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## Striking a Balance: Finding a Place for Religious Conscience Clauses in Contraceptive Equity Legislation

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STRIKING A BALANCE: FINDING A PLACE FOR RELIGIOUS  
CONSCIENCE CLAUSES IN CONTRACEPTIVE EQUITY  
LEGISLATION

I.	INTRODUCTION .....	441
II.	CONTRACEPTIVE EQUITY AND RELIGIOUS FREEDOM.....	443
	A. <i>Social and Economic Benefits of Providing Contraceptive Coverage</i> .....	443
	B. <i>The Cost to Employers of Providing Contraceptive Coverage</i> .....	445
	C. <i>Title VII and the Pregnancy Discrimination Act</i> .....	445
	D. <i>Title VII and the PDA Require Contraceptive Equity</i> .....	446
	E. <i>The EEOC Decision</i> .....	448
	F. <i>Erickson v. Bartell Drug Co.</i> .....	449
	G. <i>State Legislation</i> .....	450
	H. <i>Federal Contraceptive Equity Statutes</i> .....	451
	I. <i>Religious Free Exercise</i> .....	451
	J. <i>Extension of the First Amendment to State Action</i> .....	452
	K. <i>Current Interpretations of Neutral Laws of General Applicability</i> .....	454
III.	CURRENT AND PROPOSED CONTRACEPTIVE EQUITY LEGISLATION .....	455
	A. <i>No Religious Exemption</i> .....	456
	B. <i>Broad Religious Exemption</i> .....	457
	C. <i>Narrow Religious Exemption</i> .....	459
	D. <i>Additional Protective Language</i> .....	460
IV.	STRIKING THE BALANCE BETWEEN CONTRACEPTIVE EQUITY AND FREE EXERCISE.....	461
	A. <i>Recommendations for Appropriate Language</i> .....	462
V.	CONCLUSION.....	464

I. INTRODUCTION

For decades, a debate has been raging within religious circles: now that science has provided consumers with ways to avoid pregnancy, is utilization of these methods interference with God’s will? Each denomination and sect has a different answer to that question, but some religious groups, in their context as employers,

have resisted legislation that mandates insurance coverage of prescription contraceptives because they believe that being required to provide these services is a violation of their First Amendment right to religious free exercise.<sup>1</sup> States have attempted to remedy this issue through legislative conscience clauses that exempt religious employers from state requirements to provide contraceptive services. Each state has its own definition of a religious employer, thus, providing non-uniform protection to both women who desire these services and employers who feel their freedoms are being violated.

The tension between gender equality and the Free Exercise clause is well-illustrated in California, where a religious entity has challenged legislation mandating contraceptive coverage.<sup>2</sup> The California legislature passed contraceptive equity legislation<sup>3</sup> that included a narrow conscience clause for religious employers. The legislation allows a religious exemption for employers who meet the following criteria: “(A) the inculcation of religious values is the purpose of the entity; (B) the entity primarily employs persons who share the religious tenets of the entity; (C) the entity serves primarily persons who share the religious tenets of the entity; and (D) the entity is a nonprofit organization” as described in 26 U.S.C. 6033 (a)(2)(A)(i) or (iii).<sup>4</sup> Catholic Charities of Sacramento, a religiously funded charitable organization, failed to meet the requirements of sections (B) and (C) of the California legislation and filed suit challenging the constitutionality of the state statute that requires employers that provide health insurance prescription coverage to include coverage for contraceptives.<sup>5</sup> On appeal from an initial denial of plaintiff’s motion for a preliminary injunction, the California Third District Court of Appeals denied the organization’s petition for a writ of mandate,<sup>6</sup> holding that the trial court properly denied the injunction, “since it was not reasonably probable that [the] plaintiff’s action would prevail on the merits.”<sup>7</sup> Catholic Charities appealed this decision to the California Supreme Court; oral arguments were heard on December 2, 2003.<sup>8</sup>

The outcome of the *Catholic Charities* case could have a significant impact nationally since many states either have or are considering adopting similar legislation.<sup>9</sup> In addition, the United States Congress is considering the Equity in

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<sup>1</sup>Catholic Charities of Sacramento v. Superior Court, 90 Cal. App. 4th 425 (Cal. App. 3d Dist. 2001).

<sup>2</sup>*Id.*

<sup>3</sup>CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2002); CAL. INS. CODE § 10123.1969(d) (West 2002).

<sup>4</sup>CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2002); CAL. INS. CODE § 10123.1969(d) (West 2002).

<sup>5</sup>*Catholic Charities*, 90 Cal. App. 4th at 425.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at 425.

<sup>8</sup>California Supreme Court, available at <http://appellatecases.courtinfo.ca.gov/> (last accessed February 18, 2003).

<sup>9</sup>Center for Reproductive Law and Policy, *Contraceptive Equity Bills Gain Momentum in State Legislatures*, (July 2003), available at [http://www.crlp.org/pub\\_fac\\_epicchart.html](http://www.crlp.org/pub_fac_epicchart.html) (last accessed October 8, 2002) [hereinafter Center for Reproductive Law and Policy].

Prescription Insurance and Contraceptive Coverage Act (EPICC),<sup>10</sup> which, to ensure passage, will most likely include some form of conscience clause.<sup>11</sup>

The *Catholic Charities* case calls into question the limits of the Constitution's Free Exercise clauses<sup>12</sup> and reflects the conflict between the Pregnancy Discrimination Act (PDA) of Title VII of the Civil Rights Act of 1964.<sup>13</sup> PDA of Title VII of the Civil Rights Act of 1964 protects women from unequal treatment in the workplace,<sup>14</sup> while the First and Fourteenth Amendments to the Constitution provide citizens with the freedom to follow their religious ideals and the freedom from state interference with religious practices.<sup>15</sup>

This note will attempt to address the interrelationship of the PDA and the First and Fourteenth Amendments in the context of contraceptive equity legislation. To that end, the note will examine states' definitions of a "religious employer" and make recommendations regarding statutory language that is broad enough to cover those organizations with conscientious objections to contraception but narrow enough to allow women to have ready access to contraceptive services. Following this introduction, Part II of the note will provide background information about both contraceptive equity and religious freedom. Part III will discuss current and proposed contraceptive equity legislation in the states. Part IV will provide recommendations for appropriate language. The conclusion is Part V.

## II. CONTRACEPTIVE EQUITY AND RELIGIOUS FREEDOM

### A. *Social and Economic Benefits of Providing Contraceptive Coverage*

There are many social and economic benefits to providing contraceptive coverage to employees. The proportion of women using birth control has been on the rise since the 1980's.<sup>16</sup> By 1995, sixty-four percent of all women between the ages of fifteen and forty-four were practicing some method of contraception.<sup>17</sup> In fact, for every ten American women who are sexually active, nine do not wish to become pregnant.<sup>18</sup> A woman who wishes to have only two children in her lifetime

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<sup>10</sup>Equity in Prescription Insurance and Contraceptive Coverage (EPICC) Act of 2003 S. 1396.15 108th Cong. (2003) [hereinafter EPICC].

<sup>11</sup>Cheryl A. Danner, *Prescription Contraceptives: Educate Yourself on the Discrimination You May Be Suffering Because You Work for a Private Educational Institution*, 31 J.L. & EDUC. 513, 518 (2002).

<sup>12</sup>U.S. CONST. amends. I, XIV, § 1.

<sup>13</sup>Pregnancy Discrimination Act, 42 U.S.C. § 2000(k) (1994).

<sup>14</sup>*Id.*

<sup>15</sup>U.S. CONST. amends. I, XIV, § 1..

<sup>16</sup>The Media Resource, *News on the Horizon: Do Women Have a "Right" to Birth Control Coverage in Their Health Plans?*, available at <http://www.mediastrat.com/pages/n0102fact.html> (last accessed Sept. 20, 2002) [hereinafter The Media Resource].

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

<sup>18</sup>Megan Colleen Roth, Note, *Rocking the Cradle with Erikson v. Bartell Drug Co.: Contraceptive Insurance Coverage Takes a Step Forward*, 70 UMKC L. REV. 781, 786 (2002).

and who wishes to remain sexually active must use contraceptives for more than twenty years of her life.<sup>19</sup>

Contraceptive coverage does not come without economic cost. The Women's Research and Education Institute has estimated that during a woman's childbearing years, her out-of-pocket health expenditures are sixty-eight percent more than those of her male counterparts.<sup>20</sup> Most of these costs are associated with reproductive health care services, whether they be pregnancy-related or for contraception.<sup>21</sup>

Although contraceptive coverage is costly, using contraceptives saves health dollars that would otherwise be spent to pay for the consequences of having unprotected sex—unintended pregnancy and, depending on the method of contraception used, sexually transmitted diseases.<sup>22</sup> “Almost sixty percent of the 6.3 million pregnancies that occur annually in the United States are unintended”—higher than any other developed country except France.<sup>23</sup> More than half of all unintended pregnancies occur among the ten percent of women “who report that they do not use birth control.”<sup>24</sup>

Unintended pregnancy has a number of adverse consequences, including increased infant morbidity and mortality, the financial costs of childbirth and the care of distressed newborns, high rates of abortion, and limited women's abilities to work outside the home.<sup>25</sup>

Financially, unintended pregnancies take a significant toll on both personal family wealth and national assets. “It was estimated that by 1990: “the nation will have spent at least \$2.1 billion in first-year costs alone to care for the excess numbers of low birth-weight infants who need extensive medical care . . . . Reducing unintended pregnancy is the single most effective means of reducing the number of distressed, low birth-weight babies.”<sup>26</sup>

By reducing the number of unintended pregnancies, the United States can also reduce the abortion rate.<sup>27</sup> Nearly fifty percent of unintended pregnancies end in abortion, equaling an estimated 1.4 million abortions a year.<sup>28</sup> These abortions impose physical and emotional costs on women.<sup>29</sup> Easily available, affordable contraception decreases the number of abortions.<sup>30</sup>

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<sup>19</sup>*Id.*

<sup>20</sup>The Media Resource, *supra* note 16.

<sup>21</sup>*Id.*

<sup>22</sup>Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998).

<sup>23</sup>*Id.* at 364.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 364-65.

<sup>26</sup>*Id.* at 365.

<sup>27</sup>Roth, *supra* note 18, at 786.

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

<sup>29</sup>Law, *supra* note 22, at 367.

<sup>30</sup>*Id.*

Women bear the brunt of the adverse social and economic consequences of unintended pregnancy. In *Planned Parenthood v. Casey*, the U.S. Supreme Court affirmed that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>31</sup> Unplanned and unwanted pregnancies hinder women and prevent them from participating fully in society.

*B. The Cost to Employers of Providing Contraceptive Coverage*

Although there is a cost to employers of extending coverage for contraceptive services, that cost is not significant. Adding coverage for the full range of medical contraceptives—which includes birth control pills, implants, injections, IUDs or diaphragms—would cost a total of \$21.40 per employee per year, \$17 of which would be paid by employers, increasing an employee’s contribution by only \$4.28 yearly.<sup>32</sup> The actual cost is likely less because with adequate contraceptive coverage, there would be fewer unintended pregnancies, which are costly to insurers and employers alike.<sup>33</sup> According to the Washington Business Health Group, providing coverage for all contraceptive methods does actually reduce costs. The Group’s study found that in a company of 80,000 employees—half of whom were women—the overall per employee cost when the employer did not cover contraceptives was seventeen percent higher than when the employer provided contraceptive benefits. By factoring in costs of unintended pregnancies, the study found an average annual direct cost per employee to be \$431 if the employer provided contraceptive coverage. In contrast, it would cost \$494 a year if the employer excluded contraceptive coverage.<sup>34</sup> Thus, contraceptive coverage, according to this study, led to a fourteen percent reduction in reproductive-related claims.<sup>35</sup>

*C. Title VII and the Pregnancy Discrimination Act*

No federal law explicitly mandates prescription contraceptive coverage.<sup>36</sup> Accordingly, there is no uniform, non-discriminatory prescription drug policy within the insurance industry.<sup>37</sup> It is, however, possible to interpret Title VII and the Pregnancy Discrimination Act to require such coverage.

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<sup>31</sup>505 U.S. 833, 856 (1992).

<sup>32</sup>The Media Resource, *supra* note 16.

<sup>33</sup>Pregnancy itself creates costs to employers for time off, training for replacement employees, among other costs.

<sup>34</sup>The Media Resource, *supra* note 16.

<sup>35</sup>More than two-thirds of women rely on private insurance to help them finance medical care. The Kaiser Family Foundation and the Health Research and Education Trust surveyed employers in 2000 and found that there are notable gaps in coverage of oral contraceptives by type of health plan. Among workers who had coverage under a health maintenance organization (HMO), contraceptives were covered eighty-seven percent of the time. Workers covered under conventional insurance plans had the least access to contraceptive services, being covered only sixty percent of the time. *See id.*

<sup>36</sup>Roth, *supra* note 18, at 789.

<sup>37</sup>*Id.*

In 1964, Congress passed Title VII of the Civil Rights Act, which is the primary federal anti-discrimination law.<sup>38</sup> The goal of Title VII was “to end years of discrimination in employment and to place all men and women, regardless of race, color, religion or national origin, on equal footing in how they were treated in the workforce.”<sup>39</sup> Title VII, in its almost thirty years of existence, has been interpreted to protect women’s reproductive health choices, primarily through the addition of the Pregnancy Discrimination Act.

*D. Title VII and the PDA require contraceptive equity*

Title VII prohibits employers from discriminating on the basis of race, sex, religion or national origin.<sup>40</sup> For many years, the relationship between pregnancy and sex discrimination was ambiguous in the minds of judges interpreting Title VII, since the statute itself did not even mention pregnancy.<sup>41</sup> This relationship was brought to the forefront of the national conscience with the United States Supreme Court’s controversial decision in *General Electric Co. v. Gilbert*.<sup>42</sup>

In *Gilbert*, the Supreme Court held that an employer’s short-term disability policy that excludes pregnancy or pregnancy-related disabilities from coverage is not discrimination on the basis of sex.<sup>43</sup> The majority based its opinion on two findings: (a) pregnancy discrimination does not “adversely impact all women and therefore is not the same thing as gender discrimination; and (b) disability insurance which covers the same illnesses and conditions for both men and women is equal coverage.”<sup>44</sup> Since men and women were treated facially equally, the Court held that there was no discrimination.<sup>45</sup> Justices Brennan, Marshall and Stevens dissented from this opinion and argued that “(a) women, as the only sex at risk for pregnancy, were being subjected to unlawful discrimination; and (b) in determining whether an employment policy treats the sexes equally, the court must look at the comprehensiveness of the coverage provided to each sex.”<sup>46</sup>

In 1978, in response to *General Electric Co. v. Gilbert*, Congress clarified its intentions regarding gender discrimination by amending Title VII to add the Pregnancy Discrimination Act (PDA).<sup>47</sup> In enacting the PDA, Congress adopted the position of the dissenters in *Gilbert* by recognizing that sex-based differences existed between male and female employees.<sup>48</sup> In light of these differences, Congress

<sup>38</sup>42 U.S.C. § 2000e-2(a)(1) (2003).

<sup>39</sup>*Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

<sup>40</sup>42 U.S.C. § 2000e-2(a)(1) (2003).

<sup>41</sup>Shannon Roberson Loeser, *Gender Discrimination, the Pill & the High Cost of Insurance*, 1 WHITTIER J. CHILD & FAM. ADVOC. 125, 126 (2002).

<sup>42</sup>*General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>43</sup>*Id.* at 145.

<sup>44</sup>*Erickson*, 141 F. Supp. 2d at 1270 (citing *Gilbert*, 429 U.S. 125).

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* (citing *Gilbert*, 429 U.S. 125).

<sup>47</sup>*Id.*

<sup>48</sup>Roth, *supra* note 18, at 784.

required that employers provide single-sex benefits where applicable.<sup>49</sup> Essentially, the PDA is a definition of terms and phrases within Title VII.<sup>50</sup> It provides:

[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women . . . shall be treated the same for all employment- related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .<sup>51</sup>

The Supreme Court further clarified the boundaries of the law as it related to equality in insurance coverage.<sup>52</sup> In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,<sup>53</sup> a group of male plaintiffs sued their employer alleging that the company’s policy of not providing pregnancy-related coverage to the spouses of the employees violated the PDA. Because the female employees themselves had pregnancy-related insurance coverage and because the female employees’ spouses were fully covered under the insurance plan, the Court held that the employer’s policy violated Title VII and the PDA.<sup>54</sup> The Court reasoned that the company provided men with less insurance coverage than they provided women employees and that inequality of insurance coverage was a violation of the PDA.<sup>55</sup>

Another case that explored the limits of the PDA was *Int’l Union v. Johnson Controls*.<sup>56</sup> The employer, a battery manufacturing company, had a policy of requiring only female employees to provide proof that they were not capable of reproducing prior to being allowed to work with lead, which could potentially damage a fetus.<sup>57</sup> The Supreme Court found this policy to be a violation of the PDA, holding that classification of employees based upon their ability to become pregnant, whether or not an employee was pregnant, is sex-based discrimination.<sup>58</sup> Thus, the Court held that the PDA covers a woman’s potential to become pregnant, as well as the pregnancy itself.

The PDA thus provides protection based on women’s capacity to become pregnant and requires equal protection in terms of insurance coverage for individuals of both genders. The statute does not, however, explicitly mention prescription

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<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>42 U.S.C. § 2000e(k) (2003).

<sup>52</sup>*Erickson*, 141 F. Supp. 2d at 1270.

<sup>53</sup>462 U.S. 669 (1983).

<sup>54</sup>*Id.* at 683-84.

<sup>55</sup>*Id.*

<sup>56</sup>499 U.S. 187 (1991).

<sup>57</sup>*Id.* at 190.

<sup>58</sup>*Id.* at 191-192.



contraceptives.<sup>59</sup> Therefore, it is unclear whether the denial of contraceptive coverage is, in the words of the PDA, discrimination “on the basis of pregnancy.”<sup>60</sup>

*E. The EEOC Decision*

The U.S. Equal Employment Opportunity Commission, the federal agency charged with enforcing and interpreting Title VII and the PDA, issued a decision in 2000 which stated that “the PDA’s prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”<sup>61</sup> The EEOC issued this ruling in a claim brought by two individuals who filed charges against their employers alleging that the employers’ failure to offer insurance coverage for the cost of prescription drugs and devices violated the PDA.<sup>62</sup>

In reaching its conclusion, the EEOC stated that “[c]ontraception is a means by which a woman controls her ability to become pregnant.”<sup>63</sup> The Commission reasoned that because employers are not permitted to discharge employees from their jobs because they use contraceptives, employers also “may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.”<sup>64</sup>

The EEOC also relied on language in the PDA that allows employers to limit coverage for abortions. The EEOC concluded that Congress intended the PDA to require that employers cover all pregnancy-related medical expenses unless the statute provided an explicit exemption.<sup>65</sup> Thus, if Congress had wanted to exclude prescription contraception from coverage, it would have.<sup>66</sup> Accordingly, the EEOC ruled that by not exempting contraceptive services, Congress intended to include contraceptive equity in the PDA.<sup>67</sup>

In addition, the EEOC stated that Congress clearly expressed an intention to cover contraceptives in enacting the PDA.<sup>68</sup> The Commission noted that in Congressional debate members of Congress expressed that the PDA intended to prohibit discrimination against women “based on ‘the whole range of matters concerning the childbearing process’ and gave women ‘the right . . . to be financially

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<sup>59</sup>Roth, *supra* note 18, at 784.

<sup>60</sup>*Id.*

<sup>61</sup>Commission Decision on Coverage of Contraception, 2000 WL 33407187 (Dec. 14, 2000).

<sup>62</sup>*Id.* The insurance plans covered medical treatments and services, including prescription drugs, yet excluded all types of prescription contraceptive drugs and devices, regardless of their medical purpose.

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

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

and legally protected before, during and after [their] pregnancies.”<sup>69</sup> The EEOC construed these Congressional statements to mean that inclusion of prescription contraceptives was part of the “whole range” of the childbearing process, and that Congress intended to include these devices under the PDA.<sup>70</sup>

F. *Erickson v. Bartell Drug Co.*

In 2001, the United States District Court in the Western District of Washington heard *Erickson v. Bartell Drug Co.*,<sup>71</sup> a case of first impression in the federal courts addressing “whether the selective exclusion of prescription contraception from defendant’s generally comprehensive prescription plan constitutes discrimination on the basis of sex.”<sup>72</sup> Ultimately, the judge in *Erickson* held that the PDA does apply to contraceptive equity claims.<sup>73</sup>

Jennifer Erickson, a twenty-seven year old pharmacist, was the lead plaintiff in a class action suit brought against Erickson’s employer, Bartell Drug Company.<sup>74</sup> The company’s prescription drug plan for non-union employees specifically excluded contraceptives, although it covered other prescription drugs, including many preventative drugs and devices, such as blood pressure drugs, hormone replacement therapies, and drugs to prevent blood clotting, among others.<sup>75</sup> The court recognized that the drug plan was part of the employees’ “compensation, terms, conditions or privileges of employment” that are protected under Title VII.<sup>76</sup> Through analysis of precedent-setting PDA cases and the meaning of Title VII, the court concluded that Bartell Drug Company’s prescription drug policy was in violation of the Pregnancy Discrimination Act of Title VII of the Civil Rights Act of 1964.<sup>77</sup>

In its analysis, the court revealed that although employers do not have to cover any contraceptive services, if they choose to provide prescription coverage, they must provide equivalent insurance coverage for contraception.<sup>78</sup> Because prescription contraceptives are used only by women, the court stated that the defendant’s choice to exclude the benefit from its generally applicable benefit plan was discriminatory.<sup>79</sup>

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<sup>69</sup>*Id.* See also H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978), 124 Cong. Rec. H38, 574 (daily ed. October 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA).

<sup>70</sup>Commission Decision on Coverage of Contraception, 2000 WL 33407187 (Dec. 14, 2000).

<sup>71</sup>141 F. Supp. 2d 1266 (W.D. Wash. 2001).

<sup>72</sup>*Id.* at 1268.

<sup>73</sup>*Id.* at 1277.

<sup>74</sup>Roth, *supra* note 18, at 785.

<sup>75</sup>*Erickson*, 141 F. Supp. 2d at 1268 n.1.

<sup>76</sup>*Id.* at 1268 n.3.

<sup>77</sup>Roth, *supra* note 18 at 789.

<sup>78</sup>*Erickson*, 141 F. Supp. 2d at 1272.

<sup>79</sup>*Id.*

In addition, the court noted that Title VII “requires employers to recognize the differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover women-only expenses.”<sup>80</sup>

While the decision in *Erickson* was a positive step for women seeking contraceptive coverage, the PDA does not provide women who desire access to contraceptive services with full protection against discrimination.<sup>81</sup> For example, Title VII and the PDA are only available to employees of companies with fifteen or more employees,<sup>82</sup> leaving women or the spouses of men who work for small companies with no protection unless their state’s discrimination laws have a Title VII analogue with a lower employee threshold. In the absence of an explicit statute requiring contraceptive equity, women will have to bring claims under the PDA to enforce their rights. Such claims are costly financially and emotionally. In addition, women may find it difficult to locate attorneys willing to accept discrimination cases in which the damages are so low.<sup>83</sup>

### G. State Legislation

Many states have attempted to enact legislation to address inequities in insurance coverage.<sup>84</sup> These states have taken a variety of approaches in crafting legislation.<sup>85</sup> The benefit of state legislation is that it directly mandates contraceptive equity; however, such legislation often has its limitations. Depending on the language a state adopts, women’s access may still be limited.<sup>86</sup> For example, while most states with contraceptive equity laws mandate that “any and all” FDA approved contraceptives are covered, insurance companies may interpret this language to mean “‘any’ and ‘all’ FDA approved categories rather than individual brands.”<sup>87</sup> This difference in interpretation can have a significant medical impact, particularly in regard to the birth control pill.<sup>88</sup>

Also, oftentimes individual state laws only cover small employer-based/group policies, individual insurance plans, and Medicaid.<sup>89</sup> Employers who hold self-insured plans can be exempted under the Federal Income Retirement Security Act of 1974 (ERISA), which preempts state legislation. In the best-case scenario, because of these limitations, the maximum number of women who could benefit from state legislation is thirteen percent.<sup>90</sup>

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<sup>80</sup>*Id.*

<sup>81</sup>See Danner, *supra* note 11 at 515.

<sup>82</sup>*Id.* at 516.

<sup>83</sup>*Id.*

<sup>84</sup>Center for Reproductive Law and Policy, *supra* note 9.

<sup>85</sup>*Id.*

<sup>86</sup>Danner, *supra* note 11 at 516-17.

<sup>87</sup>Sarah E. Bycott, *Controversy Aroused: North Carolina Mandates Insurance Coverage of Contraceptives in the Wake of Viagra*, 79 N.C. L. REV. 779, 805 (2001).

<sup>88</sup>*Id.*

<sup>89</sup>Roth, *supra* note 18 at 788-89.

<sup>90</sup>*Id.* at 789.

Sole reliance on state legislation to provide women with contraceptive equity would also create an imbalance in coverage among citizens of different states, since some states offer greater coverage than others, and some states offer no coverage at all. With this lack of uniformity among the states, women will not achieve full equality nationwide.<sup>91</sup>

#### H. Federal Contraceptive Equity Statutes

Given the limitations to state legislation, the best source of protection for women would be at the federal level.<sup>92</sup> Federal legislation could require that all employers that provide prescription coverage extend the same benefits for contraceptive services.<sup>93</sup>

Federal employees already reap the benefits of contraceptive equity. The Federal Employees Health Benefits Plan (FEHBP) was the first federal statute passed that related to insurance coverage for prescription contraceptives.<sup>94</sup> The FEHBP, also called the “Lowey Amendment,” gave federal employees coverage of all five of the FDA approved prescription contraceptive drugs and devices.

Members of Congress attempted to expand access to contraceptive equity to private employers through the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC),<sup>95</sup> which was introduced in Congress in 1997, 1999 and 2001. EPICC requires that if “a health insurance plan covers benefits for other FDA approved prescription drugs or devices, it must also cover benefits for FDA approved prescription contraception drugs or devices.”<sup>96</sup> The act further requires that plans that provide other outpatient services must also provide outpatient contraceptive services.<sup>97</sup> EPICC may be the answer to inequities in insurance coverage, but it has yet to achieve passage in Congress.

#### I. Religious Free Exercise

Whether the efforts to provide equality in prescription contraceptive coverage are made at the state or the federal level, all legislators are faced with the conundrum of requiring equality while not running afoul of an employer’s right to religious free exercise. America, a nation founded on the ideal of religious freedom, remains wedded to the notion that the government should not intrude upon religious

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<sup>91</sup>See *Equity in Prescription Insurance and Contraceptive Coverage Act: Hearings on S. 766 Before the Comm. on Labor and Human Resources*, 105th Congress (1998) (statement of Richard H. Schwarz, M.D., Chairman of the Dep’t of Obstetrics and Gynecology, New York Methodist Hosp.).

<sup>92</sup>Danner, *supra* note 11, at 518.

<sup>93</sup>*Id.*

<sup>94</sup>Lisa A. Hayden, *Gender Discrimination Within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & HEALTH 171, 196 (1999).

<sup>95</sup>Equity in Prescription Insurance and Contraceptive Coverage Act, S.104, 107th Cong. § 704 (2001) [hereinafter EPICC].

<sup>96</sup>Hayden, *supra* note 94, at 197.

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

practice.<sup>98</sup> The First Amendment of the Constitution explicitly states that Congress shall make no law prohibiting the free exercise of religion.<sup>99</sup> This freedom, however, is restricted once one's religious conduct begins inflicting harm on others.<sup>100</sup>

*J. Extension of the First Amendment to State Action*

The First Amendment originally applied only to the federal government.<sup>101</sup> The first application of the Free Exercise clause to the states was in 1940.<sup>102</sup> In that year, the Supreme Court in *Cantwell v. Connecticut* held that the Fourteenth Amendment incorporated the religious liberty clauses of the First Amendment and rendered state legislatures incompetent to enact laws that impinged on religious free exercise.<sup>103</sup> In 1947, the Court held in *Everson v. Board of Education*<sup>104</sup> that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them"<sup>105</sup>

The Supreme Court in *Cantwell v. Connecticut* began articulating the situations in which a state could take actions that would infringe on individuals' free exercise rights. The court distinguished religious belief from religious conduct, stating that:

[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, [the First Amendment] safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society . . . . In every case the power to regulate must be so exercised so as not, in attaining a possible end, unduly to infringe the protected freedom.<sup>106</sup>

*Cantwell* made clear that while religious belief and speech are fully protected by the Free Exercise Clause, religiously motivated conduct is entitled to less

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<sup>98</sup>April A. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 568 (2002).

<sup>99</sup>It should be noted that there are actually two clauses in the U.S. Constitution that relate to religion; the Free Exercise Clause and the Establishment Clause, both found within the First Amendment. For my purposes, I will focus on the Free Exercise Clause, since the establishment of a state religion is not what is implicated in legislation governing prescription drug coverage.

<sup>100</sup>*Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>101</sup>Cherry, *supra* note 98, at 569.

<sup>102</sup>*Id.*

<sup>103</sup>*Cantwell*, 310 U.S. at 303.

<sup>104</sup>330 U.S. 1 (1947).

<sup>105</sup>*Id.* at 18.

<sup>106</sup>*Cantwell*, 310 U.S. at 303-04.

protection.<sup>107</sup> Thus, a state may regulate religiously motivated conduct so long as the regulations are made only to protect society.<sup>108</sup> “State regulations must be narrowly tailored so as not to suppress the free exercise of religion or unduly censor religious activity.”<sup>109</sup>

Many courts have applied *Cantwell* and have found that religiously motivated conduct that inflicts harms on others is not protected by the Free Exercise doctrine. For example, in *Bob Jones Univ. v. United States*,<sup>110</sup> the University attempted to maintain its tax-exempt status despite its policies encouraging racial discrimination in admissions, which it claimed were justified by the school’s religious beliefs.<sup>111</sup> The Court reasoned that “not all burdens on religion are unconstitutional . . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”<sup>112</sup> Because racially discriminatory schools “exert a pervasive influence on the entire educational process”,<sup>113</sup> it was held that denial of tax exempt status was an appropriate action and not in violation of the Free Exercise clause.<sup>114</sup>

Historically, the Supreme Court used the compelling state interest test to determine whether a state’s regulation was permitted. Under the compelling state interest test, a state was constitutionally required to accommodate an adherent’s exercise of his or her religious beliefs even when that exercise conflicted with a law of general applicability, unless restricting the adherent’s free exercise was necessary to serve a compelling state interest.<sup>115</sup> This test was first applied in *Sherbert v. Verner*,<sup>116</sup> where the Court held that the state’s interest in preventing the filing of fraudulent unemployment compensation claims was not compelling enough to infringe on a citizen’s First Amendment rights.<sup>117</sup> The plaintiff in *Sherbert*, a Seventh-Day Adventist, was discharged from her job because she refused to work on Saturday, her religion’s Sabbath day.<sup>118</sup> This refusal to work on Saturdays led to her inability to find new work and subsequent application for unemployment benefits.<sup>119</sup> The state of South Carolina denied her unemployment benefits because she would

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<sup>107</sup>*Id.*

<sup>108</sup>Cherry, *supra* note 98, at 576.

<sup>109</sup>*Id.*

<sup>110</sup>461 U.S. 574 (1983).

<sup>111</sup>*Id.* at 577.

<sup>112</sup>*Id.* at 603.

<sup>113</sup>*Id.* at 604 n.29.

<sup>114</sup>*Id.* at 605.

<sup>115</sup>Cherry, *supra* note 98, at 579.

<sup>116</sup>374 U.S. 398 (1963).

<sup>117</sup>*Id.* at 407.

<sup>118</sup>*Id.* at 400.

<sup>119</sup>*Id.*

not accept suitable work when offered.<sup>120</sup> The Supreme Court found that South Carolina's unemployment statute abridged the plaintiff's free exercise of religion because there was no compelling state interest involved in South Carolina's unemployment eligibility scheme.<sup>121</sup> In *Sherbert*, the Supreme Court further noted that even if the state had proven a compelling state interest, it would still be required to show that there were no less restrictive means available to achieve its goals.<sup>122</sup> Under this test, when a state was unable to demonstrate a compelling state interest, the Court required the state to accommodate the believer's exercise of religion by exempting the believer from the regulation.<sup>123</sup> Interests that have been found to be compelling under this test include the payment of social security taxes,<sup>124</sup> the elimination of racial discrimination,<sup>125</sup> and the assignment of social security numbers.<sup>126</sup>

*K. Current Interpretations of Neutral Laws of General Applicability*

More recently, the Supreme Court retreated from the *Sherbert* line of cases and limited the applicability of the strict scrutiny test. In *Employment Division v. Smith*,<sup>127</sup> the Court held that exemptions from neutral laws of general applicability are almost never required under the Constitution.<sup>128</sup> In *Smith*, two drug rehabilitation counselors were denied unemployment benefits after being fired from their jobs at an Oregon rehabilitation center.<sup>129</sup> The employees were members of the Native American Church, the adherents to which used peyote as part of their religious practice.<sup>130</sup> Since use of peyote, a hallucinogenic drug, was against the state's controlled substance law, the state unemployment compensation agency denied the employees' unemployment claims, stating that the two had been discharged for work-related misconduct.<sup>131</sup> The plaintiffs claimed that the denial of unemployment compensation for their religiously-motivated actions was a violation of their right to free exercise. The Supreme Court held that the Free Exercise clause did not prohibit the state from denying unemployment compensation for work-related misconduct based on the use of peyote.<sup>132</sup> It stated that:

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<sup>120</sup>*Id.* at 401.

<sup>121</sup>*Id.* at 406-409.

<sup>122</sup>*Id.* at 407.

<sup>123</sup>Cherry, *supra* note 98, at 579.

<sup>124</sup>*United States v. Lee*, 455 U.S. 252 (1982).

<sup>125</sup>*Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>126</sup>*Bowen v. Roy*, 476 U.S. 693 (1986).

<sup>127</sup>494 U.S. 872 (1990).

<sup>128</sup>*Id.* at 884.

<sup>129</sup>*Id.* at 874.

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* (citing OR. REV. STAT. § 457.992(4) (1987); OR. ADMIN. R. 855-80-021(3)(s)(1988)).

<sup>132</sup>*Id.* at 885.

[t]he government's ability to enforce generally applicable prohibitions on socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him by virtue of his beliefs, to become a law unto himself,"—contradicts both constitutional tradition and common sense.<sup>133</sup>

As a result of the Supreme Court's decision in *Smith*, only three types of free exercise claims remain subject to the compelling state interest test: (1) burdens that result from non-neutral laws or laws that are not generally applicable; (2) hybrid claims (where other constitutional violations are presented together with free exercise violations); and (3) when the context of government action "lends itself to an individualized governmental assessment of the reasons for the relevant conduct."<sup>134</sup>

With over twenty state contraceptive equity statutes and the possibility of a federal statute in the future, the Court's decision in *Smith* takes on added significance. *Smith* is likely to determine the constitutionality of state and potentially federal efforts to provide women with contraceptive coverage.

### III. CURRENT AND PROPOSED CONTRACEPTIVE EQUITY LEGISLATION

States have taken many different approaches to contraceptive equity statutes to create a balance between the First Amendment and the equality mandate of Title VII. Some states strike this balance with the use of "conscience clauses," legislative language which exempts those with religious objections to the policy from adherence to the law. This section will survey states' contraceptive equity laws and evaluate their constitutionality.

Since 1998, twenty-one states have passed legislation related to insurance coverage for contraceptives.<sup>135</sup> Legislation of this type requires that employers who provide prescription drug benefits to provide contraceptive drug benefits to employees as well.<sup>136</sup> Currently, eleven of those states have some form of conscience clause for religious employers.<sup>137</sup> These provisions identify the types of private sector entities entitled to claim a conscientious objection to contraceptive coverage, what grounds should form the basis of the exemption, and how the deleterious impact of those objections on individuals needing contraceptive services

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<sup>133</sup>*Id.* (citations omitted).

<sup>134</sup>Cherry, *supra* note 98, at 587-588.

<sup>135</sup>Planned Parenthood Federation of America, *Cover My Pills: Fair Access to Contraception; Get The Facts, States with Laws Requiring Full Contraceptive Coverage* (1998-2002), at [http://www.covermypills.com/facts/states\\_law.asp](http://www.covermypills.com/facts/states_law.asp) (last visited Oct. 22, 2002).

<sup>136</sup>*Id.*

<sup>137</sup>*Id.*



can be minimized.<sup>138</sup> This latter language is important because an employer who claims a religious exemption does so for all of its employees.<sup>139</sup> For non-religious employees of religiously-based hospitals or universities, an exemption can be quite detrimental.

Statutory text in contraceptive equity legislation tends to fall into three categories: those with no religious exemption, those with broad religious exemptions and those with narrow religious exemptions. Some states include additional protective language in their legislation to give female employees information about their employers' policies prior to employment.

#### A. *No Religious Exemption*

The first category of contraceptive equity legislation is that with no religious exemption. States such as Georgia,<sup>140</sup> Iowa,<sup>141</sup> New Hampshire,<sup>142</sup> Vermont,<sup>143</sup> and Virginia<sup>144</sup> have no conscience clauses in their contraceptive equity statutes.

Representative text from Iowa states:

1. [A] group policy or contract providing for third-party payment or prepayment of health or medical expenses shall not do either of the following:
  - a. Exclude or restrict benefits for prescription contraceptive drugs or . . . devices which prevent conception and which are approved by the [FDA] . . . , if such policy or contract provides benefits for other outpatient prescription drugs or devices.
  - b. Exclude or restrict benefits for outpatient contraceptive services which are provided for the purpose of preventing conception if such policy or contract provides benefits for other outpatient services provided by a health care professional.<sup>145</sup>

States with no religious exemption in their contraceptive equity laws are at the highest risk of having their laws deemed unconstitutional. Although these statutes meet the requirements of Title VII, they ignore the very real religious imposition they create. These laws, if challenged, are likely to be struck down because, although they are neutral and of general applicability, they work to inhibit religious

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<sup>138</sup>Alan Guttmacher Institute, *State Contraceptive Coverage Laws: Creative Responses to Questions of 'Conscience'* (1999) at <http://www.agi-usa.org/pubs/journals/gr020401.html> (last visited Sept. 20, 2002).

<sup>139</sup>*Id.*

<sup>140</sup>GA. CODE ANN. § 33-24-59.6 (2004).

<sup>141</sup>IOWA CODE § 514C.19 (2003).

<sup>142</sup>N.H. REV. STAT. ANN. § 415: 18-i (2003).

<sup>143</sup>VT. STAT. ANN. tit. 8, § 4099c (2003).

<sup>144</sup>VA. CODE ANN. § 38.2-3 407.5:1 (Michie 2004).

<sup>145</sup>IOWA CODE § 514C.19 (2003).

employers' free exercise by requiring employers to financially support a policy that is against their religious beliefs.

For example, under the Iowa statute, Catholic churches and monasteries are required to purchase benefit packages with contraceptive coverage for employees if they also provide prescription drug benefits. This is most likely a violation of the Free Exercise clause since it works to burden a religious entity by requiring a practice which is in direct violation of the organization's moral principles. Although *Smith*<sup>146</sup> greatly limited the scope of free exercise claims, the church would most likely be able to assert a hybrid claim, stating that requiring contraceptive coverage violates the church's right to free speech.<sup>147</sup> Refusal to support contraception could be considered a form of political speech that can be linked to the free exercise claim and render the statute unconstitutional.<sup>148</sup> Although these types of claims are controversial and not recognized by all courts,<sup>149</sup> the United States Supreme Court<sup>150</sup> and other courts have implicitly recognized their viability.<sup>151</sup>

### B. Broad Religious Exemption

Other states take the opposite tack and offer very broad exemptions to employers who find it morally objectionable to support contraception. Some states even go so far as to allow insurers and health systems that are supported by religious organizations an exemption from providing contraceptive coverage. Connecticut,<sup>152</sup> Hawaii,<sup>153</sup> Nevada,<sup>154</sup> and Washington<sup>155</sup> exempt both religious employers and religious health care providers from providing contraceptives.

Representative text from Connecticut states:

[A]ny insurance company, hospital or medical services corporation, or health care center may issue to a religious employer an individual health insurance policy that excludes coverage for prescription contraception methods which are contrary to the religious employer's bona fide religious tenets . . . (f) as used in this section: "religious employer" means

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<sup>146</sup>*Smith*, 494 U.S. 872 (1990).

<sup>147</sup>Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990).

<sup>148</sup>*Id.*

<sup>149</sup>*See supra* note 130.

<sup>150</sup>*Smith*, 494 U.S. 872.

<sup>151</sup>Even if this statutory language is not found unconstitutional under the U.S. Constitution, it remains subject to state constitutions, which may require more stringent interpretation of religious free exercise.

<sup>152</sup>CONN. GEN. STAT. § 38a-503e (2003).

<sup>153</sup>HAW. REV. STAT. ANN. §§ 431:10A-116.6, 431:10A-116.7 (Michie 2003).

<sup>154</sup>NEV. REV. STAT. ANN. § 695C.1715 (Michie 2004); *see also* § 695C.1717 (regarding contraceptive health care services); § 689B.0376 (regarding group and blanket health insurance and prescription drug coverage).

<sup>155</sup>WASH. REV. CODE ANN. § 70.47.160 (2004).

an employer that is a “qualified church controlled organization” as defined in 26 U.S.C. section 3121 or a church affiliated organization.<sup>156</sup>

Legislation with such broad language places the greatest number of women at risk of going without contraceptive coverage, since by allowing entire insurance plans and religiously-based hospitals to avoid covering contraceptive services they exclude a large pool of workers. Many of the hospital systems in the United States have their roots in religion though they employ and serve individuals of every religion.<sup>157</sup> Also, hospital systems are in a process of change, becoming more corporatized and offering individual patients less individual choice as to their hospital and primary care physicians.<sup>158</sup> Under legislation with broad exemptions, non-religious employees of a large corporation with an insurance benefit plan tied to a religiously-based hospital may be denied contraceptive coverage on the basis of the insurance company’s religious beliefs. This type of legislation appears to be the type of restriction that *Cantwell* rejected as religiously motivated conduct that inflicts harms on others.<sup>159</sup> In this situation, non-religious employees are harmed as a result of their employer-provided insurance policy, which they had little or no choice in negotiating or choosing. Such broad exemptions are not protected under the Free Exercise Clause,<sup>160</sup> and thus are likely to fail.<sup>161</sup>

Other states, like Delaware,<sup>162</sup> Maryland,<sup>163</sup> Missouri,<sup>164</sup> and New Mexico<sup>165</sup> offer no definition of a religious employer. Representative text from Missouri states:

4. (1) Any health care carrier may issue to any person or entity...a health benefit plan that excludes coverage for contraceptives if the use or provision of such contraceptives is contrary to the moral, ethical, or religious beliefs or tenets of such person or entity.

(2) [exemption for enrollee for whom coverage is against moral or religious beliefs]

(3) Any health carrier which is owned, operated or controlled in substantial part by an entity that is operated pursuant to moral, ethical, or religious tenets that are contrary to the use or provision of contraceptives

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<sup>156</sup>CONN. GEN. STAT. § 38a-503e (2003).

<sup>157</sup>William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL’Y 455, 456 (2001).

<sup>158</sup>*Id.*

<sup>159</sup>*Cantwell*, 310 U.S. at 296.

<sup>160</sup>*Id.*

<sup>161</sup>*Erickson*, 141 F.Supp. 2d 1266.

<sup>162</sup>DEL. CODE ANN. tit. 18, § 3559 (2004).

<sup>163</sup>MD. INS. CODE ANN. § 15-826 (2004).

<sup>164</sup>MO. REV. STAT. § 376.1199 (2001).

<sup>165</sup>N.M. STAT.ANN. § 59A-22-42 (2004).

shall be exempt from the provisions of subdivision (4) of subsection 1 of this section.<sup>166</sup>

These laws, if challenged, are likely to be struck down because they also do not meet the test in *Cantwell* that requires religious conduct not to inflict harm on others.<sup>167</sup> Language such as the statute quoted above allows employers and service providers with nonreligious, moral objections to contraception to be excluded from the requirement of providing contraceptives. Such language subjects the statute to analysis solely on the basis of Title VII, since the Free Exercise Clause is not implicated when moral conduct, as opposed to religious conduct, is the basis of a decision.<sup>168</sup> Under statutes like these, employees of a non-religious business, the owners of which opposed birth control would not have contraceptive coverage. For example, Wal-Mart, one of the nation's largest employers, has decided not to provide birth control pills through their pharmacy. Under statutes like these, it is not inconceivable that they would claim a moral exemption from the statute and leave their employees without adequate contraceptive services. Again, *Cantwell* provides less protection for religious conduct that inflicts harm on others,<sup>169</sup> and requiring large groups of non-believers to be burdened by their employer's religious convictions creates significant harm for the employees' reproductive health and imposes a financial burden upon them.

### C. Narrow Religious Exemption

Some states provide a narrower exemption for religious employers.

California,<sup>170</sup> Maine,<sup>171</sup> North Carolina,<sup>172</sup> and Rhode Island<sup>173</sup> offer a religious exemption that includes employers who primarily employ and serve those who adhere to the religious tenets of the entity.

Representative text from California states:

(b)(1) For purposes of this section, a religious employer is an entity for which each of the following is true:

(A) the inculcation of religious values is the purpose of the entity,

(B) the entity primarily employs persons who share the religious tenets of the entity

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<sup>166</sup>MO. REV. STAT. § 376.1199 (2001).

<sup>167</sup>*Cantwell*, 310 U.S. at 305.

<sup>168</sup>Because morality is not necessarily based upon religious beliefs, the First Amendment does not apply to moral objections.

<sup>169</sup>*Cantwell*, 310 U.S. at 305

<sup>170</sup>CAL. HEALTH & SAFETY CODE § 1367.25 (2004).

<sup>171</sup>24-A.M.R.S. § 2847-G (2003).

<sup>172</sup>N.C. GEN. STAT. § 58-3-178 (2004).

<sup>173</sup>*See* R.I. GEN. LAWS §§ 27-19-48, 27-18-57, 27-20-43, 27-41-59 (2004).

(C) the entity serves primarily persons who share the religious tenets of the entity

(D) The entity is a nonprofit organization as described in 26 USC section 6033(a)(2)(A)(i) or (iii).<sup>174</sup>

Legislative language offering a narrow conscience clause exemption is the most likely language to withstand the requirements of both Title VII and the First Amendment. Statutes with this type of language provide protection for religious free exercise and run a low risk of harming those employees who do not adhere to their employer's religious tenets.

Under statutes like these, although a non-religious employee working for a church would not have access to contraception, the harm would be minimal, since any individual church's non-religious staff is generally small. In addition, it is unlikely that there are many church staff members who vehemently disagree with the principals of their employer. Contrasted to the language of the broadly-defined statutes, it is clear that a much smaller number of employees would face denial of contraceptive coverage. In addition, employees who hold the same beliefs as their religious employers could choose not to utilize their contraceptive benefits.

Large faith-based health conglomerates or service organizations, however, would have to provide their employees with contraceptive benefits.<sup>175</sup> This is the issue brought up in *Catholic Charities*.<sup>176</sup> The California Supreme Court affirmed the lower court decision, holding that the California law is constitutional because it does not interfere with religious free exercise. The law is neutral and of general applicability and does not fall within any of the exceptions to the doctrine the Supreme Court espoused in *Smith*.<sup>177</sup> Organizations like Catholic Charities now have two choices because the California Supreme Court has ruled against them: either change employment policies and only employ members of the organization's religion, or provide non-religious employees with access to contraceptives.

#### *D. Additional Protective Language*

Some states additionally require that religious employers not offering contraceptive coverage give employees notice of that fact. Representative text from Hawaii states: "Every religious employer that invokes the exemption provided under this section shall provide written notice to prospective employees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons."<sup>178</sup>

This text does not violate either the PDA or the Free Exercise clause and allows employees to be better informed before making employment choices. Although the

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<sup>174</sup>CAL. HEALTH & SAFETY CODE § 1367.25 (2004).

<sup>175</sup>See *Catholic Charities*, 32 Cal. App. 4th at 527, 90 (Cal. App. 3d Dist. 2001), *aff'd*, 32 Cal. 4th 527 (Cal. 2004).

<sup>176</sup>*Id.*

<sup>177</sup>See Cherry, *supra* note 98, at 587-88 (citing *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990)).

<sup>178</sup>HAW. REV. STAT. ANN. § 431:10A-116.7 (2003).

Employment Retirement Income Security Act (ERISA),<sup>179</sup> the federal law governing employee benefits, requires that employees receive understandable information about their insurance coverage, this requirement is frequently ignored.<sup>180</sup> Currently, women often learn of their coverage limitations only after they have enrolled in the plan or when they submit a claim and it is denied.<sup>181</sup> Additional protective language requiring notice of contraceptive coverage exclusions helps close the information gap that is so prevalent in current insurance practice.

#### IV. STRIKING THE BALANCE BETWEEN CONTRACEPTIVE EQUITY AND FREE EXERCISE

A tension most certainly exists between the goals of Title VII and the First Amendment. This tension, however, is not irresolvable. To be sure, carefully constructed contraceptive equity legislative language is capable of walking the tightrope between the two principles.

There are several principles that should guide any efforts to achieve an effective balance and ensure that religious employers' rights to free exercise are not unduly burdened.<sup>182</sup> First, any proposed legislation must be neutral and of general applicability.<sup>183</sup> This means that conscience clauses should reflect a neutral stance, both on their face and in spirit. The Court in 1993 in *Church of the Lukumi Babalu Aye v. City of Hialeah*<sup>184</sup> stated that neutrality ensures the protection of religious minorities from discriminatory treatment. The Court's interpretation of neutrality in free exercise cases allows the state to place a burden on religious exercise only if the object of the state action is not to burden religion, but instead an "incidental effect" of the action.<sup>185</sup>

To avoid a "hybrid claim" under *Smith*, no other Constitutional rights can be violated.<sup>186</sup> Some courts reject the notion of "hybrid rights" claims,<sup>187</sup> but assuming the claims exist, any legislation must not have the effect of interfering with any other Constitutional right, e.g. freedom of speech, or the Establishment Clause.<sup>188</sup>

Any proposed legislation must not single out any one particular religion.<sup>189</sup> *Lukumi* involved a challenge to a city ordinance which prohibited the slaughter of

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<sup>179</sup>Law, *supra* note 22, at 387-88 (citing 29 U.S.C. § 1002(a)(1)(1944)).

<sup>180</sup>*Id.* at 387.

<sup>181</sup>*Id.* 387-88.

<sup>182</sup>U.S. CONST. amend. I, XIV.

<sup>183</sup>*School Dist. v. Schempp*, 374 U.S. 203 (1963).

<sup>184</sup>508 U.S. 520 (1993) *rev'd and remanded* to 2 F.3d 369 (11th Cir. 1993)..

<sup>185</sup>Cherry, *supra* note 98, at 573.

<sup>186</sup>*Smith*, 494 U.S. at 881.

<sup>187</sup>*See Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 702-707 (9th Cir. 1999), *withdrawn*, 220 F.3d 1134 (9th Cir. 2000) (en banc); *see also Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993).

<sup>188</sup>*Smith*, 494 U.S. at 881.

<sup>189</sup>*Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

animals in “sacrifice” or “ritual.”<sup>190</sup> The Court found that the language of the statute was neutral; however, the record surrounding the city’s enactment of the ordinance showed that the ordinance was intended to target the Santeria religion.<sup>191</sup> Stating that official action targeting religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality,<sup>192</sup> the court found a violation of the Free Exercise Clause.<sup>193</sup> Any language in contraceptive equity legislation aimed at a specific religion or denomination will not pass Constitutional muster.

The fact that a particular religion is burdened by a regulation is not evidence of intentional targeting. This issue arose in the *Catholic Charities* case, where the plaintiffs alleged that the Catholic Church was burdened more than other religious denominations. In its petition to the California Supreme Court, the state of California relied upon *Reynolds v. United States*,<sup>194</sup> where the United States Supreme Court upheld the right of Congress to criminalize polygamy, even though it burdened Mormons more than other religious groups.<sup>195</sup> Attorneys for the State of California stated that

[A]t a minimum, *Reynolds* demonstrates that a neutral prohibition does not become unconstitutional simply because of its disparate impact on a particular religious organization. Absent proof that a particular religious entity was unconstitutionally targeted, a valid and neutral statute survives First Amendment review even if its enforcement burdens some churches more than others.<sup>196</sup>

Lastly, any statute must be tailored so that any religious exemption does not inflict harm on others who are non-adherents.<sup>197</sup> As in *Cantwell*, the “religious conduct” of excluding contraceptives from insurance policies must not harm non-adherents, otherwise it is not protected by the First Amendment.<sup>198</sup>

#### A. Recommendations for Appropriate Language

The best way to protect reproductive freedom as well as free exercise is to tailor statutory conscience clause language to cover only organizations that primarily employ and serve those who are their own adherents. The language of a narrow religious exemption bridges the gap between Title VII and the First Amendment. By providing access to prescription contraceptive coverage, the requirements of Title

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<sup>190</sup>*Id.*

<sup>191</sup>*Id.* at 534.

<sup>192</sup>*Id.*

<sup>193</sup>*Lukumi*, 508 U.S. at 525, 535-38.

<sup>194</sup>98 U.S. 145 (1879), overruled as stated in 745 F.2d 153 (2d Cir. 1984).

<sup>195</sup>*Id.* at 161-67.

<sup>196</sup>California Supreme Court Brief, *Real Parties in Interest’s Answer Brief on the Merits*. No. S099822 [hereinafter State of California].

<sup>197</sup>*Cantwell*, 310 U.S. at 296.

<sup>198</sup>*Id.*

VII and the PDA are met.<sup>199</sup> Allowing religious employers an option to be excluded from the legislation protects the employer's right to free exercise.<sup>200</sup> The narrow exception does more, however, by ensuring that only those most likely to not desire contraceptive coverage (i.e. religious adherents) are denied access to it.

Any broader exemption would be a violation of the test in *Cantwell*, which requires that religiously motivated conduct not inflict harm on non-believers.<sup>201</sup> With broad exemptions, non-religious employees of places like Catholic Charities or religiously controlled hospital networks would not be entitled to contraceptive coverage, which would impose a burden on these non-adherents. On the other hand, the absence of any exceptions to contraceptive equity policy would likely render it unconstitutional.<sup>202</sup> The absence of exemptions would mean that individual congregations, in their context as employers, would have to offer contraceptives to their employees, causing them to support behavior that they see as morally repugnant to their religious beliefs and violative of their right to freely exercise their religion.<sup>203</sup>

When states have attempted to pass equity legislation, the main objection they face comes from religious employers who feel threatened by the idea of the state requiring them to provide services that are in conflict with their religious practice.<sup>204</sup> In debates prior to the enactment of California's legislation, much of the discussion centered specifically around crafting the language to provide for the needs of the Catholic church, which had heavily lobbied against the legislation.<sup>205</sup>

Thus, for both political and constitutional reasons, states that are considering contraceptive equity legislation should utilize a narrow exemption. Although state legislation does not ultimately protect women as much as federal legislation,<sup>206</sup> any legislation giving women access to contraceptives is a step in the right direction. Likewise, any federal legislation, such as the Equity in Prescription Insurance and Contraceptive Coverage Act, should include a narrow exemption for religious employers.<sup>207</sup> Federal legislation is the best way to provide the greatest number of women the greatest access to contraceptive coverage and a narrow religious exemption will offer religious employers the free exercise protection they desire.

In addition, both state and federal legislation should include the additional protective clause that requires employers to provide employees with information about their access to contraceptive benefits. Inclusion of this clause offers women critical information when they are making employment choices. Women who receive this information prior to employment may opt to choose an employer who

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<sup>199</sup>See *supra* Part I for a discussion of the requirements of Title VII and the PDA.

<sup>200</sup>See *supra* Part I for a discussion of the requirements of the Free Exercise Clause.

<sup>201</sup>*Cantwell*, 310 U.S. at 296.

<sup>202</sup>*Smith*, 494 U.S. at 872. *Employment Div. Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1999).

<sup>203</sup>U.S. CONST, amend. I, XIV.

<sup>204</sup>Alan Guttmacher Institute, *supra* note 138.

<sup>205</sup>State of California, *supra* note 196.

<sup>206</sup>Danner, *supra* note 11, at 516-17.

<sup>207</sup>*Id.* at 518-20.



provides prescription contraceptives unlike the current situation where women often accept a job only to find later that their contraceptive services are not covered under the employer's health benefit plan.<sup>208</sup>

Since Title VII only applies to employers with over 15 employees, it is important that legislation provide protection for employees of smaller firms. To eliminate the issue created by Title VII employer size limits, it is essential that enacted legislation be available to employees of any size organization or business entity. It is estimated that more than half of the workers in firms with fewer than 15 employees are women.<sup>209</sup> This means that approximately one-sixth of the nation's women workers are employed in such firms.<sup>210</sup> Therefore, it is estimated that 7.66 million women are employed by very small employers.<sup>211</sup> State and federal contraceptive equity legislation needs to provide all women with access to contraceptive services in order to achieve the goal of contraceptive equity. Although excluding these 7.66 million women from contraceptive services may seem to protect small business from additional insurance costs, a closer look reveals that the slight cost of adding these benefits will actually assist small business people in retaining employees and reducing the costs associated with unwanted pregnancies.<sup>212</sup> It is to a small employer's benefit to provide their employees with prescription contraceptive benefits, since contraception will keep an essential employee from having an unwanted pregnancy and being forced to take time away from their job. Prevention of unwanted pregnancies is especially important in smaller companies, since there are fewer available dollars for hiring temporary replacement employees or for lost production costs during a full time employee's pregnancy and maternity leave.

#### V. CONCLUSION

Women in United States do not receive equal treatment in their health insurance coverage.<sup>213</sup> Providing equal health care coverage is necessary to achieve equality and to reduce the number of unwanted children and abortions.<sup>214</sup>

Title VII of the Civil Rights Act of 1964 and its later-added corollary, the Pregnancy Discrimination Act, require equal access to contraceptive services even when equal access requires additional cost for one gender.<sup>215</sup> State legislation is similarly limited in scope due to ERISA preemption rules.<sup>216</sup> The proposed federal

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<sup>208</sup>Law, *supra* note 22, at 365-68.

<sup>209</sup>Laura Schlichtmann, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335, 410 n.94. (1994).

<sup>210</sup>*Id.* (citing Sheila B. Kamermen et al., *Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave, and Health and Safety* (BNA 1987)).

<sup>211</sup>*Id.*

<sup>212</sup>*See supra* Part I for an explanation of the benefits of providing contraceptive equity.

<sup>213</sup>Law, *supra* note 22, at 372.

<sup>214</sup>*Id.*

<sup>215</sup>*Erickson*, 141 F. Supp. 2d 1266.

<sup>216</sup>*Id.*

legislation, EPICC, is the most effective tool for protecting women against inequities in their insurance coverage.<sup>217</sup>

Federal and state legislation, however, must not interfere with a religious employer's right to freely exercise its religion.<sup>218</sup> The most effective way to balance the ideals set forth in both Title VII and the First Amendment is to include a conscience clause in contraceptive equity legislation. Narrowly-tailored legislative language would provide the greatest number of employees with access to contraceptives while protecting religious employers from government infringement on their free exercise rights.

In addition to the conscience clause, legislation which requires employers claiming conscience protection to provide employees with prior notice regarding the lack of contraceptive coverage will offer these employees vital information when making career choices.

Narrowly tailored conscience clauses in contraceptive equity legislation create a bridge between the competing ideals of Title VII and the First Amendment. By properly addressing both the need for contraceptive equity and the right to religious freedom, contraceptive equity legislation that has a narrow religious exemption strikes the appropriate balance between the interests of preventing unwanted pregnancy and ensuring religious freedom.

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<sup>217</sup>*Id* at 518-520.

<sup>218</sup>U.S. CONST. amends. I, XIV.

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