CONSCIENCE CLAUSES AND THE RIGHT OF REFUSAL: THE WAR BETWEEN LEGAL AND ETHICAL RESPONSIBILITY

In the decades following the legalization of abortion, contention over abortion practices continues to plague the United States. In this pursuit, conscience protections present a unique challenge for patients and practitioners alike. Framed as an effort to accommodate moral, ethical, and religious freedoms, conscience protections have implicitly created another avenue oftentimes utilized to deny abortion services. The question remains as to how society can navigate these conscience objections, mainly rooted in religious freedom, while also providing necessary healthcare services. Currently, conscience protections function as a barrier to an effective patient-provider relationship. Through the lens of a North Carolina abortion statute, this Note attempts to facilitate a conversation surrounding the use of conscience clauses in the US healthcare system, as well as provide potential safeguards for the interests of patients and practitioners involved in abortion services.

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I. INTRODUCTION

Nearly one in four women[1] will have an abortion before turning forty-five years old.[2] Fifty-nine percent of those women are already mothers to at least one child.[3] Although the Supreme Court formally recognized the constitutional right to have an abortion in *Roe v. Wade*,[4] the application of this right has been incredibly fragmented.[5] *Roe* and its progeny[6] are recognized as some of the few instances in the history of the United States where the Supreme Court openly discussed reproductive rights.[7] The opinion in *Roe* served as the first time the judicial branch of the US government acknowledged the idea that women, and those with the ability to have children, were entitled to decide whether or not to terminate their pregnancies.[8] Accordingly, *Roe* set the stage for abortion rights across the nation. States across the country, however, have consistently attempted to interpret the language of these opinions in ways that circumvent this right.[9] One of the most common methods states employ is making access to abortion services seemingly impossible.[10] Currently, six

1. This Note uses the term "women" in its discussion of abortion. However, it is important to acknowledge that the subject matter in this Note also directly affects those who do not identify as a "woman" and can conceive. It is not my intention to erase the hardship experienced by those who do not identify with this term. Unfortunately, and to my discontent, much of the discussion and law in the United States uses the term "woman" in its discussion of who can and cannot have an abortion. *E.g.*, N.C. GEN. STAT. § 14-45.1(a) (2020) ("[Abortion] shall not be unlawful, during the first 20 weeks of a *woman's* pregnancy . . . .") (emphasis added); Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a *woman's* decision whether or not to terminate her pregnancy.") (emphasis added).

2. *United States Abortion*, GUTTMACHER INST., https://www.guttmacher.org/united-states/abortion (last visited July 31, 2020).

3. *Id.*

4. 410 U.S. 113 (1973).

5. *Id.* at 154.

6. *E.g.*, June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2103 (2020); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2292 (2016); Gonzales v. Carhart, 550 U.S. 124, 124 (2007); Stenberg v. Carhart, 530 U.S. 914, 914 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833 (1992); Doe v. Bolton, 410 U.S. 179, 179 (1973).

7. *See* Jared C. Leuck, Roe v. Wade *and Its Supreme Court Progeny*, 14 J. CONTEMP. LEGAL ISSUES 209, 209 (2004).

8. *See Roe*, 410 U.S. at 154.

9. *See Access to Abortion Care*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion (last visited July 31, 2020) ("Yet for years, abortion opponents have fought to turn back the clock: stacking the federal courts with anti-abortion judges; passing unconstitutional legislation; spreading deceptions; imposing arbitrary restrictions; and waging one legal battle after another. Their ultimate goal? Reverse Roe v. Wade and make safe, legal abortion impossible to obtain.").

10. *See* Quoctrung Bui et al., *Where* Roe v. Wade *Has the Biggest Effect*, N.Y. TIMES: THE UPSHOT (July 18, 2019), https://www.nytimes.com/interactive/2019/07/18/upshot/roe-v-wade-abortion-maps-planned-parenthood.html ("Calla Hales, who runs four abortion clinics in North Carolina and Georgia, said her patients

states have only one abortion clinic.[11] Similarly, in 2017, roughly 91 percent of North Carolina counties had zero facilities that provided abortion services.[12]

In addition to creating logistical nightmares for those who seek an abortion, various states have also enacted conscience and refusal clauses under the guise of moral or "religious liberties."[13] Such clauses operate to indemnify health care professionals who refuse to provide their services in instances of abortion, sex reassignment surgery, contraceptive care, prescription filling, and other health care resources.[14] While one has a right to religious freedom under the First Amendment,[15] conscience and refusal clauses often blur the line between a health care provider's personal opinion and the unilateral right of a patient to have a "mutually respectful alliance" with his or her provider.[16]

Conscience clauses force society to pit an individual's religious and moral autonomy against the public's interest in health care. While the idea of a "conscientious objection" likely began with those who claimed religious opposition to war, this idea grew exponentially after *Roe*, forming what is commonly known as a "conscience clause."[17] Conscientious objections quickly expanded to "right to refuse" laws, which created a safety net for pharmacists who refused to fill certain prescriptions, such as the emergency contraceptive "Plan B."[18] After *Roe* recognized the right to an abortion, various

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travel two and a half hours on average. It can be a formidable challenge, even with Roe in place.").

11. Holly Yan, *These 6 States Have Only 1 Abortion Clinic Left. Missouri Could Become the First with Zero*, CNN, https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html (last updated June 21, 2019, 12:48 PM).

12. *State Facts About Abortion: North Carolina*, GUTTMACHER INST. (Mar. 2020), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-north-carolina.

13. *See* Nsikan Akpan et al., *What the New Religious Exemptions Law Means for Your Health Care*, PBS NEWSHOUR (May 3, 2019, 7:05 PM), https://www.pbs.org/newshour/health/what-the-new-religious-exemptions-law-means-for-your-health-care.

14. *See id.*

15. U.S. CONST. amend. I.

16. *See Patient Rights: Code of Medical Ethics Opinion 1.1.3*, AM. MED. ASS'N, https://www.ama-assn.org/delivering-care/ethics/patient-rights (last visited July 31, 2020).

17. Claire Marshall, *The Spread of Conscience Clause Legislation*, 39 HUM. RTS. 15, 15 (2013). Conscientious objections continue in the United States today. *See, e.g.*, *Conscientious Objectors*, SELECTIVE SERV. SYS., https://www.sss.gov/conscientious-objectors/ (last visited July 31, 2020).

18. Cynthia Dailard, *Beyond the Issue of Pharmacist Refusals: Pharmacies That Won't Sell Emergency Contraception*, GUTTMACHER INST. (Aug. 1, 2005), https://www.guttmacher.org/gpr/2005/08/beyond-issue-pharmacist-refusals-pharmacies-wont-sell-emergency-contraception.

states attempted to limit this right, using conscientious objections as a means to do so.[19]

This Note analyzes North Carolina's conscience clause ("the Clause"), which grants immunity for health care professionals who object to performing or assisting in performing procedures that result in an abortion for "moral, ethical, or religious grounds."[20] This Note then argues that the Clause is a de facto violation of *Roe* and its progeny, and further, that this clause—as well as similar clauses in other states—must be modified to allow those seeking abortions and tangential services the care to which they are constitutionally entitled. Finally, this Note discusses potential solutions that may aid in balancing a sincere religious objection with the right of a patient to receive unbiased and impartial care.

II. THE CREATION OF THE CONSCIENCE CLAUSE

In its infancy, abortion discussion was nowhere near as polarizing as it has come to be in the twenty-first century.[21] In fact, abortions before "quickening" were widely accepted and practiced at the time the Constitution was adopted.[22] Before the nineteenth century, society referred to the instance of fetal viability as the "quickening."[23] "[F]oetal [q]uickening," adapted from British common law, occurred when the pregnant woman felt the fetus move.[24] Before modern medicine, this was the only way to tell whether or not there was a viable fetus in the womb.[25] Abortions after quickening were criminalized, but only as misdemeanors.[26] Currently, one of the major arguments surrounding the morality of abortions relates to the viability of the fetus.[27] Prior to the nineteenth century, however, one of the great fears surrounding abortions was that society would be inundated with children of immigrants.[28]

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19. Marshall, *supra* note 17, at 15.

20. N.C. GEN. STAT. §§ 14-45.1(e)–(f) (2020).

21. *See History of Abortion*, NAT'L ABORTION FED'N, https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/ (last visited July 31, 2020).

22. *Id.*

23. Mary Ziegler, *A Brief History of US Abortion Law, Before and After* Roe v Wade, HISTORYEXTRA (June 21, 2019), https://www.historyextra.com/period/20th-century/history-abortion-law-america-us-debate-what-roe-v-wade/.

24. *Id.*; *see also* Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, ORG. AM. HIST., https://www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/ (last visited July 31, 2020).

25. *See* Holland, *supra* note 24.

26. *Id.*

27. Mark Tushnet, *The Supreme Court on Abortion: A Survey*, *in* ABORTION, MEDICINE, AND THE LAW 162, 162 (J. Douglas Butler & David F. Walbert eds., 3d ed. 1986).

28. *History of Abortion*, *supra* note 21; OBOS Abortion Contributors, *History of Abortion in the U.S.*, OUR BODIES OURSELVES,

Before 1800, women across the United States opted for "back-alley" procedures, as physicians had not yet invented the technology needed for a safe abortion.[29] Women also often utilized holistic approaches during their pregnancies.[30] Because medicine was in its beginning during this time period, society largely relied on the word and judgment of the mother about the fetus's health.[31] In fact, physicians were no more knowledgeable of the pregnancy and abortion processes than illegal practitioners.[32] Moreover, this time period was fraught with concern over the safety of medical procedures, and many opted to use the services of a healer rather than a physician.[33] Somewhat ironically, historians argue that the pro-life movement actually stemmed, at least in part, from physicians who worried that healers were encroaching on their clientele.[34] In response to this fear, physicians utilized the law as a means to back the healers out of reproductive medicine.[35]

The governmentalization of abortion by physicians as a means to solidify their control over potential clientele aided in removing a woman's right to choose.[36] The physicians' movement toward domination of the abortion market relied upon governmental interference: by requiring licensing and regulation, physicians could effectively run the unlicensed healers out of business.[37] Perhaps unbeknownst to physicians, this began the rapid weaponization of abortion doctrine against women.[38] Some physicians argued that this was only to protect the abortion process, as healers did not have "adequate embryonic knowledge."[39] However, historians argue this

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https://www.ourbodiesourselves.org/book-excerpts/health-article/u-s-abortion-history/ ("[W]ith the declining birthrate among women from Northern European backgrounds in the late 1800s, the U.S. government and the eugenics movement were concerned about 'race suicide' and wanted white U.S.-born women to reproduce.") (last updated May 18, 2018).

29. *See History of Abortion, supra* note 21.
30. *See* Holland, *supra* note 24.
31. *See id.*
32. *See id.*
33. *Id.*
34. *Id.*; *see also* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 10 (1997) ("In 1857, the newly organized AMA initiated a crusade to make abortion at every stage of pregnancy illegal."); Ziegler, *supra* note 23 ("Morally, the AMA contended that any taking of life was wrong—and that abortion undermined women's traditional roles and threatened to undermine the 'genetic stock' of the United States if wealthier women had fewer children than poor ones. Practically, physicians worried that midwives and other competitors—most of whom were more willing to offer abortion services than physicians were—would steal patients. By fighting to criminalise abortion, doctors could claim a moral edge over the competition.").
35. Holland, *supra* note 24.
36. *Id.*
37. *Id.*
38. *See id.*
39. *Id.*

was simply another veiled method of creating a cultural movement out of the abortion process.[40] This newfound pro-life movement would highlight the idea that a woman's body, rather than the woman herself, would tell all it needed to know about the fetus, and that only doctors could interpret those signs.[41] It is important to note that women could not vote or become doctors during this time.[42] The pro-life movement created concern about the mothers' education and lack of understanding of their own bodies.[43]

The movement caught on like wildfire. By 1900, abortion was illegal at any stage, but most states allowed licensed physicians to perform abortions if needed to save the mother's life.[44] Thus, the marketization of abortions and a general lack of access began. In the 1960s, however, issues with the drug Thalidomide and the German measles sparked a conversation about potentially liberalizing abortion.[45] In response to this shift, opponents of abortion began structuring the debate as a constitutional issue: the right to life.[46] Primarily religiously affiliated, these opponents called themselves "defenders," citing the US Constitution and Declaration of Independence as the reasoning behind their cause.[47]

Prior to the twentieth century, women enjoyed centuries of limited legal interference on abortion access.[48] However, with the development of medicine, the involvement of churches, and the marketization of the procedure, this access quickly faded.[49] This is not to say that the development of these areas is wholly negative; however, these concepts played a distinct role, harmful or otherwise, in the history of abortion in the United States.[50] Nevertheless, in the modern era, access to abortion continues to decrease, with states attempting to enact restrictive laws (including statutes with conscience protections) disguised as an exercise of the state's power under its constitution.[51] Following years of lawsuits and protests on

40. *Id.*
41. *Id.*
42. *Abortion History in the U.S.*, FINDLAW, https://family.findlaw.com/reproductive-rights/abortion-and-the-law-background.html (last updated Nov. 14, 2018).
43. *See* Holland, *supra* note 24.
44. *See id.*
45. LESLIE J. REAGAN, DANGEROUS PREGNANCIES 55–59 (2010).
46. *See* Holland, *supra* note 24.
47. *Id.*
48. *Id.; see also History of Abortion*, *supra* note 21. This is not to say that other barriers to access (such as race and socioeconomic status) did not cause a barrier to some. *See Ziegler*, supra note 23 ("[M]any women ending their pregnancies were married, white, and middle-class.").
49. Holland, *supra* note 24.
50. *See id.*
51. *What's Going on in the Fight over US Abortion Rights?*, BBC (June 14, 2019), https://www.bbc.com/news/world-us-canada-47940659.

behalf of women's rights organizations, the federal government first addressed abortion rights in the 1970s.[52]

A. Federal Abortion Case Law

The 1960s and early 1970s proved monumental to abortion rights in the United States. In 1965, the Supreme Court set the stage for privacy rights moving forward. In its landmark decision in *Griswold v. Connecticut*,[53] the Court held that the right to privacy is implicit in the Bill of Rights and that states may not criminalize contraception for married couples.[54] A few years later, in *Eisenstadt v. Baird*,[55] the Court held that everyone, married and unmarried, has both a right to privacy and a freedom from "unwarranted governmental intrusion" in matters involving one's right to have a child.[56] As a result, *Griswold* and *Eisenstadt* paved the way for *Roe* by altering how the law viewed the family dynamic.[57] These cases helped restore the power within an individual to decide personal matters in his or her life.[58] They also challenged the government's patriarchal role, which would prove to be immensely important in *Roe*.[59]

In *Roe*, utilizing the implicit rights to privacy found in *Griswold* and *Eisenstadt*, the Court ultimately held that the right to privacy encompassed the right to an abortion.[60] Thus, abortion was protected within the Court's understanding of the Fourteenth Amendment. The Court noted that this right was not absolute, however, and must be weighed against compelling state interests of protecting potential life, safeguarding health, and maintaining medical standards.[61] *Roe*'s companion case, *Doe v. Bolton*,[62] utilized the same framework set forth in *Roe*.[63] In *Bolton*, the Court held that a Georgia statute, which restricted a woman's access to an abortion, was unconstitutional.[64] Notably, however, the opinion was silent on the statute's conscience clause, thus opening the door for conscience clause usage.[65]

The decision in *Roe* stemmed from an analysis of criminal abortion statutes in Texas that made all abortions illegal unless needed to save the mother's life.[66] Proponents of these statutes

52. *Abortion History in the U.S.*, *supra* note 42.
53. 381 U.S. 479 (1965).
54. *Id.* at 484.
55. 405 U.S. 438 (1972).
56. *Id.* at 453.
57. Janet L. Dolgin, *The Family in Transition: From* Griswold *to* Eisenstadt *and Beyond*, 82 GEO. L.J. 1519, 1521–22 (1994).
58. *See id.*
59. *Id.* at 1519–20.
60. Roe v. Wade, 410 U.S. 113, 154 (1973).
61. *Id.* at 154–55.
62. 410 U.S. 179 (1973).
63. *Id.* at 201–02.
64. *Id.*
65. *Id.*
66. *Roe*, 410 U.S. at 117–18.

argued they were created to address safety concerns surrounding the increase in unlicensed persons performing abortions.[67] At the time, the Court did not identify a fetus as a person under the Constitution, so morality was not the motivating factor behind the Court's holding.[68] Rather, the opinion hinged upon the idea that during the first trimester, the mother possesses a qualified right to choose without governmental interference.[69] On its face, *Roe* helped restore a woman's power over her own body and weaken the power of the government to make decisions for her. *Roe*'s interpretation and application, however, created chaos that the public still feels today.

Following *Roe*'s federal mandate, states were required to make abortion legal until viability, which the Court believed to occur in the third trimester of a pregnancy.[70] Specifically, in the first trimester, only the mother and her physician enjoyed the right to choose.[71] In the second trimester, states could impose regulations "reasonably related to maternal health."[72] In the third trimester, however, states could impose regulations and prohibit abortions unless they were necessary to save the mother's life.[73] As such, *Roe* left power with the states to decide how restrictive they would be otherwise.

After *Roe* and *Bolton*, states took full advantage of their newly enumerated rights. In response to *Roe*'s recognition of the pervasive use of statutes akin to that in Texas, the anti-abortion conversation began to take on a more centralized role.[74] Before *Roe*, abortion discussion was predominantly state based.[75] However, with the addition of the federal government into the conversation, anti-abortion groups across the country began to join forces.[76] This movement started to become an extension of Republican and conservative values.[77] It shifted its focus to the fetus, perhaps in response to the Court's express opinion that a fetus was not a person until viability.[78] Anti-abortion groups began to use the fetus as a

67. *Id.* at 149–51.
68. *Id.* at 158.
69. *See id.* at 153–54, 163.
70. *Id.* at 160, 163–64. It is important to note that this opinion references the science that was available in the early 1970s, and with the invention of new medical technologies, viability may very well be detected earlier (and has been). *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) ("As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.").
71. *Roe*, 410 U.S. at 163.
72. *Id.* at 164.
73. *Id.* at 164–65.
74. *See* MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 58 (2015) ("In the late 1970s and early 1980s, the rise of arguments about judicial overreaching augured a larger shift in pro-life activism.").
75. Holland, *supra* note 24.
76. *Id.*
77. *Id.*
78. *See id.*

figure of sympathy, using graphic pictures to shock the public.[79] Additionally, their words began to translate into actions: groups started to block abortion clinics.[80]

The war between the newly nationalized anti-abortion movement and pro-choice advocates would continue without federal involvement until the early 1990s. In 1992, abortion would again have its day in court and, similar to the nineteenth century, the process for restricting a woman's right to choose began again. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[81] the Court held that a woman has the right to an abortion before viability without undue interference from the state.[82] The Court left "undue interference" undefined.[83] Practically, this finding allowed a state to impose restrictions on abortions so long as they do not create a substantial obstacle to obtain that abortion.[84] In *Casey*, the Court analyzed four obstacles: (1) a twenty-four hour waiting period; (2) parental notification; (3) informed consent; and (4) spousal notification.[85] Of the four obstacles, the Court held that only spousal notification of an abortion created a substantial obstacle.[86]

Following *Casey*, the application of the substantial obstacle test created much confusion.[87] However, the Court attempted to dispel some of the frenzy in *Whole Woman's Health v. Hellerstedt*.[88] In its opinion, the Court applied the "undue burden" standard to two provisions of a Texas statute.[89] These provisions required expensive hospital-grade facilities and various admittance privileges for physicians who wished to perform abortions.[90] While *Whole Woman's Health* helped alleviate concern over the application of *Casey*, it proved difficult to apply the ruling to other types of obstacles.[91] However, when an identical statute was challenged three years later in *June Medical Services, L.L.C. v. Russo*,[92] the Court upheld *Whole*

79. *Id.*
80. *Id.*
81. 505 U.S. 833 (1992).
82. *Id.* at 887.
83. *See id.*
84. *Id.* at 877.
85. *Id.* at 844.
86. *Id.* at 893–94.
87. *See* Elaine C. Howard, Note, *The* Roe*'d to Confusion:* Planned Parenthood v. Casey, 30 HOUS. L. REV. 1457, 1482 (1993); *see also* Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2035 n.57 (1994).
88. 136 S. Ct. 2292 (2016).
89. *Id.* at 2300.
90. *Id.*
91. *The Supreme Court, 2015 Term—Leading Cases*, 130 HARV. L. REV. 397, 405–06 (2016).
92. 140 S. Ct. 2103 (2020).

Woman's Health, reaffirming the fundamental right to an abortion and the importance of precedent.[93]

B. Federal Abortion Regulations

In response to the ever-growing concern over abortion, the federal government introduced legislation to separate itself from the procedure. Some of these policies would become known as federal conscience protections.[94] Soon after *Roe*, Congress created the Hyde Amendment,[95] which resulted in a significant lack of access for women on Medicaid and other federally funded programs.[96] The amendment restricts the use of federal funds in paying for abortions "outside of the exceptions for rape, incest, or if the pregnancy is determined to endanger the woman's life."[97] Although it is not a permanent law, the amendment is attached to the United States Department of Health and Human Services ("HHS") congressional appropriations bill, which Congress renews annually.[98]

The Hyde Amendment's restrictions complement those created by the Church Amendment.[99] Enacted a few months after *Roe*, the Church Amendment applies to all individuals and entities that currently receive federal funding.[100] There are three sections relating to conscience rules for abortion procedures. First, any entity or individual receiving federal funding is not required to perform a sterilization or abortion if "such procedure or abortion would be contrary to his religious beliefs or moral convictions," and no one holding such convictions may be discriminated against in the hiring process.[101] Second, an entity may exclude the performance of sterilization or abortion if the entity believes it is contrary to its religious beliefs or "moral convictions."[102] Third, an entity is not required to provide any personnel "for the performance or assistance in the performance" of an abortion or sterilization if such procedure is against the personnel's religious beliefs or "moral convictions."[103]

The Hyde and Church Amendments catalyzed the implementation of federal conscience protections. The Public Health

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93. *Id.* at 2133.

94. *Conscience Protections for Health Care Providers*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/conscience/conscience-protections/index.html (last updated Mar. 22, 2018).

95. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

96. Alina Salganicoff et al., *The Hyde Amendment and Coverage for Abortion Services*, KAISER FAM. FOUND. (Jan 24, 2020), https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/.

97. *Id.*

98. *Id.*

99. 42 U.S.C. § 300a-7 (2018); Pub. L. No. 93-45, § 401, 84 Stat. 353 (1973).

100. 42 U.S.C. § 300a-7.

101. *Id.* § 300a-7(b)(1); *id* § 300a-7(c).

102. *Id.* § 300a-7(b)(2)(A).

103. *Id.* § 300a-7(b)(2)(B).

Service Act of 1996 prohibits both state governments and the federal government from "discriminat[ing]" against health care providers who refuse to provide abortion referrals, abortion care, or abortion training referrals.[104] The government also enacted the Coats-Snowe Amendment.[105] This amendment prohibits governmental entities receiving federal funding from discriminating against health care professionals and businesses who: (1) refuse to participate in abortion training; (2) refuse to provide referrals for abortions or abortion training; or (3) refuse to make arrangements for such training—namely for medical training programs and with medical students.[106]

In 2005, the federal government continued its introduction of conscience protections. With the Weldon Amendment, the federal government prohibits using federal funds awarded through the Department of Labor to discriminate against health care entities when they do not "provide, pay for, provide coverage of, or refer for abortions."[107] Under the Coats-Snowe and Weldon Amendments, "'health care entity'" includes persons and entities "involved in the delivery of health care."[108]

The Hyde, Church, Coats-Snowe, and Weldon Amendments ("the Amendments") provided some protections for religious and moral objections in health care, but the Bush administration attempted to expand these protections exponentially. Framing the decision as a way of clarifying the Amendments, the Bush administration promulgated a new conscience rule in the final hours of President Bush's time in the oval office.[109] Former HHS Secretary Mike Leavitt said the rule "protects the right of medical providers to care for their patients in accord with their conscience."[110] The regulations attempted to "ensure" that government funds were not supporting "morally coercive or discriminatory practices or policies" that violate the Amendments.[111] They allowed health care providers, including "employees whose task it is to clean the instruments," to refuse to

104. 42 U.S.C. § 238n(a) (1996).

105. Pub. L. No. 104-134, § 245(a), 110 Stat. 1321–245 (1996).

106. 42 U.S.C. § 238n(a).

107. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 507(d)(1), 128 Stat. 2130, 2515 (2014).

108. *See id.* § 507(d)(2), 128 Stat. at 2515; *see also* Letter from James L. Madara, Exec. Vice President, Am. Med. Assoc., to Alex M. Azar, Sec'y, U.S. Dep't of Health & Hum. Servs. 4 (Mar. 27, 2018).

109. *See* HCP Live, *Obama Administration Alters Conscience Protections for Health Care Workers*, MD MAG. (Feb. 18, 2011), https://www.mdmag.com/medical-news/obama-administration-alters-conscience-protections-for-health-care-workers.

110. David G. Savage, *'Conscience' Medical Rule to Take Effect*, L.A. TIMES (Dec. 19, 2008, 12:00 AM), https://www.latimes.com/archives/la-xpm-2008-dec-19-na-conscience19-story.html.

111. 45 C.F.R. § 88.3 (2009).

provide information to abortion patients.[112] The Bush administration also noted that the new regulations were a response to "concern[] about the development of an environment . . . [that] discourage[d] individuals from entering health care."[113]

These were coined the "midnight regulations," as President Bush enacted them on his last day in office.[114] It was clear to the public that President Bush was attempting to issue these rules before President Obama took office.[115] Most importantly, the regulations did not have a medically accurate definition of abortion and could have led to the inclusion of objections to modern contraceptives.[116] Critics of the rule further argued that the regulations could have been used as a mechanism for discrimination.[117]

Two months after the enactment of President Bush's conscience rule, the Obama administration began the two-year process of repealing most of its overbroad language. It removed the section defining health care provider, as well as language that granted health care providers permission to opt out of services such as "treating gay men and lesbians and prescribing birth control to single women."[118] Further, the Obama administration sought to explain where the law was applicable and its requirements.[119] The administration also provided a mechanism for enforcing the rule: it assigned the HHS Office of Civil Rights as the medium to submit complaints.[120] Finally, it kept the right of refusal for abortions and sterilizations.[121]

In addition to the partial rescission and clarification of the Bush administration's conscience rule, the Obama administration also tackled conscience protections in its enactment of the Patient

112. Pius Kamau, *Bush's Right of Conscience Rule*, HUFFPOST (May 21, 2009, 5:12 AM), https://www.huffpost.com/entry/bushs-right-of-conscience_b_187364.

113. Brian Hartman, *Obama to Rescind Bush Abortion Rule*, ABC NEWS (Feb. 27, 2009, 6:46 PM), https://abcnews.go.com/Politics/WomensHealth/storyid=6977348&page=1.

114. Jodi Jacobson, *Obama Administration Repeals Portions of Bush "Provider Conscience Rules,"* REWIRE (Feb. 18, 2011, 1:42 PM), https://rewire.news/article/2011/02/18/obama-administration-repeals-portions-bush-provider-conscience-rules/.

115. *See id.*

116. Cristina Page, *HHS Moves to Define Contraception as Abortion*, REWIRE (July 15, 2008, 2:02 PM), https://rewire.news/article/2008/07/15/hhs-moves-define-contraception-abortion/.

117. *See* Rob Stein, *Obama Administration Replaces Controversial 'Conscience' Regulation for Health-Care Workers*, WASH. POST (Feb. 19, 2011), https://www.washingtonpost.com/national/health-conscience-rule-replaced/2011/02/18/AB7s9iH_story.html, ("[A] rule that was widely interpreted as shielding workers who refuse to participate in a range of medical services, such as providing birth control pills, caring for gay men with AIDS and performing in-vitro fertilization for lesbians or single women.").

118. HCP Live, *supra* note 109.

119. *Id.*

120. *Id.*

121. *Id.*

Protection and Affordable Care Act ("ACA").[122] The ACA separates abortion procedures from their medical counterparts by excluding abortion from the definition of health benefits that entities must offer.[123] However, Congress has acknowledged that the ACA does not preempt or affect state laws regarding abortion, any of the conscience protections discussed in Subpart II.B (i.e., the Amendments), any emergency service obligations, and further, any obligations of employers and their employees under Title VII.[124]

In early 2018, President Donald Trump attempted (and failed) to change the Amendments' language back to something eerily similar to the Bush administration's midnight regulations.[125] Similar to the Bush administration, the Trump administration advertised its new rule as a clarification measure.[126] This rule was struck down for its overbroad terms and allowance of potentially discriminatory practices.[127] Not only did the rule "reinstate the structure" of the Bush administration's rule, but it also expanded upon it.[128]

The rule applied to state and local governments, public and private health care professionals, and businesses that receive federal funds like Medicare or Medicaid.[129] It also applied to services ranging from abortion to HIV treatment and sex reassignment surgeries.[130] Moreover, it continued the previous rule's allowance of ancillary staff, such as ambulance drivers, the ability to refuse to participate in these services.[131] Further, it permitted HHS to terminate all funding if an entity violated a conscience provision.[132] In a scathing 147-page opinion, the Southern District of New York found that the rule was

122. Patient Protection and Affordable Care Act § 1303, 42 U.S.C. § 18023(a)(1) (2010). In a 2020 opinion, the Supreme Court held that the Trump Administration had the authority to promulgate regulations allowing employers with religious or moral objections to deny coverage for contraception under the ACA. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020).

123. *Id.*

124. *See* Alina Salganicoff et al., *Coverage for Abortion Services and the ACA*, KAISER FAM. FOUND. (Sept. 19, 2014), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-and-the-aca/.

125. *See* New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 499 (S.D.N.Y. 2019).

126. Katie Keith, *New York Court Vacates Conscience Rule*, HEALTH AFF. (Nov. 7, 2019), https://www.healthaffairs.org/do/10.1377/hblog20191107.342050/full/.

127. *Id.*

128. Katie Keith, *Trump Administration Prioritizes Religious and Moral Exemptions for Health Care Workers*, HEALTH AFF. (Jan. 20, 2018), https://www.healthaffairs.org/do/10.1377/hblog20180120.787956/full/.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

fraught with Title VII and Administrative Procedure Act violations and vacated the rule in its entirety.[133]

Overall, the history of federal conscience protections can be described as tumultuous at best. Regardless, language similar to federal conscience protections ultimately trickled down into state laws.[134] While the federal conscience protections provided baseline protection for abortions, states were free to—and ultimately did—implement increased restrictions to abortion access.[135] Forty-six states, including North Carolina, currently permit various health care providers to refuse to provide abortion services.[136] Since the introduction of conscience clauses in the early 1970s, it seems as if state and federal governments are still trying to find a perfect balance between providers' moral and religious objections and patients' access to abortions.

III. NORTH CAROLINA CONSCIENCE PROTECTIONS

Conscience clauses force society to favor one constitutional right over another. As the role of religion in health care rises, society is seeing an increase in the number of conscience clauses.[137] Rather than limiting these clauses to religious objections, some states, such as North Carolina, are including exceptions for moral or ethical objections as well.[138] While moral and ethical objections may create more undefined opportunities for a health care provider to base an objection upon, this Note will primarily focus on religious objections.

Conscience clauses pressure patients and health care providers to decide whether the right to religious freedom or the qualified right to an abortion is more important; this pits both parties against each other. They also frustrate the relationship between personal beliefs and professional responsibilities. Patients do not have a unilateral right to demand services from a provider.[139] However, professional obligations seem to require medical professionals to participate in the services leading to an abortion, as well as the abortion procedure itself.[140] Conscience clauses are essentially a mechanism for health

133. New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 580 (S.D.N.Y. 2019).

134. *See* Akpan et al., *supra* note 13.

135. *Id.*

136. *Refusing to Provide Health Services*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services (last visited July 31, 2020).

137. Maxine M. Harrington, *The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs*, 34 FLA. ST. U. L. REV. 779, 780–81 (2007).

138. *Id.* at 781.

139. *Id.* at 782.

140. *Cf. id.* at 802–03 (identifying statutory and regulatory schemes which may impose duty to provide care on some physicians); *see also Physician Exercise of Conscience: Code of Medical Ethics Opinion 1.1.7*, AM. MED. ASS'N, https://www.ama-assn.org/delivering-care/ethics/physician-exercise-conscience

care professionals and entities to circumvent one right by claiming the usage of another. Herein lies the problem. The Clause is no exception. In fact, the Clause is incredibly barren, which leaves much open to interpretation. Because the current language of the Clause is so open to interpretation, it may allow for a varied application of the law. More specifically, women, depending on location, may have unequal or discriminatory access to abortion care.[141]

In North Carolina, abortion is defined as "[t]he use or prescription of any instrument, medicine, drug, or other substance or device intentionally to terminate the pregnancy of a woman known to be pregnant . . . ."[142] Under North Carolina General Statutes subsection 14-45.1(e), physicians, nurses, and "any other health care provider" may refuse to perform an abortion, or participate in procedures that result in an abortion, if they object on "moral, ethical, or religious grounds."[143] Subsection 14-45.1(f) further states that no language within the statute "shall require a hospital, other health care institution, or other health care provider to perform an abortion or provide abortion services."[144]

There are few published abortion cases in North Carolina. However, in *Bryant v. Woodall*,[145] the Middle District of North Carolina found subsection 14-45.1(a) unconstitutional and enjoined its enforcement.[146] Prior to litigation, the statute criminalized abortions after twenty weeks.[147] The opinion also halted a pending amendment to the statute which would ban abortions after thirteen weeks.[148] Absent further case law, *Bryant* and subsection 14-45.1(a) provide perspective as to the current abortion ideologies within North Carolina's judiciary and legislature.

(last visited July 31, 2020) ("Physicians are expected to provide care in emergencies, honor patients' informed decisions to refuse life-sustaining treatment, . . . and not discriminate against individuals . . . .").

141. For instance, varying interpretations by states of the undue burden test from *Casey* may lead to unequal access to abortion. Howard, *supra* note 87, at 1501–03.

142. N.C. GEN. STAT. § 90-21.81 (2020).

143. *Id.* § 14-45.1(e). Until 2013, the subsection only included physicians and nurses. 2013 N.C. Sess. Laws 366.

144. § 14-45.1(f).

145. 363 F. Supp. 3d 611 (M.D.N.C. 2019).

146. *Id.* at 632. This section of the statute enumerated when an abortion is unlawful in North Carolina. *Id.* at 615. The statute was enjoined "only to the extent that [it] prohibit[ted] any pre-viability abortions." *Id.* at 632.

147. *Id.* at 615.

148. Matthew S. Schwartz, *Federal Judge Blocks North Carolina Ban on Abortions Later Than 20 Weeks*, NPR (Mar. 27, 2019, 6:51 AM), https://www.npr.org/2019/03/27/707073400/federal-judge-blocks-north-carolina-abortion-ban-after-20-weeks.

A. North Carolina's Ambiguous Conscience Clause

As currently written, the Clause leaves patients and health care providers questioning the extent of their rights. The late Justice Antonin Scalia once noted that statutory construction is a "holistic" process that includes attention to and analysis of other sections of a statute.[149] With only one definition (health care providers),[150] subsection 14-45.1(e) invites an interpretation of its language that may allow health care providers to arbitrarily refuse services and unfairly impose personal bias guised as religious objection.

Under subsection 14-45.1(e), physicians, nurses, and "any other health care provider[s]" are able to refuse to participate in an abortion procedure.[151] In defining "any other health care provider," this statute incorporates the definition set forth in subsection 90-410(1).[152] Under subsection 90-410(1), health care providers are people licensed and certified to practice a "health profession or occupation," a health care facility licensed under the state, and representatives or agents of health care providers.[153]

If a "representative or agent" can refuse to participate in actual abortion procedures, as well as any medical procedures that result in an abortion, this presents a serious threat to scheduling and accommodations. If a receptionist is classified as a representative, for example, he or she would possess the ability to refuse to schedule an abortion procedure or field an emergency abortion patient. Extending this protection to nurses presents a more harrowing problem, however. Unlike a receptionist or ancillary employee, nurses are often physically present in the procedure room.[154] Moreover, nurses play a unique role in abortion procedures, often acting as a comforting figure for mothers and a second hand for physicians.[155]

While doctors and other health care professionals are entitled to religious freedom, they must also consider their various professional standards and obligations.[156] Not only can a nurse's refusal to participate in a procedure create an unnecessary burden on the patient, but it is likely contrary to the American Nurses Association Code of Ethics ("Code").[157] Under the Code, nurses agree to practice

149. LARRY M. EIG, CONG. RES. SERV., RL 7-5700, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2014).

150. N.C. GEN. STAT. § 14-45.1(e) (2020).

151. *Id.*

152. *Id.*

153. *Id.* § 90-410(1).

154. Ann Litts, *A Day in the Life of an Abortion Nurse*, MEDIUM (July 5, 2019), https://medium.com/fearless-she-wrote/a-day-in-the-life-of-an-abortion-nurse-7255dbc55a65.

155. *See id.*

156. *See* Akpan et al., *supra* note 13.

157. Amy Levi, *Where are the Nurses in Abortion Care?*, INNOVATING EDUC., https://www.innovating-education.org/2014/07/where-are-the-nurses-in-abortion-care/ (last visited July 31, 2020).

with "compassion and respect" regardless of "the nature of the health problems."[158] While a nurse's refusal to treat a patient is not a per se violation of the Code, the Code highlights that under their "social contract," nurses are encouraged not to accept positions that may conflict with their religious beliefs.[159] Further, the Code requires that nurses inform their employer of any potential conflicts as soon as possible.[160] Mirroring the Code in an effort to mitigate potential hardship, the Clause could require the timely notification of any religious beliefs which may inhibit a nurse from participating in an abortion procedure.

The American Medical Association ("AMA") addressed this professional strain in a letter to the Secretary of HHS. Specifically, the AMA noted that physicians should not "discriminate against individuals in deciding whether to enter into a professional relationship."[161] Further, the AMA Code of Medical Ethics directs physicians to "take care that their actions do not . . . unduly burden . . . patients" and to "inform the patient about all relevant options for treatment."[162] In its letter, the AMA highlighted the fine line between recognizing a legitimate religious objection to a procedure and creating an undue burden on a patient.[163]

Further, the AMA expressed concern over the ambiguous and confusing language within the Trump administration's proposed federal conscience rule.[164] One of the areas discussed was the rule's definition of "assist in the performance" of abortions.[165] In its 2019 opinion, the Southern District of New York chastised this language, finding that it allowed refusals for assisting in "activities ancillary to a covered procedure."[166] The rule defined "assisting" to include, but not be limited to, "counseling, referral, training, or otherwise making arrangements."[167] The Clause includes similar language, as it allows objections for "participat[ing] in medical procedures" resulting in abortions.[168] This furthers the notion that the Clause is unconstitutionally vague.

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158. *Id.*

159. Patricia McMullen & Nayna Philipsen, *Do Conscience Clauses Violate Patients' Rights?*, 14 J. FOR NURSE PRAC. 448, 448–49 (2018).

160. *Id.*

161. Danielle H. Chaet, *The MA* Code of Medical Ethics' *Opinions Related to Discrimination and Disparities in Health Care*, 18 AM. MED. ASS'N J. ETHICS 1095, 1096 (2016).

162. *Physician Exercise of Conscience: Code of Medical Ethics Opinion 1.1.7*, *supra* note 140.

163. Letter from James L. Madara, *supra* note 108, at 2–4.

164. *Id.*

165. *Id.*

166. New York v. U.S. Dep't of Health & Human Servs., 414 F. Supp. 3d 475, 525 (S.D.N.Y. 2019).

167. *Id.* at 524.

168. N.C. GEN. STAT. § 14-45.1(e) (2020).

The North Carolina legislature can cure the constitutionally problematic language by clarifying that "participation" within subsection 14-45.1(e) is limited to physical participation in the exam room. As written, participation could extend to tasks like scheduling an abortion or medical procedures that could result in one, such as a pregnancy test. While the Clause does not include an enumerated list of activities like the federal rule,[169] including the exact procedures that health care professionals may opt out of will reduce uncertainty. One of the problems with the Trump administration's rule was its blind application to seemingly all aspects of the patient experience. For example, the court in *New York v. United States Department of Health and Human Services*[170] found that the rule as written could allow a refusal by anyone from the secretary responsible for scheduling an abortion procedure to the ambulance driver or elevator operator who transports the patient.[171] North Carolina's silence presents a similar issue: the lack of clarity in subsection 14-45.1(e) creates overbreadth and confusion surrounding the parties' rights. Further, with no provision to account for potential emergencies, the statute places a serious risk on the mother's health.[172]

Adding definitions may open the door to more problems, as it did with the Trump administration's rule. However, with the recent opinion regarding the Trump administration's proposed rule,[173] there is now case law directly discussing this over-broad language—specifically, that the proposed federal rule "is broader than allowed by existing law."[174] When revising the statute, the North Carolina legislature could look to the most recent federal conscience rule case as a guide for which language to avoid.[175]

Aside from the suspect constitutionality of conscience clauses, these clauses have a more practical side effect as well. Under Title VII, employers need only accommodate an employee's religious beliefs so long as they do not place an "undue hardship" on the employer's business.[176] Depending on the employee, it could be argued that a refusal to participate in abortion services frustrates the purpose of the employer's business as a health care provider. Most generally, health care providers exist to provide services to patients. If a health

169. *Compare id.* § 14-45.1, *with* 45 C.F.R. § 88.3 (2019).
170. 414 F. Supp. 3d 475 (S.D.N.Y. 2019).
171. *Id.* at 515.
172. Sarah Friedmann, *What a Medical Emergency for an Abortion Actually Means, According to OB/GYNs*, BUSTLE (June 6, 2019), https://www.bustle.com/p/what-a-medical-emergency-for-abortion-actually-means-according-to-obgyns-17929296.
173. New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d at 514–15.
174. Letter from James L. Madara, *supra* note 108.
175. See *New York v. Department of Health & Human Services*, 414 F. Supp. 3d at 524–25 for examples of language that should be avoided.
176. 42 U.S.C. § 2000e(j) (1964).

care entity has various professionals who invoke their conscience protections, that entity may have increasingly fewer mediums through which to provide care. While this may seem extreme, in areas where the only abortion clinic for miles houses a limited number of employees, the refusal of merely one employee has the potential to create significant scheduling and accommodation hardship. As such, this may affect the business's ability to carry on its mission of providing care to the public. Consequently, these refusals subject employers to various ethical challenges, as well as the costs of hiring new employees and a potential loss in profits should a patient who was refused service deter others from patronage.

B. North Carolina's Conscience Clause May Create a De Facto Abortion Ban

Legislation is unconstitutional when it creates a substantial obstacle on a mother's access to an abortion prior to viability.[177] While *Casey* is silent on conscience objections, conscience clauses like North Carolina's have the opportunity to create a substantial obstacle for a mother and should therefore be evaluated under *Casey*. Subsections 14-45.1(e) and 14-45.1(f) (and conscience objections generally) are not framed with the mother in mind; rather, they attempt to provide protections to those on the other side of the operating table. However, in doing so, these clauses effectively eliminate the ability of the mother to choose to have her abortion. While a refusal may not constitute an explicit denial of the patient's right to an abortion, as the patient could theoretically travel elsewhere, the practicality of the situation may effectuate an implicit denial.[178] Barriers to access such as the number of abortion clinics within a state, lack of child care, travel time, and excessive waiting periods aid in creating an undue burden on the mother should a health care provider refuse to provide an abortion or participate in services that result in an abortion.

First, the Clause does not limit the right of refusal to a particular trimester.[179] As such, it may be interpreted to allow health care providers and entities to refuse to participate in abortions seemingly until birth. Additionally, a health care provider's refusal to participate in abortion services under subsections 14-45.1(e) and 14-45.1(f) may make it extraordinarily difficult to find someone willing to perform the procedure. For example, if a health care professional covered under a person's insurance plan voices an objection, the client will have to find another doctor. This could take time, and it assumes that there is another doctor nearby. This presents a difficult situation for women covered under Medicaid, in addition to the restrictions

177. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

178. *See* Cameron Flynn & Robin Fretwell Wilson, *Institutional Conscience and Access to Services: Can We Have Both*, 15 AM. MED. ASS'N. J. ETHICS 226, 228 (2013).

179. *See* N.C. GEN. STAT. § 14-45.1 (2020).

they endure already under the Amendments. The Hyde Amendment, for example, restricts abortion coverage under Medicaid even when the mother's health is at risk.[180] By limiting abortion coverage to three narrow exceptions,[181] it forces low-income women to choose between using their already limited funds to pay for basic necessities or adequate abortion care.

Moreover, the Clause minimizes patient access by indemnifying hospitals and other health care entities.[182] Health care institutions have power over a large portion of the health care market.[183] If a hospital, as opposed to an individual provider, unilaterally decides to stop performing abortions, it could "significantly" affect access for women.[184] More specifically, it assumes women have a readily available alternative provider who accepts insurance (if the woman even has insurance) and is currently taking patients.

Because subsections 14-45.1(e) and 14-45.1(f) are not limited to private institutions, they allow for entities who receive state funds to engage in religious refusals. In fact, subsection 14-45.1(a) explicitly mentions that any provider under this section must be certified by the North Carolina Department of Health and Human Services.[185] In *Shelley v. Kraemer*,[186] the Supreme Court held that states may violate the Fourteenth Amendment when the judiciary enforces a discriminatory private action.[187] As it applies to conscience clauses, the New Jersey Supreme Court briefly discussed this issue in *Doe v. Bridgeton Hospital Association*.[188] The court held that allowing "non-sectarian non-profit hospital[s]" to refuse to allow abortions "clearly constitute[s] state action."[189]

Allowing non-secular, non-profit hospitals to refuse to perform abortions before viability is a violation of *Casey* and *Shelley*. The Clause, as written, may therefore violate *Shelley*. The legislature must ensure that by enacting the Clause, it is not frustrating *Shelley*'s legal precedent. In doing so, the legislature would also better protect itself from potential Establishment Clause violations.[190] More

180. *Hyde Amendment*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment (last visited July 31, 2020).

181. *Id.*

182. § 14-45.1(e).

183. Flynn & Wilson, *supra* note 178, at 228.

184. *Id.*

185. § 14-45.1(a).

186. 334 U.S. 1 (1948).

187. *Id.* at 20–21.

188. 366 A.2d 641 (N.J. 1976). This seems to be one of the only state cases addressing conscience clause language as it pertains to state action.

189. *Id.* at 647.

190. Although there have been arguments that conscience clauses violate the Establishment Clause, because North Carolina's conscience clause applies to moral, ethical, and religious objections, a facial argument in this case is likely not fruitful under *United States v. Salerno*, 481 U.S. 739, 745 (1987). The court in

specifically, should a health care provider receive state funds while also employing these religious protections, it may be argued that this is in furtherance of a religious motivation and thus violative of the US Constitution.[191]

Finally, the Clause seemingly has a disproportionate effect on people from rural areas, as well as those requiring financial assistance.[192] In 2017, there were only fourteen abortion clinics in North Carolina.[193] Further, 53 percent of women in North Carolina between the ages of fifteen and forty-four lived in counties without a clinic.[194] Because 91 percent of the one hundred North Carolina counties lack an abortion clinic,[195] those fourteen clinics are spread across nine counties. In the states touching North Carolina, lack of access ranges from 55–80 percent.[196] Even with fourteen abortion clinics, North Carolina still has more than some of its neighbors.[197]

New York v. United States Department of Health and Human Services dispelled this argument for the same reason. 414 F. Supp. 3d 475, 573–74 (S.D.N.Y. 2019). However, it did not close the door completely. *See id.* at 573 (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334–35 (1987)) ("At some point, accommodation may devolve into an unlawful fostering of religion, in violation of the Establishment Clause."); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 771 (2014) (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)) ("[A]pproving some religious claims while deeming others unworthy of accommodation could be 'perceived as favoring one religion over another,' the very 'risk the Establishment Clause was designed to preclude.'").

191. *See* U.S. CONST. amend. I.

192. *See* Christian Fiala & Joyce H. Arthur, *"Dishonourable Disobedience"—Why Refusal to Treat in Reproductive Healthcare is not Conscientious Objection*, 1 WOMAN PSYCHOSOMATIC GYNAECOLOGY OBSTETRICS 12, 13, 16 (2014).

193. *Data Center*, GUTTMACHER INST., https://data.guttmacher.org/states/table?state=NC&topics=57+58+59&dataset=data (last updated July 1, 2017).

194. *Id.*

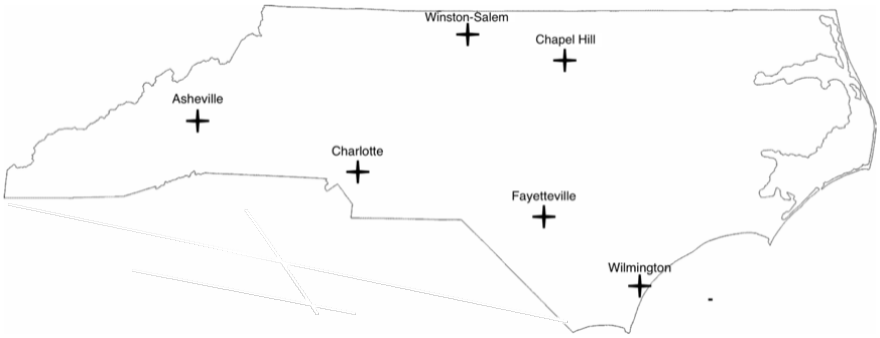
195. *Id.*

196. *Id.*

197. *State Facts About Abortion: South Carolina*, GUTTMACHER INST., https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-south-carolina (last updated Mar. 1, 2020) ("There were 10 facilities providing abortion in South Carolina in 2017, and 4 of those were clinics."); *State Facts About Abortion: Tennessee*, GUTTMACHER INST., https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-tennessee (last updated Mar. 1, 2020) ("There were 12 facilities providing abortion in Tennessee in 2017, and 8 of those were clinics."). *But see State Facts About Abortion: Georgia*, GUTTMACHER INST., https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-georgia (last updated Mar. 1, 2020) ("There were 26 facilities providing abortion in Georgia in 2017, and 15 of those were clinics."); *State Facts About Abortion: Virginia*, GUTTMACHER INST., https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-virginia (last updated Mar. 1, 2020) ("There were 32 facilities providing abortion in Virginia in 2017, and 16 of those were clinics.").

However, six of these clinics are run by Planned Parenthood,[198] which has been victim to various attempts to defund its services.[199]

FIGURE 1: MAP OF PLANNED PARENTHOOD CLINICS IN NORTH CAROLINA THAT PERFORM ABORTION SERVICES[200]



The Clause on its own does not rise to the level of a de facto ban on abortion, but its enforcement in conjunction with other North Carolina abortion laws likely has an undue burden on women seeking an abortion. The Supreme Court took a similar approach in *Russo*. There, the Court drew a map showing the limited number of abortion clinics in Louisiana should its restrictive abortion statute be upheld.[201] This indicates that the Clause would not survive a constitutional challenge because, like Louisiana, North Carolina imposes other restrictions to abortion access beyond the Clause.

In North Carolina, women are required to wait seventy-two hours following a state-directed counseling appointment before they can elect to have an abortion.[202] This is forty-eight hours longer than the obstacle in *Casey*. Additionally, North Carolina restricts the usage of funds for abortion and the support of government-offered insurance policies for abortions.[203] Similar to the Amendments, North Carolina restricts the usage of state funds for abortions unless the mother's life

198. Search: Planned Parenthood Clinics Providing Abortions in North Carolina, PLANNED PARENTHOOD, https://www.plannedparenthood.org/health-center?location=nc&limit=32&service=abortion (last visited July 31, 2020).

199. Sarah McCammon, *Planned Parenthood Withdraws from Title X Program over Trump Abortion Rule*, NPR (Aug. 19, 2019, 2:55 PM), https://www.npr.org/2019/08/19/752438119/planned-parenthood-out-of-title-x-over-trump-rule.

200. Planned Parenthood's Abortion Care Finder ("Finder") lists Abortion Care Centers based on three inputs: age, zip code, and start date of one's last period. *Abortion Clinics Near You*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/abortion-access?age=23&noDate= True&zip =27106 (last visited July 31, 2020). Figure 1 is a replica of the Finder's results based on the following inputs: 23 years old, 27106, and "I'm not sure."

201. June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2129 (2020).

202. N.C. GEN. STAT. § 90-21.82 (2020).

203. *Id.* § 143C-6-5.5.

would be endangered or the pregnancy is the result of a rape or incest.[204] There is also an annual $700 certification fee for abortion certified clinics and hospitals.[205] This is on top of the $750 initial licensing fee.[206]

Further, abortions can range from $500–$2,000, depending on when they are performed.[207] Not only do women in rural areas have to travel long distances to have an abortion,[208] but waiting periods, childcare, time off work, and the potential for a health care provider to reject services also burden their choice.[209] Not only is abortion in North Carolina expensive, but it is also becoming increasingly difficult to obtain. With seemingly sparse access to clinics in the first place, the Clause on its face exacerbates the already existing burdens.

IV. FINDING COMPROMISE

The right to freedom of religion allows conscience clauses to persist; however, they need to adequately balance a health care provider's right of refusal with a patient's right to an abortion. Since the Clause does not currently weigh these rights appropriately, the North Carolina legislature must amend this statute to remedy its constitutional deficiencies that unduly burden a woman's right to choose. There are three potential methods the legislature may utilize to narrow the scope of subsections 14-45.1(e) and 14-45.1(f).

First, North Carolina may utilize some of the limiting language it uses in other health care statutes. For example, subsection 58-3-178(e), North Carolina's statute on contraceptive prescription coverage, creates an exception for religious institutions.[210] To fall under this exception, a religious employer must (1) organize and operate for religious purposes and be tax exempt under 501(c)(3) of the US Internal Revenue Code; (2) primarily function to inculcate religious values; and (3) primarily employ people with the same religious tenets.[211] Under subsection 58-3-178(e), when a religious employer requests for contraceptives to be excluded from its health insurance plan, its insurance provider must provide notice to anyone

204. *Id.*
205. *Id.* § 131E-269.
206. *Id.* § 131E-272.
207. *Rural Women & Abortion Access*, NAT'L ORG. FOR WOMEN 2, https://now.org/wp-content/uploads/2018/02/Learn-More-Rural-Women-and-Abortion-3.pdf (last visited July 31, 2020).
208. *Id.*
209. *See* Jessica E. Morse et al., *The Impact of a 72-Hour Waiting Period on Women's Access to Abortion Care at a Hospital-Based Clinic in North Carolina,* 79 N.C. MED. J. 205, 205 (2018) ("In our clinical setting, most women decided to have an abortion quickly but still waited 10–15 days before receiving care. Extended waiting periods provide no medical benefits and the potential for harm and delay of care remains."); *see also* Bui et al., *supra* note 10.
210. § 58-3-178(e).
211. *Id.*

covered under the plan.[212] Charitable hospital organizations are included under 501(c)(3) exemptions.[213]

North Carolina should limit the Clause's scope to religious institutions.[214] A statute which incorporates language such as that in subsection 58-3-178(e) would allow a health care provider to freely express an objection without enjoining women from their medical services in the process. Further, in restricting these conscience protections to religious institutions, those who need an abortion would have prior notice as to where they may be denied services. This would help address any potential logistical issues one may have in preparing for an appointment. Specifically, if a patient is given adequate notice that an entity may not partake in certain abortion services, the patient can plan to go elsewhere.

Second, the Clause should require health care providers to give more explicit notice to potential patients. For example, in Rhode Island, a refusing party is required to state its objection in writing.[215] The statute does not state when providers must give their written statement;[216] however, notice would be best upon accepting the position. Regardless, requiring the health care provider to state an objection prior to the procedure will help provide notice to potential clients. For example, if a patient chooses to have an abortion by vacuum, which is common for women more than seven weeks pregnant, she may need the assistance of an anesthesiologist.[217] However, some practices only have one anesthesiologist in the office.[218] This may affect the patient's ability to have the procedure should the anesthesiologist object the day of the appointment.

Religious objections may also have implications for the other staff in an office, who may need to assume the objector's role. While there is always a possibility that an emergency abortion may arise, if health care providers are required to state objections upon hiring, it would remove the potential for last minute refusals that burden women by disregarding the difficulties they may have had in accessing that abortion appointment.

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212. *Id.*

213. *Charitable Hospitals - General Requirements for Tax-Exemption Under Section 501(c)(3)*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/charitable-hospitals-general-requirements-for-tax-exemption-under-section-501c3 (last updated Sept. 20, 2019).

214. Currently, there is at least one other state that implemented similar language. *See Refusing to Provide Health Services*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services (last updated July 1, 2020).

215. R.I. GEN. LAWS § 23-17-11 (2020).

216. *Id.*

217. *Abortion FAQ - Abortion Procedures*, ALEXANDRIA WOMEN'S HEALTH CLINIC, https://www.alexandriawomensclinic.com/services/abortion/faq/abortion-procedures.html (last visited July 31, 2020).

218. *See, e.g.*, *id.*

Third, a mandatory referral clause, or similar accommodation language, would augment accessibility limitations. As written, the Clause grants health care providers their right of refusal but does not include a requirement to ease the potential burden on their clients. Practically, a potential patient may drive hours to a practice or hospital to begin the abortion process only to be denied services without any referral to a practice that can actually provide these services.[219] Although the provider may also have a potential religious objection to providing a referral itself,[220] this concern may be alleviated if the provider is only required to refer the patient to general OB-GYN practices, rather than an abortion clinic.

Regardless, without a referral provision in the Clause, clients are left to fend for themselves after a refusal. For example, if a patient had been seeing her OB-GYN for contraceptive or other gynecological needs for years prior to the procedure, she may not have any other established physician relationships in the area, forcing her to seek out another practice. On average, the abortion process takes about a week to complete.[221] Low income patients usually wait two-to-three days longer.[222] In North Carolina, the process lasts at least three days longer due to the state-mandated waiting period.[223] Further, this waiting period is compounded with the looming clock on an abortion procedure; after a refusal, a woman is forced to find and wait for another abortion appointment. If a woman seeks to terminate her pregnancy with medication, she must do so within seventy days of the start of her pregnancy.[224] This method is also far more affordable than second and third trimester procedures.[225] Additionally, patients (especially those uninsured or covered under Medicaid) may have to save money to afford the procedure itself, which may take some time as well.[226] North Carolina's abortion process is already convoluted, and the Clause makes the process even more burdensome.

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219. Amy Littlefield, *'Not Dead Enough': Public Hospitals Deny Life-Saving Abortion Care to People in Need*, REWIRE (Mar. 7, 2019, 7:55 AM), https://rewire.news/article/2019/03/07/not-dead-enough-public-hospitals-deny-life-saving-abortion-care-to-people-in-need/ ("[T]he woman was so sick she couldn't walk . . . [b]ut the hospital's leadership denied her the abortion she needed. . . . Another doctor had recommended the woman [in another case] have her abortion in a hospital, but she said two hospitals—one . . . public . . . the other a faith-based nonprofit—refused to do the procedure.").

220. Judy Stone, *Refusal (Conscience) Clauses - A Physician's Perspective,* FORBES (Jan. 22, 2018, 7:00 AM), https://www.forbes.com/sites/judystone/2018/01/22/refusal-conscience-clauses-a-physicians-perspective/#666b153f4181.

221. Rachel K. Jones & Jenna Jerman, *Time to Appointment and Delays in Accessing Care Among U.S. Abortion Patients*, GUTTMACHER INST. (Aug. 2016), https://www.guttmacher.org/report/delays-in-accessing-care-among-us-abortion-patients.

222. *Id.*

223. N.C. GEN. STAT. § 90-21.82 (2020).

224. Jones & Jerman, *supra* note 221.

225. *Id.*

226. *Id.*

V. CONCLUSION

The Constitution requires that women have a right to an abortion that may not be limited by a physician, nurse, hospital, or any other health care provider who enjoys its right to religious freedom,[227] and vice versa.[228] As currently written, the Clause is ambiguous and overbroad. It is an attempt by the state to further limit the right to access abortion care, including care prior to viability, which is an unconstitutional exercise of authority and a violation of *Casey*. In practice, it also has the potential to disproportionately affect lower-income and rural populations.

As health care providers continue to exercise their right to refuse, patients continue to need services. To effectively balance these two rights, conscience clauses will likely continue. However, conscience clauses like North Carolina's must afford patients the same liberties as it does health care providers. While a complete ban of conscience clauses may be preferable for patient access, it is not legal nor just. The current language of the Clause, however, creates an undue burden on women seeking an abortion. The North Carolina legislature should modify subsections 14-45.1(e) and 14-45.1(f) to remove their ambiguous, overbroad language and potentially unconstitutional effect they have on women. The aforementioned recommendations will likely help alleviate the burden this statute places on a woman's right to an abortion, while also balancing the genuine religious objections of health care providers.

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227. *See* Roe v. Wade, 410 U.S. 113, 153–54 (1973).

228. *See* U.S. CONST. amend. I.

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