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IN GOOD CONSCIENCE: THE LEGAL TREND TO INCLUDE PRESCRIPTION CONTRACEPTIVES IN EMPLOYER INSURANCE PLANS AND CATHOLIC CHARITIES’ “CONSCIENCE CLAUSE” OBJECTION

Kate Spota*

Imagine a woman running a routine errand in California: she enters her local drug store, hands the pharmacist her prescription for a well-known drug approved by the Food and Drug Administration (FDA), and then is surprised to learn that her prescription is not covered under her insurance plan. Upon inquiry with her religiously-affiliated employer—one that provides health care benefits—she learns that this particular prescription drug was the only one intentionally excluded from her employee prescription plan. The woman must then decide between a thirty-dollar out-of-pocket cost each month¹ or a change in her lifestyle to obviate the need for the drug altogether.² How did this situation arise?

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2. See Memorandum from The Henry J. Kaiser Family Foundation, to Interested Parties, at http://www.covermypills.org (Aug. 7, 2002). This memorandum, regarding “Latest Findings on Employer-Based Coverage of Contraception,” reports that “[n]early 59 million women in the U.S. are of ‘reproductive age,’ between 16 and 44 years old. . . . Employer-based coverage is the primary form of health insurance for 64% of women of
The drug described above is a prescription contraceptive. The legal trend beginning with the Equal Employment Opportunity Commission's (EEOC) December 2000 decision\(^3\) and culminating in *Erickson v. Bartell Drug Co.*\(^4\) found sex discrimination present where an employer did not include prescription contraceptives in its otherwise inclusive prescription insurance plan. *Erickson* was the first federal court case to hold that these circumstances amounted to sex discrimination under Title VII.\(^5\) The case embraced an EEOC decision that found that Title VII protects women by forcing their employers to include prescription contraceptive coverage in employee health plans that cover nearly all other FDA approved drugs.\(^6\) In so doing, *Erickson* evidenced judicial acceptance of the controversial EEOC decision and formed the catalyst for the judicial trend finding sex discrimination in these circumstances.

This trend, however, was recently challenged in California in *Catholic Charities of Sacramento Inc. v. Superior Court,*\(^7\) where a religiously-based employer appealed a decision denying injunctive relief from a California statute\(^8\) mandating that all employers who furnish a prescription health insurance plan to their employees include prescription contraceptives in that plan.\(^9\) In an attempt to escape the California statute, Catholic Charities of Sacramento, Inc. (Catholic Charities) raised arguments regarding its religious freedoms under the Free Exercise Clause and the Establishment Clause of both the U.S. and California Constitutions.\(^10\) The California Court of Appeal found that Catholic Charities' constitutional arguments failed, and ruled that reproductive age, but a sizable minority of women lack coverage for contraceptives.” Id. (footnotes omitted).


4. 141 F. Supp. 2d 1266, 1277 (W.D. Wash. 2001) (concluding that “the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered”).


6. Roth, supra note 1, at 789-90 (clarifying that “Title VII only affects employers with fifteen or more employees”).


8. Women’s Contraception Equity Act, CAL. HEALTH & SAFETY CODE § 1367.25 (Deering 2003); CAL. INS. CODE § 10123.196 (Deering 2003).

9. See *Catholic Charities*, 109 Cal. Rptr. 2d. at 181.

10. Id. (describing Catholic Charities as a public benefit corporation and therefore, implying that Catholic Charities properly fulfilled state action requirements by invoking constitutional arguments against California's statutes).
prescription contraceptives must be included in its employee prescription drug plan.\(^{11}\)

An appeal is pending before the Supreme Court of California.\(^{12}\) If the court resolves the case in favor of Petitioner, Catholic Charities could use a "conscience clause" exception to the present legal trend that identifies an employer's failure to include prescription contraceptives in its health care plan as sex discrimination.\(^{13}\) If the California Supreme Court affirms the decision of the Superior Court denying Catholic Charities its request for injunctive relief, the legal trend will become even more entrenched. For now, the question remains unresolved.\(^{14}\)

This Note examines Petitioner's constitutional argument in Catholic Charities v. Superior Court as applied to a California statute drafted with a narrowly drawn "conscience clause" exemption. First, this Note describes the background for Roman Catholic opposition to contraceptives, and contrasts the reasons behind women's rights activists' claim for equal access to contraception as a part of reproductive freedom. Second, this Note examines the preeminent cases decided by the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, and the California Supreme Court, as well as the relevant federal statutes and administrative decisions used by the California Court of Appeal in deciding Catholic Charities. Third, this Note describes in detail the arguments advanced by the Petitioner in Catholic Charities and the court's resulting analysis. Concluding that the Court of Appeal of California correctly decided against the Petitioner in Catholic Charities, this Note examines the possible impacts of that decision on society's view of women and on the Catholic health care system. Finally, this Note concludes that the California Supreme Court will affirm the appellate

\(^{11}\) Id. ("Because the statutes have a secular purpose, do not advance or inhibit religion, and do not foster excessive government entanglement with religion, the incidental effect of the statutes on religious beliefs does not violate the religious guarantees of the United States and California Constitutions.").


\(^{14}\) Susan Berke Fogel, Recent Trends and Policy Developments at State & National Levels, 17 BERKELEY WOMEN'S L.J. 216, 216 (2002). Fogel summarized her speech with important questions surrounding the California Supreme Court's then upcoming ruling in the Catholic Charities case. She concluded:

This is a case that's being watched by all of us. We have to ask, what is the proper reach of the First Amendment? Should health care be a right? And if so, would it trump the First Amendment? What kind of limits can we put on public funds and still protect our religious liberties, which we all want to protect? Are we going to let religion trump medical standards of care and let one religious group take over our entire medical decision making?

_id. at 222._
The court's decision and hold that the mandatory inclusion of prescription contraceptives in insurance plans, even for institutions whose religious beliefs are contrary to the mandate, does not violate the Free Exercise Clause or the Establishment Clause of the U.S. or California Constitutions.

I. COMPETING RELIGIOUS, SOCIAL, AND ECONOMIC ARGUMENTS IN THE STRUGGLE BETWEEN ACCESS TO PRESCRIPTION CONTRACEPTIVES AND RELIGIOUS BELIEFS

A. The Catholic Church's Opposition to Contraceptives: A Survey

Pope Paul VI's *Humanae Vitae*, or "Of Human Life," written in 1968, confirmed the Church's ban on artificial means of contraception. The Church, through Pope Paul VI's encyclical *Humanae Vitae*, makes a distinction between the unitive and procreative purposes of sex between married couples. In the Church's view, the act of sex between married partners has a twofold purpose that cannot be separated: it brings the couple together in an act of love symbolizing their depth of feelings for one another (unitive purpose), and it provides an opportunity to bear children (procreative purpose). If these two elements are intentionally separated, the Church believes that the natural structure of the sexual act is missing and that it is improper.

The doctrine espoused by the

15. POPE PAUL VI, *HUMANAE VITAE*, at para. 11 (1968), translated in JANET E. SMITH, *WHY HUMANAE VITAE WAS RIGHT: A READER* 533 (1993); see THOMAS C. FOX, *SEXUALITY AND CATHOLICISM* 68 (George Braziller ed., 1995). The author describes *Humanae Vitae* as being "a sensitively written expression about the sanctity of marital love and the need to nurture life in marriage. . . . [However,] it has been remembered for only one thing: upholding. . . . the Catholic Church's ban on artificial birth control." *Id.*

16. POPE PAUL VI, *supra* note 15, at para. 11. Paragraph eleven of *Humanae Vitae* states: "[T]he Church, which interprets natural law through its unchanging doctrine, reminds men and women that the teachings based on natural law must be obeyed and teaches that it is necessary that each conjugal act remain ordained in itself to the procreating of human life." *Id.* (Latin terms omitted); see also *id.* at para. 11 n.11r (recognizing that various translations have interpreted this sentence differently). The DSP version states, "[The Church] teaches that each and every marriage act must remain open to the transmission of life." *Id.*

17. *Id.* at para. 12. Pope Paul VI wrote, "[I]f both essential meanings are preserved, that of union and procreation, the conjugal act fully maintains its capacity for [fostering] true marital love and its ordination to the highest mission of parenthood, to which Man is called." *Id.* (Latin terms omitted).

18. FOX, *supra* note 15, at 75-76.

19. *Id.* at 76. The author summarizes the crux of Pope Paul VI's argument in *Humanae Vitae*, stating that "[c]ontraception . . . drastically alters the sacred balance between the unitive and procreative in marriage." *Id.* Other religious scholars have
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encyclical remains in force in the Catholic Church today and influences the dispute in the Catholic Charities case.

John T. Noonan, Jr., Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 33-35 (1966). Noonan summarizes: “[T]he most obvious and commanding message of the Old Testament is that marriage and the procreation of children are eminently desirable human goods, which God has blessed.” Id. at 33. The author also recognizes:

The Old Testament provides a structure which is basic to the understanding of the Christian development of a sexual ethic. The structure may be resolved into four propositions, elementary and of sweeping breadth. Woman is a person, like man. Marriage is good, and is the ordinary state in which man and woman are sexually related. Fecundity is good. Sexual acts are not necessarily good. Id. at 30. Noonan cites several scriptural passages to emphasize the Old Testament’s message of fecundity in the context of marriage: Genesis 9:1, “God blessed Noah and his sons, and said to them, ‘Be fertile and multiply, and fill the earth’”; Deuteronomy 7:13-14, “[God] will love and bless and multiply you; he will bless the fruit of your womb . . . no man or woman among you shall be childless”; Exodus 23:26, “[N]o woman in your land will be barren ormiscarry”; Ruth 4:11, “May the Lord make this wife come into your house like Rachel and Leah, who between them built up the house of Israel.” Id. at 31.

The most often quoted, and most controversial, scriptural passage from the Old Testament regarding the contraception debate in the Church is Genesis 38: 8-10. Id. at 33-34. The story in Genesis recounts when Onan was asked by his father to marry his deceased brother’s wife Tamar. But Onan “wasted his seed on the ground,” to avoid contributing offspring for his brother.” At this, the Lord was displeased and “took his life.” Genesis 38: 8-10. The severity of this passage contrasts sharply with the rational emphasis on procreation and marriage in Genesis, Deuteronomy, Exodus, and Ruth, and in passages of the New Testament, and may be more of an anomaly than authoritative text. Noonan, supra note 19, at 35-36. Other biblical text either contradicts or distinguishes Genesis 38:8-10: Leviticus 15:18 (man is “unclean” but not condemned because of an emission of seed), Ezekial 18:6, Leviticus 18:19 (distinguishes coitus interruptus from a sexual act forbidden by law under harsh punishment). Id. at 35. Noonan theorizes that “the lack of any commandment, the contrast with other explicit regulations on marriage, the evident need to restrain other forms of sexual misconduct—support the view that contraception is not the act for which Onan was killed.” Id.

20. Janet E. Smith, Paul VI as Prophet, in Why Humanae Vitae Was Right: A Reader 520-21 (1993) (maintaining that Pope John Paul VI’s predictions were true). But see Fox, supra note 15, at 77-78 (reporting concern among the Catholic community regarding Humanae Vitae’s message). Upon its publication, Humanae Vitae drew some concern and dissenting views from Catholic followers, particularly in Washington, D.C., where a group of Catholic scholars disagreed with the views espoused by Pope Paul VI. Id. They organized primarily on the campus of The Catholic University of America in Washington, D.C. and publicly voiced their concerns with the Pope’s ban on artificial contraception. Id. at 77-79. They believed “spouses may responsibly decide according to their conscience that artificial contraception in some circumstances is permissible and indeed necessary to preserve and foster the values and sacredness of marriage.” Id. at 78.

21. See Fox, supra note 15, at 82-83. Fox notes, “It is easy . . . to forget that all other Christian religions along with most people in the Western world held that contraception was wrong up until the nineteenth century.” Id. Many theologians speculate that the Church’s resistance to change is based on various factors including:

One, by the twentieth century the Catholic Church had developed a theological-ethical theory that explained in a systematic way its total teaching with regard to
Pope John Paul II wrote *Evangelium Vitae*, or "The Gospel of Life," in 1995 and taught that civil law and moral law should coincide on issues regarding human life. Recognizing that this union does not always exist, such as with laws legitimizing abortion and euthanasia, the Pope sent a message of conscientious objection to the Catholic community. This message bears directly on the Catholic Charities case, in which a Catholic organization protested against a California statute imposing contraceptive coverage on employer insurance plans because the statute's mandate directly opposed Catholic moral teachings.

The National Conference of Catholic Bishops (NCCB) released its "Ethical and Religious Directives for Catholic Health Care Services" in 1994 and, among other health care issues, specifically directed Catholic health service providers to follow the Church's teachings regarding contraception and abortion. In particular, one directive under the

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sexual morality. The purpose of sexuality is procreation (and later love union), which means that sexuality must be restricted to marriage and that every single act of sexuality must be open to procreation. This provides the rationale for the acceptance of the generally held Catholic moral beliefs that extramarital intercourse, homosexuality, masturbation, and artificial contraception are always wrong. This systematic theory thus provides a basis for the whole understanding of sexuality. Seen as a systematic whole, to change positions on any one of these beliefs might be viewed as potentially opening the church to changes in other teachings. Two, the Catholic Church, with its great emphasis on tradition, always finds it difficult to go against what has been proposed in the past. Three, the Catholic Church often saw itself in opposition to the modern world. It was easy to cast contraception as simply one more evil creeping into modern society. Four, by the time *Humane Vitae* became public it had become not just a morality question but also an essential authority question. How could the Holy Spirit allow the church to have been wrong?

Id. at 82-83.

22. Pope John Paul II, *Evangelium Vitae*, para. 68-77 (1995). The Pope believed "there is a need to recover the basic elements of a vision of the relationship between civil law and moral law, which are put forward by the Church, but which are also part of the patrimony of the great juridical traditions of humanity." Id. para. 71. Pope John Paul II summarized that "[t]he doctrine on the necessary conformity of civil law with the moral law is in continuity with the whole tradition of the Church." Id. para. 72. The Pope quoted *Summa Theologiae* as supporting his proposition. Id. n.97 ("Every law made by man can be called a law insofar as it derives from the natural law. But if it is somehow opposed to the natural law, then it is not really a law but rather a corruption of the law.").

23. Pope John Paul II, *supra* note 22, para. 73; THE ENCYCLICALS OF JOHN PAUL II 780 (J. Michael Miller, C.S.B., ed., 1996) (providing a synopsis of the Pope's teachings on the moral foundation of civil law). Regarding abortion and euthanasia laws, the Pope declared, "There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection." Pope John Paul II, *supra* note 22, para. 73. The Pope continued that "it is ... never licit to obey [such a law]." Id.

24. See *infra* Part IV.

subtitle “Issues in Care for the Beginning of Life” reads: “Catholic health institutions may not promote or condone contraceptive practices but should provide, for married couples . . . instruction both about the Church’s teaching on responsible parenthood and in methods of natural family planning.”26 These directives impact the instant case. As a Catholic social services provider, Catholic Charities was bound to follow NCCB policies27 and, therefore, faced a conflict when a California statute contradicted its religious directives.28 This conflict resulted in litigation before the California Superior Court.

B. Access to Prescription Contraceptives: A Feminist Perspective

Much of the debate29 surrounding women’s right to prescription contraceptive coverage focuses on the analogy between men’s access to Viagra, a drug used to combat impotency, and the denial of equal access to women for birth control pills.30 This analogy is necessary because

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26. Id. at No. 52.
27. See Carol Hogan, Catholic Charities of Sacramento, Inc. vs. the State of California: The Events, the Case, and the Implications, available at http://www.cacatholic.org/ncbcarticle.html (last visited Aug. 31, 2003). Hogan writes, “It is illicit for Catholic Charities, as a part of the Catholic Church in the Diocese of Sacramento, to provide contraceptive coverage to its employees, and it is immoral to deprive their employees of pharmaceutical benefits in order to avoid the conflict.” Id.
29. Cover My Pills, Planned Parenthood Files Unprecedented Sex Discrimination Lawsuit: Employer’s Refusal to Provide Insurance Coverage for Contraceptives Unlawful and Unfair, at http://www.covermypills.org/latest/index.asp?id=1 (July 19, 2000). Planned Parenthood Federation of America argues that prescription contraceptives are a basic and essential element of women’s health care. Id. It cites statistics including, “[s]even in [ten] American women in their childbearing years are sexually active and do not wish to become pregnant.” Id. The article states that without the option of prescription contraceptives at a reasonable price, women in this group are forced to rely on less effective means of contraception, which leads to unwanted pregnancy and its associated financial and health costs. Id. Public opinion surveys show that a large majority of those polled would support coverage of contraceptives in their insurance plans, even if it meant a five-dollar increase in costs per month. Id.
30. Amy Argetsinger & Avram Goldstein, GWU to Cover Birth Control in Student Health Plan, WASH. POST, Aug. 29, 2002, at B1. The authors write, “Historically, women’s health has been given second-class status . . . . What brought this [issue surrounding sex discrimination and prescription contraceptive coverage] to everyone’s attention is that as soon as Viagra came on the market, health insurance started covering it, and women said: ‘What is this? Why don’t you cover my pills?’” Id. (quoting Dina Lassow of the Women’s Law Center). Another popular argument, and the one used by the EEOC in its December 2000 decision, views pregnancy as a preventable medical condition and therefore, finds the exclusion of prescription contraceptives from insurance
insurance plans have not only refused to cover women's birth control pills: men would also be denied coverage if a comparative contraceptive was available. To argue that employers are unfairly denying women access to prescription contraceptives would be to draw attention to the inequity in insurance plans that include Viagra for males while excluding prescription contraceptives for females.

A popular argument in support of this analogy views women's access to prescription contraceptives as enabling them access to the sex act itself. Author Sherry Colb proposes, "If we understand sexual intercourse as an activity that women might choose to forego, then it becomes clear that what birth control primarily does is facilitate sexual activity for women, not [sic] rather than prevent pregnancy." If prescription plans allow men access to Viagra, a drug designed to facilitate male sexual activity, then the exclusion of prescription contraceptives, when viewed as an avenue to a sexually active lifestyle plans impermissible. EEOC Decision, supra note 3; cf. infra Part III.B (describing the EEOC decision).

31. See Sylvia A. Law, Sex Discrimination and Insurance for Contraception, 73 WASH. L. REV. 363, 370 (1998) (stating that "[t]here is no FDA-approved contraceptive pill for men"). Law relies on an article by Christina Wang and others to describe the problems with an oral contraceptive for men, including "lower efficiency in Caucasian men, the need for several months of treatment before the effects are induced, and relatively high cost." Id. at 370 n.36. But see Kathy George, Male Birth-Control Pill Studied (Nov. 20, 2002), at http://seattlepi.nwsource.com/local/96391.malepill20.shtml (last visited Aug. 31, 2003). Dr. William Bremner, director of the University of Washington Male Contraception Research Center, believes “[r]esearch in the field [of male prescription contraceptives] has moved slowly . . . because society as a whole . . . still believe[s] that preventing pregnancy ‘is really a female issue.’” Id.


33. Id.


35. See Sibley-Schreiber v. Oxford Health Plans, Inc., 62 F. Supp. 2d 979 (E.D.N.Y. 1999) (denying defendant's motion to dismiss in a class action suit for the wrongful denial of insurance coverage for Viagra on grounds that the plaintiffs satisfied their obligation to exhaust administrative remedies, but allowing the action to proceed under a claimed violation of ERISA); see also 29 U.S.C. § 1133 (2000) (stating “every employee benefit plan shall . . . afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim”).
for women,\textsuperscript{36} appears discriminatory.\textsuperscript{37} Popular support for prescription contraceptive coverage, along with economic, social, and gender equality arguments, form the basis of the opposing view in \textit{Catholic Charities}.

II. CONTRACEPTION RULINGS UNDER THE UMBRELLA OF TITLE VII

A. Historic Legal Approaches To Obtain Freedoms for Women: Reproductive Freedom and Gender Equality

1. A Background of Reproductive Freedom Law

Over time, the Supreme Court has weighed in on several influential female reproductive rights cases.\textsuperscript{39} Beginning with \textit{Griswold v. Connecticut},\textsuperscript{40} where married persons were found to have a constitutional right of access to contraception, the Court has been laying the groundwork for reproductive freedom for women.\textsuperscript{41} In \textit{Griswold}, the

\begin{enumerate}
\item \textsuperscript{36} Colb, \textit{supra} note 32. The author theorizes:
Though birth control does not literally make sexual intercourse possible, the way Viagra does, it is similar in that it gives women access to this activity even when they wish to avoid pregnancy. The failure to cover birth control has, for this reason, signified for many a hostility to women’s sexuality.

\item \textsuperscript{37} \textit{Id.} The author, Sherry Colb, argues that viewing prescription contraception as the means to a healthy and active sexual life for women, rather than as preventative medicine, is more akin to the feelings women have about their need for the drug and, therefore, a more persuasive argument. \textit{Id.} Opponents to this argument view prescription contraceptives as a “lifestyle” choice and, therefore, oppose insurance coverage. Abigail Trafford, \textit{Viagra and the Other Sex Pill}, WASH. POST, May 19, 1998, at Z6. The author queries, “Why should health insurers foot the bill for what is a personal, rather than a medical, decision?” \textit{Id.}

\item \textsuperscript{38} 143 CONG. REC. S4487 (daily ed. May 14, 1997) (statement of Sen. Snowe). Senator Snowe commented that, “women spend 68 percent more than men in out-of-pocket health care costs . . . . It does not make sense that, at a time when we want to reduce unintended pregnancies, so many otherwise insured woman [sic] can’t afford access to the most effective contraceptives because of the disparity in coverage.” \textit{Id.}

\item \textsuperscript{39} See, e.g., Conservatorship of Valerie N., 707 P.2d 760 (Cal. 1985). The court opined:
The right to marriage and procreation are now recognized as fundamental, constitutionally protected interests. So too, is the right of a woman to choose not to bear children, and to implement that choice by use of contraceptive devices or medication, and, subject to reasonable restrictions, to terminate a pregnancy. These rights are aspects of the right of privacy which exists within the penumbra of the First Amendment to the United States Constitution.

\item \textsuperscript{40} 381 U.S. 479 (1965).

\item \textsuperscript{41} \textit{Id.} at 485-86. The executive and medical directors of the Planned Parenthood League of Connecticut were convicted for violating a Connecticut statute prohibiting the
Court invalidated a Connecticut statute that “operate[d] directly on an intimate relation of husband and wife.”\(^{42}\) The Court concluded its opinion with a poetic definition of the institution of marriage and affirmed a married couple’s right to privacy, which included access to contraception, within the bounds of their marriage.\(^{43}\)

Next, the Court expanded the right of access to contraception to unmarried persons.\(^{44}\) In *Eisenstadt v. Baird*, the Supreme Court invalidated a Massachusetts statute that forbade the sale, loan, or gift of any contraceptive, except to married couples.\(^{45}\) The Court found that the statute treated persons in the same situation differently in violation of the Equal Protection Clause of the Fourteenth Amendment.\(^{46}\) It held that “the statute, viewed as a prohibition on contraception *per se*” was unconstitutional\(^{47}\) and found no rational basis for distinguishing between contraceptive rights of married and unmarried couples.\(^{48}\)

The most widely known cases on reproductive rights are *Roe v. Wade*\(^{49}\) and *Planned Parenthood v. Casey*.\(^{50}\) In *Roe*, the Court concluded that a woman’s right to an abortion is either a constitutional right based on the Ninth Amendment or a liberty right under the Fourteenth Amendment.\(^{51}\) In *Casey*, Justice O’Connor wrote that the legality of abortion reflected use of contraceptives. *Id.* at 480. The medical personnel gave information, instruction, and advice on contraception to married couples. *Id.*

42. *Id.* at 482. The Court added that, “in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, [the statute] seeks to achieve its goals by means having a maximum destructive impact on that [marital] relationship.” *Id.* at 485.

43. *Id.* at 486. The Court wrote, “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.” *Id.*


45. See *id.* at 440-41, 443. The statute forbade anyone from “giv[ing] away ... any drug, medicine, instrument or article whatever for the prevention of conception,” except for a medical professional dispensing such contraceptives to married couples. *Id.* After the appellee gave a speech on the necessity of contraception at Boston University, he personally handed contraceptive foam to an audience member and was subsequently arrested for violating the Massachusetts statute banning the use of contraceptives among unmarried persons. *Id.* The appellee was not a licensed physician as required under the statute. *Id.*

46. *Id.* at 443; see U.S. CONST. amend. XIV § 1.

47. *Eisenstadt*, 405 U.S. at 443. The Court asserted enforcement of the statute would “materially impair the ability of single persons to obtain contraceptives.” *Id.* at 446.

48. *Id.* at 450. The Court invalidated an argument that the statute served health purposes because “[i]f there is a need to have a physician prescribe ... contraceptives, that need is as great for unmarried persons as for married persons.” *Id.*


51. *Roe*, 410 U.S. at 153 (noting that the impact of denying women the choice to control their own reproductive processes could lead to “a distressful life and future”).
the majority's belief that "[t]he ability of women to participate equally in
the economic and social life of the Nation has been facilitated by their
ability to control their reproductive lives." This line of reasoning has
been followed in important cases involving reproductive rights and
contraceptive coverage.

Similarly, Conservatorship of Valerie N. was a defining case
regarding reproductive rights heard by the Supreme Court of California,
the same court that will hear Catholic Charities' pending appeal. Valerie N. addressed the right of a conservator to impose sterilization upon a mentally disabled conservatee. Most relevant to this Note, the
court held that the California statute precluding all conservators from
arranging sterilization procedures for their conservatees was
unconstitutional, given the rights that "are accorded all other persons
[under] . . . state and federal constitutional guarantees of privacy." Specifically, the court held that both the federal and the California

52. Casey, 505 U.S. at 856.
   (holding that Title VII requires employers to provide comprehensive prescription
   insurance plans that include contraceptives); see also Catholic Charities of Sacramento,
   constitutional challenge to a narrowly-drawn "conscience clause" and mandating that an
   auxiliary religious organization include prescription contraceptives in its employee drug
   plan).
56. Valerie N., 707 P.2d at 765. ("[A]s a "pioneer" in the field, California performed
   the greatest number of sterilization operations . . . [and] [t]he total number of operations
   performed to date is more than 5,000, which is four times as many as have been performed
   for eugenic reasons, in governmental institutions, in all the rest of the world together, so
   far as known."). In her article, author Megan Colleen Roth notes that "sterilization is
   considered to be the most common form of contraception in the United States. Sterilization
   . . . is virtually irreversible . . . [y]et, sterilization is covered by most insurance
   policies, possibly explaining its appeal." Roth, supra note 1, at 786 (footnotes omitted).
57. Valerie N., 707 P.2d at 773-74 (framing the issue as "whether withholding the
   option of sterilization as a method of contraception to this class of [mentally disabled]
   women is constitutionally permissible"). Valerie's mother and stepfather petitioned for
   authorization to have Valerie sterilized. Id. at 762-63. Evidence showed that Valerie had
   a history of "inappropriate" sexual advances toward [men] including when she
   "approached men [on the street], hugged and kissed them, climbed on them, and wanted
   to sit on their laps." Id. at 763.
58. CAL. PROB. CODE § 2356(d) (Deering 2003). California's Welfare and
   Institutions Code § 2356(d) states, "No minor may be sterilized under this division." Id.
59. Valerie N., 707 P.2d at 762 (holding also that "[t]he judgment must be affirmed
   because the record does not support a conclusion that sterilization is necessary to Valerie's
   habilitation and does not support the trial court's implicit conclusion that less intrusive
   means by which to avoid conception are unavailable to Valerie").
Constitutions protected the right to use contraception. Although addressing a woman’s right to procreate, rather than a woman’s right not to procreate, the Valerie N. ruling impacted directly the legal issue discussed in Catholic Charities because it reinforced the idea of reproductive freedom.

2. A Background of Gender Equality Law

Several landmark cases involved religious organizations, gender equality, and conscience clause arguments. In 1986, the U.S. Court of Appeals for the Ninth Circuit decided EEOC v. Fremont Christian School. That case involved a private school’s policy to provide health insurance coverage to only those employees falling under the category “head of household.” As used, the term “head of household” meant single persons or married men, and excluded married women. Based on its determination that Fremont Christian School’s policy discriminated against women, the court affirmed the EEOC’s motion for partial summary judgment. Further, an injunction precluded Fremont Christian from unequal compensation of its married male and female employees. Additionally, the court declined to grant Fremont Christian’s statutory and First Amendment Free Exercise Clause arguments; instead it affirmed the district court’s ruling. The district court noted that, “the test for routine eligibility for health insurance coverage for women is whether they are married. If so, the husband is presumed to be the head of the household, rendering women ineligible for health benefits.” Fremont Christian School sometimes granted a limited exception from its employee insurance policy for married female employees. The school would permit health insurance coverage for the otherwise excluded married woman as an “act of Christian charity” when a female employee’s spouse was either a full time student or was disabled or ill, therefore, preventing him from providing for his family.

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60. Id. at 771-72 (basing its decision on the Fourteenth Amendment of the U.S. Constitution and Article I, Section I of the California Constitution).
61. See id.
62. See e.g., EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986).
63. Id.
64. Id. at 1364. Fremont Christian School is owned by the Assembly of God Church in California, a religion that believes the Bible should be interpreted literally. Id. The tenets of the Assembly of God Church include the belief “that in any marriage, the husband is the head of the household and is required to provide for that household.” Id.
65. Id. at 1365. The court noted that, “the test for routine eligibility for health insurance for women is whether they are married. If so, the husband is presumed to be the head of the household, rendering women ineligible for health benefits.” Id. Fremont Christian School sometimes granted a limited exception from its employee insurance policy for married female employees. Id. The school would permit health insurance coverage for the otherwise excluded married woman as an “act of Christian charity” when a female employee’s spouse was either a full time student or was disabled or ill, therefore, preventing him from providing for his family. Id.
66. Id. at 1370.
67. See id.
68. Id. at 1365, 1367. Freemont Christian School argued that an applicable exception exists under 42 U.S.C. § 2000e-1 (1982). Id. at 1365. However, the court cited relevant case law to invalidate the school’s claim. Id. at 1366. The court held that “religious employers are not immune from liability [under Title VII] for discrimination based on . . . sex . . . .” Id. (quoting EEOC v. Pacific Press Publishing Ass’n., 676 F.2d 1272, 1276 (9th Cir. 1982)). The court stated:
court held that "the existence of a strong compelling state interest in eradicating discrimination, coupled with the fact that eliminating the employment policy involved here would not interfere with religious belief, and only minimally, if at all, with the practice of religion." By invalidating Fremont Christian's policy, the court recognized the need to extinguish gender inequality in the workplace, thereby setting the stage for Catholic Charities.

B. A Background of Religious Exemption Arguments

In addition to important gender equality decisions, courts have ruled upon various religious exemption—or "conscience clause"—arguments. In United States v. Lee, the appellee argued before the U.S. Supreme Court that freedom of religion under the Free Exercise Clause permitted him a refund of the portion of taxes he paid to the Internal Revenue Service. Rather than attempting to interpret and validate the appellee's

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To determine whether a neutrally-based statute, such as Title VII or the [Equal Pay] Act, violates the free exercise clause, this court weighs three factors: (1) the magnitude of the statute's impact on the exercise of a religious belief; (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief; and (3) the extent to which recognition of an exemption from the statute would impede objectives sought to be advanced by the statute. 

Id. at 1367.

69. Id. at 1364. As in Catholic Charities, the appellant used constitutional arguments under the Free Exercise and Establishment Clauses to shield itself from a court-imposed injunction. Id. at 1367-70. The court denied both arguments. Id. at 1370. Addressing the Free Exercise argument, the court found that imposing Title VII protections against sex discrimination would help enforce appellant's belief that treating women unfairly would constitute "sin." Id. at 1368. Therefore, enforcement of Title VII could not have a "significant impact on Fremont Christian's religious beliefs or doctrines." Id.; see also infra notes 82-85 and accompanying text (abandoning the Sherbert balancing test). Similarly, in addressing appellant's Establishment Clause argument, the court used the three-part Lemon test to conclude that there was no excessive government-church entanglement. Fremont Christian Sch., 781 F.2d at 1369-70; see also infra Part IV.C (discussing the Lemon test in the Catholic Charities case). Under part one of the Lemon test, the court found that appellant did not qualify under the McClure exemption for ministers. Fremont Christian Sch., 781 F.2d at 1369-70; see also McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972). The appellant failed part two because EEOC enforcement does not have "[t]he potential for ongoing entanglement or continuous supervision" even when a court imposed injunction is involved. Fremont Christian Sch., 781 F.2d at 1370 (quoting EEOC v. Pacific Press Publishing Ass'n., 676 F.2d 1272, 1282 (9th Cir. 1982)). Part three similarly failed because the "EEOC's relationship to religious employers threatens no more entanglement than other statutes which regulate employee compensation at religious institutions." Id.

70. 455 U.S. 252 (1982).

71. Id. at 254. The appellee employer, a member of the Old Order Amish, failed to file social security tax returns, to withhold the necessary social security taxes from his Amish employees, or to provide his portion of social security funds as required as their
Free Exercise claim, the Court took the claim at face value. Further, the Court found that the obligation to pay taxes into the social security system *did* burden appellee's religious freedoms, but found that the burden did not violate constitutional protections under a strict scrutiny analysis. The government proved that its interest in providing retirement and health insurance benefits for the country's elderly population, by requiring mandatory payments into the social security system, overcame the burden on the appellee's religious freedoms under the First Amendment. As the Court noted, finding otherwise would "unduly interfere with fulfillment of the governmental interest."
However, this analysis would change about eight years later when the Court decided *Employment Division v. Smith.*

In *Smith,* the Court abandoned the strict scrutiny analysis applied to freedom of religion cases under the Free Exercise Clause. *Smith* questioned whether using peyote for religious reasons was properly prohibited under Oregon's criminal statute for illegal drug use. The Court found Oregon's statute constitutional and ruled that if a statute of general applicability has a corollary effect on a religious belief, then First Amendment Free Exercise Clause protection may not properly be invoked. Therefore, the Court narrowed its analysis of Free Exercise claims to accept neutral state statutes of general applicability.

The Court also analyzed the strict scrutiny analysis set forth in *Sherbert v. Verner* and discussed in *United States v. Lee.* Using a "slippery slope" analysis, the Court concluded that the *Sherbert* strict scrutiny test is most appropriately confined to unemployment compensation cases. A strict scrutiny test, when used in the context of First Amendment freedom of religion cases, would have the potential of requiring exemptions from an overwhelming number of laws in our religiously diverse society. The Court found such a policy unacceptable. Accordingly, the majority discarded the use of a strict standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) better explains most of this Court's holdings than does the standard articulated by the Court today.

77. Id. at 884-85.
78. *Smith,* 494 U.S. at 874.
79. Id. at 878-79 (stating that the Court has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”).
80. Id. at 878-79, 884-85, 888-90. See also Catholic Charities of Sacramento, Inc. v. Super. Ct., 109 Cal. Rptr. 2d 176, 185-86 (Cal. App. 3 Dist. 2001) (summarizing the *Smith* holding).
82. See supra Part II.B.
83. *Smith,* 494 U.S. at 885 (stating that although the balancing test was sometimes used to analyze Free Exercise Clause cases, the Court has “never applied the test to invalidate [such a case]”).
84. Id. at 888-89. Justice Scalia, writing for the majority, commented:

Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Id. at 888 (internal citations omitted).
85. Id. at 889.
scrutiny test under the Free Exercise Clause when applied to an otherwise valid law, and replaced it with a rational basis test.\textsuperscript{66}

In \textit{Smith v. Fair Employment & Housing Commission},\textsuperscript{87} heard by the Supreme Court of California, the petitioner argued both statutory and constitutional grounds to support her religiously-based policy excluding unmarried couples from renting her apartments.\textsuperscript{88} The Fair Employment and Housing Commission argued that Smith's policy violated, among other laws, California's Fair Employment and Housing Act (FEHA).\textsuperscript{90} The court disposed of Smith's defense to the FEHA claim, finding that the plain meaning of the statute included discrimination against unmarried persons and, therefore, Smith violated the FEHA.\textsuperscript{90} Regarding Smith's First Amendment claim, the court ruled that California's statutory bar of discrimination based on marital status was "both generally applicable and neutral towards religion"\textsuperscript{91} and, therefore, did not violate Smith's First Amendment freedoms under the Free Exercise Clause.\textsuperscript{92}

\textsuperscript{86} Id. at 888. The Court concluded its opinion by affirming its departure from "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." \textit{Id.} at 890. Congress reacted to the Court's ruling in \textit{Smith} by enacting the Religious Freedom Restoration Act (RFRA) where it restored the \textit{Sherbert} compelling interest test. Catholic Charities of Sacramento, Inc. \textit{v.} Super. Ct., 109 Cal. Rptr. 2d 176, 186 n.4 (Cal. App. 3 Dist. 2001). The Court later found the RFRA unconstitutional and reaffirmed its ruling under \textit{Smith}. \textit{Id.}

Some commentators have declared the \textit{Smith} rational basis test to be "extremely unfavorable to any litigant seeking to obtain an exemption from a statute based on religious objections." Edward T. Mechmann, \textit{Illusion or Protection? Free Exercise Rights and Laws Mandating Insurance Coverage of Contraception}, 41 \textit{CATH. LAW.} 145, 150 (2001).

\textsuperscript{87} 913 P.2d 909, 918 (Cal. 1996) (finding that a religious-based policy to refuse apartment rentals to unmarried couples to be unconstitutional).

\textsuperscript{88} \textit{Id.} at 912-13.

\textsuperscript{89} \textit{Id.} at 913 n.1; \textit{CAL. GOV'T CODE} § 12955(a) (West 2003) (finding it unlawful "[f]or the owner of any housing accommodation to discriminate against . . . any person because of the . . . marital status . . . of that person"). Respondent also alleged that Smith violated the California Civil Rights Act. \textit{CAL. CIV. CODE} § 51 (Deering 2003) (reading "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability or medical condition are entitled to . . . full and equal accommodations . . . in all business establishments of every kind whatsoever"). Fair Employment and Hous. Comm'n, 913 P.2d at 913 n.2.

\textsuperscript{90} \textit{Id.} at 914-15.

\textsuperscript{91} \textit{Id.} at 919. The court noted that "[t]he law is generally applicable in that it prohibits all discrimination without reference to motivation. The law is neutral in that its object is to prohibit discrimination irrespective of reason not because it is undertaken for religious reasons." \textit{Id.} at 919.

\textsuperscript{92} \textit{Id.} at 919-21. The court also examined Smith's free exercise claim under the Religious Freedom Restoration Act (RFRA), an act of Congress later found unconstitutional by the U.S. Supreme Court. \textit{See id.} at 921-29. The court used a four-part test under the RFRA to analyze Smith's invocation of the Free Exercise Clause:
The decisions in *Lee, Smith, and Fair Employment and Housing Commission* provide an important historical perspective to the future interpretation of the First Amendment Free Exercise Clause and its invocation in religious exemption cases. They also provide a clear background to the freedom of religion arguments promulgated in *Catholic Charities*. In that case, Catholic Charities also used a Free Exercise claim against statutory mandated inclusion of prescription contraceptives in its insurance plan.

III. IMPORTANT BILLS, REGULATIONS, AND CASES INFLUENCING THE TREND TO FIND SEX DISCRIMINATION UNDER TITLE VII

A. Members of Congress Propose the Equity in Prescription Insurance and Contraceptive Coverage Act of 2001

Senator Olympia Snowe (R-ME) introduced the Equity in Prescription Insurance and Contraceptive Coverage Act of 2001 (EPICC). The bill focused on amending the Employee Retirement Income Security Act of 1974 (ERISA) to mandate that every group health plan covered by ERISA include prescription contraceptives provided the plan covers other FDA-approved prescription drugs. EPICC's drafters also sought

(1) The burden must fall on a religious belief rather than on a philosophy or a way of life. (2) The burdened religious belief must be sincerely held. (3) The plaintiff must prove the burden is substantial or, in other words, legally significant. (4) If all of the foregoing are true, the government must "demonstrate[] that application of the burden to the person [...] is in furtherance of a compelling governmental interest, and [...] is the least restrictive means of furthering that compelling governmental interest."

*Id.* at 922-23 (footnotes omitted). Using this test, the court found that Smith's claim failed part three; she failed to prove a substantial burden on her ability to freely exercise her religious freedoms. *Id.* at 923-29. Therefore, Smith's Free Exercise claim also failed, both under the Federal Constitution and the California Constitution. *Id.* at 928-29.


94. *Id.* at 185-95.


97. *See EPICC, supra* note 95, at §§ 3, 714.
to alleviate economic and basic health care burdens for prescription contraceptive users.\textsuperscript{98} The Act's findings focus on the economic benefit in preventing unwanted pregnancies and in allowing family planning.\textsuperscript{99} In her law review article commenting on EPICC and the \textit{Erickson} case, author Julie L. Hatcher states that "the plan would protect physicians from being penalized by a reduction in reimbursements from insurance plans for prescribing contraceptive treatments."\textsuperscript{100} EPICC's introduction provides support for the proposition that Title VII protects prescription contraceptive coverage.\textsuperscript{101}

\textbf{B. EEOC Delivers a Landmark Decision Based on Title VII}

In December 2000, the EEOC found that two women (Charging Parties A and B), both registered nurses, were subjected to sexual discrimination by their respective employers (Respondents A and B)\textsuperscript{102} when their insurance plans did not include prescription contraceptives.\textsuperscript{103} Charging Party A wanted coverage for use of oral contraceptives,\textsuperscript{104} and Charging Party B wanted coverage for Depo Provera, a prescription contraceptive that is injected into the patient.\textsuperscript{105} Because each prescription drug plan excluded prescription contraceptives "regardless of intended use," the Commission concluded that the employers violated

\textsuperscript{98} \textit{Id.} Among other things, EPICC's findings include:
(2) contraceptive services are part of basic health care, allowing families to both adequately space desired pregnancies and avoid unintended pregnancy; (3) studies show that contraceptives are cost effective: for every \$1 of public funds invested in family planning, \$4 to \$14 of public funds is saved in pregnancy and health care-related costs; ... (5) unintended pregnancies lead to higher rates of infant mortality, low-birth weight, and maternal morbidity, and threaten the economic viability of families.

\textit{Id.} at § 2.

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} Hatcher, \textit{supra} note 1, at 215.

\textsuperscript{101} See \textit{Erickson v. Bartell Drug Co.}, 141 F. Supp. 2d 1266, 1276 n.16 (W.D. Wash. 2001) (commenting that EPICC would surpass the reach of Title VII by requiring all employers to include prescription contraceptives in their self-insured benefit plans, rather than just those with fifteen or more employees).

\textsuperscript{102} See EEOC Decision, \textit{supra} note 3 (determining that the EEOC had jurisdiction because respondent met the definition of employers within Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e § 701(b) (2000)).

\textsuperscript{103} See \textit{id.} Respondent A's "plan excludes coverage for prescription contraceptive drugs and devices, whether they are used for birth control or for other medical purposes."

\textit{Id.}

\textsuperscript{104} See \textit{id.} Charging that Party A wanted to use birth control pills as a means of contraception, but also to prevent against ovarian cancer and to ward off the symptoms of pre-menstrual syndrome and dysmenorrhea (menstrual cramps).

\textit{Id.}

\textsuperscript{105} \textit{id.} Charging that Party B wanted to use Depo Provera for birth control purposes alone. \textit{Id.}
Title VII, as amended by the Pregnancy Discrimination Act (PDA). The PDA protects pregnant women in the workplace from being treated differently from those similarly situated, whether the disparate treatment relates either to working conditions or the type of benefits extended by the employer. The PDA also protects women in the workplace who are affected by medical conditions relating to pregnancy.

In reaching its decision, the EEOC relied upon the Supreme Court’s determination that the PDA protects “a woman’s potential for pregnancy, as well as pregnancy itself.” Therefore, if contraception is considered a means to self-regulate a woman’s pregnancy potential, then it would logically fall under the umbrella of the PDA. The EEOC applied this reasoning to the facts presented by charging Parties A and B.

106. See id. Respondent A is largely associated with Respondent B; therefore, their prescription insurance plans are identical. Id.; see also Pregnancy Discrimination Act, 42 U.S.C. § 2000e-2(a)(1) (2000) (making it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his . . . employment, because of such individual’s . . . sex”).

107. 42 U.S.C. § 2000e(k) (defining women “affected by pregnancy, childbirth, or related medical conditions” as a class that must be protected from sexual discrimination). Congress amended Title VII in reaction to the Supreme Court’s “erroneous” decision in General Elec. Co. v. Gilbert, 429 U.S. 125, 138-39 (1976) (holding that a policy excluding coverage for pregnancy related disabilities was not sexually discriminatory under Title VII). See also Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1268-70 (W.D. Wash. 2001) (discussing the origins of sex discrimination coverage in Title VII, specifically as an attempt by a Virginia Congressman to sabotage the law by adding such a controversial subject as gender discrimination); Roth, supra note 1, at 783-84 (providing a background to Title VII protections and the Act’s role in the Erickson decision); see EEOC Decision, supra note 3 (stating that the PDA bars employers from treating women who are pregnant differently from other women who are similarly able or unable to work); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (providing that “[t]he Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex”).

108. See 42 U.S.C. § 2000e(k); see also EEOC Decision, supra note 3.

109. See EEOC Decision, supra note 3 (citing Int’l Union, UAW v. Johnson Controls, 499 U.S. 187, 199, 211 (1991), that found that employer health insurance plans that discriminate on the basis of a woman’s potential to become pregnant are to be held “in the same light as explicit sex discrimination”).

110. Id. Opponents argue that there is a “potential danger” in the EEOC’s decision. See Mechmann, supra note 86, at 160. Mechmann counters the EEOC decision by distinguishing the Church’s position from sexual discrimination. Id. at 161. The author argues that the Church’s refusal to include contraceptives in its insurance coverage is based solely on “morality-based employment policies.” Id. Mechmann contends that “[t]he Church does not provide employee benefits in situations that offend its moral doctrine, regardless of whether it is being done by male or female employees or their spouses.” Id. at 161-62 (relying on Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 414-15 (6th Cir. 1996); Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 1999)). Finally, Mechmann supports the proposition that as long as the Church enforces its moral principles in an even-handed way, it does not violate Title VII. See id. at 162.
and found that their employers violated Title VII by excluding prescription contraceptives from their health plans.\textsuperscript{111} In finding sex discrimination under these facts, the EEOC set the stage for the first federal case holding that employers must include prescription birth control and other contraceptives in their health plan to avoid committing discrimination under Title VII.\textsuperscript{112}

\textit{C. First Impressions: A Washington Federal Court is the First to Rule After the EEOC's 2000 Decision}

In seeking redress for claims of disparate treatment and disparate impact, the plaintiff in \textit{Erickson v. Bartell Drug Co.} relied on Title VII to force her employer to include contraceptives in its coverage plan—an issue of first impression in the federal court system.\textsuperscript{113} After a discussion of the relevant case law, the court in \textit{Erickson} declared:

\begin{quote}
The PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant. Read in the context of Title VII as a whole, it is a broad acknowledgement of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees . . . . The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs.\textsuperscript{114}
\end{quote}

The court then invalidated all six arguments advanced by the defendant Bartell Drug.\textsuperscript{115} Argument five, most pertinent to this Note,

\begin{itemize}
\item \textit{EEOC Decision, supra note 3.} The EEOC stated:
\begin{quote}
[P]rescription contraceptives are available only for women. As a result, Respondents' explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion. Because 100 percent of the people affected by Respondent's policy are members of the same protected group—here, women—Respondent's policy need not specifically refer to that group in order to be facially discriminatory [under Title VII].
\end{quote}
\textit{Id.}
\item \textit{Erickson, 141 F. Supp. 2d at 1275-76.}
\item \textit{Id. at 1275-76; Hatcher, supra note 1, at 213.}
\item \textit{Erickson, 141 F. Supp. 2d at 1270-72 (adding that "[e]ven if one were to assume that Bartell's prescription plan was not the result of intentional discrimination, the exclusion of women-only benefits from . . . [the] plan is sex discrimination under Title VII").}
\item \textit{Id. at 1272-76. The defendant argued that: (1) contraceptives are not a true “healthcare” issue; (2) the PDA does not cover women's control over their own reproductive cycles; (3) employers must have the ability to control costs of benefits such as health insurance coverage; (4) the insurance plan was facially neutral; (5) Title VII is
\end{itemize}
questioned the wisdom and timing of the court in ruling on an issue of first impression regarding Title VII when the Act had existed for thirty-seven years.\footnote{16} Along with the other arguments, the court struck down the defendant's position citing the December 2000 EEOC decision and the court's similar interpretation of Title VII.\footnote{17}

The court concluded its analysis by stating that, although an issue of first impression, the plaintiff properly invoked Title VII and the PDA, and was entitled to equal treatment under her employer's insurance plan.\footnote{18} In short, coverage must include prescription contraceptives.\footnote{19} In making such a ruling, the Erickson court foreshadowed the ruling in Catholic Charities, a case dealing with another issue of first impression regarding prescription contraceptive coverage.\footnote{20}

\footnote{116. Id. at 1275 (answering the defendant's "justifiabl[e]" question by noting that this case was the first challenge to the exclusion of contraceptives from employer insurance plans). The court commented on, but did not analyze, the absence of litigation on this issue before Erickson. Id. In 1998, author Sylvia Law theorized that the failure to bring Title VII claims against employers concerning prescription contraceptive coverage was due to both the inability to gain access to understandable information about insurance plans and a lack of financial backing to pursue Title VII claims as an issue of first impression. Law, supra note 31, at 386.}

\footnote{117. Erickson, 141 F. Supp. 2d at 1275-76 (holding that the EEOC's "overall interpretation of Title VII comports with this court's construction of the Act and has led the Commission to the same conclusion reached by this court").}

\footnote{118. Id. at 1277 (finding that "the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered").}

\footnote{119. Id.}

\footnote{120. In the wake of Erickson, other women filed complaints with their employers to gain access to prescription contraceptives in their insurance plans. For example, a federal judge recently granted class action status to plaintiffs in a claim against Wal-Mart, alleging that Wal-Mart's employee health insurance coverage is sexually discriminatory by not including prescription contraceptives. See Suit vs. Wal-Mart Made Class Action, at CBS NEWS, http://www.cbsnews.com/stories/2002/08/31/health/printable520436.shtml (Aug. 31, 2002). George Stein, an attorney representing the Wal-Mart employee who originally filed the suit, stated that Wal-Mart saves five million dollars a month by denying its employees birth control coverage. Id. The Washington Post reported that in August 2002, George Washington University agreed to expand coverage in its prescription insurance plan to cover contraceptives. Amy Argetsinger & Avram Goldstein, supra note 30, at B2. One of the school's students was "distressed to learn at campus orientation last year that the student health plan covered abortions but not contraceptives, [stating,] [']it didn't make sense.'" Id. According to the school's General Counsel, GWU changed its insurance plan in response to student demand rather than a specific complaint alleging sex discrimination. Id. George Washington's Associate General Counsel, Richard A. Weitzner, stated that the previous plan excluded prescription contraceptives because they were "inconsistent with the purpose of the plan, which is to protect against major medical issues." Id. See also Bergin, supra note 1, at 157-58 (proposing that the protections of}
IV. A TIMELY RELIGIOUS ARGUMENT: CATHOLIC CHARITIES SEEKS A "CONSCIENCE CLAUSE" EXCEPTION FROM CALIFORNIA'S PRO-CONTRACEPTION STATUTES

Catholic Charities arose out of a religious objection to California's Women's Contraception Equity Act, which required employers to include contraceptives in their prescription insurance plans. The petitioner, Catholic Charities, was a religiously-based public benefit corporation that provided social services without regard to its clients' religious beliefs. Similarly, Catholic Charities had a nondenominational hiring policy.

In this case, the respondent was the Superior Court of Sacramento County, the court that denied Catholic Charities its preliminary, declaratory, and injunctive relief. In its appeal, Catholic Charities sought redress from the Superior Court's ruling. Catholic Charities hoped to continue to provide its employees with a prescription insurance plan that excludes coverage of contraceptives. Such a plan directly defied California law.

On July 2, 2001, the Court of Appeal of California issued a unanimous opinion written by Principal Judge Scotland. The court carefully and thoroughly analyzed the arguments advanced by Catholic Charities under the U.S. and California Constitutions. After a detailed discussion, the court of appeal specifically rejected each of Catholic
Charities' arguments and affirmed the lower court's decision. Catholic Charities appealed the case yet again—this time to the Supreme Court of California—and was granted its petition for review on September 26, 2001.

When analyzing the central issue in Catholic Charities, the California Court of Appeal balanced the state's interest and reasoning in passing the California statute with the fundamental religious freedoms of a Catholic public corporation. The court began by examining the legislative history of the California statute and determining that, on its face, the statute was enacted to protect women's basic healthcare needs, as well as their social and economic status. In short, the legislature sought to eradicate gender discrimination while promoting women's stature in society. The court noted that the California legislature included a narrowly drawn "conscience clause" provision mainly at the demand of Catholic groups. Ironically, Catholic Charities could not take advantage of this "conscience clause" exception due to its generally

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131. Id. at 206 (using a de novo standard for the constitutional arguments).
133. Catholic Charities, 109 Cal. Rptr. 2d. at 181-84 (describing the state's reasons for enacting the statute and the substance of Catholic Charities' complaint).
134. Id. at 181-83.
135. See id. at 182. In delivering the opinion, Principal Justice Scotland commented that "prescription contraceptives statistically are the most effective methods of birth control and are an essential part of women's healthcare during their [reproductive] years." Id. at 181. The court further noted that "[m]ainly due to th[e] exclusion [of contraceptives from insurance plans], women pay 63 to 68 percent higher out-of-pocket healthcare costs than men." Id. at 182. The court also referred to the State's legislative findings, which showed that "in order for women to achieve and maintain economic and social parity and independence, it is essential that they have the ability to reliably control their reproductive capacity." Id.
136. Id. at 188-89. The court stated that a "conscience clause" exception from the prescription contraceptive coverage mandate is only acceptable under the Establishment Clause if it is "neutral toward religion and among religions." Id. at 189.
137. Id. at 183 (stating that Catholic groups lobbied the legislature for such an exception throughout the legislative process). But see Petition for Review at 7 n.6, Catholic Charities of Sacramento, Inc. v. Super. Ct., 109 Cal. Rptr. 2d 176 (Cal. Ct. App. 2001) (No. C037025) (arguing that the California legislature intentionally drafted the "conscience clause" so that Catholic employers would be excluded from it). The "conscience clause" exception required "religious employers" to meet four elements: "(A) The inculcation of religious values is the purpose of the entity. [¶] (B) The entity primarily employs persons who share the religious tenets of the entity. [¶] (C) The entity serves primarily persons who share the religious tenets of the entity. [¶] (D) The entity is a nonprofit organization." Id. Catholic Charities, 109 Cal. Rptr. 2d., at 183 (quoting CAL. HEALTH & SAF. CODE § 1367.25; CAL. INS. CODE § 10123.196). The court noted that the applicable state statutes also require such employers to provide notice to potential employees that, due to religious reasons, they do not offer coverage for contraceptive health care services. Id. at 183 n.2.
secular mission, the varying religious faiths of its employees and clients, and its business structure. Because Catholic Charities could not make use of the statutory exception, it had to include contraceptives in its insurance plan, thus violating its religious beliefs. At that point, the corporation filed suit in the California court system, charging that the statute's exclusionary language violated the First Amendment Free Exercise Clause as well as the Establishment Clause of both the U.S. and California Constitutions.

A. The Free Exercise Clause Under the Federal Constitution—Strict Scrutiny Denied

Following the Free Exercise Clause analysis set forth in United States v. Lee, Employment Division v. Smith, and Smith v. Fair Employment & Housing Commission, the court in Catholic Charities performed a detailed analysis of the Petitioner's Free Exercise Clause claim. The analysis focused on the U.S. Supreme Court's opinion in Employment Division v. Smith and summarized the holding:

[S]trict scrutiny does not apply to all free exercise challenges. An otherwise valid and constitutional law in an area in which the state is free to regulate, which law is neutral and of general applicability, need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.

Using the Smith framework, the court in Catholic Charities again examined the California statute's legitimate purpose in preventing

138.  Id. at 183 (holding that Catholic Charities does not meet any of the four criteria necessary to qualify for the narrowly defined religious employer exception).
139.  See supra Part I.A (discussing Humanae Vitae, Evangelium Vitae, and the NCCB directives, which call for bans on contraception and abortion).
140.  Catholic Charities, 109 Cal. Rptr. 2d. at 184. Catholic Charities relied on Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), to argue that the restrictive terms of the "conscience clause" demanded a strict scrutiny standard of review. Id. at 190. The court used Lukumi for the proposition that "a law is not neutral, and thus is subject to heightened scrutiny, 'if the object of [the] law is to infringe upon or restrict practices because of their religious motivation . . . .'" Id. (alteration in original). The court, following the procedures set forth in Lukumi, again examined legislative history to determine whether a malice-tainted objective existed in the Women's Contraceptive Equity Act, and found that the honest intentions of the California legislature distinguished this statute from being unconstitutional. Id. at 190-92. The court found the statute was drafted to address women's health and economic well-being, and to allow them needed control over their reproductive cycles. Id. at 181-82. In drafting the statute, the legislature did allow for a limited exemption for religious employers, but it was constitutional in that it treated all employers in the same limited way. Id. at 190-91.
141.  See supra Part II.B.
142.  Catholic Charities, 109 Cal. Rptr. 2d. at 185-86.
gender discrimination and promoting the basic healthcare needs of women, and its “conscience clause” exception.\textsuperscript{143} The court recognized that the California statute was a valid law of both neutral and general applicability.\textsuperscript{144} Therefore, the statute did not require a strict scrutiny test of its constitutionality under the Free Exercise Clause.\textsuperscript{145} The court rejected Catholic Charities’ argument that the limited language of the “conscience clause” specifically targeted the Catholic religion.\textsuperscript{146} If the exception only applied to Catholic employers, because Catholicism is the only religion that forbids contraceptive use, then Catholic employers would exclusively benefit from it, regardless of the narrow drafting of the California statute.\textsuperscript{147} Because the California statute was generally applicable and neutral under the federal Free Exercise Clause, the court turned its attention to the California Constitution.\textsuperscript{148}

\textsuperscript{143} Id. at 187. The court found the “conscience clause” exception at issue here to be narrowly drawn for a legitimate and recognizable purpose: the legislature correctly believed that a more broadly drawn religious exemption could permit more employers to escape the statute’s reach. \textit{Id.} at 189. The court reasoned that the employees of the exempted parties would feel the ultimate harm in this more inclusive approach. \textit{Id.} They would suffer from having their employer’s religious beliefs forced upon them in the realm of healthcare. \textit{Id.} Therefore, the California legislature drafted the “conscience clause” exception to mainly apply to religious employers whose employees share the same faith. \textit{Id.} In so doing, a particular employer’s religious beliefs will have a limited effect on its employees. \textit{Id.}

\textsuperscript{144} \textit{Id.} at 188-89 (evidencing the statute’s general application by noting that California employers are not required to provide contraceptive coverage in all circumstances, but only if they choose to offer prescription coverage to their employees).

\textsuperscript{145} \textit{Id.} at 186 (citing Employment Div. v. Smith, 494 U.S. 872 (1990)); see also \textit{id.} at 187 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972) (reproductive freedom); Griswold v. Connecticut, 381 U.S. 479 (1965) (same); Conservatorship of Valerie N., 707 P.2d 760 (Cal. 1985) (same); Goehring v. Brophy, 94 F.3d 1294 (9th Cir. 1996) (public health); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986) (gender discrimination); EEOC Decision, \textit{supra} note 3 (finding sex discrimination under Title VII when employers exclude prescription contraceptives from their employee insurance plans)). Catholic Charities relied on \textit{EEOC v. Arabian American Oil Co.}, 499 U.S. 244 (1991), to rebut the authoritative weight of the EEOC’s recent decision. \textit{Catholic Charities}, 109 Cal. Rptr. 2d at 188. The court invalidated that argument, relying on a federal court’s adoption of the pertinent EEOC decision in \textit{Erickson v. Bartell Drug Co.}, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). \textit{Id.}; see also discussion \textit{supra} Part III.C.

\textsuperscript{146} \textit{Catholic Charities}, 109 Cal. Rptr. 2d at 189-90.

\textsuperscript{147} \textit{Id.} at 191. Catholic Charities alleged:

\texttt{[The statute] is not facially neutral because (1) only the Catholic Church has a core teaching against artificial contraception and also operates an extensive network of hospitals, schools, and social service agencies; (2) only Catholic employers were discussed specifically during the legislative process; and (3) only the Catholic Church opposed the enactment of the statutes.}

\textit{Id.}

\textsuperscript{148} \textit{Id.} at 193. The court also invalidated Catholic Charities’ argument that relied on \textit{Lukumi}, that a \textit{Sherbert} strict scrutiny standard was necessary because the California legislature allowed for a religiously-based “conscience clause” exemption in its statute.
B. California’s Free Exercise Clause – Is It More Inclusive Than the Federal Constitution?

Catholic Charities crafted an isolated argument strictly under the California Constitution in another attempt to invalidate the state statute. This argument distinguished the California Constitution’s Free Exercise Clause from its federal counterpart due to the former’s breadth. Catholic Charities maintained that “the interpretation of [California’s] free exercise clause is not dependent upon the manner in which the corresponding federal clause has been applied.” When applying the California Constitution, Catholic Charities argued that the court should apply a strict scrutiny test against the statute in question.

Through precedent, the court demonstrated that the Supreme Court of California had never definitely ruled that the state’s Establishment Clause should be interpreted differently than the prevailing federal standard. The state’s supreme court formerly identified the California

(though not required by law to do so). Id. at 192-93. The court answered this argument by noting its policy implications: if the legislature had to satisfy a strict scrutiny test for each religious exemption incorporated into statutory law, no matter how neutral and generally applicable the exemption was drawn, the legislature would be much less likely to include religious exemptions. Id. Similarly, the court rejected Catholic Charities’ reliance on a “ministerial exception” because a public benefit corporation does not meet the requisite “clergy” member standard and thereby the court cannot be forced to refrain from “encroaching on the ability of a church to manage its internal affairs.” Id. at 193-94; see also EEOC v. Cath. Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996) (finding employer’s denial of employee’s application for tenure was a result of sex discrimination under Title VII). Lastly, the court struck down Catholic Charities’ “hybrid rights” claim. Catholic Charities, 109 Cal. Rptr. 2d. at 194-95. Such an argument required the claiming party to combine its valid Free Exercise Clause argument with another argument. Id. Here, Catholic Charities failed to establish a “colorable” First Amendment freedom of speech or Establishment Clause claim; therefore, its invocation of a “hybrid rights” argument was invalid. Id. (quoting Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999)).

149. Catholic Charities, 109 Cal. Rptr. 2d. at 195-96.

150. Id. at 195-96 n.5. The court included the pertinent parts of the California Constitution, “Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.” Id. Cf U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”)


152. Id. at 196.

153. Id. The court rejected Catholic Charities’ reliance on California v. Woody, 61 Cal. 2d 716 (1964) (holding that California courts should follow federal Constitution interpretations using a strict scrutiny standard), because that case was later overruled by the rational basis test of Employment Division v. Smith, 494 U.S. 872 (1990). Catholic Charities, 109 Cal. Rptr. 2d at 196 (recognizing that “[b]ecause Woody simply applied the
Constitution as "a document of independent force," but had never before applied its Free Exercise Clause in such a way. 154 The court summarized, "Unless and until the California Supreme Court rules otherwise, the application of the [rational basis] rule enunciated in Smith . . . is consistent with protections afforded by the free exercise clause of California's Constitution." 155 Thus, the California Court of Appeal begged the question: will the Supreme Court of California's ruling on this issue distinguish Catholic Charities, and rule that a strict scrutiny test is applicable under the California Constitution?

C. The Establishment Clause as Jointly Interpreted by the Federal Constitution and the California Constitution

Catholic Charities invoked the Establishment Clause of both the U.S. and California Constitutions in its third attempt to disprove the validity of the "conscience clause" exception in the California statute. 156 The court concurrently analyzed the claim's applicability to both constitutions because their meanings do not materially differ. 157 Specifically, Catholic Charities claimed that the Establishment Clause barred the California statute's narrow exception because it excluded the Catholic religion over others. 158 According to Catholic Charities, the statute's exception involved a "facial preference" for other religions that lacked the breadth of auxiliary organizations of the Catholic Church. 159 Such Catholic auxiliary organizations, including Catholic Charities itself, did not easily meet the definition of a "religious employer" within the statute, causing

then-existing federal standard of review . . . , Catholic Charities's reliance on Woody is misplaced").

154. Id. (citing Fair Employment & Hous. Comm'n, 12 Cal. 4th at 1177). The court concluded, "The fact California's Constitution offers broader protection does not ineluctably lead to the conclusion that neutral laws of general application must be subjected to the compelling interest test [rather than the rational basis test of Employment Division v. Smith]." Id. at 197-98 (citing also Ex Parte Andrews, 18 Cal. 678 (1861), and Gospel Army v. City of Los Angeles, 27 Cal. 2d 232 (1945) as precedent that if the California Constitution were applied as an instrument completely severed from the federal Constitution and its interpretations, that its language still "acknowledges that one's religious freedom may be curtailed in certain instances for the public good as long as the curtailment is not discriminatory").

155. Id. at 199 (citation omitted).

156. Id. at 199-206.

157. Id. at 199 n.6 (citing East Bay v. California, 24 Cal. 4th 693, 718-19 (2000), to prove that "California's Establishment Clause offers no more protection than that of the federal Constitution").

158. Id. at 199.

159. Id. (indicating that Larson v. Valente, 456 U.S. 228 (1982), sets forth the appropriate strict scrutiny test when a statute includes a "facial preference between religions").
them to fall outside its “conscience clause” exception.\(^\text{160}\) For that reason, Catholic Charities argued for a strict scrutiny test, requiring a “compelling state interest,” instead of a rational basis standard.\(^\text{161}\) The court disagreed.\(^\text{162}\)

In its ruling, the court distinguished Catholic Charities' reliance on \textit{Larson v. Valente}\(^\text{163}\) from the facts of the instant case.\(^\text{164}\) The Court noted that the statute in \textit{Larson} involved a discriminatory purpose, in allowing a “conscience clause” exemption for those religious groups whose members funded more than half their budget, thereby, excluding less established religions.\(^\text{165}\) In contrast, the \textit{Catholic Charities} court relied on its earlier analysis and reiterated that the California statute is both neutral and generally applicable.\(^\text{166}\) Therefore, Catholic Charities' argument for a strict scrutiny test to apply to its Establishment Clause claim was denied.\(^\text{167}\)

Having dispensed with the strict scrutiny argument, the court proceeded with its Establishment Clause analysis under the three-part \textit{Lemon} test.\(^\text{168}\) According to \textit{Lemon}, “to withstand an Establishment Clause challenge, a statute must have a secular legislative purpose, its primary purpose must neither advance nor inhibit religion, and the statute must not foster excessive government entanglement with

\begin{itemize}
\item \textit{Catholic Charities}, 109 Cal. Rptr. 2d. at 200.
\item \textit{Id.} at 201 (stating “the language of the religious employer exemption in the prescription contraceptive coverage statutes is sect-neutral”).
\item \textit{See generally Larson}, 456 U.S. at 228 (finding a Minnesota statute imposing registration and reporting requirements of only religious organizations soliciting more than fifty percent of funds from nonmembers unconstitutional under the First Amendment Establishment Clause).
\item \textit{Catholic Charities}, 109 Cal. Rptr. 2d. at 200.
\item \textit{Id.}
\item \textit{See supra} notes 140-46 and accompanying text (describing the Women's Contraception Equity Act).
\item \textit{Catholic Charities}, 109 Cal. Rptr. 2d. at 201. The court concluded, “\textit{Larson} is of no assistance to Catholic Charities. It simply 'indicates that laws discriminating among religions are subject to strict scrutiny ... and that laws 'affording a uniform benefit to all religions' should be analyzed under \textit{Lemon} ...'” \textit{Id.} at 200 (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987)). Catholic Charities raised another argument in its attempt to prove that “conscience clause” exemption was not neutral in its application. \textit{Id.} at 201-02. Relying on \textit{Mitchell v. Helms}, 430 U.S. 793 (2000), Catholic Charities argued that the “pervasively sectarian” doctrine forbids a legislative body from deciding for itself the various religious and secular branches of a particular religion. \textit{Id.} The court dismissed this argument because the only binding portion of \textit{Mitchell's} plurality opinion was its holding, and because the two cases were factually distinguishable. \textit{Id.} at 202-03.
\item \textit{Id.} at 203 (citing \textit{Lemon} v. \textit{Kurtzman}, 403 U.S. 602 (1971)).
\end{itemize}
Relying mainly on its previous analysis of the California statute's neutrality towards religion, the Court found that Catholic Charities' argument failed part one of the *Lemon* test. The court determined that Catholic Charities' argument also failed part two of the *Lemon* test because its religious practice was not improperly inhibited. The court concluded that "[b]eing compelled to provide [prescription contraceptive] coverage cannot be viewed as endorsing the use of contraceptives; to the contrary, the organization remains free to advise its employees that it is morally opposed to prescription contraceptive methods and to counsel them to refrain from using such methods." Such a dismissive ruling on this prong of the *Lemon* test may be hotly debated by Catholic Charities and the Catholic community as a whole; however, the court found its opinion sufficient to find against Catholic Charities on this factor.

The court similarly dismissed Catholic Charities' argument on part three of the *Lemon* test and, consequently, its entire claim. This part of the *Lemon* test involved the prohibition of excessive government entanglement with religion. The court concluded that such

169. *Id.*

170. See *supra* text and accompanying notes 144-46 (summarizing the court's analysis as determining that the California statute is generally neutral in its application, and ratifying its legitimate aims of preventing sex discrimination and promoting healthcare for women).

171. *Catholic Charities*, 109 Cal. Rptr. 2d. at 203.

172. *Id.* at 203-04.

173. *Id.* at 204. The court continues: For us to conclude otherwise would mean that such a provider of secular services could impose its own religious views on its employees by refusing to provide them with health coverage that is available to the employees of other entities performing secular services. That, we think, is not what the Establishment Clause stands for.

*Id.*

174. Hogan, *supra* note 27. Hogan writes, "It is illicit for Catholic Charities, as a part of the Catholic Church in the Diocese of Sacramento, to provide contraceptive coverage to its employees, and it is immoral to deprive [its] employees of pharmaceutical benefits in order to avoid the conflict." *Id.* The court in Catholic Charities seemed to dismiss summarily this conflict in prong two without pausing for a deeper analysis. See *supra* Part I.A (describing Catholic teaching in the *Evangelium Vitae* as requiring a conscientious objection to any civil law that opposes moral law). In her 1998 article, Sylvia A. Law similarly simplified the potential conflict for religious employers who face the mandatory inclusion of prescription contraceptives in their employee insurance plans. Law, *supra* note 31, at 386. Law wrote that, "neither employers who provide coverage for contraceptive services nor their employees are required as a result of that financial contribution to use contraception themselves." *Id.*

175. *Catholic Charities*, 109 Cal. Rptr. 2d. at 204-06.

entanglement did not exist because the state need not interfere with a religious employer at all, unless the employer argued the applicability of the statute’s exemption. In that case, the state must accept the employer’s religious objection to issuing contraceptive coverage without question. Next, the state must conduct a limited, mainly statistical, inquiry into the religious make-up of the employer’s services, employees, and customer base and conduct a legal investigation of the employer’s tax status.

For the foregoing reasons, the court found that Catholic Charities’ claim under the Lemon test failed, and that the California statute was valid under the U.S. and California Constitutions.

The court concluded by affirming the superior court’s denial of Catholic Charities’ motion for preliminary declaratory and injunctive relief. The effect of the court’s ruling is that Catholic Charities must include contraceptive coverage in its prescription insurance plan during the pendency and eventual conclusion of its trial. However, because the standard of review is whether it is “reasonably probable” that the petitioner will “prevail on the merits,” the Court of Appeal’s decision provides a clear forecast of the ultimate decision reached by the trial court. Similarly, if the Supreme Court of California affirms the Court of Appeal’s decision, it is more likely that the trial court will find against Catholic Charities.

previously interpreted excessive entanglement to mean “where religious and state employees must work closely together to work out the statutory scheme, when the state becomes involved in scrutinizing religious content or when enforcement requires government investigators to . . . engage in surveillance of the religious organization to ensure a secular purpose is served.” Id. at 205. The court summarized previous interpretations of excessive entanglement as involving “a distinction between regulatory action that requires ongoing government supervision and that which requires a limited inquiry.” Id. (citing DeMarco v. Holy Cross High Sch., 4 F.3d 166, 169-170 (2d Cir. 1993)).

177. Id. Catholic Charities argued that the California statute did require excessive entanglement regarding enforcement of its “conscience clause” exemption because “the state must undertake prolonged monitoring and ‘engage in rendering theological judgments’” in doing so. Id. at 205. The court also dismissed Catholic Charities’ claim that the definition of a “religious employer” under the California statute’s exemption was too vague to apply. Id. at 206.

178. Id. at 205 (articulating the rule that “the state must accept an entity’s assertion that contraception is contrary to its religious tenets”).

179. Id.

180. Id. at 206. The court also dismissed Catholic Charities’ claim that the definition of a “religious employer” under the California statute’s exemption was too vague to apply. Id.

181. Id.

182. Id. at 181.

V. THE LONG REACH OF CATHOLIC CHARITIES OF SACRAMENTO, INC.
V. SUPERIOR COURT: A CAREFULLY CONSTRUCTED OPINION AND ITS
SOCIETAL IMPACTS

A. A Majority Opinion of Finely Detailed Analysis—the Unanimous
Rule Against Catholic Charities

In *Catholic Charities*, the court issued a well-crafted and thorough
opinion. Each of Catholic Charities’ arguments was analyzed using well-
established precedent, including seminal U.S. Supreme Court, U.S. Court
of Appeals for the Ninth Circuit, and Supreme Court of California
cases.\(^{184}\) The opinion also reflected a shift in the legal approach
respecting women’s unique reproductive abilities.\(^{185}\)

The *Catholic Charities* opinion recognizes the inherent biological
difference between men and women—the ability to reproduce—a
difference that must be reflected and protected in our laws.\(^{186}\) Drawing
this distinction in the courts reflects society’s acceptance of the economic
and societal burdens placed solely on women due to their unique ability
to bear children.\(^{187}\) The court’s recognition creates greater societal
latitude in enabling women to have control over their reproductive
choices. Regarding this biological distinction, author and professor
Sylvia A. Law wrote, “Nature demands that women alone bear the
physical burdens of pregnancy, but society, through the law, can either
mitigate or exaggerate the cost of these burdens.”\(^{188}\) The court in
*Catholic Charities* exercised its power to enable women access to
prescription contraceptives and, more importantly, to promote equality
through reproductive control.\(^{189}\) Because the opinion is well crafted,
legally sound, and supports an important societal shift regarding
women’s reproductive control, the Supreme Court of California will
likely affirm the Court of Appeal’s decision.

\(^{184}\) See supra Part II.
\(^{185}\) Cf. Law, supra note 31, at 386 (discussing the historic lack of Title VII challenges
to exclusion of prescription contraceptives from employee insurance plans).
\(^{186}\) See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955,
955 (1984) (stating that “an equality doctrine that denies the reality of biological
difference in relation to reproduction reflects an idea about personhood that is
inconsistent with people’s actual experience of themselves and the world”).
\(^{187}\) Id. at 956 (“Pregnancy and childbirth are . . . burdensome to health, mobility,
independence, and sometimes to life itself, and women are profoundly disadvantaged in
that they alone bear these burdens.”).
\(^{188}\) Id. at 1016.
\(^{189}\) See Catholic Charities of Sacramento, Inc. v. Super. Ct., 109 Cal. Rptr. 2d. 176,
B. The Impact of Catholic Charities on the Vast Network of Catholic Auxiliary Organizations

Catholic hospitals are the largest not-for-profit providers of health care in America. Though Catholic Charities is not technically a hospital, it is a social services organization whose customers are the "poor, disabled, elderly, and otherwise vulnerable members of society." These two groups, Catholic hospitals and social services organizations, are similar because they both abide by the "Ethical and Religious Directives for Catholic Health Care Services" issued by the NCCB. Those directives forbid the distribution of contraceptives.

The Catholic Charities opinion may impact the far reach of the Catholic health care and social services system; if the Supreme Court of California affirms that opinion, that impact will be even greater. As Humane Vitae, Evangelium Vitae, and the NCCB directives indicate, well-established Catholic doctrine forbids its auxiliary institutions from providing contraceptives to its customers and its employees. In ruling that Catholic Charities must include contraceptives in its prescription insurance plan, the court has left the organization with no choice. By whatever action it takes, Catholic Charities must defy either its religious or legal obligations. As a result, it and similarly situated public benefit corporations may react by attempting to meet the California statutes' definition of "religious employer," or they may withdraw prescription

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190. Alison Manolovici Cody, Success in New Jersey: Using the Charitable Trust Doctrine to Preserve Women's Reproductive Services When Hospitals Become Catholic, 57 N.Y.U. ANN. SURV. AM. L. 323, 327 (2000) (reporting statistics including that "[t]he Catholic church controls approximately 600 hospitals nationwide, which translates into 140,000 beds, $40 billion in revenues, and 15% of all hospital care"). The author also stated that "[i]n 1996, five Catholic health care systems were counted among the nation's ten largest systems." Id.


192. See NCCB, supra note 25.

193. Id. at No. 52; see also Hogan, supra note 27. Hogan, recognizing that the Catholic Church sees this as a matter of religious freedom, wrote:

The Catholic Church views itself as the hands and feet of Jesus in the world, and as such, has created affiliated institutions such as Catholic Charities [and] Catholic hospitals . . . in order to fulfill that mission. Catholics believe that their work for charity and justice is not something separate, but integral to worship-in-fact . . . .


194. See NCCB, supra note 25, at No. 52; Pope Paul VI, supra note 15; Pope John Paul II, supra note 22; supra notes 16-19, 22-26.

195. See supra notes 137-38 (defining "religious employer" under the applicable California statute).
insurance coverage altogether. The ultimate course of action remains to be seen.

VI. CONCLUSION

The question of how Catholic auxiliary organizations in California will react to the court's upcoming decision remains unresolved. Although the court of appeal's decision relies on well-established legal principles regarding the U.S. and California Constitutions, the policy issues surrounding the case may give the Supreme Court of California pause. Each party in the case presents compelling positions; one argues the need for legislative recognition of religious freedoms, and the other argues for freedom regarding reproductive control. The religious, societal, and healthcare issues brought forth in Catholic Charities will be impacted by the Supreme Court of California's decision. The only questions remaining are when and how.