HILL-BURTON HOSPITALS AFTER *ROE* AND *DOE*: CAN FEDERALLY FUNDED HOSPITALS REFUSE TO PERFORM ABORTIONS?

I. INTRODUCTION

In the landmark decisions of *Roe v. Wade*[1] and *Doe v. Bolton*,[2] the Supreme Court balanced the conflicting interests of the pregnant woman, the fetus and the state, and proclaimed in its *Roe* opinion the following rules. First, during the initial trimester of pregnancy, abortion decisions are within the sole discretion of the woman and her physician. Thereafter, from the beginning of the second trimester, the state's interest in maternal health becomes sufficiently "compelling" that it may regulate abortion procedures to the extent such regulation reasonably relates to maternal health. Finally, at the point of viability of the fetus,[3] the state's "compelling" interest in potential life becomes controlling and it may proscribe all abortions except those necessary to save the life or health of the mother.[4] From the period of conception to the "compelling" point, the decision to terminate a pregnancy, arrived at between a woman and her physician, "may be effected by an abortion free of interference by the state."[5]

While *Roe* and *Doe* guarantee a woman's right to choose to terminate her pregnancy free of state interference within the guidelines set by the Court, they do not guarantee her an absolute right to an abortion. To the extent that states do not subsidize abortions, a woman's ability to obtain an abortion is limited by her ability to pay.[6] Financial considerations aside, the freedom from state interference is of little consequence unless facilities suitable for the performance of abortions are located within a reasonable distance of the woman's place of residence and are willing to perform such operations.[7] The Court's abortion decisions do not require the states to provide abortion facilities. States need only refrain from "interfering" with a woman's decision to obtain an abortion before their interest in maternal health or unborn life becomes compelling.

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1 410 U.S. 113 (1973).

2 410 U.S. 179 (1973).

3 Usually 28 weeks, but it may occur as early as 24. 410 U.S. at 160, citing L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971).

4 410 U.S. at 163-64.

5 Id. at 163. The Supreme Court recognized a right to privacy under the due process clause of the fourteenth amendment and determined that the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. This "fundamental" right is not unlimited, however. Regulation is justified where a "compelling state interest" exists. Id. at 154.

6 See Comment, Abortion on Demand in a Post-*Wade* Concept: Must the State Pay the Bills? 41 Fordham L. Rev. 921 (1973).

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> Despite the landmark decision, there are many areas in the U.S. where it is still difficult to obtain abortions. A number of states have rewritten their laws to comply with the requirements of the court. But a survey by TIME correspondents around the country reveals that many of the old obstacles to abortion remain.

Time, Feb. 4, 1974, at 60.

II. STATE ACTION AND THE RIGHT OF HOSPITALS TO REFUSE TO PERFORM ABORTIONS

A. Private Hospitals

A private hospital, as a general rule, "is a private corporation . . . and owes the public no duty to accept any patient not desired by it. . . . It is not necessary to assign any reason for its refusal to accept a patient for hospital service."[8] This traditional rule may be changing, at least where there has been reliance on the availability of emergency facilities.[9] Nevertheless, from this general right to deny any person admission it follows that private hospitals are free to deny admission to women seeking abortions. In short, private hospitals may refuse to perform abortions at their own discretion.

B. Public Hospitals

A state or municipal hospital is subject to the constraints of the fourteenth amendment.[10] Thus if a state hospital which performs other operations[11] refuses to perform abortions, the state is violating a woman's fourteenth amendment right to be free from "interference by the state" in her abortion decisions, within the guidelines of *Roe*.

Two months after the Supreme Court's abortion decisions, the First Circuit extended the scope of those holdings in *Hathaway v. Worcester City Hospital.*[12] The court ruled that under *Roe* and *Doe* a hospital's complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is too broad when the hospital permits surgical procedures involving no greater risk or demand on facilities to be performed.[13] An absolute refusal to perform sterilization operations was therefore held to violate the equal protection clause.[14] Accordingly, the court enjoined the municipal hospital from refusing to perform sterilization operations.[15] In so doing, it emphasized that it was neither requiring the city or state to maintain this or any other hospital nor compelling the hospital to perform every conceivable type of operation.[16] The court did hold, however, that once a state undertakes to provide general short-term hospital care "it may not draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."[17]

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[8] Birmingham Baptist Hosp. v. Crews, 229 Ala. 398, 399, 157 So. 224, 225 (1934). See also Levin v. Sinai Hosp., 186 Md. 174, 178, 46 A.2d 298, 301 (1946).

[9] See Wilimington General Hosp. v. Manlove, 54 Del. 15, 174 A.2d 135 (1961). See also Le Jeune Road Hosp., Inc. v. Watson, 171 So. 2d 202 (Fla. App. 1965).

[10] See McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971).

[11] See text accompanying note 13 infra.

[12] 475 F.2d 701 (1st Cir. 1973).

[13] Id. at 705.

[14] Id. at 706.

[15] Id. at 707.

[16] Id. at 706.

[17] Id. Similarly, in Nyberg v. City of Virginia, 361 F. Supp. 932 (D. Minn. 1973), the court relied on *Hathaway*, *Roe* and *Doe* in granting an injunction compelling a municipal hospital to perform abortions. The injunction was granted because the court found the action of the hospital "unquestionably" to be state action within the meaning of 42 U.S.C. § 1983 (1970). Id. at 938. The statute provides:

> 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 laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

C. Hill-Burton Hospitals[18]

Many hospitals, both public and private, receive federal and state aid under the Hospital Survey and Construction Act (Hill-Burton Act).[19] In considering whether or not a private hospital receiving such funds may refuse to perform abortions, two questions arise. The first is whether a state is sufficiently involved in a hospital's activities so that a decision on the part of the hospital to perform no abortions (or only therapeutic abortions) becomes a "state" action and, consequently, violates the fourteenth amendment.[20] If the answer is yes, the next consideration is whether the enactment by Congress of Title IV, § 401(b)(2)(A) (section 401) of the Health Programs Extension Act of 1973,[21] nevertheless serves to prohibit a court's enjoining such a hospital from refusing to perform abortions. The remainder of this section is devoted to answering the first question.

1. A Case for No State Action: The Bellin *Decision*

Doe v. Bellin Memorial Hospital[22] is the leading case for the proposition that a private hospital does not, by accepting Hill-Burton funds, surrender the right it would otherwise possess to refuse to perform abortions. Suit was brought in *Bellin* to enjoin a private hospital receiving Hill-Burton funds from refusing to perform nontherapeutic abortions.[23] A preliminary injunction was granted by the district court.[24] On appeal, the Seventh Circuit reversed.

The circuit court began by pointing out that in *Doe* the Supreme Court acquiesced in a provision of the Georgia abortion statute giving hospitals discretion to refuse admission to persons seeking abortions.[25] Although the statute appears on its

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18 The term "Hill-Burton hospitals," as used here, is not meant to include all hospitals receiving Hill-Burton funds; e.g., nursing homes, mental hospitals and chronic disease hospitals receiving such funds are excluded. The term is meant to include hospitals providing general short-term medical care and performing operations involving a degree of risk and demand on facilities similar to abortions.

19 42 U.S.C. § 291 (1970).

20 The fourteenth amendment by its terms applies only to actions of a state. Thus, on the one hand, official actions of state and local governmental agencies clearly fall within the ambit of the fourteenth amendment; see, e.g., Watson v. City of Memphis, 373 U.S. 526 (1963). On the other hand, purely private acts are beyond the scope of the amendment; see, e.g., Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). However, there is a middle class of cases in which the state has been somehow involved in the activity of a private individual or group. Where the state has been substantially involved in the private activity, the acts of the private individual have been designated as "state action" and held subject to the constraints of the fourteenth amendment; see, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

21 Pub. L. No. 93-45 (June 18, 1973).

22 479 F.2d 756 (7th Cir. 1973).

23 Suit was not instituted against St. Vincent Hospital and St. Mary's Hospital, the only other hospitals in the city with facilities suitable for the performance of abortions. Although a determination of the weight to be accorded a first amendment defense raised by a sectarian Hill-Burton hospital is beyond the scope of this article, a few brief points should be noted. First, 42 U.S.C. § 1983 states that "every" person who deprives another of any constitutional right under color of state law shall be liable therefore in an action at law or equity. It is conceivable, however, that a "freedom of religion" defense might be upheld in one set of circumstances but not in another. For example, a woman's fourteenth amendment rights might take precedence where the sectarian Hill-Burton hospital is the only hospital in the vicinity with facilities suitable for the performance of abortions. On the other hand, a sectarian Hill-Burton hospital in an area containing other facilities willing and able to perform abortions might not be ordered to perform such operations. See Allen v. Sisters of St. Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973). Finally, it is conceivable that the giving of federal funds to a sectarian hospital which refuses to perform abortions might be held to violate the establishment clause.

24 The decision was not reported. See 479 F.2d at 757.

25 410 U.S. at 197-98.

face to apply to all hospitals within the state, it cannot validly be interpreted as applying to public hospitals.[26] The Court, indeed, read the statute as affording protection to "the individual and denominational hospital."[27] Nothing was said, however, about the right of such a hospital to refuse to perform abortions if state action were present. Moreover, the *Bellin* court tacitly accepted the proposition that if state action could be found in the hospital's refusal to perform abortions, then an injunction against the refusal would be in order.[28] While acknowledging that a state has power under the Hill-Burton Act to pass regulations concerning the operations of hospitals participating in the Hill-Burton program,[29] the court found that no conditions relating to the performance of abortions were actually placed upon defendant hospital.[30] Wisconsin was not a "joint participant"[31] in the undertaking; rather, it had remained neutral on the issue of the hospital's abortion policy. The court therefore held that implementation by the hospital of its own rules on abortion did not constitute action "under color of state law" within the meaning of 42 U.S.C. § 1983.[32]

The court relied upon one of its earlier decisions[33] in reaching the conclusion that the "under color of state law" provision of 42 U.S.C. § 1983 is only applicable where a private person receives "significant affirmative support" from the state.[34] Here, according to the court, the facts that the hospital received governmental funds and was subject to state regulation did not justify a finding that its conduct with respect to abortions, unaffected by such support or regulation, was governed by 42 U.S.C. § 1983. Reliance was also placed upon *Powe v. Miles*,[35] which held that a state's involvement in some activity of the institution alleged to have inflicted the injury was insufficient to constitute state action. A finding of state action requires the state to have been involved in the injury-causing activity.[36]

Thus *Bellin* stands for the proposition that the "strict neutrality" of the state on the matter of the hospital's abortion policy forecloses the possibility that the hospital, in following its own abortion rules and refusing to perform abortions, is acting under color of state law.[37] As the ensuing discussion attempts to demonstrate, the *Bellin* court's analysis appears to rest upon an oversimplified view of the interrelationship between a state and a Hill-Burton hospital.[38]

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26 See text accompanying notes 10-17 supra.

27 410 U.S. at 198.

28 479 F.2d at 760-62, where the court operates upon the unstated assumption that a finding of state action would necessitate the granting of the requested injunction.

29 42 U.S.C. § 291d(a) (7) (1970) provides that the state "must provide minimum standards (to be fixed in the state's discretion) for the maintenance and operation of facilities providing inpatient care which receive aid under this part. . . ."

30 479 F.2d at 761.

31 See text accompanying note 55 infra.

32 479 F.2d at 761.

33 Lukas v. Western Electric Power Co., 466 F.2d 638 (7th Cir. 1972).

34 Id. at 654-56.

35 407 F.2d 73 (2d Cir. 1968).

36 Id. at 81.

37 In Allen v. Sisters of St. Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973), the court refused to order a Catholic hospital receiving Hill-Burton funds to perform a sterilization. The basis for the decision was *Bellin*. In *Allen*, however, the court found that other facilities were available in the vicinity for the performance of sterilizations. See note 23 supra.

38 See text accompanying notes 44-48 infra.

2. *The Case for State Action*

The leading case for the holding that a private hospital participating in the Hill-Burton program is subject to the fourteenth amendment is *Simkins v. Moses H. Cone Memorial Hospital.*[39] Plaintiffs, black physicians and patients, sought an injunction restraining defendant hospitals from denying staff positions to physicians and admission to patients on the basis of race, and a declaration that a provision of the Hill-Burton Act providing for "separate-but-equal" facilities[40] was unconstitutional. Both hospitals, through their participation in the Hill-Burton program, received large sums of public funds paid by the United States to North Carolina and dispersed by the state to various hospitals together with state funds.

The hospitals received the funds as part of a "state plan" for hospital construction, pursuant to the Act's provisions for grants of federal funds to aid in construction or modernization of state owned and private nonprofit hospitals.[41] The stated purpose of the Act is to assist the states in carrying out programs for the construction and modernization of hospitals as may be necessary, in conjunction with existing facilities, "to furnish adequate hospital, clinic, or similar services to *all* their people."[42] Participating institutions, as a condition for receiving financial assistance, become obligated to render hospital services in accordance with "minimum standards (to be fixed in the discretion of the state) for the maintenance and operation of facilities . . . which receive aid under [the Hill-Burton Act]."[43]

The issue for determination in *Simkins* was "whether the state or federal government, or both, had become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis. . . ."[44] The court proceeded to find the requisite state action through the participation of the defendants in the Hill-Burton program, which involves a massive use of public funds pursuant to governmental plans.[45] The *Simkins* decision, however, was based upon more than the mere receipt of funds. The relationship which led to a finding of state action was similar to that present in *Burton v. Wilmington Parking Authority.*[46] In *Burton* state action was found where a privately owned restaurant, leasing space in a municipal building, refused to serve blacks. Because of the mutual benefits and obligations and the interrelationship between the restaurant and the Parking Authority, the Court found "that degree of state participation and involvement in discriminatory action which it is the design of the Fourteenth Amendment to condemn."[47] Relying on the *Burton* rationale, the *Simkins* court found participation in the Hill-Burton program sufficient to constitute state action in the discrimination.

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39 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

40 Act of Aug. 13, 1946, ch. 958 § 2, 60 Stat. 1041 (formerly 42 U.S.C. § 291e(f)). This section was repealed by Pub. L. No. 88-443, § 3(a), 42 U.S.C. § 291c (1970).

41 42 U.S.C. § 291(a) (1970).

42 Id. (emphasis added).

43 42 U.S.C. § 291d(a)(7) (1970).

44 323 F.2d at 966. See note 20 supra.

45 In Cooper v. Aaron, 358 U.S. 1, 4 (1958), the Court explained its decision in Brown v. Board of Educ., 347 U.S. 483 (1954), as follows:

> That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is *state participation through* any arrangement, management, *funds or property.*

(Emphasis added).

46 365 U.S. 715 (1961).

47 Id. at 724.

> [W]e find it significant here that the 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. . . .
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> As the Government argued in its brief, the Hill-Burton Act itself and its legislative history reveal "emphasis on the creation of a State-wide system of hospitals for the provision of hospital service to all the people of the State [which] indicates that the Hill-Burton program was not limited to the granting of financial aid to individual *hospitals*. It shows, rather, a Congressional design to induce the States, upon joining the program, to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory. Upon joining the program a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care. And it is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the * * * [institution actually chosen] would otherwise be private: the equal protection guarantee applies."[48]

A strong case may thus be made for the proposition that participation in the Hill-Burton program is sufficient to bring a hospital's actions within the purview of the fourteenth amendment.[49] Even assuming that the *Powe v. Miles* principle as advanced in *Bellin*[50] is correct, however, there is state involvement in the injury-causing activity where a Hill-Burton hospital refuses to perform abortions. State involvement would be obvious where the state deliberately chooses to fund various private hospitals because of their anti-abortion policies. The court in *Simkins* found that the state, recognizing its responsibility for public health, elected to participate in the Hill-Burton program. It might have used its share of the funds to build public hospitals which, admittedly, could not have legally engaged in discrimination. Instead it adopted a plan of meeting its responsibility by channeling its Hill-Burton funds into private hospitals practicing discrimination.[51] Similarly, state involvement is clearly present where a state, fearing that public hospitals might be unable to refuse to perform abortions, awards its

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48 323 F.2d at 967-68 (footnote omitted).

49 This position, endorsed by *Simkins*, has been followed in a number of other decisions. See, e.g., Sosa v. Board of Managers of Val Verde Memorial Hosp., 437 F.2d 173 (5th Cir. 1971); Sams v. Ohio Valley General Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969). The holding has been described as a "well-established principle." Citta v. Delaware Valley Hosp., 313 F. Supp. 301, 307 (E.D. Pa. 1970). Nevertheless, the *Simkins* position has not been uniformly followed. Ward v. St. Anthony Hosp., 476 F.2d 671 (10th Cir. 1973), and Mulvihill v. Julia L. Butterfield Memorial Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971), involved suits brought by physicians against Hill-Burton hospitals which dismissed them without hearings. In refusing to find state action, the courts relied upon the *Powe v. Miles* argument advanced in *Bellin* – that the state must not be merely involved with the private institution but, rather, with the allegedly injurious activity. Like *Bellin*, they accepted *Simkins* on its facts, finding state participation in the injury-causing activity in *Simkins*. These cases may be correct in asserting that when dealing with the firing of a physician mere participation by a hospital in the Hill-Burton program is not, in and of itself, a sufficient basis for a finding of state action. But the purpose of the Hill-Burton Act is not to ensure employment for physicians. Rather, its avowed purpose is to provide adequate hospital service to all the people of the states participating in the program. Denial of such services by a Hill-Burton hospital, given the mutual participation of the state and the hospital in the program and the interrelationship involved therein, constitutes state action.

50 See text accompanying notes 35-36 supra.

51 323 F.2d at 970. *Simkins* however, was not based upon the fact that North Carolina deliberately funded private hospitals practicing racial discrimination. The court's finding of state action was clearly based upon its conclusion that "the necessary 'degree of state * * * participation and involvement' is present as a result of the participation by [defendant hospitals] in the Hill-Burton program." Id. at 967. See text accompanying notes 44-48 supra.

Hill-Burton funds to private hospitals with anti-abortion policies.[52] Thus under the state action doctrine, the hospital's actions would be subject to the constraints of the fourteenth amendment: its refusal to perform abortions would violate a woman's fourteenth amendment right of privacy under *Roe*,[53] in addition to the equal protection clause under the reasoning of *Hathaway*.[54]

Even if no wrongful motive is present in the state's distribution of its Hill-Burton funds, state involvement may still be found in the refusal of a Hill-Burton hospital to perform abortions. The rationale for such a finding is provided by *Burton*. There the lease between the restaurant and the Parking Authority contained no requirement that the restaurant be operated in a nondiscriminatory fashion despite the power of the Authority to adopt regulations respecting the use of its facilities. In other words, the state remained "neutral" on the issue of discrimination. It was precisely the neutrality of Wisconsin on the question of whether Bellin Memorial Hospital and other private hospitals receiving Hill-Burton funds could refuse to perform abortions which the court in *Bellin* relied upon in finding that no state action was present in the denial of facilities to plaintiff. However, as the Supreme Court stated in *Burton*, given the existence of a significant interrelationship between a state and a private institution involving mutual benefits and a special state interest in the success of the private body, a failure on the part of the state to take affirmative action to prevent discrimination can constitute state action:

> [I] n its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consequence to an individual denied the equal protection of the laws that it was done in good faith. . . . *By its inaction*, the Auhority, 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.[55]

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[52] The Supreme Court has not been consistent in its treatment of motive as a ground for holding legislative acts unconstitutional or state actions in violation of the fourteenth amendment. The Court has declared that it will not void a statute, constitutional on its face, on the basis of improper motives allegedly underlying it. Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367 (1968). On the other hand, in Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court found that redistricting of the Tuskeegee, Alabama, city lines had the clear purpose of disenfranchising blacks with respect to city elections. Accordingly, the Court found a violation of the fourteenth amendment. See also Griffin v. County School Bd., 377 U.S. 218 (1964). It seems clear, however, that while a finding of an improper motive on the part of the state may buttress a finding of unconstitutionality, improper motive is not a necessary condition for a finding that a statute or state action violates the Constitution. Rather, the courts focus on the effect of the statute or action challenged. In Wright v. Council of City of Emporia the Court stated:

> It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may *add* to the discriminatory effect of the action. . . . But as we said in Palmer v. Thompson, 403 U.S. 217, 225, it "is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and the same may be said for the choices of a school board. . . . Thus, *we have focused upon the effect — not the purpose or motivation* — of a school board's action. . . .

407 U.S. 451, 461, 462, (1972) (emphasis added).

[53] See note 5 supra.

[54] See text accompanying notes 12-17 supra.

[55] 365 U.S. at 725 (emphasis added).

There is no simple test for the presence of state action. The Court in *Burton* clearly recognized that "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[56] Upon weighing all the circumstances, however, it may be seen that the "symbiotic relationship" which existed between the state and the restaurant in *Burton*[57] exists between Hill-Burton participants, state and hospital.

In *Burton* the prime benefit to the state from the private body was the rent received from the restaurant and used to help defray the Authority's expenses. The major benefit to the restaurant was the convenience provided to its customers by their being able to park in the building which housed the restaurant. While each had an interest in the continued success of the other, the aims of the state and the restaurant were essentially unrelated. Delaware had no interest in ensuring the Authority's users the ability to obtain a hamburger and a cup of coffee. Its interest was in the rent to be paid to it by the Authority's tenants. The goals of state and private hospitals participating in the Hill-Burton program are the same, however. They are "joint participants" in the program because of the interest of the hospital in expanding its facilities in order to be able to offer greater medical facilities to the public (the *raison d'etre* of a nonprofit hospital) and the state in ensuring that facilities exist wherein its citizens can obtain proper medical care. The state-hospital relationship may present an even stronger case for application of the *Burton* rationale than did *Burton* itself.[58]

Accordingly, where the state and the hospital jointly participate in the Hill-Burton program to achieve their virtually identical aims, there are grounds for finding a symbiotic relationship between the participants. Given this type of relationship between the state and the hospital, and the fact that the state could have used its power of regulating the hospital's operations as set forth in the Hill-Burton Act,[59] the state has, by its inaction, made itself a party to the refusal of services. Under the circumstances, the state's inaction constitutes state action.[60]

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[56] Id. at 722.

[57] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

[58] In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court stated that the failure of the state to take action to prevent racial discrimination, where it had power to regulate, did not constitute state action when the sole connection between the state and the private institution (a private club) was the granting of a liquor license. Id. at 177. In so doing, the Court was careful to distinguish the situation, such as was present in *Burton*, where a symbiotic relationship exists between the state and the private institution. Thus where there exists both a symbiotic relationship and a power on the part of the state to regulate conduct of the private body which conduct, if practiced by the state, would violate the fourteenth amendment, the failure of the state to take affirmative action to remedy the discrimination constitutes state action.

[59] See note 29 supra.

[60] 365 U.S. at 725. See also Male v. Crossroads Associates, 469 F.2d 616 (2d Cir. 1972) (a symbiotic relationship, based upon *Burton*, between a state and a privately owned housing complex in an urban renewal project).

The Court in *Burton* pointed out, as one of many elements leading to the finding of state action in the restaurant's affairs, that given the restaurant's allegation that serving Negroes would hurt its business, profits earned by discrimination contributed to the financial success of the Authority. This, however, should not be read as a necessary element for the application of the *Burton* rationale. First, Eagle's allegation that integration would hurt its business was merely an unproved assertion in defense of the discriminatory practices. Further, even if it were true, Eagle had signed a 20 year lease with a fixed annual rental. Thus, so long as it had remained able to pay the rent, increases or decreases in the restuarant's revenues would have yielded neither a greater nor a lesser rental income for the Authority. Eagle Coffee Shoppe was obligated, under the lease, for the same fixed annual rental in either case. Finally, even if Eagle would have been so hurt by integrating as to have been unable to meet the rental payments, no evidence was presented to suggest that the Authority would have been unable to find a new tenant (in whatever line of business, food service or otherwise) willing and able to pay the same rental.

Similarly, while Eagle was a lessee of government property, a lessor-lessee relationship is not a *sine qua non* for application of the *Burton* rule. The lessor-lessee relationship, though serving as one of the factors leading to the finding of "joint participation," was not the basis of the decision. Rather, the thread underlying *Burton* and tying it to Hill-Burton hospitals is the fact that in both

In summary, the essence of *Burton* is the finding that the state and the private body were joint participants in a state project with the presence of the private body necessary for the success of the venture. This condition is met in the Hill-Burton program. Unless the state undertakes the construction of public hospitals, participation by private hospitals is a necessity if the state is to achieve its goal of providing adequate hospital service for all its citizens. The shared goal of expanded medical facilities available for the care and treatment of the state's citizens is achieved through the participation of both the state and private hospitals in the Hill-Burton program. Applying the *Burton* rationale, the failure of the state to act (its "neutrality") constitutes state action. Therefore, a private hospital receiving Hill-Burton funds may not constitutionally pursue a policy of refusing to perform abortions. The following section takes up the second question referred to earlier:[61] whether the Health Programs Extension Act of 1973 forbids a court from enjoining a Hill-Burton hospital from refusing to perform abortions.

III. THE HEALTH PROGRAMS EXTENSION ACT AND THE COURTS

On June 18, 1973, the Health Programs Extension Act of 1973[62] was enacted into law. Title IV, section 401, provides in part:

> (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 Disabilites Services and Facilities Construction Act, by any individual or entity does not authorize any court or any public official or other public authority to require —
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> (2) such entity to —
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> (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. . . .

The question arises as to whether this statute serves to prohibit any court from ordering a hospital receiving funds under the Hill-Burton Act[63] to perform abortions. Section 401 appears ambiguous. The following analysis considers the effect of the statute under each of the various possible interpretations.

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cases the state and the private body are joint participants in a project undertaken by the state for the benefit of the public with each conferring benefits on the other and the participation of the private body substantially aiding the state in carrying out its project.

61 See text accompanying note 21 supra.

62 Pub. L. No. 93-45 (June 18, 1973).

63 Title VI of the Public Health Service Act. The focus thus far has been on Hill-Burton hospitals. See note 18 supra. There has been no intention to imply that a mental hospital, for example, receiving funds under the Community Mental Health Centers Act and containing the usual medical facilities incidental to such a hospital may be ordered to perform abortions. The issue arises, rather, with respect to those hospitals noted earlier, which provide general short-term medical care and perform operations involving a degree of risk and demand on facilities similar to abortions.

A. Section 401: A Narrow Construction

It is possible to construe the statute narrowly so as to effectively read it out of existence. In *Swann v. Board of Education*,[64] the Supreme Court was faced with the interpretation of a similar statute.[65] There the statute in question authorized the Attorney General to institute federal desegregation suits under certain circumstances, subject to the proviso that "nothing herein shall empower any official or court" to issue any order for the busing of students in order to achieve a racial balance.[66] The Court read this section as merely insuring that the provisions of Title IV of the Civil Rights Act of 1964 would not be read as granting the courts new powers.[67] It did not, according to the Court, limit the existing powers of federal courts to enforce the equal protection clause. In other words, where segregation existed but there was no indication that it resulted from discriminatory state action, busing could not be ordered. On the other hand, the statute does not foreclose such a remedy when a court finds state action underlying racial segregation. Implicit in the court's approach was a desire to construe the statute so as to avoid a constitutional question.

Similarly, section 401 can be read as providing that the receipt of funds by a hospital under the enumerated acts does not provide a new ground for ordering the hospital to perform sterilizations or abortions, while leaving unaffected the power of a court to make such an order under its existing power of enforcing the fourteenth amendment. Thus, absent a finding of state action, the hospital may not be ordered to perform abortions merely because it receives federal funds under one of the enumerated acts.

This first reading of section 401 receives support from the legislative history of the Act. Representative Staggers, Chairman of the Interstate and Foreign Commerce Committee, was asked if section 401 was intended to hamper the courts in their interpretation of the Constitution. He replied:

> No, it is not. All we are saying here is that the receipt of assistance under the statutes mentioned is not intended, *in and of itself*, to authorize any person, including a court, to require a facility to perform abortion or sterilization procedures.[68]

Accordingly, if a court were to interpret the statute in this light, a finding of state action and, consequently, an injunction prohibiting the hospital from refusing to perform abortions would not be precluded by the statute. Such a reading is a fair one, not only in view of the legislative history but also the general practice of courts to construe statutes, whenever feasible, so as to avoid constitutional problems.[69] There are, however, other possible readings that the statute might be given.

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64 402 U.S. 1 (1971). See also Johnson v. Robinson, 42 U.S.L.W. 4313, 4315 (U.S. March 5, 1974).

65 42 U.S.C. § 2000c (1970).

66 42 U.S.C. § 2000c-6(a)(2) (1970). That portion of the section relied upon in *Swann* reads in full as follows:

> [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

67 402 U.S. at 17-18.

68 119 Cong. Rec. 4148 (daily ed. May 31, 1973). The bill was drawn by the Subcommittee on Public Health and Environment of the Interstate and Foreign Commerce Committee.

69 Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), quoting Crowell v. Benson, 285 U.S. 22, 62 (1932). See Johnson v. Robinson, 42 U.S.L.W. 4313, 4315 (U.S. March 5, 1974).

B. Section 401: A Declaration of Constitutional Law

A second interpretation of section 401 would be that it embodies a congressional declaration that the receipt of federal funds does not constitute state action. The stimulus for the enactment of section 401 was an injunction issued by the district court in *Taylor v. St. Vincent Hospital*,[70] ordering a Catholic hospital which received Hill-Burton funds to perform a sterilization.[71] The suit was brought under 42 U.S.C. § 1983[72] and 28 U.S.C. § 1343.[73] Section 401, viewed as a response to *Taylor*, can be read as stating that the receipt of funds under the specified acts does not serve as the basis for a finding of state action. The reasoning underlying such a reading would be as follows. A private hospital ordinarily is at liberty to refuse to perform abortions and sterilizations. It may only be ordered to perform such operations if state action is found in its refusal. Therefore, in stating that the receipt of the funds is not a basis on which a court may order a hospital to perform such operations, Congress is, in effect, declaring that the receipt of the funds does not constitute state action.

In proceedings in *Taylor* subsequent to the enactment of section 401,[74] the court found that "[b]y its plain language, this Act prohibits any court from finding that a hospital which receives Hill-Burton funds, is acting under color of state law."[75] By interpreting section 401 as prohibiting any court from finding that a Hill-Burton hospital is acting under color of state law, the Taylor court espoused a reading of the statute considerably more expansive than the second interpretation set forth above. It proceeded to dissolve the preliminary injunction and dismiss the action for lack of jurisdiction.[76] The court's theory was that Congress declared that hospitals receiving Hill-Burton funds are not acting under color of state law and cannot be found to have so acted. Therefore, with no action under color of state law, there was no jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. However, the district court's decision is vulnerable on two grounds.

The first ground is the court's belief that Congress has the power to declare conclusions of law which automatically bind the courts. Congress cannot declare substantive constitutional law so as to bar the courts from inquiry. As Chief Justice Marshall stated in *Marbury v. Madison*:[77] "It is, emphatically, the province and duty of the judicial department to say what the law is."[78]

Katzenbach v. Morgan,[79] on first reading, might be viewed as supporting the view that Congress does have the power to make declarations of substantive constitutional law which bind the courts. In *Morgan* the Supreme Court upheld section 4(e) of the Voting Rights Act of 1965[80] which had the effect of declaring invalid New York's English literacy test for voting as applied to persons who received a sixth grade

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70 Civil No. 1090 (D. Mont., filed Oct. 27, 1972).

71 1973 U.S. Code Cong. & Adm. News 1553.

72 See note 17 supra for the full text of 42 U.S.C. § 1983.

73 28 U.S.C. § 1343 grants jurisdiction to United States District Courts over actions brought to redress deprivations, under color of state law, of any constitutional rights.

74 Civil No. 1090 (D. Mont., filed Oct. 26, 1973).

75 Id. at 4. See Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973).

76 Id. at 3-4.

77 5 U.S. (1 Cranch) 137 (1803).

78 Id. at 177. Cf. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), where the Supreme Court held unconstitutional an act which forbade the Court "to give the effect to evidence which, in its own judgment, such evidence should have. . . ." Id. at 147.

79 384 U.S. 641 (1966). For an extensive analysis of *Morgan*, see Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199 (1971).

80 42 U.S.C. § 1973b(e) (1970).

education, in a language other than English, in a Puerto Rican school.[81] The Court held section 4(e) to be appropriate legislation to enforce the equal protection clause of the fourteenth amendment. It pointed out, however, that Congress lacks power, under section 5, to abrogate, restrict or dilute equal protection and due process decisions of the Court.[82]

The Court in *Morgan* did not inquire as to whether state statutes denying the franchise to persons with an inadequate grasp of the English language violate the equal protection clause. Rather, considerable reliance was placed by the Court upon the fact that Congress may well have made a factual determination that people receiving an education in Puerto Rican schools, despite an inability to understand English, are as capable of performing the functions of an informed electorate as those receiving a comparable amount of education in American schools. If they are so qualified then it naturally follows that the denial of the franchise to such persons constitutes a violation of the equal protection clause and Congress may legislate to remove the forbidden discrimination under section 5.[83]

Unlike the statute in *Morgan*, no question of fact may be said to exist with respect to section 401. What Congress did (under this construction of the statute) was merely to state that the receipt of Hill-Burton funds does not constitute state action. No facts are in dispute. This is a conclusion of law. As such, while entitled to consideration by the courts, congressional views of what does or does not constitute state action are not binding upon the courts.[84]

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[81] The Court, several years earlier, had held that a North Carolina English literacy requirement similar to New York's did not violate the equal protection clause. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[82] 384 U.S. at 651 n.10. Accordingly, "an enactment authorizing the States to establish racially segregated systems of education would not be – as required by § 5 – a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws." This prohibition against congressional dilution of the fourteenth amendment was recently reaffirmed in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37-39 (1973). Justice Powell, delivering the opinion of the Court, differentiated cases such as Shapiro v. Thompson, 394 U.S. 618 (1969), which involve a denial of fundamental rights, from others such as *Morgan*, where the challenged statute extends rather than dilutes constitutional rights.

[83] Thus *Morgan* may be viewed as similar to Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), where the Court upheld Title II of the Civil Rights Act of 1964 under the commerce clause. In enacting that statute, Congress had relied upon a determination that the refusal of hotels and restaurants to open their facilities to blacks impeded the flow of interstate commerce. Congress could therefore legislate under its commerce power to remove the impediment. See also Katzenbach v. McClung, 379 U.S. 294 (1964); United States v. Darby, 312 U.S. 100 (1941). *Morgan* may be read even more narrowly in light of the Court's other major ground of reliance – that the measure may be viewed as an attempt by Congress to secure for the Puerto Rican community of New York nondiscriminatory treatment by government. Finally, *Morgan* might be viewed as involving the allocation of functions between the states and the federal government. In any case, *Morgan* did not involve a potential denial or dilution of an individual's fourteenth amendment rights. Instead, it secured such rights for a group of people. It must also be noted that the power of Congress to go as far as it did in *Morgan* in matters of fact finding is questionable after Oregon v. Mitchell, 400 U.S. 112 (1970). A bare majority of the Court there held that the section of the Voting Rights Act Amendments of 1970 lowering the minimum voting age requirement from 21 to 18, insofar as it applied to state elections, was unconstitutional. This was done despite that fact that the Court could have deferred to a congressional determination that 18-year-olds are capable of acting as informed and responsible voters.

[84] Crowell v. Benson, 285 U.S. 22 (1932), involved the constitutionality of an act of Congress granting certain powers to a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970). The Court stated:

> The question in the instant case . . . can be deemed to relate only to determinations of fact. The reservation of legal questions is to the same court that has jurisdiction in admiralty. . . . The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court has held to fall within that category.

Id. at 49.

The second ground for attacking the *Taylor* decision is the court's determination that section 401 "prohibits any court from finding that a hospital which receives Hill-Burton funds, is acting under color of state law."[85] Even if Congress can validly pass a statute which effectively binds the courts to a conclusion that the receipt of Hill-Burton funds does not constitute state action, section 401 does not prohibit a finding of state action. What the Act does say is that the receipt of Hill-Burton funds by a hospital does not authorize a court to order the hospital to perform abortions or sterilizations. The statute nowhere excludes consideration of *other* factors, either apart from or in conjunction with the receipt of the funds, as the basis for a holding that state action is present. Read in this light, the statute is simply a congressional enactment of *Bellin*, which stated that the mere receipt of the Hill-Burton funds and the state's ability to regulate incidental thereto is not sufficient for a finding of state action. Thus section 401 would not prohibit a court from concluding, on the basis of *Simkins* and *Burton*, that additional factors justify a finding of state action, and a consequent enjoining of a Hill-Burton hospital from refusing to perform abortions.[86]

C. Section 401: A Withdrawal of Jurisdiction

A final interpretation of section 401 would be to view it as withdrawing jurisdiction for the courts either to hear cases brought to order hospitals receiving federal funds under the enumerated acts to perform abortions and sterilizations, or to grant the injunction remedy in such suits. In support of the statute, *Taylor* cited the power of Congress to control the jurisdiction of inferior federal courts.[87] However, section 401 cannot fairly be read as a "withdrawal of jurisdiction" statute.

In drafting withdrawal of jurisdiction statutes, Congress has tended to use precise language to accomplish its purposes. For example, in the Portal-to-Portal Act of 1947,[88] the section withdrawing jurisdiction contains the following clear directive: "No court . . . shall have jurisdiction of any action or proceeding. . . ."[89] The section limiting remedies in the Norris-LaGuardia Act[90] contains similar direct language: "No

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85 Civil No. 1090 at 4.

86 The error of the *Taylor* court's interpretation of § 401 may be seen from the consequences of such a reading. If the statute "prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law," then even if the refusal to perform abortions stems from a state order that such operations not be performed, no state action could be found in the refusal. Further, such a reading would mean that Congress has overruled *Simkins*. If courts cannot find that a hospital receiving Hill-Burton funds is acting under color of state law then such a hospital is free to practice racial discrimination. It is highly unlikely that Congress, even if it has such power, intended such a result. Finally, such a reading of § 401 would be the equivalent of a statute prohibiting any court from finding that "separate-but-equal" violates the fourteenth amendment. If Congress can bind the courts under the *Taylor* reading of § 401, it could do so equally well under the statute described above. However, Congress may not override the Constitution by means of a statute. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Nor may it authorize the states to violate the fourteenth amendment. Shapiro v. Thompson, 394 U.S. 618 (1969).

87 Civil No. 1090 at 5.

88 29 U.S.C. §§ 251-62 (1970).

89 29 U.S.C. § 252(d) (1970). The full section reads as follows:

> *No court* of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, *shall have jurisdiction of any action or proceeding* . . . to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 . . . to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

Id. (emphasis added).

90 29 U.S.C. §§ 101-15 (1970).

court ... shall have power to issue any restraining order or temporary or permanent injunction. ..."[91] These statutes are quite explicit. In contrast, section 401 neither states that courts shall have no jurisdiction over suits brought to order a hospital receiving federal funds to perform abortions or sterilizations, nor says that courts shall have no power to issue an injunction ordering such a hospital to perform abortions or sterilizations. Under the Act, *receipt of the funds* does not serve as authorization for such an order[92] – but the Act does not preclude a court from hearing the suit or issuing an injunction.

To the extent that a court accepts at face value a congressional declaration of the absence of state action, the statute in question has the same affect as a withdrawal of jurisdiction statute, because the court's jurisdiction is based upon an alleged deprivation of constitutional rights under color of state law. Even if such a legislative declaration of substantive constitutional law were binding on a court, section 401 would not foreclose a judicial finding of state action and a consequent order to a hospital to perform abortions on the basis of additional factors beyond the mere receipt of the funds.

However, if section 401 is read as withdrawing jurisdiction either over such actions or the injunction remedy, it must be held unconstitutional. While Congress unquestionably has broad powers to limit the jurisdiction of courts, particularly inferior federal courts under article III of the Constitution, such powers are not without limitation. In *Battaglia v. General Motors Corp.*,[93] a case involving the constitutionality of the Portal-to-Portal Act of 1947,[94] the court stated:

> [W]hile 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.[95]

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[91] 29 U.S.C. § 101 (1970). The full section reads as follows:

> *No court* of the United States, as defined in this chapter, *shall have power to issue any restraining order or temporary or permanent injunction* in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter. ...

Id. (emphasis added).

[92]

> (b) *The receipt of any grant*, contract, loan or loan guarantee under the [enumerated acts] *by any* individual or *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 convictions. ...

(Emphasis added).

[93] 169 F.2d 254 (2d Cir. 1948).

[94] 29 U.S.C. §§ 251-62 (1970).

[95] 169 F.2d at 257. Congress also has power, under art. III, §2 of the Constitution, to make "exceptions" and "regulations" regarding the Supreme Court's appellate jurisdiction. Id. at 257 n.4.

Section 401, if a jurisdictional limitation, withdraws from *all* courts, rather than merely federal courts, the right to hear cases brought to order Hill-Burton hospitals to perform abortions or sterilizations.[96] If a limitation of remedies, it withdraws the only remedy which could be useful under the circumstances and therefore effectively withdraws jurisdiction. Under such a construction, the statute is saying that regardless of whether or not state action is present in the hospital's refusal to perform abortions or sterilizations no court may ever hear such a case, or, if a remedial limitation, no court may ever grant the only remedy effective under the circumstances.

Marbury v. Madison made it clear that Congress may not abrogate the Constitution by means of a statute, however artfully drawn.[97] If section 401 were upheld as a withdrawal of jurisdiction statute, Congress could equally well pass a statute stating that no court shall have jurisdiction over cases brought to enforce a fourteenth amendment right and such a statute could be upheld. In both cases the statute, through the device of withdrawing jurisdiction, would serve to deny any possibility of vindicating a constitutionally protected right. To uphold such a statute would be to place form ahead of substance.

IV. CONCLUSION

Public hospitals, by reason of the mandate of *Roe* and *Doe*, cannot categorically refuse to perform abortions. Similarly, under the state action doctrine, private hospitals receiving federal funds pursuant to the Hill-Burton Act cannot refuse to perform abortions, notwithstanding the Health Programs Extension Act of 1973. The interrelationship of state and hospital in the Hill-Burton program, with all the rights, duties and obligations incidental thereto, and the fact that the state and the hospital are joint participants in a state project undertaken for the benefit of the public, support the finding of state action. The *Roe* prohibition against state interference in a woman's abortion decision, to be more than a mere cipher, must extend beyond state abortion statutes to the unwarranted refusal to perform abortions by hospitals with which the state is intimately involved.

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(b) The receipt of any grant ... under the [enumerated acts] by any individual or 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....*

(Emphasis added.)

97 5 U.S. (1 Cranch) at 177.