

Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals

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A person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or . . . employment itself. The potential for coercion created by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief.¹

On December 7, 2000, St. Elizabeth Medical Center in Granite City, Illinois asked Dr. Yogendra Shah to step down from his position as Chief of the Department of Obstetrics-Gynecology because of pressure that the Catholic hospital had begun to receive from the anti-abortion community. Dr. Shah performed abortions at a private clinic across the street from the hospital, and an increasingly vocal lobby viewed the employment of this doctor as a violation of Catholic principles.²

On March 19, 1998, Dr. David Mesches was forced out of his position as the chairman of the Department of Family Medicine at New York Medical College, a Roman Catholic-affiliated hospital and medical school in Kingston, New York. Dr. Mesches, in a twist of irony, was attempting to assist in completing a merger between a Catholic hospital and two non-sectarian hospitals in the area. The merger agreement required all three hospitals to bar the performance of abortion and sterilization procedures. As a result, Dr. Mesches had agreed to lease space in his offices in Kingston to a private clinic, which would provide abortions and other women's health services that would be restricted in the hospitals as a condition of the merger. When questioned about this choice, Dr. Mesches commented to a local Kingston newspaper that the right to abortion is "the law of the land" and added, "it's the right thing to

1. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 337, 340-41 (1987) (Brennan, J., concurring). Justices Brennan and Marshall concurred in the holding of *Amos*, which allowed religious institutions to be exempted from the non-discrimination mandate of § 702 of the Civil Rights Act of 1964 with respect to the hiring of employees for both religious and secular positions, but were wary of the destructive effect this might have on the freedoms of those employees. Brennan, although referring to a building engineer in a religiously affiliated gymnasium in this quote, could just as easily be speaking of the problem of physicians at religiously affiliated hospitals discussed in this paper. In his opinion, Justice Brennan also quoted James Madison and the Virginia Declaration of Rights:

We hold it for a fundamental and undeniable truth that 'Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.

Id. at 341 n.2.

2. Heather Ratcliffe, *Doctor Who Does Abortions at Clinic is Demoted by Catholic Hospital But He Will Stay on Staff at St. Elizabeth in Granite City*, ST. LOUIS POST DISPATCH, Dec. 21, 2000, at B2. See also E-mail from Sally Burgess, Hope Clinic for Women, to author (Nov. 30, 2002) (on file with author).

do.”³ Soon after these remarks were published, Dr. Mesches was dismissed from his position.⁴

In December of 1998, Dr. Schales Atkinson received a letter from the Deaconess Hospital in Oklahoma City, Oklahoma indicating that in order to grant him permanent medical staff privileges, the Methodist hospital required him to sign a statement agreeing not to “intentionally perform any abortion other than to save the life of the pregnant woman, at the Deaconess Hospital or elsewhere”⁵

INTRODUCTION

The above three examples illustrate a growing problem in the United States as Catholic and other religious health care systems and institutions take on a larger presence in the health care field and, as a result, exert enormous influence over the health care of those they serve. Catholic and some other religious hospitals restrict the services they provide in accordance with their religious beliefs and doctrine. Catholic hospitals must all comply with the National Conference of Bishops’ *Ethical and Religious Directives for Catholic Health Care Services*.⁶ These guidelines prohibit all forms of contraceptive services and counseling,⁷ as well as medical and surgical abortions,⁸ sterilizations,⁹ and even emergency contraception to victims of rape.¹⁰

The impact of these directives is widespread. Catholic hospitals are the largest single group of non-profit hospitals, constituting, as of 2001, eleven percent of all community hospitals and sixteen percent of all community hospital admissions.¹¹ In many rural areas, a Catholic hospital is often the only

3. Ian Fisher, *Casualty of the Abortion Debate*, N.Y. TIMES, Mar. 24, 1998, at B1. Dr. Mesches later clarified that he meant that leasing the office space was the right thing to do and was not referring to abortions in that statement.

4. *Id.*

5. Letter from Paul Dougherty, President, Deaconess Hospital, to Dr. Schales L. Atkinson (Dec. 11, 1998) (emphasis added) (on file with author).

6. NAT’L CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (1995), available at <http://www.ncc.buscc.org/bishops/directives.htm> [hereinafter DIRECTIVES].

7. NAT’L WOMEN’S LAW CENTER, HOSPITAL MERGERS AND THE THREAT TO WOMEN’S REPRODUCTIVE HEALTH SERVICES: USING CHARITABLE ASSETS LAWS TO FIGHT BACK 6 (2001) [hereinafter HOSPITAL MERGERS]. See also DIRECTIVES, *supra* note 6, at Directive 52.

8. See HOSPITAL MERGERS, *supra* note 7. See also DIRECTIVES, *supra* note 6, at Directive 45.

9. See HOSPITAL MERGERS, *supra* note 7. See also DIRECTIVES, *supra* note 6, at Directive 53. Sterilization is the most common form of contraception today. See HOSPITAL MERGERS, *supra* note 7, at 6.

10. See HOSPITAL MERGERS, *supra* note 7. See also DIRECTIVES, *supra* note 6, at Directive 45. Additionally, Directive 36 permits emergency contraception for rape victims but only if they test negative for pregnancy. As pregnancy tests must be performed at least seven days after conception to be effective, and emergency contraception is effective only in the first seventy-two hours after conception, it is unclear whether Catholic hospitals ever provide emergency contraception in practice. *Id.* at Directive 36. See HOSPITAL MERGERS, *supra* note 7, at 6 n.8.

11. See HOSPITAL MERGERS, *supra* note 7, at 6.

health care facility for miles around. Additionally, there are numerous Catholic-sponsored outpatient clinics and managed care plans that must also follow these directives, which in turn impacts many more women.¹²

While the impact of the religious restrictions on health care in Catholic hospitals is already enormous, it continues to grow. As hospitals throughout the country face growing financial difficulties, religiously affiliated institutions have increasingly turned to mergers with non-sectarian institutions as a remedy. In the past ten years, “almost 170 non-Catholic hospitals have merged or otherwise affiliated with Catholic health care entities.”¹³ When Catholic hospitals merge with non-sectarian institutions, they often insist on adherence to the Ethical and Religious Directives as a condition of the merger. As a 1998 survey indicated, “reproductive health services were discontinued in 48 percent of the completed mergers and affiliations involving Catholic entities” that year.¹⁴

As a further solution to the financial difficulties experienced by many health care institutions, Catholic hospitals have begun to merge with one another, creating “Catholic health care ‘mega-systems.’” Upon merger, these “mega-systems” gain inordinate bargaining power, leaving smaller, non-sectarian institutions vulnerable to exclusion from the market altogether.¹⁵ Through these mergers with both secular and Catholic institutions, an increasing number of non-sectarian private hospitals are swallowed by the religious health care system while others are pushed out of the market entirely, creating a situation in which access to abortions and other legal and often essential health care services is severely restricted for thousands of women.

But patients’ rights are not the only ones at stake in this emerging culture. The rights of thousands of hospital employees are affected by Catholic doctrine as well. The Catholic Health Association itself reported that as of 2001, Catholic hospitals employed 731,000 full and part-time workers.¹⁶ Additionally, Baptist, Church of Jesus Christ of Latter Day Saints, and Seventh Day Adventist hospitals often adhere to similar restrictions, affecting both their patients and their employees.¹⁷ Hospitals that follow religious doctrine in treating their patients often also insist on adherence to the doctrine by all those who are employed there regardless of the employees’ personal beliefs or convictions. This article will explore the problem faced by the doctors

12. *See id.*

13. *Id.* at 7.

14. *Id.* at 6 n.22. Note that the data in this survey refers only to those mergers and affiliations for which the surveyors were able to obtain information.

15. *See id.* at 7.

16. *See* MERGERWATCH, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY SPONSORED HOSPITALS IN THE UNITED STATES 24 (2002) [hereinafter NO STRINGS ATTACHED].

17. *Id.* For example, some Baptist hospitals prohibit the performance of “elective” abortions in their facilities. In addition, one HMO that is affiliated with the Church of Latter Day Saints refuses to cover sterilizations until a woman has had five children or has reached the age of forty. *See id.* at 24-25.

described above as well as numerous other health care professionals as their freedoms of speech, belief, and association are curtailed by the fear of job loss, demotion, or other adverse employment actions. As religious hospitals begin to dominate the health care market, an increasingly dire situation is created for those who work in the field.

This article examines a potential litigation strategy that may be used to combat the power of religious health care facilities to force their employees to conform to religious directives. Part I suggests that the Church Amendment, a piece of legislation attached to the Health Programs Extension Act of 1973,¹⁸ may be used to prohibit sectarian hospitals from restricting the pro-choice beliefs, words, and outside actions of the health care professionals they employ. This piece of appropriations legislation contains a constitutionally valid conditional spending provision which mandates that hospitals accepting certain federal funds refrain from discriminating in employment, promotion and demotion, and extension of staff privileges on the basis of an employee's religious or moral convictions respecting abortion. This legislation may be used to protect doctors¹⁹ who have performed or wish to perform abortions at facilities other than the religious one in which they primarily work; it can protect doctors who wish to maintain their staff privileges at a Catholic hospital but speak out publicly in support of reproductive rights; and it will provide protection for doctors who wish to refrain from signing agreements to abide by the National Conference of Bishops' *Ethical and Religious Directives for Catholic Health Care Services*²⁰ unless the agreement is specific to actions within that hospital only. Part II examines the legislative history surrounding the Church Amendment, arguing that courts should imply a private right of action into this legislation that will allow doctors to sue when their rights under this amendment have been violated. Finally, Part III argues that the Religious Freedom Restoration Act of 1993 (RFRA),²¹ which some have suggested is an obstacle to the use of the Church Amendment in this context, does not, in fact, impact this litigation strategy at all.

As religious health care systems grow ever larger and more powerful, access to reproductive services is curtailed and employee rights are restricted. Pro-choice health care professionals continue to be forced to limit the expression of their beliefs both in and outside the workplace. The courts must be utilized to address these troubling developments. The use of the Church

18. Health Programs Extension Act, 42 U.S.C. § 300a-7 (Deering, LEXIS through November 2003).

19. The use of the term "doctors" in this paper is intended to include all health care professionals.

20. See DIRECTIVES, *supra* note 6.

21. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (Deering, LEXIS through November 2003).

Amendment as part of a litigation strategy is one way that doctors can maintain their freedoms in this changing health care culture.²²

I. RESORTING TO EXTRA-LEGAL MEASURES

As religious health care systems continue to grow in both power and influence, it is vital that physicians use the Church Amendment and other developing legal remedies to deal with restrictions on their rights. The dangers of being complicit in the restrictive approaches of Catholic and other religious health care systems or of operating through extra-legal or even illegal measures are too great both for doctors and their patients.

Physicians for Reproductive Choice and Health (PRCH) has reported that numerous doctors have chosen to ignore the restrictions or to illicitly subvert the hospital policies. Many sectarian hospitals, while requiring their physicians to sign agreements to abide by the Ethical and Religious Directives, simultaneously suggest that they will not interfere in the doctors' work or communication with their patients. PRCH cautions doctors that such "don't ask, don't tell" policies should not be trusted. A doctor who signs such an agreement has entered into a legally binding contract and can face serious consequences should she breach it.²³ In this way, when doctors ignore the restrictions created by religious hospitals they endanger their jobs and reputations.

Furthermore, some doctors suggest that they will continue to practice medicine in accordance with their beliefs regardless of the religious hospital's policy and its dedication to the policy's enforcement. Dr. Erik Cohen, M.D. of

22. As courts tend to follow public opinion on controversial matters, it is important to note that the American public is overwhelmingly in favor of curtailing the powers of sectarian institutions with respect to their employees' rights and beliefs. A recent public opinion poll conducted by the American Civil Liberties Union (ACLU) found that eighty-six percent of Americans oppose "allowing employers to refuse to provide their employees with health insurance coverage for medical services the employer objects to on religious grounds." *Protecting the Rights of Conscience of Health Care Providers and a Parent's Right to Know: Hearing on H.R. 4691 Before the Subcomm. on Health of the House Comm. on Energy and Commerce*, 107th Cong. 19 (2002) (prepared statement of Catherine Weiss, Director, ACLU Reproductive Freedom Project) [hereinafter Weiss Testimony]. Additionally, seventy-nine percent of those polled believe that it is "more important to respect the personal conscience of individuals making difficult decisions" than to "respect the conscience of a religious hospital." *Id.* Finally, seventy-two percent of Americans are more concerned that the government hold "all hospitals – whether religiously affiliated or not – to the same standards" than they are about keeping "the government from forcing religious hospitals to violate their beliefs." *Id.* Thus, it is clear that while religious hospitals continue to impose their beliefs on their patients and employees alike, the American public, which often informs the direction of the courts, agrees that individual rights and constitutional freedoms should be protected over those of a religiously affiliated institution. It is in this context that the Church Amendment should be used in court to protect the rights of pro-choice health care professionals. Additionally, it is important to mention that the ACLU Reproductive Freedom Project, referenced above, is one of several parties interested in bringing a test case under the Church Amendment.

23. PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH & MERGERWATCH, *MERGERS AND YOU: THE PHYSICIANS' GUIDE TO RELIGIOUS HOSPITAL MERGERS* 5 (2001) [hereinafter *MERGERS AND YOU*].

Gilroy, California, was quoted as saying “[u]ntil they put a nun next to me, I will give a patient all of her medical options and allow her to make her own decision.”²⁴ Unfortunately, some doctors see undercover medicine as the only answer. One report indicated that a staffer at a religious hospital told a caller that she could dispense morning after pills only if the woman met her in the parking lot.²⁵ Other doctors indicate that they “feel compelled to perform one procedure but write it up as another.”²⁶ Such practices can be disastrous for a patient if no one monitors her use of prescription medication or if her future doctor cannot look at her records and find her actual medical history before prescribing medication or performing an operation.

PRCH suggests numerous options for doctors who do not want to be forced into endangering the lives of their patients or their careers: organizing and speaking out against hospital mergers and religiously affiliated hospitals that restrict the rights of patients and doctors in the area of reproductive health; encouraging doctors to redirect patients to hospitals that provide full reproductive services (thereby pressuring religiously affiliated hospitals through economic means); and speaking out against legislation that allows for broad institutional “religious exemptions.”²⁷ This article suggests that with the use of the Church Amendment, doctors have an additional option—litigation. Hospital mergers and the enforcement of religious doctrine in the health care context impact both patients and their doctors. The Church Amendment provides a means by which doctors can use the judicial process to enter this debate.

II. USING LITIGATION TO PROTECT EMPLOYEE RIGHTS IN RELIGIOUSLY AFFILIATED HOSPITALS

A. Litigation Strategies Involving Title VII

While this article is primarily concerned with an examination of the Church Amendment and its litigation potential, it is important to note that there are other potentially successful litigation strategies being used to address the curtailment of employee freedoms in religiously affiliated workplaces. One such strategy is currently in development in both Georgia and Kentucky where

24. Leslie Laurence, *The Hidden Health Threat That Puts Every Woman at Risk*, REDBOOK, July 1, 2000, at 112.

25. *Id.*

26. *Id.*

27. See MERGERS AND YOU, *supra* note 23, at 14 -18.

lawsuits have been filed arguing that Title VII of the Civil Rights Act of 1964 may be used in such cases.²⁸

Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."²⁹ Although that section broadly prohibits religious discrimination, Congress also included a provision in Section 702 of the Act to provide an exemption for religious organizations.³⁰ Section 702 provides that Title VII's non-discrimination mandate "shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, educational institution, or society of its activities."³¹ This provision, known as the "ministerial exception," exempts religious institutions from adhering to Title VII's non-discrimination mandate with regard to religious discrimination. In 1987, the United States Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos* held that application of the Section 702 exception to a religious organization's secular activities was not a violation of the Establishment Clause of the First Amendment.³² Thus, a religious organization was permitted to discriminate based on religion in its employment of individuals who fill both religious and secular positions.³³

Taken together, Section 702 and *Amos* seem to suggest that a sectarian hospital may discriminate based on religious beliefs in the hiring, firing, promotion, and extension of staff privileges. Thus, it would seem that a pro-choice physician seeking a remedy in Title VII for his discharge from a Catholic hospital should look elsewhere. The hospital can claim that under Section 702, it was permitted to discriminate based on religious beliefs and that beliefs and actions regarding abortion qualified as such. Furthermore, under *Amos*, the hospital can convincingly argue that despite the fact that a physician

28. Civil Rights Act of 1964, Title VII, § 703, 42 U.S.C. § 2000e-2 (Deering, LEXIS through November 2003).

29. 42 U.S.C. § 2000e-2(a)(1) (Deering, LEXIS through November 2003).

30. See Civil Rights Act of 1964, Title VII, § 702, 42 U.S.C. § 2000e-1 (Deering, LEXIS through November 2003).

31. 42 U.S.C. § 2000e-1(a) (Deering, LEXIS through November 2003).

32. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 337, 339 (1987).

33. The Court concluded based on the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that application of the ministerial exception to secular activities served a secular legislative purpose of alleviating government interference with the ability of religious organizations to define and carry out their religious missions, that application of § 702 in this context did not constitute government advancement of religion, and that § 702 in fact avoids excessive entanglement of church and state by removing judicial inquiry into religious belief. See *Amos*, 483 U.S. at 339.

occupies a secular position at the institution, the very fact that it is a sectarian hospital allows it to discriminate in this way.

However, courts in both Georgia and Kentucky have recently been asked to reconsider the ministerial exception in light of developments in government funding of religious organizations.³⁴ In both cases, religious institutions that receive a large portion of their annual budget from government funding fired or denied employment to the plaintiffs. These plaintiffs claim that the religious institution violated Title VII in denying them employment based solely on their religious beliefs. They further claim that the religious institution is not entitled to invoke the religious exemption under Section 702 of Title VII because such an application would violate the Establishment Clause of the First Amendment. By accepting government funding, they argue, the religious institution has waived its right to invoke the ministerial exception, as to do so would directly implicate the government in both religious discrimination and in the advancement of a particular religion, a clear violation of the First Amendment.³⁵

A 1989 district court case from Mississippi, *Dodge v. Salvation Army*, originally proposed the argument used in both of these cases.³⁶ In *Dodge*, the plaintiff, a Victim's Assistance Coordinator at a Domestic Violence Shelter operated by the Salvation Army was terminated because she was discovered to be a practicing Wiccan. The court held that because the plaintiff's position was funded entirely through government funding, the Salvation Army could not rely on Section 702 in justifying the termination, as that would have the unconstitutional effect of government endorsement of religion through the religious institution's employment practices.³⁷

While the success of this argument in the current Georgia and Kentucky cases would be a hopeful development in the areas of religious freedom and employee rights, there are a number of reasons to doubt that the plaintiffs will prevail. First, *Dodge* is an unpublished opinion from a district court. No higher courts have dealt with this issue, making *Dodge* a rather unpersuasive precedent. Furthermore, in 1994, five years after *Dodge*, a district court in Georgia decided contrary to *Dodge*. In *Siegel v. Truett-McConnell College, Inc.*, a private sectarian college fired one of its professors because he was not a

34. See *Bellmore v. United Methodist Children's Home of the N. Ga. Conf., Inc.*, No. 56-474 (Super. Ct. Fulton Cty. Ga. filed Jul. 31, 2002.) See also *Pedreira v. Kentucky Baptist Home for Children*, 186 F. Supp. 2d 757 (W.D. Ky. 2001). The court in the Kentucky case found that the defendant's prohibition on employment of homosexuals did not constitute religious discrimination under Title VII. See *Pedreira*, 186 F. Supp. 2d. at 762. The court in Georgia has yet to decide this issue.

35. See Plaintiff's Complaint at 17-18, *Bellmore* (No. 56-474) ("United Methodist Children's Home (UMCH) cannot, consistent with the United States and Georgia Constitutions, engage in religious discrimination under shelter of this exemption while receiving substantial government financial support.").

36. *Dodge v. Salvation Army*, No. S88-0353, 1989 U.S. Dist. WL 53857, at *3 (S.D. Miss. Jan. 9, 1989).

37. *Id.*

Christian.³⁸ Arguing that the college could not invoke Section 702 because of its receipt of government funds, the plaintiff claimed relief under Title VII. The Georgia court, however, distinguished *Dodge*, finding that in *Dodge*, the government funds had “substantially if not exclusively” funded the position at issue whereas in *Siegel* there was no direct federal or state subsidy of the church sponsored school.³⁹ Instead, the government provided grants to students who then chose to attend a religiously affiliated school. In this context, the court found that the religious institution could invoke Section 702 to protect its employment decision without it constituting a violation of the Establishment Clause.

The argument with respect to a religious hospital falls somewhere between these two cases. Almost all hospitals receive some form of government funding, especially with the proliferation of Medicare and Medicaid grants. As such, the funding does go directly to the hospital and not through its patients alone. On the other hand, it is difficult to claim that the position of a particular physician is financed substantially through a government grant or funding stream. While the argument that succeeded in *Dodge* might be made in the religious hospital context, it is far from a safe bet. As a result, health care professionals must wait for the resolution of the issue before the Georgia and Kentucky courts before concluding whether it constitutes a viable litigation strategy for pro-choice health care professionals. In the interim, the Church Amendment provides an alternative that can more confidently be relied upon to challenge religious discrimination by sectarian hospitals, particularly discrimination relating to abortion views.

B. The Church Amendment as Conscience Clause: The Background and Statutory Text of the Amendment

The Church Amendment, codified at 42 U.S.C. § 300a-7, was an amendment to the Health Programs Extension Act of 1973 and was signed into law by President Nixon on June 18, 1973.⁴⁰ This Act was an extension of components of the Public Health Services Act,⁴¹ an omnibus bill that contained numerous grants and programs for health care facilities and providers.⁴² The

38. *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335 (N.D.G.A. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995).

39. *Id.* at 1344.

40. The Church Amendment was Title IV, Section 401 of the Health Programs Extension Act of 1973. *See also* *Watkins v. Mercy Medical Center*, 364 F. Supp. 799, 801 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975).

41. 42 U.S.C. § 201 (Deering, LEXIS through November 2003).

42. One of the major pieces of funding legislation included in the Public Health Services Act is the Hill-Burton Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946), which provides funding for the construction of hospitals and other health care facilities. The Hill-Burton program was established in the post-World War II period to respond to the shortage of hospital facilities in many areas around the country. One scholar estimates that in the first twenty years of the program, over half of the hospitals in the country

Church Amendment, given its name because of its sponsor, Senator Frank Church of Idaho, was tacked on to this piece of appropriations legislation in order to clarify the obligations of health care facilities with regard to abortion and to create conditions upon which receipt of government funding depended. The Amendment provided, 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 Disabilities 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 –

(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.⁴³

This first piece of the amendment has been called a “conscience clause,” because it seeks to protect the conscience of religious hospitals by preventing courts from forcing such institutions to provide abortions or sterilizations.

Senator Church proposed his amendment to the Health Programs Extension Act of 1973 in the context of the concern and controversy that arose after the Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* held that statutes that prohibited all abortions violated a woman’s constitutional right to privacy.⁴⁴ As is well known, *Roe* provoked a great deal of controversy, leading Congress to immediately begin considering a number of laws limiting abortion. These laws came in the form of constitutional amendments as well as statutory proposals.⁴⁵ A number of Congressmen proposed amendments to the Constitution which would mandate the application of the due process and equal

received Hill-Burton funding. See KENNETH WING, *THE LAW AND THE PUBLIC’S HEALTH* 124 (2d ed. 1985).

43. 42 U.S.C. §300a-7 (West Supp. 1991).

44. *Roe*, 410 U.S. 113.

45. Harriet F. Pilpel & Dorothy E. Patton, *Abortion, Conscience and the Constitution An Examination of Federal Institutional Conscience Clauses*, 6 COLUM. HUM. RTS. L. REV. 279, 280-283 (1975).

protection clauses to unborn fetuses, except in cases where the mother's life was in danger, while others sought to pass constitutional amendments that prohibited abortion altogether.⁴⁶ The statutory proposals often sought to restrict the use of federal funds for abortion or abortion-related services.⁴⁷ While Congress rejected or allowed to lapse many of these proposals, it did enact a number of abortion-limiting laws as amendments to existing federal laws. In addition to the Church Amendment, passed in 1973, Congress also enacted the Legal Services Corporation Act of 1974, which prohibited the use of program funds in litigation seeking to compel the performance of an abortion against the conscience of the provider.⁴⁸ It also enacted the Foreign Aid Assistance Act of 1973, which prohibited the use of AID funds to "pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortion."⁴⁹ The Church Amendment's conscience clause therefore was not unique in its intent to limit the implications of *Roe*.

While the Church Amendment was, at the time, in keeping with many similar proposals, Senator Church proposed it in response to a specific decision by a federal district court in Montana.⁵⁰ The court in *Taylor v. St. Vincent's Hospital* issued a temporary injunction on October 27, 1972, requiring the hospital to perform a tubal ligation on the plaintiff despite the hospital's protest that such a procedure was contrary to its religious conviction.⁵¹ The court based its decision on the hospital's receipt of Hill-Burton Funds, reasoning that such funds led to the hospital being a state actor.⁵² Under 42 U.S.C. § 1983, a state actor is prohibited from denying plaintiff her constitutional right to a sterilization procedure.⁵³ In order to insure that *Taylor* could not be replicated

46. *Id.* at 283. Senator Buckley of New York proposed an amendment that sought to provide due process and equal protection to the unborn offspring. Representative Hogan of Maryland proposed an outright ban on abortions as a constitutional amendment. *See id.* at 283 n.27.

47. *Id.* at 283.

48. Pub. L. No. 93-355, § 1007 (b) (8), 88 Stat. 378 (1974).

(b) No funds made available by the Corporation under this title, either by grant or contract may be used. . . (8) to provide legal assistance with respect to any proceeding or litigation which seeks to procure a non-therapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide the facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution.

Id.

49. Pub. L. No. 93-189, § 2, 87 Stat. 714 (1973); *see also* Pilpel & Patton, *supra* note 45, at 287.

50. *See* 119 CONG. REC. 9595 (Senator Church explaining his rationale for proposing this amendment).

51. 369 F. Supp. 948 (D. Mont. 1973).

52. *Id.* *See also supra* note 42.

53. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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

elsewhere in the country, Senator Church proposed his amendment to the Health Programs Extension Act of 1973, which clarified congressional intent that the receipt of federal funding not be used to force a religious hospital to violate its convictions and perform an abortion or sterilization procedure in its facility.

The *Taylor* case was ultimately decided after the enactment of the Church Amendment. Therefore, the court dissolved its prior injunction and denied plaintiffs all relief, finding that “[b]y its plain language, [the Church Amendment] prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law.”⁵⁴ The Ninth Circuit affirmed, holding that “the Church Amendment properly permits denominational hospitals to refuse to perform sterilizations,” that the amendment was a permissible legislative action, and that it did not violate the Establishment Clause of the First Amendment.⁵⁵ Thus, the courts interpreted the Church Amendment’s conscience clause as its sponsor had intended and denied the plaintiff the right to demand a sterilization procedure at a private religious hospital.⁵⁶

C. The Church Amendment’s Non-Discrimination Provision: The Background and Statutory Text of this Provision

The Church Amendment, however, did more than merely prevent courts from forcing religious hospitals to perform abortions or sterilization procedures. As a result of an amendment by Senator Javits of New York to the original proposal, the Church Amendment was passed with a non-discrimination provision in addition to the conscience clause.⁵⁷ The second half of the Church Amendment reads, in part:

(c) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health

42 U.S.C. §1983 (Deering, LEXIS through November 2003). See also 119 CONG. REC. 9595 (Sen. Church explaining his rationale for proposing this amendment).

54. *Taylor*, 369 F. Supp. at 950.

55. *Taylor v. St. Vincent’s Hosp.*, 523 F.2d 75, 77 (9th Cir. 1975), cert. denied, 424 U.S. 948 (1976). The Supreme Court denied cert in this case over the objections of Justice White and the Chief Justice who dissented, arguing that there was a clear conflict between the circuits on this issue. See *Taylor v. St. Vincent’s Hosp.*, 424 U.S. 948, 949 (1976). While the Seventh, Tenth, and Sixth Circuits all agreed with the *Taylor* decision, see *Doe v. Bellin Memorial Hosp.*, 479 F.2d 756 (7th Cir. 1976), *Ward v. St. Anthony Hosp.*, 476 F.2d 671 (10th Cir. 1973), *Jackson v. Norton-Children’s Hosp., Inc.*, 487 F.2d 502 (6th Cir. 1973), the Fourth Circuit in *Doe v. Charleston Area Med. Ctr.*, 529 F.2d 638 (4th Cir. 1975), had decided to the contrary. See *Taylor*, 424 U.S. at 949.

56. It later became clear that this provision of the Church Amendment was unnecessary as the notion that state action could be found on the basis of receipt of federal funds was overruled in a number of later decisions. See Catherine Weiss (Director, ACLU Reproductive Freedom Project), Address at the “Public Dollars, Religious Doctrine” Merger Watch Conference (Nov. 19, 2002).

57. See 119 CONG. REC. 9599.

Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after June 18, 1973 may –

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) 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 any such service or activity.⁵⁸

This component of the Church Amendment has an entirely different function from the first half of the amendment. Whereas the first half clarifies the jurisdiction of the courts respecting private religious hospitals and their receipt of federal funds, this second component acts as a condition on the grant of such funding under the above-mentioned acts.

Such conditional funding legislation is, and was at the time of its passage, a common method of achieving congressional aims. Congress has the power to tax and spend for the general welfare and can therefore place conditions on its grant of federal money.⁵⁹ Conditional spending is particularly prevalent in health care regulation as Congress often uses such provisions as a means of impacting the distribution of health care resources. Such regulation began in the post-World War II period as the government began to require that hospitals be licensed in order to receive Hill-Burton funds.⁶⁰ In 1974, Congress passed the National Health Planning and Resources Development Act, which asserted federal control over the local planning and development of health care facilities. Congress exerted this control through conditional spending. Participation in the program was voluntary, but those institutions that failed to comply with the requirements risked losing funding under this federal program.⁶¹

58. 42 U.S.C. § 300a-7 (West Supp. 1991). The Church Amendment was expanded in 1974 by the National Research Service Award Act of 1974, Pub. L. No. 93-348, § 214, 88 Stat. 342 (1974), which provides that entities receiving a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may not discriminate against a physician or other health care personnel because he performed, assisted in the performance of, or refused to perform any lawful health service or research activity as a result of his religious beliefs or moral convictions. This amendment significantly expanded the reach of the Church Amendment's non-discrimination provision.

59. See WING, *supra* note 42, at 135.

60. *Id.* at 120. See also *supra* note 42 for a discussion of Hill-Burton Funds.

61. *Id.* at 127.

The constitutionality of these and other similar conditions is well established. A number of courts have found such conditional funding to be within Congress's valid constitutional authority under Article I, Section 8, which grants Congress the power to "lay and collect taxes . . . and provide for the general welfare."⁶² The courts have found that conditional spending could be limited only if the condition served no legitimate national purpose or if the condition was not voluntary but rather was legally coercive.⁶³ Courts have typically given broad interpretation to the "general welfare" provision or the requirement of a legitimate national purpose, treating the health care of the public as a legitimate purpose.⁶⁴ As a result of the significance attributed to health care and its costs, "the courts have rarely invalidated a spending condition imposed by the federal government on either a private or a public recipient."⁶⁵ Court decisions have focused on the dual notions that "(a) recipients always remain free to forego federal funds and thus avoid unwanted conditions and (b) Congress should have broad authority to control the way in which federally funded activities are administered."⁶⁶

Courts also have determined that a spending condition is only coercive if Congress imposes an additional sanction other than the withdrawal of federal funds to require compliance.⁶⁷ While the federal funding in question may be so great a sum as to make the recipient's choice practically nonexistent, courts have rarely considered this to be a violation, looking instead for literal voluntariness.⁶⁸ Finally, some legal commentators have suggested that courts should scrutinize the relationship of the condition to the spending program to which it is attached and demand a clear nexus between the two. Such an argument suggests that "any condition must relate to the particular general

62. See *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) *aff'd mem.*, 435 U.S. 962 (1978) (holding that the requirements in the National Health Planning and Resource Development Act of 1974 for qualifying for financial grants were constitutionally valid as the conditions on funding related to the legitimate national interest in health and should not be viewed as "coercive" in the constitutional sense). See also *Massachusetts v. Mellon*, 262 U.S. 447 (1922) (holding, in part, that the provisions that accompany funding under the Maternity Act impose "no obligation but simply extend an option which the state is free to accept or reject" making them constitutionally valid).

63. See *Califano*, 445 F. Supp. at 535-36. See also WING, *supra* note 42, at 135.

64. Kenneth R. Wing & Andrew M. Siltan, *Constitutional Authority for Extending Federal Control Over the Delivery of Healthcare*, 57 N.C. L. REV. 1423, 1439 (1978-79).

65. *Id.* at 1440-41.

66. *Id.*

67. See WING, *supra* note 42, at 135.

68. See Wing & Siltan, *supra* note 64, at 1441-44. For example, in *Massachusetts v. Mellon*, 262 U.S. 447, the Court upheld the constitutionality of the conditional funding provisions in the federal maternal and child health program, noting that "[t]he powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject." *Id.* at 480 (as cited in Wing & Siltan, *supra* note 64, at 1441 n. 77). In 1974, the Seventh Circuit further bolstered this point in *Rasulis v. Weinberger*, 502 F.2d 1006 (7th Cir. 1974) when it upheld the constitutionality of conditions regarding professional standards for physical therapists that Congress had attached to the Medicare and Medicaid programs. The court noted that, "[t]he economic incentives of participation in the Medicare Program does not constitute coercion or control." *Rasulis*, 502 F.2d at 1010.

welfare objective of the funding program to which it is attached.”⁶⁹ Despite this, the courts have typically given Congress broad discretion in this area, challenging the condition imposed only when it “strains the logic of the traditional constitutional justifications for the conditional spending authority. . . . Indeed, indications are that such conditions will be upheld with a minimum of judicial scrutiny of the condition or the relationship of the condition to the program’s objectives.”⁷⁰

The jurisprudence described above, concerning the issue of conditional spending, suggests that courts would view the Church Amendment’s non-discrimination provision favorably. The Church Amendment is a literally voluntary condition on federal funding.⁷¹ It pertains to issues of health care and to a legitimate national purpose of protecting the religious freedom and free speech rights of employees. Finally, the non-discrimination condition is directly related to the funding program to which it is attached because the government’s willingness to be involved with the furtherance of private health care in this country is dependant upon this condition.⁷²

The Church Amendment has itself faced and survived constitutional challenge, however, only with respect to the conscience clause provision of the amendment. In *Chrisman v. Sisters of St. Joseph of Peace*, a twenty-three year old woman who had been denied a sterilization procedure at a private sectarian hospital in Oregon filed an action against the hospital.⁷³ The plaintiff claimed that the hospital was a state actor by virtue of its receipt of Hill-Burton construction funds and that the hospital had refused to sterilize her because of religious beliefs, a motivation that constituted a violation of 42 U.S.C. §1983 which prevents the deprivation of any Constitutional right “under color of state law.”⁷⁴ The court, in addressing this argument, concluded that the Church Amendment prohibited courts from using the receipt of Hill-Burton funds as the basis for compelling the provision of abortions or sterilization procedures. While the plaintiff challenged the constitutionality of the Church Amendment,

69. See *Wing & Silton*, *supra* note 64, at 1445. While the Supreme Court has never explicitly adopted this argument, Justice Stone advocated this position in his dissent in *United States v. Butler*. See *United States v. Butler*, 297 U.S. 1, 85-86 (1935) (Stone, J., dissenting).

70. *Wing & Silton*, *supra* note 64 at 1441, 1446.

71. It should be noted that while complicated issues of state sovereignty are involved when examining the coercive effect of federal funding conditions applied to states, such issues do not apply to the Church Amendment which contains funding conditions for private health care institutions. See *Wing & Silton*, *supra* note 64 at 1442-43, 1451-60.

72. The only case that has ever mentioned the application of the Church Amendment in the context in which I am suggesting its use is *Watkins v. Mercy Med. Cir. et al.*, 520 F.2d 894 (9th Cir. 1975). The lower court in *Watkins* apparently required the hospital defendant to reinstate the doctor because his rights under the non-discrimination provision of the Church Amendment had been violated. However, this reinstatement decision was not explicitly mentioned in the district court opinion nor was it challenged on appeal. As such, it is only mentioned in passing in the Ninth Circuit opinion and its constitutionality is never discussed. The case will be discussed in full later in this article. See discussion *infra* p. 153.

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

74. See 42 U.S.C. §1983 (Deering, LEXIS through November 2003).

claiming it was a violation of the Establishment Clause, the court found the Church Amendment's protection of sectarian hospitals to be constitutional in that it was a valid act of congressional power and did not "affirmatively prefer one religion over another."⁷⁵ In discussing the validity of congressional authority in this area, the court noted, "[i]t has long been held that Congress has the power to modify and alter the jurisdiction which it has conferred on inferior courts of the United States."⁷⁶ The court rejected the plaintiff's Establishment Clause challenge, finding that the Church Amendment, in fact, preserved the government's neutrality in the face of religion by protecting the religious freedom of those with religious objections to abortions and sterilizations.⁷⁷

While the only constitutional challenge thus far has pertained solely to the conscience clause section of the Church Amendment, should there be an Establishment Clause challenge to the non-discrimination provision, courts would likely follow the *Chrisman* rationale. In determining the constitutionality of the non-discrimination provision, courts will likely agree that by simply protecting the religious freedom of hospital employees without intruding into the hospital's religious freedom, the second section of the Church Amendment also "preserves the government's neutrality in the face of religious differences" and hence does not violate the Establishment Clause.⁷⁸

D. Using the Church Amendment to Protect Health Care Professionals

As has been described above, the Church Amendment functions to protect sectarian hospitals whose sponsors oppose abortion and sterilization procedures as well as the employees of such hospitals who do not share their employers' religious or moral convictions. While this amendment suggests that a hospital cannot be forced by a patient, a doctor, or even a court to perform an abortion in its facility, it likewise cannot discriminate against a health care professional who professes support for reproductive rights or actually performs abortions or sterilization procedures in other facilities. As such, the problems encountered by the three doctors described at the beginning of this paper can all be addressed by the Church Amendment's non-discrimination provision. These three doctors represent examples of each of the three categories of problems addressed by the Church Amendment.

Dr. Yogendra Shah was asked to step down from his position as chair of Obstetrics-Gynecology at a Catholic hospital because he performed abortions at

75. See *Chrisman*, 506 F.2d at 311.

76. *Id.* at 311 (citing *Cary v. Curtis*, 44 U.S. 236 (1844)).

77. *Id.* The *Chrisman* court here cited *Sherbert v. Verner*, 374 U.S. 398 (1963), analogizing the Church Amendment to the *Sherbert* holding that South Carolina could not, as a condition of receiving unemployment benefits, force a Seventh-Day Adventist to work on her Sabbath. In so doing, the court there, like the Church Amendment here, maintained government neutrality on religious questions. *Id.*

78. See *Chrisman*, 506 F.2d at 311.

a private clinic across the street. In effect, he was demoted as a result of his actions as an abortion provider.⁷⁹ This case received a great deal of attention in the media and particularly within the anti-abortion Internet community. St. Elizabeth's Hospital had known for a long time that Dr. Shah performed abortions at a private clinic. His employment and high-level position in Obstetrics-Gynecology became a problem only when the anti-abortion lobby rallied around the issue, putting enormous pressure on the hospital. It was at that point that the hospital asked Dr. Shah to step down from his position.⁸⁰ Had the hospital carefully considered its rights and obligations under the Church Amendment, perhaps it would not have caved under the pressure of the anti-abortion lobby. Furthermore, had Dr. Shah wanted to, he could have enforced his rights in court by relying on the Church Amendment's provisions. The Church Amendment specifically states that an entity receiving funds under the Public Health Service Act⁸¹ may not "discriminate in the employment, promotion, or termination of employment of any physician . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion . . ." ⁸²

Dr. David Mesches could also have relied on the Church Amendment to enforce his rights. Dr. Mesches was dismissed from his position at the Roman Catholic New York Medical College because of statements he made in the newspaper that were perceived to be supportive of reproductive rights. Soon after these statements were published, Dr. Ralph O'Connell, dean of the College's School of Medicine, told Dr. Mesches that "it would not be possible for him to hold this public position on abortion and to continue to be the chair of our department."⁸³ The School's Vice President of Communications, when speaking to a local newspaper, added, "He took a position that does not support the values and mission of New York Medical College."⁸⁴ Like Dr. Shah, had Dr. Mesches chosen to pursue this case in a court of law, he could have relied on the Church Amendment to enforce his rights. The Amendment is clear with regard to discrimination based on a physician's views on abortion, stating that

79. See Heather Ratcliffe, *Doctor Who Does Abortions at Clinic Is Demoted by Catholic Hospital but He Will Stay on Staff at St. Elizabeth in Granite City*, ST. LOUIS POST DISPATCH, Dec. 21, 2000, at B2.

80. See e-mail from Sally Burgess, Hope Clinic for Women, to author (Nov. 30, 2002) (on file with author).

81. The Public Health Service Act, 42 U.S.C. §§ 201-207, 209-229, 241-272, 281-286, (Deering, LEXIS through November 2003), is a large piece of funding legislation under which most hospitals receive some funding. For example, The Hill-Burton program, which has provided funding to thousands of hospitals, is included in the Public Health Service Act along with numerous other funding programs. However, it is important to note that Medicare and Medicaid funding are covered under the Social Security Act and hence receipt of those funds do not make a hospital liable under the Church Amendment.

82. The Church Amendment, 42 U.S.C. § 300a-7(c)(1) (West. Supp. 1991) (emphasis added).

83. Barbara J. Durkin, *Abortion View Gets Official in Trouble*, THE REPORTER DISPATCH, Mar. 6, 1998, at 1A.

84. *Id.*

entities receiving funding as described above may not discriminate against a physician or other health care professional "because of his religious beliefs or moral convictions respecting sterilization procedures or abortions."⁸⁵

Finally, Dr. Schales Atkinson could also have relied on the Church Amendment had he wished to maintain his staff privileges at the Methodist-affiliated Deaconess Hospital while refusing to sign an agreement that he would not perform abortions even outside of the sectarian hospital's facility. Because the Church Amendment prohibits discrimination based on a physician's having performed an abortion, the most successful strategy for Dr. Atkinson would have been to make clear that he was signing the agreement under duress and then perform an abortion or sterilization procedure outside the hospital. If the hospital had then taken any adverse employment action against him, Dr. Atkinson could have relied on the Church Amendment in demanding that his privileges be restored.⁸⁶

Since the enactment of the Church Amendment, there has only been one case which seemed, in part, to rely on the amendment's non-discrimination provision as part of a litigation strategy. That case emerged in the period directly after the enactment of the amendment and before the issue of hospital mergers and the growth of sectarian hospitals in the health care field made the Church Amendment even more vital. The case, *Watkins v. Mercy Medical Center*, was an action by a doctor who sought injunctive relief against a hospital that had refused to renew his staff privileges when he refused to sign an agreement to abide by the Catholic Hospital's Ethical and Religious Directives.⁸⁷ The Directives of the Mercy Medical Center specifically prohibited staff physicians from performing voluntary or involuntary vasectomies or other sterilization or abortion operations in a hospital setting.⁸⁸ Dr. Watkins had sued the hospital, claiming that the refusal to extend his staff privileges constituted a deprivation of his constitutional rights under 42 U.S.C. § 1983. The court, however, denied the plaintiff relief, citing the Church Amendment and its language explicitly prohibiting "any court from finding state action on the part of a hospital which receives Hill-Burton funds and using that finding as a basis for requiring the hospital to make its facilities available

85. 42 U.S.C. § 300a-7(c)(1) (West. Supp. 1991).

86. See discussion *infra* Part III, which will discuss in more detail the remedies available under the Church Amendment. In brief, a physician may sue the hospital in court, arguing that the Church Amendment contains an implied private right of action. This would allow the doctor to demand damages and/or reinstatement. Alternatively, as the Church Amendment is a condition on spending, the physician may demand the withdrawal of federal funds based on the hospital's violation of the Amendment's provisions. The withdrawal of federal funds, however, is a drastic remedy, and one that is rarely used.

87. 364 F. Supp. 799 (D. Idaho, 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975).

88. See *id.* at 800. Note that the Directives of the Mercy Medical Center indicated a prohibition against abortion and sterilization in a hospital setting, meaning in any hospital. Thus, like the situation faced by Dr. Atkinson, the prohibition was not specific to the Catholic hospital in which Dr. Watkins worked, and as such, could be argued to be a violation of the Church Amendment.

for the performance of sterilization procedures or abortions.”⁸⁹ The court viewed Dr. Watkins’ claim as demanding that he be reinstated and allowed to perform abortions or sterilization procedures in that hospital. At the close of the opinion, the court noted, “Dr. Watkins is free to believe that sterilization services should be provided for the public and to perform them anywhere he is able.”⁹⁰ While this appears to be merely dicta in the district court opinion, it is clear from the Ninth Circuit opinion that, as a result of the hospital’s violation of the non-discrimination provision in the Church Amendment, Dr. Watkins was reinstated at the hospital with the understanding that he would not perform abortions or sterilizations in that hospital facility.⁹¹ The Ninth Circuit affirmed the district court’s denial of damages and unrestricted use of the hospital’s facilities, finding that the lower court was correct in determining that there was no state action involved and hence no jurisdiction under § 1983. Thus, the only case to address the Church Amendment’s non-discrimination provision appears to have applied it, albeit in dicta, as this article suggests, with very little discussion of its constitutionality or the appropriate means of reliance on it.

E. Courts Are Already Moving in This Direction

While only one court, in *Watkins*, has so far relied on the Church Amendment’s non-discrimination provision, we may derive some assurances about the direction courts will go in the future from the way in which courts have dealt with the issue of contraceptive coverage. As state legislatures begin to require contraceptive coverage in health plans within their states, religiously affiliated institutions have begun to demand refusal clauses that would exempt them from such laws because of their religious beliefs. Despite these demands, however, the courts and legislatures have rejected such requests. In California, for example, the legislature refused to exempt religious institutions with diverse work forces from this requirement, a decision upheld by a California appeals court in *Catholic Charities v. Superior Court*.⁹² Such an exemption, the court found, would have meant “imposing the employers’ religious beliefs on

89. *Id.* at 801.

90. *Id.* at 803. While this quote did not specifically refer to the Church Amendment’s non-discrimination provision, elsewhere in its opinion, the court noted that Congress has taken the position, as evidenced by the Church Amendment, that in addition to supporting the religious freedom of the hospital, “at the same time, the hospital cannot discharge a staff member who religiously or morally believes that [abortion] services should be performed.” *Id.*

91. See *Watkins v. Mercy Med. Ctr.*, 520 F.2d at 895-896. Referring to the district court, the Ninth Circuit stated:

However, the court found that appellee had violated 42 U.S.C. § 300a-7 by removing appellant from staff because of his belief that sterilizations and abortions should be performed. The judgment provided for the restoration of Dr. Watkins to staff privileges on condition that he not perform abortions or sterilizations contrary to the hospital’s rule.

Id.

92. 109 Cal. Rptr. 2d 176 (Cal. Ct. App. 2001), *petition for review granted*, 31 P.3d 1271 (Cal. 2001).

employees who did not share those beliefs,” which would, in turn, “undermine the anti-discrimination and public welfare goals of the prescription coverage statutes.”⁹³ This case in the contraceptive coverage context suggests that courts are likely to prohibit religious institutions from imposing their beliefs on their diverse employees in other contexts as well. The use of the Church Amendment to prevent discrimination against physicians and other health care professionals who disagree with the religious convictions of the hospitals at which they work is certainly in keeping with this developing judicial trend.

III. FINDING AN IMPLIED PRIVATE RIGHT OF ACTION IN THE CHURCH AMENDMENT

While it is clear that the Church Amendment’s statutory language affords protections for the doctors described above, the notion that a court will interpret this statute to include a private right of action is slightly more complex. In light of the current Supreme Court’s disfavor for implied rights of action, it is important to examine this point when attempting to use the Church Amendment as a remedy for individual adverse employment actions.⁹⁴

As Justice Powell noted in his dissent in *Cannon v. University of Chicago*, “[i]mplied private rights of action are judicially inferred rights to relief from injuries caused by another’s violation of a federal statute.”⁹⁵ If a statute does not contain enforcement provisions within its text, a question arises as to how a court should determine the remedy for the statute’s violation when a party is adversely affected by that violation. Courts dealing with implied rights of action often, as a starting point, look to *Texas and Pacific Railway Company v. Rigsby*, one of the earliest cases dealing with this issue, in which the Court inferred a private right of action in the Federal Safety Appliance Acts.⁹⁶ In commenting on the origins of this principle, the Court famously noted:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed . . . in these words: ‘So in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage,

93. *Id.* at 183. See also Weiss Testimony, *supra* note 22, at 17; *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

94. The current Supreme Court has denied or limited implied private rights of action in numerous cases since the late 1970s. See e.g., *Touche Ross & Co. v. Reddington*, 442 U.S. 560 (1979); *Guardians Ass’n v. Civil Serv. Comm’n of the City of New York*, 463 U.S. 582 (1983); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

95. 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting).

96. 241 U.S. 33 (1916).

or for the recompense of a wrong done to him contrary to the said law.⁹⁷

For many years after *Rigsby*, courts relied on this notion to imply private rights of action into numerous pieces of federal legislation.

As the law developed, however, the court established a more specific analysis for determining when to imply a private right of action. In 1975, the Supreme Court revisited this issue, establishing a four-factor test in *Cort v. Ash*.⁹⁸ In *Cort*, the plaintiff brought a claim against a corporation of which he was a stockholder, alleging a violation of a criminal statute that prohibited corporations from making contributions or expenditures in connection with specified federal elections, and arguing that he was entitled to damages as a result of this violation.⁹⁹ In response, the Court introduced four factors to consider when evaluating an implied private right of action:

[1] First, is the plaintiff one of the class for whose especial benefit the statute was enacted? . . . [2] Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? [3] Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [4] And finally, is the cause of action one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law?¹⁰⁰

Upon applying this test to the facts in *Cort*, the Supreme Court found no implied private right of action.¹⁰¹

In 1979, the Court decided another case in which it did imply a private right of action for a sex discrimination statute. In *Cannon v. University of Chicago*, the Court found an implied private right of action in Title IX, the statute that bars sex discrimination in educational facilities that receive federal funding.¹⁰² Because Title IX's non-discrimination mandate was based on

97. *Id.* at 39.

98. 422 U.S. 66 (1975).

99. *Id.* at 73.

100. *Id.* at 78.

101. *Id.* at 68. The Court first concluded that the general criminal statute at issue in the case did not suggest a specific group of people for whose benefit the statute was enacted. The criminal statute's basic purpose was instead "to assure that federal elections are 'free from the power of money.'" *Id.* at 81-82. Second, the Court found no suggestion in the legislative history of an intent to create a remedy for private shareholders under this act. *Id.* at 82-83. Third, the Court concluded that the creation of such a remedy would not further the primary congressional purpose behind the act, that of lessening the influence of corporate funds in federal elections. *Id.* at 84. Fourth, the Court determined that given that corporations are themselves created under and governed by state law, it was wholly appropriate to relegate the original plaintiff and others like him to the remedies provided by state law. *Id.*

102. 441 U.S. 677 (1979). It is important to note that *Cannon* was decided prior to *Touche Ross & Co. v. Reddington*, 442 U.S. 560 (1979) in which the Court further narrowed the possibility of finding an implied private right of action. However, the Court in *Touche Ross* explicitly distinguished that case

congressional funding of educational programs, the Court of Appeals in *Cannon* held that the only enforcement mechanism for Title IX was found in § 902 of the act, which established a procedure for the termination of federal financial support for institutions that violated the non-discrimination requirements. Thus, the Court of Appeals was unwilling to imply a private remedy in addition to the procedure described in § 902.¹⁰³ However, upon applying the four factors of the *Cort* test, the Supreme Court disagreed and found an implied private right of action in Title IX despite the statute's nature as a condition on federal spending.

In assessing the first *Cort* factor, the Court found that the plaintiff, a woman who was denied admission to the medical schools at two private universities, was a member of the specific class (women) for whose benefit the statute was enacted.¹⁰⁴ In looking to the second factor, the legislative history, the Court noted:

We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be silent or ambiguous on the question. Therefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.'¹⁰⁵

The Court did, in fact, find legislative history that supported an implied private right of action for Title IX. The statute was modeled on Title VI, which, at the time of the enactment of Title IX, was being interpreted by the lower courts to include an implied private right of action.¹⁰⁶ Despite this discovery of congressional intent, the Court recognized that Title IX was unique in its legislative history and hence saw fit to include the above statement, suggesting that an intent to create a private right of action need not be expressly stated in the legislative history in order for courts to imply it. Furthermore, the Court indicated that, when assessing congressional intent, it was appropriate for a court to consider the time period and contemporary jurisprudence on which Congress relied when enacting the statute in question. In the period prior to 1975, before *Cort v. Ash* created a stricter means of assessing a remedy, the courts implied many private rights of action into statutes that did not expressly contain them. Thus, the *Cannon* court continued:

from *Cannon* and other cases in which the statute in question prohibited certain conduct or created federal rights in favor of private parties, thereby leaving the holding in *Cannon* intact. See *Touche Ross*, 442 U.S. at 569.

103. See *Cannon*, 411 U.S. at 683-85.

104. *Id.* at 690-94.

105. *Id.* at 694 (citing *Cort v. Ash*, 422 U.S. 66, 82 (1975)).

106. See *id.* at 696 n.19.

We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into account its contemporary legal context. In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.¹⁰⁷

In considering the third factor, the statutory purpose, the court noted that when a private right of action "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."¹⁰⁸ Furthermore, the Court suggested that with regard to statutes that act as conditions on funding, a consideration of appropriate remedies is necessary. The withdrawal of federal funding, the court noted, is a severe remedy and may not provide an appropriate means of protecting the individual when an isolated violation has occurred. A private right of action would help accomplish the goal of non-discrimination in such legislation without resorting to a severe and extreme remedy.¹⁰⁹

Finally, in assessing the fourth factor, whether the subject matter is more appropriately left to the states, the Court found that protecting individuals against discrimination has, since the Civil War, been a prerogative of the federal government. Additionally, as the non-discrimination requirement in Title IX was based on the expenditure of federal funds, it was surely a case for the federal courts.¹¹⁰ Having found that the statute met all four *Cort* factors, the *Cannon* court concluded that it was appropriate to imply a private right of action in Title IX.

While *Cannon* is not the most recent analysis of implied rights of action by the Supreme Court, the statute at issue in that case is the most analogous to the Church Amendment.¹¹¹ Like Title IX, the Church Amendment is a condition on federal spending that seeks to protect individuals from discrimination. Like Title IX, the Church Amendment's non-discrimination provision seeks to protect a specific class of persons, namely health care professionals who work in sectarian hospitals but do not share the religious beliefs of those institutions. Like Title IX, an implied private right of action would assist in advancing the legislative purpose of the amendment, the prevention of discrimination suffered by health care professionals who do not share the religious beliefs of the hospitals at which they work. The threat of a civil lawsuit surely advances this purpose. Additionally, the withdrawal of federal funds from a hospital is a

107. *Id.* at 698-99.

108. *Id.* at 703.

109. *Id.* at 705-706.

110. *See id.* at 708-709.

111. *See infra* pp. 159-62 for discussion of the more recent cases on implied private rights of action.

severe remedy. Hence, as the Court similarly indicated in *Cannon*, a finding of a private right of action for doctors at sectarian hospitals is a far more appropriate remedy for an isolated violation of the statute.¹¹² Finally, like Title IX, the Church Amendment is a condition on federal spending that deals with discrimination against individuals and the protection of those individuals' religious and moral convictions as well as their rights of free speech and association. Surely these are matters appropriately dealt with by the federal government.

Shortly after the decision in *Cannon*, the Court, in 1979, returned to the question of implied private rights of action in *Touche Ross & Co. v. Redington*, this time clarifying in its decision that the focus of the court's inquiry should be the determination of congressional intent.¹¹³ While noting that the *Cort* test established four factors, the *Touche Ross* court insisted that these factors were not of equal weight and that at least three of those factors were primarily used to establish legislative intent.¹¹⁴ The Court further noted that in cases where a private right of action was not expressly provided but was implied, "the statute in question at least prohibited certain conduct or created federal rights in favor of private parties."¹¹⁵ Additionally, the Court suggested that where the statute in question is flanked by provisions of the same act that do provide private rights of action, the court should assume that when Congress intended to provide a private right of action, it did so expressly.¹¹⁶ Thus, with the *Touche Ross* decision, the Court further narrowed the test for implying a private right of action, continuing the process, which had begun with the *Cort* decision in 1975, of limiting the number of statutes in which an implied right could be found.

Despite the obvious analogy to *Cannon*, the Church Amendment should be considered in light of *Touche Ross* as well, as it was decided in the same year as *Cannon*. *Touche Ross* mandates that courts look first and foremost for a showing of congressional intent.¹¹⁷ The Court in *Touche Ross* indicated that when a court answers the first two factors in the negative, that (1) the plaintiff is not in the special class for whose benefit the statute was enacted, and (2) that

112. While the Federal Government has the power to withdraw funding should a recipient violate the conditions on the funding, the government has virtually never done so, or even threatened to do so. See e-mail from Sylvia Law, Professor, NYU School of Law, to author (Dec. 10, 2002) (on file with author). As a result, an implied private right of action is the only real means of giving the Church Amendment's non-discrimination provision its intended effect.

113. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

114. *Id.* at 575-576 (noting that the first three factors, (1) the language and focus of the statute, (2) the legislative history, and (3) the purpose of the statute, all help the court to determine congressional intent in this matter).

115. *Id.* at 569.

116. *Id.* at 571.

117. *Id.* at 575.

the legislative history does not indicate any congressional intent to create a private right of action, the inquiry should end there.¹¹⁸

Under the *Touche Ross* scheme, the Church Amendment provides a unique case in which the first *Cort* factor would be answered in the positive, while the second factor, the existence of evidence of congressional intent to imply a private right of action, while positive, is minimal. The would-be plaintiff (a pro-choice physician) is certainly within the class for whose especial benefit the statute was enacted. The Church Amendment clearly contains a non-discrimination provision aimed at the protection of health care professionals. The legislative history, while positive, is sparse on the question of congressional intent with respect to a private right of action.

The House, Senate, and Conference Reports make no mention whatsoever of the remedy for a violation of the non-discrimination provision of the amendment.¹¹⁹ The only mention of a remedy can be found in the Congressional Record of the Senate floor debates during which Senator Javits of New York proposed the non-discrimination provision as an addition to Senator Church's amendment.¹²⁰ When asked by Senator Pastore if there was a penalty for the violation of this provision, Senator Javits responded that there was an affirmative benefit to participating in a federal program: the funding.¹²¹ "[The amendment] qualifies the benefit by saying that if they do discriminate against the doctor who is in their hospital because he has done something they do not approve of in the other hospital, we have the authority to deprive them of that benefit,"¹²² Javits stated, later adding, "but suppose that hospital fires a doctor because they do not approve of what he did in another hospital. I say they do not have the right to fire him, and they may lose the benefits of Federal funds because they are discriminating against a doctor."¹²³ Senator Javits' comments indicate a recognition that firing doctors for such reasons would be violating their rights and might also risk the withdrawal of federal funds.

In interpreting this meager legislative history, it is important to consider the *Cannon* court's approach to legislative history on this issue.¹²⁴ That court noted that the absence of clear congressional intent in legislative history is to be expected where there is no express mention of a remedy in the text.¹²⁵ Furthermore, the *Cannon* court suggested that it was important to consider the time period and contemporary jurisprudence that was in existence when the

118. *Id.* at 576.

119. See House Report No. 93-227 (1973) reprinted in 1973 U.S.C.C.A.N. 1464, 1473; Senate Report No. 93-381 (1974) reprinted in 1974 USCCAN 3634, 3655 and 3674.

120. See 119 CONG. REC. 9595, 9603 (1973).

121. See *id.*

122. *Id.*

123. *Id.*

124. The *Cannon* court's approach to interpreting legislative history was left intact by the *Touche Ross* decision, which merely re-focused the entire inquiry on legislative intent. Thus, it seems appropriate to use the *Cannon* rationale even while applying the *Touche Ross* analysis to the question.

125. See *Cannon*, 411 U.S. at 694, 698-699.

statute in question was enacted. The Church Amendment was passed in 1973, which was only one year after Title IX was enacted. As such, the Church Amendment was enacted in the period before the Court decided *Cort v. Ash*, the case that initially restricted the recognition of implied rights of action. Thus, as the *Cannon* court found with respect to Title IX, it is safe to assume that the Congress that enacted the Church Amendment relied on the pre-*Cort* decisions to presume that an implied right of action would be found in the statute without any express language in its text.¹²⁶

Furthermore, as the *Touche Ross* court explicitly stated, those cases that have found implied private rights of action invariably involve a statute which “prohibited certain conduct or created federal rights in favor of private parties.”¹²⁷ The Church Amendment easily fits this category as well. The non-discrimination provision of the Church Amendment expressly prohibits discrimination against pro-choice health care professionals who work in hospitals which do not share their convictions. The statute prohibits specific conduct including “discrimination in the employment, promotion, or termination of any physician or other health care personnel.”¹²⁸ As a result, the Church Amendment fits the description provided by the *Touche Ross* opinion of a case in which an implied private right of action is appropriate. A health care professional who faces discrimination in employment as a result of her abortion-related actions or beliefs expressed outside the hospital can have a private cause of action against the sectarian hospital at which she is employed.

Before concluding this section, it is important to consider recent Supreme Court jurisprudence on private rights of action in order to determine whether the jurisprudence has changed in a way that will affect the use of the Church Amendment. In 2001, the Supreme Court decided *Alexander v. Sandoval*, its most recent decision on implied rights of action in the area of anti-discrimination legislation.¹²⁹ In *Sandoval*, the plaintiff, a non-English speaker, claimed that Alabama’s policy of only providing the driver’s license exams in English was a violation of Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on national origin in programs that receive certain government funding.¹³⁰ The *Sandoval* court held that no private right of action could be implied in Title VI to challenge regulations that discriminate by way of disparate impact.¹³¹ In coming to this conclusion, the Court relied on *Cannon* as well as *Guardians Association v. Civil Service Commission of the City of New York*.¹³² The *Sandoval* court noted that *Cannon*’s finding of an

126. See *id.* at 698-99.

127. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979).

128. 42 U.S.C. §300a-7 (West. Supp. 1991) [The Church Amendment].

129. 532 U.S. 275 (2001).

130. *Id.*

131. *Id.* at 293.

132. *Id.* at 276.

implied right of action rested on the assumption that the University of Chicago had intentionally discriminated against the plaintiff. As such, the Court in *Cannon* had no occasion to consider whether the right reached regulations that barred disparate impact discrimination.¹³³ Furthermore, the *Guardian* court had held that with respect to Title VI, an implied private right of action could only allow the recovery of compensatory damages in cases of intentional discrimination.¹³⁴ The *Sandoval* court, after considering the specific provisions of Title VI, concluded that it would be inappropriate to imply a private right of action to enforce disparate impact regulations.¹³⁵

While *Sandoval* is somewhat similar to a Church Amendment case, as both deal with implying private rights of action in anti-discrimination statutes based on federal funding, a Church Amendment case is easily distinguishable from *Sandoval*. Under the Church Amendment, an entity receiving federal funding under the Public Health Service Act may not *intentionally* discriminate against a health care professional based on his or her actions or beliefs regarding abortion. There is no mention or suggestion of disparate impact discrimination. As a result, while *Sandoval* limits the future of Title VI disparate impact suits, it should have no real impact on the potential to imply a private right of action in the Church Amendment. Furthermore, because *Sandoval* is such a specific decision that distinguishes types of discrimination, it would be imprudent to speculate about the future of the Court's jurisprudence on implied rights of action based on its holding. An implied right of action in the Church Amendment should therefore be secure.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 AND ITS POTENTIAL TO ERODE THE CHURCH AMENDMENTS' PROTECTIONS

In December of 2000 and January of 2001, when the anti-abortion Internet community picked up the story of Dr. Yogendra Shah, there was some debate as to whether the hospital could terminate him entirely or merely remove him from his position as chief of the obstetrics and gynecology department.¹³⁶ As the *National Catholic Register* reported, the hospital's legal counsel suggested that firing Dr. Shah because he performed abortions at a private clinic would be

133. *Id.* at 282.

134. *See Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 584 (1983). The *Guardian* court found that in disparate impact cases, "in the absence of proof of discriminatory animus," compensatory relief should not be awarded but injunctive and declaratory relief were still available. *Id.*

135. *See Sandoval*, 532 U.S. at 293.

136. This article argues that both termination and demotion are prohibited in this context by the Church Amendment.

a violation of the Church Amendment.¹³⁷ A December 7, 2000 statement by the Catholic Diocese of Springfield, Illinois warned that “to protest the law that protects Dr. Shah . . . would be provoking litigation that might endanger the legal right of Catholic hospitals to refuse to perform abortions.”¹³⁸ Thus, the hospital and the Catholic community in Springfield worried that should the hospital successfully challenge the Church Amendment’s non-discrimination provision, the courts would also invalidate the other provisions of the amendment which serve to protect the religious freedom of the sectarian hospital.

In responding to this fear on the part of the Diocese, Richard Myers, a professor at Ave Maria School of Law, suggested that the hospital could challenge only the non-discrimination provision of the Church Amendment by arguing that it was a violation of the Religious Freedom Restoration Act of 1993 (RFRA).¹³⁹ RFRA reinvigorated a strict test for assessing rules of general applicability that, in practice, infringe on religious activities or beliefs. It is the contention of this article that RFRA, while constitutional as applied to federal law, would not restrict the protections afforded by the Church Amendment.

Congress passed RFRA in response to the Supreme Court’s highly controversial decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁴⁰ The Court in *Smith* decided that the denial of unemployment benefits to Native American employees who had ingested peyote as a sacrament during a religious ceremony was not a violation of the federal free exercise clause.¹⁴¹ In so doing, the *Smith* court, by a five-four majority, rejected the application of the *Sherbert v. Verner*¹⁴² “compelling interest” test to laws that only incidentally prohibit or burden religious practices.¹⁴³ The response to the *Smith* decision was an uproar on the parts of both liberals and conservatives who were concerned about the restrictions on religious freedom created by the decision. The congressional response was the enactment of RFRA, which was signed into law by President Clinton. The passage of RFRA re-invigorated the *Sherbert* test for statutes of general applicability. Thus, if a plaintiff argued that a statute incidentally caused a

137. Eve Tushnet, *Catholic Hospital Says It's Stuck With Abortionist*, NAT'L CATHOLIC REG. (Jan. 7, 2001) at http://www.ncregister.com/Register_News/Tushnet-Abortionist.htm (last visited Nov. 11, 2003).

138. *Id.*

139. *Id.* Richard Myers referred to the Religious Freedom Restoration Act, codified at 42 U.S.C. § 2000bb-1 (Deering, LEXIS through November 2003) [hereinafter RFRA].

140. *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

141. *Id.* See also S. REP. 103-111 at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1894-95.

142. *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that for a law that directly burdened religion to be constitutional, it must pass the “compelling interest” test, which required a finding that a compelling state interest justified the burden on religion and that the law in question was the least restrictive means of furthering that interest).

143. Justices Scalia, Rehnquist, Kennedy, White, and Stevens made up the majority in this case. Justice O'Connor, while concurring in the result, vehemently opposed the rejection of the compelling interest test. Justices Brennan, Marshall, and Blackmun dissented. See *Smith*, 494 U.S. 872.

substantial burden on his free exercise of religion, the government could only justify such a statute's application to this plaintiff if it was "in furtherance of a compelling governmental interest and [was] the least restrictive means of furthering that compelling governmental interest."¹⁴⁴

A. RFRA and the Church Amendment as Competing Statutes

The first question that must be addressed in assessing RFRA's implications for the use of the Church Amendment is whether RFRA trumps the Church Amendment, as both are pieces of federal legislation, presumably standing on equal ground. Both the case law on the issue of competing statutes and the text of RFRA itself suggest that RFRA prevails over the Church Amendment. For example, the Fifth Circuit has suggested that "[u]nder the usual rules of statutory construction, where there is a conflict between an earlier statute and a subsequent enactment, the subsequent enactment governs."¹⁴⁵ However, in the same opinion, the court also noted that "the cardinal rule of construction is that repeals by implication are not favored."¹⁴⁶ As such, it is important to look at the statutory text and legislative history of RFRA as well. The Senate Report regarding RFRA speaks directly to this point in stating that the "Act applies to all Federal and State law, and the implementation of the law, whether statutory or otherwise and whether adopted before or after the enactment of this Act."¹⁴⁷ Finally, in *EEOC v. Catholic University of America*, the D.C. Circuit, while acknowledging that legislation usually applies only prospectively, found that the statute explicitly states that it applies to all federal law, whether enacted before or after the enactment of RFRA.¹⁴⁸ Thus, it is clear that despite RFRA's enactment twenty-one years after the Church Amendment, should the two laws be found to be irreconcilable, RFRA would prevail.

B. The Constitutionality of RFRA

In assessing RFRA's impact on the Church Amendment it is vital to consider the issue of RFRA's constitutionality in general. This issue was resolved, in part, by the Supreme Court in 1997 in *City of Boerne v. Flores*.¹⁴⁹ The Court held that in enacting RFRA, Congress overstepped its authority

144. RFRA, 42 U.S.C. § 2000bb-1(b) (Deering, LEXIS through November 2003).

145. *Interstate Commerce Comm'n v. S. Ry. Co.*, 543 F.2d 534, 539 (5th Cir. 1976). *See also* *United States v. Tynen*, 78 U.S. 88, 92 (1870) ("When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.").

146. *See Interstate Commerce Comm'n*, 543 F. 2d at 539.

147. S. Rep. 103-111 at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1882, 1893. As will be discussed later in the article, RFRA no longer applies to state law. *See discussion infra* pp. 165-67.

148. *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 468 (D.C. Cir. 1996).

149. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

under Section 5 of the Fourteenth Amendment.¹⁵⁰ *Flores* suggests that Congress's power under the Fourteenth Amendment is restricted to laws of a remedial nature that enforce the Amendment's provisions regarding constitutional privileges, due process, and equal protection. The *Flores* court suggested that Congress lacks the power to enact substantive legislation that goes beyond remedies, stating, "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."¹⁵¹ Thus, Congress may not enact legislation that seeks to define and interpret what constitutes a violation of constitutional rights and privileges but may only enforce the provisions of the Amendment as it stands.¹⁵² The Court further suggested that while remedial legislation is appropriate in cases like the Voting Rights Act where there is a history of flagrant constitutional violations, no such historical record existed that would justify RFRA's enactment. As such, RFRA could not be considered remedial as it was so out of proportion to any remedial object.¹⁵³ Thus, with *Flores*, the Court dealt a severe blow to RFRA and its potential to revise the jurisprudence on freedom of religion.

However, despite this decision, a number of lower courts have interpreted *Flores* as an invalidation of RFRA's application only to state laws, upholding its validity as applied to federal law. Both the Eighth and Tenth Circuits have upheld RFRA as applied to federal laws, namely bankruptcy laws and Bureau of Prison regulations, respectively.¹⁵⁴ These courts have insisted that in enacting RFRA, Congress relied on its powers under the Fourteenth Amendment to apply the statute to the states and on its powers under Article I, Section 8 of the United States Constitution to apply it to the federal government. Therefore, according to the Eighth and Tenth Circuits, when the Supreme Court found RFRA to be outside of Congress's powers under the Fourteenth Amendment, its decision applied only to RFRA's implications for state law as, by its terms, the Fourteenth Amendment is applicable only to the states.

In *Young v. Crystal Evangelical Free Church*, the Eighth Circuit originally held that RFRA applied to the federal bankruptcy laws.¹⁵⁵ When the Supreme

150. *Id.* U.S. CONST. amend. XIV § 1 reads, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States. . ." U.S. CONST. amend. XIV § 5 allows Congress to have "power to enforce, by appropriate legislation, the provisions of this article."

151. *Flores*, 521 U.S. at 519.

152. *Id.*

153. *See Flores*, 521 U.S. at 532-33.

154. *See Young v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998) (regarding bankruptcy laws). *See also Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (regarding Bureau of Prison Regulations). Note that this question has not been decided by the Supreme Court and several circuits have declined to reach this issue in their analyses. *See, e.g., Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001).

155. 141 F.3d 854 (8th Cir. 1998).

Court received this case, it vacated the decision and remanded for reconsideration in light of *Flores*, which had recently been decided. The Eighth Circuit upheld its original decision, this time on the grounds that RFRA was constitutional as applied to federal law and that the constitutional part of the act was severable from the part declared to be invalid by the Supreme Court. The court opined, “[w]here the Supreme Court strikes down one portion of a statute, we must presume that other portions of the statute remain in effect ‘unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.’”¹⁵⁶ In this case, the court reasoned, Congress’s goal in enacting RFRA was to protect religious liberty as fully as possible from encroachment by all government actors. There is nothing in the text or legislative history to suggest that Congress would not want RFRA extended to federal legislation even if it did not apply to the states.¹⁵⁷ With regard to the notion that the enactment of RFRA constituted a violation of the separation of powers doctrine, the Eighth Circuit concluded that while the interpretation of the Constitution is solely within the power of the judiciary, Congress may legislate to provide greater statutory protection of individual liberties than that granted by the Supreme Court’s interpretation of the constitutional protection.¹⁵⁸ The Religious Freedom Restoration Act can thus be interpreted as an expansion of the protection of free exercise of religion in federal statutes, an expansion that is legitimately within congressional authority. Finally, the Eighth Circuit concluded that RFRA was not a violation of the Establishment Clause as it has the secular purpose of protecting the Free Exercise Clause, does not advance a particular religion, and was designed to prevent excessive entanglement between government and religion by limiting the impact neutral laws have on religion.¹⁵⁹

The Tenth Circuit, in *Kikumura v. Hurley*, similarly held that the application of RFRA to federal law is distinguishable from its application to state and local law, which the Supreme Court declared to be unconstitutional in *Flores*.¹⁶⁰ In *Kikumura*, the plaintiff, a federal prisoner, brought suit against the prison wardens for denying him pastoral visits, claiming that this denial constituted a violation of his rights under the First and Fifth Amendments as well as under RFRA.¹⁶¹ Like the *Young* court, the Tenth Circuit held that

156. *Id.* at 859 (citing *INS v. Chadha*, 462 U.S. 919, 931-32 (1983)).

157. *See id.*

158. *See id.* at 859-60 (citing *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803)). The Court cited a number of examples of such statutory protection including the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (Deering, LEXIS through November 2003) (giving greater protection to journalists against searches and seizures) and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (Deering, LEXIS through November 2003) (equating employment discrimination based on pregnancy with employment discrimination based on gender). *See id.* at 860.

159. *See id.* at 862-63.

160. *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001).

161. *Id.* at 953.

Congress's power to apply RFRA to federal laws arose out of its Article I powers and, as such, was not affected by the *Flores* decision regarding the Fourteenth Amendment.¹⁶² The Tenth Circuit further held that "when a portion of a statute is declared unconstitutional, the constitutional portions of the statute are presumed severable" unless it is clear that congressional intent was to enact both portions or neither.¹⁶³ Because the court found no such congressional intent, it found RFRA as applied to federal laws to be severable from the state-focused portion of RFRA and constitutional in its own right.

Thus, at this point, both the Eighth and the Tenth Circuits, the only circuits to have dealt with this issue, have concluded that RFRA remains valid as applied to federal law. As such, it is important to consider RFRA's impact on the Church Amendment, which is a piece of federal legislation.

C. RFRA's Lack of Impact on the Church Amendment

RFRA mandates that if a rule of general applicability is found to substantially burden a person's religious practice, that rule is only justified if it furthers a compelling state interest and if it is the least restrictive means of furthering that interest.¹⁶⁴ As the remainder of this article will demonstrate, RFRA has no impact on the Church Amendment because, should the Amendment be viewed as a rule of general applicability, the non-discrimination provision in the Church Amendment cannot be considered to be a "substantial burden" on the exercise of religion.¹⁶⁵ Even if the Church Amendment were to be considered a "substantial burden," there is clearly a compelling state interest advanced by the Church Amendment, namely the protection of a physician's rights of freedom of speech and freedom of religion. The Amendment therefore clearly meets the least restrictive means test as well.

162. *Id.* at 959.

163. *Id.*

164. *See* RFRA § 2000bb-1.

165. There is some debate as to the definition of "rules of general applicability" and whether the Church Amendment qualifies as such a rule. The Religious Freedom Restoration Act only applies to rules of general applicability because the "compelling state interest test" created by *Sherbert v. Verner*, 374 U.S. 398 (1963), still applies to laws that directly burden the free exercise of religion. Thus, if the Church Amendment is viewed as a law that directly burdens the free exercise right of religious hospitals, it must face the same "compelling state interest" test that RFRA has reinvigorated for laws that do not directly burden religious exercise. Whether or not the Church Amendment is viewed as such a neutral rule of general applicability, this section argues that it passes the "compelling interest" test that is required either by RFRA or by *Sherbert*. This article addresses the argument that the Church Amendment violates RFRA because this is the argument that has most frequently been advanced by the religiously affiliated hospitals.

The "Substantial Burden" Analysis

The "substantial burden" factor is the first inquiry to consider when assessing RFRA's impact on a statute. Under this test, courts have generally inquired whether the "government has placed a substantial burden on the observation of a central religious belief or practice. . . ." ¹⁶⁶ Furthermore, courts often look to whether the plaintiff can reasonably claim that the regulation has forced him to engage in conduct that his religion forbids or has prevented him from engaging in conduct that his religion requires. ¹⁶⁷ In *Planned Parenthood Association of Southeastern Pennsylvania v. Walton*, the Court held that the Freedom of Access to Clinic Entrances Act (FACE) did not violate RFRA as it merely prohibited the use of force or threat of force or the physical obstruction of a clinic entrance. ¹⁶⁸ Concluding that the plaintiffs, abortion protestors, were not arguing that their religion mandated the use of force or threat of force, the court found that their religious practice was not substantially burdened by the statute's prohibition. ¹⁶⁹

Similarly, in assessing the "substantial burden" element, the court in *Storm v. Town of Woodstock* inquired whether the state had "put substantial pressure on an adherent to modify his behavior and to violate his beliefs." ¹⁷⁰ In this case, the court found that while a prohibition on nighttime parking near a field where plaintiffs gathered for "full moon gatherings" made it less convenient for them to gather for their service, it did not substantially burden their religious practice. ¹⁷¹ Furthermore, the Fourth Circuit in *Goodall by Goodall v. Stafford County School Board* held that a law or policy operating to make a person's religious practice more expensive does not in itself constitute a substantial burden for the purposes of RFRA. ¹⁷² Finally, the Supreme Court of California relied, in part, on this notion when it decided *Smith v. Fair Employment and Housing Commission*. ¹⁷³ In *Smith*, the court held that the Fair Employment and Housing Commission's decision prohibiting discrimination based on marital status in the rental of property did not substantially burden the landlord's

166. *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001), *cert. denied*, 535 U.S. 986 (2002) (holding that a ban on the selling of message-bearing t-shirts on the National Mall did not substantially burden the religious practices of Evangelical Christians and hence did not violate RFRA).

167. *See id.* at 16. *See also Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995).

168. 949 F. Supp. 290 (E.D. Pa. 1996).

169. *See id.* at 296.

170. 994 F. Supp. 139, 146 (N.D.N.Y. 1996) (citing *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996)). Note that while this case was decided before the Supreme Court invalidated RFRA as applied to state law, it nevertheless provides insight into the appropriate interpretation of "substantial burden" when RFRA is applied to federal law. *See also Goodall*, 60 F.3d at 171 (noting that RFRA did not indicate a definition for the term "substantial burden" and so it is appropriate to look to pre-RFRA religious freedom case law to determine its meaning).

171. 994 F. Supp. 290.

172. 60 F.3d at 171.

173. 913 P.2d 909 (Cal. 1996).

religious practice.¹⁷⁴ The landlord claimed that renting to a non-married, co-habiting couple would violate her religious beliefs. The court concluded that the Commission's decision did not impose a substantial burden, as the landlord had the option of selling the property and earning income elsewhere if she did not want to comply with the Commission's non-discrimination rules.¹⁷⁵ Furthermore, the court found it to be particularly important that the rights of third parties were involved in this case, opining, "the parties have not brought to our attention a single case in which the Supreme Court exempted a religious objector from the operation of a general law when the court recognized that the exemption would detrimentally affect the rights of third parties."¹⁷⁶

Based on the case law described above, it is clear that the Church Amendment should not be considered by the courts to be a substantial burden on a hospital's exercise of its religion. The definition of "substantial burden" suggested by the court in *Henderson v. Kennedy* referred to a regulation that forces someone to engage in conduct that his religion forbids or one that prevents him from engaging in conduct that his religion requires.¹⁷⁷ The Church Amendment's non-discrimination mandate neither forces a hospital to engage in conduct contrary to its religion nor does it prevent conduct that the hospital believes is mandated by its religion. Because a doctor's right under the Church Amendment extends only to actions outside of a sectarian hospital facility and because the first part of the Church Amendment insures that a hospital will never be mandated to perform an abortion or sterilization contrary to its religious or moral conviction, hospitals cannot claim that their exercise of religion is burdened by the prohibition against discrimination.

Similarly, under both *Henderson* and *Walton*'s interpretations of "substantial burden,"¹⁷⁸ a hospital could not argue that a central tenet of its religious practice is violated because of the Church Amendment. Much as in *Walton*, where the abortion protestors could not claim that the use of force at abortion clinics was mandated by their religion, a sectarian hospital cannot claim that the demotion or termination of doctors due to their performance of abortions outside of the facility or to the beliefs they hold respecting abortion is mandated by Catholicism or any other religion.

Finally, as both the *Goodall* and *Smith* decisions suggest,¹⁷⁹ a regulation that makes religious practice more expensive is not considered to substantially burden that practice. In the case of the Church Amendment, the statute is merely a condition on federal funding. A hospital always maintains the right to forego the federal funds if it wishes to discriminate without government

174. *Id.* at 929.

175. *Id.* at 925.

176. *Id.* at 928.

177. 253 F.3d at 17.

178. See discussion *supra* p. 168-69.

179. See *Goodall*, 60 F.3d at 171; see also *Smith*, 913 P.2d at 925.

intervention. While this may be a more expensive option for hospitals, it is not so severe as to constitute a substantial burden.¹⁸⁰

The *Smith* case from the California Supreme Court further suggests that if the exemption of a religious objector from a law of general applicability restricts the rights of third parties, the law is not to be considered a substantial burden on the religious objector. As with the regulation at issue in *Smith*, exempting a sectarian hospital from the Church Amendment because it burdens the hospital's right of free exercise would substantially affect the rights of the physician, a third party in this scenario, to his freedom of religion, freedom of speech, and various other employment rights. As such, this impact on the rights of a third party alone should be sufficient to conclude that the Church Amendment's non-discrimination provision does not constitute a substantial burden on a sectarian hospital's religious practice.

The "Compelling State Interest" and "Least Restrictive Means" Analyses

However, should a court conclude that the Church Amendment's mandate not to discriminate does constitute a substantial burden on the hospital's religious freedom, there is also a persuasive argument that this burden is justified by the compelling state interest of protecting the physician's rights of freedom of speech and freedom of religion. Additionally, the Church Amendment prevents the chilling of speech and thought that might arise in an environment where words and beliefs could lead one to lose her job.

The case law interpreting the "compelling state interest" factor supports such a finding in the Church Amendment as well. The court in *U.S. v. Lundquist* used a two-prong test to assess the government's claim that the Bald and Golden Eagle Protection Act furthered a compelling state interest such that

180. The argument that the Church Amendment cannot be characterized as a "substantial burden" on religious practice because it is a voluntarily assumed condition on federal funding is bolstered by a number of Supreme Court cases that address such conditional funding provisions in Title IX and Title X. In *Grove City College v. Bell*, 465 U.S. 555 (1984), the Court, in addressing Title IX's ban on sex discrimination in education, held that Congress is free to attach reasonable conditions on its federal spending programs that the recipients of those programs are not obligated to accept without violating the recipient's First Amendment rights. *Id.* at 575. *Grove City* was later cited by the Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991), in addressing the arguments of recipients of family planning funds under Title X that the regulation's restrictions on abortion counseling and referrals violated their First Amendment freedom of speech rights. *Id.* While this case was a painful blow to advocates of reproductive rights, its holding is supportive of the constitutionality of the Church Amendment's non-discrimination provision. In upholding Title X's restrictions on speech, the Court noted that the restrictions were a part of a voluntary conditional funding program which recipients could forego should they choose to reject the conditions. The Court noted that they had "never held that the Government violates the First Amendment simply by offering that choice." *Id.* at 199 n.5. Furthermore, the *Rust* court highlighted the fact that the regulations do not force Title X recipients to give up all of their abortion related speech, but merely require that such speech be separate and distinct from their Title X activities. *Id.* at 196. Similarly, the Church Amendment does not preclude the religiously affiliated hospital from maintaining opposition to abortion and abortion-related procedures. It merely prohibits employment decisions based on the beliefs or external practices of the health care professionals who are employed there.

the burden on plaintiff's practice of his Native American religion was justified.¹⁸¹ The government argued that the interest furthered by the statute was the preservation of eagles, which are threatened or endangered in most states. In assessing this claim, the court sought to determine: (1) the importance of the value underlying the government regulation and (2) the degree of proximity and necessity that the regulation at issue bears to the underlying value.¹⁸² The court in *Lundquist* found that the government had a valid state interest in protecting eagles and also agreed that prohibition of possession of eagle parts was sufficiently related to the government's legitimate interest in preserving the species.¹⁸³

In applying the above test to the Church Amendment, courts should reach a similar conclusion. The value underlying the Church Amendment's prohibition of discrimination, the importance of preserving freedom of speech and religion, is uncontested. It is also clear that the means employed by the Church Amendment, the prohibition of discrimination in employment, promotion, and extension of staff privileges, is directly related to the underlying purpose of the legislation.

Thus, the only remaining question is whether the means utilized by the Church Amendment constitute the "least restrictive means" of furthering the government's legitimate interest in protecting employee rights. In *Jolly v. Coughlin*, the court assessed a Rastafarian inmate's claim that his rights under RFRA had been violated when he was confined for refusing to submit to a TB screening.¹⁸⁴ The *Coughlin* court noted that the least restrictive means analysis is always fact sensitive and that there is no objective test that can be applied in all cases. Rather, the court must look at the specifics of the situation in order to determine whether alternative means would have been sufficiently effective.¹⁸⁵ Additionally, the court noted that there is a fairly high burden that the government must meet in defending its statute or regulation as the least restrictive means. The Court in *Lundquist* further noted that if the compelling state interest can be achieved despite the exemption of one individual, then the least restrictive means test has not been met.¹⁸⁶

In applying these standards to the Church Amendment, it is again clear that the statute passes the test. The non-discrimination provision does not forbid the hospital from holding a particular religious belief or from enforcing that belief in its facility. Rather, the provision simply restricts the hospital's ability to terminate or demote employees based on their disagreements with the

181. 932 F. Supp. 1237 (D. Or. 1996).

182. *Id.* at 1242. *See also Callahan v. Woods*, 736 F.2d 1269, 1274 (9th Cir. 1984).

183. *See Lundquist*, 932 F. Supp. at 1242. *See also U.S. v. Hugs*, 109 F.3d 1375 (9th Cir. 1997) (holding that the Bald and Golden Eagle Protection Act does not violate RFRA as the burden on Native American religion is justified by the government's compelling interest in preserving eagles).

184. 76 F.3d 468 (2d Cir. 1996).

185. *See id.* at 479.

186. *See Lundquist*, 932 F. Supp. at 1242. *See also Callahan*, 736 F.2d at 1272-73.

hospital's religious beliefs.¹⁸⁷ Additionally, as a condition on federal funding, the hospital can reject the Church Amendment's demand entirely should it choose to forego the funding. As such, the provision certainly qualifies as the least restrictive means of furthering the government's interest in protecting the freedoms of employees who work in sectarian hospitals. Thus, the RFRA would not impact the Church Amendment and its ability to protect physicians and other health care professionals from discrimination at the hands of the sectarian hospitals at which they work.¹⁸⁸

CONCLUSIONS

As religious health care systems gain increasingly greater power over the health care of Americans, both patients and their doctors are deprived of basic rights. Since the watershed decision of *Roe v. Wade*, patients have raised these concerns in the media, the legislatures, and the courts. The Church Amendment provides physicians and other health care professionals with the possibility of using the judicial system to maintain their rights and their voices in this debate. The Church Amendment is a constitutionally valid act of Congress that impliedly provides health care professionals with a private right of action against hospitals that discriminate against them because they have performed abortions or because of their religious or moral convictions

187. Should courts, as seems reasonable to expect, imply a private right of action in the Church Amendment, the argument that the Church Amendment meets the least restrictive means test would only be strengthened.

188. Opponents of the use of the Church Amendment in this context may, in addition to the RFRA argument, suggest that the amendment constitutes a violation of the hospital's freedom of expression, pointing to *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In *Dale*, the Supreme Court held that application of New Jersey's public accommodations law to the Boy Scouts in order to force the reinstatement of an openly gay assistant scoutmaster was a violation of the Boy Scouts' First Amendment right of expressive association. *Id.* While some may attempt to argue that the hospital's First Amendment rights are violated by the Church Amendment's non-discrimination provision, *Dale* is easily distinguishable from any case that would arise under the Church Amendment. In *Dale*, the Court insisted that in order to find a constitutional violation, the Boy Scouts had to be found to engage in "expressive association." *Id.* at 648. While that was easily demonstrated with respect to the Boy Scouts, a group that seeks to "instill values in young people," *id.* at 649, a hospital, whether religiously affiliated or not, is in a distinctly different category. The mission of a hospital is to provide healthcare, not to expound on political or social values. Thus, a court addressing this question should find that a hospital is not engaged in expressive association and, as such, its employment policies can be restricted without constitutional effect. However, should a court find that a religiously affiliated hospital is engaged in expressive association, the restrictions created by the Church Amendment should not be seen as significantly burdening the hospital's anti-abortion stance. *See id.* at 653. While in *Dale* the Court found that the openly gay scoutmaster's presence in the organization would send a message that was contrary to its pronounced mission, in the case of a religiously affiliated hospital, a pro-choice doctor can be prevented from performing abortions or even advocating the performance of abortions while in the hospital. The doctor's mere presence on the hospital staff would not significantly burden the hospital's mission of providing healthcare and would not suggest that the hospital approves of abortions simply because someone on its staff holds such beliefs. As a result, neither RFRA, nor *Sherbert*, nor *Dale* poses a significant threat to the use of the Church Amendment to protect pro-choice physicians working in religiously affiliated hospitals.

respecting such legal medical procedures. The Religious Freedom Restoration Act should not be interpreted to undermine these protections, and physicians should be able to litigate in court based on the Church Amendment's anti-discrimination clause. Physicians can and should use these protections to both act and speak in keeping with their conscience and without the fear of losing their employment as a result.

The problem of hospital mergers and restriction of reproductive services is far larger than the scope of this article. The Church Amendment's protections provide a remedy for doctors who wish to maintain pro-choice views or perform abortions at private clinics while adhering to the restrictions of the religious hospitals in which they work. Unfortunately, this is merely a remedy to one small problem within a far larger web of difficulties. The growing restrictions on access to legal health care services have created problems for men, women, patients, and health care professionals. Such problems must be addressed through litigation, new legislation, and community pressure on a large scale. However, the protections afforded by the Church Amendment can help to maintain a community of pro-choice and like-minded individuals at religious hospitals. Protected pro-choice employees working within sectarian institutions can, in turn, assist in the overall campaign to force all hospitals to serve their patients in a responsible and comprehensive way.

