2023

My Body, [Doctor's] Choice: Restoring the Balance Between Freedom of Conscience and Access to Healthcare in America

Kimberly E. Begley

I. **Introduction**

> I was not seeking to end my pregnancy. I was seeking proper medical care. I didn't have control over my miscarriage, but the hospital had control over the care I would receive at that devastating time. Instead of acting in my best interest, religious beliefs were used to deny me the right type of medical care.[1]

Tamesha Means was only eighteen weeks pregnant when her water broke.[2] In a panic, Tamesha rushed to the only hospital in her county for help; however, the doctors turned her away, telling her that she simply needed to go home and rest.[3] Over the next forty-eight hours, Tamesha would begin to bleed profusely and, eventually, develop a fever.[4] Nevertheless, the hospital denied her care two more times.[5] As Tamesha was leaving the hospital following her third trip, she went into labor.[6] It was at this moment that the hospital was finally willing to help. The doctors admitted her to a room and delivered her baby, which died a few hours later.[7] Although Tamesha made a full recovery, she later discovered that the doctors had known that she was developing a life-threatening infection from a miscarriage and that her pregnancy was not going to make it.[8] Yet, they still refused to do anything until her baby was coming out of her.

Although disheartening, the hospital's decisions were protected by law. The hospital was affiliated with the Catholic Church, meaning it was prohibited from administering medical treatments that could result in the termination of a pregnancy. In these situations, the doctrine of conscientious objection gives medical providers the right to refuse "to provide or participate in the delivery of a legal, medically appropriate healthcare service to a patient because of personal

---

[1] Tamesha Means, *Catholic Hospitals Shouldn't Deny Care to Miscarrying Mothers Like Me*, THE GUARDIAN (Feb. 23, 2016, 12:07 PM), https://www.theguardian.com/commentisfree/2016/feb/23/catholic-hospitals-abortion-womens-health-care-miscarrying-mothers.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Means, *supra* note 1.
[8] *Id.*

beliefs."[9] The right to free conscience is essential in a democracy, as an individual's conscience is intimately related to their decision-making on religious, moral, and philosophical grounds.[10] However, all rights come with costs, and sometimes these costs "fall on individuals who do not benefit directly from the right in question."[11] This is the case with the right to medical conscience. Because our courts have interpreted conscience laws so broadly, these laws directly interfere with an individual's decisions regarding their own body.[12] Modern conscience laws inhibit access both to medical treatments and to information regarding the availability of medical treatments.[13] By providing virtually absolute deference to a provider's beliefs, the United States has failed to adequately strike a balance between religious freedom and access to healthcare.[14]

Tamesha Means' story is not unique.[15] However, this does not have to be the case. Around the world, other nations which guarantee the right to conscience have successfully allowed healthcare providers to refuse to perform procedures while still ensuring that patients maintain access to treatment.[16] Within this realm, the United Kingdom is the gold standard. Despite working under comprehensive conscience laws, most British physicians believe that access to abortions has not been significantly impeded.[17] In fact, there has been an increase in the number of abortions that

---

[9] Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, THE HASTINGS CENTER (May 31, 2022), https://www.thehastingscenter.org/briefingbook/conscience-clauses-health-care-providers-and-parents/.
[10] Erin Whitcomb, *An International Review of Conscientious Objection to Elective Abortion*, 24 ST. JOHN'S J.L. COMM. 771 (2010).
[11] Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 K.U. L.J. 781 (2017).
[12] Wanying Yang, Comment, *My Body is Not My Choice Anymore? How Conscience Protections for Doctors Violate an Individual's Right to Use Contraceptives and the Establishment Clause*, 29 AM. U.J. GENDER SOC. POL'Y & L. 251 (2021).
[13] Nadia N. Sawicki, *Mandating Disclosure of Conscience-Based Limitations on Medical Practice*, 42 AM. J.L. AND MED. 85 (2016).
[14] Olivia Rojas, Note, *Conscience Clauses and the Right of Refusal: The War Between Legal and Ethical Responsibility*, 55 WAKE FOREST L. REV. 717 (2020).
[15] *See* Brigitte Amiri, *Catholic Hospitals Denied These Women Critical Care. Now They're Speaking Out,* ACLU N. CAL. (Nov. 2, 2016), https://www.aclunc.org/blog/catholic-hospitals-denied-these-women-critical-care-now-they-re-speaking-out.
[16] These include the United Kingdom, Norway, and Portugal. Wendy Chavkin, Laurel Swerdlow & Jocelyn Fifield, *Regulation of Conscientious Objection to Abortion: An International Comparative Multiple-Case Study***,** 19 HEALTH AND HUM. RIGHTS 1, 55-58 (2017).
[17] *Id.*

have been performed in the United Kingdom since the passage of conscience laws.[18] As a result of these statistics, this paper will argue that the United States should follow the example of the United Kingdom in order to restore a constitutional balance between freedom of religion and access to medical care.

First, Section II of this paper will examine the rise of medical conscience laws in the United States at both the federal and state levels. Next, Section III will explain the Free Exercise Clause and analyze how this clause interacts with medical conscience. Section III will also provide this same explanation and analysis for the Free Speech Clause. Finally, Section IV will lay out the conscience laws in the United Kingdom and provide recommendations as to how the United States can implement these laws without running afoul of the Constitution.

II. History of Medical Conscience Laws

a. Medical Conscience in Federal Laws

In 1973, the Supreme Court of the United States held that the Constitution protects a woman's right to obtain an abortion.[19] Concerned with the implications of this "pro-choice" decision, as well as with a district court's concurrent decision requiring a hospital to provide sterilizations,[20] healthcare providers who objected to these procedures on religious grounds began raising conscience objections.[21] This was the first time that the idea of religious conscience was used outside of the military context.[22] In response to these protests, Congress passed the Church Amendment. The Church Amendment prohibits public authorities from using an individual or

[18] "The proportion of procedures performed in England and Wales has increased to 75%, reflecting an improvement in access." ROYAL COLL. OF OBSTETRICIANS AND GYNAECOLOGISTS, THE CARE OF WOMEN REQUESTING INDUCED ABORTION: EVIDENCE-BASED CLINICAL GUIDELINE NUMBER 7 (2011).
[19] Roe v. Wade, 410 U.S. 113 (1973).
[20] Taylor v. St. Vincent's Hosp., 369 F. Supp. 984 (D. Mont. 1973).
[21] Yang, *supra* note 12.
[22] Esther Ju, Note, *Unclear Conscience: How Catholic Hospitals and Doctors are Claiming Conscientious Objections to Deny Healthcare to Transgender Patients*, 2020 U. ILL. REV. 1289 (2020).

healthcare entity's receipt of federal funds to require them to either perform abortions, perform sterilizations, or assist in research if it goes against their religious beliefs.[23] This law also forbids healthcare entities from discriminating in hiring, firing, or promoting based on an individual's willingness to perform abortions and sterilizations.[24]

For two decades, the Church Amendment was the only federal law which addressed medical conscience concerns. However, this changed in 1996 when Congress passed the Coats-Snowe Amendment. This law expands upon the Church Amendment by forbidding governments from discriminating against a healthcare entity that refuses to undergo or provide medical abortion training.[25] The Coats-Snowe Amendment also defines "healthcare entity" for the first time.[26] Nine years later, Congress passed yet another medical conscience law. The Weldon Amendment provides that a government agency cannot use a healthcare entity's receipt of funds from the Departments of Labor, Health and Human Services, or Education to discriminate on the basis of that entity's refusal to provide abortions.[27] This law also significantly broadens the definition of "healthcare entity" that was laid out in the Coats-Snow Amendment.[28] Additionally, while not a separate conscience law itself, the Patient Protection and Affordable Care Act of 2010 (ACA) contains two provisions related to medical conscience. First, healthcare plans are permitted to opt out of coverage of abortion services.[29] Second, healthcare plans are prohibited from discriminating against a healthcare provider or entity based on an unwillingness to cover abortions.[30]

---

[23] 42 U.S.C. § 300a-7.
[24] *Id.*
[25] 42 U.S.C. § 238n.
[26] "The term 'health care entity' includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." *Id.*
[27] Consolidated Appropriations Act of 2005, Pub. L. No. 447, tit. V, § 508, 118 Stat. 2809 (2004).
[28] "The term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." *Id.*
[29] Pub. L. No. 111-148, 124 Stat. 119.
[30] *Id.*

Finally, although no longer in effect, the Trump Administration had expanded and reenacted a conscience rule that the Obama Administration had previously rescinded. Known as Protecting Statutory Conscience Rights in Healthcare, the rule was enacted to address "confusion over what [was] and what [was] not required under Federal conscience and anti-discrimination law."[31] On its surface, this rule (1) defined statutory terms; (2) imposed assurance and certification requirements; (3) reaffirmed the Office of Civil Rights' enforcement authority; (4) imposed records and cooperation requirements; and (5) adopted a voluntary provision notice.[32] However, the rule was "not narrowly tailored and expand[ed] the conscience exemption to an unlimited and unprecedented scope."[33] Six months after the rule was announced, the New York Southern District Court vacated the rule in a multi-state litigation.[34] In doing so, the court admitted that the rule did not violate the First Amendment, and ultimately vacated the rule on procedural grounds.[35] However, this holding is still up for appeal, and if the rule is eventually passed, it would "reinterpret federal laws to expand the ability of healthcare providers to deny patients on religious . . . grounds."[36]

b. Medical Conscience in State Laws

[31] 84 Fed. Reg. 23,170 (July 22, 2019) (codified at 45 C.F.R. pt. 88).
[32] *Id.*
[33] Yang, *supra* note 12; "The rule applied to state and local governments, public and private health care professionals, and businesses that receive federal funds like Medicare or Medicaid. It also applied to services ranging from abortion to HIV treatment and sex reassignment surgeries. Moreover, it [gave] ancillary staff, such as ambulance drivers, the ability to refuse to participate in these services. Further, it permitted [the Department of Health and Human Services] to terminate all funding if an entity violated a conscience provision." Rojas, *supra* note 14.
[34] New York v. United States Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475 (S.D.N.Y. 2019).
[35] The court found that the Department of Health and Human Services lacked the authority to define terms and to promulgate assurance and certification requirements, and that the rule conflicted with both Title VII and EMALTA. *Id*.
[36] Ju, *supra* note 22.

Medical conscience laws vary significantly across states. Currently, forty-six states allow some healthcare providers to refuse abortions.[37] Further, twelve states allow healthcare providers to refuse to provide services related to contraception, and eighteen states allow healthcare providers to refuse to provide sterilizations.[38] Finally, twenty states and the District of Columbia allow certain employers and insurers to refuse to comply with contraceptive coverage mandates,[39] while eight states do not permit any refusals.[40] Only nine states and the District of Columbia prohibit restrictions and delays by insurers that impede access to contraceptives.[41]

i. Mississippi

The broadest state conscience law is in Mississippi.[42] Under the Mississippi Health Care Rights of Conscience Act, both a healthcare provider and a healthcare institution have the right to not participate in a healthcare service that violates their conscience.[43] Mississippi defines a "healthcare provider" as

> *Any* individual who may be asked to participate in any way in a health-care service, including, but not limited to: a physician, physician's assistant, nurse, nurses' aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, researcher, medical or nursing school faculty, student or employee, counselor, social worker or any professional,

[37] *Refusing to Provide Health Services*, GUTTMACHER INST. (Nov. 1, 2022), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services. All forty-six states permit individual healthcare providers to refuse to provide abortion related services. Meanwhile, forty-four states allow healthcare institutions to refuse to provide abortion services. Of these states, thirteen limit the exemption to private healthcare institutions, and one state only allows religious institutions to refuse to provide this care. *Id.*
[38] *Id.*
[39] Three states only allow churches and church associations to refuse to provide coverage; seven states allow churches, church associations, and religiously affiliated schools to refuse to provide coverage; and seven states and the District of Columbia allow all religious organizations to refuse to provide coverage. Only two states have an unlimited refusal clause. *Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Nov. 1, 2022), https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives.
[40] *Id.*
[41] *Id.*
[42] Douglas Nejaime & Reva B. Segel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516 (2015).
[43] Miss. Code. Ann. § 41-107-7.

> paraprofessional, or any other person who furnishes or assists in the furnishing of, a health-care procedure.[44]

Similarly, the law defines a "healthcare institution" as

> *Any* public or private organization, corporation, partnership, sole proprietorship, association, agency, network, joint venture, or other entity that is involved in providing health-care services, including, but not limited to: hospitals, clinics, medical centers, ambulatory surgical centers, private physician's offices, pharmacies, nursing homes, university medical schools and nursing schools, medical training facilities, or other institutions or locations where health-care procedures are provided to any person.[45]

Finally, a "healthcare service" is

> *Any* phase of patient medical care, treatment, or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing, or administering any drug, or medication, surgery, or any other care or treatment rendered by health-care providers or health-care institutions.[46]

By using broad language, Mississippi's conscience law protects any healthcare provider who participates in any healthcare procedure. As a result, this law effectively allows medical professionals to refuse to provide all services under the guise of conscience. Since there are no limitations or consequences for the refusal to participate, Mississippi provides unfettered protection of religious rights.[47] While this law may sound preferable from a constitutional standpoint, this law has the consequence of restricting patients' access to medical care, and in some cases, eliminating that access entirely. Without the assurance that a patient will be able to have their health needs met, this law "compromises ultimate objectives of the healthcare delivery system."[48]

ii. Illinois

[44] Miss. Code. Ann. § 41-107-3(b) (emphasis added).
[45] Miss. Code. Ann. § 41-107-3(c) (emphasis added).
[46] Miss. Code. Ann. § 41-107-3(a) (emphasis added).
[47] Georgia Chudoba, Comment, *Conscience in America: The Slippery Slope of Mixing Morality with Medicine*, 36 SW. U. L. REV. 85 (2007).
[48] Kelsey C. Brodsho, Comment, *Patient Expectations and Access to Prescription Medication are Threatened by Pharmacist Conscience Clauses*, 7 MINN. J.L. SCI. & TECH. 327 (2005-2006).

The conscience law in Illinois presents an interesting case. Until recently, the Illinois Health Care Right of Conscience Act was the "gold standard of conscience protecting legislation."[49] The law contains language as broad as in Mississippi: it protects "any nurse, nurses' aide, medical school student, professional, paraprofessional, or any other person who assists in the furnishing of healthcare services" or any healthcare facility who refuses to participate in "any phase of patient care" if it goes against their conscience.[50] However, in 2016, the state passed an amendment to the Act, which offers safeguards for patients when physicians object to their requested service. Specifically, an objecting healthcare provider must first "inform the patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of the treatment options[.]"[51] Thereafter, a patient will either receive the service by others in the facility or will simply be informed that the service cannot be provided.[52] If requested by the patient, the healthcare provider must "(i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer the health care service."[53]

Because Illinois provides some protection to patients, it is more successful at balancing a physician's right to conscience with access to healthcare than Mississippi. Nevertheless, this statute is still problematic from the patient's standpoint. Nothing in the law specifically requires a

[49] Francis J. Manion, *Protecting Conscience Through Litigation: Lessons Learned in the Land of Blagojevich*, 24 REGENT U. L. REV. 369, 372 (2012).
[50] The law contains a non-exhaustive list of covered services: "Testing; diagnosis; prognosis; ancillary research; instructions; family planning, counselling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons; or an abortion[.]" 745 Ill. Comp. Stat. Ann. 70/3.
[51] 745 Ill. Comp. Stat. Ann. 70/6.1; While this may sound commonplace in the medical field, *The New England Journal of Medicine* found that 14% of surveyed doctors believed that a physician who objects to a procedure is not obligated to present all information when discussing treatment options with a patient. Sawicki, *supra* note 13.
[52] 745 Ill. Comp. Stat. Ann. 70/6.1
[53] *Id.*

physician to provide patients with all the information necessary to receive treatment.[54] Because the onus is on the patient to ask for this information, a patient who is not fully aware of their rights would not be able to receive full access to proper medical care.[55] Since the average patient would not know about this requirement, this type of scenario is certainly conceivable and likely to occur.

iii. New York

In contrast to the previous laws, the law in New York is extremely narrow. Under the Family Health Care Decisions Act, both an individual physician and a private hospital can refuse to provide a medical procedure if the procedure violates their "sincerely held religious beliefs[.]"[56] However, these providers can only make a conscientious objection under certain conditions. First, if a private hospital objects to a procedure, the hospital must inform the patient requesting the procedure of the hospital's policy prior to or upon admission.[57] The hospital must then transfer the patient to another hospital that is "reasonably accessible under the circumstances and willing to honor the [patient's] decision."[58] Similarly, if an individual physician objects to a procedure, they must inform both the patient and their employer of their objection.[59] The objecting physician must then help the hospital in transferring the patient to another physician who is willing to honor the patient's decision.[60]

From the patient's standpoint, this law is ideal. Namely, the law provides "full information about, and access to, all legal medical treatments that fall within the standard of care . . . without any delay or inconvenience greater than that experienced by patients whose providers do not have

[54] Benjamin P. Brown, Lee Hasselbacher & Julie Chor, *Whose Choice? Developing a Unifying Ethical Framework for Conscience Laws in Health Care*, 128 OBSTET. GYNECOL. 2 (2016).
[55] *Id.*
[56] N.Y. Pub. Health Law § 2994-n.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

objections to treatment.[61] However, objecting physicians may argue that this law violates their religious freedom. Many conscientious objectors strongly believe that cooperation in the performance of a medical procedure is equally as sinful as direct performance.[62] By requiring physicians to provide access to an objectionable procedure, the argument could be made that this law does not take the religious views of these physicians seriously.

III. Analysis

a. Free Exercise Clause

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise" of religion.[63] This is known as the Free Exercise Clause. At its core, the Free Exercise Clause guarantees every American citizen the right to adopt any religious belief and the right to engage in religious rituals.[64]

i. History of Free Exercise in the United States

The Supreme Court of the United States has been inconsistent in its treatment of the Free Exercise Clause. The Court was first confronted with a free exercise question in 1878. To analyze this question, the Court devised the rational basis test.[65] Under the rational basis test, a government cannot punish citizens because of their religious beliefs, but it can regulate religiously motivated conduct if it has a rational basis for doing so. The rational basis test was the Court's standard for determining whether a law violated the Free Exercise Clause until 1963. At this time, the Court shifted its standard of review from rational basis to strict scrutiny. [66] The strict scrutiny test

[61] Sawicki, *supra* note 13.
[62] *Id.*
[63] U.S. CONST. amend. I.
[64] *Free Exercise Clause,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/free_exercise_clause (last visited Dec. 20, 2022).
[65] Reynolds v. U.S., 98 U.S. 145 (1878).
[66] Sherbert v. Verner, 374 U.S. 398 (1963).

provides that when a law unintentionally burdens religious practices and beliefs, the legislature must show that the law serves a compelling secular state interest and that the law is narrowly tailored to achieve this interest. This higher standard, which gives almost no deference to the government, was reaffirmed by the Court in 1972.[67]

An important Free Exercise doctrine arose during the strict scrutiny era. In *Thomas v. Review Board of Indiana Employment Security Division*, Thomas, a Jehovah's Witness, was hired to work in a roll foundry, which fabricated steel for various industrial purposes.[68] Thomas was then transferred to a department that fabricated turrets for military tanks, and he quit because his religious beliefs prevented him from participating in weapons production.[69] The state of Indiana denied Thomas unemployment benefits, and the Supreme Court of Indiana affirmed. This court found that the "basis and precise nature" of Thomas's religious beliefs were unclear, and that the state had an interest in preserving the integrity of the insurance fund by encouraging workers to not quit for personal reasons.[70] However, the Supreme Court of the United States reversed. The Court found that it was not a court's job to analyze the legitimacy of someone's faith.[71] Crucially, it held that "religious beliefs need not be acceptable, logical, consistent, or comprehensive to others in order to merit First Amendment protection."[72]

Ten years after *Thomas*, the Supreme Court altered its standard of scrutiny once again. After years of struggling to consistently implement strict scrutiny, the Court returned to rational basis, opting to only use strict scrutiny under limited circumstances. Specifically, the Court held that when a law burdens religious exercise but is generally applicable and facially neutral, the

[67] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[68] Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 710 (1981).
[69] *Id.*
[70] *Id.* at 713.
[71] *Id.* at 720.
[72] *Id.* at 714.

government only needs to show that the law passes rational basis.[73] However, in the rare case that a law directly and intentionally targets religion, the government must prove that it survives strict scrutiny.[74] Ultimately, Congress was not satisfied with the Court's decision. In response, it passed the Religious Freedom Restoration Act (RFRA). RFRA mandates that federal courts use strict scrutiny when determining whether a law violates the Free Exercise Clause, regardless of the law's general applicability and facial neutrality.[75] Although the Supreme Court struck down RFRA as applied to the states, many states have enacted their own "State RFRAs," which mirror the federal law.[76]

ii. Modern Free Exercise and Medical Conscience

Currently, our courts' religious liberties dockets largely consist of complicity claims. Complicity claims are "religious objections to being made complicit in the assertedly sinful conduct of others."[77] Compared to other free exercise claims, complicity-based claims have a unique feature of inflicting harm on third parties who do not share the claimant's beliefs. While accommodating a typical free exercise claim creates a benefit for the claimant—typically an exemption from a law which allows the claimant to fully practice his religion—accommodating complicity claims creates restrictions upon the otherwise law-abiding citizen whom the religious objector believes is sinning.[78]

The first Supreme Court case to legitimize complicity-based conscience claims was *Burwell v. Hobby Lobby*. In *Hobby Lobby*, a group of religious business owners sought to be

[73] Emp. Div. v. Smith, 494 U.S. 872 (1990).
[74] *Id.*
[75] 42 USCS § 2000bb.
[76] City of Boerne v. Flores, 521 U.S. 507 (1997).
[77] Nejaime & Segel, *supra* note 42.
[78] *Id.*

excused from an ACA requirement that employers offer health insurance covering the cost of contraception.[79] The business owners believed that it was "immoral and sinful for them to intentionally participate in, pay for, facilitate, or otherwise support" drugs that could operate after an egg is fertilized.[80] However, the government argued that the contraceptive regulations did not impose a substantial burden on the owners' exercise of religion as providing coverage for contraceptives does not directly result in the destruction of an embryo.[81] The Supreme Court ultimately rejected the government's argument, finding that

> [The business owners] believe that providing the coverage demanded by the [contraceptive] regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy . . . . [The government] in effect tells the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.[82]

Justice Alito saw this case as nearly identical to the facts in *Thomas* and relied heavily on its holding that courts cannot evaluate the reasonableness of a religious belief.[83] However, Alito's comparison to *Thomas* was unfounded. The plaintiff in *Thomas* was seeking a religious exemption in order to receive insurance benefits, a decision that only impacted himself. Meanwhile, the plaintiffs in *Hobby Lobby* were seeking a religious exemption in order to refuse to provide health insurance, a decision that impacted thousands of employees. Essentially, the Court's finding in *Hobby Lobby* reflects the fundamental problem with complicity-based claims: the requested accommodation placed a burden on others who did not share the religious owners' beliefs that contraceptives were sinful.[84]

---

[79] Burwell v. Hobby Lobby Stores, inc., 573 U.S. 682 (2014).
[80] *Id.* at 702. These drugs included two forms of the morning after pill, and two types of intrauterine devices. *Id.*
[81] *Id.* at 723.
[82] *Id.* at 724.
[83] *Id.* at 725.
[84] *See* Holt v. Hobbs, 574 U.S. 352 (2015) (Ginsburg, J., concurring) ("Unlike the exemption this Court approved in [*Hobby Lobby*], accommodating petitioner's religious belief in [*Holt*] would not detrimentally affect others who do not share petitioner's belief").

The Court ultimately held in *Hobby* Lobby that the contraceptive regulation violated RFRA, as it forced the business owners to choose between abandoning their religious beliefs or paying a hefty fine.[85] In making its ruling, the Court accepted the assertion that the contraceptives destroyed an embryo without scientific proof, deferred to the business owners' claim that this was immoral, and blanketly accepted the allegation that the business owners would be complicit in destroying an embryo by providing insurance for those contraceptives.[86] In giving full deference to the religious claimants, this ruling severely disturbs the balance between religious rights and access to healthcare. This decision was also the first time the Supreme Court found a substantial burden on religious exercise where an objector is required to take an action that *might* enable a third party to do things at odds with the objector's religious beliefs.[87] Although the ACA permitted employees to use their insurance to cover contraceptives, there was no guarantee that they would do so. Therefore, the Court used the mere possibility of contraceptive coverage to take this choice away from employees.

Significantly, *Hobby Lobby* moved the fight over religious conscience from between the objector and the state to between the objector and other citizens who have interests that may be impacted by the objection.[88] This is evidenced by the holdings in two recent cases. First, in *Little Sisters of the Poor v. Pennsylvania*, the Supreme Court explicitly stated: "we made it abundantly clear [in *Hobby Lobby*] that, under RFRA, the Departments *must accept* the sincerely held complicity-based objections of religious entities."[89] In this case, the Court held that the government

[85] *Hobby Lobby*, 573 U.S. at 723.
[86] Amy J. Seppinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897 (2015).
[87] Erwin Chemerinsky, *The Broad Reach of the Narrow Hobby Lobby Ruling*, L.A. TIMES (June 30, 2014, 6:41 PM), https://www.latimes.com/nation/la-oe-chemerinsky-hobby-lobby-supreme-court-20140701-story.html.
[88] Sean Nadel, Note, *Closely Held Conscience: Corporate Personhood in the Post-Hobby Lobby World*, 50 COLUM. J.L. & SOC. PROBS. 417 (2017).
[89] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2383 (2020) (emphasis added).

had the power to expand the number of entities that could be exempted under the ACA contraceptive regulation.[90]

Then, two years later, the Texas Northern District Court struck another provision of the ACA. In *Braidwood Management v. Becerra*, a group of religious business owners sought to be exempt from a provision requiring them to cover certain forms of preventative care.[91] The business owners specifically objected to the coverage of PrEP drugs,[92] claiming that the coverage made them "complicit in facilitating homosexual behavior, drug use, and sexual activity outside of a marriage between one man and one woman."[93] The government argued that the business owners' claim that these drugs encouraged homosexual behavior was empirical, and required factual support.[94] However, Judge O'Connor clarified that, under *Hobby Lobby*, the government cannot tell the business owners that "the connection between the morally objectionable conduct and complicity in the conduct" is too attenuated.[95] He then explained that *Little Sisters* only required an objector's beliefs to be sincere, not correct.[96] Since the business owners sincerely believed that providing coverage to PrEP made them complicit in homosexual behavior, it was enough to prove that they were substantially burdened by the ACA requirement.[97]

If *Braidwood* and *Little Sisters'* continuation of the holding in *Hobby Lobby* is any indication of the direction in which our jurisprudence is heading, access to healthcare is in jeopardy. In giving full deference to religious beliefs and rejecting arguments based on attenuation,

---

[90] *Id.* at 2386.
[91] Braidwood Mgmt. v. Becerra, 2022 U.S. Dist. LEXIS 161052 (N.D. Tex. Sept. 7, 2022).
[92] PrEP drugs are recommended for individuals who are at high risk of contracting HIV. *Id.* at *3
[93] *Id.* at *7.
[94] *Id.* at *55.
[95] *Id.*
[96] *Id.*
[97] Like in *Hobby Lobby*, the court found that this requirement forced the business owners to choose between abandoning their religious beliefs or facing a financial penalty. *Id.* at *53

courts are putting hundreds of citizens in danger. This is illustrated most clearly in *Braidwood*. By blanketly accepting the argument that access to PrEP drugs encourages homosexual behavior, the Texas court ignored the fact that for the first time in a decade, heterosexuals have a higher rate of diagnosis of HIV than homosexuals.[98] This means that, statistically, heterosexuals would need access to PrEP more than homosexuals. By inadvertently hindering activity that is not seen as "objectionable" in order to stop the behavior that is "objectionable," our courts' decisions have massively increased the harm that conscientious objections can cause.

b. Free Speech Clause

The First Amendment to the United States Constitution also provides that "Congress shall make no law . . . abridging the freedom of speech[.]"[99] The general idea supporting the Free Speech Clause is that there is a "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open[.]"[100]

i. History of Free Speech in the United States

In deciding whether a law regulating speech violates the First Amendment, courts must first determine whether the law is content-neutral or content-based.[101] A law is content-neutral, and therefore subject to lower scrutiny, if it either (1) aims at prohibiting expressive conduct and incidentally burdens speech;[102] or (2) regulates the time, place, or manner of speech.[103] Conversely, a law is content-based, and therefore subject to strict scrutiny, if it proscribes speech "based on the

[98] Ian Green, *HIV Now infects more heterosexual people than gay or bisexual men- we need a new strategy,* THE GUARDIAN (Feb. 9, 2022, 3:00 PM), https://www.theguardian.com/commentisfree/2022/feb/09/hiv-infects-heterosexual-gay-bisexual-men-uk-testing-virus.
[99] U.S. CONST. amend. I.
[100] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[101] *Limitations on Expression*, LAWSHELF, https://lawshelf.com/coursewarecontentview/limitations-on-expression (last visited Dec. 20, 2022).
[102] U.S. v. O'Brien, 391 U.S. 367 (1968).
[103] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

topic discussed or the idea or message expressed."[104] A subcategory of content-based regulations is compelled speech. Under the doctrine of compelled speech, a law is presumptively unconstitutional if it compels individuals to say things that they otherwise do not want to say.[105] The Supreme Court first faced the issue of compelled speech in 1943. In holding that a school cannot force students to say the Pledge of Allegiance, the Court explained that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can . . . force citizens to confess by word or act their faith therein."[106]

Since its inception, the compelled speech doctrine has greatly expanded beyond the Pledge of Allegiance, allowing the Supreme Court to strike down many laws that regulate speech. First, the Supreme Court applied the compelled speech doctrine to mandatory disclosures in 1988. In *Riley v. National Federation of the Blind of North Carolina*, the Court struck down a law that required fundraisers to disclose a percentage of their charitable contributions to potential donors.[107] Although this information was factual and could have been relevant to a donor's decision-making, the Court found that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."[108] Therefore, the Court applied strict scrutiny and held that the state's interest in informing donors how their money was being spent did not outweigh the constitutional infringement of the compelled disclosure.[109]

Additionally, in 1995, the Supreme Court established that private groups have a right to define the parameters of their expression. In *Hurley v. Irish American Gay, Lesbian, and Bisexual*

---

[104] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).
[105] Eugene Volokh, *The Law of Compelled Speech,* 97 TEX. L. REV. 355 (2018).
[106] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[107] Riley v. Nat'l Fed'n of the Blind of N.C., inc., 487 U.S. 778 (1988).
[108] *Id.* at 795; 798.
[109] Specifically, the Court found that (1) the danger that the state posited was not great; and (2) the compelled disclosure would "hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent." *Id.* at 797.

Group of Boston (GLIB), an organization consisting of gay, lesbian, and bisexual descendants of Irish immigrants were banned from marching in their city's St. Patrick's Day parade.[110] In determining whether the state of Massachusetts could force the private parade organizers to include GLIB, the Court found it relevant that the organizers individually selected each participant.[111] Subsequently, the inclusion of GLIB "would likely [have been] perceived as having resulted from the [organizer's] customary determination . . . that [GLIB's] message was worthy of presentation and quite possibly of support as well."[112] Since the organizers would not have had the opportunity to disavow themselves from GLIB's message, the organizers would have lost their "autonomy to choose the content of [their] own message."[113] Given that autonomy is a fundamental rule under the First Amendment, the Court held that the law did not pass strict scrutiny.

Finally, in 2006, the Court discussed when the government can use private entities to advance its own ideas. In *Rumsfeld v. Forum for Academic and Institutional Rights*, the Court held that the federal government could condition federal funds for higher education institutions on the institutions allowing military recruiters access equal to that of other recruiters.[114] Relying on precedent, the Court explained that it had only found a compelled speech violation when the speaker's own message was being hindered by the speech that it was being forced to accommodate.[115] In this case, the university's speech would not have been affected by the military's message, as the school's decision to allow recruiters on campus was not expressive.[116] The university was also free to disassociate itself from the military's message, as the government

[110] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).
[111] *Id.* at 574.
[112] *Id.* at 575.
[113] *Id.* at 573.
[114] Rumsfeld v. F. for Acad. & Institutional Rts., inc., 547 U.S. 47 (2006).
[115] *Id.* at 63.
[116] *Id.* at 64.

did not restrict what the school could say.[117] Therefore, the state's mandate was not unconstitutional.

ii. Free Speech and Medical Conscience

It is widely held that states have an interest in preventing doctors from expressing opinions that are inconsistent with accepted medical standards.[118] As a result, states are permitted to use their police powers to regulate doctor-patient speech.[119] However, "the difficulty lies in drawing the line between what is acceptable to require in the name of professional regulation and what goes too far into the realm of what must remain protected speech."[120]

One seminal case on the issue of free speech and medical conscience is *Evergreen Association v. City of New York*. In *Evergreen*, a group of pregnancy services centers[121] moved for preliminary injunction to prevent a law which imposed confidentiality requirements and mandatory disclosures from taking effect.[122] One of these disclosures mandated a center to state whether it provided or referred for abortion, emergency contraception, or prenatal care.[123] The Second Circuit found that this disclosure was not sufficiently tailored to New York City's interest in ensuring access to healthcare.[124] Relying on *Riley*, the court held that this disclosure would "change the way in which a pregnancy services center . . . discusses the issues of prenatal care, emergency contraception,

[117] *Id.* at 65.
[118] Lauren R. Robbins, Comment, *Open Your Mouth and Say "Ideology": Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155. (2009).
[119] *Id.*
[120] *Id*.
[121] New York law defines a "pregnancy services center" as "a facility . . . the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care; or (2) has the appearance of a licensed medical facility." Evergreen Ass'n v. City of New York, 740 F.3d 233, 239 (2d Cir. 2014).
[122] *Id.* at 242.
[123] *Id.*
[124] *Id.* at 249.

and abortion."[125] Ultimately, the court saw the disclosures as centered around a public debate on the morality of abortion and contraceptives, so it found that the disclosures went so far as to alter the centers' political speech, rendering the requirement unconstitutional.[126]

Three years later, the Supreme Court was confronted with a parallel issue concerning crisis pregnancy centers in *National Institute of Family and Life Advocates* (*NIFLA*) *v. Becerra*. Crisis pregnancy centers are organizations that provide prenatal services from a "pro-life" perspective.[127] Seeking to "ensure that California residents [made] their personal reproductive healthcare decisions knowing their rights and the healthcare services available to them," the California legislature enacted the FACT Act, which regulated crisis pregnancy centers.[128] The Act, in part, required licensed facilities to disclose that California has public programs which provide free or low-cost access to contraception, prenatal care, and abortion.[129] Initially, the Ninth Circuit Court of Appeals held that the FACT Act regulated professional speech, which is only subject to intermediate scrutiny.[130] According to the court, "speech can be . . . characterized as professional when it occurs within the confines of a professional practice."[131] Because patients go to crisis pregnancy centers seeking the professional medical services they offer, the court held that any speech related to their services can be categorized as professional speech.[132] Therefore, since the

[125] *Id.*
[126] *Id.*
[127] Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers,* GUTTMACHER INST. (Sep. 10, 2012), https://www.guttmacher.org/journals/psrh/2012/09/public-health-risks-crisis-pregnancy-centers.
[128] Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).
[129] *Id.* at 2368.
[130] Under intermediate scrutiny, the State must prove that "the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest." Nat'l Inst. of Family & Life Advocs. v. Harris, 839 F.3d 823, 841 (9th Cir. 2016).
[131] *Id.* at 839.
[132] *Id.* at 840.

centers only had to inform patients of the existence of specific services and not endorse them, the Ninth Circuit found that the Act passed intermediate scrutiny.[133]

However, the Supreme Court reversed. Justice Thomas noted that the Court had only ever afforded less protection to professional speech under two circumstances: where laws required professionals to disclose factual, uncontroversial information; and where a state regulated professional conduct that incidentally involved speech.[134] Justice Thomas did not view the FACT Act as falling under either of these situations. First, the Act required clinics to disclose information about services that were "anything but . . . uncontroversial."[135] Second, the Act did not regulate conduct, as it applied to all interactions between a doctor and patient, whether or not the patient was seeking a medical procedure.[136] As a result, the Court applied strict scrutiny to the FACT Act. In doing so, it found that the Act was "wildly underinclusive"[137] and not sufficiently tailored to achieve California's goal of providing low-income women with information about state-sponsored services.[138]

The Court's decision in *NIFLA* has lasting implications on the adjudication of conscience claims under the Free Speech Clause. By reframing speech about abortion and contraceptives as "controversial," the Court signaled that conversations surrounding these services are different than other forms of doctor-patient speech. In other words, abortion and contraceptives were not viewed as professional medical services but were instead seen as political topics that a doctor should not be forced to discuss. However, the Court did not provide criteria as to what is legally considered

[133] *Id.* at 842.
[134] *Becerra*, 138 S. Ct. at 2372.
[135] *Id.* at 2373.
[136] *Id.* at 2374.
[137] Justice Thomas noted that the Act only applied to clinics that had the primary purpose of "providing family planning or pregnancy-related services." Clinics that had another primary purpose but served low-income women were omitted, even though they could have educated their patients about the state's services. *Id.* at 2375.
[138] *Id.*

"controversial."[139] By not setting this standard, the Court added to the power that conscientious objectors have in the United States. Now, any physician who personally objects to a medical disclosure requirement can label the required speech as "controversial" and move the standard of review from intermediate scrutiny to strict scrutiny.[140] This higher standard makes it more likely that the required speech will be held unconstitutional. Since *NIFLA* practically gives physicians the authority to defeat compelled speech laws that go against their conscience, it is highly probable that this holding will be used to strike down medical disclosure requirements beyond those that focus on abortion and contraception.[141]

Additionally, courts have used strategies aside from re-labeling doctor-patient speech to strike down medical disclosure requirements. In *Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore,* a non-profit Christian pregnancy center sought to enjoin enforcement of an ordinance requiring them to post a disclaimer in its waiting room notifying patients that "it does not provide or make referrals for abortion or birth-control services."[142] The purpose of this law was to ensure that patients were not misled into visiting "pro-life" pregnancy centers and unintentionally delaying a wanted abortion.[143] Since the ordinance required pregnancy centers to deliver a particular message, the Fourth Circuit analyzed it under strict scrutiny.[144] Mirroring the argument in *Hurley*, the Fourth Circuit found that the disclaimer "[portrayed]

---

[139] Professors Chemerinsky and Goodwin continue with this scathing statement: "There is no escaping the conclusion that five male justices find women's reproduction and healthcare options to be controversial precisely because of their own hostility to abortion rights." Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U.L. REV. 61 (2019).
[140] *Id.*
[141] Among other things, *NIFLA* could realistically extend to laws requiring physicians to discuss childbirth services, safe infant sleep practices, child seat belts, and gynecological services. Victoria Hamscho, Note, *NIFLA v. Becerra: The First Amendment and the Future of Mandatory Disclosure Laws*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 269 (2019).
[142] Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 879 F.3d 101, 106 (4th Cir. 2018).
[143] *Id.*
[144] *Id.* at 110.

abortion as one among a menu of morally equivalent choices," and that the center could not divorce itself from that implication.[145] Since the center's mission was to provide alternatives to abortion, the message in the disclaimer was "antithetical to the very moral, religious, and ideological reasons the center [existed]."[146]

In holding that the disclosure did not satisfy strict scrutiny, the Fourth Circuit explained that there was "insufficient evidence to demonstrate that deception actually [took] place and that health harms [were] in fact being caused by delays resulting from deceptive advertising."[147] In particular, the court condemned the state for failing to provide evidence of a woman entering a Christian pregnancy center under the misimpression that she could obtain an abortion.[148] However, in holding as it did, the Court both distorted the ways in which pregnancy centers impede access to certain services. Specifically, by limiting the scope of evidence to women who mistakenly entered a "pro-life" center based on a misrepresentation, the court overlooked and dismissed the various other ways that these centers actually cause harm.[149] As a result, the court gave greater deference to religious objectors.

c. Dobbs v. Jackson Women's Health Organization

The Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization* makes the federal government's involvement in fostering access to medical information and procedures even more important. In *Dobbs*, the State of Mississippi asked the Supreme Court to

[145] *Id.*
[146] *Id.*
[147] *Id.* at 111.
[148] *Greater Balt.*, 879 F.3d. at 112.
[149] *See* Aziza Ahmed, *Informed Decision Making and Abortion: Crisis Pregnancy Centers, Informed Consent, and the First Amendment*, 43 J.L. MED. & ETHICS 51 (2015) (Highlighting that 203 of 254 studied websites contained at least one false or misleading piece of information; twenty of twenty-three investigated centers provided misinformation to undercover investigators; and five states required doctors to tell women that life begins at conception, a religious ideology).

uphold the constitutionality of a state law that prohibited an abortion after the fifteenth week of pregnancy.[150] To achieve this, the state argued that both *Roe v. Wade* and *Planned Parenthood v. Casey* should be overturned to allow each state to regulate abortion however it felt was necessary.[151] Finding that the Constitution did not explicitly reference abortion and that the right to abortion was not "implicitly protected by any constitutional provision," the Supreme Court overruled the two cases.[152] In doing so, the Court announced that it was "[returning] the issue of abortion to the people's elected representatives."[153]

By giving state officials full control over abortion care, *Dobbs* is expected to exacerbate already existing problems in the healthcare field. On the night that the decision came down, 90% of counties where a third of women live lacked an abortion provider, and even more clinics have closed since.[154] This has forced women to have to travel to distant clinics in order to obtain certain medical procedures, costing both money and time that many women do not have. Further, it is projected that 44% of current medical residents will lose in-state abortion training as the result of restrictive state laws.[155] Given that the benefits of abortion training extend beyond induced abortion to a physician's skills in ultrasonography, pregnancy counseling, and miscarriage management, the ramifications of this lack of training will be immense.[156] Additionally, many state laws now require providers to use specific language when discussing abortion with patients.[157] In some cases, this language purposely conveys misinformation to persuade a woman to make a

[150] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] Andrzej Kulczucki, *Dobbs: Navigating the New Quagmire and Its Impacts on Abortion and Reproductive Health Care*, 49 HEALTH EDUC. & BEHAV. 6 (2022).
[155] Kavita Vinekar et al., *Projected Implications of Overturning Roe v Wade on Abortion Training in U.S. Obstetrics and Gynecology Residency Programs*, 140 OBSTET. GYNECOL. 2 (2022).
[156] *Id.*
[157] Kulczucki, *supra* footnote 154.

certain choice.[158] Most disturbing, there have been reports of medical providers refusing to provide help in cases of miscarriages or ectopic pregnancies in fear of breaking broad and confusing state abortion laws.[159]

At its core, the decision in *Dobbs* has provided conscientious objectors with absolute deference. If objectors are able to control the law without any constraints, they can prohibit an entire state from obtaining medical procedures that they personally do not agree with. These sweeping restrictions on healthcare have the effect of putting millions of lives at risk. Without the guarantee of federal safeguards, women will continue to have their health decisions made for them in order to make way for the free exercise of religion.

IV. Recommendations

A. Conscientious Objection in the United Kingdom

The United Kingdom guarantees healthcare workers a legal right to conscientious objection. However, this legal right is limited, especially when compared to the same right in the United States. In the United Kingdom, the right to conscientious objection is only available in two areas: fertility treatment and abortion.[160] First, a physician does not have a duty to participate in assisted reproduction or embryo research if they have a conscientious objection to either of these procedures.[161] Second, a physician is also not under a duty to perform an abortion if they have a conscientious objection to the procedure, unless the procedure will save the life of the pregnant woman, or prevent permanent injury to her physical or mental health.[162] Regarding abortion, the

[158] *Id.*
[159] *Id.*
[160] *Conscientious Objection and Expressing Personal Beliefs*, BRITISH MED. ASS'N (July 18, 2022) https://www.bma.org.uk/advice-and-support/ethics/personal-ethics/conscientious-objection-and-expressing-personal-beliefs
[161] Human Fertilisation and Embryology Act 1990 c. 37, § 38(1) (UK).
[162] Abortion Act 1967 c. 87, § 4 (Gr. Brit.).

term "participate in" is limited to directly participating in the abortion itself, and the term "treatment" encompasses everything that occurs from the moment that drugs are administered to the moment a fetus is delivered.[163] This vastly differs from the law in Mississippi, which protected any healthcare provider who participated in any stage of the healthcare procedure.

Additionally, there are common law requirements that physicians must follow regarding conscientious objections. Like the law in New York, all physicians must inform their patient if they have an objection to a particular procedure and, subsequently, they must help transfer the patient to a non-objecting physician.[164] Similarly, an objector, once hired, must disclose their objection to their employer.[165] Importantly, the National Health Services also grants women greater access to obtaining an abortion through self-referral than the United States does.[166] The British government not only provides a list of licensed hospitals and clinics that provide abortions, but it also pays for all procedures received at these licensed facilities.[167]

B. The United States' Implementation of the United Kingdom's Conscience Laws

i. Informing Prospective Employees of Responsibilities

In order to restore the balance between religious freedom and access to medical care, the United States should enact conscience laws similar to the laws in the United Kingdom. First, the United States should require medical facilities to inform prospective employees that they provide certain medical services. Particularly, if a medical facility provides abortions, sterilizations, IVF, or similar procedures, the facility should be required to state this in a job description. To not run

[163] Greater Glasgow Health Bd. v. Doogan & Anor, [2014] U.K.S.C. 68.
[164] *Personal beliefs and medical practice: Conscientious objection*, GEN. MED. COUNS. (2013), https://www.gmc-uk.org/guidance/ethical_guidance/21177.
[165] *Id.*
[166] *Abortion*, NAT'L HEALTH SERVS., https://www.nhs.uk/conditions/abortion/ (Apr. 24, 2020).
[167] *Id.*

afoul of federal conscience laws, the facility would need to reiterate that this information is not a criterion for hiring but is only serving as a notice to potential applicants.[168] However, if this mandate were to be codified in the United States, it would allow more individuals to feel comfortable joining the medical field and, subsequently, lessen the number of lawsuits relating to conscience claims. Although the United States has some of the broadest conscience protections, physicians still report facing discrimination and coercion in their workplace because of their beliefs.[169] As a result, many individuals consider foregoing a career in a particular medical specialty to avoid feeling ostracized by an employer.[170] Giving an applicant advanced notice that they are applying to a facility that performs certain medical procedures provides them the opportunity to apply elsewhere. If individuals knew that they had the option to specifically apply to facilities that reflect their core beliefs, they would likely feel more comfortable joining the medical field. In the end, this would help legitimize a physician's religious exercise without taking away a patient's bodily autonomy.

ii. Mandatory Disclosure of Objections

Second, the United States should require conscientious objectors to disclose their objections to their employer immediately upon being hired. The idea of employees disclosing their religious views to their employer is not novel. Namely, it is already settled law that if an employee's religious belief, practice, or observance conflicts with a work requirement, such as

[168] *See* 42 U.S.C. § 300a-7.
[169] *See* Danquah *v.* Univ. of Med. & Dentistry of N.J., No. 2:11-cv-6377 (D.N.J. Oct. 31, 2011) (twelve nurses sued a public hospital over a policy that required them to assist in abortions); Hellwege *v.* Tampa Fam. Health Ctrs., 103 F. Supp. 3d 1303 (M.D. Fla. 2015) (a nurse-midwife alleged an inability to apply for a position at a federally qualified health center due to her objections to prescribing contraceptives); Cenzon-DeCarlo *v.* Mt. Sinai Hosp., 626 F.3d 695 (2d Cir. 2010) (nurses alleged they had been coerced to participate in abortions).
[170] *See* Letter from Jonathon Imbody, Fed. Pol'y Analyst, Christian Med. Assoc., to Dep't of Health and Hum. Servs. (Mar. 26, 2018) (on file with the Dep't of Health and Hum. Servs.) (33% of surveyed individuals have "considered not pursuing a career in a particular medical specialty because of attitudes prevalent in that specialty that is not considered tolerant of their moral, ethical or religious beliefs.").

designated work hours or a uniform code, an employer is not required to provide an accommodation for the employee *until* the employee puts the employer on notice.[171] Therefore, there would be no legitimate reason why it would be unconstitutional to require an employee to inform their employer that they are not willing to perform an abortion, provide contraception, or partake in IVF.

If implemented into law, this advanced notice would "[enable] supervisors to accommodate conscience-based objections with a minimum of inconvenience and disruption."[172] This is particularly true when it comes to scheduling. While an employer would not be allowed to use an employee's objection to reduce their schedule or to assign them unwanted shifts, an employer could ensure that an objecting employee always works the same shift as a non-objecting employee. This would help both the objecting employee and any potential patients. First, it would help the employee by "increasing the likelihood that an accommodation [would] be feasible," and ensuring that the employee will never be asked to perform, or even discuss, a medical procedure that they do not agree with.[173] Additionally, this solution would help patients by strengthening access to healthcare through "[minimizing] the burdens that [they] will experience as a result of conscience-based refusals."[174] In particular, a balanced schedule would ensure that a patient always has the opportunity to speak with a physician who is willing to perform their requested procedure.

iii. Greater Access to Self-Referrals

Finally, the United States should simplify the process for women to obtain self-referred reproductive care. In the United Kingdom, the federal government publishes a list of healthcare

[171] 42 U.S.C. § 2000e(j).
[172] Mark R. Wicclair, *Conscientious objection in medicine*, 14 BIOETHICS 3 (July 2000).
[173] *Id.*
[174] *Id.*

facilities which provide abortions free-of-charge.[175] To obtain an abortion from one of these providers, the law requires that a woman contact the facility and obtain two signatures from consenting physicians.[176] This process is extremely helpful for women who seek an abortion as it allows them to bypass the general practitioner, the usual gatekeeper in obtaining these services.[177] The United States similarly allows women to self-refer abortions. However, the process in the United States is not as simple due to a lack of accurate information. Specifically, when a woman wants to find a clinic, a typical Google search leads "to either crisis pregnancy centers or antiabortion websites regardless of search term or search engine . . . . [The] searches rarely [identify] hospital-based abortion providers or private physicians' offices that [provide] abortions."[178] This makes it likely that women will encounter misinformation or seek care at a facility that does not provide the service that they are requesting.[179]

The United States federal government could solve these problems by mirroring the United Kingdom in creating a list of healthcare providers that will perform specific medical procedures. Although the government is prohibited from using a third-party to promote its message, our Supreme Court has held that the government is free to promote any message that it wants through its own means.[180] Therefore, it would be constitutional for the government to provide information on how to access morally objectionable medical treatments. If the government were to do so, it

[175] *Abortion*, *supra* note 166.
[176] Chavkin, Swerdlow & Fifeld, *supra* note 16.
[177] *Id.*
[178] Laura E. Dodge, *Quality of Information Available Online for Abortion Self-Referral*, 132 OBSTET. GYNECOL. 6 (2018).
[179] *Id.*
[180] *See NIFLA*, 138 S. Ct. 2361, 2376 ("California could inform low-income women about its services without burdening a speaker with unwanted speech."); *Riley*, 487 U.S. 781, 800 ("as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file.")

would ensure that patients obtain accurate medical information, allowing to them to receive the medical procedure that they requested.

V. Conclusion

Arguably the most controversial decision in the Supreme Court's history, *Roe v. Wade* sparked a movement among religious conscientious objectors. At both the state and federal levels, an extensive number of medical conscience laws have been passed since *Roe* was announced. These laws only became broader as time went on, eventually giving conscientious objectors virtually unfettered power. Although the right to conscience is an integral part of the freedom of religion, the conscience laws in the United States are having detrimental effects on the healthcare system. Namely, patients are being denied procedures because of religion, even if the denial endangers their lives. For the first time in American history, religious beliefs have taken centerstage at the expense of patients nationwide. The United States is moving in the direction of a healthcare crisis that has not been seen in any other industrialized nation.

Fortunately, the United States is not a lost cause. The United States can still restore an appropriate balance between religious rights and access to medical care by looking to the United Kingdom for guidance. In implementing provisions of British law, the United States could give patients their medical rights back without infringing on a provider's freedom of exercise. Given the Supreme Court's most recent decision in *Dobbs*, it is imperative that the federal government start getting more involved in religious conscience claims before these broad laws become irreversible. In a nation that proclaims to have the most freedom in the world, nobody should have to experience the fear of not having control over their own body.