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Recommended Citation
David Hejna, Hospital Medical Staff: When are Privilege Denials Judicially Reviewable?, 11 U. Mich. J. L. Reform 95 (1977). Available at: https://repository.law.umich.edu/mjlr/vol11/iss1/6

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HOSPITAL MEDICAL STAFF: WHEN ARE PRIVILEGE DENIALS JUDICIALLY REVIEWABLE?

The relationship between a hospital and its medical staff is unique. Most physicians serving as hospital staff are not salaried employees. Rather, they use hospital facilities to care for their patients pursuant to "staff privileges" granted by the hospital's board of governors. Staff privileges at one area hospital are practically indispensable for the modern physician, and privileges at a conveniently located hospital are considered important. By extending staff privileges the hospital benefits from having a staff large enough to ensure maximum use of its facilities. The public benefits when an adequate number of qualified physicians have access to hospital facilities.

Despite the importance to physicians, hospitals, and the public of reasonable grants of medical staff privileges, procedures for staff selection are often capricious and arbitrary. Although staff privileges are officially granted by the hospital's board, the actual decisions concerning staff selection are generally made by members of the hospital's current medical staff. These medical staffs often function like "exclusive social clubs or secret fraternal societies," having power to exclude an applicant for "ideological, moral or even political reasons," or for no reason at all. Furthermore, the denial of privileges at one hospital may have adverse or even disastrous consequences for the physician's career in general. Widespread abuse in the staff selection process has been alleged or documented in numerous cases and may involve conspiracy to exclude

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1 See M. ROEMER & J. FRIEDMAN, DOCTORS IN HOSPITALS 4, 25 (1971).
2 HEALTH LAW CENTER, PROBLEMS IN HOSPITAL LAW 25 (2d ed. 1974).
5 Personal communications with G. Flick, Hospital Administrator, University of Michigan Hospital, and L. Burns, Hospital Administrator, University of Wisconsin Hospital. See ROEMER & FRIEDMAN, supra note 1, at 110-11.
8 Joining The Hospital's Professional Social Club, ACTION KIT FOR HOSPITAL LAW, November, 1973, at 3.
9 Id.
10 Id.
new competition for patients, race discrimination, bias against osteopathic doctors, intolerance of a doctor's criticism of hospital policy, irrationally restrictive bylaws, mistaken summary appraisal of a doctor based on uncorroborated hearsay and rumor, and conspiracy to exclude a physician who testifies extensively in malpractice litigation.

In light of these abuses and the importance of properly granting staff privileges, there should be some means of correcting improper denials of staff privileges. If the hospital is a public institution, owned and operated by the government, a physician denied staff privileges may contest the denial in court and assert his right to the due process and equal protection safeguards of the United States Constitution and to certain federal statutory safeguards. Most hospitals, however, are private, non-profit organizations, and some small, private hospitals are even operated for profit. The question whether the denial of staff privileges by a private hospital is judicially reviewable has been approached differently by the courts. All of the approaches provide the same kind of protection for the physician: procedural and substantive safeguards to ensure a fair hearing on his qualifications. However, the approaches differ in the factors that


20 Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972).


23 ROEMER & FRIEDMAN, supra note 1, at 18.

must be present before the court has jurisdiction to apply those safeguards. This article discusses the various approaches and favors the one that imposes a common law fiduciary duty upon all voluntary hospitals to ensure that staff privileges are not unreasonably denied.

I. Availability of Constitutional and Statutory Protection

State statutes dealing with the denial of hospital staff privileges often apply only to public hospitals, and only to the most prevalent forms of discrimination.25 A notable exception, however, is a recently amended New York statute which provides that the denial of staff privileges must be related to "standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant."26 In Fritz v. Huntington Hospital,27 the New York Court of Appeals held that the statute applied to both private and public hospitals.28 Furthermore, the court ruled that physicians who had been denied privileges had standing to seek injunctive relief under the statute.29


The applicant is also generally entitled to procedural fairness, including notice of any adverse charges and an opportunity to be heard. Sosa v. Board of Managers of Val Verde Memorial Hosp., 437 F.2d 173, 176-77 (5th Cir. 1971). The aid of counsel for the applicant may be appropriate where the charges are especially serious, or where the hospital's attorney is present. Silver v. Castle Memorial Hosp., 53 Haw. 475, 485, 497 P.2d 564, 572, cert. denied, 409 U.S. 1048 (1972). See generally Note, Denial of Hospital Staff Privileges: Hearing and Judicial Review, 56 Iowa L. Rev. 1351 (1971); Comment, Hospital Medical Staff Privileges: Recent Developments In Procedural Due Process Requirements, 12 Williamette L.J. 137 (1975).


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State restraint of trade statutes have generally been held inapplicable to a hospital's refusal to grant staff privileges. Moles v. White, 336 So. 2d 427 (Fla. App. 1976). See generally Southwick, Hospital Medical Staff Privileges, 18 De Paul L. Rev. 655, 669 (1969).


28 Id. at 345, 348 N.E.2d at 552, 384 N.Y.S.2d at 96.

29 Id. at 345-46, 348 N.E.2d at 552-53, 384 N.Y.S.2d at 96-97. The court remanded the
Despite the limited protection under most state statutes, federal constitutional and statutory protection is available when "state action" is found.\textsuperscript{30} State action is clearly present if the hospital is public.\textsuperscript{31} However, determining whether there is state action in the private hospital setting is more complex. Most voluntary hospitals have varying degrees of involvement with federal, state, and local government. Proprietary hospitals are also extensively regulated and may indirectly receive substantial funding through medicare and medicaid programs.\textsuperscript{32} The courts have applied three principle tests for state action in the private hospital setting.

A. The Nexus Test

Under the nexus test for state action, there must be a direct connection between the state and the hospital’s denial of staff privileges. A three-pronged formulation of the test is set forth in Barrett v. United Hospital.\textsuperscript{33} First, state involvement with the hospital must be significant. Second, the state must be involved in the act which caused the injury, that is, the denial of privileges. Third, the state’s involvement must aid, encourage, or connote approval of the injurious act.

In applying the nexus test, the Barrett court ruled that tax-emption, the receipt of substantial federal aid, and extensive state regulation of hospitals did not satisfy the nexus requirement. There was no direct connection between those state activities and the hospital’s policies regarding the case for a hearing on the merits of the plaintiff’s claim that the defendant hospital’s exclusion of all osteopathic doctors failed to meet the requirements of the statute.


Because staff privileges are generally viewed as a property or liberty interest, the principle issue where privileges are denied is whether state action is involved. This is also generally true for related federal statutory protection. 42 U.S.C. § 1983 (1970) (“under color of state law”). Dicta in some cases have suggested that 42 U.S.C. § 1985 (3) may apply to invidious class discrimination despite the absence of state action. Pollock v. Methodist Hosp., 392 F. Supp. 393, 395 (E.D. La. 1975); Barrio v. McDonough Dist. Hosp., 377 F. Supp. 317, 319-20 (S.D. Ill. 1974). Nonetheless, it is unlikely that invidious class discrimination will be present in many privilege denials. In Bricker v. Crane, 468 F.2d 1228, 1233 (1st Cir. 1972), for example, the court held that physicians who had testified extensively in malpractice litigation did not comprise a suspect class. See generally Griffin v. Breckenridge, 403 U.S. 88 (1971).

\textsuperscript{30} See note 22 supra.

\textsuperscript{31} See note 22 supra.


\textsuperscript{33} 376 F. Supp. 791, 797 (S.D.N.Y. 1974), aff’d, 506 F.2d 1395 (2d Cir. 1974).
termination of staff privileges. There were, for example, no state re­
requirements that the hospital’s bylaws governing the staff appointment
process receive state approval, nor were any state nominees sitting on the
board of trustees.

The only decision where state action has been found in a private
hospital under the nexus test is Aasum v. Good Samaritan Hospital. In
Aasum, the plaintiff chiropractor claimed that the hospital’s refusal to
permit him access to clinical laboratory facilities to treat his patients was
unreasonable and discriminatory. The defendant private, non-profit hos­
pital’s refusal was based on recommendations of the Oregon Board of
Medical Examiners concerning use of hospital facilities by persons not
licensed to practice medicine. In view of this connection between the
state agency and the hospital’s exclusion of the plaintiff, the court found
state action under the Barrett formulation of the nexus test. The court,
however, sustained the constitutionality of the hospital’s action.

In both Barrett and Aasum, the courts noted that a less restrictive
test would be applied where there are allegations of racial discrimina­tion.
Other courts are in accord with this double state action standard, but the
standard has not been endorsed by the Supreme Court. In other re­
spects, however, the nexus test is more consistent with recent Supreme
Court rulings than the other two tests for state action commonly em­
ployed by the courts. In Jackson v. Metropolitan Edison Co., a public
utility that held a partial monopoly because of extensive state regulation
terminated a consumer’s electric service without advance notice or a
prior hearing. The Court held that no state action was present because the
termination policy had been initiated by the utility and had never been
specifically approved by the state regulatory agency. The Court found
that there was no direct connection between the state and the termina­tion
electric service. The Court also held that the company was not fulfilling
a “public function” to an extent that would constitute state action.

\[\text{References}\]

34 Id. at 800-05.
35 Id. at 803.
39 Ascherman v. Presbyterian Hosp. of Pacific Medical Center, 507 F.2d 1103, 1106 (9th
Cir. 1974) (Duniway, J., concurring); Ponca City Hosp. v. Murphree, 545 P.2d 738, 742
(Okla. 1976).
ing).
42 Id. at 355-57.
43 Id. at 352-54. These rulings in Jackson appear to retreat from the state action decisions
in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), and Moose Lodge No. 107 v.
Irvis, 407 U.S. 163 (1972). In Burton, the Court found state action where a restaurant leased
space in a parking structure owned and operated by a state agency and built with public
funds. The Court premised its finding of state action on whether “to some significant extent
the State in any of its manifestations has . . . become involved,” and noted that “[o]nly by
sifting facts and weighing circumstances can the nonobvious involvement of the State in
private conduct be attributed its true significance.” 365 U.S. at 722. The Court reasoned that
state action was present because the restaurant was operated as an integral part of the public
parking structure and benefitted from the building’s tax-exempt status, and because the state
Although the nexus test is generally in accord with the Supreme Court's state action decision in *Jackson*, the test does not provide adequate protection for physicians denied staff privileges by private hospitals. Consequently, adequate protection under a theory of state action can be afforded physicians only if the Court's decision is held inapplicable in the hospital setting.

**B. The Significant State Involvement Test**

A few courts, relying on early Supreme Court rulings, apply a relatively broad test for state action in the hospital setting. State action is present wherever state involvement with the hospital is significant, as viewed after sifting and weighing all relevant facts and circumstances. Neither a direct nexus between the state and the denial of staff privileges nor state approval of the denial is required.

In cases decided under this test, findings of state action have rested primarily on the presence of substantial federal funding. Hospital funding for capital expenditures is derived chiefly from the Hill-Burton Act. A finding of state action is likely where Hill-Burton funds account for one-third to one-half of the costs for any large hospital construction agency by its inaction had tacitly supported the restaurant's discrimination against the plaintiff. 365 U.S. at 724-25.

In *Moose Lodge*, however, the Court found no state action in a state agency's issuance of a liquor license, where it was issued to a private club, located in a private building, which did not hold itself out as a public accommodation. The Court again noted the importance of "sifting facts and weighing circumstances," 407 U.S. at 172 (quoting *Burton*, 365 U.S. at 722), and stated that the test was whether the state had "significantly involved itself" with the discrimination. 407 U.S. at 173 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)). The Court found none of the factors that constituted significant state involvement in *Burton*.

44 Aasum v. Good Samaritan Hosp., supra note 36, at 7, is the only case in which state action has been found under this test.


47 Because federal funding has been so pervasive in hospital construction, the test is sometimes expressed as if that were the only criterion. *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826, 828 (4th Cir. 1969); *Barrett v. United Hosp.*, 376 F. Supp. 791, 800 (S.D.N.Y. 1974), *aff'd*, 506 F.2d 1395 (2d Cir. 1974).

The Hill-Burton Act, however, is more than merely a source of hospital funding. The Act also establishes state-wide planning for the construction of all public and private non-profit hospitals. This regulatory aspect increases the "significance" of any funds received by a hospital and may be significant even where no funds are received. In Eaton v. Grubbs, for example, although the defendant non-profit hospital had not received any Hill-Burton funds, the pervasiveness of the state's participation in the Hill-Burton program contributed to the finding of significant state involvement. The court also considered the hospital's history of local grants and tax-exemptions, the county's reversionary interest in the hospital's real property, and the benefits to the hospital from the state's exercise of its power of eminent domain.

Unlike the nexus test for state action, the significant state involvement test is not relaxed in cases of alleged racial discrimination. The pivotal case was Sams v. Ohio Valley General Hospital Association, where the plaintiffs claimed that the defendant hospitals' refusal to grant staff privileges to physicians not having offices and practices within the county was irrational and discriminatory, and thus a denial of equal protection. The court held that the same state action test should be applied as in prior cases involving racial discrimination. The court then found that state action was present under the significant state involvement test because both hospitals had received substantial Hill-Burton funds.

The same test was applied in subsequent cases where the physician claimed that he had been denied due process, rather than equal protection. In Christhilf v. Annapolis Emergency Hospital Association, for example, the court affirmed the district court's finding of state action by a private, non-profit hospital based on county and Hill-Burton funding for capital expenditures. Having found state action, the court held that the plaintiff's hospital privileges could not be terminated without due process.

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52 Id. at 712-13.
53 See notes 37-40 and accompanying text supra.
55 413 F.2d 826 (4th Cir. 1969).
56 Id. at 828.
57 One hospital had received $3,352,755 to assist construction of a new addition costing a total of $9,863,758. The other hospital had received $625,976 for a new wing costing a total of $1,264,696. In addition, both hospitals had received appreciable private contributions from the community. Id. at 827.
58 496 F.2d 174 (4th Cir. 1974).
59 Id. at 178.
Although the significant state involvement test goes far toward expanding protection for the physician concerning staff privileges, certain problems inhere in the approach. The test is apparently not in accord with the recent Supreme Court decision in *Jackson* that requires application of the nexus test criteria, at least in cases outside the hospital context. The significant state involvement test is also more vague than the nexus test because it focuses generally on the "significance" of state involvement with the institution rather than on a direct connection between the state and the injurious act. Because it is vague, the test does not provide adequate guidance for hospitals. Finally, increased findings of state action for the purpose of safeguarding medical staff privileges concomitantly subject the hospital to suits based on other constitutional claims, including claims by patients which may be appropriate only against truly public hospitals.

C. Public Function Test For State Action

The Sixth Circuit has applied a public function test, which forms an intermediate approach to the state action question in the private hospital setting. Under this test, a hospital is subject to constitutional and statutory constraints on state action if it is fulfilling the role of a public agency. Although a direct nexus between the state and the denial of staff privileges is not required, something more than regulation and partial state funding must be shown. For example, the appointment of a private

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60 See notes 41-43 and accompanying text supra.
62 For example, in Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975), the plaintiff sought declaratory and injunctive relief against enforcement of the defendant hospital's policy of prohibiting abortions except for the purpose of saving the life of the mother. The court ruled that, absent en banc reconsideration, it was constrained to apply the same state action test as in prior cases involving the staff privilege issue. Because the hospital had received substantial Hill-Burton funds, state action was found and the hospital's anti-abortion policy was held in violation of the Constitution. Congress has suggested that such a result in the case of private hospitals may be improper. The Health Programs Extension Act of 1973, 42 U.S.C. § 300a-7(a)(2)(A)(Supp. V 1975), provides that the receipt of Hill-Burton funds does not authorize a court to order a private hospital to perform an abortion "if the performance of such a procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions."Id. The Court in *Charleston Area Medical Center*, however, found this provision inapplicable. 529 F.2d at 624 n.7. See generally Abortion Issue Portends New Attacks On Hospitals, ACTION KIT FOR HOSPITAL LAW, September 1972.

63 O'Neil v. Grayson County War Memorial Hosp., 472 F.2d 1140, 1143 (6th Cir. 1973); Chiaffitelli v. Detmer Hosp., Inc., 437 F.2d 429, 430 (6th Cir. 1971); Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33, 35 (6th Cir. 1968).
hospital’s board members by a public body, when combined with state regulation and funding, is sufficient to satisfy the public function test. In *Meredith v. Allen County War Memorial Hospital Commission*, the entire commission operating the private, non-profit hospital was appointed by the governing body of the county. In addition, the hospital was the only one in the area and it had been financed in part with public funds. The court held that “[a]n institution such as this, serving an important public function and financed in part by public funds, is sufficiently linked with the state for its acts to be subject to the limitations of the Fourteenth Amendment.”

The Sixth Circuit broadened its approach in *Chiaffitelli v. Dettmer Hospital, Inc.*, where only five of the nine hospital board members were responsible to the public. Under the private hospital’s charter, four members were appointed by the County Commissioner and a fifth was the Judge of the Common Pleas Court. In view of this, the Sixth Circuit in a per curiam opinion reversed the district court’s ruling that the hospital was not a “public agency.” Although the hospital had received public funding, the court expressly disclaimed reliance on that factor in holding that the hospital was a public agency. The court then ruled that, as a public agency, the hospital was subject to the plaintiff physician’s claim that the failure to renew his privileges was arbitrary and discriminatory in violation of 42 U.S.C. § 1983.

Public appointment of hospital board members is only one of several additional factors that may sustain a finding of state action in a private, non-profit hospital under this test. In *O’Nei l v. Grayson County War Memorial Hospital*, the court found state action although none of the hospital board members were publicly appointed. The court observed that the hospital was the only one in the county and was financed in part by Hill-Burton funds. The Hospital Foundation also leased premises from the County Fiscal Court on a long term basis in exchange for nominal consideration and the Foundation’s agreement to fulfill all duties incident to maintenance and operation of the hospital. The lease further provided the Fiscal Court with a reversionary interest in all donations received by the hospital and required that the hospital’s board contain at least one member from each of the county’s districts. The court held that all these facts were elements of “the public function served by the Hospital,” and concluded, “the Hospital is not a purely private institution, immune from the mandates of the Fourteenth Amendment.”

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65 397 F.2d 33 (6th Cir. 1968).
66 *Id*. at 35.
67 437 F.2d 429 (6th Cir. 1971).
68 *Id*. at 430.
69 *Id*. at 430 n.1 and accompanying text.
70 *Id*. at 430.
71 472 F.2d 1140 (6th Cir. 1973).
72 *Id*. at 1142.
73 *Id*.
74 *Id*. at 1143.
75 *Id*.
The public function rationale also appears to have been the basis for a finding of state action in a private, non-profit hospital by the District Court of Connecticut. In *Schlein v. Milford Hospital*, the court found that because the state licensed physicians and because state licensing of hospitals had created a geographic monopoly, the hospital played "a pivotal role in the implementation of the state's regulatory authority." Therefore, the hospital was required to comply with the due process limitations of the Fourteenth Amendment.

The public function test for state action in the hospital setting is commendable because it reflects the increasing tendency of people to view the hospital as fulfilling a public function. Some writers have taken the position that hospitals have essentially become "public utilities." Even if hospitals are public utilities, however, it does not necessarily follow that state action is present. Supreme Court decisions dealing with the public function doctrine do not require such a result because those decisions involved private entities carrying on traditional governmental functions, while hospitals have traditionally been non-governmental. In addition, the doctrine was originally developed with respect to First Amendment issues, not due process and equal protection claims.

Even if decisions applying the public function test to the hospital setting have formulated a permissible interpretation of the Supreme Court rulings, the test is nevertheless overly vague. Hospitals subject to this test cannot adequately determine which factors the court will apply or what weight the court will accord particular factors. In addition, the test fails to result in findings of state action at many private hospitals. Finally, as with the other tests, findings of state action concomitantly subject the

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79 M. ROEMER & J. FRIEDMAN, supra note 1, at 20.
82 See note 81 supra.
83 The Sixth Circuit recognizes that its approach is vague. O'Neil v. Grayson County Memorial Hosp., 472 F.2d 1140, 1143 (6th Cir. 1973).
hospital to a range of claims unrelated to the unique issue of staff privilege denials. 85

II. AVAILABILITY OF COMMON LAW PROTECTION: THE FIDUCIARY DUTY

Where the denial of staff privileges comprises a common law tort such as defamation 86 or interference with trade or business, 87 the physician may bring an appropriate action against the hospital board and members of the medical staff. 88 However, where the hospital has held a "quasi-judicial" hearing concerning the physician's qualifications, statements made in connection with the hearing are privileged even though they are false and result in an unreasonable denial of staff privileges. 89 In addition, 85

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85 See note 62 and accompanying text supra.
88 Although this tort liability may discourage ungrounded privilege denials, it may also go too far and result in a grant of staff privileges to an unqualified physician. Those charged with evaluating staff often fear that true vigilance on their part will expose them to personal liability. Joint Comm'n on Accreditation of Hospitals (JCAH), Guidelines for the Formulation of Medical Staff Bylaws, Rules and Regulations 1971, at 49-50 (1971). The problem of unqualified physicians obtaining staff privileges is important from the hospital's viewpoint because hospitals have been held liable for the negligence of its staff, on theories of either vicarious or direct corporate responsibility. Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965), cert. denied, 383 U.S. 946 (1966); Corleto v. Shore Memorial Hosp., 138 N.J. Super. 302, 350 A.2d 534 (1975). See generally Southwick, The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician, 9 Cal. West. L. Rev. 429, 440-53 (1973). This development has led to the suggestion that hospitals should have greater discretion in denying staff privileges, and correspondingly be subject to less judicial review. Huffaker v. Bailey, 273 Ore. 273, 282, 540 P.2d 1398, 1402 (1975). However, it does not follow that judicial review to ensure that privileges are not unreasonably denied to a qualified physician will in any way affect the hospital's right to deny privileges to an unqualified applicant. Indeed, requiring hospitals to adopt sound procedures and criteria should help to ensure that only qualified physicians are granted staff privileges. See generally Joint Comm'n on Accreditation of Hospitals, supra at 10-14, 21-29.
89 Cf. Ascherman v. Natanson, 23 Cal. App. 3d 861, 100 Cal. Rptr. 656 (1972). The primary factors determining the nature of a quasi-judicial hearing applied by the court in Ascherman were "(1) whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts, (2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts and, more importantly (3) whether its power affects the personal or property rights of private persons .... " Id. at 866, 100 Cal. Rptr. at 659. A private hospital's hearing was held "quasi-judicial" in Goodley v. Sullivant, 32 Cal. App. 3d 619, 108 Cal. Rptr. 451 (1973). But see DiMiceli v. Klieger, 58 Wis. 2d 359, 206 N.W.2d 184 (1972).
it should be noted that any protection concerning staff privileges provided in a hospital's bylaws is judicially enforceable under common law principles.\textsuperscript{90}

A growing minority of courts, when confronted with a private hospital's unreasonable denial of staff privileges, have imposed a common law fiduciary duty upon the hospital.\textsuperscript{91} Under this duty, the hospital must ensure that privileges are not denied unreasonably, arbitrarily, or capriciously.\textsuperscript{92} As stated by the California courts, the hospital's action must be "substantively rational and procedurally fair."\textsuperscript{93}

The crucial issue, with respect to this duty, is determining the circumstances under which it will be imposed. In the leading case, \textit{Greisman v. Newcomb Hospital},\textsuperscript{94} the New Jersey Supreme Court held that the defendant private, non-profit hospital had a fiduciary duty to evaluate the plaintiff physician's application for staff privileges on its merits, rather than arbitrarily excluding all osteopathic doctors under a provision of the hospital's bylaws. In finding a fiduciary duty, the court relied upon its determination that the hospital was not strictly private because it had received substantial funds from public sources and through public solicitations; had received tax benefits, possessed a virtual monopoly on area health care facilities, and was a non-profit organization dedicated by virtue of its certificate of incorporation to serving the sick and injured. The court further noted that enterprises even more private in nature than

\textsuperscript{90} Note, \textit{Denial of Hospital Staff Privileges: Hearing and Judicial Review}, 56 \textit{IOWA L. REV.} 1351, 1356-57 (1971).


\textsuperscript{93} Ascherman v. Saint Francis Memorial Hosp., 45 Cal. App. 3d 507, 511-12, 119 Cal. Rptr. 507, 509 (1975), \textit{quoting} Pinsker v. Pacific Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 550, 526 P.2d 253, 260, 116 Cal. Rptr. 245, 260 (1974). The California courts have also incorporated principles of administrative law, such as the "substantial basis test" and the "exhaustion of administrative remedies" doctrines, into their analysis. Anton v. San Antonio Community Hosp., 55 Cal. App. 3d 212, 127 Cal. Rptr. 394, 398, 400 (1976). The substantial basis test limits the scope of review by the court by requiring that the hospital's action be sustained if there is a substantial basis for the decision in the evidence considered as a whole. The exhaustion doctrine provides that an appeal to the court is not available until the physician has exhausted all remedies within the hospital. \textit{See generally} K. DAVIS, \textit{ADMINISTRATIVE LAW TREATISE} §§ 20.01-20.10, and §§ 29.01-29.11 (1958).

\textsuperscript{94} 40 N.J. 389, 192 A.2d 817 (1963).
hospitals had been subjected to state regulation. The court also observed that courts had imposed a common law duty on innkeepers, carriers, and farriers to serve all "comers." Finally, the court noted that it had the power to expand the common law to serve current public needs and cited its own recent decision vesting a local medical society with a fiduciary duty respecting membership applications. Therefore, the court concluded that it was justified in imposing a similar duty on the defendant hospital.

Some courts continue to require either substantial funding or a virtual monopoly before they will review a hospital's denial of staff privileges under the fiduciary duty approach. In Peterson v. Tucson General Hospital, Inc., for example, the Arizona Appellate Court surveyed the various doctrines for judicial review of private hospitals, and concluded that review in the present case was proper because the defendant, a private, non-profit hospital, constituted a virtual monopoly. In Silver v. Castle Memorial Hospital, the Supreme Court of Hawaii held that a private hospital was subject to judicial review where it received "more than nominal governmental involvement in the form of funding." The court viewed such a hospital as a "quasi-public" institution.

In New Jersey cases decided since Greisman v. Newcomb Hospital, the factors of substantial funding and geographic monopoly have not been emphasized. Recent cases in California and Colorado have gone further and have imposed the fiduciary duty on virtually all non-profit hospitals. In Hawkins v. Kinsie, the Colorado Appellate Court held that judicial review of the hospital's failure to renew the plaintiff's staff privileges was available because the hospital, although private, was a non-profit corporation conducted for the benefit of the general public, and because physicians and patients generally would be penalized if no remedy were available. In Ascherman v. Saint Francis Memorial Hospital, the plaintiff physician already had privileges at other hospitals and earned a gross annual income in excess of $80,000. Nevertheless, the California Appellate Court held that he was entitled to a fair evaluation of his application because staff privileges at the defendant, non-profit hospital would greatly enhance the plaintiff's convenience in practicing his profession.

In a subsequent decision, Anton v. San Antonio Community Hospi-
tal.\textsuperscript{104} the California Appellate Court held that all non-profit hospitals have a fiduciary duty respecting the denial of staff privileges. The court stated:

An entity operating a private, non-profit hospital assumes a public trust which carries with it an obligation to deal fairly with the public it serves and with the doctors to whom it accords hospital privileges . . . . The fiduciary obligation to the doctors requires observance of ‘fair procedure’ in making decisions pertaining to medical staff membership.\textsuperscript{105}

The fiduciary duty approach achieves essentially the same safeguards for the physician as those provided by the Constitution;\textsuperscript{106} therefore, the same burden is imposed on the hospital under either approach. Ordinary costs associated with the hearing procedure should be incorporated into the hospital’s non-profit operating budget.\textsuperscript{107} On the other hand, it may be appropriate for the physician to pay for the cost of inspecting or copying documents in the hospital’s possession bearing on charges against the physician.\textsuperscript{108} Eventually, many hospitals may even benefit financially from the hearing procedures. Improved selection procedures may reduce the hospital’s insurance payments,\textsuperscript{109} and may reduce the number of cases in which the hospital is found vicariously or corporately liable for physician negligence.\textsuperscript{110} For some hospitals, an increase in the number of physicians who are granted staff privileges may produce an increase in the number of patients and, consequently, an increase in net revenue.\textsuperscript{111}

The fiduciary approach, however, differs from the constitutional approach in several important ways. First, the fiduciary duty approach encompasses a greater number of hospitals.\textsuperscript{112} Furthermore, by clearly extending the duty to all non-profit hospitals, the fiduciary duty approach permits hospital administrators to plan accordingly in formulating procedures for evaluating applicants. In contrast, the constitutional approach based on state action is uncertain in scope, and is subject to superceding decisions of the Supreme Court.\textsuperscript{113} Also, the fiduciary duty can be limited to the issue of staff privileges, thus avoiding inappropriate constitutional claims by patients.\textsuperscript{114}

\textsuperscript{104} 55 Cal. App. 3d 212, 127 Cal. Rptr. 394 (1976).
\textsuperscript{105} Id. at 398.
\textsuperscript{106} See note 24 and accompanying text supra.
\textsuperscript{107} Klinge v. Lutheran Charities Ass’n, 523 F.2d 56, 64 (8th Cir. 1975).
\textsuperscript{108} Christhilf v. Annapolis Emergency Hosp. Ass’n, 496 F.2d 174 (4th Cir. 1974).
\textsuperscript{109} Note, supra note 90, at 1351.
\textsuperscript{110} See note 88 supra.
\textsuperscript{111} See note 5 supra.
\textsuperscript{113} See note 60 and accompanying text supra.
\textsuperscript{114} See note 62 and accompanying text supra.
The modern physician needs staff privileges at a conveniently located hospital. The public needs more physicians with easy access to hospitals. The hospital needs a large enough medical staff to ensure maximum use of its health care facilities. Nevertheless, staff privileges continue to be denied unreasonably. Judicial review is necessary to curtail inadequate or secretive procedures and to discourage arbitrary, discriminatory, or self-serving recommendations by the hospital’s current medical staff.

The imposition of a common law fiduciary duty avoids subjecting private hospitals to constitutional claims unrelated to the unique staff privilege issue, and also avoids strained interpretations of recent Supreme Court rulings on state action. Furthermore, imposing the duty on all private, non-profit hospitals provides an easily applied test. Finally, and most importantly, because all non-profit hospitals are subject to the fiduciary duty, this approach achieves optimal protection for physicians, hospitals, and the public.

—David Hejna