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## Freedom at Risk: The Implications of City of Boerne v. Flores on the Merger of Catholic and Non-Catholic Hospitals

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## NOTES AND COMMENTS

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### **FREEDOM AT RISK: THE IMPLICATIONS OF *CITY OF BOERNE V. FLORES* ON THE MERGER OF CATHOLIC AND NON-CATHOLIC HOSPITALS**

In recent years the health care industry in the United State has witnessed a significant increase in the number of non-profit, Catholic hospitals merging with for-profit, non-Catholic hospitals or health care systems.<sup>1</sup> Catholic hospitals are integral health care providers, comprising the largest portion of private sector health care in the United States.<sup>2</sup> In many areas, Catholic hospitals remain the largest providers of available health services.<sup>3</sup> However, the number of Catholic hospitals merging with non-Catholic facilities has dramatically increased in recent years.<sup>4</sup>

In 1993, Congress enacted the Religious Freedom Restoration Act (“RFRA”)<sup>5</sup> to protect individual religious freedom.<sup>6</sup> In June of 1997, the Supreme Court invalidated the Act in *City of Boerne v. Flores*.<sup>7</sup> The Court’s decision may have vast implications for employees and patients affected by the Catholic health-care network in the United States.

This Comment traces the history of RFRA from its roots in *Employment Division v. Smith* through the Supreme Court’s decision in *Boerne*. This comment will also explore the current status of the Free Exercise Clause in light of *Boerne*. Only with such a background can there be a full examination

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1. Janet Gallagher, Religious Freedom, Reproductive Health Care, and Hospital Mergers, 52 JAMWA 65 (1997).

2. Jane Hochberg, The Sacred Heart Story: Hospital Mergers and Their Effects on Reproductive Rights, 75 OR. L. REV. 945, 949 (1996).

3. *Id.*

4. *Id.* at 949. In 1994, there were over one hundred mergers, affiliations, and joint ventures between Catholic and non-Catholic hospitals, managed care organizations, and other providers. *Id.*

5. 42 U.S.C. § 2000bb.

6. *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997).

7. *Id.* at 2158.

of the negative impact that Catholic hospital mergers have on accessibility of reproductive and community health care in the United States.

### I. THE MERGER OF CATHOLIC AND NON-CATHOLIC HOSPITALS

The Catholic health care network is the largest provider of health services in the United States. Catholic hospitals treat over fifty million patients annually, comprising sixteen percent of hospital services nationwide.<sup>8</sup> According to Catholics For Free Choice, in 1990, Catholic hospitals generated 1.6 billion in net income and managed \$38 billion in assets.<sup>9</sup> In addition, the Catholic health care system includes about 542 hospitals and provides about fifteen percent of all health care.<sup>10</sup>

Both Catholic and non-Catholic hospitals around the country are merging or forming integrated delivery systems (“IDS”) with other hospitals and health care providers.<sup>11</sup> Providers argue that the mergers are “a necessary trend in the era of rising health care costs and emphasis on economic reform.”<sup>12</sup> Hospitals facing economic pressures hope to merge in order to minimize costs and often times just to remain open.<sup>13</sup> This trend began in the 1980s and has continued in full force into the 1990s, spurred in part by President William Clinton’s drive for health care reform and the likely economic ramifications of it.<sup>14</sup> In addition, many Catholic and non-Catholic hospitals merge in order to be more competitive in the quest to obtain managed care contracts.<sup>15</sup> Many non-sectarian hospitals find the need to merge with Catholic hospitals in order to obtain economic security.<sup>16</sup>

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8. *Merge with Care* (last modified 1996) <<http://www.rcrc.org/pubs/speakout/merg.html>> [hereinafter *Merge*].

9. Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 MERCER L. REV. 1087, 1092 (1995).

10. Karen Brandon, *Catholic Hospitals Pacts Cut Birth Control Services*, CHI. TRIB., Jul. 12, 1998, at A20.

11. Hochberg, *supra* note 2, at 949. A 1994 survey of 1,143 hospitals and 41 health systems revealed that 24 percent already belonged to an integrated delivery system while 71 percent said that they already belonged to or are developing an IDS. Frank Cerne, *The Fading Stand-Alone Hosp.*, HOSP. & HEALTH NETWORKS, June 20, 1994, at 28-29. According to Modern Healthcare magazine, in 1997, 627 hospitals were merged with or acquired, an eighteen percent drop from the 768 mergers and acquisitions in 1996. *Hospital Consolidation Slows, Paced by Columbia/HCA* (visited October, 1997) <<http://www.modernhealthcare.com>>.

12. Hochberg, *supra* note 2, at 949, citing Shari Roan, *When the Church and Medicine Clash More Hospitals are Merging with Catholic Facilities to Survive*, L.A. TIMES, Feb. 2, 1995, at A1.

13. Brandon, *supra* note 10.

14. Ikemoto, *supra* note 9, at 1093.

15. Gallagher, *supra* note 1, at 65.

16. “Nationwide, hundreds of hospitals, faced with intense pressure to lower costs and a reduced need for inpatient beds, are affiliating to remain financially solvent.” Henry L. Davis, *Falls, Batavia Mergers Take Toll on Reproductive Services*, BUFF. NEWS, Jan. 16, 1998, at 1A.

Catholic hospitals have been willing participants in this “merger mania.”<sup>17</sup> From 1990 to 1997, approximately 84 partnerships were formed between Catholic and non-Catholic medical institutions.<sup>18</sup> In 1996 alone, Catholic hospitals were involved in twenty-nine such reorganizations.<sup>19</sup> Further evidencing this merger trend, the 1994 National Conference of Catholic Bishops revised the *Ethical and Religious Directives for Catholic Health Care Services* (“*Directives*”) to include a section on “Forming New Partnerships with Health Care Organizations and Providers.”<sup>20</sup> This section gives hospitals and providers assistance in organizing Catholic and non-Catholic collaborations.<sup>21</sup>

A. *The Ethical and Religious Directives for Catholic Health Care Services*

Catholic hospitals operate under the *Directives* published by the National Conference of Catholic Bishops (“NCCB”).<sup>22</sup> The *Directives* consist of a set of principles drawn from a “faith-inspired vision of the human person” that are applied on a case-by-case basis.<sup>23</sup> The purpose of the *Directives* as stated in the Preamble is twofold: first, to reaffirm the ethical standards of behavior in healthcare that flow from the Church’s teaching about the dignity of a human person; second, to provide authoritative guidance on certain moral issues that face Catholic healthcare today.<sup>24</sup>

Catholic leaders initially created the ethical norms for Catholic healthcare facilities in the 1940s and 1950s.<sup>25</sup> However, these ethical norms were unauthorized and had no canonical force until they were approved by a bishop for his diocese.<sup>26</sup> Therefore, they were not consistently followed and “geographic morality” resulted.<sup>27</sup> In 1971, a new set of *Directives* was

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17. Brandon, *supra* note 10.

18. *Id.*

19. Michael Casey, *NY Catholic Healthcare Providers Expected to Unite*, MED. INDUSTRY TODAY, Jan. 15, 1998.

20. National Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, (last modified November 1994), <<http://www.usc.edu/hsc/info/newman/resources>>[hereinafter *Directives*]. See also Ikemoto, *supra* note 9, at 1093.

21. *Id.*

22. *Directives*, *supra* note 20.

23. Sr. Jean Deblois & Rev. Kevin D. O’Rourke, *Introducing the Revised Directives: What Do They Mean for Catholic Healthcare?*, HEALTH PROGRESS, Apr. 1995, at 18.

24. *Id.*

25. *Id.* at 19.

26. *Id.*

27. Deblois & O’Rourke, *supra* note 23, at 19. “Geographic morality” meant that each diocese would interpret and apply the *Directives* differently. This caused dissonance since what was prohibited in one diocese often would be authorized in another. *Id.*

approved by the NCCB with minor corrections made in 1975.<sup>28</sup> In 1988, a subcommittee of the Committee on Doctrine of the NCCB coordinated with several agencies to revise the *Directives* in light of new medicinal technology and various social and legal changes in the United States.<sup>29</sup> In 1994, the revised and now official *Directives* were presented.<sup>30</sup> The *Directives* became a binding force when the NCCB approved them and local bishops promulgated them.<sup>31</sup> Currently, the *Directives* are the “discipline for all healthcare facilities in the United States that are affiliated with the Catholic Church.”<sup>32</sup>

### *B. The Effect of Mergers Between Catholic and Non-Catholic Hospitals*

When Catholic and non-Catholic hospitals merge, Catholic hospitals often impose religious controls on services.<sup>33</sup> Catholic hospitals have leverage to impose such limitations because of their strong financial position.<sup>34</sup> The non-Catholic hospital often agrees as part of a consolidation agreement to follow Catholic doctrine and to refrain from participating in procedures explicitly prohibited by the Church.<sup>35</sup> As a result, certain community health services are

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28. *Id.* at 20. The 1971 *Directives* did not address the “ethical issue concerning sterilization to avoid the physiological pathologies predictable because of pregnancy.” *Id.* In 1975, the Congregation for the Doctrine of the Faith found that these sterilizations were contraceptive in nature and therefore prohibited by the *Directives*. *Id.* For example, a tubal ligation performed to avoid a disorder that would occur if a woman became pregnant is classified as a physiological pathology predictable because of pregnancy.

29. *Id.* Five agencies gathered to assist the NCCB with this project: CHA, the Pope John XXIII Center, the Center for Health Care Ethics/Saint Louis University Health Sciences Center, the Medical-Moral Board of the Archdiocese of San Francisco, and the Kennedy Institute of Ethics at Georgetown University. Deblouis & O’Rourke, *supra* note 23, at 20.

30. *Id.*

31. *Id.* at 21.

32. *Id.*

33. *Id.*

34. *Merge*, *supra* note 8. Secular hospitals are consistently struggling to lower costs and are facing a reduced need for inpatient beds. Catholic hospitals are strong financially, in part, because they are the largest provider of non-profit health care in the country. Davis, *supra* note 15. In New York, Moody’s Investors Service reported that multistate non-profit health systems had a median budget of approximately \$450 million to spend on acquisitions in 1996. This places non-profits in a position for potential growth. Casey, *supra* note 19. See also Howard J. Anderson, *Catholic Hospitals Join Forces With Non-Catholic Competitors (Developing Stronger Regional Systems of Care)*, HOSP. & HEALTH NETWORKS, October 20, 1990.

35. Casey, *supra* note 19. According to Casey, this has been a deal maker or breaker in several recent cases. In Upstate New York, two secular hospitals (Northern Dutchess Hospital, and Kingston Medical Center) negotiated a merger with a Catholic hospital (Roman Catholic Benedictine Hospital) only after agreeing to abide by the *Directives*; In addition, in another New York merger, a small secular hospital, Genessee Memorial Hospital, and a Catholic hospital, St. Jerome Hospital, agreed to a merger only after promising to build an independent, freestanding health clinic to provide reproductive health services for women. This is not unique to New York; over 100 mergers or affiliations had similar results. See Casey, *supra* note 19. See also John

eliminated which disproportionately affect women.<sup>36</sup> Between 1990-95, 57 mergers and affiliations took place between Catholic and non-Catholic hospitals, “10 resulted in the complete elimination of reproductive health services for women; 12 compromised, allowing the continuation of reproductive services in the non-Catholic hospital; 6 allowed the services to be performed at legally separate clinics.”<sup>37</sup>

The *Directives* set forth direct prohibitions on the distribution of the morning-after pill,<sup>38</sup> the use of assisted contraception methods,<sup>39</sup> and abortion.<sup>40</sup> In addition, the *Directives* also place restrictions on prenatal testing and genetic screening,<sup>41</sup> contraception,<sup>42</sup> and sterilization.<sup>43</sup>

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Morrissey, *Catholics Call It Off: Bishop Scuttles R.I. Merger With Secular Network*, MODERN HEALTHCARE, Dec. 15, 1997, at 6 (discussing how the Roman Catholic Bishop in Providence, Rhode Island called off a proposed merger between Catholic and non-Catholic providers because of a dispute over the Catholic providers adherence to the *Directives* and the refusal to perform abortions, sterilizations and other procedures that violate the *Directives*). In Chicago, Illinois, Westlake Community Hospital and Catholic Resurrection Health Care successfully merged and agreed to eliminate reproductive services. Bruce Japsen, *Health-Care Impasse Resolved; Resurrections Westlake Doctors to Divert Reproductive Procedures*, CHI. TRIB., Aug. 22, 1998 at 1. Also, reproductive services will end at Hoffman Estates Medical Center after Columbia/HCA Healthcare Corp. sells the hospital to Roman Catholic Alexian Brothers Health System of Elk Grove Village. *Id.* Neither Westlake or Hoffman Estates performed abortion procedures, but both hospitals argue that there will not be a problem with this because there are many hospitals in the area that will perform these services. *Id.*

36. Ikemoto, *supra* note 9, at 1088. See also *Hospital Mergers: The Threat to Reproductive Health Services* (last updated June, 1995) <<http://www.aclu.org/library/hospital.html>> (discussing the serious risk to women’s health care because of a declining number of reproductive health care providers).

37. Mark Hayward, *Symptom of Change*, THE UNION LEADER, October 19, 1997, at A1.

38. *Directives*, *supra* note 20. The morning after pill prevents a fertilized egg from implanting in a woman’s uterus and is usually used for women who have been raped. *Directive* 36 permits the use of the morning after pill only if there is no evidence that fertilization has occurred. *Id.* Most Catholic leaders have conceded to the discretion of physicians in determining whether to administer the drug. Michael Hirsley, *Bishop Reignites Ethics Struggle; Catholic Hospital Told to Deny Morning-After Pill to Victims of Rape*, CHI. TRIB., Feb. 25, 1994, at N1. However, at least one Bishop in the Peoria diocese refused to allow the one Catholic hospital in his diocese that administers the drug, St. Francis, to continue. *Id.* Illinois state law requires that the hospital inform rape victims where they can obtain the pill even if the Catholic hospital will not provide it. *Id.* One of the problems, though, is that St. Francis hospital is a designated trauma hospital that treats many rape victims. *Id.*

39. *Directives*, *supra* note 20. Several of the *Directives* disallow the use of assisted conception methods for unmarried persons, the use of donated ova and sperm, surrogacy, and any method that separates marital intercourse from conception. *Id.*

40. *Directive* 45 prohibits abortion services and is vehement about it. *Id.*

41. *Directives* 50 and 52 restrict their use when the information acquired from these services might be used to choose abortion. *Id.*

According to Francis Kissling of Catholics for Free Choice, abortion is not the major issue or deal maker or breaker in mergers, since relatively few hospitals perform abortions anyway. The bigger issue, Kissling says, is the impact of “merger activity” on contraception, sterilization, assisted reproduction and emergency contraception following rape.<sup>44</sup> According to Catholics for Free Choice, of 64 mergers and affiliations of Catholic and non-Catholic hospitals nationwide between 1990-97, 48 percent of mergers have led to the discontinuation of all or some of these services.<sup>45</sup>

A major concern is that many Catholic hospital patients may not be cognizant of the restrictions imposed on the available services.<sup>46</sup> In a national survey of women, Catholics for Free Choice discovered that very few women realize that Catholic facilities are permitted by law and required by Church officials to bar or limit disapproved health services.<sup>47</sup> Only twenty-seven percent of women surveyed were aware that their access to medical procedures would be restricted at a Catholic hospital or through a Catholic-sponsored health plan.<sup>48</sup> Women that did know about the existence of such limitations were unaware of the broad scope of pertinent service restrictions.<sup>49</sup>

Certain groups of women are more affected by these mergers. Mergers between Catholic and non-Catholic hospitals have a disparate impact on women living in rural communities who lack the ability to choose medical providers.<sup>50</sup> When the only two hospitals in an area merge and discontinue church prohibited community health services, rural women may effectively be prevented from obtaining these services.<sup>51</sup> Rural women also tend to be poorer and often lack the insurance flexibility that would allow them to gain access to

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42. *Directive 52* prohibits Catholic hospitals from “condoning contraceptive practices.” This includes prohibiting Catholic hospitals from informing HIV positive patients on how to avoid transmission of the virus. Ikemoto, *supra* note 9, at 1107.

43. The *Directives* ban direct sterilization procedures intended solely to prevent conception. *Id.*

44. Shari Roan, *When the Church and Medicine Clash; More Hospitals Are Merging with Catholic Facilities to Survive. Vital Care is Preserved, but Some Patients Lose Access to Family Planning or Options for the Terminally Ill*, L.A., TIMES, Feb. 2, 1995, at 1.

45. *Hospital Mergers Reducing Availability of Abortions, Group Says*, STAR-TRIBUNE, Apr. 26, 1998, at 05E.

46. Cathy Tokarski, *For Whom the Church Bell Tolls*, HOSPITALS, Oct. 20, 1995, at 41-43.

47. *Id.*

48. *Id.*

49. *Id.*

50. Ikemoto, *supra* note 9, at 1102. Women who live in sparsely populated rural areas often have little choice regarding hospitals and providers. *Id.* Often, a Catholic hospital is their only alternative. *Id.* Across the country, forty-six Catholic hospitals are considered sole providers for hospital services in their regions. *Id.*

51. *Id.*

alternative facilities.<sup>52</sup> A similar burden is placed on poor women living in urban areas.<sup>53</sup> Financial or transportation restrictions may limit a patient to the services of one hospital, which may not provide the necessary community health services that an individual desires.<sup>54</sup>

The issues surrounding access to healthcare are just beginning to be examined by courts and legislatures. In 1994, the Center for Reproductive Law and Policy sued a health care facility on behalf of two women who were denied contraceptives and who received delayed services because of a Catholic hospital's adherence to the *Directives*.<sup>55</sup> The suit involved Leonard Hospital and St. Mary's Hospital who merged to form Seton Health Systems.<sup>56</sup> When the Public Health Council approved the merger, it provided Seton with four alternatives for handling requests for sterilization or contraceptives: (1) offer the services requested; (2) refer patients to a provider offering the service; (3) provide the patient with a list of providers offering the service; or (4) refer the patient to a government agency that would provide a list of providers.<sup>57</sup> The Center for Reproductive Law and Policy alleged that the Public Health Council failed to obtain adequate assurances that patients seeking these services would receive them when they approved the merger.<sup>58</sup> The suit was resolved under the terms of a settlement agreement requiring Seton staff members to provide and review with patients a detailed list of hospitals providing contraceptive or sterilization services.<sup>59</sup>

Disputes surrounding the provision of services when a Catholic and non-Catholic hospital merge are becoming more and more commonplace. In Baltimore, Maryland, two hospitals, St. Joseph Medical Center and the Greater

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52. *Id.* at 1102. Ikemoto discusses the plight of two rural area hospitals, one in Everett, Washington, and one in Lorain, Ohio. *Id.* In both of those cases mergers occurred between the only two hospitals in town. *Id.* As a result, no other hospitals were available in the area to provide the extinguished services. *Id.* Rural women either had to do without the services, or drive long distances in order to obtain them. *Id.* at 1102. In addition other factors unique to a rural lifestyle, including lower income levels, large percentages of uninsured patients, lack of public transportation, smaller social service networks, and fewer information sources, help create problems for rural women to find alternative providers. *Id.* at 1089. According to Francis Kissling, president of Catholics for Free Choice, "These mergers have an effect on poor women, who disproportionately seek reproductive health care in hospitals." *Hospitals & Health Systems Catholic Hospitals: Mergers Limit Reproductive Services*, AMER. POL. NETWORK, INC., Apr. 7, 1998.

53. Ikemoto, *supra* note 9, at 1000.

54. *Id.* at 1112.

55. *Access: Settlement Requires Catholic Entity to Provide Referrals on Contraception*, BNA'S HEALTH REP., May 30, 1996, at d32 (discussing *Amelia E. v. Public Health Council*, N.Y. Sup. Ct. (Albany Co.), No. 7062-94) [hereinafter *Access*].

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

Baltimore Medical Center (“GBMC”) called off merger discussions when controversy arose “over whether the Roman Catholic religious *Directives* followed by St. Joseph—prohibiting abortion, sterilization, and in-vitro fertilization—would affect GBMC, which is known for its large range of women’s services.”<sup>60</sup> Under the proposed merger, a separate corporation created by GBMC would provide abortions and in-vitro fertilization in a separate building on hospital grounds.<sup>61</sup> In Chicago, Loyola University Medical Center and Oak Park’s West Suburban Hospital Medical Center ended merger negotiations and a two-year affiliation after disagreeing over whether physicians would continue to provide contraceptive counseling and elective sterilizations to poor neighborhoods after the completion of the merger.<sup>62</sup>

The extent that Catholic hospitals and health care providers can object to the provision of services that contradict the *Directives* is influenced, in part, by the Religious Freedom Restoration Act of 1993 and accompanying case law.

## II. THE RELIANCE OF HOSPITALS AND PHYSICIANS ON CONSCIENCE CLAUSES TO PROTECT ACTIONS

Doctors, hospitals, and other health care providers are afforded some protection from being forced to provide health services with which they morally or religiously disagree. The Church Amendment or conscience clause legislation allows a health care provider to refuse to perform services that he or she finds objectionable.<sup>63</sup> Congress originally enacted the Church Amendment in 1973 in response to *Taylor v. St. Vincent’s Hospital*<sup>64</sup> where the court forced St. Vincent’s to perform a tubal ligation in a Catholic hospital.<sup>65</sup> The Church Amendment initially protected recipients of federal funds from requiring

60. M. William Salganik, *St. Joseph Medical Shelves Merger Talks with GBMC; Indecision by GBMC Prompts Move; Johns Hopkins Still a Choice*, BALTIMORE SUN, May 1, 1998, at 1C.

61. *Id.*

62. George Gunset, *Two Area Hospitals Sever Ties*, CHI. TRIB., August 14, 1998, at N1.

63. 42 U.S.C. § 300a-7 (1988).

64. 369 F. Supp. 948 (D. Mont. 1973), *aff’d*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976).

65. 369 F. Supp. at 949. In *Taylor v. St. Vincent’s Hospital*, the Taylors brought an action to enjoin St. Vincent’s Hospital from refusing to provide tubal ligation in combination with Mrs. Taylor’s caesarian section. *Id.* Tubal ligation is a surgical sterilization procedure. *Id.* St. Vincent’s, a private, charitable non-profit corporation, took over the operation of the hospital from the Sisters of Charity of Leavenworth. *Id.* St. Vincent’s was one of two hospitals in Billings, Montana. *Id.* Maternity services for both hospitals, St. Vincent’s and Billings Deaconess were combined at St. Vincent’s. *Id.* One of the conditions of the trustees of the Sisters of Charity was that Billings Deaconess would be prohibited from performing surgical sterilization. *Id.* The Taylors obtained an injunction. *Id.* Shortly after the injunction was granted, Congress enacted the Church Amendment and the district court dissolved the injunction. *Id.* at 951. The Court of Appeals for the 9th Circuit affirmed. 523 F.2d at 75.

participation in abortion or sterilization procedures that conflict with a provider's religious or moral beliefs.<sup>66</sup>

One year after passage of the Church Amendment, Congress responded to the anti-abortion protests resulting from *Roe v. Wade*<sup>67</sup> by expanding the amendment to apply to "any healthcare provider who refused to perform any health service or research that conflicts with personal religious or moral beliefs."<sup>68</sup> In addition, institutions are barred from discriminating against personnel because they either perform or refuse to perform procedures on religious or moral grounds.<sup>69</sup> Lastly, a health care institution founded on particular religious beliefs is not required to make facilities or staff available for sterilization or abortion services.<sup>70</sup>

Many states have adopted conscience clauses that are more limited than federal conscience clauses.<sup>71</sup> Most state statutes allow for the conscientious objection to abortion, with many others covering other procedures such as contraception, sterilization, euthanasia, and artificial insemination.<sup>72</sup> There is some indication that state conscience clauses need to be expanded; state courts have not been consistent in their application of the conscience clause in the face of Establishment Clause and right of privacy challenges.<sup>73</sup>

Courts have generally held that state law requirements that a hospital provide certain services are unaffected by federal or state conscience clauses. For example, the New Jersey legislature passed a conscience clause provision preventing a hospital or staff member from being required to provide abortion services.<sup>74</sup> In *Doe v. Bridgeton Hospital Association*,<sup>75</sup> the New Jersey

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66. 42 U.S.C. § 300(a)-7 (1973).

67. 410 U.S. 113, 153 (1973).

68. 42 U.S.C. § 300(a)-7. The Conscience Clause Amendment applies to any program administered by the Secretary of Health and Human Services. Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1482 n. 253 (1995).

69. 42 U.S.C. § 300(a)-7.

70. *Id.*

71. Boozang, *supra* note 68, at 1482. See also Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, J. LEGAL MED., 177, 177 (1993)(discussing the range of conscience clauses among the forty-four states that have them).

72. Wardle, *supra* note 71, at 177.

73. See *Doe v. Bridgeton Hospital Assoc.*, 366 A.2d 641 (N.J. 1976)(holding that private non-sectarian hospitals may not refuse to make their facilities available for first trimester elective abortion procedures), *cert. denied*, 433 U.S. 914 (1977); *Hummel v. Reiss*, 589 A.2d 1041 (N.J. Super. Ct. App. Div. 1991), *aff'd*, 608 A.2d 1341 (N.J. 1992)(holding that a religious hospital may have a duty to discuss abortion when providing genetic counseling). *But see Poelker v. Doe*, 432 U.S. 519 (1977)(holding that a public hospital affiliated with a Catholic medical school can refuse to provide abortion services); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974)(upholding the use of the Church Amendment in an action against a Catholic hospital that refused to permit the sterilization of a woman).

74. N.J. Stat. Ann. §§ 2A:65A-1, A-2 (1987).

Supreme Court held that private non-sectarian hospitals must provide first trimester elective abortion procedures.<sup>76</sup> Yet, the court noted that the statute “providing that no hospital shall be required to provide abortion services or procedures and providing that refusal to perform, to assist in the performance, or to provide abortion services shall not constitute grounds for civil or criminal liability, disciplinary action, or discriminatory treatment” was non-binding on a nonsectarian nonprofit hospital because it would be an impermissible state action frustrating a woman’s constitutional right to obtain an abortion.<sup>77</sup> The court cautioned in dicta that they were not making a decision regarding whether or not religious beliefs could be grounds for a religious hospital to prohibit elective abortions.<sup>78</sup>

In another important case, *St. Agnes Hospital v. Riddick*,<sup>79</sup> a hospital brought a civil rights action and common law due process and breach of contract claims against a hospital accreditation association, the Accreditation Council for Graduate Medical Education, (“ACGME”) because the association withdrew accreditation from the hospital’s obstetrics and gynecology residency training programs.<sup>80</sup> ACGME withdrew accreditation because St. Agnes Hospital did not have a resident training program in elective abortions, sterilization, and artificial contraception due to the hospital’s adherence to the *Ethical and Religious Directives*.<sup>81</sup> The United States District Court for the District of Maryland held that Maryland’s conscience clause statute did not

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75. 366 A.2d 641 (N.J. 1976), *cert. denied*, 433 U.S. 914 (1977).

76. *Id.* Although the Bridgeton Hospital Association was not a Catholic hospital it did consist of private non-profit hospitals. *Doe*, 366 A.2d at 643. Two women who desired abortions visited Dr. Milner who had staff privileges at the Bridgeton hospital. *Id.* at 644. Although the hospital was capable of performing the procedure, the hospital denied the doctor access. *Id.*

77. *Id.* at 647.

78. *Id.* “This is not to say that religious beliefs may or may not be appropriate grounds for a hospital operated by a recognized religious body to prohibit elective abortions. We are not passing upon the issues which may be considered in that context, particularly since the questions are not before us and have not been fully briefed and argued by the parties.” *Id.*

79. 748 F. Supp. 319 (D.C. Md. 1990).

80. *Id.* at 320. The ACGME is a private, non-profit organization that contains a Residency Review Committee (RRC) for each medical specialty. *Id.* at 321. The hospital alleged violations of the First and Fourteenth Amendments, 42 U.S.C. §§ 1983 and 1985(3), common law due process rights, breach of contract, and § 20-214 of the Maryland Health General Code (conscience clause). *Id.* at 320. Not only does St. Agnes refuse to train their residents in these areas, they also forbid their residence from “indirectly acquiring clinical experience that cannot be directly obtained within the hospital.” *St. Agnes*, 748 F. Supp. at 322. Regarding St. Agnes’ free exercise argument, the court found that the training provision constituted a compelling interest of adequately trained physicians. *Id.* at 330. In addition, the court held that there was no less restrictive alternative with which the ACGME could use that would not sacrifice the integrity of the system. *Id.* at 331.

81. *Id.* at 322. ACGME also cited the hospital for deficiencies in retropublic surgery, tubal surgery, family planning and education in oncology and endocrinology. *Id.* at 320.

exempt St. Agnes Hospital from providing the resident training.<sup>82</sup> The court held that the hospital “failed to prove that the withdrawal of accreditation was directly related to its refusal to perform the religiously verboten procedures.”<sup>83</sup>

A hospital employee can also use a conscience clause to refuse to perform job tasks that conflict with the employee’s religious, moral, or ethical views.<sup>84</sup> Most conscience clauses protect employees from being required to perform or assist with abortions or sterilization.<sup>85</sup> In 1979, a nurse anesthetist, Marjorie Swanson was discharged for refusing to assist with a tubal ligation.<sup>86</sup> Swanson cited the Montana conscience clause as the foundation for her refusal.<sup>87</sup> The Montana Supreme Court upheld her conscience clause objection in spite of the fact that she had assisted in sterilization procedures on prior occasions, and despite the fact she never cited her moral or religious beliefs in support of her refusal.<sup>88</sup>

A similar result was reached by the Florida Court of Appeals in 1981 in *Kenny v. Ambulatory Centre of Miami, Florida, Inc.*<sup>89</sup> Margaret Kenny, a registered nurse, alleged that she was demoted to part-time status because she refused to assist with abortions.<sup>90</sup> The court held that the Florida conscience clause controlled, and that consequently she had a right to refrain from assisting with abortions in accord with her religious beliefs.<sup>91</sup>

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82. *St. Agnes*, 748 F. Supp. at 342. The Maryland conscience clause statute reads as follows: (b) Hospitals—(1) A licensed hospital, hospital director, or hospital governing board may not be required: (I) To permit, within the hospital, the performance of any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy; or (ii) To refer to any source for these medical procedures. (2) The refusal to permit or to refer to a source for these procedures may not be grounds for: . . .(ii)Disciplinary or other recriminatory action against the person by this State or any person. MD. CODE. ANN., [Health-Gen.] § 20-214 (1990).

83. *Id.* at 342.

84. See also Margaret Davino, *You Don’t Have To Care For Every Patient; Legalties of Conscientious Objection*, RN, Sept. 1996, at 63.

85. *Id.* See also 42 U.S.C. § 300a-7 (1973).

86. *Swanson v. St. John’s Lutheran Hosp.*, 597 P.2d 702 (Mont. 1979).

87. *Id.* at 703. The Montana conscience clause reads as follows: “(2) All persons shall have the right to refuse to advise concerning, perform, assist, or participate in sterilization because of religious beliefs or moral convictions. If requested by any hospital or health care facility or person desiring sterilization, such refusal shall be in writing signed by the person refusing, but may refer generally to the grounds of ‘religious beliefs and moral convictions’. The refusal of any person to advise concerning, perform, assist, or participate in sterilization shall not be a consideration in respect to staff privileges of any hospital or health care facility, nor a basis for any discriminatory, disciplinary, or other recriminatory action against such person, nor shall such person be liable to any person for damages allegedly arising from such refusal.” MONT. CODE ANN. § 50-5-503 (1992).

88. *Swanson*, 597 P.2d at 711.

89. 400 So.2d 1262 (Fla. Dist. Ct. App. 1981).

90. *Id.* at 1263.

91. *Id.* at 1267. The Florida statute reads as follows: “RIGHT OF REFUSAL. Nothing in this section shall require any hospital or any person to participate in the termination of a

These cases demonstrate the tensions that exist and establish the inadequacy of conscience clauses in protecting the religious freedom of health care providers. A right to access to health care often trumps religious rights of hospitals and physicians to refuse to perform certain medical procedures. In addition, constitutional rights often trump the religious rights of hospitals and physicians to refuse to perform certain medical procedures.<sup>92</sup> The arguments surrounding the merger of Catholic and non-Catholic hospitals often pits the constitutional right to religious freedom against a woman's constitutional right of access to necessary health services.

### III. RELIGIOUS FREEDOM AND *CITY OF BOERNE V. FLORES*

#### A. *The Religious Freedom Restoration Act*

When the Supreme Court first began examining cases involving free exercise of religion, the Court focused on the intent of the clause, which was "to leave Congress free to regulate religious practices that were subversive of social duties or good order."<sup>93</sup> Gradually, this gave way to a more strict reading of the free exercise clause by the Court. After the Court decided *Sherbert v. Verner*,<sup>94</sup> the only way a neutral state law restricting religious freedom could pass muster was if the state showed a compelling interest and no less restrictive way of accomplishing the same goal.<sup>95</sup>

Following *Sherbert*, the Supreme Court applied the compelling state interest test with great frequency and often sustained the free exercise

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pregnancy, nor shall any hospital or any person be liable for such refusal. No person who is a member of, or associated with, the staff of a hospital nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds, shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person." FLA. STAT. ch 458.22(5) (1977).

92. See *supra* note 73.

93. Marie Elise Lasso, *Employment Division v. Smith: The Supreme Court Improves the State of Free Exercise Doctrine*, ST. LOUIS U. PUB. L. REV. 569, 571 (1993), citing *Reynolds v. United States*, 98 U.S. 145 (1878).

94. 374 U.S. 398 (1963). In *Sherbert*, a Seventh-Day Adventist was discharged by her employer for her refusal to work on Saturday, the Sabbath Day of her religion. *Id.* at 398. The South Carolina Employment Security Commission refused to pay her unemployment compensation on the grounds that her refusal to work Saturdays disqualified her for failure to accept suitable work. *Id.* The Court held that neutral laws or government conduct may infringe an individual's religious freedom only when the state has a compelling interest and can show no alternative, less restrictive regulation. *Id.*

95. *Id.* at 406-407.

challenges.<sup>96</sup> However, after Justice Rehnquist's dissent in *Thomas v. Review Board*,<sup>97</sup> the Court was less willing to sustain free exercise challenges. In 1986, in *Bowen v. Roy*,<sup>98</sup> Chief Justice Burger, writing for the majority, refused to apply the *Sherbert* compelling interest test.

The cases decided after the inception of the free exercise clause have set the stage for the modern debate surrounding the creation and application of the Religious Freedom Restoration Act ("RFRA").

The history of the creation of RFRA can be traced back to *Employment Division v. Smith*.<sup>99</sup> In *Smith*, petitioner Alfred Smith, a member of the Native American Church, was dismissed from his employment because he ingested peyote during a sacramental ritual.<sup>100</sup> As a result, the Oregon Employment Division denied him unemployment compensation, claiming that his use of peyote constituted drug use in violation of state law.<sup>101</sup> The majority held that because Smith violated a criminal statute, the state had a valid basis for denying him unemployment compensation.<sup>102</sup> Smith's religious beliefs could not exempt his religious practice from regulation under Oregon law.<sup>103</sup>

Justice Scalia, writing for the majority, explained that an analysis of the free exercise clause does not mean "that an individual does not have an obligation to comply with a neutral law of general applicability just because the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."<sup>104</sup> Instead, the Court held that the free exercise clause only protects individuals from legislation that directly prohibits or compels religious activities or practices.<sup>105</sup> The Court also examined free exercise clause precedent and explained that the only times the Court upheld a free exercise claim was when the claims were "hybrid" claims, i.e., when the free exercise

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96. Lasso, *supra* note 93, at 573. See *Wisconsin v. Yoder* where the Court used the compelling state interest to hold that a Wisconsin law mandating school attendance burdened the Amish religion. 406 U.S. 205 (1972). The Court held that the state's interest in preparing citizens to "participate effectively in society" was not compelling enough to justify the invasion. *Id.* at 222.

97. 450 U.S. 707 (1981).

98. 476 U.S. 693 (1986).

99. 494 U.S. 872 (1990).

100. *Id.* at 874.

101. *Id.*

102. *Id.* at 884-85.

103. *Id.* at 885.

104. *Id.* at 879, *citing*, *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982). In *Lee*, an Amish employer sought exemption from collection and payment of Social Security taxes because the Amish religion prohibited participation in governmental support programs. 455 U.S. at 254. The Supreme Court did not apply an exemption, holding that there would be no way to distinguish an Amish persons objection to Social Security taxes from the religious objection that others might have to the collection or use of other taxes. *Id.* at 259-260.

105. *Id.* at 877.

clause was challenged among other Constitutional protections.<sup>106</sup> This was not the case in *Smith*. In addition, the Court noted the difficulties associated with applying the compelling state interest test.<sup>107</sup> One such difficulty is that no guidelines exist to aid judges in determining the merits of the religious interest involved.<sup>108</sup> This, the majority held, would likely lead to anarchy due to the large number of religious exemptions that would likely result.<sup>109</sup> A more sensible solution, Justice Scalia noted, is to leave it to the political process.<sup>110</sup>

Congress enacted RFRA in response to the Supreme Court's decision in *Smith*.<sup>111</sup> Religious groups lobbied Congress for the enactment.<sup>112</sup> RFRA was designed to protect the free exercise of religion that the framers of the Constitution secured as an unalienable right, from any laws, neutral or otherwise, that may interfere with the exercise of religion without compelling justification.<sup>113</sup> The Act's stated purposes are "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."<sup>114</sup> Under RFRA, the government is prohibited from substantially burdening a person's exercise of religion, even if the burden is a result of a law of general applicability.<sup>115</sup> The only exception is if it can be shown that the burden is "(1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering."<sup>116</sup>

RFRA has been both praised and criticized. Some lauded it as a great preserver of religious liberties while others thought that its enactment represented an unconstitutional enlargement of legislative powers and

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106. *Id.* at 881.

107. *Smith*, 494 U.S. at 888.

108. *Id.*

109. *Id.*

110. *Id.* at 890.

111. Thomas D. Dillard, *The RFRA: Two Years Later and Two Questions Threaten Its Legitimacy*, 22 J. CONTEMP. L. 435, 443 (1996). In enacting RFRA, Congress used the power of the Fourteenth Amendment which guarantees that no State shall make or enforce any law depriving any person of "life, liberty or property, without "due process of law," or denying any person the "equal protection of the laws." The Fourteenth Amendment also empowers Congress to enforce those guarantees by legislation. Gerald L. Neuman, *The Global Dimensions of RFRA*, 14 CONST. COMMENT. 33 (1997).

112. Newman, *supra* note 111, at 35. See also Oliver Thomas & Bruce Fein, *Is the Religious Freedom Restoration Act Good for America?*, INSIGHT ON THE NEWS, December 9, 1996, at 24 (discussing the backlash against the Court by the public and Congress in response to *Smith*).

113. 42 U.S.C. § 2000bb.

114. 42 U.S.C. § 2000bb.

115. 42 U.S.C. § 2000bb.

116. 42 U.S.C. § 2000bb.

encroachment on the authority of the judiciary.<sup>117</sup> In addition, many attorneys' general and prison officials expressed concern with the potential for increasing the number of lawsuits brought by prisoners for religious imposition.<sup>118</sup>

### B. *City of Boerne v. Flores*

In *Boerne*, the Archbishop of San Antonio submitted an application to the local zoning commission in order to obtain a building permit to enlarge a church in Boerne, Texas.<sup>119</sup> The zoning commission denied the permit because of the presence of a local ordinance that prohibited construction affecting historic landmarks or buildings in a historic district.<sup>120</sup> Consequently, the Archbishop brought suit alleging a violation of RFRA as one basis of relief.<sup>121</sup>

#### 1. District Court

The District Court held that the enactment of RFRA was an unlawful expansion of Congress' power under § 5 of the Fourteenth Amendment.<sup>122</sup> In doing so, the court found that the enactment of RFRA violated the doctrine of Separation of Powers by intruding on the power and duty of the judiciary.<sup>123</sup> The court emphasized that *Smith* remained the law in this area "for this court to follow pursuant to the doctrine of *stare decisis*."<sup>124</sup> The court certified its order for interlocutory appeal.<sup>125</sup>

#### 2. The Fifth Circuit

On appeal, the Fifth Circuit held that Congress had authority to enact RFRA under the Enforcement Clause of the Fourteenth Amendment.<sup>126</sup> First, the court used the three-part test from *Katzenbach v. Morgan*<sup>127</sup> to determine whether or not Congress exceeded its authority under Section 5 in enacting

117. See William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 304 (1996).

118. Dillard, *supra* note 111, at 449. An amendment to RFRA was filed and defeated in the Senate. This Amendment would have exempted prisons from the application of RFRA. *Id.*

119. *Boerne*, 117 S. Ct. at 2158.

120. *Id.*

121. *Id.*

122. *Flores v. City of Boerne*, 877 F. Supp. 355 (D.C. Texas 1995).

123. *Id.* at 357.

124. *Id.*

125. *Id.* at 358.

126. *Flores v. City of Boerne*, 73 F.3d 1352( 5th Cir. 1996).

127. 384 U.S. 641 (1966)(holding that Congress had authority under § 5 to provide that certain people who did not speak English could not be denied the right to vote). The *Morgan* three part test as applied by the *Flores* Court is as follows: (1) whether RFRA can be regarded as an enactment to enforce the Fourteenth Amendment; (2) whether RFRA is "plainly adapted to that end;" and (3) whether RFRA is consistent "with the letter and spirit of the constitution." *Flores*, 73 F.3d at 1358-1362.

RFRA.<sup>128</sup> The court found that Congress enacted RFRA to enforce the rights guaranteed by the First Amendment's Free Exercise Clause. The court stated that Section 5 of the Fourteenth Amendment converted the First Amendment's denial of power to Congress into an authorization to Congress to make all laws plainly adopted to secure rights of free speech and free exercise of religion.<sup>129</sup> They found that the City's argument that Congress' Section 5 power is more limited when it acts to enforce provisions other than the Equal Protection Clause was inaccurate since Section 5 does not place conditions on Congress' authority.<sup>130</sup> Next, the court held that the justifications offered by Congress as reasons for enacting RFRA clearly fit within the remedial power of Congress under Section 5.<sup>131</sup> Finally, the court found that RFRA did not violate separation of powers, the Establishment Clause or the Tenth Amendment.<sup>132</sup>

### 3. The Supreme Court

#### a. Majority Opinion

As a preface to the Court's opinion, the majority held that after *Katzenbach*,<sup>133</sup> Congress' enforcement power under Section 5 of the Fourteenth Amendment is limited to a remedial function.<sup>134</sup> Any legislation that alters the meaning of the Fourteenth Amendment, the Court held, can not be considered "enforcement" under Section 5.<sup>135</sup> In addition, the majority agreed that the free exercise of religion was indeed a provision of the article since the liberty interests inherent in the Due Process Clause include the liberties guaranteed by the First Amendment.<sup>136</sup> The majority outlined two primary arguments against Congress' use of its Section 5 enforcement power to enact RFRA: the history of the Fourteenth Amendment and caselaw interpreting the Amendment.<sup>137</sup> In enacting RFRA, Congress was not just merely enforcing the provisions of the Fourteenth Amendment; it was dictating the meaning of the Free Exercise Clause.<sup>138</sup> Moreover, no precedent supports

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128. *Id.* at 1358.

129. *Id.*

130. *Id.*

131. *Flores*, 73 F.3d at 1360. The justifications as offered by the United States included; "(1) RFRA deters governmental violations of the Free Exercise Clause; (2) RFRA prohibits laws that have the effect of impeding religious exercise; and (3) RFRA protects the free exercise rights of adherents of minority religions." *Id.* at 1359.

132. *Id.* at 1361-64.

133. *Katzenbach*, 384 U.S. at 651.

134. *Boerne*, 117 S. Ct. at 2163.

135. *Id.* at 2164.

136. *Id.* at 2163, citing *Cantwell v. Connecticut*, 310 U.S. 296, 302 (1940).

137. *Id.* at 2164.

138. *Id.*

the idea that Congress has a substantive, non-remedial power under the Fourteenth Amendment.<sup>139</sup>

The majority argued that an examination of the Framers' intent of the Fourteenth Amendment reveals a remedial purpose.<sup>140</sup> The framers rejected the First Draft Amendment proposed by John Bingham of Ohio because the Framers felt that it gave Congress too much power and "intruded into state responsibility, a power inconsistent with the federal design central to the Constitution."<sup>141</sup> As a result, the House delayed vote on the First Draft Amendment. When the current Amendment was drafted, the Framers designated Congress' power remedial rather than plenary.<sup>142</sup>

The majority bolstered its argument by including a discussion on the Ku Klux Klan Act<sup>143</sup> that was passed a few years after the Amendment's ratification.<sup>144</sup> Representative James Garfield argued that there were limits on Congress' enforcement power, "unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to § 5 . . . the force and effect of the rejected [Bingham] clause."<sup>145</sup>

Next, the majority examined the Civil Rights cases to distinguish Congress' remedial and enforcement power. The early Civil Rights Acts<sup>146</sup> proscribed criminal penalties for denying any person "the full enjoyment of public accommodations."<sup>147</sup> The Civil Rights Acts were invalidated by the Supreme Court as an attempt to regulate private conduct.<sup>148</sup> In response, the Court held that Congress had no authorization to pass "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce."<sup>149</sup> Next the majority distinguished *South Carolina v. Katzenbach*<sup>150</sup> where the Court upheld the Voting Rights Act ("VRA")<sup>151</sup> because they were "remedies aimed at areas where voting discrimination has been most flagrant."<sup>152</sup>

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139. *Boerne*, 117 S. Ct. at 2164.

140. *Id.* at 2164.

141. *Id.*

142. *Id.* at 2165.

143. Ku Klux Klan Act of 1871 ch. 22 § 2, 17 stat. 13, 13 (codified as amended at 42 U.S.C. § 1985 (3)(1982)).

144. *Boerne*, 117 S. Ct. at 2165.

145. *Id.* at 2166.

146. Ch. 114, 18 stat. 335 (1875)(codified as amended at 18 U.S.C. § 243 (1994)).

147. *Id.*

148. *Id.*

149. *Boerne*, 117 S. Ct. at 2166.

150. 383 U.S. 301 (1966).

151. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § § 1971, 1973 - 1973bb-1 (1988)).

152. *Id.* at 2167.

This was tempered by a discussion of recent cases where the Court has considered whether Congress has a substantive, non-remedial power under the Fourteenth Amendment.<sup>153</sup> In particular, the majority examined *Oregon v. Mitchell*,<sup>154</sup> where the Court held that Congress exceeded its enforcement powers by enacting legislation lowering the minimum age of voters from 21 to 18 in state and local elections. The majority held that this was an intrusion into an area typically reserved to the states.<sup>155</sup>

In discussing specifically whether RFRA was a proper exercise of congressional power, the majority held that there must be some congruency between the means used to adopt remedial measures and the ends to be achieved.<sup>156</sup> The majority compared RFRA with the VRA. The VRA was sustained because it was supported by “examples of modern instances of generally applicable laws passed because of religious bigotry.”<sup>157</sup> Bolstered by comments made during Congressional Committee hearings, the same is not true for RFRA.<sup>158</sup> In addition, the majority stated that RFRA is not remedial or preventive because its “sweeping coverage ensures its intrusion at every level of government.”<sup>159</sup> In comparison, the VRA was confined to regions of the country where voting discrimination was most flagrant, only affected a discrete class of state laws, and had a termination date.<sup>160</sup> Because RFRA reaches into the area of broad, neutral legislation, its sweep is too broad and will displace a large proportion of state and federal legislation.<sup>161</sup> The overreaching scope of RFRA distinguishes it from other congressional legislation that falls within the purview of Congress’ enforcement power.<sup>162</sup>

The majority also criticized the inherent RFRA test.<sup>163</sup> The required showing of a substantial burden on religious freedom is difficult to contest.<sup>164</sup> The test, which requires the state to show a compelling governmental interest and least restrictive alternative is one of the most stringent tests in Constitutional law and, according to the majority, makes it fairly easy for objectors to win.<sup>165</sup>

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153. *Id.*

154. 400 U.S. 112 (1970).

155. *Id.*

156. *Boerne*, 117 S. Ct. at 2169.

157. *Id.*

158. *Id.* The Court examined the legislative history of RFRA and found that there was no testimony concerning cases of *religious* persecution occurring within the past 40 years. *Id.*

159. *Id.* at 2170.

160. *Id.*

161. *Boerne*, 117 S. Ct. at 2170.

162. *Id.*

163. *Id.* at 2171. *See also* 42 U.S.C. § 2000bb (1993).

164. *Boerne*, 117 S. Ct. at 2171.

165. *Id.* at 2171.

For the foregoing reasons, and because *Marbury v. Madison*<sup>166</sup> allows the Court to do so, the majority of the Court held that Congress exceeded its powers in enacting the RFRA.

b. Justice Stevens

Justice Stevens' brief concurrence centered not on whether Congress exceeded its power under Section 5 of the Fourteenth Amendment, but whether RFRA violates the First Amendment freedom of religion clause.<sup>167</sup> Justice Stevens stated that by enacting RFRA, Congress gave a preference in favor of the establishment of religion.<sup>168</sup> The Catholic Church in *Boerne* sought special application of a generally applicable, neutral law.<sup>169</sup> Simply stated, RFRA should not provide an exemption from a law when atheists or agnostics cannot obtain the same or similar relief.<sup>170</sup>

c. Justice Scalia

Justice Scalia's concurrence attacked Justice O'Connor's dissent in *Boerne*. First, he addressed Justice O'Connor's claim that the decision in *Smith* was inconsistent with historical protections of religion.<sup>171</sup> Justice Scalia argued that historical statutes<sup>172</sup> protecting the free exercise of religion protected action taken "for," "in respect of," or "on account of" one's religion, or "discriminatory" action to the exclusion of all others.<sup>173</sup> This, Justice Scalia argued, did not encompass the neutral, generally applicable laws that the dissent discussed.<sup>174</sup>

In addition, he criticized Justice O'Connor's use of the "provisos" found in the early statutes.<sup>175</sup> According to Justice Scalia, the provisos indicate exactly what *Smith* held, that the free exercise of religion is tolerated as long as it does not disturb neutral, generally applicable statutes.<sup>176</sup>

Next, Justice Scalia analyzed the dissent's analysis of the framer's intent.<sup>177</sup> Justice Scalia contended that the historical documentation of the

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166. *Id.* at 2172, citing *Marbury v. Madison*, 5 U.S. 137 (1 Cranch)(1803).

167. *Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 2172-73 (Scalia, J., concurring).

172. Historical statutes include the Maryland Act Concerning Religion of 1649, Rhode Island Charter of 1663, New Hampshire Constitution, Maryland Declaration of Rights of 1776, Northwest Ordinance of 1787, New York Constitution, Maryland Act Concerning Religion of 1649, and the Georgia Constitution. *Id.*

173. *Boerne*, 117 S. Ct. at 2173 (Scalia, J., concurring).

174. *Id.*

175. *Id.*

176. *Id.* at 2174.

177. *Id.*

framers only supports their views of what constitutes the “proper” relationship between government and religion and does not advance the idea that these things should be constitutionally protected.<sup>178</sup>

d. Justice O’Connor

The driving force behind Justice O’Connor’s dissent was her belief that the Court in *Employment Division v. Smith* did not properly interpret the Free Exercise Clause and used an erroneous standard.<sup>179</sup> As an introduction to her opinion, she examined how the Free Exercise Clause guarantees that individuals may participate in religious practices without impermissible government interference.

At the crux of her opinion, she relied on the fact that the aforementioned interpretation of *Smith* is inconsistent with precedent or history.<sup>180</sup> Justice O’Connor traced the history of the inception of the Free Exercise Clause finding that the intent of the framers in incorporating the Free Exercise Clause was to prevent the government from adopting laws that discriminated against religion.<sup>181</sup> Two other important events also evidence this intent. First, the framers specifically included protection for religion in the Bill of Rights, and, second, the principles of free exercise were first articulated in this country in the early colonies.<sup>182</sup> In addition, history reveals that the framers viewed religion as integral to society and thus accorded the free exercise of religion a “special constitutional status.”<sup>183</sup> As a result, interference in the religious activities of Americans should be seriously examined.<sup>184</sup>

IV. ANALYSIS: THE IMPACT OF THE *CITY OF BOERNE* ON SERVICES MERGED HOSPITALS PROVIDE

The ability of a Catholic hospital to provide prohibited services is dictated by the *Directives* issued by the Pope.<sup>185</sup> When a provider chooses to make prohibited services unavailable, it is freely exercising their religious beliefs as dictated by the *Directives*. Prior to the enactment of RFRA in 1993, religious freedom was accorded little protection from generally applicable laws.<sup>186</sup>

178. *Id.* at 2175.

179. *Boerne*, 117 S. Ct. at 2176 (O’Connor, J., dissenting).

180. *Id.* at 2177.

181. *Id.* at 2178. “The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-Smith jurisprudence.” *Id.*

182. *Id.* at 2179.

183. *Boerne*, 117 S. Ct. at 2185 (O’Connor, J., dissenting).

184. *Id.*

185. *Directives*, *supra* note 20. *See also*, Hochberg, *supra* note 2, at 951.

186. Neuman, *supra* note 111, at 33 (discussing *Employment Division* which abandoned the compelling interest test).

After RFRA was enacted, religious freedom gained greater protection.<sup>187</sup> During this time, RFRA was used as the basis for many legal actions.<sup>188</sup> Since the Supreme Court overturned RFRA, critics of the decision fear that it will be more difficult for individuals claiming infringement of religious freedom to succeed in court.<sup>189</sup> The *Boerne* decision is likely to impact newly merged Catholic and non-Catholic hospitals that discontinue or fail to provide necessary community health services. Another troublesome area includes accreditation of Catholic hospitals that fail to teach abortion techniques or birth-control counseling.<sup>190</sup>

The constitutional right to refuse to provide treatment that conflicts with a health care provider's religious beliefs has never been more uncertain. Many questions remain uncertain, such as whether the Free Exercise Clause protects a Catholic hospital's objections to a patient's treatment request? Will the Supreme Court, after overturning RFRA, protect a state's interest in guaranteeing access to patient care to protect a religiously affiliated hospital's self-identified mission?<sup>191</sup> Under RFRA, any challenges regarding the provision of services at a Catholic hospital withstood greater protection. The overturning of RFRA leaves religious freedom on shaky ground. According to Kathleen Boozang, under the *Smith* test a hospital could defend its policy or mission against a generally applicable neutral law forcing it to provide treatment by trying to fall within one of the two exceptions set out in *Smith*. Boozang stated that hospitals would likely succeed under the second exception by presenting a hybrid argument on the ground that the law conflicts with another constitutional interest.<sup>192</sup> Boozang also states that the transmission of AIDS would be a sufficiently compelling state interest that would outweigh any religious freedom argument in favor of the provision of birth control.<sup>193</sup>

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187. 42 U.S.C. § 2000bb.

188. George F. Will, WASH. POST, June 29, 1997, at CO7. People and institutions have based challenges on RFRA for many of the basic exercises of states' traditional powers, from highway improvements to health and safety regulations. *Id.* Following the enactment of RFRA, approximately 200 cases were brought by prison inmates claiming that RFRA protects rights such as drug use, dress and grooming requirements. *Id.*

189. Michael Kirkland, *RFRA Decision: Anti-Religion Ripples*, U.P.I., August 14, 1997 (citing Mark Stern, legal director for the American Jewish Congress, stating that the overturn of RFRA affects zoning decisions on religious buildings across the country). The overturning of RFRA has an affect on tithing and bankruptcy, prison access for ministers and priests, and accreditation of religious clubs in schools and on college campuses. *Id.* See also *St. Agnes Hospital* 748 F. Supp. at 319.

190. Kirkland, *supra* note 189. Under RFRA, Catholic hospitals who do not want to teach abortion techniques would have a better chance of justifying their actions.

191. See Boozang, *supra* note 68, at 1505.

192. *Id.* at 1499.

193. *Id.* at 1504.

States are beginning to become more proactive in their attempt to protect an individual's right to receive necessary services. For instance, New York state legislators recently introduced a bill that would require the state Health Commissioner to ensure that hospitals continue providing contraception, sterilization and abortion services after merging with facilities that do not historically provide those services.<sup>194</sup> Under RFRA, newly merged Catholic hospitals would have a greater ability to successfully challenge this and similar legislation. After all, it would be easier under RFRA as opposed to *Smith*, to show that the generally applicable statute significantly impacts the hospital's free exercise of religion.<sup>195</sup> Without RFRA, a state law can more easily pass muster as the state will not have to prove the existence of a compelling state interest.

The rejection of RFRA signifies a return to less protection of religious freedom. Now hospitals, physicians, and other health providers, unable to gain protection from RFRA are less able to refuse to provide necessary services. As a result, Catholic health providers are not exempt from a generally applicable law that hampers religious freedom. This is a return to the climate prevalent when *Smith* was decided.<sup>196</sup>

However, there is a question regarding whether or not the overturn of RFRA will impact the provision of necessary services. While RFRA was in effect few cases, if any, were filed involving a hospital seeking protection under RFRA for failing to provide services. The cases that were filed involving issues of access to health care, including the case involving the Seton System in New York,<sup>197</sup> were settled with the end result the institution of patient referral services.<sup>198</sup> Does the lack of cases involving this issue foreshadow little change now that RFRA has been overturned?

Evidence indicates that the issue of religious freedom is still omnipresent. Legislators are currently attempting to reach a compromise regarding RFRA and the free exercise of religion issues.<sup>199</sup> The Supreme Court held that Congress overstepped massive legislative boundaries in enacting RFRA.<sup>200</sup> As a result of prior struggles, Congress is currently attempting to reach a middle

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194. Sylvia Wood, *Bill Aims to Maintain Services After Hospital Mergers*, TIMES UNION, June 10, 1998, at B9.

195. The pre-RFRA issue was that courts were dismissing individual's free exercise complaints because the statute or law invoked was generally applicable and did not specify religious exemption. RFRA was designed to prevent these decisions.

196. The legislature is required to show a compelling governmental interest in order to defend against a free exercise of religion claim.

197. *Access*, *supra* note 55. (discussing *Amelia E. v. Public Health Council*, N.Y. Sup. Ct. (Albany Co.), No. 7062-94).

198. *Id.*

199. T. R. Goldman, *Lawmakers Take Steps to Respond After Legislation is Found Unconstitutional*, LEGAL TIMES, July 14, 1997, at 8.

200. *Boerne*, 117 S. Ct. at 2172.

ground in the religious freedom arena.<sup>201</sup> At this time it is looking at alternatives such as the creation of a constitutional amendment protecting religious freedom and reintroduction of portions of the 1993 RFRA.<sup>202</sup>

However, regardless of whether RFRA is resurrected, in order to resolve these issues, the legislature, the judiciary, and health care providers must reach an agreement. While it is undesirable to require Catholic hospitals to act in opposition to the religious *Directives* and provide certain services, Catholic hospitals who merge with non-Catholic hospitals and insist that the *Directives* govern services provided must recognize that these prohibited services are necessary to many individuals, primarily women who lack the financial resources to take advantage of alternative healthcare sources.

In order for Catholic and non-Catholic hospitals to reach an agreement, there must be a compromise of institutional values. Sale negotiation should include discussion of the availability of necessary services prohibited by the *Directives*.<sup>203</sup> Within the negotiation process, it may be possible for both parties to reach an agreement to provide the services in an alternative building or to simply require physicians to provide referrals.<sup>204</sup>

In addition, Catholic hospitals must closely examine the patients and the community they serve. Many Catholic hospitals profess to be charitable and many are required to provide charitable service in order to be eligible to receive tax-exempt status.<sup>205</sup> In fact, many Catholic and non-Catholic hospital mergers are successful, in part, because Catholic hospitals tend to make

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201. Telephone Interview with Joanne Husted, Women's Legal Defense Fund (Oct. 1997). Congress began conducting hearings in front of the House Judiciary panel's Constitutional subcommittee on July 14, 1997. Goldman, *supra* note 199, at 8. In addition, many states are drafting their own version of RFRA. *See, e.g.,* Llen Oxman, *AG Wants State Religious Liberty Law*, NAT'L L.J. July 14, 1997, at A8; Marcia M. McBrien, *House Passes Religious Rights Bill*, MICH. LAW. WKLY., July 14, 1997, at 41; Ed Briggs, *Virginia Looks at Religious Rights*, TIMES UNION, September 6, 1997, at E2.

202. Goldman, *supra* note 199.

203. *See, e.g.,* Davis, *supra* note 16, at A1 (discussing the merger of St. Jerome and Genesee Memorial hospitals in Batavia, New York where the hospitals are trying to work out a deal with local physicians operating a surgery center to handle tubal ligation; *Access*, *supra* note 55 (discussing the settlement agreement between reproductive rights groups and a health care facility resulting from the merger of a Catholic hospital and a non-sectarian facility to provide patient referrals).

204. Davis *supra* note 16, at A1. In a New York merger between Catholic St. Jerome Hospital and secular Genesee Memorial Hospital, hospital officials had at first agreed to build a free standing outpatient surgery center to perform tubal ligation. *Id.* However, this proved too expensive, so now officials are trying to create a referral and transport system so women who desire tubal ligation immediately after giving birth may be transferred immediately. *Id.* *See also* Casey, *supra* note 19.

205. Ikemoto, *supra* note 9, at 1091. Catholic hospitals are tax exempt under § 501(c)(3) of the Internal Revenue Code. *Id.* As a result, Catholic hospitals must provide a large amount of subsidized care to the elderly, disabled, and low-income patients. *Id.*

excellent partners due to their commitment to quality care and concern for the poor and underserved.<sup>206</sup>

Regardless of their strong commitment to their values, it is likely that market pressures will induce Catholic hospitals to provide services prohibited by the *Directives*.<sup>207</sup> For instance, Catholic hospitals forced to compete for managed care contracts are rapidly increasing the breadth of available services.<sup>208</sup>

Recently, the Alaska Supreme Court held in *Valley Hospital v. Mat-Su Coalition for Choice*,<sup>209</sup> that a quasi-public hospital must provide abortion services.<sup>210</sup> The court's decision was based on both the Supreme Court of Alaska's interpretation of the United States Constitution and on the protection of privacy in the Alaska constitution.<sup>211</sup> In doing so, the court held that "reproductive rights are fundamental, and [that] they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution."<sup>212</sup> In addition, the court held that the hospital did not advance any "medical, safety or other public-welfare interest to justify precluding elective abortions."<sup>213</sup> Not even the existence of a conscience clause hampered

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206. Carmen F. Deyesu. *Making the Case for St. Joseph Medical Center*, BALTIMORE SUN, June 25, 1998, at 23A.

207. Boozang, *supra* note 68, at 1492. Many women seek sterilization immediately following childbirth. If a Catholic hospital refuses to accommodate this request, it is likely that female patients will choose a non-Catholic hospital for birthing/delivery services. *Id.* In addition, many insurance companies refuse to pay for sterilization that is not performed immediately following childbirth, due to the increased costs associated with delayed sterilization. *Id.*

208. *Id.* "Third party payers, striving to lower or avoid large health care expenditures, may not cover sterilizations that do not occur concurrent with a recent delivery and are more likely to contract with hospitals that provide both obstetrics and sterilization services." *Id.*

209. 948 P.2d 963 (Alaska 1997).

210. *Id.* Ten women filed suit through the Mat-Su Coalition for Choice seeking declaratory and injunctive relief. Valley Hospital is a 36 bed facility owned by a non-profit corporation. *Id.* at 965. In September, 1992, the operating board of the corporation enacted a policy prohibiting abortions at the hospital unless "(1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest." *Id.* at 965. The court held that Valley Hospital was "quasi-public" based on two main factors: (1) The hospital participated in the State's Certificate of Need program which provides that the State must "review and approve expenditures of one million dollars or more for construction or alteration of a health care facility; and (2) the hospital received construction funds, land and operating funds from state, local, and federal governments." *Id.* at 971.

211. *Id.* at 966-967. See also Natalie Phillips, *Abortion Ban Not Allowed; Court Denies Appeal by Valley Hospital*, ANCHORAGE DAILY NEWS, Nov. 22, 1997, at 1A; Tom Fink, *Court's Abortion Decision is 'Out of Step'*, ANCHORAGE DAILY NEWS, Dec. 8, 1997, at 4B.

212. *Valley Hospital*, 948 P.2d at 968. Article I, Section 22 of the Alaska Constitution reads as follows: "The right of the people to privacy is recognized and shall not be infringed." *Id.*

213. *Id.* at 971.

the court in its decision.<sup>214</sup> In a revealing footnote, the court indicated that a free exercise of religion argument may be raised when the issue is applied to religious based hospitals or providers.<sup>215</sup>

The *Valley Hospital* decision indicates that at least one state supreme court is willing to take a stand and force public and quasi-public institutions to perform abortions, regardless of a doctor's religious or moral views or the institution's religious affiliation.

## V. CONCLUSION

The merger of Catholic and non-Catholic hospitals dramatically effects the provision of necessary health services. Unfortunately, necessary health services directly impact women, particularly women who reside in rural areas and women of lower income levels.

The exact impact of the Supreme Court's decision in *City of Boerne v. Flores* is yet unknown. However, action must be taken to ensure that all Americans have access to health care. At present, it is likely that the rejection of the Religious Freedom Restoration Act may be a positive sign to those attempting to ensure access to health care. Arguably whatever happens in this debate, it is important that a healthy balance is struck between the religious rights of providers and the individuals seeking access. Many newly merged Catholic and non-Catholic hospitals have successfully preserved the provision of these necessary services through compromise and collaboration. Compromise and collaboration are integral to ensuring access to healthcare for all.

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214. *Id.* at 971-72. ALASKA SESS. LAWS 18.16.010(b) reads as follows: "Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section." *Id.* The court held that Valley Hospital had only a "sincere moral belief" that elective abortion was wrong. *Id.* at 972. In addition, the Alaska Attorney General has stated that this statute should be invalid unless it is construed to apply only to sectarian hospitals. *Id.*

215. *Valley Hospital*, 948 P.2d at 971. "Nothing said in this opinion should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state interest. Recognizing such a policy as 'compelling' could violate the Establishment Clause of the First Amendment to the United States Constitution. As this point is not raised, we do not rule on it." *Id.* n. 18.