Judicial Review of Private Hospital Activities

The internal activities of both public and private hospitals are increasingly the subject of demands for judicial review. Typical challenges have come from patients demanding admission or certain types of treatment or from members of the medical profession applying for staff privileges. Courts look to two general sources of law in determining whether they have the authority and duty to examine a hospital's actions. First, a court may exert power under state law to require that hospital administrators meet a standard of fairness and reasonableness. The scope of this review, of course, varies from state to state. Alternatively, a court may find that a hospital's conduct violates the equal protection and due process clauses of the fourteenth amendment, if requisite state action can be found. Under either approach, the factor that determines the permissibility of judicial review is the existence of a requisite degree of governmental or public involvement in the functioning of the hospital. This Note will examine the judicial review of hospitals under state law and the fourteenth amendment and will suggest that unless certain clear requirements for "publicness" are met, judicial restraint based on the failure of legislative institutions to mandate judicial interference is the better course.

In the majority of jurisdictions, the ability of a complainant to get relief for the alleged misconduct of a hospital depends on whether that hospital is deemed private or public. Of course, absent special limiting statutory or common-law privileges, all hospitals can be open to causes of action for breach of contract, wrongful death and vio-

5. See id.
8. Some courts have found enforceable contract rights between the physician and the hospital based on hospital bylaws. See, e.g., Joseph v. Passaic Hosp. Assn., 26
lation of the antitrust laws. 10 However, these theories are of little practical import in establishing any judicial control over the managerial decisions of the hospital administrators, despite the harm those decisions might cause. The reality is that, in the majority of states, administrators of so-called private hospitals have virtually unrestrained discretion 11 while judicial interference generally grounded on the theory that state bodies cannot be immune from review by the courts is permitted only when the hospital is deemed public. 12


9. If an individual relies to his detriment upon a hospital custom of providing medical treatment, an action may lie. See Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 174 A.2d 135 (1961) (a wrongful death action against a hospital for refusal to admit a patient).

10. Although numerous attempts have been made to find private hospitals in violation of state or federal antitrust laws, no success has yet been achieved. See Pollock v. Methodist Hosp., 392 F. Supp. 393 (E.D. La. 1975) (requirement that staff physician purchase malpractice insurance not violation of Sherman Act); Elizabeth Hosp., Inc. v. Richardson, 167 F. Supp. 155 (W.D. Ark.), aff'd, 269 F.2d 167 (8th Cir. 1958), cert. denied, 361 U.S. 884 (1959) (operation of hospitals, although a form of commercial activity, is nonetheless purely local in character and not within scope of the antitrust laws); Willis v. Santa Ana Community Hosp. Assn., 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 554 (1962) (California antitrust law does not apply to medical profession); Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946) (dividing medical staff into four classes was not a combination or conspiracy in restraint of trade in violation of Sherman Act).

In addition, actions of private hospitals that violate state corporation laws create possible causes of action in favor of physicians and patients. See Stevens v. Emergency Hosp., 142 Md. 526, 121 A. 475 (1923).

11. See, e.g., Moore v. Andalusia Hosp., Inc., 284 Ala. 259, 224 So.2d 617 (1969) (decisions are within sound discretion of managing authorities); West Coast Hosp. Assn. v. Hoare, 64 So.2d 293 (Fla. 1953); Natalie v. Sisters of Mercy, 243 Iowa 592, 52 N.W.2d 701 (1957) (doctor's personal life can be considered by hospital officials as violating hospital standards); Hughes v. Good Samaritan Hosp., 289 Ky. 123, 158 S.W.2d 159 (1942) (doctor can be barred from surgery); Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946) (no common-law duty to accept as patients all who desire admission); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554 (1924), aff'd, 239 N.Y. 615, 147 N.E. 219 (1925) (exclusion or expulsion may be summary; no charges need be brought, and no explanation, reasoning or hearing is necessary); State ex rel. Wolf v. LaCrosse Lutheran Hosp. Assn., 181 Wis. 33, 193 N.W. 994 (1923) (exclusion or expulsion may be summary). See also Comment, Public Control of Private Sectarian Institutions Receiving Public Funds, 63 MICH. L. REV. 142 (1964); Note, supra note 7; Note, 18 RUTGERS L. REV. 704, supra note 8; Note, 15 RUTGERS L. REV. 327, supra note 8.

Courts assessing a prayer for relief, therefore, must initially determine whether the hospital whose decision or action has been challenged is a public or private institution.

Certain characteristics can be identified that indicate the public character of a hospital. A public hospital is generally described as "an instrumentality of the state, founded and owned by the state in the public interest, supported by public funds, and governed by managers deriving their authority from the state." It is undisputable that the actions of a hospital that possesses all of these features can be subjected to judicial review. In contrast, a hospital that has the power to manage its own affairs free of governmental control and that relies on private funding is clearly deemed private and thereby not subject to review by the courts.

There is considerable middle ground between these two extremes, however, and a hospital will frequently possess characteristics that seem to make it both public and private. It is often the case that a designation cannot be made merely by looking at selected indicators. For example, courts have frequently stated that receipt of public funds or governmental regulation of certain activities does not necessarily lead to a finding of "publicness." Substantial governmental control and public financial assistance may thus be necessary but not sufficient factors for a holding that judicial review is required. The current uncertainty as to ascertaining "publicness" may cause considerable hardship; fairness requires that courts articulate standards for evaluation so that a hospital has


a reasonable basis for knowing whether its internal activities are subject to challenge in the courts.\textsuperscript{17}

The confusion has not been diminished by decisions in some jurisdictions holding that the possession of certain characteristics common to a large number of ostensibly private hospitals—nonprofit status, tax benefits, public sources of funds, and virtual monopoly status for a geographical area—can form the basis of judicial review.\textsuperscript{18} The leading case implying this type of analysis is \textit{Greisman v. Newcomb Hospital},\textsuperscript{10} in which an osteopath asked the court to order reconsideration of his application for admission to the defendant's courtesy staff. The court noted that the hospital was the only medical facility in a metropolitan area with a population of approximately 100,000.\textsuperscript{20} Other significant factors considered by the court were the nonprofit status of the facility, receipt of large public contributions and foundation grants, and tax-exempt status as a charitable institution.\textsuperscript{21} After citing these factors, the court held that the powers of hospital officials are to be held in trust “for the benefit of the public.”\textsuperscript{22} Management powers were “rightly viewed . . . as fiduciary powers to be exercised reasonably and for the public good.”\textsuperscript{23}

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\textsuperscript{17} For instance, if a hospital claims to be private, it will be governed, at least in part, by private managers, individuals who are neither paid nor appointed by the state. However, as indicated in the text, other factors such as governmental financial aid, tax exemptions or extensive governmental regulation might be sufficient to outweigh the significance of privately paid and appointed managers and may result in finding that the hospital is subject to judicial review. For examples of how hospitals with only minor governmental contact and believing themselves to be private can find their internal activities subject to judicial review, see Edson v. Griffin Hosp., 21 Conn. Supp. 55, 144 A.2d 341 (Super. Ct. 1958) (ninety-five per cent of income from services rendered); West Coast Hosp. Assn. v. Hoare, 64 So.2d 293 (Fla. 1953) (only one per cent of hospital's budget contributed by city).


\textsuperscript{19} 40 N.J. 389, 192 A.2d 817 (1963), \textit{discussed in} Note, 18 RUTGERS L. REV. 704, supra note 8 (pointing out that Newcomb Hospital easily could have been classified as a private institution with the accompanying exclusionary powers). \textit{See also} Note, supra note 7, at 1440-43.

\textsuperscript{20} 40 N.J. at 402, 192 A.2d at 824.

\textsuperscript{21} 40 N.J. at 396, 192 A.2d at 821.

\textsuperscript{22} 40 N.J. at 403, 192 A.2d at 825. The \textit{Greisman} court found support for its decision in Falcone v. Middlesex County Medical Socy., 34 N.J. 582, 170 A.2d 791 (1961), where the court declared the membership requirements of a county medical society arbitrary and invalid and ordered the admission of Dr. Falcone to full membership. 40 N.J. at 399-402, 192 A.2d at 822-24. \textit{But cf.} Note, 75 HARV. L. REV. 1186, supra note 8, at 1197 (“[T]he power of one hospital to exclude is usually not the power to deny all local hospital privileges, as is ordinarily true of exclusion by a society. . . . [J]udicial restraints would thus appear less justifiable on private hospitals than on medical societies, especially in view of the hospital's direct responsibility for care of its patients.”).

It is not clear from *Greisman* whether the public aspects of the hospital were necessary for a finding of a public trust. This question was dealt with in *Silver v. Castle Memorial Hospital*, which, like *Greisman*, involved an issue of staff privileges. After noting the *Greisman* concept of fiduciary powers, the *Silver* court pointed out that if a hospital's patients were to be of primary concern, and if one accepts a fiduciary relationship between a hospital, its staff and the public, then the rationale for the distinctions of public, quasi-public, and private breaks down and decisions must be subject to review in all cases. While the court's review was based on the large amount of public funding received by the hospital and not on its broadened view of fiduciary powers, its analysis of *Greisman* argues for an end to the consideration of "publicness" in challenges to hospital activities, thereby subjecting all hospitals to judicial review. Similarly, in *Woodard v. Porter Hospital, Inc.*, the court, not questioning that the hospital was private, held that authorities of private hospitals had broad discretionary powers, but that their exercise would be subject to review by courts of equity. It thus seems evident that judicial authority exists under common-law analysis in some states to review internal activities of hospitals that are clearly private under the traditional "publicness" test.

418, 231 A.2d 389 (App. Div. 1967) (hospital was private in the sense that it was nongovernmental, but public in the sense that it was devoted to the public use); *Schnier v. Englewood Hosp. Assn.*, 91 N.J. Super., 527, 221 A.2d 559 (Law Div. 1966).

25. 497 P.2d at 569.
26. 497 P.2d at 570. The *Silver* court characterized the type of governmental involvement with a hospital that existed in *Greisman* as creating a "quasi-public" hospital. 497 P.2d at 569 ("[Q]uasi-public' status is achieved if what would otherwise be a truly private hospital was constructed with public funds, is presently receiving public benefits or has been sufficiently incorporated into a governmental plan for providing hospital facilities to the public."). While it was not clear in *Greisman* that "quasi-public" status was a necessary condition to the finding of fiduciary responsibility, the *Silver* court, as indicated in the text, clearly advocated the view that a fiduciary duty of hospitals to the public exists regardless of "quasi-public" status. See 497 P.2d at 569: "Hospital officials ... must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public."

27. 497 P.2d at 570 ("Our opinion ... is limited to those situations where the hospitals involved have had more than nominal governmental involvement in the form of funding. We leave ... the issue as to whether a truly completely private hospital is subject to [judicial] review to future cases . . . .").
29. 125 Vt. at 423, 217 A.2d at 40.
While it appears that these decisions oppose the traditional and still prevailing refusal of courts to review activities of private hospitals, it should be noted that the Greisman court's analysis does not necessarily produce the conflict the language of the opinion might suggest. Neither Greisman nor the succeeding cases actually involved a hospital without substantial public attributes. The majority jurisdictions may in fact look to exactly the same characteristics in determining whether a hospital is public, and therefore subject to judicial review, or private, and beyond the reach of the courts. The difference in mode of analysis may, therefore, be more semantic than substantive, with the majority jurisdictions simply more restrained in finding the degree of "publicness" necessary to warrant judicial review.31

Nevertheless, the language of Greisman, Silver, Woodward, and subsequent cases32 certainly suggests a fiduciary approach regardless of the degree of "publicness." Thus, apart from the ownership and funding considerations, private hospitals may be thought of as "public" in the same sense as common carriers.33 The issue may be little different than that which must be resolved in deciding whether there should be judicial review of activities of railroads independent of enabling legislation. No doubt, the common law often followed this approach,34 although it is not immune from challenge on policy grounds. After all, in the context of the detailed regulation of all forms of economic activity by current legislatures,35 it can be argued persuasively that courts applying state law should defer to the more publicly responsive branches and review private hospital activities only as part of a clear legislative or administrative mandate to do so.

A related, but distinct, method of challenging internal hospital activities is to find that the state action requirements of the fourteenth amendment have been met in a suit alleging violation of the equal protection or due process clauses.36 This approach requires

31. No court may ever have to abandon a "publicness" analysis in favor of a purely fiduciary analysis in order to hold a private hospital subject to judicial review. Characteristics such as tax benefits and public contributions are common to virtually all hospitals. Thus, the question left open in Silver, see note 27 supra, of whether a completely private hospital is subject to judicial review may be moot. If this assumption is true, then there are only two classes of hospitals: public hospitals the internal activities of which are subject to judicial review in all jurisdictions, and quasi-public hospitals, the internal activities of which are subject to judicial review in the minority jurisdictions that have followed the holding of Greisman.

32. See cases cited note 30 supra.


34. 40 N.J. at 397, 192 A.2d at 821.

35. See text at note 66 infra.

36. The Supreme Court has stated that although the general principle of state action can be easily articulated, "the question of whether particular discriminatory con-
the complaining party to allege an invasion of rights by the state rather than by a private party. Therefore, the major problem for the court in deciding the appropriateness of review is to draw a line between governmental acts and private ones.

The starting point for much recent state action analysis is Burton v. Wilmington Parking Authority, in which a restaurant that leased space in a parking structure owned by the defendant, an agency of the State of Delaware, refused to serve the plaintiff because of his race. The plaintiff claimed that the restaurant's action was sufficiently


38. In so doing, the court should speak in terms of private action as distinct from state action, but the analysis typically begins instead with the assertion that the court is seeking state involvement in private activity. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). This approach clouds the state action analysis. State action and private action are mutually exclusive concepts. If the court determines that state action is present, denominating the activity as private as well adds nothing to the analysis, and is in fact contradictory. The language used by the courts must be interpreted to mean that state action exists in what first appears to be private activity.


connected with the state to require that the obligations of the equal protection clause of the fourteenth amendment be met. The United States Supreme Court, reversing the Delaware Supreme Court, held that under these circumstances exclusion of the plaintiff was discriminatory state action. The standard enunciated by the court was whether the state, "in any of its manifestations," was "to some significant extent" involved in the otherwise private conduct. The Court found that only by "sifting facts and weighing circumstances," such as public ownership of the building in which the restaurant was located, could the "nonobvious involvement of the state in private conduct be attributed its true significance." This method of analysis is used in most subsequent lower court decisions.

In *Moose Lodge No. 107 v. Irvis*, involving very similar discrimination but a different degree of governmental connection, the Supreme Court had little difficulty in concluding that no state action was present. The plaintiff, denied service because of his race, claimed that the issuance of a liquor license by the state to the Lodge was sufficient state involvement to make the equal protection clause applicable. The Lodge, however, was privately owned and

40. The Delaware Supreme Court had held that the restaurant was acting "in a purely private capacity" under its lease, that its action was not that of the Parking Authority and was not, therefore, state action within the contemplation of the prohibition contained in the fourteenth amendment. *Wilmington Parking Auth. v. Burton*, 39 Del. Ch. 10, 22, 157 A.2d 894, 902 (1960), revd., 365 U.S. 715 (1961).

41. 365 U.S. at 717.

42. 365 U.S. at 722. Throughout its opinion, the Court referred to state action in private activity. As previously indicated, see note 38 supra, state action and private action should be considered mutually exclusive concepts. Although directly engaged in by private individuals, the racial discrimination in *Burton* was state action, not because the state participated in the discrimination of private individuals, but because the state's position as owner and lessor of the restaurant made it justifiable to characterize the discrimination as the direct activity of the state, regardless of the private interests of the restaurant. See note 43 infra.

43. 365 U.S. at 722. In *Burton*, other facts and circumstances that resulted in a finding of significant state involvement with the restaurant were the upkeep and maintenance provided by the Parking Authority and the mutual benefits the restaurant and the Parking Authority conferred upon one another. 365 U.S. at 722-24. The Court concluded that the state had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S. at 725.


46. 407 U.S. at 165.
funded, located in a building owned by the membership, and did not hold itself out as a public accommodation. The minor regulation associated with granting a liquor license in no way gave the state an interest in the club's enterprise, and consequently the equal protection clause was inapplicable.

Moose Lodge seems to have begun a contraction of the scope of the state action doctrine, as further evidenced by the Court's recent holding in *Jackson v. Metropolitan Edison Co.* The claim was based on termination of electric service without a notice or hearing. The defendant, a public utility, was heavily regulated by the state. The Court evidently abandoned the sifting and weighing analysis used in *Burton* and *Moose Lodge* and instead inquired exclusively into the presence of a nexus between the state and the specific challenged action. Regulation was held insufficient to

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47. 407 U.S. at 171.
48. 407 U.S. at 171, 175.
49. 407 U.S. at 175 ("In short while [the restaurant in *Burton*] was a public restaurant in a public building, Moose Lodge is a private social club in a private building.").
50. 407 U.S. at 176-77. In contrast, the state in *Burton* had an interest in the success of the restaurant since such success would draw more people downtown to use the Authority parking garage.
51. 407 U.S. at 177. However, because the constitution and bylaws of Moose Lodge contained racially discriminatory provisions, the Court did issue a decree enjoining the enforcement of a state agency regulation, PENNSYLVANIA LIQUOR CONTROL BOARD, REGULATION SECTION 113.09 (June ed. 1970), that required every club liquor licensee to follow its constitution and bylaws. 407 U.S. at 179 (1972).
55. The Court's approach in *Jackson*, although claiming to rely on the sifting and weighing approach of *Burton*, abandoned the spirit of that approach. Viewing the series of contentions put forth by the plaintiff, the Court found "none of them persuasive." 419 U.S. at 351. This language suggests that the Court viewed the factors separately and did not sift and weigh them in the aggregate. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 148-49 (1975). However, the case does contain language suggesting that the *Burton* approach was not entirely abandoned. In summing up, the Court stated: "All of petitioner's arguments taken together show [no state action]." 419 U.S. at 358.
56. 419 U.S. at 350-51 ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment . . . . [T]he inquiry must be whether there is a suffi-
provide such a link,\textsuperscript{57} and the Court rejected the plaintiff's claim that the state specifically authorized and approved Metropolitan's termination practice.\textsuperscript{58} Although the company had filed a general tariff including the termination provisions with the Public Utilities Commission, that agency did not specifically consider the procedures. The Court found that initiation of the practice came from the company and not the state,\textsuperscript{59} and, thus, as in \textit{Moose Lodge},\textsuperscript{60} it could not be said that the state either overtly or covertly encouraged the practice.\textsuperscript{61}

The Court also dealt with the fact that Metropolitan had a monopoly that arguably was granted by the state.\textsuperscript{62} Because the Pennsylvania statute conferring monopoly status did not impose any obligation on the state itself, however, the Court accepted previous

ciently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself"). It is possible that the nexus analysis owes its origins at the Supreme Court level to \textit{Moose Lodge}, where the Court talked in terms of "overtly or covertly" encouraging certain actions. 407 U.S. at 173.

\textsuperscript{57} 419 U.S. at 351, 358.

\textsuperscript{58} 419 U.S. at 354.

\textsuperscript{59} 419 U.S. at 357:

Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action." At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiation comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

\textsuperscript{60} 407 U.S. at 173.

\textsuperscript{61} 419 U.S. at 357 n.17. A full discussion of the merits in \textit{Jackson} is beyond the scope of this Note. However, it should be observed that the result reached in \textit{Jackson} remains controversial even under the nexus test articulated by the Court. For example, the Court held that no nexus existed between the state and the practice of Metropolitan of immediately terminating service upon nonpayment because, among other factors, the state had approved the termination practice only in the course of approving Metropolitan's general tariff; no hearing was conducted concerning the tariff's termination provision. 419 U.S. at 354-55. However, "[t]o hold that specific, rather than routine, approval is required" to create the necessary nexus "would make the state action determination turn on the fortuity of whether a practice has been challenged at some time in the past and would also imply that to circumvent the effects of the \textit{Jackson} decision, plaintiffs need only challenge a given practice before the state commission to get a ruling on its validity." \textit{The Supreme Court, 1974 Term, supra} note 55, at 145-46 n.53.

However, \textit{Jackson} also can be read as holding that state approval of any type, absent state initiative or a state order regarding the challenged activity, is insufficient to transform apparent private activity into state action. 419 U.S. at 357 ("Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' "); see \textit{The Supreme Court, 1974 Term, supra} note 55, at 145-47.

\textsuperscript{62} Although the Court assumed \textit{arguendo} the monopoly status of Metropolitan Edison, the court doubted whether Pennsylvania had actually granted a monopoly. 419 U.S. at 351,
state court holdings\(^{63}\) that the provision of utility services was not a state function or municipal duty.\(^{64}\) Similarly, the plaintiff’s claim that Metropolitan was serving a state function by conducting a business “affected with the public interest” was rejected because of the expansive scope that ruling would give to the doctrine, for most businesses are affected with some public interest.\(^ {65}\)

In the same view, almost every facet of modern society is subject to government involvement through regulation, licensing, financial aid, or other control.\(^ {66}\) To avoid the extreme result of finding state action in virtually every situation,\(^ {67}\) the state action doctrine must be construed as requiring a minimum degree of governmental involvement—an involvement that might consist of several different facets that, in the aggregate, are sufficient to trigger the fourteenth amendment.\(^ {68}\) The results of a state action inquiry thus depend more on particular factual circumstances than is the case in most other types of litigation.\(^ {69}\) Since the Court in \textit{Jackson} limited the


\(^{64}\) 419 U.S. at 353. Noticeably absent in the Court’s analysis of the monopoly factor was any consideration of the implication of \textit{Moose Lodge}, 407 U.S. at 117, that if a state grants monopoly status to a private entity such that no alternative exists for access to the service provided by the entity, then the provision of the service by the private entity constitutes state action. For the view that a state grant of monopoly status that eliminates alternatives for access to a service creates a sufficient nexus between the state and the service, see \textit{The Supreme Court, 1974 Term, supra} note 55, at 143.

\(^{65}\) 419 U.S. at 353-54 (“Doctors, optometrists, lawyers, Metropolitan, and Nebbia’s upstate grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, ‘affected with a public interest.’ We do not believe that such a status converts their every action, absent more, into that of the State.”).

The public function strand of the state action doctrine has been severely limited since \textit{Jackson}. See note 70 infra.


\(^{67}\) See, e.g., \textit{Burton v. Wilmington Parking Auth.}, 365 U.S. 715, 725-26 (1961) (“Owing to the very ‘largeness’ of government, a multitude of relationships might appear to some to fall within the [Fourteenth] Amendment’s embrace.”); \textit{Williams, supra} note 66, at 367 (“it is difficult to conceive of situations where state action is not present”). In \textit{Moose Lodge No. 107 v. Irvis}, 407 U.S. 163, 173 (1972), the Court pointed out that since state-furnished services included such necessities of life as electricity, water, and police and fire protection, any private entity could be classified as involved with state action.

\(^{68}\) See \textit{Williams, supra} note 66, at 365-69. Otherwise, the pervasive governmental regulation of society would subordinate all apparently private activity to the demands of the fourteenth amendment, thereby making no sphere of private conduct entirely free from judicial review. See generally \textit{Wahba v. New York Univ.}, 492 F.2d 96, 102 (2d Cir.), cert. denied, 419 U.S. 874 (1974); \textit{Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1119-20 (1960)}.

\(^{69}\) \textit{Burton v. Wilmington Parking Auth.}, 365 U.S. 715, 726 (1961); \textit{Lewis, supra} note 68, at 1085.

Emphasis on particular facts and on questions of degree is equally appropriate under two different conceptual approaches to state action. One approach considers
broad implications of Burton to the facts of that case, the Court seems unlikely to hold that most activities otherwise considered private will be held subject to the demands of the fourteenth amendment.\footnote{70}

A finding of state action to be a necessary condition to judicial review of the alleged underlying substantive violation of the fourteenth amendment. This approach focuses on whether the degree of explicit or implicit state involvement with the complained of activity is sufficient to justify the possibility of legal responsibility under the equal protection and due process clauses of the fourteenth amendment. Under this analysis, a court adds up the public characteristics of the activity and the defendant, and if a sufficient degree of "publicness" exists, there is state action and the private characteristics are disregarded. \textit{See note 42 supra. This approach recognizes that public activity and private activity are mutually exclusive concepts, \textit{see note 38 supra}, and the Supreme Court has consistently used this approach when addressing the state action question. \textit{See, e.g., Hudgens v. NLRB, 424 U.S. 507, 513-21 (1976); Civil Rights Cases, 109 U.S. 3, 11 (1883).}

A second approach to the concept of state action reasons from the fact of pervasive governmental regulation of and involvement in the private sector. \textit{See text at note 66 supra. It would assume the legitimacy of judicial review of all but the most purely private conduct, whether traditionally thought of as private or public, would proceed to balance the interests asserted by the parties in order to come to a determination on the merits concerning the alleged violation of the fourteenth amendment, and, if a violation were found, would, in conclusory fashion, categorize as state action the activity producing the violation. \textit{See, e.g., Black, supra note 36; Williams, supra note 66. Under this approach, the particular facts of a case are crucial in determining both the degree to which the complaining party's interests have been infringed by the conduct of the defendant and the degree to which the defendant's interests would be infringed by a holding favorable to the plaintiff. \textit{See, e.g., Wahba v. New York University, 492 F.2d 96, 102 (2d Cir.), cert. denied, 419 U.S. 874 (1974); Williams, supra note 66, at 378.}

It should be noted that under the traditional state-involvement approach to state action questions, there may be an implicit balancing of the defendant's interest in acting in the complained of manner against the plaintiff's interest in fairer treatment at the hands of the defendant. Arguably, this implicit balancing of the parties' interests has actually played a greater role in Supreme Court decisions than has the express weighing of public characteristics. \textit{See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (defendant's interest in termination of utility service upon non-payment outweighed plaintiff's interest in a hearing before termination, despite extensive governmental regulation of defendant); Shelly v. Kraemer, 334 U.S. 1 (1948) (plaintiff's interest in being free from racial discrimination outweighed defendant's interest in a private covenant, despite judicial enforcement being the only state involvement with the covenant).}

This Note speaks of state action in the traditional sense of weighing the private against the public characteristics of the activity and the defendant. Even though, in a particular case, a court may allow its finding of requisite state involvement to be affected by perceptions of the interests of the parties, the analytical focus upon state involvement forces courts to draw a sharp, if uneven, line between private and public conduct. This line provides more comprehensive protection of private activity free from governmental interference than do ad hoc determinations of judicial reviewability based primarily on a balancing of interests in individual cases.

Another strain of state action analysis that could conceivably subject activities traditionally considered private to the demands of the fourteenth amendment is the public function approach first recognized in Marsh v. Alabama, 326 U.S. 501 (1946). In Marsh, the Court held that the business district of a privately owned, or "company" town, was subject to the constitutional provisions of freedom of press and religion. The private rights of the owners were disregarded because the town had "all the characteristics of any other American town." 326 U.S. at 502. This analysis was briefly extended in Food Employees Local 590 v. Logan Valley Plaza, Inc., 391
The first case to find state action in the context of privately owned hospitals was *Simkins v. Moses H. Cone Memorial Hospital*, a case decided after *Burton* but before *Moose Lodge*. Black physicians, dentists and patients sued to restrain two hospitals from denying the physicians and dentists use of the hospitals' staff facilities and from denying patients the right to be treated by their own doctors. The plaintiffs also contested the constitutionality of the separate-but-equal provision of the Hill-Burton Act—the federal government's program to assist the states in the construction and modernization of public and nonprofit community hospitals.

Involvement in the Hill-Burton program resulted in detailed state regulation and financial assistance, which, in the case of one defendant, amounted to receipt of approximately 50 per cent of the cost of three construction projects. The court, utilizing the "sifting and weighing" test of *Burton*, found that the defendants' participation in the Hill-Burton program provided the "degree of state participation and involvement" necessary to impose constitutional requirements on hospital action. *Simkins* stressed the fact that a "massive use of public funds" resulted from participation in this case. In virtually the same breath, moreover, the court emphasized that racial discrimination was involved "in a concern touching health and life

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U.S. 308 (1968), in which the Court held that peaceful picketing of a store in a private shopping center was protected by the first amendment because the shopping center was "open to the public to the same extent as the commercial center of a normal town" and, thus, was the functional equivalent of the business district in *Marsh*. 391 U.S. at 318. This holding has been overruled by *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *Lloyd*, denying first amendment protection to picketers in a private shopping center, was distinguishable from *Logan Valley* since the picketing did not involve shopping center activities but rather was general antiwar protesting. It is now clear, however, that the Court has totally rejected the holding of *Logan Valley*, *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976), and the public function analysis appears to be limited to the facts of *Marsh*. Under this state of the law the theory has little viability in the context of privately owned hospitals.

74. 323 F.2d at 964.
75. *See* 323 F.2d at 963 n.6.
76. 323 F.2d at 967. The court also held unconstitutional the separate-but-equal provision of the Act. 323 F.2d at 969.
77. 323 F.2d at 967 ("We deal here with the appropriation of millions of dollars of public monies pursuant to comprehensive governmental plans.")
itself." The case should, therefore, not be read as requiring that state action be found in activities of all hospitals that participate in the Hill-Burton program. This is particularly true when one recalls that in Jackson detailed regulation failed to persuade the Court that state action existed.

That the receipt of extensive governmental financial assistance may serve as a primary basis for a finding of state action was settled in the Fourth Circuit by the time of Simkins. In Kerr v. Enoch Pratt Free Library, a library established through a private grant became increasingly dependent upon state aid, and at the time of trial received 99 per cent of its budget from the city of Baltimore, which also exercised a high degree of control over spending. The city also held title to the library property. Because of this extensive involvement the court found state action present and required the defendant to abandon its discriminatory policy regarding admission to its training course for library workers. Kerr, however, was clearly an extreme case. Only very rarely will a privately owned entity both receive monetary aid and relinquish control to the extent that a finding of state action could be based solely on the precedential authority of Kerr; many cases involving private hospitals.

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78. 323 F.2d at 967 ("[W]e emphasize that this is not merely a controversy over a sum of money. Viewed from the plaintiff's standpoint it is an effort by a group of citizens to escape the consequences of discrimination . . . .").

79. See 323 F.2d at 967 ("Not every subvention by the federal or state government automatically involves the beneficiary in 'state action,' and it is not necessary or appropriate in this case to undertake a precise delineation of the legal rule as it may operate in circumstances not now before the court.").

However, later Fourth Circuit cases have considered Hill-Burton participation per se sufficient for a holding of state action. E.g., Christhilf v. Annapolis Emergency Hosp. Assn., 496 F.2d 174 (4th Cir. 1974); Cypress v. Newport News Gen. & Nonsectarian Hosp. Assn., 375 F.2d 648 (4th Cir. 1967); see text at notes 95-96 infra.

80. Significantly, one commentator has observed that despite the court's emphasis upon the regulatory aspects of participation in Hill-Burton, see 323 F.2d at 964-65, the actual governmental involvement with the hospital in Simkins, apart from funding, was very slight. See Comment, supra note 11, at 145-46. It should also be noted that the United States, as intervenor for the plaintiffs in Simkins, admitted that receipt of governmental funds alone would not be sufficient to support a finding of state action. 323 F.2d at 971 (Haynsworth, C.J., dissenting); see Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 43 CORNELL L.Q. 375, 391 (1958). These considerations, along with Jackson's undercutting of regulation alone as significant to the state action inquiry, increase the importance of the particular facts in Simkins—massive public funding, see text at notes 81-85 infra—and racial discrimination, see text at notes 86-97 infra—to the finding of state action in that case and render inconclusive the effect of simple participation in the Hill-Burton program.


82. See 149 F.2d at 216.
83. 149 F.2d at 216.
84. 149 F.2d at 219.
have failed to find state action despite governmental financial assistance. 85

A possible rationale for Simkins is the offensiveness of the hospital’s action. 86 Although the Supreme Court has never formally accepted the notion “that different standards should apply to state-action analysis when different constitutional claims are presented,” 87 it has been especially willing to find state action in cases involving racial discrimination. 88 Many lower courts have followed this practice as a means to prevent a private facade from being used to insulate racially discriminatory conduct. 89 The Second Circuit, for example, “has long recognized a double ‘state action’ standard: ‘a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims.’ ” 90 The Fifth Circuit in Greco v. Orange Memorial Hospital Corporation, 91 faced with an action to compel a private hospital to perform an abortion, simply distinguished Burton as a case involving racial discrimination. 92 It reasoned that “the interest of the hospital in ordering its internal administrative affairs outweighs the interest of the people disadvantaged in this case.” 93 Commentators have also expressed the view


With something less than the almost complete governmental control that accompanied the financial aid in Kerr, the degree to which a regulated private organization is dependent for construction or operating budget on governmental aid should be determinative of the outcome. See, e.g., Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). See also note 80 supra.

86. This rationale assumes the relevance of the underlying complained of conduct to the question of state action. See, e.g., Wahba v. New York Univ., 492 F.2d 96, 102 (2d Cir.), cert. denied, 419 U.S. 874 (1974) ("determination of [state] action . . . hinges on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions"); Williams, supra note 66, at 378 ("The issue of state action is not the real issue. The issue must be resolved by a balancing of the right of personal discrimination against the state's compulsory concern for the elimination of discrimination."). See also note 69 supra.


89. See Black, supra note 36, at 95.


91. 513 F.2d 873 (5th Cir.), cert. denied, 423 U.S. 100 (1975).

92. 513 F.2d at 879.

93. 513 F.2d at 880. This sounds like a determination on the merits and is hardly relevant to the question of whether it is the state or a private entity that is acting. See note 69 supra.
that different standards are or should be applied in cases of racial discrimination. See, e.g., Williams, supra note 66, at 380; Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 COLUM. L. REV. 656, 657 (1974); Comment, supra note 11, at 153.

Abandonment of traditional state action analysis in the abortion context in order to avoid a finding of state action, when compared to similar abandonment in the context of racial discrimination in order to find state action, reflects the ad hoc nature of judicial review of the private sector when considerations of "publicness" are ignored. Due to the principled nature of constitutional adjudication, see Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959), the Supreme Court should not mold the availability of judicial review around the interests of particular groups. This is more appropriately accomplished by legislative bodies. For example, in order to prevent a private hospital from being required to perform an abortion or sterilization because of a possible finding of state action based on participation in the Hill-Burton program, see, e.g., Doe v. Bellin Memorial Hosp., 479 F.2d 736 (7th Cir. 1973), Congress enacted the Health Programs Extension Act of 1973, 42 U.S.C. §§ 300a-7(a) to -7(b) (Supp. V 1975). The Act prohibits a court from using the receipt of Hill-Burton funds as a basis for forcing a hospital to allow for such procedures if they are prohibited on the basis of religious beliefs or moral conviction. 42 U.S.C. § 300a-7 (Supp. V 1975). See Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974); Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), affd., 520 F.2d 894 (9th Cir. 1975). As pointed out in Simkins, racial discrimination is even more offensive in a hospital setting when an individual's health and life may be in jeopardy. See 323 F.2d at 967; text at note 78 supra.

This approach, however, is not without difficulties. The doctrinal basis of state action analysis does not allow an explicit balancing of interests, but rather inquires on an absolute basis into whether the state is significantly involved in otherwise private activity. See notes 38, 69 supra. Under traditional analysis, the nature of the activity does not change the nature of the action.

However, it has been argued that traditional state action analysis should be abandoned and the offensiveness of the conduct complained of should be considered in determining if state action exists. See notes 69, 86 supra. Under this approach, the interests of the private institution should be considered along with the interests of the plaintiff. See, e.g., Wahba v. New York Univ., 492 F.2d 96, 102 (2d Cir.), cert. denied, 424 U.S. 948 (1975); Note, Judicial Control of Actions of Private Associations, 76 HARV. L. REV. 983, 990 (1963):

The court should also give consideration to the weight of any existing social interest in permitting the type of conduct of which the plaintiff complains, the burden which would be imposed on such an association by judicial intervention in similar cases in the future, the burden on courts were they to take cognizance of such disputes, and the extent to which intervention might interfere with other socially recognized values promoted by such associations.

Numerous interests of a hospital are affected by judicial interference. Natural development could be stifled. See Note, supra note 3, at 1358. Reliance on internal procedures to solve hospital problems would be hampered. See Note, Exhaustion of Remedies in Private, Voluntary Associations, 65 YALE L.J. 369, 389 (1956). Regu-
validated racially discriminatory actions by hospitals on the ground that receipt of Hill-Burton funds alone was sufficient for a finding of state action. Then in *Sams v. Ohio Valley General Hospital Association* the court found state action in a hospital's bar to staff privileges for physicians who had their offices outside the county in which the hospital was located. There was, however, no allegation of racial discrimination. The court was evidently locked into an analysis in which Hill-Burton participation alone was sufficient to mandate a finding of state action regardless of other factors. The sifting and weighing of the circumstances approach had been abandoned in favor of a per se rule designed to facilitate judicial administration.

The Fourth Circuit's post-*Simkins* decisions cannot withstand analysis, whatever the merits of *Simkins* itself. The basic rule for a finding of state action is that the government must be involved "to some significant extent" in the affairs of an otherwise private institution. Any judicial practice that ignores the extreme variations in the amount of state involvement in the activities of hospitals participating in the Hill-Burton program obviously ignores the "significant extent" requirement as well as the sifting and weighing method, and can properly be described as arbitrary. Since all states have participated in Hill-Burton, a rule based solely on that participation expands the state action doctrine to many hospitals regardless of private management and ownership, a result surely intended by neither *Simkins* nor by the Supreme Court in its series of state action cases.

Requiring the quality of medical care could become more difficult if decisions on staff privileges were subject to judicial review, for a hospital's regulation of its medical staff through the granting of staff privileges is a significant method of regulating the quality of care it dispenses. *Citta v. Delaware Valley Hosp.*, 313 F. Supp. 301, 309 (E.D. Pa. 1970). Inability of a hospital to control effectively the quality of its medical staff could also cause problems in keeping the cost of insurance down, see *Citta v. Delaware Valley Hosp.*, 313 F. Supp. 301, 309 (E.D. Pa. 1970), and in proper utilization of hospital facilities. See *Dyan v. Wood River Township Hosp.*, 18 Ill. App. 2d 263, 269, 152 N.E.2d 205, 208 (1958).


96. 413 F.2d 826 (4th Cir. 1969).

97. See 413 F.2d at 828.

98. *Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc.*, 507 F.2d 1103, 1104 (9th Cir. 1974); text at notes 39-42 supra.


100. See generally *Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc.*, 507 F.2d 1103, 1104-06 (9th Cir. 1974).
The real weakness of post-*Simkins* decisions, however, is that the nexus test first articulated by the Supreme Court in *Jackson* clearly requires a search for state involvement in the challenged activity.101 *Simkins* itself can meet the nexus or causal connection102 test because the state was enforcing the separate-but-equal provisions of Hill-Burton.103 The mere receipt of Hill-Burton funds, however, gives no guidance as to whether a nexus exists between the state involvement and the challenged activity.

The nexus approach in a nonhospital but somewhat similar setting is illustrated by *Powe v. Miles*.104 Students at Alfred University who participated in a demonstration during an ROTC parade were suspended when they refused to comply with the dean’s order to disband. They brought an action under the Civil Rights Act105 demanding reinstatement. The court was unimpressed with state regulations imposed on the university because that approach “overlooks the essential point—the state must be involved not simply with some activity of the institution . . . but with the activity that caused the injury.”106

A number of other circuits have adopted the *Powe* approach. In *Ascherman v. Presbyterian Hospital of the Pacific Medical Center, Inc.*,107 for example, the assets of one hospital had been transferred to the defendant, which terminated all staff privileges of physicians from the former facility. The plaintiff submitted a request for staff privileges at the defendant hospital, but was rejected. The court, although purportedly relying on *Burton*,108 clearly based its decision on the nexus test. Instead of speaking of general involvement in the affairs of the hospital, it searched for “a connection between the state’s involvement and the plaintiff’s deprivation” and “a sufficient connection between the state and the private activity of which appellant complains.”109 Because it found no statute or regulation authorizing either the state or federal government to participate in

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101. See text at note 56 supra. State involvement in the challenged activity, as opposed simply to involvement with the actor, had been the focus of a number of courts even prior to *Jackson*. These courts often stated that they were looking for a “causal connection” between the state and the complained of injury. See, e.g., *Ward v. St. Anthony Hosp.*, 476 F.2d 671, 676 (10th Cir. 1973); *Ozlu v. Lock Haven Hosp.*, 369 F. Supp. 285, 288 (M.D. Pa. 1974), aff’d., 511 F.2d 1395 (3d Cir. 1975).

102. See note 101 supra.

103. See note 72 supra. Other courts have pointed out the nexus or causal connection in *Simkins*. See, e.g., *Ascherman v. Presbyterian Hosp.*, 507 F.2d 1103, 1104-05 (9th Cir. 1974); *Ward v. St. Anthony Hosp.*, 476 F.2d 671, 675 (10th Cir. 1973).

104. 407 F.2d 73 (2d Cir. 1968).


106. 407 F.2d 73, 81 (2d Cir. 1968).

107. 507 F.2d 1103 (9th Cir. 1974).

108. 507 F.2d at 1104.

109. 507 F.2d at 1105 (emphasis added).
decisions on hospital staff privileges, the court held that no state action was present. A similar result was reached by the Tenth Circuit in *Ward v. St. Anthony Hospital* in the context of the dismissal of a physician and in numerous other recent cases.

It may be, however, that a court need not choose between the nexus test and the sifting and weighing test, for there is no apparent reason why the two are mutually exclusive rather than complementary methods of analysis in the state action context. In clear cases of causal connection or nexus, such as *Simkins*, it is not necessary to search further for state action. It would seem entirely proper, however, when no nexus is found, for a court then to weigh all the circumstances of the case and appropriately hold that the state is involved in the otherwise private activity to such a significant extent that state action must be found under *Burton*. It is this "nonobvious involvement of the state in [the] private conduct" that has been overlooked in many recent decisions, including perhaps the *Jackson* decision itself. Totally ignoring the degree of state involvement in the general activities of the defendant so long as there is no state involvement in the challenged activity itself is no more reasonable than the post-*Simkins* Fourth Circuit analysis that ignored the degree of state involvement in all cases in which the hospital participated in the Hill-Burton program. Just as the concept of a common-law fiduciary relationship between a hospital, its staff and the public can be pushed beyond reasonable limits when all hospitals become subject to judicial review, the state action analysis was distorted when the Fourth Circuit went beyond the factual setting of *Simkins* and adopted a rigid "Hill-Burton equals state action" approach. In both state and federal courts the desire for an easily applied rule resulted in judicial encroachment into areas reserved either to other governmental branches or to private citizens. By confining its activities to

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111. 476 F.2d 671 (10th Cir. 1973).


113. See text at notes 102-03 supra.


115. See note 64 supra; cf. note 61 supra.

116. See text at notes 8-34 supra.

117. See text at notes 18-35 supra.
areas clearly mandated by the Constitution or by statute, the judiciary serves its finest traditions. In the state law setting, a thorough review of the allegations of "publicness" in hospitals protects any possible state interest without improperly sacrificing the rights of private citizens and entities. In the federal constitutional framework, the two-level analysis combining the nexus test of *Jackson* with the earlier but compatible "nonobvious involvement" test of *Burton*, as applied in the hospital context, avoids the inflexible post-*Simkins* approach without sacrificing the wisdom of *Simkins* itself. This produces a proper balance of judicial restraint and the judicial obligation to insure that legal rights of citizens are adequately protected.