duty.

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*,

Jefferson agreed. He famously explained: “The rights of conscience we never
submitted, we could not submit. We are answerable for them to our God.” Thomas Jefferson,
Notes on Virginia, in The Life and Selected Writings of Thomas Jefferson, 275 (Adrienne Koch
& William Peden eds., 1944), cited in Steven D. Smith, *The Rise and Fall of Religious Freedom

Dailey, *supra* note __, at 1826-35.

Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early
how to be good in a variety of local institutions--by the firesides as well as at the altar . . . [The
Founders believed that] . . . individuals learned virtue in their families, churches, and schools.”
*Id.*).
families. Those institutions only could thrive in an environment rich in liberty of conscience and freedom of religion.

Note the interconnectedness of virtue, republican government, liberty, religion and family. Republican government requires virtue in the people; in order for virtue in the people to develop there must be liberty – especially of religion and conscience -- (as well as private institutions of church and family to teach people how to exercise and discipline their liberty to develop virtue); and for secure protection of individual liberty, including liberty of religion and conscience, and for protection of churches and families, a Republican government is needed.

The structural significance of this for our government is that protection of rights of conscience and religious liberty is necessary in order to cultivate the virtue that was understood to be the pre-condition for our constitutional system of republican government, and to foster and nurture the institutions that inculcated virtue in the people.

Moreover, protection for rights of religious conscience was part of the solution to the dilemma of controlling factions, which Madison analyzed so brilliantly in Federalist No. 10.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy that it was worse than the disease. Liberty is to faction what air is to fire, an ailment without with it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the
annihilation of air, which is essential to animal life because it imparts to fire its destructive agency.

The second expedient is as impractical as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. . . . The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of those faculties is the first object of government. From the protection of different and unequal faculties . . . ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man . . . . A zeal for different opinions concerning religion, concerning government, and many other points . . . have . . . divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. . . .

. . . .

The inference to which we are brought is that the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its effects. 67

Madison’s solution to the danger of factions was to extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to

invade the rights of the citizens, or if such a common motive exists, it will be
more difficult for all who feel it to discover their own strength and to act in unison
with each other. Greater security [is] afforded by a greater variety of parties,
against the event of any one party being able to outnumber and oppress the rest.\(^{68}\)

The dilemma of delegation also troubled Madison. The “filter” of representation in
representative democracy may result in good representatives formulating public policy that “will
be more consonant to the public good” than in a pure democracy, or “the effect may be inverted.
Men of factious tempers, or local prejudices, or sinister designs, any, by intrigue, by corruption,
or other means, first obtain the suffrages, and then betray the interests of the people.”\(^{69}\) Madison
saw the solution lay in part in federalism,\(^{70}\) and primarily in “enlarge[ing] the sphere” to allow
diversity of faction to flourish and allow faction to cancel faction.\(^{71}\) In Federalist No. 51,
Madison returned to the theme which he described as “[t]he policy of supplying, by opposite and
rival interests, the defect of better motives” and so that “each may be a check on the other . . .
.\(^{72}\)

Application of that principle to the rights of conscience in health care suggests the value
of liberating conscience to cultivate wide diversity, so that no one viewpoint on the moral issue
(such as that of dispensing pharmaceutical abortifacients or of participating in surgical abortions)
excludes or controls all others. Rights of conscience, or moral pluralism, produces greater
liberty for all views of any particular moral issue. Thus, the fourth point is that protection of

\(^{68}\) Id. at 83.

\(^{69}\) Id. at 82.

\(^{70}\) Id. at 83 (“The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.”).

\(^{71}\) Id. at 83-84.

\(^{72}\) Federalist No. 51, supra note _ at 322.
rights of conscience is part of the “extended sphere” the Founders believed necessary to overcome the problem of factions in government.

Madison’s applied the logic of pluralism specifically to the problem of religious contentions and factions (different denominations and belief systems). The historical belief of rulers and their advisors was that uniformity of religious views within the polis was necessary to nurture and preserve political unity within a nation. England and her colonies in the New World, a few other nations had begun to experiment with moderate doses tolerance of religious differences. Madison advocated abandonment establishment and cultivation of wide religious liberty and protect broadly rights of conscience. He recognized that religious liberty was the cause of religious contention but that it also was necessary to foster the virtue essential for a free republican form of government.  

During the Virginia ratifying convention, Madison declared: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.” Like his contemporaries, he believed that virtue was the essential foundation of republican government (what we would call liberal democracy). So rather than attempting to remove the cause of the problem (religious liberty), and with it destroy the form of government that would best secure the legitimate purposes of government (republican democracy), as he did in Federalist No. 10, Madison advocated “enlarging the sphere,” by protecting all rights of conscience. He did so not just because that would diminish the likelihood of any one religious faction gaining abusive amounts of power or influence, but because it would produce the antidote to the problem – the antidote of virtue in men and in society whereby individuals would restrain themselves out of choice and out of respect for the

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73 See supra note __.
74 The Writings of James Madison 223 (Gaillard Hunt ed., 1904).
rights of others which they shared in common as citizens of this Republic. All citizens interested in the survival of the Republic would share a common interest in cultivating virtue for the sake of the Republic, and many different religions and world views would contribute competitively to foster virtue and preserve liberty under the republican government.

Madison believed that human goodness alone is not sufficient protection for rights. That includes rights of conscience. “If men were angels no [protection for rights of conscience] would be necessary,” to paraphrase Madison.\(^{75}\) Certainly “a dependence on the [good will of] people” to protect rights of conscience of health care providers in the long run, in the historical view, the “primary” means of preventing abuses, but “experience has taught . . . the necessity of auxiliary precautions” such as laws protecting rights of conscience of health care providers.\(^{76}\) Thus, the sixth point is that protection of rights of conscience is required as an “auxiliary precaution” and is the Madisonian solution to the dilemma of conflict between rights of conscience of health care providers and patient access to legal therapies and medicines is to liberate conscience.

IV. The Future of Protection for Rights of Conscience of Health Care Providers in America

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V. Conclusion: Balancing Rights of Conscience with Accommodation of Access

Professor Kent Greenawalt has written:

\(^{75}\) Federalist No. 51, supra note ___ at 322.

\(^{76}\) Federalist No. 51, supra note ___ at 322.
In principle, people should not have to render services that they believe are forbidden directly by God or are deeply immoral. However, any privilege to refuse needs to be compatible with individuals being informed about and being able to acquire standard medical services and drugs, and with health care institutions and pharmacies not having to turn handsprings to have personnel on hand to provide what is needed.\textsuperscript{77}

He also counsels that “people who can get treatment or drugs elsewhere and have adequate information about alternative possibilities have a much less powerful claim that refusal impinges on them to an impermissible degree.”\textsuperscript{78}

Such an approach has been tried successfully, showing that it is possible to protect both rights of conscience and rights of patients to controversial medical procedures. For example, the American Pharmaceutical Association adopted a balanced policy in 1998 that includes protecting the rights of conscience of pharmacists and also supports the establishment of “a system to ensure patient access to legally prescribed therapy without compromising the pharmacists right of conscientious refusal,” such as toll-free telephone access to information about pharmacies and pharmacists who will fill controversial prescriptions that may violate the rights of conscience of some other pharmacists.\textsuperscript{79} “The Association of Reproductive Health Professionals operates a [toll free] national hotline . . . that allows patients to find a listing of providers who provide

\textsuperscript{78} Id. at 823.
emergency contraception services.”80 In rural Washington state, such a toll-free referral system has been operated successfully since 1997 and by 2005 nearly 5,000 emergency contraception interventions were being done annually in Washington chain pharmacies in forty-three locations.81 The success of this system is that no pharmacist with moral objections to dispensing what are called “emergency contraceptives” is forced to violate his or her conscience to do so, while patients and their physicians who prescribe the potential abortifacient medications have a means to instantly identify and locate pharmacists who have no objection to dispensing the legal medication. By similar notice, information and communication systems, established in advance, other health care providers and patients could in most cases achieve respect for both rights of conscience of providers and access of patients to legal treatment options that are morally objectionable to some providers.

Protection for rights of conscience of health care providers balanced with protection for the access interests of patients and other providers to accessible information previously disclosed and easily accessible can vindicate both values. Whether such reasonable, balanced and practical solutions are politically acceptable remains to be seen.

80 Id. at 3.
81 Id. at 3-5.