Michigan Law Review

Volume 62 | Issue 8

1964

# State Action, State Law, and the Private Hospital

Mary Mandana Long
*University of Michigan Law School*

## STATE ACTION, STATE LAW, AND THE PRIVATE HOSPITAL

On March 2, 1964, the United States Supreme Court denied a petition to review by certiorari the decision in *Simkins v. Moses H. Cone Memorial Hosp.*[1] By declining to review the case the Supreme Court left unaffected[2] the holding of the Court of Appeals for the Fourth Circuit that two private hospitals which had participated in the Hill-Burton program of federal hospital assistance[3] were sufficiently involved with governmental action, both state and federal, to bring their conduct within the fifth and fourteenth amendment prohibitions against racial discrimination.[4] This deci-

1 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 84 S. Ct. 793 (1964) [hereinafter referred to as the principal case].

2 A denial of a petition for certiorari simply means that fewer than four members of the Court deemed it desirable to review the decision. The Court has stated that such a denial carries with it no implication whatever regarding its views on the merits of the case. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950). See also Brown v. Allen, 344 U.S. 443 (1953).

3 Funds for federal aid for construction of hospital and related health facilities are made available through annual appropriations by Congress. These appropriations are then allocated among the states and possessions in accordance with a statutory formula based on population and relative per capita income of the states and possessions. States wishing to participate must inventory existing facilities, determine hospital construction needs, and develop construction priorities according to federal standards. State agencies make these inventories and then adopt state-wide plans which are submitted to the Surgeon General of the United States for approval. Hospital Survey and Construction Act, 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291 (1958).

4 The court also found that portion of the Hill-Burton Act which tolerated "separate but equal" facilities for separate population groups, and a regulation pursuant to that portion, unconstitutional. 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291e(f) (1958); 42 C.F.R. § 53.112 (1960). This aspect of the decision seems clearly correct under Brown v. Board of Education, 347 U.S. 483 (1954), and Bolling v. Sharpe, 347 U.S. 497 (1954). The court stated that, because the statute and regulation sanctioned unconstitutional practice, it was necessary to pass upon their validity in order to make the injunctive relief granted effective. Principal case at 969.

sion will probably affect all of the 3,346 private, non-profit hospitals in the United States and its possessions which have received federal funds for building construction under the Hill-Burton program.[5]

In the principal case a class action was brought in a federal district court by a group of Negro physicians, dentists, and patients seeking to restrain the defendant hospitals from denying the use of staff facilities to Negro doctors and dentists and from refusing admittance to Negro patients. Both defendants were non-profit hospitals owned and governed by boards of trustees and duly constituted charitable corporations under state law. They both participated in the Hill-Burton program,[6] and both discriminated on the basis of race. The district court granted defendants' motion to dismiss on the ground that no "state action" was present, and denied the motion by the plaintiffs and the United States[7] for summary judgment.[8] The plaintiffs and the United States appealed to the Court of Appeals for the Fourth Circuit, which, sitting en banc, found that there was state

5 Journal of the American Hospital Association, Guide Issue, Aug. 31, 1963, p. 448. As of June 30, 1962, there were 2,950 Hill-Burton projects approved for the 3,346 voluntary non-profit hospitals in the United States. Because some private hospitals have been engaged in more than one project, this number is somewhat larger than the number of such hospitals receiving Hill-Burton funds; nevertheless, the approximate correlation is sufficiently close to indicate the vast impact of the holding in the principal case.

As of June 30, 1962, $1,751,204,000 of federal funds was approved for 6,236 projects, the total cost of which was to be $5,523,280,000. Of these projects 3,286, with a total cost of $2,112,073,000, were publicly owned. The federal share of the cost of these projects was $768,937,000, or 36.4%. The hospitals which will be affected by the decision in the principal case are the private non-profit organizations, for there is no doubt that the activities of hospitals that are state or municipally owned constitute "state action." See Appendix *infra*.

6 The Moses H. Cone Memorial Hospital had received a total of $1,269,950 of Hill-Burton funds in connection with the construction of a diagnostic and treatment center and an addition to its general facilities. The Hill-Burton funds constituted approximately 17.2% of the total cost of $7,367,023 of these two projects. The hospital is a large and successful one with facilities worth millions of dollars and a substantial endowment, and the government subsidies amounted to a very small portion of the total cost of the hospital facilities.

The Wesley Long Hospital undertook three projects costing a total of $3,927,385 which were designed to replace its antiquated general facilities with modern ones, to enlarge its capacity from 78 to 150 beds, and to construct a laundry and a nurses' training school. It received $1,948,100 of Hill-Burton funds, which is approximately 49.6% of the total cost of these projects. The ratio of the subsidy to the total value of all of its facilities does not appear. Principal case at 963, 971.

It is perhaps arguable that construction of a separate laundry or a nurses' training school with government funds is not adequate reason for bringing the entire hospital within the scope of the fourteenth amendment. This question was not raised in the principal case because both defendant hospitals received Hill-Burton funds for the construction of general hospital facilities. However, the court did not indicate that it would make any distinctions with reference to the type of facilities constructed. Indeed, as long as the facility constructed is part of the total operations of the hospital, the hospital as a whole has been aided and there would seem to be no reason for such a distinction.

7 The United States intervened because the proceeding was one in which the constitutionality of an act of Congress affecting the public interest was drawn in question. 28 U.S.C. § 2403 (1958); FED. R. CIV. P. 24(a).

8 Simkins v. Moses H. Cone Memorial Hosp., 211 F. Supp. 628 (M.D.N.C. 1962).

action, and remanded to the district court with directions to grant injunctive relief.[9]

The decision in the principal case presents a conflict between two lines of legal authority which, while ordinarily separate and distinct, are in this context confusingly intermingled. The first legal development is the expansion of the concept of state action as a federal constitutional concept, exemplified by the principal case. The second involves a series of state decisions which have firmly established that, as a matter of state law, a private hospital has complete discretion to determine who may use its facilities.[10] These two lines of authority collide in the type of fact situation involved in the principal case, and it is therefore necessary to determine what effect the expansion of the concept of state action to include actions formerly deemed private will have upon a doctrine which has developed on the basis of state law with little or no regard given to possible federal constitutional principles. Section one of the fourteenth amendment to the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.[11] That the fourteenth amendment is not a limitation on private action has been considered settled since the *Civil Rights Cases* were decided in 1883.[12] Three years before that the Court had stated that "A State acts by its legislative, its executive, or its judicial authorities," and that when anyone "by virtue of public position under a State government . . . acts in the name and for the State, and is clothed with the State's power, his act is that of the state."[13]

9 Principal case at 969.

10 Edson v. Griffen Hosp., 21 Conn. Supp. 55, 144 A.2d 341 (Super. Ct. 1958); West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953); Natale v. Sisters of Mercy, 243 Iowa 582, 52 N.W.2d 701 (1952); Hughes v. Good Samaritan Hosp., 289 Ky. 123, 158 S.W.2d 159 (1942); Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946); Leider v. Beth Israel Hosp. Ass'n, 11 N.Y.2d 205, 182 N.E.2d 393, 227 N.Y.S.2d 900 (1962); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554 (1924), *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925); Weary v. Baylor Univ. Hosp., 360 S.W.2d 895 (Tex. Civ. App. 1962); Khoury v. Community Memorial Hosp., 203 Va. 236, 123 S.E.2d 533 (1962).

11 U.S. CONST. amend. XIV, § 1. The fifth amendment provides that no person shall be deprived of life, liberty or property without due process of law. U.S. CONST. amend. V. This amendment is a limitation solely upon the federal government. Barron v. Mayor & City Council, 32 U.S. (7 Pet.) 243 (1833). The Constitution does not contain an equal protection clause applicable to the federal government. However, the due process clause, in serving as a restraint on arbitrary legislation, tends to secure equal protection of the laws. In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court held that compulsory racial segregation in District of Columbia schools violated the due process clause of the fifth amendment. See Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1937); Truax v. Corrigan, 257 U.S. 312, 331 (1921); Korematsu v. United States, 323 U.S. 214, 235 (1944) (dissent).

12 109 U.S. 3, 11 (1883); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

13 *Ex parte* Virginia, 100 U.S. 339, 347 (1880). In a recent decision the Supreme Court, citing *Ex parte Virginia*, held that statements by a city mayor and chief of police that the city would not permit Negroes to seek desegregated service in restaurants were authoritative acts of the executive, and that the city must therefore be treated as if it had an ordinance prohibiting such conduct. Although it did not decide the issue, the Court indicated that such statements, together with the fact of previous arrests of Negroes attempting to obtain

If the concept of state action had been limited to the official acts of state officials, it would have been so easy to avoid state action that the fourteenth amendment would have been largely ineffectual. Thus, a problem which has plagued the federal courts since 1883 is the determination of when action by private individuals is to be deemed state action for purposes of the fourteenth amendment. It was not a long step from official acts of a state official to the unofficial acts of a state official done under "color of state authority."[14] Similarly, state action was found where a state official, although in a position to use the authority of his office to prevent action which resulted in a denial of due process or equal protection, failed to do so.[15] The Supreme Court had no difficulty in finding state action where a private person acted in a discriminatory manner under compulsion of a state statute or local ordinance.[16] It is only in the past two decades, however, that it has been recognized that there can be state action where a private party acts in his private capacity and without compulsion of state law. The initial extension of the state action concept into the area of wholly private activity was made in those instances where the private party was performing a "basic state function."[17] Next, when the state, through its judicial branch, enforced private discrimination, the Court found state action in the affirmative sanctioning of such discrimination.[18]

In addition to the cases which could easily be categorized into the somewhat definitive groups mentioned above, there appeared a number of lower federal court cases in which state action was found which did not fit into any category. In *Kerr v. Enoch Pratt Free Library*[19] state action

such service, showed that the owner's action was coerced by the city officials. Lombard v. Louisiana, 373 U.S. 267, 278 (1963).

14 Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945).

15 McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).

16 Buchanan v. Warley, 245 U.S. 60 (1917); Truax v. Raich, 239 U.S. 33 (1915). In 1963 the Supreme Court reversed criminal trespass convictions of Negroes who refused to heed the proprietors' orders that they leave the white sections of certain lunch counters. The Negroes were ordered to leave because of their race, and local ordinances required segregation of the races at such facilities. Adopting the phraseology of its holding in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court stated that when a state has commanded a particular result, it has the power to determine that result and thereby has "become involved" in it "to a significant extent." Peterson v. Greenville, 373 U.S. 244, 248 (1963). In Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963), the Court reversed the convictions of two ministers who had aided and abetted violation of a local criminal trespass ordinance by inciting sit-in demonstrations, stating that there could be no conviction for aiding and abetting someone to do an innocent act.

17 Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944). The *Terry* and *Smith* cases arose under the fifteenth amendment, which also requires state or federal action. U.S. CONST. amend. XV.

18 Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948). This form of state action, however, has not yet been extended to its logical extremes. See Black v. Cutter Labs., 351 U.S. 292 (1956). See generally Comment, *Impact of Shelley v. Kraemer on the State Action Concept*, 44 CALIF. L. REV. 718 (1956).

19 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945).

was found in the substantial control exerted by the city through regulatory requirements attached to large subsidies which it granted to the library.[20] The granting of government aid, however, was apparently not deemed sufficient in the absence of substantial regulatory control.[21] Where the Government collusively used a private party as its agent to achieve indirectly a purpose which the government itself could not constitutionally achieve, however, such as the leasing of public swimming pools to private parties to avoid integration, the discriminatory acts of these private parties were held acts of the state.[22] Similarly, where a government undertook to provide a public service on its own property and procured a private party to operate the service, such as by awarding a restaurant concession in an air terminal, the conduct of the private party while performing this function was deemed to be that of the state for purposes of the fourteenth amendment, even though the state had not intended that the service be performed on a discriminatory basis.[23] While these decisions cannot be neatly categorized, they indicate that the lower federal courts sensed that there could be a private-state relationship of such a nature that the acts of the private party would be acts of the state for the purposes of the fourteenth amendment, even though there was no official state action, no formal delegation of state authority, and no state authorization of the discriminatory acts. This rather unformed and nebulous feeling was given verbal expression by the Supreme Court in *Burton v. Wilmington Parking Authority*.[24] Although the Court declined to give a precise definition of state action,[25] it held that a state could become so substantially involved in an otherwise private activity that that activity would constitute state action even though the state neither exercised control over it nor gave it direct financial support.[26] The Court refused to enunciate a precise formula for determining

20 *Id.* at 219.

21 Eaton v. Board of Managers of James Walker Memorial Hosp., 261 F.2d 524 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959), overruled by Eaton v. Grubbs, 32 U.S.L. WEEK 2523 (4th Cir. April 1, 1964); Hackley v. Art Builders, Inc., 179 F. Supp. 851 (D. Md. 1960); Mitchell v. Boys Club of Metropolitan Police, 157 F. Supp. 101 (D.D.C. 1957); Norris v. Mayor & City Council, 78 F. Supp. 451 (D. Md. 1948).

22 City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957) (the successful plaintiff-appellee in this case was apparently the same George C. Simkins, Jr. who prevailed in the principal case); Department of Conservation v. Tate, 231 F.2d 615 (4th Cir. 1956); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D.W. Va. 1948).

23 Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956); Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960).

24 365 U.S. 715 (1961).

25 "[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task,' which 'This Court has never attempted.'" *Id.* at 722. The Court also indicated that its decision was limited to the facts of the particular case. *Id.* at 726. However, in view of the fact that in the *Peterson* case the Court specifically quoted from *Burton* in framing its decision (see note 16 *supra*), it would seem that *Burton* may now be properly regarded as enunciating a broad rule of law.

26 The *Burton* case involved an owner of a restaurant who leased space in a municipal parking structure and who was found to have violated the fourteenth amendment when

what constitutes sufficient involvement, and stated that only by sifting the facts and weighing the circumstances of each case could "nonobvious involvement" of the state in private conduct be attributed its true significance.[27] The important elements of the relationship in issue in *Burton* which led the Court to find sufficient involvement of the state in the activities of the privately operated restaurant were the continuous relationship between the parties, the interdependence and the mutual benefits conferred, the fact that restaurants are normally open to the general public, the fact that the restaurant was located in a public building and was likely to be associated by most people with the state, and the fact that the state could have prohibited the discrimination and did not do so.[28]

The *Burton* holding placed in doubt the validity of previous lower court decisions in which no state action was found because the state did not actually control the actions of the private party.[29] Thus, in *Eaton v. Grubbs*[30] the plaintiffs who had been denied relief in *Eaton v. Board of Managers of James Walker Memorial Hosp.*[31] sued the same defendant asking that the issue of state action be reconsidered because the previous decision had applied a day-to-day control test instead of considering the totality of the relationship. The district court dismissed the action for lack of jurisdiction, stating that *Burton* did not enunciate a new principle of law and that, as stated in *Burton*, each case was to be decided on its own facts.[32] It seems difficult to deny, however, that *Burton* did expand the concept of state action to include activities which were formerly not included, and this view has recently received judicial approval.[33] If the group of pre-*Burton* cases which had found no state action despite significant state involvement had been decided after *Burton*, they probably would have been decided differently. Significantly, the *Burton* principle of considering the totality of the state-private relationship has been used to find state

he excluded Negroes. The city did not encourage the discrimination, but it could have prohibited it in the lease. The rents were essential to the city's plan to operate the garage on a self-sustaining basis, and the restaurant depended on the existence of the parking garage to attract some customers. Also, the restaurant was operated as an integral part of the public building. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

27 *Id.* at 722.

28 *Id.* at 723-25.

29 See cases cited in note 21 *supra.*

30 216 F. Supp. 465 (E.D.N.C. 1963), *rev'd*, 32 U.S.L. WEEK 2523 (4th Cir. April 1, 1964).

31 261 F.2d 524 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959). This case was overruled by Eaton v. Grubbs, 32 U.S.L. WEEK 2523 (4th Cir. April 1, 1964).

32 Eaton v. Grubbs, 216 F. Supp. 465 (E.D.N.C. 1963), *rev'd*, 32 U.S.L. WEEK 2523 (4th Cir. April 1, 1964).

33 After its decision in the principal case, the Court of Appeals for the Fourth Circuit, sitting en banc, reversed the decision of the district court in *Eaton v. Grubbs*. Relying on its decision in the principal case and upon Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), *cert. denied sub nom.* Ghioto v. Hampton, 371 U.S. 911 (1962), as well as upon *Burton*, the court stated that "a new and independent examination must be made of the relationship between the governmental bodies and the . . . Hospital." The court went on to find the hospital subject to the fourteenth amendment. Eaton v. Grubbs, 32 U.S.L. WEEK 2523 (4th Cir. April 1, 1964), *reversing* 216 F. Supp. 465 (E.D.N.C. 1963).

action in two recent cases where clearly there would have been none before. In *Hampton v. City of Jacksonville*,[34] the court found sufficient involvement to constitute state action where a city sold two public golf courses to private citizens with reverter to the city if they should cease to be so used. The city had sold the golf courses to the private parties only after earlier in the litigation an injunction had issued prohibiting the city from operating them on a racially restricted basis. Indicating that it was irrelevant whether there had been a collateral agreement whereby the private parties would continue to segregate the golf courses, the court said that "the only question is a legal one: Do the agreed facts compel the conclusion that the operation of the golf course in the hands of the new owners continue to be state action within the purview of the XIV amendment?"[35] The court felt that the absolute obligation of the private parties to use the land only as a golf course, enforced by use of the reverter, brought the activity within the fourteenth amendment even though the daily operation was not subject to the city's direction. In *Smith v. Holiday Inns*[36] discrimination by a private motel was held state action. The court found sufficient involvement because a state housing authority had cleared a slum area and redeveloped it, supervising the kinds of buildings constructed. When the land was conveyed to the private purchasers, the state authority retained some continuing control by means of restrictive covenants for the breach of which it had a right of action.

It was on the basis of the *Burton* standard of analyzing the total relationship of the private party and the state that the court in the principal case determined that there had been sufficient involvement of the state and federal governments in the affairs of the defendant hospitals to constitute state and federal action within the fourteenth and fifth amendments. The involvement was found in the participation of defendants in the massive public funds available under the Hill-Burton program, the governmental regulations to which participating hospitals are subject, and the federal-state sharing of a common plan for a proper allocation of available medical and hospital resources.[37]

[34] 304 F.2d 320 (5th Cir.), *cert. denied sub nom.* Ghioto v. Hampton, 371 U.S. 911 (1962). In finding state action the court specifically questioned the validity of *Eaton v. Board of Managers of James Walker Memorial Hosp.* in the light of *Burton*. "Being unable, as we are, to find any valid distinction between the effect of the lease in the Wilmington Parking Authority case and the sale with a reversionary interest in the Walker Hospital case, we doubt whether the Court of Appeals for the Fourth Circuit would have decided the Hospital case as it did had it followed the Supreme Court decision." *Id.* at 323.

[35] *Id.* at 321.

[36] 220 F. Supp. 1 (M.D. Tenn. 1963).

[37] The dissenting judge did not think there was sufficient involvement. He argued that the program was intended by Congress to be merely a grant and not a regulatory scheme (60 Stat. 1091 (1946), 42 U.S.C. § 291m (1958); *Hearings on S. 191 Before the Senate Committee on Education and Labor*, 79th Cong., 1st Sess. 22 (1945)), that the state commission was not empowered to exercise any regulatory functions (see N.C. GEN. STAT. § 131-120 (1958)), that the regulations imposed by the statute were no more than devices to secure proper use of the money, and that therefore there was no state action. Principal case at 972-75.

Notwithstanding the steady expansion of the concept of state action, which, culminating in the principal case, has finally placed the activities of many private hospitals within the commands of the fourteenth amendment, the overwhelming majority of state courts have firmly established that for state-law purposes a private hospital has complete discretion over the use of its facilities. Two recent cases exemplify the rationales of both the majority position and the minority view, held only by New Jersey. In *Shulman v. Washington Hosp. Center*,[38] a physician sued for reinstatement as a member of the courtesy staff of a hospital owned and operated by a private corporation, and a federal district court in the District of Columbia held that a private hospital may admit or exclude patients and appoint or remove members of its medical staff in its discretion. In *Greisman v. Newcomb Hosp.*[39] an osteopathic physician sued to force a private hospital to consider his application for admission to its courtesy staff, but in this case the Supreme Court of New Jersey held that a hospital, although private in the sense that it is non-governmental, is sufficiently imbued with a public aspect that it was subject to public supervision and can not exercise its power to admit physicians to staff membership arbitrarily or unreasonably.

The majority view, as illustrated by the *Shulman* case, starts with the proposition that all hospitals are either public or private. A public hospital is one owned, maintained, and operated by a governmental unit and supported by government funds. A private hospital is one that is owned, maintained, and operated by a corporation or individual without governmental participation in its control.[40] The distinction has typically been made in terms of public and private corporations. The most frequently cited formulation of the distinction was made in *Van Campen v. Olean Gen. Hosp.*,[41] where it was stated that a public corporation is 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, whereas a corporation organized by permission of the legislature, supported largely by voluntary contributions, and managed by officers and directors who are not representatives of the state or any political subdivision is a private corporation, although engaged in charitable work.[42] The fact that a private hospital may receive donations or subventions from the government, or compensation for caring for indigent patients, is deemed to be immaterial.[43] Once a hospital has established its character as a private institution, it is not required to accept any person who demands access to its facilities, "as there can be no absolute right in individuals to claim the

38 222 F. Supp. 59 (D.D.C. 1963).

39 40 N.J. 389, 192 A.2d 817 (1963).

40 Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 61 (D.D.C. 1963).

41 210 App. Div. 204, 205 N.Y. Supp. 554 (1924), *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925).

42 Levin v. Sinai Hosp., 186 Md. 174, 178, 46 A.2d 298, 300 (1946).

43 West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554 (1924), *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925); Khoury v. Community Memorial Hosp., 203 Va. 236, 123 S.E.2d 533 (1962).

benefit of its privileges."[44] It follows under the majority view, therefore, that if a private hospital in its discretion excludes a doctor or patient from the use of the facilities of the hospital, the courts are without authority to interfere.[45]

The *Greisman* case is a clear statement of the New Jersey view. The court accepted the public corporation-private corporation distinction enunciated in the *Van Campen* case. However, it held that a combination of factors may exist which imbue a private hospital with a public aspect so that it is subject to the state police power to regulate for the health, safety, and morals of the public. In *Greisman* the factors deemed important to the finding that Newcomb Hospital was imbued with a public aspect were: it was a non-profit organization dedicated to a vital public use; as such, it received tax benefits; its funds were in large part received from public sources and through public solicitation;[46] and it exercised a virtual monopoly in its geographical area. Making reference to the common-law duties of innkeepers and carriers to serve all comers on reasonable terms[47] and the statutory obligations imposed upon private businesses such as warehouses, insurance companies, and milk distributors,[48] the court pointed out that a state may "upon proper occasion . . . regulate a business in any of its aspects. . . ."[49] Conceding that hospital officials must be vested with a large measure of discretion in managing a private hospital, the court stated that they must remember that such hospitals are operated for the benefit of the public,[50] and that courts would be remiss if they did not intervene where that discretion is exercised in a manner unrelated to sound hospital standards and not in furtherance of the common good.[51]

Although the opinions of the courts following the majority view fail to make it totally clear,[52] it is apparent that when they speak of the ab-

44 Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 62 (D.D.C. 1963); Levin v. Sinai Hosp., 186 Md. 174, 180, 46 A.2d 298, 301 (1946); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554 (1924), *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925).

45 See cases cited note 10 *supra*.

46 The cost of a new building for the defendant hospital had been borne by public subscription, it had received local funds for caring for indigents, it had received charitable contributions from the Ford Foundation and other similar organizations, and it was eligible for Hill-Burton funds. Greisman v. Newcomb Hosp., 40 N.J. 389, 392, 192 A.2d 817, 818 (1963).

47 *E.g.*, Garifine v. Monmouth Park Jockey Club, 29 N.J. 47, 50, 148 A.2d 1, 2 (1959); Messenger v. Pennsylvania R.R., 36 N.J.L. 407 (Sup. Ct. 1873), *aff'd*, 37 N.J.L. 531 (Ct. Err. & App. 1874).

48 *E.g.*, Nebbia v. New York, 291 U.S. 502 (1934); German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914); Munn v. Illinois, 94 U.S. 113 (1876).

49 Nebbia v. New York, *supra* note 47, at 536-37.

50 Supporting this point of view that private corporations serving the public have higher duties than ordinary private corporations is the virtually unanimous rule that such corporations cannot contract away their liability for negligence. See Tunkl v. Regents of the Univ. of Calif., 32 Cal. Rptr. 33, 383 P.2d 441 (Cal. 1963).

51 The court also relied heavily upon a prior decision in Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961), in which it had declared invalid an arbitrary membership requirement of a county medical society. Greisman v. Newcomb Hosp., 40 N.J. 389, 399-403, 190 A.2d 817, 822-24 (1963).

52 An exception is West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953).

solute discretion of the managing officials of a hospital they do not mean that this discretion could not be subjected to control by the legislature under the state police power. Thus, the real distinction between the majority and minority views would seem to be that the majority view holds that the legislature alone can exercise control over private hospital management, while the New Jersey court holds this to be a proper judicial function.[53]

Although the rule adopted in New Jersey and the rule set forth in the principal case overlap in the sense that both may be applicable to a single situation, they are nevertheless separate and distinct. Different factual prerequisites are necessary to invoke the two rules, and the consequences of their application are different. The New Jersey court in *Greisman* indicated that the crucial element was the public aspect of the hospital,[54] whereas the court of appeals in the principal case was looking for governmental involvement in the activities of the hospital.[55] In finding a public aspect, the New Jersey court emphasized the non-profit, charitable nature of the hospital and the fact that it received a large portion of its funds from a governmental source or from public solicitation of private persons.[56] To find sufficient governmental involvement, however, the court in the principal case stressed the control exerted by the government over the hospital, the large amount of government funds involved, and the participation of the hospital in a nationwide plan for allocation of hospital facilities.[57] Also, to the New Jersey court the fact that the defendant was the only hospital in the area and thus had a virtual monopoly was very important.[58] Under the reasoning of the principal case this factor would be irrelevant. Having found that a particular hospital is imbued with a public aspect, a court in New Jersey may, in the exercise of the state police power, exert extensive control over the discretion of the hospital authorities.[59] This is not true under the rule of the principal case; if there is governmental involvement sufficient to constitute state action, the court may only prohibit the hospital authorities from exercising their discretion so as to deny to anyone due process of law or the equal protection of the

53 Even courts adhering to the majority view concede that courts may properly review claims of arbitrary exclusion that are brought against public hospitals. *E.g.*, Ware v. Bendikt, 225 Ark. 185, 280 S.W.2d 234 (1955); Stribling v. Jolly, 241 Mo. App. 1123, 253 S.W.2d 519 (1953); Alpert v. Board of Governors, 286 App. Div. 542, 145 N.Y.S.2d 534 (1955).

54 Greisman v. Newcomb Hosp., 40 N.J. 389, 397-404, 192 A.2d 817, 821-25 (1963).

55 Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 960 (4th Cir. 1963).

56 Greisman v. Newcomb Hosp., 40 N.J. 389, 396, 192 A.2d 817, 821 (1963).

57 Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 967 (4th Cir. 1963).

58 Greisman v. Newcomb Hosp., 40 N.J. 389, 402, 192 A.2d 817, 824 (1963).

59 For example, the court could, under the state police power, regulate the prices charged by the hospital if it felt they were so exorbitant as to deprive persons of proper medical care. See cases cited in note 46 *supra; cf.* Group Health Ins. v. Howell, 40 N.J. 436, 193 A.2d 103 (1963), where the New Jersey court declared invalid a statute requiring approval of the state medical society before a medical insurance company could be licensed to do business in the state where the membership of the medical society interlocked with the membership of the board of directors of the only medical insurance company in existence in New Jersey.

laws. The extent of judicial control over the hospital authorities is thus substantially narrower than that permitted under the New Jersey rule.

Considering the state cases[60] in conjunction with the principal case, it is necessary to realize that the state cases have been decided on the basis of state law concerning the rights and privileges of corporations;[61] the rights and duties of the parties under the federal constitution were not considered. However, as illustrated by the principal case and the *Hampton* and *Holiday Inns* decisions, the principle of *Burton v. Wilmington Parking Authority* is broad and capable of a variety of applications. Consequently, an application of the *Burton* test to the facts of many of the state-law cases would have resulted in finding state action. Any time the activities of a hospital, which under state law is a private hospital, are found to constitute state action, the right-privilege distinction on which the state cases have turned, although still relevant for purposes of state law, would no longer matter; whether admission to the facilities of a private hospital is a right or a privilege under state law is irrelevant to whether there is a protectible interest under federal constitutional law. It is true that in *Hayman v. Galveston*[62] the Supreme Court of the United States held that use of hospital facilities is a privilege and not a constitutional right. However, in virtually every case where a claim of discriminatory exclusion or expulsion is brought against a private hospital, whether by a physician or a patient, the basis of the claim will be action which was arbitrary or unreasonable. If the claimant had attained some sort of permanent position in the hospital before the complained of action occurred, such as having been appointed to the medical staff, he could rightfully claim that he had been deprived of a valuable interest, cognizable as property, without due process of law. However, if the court refused to consider that interest as property or if the claimant had merely been excluded, he could justly claim that an arbitrary and irrational standard had been applied, depriving him of the equal protection of the laws. Thus, whether he has a right or merely a privilege he will have an interest protectible under the fourteenth amendment, and the only purpose of the right-privilege distinction will be to determine whether the claimant is entitled to relief under the due process or the equal protection clause.[63]

[60] Henceforth the state cases will be considered without regard to the split of authority. If a plaintiff in New Jersey proceeds under state law and the actions complained of are found to be arbitrary, the suit will be decided on the basis of state law. If the actions are found not to be arbitrary under state law, the fourteenth amendment will have the same ramifications as in all majority jurisdictions.

[61] Occasionally a state court will confuse matters by citing Hayman v. Galveston, 273 U.S. 414 (1927), in reaching its decision according to state law. That case held that use of hospital facilities is a privilege, not a constitutional right, although it might be a denial of equal protection if a public hospital arbitrarily excluded persons from the use of its facilities. See Edson v. Griffen Hosp., 21 Conn. Supp. 55, 144 A.2d 341 (Super. Ct. 1958).

[62] 273 U.S. 414 (1927).

[63] The right-privilege distinction is important in situations where a plaintiff is not able to argue that he had been denied equal protection of the laws, but can only claim that he has been deprived of life, liberty, or property without due process of law. In such situations the idea that a privilege once granted may sometimes be protected under the

The key question, therefore, is whether there is sufficient state action to bring the conduct of the private hospital within the prohibitions of the fourteenth amendment.[64] In many situations the question will be answered by the principal case, which, while following the *Burton* approach of examining the total relationship, extends its outer limits by expanding the notion of what constitutes sufficient involvement. This extension is not a disturbing one, however, for when a substantial amount of public funds is granted to a private organization to aid it in its performance of a public service it would be inequitable if that service were not available to everyone on an equal basis.[65] In *Cooper v. Aaron*[66] the Supreme Court emphatically stated that state support of segregated schools "through any arrangement, management, funds or property could not be squared with the fourteenth amendment."[67] This principle ought to apply with equal force to any other public function performed by a private organization, and it certainly is appropriate to a function so basic to the existence of the state as the preservation of the health of the public.[68] Furthermore, since state support of unreasonable discrimination cannot be squared with the fourteenth amendment, it is all the more distasteful when, in violation of the fifth amendment, the federal government, through such programs as the Hill-Burton Act, indirectly supports discrimination. By striking down an instance of discrimination in which both state and federal governments were involved, the decision in the principal case has taken an important step in making the guarantees of the fifth and fourteenth amendments realities for persons unreasonably denied the use of private hospital facilities.[69]

*Mary Mandana Long*

fourteenth amendment would be of significance. See Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952). In many of the state cases the plaintiffs were asking for reinstatement of a privilege previously held rather than the granting of a new privilege. The notion that a privilege once granted may not be taken away without due process, however, is not mentioned in any of the private hospital cases. It was recognized in Alpert v. Board of Governors, 286 App. Div. 542, 145 N.Y.S.2d 534 (1955), which involved a public hospital.

64 Or else sufficient federal action to bring it within the fifth amendment.

65 *Cf.* Steir v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959).

66 358 U.S. 1 (1958).

67 *Id.* at 19.

68 *Cf.* cases cited in note 17 *supra.*

69 The extension of judicial control over the activities of private hospitals would be complete if a proposition analogous to that advocated by Judge Skelly Wright in relation to higher education were adopted. In Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962), Judge Wright granted on other grounds the motion of Negro plaintiffs who sought admission to Tulane, but pointed out that, in view of the great public interest in education and the fact that private colleges perform a public function, there is no school or college so "private" as to escape the reach of the fourteenth amendment. After Judge Wright was transferred to the Court of Appeals for the District of Columbia, however, a motion for a new trial was granted by his successor on the ground that summary judgment was inappropriate because the question of "substantial" involvement is a matter of degree and must be tried on the merits. 207 F. Supp. 554 (E.D. La. 1962), *aff'd*, 306 F.2d 489 (5th Cir. 1962). Upon retrial it was held that private universities and colleges are not subject to the fourteenth amendment prohibitions. 212 F. Supp. 674 (E.D. La. 1962).

## APPENDIX

The following table shows the number of voluntary non-profit hospital projects, the total cost, the federal share of the cost, and the percentage of the total cost which is paid for by federal funds on a state-by-state basis:

| State | Number of Projects | Cost (in thousands of dollars) | | Federal Share as Percentage of Total Cost |
|---|---|---|---|---|
| | | Total | Federal Share | |
| Alabama | 39 | $ 47,005 | $ 22,411 | 47.6 |
| Alaska | 10 | 8,648 | 2,411 | 27.9 |
| Arizona | 38 | 29,605 | 9,178 | 31.0 |
| Arkansas | 26 | 25,888 | 13,751 | 53.3 |
| California | 100 | 169,625 | 42,255 | 24.9 |
| Colorado | 39 | 51,908 | 11,971 | 23.1 |
| Connecticut | 80 | 82,599 | 11,381 | 13.8 |
| Delaware | 9 | 7,705 | 1,727 | 24.1 |
| District of Columbia | 16 | 16,597 | 3,746 | 22.6 |
| Florida | 56 | 55,505 | 16,745 | 30.2 |
| Georgia | 18 | 16,547 | 6,264 | 37.8 |
| Hawaii | 12 | 11,397 | 4,294 | 37.6 |
| Idaho | 20 | 8,645 | 2,669 | 30.9 |
| Illinois | 126 | 221,798 | 47,535 | 21.4 |
| Indiana | 50 | 76,191 | 21,615 | 28.4 |
| Iowa | 63 | 64,425 | 19,668 | 28.3 |
| Kansas | 46 | 49,784 | 14,035 | 28.1 |
| Kentucky | 51 | 48,303 | 23,056 | 47.8 |
| Louisiana | 40 | 41,905 | 14,833 | 35.3 |
| Maine | 50 | 35,164 | 12,096 | 34.4 |
| Maryland | 55 | 97,927 | 17,718 | 18.1 |
| Massachusetts | 142 | 157,901 | 32,225 | 20.4 |
| Michigan | 103 | 117,062 | 35,232 | 30.1 |
| Minnesota | 56 | 64,991 | 18,916 | 29.1 |
| Mississippi | 15 | 11,245 | 5,955 | 53.6 |
| Missouri | 62 | 93,592 | 30,793 | 32.9 |
| Montana | 35 | 16,590 | 5,387 | 32.5 |
| Nebraska | 56 | 44,383 | 12,124 | 27.2 |
| Nevada | 6 | 3,200 | 1,221 | 38.1 |
| New Hampshire | 49 | 26,304 | 8,540 | 32.5 |
| New Jersey | 75 | 104,774 | 25,273 | 24.1 |
| New Mexico | 30 | 19,117 | 6,793 | 35.5 |
| New York | 187 | 318,925 | 77,592 | 24.4 |
| North Carolina | 132 | 75,249 | 31,076 | 41.3 |
| North Dakota | 44 | 25,292 | 8,337 | 33.0 |
| Ohio | 130 | 177,242 | 45,901 | 26.0 |
| Oklahoma | 61 | 39,515 | 13,539 | 34.2 |
| Oregon | 57 | 43,391 | 12,599 | 29.0 |
| Pennsylvania | 205 | 328,081 | 92,450 | 28.2 |
| Rhode Island | 41 | 48,736 | 7,480 | 15.4 |
| South Dakota | 25 | 10,143 | 5,111 | 50.6 |
| South Carolina | 44 | 21,493 | 7,828 | 36.4 |
| Tennessee | 37 | 32,813 | 13,326 | 40.5 |
| Texas | 108 | 147,770 | 41,709 | 34.9 |
| Utah | 10 | 8,840 | 3,397 | 38.5 |
| Vermont | 27 | 19,301 | 6,692 | 34.6 |
| Virginia | 77 | 91,327 | 35,995 | 39.4 |
| Washington | 46 | 56,030 | 14,791 | 36.4 |
| West Virginia | 25 | 40,556 | 16,635 | 40.8 |
| Wisconsin | 95 | 88,586 | 28,868 | 32.6 |
| Wyoming | 3 | 1,478 | 517 | 34.5 |
| Puerto Rico | 13 | 10,609 | 6,606 | 62.3 |
| U.S. and Possessions Total | 2,950 | $3,411,307 | $982,267 | 28.8 |

DEPARTMENT OF PUBLIC HEALTH, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HILL-BURTON PROGRAM-PROGRESS REPORT JULY 1, 1947-JUNE 30, 1962 (1962).