

**STEM CELL BASED TREATMENTS AND NOVEL  
CONSIDERATIONS FOR CONSCIENCE CLAUSE  
LEGISLATION**

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## I. INTRODUCTION

Conscience clause legislation began with a fairly narrow focus: protecting physicians from being compelled to provide abortions. In subsequent decades, it expanded to include more classes of people and more types of procedures. This expansion now threatens to collide with the development of medical treatments derived from stem cells. Under current conscience protection laws, it is possible that doctors in many jurisdictions will be allowed to decline to provide potentially life-saving treatments; a result which was never contemplated by early conscience clauses and not intended by any but the most expansive of current state conscience clauses.

### *A. The Birth of the Conscience Clause and the Path of Expansion*

In the wake of the landmark 1973 Supreme Court decision in *Roe v. Wade*,<sup>1</sup> the prospect of being obligated to perform abortions, despite their serious moral and religious objections to the procedure, became an alarming reality for many health care professionals.<sup>2</sup> Shortly thereafter, Congress

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1. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman may elect to terminate her pregnancy, for any reason, before the fetus becomes viable; and defining viability as the potential to “live outside the mother’s womb, albeit with artificial aid”).

2. See JODY FEDER, CONG. RES. SERV., RS21428, THE HISTORY AND EFFECT OF

stepped in to allay these fears with the creation of the first federal conscience clause legislation, known as the Church Amendments.<sup>3</sup> In the decades following Congress' first step, federal conscience protection has incrementally expanded, and most of the states followed suit by enacting their own conscience clause legislation.<sup>4</sup>

Though the construction of conscience clauses, as well as the scope of entities and procedures that are covered, vary significantly among the states, each advances the same general objective of "allow[ing] medical providers to refuse to provide services to which they have religious or moral objections."<sup>5</sup> The protections created by the Church Amendments were fairly narrow, covering only a medical professional's right to refuse to perform sterilization or abortion procedures.<sup>6</sup> The subsequent path of conscience clause legislation has largely been one of expansion.<sup>7</sup> The scope of this type of legislation has grown from sterilization and abortion to include procedures such as the termination of life support or the non-dispensation of contraception,<sup>8</sup> with the most expansive state conscience clauses creating an unqualified right to decline to provide *any* medical service or procedure to which one is morally or religiously opposed.<sup>9</sup>

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ABORTION CONSCIENCE CLAUSE LAWS (2006), *available at* <http://www.policyarchive.org/handle/10207/bitstreams/3696.pdf> (describing the passage of the Church Amendments as a reaction to *Roe v. Wade*).

3. 42 U.S.C. § 300a-7 (2010) (known as the Church Amendments; providing that an individual's or organization's receipt of federal funds authorized under certain enumerated acts does not obligate that individual or entity to perform, assist with, or provide personnel or facilities for, abortion or sterilization procedures when doing so would be contrary to religious beliefs or moral convictions).

4. GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 1-2 (2011), *available at* [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf). As of Apr. 1, 2011, forty-six states, all except Alabama, New Hampshire, Vermont and West Virginia, have adopted some type of conscience clause legislation which, at a minimum, allows some individual health care professionals to refuse to provide abortion procedures; however, many of these state clauses are more expansive and include individuals or organizations which are tangential to the direct provision of procedures, or procedures other than abortion, such as sterilization or the provision of contraception.

5. *See* FEDER, *supra* note 2, at 1.

6. *See* 42 U.S.C. § 300a-7 (2010) (enumerating only abortion and sterilization as protected procedures).

7. *See* FEDER, *supra* note 2, at 1 ("[C]onscience clause laws have grown to encompass protections for entities that object to a wide array of medical services and procedures . . ."); *see also* 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, 784 (2007) (detailing the various efforts to expand conscience clause protections).

8. *See* GA. CODE ANN. § 31-32-10(b) (West 2009) (providing protection from civil liability for any person who, in good faith, refuses to comply with an individual's instructions regarding the withdrawal of life-sustaining procedures or nourishment); *see also* ARIZ. REV. STAT. ANN. § 36-2154 (2010) (providing that any "pharmacy, hospital or health professional" or any of their employees, may decline to provide emergency contraception on moral or religious grounds); *see also* FEDER, *supra* note 2, at 1.

9. *See* MISS. CODE ANN. § 41-41-215 (West 2009) (the Mississippi state conscience clause).

### B. Implications for Stem Cell Based Treatments

Conscience clauses laudably protect health care professionals' interest in freedom from being compelled to perform procedures to which they have moral or religious objections. However, in some circumstances, the exercise of this right can impinge on patients' reciprocal interests in obtaining these procedures.<sup>10</sup> Critics of the general concept of conscience protection legislation have long argued that these clauses restrict patient access to procedures; either as a result of the logistic difficulties in finding a willing health care professional (especially in the era of managed care), or by depriving a patient of complete disclosure of all medical options available to them because a health care professional may find some of those options personally objectionable.<sup>11</sup>

The long history of federal conscience legislation and the near ubiquity of state conscience clauses tend to imply that the majority of the public believes that the potential harm to patients outweighs the benefits of conscience protection for health care providers.<sup>12</sup> However, the majority of conscience clauses apply only to abortion procedures and it is unclear whether the general public would favor a conscience clause that included procedures, which were either significantly more beneficial or less objectionable.<sup>13</sup> This scenario is on the horizon with the impending development of stem cell based treatments.

Although effective stem cell based treatments are not yet a reality, the field shows great promise. It is expected that soon such treatments will remedy a host of ailments for which there are currently few or no effective treatments, including: Alzheimer's, Parkinson's and Lou Gehrig's disease, spinal paralysis, inflammatory bowel syndrome, macular degeneration, diabetes, and many cancers.<sup>14</sup> Despite the potential benefits, many health care

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10. See generally Georgia Chudoba, *Conscience in America: The Slippery Slope of Mixing Morality with Medicine*, 36 S.U. L. REV. 85 (2007) (detailing several arguments against the general concept of conscience clauses in the health care field).

11. *Id.* at 95-97.

12. GUTTMACHER INST., *supra* note 4, at 1-2 (as of Apr. 1, 2011, forty-six states have enacted some form of conscience clause legislation).

13. *Id.* (as of Apr. 1, 2011, forty-six states provide conscience protection for abortion procedures, but only eighteen include sterilization procedures and only fourteen include the provision of contraception).

14. See, e.g., Daniel J. DeNoon, *The Future of Stem Cells: Disease Research Hindered by Reproductive Cloning Threat, Experts Say*, WEBMD.COM (July 8, 2004), <http://www.webmd.com/alzheimers/news/20040708/future-of-stem-cells> (stating that stem cells could potentially be used to treat Alzheimer's and Parkinson's Diseases, cancer, spinal paralysis, and other ailments); see also, e.g., Andrew Pollack, *Pfizer Acquires a Stem-Cell Therapy*, N.Y. TIMES.COM (Dec. 21, 2009), <http://www.nytimes.com/2009/12/21/business/21pfizer.html> (stating that Pfizer has acquired the rights to a potential stem cell based therapy for inflammatory bowel disease, and is also researching stem cell based treatments for macular degeneration and diabetes); see also, e.g., Inst. for Quality and Efficiency in Health Care, *Women With Breast Cancer May Benefit from Autologous Stem Cell Transplantation*,

professionals have religious or moral objections to their use because certain types of stem cells can only be derived from fertilized embryos, which are destroyed in the process of harvesting stem cells.<sup>15</sup> The use of these cells implicates the same moral and ethical issues at the heart of the abortion and contraception debate, namely the belief that human life begins at fertilization.<sup>16</sup> The continued expansion of conscience clauses threatens to swallow procedures based on stem cell use. While the moral objections to utilizing embryonic stem cells are often rooted in the same principles as objections to abortion, the differences between these types of procedures are so great as to warrant an entirely different analysis when considering their inclusion in conscience clauses.

### C. Summary

Part II of this Note examines both the historical development of conscience clauses at the federal level and the variation among conscience clauses adopted by the majority of the states. In addition to laying out the current landscape of conscience clause legislation, Part II also explores the interests and intent these clauses embody and the reasons for their variation. Part III defines the term “stem cell” and identify the unique potential that treatments derived from stem cells possess, and notes the reasons why some find stem cell based treatments morally objectionable. Part IV of this Note analyzes the major differences between the emerging stem cell based treatments and those procedures which were the traditional targets of conscience clause legislation. Part IV also attempts to explain why these differences warrant a different analysis for stem cell based treatments in the context of deciding whether or not these treatments should be covered by conscience clauses. Part V explores three possible avenues that could bring stem cell based treatments under the umbrella of current conscience clauses and the negative implications that would result from each. Finally, Part VI offers a proposal calculated to ensure that the relationship between stem cell based treatments and conscience clauses is determined explicitly by all affected

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SCIENCEDAILY.COM (Jan. 13, 2010), <http://www.sciencedaily.com/releases/2010/01/100112122427.htm>; see also, e.g., Letizia Mazzini, et al., *Stem Cells in Amyotrophic Lateral Sclerosis: State of the Art*, 9.10 EXPERT OP. ON BIOLOGICAL THERAPY 1245, 1245-58 (2009), available at <http://www.ncbi.nlm.nih.gov/pubmed/19663719>.

15. NAT'L INST. OF HEALTH, STEM CELL BASICS 1, 2 (2009), available at <http://stemcells.nih.gov/staticresources/info/basics/SCprimer2009.pdf>.

16. See The Pew Forum on Religion and Public Life, *Religious Groups' Official Positions on Stem Cell Research*, THE PEW FORUM.ORG (July 17, 2008), <http://pewforum.org/Science-and-Bioethics/Religious-Groups-Official-Positions-on-Stem-Cell-Research.aspx> (outlining the official position of several prominent religious groups' opposition to the destruction of fertilized embryos and belief that human life begins at conception); see also Steven Ertelt, *Abortion Poll Finds Most Christians Think Life Begins at Conception*, LIFE NEWS.COM, (Jan. 16, 2007), <http://www.lifenews.com/nat2870.html> (describing a poll in which 440 out of the 500 Christians surveyed responded that life begins at the moment of conception).

parties and in a manner that appropriately balances the right of refusal for health care professionals and the potential life saving benefits that these procedures promise to provide.

## II. CONSCIENCE CLAUSE LEGISLATION

Examining the historical course of development of federal and state conscience clauses, as well as their similarities and differences, not only explains how the current framework of legislation arose, but also reveals the range of motivations, intentions, and values placed on the interests of health care professionals and patients by the general public.

### *A. Development of Federal Conscience Clause Legislation*

While the story of both federal and state conscience clause legislation is largely one of expansion, Congress has historically shown far more restraint than state legislatures. The expansion of federal conscience protection has primarily taken the form of including more classes of people, while simultaneously limiting the services included to those related to abortion or contraception.

#### *1. The Church Amendments*

In 1973, the first federal conscience clause legislation, known as the Church Amendments,<sup>17</sup> was passed as a reaction to the Supreme Court's decision permitting abortion in *Roe v. Wade*.<sup>18</sup> The first pertinent section protects any individual or organization that receives certain federal aid from being compelled to participate in, assist in the performance of, or provide personnel for sterilization or abortion procedures which conflict with that individual's or organization's religious beliefs or moral convictions.<sup>19</sup> The second pertinent section goes further, protecting individuals from discrimination in employment, promotion, termination or extension of staff privileges on the basis of that individual's position on, or past decisions regarding the performance of sterilizations or abortions.<sup>20</sup> The Church Amendments broadly protected an array of privileges for health care providers, but explicitly limited those protections to the context of abortion or sterilization.<sup>21</sup>

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17. 42 U.S.C. § 300a-7 (2010).

18. *Roe v. Wade*, 410 U.S. 113 (1973).

19. 42 U.S.C. § 300a-7(b) (2010).

20. *Id.* § 300a-7(c) (2010).

21. *See id.* § 300a-7 (2010) (enumerating only abortion and sterilization as protected procedures).

## 2. *The Danforth Amendment*

Next came the Danforth Amendment of 1978,<sup>22</sup> which provided that nothing in Title IX of the Education Amendments of 1972,<sup>23</sup> “shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service . . . related to an abortion” nor “to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.”<sup>24</sup> This amendment extended protections to taxpayers and women who received abortions. While the amendment protected a much larger group of people, the procedures it targeted were even more restrictive than the Church Amendments, as it concerned only abortion.

## 3. *Omnibus Consolidated Rescissions and Appropriations Act*

The Omnibus Consolidated Rescissions and Appropriations Act of 1996 prohibited the federal government, or any state government receiving federal aid, from discriminating against a health care entity on the basis of that entity’s provision or non-provision of training related to abortion procedures.<sup>25</sup> Again, Congress expanded the class of recipients for conscience protection, but restricted the context to services related to abortion procedures.

## 4. *Balanced Budget Act*

The next and arguably most significant expansion of federal conscience protection was contained within the Balanced Budget Act of 1997.<sup>26</sup> This act made several amendments to the Medicare and Medicaid programs.<sup>27</sup> Addressing the concern that managed care plans might restrict health care professionals from informing their patients about services not covered under those plans,<sup>28</sup> Congress prohibited the imposition of any such limitations on health care professionals’ discussion of medical options.<sup>29</sup>

22. 20 U.S.C. § 1688 (2010) (the Danforth Amendment).

23. *Id.* § 1681 (2010) (Title IX of the Education Amendments of 1972, prohibiting discrimination on the basis of sex under any educational program or activity receiving federal funding, this legislation was the backbone for the Danforth Amendment).

24. 20 U.S.C. § 1688 (2010).

25. 42 U.S.C. § 238n(a) (2010).

26. Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat 251 (2010) (omnibus legislative package), available at <http://www.gpo.gov:80/fdsys/pkg/PLAW-105publ33/pdf/PLAW-105publ33.pdf>.

27. *See id.*

28. *See* FEDER, *supra* note 2, at 3.

29. § 1852, 111 Stat. at 286-99 (omnibus legislative package); 42 U.S.C. § 1395w-22(j)(3)(B) (2010) (the codification of the pertinent Medicare conscience clause provision); 42 U.S.C. § 1396u-2(b)(3)(B) (2010) (the codification of the identical Medicaid conscience

However, the act also exempted those managed care providers from the requirement to pay for any service the managed care plan found religiously or morally objectionable.<sup>30</sup>

This amendment represented an expansion of federal conscience clause protection in two major ways: through an expansion of conscience protection to companies who merely finance services, and also through a potential expansion of protected services beyond abortion or sterilization procedures.<sup>31</sup>

### 5. *Hyde-Weldon Amendment*

In 2004, the Hyde-Weldon Amendment was inserted into the appropriations bill for the Department of Health and Human Services.<sup>32</sup> It provided in part that “no federal agency or program, nor any state or local government, may receive health and human services funding if it discriminates against a healthcare entity because it ‘does not provide, pay for, provide coverage of, or refer for abortions.’”<sup>33</sup> Like the Omnibus Consolidated Rescissions and Appropriations and Balanced Budget acts, the Hyde-Weldon Amendment expanded the list of protected services beyond the physical provision of abortion procedures, but not beyond services, which bear some ultimate connection to the provision of abortions.

#### *B. Congressional Intent Behind the Limited Scope of Included Services in Conscience Clause Legislation*

A common theme of federal conscience legislation has been the extension of protections to more people and to more situations, while at the same time reflecting a hesitancy to extend protections to all types of moral objections, opting to limit the scope to abortion procedures and related services. Congress’ intent not to expand conscience protection to other procedures is not only discernable from the statutory text, it is also directly supported by the legislative history. Representative Dave Weldon, the pro-life, pro-conscience clause Congressman from Florida, , in a statement before the House of Representatives in 2002, made it clear that federal conscience

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clause provision); *see also* FEDER, *supra* note 2, at 3.

30. § 1852, 111 Stat at 286-99 (omnibus legislative package); 42 U.S.C. § 1395w-22(j)(3)(B) (2010) (the codification of the pertinent Medicare conscience clause provision); 42 U.S.C. § 1396u-2(b)(3)(B) (2010) (the codification of the identical Medicaid conscience clause provision); *see also* FEDER, *supra* note 2, at 3.

31. FEDER, *supra* note 2, at 3.

32. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004), *available at* <http://www.gpo.gov:80/fdsys/pkg/PLAW-108publ447/pdf/PLAW-108publ447.pdf>; Catherine Grealis, *Religion in the Pharmacy: A Balanced Approach to Pharmacists’ Right to Refuse to Provide Plan B*, 97 GEO. L.J. 1715, 1719 (2009).

33. Grealis, *supra* note 32, at 1719.



clause legislation was not intended to include procedures other than abortion:

Contraception is not defined by the FDA as abortion. The morning-after pill is not defined by the FDA as abortion. It is defined as contraception. It is something different. So to interpret this statute to claim that it is going to prohibit access is to take essentially a religious entity's doctrine and put that into the statute, and it is just not there. It is not in the language.<sup>34</sup>

While most state conscience clauses conform to the federal model,<sup>35</sup> some have extended protections to enumerated procedures other than abortion and sterilization,<sup>36</sup> and a few have created an absolute right to decline to provide any procedure for which one has a moral objection.<sup>37</sup>

*C. Differences Between State and Federal Conscience Clauses  
and the Variation Among the States*

The construction of the majority of conscience clause legislation reveals an intention to balance conscience protection for health care professionals against patient access to legal procedures by enumerating the types of services health care professionals can decline to provide on moral grounds. Federal conscience clause legislation has kept a fairly consistent focus, centered on the enumerated services of abortion and sterilization. Most federal conscience protection legislators have been wary of extending an absolute right to decline to perform *any* service that might be against a health care provider's religious beliefs or moral convictions. The Church Amendments,<sup>38</sup> the Danforth Amendment,<sup>39</sup> the Omnibus Consolidated Re-cessions and Appropriations Act,<sup>40</sup> and the Hyde-Weldon Amendment,<sup>41</sup> all

34. 148 CONG. REC. H6566-01 (daily ed. Sept. 25, 2002) (statement of Rep. Weldon in response to the claim that previous federal conscience clauses extended to procedures other than abortion or sterilization, namely contraception).

35. See IND. CODE ANN. § 16-34-1-4 (West 2009).

36. ARIZ. REV. STAT. ANN. § 36-2154 (2010) (providing that any "pharmacy, hospital or health professional" or any their employees, may decline to provide emergency contraception on moral or religious grounds).

37. See MISS. CODE ANN. § 41-41-215(5) (West 2009).

38. 42 U.S.C. § 300a-7 (2010) (the Church Amendments, providing specifically "performance of any sterilization procedure or abortion").

39. 20 U.S.C.A. § 1688 (the Danforth Amendment, providing specifically "has received any benefit or service related to a legal abortion").

40. 42 U.S.C. § 238n(a) (West 2010) (the OCRRA, referencing only abortions).

41. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004), available at <http://www.gpo.gov:80/fdsys/pkg/PLAW-108publ447/pdf/PLAW-108publ447.pdf> (providing specifically "provide, pay for, provide coverage of, or refer for abortions").

restrict conscience protection to either abortion and sterilization procedures, or abortion procedures alone.

Similarly, state conscience clause legislation has traditionally focused on the enumerated services of abortion, sterilization and contraception. Currently, forty-six states have enacted conscience clauses that allow some health care professionals to refuse to perform abortions.<sup>42</sup> Fourteen states allow some health care professionals to refuse to provide contraception.<sup>43</sup> Eighteen states allow some health care professionals to refuse to provide sterilizations.<sup>44</sup> Though the scope of the majority of state statutes is limited to the enumerated procedures of abortion, sterilization, or contraception, a few have a much broader scope.

Mississippi's conscience clause is arguably one of the broadest.<sup>45</sup> Unlike the majority of conscience clauses, it does not enumerate which services a health care professional may decline to provide:

A health-care provider may decline to comply with *an individual instruction or health-care decision for reasons of conscience*. A health-care institution may decline to comply with an individual instruction or health-care decision if the instruction or decision is contrary to a policy of the institution which is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health-care decisions for the patient.<sup>46</sup>

This broadly drawn provision allows a health care professional total discretion in refusing to provide any service that he or she finds morally objectionable. It has been criticized as being excessively skewed in favor of health care professionals and unreasonably broad.<sup>47</sup>

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42. GUTTMACHER INST., *supra* note 4, at 1, *see, e.g.*, IND. CODE ANN. § 16-34-1-4 (West 2009). Alabama, New Hampshire, Vermont and West Virginia are the only four states that do not allow health care professionals to refuse to provide abortion services.

43. GUTTMACHER INST., *supra* note 4, at 1, *see e.g.*, ARIZ. REV. STAT. ANN. § 36-2154 (2010). The fourteen states that allow some health care professionals to refuse to provide contraception are Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Maine, Massachusetts, Mississippi, New Jersey, South Dakota, Tennessee, and Washington.

44. GUTTMACHER INST., *supra* note 4, at 1, *see, e.g.*, ARK. CODE ANN. § 20-16-304 (West 2010). The eighteen states that allow some health care professionals to refuse to provide sterilization procedures are Arkansas, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, New Jersey, New Mexico, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin.

45. *See* MISS. CODE ANN. § 41-41-215 (West 2009); *see also* Harrington, *supra* note 7, at 785-86.

46. MISS. CODE ANN. § 41-41-215(5) (West 2009) (emphasis added).

47. *See generally*, Harrington, *supra* note 7.

Indiana's conscience clause is typical of those on the more traditional end of the spectrum. It provides:

No physician; or employee or member of the staff of a hospital or other facility in which an abortion may be performed; shall be required to perform an abortion or to assist or participate in the medical procedures resulting in or intended to result in an abortion, if that individual objects to such procedures on ethical, moral, or religious grounds.<sup>48</sup>

Like the majority of state conscience clauses, it explicitly limits the protection of conscience to "procedures resulting in . . . an abortion."<sup>49</sup>

#### *D. Reconciling the Differences in the Scope of Conscience Clause Protections Among Jurisdictions*

The divergent approaches to and the wide-ranging scope of conscience clause legislation make it clear that there is no single, universally accepted conscience clause. The best solution will continue to be determined by balancing the values that the individuals in a jurisdiction place on health care professionals' interests in protecting their consciences, patient's interests in the ease of access to procedures, and the utility and ethical soundness of the gambit of medical services.

Even though most individuals have clearly defined and generally polarized opinions about the value of services like abortion, sterilization, and contraception, striking the right balance is still extremely difficult. This task would be exponentially more difficult if there was a service that did not fall neatly to either side, a service that might pose similar moral problems but at the same time offered a universally desirable benefit. The emergence of stem cell based treatments and their novel and profound differences from traditional targets of conscience clauses threaten to potentially turn the traditional, majoritarian balance on its head.

#### *E. Policies Regarding Embryonic Stem Cell during the Bush and Obama Administrations*

In 2001, President Bush issued a directive which prohibited the use of federal dollars to fund research involving certain stem cell lines.<sup>50</sup> Funds would only be issued for research on embryonic stem cell lines which were

48. IND. CODE ANN. § 16-34-1-4 (West 2009) (the Indiana state conscience clause).

49. *Id.*

50. Nat'l Inst. of Health, *NIH's Role in Federal Policy*, NIH STEM CELL INFORMATION, <http://stemcells.nih.gov/policy/NIHFedPolicy.asp> (last modified on Oct. 6, 2006).

derived from embryos before August 9, 2001 and only from those embryos which were originally created for reproductive purposes and no longer needed.<sup>51</sup> This effectively restricted research to the seventy one currently existing embryonic stem cell lines in existence throughout the world at that time.<sup>52</sup> President Obama issued an executive order in March of 2009 which reversed this ban on federal funding.<sup>53</sup> The current administration has sided with the “majority of Americans” in recognition of the great potential stem cell based treatments may hold.<sup>54</sup>

### III. STEM CELL BASED TREATMENTS

The scientific community has known about stem cells since their discovery over fifty years ago.<sup>55</sup> They initially raised little controversy and were mostly unknown by the general public until 1998, when scientists discovered a way to derive and grow human stem cells from fertilized embryos.<sup>56</sup> This discovery was a major breakthrough, and while it was the first step toward previously unimaginable therapies and cures, it was also a step into uncharted ethical territory. Over ten years later, we are still wrangling with many of the same ethical and legal questions. Tackling these questions requires knowing what stem cells are, why they offer such grand therapeutic promise, and where moral objections to stem cell research and potential stem cell based treatments originate.

#### A. *An Overview of Stem Cells*

##### 1. *What is a Cell?*

Cells are the basic building blocks of all living things.<sup>57</sup> Every human being is composed of trillions of microscopic cells.<sup>58</sup> While all human cells have the same basic parts, their structures and functions are extremely di-

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51. *Id.*

52. *Id.*

53. CBS & The Associated Press, *Obama Ends Stem Cell Research Ban*, <http://www.cbsnews.com/stories/2009/03/09/politics/100days/domesticissues/main4853385.shtml> (last modified on Mar. 9, 2009).

54. *Id.*

55. Nat'l Inst. of Health, *Stem Cell Basics: What are Adult Stem Cells?*, NIH STEM CELL INFORMATION, <http://stemcells.nih.gov/info/basics/basics4> [hereinafter *Stem Cell Basics: What are Adult Stem Cells?*] (last modified on Aug. 5, 2010).

56. Nat'l Inst. of Health, *Stem Cell Basics: Introduction*, NIH STEM CELL INFORMATION, <http://stemcells.nih.gov/info/basics/basics1> [hereinafter *Stem Cell Basics: Intro*] (last updated Aug. 5, 2010).

57. *A Science Primer: A Basic Introduction to the Science Underlying NCBI Resources, What is a Cell?*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., [http://www.ncbi.nlm.nih.gov/About/primer/genetics\\_cell.html](http://www.ncbi.nlm.nih.gov/About/primer/genetics_cell.html) (last updated Mar. 30, 2004).

58. *Id.*

verse.<sup>59</sup> Every adult cell contains a full copy of the individual's unique set of deoxyribonucleic acid ("DNA").<sup>60</sup> The DNA within every adult cell contains the instructions for building any type of cell and controls the structure and function of the cell it occupies.<sup>61</sup> Human cells are created by one of two processes, meiosis or mitosis.<sup>62</sup> In both meiosis and mitosis, an adult cell divides itself into two smaller cells; the difference between these processes is the amount of DNA each new cell carries.<sup>63</sup> Mitosis results in two new cells, each with a full copy of DNA.<sup>64</sup> This is how old cells replace themselves when they get worn out and how plants and animals are able to grow.<sup>65</sup> However, in order for mitosis to occur in a new individual, there must be a first cell; and this first cell is created, in part, by meiosis.<sup>66</sup> Meiosis results in two new cells, either two sperm cells or two eggs, each possessing half of a copy of DNA.<sup>67</sup> Fertilization occurs when a sperm cell and an egg cell combine to form a new individual; each cell contributes its half DNA to create a new cell.<sup>68</sup> This new single cell is called a zygote and through mitosis it divides and grows into a new individual.<sup>69</sup>

Each cell in the body has a specific purpose, such as transporting oxygen or detecting light.<sup>70</sup> Once a cell adopts a particular structure or purpose it is said to be differentiated and it will remain as that type of cell indefinitely.<sup>71</sup> When it divides using mitosis, the two new cells can only become the type of cell from which they originated.<sup>72</sup>

## 2. *What are Stem Cells?*

A stem cell is a cell that has not yet differentiated into a specific cell type.<sup>73</sup> Unlike differentiated cells, stem cells have the potential to develop into any cell type.<sup>74</sup> It is this characteristic that gives stem cells their therapeutic promise.<sup>75</sup> These cells can replicate themselves for long periods of time, and a small culture of stem cells can proliferate into millions after

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Nat'l Inst. of Health, *supra* note 15, at 1.

74. *Id.* at 4.

75. *Id.* at 2.

several months.<sup>76</sup> Because stem cells have the ability to differentiate into any type of cell, they have tremendous potential in the treatment of many diseases and injuries for which there are no traditional remedies.<sup>77</sup> Certain types of cells, like those found in the spinal cord, do not replicate frequently and therefore cannot heal after more serious damage.<sup>78</sup> If undifferentiated stem cells could be coaxed into differentiating into spinal nerve cells, it may be possible to ameliorate some of the damage caused by spinal cord injuries.<sup>79</sup> This is just one example of the novel therapeutic uses for stem cells.

### 3. *Embryonic Stem Cells v. Adult Stem Cells*

Embryonic stem cells are derived from very early stage embryos before cell differentiation starts to occur.<sup>80</sup> Stem cells are extracted from these early stage embryos, called blastocysts, about four days after the embryo is created.<sup>81</sup> An adult stem cell is a stem cell that is found, undifferentiated, among the body tissue of an already developed organism.<sup>82</sup> Each has advantages and disadvantages regarding potential use in stem cell based treatments.<sup>83</sup> The first difference is with the types of cells into which each has the ability to differentiate.<sup>84</sup> Embryonic stem cells can become any of the cell types within the body, a characteristic known as pluripotency.<sup>85</sup> Adult stem cells, however, are believed to be limited to differentiating into only those cell types from those tissues or organs from which they originated.<sup>86</sup>

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76. NAT'L INST. OF HEALTH, STEM CELL BASICS 2 (2009), available at <http://stemcells.nih.gov/info/basics/basics2.asp> (last modified Apr. 28, 2009).

77. NAT'L INST. OF HEALTH, STEM CELL BASICS 7 (2009), available at <http://stemcells.nih.gov/info/basics/basics6.asp> (last modified Apr. 28, 2009).

78. Daniel Stimson, *Combination Therapy Stimulates Spinal Cord Regeneration in Rats More Than One Year after Injury*, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE (Feb. 1, 2010) [http://www.ninds.nih.gov/news\\_and\\_events/news\\_articles/combination\\_therapy\\_SCI.htm](http://www.ninds.nih.gov/news_and_events/news_articles/combination_therapy_SCI.htm) ("Several factors make it difficult to recover from injury to the spinal cord. Although the developing spinal cord contains signals that encourage nerve cells to grow, by adulthood those have been replaced by signals that inhibit growth and maintain stable connections. Changes within nerve cells themselves also direct them to stop growing as they mature.").

79. See DeNoon, *supra* note 14 (stating stem cell based treatments could reverse spinal paralysis).

80. James A. Thomson, et al., *Embryonic Stem Cell Lines Derived from Human Blastocysts*, 282 SCI. 1145, 1145-47 (1998); NAT'L INST. OF HEALTH, STEM CELL BASICS 3 (2009), <http://stemcells.nih.gov/info/basics/basics3.asp> (last modified Sep. 13, 2010).

81. *A Science Primer: A Basic Introduction to the Science Underlying NCBI Resources, What is a Cell?*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., [http://www.ncbi.nlm.nih.gov/About/primer/genetics\\_cell.html](http://www.ncbi.nlm.nih.gov/About/primer/genetics_cell.html) (last updated Mar. 30, 2004).

82. NAT'L INST. OF HEALTH, *Stem Cell Basics*, *supra* note 15, at 4.

83. *Id.* at 12.

84. *Id.*

85. *Id.* at 5, 12.

86. *Id.* at 12.

Embryonic stem cells have other advantages as well. They are easier to maintain in laboratory setting and can be extracted more easily than adult stem cells.<sup>87</sup> This is a critical difference because large numbers of cells would likely be required for stem cell based treatments.<sup>88</sup> However, adult stem cells are currently thought to be less likely than embryonic stem cells to be rejected after a transplant.<sup>89</sup> This is an important advantage for adult stem cells because immune rejection can only be circumvented by continuous administration of immunosuppressive drugs, which often come with serious side effects.<sup>90</sup>

#### 4. *Induced Pluripotent Stem Cells*

Induced pluripotent stem cells (iPSCs) are adult cells that have been genetically reprogrammed to an embryonic stem cell-like state by being forced to express genes and factors important for maintaining the defining properties of embryonic stem cells. Although these cells meet the defining criteria for pluripotent stem cells, it is not known if iPSCs and embryonic stem cells differ in clinically significant ways.<sup>91</sup>

While not definitively superior, the use of embryonic stem cells poses less of a technological challenge adult stem cells.<sup>92</sup> Though iPSCs might be able to replicate the functionality of embryonic stem cells, it is uncertain if their use will be feasible.<sup>93</sup>

#### 5. *Moral Objections to Stem Cell Based Treatments*

The grounds for most moral objections to stem cell based treatments centers almost exclusively around the use of embryonic stem cells because the collection of these cells necessarily requires obtaining or creating, and subsequently destroying, fertilized embryos.<sup>94</sup> Thus, the view one holds about the status of an embryo is an essential, and for many the only, factor in determining one's moral or ethical stance on the use of stem cell based

87. *See id.* at 13.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. NAT'L INST. OF HEALTH, STEM CELL BASICS 5 (2009), available at <http://stemcells.nih.gov/info/basics/basics5.asp> (last modified Jan. 20, 2011).

93. NAT'L INST. OF HEALTH, STEM CELL BASICS 6 (2009), available at <http://stemcells.nih.gov/info/basics/basics6.asp> (last modified Apr. 28, 2009).

94. *See* 1 NAT'L BIOETHICS ADVISORY COMM'N, ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH 49, 49-51 (1999), available at <http://bioethics.georgetown.edu/nbac/stemcell.pdf>.

treatments.

Views on the status of embryos fall along a spectrum, but can generally be classified into three categories.<sup>95</sup> At one end of the spectrum, embryos are viewed simply as small clusters of cells not unlike any other cluster of cells found in the human body.<sup>96</sup> Those who hold this view believe that embryos present no greater ethical or moral significance than a sample of blood, and deserve little or no special treatment.<sup>97</sup> At the opposite end of the spectrum, embryos are viewed as having nearly the same status as fully formed human beings, because an embryo possesses the potential to form a human being.<sup>98</sup> The third view falls somewhere in between these extremes, recognizing that an embryo has properties which give it greater status than a simple cell cluster, but not so great as to put it on par with a fully-developed person.<sup>99</sup>

The largest and most vocal opposition to the use of embryonic stem cells originates from various religious groups. A number of religious groups have offered official positions on stem cell research, including: Catholicism,<sup>100</sup> Episcopalianism,<sup>101</sup> Hinduism,<sup>102</sup> Islam,<sup>103</sup> Judaism,<sup>104</sup> the Luther-

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95. *Id.* at 49-50.

96. *Id.* at 49.

97. *Id.*

98. *Id.*

99. *Id.* at 50.

100. The Pew Forum on Religion and Public Life, *supra* note 16 (“In accordance with their anti-abortion stance, the U.S. Conference of Catholic Bishops supports adult stem cell research but opposes embryonic stem cell research since it creates or destroys human embryos.”) (citing, *Catholic Support for Ethically Acceptable Stem Cell Research*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/prolife/issues/bioethic/stemcell/stemcath.shtml> (last visited Mar. 17, 2011)).

101. *Id.* (“In 2004, the church’s governing body, the General Convention, declared itself in favor of stem cell research as long as the embryos used would have been destroyed otherwise, the embryos were not created solely for research purposes and the embryos were not bought or sold.”) (citing *Acts of Convention: Resolution # 2003-A014*, THE ARCHIVES OF THE EPISCOPAL CHURCH, [http://www.episcopalarchives.org/cgi-bin/acts/acts\\_resolution.pl?resolution=2003-A014](http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=2003-A014) (last visited Mar. 17, 2011)).

102. *Id.* (“Though Hinduism believes that life begins at conception, the religion has no official position on stem cell research.”) (citing Pankaj Mishra, *How India Reconciles Hindu Values and Biotech*, N.Y. TIMES.COM (Aug. 21, 2005), [http://www.nytimes.com/2005/08/21/weekinreview/21mishra.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2005/08/21/weekinreview/21mishra.html?_r=1&pagewanted=all)).

103. *Id.* (“There is no explicit Islamic ruling on the issue of stem cell research. While some Muslim leaders allow for stem cell research on the ground that, according to Islam, an embryo in the early stage of pregnancy does not have a soul, others argue that the termination of an embryo at any stage of pregnancy is morally impermissible.”) (citing Dr. Muzammil Siddiqi, *An Islamic Perspective on Stem Cells Research*, ISLAM 101.COM, <http://www.islam101.com/science/stemCells.htm> (last visited Mar. 7, 2011)).

104. *Id.* (“All major Jewish denominations – including the Reform, Conservative, Orthodox and Reconstructionist movements – support both embryonic and adult stem cell research as long as it is for medical or therapeutic purposes.”) (citing Religious Action Ctr. Of Reform Judaism, *Stem Cell Research*, RAC.ORG, <http://rac.org/advocacy/issues/stemcell/#rjm> (last updated July 26, 2005)).



an Church-Missouri Synod,<sup>105</sup> the National Association of Evangelicals,<sup>106</sup> the Presbyterian Church (U.S.A.),<sup>107</sup> the Southern Baptist Convention,<sup>108</sup> the Unitarian Universalist Association of Congregations,<sup>109</sup> the United Church of Christ,<sup>110</sup> and the United Methodist Church.<sup>111</sup>

The view that an embryo should have the same legal and moral status as a fully developed human is the fundamental argument advanced by those who are opposed to any destruction of embryos.<sup>112</sup> The objection to the use of embryonic stem cells comes from the same moral principle as the objection to abortion, but the differences between stem cell based treatments and procedures, like abortion and sterilization, warrant a comparatively elevated level of consideration.

105. *Id.* (“In 2005, the group reaffirmed its opposition to embryonic stem cell research, advocating instead for adult stem cell research.”) (citing COMM’N ON THEOLOGY & CHURCH REL. OF THE LUTHERAN CHURCH—MISSOURI SYNOD, CHRISTIAN FAITH AND HUMAN BEGINNINGS: CHRISTIAN CARE AND PREIMPLEMENTATION HUMAN LIFE 1 (2005), available at <http://www.lcms.org/graphics/assets/media/CTCR/CTCR%20Human%20Beginnings.pdf>).

106. The Pew Forum on Religion and Public Life, *supra* note 16 (“In 2005, the National Association of Evangelicals issued a statement voicing its opposition to stem cell research.”) (citing Nat’l Ass’n of Evangelicals, *Bioethics and Stem Cell Research*, NAE.NET (Mar. 11, 2005), <http://www.nae.net/government-affairs/policy-resolutions/90-bioethics-a-stem-cell-research-2005>).

107. *Id.* (“In 2004, the Presbyterian Church’s governing body, the General Assembly, reaffirmed its position in favor of stem cell research that is intended to ‘[restore health] to those suffering from serious illness.’”) (citing The Wash. Off., *Next Steps: Federal Funding for Stem Cell Research*, THE WASH. OFF. (2004), <http://archive.pcusa.org/washington/issue/net/hc-050802.htm>).

108. *Id.* (“In 1999, the Southern Baptist Convention reaffirmed its ‘opposition to the destruction of human embryos . . . [and] support for the development of alternative treatments which do not require human embryos to be killed.’”) (citing Southern Baptist Convention, *Resolution on Human Embryonic and Stem Cell Research*, SBC.NET (June 1999), <http://www.sbc.net/resolutions/amResolution.asp?ID=620>).

109. *Id.* (“In 2006, the association’s policymaking body, the General Assembly, stated its support for stem cell research as long as the research is for medical therapies and not the reproductive cloning of humans.”) (citing Unitarian Universalist Association of Congregations, *Pass the Stem Cell Research Enhancement Act*, UUA.ORG, <http://www.uua.org/socialjustice/socialjustice/statements/8064.shtml> (last updated June 3, 2010)).

110. *Id.* (“In 2001, the United Church of Christ ruled in favor of research on embryonic stem cells that would otherwise be discarded from in vitro fertilization.”) (citing UNITED CHURCH OF CHRIST, SUPPORT FOR FEDERALLY FUNDED RESEARCH ON EMBRYONIC STEM CELLS (2001), available at <http://www.ucc.org/synod/resolutions/SUPPORT-FOR-FEDERALLY-FUNDED-RESEARCH-ON-EMBRYONIC-STEM-CELLS.pdf>).

111. *Id.* (“In 2004, the United Methodist Church asserted its support for therapeutic cloning in which spare embryonic stem cells resulting from in vitro fertilization are used. The church also maintained its opposition to the use or creation of embryonic stem cells solely for the purpose of research.”) (citing United Methodist Church, *Ethics of Embryonic Stem Cell Research*, UMC.ORG, <http://archives.umc.org/interior.asp?ptid=4&mid=6560> (last visited Mar. 17, 2011)).

112. 1 NAT’L BIOETHICS ADVISORY COMM’N, *supra* note 94.

IV. DIFFERENCES BETWEEN STEM CELL BASED TREATMENTS  
AND PROCEDURES TRADITIONALLY INCLUDED IN  
CONSCIENCE CLAUSES

Regardless of one's moral stance on the procedures traditionally included by conscience clauses or one's moral stance on the potential use of stem cell based treatments, the following differences warrant careful consideration when considering inclusion of stem cell based treatments under conscience clause protection.

*A. Stronger Conflict with Health Care Professionals' Duty of Care*

Apart from rare exigent circumstances, it is usually not necessary for the health of the patient to require an abortion or contraception.<sup>113</sup> Since a delay or even a complete prevention of the receipt of these traditionally included services rarely poses a health risk, such a refusal would rarely conflict with a duty to provide care. Unlike traditionally included services, a delay or prevention in receipt of a stem cell treatment could possibly cause serious injury or death. There is evidence contained in some conscience clauses that demonstrates that conscience clause protection was not meant to be extended to this extreme. For example, these certain conscience clauses contain additional provisions qualifying the freedom of a health care professional to decline to provide a particular service in non-emergency situations only.<sup>114</sup>

Stem cell based treatments could provide the only viable treatment option for a wide array of diseases and injuries.<sup>115</sup> The risk of harm to a patient's health resulting from a refusal to perform a non-emergency abortion is trivial compared to the risk of harm to a patient's health resulting from a refusal to provide an effective stem cell based treatment for serious and time-sensitive ailments, such as cancer. A delay in receiving a non-emergency abortion is unlikely to create or prolong physical pain and poses no direct risk to patient health, but even a short delay in getting treatment

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113. Julie Cantor & Ken Baum, *The Limits of Conscientious Objection-May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2009 (2004) (except in emergency situations, physicians are generally free to choose patients and procedures).

114. *E.g.*, 745 ILL. COMP. STAT. ANN. 70/6 (West 2010) (the Illinois conscience clause, providing in part that "[n]othing in this Act shall be construed so as to relieve a physician or other health care personnel from obligations under the law of providing emergency medical care.").

115. DeNoon, *supra* note 14 (stating that stem cells could potentially be used to treat Alzheimer's and Parkinson's Diseases, cancer, spinal paralysis, and other ailments); Pollack, *supra* note 14 (stating that Pfizer has acquired the rights to a potential stem cell based therapy for inflammatory bowel disease, and is also researching stem cell based treatments for macular degeneration and diabetes); Inst. for Quality and Efficiency in Health Care, *supra* note 14; Mazzini et al., *supra* note 14, at 1245-58.

for cancer could prolong serious pain.<sup>116</sup> The same issues of time sensitivity and limited access are two of the main arguments against extending conscience clause protections to pharmacists for the dispensation of emergency contraception, and those arguments could apply with equal force to potential stem cell based treatments.<sup>117</sup> The conflict between conscience protection of a health care professional's right to decline to provide services thought to be objectionable and the duty to provide for the care and health of a patient would be significantly stronger when declining certain stem cell based treatments than when declining a service traditionally included in conscience clauses.

### *B. Heightened Importance of Patient Access to Procedures*

Just because a particular health care provider is unwilling to provide a treatment does not mean that such a treatment is rendered unavailable to a patient. A health care professional can, and indeed may be obligated to, make arrangements for a patient requesting care to receive it from some other source.<sup>118</sup> But such an arrangement is not a perfect solution and some patients who would have otherwise received the treatment, will not. A small number of patients may be unwilling or unable to see a second health care professional as the referral process will likely involve another appointment with additional costs and may even require travel to a new and possibly distant location. The benefits of protecting a health care professional's right to refuse objectionable procedures probably justifies a risk of inconvenience to patients seeking abortions, but this balance is not as easily struck when the patient is seeking a remedy for severe pain or lack of mobility. This problem is compounded by the fact that many health care professionals "do not believe they are obligated to disclose information about medically available treatments they consider objectionable."<sup>119</sup>

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116. See Timothy Moynihan, *Cancer Pain: Relief is Possible*, MAYO CLINIC.COM (Oct. 3, 2009), <http://www.mayoclinic.com/health/cancer-pain/CA00021> ("Cancer can cause pain by growing into or destroying tissue near the cancer. Cancer pain can come from the primary cancer itself . . . As a tumor grows, it may put pressure on nerves, bones or other organs, causing pain."); see also Daniel Levin et al., *Public Attitudes Toward Cancer Pain*, 56 *CANCER* 2337 (1985) (stating "presence of pain tends to shorten delay in seeking diagnosis for some patients").

117. Grealis, *supra* note 32, at 1720.

118. *Johnson v. Vaughn*, 370 S.W.2d 591, 596 (Ky. 1963) (stating that a physician should not leave a patient who is in need of treatment without providing reasonable notice or arranging the patient's transfer to another physician).

119. Farr A. Curlin et al., *Religion, Conscience, and Controversial Clinical Practices*, 356 *NEW ENG. J. MED.* 593, 597 (2007) (where fourteen percent of surveyed physicians reported that they did "not believe they [were] obligated to disclose information about medically available treatments they consider[ed] objectionable").

*C. Diminished Weight of Health Care Professionals'  
Right to Protection of Conscience*

The principle behind all conscience clauses is that no one should be forced to do anything they find morally objectionable.<sup>120</sup> This attitude of personal liberty pervades much of American culture and is deservedly a point of national pride. But the right to freedom of choice and protection of conscience has never been absolute, or without consequences.

There are elements of every profession that are unavoidable, and a person with a moral or personal objection to those elements may be unable to adequately perform the job. A high-rise construction worker's fear of heights cannot be accommodated. Luckily, people are allowed to choose professions that suit their personal and moral temperaments. Should stem cell based therapies become pervasive and efficient, we may encounter a medical landscape in which stem cell based treatments are the least expensive or most effective treatment for a large number of ailments. In this situation, health care professionals who abstain from using such treatments may be less and less able to offer effective or affordable care.

In addition, most conscience clause legislation absolves health care providers of responsibility for declining to provide a service.<sup>121</sup> Much of the opposition to conscience clauses, namely restriction of access or potential for misinformation, could be eliminated if health care providers were explicitly required to assist patients in acquiring procedures they are not comfortable performing themselves. In this way, health care providers retain the same rights of refusal but would greatly decrease the risk of negative outcomes associated with their exercise of that right.

*D. Objectionable Ends or Objectionable Means?*

There is an important distinction between the moral objections to stem cell based treatments and the moral objections to services traditionally covered by conscience clauses. Unlike abortion or contraception, the objection to stem cell based treatments lies in the means by which these treatments are created, not the ultimate results they produce. There is much debate over the social good of abortion and contraception, but few would dispute that the therapeutic possibilities that stem cell based treatments could offer are anything but positive. This is exemplified by the general acceptance of induced pluripotent stem cells as an alternative to embryonic stem cells.<sup>122</sup>

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120. See FEDER, *supra* note 2, at 2.

121. See, e.g., IND. CODE ANN. § 16-34-1-4 (West 2009); see also, e.g., MISS. CODE ANN. § 41-41-215 (West 2009).

122. See The Pew Forum on Religion and Public Life, *supra* note 16 (survey of official positions on stem cell research of various religions showing that most endorse or are neutral on the issue of adult stem cells and oppose the use of embryonic stem cells).

### *E. Different Rights Implicated*

The basis for the legal status of abortion and contraception is patient-centric, one of personal and reproductive freedom.<sup>123</sup> However, a different rationale exists for promoting the use of stem cell base treatments; not one of personal liberty for the physician, but the profound social good such treatments could offer society and moreover, individual patients.

Legal, medical, and sociological scholars alike have stated that embryonic stem cells “have the potential to provide a limitless source of specific cell types for transplantation,” organ creation, tissue regeneration, nerve repair, and so on, which could aid in alleviating the “debilitating conditions” of so many persons around the globe. Michael Brannigan has argued that “[b]ecause the benefits of embryonic stem cell research clearly outweigh the burdens, the moral status of [persons who suffer from debilitating diseases and conditions] clearly [have] priority over the moral status of the early embryo.”<sup>124</sup>

Because the implicated rights are of a different nature and the benefits are so much greater, stem cell based treatments should not be placed in the same category as the traditionally considered services of abortion or sterilization within conscience clauses. While the differences between procedures traditionally included in conscience clauses and potential stem cell based treatments do not dispositively mandate that stem cell based treatments be universally exempt from all conscience clauses, those differences demonstrate, at a minimum, that stem cell based treatments deserve a higher level of consideration than abortion or sterilization in a conscience clause context.

### V. THREE POSSIBLE AVENUES OF EXPANSION OF CONSCIENCE CLAUSE PROTECTIONS TO INCLUDE STEM CELL BASED TREATMENTS

If stem cell based treatments deserve a comparatively elevated level of consideration before their inclusion in a conscience clause then an automatic inclusion or an inclusion precipitated by those in the minority would be far less desirable than an explicit decision by the majority. The following

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123. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

124. Sylvia E. Simson, *Breaking Barriers, Pushing Promise: America's Need for an Embryonic Stem Cell Regulatory Scheme*, 34 *BROOK. J. INT'L L.* 531, 542-43 (2009).

are three possible avenues that could result in stem cell based treatments being included in conscience clauses.

#### *A. Overly Broad State Conscience Clauses*

The most obvious route to the inclusion of stem cell based treatments in conscience clauses, without due consideration, is exemplified by the overly broad state conscience clauses. Because these clauses place no limitations on the types of services a health care professional may refuse to provide, stem cell based treatments are arguably already included in such clauses. These open ended conscience clauses, like that of Mississippi, could readily be interpreted to allow health care professionals to decline to provide any stem cell derived treatment at all.<sup>125</sup>

#### *B. Legislative Expansion of Current Conscience Clauses*

Aside from states which place no limitation on the types of services health care professionals may decline to provide, some states have greatly expanded the traditional scope of conscience clause protections to include “family planning services or referrals . . . assisted reproduction, human cloning, fetal experimentation, euthanasia, and termination of life support.”<sup>126</sup> While these newly enumerated services are similar to abortion and sterilization in that they do not promise the level of potential benefits offered by stem cell based treatments, their inclusion in conscience clauses nonetheless demonstrates the willingness of some states to extend the protections of a doctor’s choice to refuse morally objectionable procedures beyond its traditional scope.

#### *C. Possible “Back Door” Classification of Stem Cell Based Treatments as Currently Enumerated Procedures*

While the majority of conscience clauses enumerate abortion as one of the services that health care providers may decline to provide, only a few actually define the term “abortion.”<sup>127</sup> Of the states that have taken the care to define the term, most focus on either the end result of a terminated pregnancy or a broad description of the procedure. This reflects intent to restrict the term to its common usage, presumably to prevent its extension to related but distinct terms, like contraception. Some statutes even explicitly exempt

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125. See MISS. CODE ANN. § 41-41-215(5) (West 2009).

126. Martha S. Swartz, “Conscience Clauses” or “Unconscionable Clauses:” *Personal Beliefs versus Professional Responsibilities*, 6 YALE J. HEALTH POL’Y L. & ETHICS 269, 284 (2006).

127. See, e.g., LA. REV. STAT. ANN. § 40:1299.35.1(1) (2009); see also, e.g., N.D. CENT. CODE § 14.02.1-02(1) (1975); DEL. CODE ANN. tit. 11, § 654 (1975).

things like contraception from the definition.<sup>128</sup>

Because the term “abortion” has a commonly understood meaning,<sup>129</sup> such specificity is not required as a practical matter, as evidenced by the abundance of statutory provisions which lack a definition of the term altogether. Thus, these explicit omissions might also reveal intent to prevent procedures that are commonly understood not to be abortions (such as the provision of birth control medication, or stem cell based treatments) from being piggybacked onto an overly broad or formalistic definition of abortion. Because most of these statutes were drafted and enacted before 1980,<sup>130</sup> they do not contain explicit exemptions for stem cell based therapies.<sup>131</sup> However, the intent behind preventing an expansion of the term to encompass contraception applies with more or equal force to the inclusion of stem cell treatments. Because stem cell based treatments are still in the research phase, there is no case law dealing directly with the classification of such treatments. However, analogous extensions, such as the classification of contraception as abortion, have been attempted and demonstrate essentially the same legal reasoning.

One such example is the Louisiana case of *Margaret S. v. Edwards*.<sup>132</sup> In this case the plaintiffs argued that “abortion”,<sup>133</sup> defined under the act as “the deliberate termination of a human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn child” covered two methods of contraception, namely the use of an intra-uterine device (“IUD”) and the “morning-after pill.”<sup>134</sup> The plaintiffs ad-

128. MICH. COMP. LAWS ANN. § 333.17016(5)(a); MICH. COMP. LAWS ANN. § 333.17516(5)(a) (defining “abortion” as “the intentional use of an instrument, drug, or other substance or device to terminate a woman's pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus” and explicitly exempting “the use or prescription of a drug or device intended as a contraceptive.”).

129. See BLACK'S LAW DICTIONARY 6 (8th ed. 2004) (defining abortion as “an artificially induced termination of a pregnancy for the purpose of destroying an embryo or fetus”); see also Oxford University Press, *Abortion*, OXFORD DICTIONARIES.COM, [http://www.askoxford.com/concise\\_oed/abortion?view=uk](http://www.askoxford.com/concise_oed/abortion?view=uk) (last visited Mar. 7, 2011) (defining abortion as “the deliberate termination of a human pregnancy,” or “the natural expulsion of a fetus from the womb before it is able to survive independently.”).

130. See RACHEL BENSON GOLD, THE GUTTMACHER REPORT ON PUBLIC POLICY: CONSCIENCE MAKES A COMEBACK IN THE AGE OF MANAGED CARE 1 (1998), available at <http://www.guttmacher.org/pubs/tgr/01/1/gr010101.pdf> (providing that half of the states had their own conscience clause legislation by the end of 1974, and nearly all of the states had enacted their own conscience clause legislation by the end of 1978).

131. See *Stem Cell Basics: What are Adult Stem Cells?*, supra note 55 (providing that the first successful derivation of human stem cells was not accomplished until 1998, almost twenty years after most states had enacted their conscience clauses).

132. *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La., 1980).

133. LA. REV. STAT. ANN. § 40:1299.35.1(1) (2009) (stating Louisiana's statutory definition of “abortion” as cited in *Edwards*, 488 F. Supp. 181.).

134. *Edwards*, 488 F. Supp. at 190-91.

vanced this argument in an attempt to show that the act's definition of abortion was impermissibly vague, since it necessarily included these forms of contraception, which are, in their common usage, not considered forms of abortion.<sup>135</sup> In its analysis, the court examined other state statutes dealing with abortion and stated that those statutes were similarly open ended,<sup>136</sup> even broader,<sup>137</sup> or failed to define the term altogether.<sup>138</sup> Because any treatment derived from embryonic stem cells necessarily involves destroying the viability of an embryo, such treatments could be construed to fall under the definition of abortion. This construction, while textually permissible, would go against the legislative intent behind conscience clauses with enumerated services.<sup>139</sup>

## VI. PROPOSAL

Most conscience clauses were adopted decades before the average person had ever heard of stem cells and as a result,<sup>140</sup> reflect a balance between conscience protection and the potentially objectionable procedures of the time, all of arguably marginal public good. Inherent in these clauses is an assumption that patients, for reasons of personal choice, request objectionable procedures. This assumption informs the balance between conscience protection and patient access underlying the purposes of these clauses. In light of this, it is not surprising that most conscience clauses accord greater weight to the health care professional's right of refusal. However, aside from a few outliers,<sup>141</sup> these clauses have stopped short of providing an unqualified right of refusal for any procedure, demonstrating that the competing interests behind abortion and contraception are due at least some consideration. An attempt to balance stem cell based treatments

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135. *Id.*; see also BLACK'S LAW DICTIONARY, *supra* note 129; Oxford University Press, *supra* note 129.

136. N.D. CENT. CODE § 14.02.1-02(1) (1975) (defining abortion as "the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead embryo or fetus.").

137. DEL. CODE ANN. tit. 11, § 654 (1975) (defining abortion as "an act committed . . . with intent to cause a miscarriage.").

138. MISS. CODE ANN. § 97-3-3 (1997).

139. See 148 CONG. REC. H6566-01 (daily ed. Sept. 25, 2002) (statement of Rep. Weldon) ("Contraception is not defined by the FDA as abortion. The morning-after pill is not defined by the FDA as abortion. It is defined as contraception. It is something different. So to interpret this statute to claim that it is going to prohibit access is to take essentially a religious entity's doctrine and put that into the statute, and it is just not there. It is not in the language.").

140. See *Stem Cell Basics: Intro*, *supra* note 56 (providing that the first successful derivation of human stem cells was not accomplished until 1998); see also GOLD, *supra* note 130 (providing that half of the states had their own conscience clause legislation by the end of 1974, and nearly all of the states had enacted their own conscience clause legislation by the end of 1978).

141. MISS. CODE ANN. § 41-41-215 (1998).



within the confines of current conscience clauses might well produce results that do not accurately reflect public opinion and were never contemplated at the time the clause was created.

*A. Explicit and Proactive Reconsideration by Legislators of how Current Conscience Clauses Would Apply to Stem Cell Based Treatments*

Legislatures are beholden to the will of their constituents and this author is in no position to tell them how to balance the competing interests behind their conscience clauses. While this author believes that excluding stem cell based treatments from conscience protection is the best course of action, even an explicit inclusion is preferable to leaving the question unresolved. The mere act of proactively and consciously addressing the issue would provide benefits for both health care professionals and patients and is much preferred to the consequences likely to result from inaction.

*B. The Benefits of Explicit and Proactive Reconsideration*

*1. A More Accurate Reflection of Public Opinion*

In the absence of clear legislative consideration regarding stem cell based treatments, their inclusion or exclusion will be a matter of statutory interpretation determined by the courts. Legislatures are in a much better position to accurately gauge the opinions of their constituents and reach a decision based on that input.

*2. Clarification of the Law, Removal of Uncertainty*

Without guidance on whether or not a health care professional may decline to provide a stem cell based treatment, many such professionals may perform these procedures against their moral convictions out of fear of legal liability. Conversely, health care professionals who do decline to provide these procedures may end up liable themselves.

*3. Proper Balancing of Right of Refusal and Patient Access*

Lastly, only the legislature is positioned to freely balance the right of conscience protection for health care professionals against the right of access to care for patients. The unstated assumption in most conscience clauses (that there is minimal public good created by the traditionally included procedures) does not hold for stem cell based treatments. The status of stem cell based treatments is a novel issue, largely unaddressed by current conscience clauses. Going forward, legislatures are in the best position to change the existing law in order to recognize this fact.

## VII. CONCLUSION

Conscience clauses were originally created for the narrow purpose of protecting health care professionals who were morally or religiously opposed to performing abortions. Because the moral objections behind the use of embryonic stem cells are typically rooted in the same principles, these treatments are at risk of being classified with the services typically included in conscience clauses, despite the numerous differences between them.

It would be prudent for legislatures to prospectively examine how their current conscience clause statutes might apply to stem cell based treatments. These conscience clauses should be clarified to explicitly include or exclude stem cell based treatments now, before the impending proliferation of such treatments. Failure to do so will result in confusion, a wave of litigation, and potential outcomes that were neither intended by legislative drafters nor accurate reflections of public opinion.