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decision were reached it would have been a better result than shying away from the right because the balance was difficult or controversial or because it called into question medical opinions. Constitutional rights can be dealt with and medical concerns may at the same time be given due weight and respect.

ERIC M. NEWMAN

Hospitals—A Current Analysis of the Right to Abortions and Sterilizations in the Fourth Circuit: State Action and the Church Amendment

The United States Supreme Court in *Roe v. Wade*¹ found that the right of privacy guarantees a woman the prerogative of having an abortion "free of interference by the State."² The right of privacy also includes the fundamental right to decide whether to bear or beget a child³ and therefore implicitly encompasses the sterilization decision.⁴ However, in *Roe's* companion case, *Doe v. Bolton*,⁵ the Court let stand a section of the challenged Georgia abortion statute that allows a hospital to refuse to admit a patient for an abortion. The Court noted that the purpose of this provision was "obviously . . . to afford appropriate protection . . . to the denominational hospital."⁶ Thus an enigma remains: how valuable is the *Roe* guarantee to an abortion or sterilization free of state interference if under *Doe*⁷ some hospitals may absolutely refuse to admit patients for such operations?⁸

As *Roe* guarantees abortions "free of interference by the State," an initial inquiry must concern the scope of the duty thus imposed. Clear-

1. 410 U.S. 113 (1973).

2. *Id.* at 163. The absoluteness of the right depends on the trimester of pregnancy concerned.

3. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

4. Compare the sterilization decision with the personal rights listed in *Roe v. Wade*, 410 U.S. at 152-53 that have been held to be part of the right of privacy.

5. 410 U.S. 179 (1973).

6. *Id.* at 198. However, the Court generally spoke in terms of "hospital" without any qualification.

7. The *Roe* and *Doe* opinions are to be read together. *Roe v. Wade*, 410 U.S. at 165.

8. See Note, *Hill-Burton Hospitals after Roe and Doe: Can Federally Funded Hospitals Refuse to Perform Abortions?*, 4 N.Y.U. REV. L. & SOC. CHANGE 83, 84 (1974).

ly a state cannot pass a statute forbidding abortions during the first two trimesters of pregnancy since the *Roe* decision directly invalidated such a statute.⁹ But the Supreme Court has not yet determined whether the state ever has a duty to insure the availability of such procedures.¹⁰ If the state must insure access to facilities that offer these operations, the nature of the state's relationship with a particular hospital becomes crucial for execution of this duty. Hospitals generally incorporate and, thus, traditionally have been classified as either public or private by corporation law.¹¹ The due process clause of the fourteenth amendment has been held to apply to public hospitals in the context of staff membership.¹² The Supreme Court in *Roe* found the right to an abortion to be based on the due process clause of the fourteenth amendment.¹³ Thus, not surprisingly, several courts since *Roe* have held that a public hospital must allow nontherapeutic abortions and sterilizations when the hospital offers other procedures that involve the same amount of risk and care, and when the hospital's failure to allow abortions or sterilizations would result in denial of the patient's fundamental right to such operations.¹⁴ If these courts are correct in construing *Roe* as imposing an affirmative duty¹⁵ on the state to insure that a publicly owned hospital that offers medically indistinguishable procedures also offers abortions and sterilizations when the individual's fundamental right would otherwise be abridged, then, upon a finding of state action,

9. 410 U.S. at 164.

10. The Supreme Court recently denied a writ of certiorari to two cases that would have potentially presented this issue to the Court: *Taylor v. St. Vincent's Hosp.*, 44 U.S.L.W. 3492 (U.S. Mar. 2, 1976) (White, J. and Burger, C.J., dissenting), *denying cert. to* 523 F.2d 75 (9th Cir. 1975) (sterilization); *Greco v. Orange Memorial Hosp. Corp.*, 96 S. Ct. 433, 436 (1975) (White, J. and Burger, C.J., dissenting), *denying cert. to* 513 F.2d 873 (5th Cir. 1975) (abortion).

11. Note, *The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy*, 1966 WASH. UNIV. L.Q. 485, 486. The author argues that since the purpose of a hospital is to serve the public rather than to make a profit, the public/private dichotomy has little meaning in the hospital context. Apart from corporation law, the distinction is invalid since public and private hospitals cannot be distinguished on the basis of purpose or function. *Id.* at 514-15.

12. See cases collected in *id.* at 487-91.

13. 410 U.S. at 153.

14. See *Doe v. Poelker*, 515 F.2d 541, 546 (8th Cir. 1975) (abortion); *Doe v. Hale Hosp.*, 500 F.2d 144, 147 (1st Cir. 1974) (abortion); *Nyberg v. City of Virginia*, 495 F.2d 1342, 1347, 1378 (8th Cir. 1974) (abortion); *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 705-06 (1st Cir. 1973) (sterilization). The actions were based on the equal protection clause of the fourteenth amendment.

15. Although the Constitution does not usually impose an affirmative duty on a state, the state's previous involvement in unconstitutional conduct may allow for such an imposition. A state's unconstitutional abortion statute should suffice for this involvement and render any later attempt at neutrality insufficient for adequate protection of the right to an abortion. See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

Roe would also compel the state to require a private hospital to offer such procedures under identical circumstances. Whether the requisite state action can be found in a private hospital's receipt of Hill-Burton funds is unclear.

The Hill-Burton Act¹⁶ provides a highly regulated program designed to assist a state in furnishing adequate hospital care to all its citizens. Once a state decides to participate in the program, a state agency is responsible for administering the plan within the statutory guidelines.¹⁷ The Fourth Circuit has consistently held that a hospital's receipt of Hill-Burton funds is a sufficient basis for a finding of state action.¹⁸ Although it has never directly addressed the issue in the abortion-sterilization context, in the recent case of *Doe v. Charleston Area Medical Center, Inc.*,¹⁹ the court implied that it would also apply this state action doctrine in such cases.²⁰ Whether the Fourth Circuit should apply this theory of state action in the abortion-sterilization context must be considered in light of recent judicial and congressional action to the contrary.

The landmark case finding state action on the basis of receipt of Hill-Burton funds is the 1963 Fourth Circuit Court of Appeals decision in *Simkins v. Moses H. Cone Memorial Hospital*.²¹ The suit was brought by black patients and doctors who were denied treatment and staff privileges respectively by the defendant hospitals on the basis of race.²² The court relied on two aspects of the Hill-Burton program to support a finding of state action in accord with previous Supreme Court holdings. First, participating Hill-Burton hospitals "operate as integral

16. 42 U.S.C. §§ 291-91o (1970). Public and nonprofit hospitals are eligible. 42 U.S.C. § 291a(b).

17. 42 U.S.C. § 291d(a)(1)-(2) (1970).

18. *E.g.*, *Christhilf v. Annapolis Emergency Hosp. Ass'n*, 496 F.2d 174 (4th Cir. 1974); *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826 (4th Cir. 1969); *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648 (4th Cir. 1967); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). *See also* *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964).

19. Civil No. 75-1161 (4th Cir. Nov. 6, 1975). Hill-Burton funding was not necessary because the hospital involved was complying with a state law by refusing to offer nontherapeutic abortions. *Id.* at 9. However, in an earlier unrelated case, this same hospital was found to be "sufficiently imbued with state action by receipt of Hill-Burton funds to invoke application of the fourteenth amendment." *Id.* at 7. That finding came in *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974).

20. *See* Civil No. 75-1161 at 7-9.

21. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

22. *Id.* at 962.

parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health."²³ Thus the hospitals and the state were joint beneficiaries within the rationale of *Burton v. Wilmington Parking Authority*.²⁴ The fact that the object of both the state and the hospitals was to furnish the public with adequate medical care strengthens this analysis.²⁵ Second, "[u]pon joining the program a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care,"²⁶ and it is irrelevant for fourteenth amendment purposes that the instrument utilized would otherwise be private. The

23. *Id.* at 967 (footnote omitted).

24. 365 U.S. 715 (1961). *Burton* concerned a private restaurant, located in a public building, that refused to serve blacks. The Court's finding of state action rested in part on the benefits mutually conferred on the state and the restaurant because of the restaurant's location.

By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Id. at 725.

However, recent Supreme Court decisions define state action narrowly. In 1972, the Supreme Court decided *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in which state regulation pursuant to the issuance of a liquor license to a private club that had discriminatory policies was held insufficient for a finding of state action. In 1974, the Court held in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), that a state regulated private utility company could terminate electric service to a consumer without complying with formal due process requirements, despite its monopolistic status and the essential nature of its product. By basing the holdings on the absence of state involvement in the challenged activity, the Court appears to be limiting the holding of *Burton*. However, the nature of the state's involvement with a Hill-Burton hospital is more analogous to *Burton* than to either *Moose Lodge* or *Jackson*. By participating in the Hill-Burton program, the state is essentially going into the hospital business. Offering surgical procedures is the crux of that business. Therefore, there is a symbiotic relationship between the state and the hospital that meets the requirements of *Burton*. In addition, *Moose Lodge* and *Jackson* are distinguishable on the basis of the relationship of the constitutional right to the entity involved. A finding of state action in *Moose Lodge* would have required members of a private club to forfeit their freedom of association as the price of a liquor license. In *Jackson*, the consumer was provided with some procedural safeguards, and a utility company is not in the business of conducting formal due process hearings. The infringement on the individual's right was slight as compared to the potential burden of the utility of complying with formal due process requirements. For an analysis of this balancing of interests, see Note, *Public Utilities—State Action and Informal Due Process After Jackson*, 53 N.C.L. REV. 817, 827-28 (1975).

25. Note, *Constitutional Law—State Actions—Denial of Abortion by Private Hospital Receiving Federal Financial Support under the Hill-Burton Program does not Constitute State Action*, 2 FORDHAM URBAN L.J. 611, 618-19 (1974).

26. 323 F.2d at 968.

hospital's performance of a state adopted function brings it within the holding of *Marsh v. Alabama*.²⁷

Although *Simkins* dealt with racial discrimination, later Fourth Circuit holdings demonstrate that the racial context was not the determinative factor. Relying on the *Simkins* analysis of the nature of the Hill-Burton program, state action has been found in other factual contexts.²⁸ Although no clear basis exists for treating abortion and sterilization cases differently, two occurrences in 1973 may prevent the extension of the Fourth Circuit's state action theory to the abortion-sterilization area. First, the Seventh Circuit Court of Appeals, despite precedent otherwise,²⁹ held in *Doe v. Bellin Memorial Hospital*³⁰ that the receipt of Hill-Burton funds is not a sufficient basis for a finding of state action because the receipt of governmental funding does not establish that the state was directly or indirectly involved in the hospital's decision not to offer such procedures—a position that other courts have since adopted.³¹ Second, Congress enacted the conscience clause of the Health Programs Extension Act of 1973³² forbidding courts to require a Hill-

27. 326 U.S. 501 (1946) (corporate town). The *Simkins* court also cited: *Terry v. Adams*, 345 U.S. 461 (1953) (primary); *Smith v. Allwright*, 321 U.S. 649 (1944) (primary); *Nixon v. Condon*, 286 U.S. 73 (1932) (primary). 393 F.2d at 968 n.15. See also *Munn v. Illinois*, 94 U.S. 113, 126 (1876). But see *Hudgens v. NLRB*, 44 U.S.L.W. 4281 (U.S. Mar. 3, 1976), overruling *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), which held that a private shopping center was sufficiently analogous to a business district to be imbued with state action to require that first amendment rights be recognized on its premises. Whatever the potential effect of *Hudgens* on *Marsh*, the state's participation in the Hill-Burton program still falls within the holdings of the three Texas primary cases *supra* and within the sentiments expressed in *Munn, supra*.

28. E.g., *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974) (denial of staff privileges must comply with due process); *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826 (4th Cir. 1969) (county residency requirement for staff privilege eligibility violates due process and equal protection).

29. *Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125, 133 (N.D. Ill. 1972). The Seventh Circuit may be applying a double standard depending on the presence or absence of racial discrimination. Note, 2 *FORDHAM URBAN L.J.*, *supra* note 25, at 617. The author queries what the Seventh Circuit would do if a Hill-Burton hospital serving a predominantly black community refused to treat sickle cell anemia. *Id.* at 619.

30. 479 F.2d 756 (7th Cir. 1973).

31. Abortion-sterilization context: *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873 (5th Cir.), cert. denied, 96 S. Ct. 433 (1975) (abortion); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974) (sterilization); *Allen v. Sisters of Saint Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973), *aff'd*, 490 F.2d 81 (5th Cir. 1974) (sterilization). In general: *Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc.*, 507 F.2d 1103 (9th Cir. 1974); *Ward v. St. Anthony Hosp.*, 476 F.2d 671 (10th Cir. 1973); *Barrett v. United Hosp.*, 376 F. Supp. 791 (S.D.N.Y.), *aff'd mem.*, 506 F.2d 1395 (2d Cir. 1974). Cf. *Jackson v. Norton-Children's Hosps. Inc.*, 487 F.2d 502 (6th Cir. 1973).

32. 42 U.S.C.A. § 300a-7 (1974). The part of the Church Amendment relevant to

Burton hospital to allow abortions or sterilizations if the hospital's refusal is based on religious or moral grounds.

In *Bellin*, the Seventh Circuit Court of Appeals extended the "specific act theory" of state action to apply to the abortion area. The specific act theory was developed by the Second Circuit in *Powe v. Miles*³³ in relation to governmental funding of education. *Powe* held that receipt of public funding is not a sufficient basis for a finding of state action unless the state was involved directly or indirectly in the specific act challenged.³⁴ Relying on the Supreme Court's failure in *Doe* to invalidate the provision of the Georgia abortion statute that allows hospitals to refuse to admit abortion patients, the Seventh Circuit decided that as long as the state is neutral as to whether a Hill-Burton hospital need offer such procedures, the hospital's decision will be free of state action.³⁵

The reluctance of the courts to find state action in the abortion-sterilization area possibly reflects a hostility to the *Roe* and *Doe* decisions³⁶ and a repugnance to requiring hospitals to offer any particular service.³⁷ Despite these considerations, finding state action on the basis of receipt of Hill-Burton funds has merit in the abortion-sterilization context, as well as in the traditional situations. One purpose of the Hill-Burton Act is "to assist the several States . . . to furnish adequate

this discussion is section 300a-7(a)(2)(A). For the relevant language, see text accompanying note 47 *infra*.

33. 407 F.2d 73 (2d Cir. 1968).

34. *Id.* at 81.

35. 479 F.2d at 760. "We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves." *Id.* See note 15 *supra*. For analysis of *Bellin's* reliance on *Doe*, see text accompanying notes 44-45 *infra*.

36. The most striking example of judicial reluctance to find state action in the abortion-sterilization context is the Fifth Circuit's decision in *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975). The hospital in *Greco*, which was exempt from all local, state and federal taxation, was built on land owned by the county, its construction was financed by interest-bearing county bonds and Hill-Burton funds, and the building was leased to a private nonprofit corporation for one dollar a year. The lease included a provision that the lessor county was relieved "of the responsibility and expense of operating a hospital." *Id.* at 876. The reason for judicial hostility may be the nature of the *Roe* decision itself. See Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. REV. 223, 223-34 (1973).

37. This repugnance is explained in part by corporation law. The decisions made by a corporation's board of directors are within the board's sound discretion. 1966 WASH. UNIV. L.Q., *supra* note 11, at 493. However, hospitals should not be governed by corporation law. See note 11 *supra*. Cf. *Fitzgerald v. Porter Memorial Hosp.*, 523 F.2d 716 (7th Cir. 1975).

hospital, clinic, or similar services to all their people."³⁸ All hospitals in the state are taken into account in the allocation of Hill-Burton funds,³⁹ and the state has the power to preclude the construction of public hospitals in an entire area by funneling these funds to private hospitals.⁴⁰ Since the Hill-Burton Act gives the state extensive control over the types of hospitals available to the public, mere neutrality towards each hospital's decision is insufficient to insure the exercise of an individual's fundamental right "free of interference by the State." By participating in the Hill-Burton program, the state is essentially going into the business of providing medical care to all its inhabitants. As the constitutional right involved is peculiarly related to what is now a state function, this situation is distinguishable from recent United States Supreme Court cases that define state action narrowly.⁴¹

Although *Bellin* distinguished *Simkins* on the ground that the state's duty to require a hospital to comply with the constitutionally sound nondiscriminatory regulations of the Hill-Burton Act implicated the state in the hospital's discriminatory policies,⁴² this analysis applies just as well to the abortion-sterilization decisions. The only difference is that the compulsion comes from the Supreme Court⁴³ rather than congressional mandate. However, the end result is the same: the hospital need only comply with the Constitution. In addition, the *Bellin* court's reliance on *Doe v. Bolton* was misplaced. Besides the fact that the Supreme Court did not expressly pass on the validity of that specific provision of the Georgia abortion statute,⁴⁴ the language in *Doe* shows at most an intention to protect the denominational hospital.⁴⁵ Even if the Seventh Circuit intended merely to protect the denominational hospital, the effect of the specific act theory is to insulate all private Hill-Burton hospitals from judicial attack. Protection of the denominational hospital may be better discussed in connection with the Health Programs Extension Act of 1973.

The second occurrence threatening the Fourth Circuit's position on Hill-Burton funding was Congress' enactment of the conscience clause,

38. 42 U.S.C. § 291(a) (1970).

39. Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237, 256 (1974).

40. See Note, 4 N.Y.U. REV. L. & SOC. CHANGE, *supra* note 8, at 88-89.

41. See textual matter in notes 24 and 27 *supra*.

42. 479 F.2d at 761. See text accompanying note 17 *supra*.

43. See paragraph containing notes 9-15 *supra*.

44. The *Bellin* court recognized this fact. 479 F.2d at 760.

45. See text accompanying note 6 *supra*.

popularly known as the Church Amendment, of the Health Programs Extension Act of 1973. This clause in relevant part states:⁴⁶

(a) The receipt of . . . [Hill-Burton funds] . . . by any . . . entity does not authorize any court . . . to require

. . . .

(2) such entity to—

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions⁴⁷

The conscience clause was passed in reaction to a preliminary injunction issued in *Taylor v. St. Vincent's Hospital*⁴⁸ enjoining the defendant hospital from prohibiting the plaintiff's doctor from sterilizing her during the delivery of her baby. In granting the injunction, the court found receipt of Hill-Burton funds alone sufficient to support the state action element of jurisdiction under 42 U.S.C. section 1983 and 28 U.S.C. section 1343.⁴⁹

As construed by the courts, the Church Amendment forbids a judicial finding of state action on the basis of receipt of Hill-Burton funds in the abortion-sterilization context if the hospital's refusal to perform such procedures is based on religious or moral convictions.⁵⁰ Concerning the scope of the statute, the United States District Court for the District of Idaho has noted that ". . . recent congressional action has effectively revoked the ability of a court to find state action on the part of a hospital which receives Hill-Burton funds."⁵¹ Although the broadness of this language indicates that under no circumstances can a court clothe a Hill-Burton hospital with state action,⁵² the Ninth Circuit

46. All future references to the Church Amendment apply only to the portion of the clause quoted.

47. 42 U.S.C.A. § 300a-7(a)(2)(A) (1974).

48. Civil No. 1090 (D. Mont. Nov. 1, 1972). The citation for the later trial of the section 1983 action is: *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3492 (U.S. Mar. 2, 1976).

49. 1973 U.S. CODE CONG. & AD. NEWS 1473.

50. Cases construing the Church Amendment are: *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974); *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3492 (U.S. Mar. 2, 1976); *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975).

51. *Watkins v. Mercy Medical Center*, 364 F. Supp. 799, 801 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975).

52. Note, 4 N.Y.U. REV. L. & SOC. CHANGE, *supra* note 8, at 93 & n.75.

gives the statute a much narrower construction, as shown in *Chrisman v. Sisters of St. Joseph of Peace*.⁵³ To determine the state action issue in *Chrisman*, the court ignored Hill-Burton funding as a relevant factor and proceeded to analyze other state connections with the defendant hospital.⁵⁴ The *Chrisman* interpretation of the statute's mandate is probably correct.

The trial court in *Taylor* stated that the Church Amendment was a valid exercise of congressional power to limit the jurisdiction of the inferior courts under Article III of the Constitution.⁵⁵ In *Chrisman*, the Ninth Circuit held that the statute did not violate the establishment clause of the first amendment since Congress' object in passing the conscience clause was to retain neutrality.⁵⁶ However, the statute has yet to be challenged on the basis of legislative encroachment on the judicial role of interpreting the Constitution.⁵⁷ In light of the Supreme Court's interpretation of the judicial and legislative roles, a strong constitutional attack could be made on this basis.

In *Reynolds v. Sims*,⁵⁸ the United States Supreme Court rejected the argument that congressional approval of a plan that had a detrimental effect on the constitutional right to vote protected that plan from judicial scrutiny. The Court stated: "Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights."⁵⁹ Therefore, Congress lacks the power to define state action so as to deprive an individual of a fundamental constitutional right. The fact that the conscience clause may be construed as a valid exercise of the congressional power to limit the jurisdiction of the federal courts is insufficient to protect the clause from constitutional attack since a statute can be ". . . unconstitutional even though it was adopted by Congress as an exercise of federal power."⁶⁰ In *Shapiro v. Thompson*,⁶¹ the Court noted that "Congress is

53. 506 F.2d 308 (9th Cir. 1974).

54. *Id.* at 312.

55. 369 F. Supp. at 951. See Note, 4 N.Y.U. REV. L. & SOC. CHANGE, *supra* note 8, at 95-96.

56. 506 F.2d at 311.

57. This challenge was attempted in *Hodgson v. Anderson*, but the court found the plaintiffs did not have standing to make the challenge. 378 F. Supp. 1008 (D. Minn. 1974), *appeal dismissed*, 420 U.S. 903 (1975).

58. 377 U.S. 533 (1964).

59. *Id.* at 582.

60. *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969).

61. 394 U.S. 618 (1969). *Shapiro* concerned statutory provisions denying welfare assistance to otherwise qualified recipients because they failed to meet a one year residency requirement. The Court held the provisions unconstitutional as a violation of

without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection clause."⁶² Although Congress' purpose in enacting the Church Amendment was to afford protection to the denominational hospital, the vehicle chosen has the effect of allowing the state to reap the benefits of the Hill-Burton program while at the same time denying the fundamental rights of individuals by channeling funds to denominational hospitals.⁶³

The conflict remains between the fundamental right recognized in *Roe* and the desire to protect denominational hospitals recognized in *Doe*. Although the Church Amendment was an attempt by Congress to give the dictum in *Doe* statutory significance, statutory restraints on judicial interpretation of the Constitution are not within Congress' power.⁶⁴ However, a crucial question remains: does the denominational hospital *need* protection? A finding of state action does not automatically compel the hospital to offer abortions or sterilizations. The hospital may only be compelled if the individual does not have access to a facility willing to allow the performance of these procedures. In the few cases when the state refuses to furnish a clinic for these purposes and the denominational hospital is the only facility available, the infringement on the entity's religious or moral convictions is slight since the staff and doctors involved in the performance of abortions and sterilizations must not have any religious or moral objections to the procedures.⁶⁵ As the hospital need only provide its physical facilities for the performance of such procedures, its interest should be subordinated to an individual's fundamental rights.⁶⁶ Until the Supreme Court sees fit to clarify the hospital's role in the abortion-sterilization area, the Fourth Circuit should follow its own sound precedent when faced with this problem.

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the right to travel even though it assumed *arguendo* that Congress had approved the statutes. *Id.* at 641.

62. *Id.* The Court relied on *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

63. See text accompanying notes 38-41 *supra*.

64. See text accompanying notes 58-63 *supra*.

65. See Ambrose, *The Milwaukee Story: A Public Hospital's Resistance to the Supreme Court Abortion Rulings*, 4 FAM. PLAN./POP. REP. 68, 69 (1975). Cf. 42 U.S.C.A. § 300a-7(c) (1974).

66. Compare *Watkins v. Mercy Medical Center*, 364 F. Supp. at 803 with Note, 74 COLUM. L. REV., *supra* note 39, at 257-58, 261 for analysis of whether a hospital has a first amendment right of freedom of religion.