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Section 401(b) of the Health Programs Extension Act: An Abortive Attempt by Congress To Solve a Constitutional Dilemma

NOTES

SECTION 401(b) OF THE HEALTH PROGRAMS EXTENSION ACT: AN ABORTIVE ATTEMPT BY CONGRESS TO RESOLVE A CONSTITUTIONAL DILEMMA

In *Roe v. Wade*[1] and *Doe v. Bolton*,[2] the Supreme Court held that the right to privacy guaranteed by the fourteenth amendment encompasses a woman's decision to terminate her pregnancy. In the wake of these decisions a conflict has surfaced between a woman's claimed right to have an abortion or sterilization and the claimed first amendment right of hospitals and hospital personnel to refuse on moral and religious grounds to perform such operations. The resolution of this conflict poses a difficult question of constitutional balancing for legislatures and courts.

The conflict first appeared in *Taylor v. St. Vincent's Hospital*,[3] in which the Federal District Court for the District of Montana granted a preliminary injunction ordering a religious hospital to perform a sterilization previously refused on religious grounds.[4] The court granted relief for deprivation of Mrs. Taylor's civil rights under section 1983 of the federal civil rights law.[5] Prerequisite to federal court jurisdiction of such a claim is, according to the prevailing view, a finding of state involvement in the allegedly discriminatory act.[6] The *Taylor* court, influenced

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

2. 410 U.S. 179 (1973).

3. Civil No. 1090 (D. Mont., Nov. 1, 1972).

4. The hospital operated by the Sisters of Charity of Leavenworth refused to perform the operation pursuant to the "Ethical and Religious Directives for Catholic Hospitals", incorporated by reference into its bylaws. Taylor v. St. Vincent's Hospital, 369 F. Supp. 948, 949 (D. Mont. 1973).

5. Such relief is provided by 42 U.S.C. § 1983 (1970), which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

6. 28 U.S.C. § 1343 (1970) states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .

by St. Vincent's "monopoly position" as the only hospital in the city with a maternity department,[7] found state action in the receipt of federal funds by the hospital under the Hill-Burton Act,[8] and in favorable tax treatment afforded the hospital by the state.

The district court's preliminary injunction in *Taylor* precipitated the passage[9] of section 401(b) of the Health Programs Extension Act of 1973.[10] Reacting strongly to a Catholic hospital being forced to permit an operation repugnant to its religious precepts,[11] Congress attempted to prevent a recurrence of the *Taylor* result. Section 401(b) provides that receipt of Hill-Burton funds does not authorize a court or other public authority to require a hospital or its personnel to perform abortions or

> 3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> 4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

7. The maternity department of Billings Deaconess Hospital was the only other community facility consolidated into St. Vincent's to reduce the cost of duplicated maternity services. Before the consolidation, St. Vincent's informed local obstetricians and Deaconess Hospital that it would not permit surgical sterilizations. 369 F. Supp. at 949. On appeal, the Court of Appeals for the Ninth Circuit questioned St. Vincent's monopoly status, however, citing an agreement between the two hospitals whereby sterilizations would be performed at Deaconess after the patient had been admitted to St. Vincent's. Taylor v. St. Vincent's Hospital, Civil No. 74-1142 at 8 (9th Cir. Aug. 26, 1975).

8. 42 U.S.C. §§ 291-291o (1970). Enacted in 1946, the purpose of the Hill-Burton Program was to infuse federal money into the development and improvement of health care facilities in the United States. *See* 42 U.S.C. § 291. The money is given to the states for distribution to the hospitals pursuant to state plans that must require assurances from the recipient health care facility that, among other things, treatment will be available to all persons residing within the state and provided for persons unable to pay. *Id.* § 291c(e). In the first twenty-four years of the program's existence, a total of 10,748 projects were approved to aid more than 3,800 communities, with $3.7 billion in Hill-Burton funds being expended. U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, HILL-BURTON PROGRAM PROGRESS REPORT JULY 1, 1947-JUNE 30, 1971, at 9-10 (1972).

9. H.R. REP. No. 93-227, 93d Cong., 1st Sess. at 11 (1973).

10. Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b), 87 Stat. 91 (codified at 42 U.S.C.A. § 300a-7(a) (1974)).

11. *See, e.g.*, 119 CONG. REC. S5717 (daily ed. Mar. 27, 1973) (remarks of Senator Church); *id.* at H4147 (daily ed. May 31, 1973) (remarks of Representative Heinz). Senator Church was the author and sponsor of the original version of section 401(b). *Id.* at S5717 (daily ed. Mar. 27, 1973).

sterilizations, or make facilities available therefor, if refusal to do so is based on "religious beliefs or moral convictions." [12]

Reviewing its preliminary injunction following enactment of section 401(b), the court in *Taylor* held that the Act, "[b]y its plain language . . . prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law." Accordingly the court dissolved the injunction and denied all relief.[13] The Court of Appeals

12. Section 401(b) provides:

> (b) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or public official or other public authority to require—
>
> (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or
>
> (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 convictions, or
>
> (B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

Health Programs Extension Act of 1973 § 401(b), 42 U.S.C.A. § 300a-7(a) (1974).

Section 401(b) is complemented by section 401(c), which resulted from an amendment introduced on the floor by Senator Javits. *See* 119 CONG. REC. S5725-26 (daily ed. Mar. 27, 1973). As passed by both houses, Section 401(c) provides:

> (c) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after [June 18, 1973,] may—
>
> (1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
>
> (2) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
>
> because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

Health Programs Extension Act of 1973 § 401(c), 42 U.S.C.A. § 300a-7(b)(1) (1974).

13. Taylor v. St. Vincent's Hospital, 369 F. Supp. 948, 950 (D. Mont. 1973).

for the Ninth Circuit affirmed,[14] basing dismissal of the complaint on its intervening decision in *Chrisman v. Sisters of St. Joseph of Peace*[15]; there it had held that section 401(b) prohibited the court's reliance upon receipt of Hill-Burton funds as grounds for finding state action in order to compel performance of sterilization or abortion procedures if such procedures were contrary to the religious or moral convictions of those refusing to perform them.

Not only is the *Taylor* and *Chrisman* interpretation of section 401(b) not mandated "by the plain language of the statute," [16] but this interpretation renders the statute an unconstitutional usurpation of judicial powers. More limited readings of the statute that are consonant with congressional intent and constitutional requirements are possible; this Note will develop these more sound alternative interpretations of section 401(b) and examine the fallacies of *Taylor* and *Chrisman.*

HILL-BURTON FUNDS AND STATE ACTION

Roe v. Wade[17] and *Doe v. Bolton*[18] established the principle that a woman's decision to abort her pregnancy is encompassed within the expanding right of privacy protected by the fourteenth amendment.[19] Far

14. Taylor v. St. Vincent's Hospital, Civil No. 74-1142 (9th Cir., Aug. 26, 1975).

15. 506 F.2d 308 (9th Cir. 1974).

16. 369 F. Supp. at 950.

17. 410 U.S. 113 (1973).

18. 410 U.S. 179 (1973).

19. Nowhere does the word "privacy" appear in the Constitution. Although long a topic of scholarly concern, *see, e.g.*, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), the right to privacy was not recognized as an independent constitutional right until the Supreme Court's landmark decision in Griswold v. Connecticut, 381 U.S. 479 (1965). *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 228-33 (1965). Seven Justices concurred in the result but disagreed as to the source of the right. Justice Douglas, writing for the Court, found a "zone of privacy" emanating from the first, third, fourth, fifth, and ninth amendments, 381 U.S. at 484. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, relied on the ninth amendment, *id.* at 499; Justices Harlan and White relied on the fourteenth amendment, *id.* at 500, 507.

In *Griswold* the Court declared unconstitutional (as an unwarranted intrusion into the right of marital privacy) a state statute prohibiting the use, even by married couples, of contraceptives. Later cases have expanded the right of privacy to include "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (declaring unconstitutional a state statute forbidding distribution of contraceptives to single persons). *Wade* and *Bolton* added the abortion decision to the specific list of activities encompassed by the right of privacy under the fourteenth amendment,

from settling the issue, however, these cases spawned a variety of state and local laws limiting the right to obtain an abortion. Statutes have been passed requiring consent by spouse, parents, or putative father,[20] or prohibiting the use of Medicaid funds to reimburse an indigent woman for a nontherapeutic abortion.[21] The right to obtain an abortion upheld by *Wade* and *Bolton* is not absolute; at certain points in a woman's pregnancy the state acquires a compelling interest to protect first the health of the mother, and later that of the viable fetus.[22] Another potential limitation to the impact of *Wade* and *Bolton* is that even though they establish the right to abortion, they do not expressly impose a duty on the state to provide facilities for performing abortions.[23] Thus the pregnant woman who could find no hospital willing to perform the procedure might get little consolation from her guaranteed right to an abortion. In subsequent decisions, however, lower courts have taken steps to remedy this situation. On the basis of the Supreme Court decisions, these courts

Wade indicating that abortion also would be covered by a right of privacy founded on the ninth amendment. Roe v. Wade, 410 U.S. 113, 153 (1973). The right to privacy expressed in *Wade* and *Bolton* has been interpreted to include the right to voluntary sterilization. Hathaway v. Worcester City Hospital, 475 F.2d 701 (1st Cir. 1973). *See also* Comment, *Prohibition of Sterilization: Hospital Prerogative or Negative Pregnant?*, 54 BOSTON U.L. REV. 828, 833-37 (1974); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 713-17 (1973).

Since the Supreme Court decided *Wade* and *Bolton*, states have enacted laws establishing reporting systems for abortions, limiting permissible facilities for abortion, and requiring measures to save a viable fetus. Since 1973 a majority of states have passed statutes similar to section 401(b), allowing institutions and personnel to refuse to provide abortions on moral or religious grounds. *See generally* Note, *Implication of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974) [hereinafter cited as *Abortion Implications*].

20. *See* Jones v. Smith, 278 So. 2d 339 (Fla. Ct. App. 4th Dist. 1973), *cert. denied*, 415 U.S. 958 (1974).

21. *Compare* Doe v. Beal, 44 U.S.L.W. 2065 (3d Cir. July 21, 1975) (compelling reimbursement) *with* Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975) (refusal to reimburse does not violate Social Security Act).

22. Under *Wade* and *Bolton* the abortion decision is solely up to the mother and her physician during the first trimester. The state acquires a compelling interest in the mother's health from the beginning of the second trimester; the state's interest in the fetus becomes compelling when it reaches viability, usually at 28 weeks. At that point the state can proscribe all abortions except those necessary to save the life of the mother.

23. Justice Blackmun stated in dicta in Doe v. Bolton, 410 U.S. 179, 197-98 (1973): "Under [the Georgia statute], the hospital is free not to admit a patient for an abortion. . . . These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital." That these statutes were cited with apparent approval by the Court has proved persuasive to later courts. *See* notes 48-50 *infra* & accompanying text.

have required public hospitals to allow voluntary sterilization procedures and nontherapeutic abortions on the grounds that "once the state has undertaken to provide general short-term hospital care . . . it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights." [24]

Purely private hospitals remain free under *Wade* and *Bolton*[25] to restrict the right to an abortion without exposure to liability for deprivation of fundamental rights under section 1983 of the federal civil rights laws.[26] To be cognizable under that section, the private hospital's action

24. Hathaway v. Worcester City Hospital, 475 F.2d 701, 706 (1st Cir. 1973) (sterilizations). *See, e.g.*, Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974) (nontherapeutic abortions); Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974), *appeal dismissed*, 95 S. Ct. 169 (1974) (nontherapeutic abortions); Orr v. Koefoot, 377 F. Supp. 673 (D. Neb. 1974) (nontherapeutic abortions). *Cf.* McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971) (sterilizations).

In Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3242 (U.S. Sept. 20, 1975) (No. 75-442), the court declared St. Louis' city policy against the performance of nontherapeutic abortions in public hospitals to be an infringement of the right to privacy and a denial of equal protection to indigent women. It also directed the district court on remand to fashion relief that would impose upon the city the duty to obtain personnel whose personal convictions permitted them to perform abortions. The city had staffed its maternity facilities entirely from a Catholic medical school, whose students and faculty refused to perform abortions for religious reasons. The court stated that "the city will not be allowed to achieve indirectly through its manner of staffing its hospitals what it cannot accomplish directly—the prohibition of all nontherapeutic abortions in those hospitals." *Id.* at 546. *Cf.* Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974) (striking down as overbroad a St. Louis city ordinance regulating abortion clinics).

25. *See* note 23 *supra* & accompanying text.

26. 42 U.S.C. § 1983 (1970). *See* note 5 *supra*. State action for state involvement with private activity alleged to be a deprivation of constitutional rights has been a requirement for actions under the fourteenth amendment since the Civil Rights Cases, 109 U.S. 3 (1883), in which the court stated:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. . . . [C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. . . . [I]f [the wrongful act of an individual is] not sanctioned in some way by the State, or not done under State authority, [the injured party's] rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.

Id. at 11, 17.

Likewise, unless state action is present a private institution cannot be liable under section 1983. *See, e.g.*, Barrett v. United Hospital, 376 F. Supp. 791 (S.D.N.Y.), *aff'd mem.*, 506 F.2d 1395 (2d Cir. 1974) (hospital); Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971) (private parochial school);

in limiting or forbidding abortions and sterilizations must be clothed with state action. Following the directive of *Burton v. Wilmington Parking Authority*,[27] that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance," [28] courts have considered many indicia of involvement to find state action in private activity. These indicia

Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963) (hospital). *See also* Evans v. Newton, 382 U.S. 296, 300 (1966) (Douglas, J.): "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered." (Footnote omitted).

However, purely private acts of discrimination are within the range of sections 1981 and 1982, which have their foundation in the thirteenth amendment's prohibition of slavery and involuntary servitude, a prohibition that has been held to reach private action in which no state action was involved. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), held that section 1982, guaranteeing to "[a]ll citizens of the United States . . . the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property," 42 U.S.C. § 1982 (1970), barred private and public discrimination in the sale or rental of property. The range of section 1982 was expanded in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), in which the refusal by a corporation operating community recreational facilities to permit assignment of a membership share in a beach was held to be an interference with the right to "lease".

Section 1981, guaranteeing to all citizens the right to make and enforce contracts, and the right to the equal benefits of all laws for the security of person and property as is enjoyed by white citizens, has been accorded by the Supreme Court a broad interpretation similar to that which the Court has given section 1982. Tillman v. Wheaton-Haven Rec. Ass'n, 410 U.S. 431 (1973) has been held by a lower federal court to bar racial discrimination in admissions to purely private schools. McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3279 (U.S. Nov. 11, 1975). Finding the relationship between a school and its pupils to be a contractual one, with the admissions process part of the formation of a contract, the court held that the equal right to contract guaranteed by section 1981 prohibited the rejection of a black applicant when the basis for exclusion was race and he met all other requirements for admission. The court limited its holding by cautioning that private schools would be free to apply any nonracial criteria that would result in a disproportionate impact on members of one race.

Section 1985(3) forbids a purely private conspiracy with intent to deprive others of equal protection of the laws or equal privilege and immunities, with a "racial, or perhaps otherwise class-based, insidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), *overruling by implication* Collins v. Hardyman, 341 U.S. 651 (1951) (§ 1985(3) reached only conspiracies under color of state law).

27. 365 U.S. 715 (1961).

28. *Id.* at 722.

have included tax benefits,[29] public funding,[30] state appointees on hospital governing boards,[31] leases from local government,[32] and the determination of whether a private hospital has a "monopoly" position in the area.[33] The most common element in a finding of state action, however, has been a hospital's receipt of Hill-Burton funds.

Simkins v. Moses H. Cone Memorial Hospital[34] was the first appellate decision to hold that receipt of Hill-Burton funds constituted state action; the Court of Appeals for the Fourth Circuit based its decision on the "elaborate and intricate" scheme of government regulation accompanying Hill-Burton funding, on the Act's detailed minimum standards for participating hospitals, and on the Act's imposition of a duty on the state to plan for adequate hospital care.[35] Cases since *Simkins* have continued to stress the Hill-Burton Act's requirement of pervasive government involvement in a private hospital's internal affairs as grounds for finding state action.[36] One court stated as a well-established principle that "the receipt of Hill-Burton funds carries with it the obligation to observe Federal Constitutional mandates."[37]

29. Taylor v. St. Vincent's Hosp., Civil No. 1090 at 3 (D. Mont., Nov. 1, 1972), *rev'd*, 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, Civil No. 74-1142 (9th Cir., Aug. 26, 1975).

30. Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974); Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429, 430 (6th Cir. 1971) (six percent of budget came from special county tax); Sosa v. Board of Mgrs. of Val Verde Mem. Hosp., 437 F.2d 173 (5th Cir. 1971).

31. Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429 (6th Cir. 1971); Sosa v. Board of Mgrs. of Val Verde Mem. Hosp., 437 F.2d 173 (5th Cir. 1971); Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968).

32. O'Neill v. Grayson County War Mem. Hosp., 472 F.2d 1140 (6th Cir. 1973). *Contra*, Greco v. Orange Mem. Hosp. Corp., 573 F.2d 873 (5th Cir.), *cert. denied*, 44 U.S.L.W. 3328 (Dec. 2, 1975).

33. O'Neill v. Grayson County War Mem. Hosp., 472 F.2d 1140 (6th Cir. 1973); Foster v. Mobile County Hosp. Bd., 398 F.2d 227 (5th Cir. 1968); Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968). *Contra*, Taylor v. St. Vincent's Hosp., Civil No. 74-1142 (9th Cir. Aug. 26, 1975).

34. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

35. 323 F.2d at 964, 968.

36. *See, e.g.*, Doe v. Charleston Area Medical Center, Inc., 44 U.S.L.W. 2233 (4th Cir. Nov. 6, 1975); 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); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972); Bricker v. Sceva Speare Mem. Hosp., 339 F. Supp. 234 (D.N.H.), *aff'd sub nom.* Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972); Citta v. Delaware Valley Hosp., 313 F. Supp. 301 (E.D. Pa. 1970).

37. Citta v. Delaware Valley Hosp., 313 F. Supp. 301, 307 (E.D. Pa. 1970).

Some commentators have gone further and suggested that all hospitals can be considered public institutions because of the essential public services that private hospitals provide, the extensive regulation of all hospitals in states participating in Hill-Burton programs,[38] and most importantly, the fact that existence of private hospitals is taken into account in disbursing both state and Hill-Burton funds.[39] This impact of private hospitals on governmental funding decisions is vital to the contention that all hospitals are public entities. The argument proceeds as follows: because a private hospital already exists to serve a given area, the state will tend to channel available funds (including Hill-Burton funds) into assisting that hospital, rather than into construction of a new, public hospital, which (unlike the private institution) would be required to perform abortions and sterilizations.[40] By using the private hospital to help fulfill its Hill-Burton Act duty of providing adequate medical care, the state makes that hospital its agent in fulfilling a public duty; thus the hospital assumes a quasi-public character and can no longer be considered purely private.[41]

38. The court found state action present in Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964), even though the hospital had not received Hill-Burton funds, because it had to follow the regulations prescribed by the state under the Hill-Burton program. *Id.* at 713.

39. *See Abortion Implications*, *supra* note 19 at 256-57; 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, 88-89 (1974) [hereinafter cited as *Hill-Burton Hospitals*].

40. *See* note 24 *supra* & accompanying text.

41. *See* Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959, 967, 970 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964):

> [T]he defendant hospitals operate as integral 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.
> . . . .
> Giving recognition to its responsibilities for public health, the state elected not to build publicly owned hospitals. . . . Instead it adopted and the defendent [hospitals] participated in a plan for meeting those responsibilities by permitting its share of Hill-Burton funds to go to existing private institutions. The appropriation of such funds . . . effectively limits Hill-Burton funds available in the future.
> . . .

Support for this approach can be found in Gilmore v. City of Montgomery, 94 S. Ct. 2416 (1974), in which the Court acknowledged that a city's rationing of its limited facilities to a racially discriminatory group, necessitating denial to other groups, came "dangerously close" to the impermissible state action found in *Burton*. When the city provided the exclusive use of its parks to an all-white baseball league (and

Neither this broad analysis nor that of *Simkins*, finding state action wherever Hill-Burton funds are received, has achieved unanimous acceptance. Some courts have required direct state involvement in the challenged conduct to find state action. This approach was well stated in *Powe v. Miles*:[42] "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. . . . [T]he state action, not the private action, must be the subject of complaint." [43] This approach has meant almost certain defeat for plaintiffs seeking relief from private hospitals refusing to perform abortions or sterilizations. Courts embracing this view require direct state involvement with the private hospitals' policies restricting or forbidding such procedures, and when such state influence over internal hospital policy has not been found, relief has not been granted.[44] These decisions are consonant with recent Supreme Court decisions involving state action. In *Jackson v. Metropolitan Edison Co.*,[45] the Court required a "sufficiently close nexus" [46] between the state and the challenged activity of the private entity to find state action, and in *Moose Lodge No. 107 v. Irvis*,[47] the Court required state involvement to

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the park could not accommodate any more than one league), the city put its power and prestige behind the league's racial discrimination. So here, when the state rations its limited Hill-Burton funds to a private hospital instead of building a public hospital, the state places its power and prestige behind the private hospital, making it a partner in the private hospital's activities. *Burton* dictates that this constitutes state action, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) and the private hospital therefore must follow the same standards as the public hospital in guaranteeing the right to have abortions and sterilizations. *See* cases cited note 24 *supra*.

42. 407 F.2d 73 (2d Cir. 1968). *Accord*, Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

43. 407 F.2d at 81. *See, e.g.*, Ascherman v. Presbyterian Hosp., 507 F.2d 1103 (9th Cir. 1974); Jackson v. Norton-Children's Hosp., Inc., 487 F.2d 502 (6th Cir. 1973); 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); Communications Workers Local 10317 v. Methodist Hosp., 368 F. Supp. 564 (E.D. Ky. 1974), *aff'd mem.*, 511 F.2d 1403 (6th Cir. 1975); Mulvihill v. Julia L. Butterfield Mem. Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971). *But cf.* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 674-75 (1974), criticizing the *Powe* v. *Miles* approach for failure to recognize that government involvement, such as aid, supports and relates to every action of the challenged enterprise.

44. *See* notes 48-56 *infra* & accompanying text.

45. 95 S. Ct. 449 (1974).

46. *Id.* at 453.

47. 407 U.S. 163 (1972).

Jackson and *Moose Lodge* may represent a significant departure from *Burton*,

"foster or encourage" the challenged activity before state action would be found.

The *Powe v. Miles* approach has been followed in two cases dealing with the limiting or forbidding of abortions and sterilizations by private hospitals. In both cases the private hospital's position was upheld. In *Doe v. Bellin Memorial Hospital*[48] the court refused to find state action based on receipt of Hill-Burton funds and extensive state regulation; it held instead that there was no state involvement in the hospital's abortion policy. The court relied heavily on Justice Blackmun's dicta in *Doe v. Bolton*,[49] which it felt implicitly approved a Georgia statute that allowed private hospitals to refuse to perform abortions.[50] Furthermore, it distinguished *Simkins* as a case in which there was direct state involvement in the challenged activity of disbursing Hill-Burton funds to racially discriminatory hospitals.[51]

In *Greco v. Orange Memorial Hospital Corp.*[52] another court found no state action despite receipt of Hill-Burton and county funds, lease of the land and hospital building from the county for $1.00 per year, and tax exemptions.[53] The *Greco* court aligned itself with courts that have been more hesitant to find state action in cases in which there are no allegations of racial discrimination than in cases involving such allegations.[54] The court found that only the "internal affairs" of the facility were involved, and stated that "the interest of the hospital in ordering its internal administrative affairs outweighs the interest of the people dis-

in which the inquiry was not into whether the state was directly involved with the challenged activity of the private enterprise, but into the "activities, obligations and responsibilities . . . the benefits mutually conferred", which made the State a joint venturer with the private enterprise in all its activities, not just the subject of plaintiff's complaint. Burton v. Wilmington Parking Auth., 365 U.S. 715, 724, 725 (1961). *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 673 (1974).

48. 479 F.2d 756 (7th Cir. 1973).

49. 410 U.S. 179, 197-98 (1973).

50. *See* note 23 *supra* & accompanying text.

51. 479 F.2d at 760-61 & n.11.

52. 513 F.2d 873 (5th Cir. 1975).

53. *Id.* at 876.

54. *See* Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974); Barrett v. United Hosp., 376 F. Supp. 791, 805 (S.D.N.Y.), *aff'd mem.*, 506 F.2d 1395 (2d Cir. 1974) (dicta); Bright v. Isenbarger, 314 F. Supp. 1382, 1392-93 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971). *Cf.* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (Miller, J.): "[The fourteenth amendment] is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

advantaged in this case." [55] Relying on *Bellin*, the court held that there was no "nexus" between the county's involvement with the hospital and the hospital's abortion policy, and that the lack of such a nexus precluded a finding of state action.[56]

Thus the relevant cases have evidenced a dichotomy of opinion toward the issue of whether receipt of Hill-Burton funds constitutes sufficient state action to make a hospital's refusal to perform abortions and sterilizations a violation of federal civil rights laws. The enactment of section 401(b) of the Health Program Extensions Act of 1973 added another consideration to this uncertain area, making the relevance of the receipt of Hill-Burton funds to the existence of state action an even more controversial issue.

Judicial Interpretations of Section 401(b)

Interpretations of Section 401(b) by the Court of Appeals for the Ninth Circuit

Although the legal effect of section 401(b) is unclear, the primary legislative motivation behind its passage is not; angered by the *Taylor*[57] decision, which required a Catholic hospital to perform an operation repugnant to Catholic beliefs, Congress determined to break the link between Hill-Burton funds and state action. Congress' intent, in the words of several legislators, was to prevent the use of Hill-Burton funds as a "lever" [58] to force denominational hospitals to perform abortions and sterilizations, and to make clear that receipt of federal funds would not be conditioned on the hospitals' assenting to such procedures.[59]

Following vehement congressional debate over section 401(b), the federal district court, reviewing the preliminary injunction in *Taylor*, gave a broad reading to the new law.[60] It held that section 401(b) prevented a finding of state action merely because the hospital was a recipient of Hill-Burton funds, and that the law effectively precluded all federal court jurisdiction over claims against private hospitals in-

55. 513 F.2d at 880.

56. *Id.* at 881-82 & n.19.

57. Taylor v. St. Vincent's Hosp., Civil No. 1090 (D. Mont. Nov. 1, 1972).

58. *See, e.g.*, 119 Cong. Rec. S5722 (daily ed. Mar. 27, 1973) (remarks of Senator Church); 119 Cong. Rec. H4147 (daily ed. May 31, 1973) (remarks of Representative Heinz).

59. *See* notes 119-31 *infra* & accompanying text.

60. Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973).

volving allegations of state action as a result of receipt of such funds. The court justified this result as harmonious with Congress' acknowledged power under article III of the Constitution to establish and alter the jurisdiction of inferior federal courts.[61] Alternatively, it upheld section 401(b) as within Congress' power to restrict remedies that courts may grant. *Watkins v. Mercy Medical Center*,[62] a district court case contemporaneous with the final decision in *Taylor*, likewise held that the "plain language" of section 401(b) "revoked the ability of a court to find state action" [63] resulting from the receipt of Hill-Burton funds. Unlike *Taylor*, however, the *Watkins* decision did not characterize section 401(b) as a jurisdictional statute.[64]

The first appellate court to review section 401(b) deemed it a restriction on a court's power to grant equitable relief. In *Chrisman v. Sisters of St. Joseph of Peace*,[65] the plaintiff sued for an injunction to compel Sacred Heart Hospital to perform a tubal ligation that she had been refused. The hospital had based the refusal on medical grounds, but Mrs. Chrisman alleged that its reasons were primarily religious.[66] The Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the complaint on three grounds: mootness,[67] lack of the state action

61. *Id.* at 951. The court did not discuss, however, the power of Congress to withdraw jurisdiction from state courts as well, within the language of section 401(b) that receipt of Hill-Burton funds "does not authorize *any* court" to compel abortions. (Emphasis supplied).

62. 364 F. Supp. 799 (D. Idaho 1973).

63. *Id.* at 801.

64. *Watkins* refused reinstatement and damages to a physician who was denied staff privileges at a Catholic hospital for his failure to accept the "Ethical and Religious Directive for Catholic Hospitals" (also involved in *Taylor*) forbidding sterilization and abortions. Unlike *Taylor*, the *Watkins* court considered other possible grounds for state action but did not find it in the hospital's tax exempt status or other benefits received from the state, since the state was in no way involved with Mercy's policy relating to sterilizations or abortion. *Id.* at 802. *Watkins* also considered whether section 401(c) prohibited the doctor's dismissal for his insistence on his right to perform abortions and sterilizations. In essence, the court held the section inapplicable. The law was intended to protect the "religious rights" of hospitals and hospital personnel, whereas Watkins was dismissed for refusing to agree not to perform sterilizations at the hospital, not for his religious beliefs. *Id.* at 803.

65. 506 F.2d 308 (9th Cir. 1974).

66. *Id.* at 309 & nn.3-4.

67. The court found plaintiff's claim for injunctive relief moot since she had had the requested sterilization performed at another hospital. *Id.* at 314-15. Moreover, though declaring the request for equitable relief moot, the court conceded that her requests for declaratory relief and damages made in addition to her injunction claim were not moot. *Accord*, McCabe v. Nassau County Medical Center, 453 F.2d 698,

required by section 1983, and most important, its view of section 401(b) as withdrawing the court's power to award injunctive relief in cases in which state action was based on receipt of Hill-Burton funds. This interpretation of the law's effect was justified as being within Congress' power to restrict remedies available in certain causes of action.[68] Like the district court in *Watkins*, the Ninth Circuit did not construe section 401(b) as totally withdrawing court jurisdiction over section 1983 claims based on the hospital's receipt of Hill-Burton funds;[69] the court here viewed the law merely as a restriction on remedies, which forbade injunctive relief on those grounds. Considering other indicia of alleged state action that might justify injunctive relief, the court weighed the use of state and federal funds for construction, state licensing, and tax exemptions. It found that these did not amount to state action because the state was not specifically involved with the hospital's refusal to perform sterilizations, a type of involvement it believed was a prerequisite to a finding of state action.[70]

The Court of Appeals for the Ninth Circuit recently affirmed the final *Taylor*[71] order denying injunctive relief, basing its affirmance primarily on *Chrisman*. It did not construe section 401(b) as totally withdrawing jurisdiction, but as restricting the remedy. Considering other facts in *Taylor* besides Hill-Burton funds, which might have provided grounds for a finding of state action, such as tax exemptions, state regulation, and private hospital's performance of a public function, the court found that state involvement was still insufficient to give it jurisdiction. The state was not involved so specifically with the challenged activity as to give that activity the color of state law.[72] The court acknowledged that St.

701-02 (2d Cir. 1971). The *Chrisman* court distinguished the holding in Roe v. Wade, 410 U.S. 113, 125 (1973), that the issue in a case involving the right to choose an abortion was not mooted by the fact that the plaintiff had received her abortion. Although in the case of abortion, the condition of the plaintiff was "capable of repetition, yet evading review," *id.* at 125, *citing* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), here the parties to the *Chrisman* litigation had stipulated that "surgical sterilization by tubal ligation is generally considered permanent and irreversible, and plaintiff would not reasonably expect to ever be obligated to undergo such a procedure again." 506 F.2d at 314.

68. *Id.* at 311. The court also rather summarily dismissed establishment clause objection to section 401(b), on the basis of its neutrality, citing Sherbert v. Verner, 374 U.S. 398 (1963), and Justice Blackmun's dicta in Doe v. Bolton, *see* note 23 *supra*.

69. *See* note 64 *supra*.

70. 506 F.2d at 313-14. *See* notes 45-51 *supra* & accompanying text.

71. Taylor v. St. Vincent's Hosp., Civil No. 74-1142 (9th Cir. Aug. 26, 1975).

72. *Id.* at 5-7.

Vincent's had the only maternity department in the city, a factual distinction from *Chrisman,* but concluded that this alleged "monopoly" [73] of maternity services was not grounds for finding state action. The court stated that there was "insufficient relationship" between St. Vincent's refusal to perform the requested sterilization and its monopoly status, and that the state was not at all involved with the hospital's possession of a monopoly. Under these circumstances, the court concluded, no question of state action arose.[74]

Section 401(b) as a Withdrawal of Jurisdiction

The district court in *Taylor* rested its denial of relief primarily on its construction of section 401(b) as withdrawing federal court jurisdiction over section 1983 claims against hospitals that were receiving Hill-Burton funds and refusing to perform abortions and sterilizations. This reading of the statute is broader than that accorded it by other courts, although suggestions of this sweeping withdrawal of jurisdiction appear in other cases. The district court supported its holding by invoking congressional power to alter federal court jurisdiction. Such power does exist, but in the final analysis, it is irrelevant to section 401(b).

Congressional power to alter lower federal court jurisdiction is derived from article III of the Constitution,[75] under which Congress is given the power to create inferior federal courts and to confer upon them as much judicial power as it sees fit.[76] Under the most widely ac-

73. *See* note 7 *supra.*

74. Civil No. 74-1142 (9th Cir. Aug. 26, 1975), at 7.

75. Article III states in pertinent part: "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

76. The view that Congress is required to vest the inferior federal courts with all of the judicial power under article III is distinctly a minority one, though it has had advocates as influential as Justice Story, who stated in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-29, 330 (1816):

> The judicial power of the United States *shall* be vested (not *may* be vested) in one Supreme Court, and in such inferior courts as congress may, from time to time, ordain and establish. . . . The judicial power must, therefore, be vested in some court by congress; and to suppose, that it was not an obligation binding on them, but might, at their pleasure be omitted and declined, is to suppose, that, under the sanction of the constitution, they might defeat the constitution itself. . . . If then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all.

Accord, Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other*

cepted view of article III,[77] the power to create federal courts implies a concomitant power to destroy them entirely,[78] with very few significant limitations. Although Congress has not attempted to wield that power to its greatest extent, it has from time to time imposed jurisdictional limitations, which have been sustained by the courts. For example, in *Lockerty v. Phillips*,[79] the Supreme Court upheld the Emergency Price Control Act of 1942,[80] which withdrew all state and federal court jurisdiction over regulations promulgated by a wartime price administrator. The Act vested such jurisdiction exclusively in an Emergency Court of Appeals from which actions could be appealed to the Supreme Court. In *Yakus v. United States*,[81] the withdrawal of jurisdiction by this Act was held to preclude a defense to a criminal action challenging the validity of a price regulation, because a forum had been provided in which the regulation could be challenged.[82] "Such a procedure, so long as it

grounds sub nom. Johnson v. Eisentrager, 339 U.S. 763 (1950). *See generally* 13 C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3526, at 110-15 (1975).

77. *But see* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974), which argues that practically Congress cannot abolish inferior federal courts. Since the Supreme Court cannot perform the duty of case by case review of federal cases, the lower federal courts are required under the Constitution to perform that function. Thus, they cannot be abolished because they are constitutionally required, nor can their jurisdiction be curtailed because of substantive disagreement with judicial decisions, but it can be restricted only in the interests of judicial efficiency and reducing case loads. The line between restricting jurisdiction to promote efficient judicial administration and to prevent an undesired result, is, of course, difficult to draw. Eisenberg argues that any examination of jurisdictional statutes should begin with the presumption that forums must exist for federal issues. *Id.* at 520-30.

78. *See, e.g.*, Judge Sirica's statement in Senate Select Comm. on Pres. Campaign Activ. v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973): "Simply stated, Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction. When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth and the Congress taketh away."

The Supreme Court has spoken often of the wide scope of congressional power over inferior federal court jurisdiction. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Cary v. Curtis, 44 U.S. (3 How.) 235, 245 (1845).

79. 319 U.S. 182 (1943).

80. Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.

81. 321 U.S. 414 (1944).

82. The Pipeline Amendment, section 203(d) of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C.A. § 1652(d) (Supp. 1974), tracks very closely the jurisdictional provisions of the Emergency Price Control Act of 1942. It vests exclusive jurisdiction

affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process." [83]

When Congress, however, has purported to withdraw jurisdiction over a certain class of action from both state and federal courts, and has provided no alternative forum, the courts have not respected the attempted withdrawal of jurisdiction, but have treated the matter concerned as open to their decision. The Portal-to-Portal Act[84] was passed to eliminate liabilities that had arisen from an unexpectedly broad interpretation of the Fair Labor Standards Act.[85] Congress attempted to deal with the problem by eliminating the claims as a matter of substantive law, and by withdrawing jurisdiction over such claims from both state and federal courts. Faced with challenges to the Act as depriving property without due process in violation of the fifth amendment, the courts took jurisdiction in spite of the Portal-to-Portal Act and treated the challenges on their merits.[86] In *Battaglia v. General Motors Corp.*[87] the Court of Appeals for the Second Circuit addressed the issue of withdrawal of jurisdiction and laid down a significant restriction on Congress' power over federal court jurisdiction:

> We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the require-

in a single court and it provides also that all challenges to the validity of the act on its face be brought within 60 days of November 16, 1973. It has been questioned, however, whether the restrictive jurisdiction aspects of the Pipeline Amendment are valid, absent the wartime circumstances present for the passage of the Price Control Act. The Court stressed the wartime emergency in upholding the 60-day limitation on actions by those affected by price regulations under the Price Control Act. Yakus v. United States, 321 U.S. 414, 431-32, 435, 439, 441-42 (1944); Bowles v. Willingham, 321 U.S. 503, 520 (1944). *See* Note, *Congressional Power over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples*, 49 N.Y.U.L. REV. 131, 153-62 (1974). [hereinafter cited as *Congressional Power*].

83. 321 U.S. at 433.

84. 29 U.S.C. §§ 251-62 (1970) (originally enacted as Act of May 14, 1947, ch. 52, § 1, 61 Stat. 84). 29 U.S.C. §§ 201-19 (1970) (originally enacted as Act of June 25, 1938, ch. 676, § 1, 52 Stat. 1060).

85. In three cases during the 1940's, the Supreme Court had defined the term "work week" within the act to include time spent in activities preliminary to time actually spent on the job. In one six-month period, more than 1000 claims seeking close to six billion dollars in unpaid overtime and statutory damages were filed in federal courts, as a result of this broad interpretation. 13 C. WRIGHT, A. MILLER, E. COOPER, *supra* note 76, § 3526, at 116.

86. *See* Fisch v. General Motors Corp., 169 F.2d 266 (6th Cir. 1948), *cert. denied*, 335 U.S. 902 (1949); Seese v. Bethlehem Steel Co. Shipbldg. Div., 168 F.2d 58 (4th Cir. 1948); Miller v. Howe Sound Mining Co., 77 F. Supp. 540 (E.D. Wash. 1948); Hollingsworth v. Federal Mining & Smelting Co., 74 F. Supp. 1009 (D. Idaho 1947).

87. 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

> ments of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[88]

The restrictions in *Yakus* and in *Battaglia* on Congress' power over jurisdiction appear to invalidate the *Taylor* district court's reading of section 401(b). Reading the statutory language to mean that the receipt of Hill-Burton funds "does not authorize *any* court" [89] to compel the performance of sterilizations or abortions, purports to deprive all courts, state and federal, of jurisdiction. Thus, such a reading denies aggrieved parties all opportunity to be heard for violations of their fundamental right of privacy in cases like *Taylor*.[90] This result is a deprivation of due process, beyond congressional power to limit federal court jurisdiction.[91] When faced with a statute having an effect such as section 401(b) was given by the *Taylor* district court, other courts should follow *Battaglia*, take jurisdiction, and consider the merits of the plaintiff's claim.[92]

The reading of section 401(b) that was embraced by the *Taylor* district court was so broad that it rendered the statute unconstitutional. Such a reading was not mandated by congressional intent. As contrasted with the Portal-to-Portal Act and the Emergency Price Control Act,

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88. 169 F.2d at 257.

89. Health Programs Extension Act of 1973 § 401(b), 42 U.S.C.A. § 300a-7(a) (1974) (emphasis supplied).

90. *Cf.* Lockerty v. Phillips, 319 U.S. 182, 188 (1943) (dictum): "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored."

91. *See* Eisenberg, *supra* note 77, at 521; *Congressional Power*, *supra* note 82, at 141-43.

It should be noted that the Pipeline Amendment specifically exempts questions as to the constitutionality of acts taken pursuant to the Pipeline Act, and sets a limitation of 60 days following the act in question in which to bring an action questioning its constitutionality. 43 U.S.C.A. § 1652(d) (Supp. 1974). This provision is also similar to the Emergency Price Control Act of 1942, and its application in the pipeline context raises constitutional questions. *See Congressional Power*, *supra* note 82, at 160-62.

92. Another alternative for federal courts construing section 401(b) as a withdrawal of jurisdiction would be as a withdrawal of all federal jurisdiction (since that is within congressional authority), but not of state jurisdiction. State courts then would be free to decide the constitutionality of section 401(b). *Congressional Power*, *supra* note 82, at 150. This course of action may not be sufficient to protect the right to privacy, however, in view of the state courts' inadequacies as defenders of constitutional rights. *See* Eisenberg, *supra* note 77, at 510-11.

both of which contain explicit statutory language limiting jurisdiction, section 401(b) does not mention jurisdiction. An intent to restrict jurisdiction should not be read into an ambiguous statute,[93] especially when legislative history indicates no such intent. Withdrawal of jurisdiction was not mentioned in the House report on the amendment that became section 401(b),[94] nor in the congressional debates attending its passage. A key exchange in the House debate indicated the absence of intent on the part of Congress that section 401(b) withdraw federal court jurisdiction over actions against private hospitals for interference with the right of privacy:

> Mr. ECKHARDT. . . . Now, I am not so much concerned one way or the other about the abortion question, but I am very much concerned about not writing any laws that infringe on any courts' rights to interpret the Constitution. If we create Federal courts, as we have, and they are called upon to deal generally with the Federal law and the Constitution, I do not think we can hamper them in their interpretation of the Constitution by means of a statute.
>
> Mr. Chairman, I hope that is not what section 401(b) is designed to do.
>
> Mr. STAGGERS . . . [I]n reply to the question of [Mr. Eckhardt] I would agree with him that it is not. The answer would be: No, it is not.
>
> . . . .
>
> Mr. ECKHARDT. Then do I understand correctly that we are not attempting in the statute to curtail the exercise in the Federal Court of any right which an individual may assert as his constitutional right?
>
> Mr. STAGGERS. Certainly not.[95]

93. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1399 (1953): "In the end we have to depend on Congress for the effective functioning of our judicial system, and perhaps for any functioning. The primary check on Congress is the political check—the votes of the people. If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and the political check can operate." *See also* Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); Leedom v. Kyne, 358 U.S. 184, 189-90 (1958); Lockerty v. Phillips, 319 U.S. 182, 188 (1943).

94. H.R. REP. No. 93-227, 93d Cong., 1st Sess. at 10-11 (1973).

95. 119 CONG. REC. H4148 (daily ed. May 31, 1973).

Section 401(b) as a Restriction on Remedy

An alternative holding of the district court in *Taylor*,[96] and the interpretation of section 401(b) in *Chrisman*[97] and *Taylor*[98] by the Court of Appeals for the Ninth Circuit, was that 401(b) is a restriction on remedy, forbidding the courts to grant injunctions compelling private hospitals to perform abortions and sterilizations. This restriction was applied only to injunctive relief, as the courts sanctioned declaratory relief and damages in such situations. This interpretation of section 401(b) runs afoul of the specific language of the statute, as well as of its legislative history, neither of which clearly indicated that the statute was meant to withdraw a particular remedy from the judicial arsenal.[99] Such a reading of section 401(b) poses serious constitutional problems as well. For a woman seeking relief for the infringement of her right to privacy, damages are an inadequate remedy. Performance of the operation is the only effective remedy for denial of her constitutional right, a denial that stems from the hospital's refusal to perform the operation.[100]

When Congress creates a federal right, it has broad power to restrict remedies;[101] it cannot, however, deprive aggrieved parties of all relief by withdrawing all effective remedies, without violating the requirements of due process.[102] Only when other adequate remedies are available and the restriction is deemed "reasonable" has Congress exercised its broad power to restrict remedies.[103] The *Chrisman-Taylor* interpretation of

96. Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 951 (D. Mont. 1973).

97. Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 311 (9th Cir. 1974).

98. Taylor v. St. Vincent's Hosp., Civil No. 74-1142 (9th Cir. Aug. 26, 1975), at 4.

99. The lack of language pertaining to remedy in section 401(b) is notable as compared with the language of section 1 of the Norris-La Guardia Act: "No court . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provision of this chapter . . . ." 29 U.S.C. § 101 (1970). *See* Lauf v. E.G. Shinner Co., 303 U.S. 323 (1938).

100. Doe v. Bellin Mem. Hosp., 479 F.2d 756, 759 (7th Cir. 1973); *Congressional Power*, *supra* note 82, at 152.

101. Eisenberg, *supra* note 77, at 530-31; Hart, *supra* note 93, at 1366.

102. *See* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.08[3], at 63 (2d ed. 1975). It has been suggested that the Supreme Court, in interpreting section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. APP. § 460(b)(3) (1970), has implied that Congress may not withdraw the only remedies effective to vindicate a right once the federal courts have been given jurisdiction over such right. *Congressional Power*, *supra* note 82, at 139-40 n.57. *See* Breen v. Selective Serv. Local Bd. No. 16, 396 U.S. 460 (1970); Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968).

103. 5 J. MOORE, *supra* note 102, ¶ 38.08[3], at 60-63. *See also* notes 82-83 *supra* & accompanying text.

section 401(b) would withdraw the remedy of injunctive relief from all available forums, state and federal. Since the only adequate remedy for a woman refused an abortion or sterilization is the performance of the procedure, this deprivation of injunctive relief leaves her no satisfactory remedy. This restriction of remedy thus must be deemed unreasonable, and the *Chrisman-Taylor* interpretation of section 401(b), which precludes injunctive relief, must be viewed as a denial of due process.[104]

Section 401(b) as a Rule of Evidence

A third interpretation of section 401(b) appears in *Chrisman* and in *Taylor*. By holding that the statute precluded a finding of state action from the mere fact of receipt of Hill-Burton funds, but that other grounds for finding state action, such as tax exemptions and "monopoly" status, remained open to judicial consideration, the Court of Appeals for the Ninth Circuit treated section 401(b) as a rule of evidence. Since this interpretation leaves a court free to take jurisdiction and to award injunctive relief if it finds state action on other grounds, it is not subject to the due process objections that have been raised against the views espoused by the Court of Appeals for the Ninth Circuit as to the law's impact on jurisdiction and remedies.[105] This treatment of section 401(b) as a rule of evidence, however, has a serious constitutional flaw of its own. If section 401(b) is construed as prescribing the weight that evidence of Hill-Burton funds shall have toward a finding of state action, then section 401(b) becomes an unconstitutional legislative usurpation of judicial power, under the rule of *United States v. Klein*.[106]

Klein sued in the Court of Claims as administrator of the estate of a decedent whose property had been seized by the Union during the Civil War. An 1863 law[107] permitted recovery of the value of the lost property if the claimant had remained loyal to the Union, and an earlier case, *United States v. Padelford*,[108] established that a presidential pardon (as had been obtained by Klein's decedent) constituted conclusive proof of loyalty. The Court of Claims held for Klein on the basis of *Padelford*. While the Government's appeal to the Supreme Court was pending, however, Congress passed a law providing that no presidential

104. *See Congressional Power, supra* note 82, at 152.

105. *See* notes 81-88, 101-04 *supra* & accompanying text.

106. 80 U.S. (13 Wall.) 128 (1872).

107. Abandoned and Captured Property Act, Act of March 3, 1863, ch. 120, 12 Stat. 820.

108. 76 U.S. (9 Wall.) 531 (1870).

pardon would be admissible in the Court of Claims as evidence of loyalty,[109] and purporting to deprive the Supreme Court of jurisdiction over cases in which a claimant used such evidence. Refusing to respect this denial of jurisdiction, the Court held that Congress could not prescribe a rule of decision to the judiciary in the guise of a withdrawal of jurisdiction. The Court held that such legislation went beyond "the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." [110] Furthermore, it violated the concept of separation of powers, since it constituted congressional usurpation of the judicial function of weighing evidence and construing statutes: [111]

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule of decision of a cause in a particular way?
>
> ... In the case before us ... the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give an effect precisely contrary.
>
> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.[112]

Klein does not contradict Congress' acknowledged power to change the applicable substantive law during the pendency of a case, and thus

109. Act of July 12, 1870, ch. 251, 16 Stat. 235.

110. 80 U.S. (13 Wall.) at 146.

111. *See* 5 J. MOORE, *supra* note 102, ¶ 38.08[3], at 64; *Abortion Implication, supra* note 19, at 261-62. *Cf.* National Treasury Employees Union v. Nixon, 492 F.2d 587, 605 (D.C. Cir. 1974).

112. 80 U.S. (13 Wall.) at 146, 147. The importance of *Klein* has been questioned by commentators and courts who find ambiguities in the case, undermining its interpretation as a clear prohibition of congressional prescription of rules of decision to the judiciary. Eisenberg suggests that "a cautious reading of the case is appropriate," Eisenberg, *supra* note 77, at 527 n.167, and suggests reading *Klein* only as prohibiting Congress from impairing the President's power to pardon, *id.* at 526-27.

Klein has raised also the problem of reconciling the duty of courts to follow changes in substantive law while an appeal is pending, with the prohibition to Congress to prescribe rules of decision in a pending case. *See* notes 115-17 *infra;* Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962) (dictum). *But see Abortion Implications, supra* note 19, at 262 n.173. It should be noted that so esteemed a scholar as Professor Moore has interpreted Pope v. United States, 323 U.S. 1 (1944), a case following *Klein,* as indicating that Congress cannot "direct how constitutional courts shall decide a case," "without usurping the judicial function." 5 J. MOORE, *supra* note 102, ¶ 38.08[3], at 64 & n.28. *See also* Hart v. United States, 118 U.S. 62, 66 (1886); Battaglia v. General Motors Corp., 169 F.2d 254, 262 (2d Cir.), *cert. denied,* 335 U.S. 887 (1948).

alter its outcome.[113] Rather, *Klein* prohibits congressional prescription of rules of decision,[114] as inconsistent with the courts' historic role as final arbiters of the meaning of the Constitution.[115] This prohibition is clearly applicable to the interpretation of section 401(b) that would withdraw receipt of Hill-Burton funds from court consideration as grounds for state action. By prescribing that the receipt of Hill-Burton funds shall not constitute state action, section 401(b), like the act considered in *Klein*, dictates to the courts the weight to be afforded certain evidence and attempts to deprive courts of the freedom to give evidence "the effect . . . which, in its own judgment, such evidence should have . . . ." [116] Under *Klein*, this is an unconstitutional usurpation of judicial power.[117]

In the absence of a clear indication that section 401(b) was intended by Congress to serve as a restriction on jurisdiction or remedy, or as a legislative prescription of a rule of evidence, none of those extreme interpretations is tenable; although they uphold the statute, they have been shown to raise serious due process and separation of powers problems, problems that cannot be said to arise from the language of the statute or from its legislative history. Since the constitutional problems have arisen from judicial construction of the statute, rather than from its wording or legislative history, section 401(b) is not unconstitutional on its face. In keeping with the well-established principle of statutory

113. *See* District of Columbia v. Eslin, 183 U.S. 62 (1901); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 102 (1801).

114. *See* United States v. Butenko, 494 F.2d 593, 638-39 (3d Cir. 1974) (Gibbons, J., dissenting in part).

115. "It is, emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See also* United States v. Butenko, 494 F.2d 593, 639-41 (3d Cir. 1974) (Gibbons, J., dissenting in part).

116. 80 U.S. (13 Wall.) at 147.

117. *See Abortion Implications*, *supra* note 19, at 262.

Some commentators have suggested that an interpretation of section 401(b) as prescribing the evidentiary effect of Hill-Burton funds for purposes of determining state action may be saved by Katzenbach v. Morgan, 384 U.S. 641 (1966). *Morgan* was widely interpreted to hold that Congress had the power to define the meaning of the fourteenth amendment under the amendment's enabling clause, thereby exempting the fourteenth amendment from the traditional rule that the courts are the final arbiters of the Constitution. See Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). For examinations of the *Morgan* rationale in relation to section 401(b), *see Abortion Implications*, *supra* note 19, at 262 n.177; *Hill-Burton Hospitals*, *supra* note 39, at 93-94.

construction that a statute should be interpreted harmoniously with the Constitution,[118] this Note suggests an interpretation of section 401(b) that avoids the constitutional flaws mentioned above and is more consistent with the language of section 401(b) and congressional intent at the time of its passage.

An Alternative Interpretation of Section 401(b)

Legislative debates leading up to the passage of section 401(b) were replete with statements indicating that Congress did not intend Hill-Burton funds to be used as a "lever" [119] to force hospitals to perform abortions and sterilizations if such procedures were contrary to their religious precepts. These statements evidenced a serious misconception on the part of the legislators in regard to the district court's grounds for the preliminary injunction against the defendant in *Taylor v. St. Vincent's Hospital*.[120] In *Taylor*, the district court found that Hill-Burton funds and other indicia of state involvement constituted "state action." This finding was a prerequisite to the court's power to take jurisdiction under section 1343(3).[121] Only after the jurisdictional requirement of action "under color of state law" had been satisfied could the court consider the plaintiff's substantive claim for abridgement of her right to privacy by the hospital's refusal to perform the requested sterilization. The hospital's receipt of Hill-Burton funds, therefore, was pertinent to the jurisdictional requirement, but not to the gravamen of Mrs. Taylor's claim under section 1983.[122] Supporters of section 401(b) in Congress, however, seem to have interpreted the court's decision as construing the Hill-Burton Act to compel hospitals receiving funds to perform abortions and sterilizations irrespective of religious beliefs. For example, Senator Stevenson stated that the district court in *Taylor* "based its *de-*

118. In other words, the court will not seek confrontations with the legislature by deeming a statute unconstitutional if a plausible and constitutional reading exists. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62 (1932); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 441 (1821). *See generally* G. Gunther & N. Dowling, Cases & Materials on Constitutional Law 159 (8th ed. 1970).

119. *See* note 58 *supra*.

120. Civil No. 1090 (D. Mont. Nov. 1, 1972).

121. *See* note 6 *supra*.

122. *See* note 5 *supra*.

cision upon the fact that the hospital received Hill-Burton funds." [123] Similar misreadings of *Taylor* appear in the House debates.[124]

The original version of section 401(b), sponsored by Senator Church, did not speak to the courts at all, much less to their jurisdiction or choice of remedies; the object of the amendment, rather, was to prohibit the imposition on hospitals or hospital personnel of a requirement to perform abortions or sterilizations as a condition to the receipt of Hill-Burton funds, if those procedures were contrary to religious beliefs or moral convictions.[125] The fear that hospitals receiving Hill-Burton funds would be required to perform abortions as a condition of assistance under the Hill-Burton Act was paramount, at least to Senator Church. He spoke of the danger that "zealous administrators [would require] the performance of abortions . . . as a part of their regulations pertaining to federally funded programs," [126] and he emphasized the need for Congress, "which has the power to impose such conditions as it may choose upon the acceptance of Federal money," [127] to "clarify [its] intent . . . with respect to the significance of accepting Federal funding as it might apply to the question of performing abortions or sterilizations . . . ." [128] Similar sentiments were evident throughout the debates.[129]

Given the congressional intepretation of *Taylor*, and the clearly manifested intent that hospitals receiving Hill-Burton funds should not be required to perform abortions or sterilizations if their objections were religious or moral, the most plausible interpretation of section 401(b) is that it confers upon hospitals receiving Hill-Burton funds the substantive right to refuse to perform abortions and sterilizations when the refusal is based on religious belief or moral conviction.[130] Following this view,

123. 119 CONG. REC. S5718 (daily ed. Mar. 27, 1973) (remarks of Senator Stevenson) (emphasis supplied).

124. *See, e.g., id.* at H4147 (daily ed. May 31, 1973) (remarks of Representative Heinz); *id.* at H4152 (daily ed. May 31, 1973) (remarks of Representative Froelich).

125. The original Church Amendment appears at *id.* at S5717 (daily ed. Mar. 27, 1973).

126. *Id.* at S5717 (daily ed. Mar. 27, 1973) (remarks of Senator Church).

127. *Id.*

128. *Id.*

129. *Id.* at H4146 (daily ed. May 31, 1973) (remarks of Representative Hastings); *id.* at H4147 (daily ed. May 31, 1973) (remarks of Representative Heinz); *id.* at H4149 (daily ed. May 31, 1973) (remarks of Representatives Heckler and Burke); *id.* at H4152 (daily ed. May 31, 1973) (remarks of Representative Froelich).

130. *See* the exchange between Senators Pastore and Church, *id.* at S5726 (daily ed. Mar. 27, 1973):

> Mr. PASTORE: . . . My question is this: What the Senator from Idaho is actually doing in his amendment is to say that Hill-Burton funds shall not be

a court could take jurisdiction of a section 1983 claim against a private hospital receiving Hill-Burton funds; it could consider the full range of possible grounds for state action; and it could grant injunctive relief. Section 401(b) would constitute an affirmative statutory defense that the court could consider in light of the impact of a defendant hospital's conduct on a plaintiff's right of privacy.[131]

Such an affirmative defense approach avoids the thorny due process and separation of powers problems that have been raised by judicial interpretations of section 401(b). This approach is not, however, free from potential constitutional problems. As was noted in the congressional debates, a guarantee to religious institutions that they can refuse to perform constitutionally-sanctioned procedures on religious grounds, without the threat of loss of federal funds, is objectionable as a possible establishment of religion in violation of the first amendment.[132] The basic requirement that government maintain neutrality toward religion, neither establishing religion nor showing hostility toward it, has been expressed in a threefold test for statutes facing establishment clause objections. This test requires that such a statute must have a secular legislative purpose,[133] that the principal effect of the statute must be one that neither advances nor inhibits religion,[134] and that the statute must not foster an excessive governmental entanglement with religion.[135]

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denied to any hospital that does not choose to allow abortions to be committed within that hospital.

Mr. CHURCH: If the refusal is based upon religious beliefs or moral convictions against such procedure.

131. *See Congressional Power*, *supra* note 82, at 152-53.

132. 119 CONG. REC. S5720-21 (daily ed. Mar. 27, 1973) (remarks of Senator Javits); *id.* at S5724 (daily ed. Mar. 27, 1973) (remarks of Senator Kennedy); *id.* at H4150 (daily ed. May 31, 1973) (remarks of Representative Abzug).

The establishment clause objection has been raised in the cases interpreting section 401(b), but the courts have not discussed the problem in any detail. *See* Taylor v. St. Vincent's Hosp., Civil No. 74-1142 (9th Cir. Aug. 26, 1975), at 4; Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 311-12 (9th Cir. 1974); Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 951 (D. Mont. 1973); Watkins v. Mercy Medical Center, 364 F. Supp. 799, 803 (D. Idaho 1973).

133. Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

134. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

135. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). The test for establishment clause violations is not cumulative; a government program failing one requirement will be held unconstitutional. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788-89 (1973), which used only the primary effect test to invalidate a program of tuition reimbursement to parents of parochial school children and to parochial schools for maintenance and repair costs.

Applying this threefold test to section 401(b), one can conclude that on its face the statute neither directly aids nor inhibits religion to an extent that would render it unconstitutional.[136] Governmental involvement with the free exercise of religion is an area in which "strict neutrality" [137] must give way to "benevolent neutrality." [138] By providing that a hospital's refusal to perform abortions or sterilizations would not jeopardize its continued receipt of Hill-Burton funds, Congress has not maintained a posture of strict neutrality; it has made an affirmative provision to protect religious beliefs. Were Congress not to respect those beliefs, at least insofar as individual hospital personnel are concerned,[139] it is possible that individuals would be penalized for exercising their beliefs. Such punishment could in itself be considered a violation of the free exercise clause of the first amendment. Indeed, the Supreme Court has on occasion recognized that such penalization resulting from the conflict of religious beliefs with the law affords grounds for special treatment of an individual. Rather than viewing the free exercise clause as a barrier to this special treatment, the Court has seen it as compelling such treatment.[140] Applying this type of reasoning to section 401(b),[141] a

136. 403 U.S. 602 (1971).

137. *See* Everson v. Board of Educ., 330 U.S. 1, 18 (1947): "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."

138. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970): "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions . . . . [W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

139. *But cf.* notes 140-42 *infra* & accompanying text.

140. The court upheld an exemption from the draft for religiously motivated conscientious objectors in United States v. Seeger, 380 U.S. 163 (1965). The court did not consider the claim that the exemption, section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. APP. § 456(j) (1970), was an establishment of religion; rather, it construed the exemption in the statute to include all religious beliefs and to exclude "essentially political, sociological, or philosophical views." 380 U.S. at 165. Section 6(j) was held to exclude selective conscientious objection in Gillette v. United States, 401 U.S. 437 (1971). The establishment clause objection that section 6(j), in exempting only conscientious objection to all wars, constituted a governmental discrimination between different types of religious beliefs, was rejected; the statutory distinction was held justified by "neutral secular" purposes, among them the avoidance of erratic adjudication of conscientious objector claims. The Court also rejected an argument that section 6(j) interfered with free exercise, because the burden on free exercise was justified by substantial governmental aims.

In neither *Seeger* nor *Gillette* does the Court indicate whether an exemption from

court could find a violation of the free exercise clause in penalties imposed on hospital personnel who refused to perform abortions or sterilizations for religious reasons. Thus, at least insofar as individuals are protected by section 401(b), the delicate balance that the statute strikes between establishment and free exercise of religion would appear to be constitutionally valid.

A very different question is presented insofar as the section purports to protect the rights of institutions to refuse to perform abortions and sterilizations without loss of Hill-Burton funds. No court has decided clearly the issue of whether an institution possesses the same right to free exercise of religion as is clearly possessed by an individual.[142] Indeed, it is hard to conceive of an institution or organization *per se* possessing any kind of beliefs or putting them into practice. The argument may be made that there is no need to protect the "rights" of institutions in this regard, since the rights of hospital personnel are protected, and the religious organization sponsoring the hospital is not directly injured by the use of its facilities for abortions. As the issue of the existence of a corporate "conscience" has never been litigated, let alone settled, the constitutional status of the protection afforded to institutions by section 401(b) remains uncertain. Should it be found unconstitutional, however, sections 401(b)(1) and 401(b)(2)(B), relating to the rights of individuals to refuse to perform abortions or sterilizations on religious or moral grounds, could be held separable from 401(b)(2)(A), which protects the institution.

Conclusion

Section 401(b) represents an attempt to resolve the conflict between two constitutionally protected rights: privacy and free exercise of religion. The statute was a manifestation of strong legislative intent to

the draft based on religious belief (broadly defined in *Seeger*) actually was required by the free exercise clause. Justice Harlan, concurring in Welsh v. United States, 398 U.S. 333 (1970), faced that question in relation to section 6(j); he stated that Congress could eliminate all exemptions for conscientious objectors without violating the free exercise clause, that entirely neutral course being approved by the first amendment. *Id.* at 356.

141. *See* note 12 *supra.*

142. Justice Blackmun's opinion for the court in Doe v. Bolton, 410 U.S. 179 (1973), mentioned, with apparent approval, the protection given by the Georgia statute to denominational hospitals that would not perform abortions. There was no discussion of the first amendment issues. But the issue was considered in King's Garden, Inc. v. Federal Communications Commission, 498 F.2d 51 (D.C. Cir. 1974), though no clear resolution was made.

guarantee free exercise by protecting the rights of those who refused to perform abortions and sterilizations on religious or moral grounds, even though this protection might infringe upon the right to privacy of one seeking an abortion or sterilization.

Section 401(b) tells the courts and other public authorities that religious hospitals and hospital personnel shall not be forced to perform abortions and sterilizations simply because the hospital has received Hill-Burton funds, but it provides no guidance as to how that mandate should be implemented. In attempting to achieve Congress' aim, courts have read unwarranted and unconstitutional meanings into the amendment. An alternative interpretation of section 401(b) is available, one which does not avoid all constitutional problems, but which is less sweeping and more harmonious with congressional intent than those past judicial interpretations. That alternative has additional advantages, as it permits courts to consider the full range of grounds for state action in each case before assuming jurisdiction, and to examine the merits of the substantive claim for interference with the right to privacy. The interpretations given section 401(b) by the courts of the Ninth Circuit deny injunctive relief to a plaintiff refused an abortion or sterilization by a private hospital. Thus those interpretations preclude the only effective remedy for the substantial deprivation of her right to privacy which the refusal entails. For this reason, other courts should not consider themselves bound by the holdings of *Taylor*, *Chrisman*, and *Watkins*, but should feel free to examine less sweeping alternatives in construing section 401(b).[143]

The constitutional problems presented by section 401(b), as it is presently being interpreted, emphasize the need for Congress to speak plainly and clearly when it legislates in the field of constitutional rights. Section 401(b) has served only to exacerbate the conflict it was supposed to resolve. Persons seeking vindication of their rights to have abortions and sterilizations performed, and hospitals asserting the right not to perform them, must await an interpretation of section 401(b) that will resolve definitively its inherent constitutional conflict.

143. Although the Court of Appeals for the Ninth Circuit is the only federal circuit court to have considered the validity of section 401(b) on its merits, the Fourth Circuit Court of Appeals in Doe v. Charleston Area Medical Center, Inc., 44 U.S.L.W. 2233 (4th Cir. Nov. 6, 1975) recently held that a defense based on section 401(b) was not available to the defendant hospital whose refusal to perform abortions was based on the state's criminal abortion laws. The court ruled that the hospital's attempt to invoke the criminal statutes as a moral obligation fell short of compliance with the religious or moral belief proviso of section 401(b). Moreover, in finding the hospital's anti-abortion policy unconstitutional, the court considered the reliance on state law to be a strong indicia of the state action required by section 1983.