CONSTITUTIONAL LAW: DISCRIMINATION BY PRIVATE HOSPITALS PARTICIPATING IN HILL-BURTON PROGRAM HELD TO BE VIOLATION OF FIFTH AND FOURTEENTH AMENDMENTS

The application of the fifth and fourteenth amendment prohibitions against discrimination has been subjected to much misleading judicial interpretation. This is caused in part by courts' seeking to decide these issues through the application of general formulas. The particularistic approach relied upon by the Fourth Circuit Court of Appeals in Simkins v. Moses H. Cone Memorial Hosp. could bring needed direction to judicial decision-making in this controversial field of law.

Plaintiffs, Negro doctors, dentists and patients, sought admittance to defendants' private, nonprofit hospitals and were refused such solely because of their race. The institutions had received substantial federal funds for the construction of additional facilities under the Hill-Burton Act. This act requires participating states to inventory existing facilities and to determine construction needs and priorities according to federal standards. Hill-Burton funds may be used for new or additional facilities at government owned or private

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4 Van Alstyne & Karst, supra note 2, at 7.
5 323 F.2d 959 (4th Cir. 1963).
6 The Moses H. Cone Memorial Hospital and the Wesley Long Memorial Hospital are located in Greensboro, North Carolina.
7 323 F.2d at 962. There is no dispute as to the material facts in this case.
8 Id. at 963 n.6. The Moses H. Cone Memorial Hospital received $1,269,950.00 or 17.2% of the total construction expenses for two projects. The Wesley Long Memorial Hospital has received most of the $1,948,800.00 appropriated to it or 49.8% of the total cost of three construction projects.
nonprofit hospitals, the allocation being made by a state agency subject to the approval of the Surgeon General of the United States. Although racial nondiscrimination is provided for in the act, an exception is permitted if separate-but-equal facilities are provided. Defendants, admitting that they discriminated, received their funds pursuant to this exception.

Plaintiffs' suit to enjoin defendants from refusing to admit them was dismissed by the district court on a finding that since defendants were not instrumentalities of government, they were not subject to the restrictions of the fifth and fourteenth amendments. This approach which searched for a formal connection was rejected by the Fourth Circuit Court of Appeals. They perceived the inquiry to be whether the government had become so involved in the activities of these otherwise private hospitals, that these activities were also activities of the government, without the hospitals becoming either instrumentalities or agents in a strict sense. Utilizing this approach, the majority held for the plaintiffs, finding the necessary degree of governmental involvement as a result of the participation by defendants in the Hill-Burton program. Moreover, the court

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9 In North Carolina the designated state agency is the North Carolina Medical Care Commission.

10 42 U.S.C. § 291e(f) (1958) provides “That the State plan shall provide for adequate hospital facilities for the people residing in a State, without discrimination on account of race, creed, or color, and shall provide for adequate hospital facilities for persons unable to pay therefor. Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each group. . . .” (Emphasis added.)

The italicized section of the statute was also at issue before the court, and it was held to be unconstitutional. However, this note does not undertake to deal with that aspect of the case. 323 F.2d at 969.

11 323 F.2d at 965.


13 Id. at 641.

14 323 F.2d at 966.

15 Id. at 964-65. The court said that the Hill-Burton program subjected participating hospitals to an elaborate and intricate pattern of government regulations and found the most significant to be: (1) The government has a right to recover a proportional share of its grant if within twenty years after the completion of the project the hospital is sold or transferred to one not qualified for a grant or not approved by the state agency. (2) Participating hospitals are required to meet minimum standards for main-
noted two additional general theories on which it might have rested its decision. These theories typify the traditional approach which employs various general formulas to determine whether the questioned activity is within the ambit of the nondiscrimination requirements of the fourteenth amendment.26

The first of these theories noted by the court is the state function theory.27 The court examined the purpose of the Hill-Burton program and concluded that a state which joins the program undertakes, as a state function, the responsibility of providing hospital care for all the people in the state. As authority for this theory the court cited one decision28 dealing with first amendment freedoms in a company owned town and three cases29 involving voting in primary elections conducted by "private" political parties. To justify the holding in the instant case on this ground, however, re-

10 Van Alstyne & Karst, supra note 2, at 7.

27 323 F.2d at 968.

18 Marsh v. Alabama, 326 U.S. 501 (1946). A member of the Jehovah's Witnesses, who was distributing religious literature, was convicted under a state trespass statute for refusing to leave the sidewalk of a company-owned town. The conviction was reversed on grounds that a state may not permit a corporation to govern citizens so as to restrict their fundamental liberties guaranteed by the first and fourteenth amendments. Mr. Justice Black, speaking for the majority, said that company property when used as a town loses its identification as purely private property.

Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962) was also cited by the majority in Simkins in support of the state function theory. However, this case held that the university, despite substantial state financial involvement, was not subject to the fourteenth amendment.


In Terry v. Adams, the latest and most far reaching of these cases, there was discrim-
ination on racial ground in preprimaries held in Texas by the Jaybird Association, a privately financed, voluntary organization. A victory at this stage was the equivalent of election as the winner usually ran unopposed or defeated any opposition in the Democratic primary and general election. There was no majority opinion and Mr. Justice Black joined by two others announced the opinion of the Court. He reasoned that there was a governmental function involved and that however private the form of the organization that performs this function, it must comply with the constitutional prohibitions against discrimination. Mr. Justice Clark, joined by three Justices in a concurring opinion, emphasized the "attributes of government" of the Jaybird As-

quires stretching the state function formula and results in logical
implications the courts probably would refuse to follow. Thus, hos-
pital care is not historically or functionally related to the state in
the same manner as are local government and the election of public
officials. Moreover, an adoption of this theory might bring all the
hospitals in a participating state within the scope of the fourteenth
amendment prohibitions against discrimination regardless of
whether the particular hospital itself participated in the program.

As a second general theory, the court felt that affirmative sanc-
tioning of discrimination by federal and state governments brings
the discrimination within the confines of the fifth and fourteenth
amendments. The primary authority cited for this theory is a
decision which held unconstitutional a state statutory provision
which required segregation (when separate-but-equal was the pre-
vailing doctrine) but permitted unequal facilities to be provided for
the two races. In more recent cases also cited for support, state compelled segregation was held unconstitutional. However,
these cases are not strong authority for requiring plaintiffs' admission
to defendants hospitals as they held unconstitutional only the statute
involved and did not affect the right of the private parties involved
to discriminate.

Theories which resolve these disputes by the application of gen-

20 See Lewis, supra note 2, at 1098-99.
21 Mr. Justice Black, in announcing the opinion of the Court in Terry v. Adams,
345 U.S. 461 (1953), said that an organization that performs a governmental function,
however private its form, must comply with the constitutional prohibitions against
discrimination. Thus in the instant situation, since all hospitals in a state participating
in the Hill-Burton program would be performing a state function, they all would
be subject to the constitutional prohibitions against discrimination.
22 323 F.2d at 968.
23 McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914). An Oklahoma statute re-
quiring railroads to provide segregated facilities was held constitutional under the then
prevailing doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896). However, a provision
allowing unequal segregated facilities with respect to sleeping, dining and chair cars
was held unconstitutional.
24 Lombard v. Louisiana, 373 U.S. 267 (1963) (mayor and police chief ordered
segregation); Peterson v. City of Greenville, 379 U.S. 244 (1965) (city ordinance re-
quired all restaurants to segregate); Williams v. Hot Shoppes, Inc., 293 F.2d 835, 843
(D.C. Cir. 1961) (segregation compelled by state officials in opinion of Bazelon, J.
and Edgerton, J. dissenting).
25 These cases also can be distinguished from Simkins on the ground that in these
cases segregation was required, whereas in Simkins the government merely permitted
the recipient of its grant to segregate.
26 Theories other than those discussed in the text have evolved from approaching
this type of constitutional question in terms of "state action." See Screws v. United
eral formulas tend to give the impression that the law is precise and settled in this field, when actually this conceptualistic approach has resulted in "a host of theories which, taken literally or even seriously, cannot be applied generally." The chief fault in these theories is that they have caused courts to lose sight of the real interests that are competing for constitutional recognition.

In contrast to these formal approaches, the Simkins majority primarily relies on the approach used in Burton v. Wilmington Parking Authority. There the Supreme Court recognized that the fashioning of a precise formula was an impossible task and concluded that only by "sifting facts and weighing circumstances" can the state "involvement in private conduct be attributed its true significance." This type of analysis requires that the court balance the interests of the parties involved. In the instant case the interests of plaintiffs, the parties being discriminated against, involve "health and life itself." Defendants are asserting a private right to discriminate which the Supreme Court repeatedly has said does not violate the fourteenth amendment. Although not specifically mentioned by


What seems to be a better view is that of Professor Horowitz who says, concerning the application of the fourteenth amendment to the many problems that arise under it, "that in all of these problems there is state action, and that the sole issue, which tends to become obscured in the search for state action, is whether the particular state action in the particular circumstances . . . is constitutional when tested against the various federal constitutional restrictions on state action." Horowitz, supra note 2, at 208-09.

26 Van Alstyne & Karst, supra note 2, at 6.
27 Williams, supra note 2, at 390.
29 Id. at 722. This case involved the lessee of a state owned building in which an agency of the state ran a parking garage. The lessee operated a restaurant and discriminated on the basis of race. This discrimination was held to violate the fourteenth amendment. The majority opinion stressed the degree of the government's interdependence with the lessee, and also discussed the state's responsibility and its inaction.

The Burton approach has been welcomed by some and criticized by others. Compare Van Alstyne & Karst, supra note 2, at 57-58, and Williams, supra note 2, at 982-84, with St. Antoine, supra note 2, at 1005-06, and Lewis, Burton v. Wilmington Parking Authority—A Case Without Precedent, 61 COLUM. L. REV. 1458, 1466-67 (1961).
30 323 F.2d at 967.
31 The Supreme Court has often said that it is embedded in our constitutional law that the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful." E.g., Burton v. Wilmington Parking Authority, 365 U.S. 715, 721 (1961); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

Another equity asserted by defendants is that they took the funds without notice that they would thereby subject themselves to restrictions on their racial policies. However, the court found powerful countervailing equities in favor of plaintiffs. Plaintiffs
the court, an important consideration which weighs in plaintiffs' favor is that the party asserting the private right to discriminate is an institution rather than an individual. It is likely that an institution or a group has a greater vulnerability to the constitutional prohibitions against discrimination because of a greater relationship with and power to affect the rights and interests of the public.

Furthermore, into this sifting and weighing process must go the number and degree of government contacts. Present in the instant case, but not relied on by the majority, are a number of minor contacts that defendants have with the state, such as tax exemption and state licensing of the hospitals, which standing alone are not dispositive but combine to build a stronger case for plaintiffs. The decision primarily rested on the massive use of public funds and the interdependence between the defendants and the state and federal plans for the promotion and maintenance of public health.

As it is in the nature of this type of particularistic approach that

have no effective remedy unless the discrimination complained of is enjoined, and this discrimination handicaps Negro physicians and detrimentally affects the health of Negro patients. The court analogized the position of defendants to that of the lessee in Burton v. Wilmington Parking Authority, supra, who outfitted his restaurant business, and to the collective body of Southern voters who approved school bond issues before Brown v. Board of Educ., 347 U.S. 483 (1954). However, in these cases, as in Simkins, the equities favoring compliance with the fourteenth amendment prohibitions against discrimination outweighed the competing interests.

"If the purpose of the government in giving assistance is considered to coincide with the purpose for which the recipient is expected to use the assistance, a plain difference can be seen between individual and institutional beneficiaries. When an individual satisfies his private needs, be they subsistence, education, or housing, the public purposes underlying the grant used by him are exhausted. But an institution has needs that can generally be described only in terms of its institutional purpose. If this purpose, private in origin, is to serve members of the public at large, presumably this service is the reason for state assistance, and it is pertinent to inquire whether the state can help accomplish this purpose without altering the private character of the institution's activity." Lewis, supra note 2, at 1103.

Williams, supra note 2, at 375-77.

One present member of the Supreme Court, Mr. Justice Douglas, has taken the position that whenever a state licenses a business that business is prohibited from discriminating on racial grounds by the fourteenth amendment. Garner v. Louisiana, 36 U.S. 157, 184 (1961) (concurring opinion).

Both hospitals received their corporate charter from the state. Furthermore, six of the fifteen directors of the Moses H. Cone Memorial Hospital are appointed by an agent or agency of the state. Moreover, the Cone Hospital also participates in the training of student nurses from Woman's College of the University of North Carolina and the Agricultural and Technical College of North Carolina, both state-supported institutions. However, this program is conducted voluntarily by the hospital at a substantial monetary sacrifice. Simkins v. Moses H. Cone Memorial Hosp., 211 F. Supp. 628, 630-34 (M.D.N.C. 1962).

323 F.2d at 967.
the decision be limited to its facts, the majority emphasized that it was not creating a legal rule that might operate in circumstances not before the court. Thus, the majority said that not every subvention by the government would automatically bring the beneficiary within the ambit of the fourteenth amendment prohibitions against discrimination.

The main analysis of the majority in Simkins represents a more straightforward approach to the application of the fifth and fourteenth amendments and is one which will give judicial recognition to the values underlying the formulas without becoming bound by their broad implications. Under this approach, courts will balance the interests of the parties involved while weighing the number and degree of government contacts, and will have to justify their decision on these grounds. Since close cases will continue to arise, this approach does not represent a final answer to the many problems in this field. However, it is more desirable to have these cases decided on their particular merits rather than by an unverbalized approach which is then fitted into a conceptualistic formula or by the application of a formula without regard to the underlying interests.

It is a misunderstanding of this aspect of this approach that has caused commentators to criticize Burton v. Wilmington Parking Authority as follows: "It was a model of circumspection if not irresolution." St. Antoine, supra note 2, at 1005-06. "[T]he Court, by emphasizing all of the facts, appears to have done its best to decide a case without creating a precedent." Lewis, supra note 29, at 1466.

Van Alstyne & Karst, supra note 2, at 58.