

CONSCIENCE IN CONTEXT: PHARMACIST RIGHTS AND THE ERODING MORAL MARKETPLACE

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“The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”¹

I. INTRODUCTION

With these words, James Madison helped derail proposed legislation that would have provided taxpayer funding “for Teachers of the Christian Religion” in Virginia. Over the ensuing 220 years, Madison’s sentiment has become a fixture of the American constellation of non-negotiable ideals. Religious devotion is a matter for individual conscience, not external coercion. As a citizenry, we comprise hundreds of wildly divergent faiths (including a rising number claiming no faith), and thus our common life requires uncommon tolerance, whether as a function of principle or simple survival.

Government efforts to intrude on the inner sanctum of an individual’s relationship with the divine will meet staunch opposition from virtually every station along the American ideological spectrum today. In Michael Newdow’s recent and well-publicized challenge to the pledge of allegiance, for example, no one contemplated contesting his daughter’s entitlement to refrain from uttering the phrase, “under God.” The entire dispute centered on whether a public school could legitimately lead willing students in the recitation of that phrase, or whether even that exercise brings undue coercion to bear on the individual’s conscience.² That the dissenting students should be excused from the exercise is beyond dispute.

Generally off the table of twenty-first century public debate is any

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1. JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON: WRITINGS 30 (Jake Rakove ed., 1999).

2. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

suggestion that an individual's conscience is the proper object of government regulation. Such considerations may have occupied much of the colonists' society-ordering attention, but those debates have been conclusively settled, in effect granting a trump to the dictates of conscience. Indeed, even the perception that non-governmental bodies are creeping into the sphere of individual conscience will spark widespread and bitter resistance, as evidenced by the public reaction to Catholic bishops' efforts to link politicians' personal religious standing with their public policy stances,³ or to the Boy Scouts' insistence that members toe the group's theistic line.⁴

The problem is that our collective certainty in the sanctity of individual conscience sheds very little light on many of the most pressing disputes over the role of religion in modern society. There is a rapidly expanding and intensifying conflict centering on the role that religious faith should play in the provision of the goods deemed foundational in our society; goods such as health care, education, law, and charitable services. These disputes do not pit the monolithic, conscience-squelching state against the noble and brave individual. Rather, the battle lines are forming between consumer and provider, with both acting according to the dictates of conscience. Conscience drives a single mother to conclude that the morning-after pill is her best option to prevent an unplanned pregnancy, but also drives her pharmacist to decline to fill it. Conscience drives a school teacher to talk about intelligent design during science class, but also drives the parents of his student to insist that he be prohibited from doing so. Conscience drives a federally funded drug rehabilitation program leader to integrate biblical teachings into group discussions, but also drives a program participant to object to proselytization. In these and other scenarios, the mere invocation of conscience's sanctity does not bring resolution.

Nevertheless, much of the media coverage and academic commentary surrounding the most hot-button disputes persists in presuming that resolutions must be cast in terms of the fully atomized individual and the monolithic state, as though harnessing state power to defend some conception of individual conscience can bring closure. Our conscience-driven template may suffice when the issue at hand involves state power targeting the individual directly, but the competing claims made in many of our current contests over personal liberty have shifted markedly in substance, and our conversation must change accordingly. Noticeably vacant in the public discourse is the intermediate

3. THE PEW FORUM ON RELIGION & PUBLIC LIFE, GOP THE RELIGION-FRIENDLY PARTY, BUT STEM CELL ISSUE MAY HELP DEMOCRATS (2004), <http://pewforum.org/docs/index.php?DocID=51> (finding that seventy-two percent of Catholics believe it is improper to deny communion to pro-choice politicians).

4. See Marsha King, *Boy Scouts Protested for Exclusionary Policies*, SEATTLE TIMES, Feb. 28, 2003, at B1 (reporting that Boy Scouts' decision to kick out Darrell Lambert for being an atheist "provoked a huge public response and media interviews across the nation").

landscape between the state and the individual.

This omission is exemplified glaringly by the well-publicized battle over the extent to which pharmacists may allow their religiously shaped moral judgments to narrow the range of services they offer. Both sides beseech the state to enshrine collectively a particular vision of the individual's prerogative.⁵ On one side, conscience is invoked to justify legislation that would enable individual pharmacists to refuse to fill prescriptions on moral grounds without suffering any negative repercussions, whether in the form of government penalty, employment discrimination, or third-party liability. On the other side, conscience is invoked to justify legislation that would enable individual consumers to compel pharmacies to fill any legally obtained prescription without delay or inconvenience. For the most part, legislatures have embraced the zero-sum terms⁶ in which the combatants have framed the contest.⁷ Academics have done little to change the course of the conversation. As with most legal scholarship, the proffered resolutions are grounded in the law's coercive power: in the guise of insurmountable individual right, non-negotiable state trump, or both.⁸

This Article asks us to step back from these two-dimensional terms of engagement and to contextualize the public relevance of conscience. In particular, the Article outlines the contours of a marketplace where religiously shaped norms and values are allowed to operate and compete without invoking the trump of state power. A more deliberate articulation and broader recognition of this "moral marketplace" would enrich our discourse on a range of issues; as an entry point, this Article will explore the marketplace's ramifications for the roles and responsibilities of pharmacists. Pharmacists provide an ideal vehicle for testing the marketplace approach, not just because their moral claims have inspired public passions that are not likely to dissipate anytime soon,⁹ but also because the legal system's response to the competing

5. Rob Stein, *Pharmacists' Rights at Front of New Debate; Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, at A1 (reporting that battle over pharmacists "has triggered pitched political battles in State Houses across the nation as politicians seek to pass laws either to protect pharmacists from being penalized—or force them to carry out their duties").

6. "Zero-sum" refers to contests where the amount of one side's gain will necessarily equal the amount of the other side's loss; i.e., it is assumed that, if the pharmacist wins, the consumer must lose, and vice versa.

7. See *infra* Part II.

8. See *id.*

9. The contexts in which health care providers' consciences will create conflicts with consumers' expectations are only going to increase in coming years. See, e.g., Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 181 (1993) ("As the range of medical technologies continues to expand and social mores change, the number of medical services involving potentially serious conflicts of conscience is certain to increase [Further, the] growing diversities of culture and religion in America are increasing the potential for dilemmas involving conflict of moralities

claims of conscience has been starkly devoid of space in which contrasting moral visions might be allowed to flourish in any meaningful way.¹⁰

Put simply, this Article asks the state to allow all sides in the pharmacist controversy to live out their convictions in the marketplace, maintaining a forum in which pharmacies craft their own particular conscience policies in response to the demands of their employees and customers. If a pharmacy wants to require all of its pharmacists to provide all legal pharmaceuticals, or to forbid all of its pharmacists from providing certain pharmaceuticals, or to leave it within the pharmacist's individual moral discretion whether to provide certain pharmaceuticals, so be it. The pharmacy must answer to the employee and the consumer, not the state, and employees and consumers must utilize market power to contest (or embrace) the moral norms of their choosing. Rather than making all pharmacies morally fungible via state edict, the market allows the flourishing of plural moral norms in the provision of pharmaceuticals. Individual consciences can thrive through overlapping webs of morality-driven associations and allegiances, even while diametrically opposed consciences thrive simultaneously. The zero-sum contest over the reins of state power is replaced by a reinvigorated civil society,¹¹ allowing the commercial sphere to reflect our moral pluralism. This is not to suggest that the prospects for civil society are inexorably linked with market economics,¹² but only that where the marketplace provision of certain goods and services is subject to a society-wide battle over moral norms, allowing the contest to proceed may be more conducive to a healthy and engaged public life than the current inclination to legally enshrine one set of moral norms and negate the others.

State power is not marginalized in the moral marketplace, but it is constrained, as it is devoted to maintaining a well-functioning market, not to eviscerating the market through the top-down imposition of particular moral norms. For example, the state can and should ensure that all valid prescriptions for any legal contraceptive can be filled within a reasonably defined geographic

and intensifying the need to protect the rights of conscience of all health care providers.”).

10. See DON E. EBERLY, *AMERICA'S PROMISE: CIVIL SOCIETY AND THE RENEWAL OF AMERICAN CULTURE* 172 (1998) (“A society in which only individuals and the state advance while the mediating associations of civil society retreat is one that is inching toward authoritarianism.”).

11. Michael Walzer describes civil society as “the space of uncoerced human association.” Michael Walzer, *The Idea of Civil Society*, *KETTERING REV.*, Winter 1997, at 8.

12. See Benjamin R. Barber, *Clansmen, Consumers, and Citizens*, in *CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL* 9, 13 (R. Fullinwider ed., 1999) (“Civil society understood as a surrogate for the private sector presents freedom in a strong sense but sociability in its very thinnest sense.”); EBERLY, *supra* note 10, at 174 (“The utilitarian individualism that is eroding the authority centers of civil society and consuming the moral capital of American democracy . . . is also the driving force in American economics.”).

area, but such concerns over access cannot justify current efforts to require pharmacies to offer all legal contraceptives. The fact that an individual is unable to obtain the morning-after pill at a particular pharmacy may be cause for her to take her business elsewhere, stage a protest, or organize a boycott; but as long as she can obtain the pill at another pharmacy, it is not cause for legislative action.

This sounds like—and is—a fairly straightforward proposal, but there are few traces of it in the cacophony of voices trumpeting pharmacist (or consumer) rights. Both sides in the debate invoke conscience as a freestanding, absolute value without acknowledging—much less articulating—the real-world relationships and associational ties that empower individuals to live out the dictates of conscience. And so before we can articulate the moral marketplace in detail, we must discern its absence; in that regard, Part II of this Article captures the current tenor of the debate over pharmacist rights, emphasizing the degree to which this decontextualized understanding of conscience dominates both sides' articulation of the problem and potential resolutions. The Article then attempts to bring the moral marketplace into relief and outline its function as a mediating context to facilitate the robust exercise of conscience. Part III locates the moral marketplace as a venue in which to transcend an atomistic understanding of the individual, allowing like-minded individuals to connect and pursue a common sense of identity and purpose. This function responds to a recurrent theme of concern that a market-based approach commodifies individual dignity. Part IV explores the moral marketplace as a check against the coercive trump of collective power, a power made no less threatening by its stated service to whatever conception of individual rights prevails in the public arena. In Part V, the Article distinguishes the moral marketplace from a traditional libertarian perspective on public policy concerns, embracing a limited government role in ensuring the market's proper functioning and in voicing support for chosen public norms. This role as market actor is carefully circumscribed, however; while the state can facilitate a market in which varying conceptions of the good are pursued, it must resist the temptation to act as an arbiter of the good by closing down the market. Finally, Part VI sketches some preliminary lessons that the pharmacist controversy might hold for other controversies in which a context-less elevation of individual conscience threatens the vibrancy and continued relevance of the moral marketplace.

II. PHARMACISTS ON THE FRONT LINES

In July 2002, Wisconsin pharmacist Neil Noesen rejected a college student's prescription for birth control pills and refused to refer her to another pharmacy.¹³ A devout Roman Catholic, Noesen considered the facilitation of

13. See Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 9, 2004,

contraceptive use to be immoral. The state pharmacy board voted to discipline Noesen and required, as a condition of maintaining his license, that he provide written notice to prospective employers of the pharmaceuticals he declines to dispense and the steps he will take to ensure that a patient's access is not impeded.¹⁴ He was also required to pay for the costs of the proceeding (amounting to as much as \$20,000) and to undergo six hours of continuing pharmacy education.¹⁵

One's reaction to Noesen's conduct and subsequent punishment is a good indication of how one will view the broader controversy over pharmacists and conscience. In Wisconsin, the Noesen episode is frequently cited as a galvanizing impetus on both sides of the debate.¹⁶ For some, Noesen is a courageous figure standing against the onrushing tide of unfettered and self-centered reproductive choice. While Noesen's refusal to dispense birth control pills failed to win legislative backing, his case helped drive both houses of the state legislature to pass a bill forbidding employment discrimination, state disciplinary action, and third-party liability based on a pharmacist's refusal to dispense drugs used for sterilization, abortion, the destruction of a human embryo, or euthanasia.¹⁷

From the opposite vantage point, Noesen is seen as a paternalistic zealot using his state-licensed power over pharmaceuticals to demean women and hinder lawful access to health care. In vetoing the bill, Governor Jim Doyle reflected this perspective, explaining, "[y]ou're moving into very dangerous precedent where doctors make moral decisions on what medical care they'll provide."¹⁸ The Governor's allies on the issue have subsequently sought to enshrine their own consumer-driven moral claims by introducing legislation requiring "every pharmacist" to "administer, distribute, and dispense" all FDA-approved contraceptives unless a patient will be harmed.¹⁹ One of the bill's sponsors explained that a physician "must be assured that his or her medical

at A3.

14. Apparently Noesen had reached a verbal agreement with his supervisor to avoid filling birth control prescriptions but had not provided written notice to the pharmacy itself. *Legal Battle Over Pharmacists' Obligations is Joined in Illinois*, CHAIN DRUG REV., Jun. 6, 2005, at 248.

15. *See id.*

16. *See, e.g.*, Stacy Forster, *Lawmakers Push for Conscience Clauses*, MILW. J. SENTINEL, Mar. 5, 2005, at B1 ("The Noesen case has pushed the issue of a pharmacists' 'conscience clause' to the forefront.").

17. Assemb. B. 67, 95th Leg., Reg. Sess. (Wis. 2003), S.B. 155, 95th Leg., Reg. Sess. (Wis. 2005).

18. Stacy Forster, *Women's Health Debate Intensifies*, MILW. J. SENTINEL, Apr. 21, 2004, at B1.

19. Assemb. B. 532, 97th Leg., Reg. Sess. (Wisc. 2005). The opposing side has also introduced more narrowly tailored conscience legislation—covering only drugs believed by the pharmacist to cause abortion or other death—in an effort to overcome the Governor's veto. *See* S.B. 155, 95th Leg., Reg. Sess. (Wis. 2003).

judgment will not be overruled by a pharmacist's personal moral or religious beliefs."²⁰ Even if a woman's overall access to contraceptives is not jeopardized, another sponsor insisted that she should not "have to go through the humiliation of being denied her legal, safe contraception at the pharmacy counter."²¹

As any casual observer of recent news coverage can attest, Noesen's story is not unique, and every reported incident of a pharmacist refusing to dispense FDA-approved drugs and/or being punished for such refusal is quickly assimilated by the culture war armies and unfurled as a battle flag to rally the troops. Indeed, Wisconsin's is but one of twenty-three state legislatures that have taken up the question of pharmacists and conscience.²² Four states have already enacted conscience clauses specifically protecting the exercise of conscience by pharmacists,²³ and other states encompass pharmacists within the conscience protection afforded health care providers in general.²⁴ Mississippi's statute is held up as a template by the conscience movement, as it protects pharmacists²⁵ from being held "civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience," and forbids any employment discrimination based on such exercises of conscience.²⁶ In at least twelve other states, legislation has been introduced that would allow pharmacists to refuse to dispense contraceptives based on moral or religious objections.²⁷ Some of the proposed legislation aims to expand existing conscience clauses; South Dakota, for example, is considering amending its fairly narrow pharmacist conscience clause²⁸ with an entirely open-ended version mirroring Mississippi's prohibitions on conscience-based liability²⁹ and discrimination.³⁰

Legislatures in four states are pursuing rights claims from the opposite

20. Press Release, State Senator Judy Robson, Democratic Leaders Announce Birth Control Protection Act (June 7, 2005) (on file with author).

21. Judith Davidoff, *Democrats Unveil Their Bill on the Pill*, CAPITAL TIMES, June 7, 2005, at 3A (quoting State Senator Christine Sinicki).

22. Monica Davey & Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight*, N.Y. TIMES, Apr. 19, 2005, at A1.

23. The states are Arkansas, Georgia, Mississippi, and South Dakota.

24. See, e.g., OR. REV. STAT. § 127.625 (2003) (shielding health care providers from being required to participate in the withdrawal or withholding of life-sustaining procedures).

25. The statute covers all "health care providers," which is explicitly defined to include pharmacists. MISS. CODE ANN. § 41-107-3 (2004).

26. *Id.*

27. Davey & Belluck, *supra* note 22.

28. "No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to: 1) Cause an abortion; or 2) Destroy an unborn child . . . ; or 3) Cause the death of any person by means of assisted suicide, euthanasia, or mercy killing." S.D. CODIFIED LAWS § 36-11-70 (1998).

29. H.B. 1255, 80th Leg. (S.D. 2005).

30. *Id.*

angle, considering bills that would require all pharmacies to provide all contraceptives. California's proposed measure would preclude a pharmacist from refusing to "dispense a lawful prescription" on moral or religious grounds unless she notified her employer in writing of her objections and the employer was able to "establish a policy and protocol to accommodate the patient's need for the drug."³¹ Missouri's bill would require a pharmacist to fill all prescriptions unless her employer can accommodate her objections without undue hardship to the consumer; "undue hardship" is defined in part as an inability to fill the prescription in "the equivalent time period" as the pharmacy fills other prescriptions of in-stock medications.³² In other words, religious or moral objections are permissible only if they cause no delay in the provision of pharmaceuticals. In West Virginia, where the legislature is entertaining legislation from both sides of the debate, a bill would forbid pharmacists from refusing to dispense medication unless it is out of stock or the medication could cause harm in combination with the customer's other medications.³³ New Jersey's bill is starker still, proposing that pharmacists be forbidden from refusing to dispense a medication solely on the grounds that doing so "would contravene the pharmacist's philosophical, moral or religious beliefs."³⁴

This is a battle that has exploded in only the past two years and shows no signs of abating. In the states that have not taken up the issue, observers believe that "it is only a matter of time" before they do.³⁵ And state action no longer waits on the legislature. In response to two incidents in Chicago in which pharmacists refused to dispense birth control pills, Illinois Governor Rod Blagojevich ordered all pharmacies serving the public³⁶ to dispense "all FDA-approved drugs or devices that prevent pregnancy" to the patient "without delay, consistent with the normal timeframe for filling any other prescription."³⁷ The governor's stated justification for the order was pitched in the language of individual rights, albeit those of the customer, not the pharmacist.³⁸ And a significant motivation seemed not so much a perceived

31. CAL. LAB. CODE § 21 (2005).

32. S.B. 458, 93rd Gen. Assem., Reg. Sess. (Mo. 2005).

33. H.B. 2807, 79th Leg. (W.Va. 2005).

34. S.B. 2178, 211th Leg., 2d Reg. Sess. (N.J. 2004).

35. Caryn Tamber, *Conscience Clauses for Pharmacists is Controversial Topic in MD and Other States*, DAILY RECORD, June 10, 2005.

36. The order applies to Division I Pharmacies, defined as "any pharmacy that engages in general community pharmacy practice and that is open to, or offers pharmacy service to, the general public." 68 ILL. ADMIN. CODE § 1330.5 (2005).

37. Press Release, State of Illinois Department of Financial and Professional Regulation, Governor Blagojevich Moves to Make Emergency Contraceptives Rule Permanent, (Apr. 18, 2005), <http://www.idfpr.com/NEWSRLS/041805govcontraceptivespermrule.asp>.

38. *Id.* ("Filling prescriptions for birth control is about protecting a woman's right to have access to medicine her doctor says she needs. Nothing more. Nothing less. We will

threat to contraceptive access itself, but potential inconvenience and aggravation.³⁹ Efforts by pharmacy chains to carve out their own policies on the issue were immediately squelched.⁴⁰

In a predictable turn, this battle has now been joined on the national stage. In Congress, one pending bill purports to strike a balance between the pharmacist and the consumer. Premised on honoring the consciences of individual pharmacists while requiring that every pharmacy ensure that all legal prescriptions are filled, its effect is to guarantee that all of the nation's pharmacies dispense all legal pharmaceuticals.⁴¹ A competing congressional bill similarly focuses only on the individual pharmacist by requiring that a pharmacy accommodate the religious objections of a pharmacist by ensuring that another pharmacist is on duty to dispense the drug in question.⁴²

So how and why did pharmacists so suddenly take center stage in our collective culture war drama? Conscience clauses have been common since *Roe v. Wade*, as the reigning political judgment since then has held that health care providers not be compelled to participate in a procedure as morally controversial as abortion. Such clauses remain fairly uncontroversial as applied to physicians, but the advent of "Plan B" emergency contraception has driven pharmacists to seek the same protection enjoyed by physicians. Plan B prevents pregnancy for up to three days after intercourse by blocking the fertilized egg's implantation in the uterus, and some pharmacists believe that the blocking of implantation is a form of abortion. Coupled with pharmacists' gradually expanded discretionary role as gatekeepers to pharmaceutical care,⁴³ the

vigorously protect that right.").

39. Dirk Johnson & Hilary Shenfeld, *Swallowing a Bitter Pill in Illinois*, NEWSWEEK, Apr. 25, 2005, at 28 (reporting Blagojevich's assertion that women should be able to fill birth control prescriptions "without delay, without hassle and without a lecture").

40. See *Four Pharmacists Suspended Over Morning-After Pill*, CHI. TRIB., Dec. 1, 2005, at 7 (reporting Walgreen's suspension of pharmacists for failing to comply with governor's rule); *Legal Battle Over Pharmacists' Obligations is Joined in Illinois*, *supra* note 14 (reporting on claim that Albertson's accommodated a pharmacist's religious beliefs by having him "refer patients seeking emergency contraceptives to another pharmacy less than 500 yards" from the store "until it was required to comply with the governor's rule").

41. Davey & Belluck, *supra* note 22, at A1 (reporting that "bills requiring all legal prescriptions to be filled have been introduced in recent days [in both the Senate and the House]"); Edward Epstein, *Boxer Eyes Prescription Protection*, S.F. CHRON., Apr. 19, 2005, at A1.

42. Senators Santorum and Kerry explain that under their Workplace Religious Freedom Act, a "pharmacist who does not wish to dispense certain medications would not have to do so long as another pharmacist is on duty and would dispense the medications." Rick Santorum & John Kerry, Letter to the Editor, *Religion in the Pharmacy*, N.Y. TIMES, Apr. 12, 2005, at A20.

43. Especially in recent years, the legal system has imposed on pharmacists a counseling role in many contexts. Alan Meisel, *Pharmacists, Physician-Assisted Suicide, and Pain Control*, 2 J. HEALTH CARE L. & POL'Y 211, 231 (1999); see also William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacist's Right of*

widespread availability of Plan B brought the issue to a head. It has now spilled over to the dispensation of the more common birth control pills, and in at least one reported incident, to other medications like anti-depressants.⁴⁴ As pharmaceutical technology encompasses moral hot potatoes such as genetic screening tools, research derived from embryonic stem cells, or race-specific medications,⁴⁵ the stakes and passions will ratchet up accordingly.

That these emerging moral tensions have resulted in clumsily and rigidly drawn lines in the sand within the political arena may be understandable given the public discourse surrounding the issue. From one side of the cultural divide, objecting pharmacists appear as religious zealots seeking to turn the clock back on women's reproductive rights. A *New York Times* editorial, for example, pronounces any refusal by a pharmacist to dispense contraceptives to be "an intolerable abuse of power," and asks that such pharmacists "find another line of work."⁴⁶ Other commentators label the conscience movement a thinly veiled attempt by pharmacists to "be the arbiters of morality for their customers."⁴⁷ Nationally syndicated columnist Ellen Goodman attempts to resolve the issue with the simplistic reminder that "the pharmacist's license [does] not include the right to dispense morality."⁴⁸ Other newspaper editorials call the pharmacists' actions "a clear and simple abuse of power," urge pharmacists who "do not want to fill legal prescriptions [to] quit" their jobs,⁴⁹ and conclude that "[m]oralizing and dispensing medications don't mix."⁵⁰ An official from the National Organization of Women labels pharmacists who won't dispense contraceptives as "extremists . . . [who] are arrogantly playing the role of

Conscience, 5 J. PHARMACY & L. 1, 1 (1996) ("The pharmacist is an active participant [in drug therapy] whose values, attitudes, and beliefs should be given consideration. . . . Pharmacists see themselves as drug managers whose duty it is to assure that patients' best interests are promoted."); Molly M. Ginty, *Pharmacists Dispense Anti-Choice Activism*, WOMEN'S ENEWS, May 4, 2005, <http://www.womensenews.org/article.cfm/dyn/aid/2278/context/archive> ("Today, [pharmacists] hold more power over our medical decisions than ever before.") (quoting Adam Sonfield of the Adam Guttmacher Institute).

44. See Tresa Baldas, *Fighting Refusal to Treat: "Conscience" Clauses Hit the Courts*, NAT'L LAW J., Feb. 7, 2005, at 1.

45. Nicholas Wade, *Race-Based Medicine Continued*, N.Y. TIMES, Nov. 14, 2004, § 4 (Magazine), at 12 ("Researchers last week described a new drug, called BiDil, that sharply reduces death from heart disease among African-Americans. . . . But not everyone is cheering unreservedly. Many people, including some African-Americans, have long been uneasy with the concept of race-based medicine, in part from fear that it may legitimize less benign ideas about race.")

46. Editorial, *Moralists at the Pharmacy*, N.Y. TIMES, Apr. 3, 2005, § 4, at 12.

47. *Governor Dispenses with Pharmacists' Nonsense*, CHI. SUN-TIMES, Apr. 5, 2005, at 37; see also Eric Ferkenhoff, U.S. NEWS & WORLD REP., Apr. 25, 2005, at 18.

48. Ellen Goodman, *Pharmacists and Morality*, BOSTON GLOBE, Apr. 14, 2005, at A14.

49. Editorial, *Just Fill the Prescription*, PALM BEACH POST, June 29, 2005, at 14A.

50. Editorial, *Morals and Medicines Cause Bad Reactions*, GREENSBORO NEWS & REC., May 1, 2005, at H2.

doctor and God.”⁵¹

From the other side, the monolithic state appears to be stifling freedom of religion in the service of the sexual revolution. But in response, the conscience movement asks the monolithic state to ensure that individual pharmacists can act without the possibility of negative consequences by effectively removing the pharmacist from the marketplace. The consumer’s moral claim, we are repeatedly told, pales in comparison to the pharmacist’s because allowing “one person’s convenience [to] trump another person’s moral conscience” is “obnoxious, offensive and un-American.”⁵² After all, if contraception is as evil as its opponents claim, “[t]he only thing the pharmacist is objecting to is being forced to kill and being forced to do harm.”⁵³ Requiring an objecting pharmacist to refer the customer to a pharmacy where the drug in question is available is viewed by many within the conscience movement as a moral non-starter. Karen Brauer, president of Pharmacists for Life, describes such referral requirements as forcing the pharmacist to say “I don’t kill people myself but let me tell you about the guy down the street who does.”⁵⁴ Once health care providers are forced to disconnect their own moral judgments from their professional roles, we have, it is feared, embarked on the path infamously forged by Dr. Mengele.⁵⁵ The state must step in.

Unfortunately, academic commentators have fallen into the same two-dimensional template – presuming that the controversy is resolvable only with the rights-driven language of state power. State action is warranted given the unjustified oppression of the consumer or the pharmacist, depending on the commentator’s perspective. Noted ethicist Anita Allen urges that “the medicine counter is no place for ad hoc moralizing,” insisting that pharmacists must “withhold their moral judgments at work.”⁵⁶ Philosopher Elizabeth Anderson writes that “[t]he Christian pharmacist who refuses to fill birth control prescriptions differs only in degree and not in kind from the Talibanesque taxi driver who refuses to serve women who are unaccompanied by male relatives.”⁵⁷ Health law specialists Susan Fogel and Lourdes Rivera urge that

51. Kirsten Singleton, *Governor’s Directive to Pharmacists Gets Support at Statehouse Rally*, STATE J.-REG., May 17, 2005, at 28.

52. Sheila G. Liaugminas, *Pharmacists Battling Lawsuits Over Conscience Issues*, NAT’L CATH. REG., Feb. 13-19, 2005, at 1.

53. Shari Rudavsky, *Pill Raises Concerns Over Ethics*, J. GAZETTE, June 12, 2005, at 7C (quoting Karen Brauer, President of Pharmacists for Life).

54. Editorial, *Prescription Politics Hard to Swallow*, BALT. SUN, Apr. 22, 2005, at 13A.

55. See Letter to the Editor, PHILA. DAILY NEWS, Apr. 19, 2005, at 16 (“I wonder how many of Buchenwald’s victims were village pharmacists who refused on moral grounds to provide cyanide or other deadly poisons to local Nazi functionaries for ‘official use.’”).

56. Anita L. Allen, *Rx for Trouble: Just Give Us the Medicine, Please*, NEWARK STAR-LEDGER, May 8, 2005, at 1.

57. Elizabeth Anderson, *So You Want to Live in a Free Society*, LEFT2RIGHT, Aug. 2,

health care entities “should not be able to refuse, on religious or ‘moral’ grounds, to honor patients’ informed health care decisions, or to provide medically appropriate services (including drugs, devices and procedures), as defined by the applicable standard of care.”⁵⁸

Moreover, like the popular discourse, the academic debate pays scant attention to the middle ground between the individual and the state, as the prospect of institutional autonomy in these matters is given short shrift. One bioethicist has even equated efforts to protect hospitals’ religious autonomy as “ethically doubtful legal protection of religious fundamentalism,” for “[w]hile conscientious objection is an important human right . . . it is not a right that institutions can invoke” because “hospitals and clinic corporations are artificial legal bodies that have no eternal soul that they may claim an entitlement to protect.”⁵⁹ And, in Fogel and Rivera’s terms, “[w]hile it is appropriate for individuals to decide what role religion will play in their personal health care decisions, it is not appropriate for corporate health care entities to impose those beliefs on physicians and patients and the communities they serve in a manner that supplants sound medical decision-making and patients’ rights.”⁶⁰

This is true even of those who favor conscience legislation. A leading conservative scholar in the field, Lynn Wardle, has drafted model legislation providing that no one may:

discriminate against, penalize, discipline, or retaliate against any individual in employment, privileges, benefits, remuneration, promotion, [or] termination of employment . . . because of his or her refusal or unwillingness to counsel, advise, pay for, provide, perform, assist, or participate directly or indirectly in providing or performing health services that violate his or her conscience.⁶¹

Another scholar insists that legislation is needed to provide pharmacists “with protection against efforts to conform their actions to the employers’ views.”⁶² On both sides, the individualist terms of the debate⁶³ are amenable only to a resolution grounded in a rights-based conception of autonomy. Few have acknowledged the relevance of intermediate institutions;⁶⁴ contestants

2005, http://left2right.typepad.com/main/2005/08/so_you_want_to_.html.

58. Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe is Not Enough: When Religion Controls Health Care*, 31 *FORDHAM URB. L.J.* 725, 748 (2004).

59. Bernard M. Dickens, *Reproductive Health Services and the Law and Ethics of Conscientious Objection*, 20 *J. MED. & L.* 283, 291 (2001).

60. Fogel & Rivera, *supra* note 58, at 748-49.

61. Wardle, *supra* note 9, at 228.

62. Alan Meisel, 2 *J. HEALTH CARE L. & POL’Y* 211, 236 (1999).

63. Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist’s Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 *J.L. & HEALTH* 77, 102 (2003) (advocating for pharmacist conscience clauses because “[c]ertain issues, because of their inherent complexity and ambiguity, must be resolved, with guidance from religion, philosophy, and science, in the heart and mind of each individual.”).

64. One helpful exception is the work of Allen and Brushwood, who acknowledge that

urge that priority be placed on one conscience or the other—the consumer’s or the pharmacist’s—presuming together that such priority is to be realized through the bestowal of state power.

Such is the landscape against which the pharmacist controversy rages. The choices are stark: favor the pharmacist and bring state power to bear on any entity that would retaliate against the pharmacist’s conscience-shaped professional conduct, or favor the consumer and bring state power to bear on any entity that would stand in the way of their conscience-shaped health care decisions.

III. THE MORAL MARKETPLACE AND THE ATOMISTIC INDIVIDUAL

In seeking to protect their moral autonomy through state action, both the pharmacist and the pharmaceutical consumer are unnecessarily isolating themselves, as their rights-based claims have made the state the only relevant audience for moral suasion. If pharmacist and customer were instead left to operate within the moral marketplace, their sustenance would come from targeting the hearts and minds of their neighbors, linking together in common cause. Rather than short-term political advocacy aimed at one-time legislation, the moral marketplace enlists actors in an ongoing competition over the good. The pharmacy owner is given the ultimate say in determining company policy,⁶⁵ but pharmacists and customers are not rendered powerless: the pharmacist can consider those policies in evaluating potential employers, the customer can take her business elsewhere, and both can, through collective action, bring considerable public attention to bear on a policy to which they object. Pushing moral ideals upward through employment and consumer transactions fosters social ties in ways that the top-down enforcement of state-enshrined rules cannot.

The failure to recognize the hyper-individualist slant of our public discourse emanates, at least in part, from our broader failure to distinguish between positive and negative liberty in setting our expectations of the law’s function in the social order. Negative, or “freedom from,” forms of liberty recognize claims of entitlement to non-interference with one’s pursuit of the good, however the good is defined by the pursuer.⁶⁶ Positive, or “freedom to,” forms of liberty contemplate affirmative claims of self-direction and self-

“[n]o clear principle allows us to favor the employee’s conscience over the [pharmacy] owner’s.” Allen & Brushwood, *supra* note 43, at 17.

65. The owner’s authority is subject to overarching access requirements, as discussed in Section V, *infra*, at 129.

66. See ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 7 (1958) (“What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?”).

control in the pursuit of a particular good.⁶⁷ In our morally pluralist society, individuals' conceptions of the good will often conflict, and thus attempts by the state to embrace all conceptions of positive liberty would be contradictory and self-defeating.⁶⁸ Just as the state cannot support equal distribution of wealth and the right to private property, for example, neither can it support an unfettered right among pharmacists to follow the dictates of conscience along with an unfettered right among consumers to all legal pharmaceuticals on demand. As a result, positive liberty usually requires the state to adopt certain conceptions of the good and reject others.

In the current dispute, the predominance of positive liberty is evident in the advocacy of both the consumers and the pharmacists. On the consumer side, the cause of reproductive rights has evolved from one of negative liberty—seeking to prevent the state from criminalizing abortion or contraception—to an extreme form of positive liberty—asking not only to have the full range of legal pharmaceuticals available at every pharmacy, but to insist on their availability with “no hassle, no delay, no lecture.”⁶⁹ The problem, in a society that values pluralism, is that positive liberty claims conflate legality with universal availability—i.e., the fact that the state does not forbid the sale of a drug is taken to mean that every licensed pharmacist must sell that drug to every consumer legally entitled to purchase it. This conflation renders the moral convictions of pharmacists, and the moral identities of pharmacies, irrelevant. The individual consumer does not just coexist with the morally divergent views of the provider; the individual, backed up by state power, trumps the provider. All pharmacists are enlisted in the service of a lowest-common-denominator approach to professional morality: all legal drugs are deemed morally permissible, and providers have no standing to object. The individual preference becomes the collective norm. By no means is this to suggest that consumer access to morally controversial pharmaceutical products is not an important public value; rather, the point is to emphasize that the elevation of universal consumer access imposes significant burdens on other public values, most notably a sense of moral agency among pharmacists.

But on the provider side, the desire to exercise moral agency has led pharmacists to seek not just a negative liberty to protect themselves against

67. *See id.* at 29 (describing positive liberty as “not the ‘negative’ conception of a field (ideally) without obstacles, a vacuum in which nothing obstructs me, but the notion of self-direction or self-control”).

68. ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 171 (1969) (“Pluralism, with the measure of ‘negative’ liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great disciplined, authoritarian structures the ideal of ‘positive’ self-mastery by classes, or peoples, or the whole of mankind.”).

69. Press Release, State of Ill. Dep’t of Fin. and Prof’l Regulation, Governor Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005) (on file with author).

coercive state requirements that they dispense certain drugs, but also a positive liberty to restrain non-state employers from punishing them for the professional by-products of their moral convictions. In effect, pharmacists ask the state to shield them from the marketplace fallout that would otherwise accompany their marketplace conduct. The importance of professional space to exercise moral agency is beyond dispute, both in its public⁷⁰ and personal aspects.⁷¹ Rhetoric aside, few would seek to disconnect professionals entirely from their own moral identities. The prospect of professionals functioning as amoral, technically proficient robots—facilitating whatever the law allows and the client desires—brings to mind a wide range of public fiascos, including the lawyer-driven collapse of Enron⁷² and the complicity of medical professionals in the human experimentation occurring in Nazi Germany.⁷³ But as with consumer access, there are costs to an absolutist defense of a professional's moral agency. One's conscience cannot always be given authority over the contours of one's role; certain roles are not suited for certain consciences, and no one is compelled to become a pharmacist.

A path to resolution must acknowledge more nuance than is shown in either of these positions. Yes, a consumer's access to legal pharmaceutical products is, on balance, beneficial to society, as is a pharmacist's ability to take moral responsibility for her professional conduct, but the legal order's collective enshrinement of either quality is not so beneficial. One essential element of a healthy civic life is acknowledging the relevance of our links to one another even (or especially) when those links are partial or embody normative ideals that are opposed by other segments of society. The legal status of the individual should be a primary concern of, but not constitutive of, our

70. Civil society derives, to a significant extent, from citizens' capacity and willingness to exercise moral agency. Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL'Y 289, 315 (2004) [hereinafter Galston, *Civic Renewal*] (relating view that "healthy civic life is impossible without widespread acceptance of a core of moral norms and a sense of moral obligation toward oneself, others, and the community as a whole.").

71. Requiring an individual to act, as a condition of employment, in ways that she finds morally reprehensible or diametrically opposed to her religious convictions, can inflict significant damage on her sense of identity. See Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 J. L. & RELIG. 427, 443 (2004); cf. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 781 (2002) (exploring notion of "covering"—or downplaying one's identity in order to assimilate—in the context of gays and lesbians, and arguing that "certain acts denominated as covering, such as abstention from same-sex sodomy, might be constitutive of gay identity").

72. See, e.g., Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 223 (2006) (exploring operative moral claims underlying Enron scandal); W. Bradley Wendel, *The Jurisprudence of Enron: Professionalism as Interpretation*, 99 NW. U. L. REV. 1169 (2005).

73. See, e.g., VIVIEN SPITZ, *DOCTORS FROM HELL: THE HORRIFIC ACCOUNT OF NAZI EXPERIMENTS ON HUMANS* (2005).

ongoing conversations regarding the good.

In this regard, the “moral marketplace” impetus is part of a broader project to shore up the practical relevance and theoretical defenses of civil society, which many see as having been eclipsed by the ascendant individual.⁷⁴ Critics have rightfully questioned whether individual rights “are sufficient to explain and justify the full range of constraints we wish to impose on the exercise of public power.”⁷⁵ Self-governance, in William Galston’s estimation, is not just about individual rights, but “may also be identified with associational opportunities for people to express their fundamentally social natures through communal pursuit of their partial goods coupled with a profound sense of their collective responsibility for one another.”⁷⁶ Even those preoccupied by individual autonomy must recognize that the concept’s real-world implementation is inherently wrapped up in institutional autonomy.⁷⁷ Our own autonomy consists, in large part, of our relationships with other individuals and communities.⁷⁸

For the social dimension of humanity to have traction in the legal sphere, one key is to recognize and protect political pluralism, which sees social life as comprising “multiple sources of authority—individuals, parents, civil associations, faith-based institutions, and the state, among others—no one of which is dominant in all spheres, for all purposes, on all occasions.”⁷⁹ This recognition requires more state inaction than action, for political pluralism is a “politics of recognition rather than construction;” indeed, as it “respects the diverse spheres of human association, it does not understand itself as creating or constructing those activities.”⁸⁰

The second key concept to ingrain into the legal consciousness is value

74. See, e.g., Daniel R. Ortiz, *Categorical Community*, 51 STAN. L. REV. 769, 769-70 (1999) (“Many political and ethical theorists have questioned what they see as the philosophical foundations of individual sovereignty Although their specific aims may vary, these theorists share an overall ambition: denying the ontological priority of the individual.”); see also DON E. EBERLY, *AMERICA’S PROMISE: CIVIL SOCIETY AND THE RENEWAL OF AMERICAN CULTURE* 7 (1998) (“When culture has embraced a concept of freedom that is out of balance, it undermines the prerequisites for, and thus the possibility of, a free and functional society.”); ROBERT NISBET, *THE QUEST FOR COMMUNITY* (1990).

75. William A. Galston, *Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience*, 48 AM. J. JURIS. 149, 149 (2003) [hereinafter Galston, *Expressive Liberty*].

76. Galston, *Civic Renewal*, *supra* note 71, at 307-08.

77. See, e.g., Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 176 (2003) (“An account of individual rights that leaves out institutional autonomy . . . cannot vindicate the value of individual autonomy which anticoercion theory seeks to protect.”).

78. As Harold Laski memorably put it, “Whether we will or no, we are bundles of hyphens.” HAROLD J. LASKI, *FOUNDATIONS OF SOVEREIGNTY* 170 (1921).

79. Galston, *Expressive Liberty*, *supra* note 76, at 149.

80. *Id.*

pluralism, which refers to “[t]he conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathizing and deriving light from each other.”⁸¹ According to Joseph Raz, value pluralism speaks “of the existence of more goods than can be chosen by one person,” and of more “virtues than can be perfected by one person,” including virtues that are incompatible.⁸² So “[w]hile states may legitimately act to prevent the great evils of human existence, they may not seek to force their citizens into one-size-fits-all patterns of desirable human lives.”⁸³

Value pluralism, in combination with political pluralism, reveals a more radical stance toward the law than is acknowledged in much of today’s individualist rhetoric. Many rights-based advocates espouse value pluralism as a theoretical basis for seeking maximum individual autonomy—i.e., empowering the individual to pursue her chosen good. But a strictly individualist slant to value pluralism ignores political pluralism and its reminder that, for most individuals, sources of meaningful authority lie outside the self, usually in various non-state forms of community. If we are serious about facilitating individuals’ pursuit of various, often wildly divergent, visions of the good, we must create space for that pursuit to occur not only individual by individual, but community by community. Modern liberalism seeks to domesticate value pluralism by reading its lesson as requiring no more than a universal legal regime of maximum individual autonomy, whether invoked in homage to the consumer or the provider.

Of course, the common identity that is facilitated by a for-profit pharmacy shaped in part by moral norms is hardly the stuff of Tocquevillian dreams. Our nation’s robust history of associational life conjures up images of barn-raising and Boy Scouts, not monthly runs to refill a prescription. But the fact that consumers and pharmacists drawn to a particular moral stance on controversial pharmaceutical products are unlikely to give rise to “thick” communities does not negate the value of the collective life they do create. Daniel Ortiz helpfully invokes Ronald Dworkin’s well-known example of an orchestra’s limited collective life, in which “[a]lthough the members view some of their individual activities as expressive of and constituted by the larger entity, they do not view all or indeed most of their individual activities that way.”⁸⁴ And pharmacy patrons might be pulled in several different directions. A Roman Catholic might choose a pharmacy that sells the morning-after pill despite what she hears from her bishop, as “different communities could each exert claims over

81. ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 11 (Henry Hardy, ed. 1990).

82. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 399 (1986).

83. Galston, *Expressive Liberty*, *supra* note 76, at 150.

84. *See* Ortiz, *supra* note 75, at 782-83 (discussing Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 493 (1989)).

different parts of the individual's identity and sometimes exert conflicting claims over the same ones."⁸⁵ Most of today's associational life is messier and more complex than the straightforward, all-encompassing enclaves of the Amish, as most of us do not belong to a single community, but rather lie "at the intersection of many different ones."⁸⁶ Even with the partial loyalties fostered by a morality-driven pharmacy landscape, though, the moral discourse is reinvigorated, and individuals become active participants in cultivating their own moral environments, not just constituents asking that their chosen norms be imposed on the whole.

To many, the travails of individualism do not pose a threat nearly as dire as the one posed by opening up pharmaceutical access to market forces. Transcending individualism is a fine idea, the skeptic concedes, but not at the price of commodifying something as personal as health care, especially since the most controversial pharmacy issues center on women's reproductive health care, and since the commodification takes the regulation of the issues out of a politically accountable central authority.⁸⁷

Further, the benefits to civil society may seem attenuated, as the cultivation of moral autonomy among what are primarily large corporations strikes modern sensibilities as being of dubious importance.⁸⁸ Generally, "commercial entities are not included within the purview of civil society."⁸⁹ After all, unlike relationships that are "glued together by notions of reciprocal obligations and visions of common destinies . . . [c]ommodified relationships . . . are instrumental in nature."⁹⁰ Relationships centered in the pharmacy transaction

85. *Id.* at 806.

86. *Id.*

87. Andrew Koppelman's criticism of the Rehnquist Court's federalist bent is instructive: "'Decentralization' sounds wonderfully democratic. It implies that people are becoming masters of their own destinies, freed from the oppression of distant functionaries who neither know nor care about the particulars of their lives. Strangely, however, 'decentralization' can sometimes be deployed to disguise oligarchic rule by an unaccountable elite." Andrew Koppelman, *How "Decentralization" Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. 11, 11 (2003).

88. "Clearly, corporations do not have the same kind of moral autonomy that humans do, and it would be a mistake to 'anthropomorphize' corporations for purposes of ethical analysis." Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 254 (2001).

89. Galston, *Civic Renewal*, *supra* note 71, at 294; *see also* George Brenkert, *The Corporation and Its Culture*, 5 BUS. ETHICS Q. 681-82 (1995) ("The business life is the active, not the contemplative, life. More than this it is the active life as directed towards the production and sale of goods and services for a profit. As such, it is only part of life."), *quoted in* Mayer, *supra* note 88, at 232.

90. JEREMY RIFKIN, *THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM, WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE* 11-12 (2000), *quoted in* Mayer, *supra* note 88, at 253; EBERLY, *supra* note 10, at 22 ("[C]ivil society self-consciously serves public purposes as it calls people beyond the minimalist obligations of the law and the narrow self-interest of the market's bottom line to a higher plane of social cooperation and generosity.").

may seem inescapably instrumental, especially because most large pharmacy chains are ill-suited to function as mediating structures that would foster deeper connections or a sense of reciprocal obligation among consumers.⁹¹ Indeed, most Americans are unlikely to drive across town to pick up cold medicine simply because the neighborhood pharmacy stocks a drug they consider morally problematic.

It is true that the moral discourse fostered by pharmacies' profit-driven identities cannot match the richness of the discourse nurtured within thicker communities, such as families or voluntary associations organized deliberately around a set of normative claims. But that is not to say that the moral discourse occurring in the marketplace is somehow nonexistent or inauthentic. As Nancy Rosenblum puts it, all lawful groups contribute to "the moral uses of pluralism."⁹² Timothy Fort's work has pointed out that while "businesses do not necessarily nourish solidarity, compassion, empathy, and respect for others . . . [s]aying that businesses are not necessarily mediating institutions does not mean . . . that they cannot become mediating institutions."⁹³ As Harold Laski put it nearly 100 years ago, a corporation has "a personality that is self-created, and not state-created," and corporations are "in relations with the state, a part of it; but one with it they are not."⁹⁴ This personality "follows from the corporation's mediating function: through incorporation individuals can achieve a sanctioned object, whether economic, moral or intellectual."⁹⁵ If we understand civil society as "an inherently moral term that implies the existence of social and moral obligations that exist independent of the individual and operate upon him,"⁹⁶ there is no reason that a pharmacy landscape defined in

91. Mediating structures are "those institutions standing between the individual in his private life and the large institutions of public life." The large institutions, or "megastructures," include the state, as well as the "large economic conglomerates of capitalist enterprise, big labor, and the growing bureaucracies that administer wide sectors of the society, such as in education and the organized professions." Richard John Neuhaus & Peter Berger, *To Empower People: The Role of Mediating Structures in Public Policy*, in *THE ESSENTIAL NEOCONSERVATIVE READER* 213, 214 (Mark Gerson ed., 1996).

92. Nancy L. Rosenblum, *The Moral Uses of Pluralism*, in *CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL* 255, 266 (R. Fullinwider ed., 1999) ("Surely it is important that groups provide relatively benign outlets for ineradicable viciousness, intolerance, or arrant self-interest, and that antidemocratic dispositions be contained when they cannot be corrected.").

93. Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 *VAND. J. TRANSNAT'L L.* 829, 862 (2000); see also EBERLY, *supra* note 10, at 23 ("Civil society . . . might include the economies of the local grocer, dentist, and shopkeeper, but probably not the international corporate conglomerate" because the latter, "by virtue of their scale, ownership, and function, to permit local loyalties to affect the bottom line.").

94. Laski, *supra* note 79, at 413, 425.

95. Joel Edan Friedlander, *Corporation and Kulturkampf: Time Culture as Illegal Fiction*, 29 *CONN. L. REV.* 31, 39 (1996).

96. Rosenblum, *supra* note 92.

part by moral convictions cannot be encompassed within its reach.

There is no shortage of evidence that corporations—even large chains—are willing to adopt particular moral stances regarding the goods and services they offer. The stances vary across the ideological spectrum: Wal-Mart has aggressively guarded its shelves from products deemed too racy,⁹⁷ clothing retailer Abercrombie & Fitch has embraced sex as a marketing tool,⁹⁸ automaker Subaru targeted the gay and lesbian community at a time when such a strategy risked alienating the broader public,⁹⁹ and Domino's Pizza became readily identified with its founder's work in opposition to legalized abortion.¹⁰⁰ This is to say nothing of the sole proprietors who make morally laden decisions every day regarding what their stores will or will not offer for sale. Whether or not such policies are deliberately calculated to align a company more closely with its customer base or stem from the managers' freestanding moral convictions, the fact is that such alignment occurs.

Moral convictions impact decisionmaking not only on the management side,¹⁰¹ but also on the consumer side.¹⁰² And consumers are being proactive on this front. There is a trend among investors to encourage particular moral identities among corporations, evidenced not only by the myriad boycotts in operation at any given time, but also by the rise of "social investing."¹⁰³ It almost goes without saying that "[m]oral desires will often be implicated in the context of business-relevant decisions."¹⁰⁴ Economic activity, after all, "is frequently undertaken for the sake of recognition rather than merely as a means

97. See Eric Convey, *Wal-Mart Yanks Men's Magazines*, BOSTON HERALD, May 7, 2003, at 5.

98. See Susan Chandler, *Racy Catalogue Spurs a Chain Reaction*, CHI. TRIB., Dec. 9, 1999, at N1.

99. See Fred Kuhr, *Driving Sales*, THE ADVOCATE, Nov. 9, 2004, at 38 ("The car company began to aggressively court gay and lesbian consumers, with notable advertisements with such slogans as 'It's not a choice. It's the way we're built.'").

100. See Cecilia Deck, *Protest Hits Domino's Ann Arbor Home*, DETROIT FREE PRESS, July 19, 1989, at 4A (recounting National Organization for Women's boycott of Domino's).

101. *Id.* (noting that firms "such as The Body Shop, Tom's of Maine, and Ben & Jerry's target the moral desires of potential customers by engaging in social-cause marketing").

102. Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROBS. 129, at 142 (1999) (recounting consumer-led boycotts of firms triggered by moral convictions).

103. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1287 (1999) (reporting that investments using social screens increased from \$639 billion to \$1.185 trillion between 1995 and 1997); see also Marek Fuchs, *Putting Money Where Beliefs Are, Through 'Morally Pure' Investment Funds*, N.Y. TIMES, June 29, 2002, at A13 ("Depending on the particular religion, holdings are screened to avoid companies involved in pornography, birth control, bombs, giving insurance benefits to the same-sex domestic partners of employees and charging interest on loans.").

104. Dunfee, *supra* note 102, at 140-41.

of satisfying natural material needs.”¹⁰⁵

If the state stays out of the battle over pharmacists and conscience, pharmacies—from small mom-and-pop operations to national chains like CVS and Walgreens—will have the space to build moral claims into their corporate identities. Customers and employees alike will have the opportunity to come together in support of a moral stance with which they agree. For the employee pharmacists, this coming together will be significant, dissipating the tension between their personal beliefs and professional calling. Some pharmacists will seek out prospective employers who will defer to their employees’ moral agency; others will want to work in environments reflecting their own substantive moral claims, whether those claims are grounded in unfettered reproductive access and customer choice or pro-life concerns. Whatever course is taken, pharmacists will have the chance to use the employment relationship as a mediating structure, linking themselves with a broader moral community, lending greater coherence to their own professional identities.

For customers, while the coming together will occupy only a small segment of their identities, it will represent a mediating function that is now largely absent. By supporting a pharmacy based at least in part on the pharmacy’s treatment of controversial drugs and/or of its pharmacists’ moral qualms about such drugs, the customer’s day-to-day existence will become more closely aligned with her beliefs and values, even if only incrementally. Especially to the extent that the pharmacist’s and customer’s beliefs and values are not predominant in the wider community, the pharmacy performs a mediating function in the purest sense, serving as a vehicle for shared expression, purpose, identity, and meaning.¹⁰⁶ The percentage of customers who ultimately take advantage of the mediating opportunities presented by a diverse moral landscape of pharmacies (i.e., by driving across town in support of a pharmacy’s moral position) is largely beside the point. For a society committed to moral pluralism, the significance lies in not having the opportunity to pursue one’s own moral claims foreclosed by the state. It is one thing to embrace convenience over the pursuit of one’s moral convictions in the marketplace; it is quite another to have the state declare one’s moral convictions unwelcome in the marketplace.

The distance between traditional civil society stalwarts and commercial entities dealing in morally charged products is not as great as it might seem.¹⁰⁷

105. FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 7 (1995); *see also* AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS passim* (1988) (arguing that individuals’ economic decisions are not motivated only by self-interest, but also by moral considerations).

106. *See* Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 962-65 (2004).

107. Fort & Schipani, *supra* note 93, at 870 (“A mediating institution either could ask its members to nominate, discuss, and vote on what values it holds important, or it could tell

By acknowledging the relevance of our connectedness, and allowing commercial choices to reflect that connectedness, the moral marketplace helps us escape the impoverished discourse of zero-sum, rights-driven individualism.

IV. THE MORAL MARKETPLACE AND COLLECTIVE POWER

Just as individual autonomy should not be the sole object of our conversations regarding the good, neither should the state be the exclusive audience for, or arbiter of, those conversations. We must recognize that “[w]hen mediating and moderating associations collapse, human passion asserts itself through power, not reasoned argument and consensual interaction.”¹⁰⁸ In this regard, there is a necessary corollary to our recognition of the moral marketplace’s power to transcend the domain of the atomistic individual: the moral marketplace does not subjugate the individual to the collective will. If anything, it creates space for individual human flourishing by reining in attempts to harness collective power to a particular conception of individual well-being.

Replacing collective political determinations with market determinations is not an obvious path to ideal policy outcomes. James Boyd White, for example, cautions us “not to abandon our collective powers of judgment, as the marketplace metaphor invites us to do,” because “[d]espite what we say about the ‘marketplace of ideas,’ we also know, if we allow ourselves to reflect on it, that we simply cannot trust any such process to winnow out the bad and promote the good.”¹⁰⁹

Nor can we rely on the marketplace to winnow out the false and promote the true, at least when it comes to religious and moral convictions. Justice Holmes, who pioneered the marketplace approach to free speech in his famous dissent in *Abrams v. United States*, presumed that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹¹⁰ The relative marketplace successes of pharmacies that do or do not offer the

stories about what is meaningful to individual members of the group. These techniques elicit the moral goods of the constituents which can become aims to which members aspire and hold each other accountable in addition to—not instead of—the traditional aim of profitability.”).

108. EBERLY, *supra* note 10, at 173.

109. James Boyd White, *Free Speech and Valuable Speech: Silence, Dante, and the “Marketplace of Ideas,”* 51 UCLA L. REV. 799, 813 (2004).

110. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984) (“This theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems. A properly functioning marketplace of ideas, in Holmes’s perspective, ultimately assures the proper evolution of society, wherever that evolution might lead.”).

morning-after pill, or that do or do not force their employees to dispense the morning-after pill, will do little to bring consensus as to the “truth” of the moral claims made regarding the pill or the sanctity of pharmacists’ consciences.¹¹¹ As Stanley Ingber observes, “if the possibility of rational discourse and discovery is negated by [individuals’] entrenched and irreconcilable perceptions of truth, the dominant ‘truth’ discovered by the marketplace can result only from the triumph of power, rather than the triumph of reason.”¹¹² And the ends of this market power are not always noble. After all, market forces have catapulted Howard Stern to the heights of cultural influence; do we really want those same forces unleashed with respect to health care? Which values, in the end, will rule the marketplace, and which values will be marginalized once stripped of support from collective ordering?¹¹³

One reassurance stems from the fact of the current project’s limited ambitions: it is not directed, for example, toward the establishment of communes devoted to the all-encompassing embodiment of a contested norm. Pharmacies are not equipped or positioned to transform wholly the worldviews of their customers. As such, the constraints on a pharmacy’s mediating function are also constraints on the corrosive effects of a pharmacy’s embrace of any particular norm.¹¹⁴ But a more fundamental reassessment of the marketplace threat requires us to recognize that the current trend toward collectively enshrining individual autonomy as an absolute value (on the consumer or pharmacist side) already reflects normative claims of dubious social value.¹¹⁵ The problem is that this trend merges the atomistic individual with the collective power of state authority, effectively barring divergent (i.e., non-individualist) conceptions of meaningful autonomy. The pharmacist’s

111. Christopher Wonnell challenges the aptness of the truth-seeking function in free speech, asking: First, is there a demand for truth, and second, even if there is a demand, can truth be deciphered from falsehood? Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 693 (1986).

112. Ingber, *supra* note 110, at 15.

113. “One of the great worries about the revival of concern with groups and associations is that these partial loyalties could detract from our most inclusive loyalties, the widest forms of tolerance.” Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1584 (2001).

114. See Macedo, *supra* note 113, at 1585 (“[T]he fact that multiple commitments elicit critical reflection also means that free individuals are not deeply or ineluctably committed to anything: a secure identity is not given, unshakeable beliefs are not easily available. A certain shallowness of commitment may go along with this model of freedom, and some will see that shallowness as the unattractive corollary of [Robert] Putnam’s jaunty celebration of ‘the strength of weak ties.’”).

115. Cf. White, *supra* note 109, at 815 (challenging market ideology that “refuses on the surface to make ‘value choices,’ supposedly leaving them to be worked out by consumers in the market, but in fact it is deeply resonant of value, especially in its way of imagining what a human being is, its sense of what motives drive us, and its image of what constitutes a fulfilled human existence.”).

conscience must be honored, period. The pharmacy customer must have maximum access to all legal pharmaceuticals, period. The space between the individual and the collective has been swallowed up.

This intermediate space is where the moral marketplace does its work, and much of that work is aimed at constructing bulwarks against the encroachments of the state. That this work may not result in a broader discernment of truth is immaterial, for the state's elevation of a single contested conception of individual autonomy also has little relation to truth.¹¹⁶ Morally distinct pharmacies give individuals room to experience and act on divergent worldviews and priorities, whether or not their aim is to reach any consensus via the political apparatus of the collective.¹¹⁷

Contrary to popular conceptions of the phrase's origins, Justice Holmes never actually used the phrase "marketplace of ideas" in his landmark *Abrams* dissent; his actual phrase, "competition of the market," may suggest a concern not with markets' "celebration of discretionary choice, but rather [with] the harsh fact that economic actors and their products are pitted against one another."¹¹⁸ Vincent Blasi extrapolates from this to draw out the lesson for free speech theory:

An unregulated marketplace of ideas encourages free thought not so much by determining the equilibrium of the moment as by keeping low the barriers to entry, barriers that take the form not only of coercive sanctions but also social and intellectual peer pressures toward conformity. The sheer proliferation of ideas in a free market complicates perceptions in a manner that helps to weaken such barriers. In addition, the market metaphor makes a statement about the dynamic and chronically incomplete character of understanding and the value of intellectual contest and innovation.¹¹⁹

Although pharmacists traffic in products, not ideas, our society's struggle with the moral dimension of modern pharmaceuticals displays a similar capacity for benefiting from a well-functioning and diverse marketplace. Understanding this diversity to warrant that a full range of consumer choices is available in every pharmacy eviscerates the concept, as it presumes that the only relevant decision-maker in the provision of pharmaceuticals is the individual, and that the efficacy of individuals' moral convictions should extend no farther than themselves.

116. Wonnell points out that "private utterances that have nothing to do with truth are at least a helpful countervailing power to governmental acts and utterances that also have nothing to do with truth." Wonnell, *supra* note 111.

117. See Ingber, *supra* note 110, at 75-76 ("An individual's experience bestows knowledge as much as do the lessons learned from speech. Individual choice and societal change therefore depend less upon free expression than upon the development of new needs, demands, and experiences allowing, or forcing, individuals to change their perspectives.").

118. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, *24.

119. *Id.* at *27.

To lend some theoretical heft to the status quo, defenders of the prevailing two-dimensional approach to moral discourse—in which warring conceptions of individual autonomy battle for the reins of collective power—may invoke the idea of deliberative democracy or civic republicanism. Deliberative democracy holds that “political decision-making is legitimate insofar as it follows upon a process of public discussion and debate in which citizens and their representatives, going beyond self-interest and existing preferences, reflect on the public interest or common good,”¹²⁰ and in the long tradition of civic republicanism, “human freedom has its summit, not in the pursuit of private preferences, but in self-governance through political participation.”¹²¹ Both themes call for “a process of reflection or discussion in which participants appeal to reasons from a public standpoint.”¹²²

Under this view, state-mandated access to pharmaceuticals may very well represent a public value that is the proper object of collective discernment and enforcement. Especially given that pharmacists are licensed by the state, this argument goes, the public should have input into setting boundaries on their professional role, whether those boundaries follow the contours of conscience or are shaped by the perceived merits of consumer choice.¹²³ Whatever the outcome of the political struggle between those favoring pharmacist rights and those favoring consumer rights, the legislature is acting within its proper sphere when it adopts one side’s moral claims over the other.

The moral marketplace project is not premised on any suggestion that public values are irrelevant to the conduct of pharmacists, or that the state lacks standing to contribute to the defining of pharmacists’ professional duties.¹²⁴ But the state generally shapes conduct through a one-size-fits-all imposition of certain norms. This imposition can be especially problematic in the context of highly charged “culture war” issues, such as the ones in which pharmacists are currently enveloped. Especially on matters so tightly wrapped up with religious convictions, public consensus will often prove impossible, and the state’s adoption of one contested moral position derives not from the success of a collective conversation, but from the wielding of state power. For example,

120. R. Randall Rainey, S.J. & William Rehg, S.J., *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1951 (1996).

121. *Id.*

122. *Id.* at 1952.

123. This theme emerges in the broader corporate context. “[T]he emergence of stakeholder theory in business ethics, and the subsequent appearance of corporate constituency statutes, indicates a desire to remind corporations that the public has granted them substantial benefits not available to natural persons, and has expectations of social as well as economic returns.” In other words, “in exchange for various special rights granted to private corporations, states expected certain public benefits.” Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 235 (2001).

124. *See infra*, at 131.

Wal-Mart's recent decision to carry Plan B at all of its pharmacies nationwide, in a reversal of corporate policy, did not flow from the demands of the chain's constituents; it was the product of legal actions brought or threatened by several states.¹²⁵

Rather than relegating these issues to the zero-sum contest of worldviews occupying our political sphere,¹²⁶ the moral marketplace aims to provide a forum in which individuals and associations can live out the implications of their worldviews, unburdened by a need to convince the wider community of their cause. In fact, often the moral marketplace will be most valuable when it allows communities to flourish in tension with prevailing norms, thereby giving voice to dissidents and challenging the majority continually to reassess conventional wisdom.¹²⁷

The prudence of allowing sub-communities to live out divergent—even radically opposed—worldviews in the public sphere is underscored by the work of Jürgen Habermas, who argues that “the justification of norms and commands requires that a real discourse be carried out.”¹²⁸ His principle of “discourse ethics” holds that “[o]nly those norms may claim to be valid that could meet with the consent of all affected in their role as participants in a practical discourse.”¹²⁹ Basically, Habermas is seeking to ground “moral norms in communication.”¹³⁰ Because Habermas is not providing substance to his theory of ethics, discourse ethics depends on content that is provided by the community engaged in the discourse. As Habermas explains, “[i]t would be utterly pointless to engage in a practical discourse without a horizon provided by the lifeworld of a specific social group and without real conflicts in a concrete situation in which the actors consider it incumbent upon them to reach a consensual means of regulating some controversial social matter.”¹³¹

Accordingly, discourse ethics challenges our presumption that political power is an adequate tool by which to resolve contentious social issues. Habermas battles against the decontextualization and demotivation that has accompanied the dominance of universalist moralities, under which “moral

125. See Michael Barbaro, *In Reversal, Wal-Mart Will Sell Contraceptive*, N.Y. TIMES, Mar. 4, 2006, at C4.

126. See EBERLY, *supra* note 10, at 171 (“Absent the restraining influence of moral and cultural norms, the expansion of liberty becomes a zero sum game in which one person’s legal gain becomes another person’s loss.”).

127. See Blasi, *supra* note 118, at *46 (arguing that Holmesian marketplace of ideas “does not offer the prospect of wisdom through mass deliberation,” but a “much needed counterweight, both conceptual and rhetorical, to illiberal attitudes about authority and change on which the censorial mentality thrives.”).

128. JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 68 (Christian Lenhardt et al. trans., 1990).

129. *Id.* at 197.

130. *Id.* at 195.

131. *Id.* at 103.

judgment becomes dissociated from the local conventions and historical coloration of a particular form of life.”¹³² Such moralities must be able to take the context of a particular community into account in order to “support motivations for translating insights into moral action.”¹³³ Such translation is more feasible within groups devoted to a common moral stance or worldview, given that communicative agreement on ethical norms “requires a large background consensus on matters that are unproblematic for group members,” and a shared “lifeworld background stabilizes a communicatively integrated group insofar as it removes a large body of assumptions from challenge—as it were, fusing validity with the facticity of a given cultural background.”¹³⁴

William Rainey and William Rehg invoke Habermas’s account of discourse ethics to call for a public communications policy that facilitates consensus-seeking. However, for those issues that defy rational consensus, they submit that “debate would still retain an epistemic moment insofar as such matters call for just, and hence mutually acceptable, frameworks of toleration and compromise,” for “[w]ithout such a working hypothesis, the danger exists that political discourse will degenerate into a mere power struggle that veils its nakedness with horse-trading, attention-grabbing, and name-calling.”¹³⁵ In any such framework of toleration, civil society plays an essential role, defined by Habermas as “those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere.”¹³⁶ As such, “the reasonableness of the public deliberative process depends more on broadly dispersed, decentered discursive fora than on the polity’s capacity to come together in some sense or achieve a unified point of view.”¹³⁷ In other words, the desirability of social consensus means that where consensus is impossible, social toleration of the competing claims—rather than the collective elevation of one and the negation of all others—is in order.

The moral marketplace facilitates this process by serving as a “checking” function on state efforts to instill conformity in matters governed by contested moral norms.¹³⁸ This seeming resistance to majority rule actually is in keeping

132. *Id.* at 109.

133. *Id.*

134. William Rehg, *Introduction to JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (Christian Lenhardt et al. trans., 1990), at xvi.

135. Rainey & Rehg, *supra* note 120, at 1962.

136. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 367 (William Rehg trans., MIT Press 1996).

137. Rainey & Rehg, *supra* note 120, at 1967.

138. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 539 (“because no concentrated force is available to check it, government misconduct may properly be regarded as a more serious evil than misconduct by

with democratic values, for it limits the contexts in which citizens are defined by their government.¹³⁹ The moral marketplace contemplates a bottom-up, rather than top-down, approach to contentious social issues.¹⁴⁰ Specifically, the approach will only proceed as far “up” as consensus allows, thereby creating space for divergent views to coexist. The tolerance valued by the moral marketplace is not the placing of artificial boundaries around each individual, beyond which their own moral claims are rendered powerless; rather, it means “the principled refusal to use coercive state power to impose one’s views on others, and therefore a commitment to moral competition through recruitment and persuasion alone.”¹⁴¹

The widespread disregard of this principle in the pharmacist debate may stem, at least in part, from a misunderstanding of pluralism—in particular, a failure to distinguish between multiple sources of authority. The imposition of particular moral claims by non-state actors cannot be held to the same normative standard to which the state’s imposition of similar claims is held. Bernard Dickens, for example, makes the astounding assertion that “[g]overnments that enforce one version of conscience, such as [a health care institution’s] prohibition of medically indicated sterilization or abortion, are ethically, and in human rights law, indistinguishable from those that enforce another, such as involuntary sterilization or forced abortion.”¹⁴² If pluralism means anything, it means that a local pharmacy’s decision not to sell the morning-after pill cannot be equated with the state’s decision to prosecute criminally anyone found in possession of the morning-after pill. To disempower non-state institutions from defying prevailing norms effectively disempowers individuals, exacerbating the problem of having “large numbers of people [who] do not participate in decisions that determine the conditions of their everyday lives, relying instead upon government officials, government institutions and government-funded institutions, and other outsiders to provide for their well-being.”¹⁴³

private parties who are subject to the checking power of government.”).

139. White, *supra* note 109, at 816 (“[F]or democracy to be real it requires what it makes possible, an identification of the individual with his government—his sense of pride or shame at the moral history of his nation, at what is said and done in his name. It is built upon, and requires, a sense of public responsibility leading to collective self-education.”).

140. See Galston, *Civic Renewal*, *supra* note 71, at 296 (“Authors who believe in the importance of social capital for civic health argue that it makes collective action both more likely and more efficient because, in the presence of social capital, people cooperate with one another based upon trust rather than the threat of legal or other formal sanctions. The lack of social capital, in contrast, results in collective action and free rider problems and, relatedly, to excessive reliance on government and public entities to solve community problems.”).

141. Galston, *Civic Renewal*, *supra* note 75, at 151.

142. Dickens, *supra* note 59, at 293.

143. Galston, *Civic Renewal*, *supra* note 70, at 297.

The “checking” power of the moral marketplace also is a function of the fact that pressure to conform emanates not just from the state, but from a marketplace stripped of ideological or moral diversity. There is something to be said for allowing institutions to promote a type of second-order diversity,¹⁴⁴ which also can be thought of as inter-institutional diversity rather than intra-institutional diversity,¹⁴⁵ by adopting distinctive morality-driven policies, even if those policies have the effect of repelling certain segments of the potential employee and customer pool. Robust public discourse regarding the moral claims embedded in current and future pharmaceutical controversies will be fostered more directly by pharmacies representing a range of perspectives than by the current system in which the adherents to various moral perspectives are scattered randomly and anonymously among morally fungible pharmacies.¹⁴⁶ Individuals are equipped to withstand the homogenizing force of uniform market norms when they can associate with like-minded others, which requires the accessibility of diverse associations.¹⁴⁷ Again, the moral marketplace reflects the social reality of human beings and a reminder that those concerned with the cause of individual autonomy must do more than harness collective power to its realization; they must, to a certain degree, disconnect the individual and the state, rediscovering the social space between the two.

V. THE MORAL MARKETPLACE AND STATE REGULATION

It should be obvious by now that the moral marketplace project is premised not on new legislation, the enshrinement of constitutional rights, or expansion of common law doctrine, but simply on the state’s recognition that the ongoing contest over moral norms is usually best left to play out through the informed and deliberate day-to-day decisions of the citizenry. This is not, though, some recycled libertarian take on the culture wars. The government is a market actor, and its participation is crucial to the project’s success.¹⁴⁸

144. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

145. William A. Galston, *Liberal Government, Civil Society, and the Rule of Law*, 23 YALE L. & POL’Y REV. 15, 17 (2005) (“[I]f a government requires boys and girls to be educated together, every school is diverse with respect to gender, but all schools are the same with respect to the gender distribution of their student bodies.”).

146. Cf. Gerken, *supra* note 144, at 1163 (“Second-order diversity makes electoral minorities visible not only to the polity, but to each other, thereby providing an important source of political energy. The choice made by a decisionmaking body dominated by a minority group signals to other group members that a critical mass exists somewhere within the system and provides a decision around which the group can coalesce.”).

147. Organizations “provide individuals with the opportunity to exercise power over some share of the world, an opportunity that individuals lack in an unorganized state.” Hills, *supra* note 77, at 182.

148. See Rosenblum, *supra* note 92, at 268 (“Government has a predominantly enabling role: to facilitate the experience of pluralism.”).

Recognizing the importance of the market in our “culture war” debates is not meant to suggest an embrace of all market outcomes. After all, “it is perfectly possible for a series of individual choices, each in some sense ‘rational’ on the conditions presented, to produce a result that no one could sensibly want.”¹⁴⁹ Given that a corporation’s mediating aims “could be destructive,” there is a basis for constructing “a regulatory environment in which there will be limits on such activity and with transparency of those aims so that groups are accountable for their actions.”¹⁵⁰

The state’s primary role will be to address market failure. As with traditional economic markets, markets comprised of commercial firms trafficking not just in goods and services, but in moral claims, will also fail. One essential safeguard is for individuals to be given the information necessary for their active and knowing participation in the market—i.e., the moral marketplace will not function as such unless consumers and employees know the moral claims on which the pharmacy’s identity is based. If the state allows pharmacies to stake out their own positions on controversial drugs and pharmacists’ obligations, it would be justified in requiring those positions to be publicized.¹⁵¹

Markets also run into problems with externalities “when the full quantum of social costs generated by an activity cannot practically be observed, measured, or assessed against those who engage in the activity.”¹⁵² The most glaring externality in the pharmacy debate stems from the individuals who might lack access to the pharmaceuticals they desire. In a given community, sufficient market power might reside with those who favor restrictions on contraceptives, for example, so as to block their availability even for those who seek to use them. Especially in rural areas, there might be so few individuals seeking contraceptives that economic incentives are insufficient to motivate a contraceptive-dispensing pharmacy to enter the market. Under these circumstances, individuals holding the minority view will be precluded from market participation because there is no pharmacy option reflecting their own

149. White, *supra* note 109, at 815.

150. Fort & Schipani, *supra* note 93, at 870.

151. California, for example, is the “first state to require managed care organizations and insurance companies to warn consumers that some physicians and hospitals restrict access to covered reproductive health services and to offer consumers information about those restrictions.” Fogel & Rivera, *supra* note 58, at 741. Note, however, that the provision of information should not be turned into a government shaming mechanism. See CHAIN DRUG REV., Apr. 18, 2005 (“Any drug store that employs a pharmacist unwilling on moral, not medical, grounds to fill certain prescriptions must identify that pharmacist by name by posting a sign at the pharmacy, in the store’s front window, or in both locations, so that all patients know, in advance of bringing a prescription to the pharmacy counter, that the pharmacist has in the past taken it upon himself or herself to determine not to fill certain prescriptions for certain patients.”).

152. Blasi, *supra* note 118, at *7.

moral claims.¹⁵³

But we must recognize the limited scope of the access problem, and the correspondingly limited scope of the justified government response. In most areas, rural or otherwise, access to widely relied-on pharmaceuticals like contraceptives will not be a problem. Most Americans support the availability of such products, and the market will reflect that.¹⁵⁴ The fact that individuals might have to drive across town does not mean that the market has failed. If moral discourse regarding controversial pharmaceuticals is going to take place, we must discern between market-driven inconvenience and market-driven lack of access. The latter warrants state intervention; the former does not.

Access cannot be trotted out as a bogeyman every time a pharmacy decides to carve out an identity for itself that diverges from the model of unlimited consumer choice. If the marketplace is going to be relevant, the state must restrain its regulatory ambition. Intervention should be precisely targeted, premised on the lack of a particular pharmaceutical product's availability in a reasonably defined geographic market. The state should be legislatively empowered to declare a market failure with respect to particular pharmaceuticals and to require, as a condition of licensing, the provision of those pharmaceuticals by pharmacies operating within that market. If a pharmacy subsequently entering into the market demonstrates a commitment to selling the pharmaceutical in question, existing pharmacies could petition to terminate the previously imposed conditions of licensing. The reality of market failure should inform the state's approach, but the fear of market failure should not be invoked as the basis for constraining what could otherwise be a vibrant moral marketplace.

As a market actor, the state can do more than guard against market failure; the state can pursue its own normative claims, though self-restraint again is in order. The obvious mechanism is through licensing requirements and funding programs (e.g., the state-level equivalents of Medicare and Medicaid).¹⁵⁵ The

153. "Because dominant groups espousing established perspectives have relatively complete access to the market and find their views largely adopted by the public, they, unlike dissidents, do not perceive marketplace outcomes as predetermined, or as strongly influenced by socialization, access, or packaging." Ingber, *supra* note 110, at 49; *see also* Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962 (1997) ("Producers often speak to make a profit, and they are usually very different people from the ostensible consumers, who often misunderstand or ignore the message, often lack a viable channel for communicating their response, and are often afraid to make fools of themselves by speaking up.").

154. *See* Catholics for a Free Choice, *Religion, Reproductive Health, and Access to Services: A National Survey of Women* (2000), <http://www.catholicsforchoice.org/onlinepubs/healthcare/religionreproductivehealthandaccessstoservices.pdf>.

155. "[R]evenue sources of religious[ly] controlled health systems are not significantly different from those of any other private corporate interests in the health care industry," as "in 1998, the combined Medicare and Medicaid funding for religiously-controlled hospitals

marketplace's prospects turn on the substance and expansiveness of those normative claims. Stephen Macedo argues that a "liberal society . . . need not guarantee that its institutions and policies provide a level playing field for the different groups that compete for members in society,"¹⁵⁶ but as David Cole has recognized in the First Amendment context, the danger of government-funded speech laden with coercive "strings" lies not "in the coercive effect of the benefit on speakers, but in the indoctrinating effect of a monopolized marketplace of ideas."¹⁵⁷ The question of such regulation is a thorny one "because of the paradoxical nature of such speech: it is both necessary to and potentially subversive of democratic values."¹⁵⁸

As an actor within (not over) the moral marketplace, the state must resist the tendency to regulate in favor of the least objectionable norms, which often results in the imposition of a lowest common denominator approach to contested values, ensuring that unfettered individual choice becomes the universal norm.¹⁵⁹ Cole focuses on the federal government's abortion-related "gag rule" in advocating for a "spheres of neutrality" approach, which calls us to consider the role that certain institutions play in public debate and in checking government indoctrination. "Only by barring government control of the content of speech in critical public institutions," Cole writes, "can the first amendment ensure an 'uninhibited, robust, and wide-open' public debate."¹⁶⁰ He focuses on public forums, the press, and public universities, while also acknowledging that institutions "such as medicine, education, and the law" are "critical to individual autonomy and choice."¹⁶¹ Cole also wants government neutrality to rein in fiduciary relationships like "doctor-patient," given that "a counselee is the paradigmatic 'captive audience,' particularly vulnerable to indoctrination," and "[o]ne of the first amendment's principal aims is to ensure that individuals are free to choose their own destinies free of the government's ideological intrusion."¹⁶²

The need to guard against the government's "ideological intrusion" is equally applicable to the pharmacist controversy. Although Cole might resist the moral marketplace's de-emphasis of an individualist understanding of moral autonomy, a similar impetus for a "'wide-open' public debate" on the

accounted for roughly half of their revenues." Fogel & Rivera, *supra* note 58, at 742.

156. Macedo, *supra* note 113, at 1592.

157. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 680 (1992).

158. *Id.* at 681.

159. Ingber, *supra* note 110, at 28 ("Government inculcates ideas that tend to protect existing interests, prevailing values, and current attitudes. In short, the government strongly encourages the public to choose those ideas within the market that preserve the status quo.").

160. Cole, *supra* note 157, at 711.

161. *Id.* at 716.

162. *Id.* at 743.

provision of morally controversial pharmaceuticals exists in this context. As such, the normative claims pursued by the government should not impose particular substantive outcomes on the moral debate—e.g., the non-negotiable sanctity of the pharmacist's conscience or the non-negotiable sanctity of consumer choice—but should be geared toward facilitating participation within the market. The state is a facilitator, not an arbiter.

Seen in this light, antidiscrimination laws targeting non-state actors are justified under certain circumstances even when they hamper a group's ability to foster a morality-driven identity. For some organizations, their particular moral claim will require the exclusion of certain segments of society in order to construct a chosen identity. The state's stance toward the exclusion will depend on the nature of the resulting harm. For example, where the organization provides a key path by which to access political participation or economic opportunity,¹⁶³ the individual's interest may trump the organization's identity-based claim.¹⁶⁴ The moral marketplace's vitality does not justify the deprivation of individuals' self-sufficiency, which requires access to the economic and political life of the community. But where the organization is primarily social, religious, or ideological, the harm of exclusion is qualitatively different.¹⁶⁵

To be clear, this understanding of the boundaries of the moral marketplace does not require an upheaval of the current legal order. For the most part, statutes and governing constitutional interpretations allow the local country club to discriminate in its membership decisions based on race, religion, or gender, but not the local pharmacy in its hiring or service to customers. Even the pharmacy, though, would be allowed to discriminate if a prospective employee's religious beliefs would effectively preclude her from performing her job and where accommodating those beliefs would cause undue hardship.¹⁶⁶ Such might be the case if the pharmacy articulated and pursued a particular moral claim regarding the provision of certain pharmaceuticals.¹⁶⁷ This brief sketch is not meant to cast bright-line rules regarding permissible antidiscrimination legislation, but simply to emphasize the restraint required on the part of the state for the moral marketplace to have meaning. A pluralist society should promote inclusiveness, but the state should only enforce it as

163. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

164. I have elaborated on this elsewhere. See Vischer, *supra* note 106, at 973-78.

165. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

166. See *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (holding that employers' obligations under Title VII to accommodate employees' religious beliefs are limited to accommodations that result in minimal cost); Betsy Malloy, *Dispensing Morality; Refusal Clauses, Religious Exemptions and Conscience Clauses*, TEXAS LAWYER, June 13, 2005, Vol. 21 No. 15, at 38 (applying standard to pharmacist context).

167. Of course, if every pharmacy in a community pursued the same claim, then the state might be justified in mandating access, as discussed *supra* at 130.

required to ensure access to the fundamental building blocks of modern life. Access to contraceptives could very well qualify as such a building block, but again, such access does not require all contraceptives to be made available at all pharmacies.

The professional provision of pharmaceuticals should not be regulated out of independence, co-opted by the collective will. As with other professions, pharmacists can be regulated “as a means of fostering the existence and integrity of the institution,” but also must be protected “from ready destruction at the hands of the State, whether by direct regulation or by selective funding.”¹⁶⁸ Organizations of pharmacists, especially when committed to common ideals and norms, can mediate “the isolated endeavors of individuals and the collective political decision making of universalizing government institutions.”¹⁶⁹ The normative claims to be pursued by the state as market actor thus boil down to questions of access. Whether to remedy market failures or to overcome deliberately exclusionary practices by key economic gatekeepers, the state’s objective is not to impose a certain vision of the good, but to promote the public conversation(s) regarding the good.¹⁷⁰

VI. CONCLUSION

The operation of the moral marketplace, of course, is not limited to the pharmacy. A more deliberate effort to create space for the coexistence of plural and competing moral norms holds out hope for mitigating the alienation and intransigence fostered by the rights-driven, state-imposed solutions sought by culture war combatants on a range of contested issues. In much of our heated public discourse, the mere invocation of individual conscience does not bring clarity, much less the clarity presupposed by the zero-sum terms in which resolutions are framed.

In the debate over the institutional autonomy of religious hospitals, for example, the overriding concerns have become patient choice and employee freedom,¹⁷¹ with little credit given to the societal benefits that divergent

168. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 873 (1999).

169. *Id.*

170. “In a liberal pluralist regime, a key end is the creation of social space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence.” Galston, *Expressive Liberty*, *supra* note 75, at 173. *But see* Macedo, *supra* note 113, at 1593 (“[T]he project of promoting a healthy liberal democratic civil society is inevitably a deeply judgmental and non-neutral project.”).

171. *See, e.g.*, William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL’Y 455, 459 (2001) (“Statutory privileges protecting organizational moral choices, the so-called federal and state ‘conscience clauses,’ should be revisited by courts and legislative bodies” given that “patient medical choices that [have] become limited as a result of private religious

organizational identities might bring.¹⁷² The need to protect religious and moral diversity is understood only in individualist terms.¹⁷³ Once the value of organizational identity is removed from the equation, the stakes of the public debates over controversial health care issues—emergency contraception, abortion, genetic screening, end-of-life treatment—are correspondingly heightened. If all hospitals are morally fungible, then the state’s judgment that a given treatment should be available is equivalent to a judgment that the treatment should be available everywhere. Physicians, administrators, nurses, patients, and financial donors who lose the public debate do not just face a community that makes available a treatment that defies their moral convictions, but are precluded even from maintaining a subcommunity that enables them to live out their convictions. As the state increasingly requires that certain controversial treatments be made available at all hospitals, public and private,¹⁷⁴ dissenting moral claims are effectively negated, and the moral marketplace is shut down.¹⁷⁵

The same dynamic can be seen in California, where the legislature recently passed a law requiring employers who provide prescription drug coverage to their employees to cover contraceptives.¹⁷⁶ The law included a religious

hospital-HMO contracts and corporate transformations through mergers and acquisitions.”).

172. Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 MERCER L. REV. 1087, 1104 (1996) (reporting one community hospital that “chose to affiliate with Catholic Healthcare West rather than with Columbia/HCA because of concerns that an investor-owned company would put profit ahead of patients”).

173. “In the reproductive health context, it is possible to accommodate individual—as opposed to institutional—refusals to provide certain health services without imposing inappropriate burdens on patients’ rights.” Fogel & Rivera, *supra* note 58, at 728-29 (2004); *see also id.* at 748 (recommending that policymakers respect the consciences of “individual health care professionals”).

174. Six states—New York, Illinois, Washington, New Jersey, New Mexico, and California—require all hospitals to provide rape victims with emergency contraception or to inform them about how to obtain it. *See* Marie McCullough, *New Jersey Must Tell Rape Victims of Emergency Birth Control*, PHILA. INQUIRER, Mar. 24, 2005, at B6. The issue is also sparking political battles in other states. *See, e.g.,* Scott Greenberger, *Romney Vetoes Bill on Pill, Takes Aim at Roe v. Wade*, BOSTON GLOBE, July 26, 2005, at A1 (reporting that bill requiring all hospitals to require morning-after pill was likely to become law despite governor’s veto); Lynn Bartels, *Override Unlikely for Rape Bill*, ROCKY MOUNTAIN NEWS, May 2, 2005, at 4A (reporting that legislators lack the votes to override governor’s veto of bill requiring all hospitals to provide referrals to rape victims for morning-after pill).

175. In combination with state mandates, market consolidation and managed care directives also threaten the flourishing of divergent moral identities among hospitals. Kathleen Boozang predicts that “[t]he continual evolution of health care delivery . . . threatens to diminish, if not completely erode, the ability of sectarian hospitals and nursing homes to maintain control over the kinds of medical care that they provide.” Kathleen Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1430 (1995).

176. Women’s Contraception Equity Act, CAL. HEALTH & SAFETY CODE § 1367.25 (2003); *see generally* Susan J. Stabile, *State Attempts to Define Religion: The Ramifications*

exemption, but this was drawn narrowly, defining “religious employer” as employers whose purpose is to inculcate religious values, who primarily employ persons of the employer’s same faith, and who primarily serve people of the employer’s same faith.¹⁷⁷ In other words, any religious organization who took seriously its tradition’s call to service fell outside the exemption, including Catholic Charities, which unsuccessfully challenged the statute as an encroachment on its religious liberty.¹⁷⁸ In these terms, reproductive freedom as a moral claim is enshrined not as a negative liberty—that is, it does not consist of the individual consumer’s entitlement to use birth control free from government interference. Rather, it is a distinctly positive liberty—the individual consumer can compel her employer to pay for her birth control, even if the act of payment violates the employer’s most fundamental beliefs. In other words, a moral claim grounded in individual conscience successfully harnessed itself to state power, effectively eradicating the middle ground of associations and shutting down the moral marketplace.

In education, the school choice movement actually offers the potential to erode the moral marketplace further,¹⁷⁹ depending on the level of regulation that would accompany school vouchers. As James Dwyer explains, “states must attach to vouchers whatever regulatory strings are needed to ensure that children in all private schools receive a good secular education,” and if this means that “some parents cannot use their children’s schooling to proclaim the ‘good news,’ because in the state’s judgment the parents’ news is not so good, then so be it.”¹⁸⁰ Again, in service of the individual, the state is asked to enshrine collectively certain moral norms that emerge victorious in the political arena.

A similar predisposition drives a range of other debates, some more subtly than others, ranging from Charitable Choice regulation,¹⁸¹ to the teaching of evolution in schools,¹⁸² to the regulation of lawyers.¹⁸³ In each context, the

of Applying Mandatory Prescription Contraceptive Coverage to Religious Employers, 28 HARV. J. L. & PUB. POL’Y 741 (2005).

177. CAL. HEALTH & SAFETY CODE § 1367.25(b) (2003) (also requiring non-profit status).

178. *Catholic Charities v. Super. Ct.*, 85 P.3d 67, 77 (Cal. 2004).

179. The moral marketplace is vibrant for families who can afford private schools, but largely non-existent for those who cannot.

180. James G. Dwyer, *School Vouchers: Inviting the Public Into the Religious Square*, 42 WM. & MARY L. REV. 963, 992, 1005 (2001).

181. See, e.g., Noah Feldman, *A Church-State Solution*, N.Y. TIMES, July 3, 2005, §6 (Magazine), at 28 (insisting that “government must go to great lengths to disassociate itself from supporting religious institutions.”); Ronald J. Sider, *Evaluating the Faith-Based Initiative*, THEOLOGY TODAY, Jan. 1, 2005, at 67 (quoting Barry Lynn’s suggestion that charitable choice may be “the worst idea in modern political history”).

182. See, e.g., Kim Kozlowski, *Evolution Battle Grows in Schools*, DETROIT NEWS, July 24, 2005, at 1A.

public discourse is aimed at a winner-take-all outcome, rather than the articulation of foundational, but minimal, principles on which the moral contest will be allowed to proceed. Reconceiving the state as facilitator of public discourse regarding the good, rather than as arbiter of the good, will by no means end the divisiveness that has characterized much of our public life in recent years. And there will be ways of life allowed to flourish that strike much of the surrounding community as illiberal, bigoted, or exclusionary. But it is one thing for a true believer to try out her moral convictions in the public sphere and find them incapable of attracting sufficient interest and support to be viable; it is quite another for the state to forbid her from even trying. A more steadfast defense of the space in which individuals and groups can live out the dictates of their consciences—even when those dictates have been rejected by the majority—may reduce the bright-line vitriol and widespread alienation that has defined the culture wars and gradually introduce a more nuanced, contextual understanding of conscience and its role in our public life.

We should resist the temptation to construct abstract visions of “conscience” and pit them against each other in a winner-take-all struggle for power in our legal system. Instead, we should place greater focus on the vital human associations that allow an individual’s conscience to enjoy real-world traction. More often than not, this will require the state to step back and narrow its function to ensuring a vibrant and well-functioning marketplace. Making space for the unpopular exercise of conscience is an American tradition, but that tradition cannot be relegated to the Amish-style enclave and isolated military conscript; the tradition must extend to the heart of our society, where our moral convictions and daily existences intersect. If moral pluralism is going to mean anything in our society, it has to mean something at Walgreen’s.

183. See Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 96-F-140 (1996) (requiring Catholic lawyer to proceed with a court appointment in case representing a minor seeking an abortion without parental consent, despite the lawyer’s religiously grounded objection); see also Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997).

