CONSTRUCTION OF A WILL AND THE THRESHOLD QUESTION OF STATE ACTION

First National Bank v. Danforth, 523 S.W.2d 808 (Mo. 1975)

Testator's will created a charitable trust,[1] limiting the beneficiaries to "Protestant Christian Hospitals" and white patients.[2] The trustee

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1. A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.

RESTATEMENT (SECOND) OF TRUSTS § 348 (1957). In Missouri, chapter 456, MO. REV. STAT. (1969) regulates the creation and administration of trusts. The difference between a charitable trust and a private trust is the character of the beneficiaries. A private trust dedicates property to the benefit of specified persons; a charitable trust involves property dedicated to the benefit of the community. A private trust must designate a beneficiary ascertainable at the creation of the trust or within the period of the Rule Against Perpetuities. A charitable trust is free from such limitations. *See* 4 A. SCOTT, THE LAW OF TRUSTS §§ 348, 369 (3d ed. 1967) [hereinafter cited as SCOTT]; RESTATEMENT (SECOND) OF TRUSTS § 369 (1957).

A charitable trust requires a charitable purpose. Numerous purposes have been adjudged charitable, *see* SCOTT § 368; RESTATEMENT (SECOND) OF TRUSTS § 368 (1957), although an exhaustive list is impossible due to the varying needs of separate communities. Courts often quote Lord Macnaghten's definition of charity:

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

SCOTT § 368, *quoting* Commissioners for Special Purposes of Income Tax v. Pemsel, [1891] A.C. 531, 583. *See generally* SCOTT §§ 348-403; RESTATEMENT (SECOND) OF TRUSTS §§ 348-403 (1957); Power, *The Racially Discriminatory Charitable Trust: A Suggested Treatment*, 9 ST. LOUIS L.J. 478 (1965); Stinson, *Modern Charitable Trusts and the Law*, 17 ST. LOUIS L. REV. 307 (1932); Annot., 25 A.L.R.3d 736 (1969).

2. The will required that the trust funds, valued at $11,392,703.00 on January 17, 1974, be used

> in contributing to the maintenance and support of Protestant Christian Hospitals operated and maintained upon a nonprofit basis in the territory now constituting Jackson County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said Hospitals, born of white parents in the United States of America. . . .
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> . . . .
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> And I give my said Trustees . . . sole power and authority to select . . . such Hospital and Hospitals of the kind and character aforesaid as in the judgment and discretion of Trustees . . . as they . . . shall determine to be giving and will continue to give the greatest measure of hospital service and care to deserving poor and unfortunate people of the class aforesaid.

Brief for Defendants-Appellants at 3-4, First Nat'l Bank v. Danforth, 523 S.W.2d 808 (Mo.), *cert. denied*, 421 U.S. 1016 (1975). The trial court ruled that the words "and/or" were used in the conjunctive sense. *Id.* at 5. Thus, the trustee could not assert

brought an action for construction of the will.[3] The Attorney General of Missouri[4] asserted that the creation and administration of the trust, and judicial construction of the will involved state statutes and courts; hence the racially discriminatory terms of the trust violated the equal protection clause of the fourteenth amendment.[5] Of twenty-three hos-

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an option to present funds to the hospitals only, thereby circumventing the racial discrimination inherent in granting funds to white patients only.

3. Mo. REV. STAT. § 527.040 (1969) provides:

> Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que trust*, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:
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> (1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or
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> (2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
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> (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

In *First National Bank*, the trustee sought construction of the phrase "Protestant Christian Hospitals," and identification of the individual beneficiaries, 523 S.W.2d at 812. The trial court held that the phrase meant those hospitals with "some special relationship to and at least partial control by a Protestant Christian church." *Id.* at 815.

4. The Attorney General represents the community's interest in the enforcement of a charitable trust. *See generally* SCOTT § 391; Note, *The Attorney General and the Charitable Trust Act—Wills, Contest and Construction*, 14 CLEV.-MAR. L. REV. 194 (1965); Note, *The Enforcement of Charitable Trusts*, 18 SYRACUSE L. REV. 618 (1967).

5. The Attorney General asked that the court apply either of two doctrines to permit the distribution of trust funds on a constitutionally valid basis. 523 S.W.2d at 816.

The more conservative doctrine, "deviation," enables trustees to deviate from the express terms, but not the stated purpose, of a trust when literal compliance would be impossible or illegal. Deviation therefore alters only the methods of accomplishing the purposes of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 381 (1957). Missouri has adopted the doctrine. *See* Reed v. Eagleton, 384 S.W.2d 578 (Mo. 1964) (city's purchase of additional recreational facilities as stipulated by charitable trust was impractical; court authorized application of trust funds to maintain existing facilities); Lackland v. Walker, 151 Mo. 210, 52 S.W. 414 (1899) (when land rents proved insufficient to fund charitable trust, sale of these lands was proper to derive income to maintain trust).

While deviation applies to both private and charitable trusts, the second doctrine, "cy pres," is unique to charitable trusts. Cy pres permits alteration of the specific purpose expressed in the trust instrument, if the testator's original purpose is impossible to fulfill. When a general charitable intention is evident, courts assume that the creator of the trust would have applied the trust property to other, similar charitable purposes rather than permit the trust to fail. *See* SCOTT § 399; RESTATEMENT (SECOND) OF TRUSTS § 399 (1957).

The radical step of applying cy pres is consistent with the liberal rules of construction governing charitable trusts, which are favorites of the law and are to be construed as valid whenever possible. Burrier v. Jones, 338 Mo. 679, 92 S.W.2d 885 (1936); Mott v. Morris, 249 Mo. 135, 155 S.W. 434 (1913); *see* Evans v. Abney, 396 U.S. 435, 439-

pitals joined as codefendants, four sought to uphold the trust's validity,[6] and thirteen maintained that the discriminatory provisions were illegal.[7] The trial court upheld the restrictions.[8] The Supreme Court of Missouri affirmed and *held*: Neither the creation and administration of a charitable trust, nor judicial construction of the will that created the trust, constitutes state action under the fourteenth amendment.[9]

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43 (1970). For a summary of the historical development of the doctrine, see Church of Jesus Christ of the Latter Day Saints v. United States, 136 U.S. 1, 50-60 (1890). *See also* E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES (1950); SCOTT §§ 399-399.4; RESTATEMENT (SECOND) OF TRUSTS § 399 (1957); Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L.Q. 382 (1959); Peters, *A Decade of Cy Pres: 1955-65*, 39 TEMP. L.Q. 256 (1966); *Report of Committee on Charitable Trusts*, 104 TRUSTS & ESTATES 990 (1965).

6. These hospitals contended that the racial limitation in the trust was purely private discrimination, involving no state instrumentality. They argued that neither the trust, the trustee, the hospitals, nor the trial court had fostered religious discrimination. They also asserted that the trial court had not engaged in religious doctrinal disputes by determining the proper recipient hospitals, and had not violated the first or fourteenth amendments. Brief for Defendants-Respondents at 21, 24, 25, First Nat'l Bank v. Danforth, 523 S.W.2d 808 (Mo.), *cert. denied*, 421 U.S. 1016 (1975). These hospitals were those that the trial court had determined to be "Protestant Christian Hospitals" and therefore eligible for an award of trust funds. *Id.* at 9-10.

7. Eight of these hospitals, known as the Lakeside Group, pursued the appeal, joined by appellant Martin Luther King, Jr. Memorial Hospital. Of the remaining hospitals in Jackson County, two were disqualified as government operated, one was disqualified as a profit-making corporation, two disclaimed any right to benefits, and one hospital did not file an answer. Brief for Plaintiff-Respondent at 19-21, First Nat'l Bank v. Danforth, 523 S.W.2d 808 (Mo.), *cert. denied*, 421 U.S. 1016 (1975).

The Lakeside Group asserted that the trial court's enforcement of the trust's restrictions constituted state action. The group claimed additional grounds for state action deriving from the nature of the trust, the hospital beneficiaries, and the trustee-bank. Appellants further contended that the trial court had violated the first and fourteenth amendments by interfering in a matter of religious doctrine. The Lakeside Group sought to apply deviation or cy pres to save the trust from failure. Brief for Defendants-Appellants at 16-19, First Nat'l Bank v. Danforth, 523 S.W.2d 808 (Mo.), *cert. denied*, 421 U.S. 1016 (1975). For a discussion of cy pres, see note 5 *supra*.

Other parties to the suit were four allegedly collateral heirs and the unknown heirs. Both known and unknown heirs argued that the trust violated the fourteenth amendment and was thus illegal, that the trust instrument did not manifest a general charitable intention so that cy pres was inapplicable, and, therefore, the trust res should revert to them. First Nat'l Bank v. Danforth, 523 S.W.2d 808, 815-16 (Mo.), *cert. denied*, 421 U.S. 1016 (1975).

8. First Nat'l Bank v. Danforth, No. 726,091 (Mo. Cir. Ct., Oct. 10, 1973).

9. First Nat'l Bank v. Danforth, 523 S.W.2d 808, 821-22 (Mo.), *cert. denied*, 421 U.S. 1016 (1975). The court also rejected appellant's claim that the term "Protestant Christian" was so vague as applied to hospitals that its meaning could not be determined:

> "Protestant Christian" is not ambiguous. Both terms have an ascertainable meaning; and in common and familiar usage denote a non-Catholic Chris-

The fourteenth amendment,[10] passed in 1868, was intended to protect the constitutional rights of the recently liberated blacks from encroachment by the states.[11] Thus, approval of or participation in unconstitutional conduct by some part of the state government[12] is a prerequisite to constitutional invalidity under the fourteenth amendment.[13]

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tian religious body. When the non-Catholic Protestant Christian entity is a hospital . . . it reasonably means . . . a hospital that has some relationship to and control by a Protestant Christian Church, and when such bodies are selected in the trustee's discretion, such class becomes fixed and definite.

523 S.W.2d at 818.

10. The fourteenth amendment, which became part of the Constitution on July 21, 1868, declares:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

11. *See* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908) [hereinafter cited as FLACK]; J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) [hereinafter cited as Bickel]; Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950) [hereinafter cited as Frank & Munro]; Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610.

The 39th Congress did not foresee the impact of section one of the amendment on future generations. *See, e.g.*, FLACK 94 (fourteenth amendment reflected congressional desire to make the Bill of Rights binding on states and to give validity to the Civil Rights Act of 1866, 42 U.S.C. § 1981-82 (1970)); Bickel 58 (lack of congressional interest in section one due to consensus that the section merely embodied the Civil Rights Act of 1866); Frank & Munro 140-41 (congressional attention concentrated on political sections of the fourteenth amendment while virtually ignoring section one). *See* note 44 *infra.*

12. Cooper v. Aaron, 358 U.S. 1, 17 (1958); Shelley v. Kraemer, 334 U.S. 1, 20 (1948); Twining v. New Jersey, 211 U.S. 78, 90 (1908); Civil Rights Cases, 109 U.S. 3, 11 (1883); Virginia v. Rives, 100 U.S. 313, 318 (1880); *Ex parte* Virginia, 100 U.S. 339, 347 (1880).

13. The earliest cases involving the fourteenth amendment made clear that the amendment could not be used to eliminate all discrimination. In United States v. Cruikshank, 92 U.S. 542 (1875), white men were convicted of violating a federal law by disrupting a political meeting of blacks. The Supreme Court overturned their convictions, implying that the law was unconstitutional. This decision was the first formulation of the principle that the fourteenth amendment only prohibits discriminatory activities by the states. Two later cases, both involving the constitutionality of all white juries, affirmed the requirement of *state* interference with constitutional rights. *Ex parte* Virginia, 100 U.S. 339 (1880); Virginia v. Rives, 100 U.S. 313 (1880). Finally the Civil Rights Cases, 109 U.S. 3 (1883), declared unconstitutional an attempt by Congress to outlaw discrimination absent state action. "It is state action of a particular character

Courts have applied the fourteenth amendment in the absence of obvious state involvement when confronted with racial discrimination.[14] In *Shelley v. Kraemer*[15] the Supreme Court held that a state court

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that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Id.* at 11. The effect of this decision was twofold: the fourteenth amendment provides no remedy against private discrimination, and any constitutionally appropriate remedy for private discrimination must be provided by the state. For discussion of state action, see Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 (1973); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974). *See* note 44 *infra*.

14. Courts often look beneath the surface of an allegedly discriminatory deed to find state action in its ramifications. Even in the absence of a discriminatory state statute, the Supreme Court held that police enforcement of a state custom authorizing restaurants to refuse to serve whites accompanied by blacks constituted state action. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). In Reitman v. Mulkey, 387 U.S. 369 (1967), the Court found unconstitutional state action in an addition to the California Constitution that prohibited the state from interfering with a private individual's sale or refusal to sell residential property. Where a restaurant leased space in a parking garage owned and operated by the state, the Supreme Court held that the refusal to serve a black constituted state action because the state was a participant in the discrimination. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). *See* note 20 *infra*. In Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975), and McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), the grant of tax benefits and a scheme of government regulation provided a basis for finding state action in the conduct of private foundations and fraternal orders.

The Fourth Circuit has held that hospitals performing the public function of health care or receiving Hill-Burton funds, *see* note 43 *infra*, are subject to fourteenth amendment strictures. *See* Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963). *See also* Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970) (state aid to private school rendered schools' racially discriminatory conduct unconstitutional). For cases involving sex discrimination, see Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974); Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969) (state issuance of liquor license renders tavern's sex discrimination actionable).

Recent cases indicate that the Supreme Court is presently unwilling to enlarge the scope of state action. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). In *Moose Lodge*, a black male claimed that appellant's refusal to serve him violated the equal protection clause of the fourteenth amendment. The Supreme Court rejected the argument that issuance of a private club liquor license by the Pennsylvania liquor board was state action since the licensing did not "foster or encourage racial discrimination," and because the state was not a "joint venturer in the club's enterprise." *Id.* at 176-77. *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (discussed in note 44 *infra*); Lloyd Corp. v. Tanner, 407 U.S .551 (1972) (discussed in note 19 *infra*).

15. 334 U.S. 1 (1948).

may not enforce a private, racially restrictive covenant.[16] In *Barrows v. Jackson*[17] the Court held that the fourteenth amendment prohibited the exercise of state judicial power to award damages for the breach of a racially restrictive covenant.[18] The Court further enlarged the state action concept in ruling that the assumption of a "public function" by a private corporation rendered otherwise private discriminatory conduct unconstitutional.[19] Still another line of cases

16. *Id.* In 1911, thirty property owners in a St. Louis neighborhood agreed not to sell their properties to non-Caucasians. Thirty-four years later, a tract encompassed by the agreement was sold to appellant, a black. Respondent, owner of a parcel subject to the terms of the restrictive agreement, brought a suit in equity to enjoin petitioner from taking possession and to revest title in the grantor. The trial court questioned the validity of the original agreement and refused to issue an injunction. The Supreme Court of Missouri reversed and granted respondent's plea. Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946), *rev'd*, 334 U.S. 1 (1948). In reversing the Missouri Supreme Court, the United States Supreme Court conceded that a racially restrictive covenant was not unconstitutional if the covenantors adhered to it voluntarily. But a covenantor could not seek redress for a violation in the state courts. 334 U.S. at 13. State courts are instrumentalities of the state and discriminatory actions forbidden to the state may not be implemented by state courts. *Id.* at 18, 20.

17. 346 U.S. 249 (1953).

18. Petitioner attempted to accomplish at law what *Shelley v. Kraemer* had proscribed in equity—effectuation of a racially restrictive covenant. Petitioner was party to a covenant restricting the sale of property to non-Caucasians. Respondent, a co-covenantor, breached the covenant by conveying land to a black, leading petitioner to seek monetary damages. 346 U.S. at 251. The Supreme Court characterized the exercise of judicial power to make such an award as state action in violation of the fourteenth amendment. To permit damages, the Court reasoned, would be to sanction the racially restrictive covenant. *Id.* at 254. If the state, through its courts, were to require payment of damages, the potential seller would face the choice of not selling to a black, or of adding a surcharge to cover his future damages. Either outcome would discourage sales to the excluded minority and deny them equal protection of the laws. *Id.*

Other cases have invalidated discriminatory covenants. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Hurd v. Hodge, 334 U.S. 24 (1948); Pennsylvania v. Brown, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968); Wachovia Bank & Trust Co. v. Buchanan, 346 F. Supp. 665 (D.D.C.), *aff'd*, 487 F.2d 1214 (D.C. Cir. 1972); Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967); Milford Trust Co. v. Stabler, 301 A.2d 534 (Del. Ch. 1973); Bank of Delaware v. Buckson, 255 A.2d 710 (Del. Ch. 1969); Howard Sav. Institution v. Peep, 34 N.J. 494, 170 A.2d 39 (1961); *In re* Hawley's Estate, 32 Misc. 2d 624, 223 N.Y.S.2d 803 (Sur. Ct. 1961).

19. Marsh v. Alabama, 326 U.S. 501 (1946). In *Marsh*, the Supreme Court held that a private corporation had assumed a public function by creating a company-owned town "operated primarily to benefit the public." *Id.* at 506. Thus, the town's refusal to allow the distribution of religious literature in a community "business block" was state action in violation of the first and fourteenth amendments. The Court subsequently relied upon *Marsh* to hold that a privately owned shopping center was a "community business block" and that infringement upon the exercise of first amendment rights through the use of trespass laws constituted state action. Amalgamated Food Employees Union

indicated that state approval through regulatory or licensing agencies may constitute state action.[20] The disparate circumstances in which

v. Logan Valley Plaza, 391 U.S. 308 (1968). *See* Evans v. Newton, 382 U.S. 296, 301-02 (1966), where the Court prohibited a privately owned park that was municipal in nature from being maintained on a discriminatory basis since it performed a public function. *See also* note 28 *infra.*

Recent cases indicate that the public function analysis established in *Marsh* will be limited to its facts. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). Although the Supreme Court in *Lloyd* conceded that a shopping center was the functional equivalent of a public business district, it permitted the owner to prohibit picketing because the protest was unrelated to the shopping center's purpose and there were "adequate alternative avenues of communication." *Id.* at 564, 566. The Court characterized *Marsh* as "an economic anomaly of the past, 'the company town,'" *id.* at 561, and implied that the *Marsh* reasoning was inapplicable where the entity in question had not assumed all the attributes of a state-created municipality. *Id.* at 569. *Marsh* was further undermined in Hudgens v. NLRB, 44 U.S.L.W. 4281 (U.S., Mar. 3, 1976), where the Supreme Court declared "that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*. . . . [T]he rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." *Id.* at 4285.

The Supreme Court has employed reasoning similar to the public function rationale in handling cases involving the fifteenth amendment's prohibition of racial discrimination by federal or state government in national and state elections. *See* Terry v. Adams, 345 U.S. 461 (1953) (political "club" that conducted part of the state elective process may not exclude blacks); Smith v. Allwright, 321 U.S. 649 (1944) (political party's rules excluding blacks from voting in party's primaries violate fifteenth amendment); Nixon v. Condon, 286 U.S. 73 (1932) (political committee empowered to hold state primaries forbidden to discriminate).

20. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); *cf.* Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952). In *Burton*, the Court held that state action included even tacit approval of racial discrimination by a state authority which had leased space in a publicly owned building to a restaurant that refused to serve blacks. There was mutual benefit to the state and restaurant, which implicated the former in the discriminatory practices of the latter. 365 U.S. at 723-24. *See* note 45 *infra.*

As *Burton* noted, however, no test has been formulated for the presence of state action. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. The unpredictability of the "sifting facts" procedure was evidenced in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Petitioner, a black, was denied service on racial grounds by a private club that held a state liquor license. Absent the "symbiotic relationship" in *Burton*, the Court failed to find a "sufficiently close nexus" between the state and the challenged activity. *Id.* at 176. The Court suggested that state action would be present if state regulation fostered racial discrimination, or if the state were a joint venturer in the undertaking. *Id.*

The Court most recently reviewed the effect of licensing and regulation in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), characterized by the *First National Bank* court as "[t]he last word" on the subject. 523 S.W.2d at 822. *Jackson* dealt with the process due customers cut off from electric service by a utility that had received a certificate of public convenience from the state utility commission. Applying the *Burton* test of "sifting facts and weighing circumstances," the Court examined the utility's near monopoly status, the state's extensive regulation of the utility, the nature of the service performed, the utility's filing of a tariff with the state commission, and the ab-

courts have found state action,[21] however, has left the limits of the concept unclear.[22]

In *First National Bank v. Danforth*,[23] the Missouri Supreme Court found none of these cases apposite,[24] and rejected three possible sources of state involvement.[25] First, the court implicitly rejected the argument

sence of a symbiotic relationship with the state. Because discriminatory conduct must be "attributable" to the state, the Court found insufficient state involvement to invoke the fourteenth amendment. Jackson v. Metropolitan Edison Co., *supra* at 356; note 44 *infra*.

21. *See* cases cited notes 14-20 *supra*.

22. One court has described the concept as the "murky waters of state action." McGlotten v. Connally, 338 F. Supp. 448, 449 (D.D.C. 1972).

23. 523 S.W.2d 808 (Mo.), *cert. denied*, 421 U.S. 1016 (1975).

24. 523 S.W.2d at 820-21.

25. The court initially assumed that the trust would create racial discrimination by selecting only white patients as one class of beneficiaries. 523 S.W.2d at 820. It qualified the concession, however, by noting that the beneficiary hospitals could use the trust funds as they wished, including application to health care services that were offered on a non-discriminatory basis. *Id.* at 821. The court thought this lessened the involvement of the state in the discrimination. *Id.*

The court's reasoning here is perplexing. Since the trustee must allocate income on an annual basis to those hospitals that provide the greatest measure of service to white persons, the trust encourages racially discriminatory hospitals. To ignore the effect of this quasi-competitive standard for choosing hospitals is to ignore the rationale behind Barrows v. Jackson, 346 U.S. 249 (1953). *Barrows* invalidated a claim for damages for breach of a racially restrictive covenant on the theory that future sellers would be discouraged from selling to blacks. *See* note 18 *supra*. The *First National Bank* holding will encourage discrimination because it endorsed the award of funds to those hospitals best serving whites.

Although *Barrows* and *Shelley* involved inter vivos agreements whereas the discrimination in *First National Bank* resulted from a gratuitous transfer by will, the Missouri Supreme Court refused to distinguish the cases on these grounds. See also Evans v. Newton, 382 U.S. 296 (1966).

On the related issue of religious discrimination, the court held that secular institutions such as hospitals may be operated by religious organizations without losing their secular status. 523 S.W.2d at 820, *citing* Speer v. Colbert, 200 U.S. 130 (1906); Bradfield v. Roberts, 175 U.S. 291 (1899); Wyatt v. Stillman Institute, 303 Mo. 94, 260 S.W. 73 (1923); Society of Helpers v. Law, 267 Mo. 667, 186 S.W. 718 (1916); State *ex rel.* Morris v. Board of Trustees, 175 Mo. 52, 74 S.W. 990 (1903). Although the court apparently used these cases to rebut the claim of racial discrimination, later language suggests that the court actually intended to dispose of the religious discrimination issue. *See* 523 S.W.2d at 820.

Because it found the trust valid, the court did not discuss the application of deviation or cy pres. *See* note 5 *supra*. For examples of courts that did apply cy pres to strike racial restrictions from charitable trusts, see Wachovia Bank & Trust Co. v. Buchanan, 346 F. Supp. 665 (D.D.C.), *aff'd*, 487 F.2d 1214 (D.C. Cir. 1972); Bank of Delaware v. Buckson, 255 A.2d 710 (Del. Ch. 1969); Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969).

that the right to make a will and create a trust was a source of state action, absent a governmental body as trustee.[26] Thus, the court distinguished *Evans v. Newton*,[27] which had also examined the constitutionality of a racially restrictive charitable trust created by will.[28] In *Evans* a governmental body had served as trustee; but in *First National Bank*, the testator, the trust res, the trustee, and the beneficiaries were all private.[29] The court next rejected the claim that judicial construction of the will created the requisite state action.[30] *Shelley* and *Barrows*, the court reasoned, involved affirmative judicial action to enforce racial discrimination; whereas the *First National Bank* court merely interpreted the intent of the testator.[31] A contrary rule would invalidate all racially or religiously discriminatory wills that require judicial construction, a result the *First National Bank* court thought contrary to precedent.[32] Finally, the court summarily rejected the claim that the public character of a charitable trust,[33] or the quasi-public character of the trustee bank,[34] necessarily implicated the state in racial discrimination.

The court's reasoning is unpersuasive. In *Evans*, private citizens had replaced the city as trustee by the time of the Supreme Court ruling.[35]

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26. 523 S.W.2d at 821.

27. 382 U.S. 296 (1966).

28. *Evans* involved a trust created by the will of Senator Bacon, which established a park in the city of Macon, Georgia, for enjoyment of white citizens only. The city was appointed trustee but subsequently resigned when it felt it could no longer administer the park on a segregated basis. To replace the city a state court appointed private trustees who continued to maintain the park for whites only. The Supreme Court accepted the state court's appointment of trustees but ruled that the park could not be segregated. The Court presumed continued municipal maintenance of the park and "buttressed" this presumption by noting that the facilities offered by a park, even a private park, were "municipal in nature." *Id.* at 301.

29. 523 S.W.2d at 821.

30. *Id.*

31. *Id.*

32. *Id. But see* notes 38-41, 46 *infra* and accompanying text.

33. 523 S.W.2d at 822.

34. *Id.*

35. Evans v. Newton, 382 U.S. 296, 298 (1966). The *First National Bank* court used a frequently quoted passage from Evans to support its conclusion that no state action was present. "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State . . . *arguendo* . . . no constitutional difficulty would be encountered." 523 S.W.2d at 821, *quoting* Evans v. Newton, *supra* at 300. This excerpt from *Evans*, however, simply states the question. *Evans* reserved decision on the precise issue before the *First National Bank* court, whether the state facilitated racial discrimination through its statutory provisions for charitable trusts. *See* Evans v. Newton, *supra* at 300-01 n.3.

Although the Court based its decision in part upon the "momentum [the park] acquired as a public facility," it clearly held that the "public character" of the park prohibited its segregated operation by any trustee, public or private.[36] Thus, state courts, by assisting private parties in the performance of a public function, implicate the state in that action.[37] The *First National Bank* court's treatment of *Shelley* and *Barrows* is still less persuasive. The distinction between "affirmative judicial action" enjoining possession, divesting title or awarding damages, and passive construction of a testator's intent cannot withstand analysis.[38]

36. Evans v. Newton, 382 U.S. 296, 301-02 (1966).

37. *Id.* at 302. *See also* notes 42-45 *infra* and accompanying text. After the Supreme Court had ruled in *Evans v. Newton* that the park could not be maintained on a discriminatory basis, the Georgia trial court determined that Bacon's will had not manifested a general charitable intent because his sole purpose was to create a segregated park. Accordingly, the court refused to apply cy pres, *see* note 5 *supra*, and held that the trust had failed. The trust property reverted to the testator's heirs at law. After the Georgia Supreme Court affirmed the trial court's decision, the United States Supreme Court held in Evans v. Abney, 396 U.S. 435 (1970), that the state courts' refusal to save the trust through cy pres did not violate the fourteenth amendment because those courts had merely applied neutral rules of construction to arrive at a decision which did not produce a violation of any constitutionally protected rights. The Court rejected the argument based on Shelley v. Kraemer, 334 U.S. 1 (1948), *see* note 16 *supra*, that the trial court's action was unconstitutional on grounds that it encouraged a private scheme of discrimination. The elimination of the park was also the end of any discrimination. Similarly, since blacks and whites were equally deprived of enjoyment of the park, the Court rejected petitioners' equal protection argument. 396 U.S. at 445.

Although *First National Bank v. Danforth* and *Evans v. Abney* both involved judicial construction of a testator's will there are crucial differences between the two cases. In *Evans v. Abney*, the Supreme Court was considering a trust that had already been adjudged unconstitutional and thus unenforceable. *See* Evans v. Newton, 382 U.S. 296 (1966); note 28 *supra*. The primary issue was whether the testator had the general charitable intent necessary to apply cy pres. The state court's refusal to apply cy pres was not in itself unconstitutional because no discrimination resulted. In *First National Bank v. Danforth*, however, the constitutionality of the trust was at issue. The court deemed it unnecessary to determine the existence of a general charitable intent since the conclusion that the trust was constitutional rendered the doctrine of cy pres inapplicable, *see* note 5 *supra*. In contrast to *Evans v. Abney*, the decision in *First National Bank v. Danforth* permitted the enforcement of a trust which by the court's own admission was racially discriminatory.

38. *Shelley* is the touchstone against which cases involving judicial enforcement of racially restrictive covenants must be appraised. The *Shelley* record contains no reference to "affirmative judicial enforcement," though the Supreme Court repeatedly alluded to "judicial action" and "judicial enforcement." 334 U.S. 1 at 8, 13-15, 20.

Because the Court in *Shelley* did not specifically describe any restrictions on judicial enforcement as a source of state action, courts could extend the doctrine to any judicial action or restrict it to a narrow interpretation. Commentators have noted this dilemma. Henkin, Shelley v. Kraemer—*Notes for a Revised Opinion*, 110 U. PA. L. REV. 473

Each judicial action is equally essential to implement the discrimination.[39] Since *Shelley* held that "the action of state courts . . . is to be

(1962); Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637 (1961); Comment, *The Impact of* Shelley v. Kraemer *on the State Action Concept*, 44 CAL. L. REV. 718 (1956); 65 COLUM. L. REV. 919 (1965).

39. One might suggest that the construction in *First National Bank* was not essential to discrimination, since the trustee could have proceeded without it. As a practical matter, however, trustees are unlikely to distribute significant funds from ambiguously worded trusts. In any event, the decision to seek judicial construction should settle the issue of state action.

The *First National Bank* suit was authorized by MO. REV. STAT. § 527.040 (1969) *quoted in* note 3 *supra*. The section is part of the Missouri enactment of the Uniform Declaratory Judgment Act, the scope of which is described in MO. REV. STAT. § 527.010 (1969):

> The Circuit courts and courts of common pleas of this state, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Because § 527.010 is substantially the same as the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1970), and the declaratory judgment enactments of other states, the decisions of other courts interpreting the Act are persuasive authority. State *ex rel.* United States Fire Ins. Co. v. Terte, 351 Mo. 1089, 176 S.W.2d 25 (1943).

Relief through declaratory judgment is sui generis, being neither legal nor equitable, though it may be combined with a plea for legal or equitable relief. Wallace v. Norman Indus., Inc., 467 F.2d 824 (5th Cir. 1972); Sanders v. Louisville & N.R.R., 144 F.2d 485 (6th Cir. 1944); Mutual Drug Co. v. Sewall, 353 Mo. 375, 182 S.W.2d 575 (1944). Although a judgment normally requires some form of execution, lack of execution does not invalidate the judicial function. Nashville, C. & S.L. Ry. v. Wallace, 288 U.S. 249, 263 (1933).

In an effort to counteract the mistaken belief that a declaratory judgment is an advisory opinion, courts stress the fact that the *sine qua non* of an action for a declaratory judgment is a justiciable controversy. The case must not present an abstract or hypothetical problem. Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952); United Public Workers of America v. Mitchell, 330 U.S. 75 (1947); Ashwander v. TVA, 297 U.S. 288 (1936); Tietjens v. City of St. Louis, 359 Mo. 439, 222 S.W.2d 70 (1949). Furthermore, the controversy must be amenable to a conclusive decree. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937); State *ex rel.* Chilcutt v. Thatch, 359 Mo. 122, 221 S.W.2d 172 (1949). The court may not assert jurisdiction over the controversy unless its decision will terminate the controversy and grant relief. Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren, 204 F.2d 256 (7th Cir. 1953); Panhandle E. Pipe Line Co. v. Michigan Consol. Gas. Co., 177 F.2d 942 (6th Cir. 1949); Angell v. Schram, 109 F.2d 380 (6th Cir. 1940). An opinion rendered in a suit for declaratory judgment is res judicata. Daniels v. Thomas, 225 F.2d 795 (10th Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); Smith v. Pettis County, 345 Mo. 839, 136 S.W.2d 282 (1940). *See generally*, W. ANDERSON, DECLARATORY JUDGMENTS (1951). In *First National Bank* the trial court accepted a controversy for adjudication and rendered a final

regarded as action of the State,"[40] judicial construction of a racially discriminatory will should suffice to invoke the fourteenth amendment.[41] Also puzzling was the conclusion that neither the bank,[42] the

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and binding judgment on the parties. The trustee could not legally disregard that judgment. These factors combine to involve the state in a violation of the fourteenth amendment.

40. Shelley v. Kraemer, 334 U.S. 1, 14 (1948). *See* notes 15-16 *supra* and accompanying text.

41. *See, e.g., In re* Potter, 275 A.2d 574 (Del. Ch. 1970). In *Potter*, the trustees of a charitable trust limiting beneficiaries to poor whites refused to serve. The state chancery court subsequently appointed trustees and continued to do so over the life of the trust. When the trustee sought instructions regarding the application of a non-white for aid from the racially discriminatory trust, the Delaware Court of Chancery concluded that its own involvement in the supervision and direction of the trust constituted state action. *Id.* at 583. The court reasoned that only if judicial supervision were of a "routine nature" could a charitable trust be deemed "non-public" for purposes of the fourteenth amendment. *Id.* at 582. Unfortunately, the court neglected to delineate the scope of "judicial supervision of a routine nature." It merely declared that when, as in *Potter*, state action had been established,

> not only may this Court not seek to take a position of neutrality . . . but . . . it must affirmatively instruct [the trustee to pay no regard] to the color of any applicant's skin . . . .

Id. at 583. *But see In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570, *reh. denied*, 358 U.S. 858 (1958). In *Girard*, the Pennsylvania Supreme Court pointed out that if any action by a state court constituted sufficient state action for purposes of the fourteenth amendment, no private charity created by will could make distributions according to race, creed, or color because all wills must first be probated. *Id.* at 454. Since *Girard* upheld the substitution of private individuals for a city as trustees of a racially discriminatory trust, it is doubtful that the decision would be valid in the wake of Evans v. Newton, 382 U.S. 296 (1966). *See* notes 28, 35, 37 *supra*. Finally, the racially restrictive terms under consideration in *Girard* were ultimately stricken from the trust. *See* Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968). *See also* Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957); Power, *supra* note 1. Clark argued:

> In *Shelley v. Kraemer*, no judicial action was necessary to bring the covenants into existence or to make them effective if the parties chose to honor their terms. But the charitable trust has no such original vitality. . . . The trust becomes operative only after a court has found . . . that it is charitable. . . . To encourage a continuous flow of funds into philanthropic enterprises, [the government] bestows privileges, of which tax immunity is only one. The state creates and defines charitable trusts, grants them perpetual existence, modernizes them through cy pres, appoints and regulates the trustees, approves accounts, construes ambiguous language in the trust charter and sometimes goes so far as to impose a less stringent standard of tort liability on such trusts than on their private counterparts.

Clark, *supra* at 1003-04.

42. The court noted that the privately owned bank selected beneficiaries in an "exercise of unlimited discretion." 523 S.W.2d at 821. Because the trustee was guided only by the specifications of the testator, no public body was involved in the selection procedure. Therefore, the court reasoned, the bank's affiliation with the trust could not be

hospital,[43] nor the charitable trust served a function sufficiently public

the source of state action. The court later added that the bank, a national organization, was not engaged in "significant encouragement of discrimination as to constitute a 'state action.'" *Id.* at 822, *citing* Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974). The *Kruger* court outlined the extensive relations between states and the banking industry but rejected the contention that bank action is state action. The court speculated:

> As concepts of state action evolve to correspond more closely to economic reality, we may arrive at judicial recognition that such institutions and enterprises should be considered agents of the state.

Id. at 365, 521 P.2d at 449, 113 Cal. Rptr. at 457. This argument is strengthened by a line of cases declaring that national banks are the agencies and instrumentalities of the federal government. *See* Brief for Defendants-Appellants at 41-43, First Nat'l Bank v. Danforth, 523 S.W.2d 808 (Mo.), *cert. denied*, 421 U.S. 1016 (1975), *citing* First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252, 256 (1966); Franklin Nat'l Bank v. New York, 347 U.S. 373, 375 (1954); First Nat'l Bank v. Anderson, 269 U.S. 341, 347 (1926); Christopher v. Norvell, 201 U.S. 216, 225 (1906). *See also* A. BERLE, THE THREE FACES OF POWER 39-50 (1967) (corporate action denying "equal protection of the laws" should be state action, because of state power to grant the corporate-form privileges).

Courts have adjudged the banking industry to be "affected with a public interest." Noble State Bank v. Haskell, 219 U.S. 104 (1911). Moreover, a bank's "transactions frequently are subjected to closer scrutiny and tested by a higher standard than that applied to ordinary commercial affairs." Rothschild v. Manufacturers Trust Co., 279 N.Y. 355, 359, 18 N.E.2d 527, 528 (1939), *citing* Noble State Bank v. Haskell, *supra*. But the Supreme Court has explicitly rejected the "affected with a public interest" test as a basis for state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353-54 (1974).

43. Courts have disagreed whether the public function that hospitals and universities serve, and the government subsidies and tax benefits received by these institutions, sufficiently implicate the state to prohibit discriminatory action. The majority of cases alleging unconstitutional discrimination by a hospital or university are brought under 42 U.S.C. § 1983 (1970), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The statute's "under color of" law provision is identical to the fourteenth amendment's state action requirement. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966); Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873, 877 n.7 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 656 n.4 (1974); Comment, *Federal Comity, Official Immunity, and the Dilemma of Section 1983*, 1967 DUKE L.J. 741, 742. *But see* Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 646 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973) (analysis of fourteenth amendment state action requirement focuses on factors different from analysis of § 1983 under color of law requirement).

Most actions brought against hospitals under 42 U.S.C. § 1983 (1970) name the Hospital Survey and Construction Act (Hill-Burton Act), 42 U.S.C. §§ 291-291(o) (1970),

to support a finding of state action.[44] Indeed, the number of conten-

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as the statute supplying the state action requirement. Hill-Burton is designed to increase hospital services in the United States by distributing federal funds through state governments to participating public or nonprofit hospitals. 42 U.S.C. § 291 (1970). To obtain Hill-Burton funds, a state must prepare a detailed plan and name a state agency to determine state medical needs and means to fulfill those needs. Hospitals that discriminate on the basis of race, creed, or religion are not eligible. 42 U.S.C. §§ 291 (c)-(d); 42 C.F.R. §§ 53.111-.122 (1975). *See generally* Comment, *Provision of Free Medical Services by Hill-Burton Hospitals*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 351 (1973); 62 GEO. L.J. 1783 (1974).

A court considering alleged hospital discrimination might also weigh receipt of Medicare and Medicaid payments, licensing or incorporation of the institution by the state, *see* A. BERLE, *supra* note 42, at 47, and the argument that health care of its citizens is a state function. Cases involving charges of unlawful discrimination by a hospital or university in which state action was found include Klinge v. Lutheran Charities Ass'n, 523 F.2d 56 (8th Cir. 1975) (participation in Hill-Burton program is source of state action); Doe v. Charleston Area Medical Center, 529 F.2d 638 (4th Cir. 1975) (Hill-Burton funding and other state financial and regulatory involvement constitutes state action); Shaw v. Hospital Auth., 507 F.2d 625 (5th Cir. 1975) (actions of governing body of public hospital with state and federal funds are state actions); Sosa v. Board of Managers of Val Verde Mem. Hosp., 437 F.2d 173 (5th Cir. 1971) (board of hospital that received Hill-Burton funds acts as state agency); Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969) (Hill-Burton funds are source of state action); Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966) (private hospital's participation in Hill-Burton program established state action); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964) (hospital, non-recipient of Hill-Burton funds, performs state function of health care and is therefore an instrumentality of the state); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) (denial of staff privileges to black doctor by hospital receiving Hill-Burton funds is state action); Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974) (tax exemption, scholarship support, government research projects, government financing combine to render university's action state action); Citta v. Delaware Valley Hosp., 313 F. Supp. 301 (E.D. Pa. 1970) (Hill-Burton funds awarded hospital are basis for state action). *Contra*, Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975) (insufficient county-hospital involvement to justify a finding of state action); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 96 S. Ct. 422 (1975) (tax exemption, state charter, and federal funds not sufficient basis for state action); Doe v. Bellin Mem. Hosp., 479 F.2d 756 (7th Cir. 1973) (acceptance of Hill-Burton funds not adequate grounds for state action); Aasum v. Good Samaritan Hosp., 395 F. Supp. 363 (D. Ore. 1975) (receipt of Hill-Burton funds coupled with federal and state tax exemptions and state appointment of minority of hospital board is not state action); Spencer v. Community Hosp., 393 F. Supp. 1072 (N.D. Ill. 1975) (receipt of state funds does not evidence the state involvement necessary for state action); Slavcoff v. Harrisburg Polyclinic Hosp., 375 F. Supp. 999 (M.D. Pa. 1974) (receipt of Hill-Burton funds is not cause for a finding of state action).

All of the hospitals involved in *First National Bank* satisfied some or all of the criteria that have been recognized as a basis for state action.

44. The court summarized its argument against state action by reference to Jackson

tions examined and discarded suggests that the court could have discerned, in the sum of many separate grounds, substantial support for a finding of state action.[45]

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v. Metropolitan Edison Co., 419 U.S. 345 (1974). *See* note 20 *supra*. *Jackson* is distinct from *First National Bank* on several grounds. In *Jackson*, a privately owned and operated utility company held a certificate of convenience from the state Public Utilities Commission. When the company cut off a delinquent customer's service, she filed suit seeking damages and an injunction to compel the company to provide power. The customer alleged that she had a right to electrical service and that Metropolitan's disruption of service constituted state action, depriving her of property without due process. 419 U.S. at 347-48.

Although the utility had filed a certificate of convenience with the state commission, the commission had never conducted a hearing on the company's service termination procedure. The Court found that the filing without more did not amount to state authorization. This holding provides little support for the *First National Bank* court's position if, as *Shelley* mandates, judicial approval is seen as state authorization. The most critical distinction is that *Jackson* did not involve racial discrimination. Courts have developed a more flexible state action standard for cases involving racial discrimination. In Barrett v. United Hosp., 376 F. Supp. 791 (S.D.N.Y.), *aff'd mem.*, 506 F.2d 1395 (2d Cir. 1974), the court referred to this difference as a "double 'state action' standard." *Id.* at 797. This special treatment of racial claims stems from the original goal of the amendment, combatting racial discrimination. *See* note 11 *supra* and accompanying text. *See also* Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66 (2d Cir. 1976); Greenya v. George Washington Univ., 512 F.2d 556, 560 (D.C. Cir.), *cert. denied*, 96 S. Ct. 422 (1975); Jackson v. Statler Foundation, 496 F.2d 623, 628-29 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring).

It should be noted that the Court in *Jackson* discounted the extensive state regulation of the utility company, 419 U.S. at 350-51, although, as Justice Marshall pointed out in dissent, great authority supports the proposition that "the State's sanction did not need to be in the form of an affirmative command." 419 U.S. at 369 n.2 (Marshall, J., dissenting). The Court had previously indicated that even minimal state involvement would be construed as state action. *See, e.g.*, Bell v. Maryland, 378 U.S. 226, 309-11 (1964) (Goldberg, J., concurring) (state inaction can constitute responsible state action within the meaning of the fourteenth amendment); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (even state inaction can amount to approval of discrimination); Civil Rights Cases, 109 U.S. 3, 17 (1883) (conduct in question must be "sanctioned in *some* way by the State") (emphasis added). *Jackson* thus reflects a more conservative tendency in the current members of the Court. *See* Barker, *Black Americans and the Burger Court: Implications for the Political System*, 1973 WASH. U.L.Q. 747; Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Mendelson, *From Warren to Burger: The Rise and Decline of Substantive Equal Protection*, 66 AM. POL. SCI. REV. 1226 (1972); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

45. Numerous cases endorse the theory that no single factor can be determinative of the existence of state action; the total relationship between the state and the alleged transgressor is the relevant consideration. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), illustrated the procedure:

The Missouri Supreme Court's refusal to find state action reflects the uncertainty surrounding the concept.[46] The line between private and state discrimination is often vague and ill-defined.[47] Constitutional

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> Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building . . . indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.

Id. at 724.

See also Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972). The *First National Bank* court made no effort to consider the totality of the relationship between the state and the trust—its trustee, beneficiaries, and judicial construction.

46. The court's opinion reflected the fear that a contrary result would signal the demise of one's freedom to dispose of property by will. 523 S.W.2d at 821. But testators now lack absolute freedom of testation; the power to devise is circumscribed by many statutes. *See, e.g.*, MO. REV. STAT. § 474.160 (1969) (surviving spouse has right to take against will); MO. REV. STAT. § 474.320 (1969) (formalities of execution necessary to create a valid will); MO. REV. STAT. § 474.400 (1969) (testator must fulfill requirements to revoke a will). *See also* Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 501 (1964) (testator's "freedom" is subject to claims of creditors, surviving spouse's forced share, statutory provisions for disinherited heirs, statutory restrictions on charitable dispositions, statutory restrictions on dispositions for immoral purposes, gift and estate tax); Nussbaum, *Liberty of Testation*, 23 A.B.A.J. 183 (1937) (attitude towards unrestricted liberty of testation appears to be declining).

The *First National Bank* court's fear is reminiscent of Justice Harlan's dissent in Evans v. Newton, 382 U.S. 296 (1966), which feared the "pervasive potentialities of this 'public function' theory of state action." 382 U.S. at 322 (Harlan, J., dissenting). He foresaw its future misapplication to myriad other functions previously viewed as nongovernmental. The apprehensions of both Justice Harlan and of the *First National Bank* court, however, must be balanced against the protection of each person's constitutional rights. An infrequently noted passage from Shelley v. Kraemer, 334 U.S. 1 (1948), illustrates this balance. Respondents in *Shelley* contended that if the Court denied the injunction, *they* would be denied equal protection of the law. To this argument the Court said:

> The Constitution confers on no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.

Id. at 22. *See also* Bassett, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 CATH. U.L. REV. 39, 53 (1972); Note, *Section 1981 and Private Groups: The Right to Discriminate versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975).

47. The Supreme Court has declared that formulation of a precise test for state action is an impossible task. *See* Reitman v. Mulkey, 387 U.S. 369, 378 (1967); Burton

rights are at stake; the need for a definitive statement of the boundaries by the United States Supreme Court is manifest.[48]

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v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961); Kotch v. Pilot Comm'rs, 330 U.S. 552, 556 (1947). Although the resulting flexibility has been cited as a virtue, *see Burton, supra* at 722, this failure to delineate clear standards may be a vice in close cases. *See* note 48 *infra*.

48. A leading authority on the law of trusts observed:

> Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? . . . [A man] is permitted to devote his property in perpetuity to charitable purposes only because the public interest is supposed to be promoted by the creation of charities. . . . The founder of a charity should understand therefore that he cannot create a charity which shall be forever exempt from modification.

SCOTT § 399.4.

Scott's position suggests a public policy argument—that testators should be forbidden to discriminate. Courts understandably would prefer to ground their reasoning on more concrete bases. *But see* Hurd v. Hodge, 334 U.S. 24 (1948). In *Hurd*, handed down on the same day as Shelley v. Kraemer, 334 U.S. 1 (1948), the Court was confronted with a racially discriminatory covenant in the District of Columbia. Thus deprived of the fourteenth amendment prohibition against state judicial enforcement of discrimination, the Court invoked the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970), and emphasized:

> But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants . . . is judicial action contrary to the public policy of the United States . . . . The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution . . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

334 U.S. at 34-35 (footnotes omitted).

Absent a definitive statement by the Supreme Court, the protean character of state action, once regarded as a substantial asset, may be the ultimate source of its fall from judicial grace. For a sampling of the criticisms directed toward the state action doctrine, see Gunther, *supra* note 44 (restrictive interpretation of precedent has curtailed the vitality of state action); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966) (conflicting constitutional claims can neutralize violations of the fourteenth amendment); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963) (right of public to be free from discrimination must be weighed against private right to discriminate). In denying certiorari to *First National Bank*, 421 U.S. 1016 (1975), the Supreme Court leaves still undefined the scope of Shelley v. Kraemer, 334 U.S. 1 (1948). *See* notes 15-16 & 38-41 *supra*.