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THE LEGAL STANDING OF THE SOUTH'S SCHOOL RESISTANCE PROPOSALS

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On May 17, 1954, the Supreme Court of the United States announced its decision of the most momentous issue to come before the Court in recent years. At stake was the constitutionality of segregation of the races in the public schools.

By its unanimous ruling in *Brown v. Board of Education*,[1] and its four companion cases, that segregation *per se* was an unconstitutional denial of the equal protection of the laws to Negro school pupils, the Court thus disposed of the crucial issue which had hovered in the background of so many cases of recent years dealing with racial discrimination.

On the one hand, a decision upholding the states' power to require segregation of the races would undoubtedly have deterred for many years the efforts of Negro leaders to eliminate the practice and policy of racial separation. On the other hand, the Court's agreement that "separate but equal" was not enough and that segregation itself was invalid, upset the policy of separation of the races required by law in seventeen states and the District of Columbia, and permitted in four other states.[2] Fifteen of these states had provisions in their state constitutions requiring separation in the schools.[3]

While some of the few states outside of the South which permitted segregation were already moving to abolish the practice,[4] the established separation in the schools has been the keystone and supporting arch of the South's racial segre-

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1. — U.S. —, 98 L. ed. 583. The *Brown* case originated in Kansas. The other cases and the states in which they arose were: Briggs v. Elliott, South Carolina; Davis v. County School Board, Virginia; Bolling v. Sharpe, District of Columbia; Gebhart v. Belton, Delaware.

2. MURRAY, STATE'S LAWS ON RACE AND COLOR 14 (1950). See also N. Y. Times, May 18, 1954, p. 18.

3. Alabama, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

4. Several New Mexico cities abolished segregation in their schools during 1952 and 1953, refuting their previous segregated operation under New Mexico's statute permitting this practice. N. Y. TIMES, August 24, 1952, p. 64, col. 3; *id.*, Feb. 15, 1953, p. 34, col. 1. Phoenix, Arizona, took similar action after a local court declared segregation to be unlawful despite Arizona's permissive statute. N. Y. TIMES, Feb. 15, 1953, p. 34, col. 1; *id.* July 16, 1953, p. 15, col. 7. Topeka, Kansas, whose segregated system was attacked in Brown v. Board of Education, also moved to integrate its schools. *Id.*, Sept. 5, 1953, p. 13, col. 5.

gation. The decision declaring this practice to be henceforth invalid was expected to be a stunning blow to the structure upon which the social order of the South has for long been based.[5]

PREPAREDNESS MEASURES

Anticipating a decision adverse to segregation and fearing its unpredictable impact, Southern leaders of those states in which the decision would have its most real consequences early announced their intention to undertake any possible or feasible measures to insure the continuance of separate schools for the races, despite the Court's ruling. Governor James F. Byrnes of South Carolina declared in March 1951, while the case involving that state's segregation laws was still before the trial court:

> Should the Supreme Court decide this case against our position, we will face a serious problem. Of only one thing can we be certain. South Carolina will not now nor for some years to come, mix white and colored children in our schools. . . . If the Court changes what is now the law of the land, we will, if it is possible, live within the law, preserve the public school system, and at the same time maintain segregation. If that is not possible, reluctantly we will abandon the public school system. To do that would be choosing the lesser of two great evils.[6]

Governor Herman Talmadge of Georgia echoed these sentiments in repeated pronouncements.[7]

It was generally agreed throughout the South that white Southerners, while proud of the progress which had been made in Negro education and determined to continue that

5. A Southern newspaper editor reported: "If the Court forbids all segregation in public education, the consequences will be tremendous, though unpredictable." Dabney, *Southern Crisis: The Segregation Decision*, THE SATURDAY EVENING POST, Nov. 8, 1952, at p. 104. Another commentator added: "The political and sociological pressures surrounding the whole question are intense. . . . many Southerners maintain that a decision barring segregation would upset the whole fabric of society . . . ." N. Y. TIMES, Dec. 8, 1953, p. 1, col. 4.

6. Address before the South Carolina Education Association, March 16, 1951, THE STATE (Columbia, S. C.), March 17, 1951, p. 1, col. 8. In a subsequent interview, Governor Byrnes commented: "It is my belief that a Supreme Court ruling outlawing segregated public schools could have an emotional impact in certain areas of South Carolina and result in trouble. I therefore consider it sound governmental policy at this time to evolve a plan of action in advance in order to counteract any future hysteria." N. Y. TIMES, May 28, 1951, p. 16, col. 4.

7. N. Y. TIMES, June 6, 1950, p. 19, col. 2; *id.*, June 14, 1952, p. 34, col. 7.

progress,[8] were not yet ready to merge the races throughout their public schools. Consequently, Southern legislators, resolved to avoid such a merger, began both public and private consideration of self-styled "preparedness measures"[9] designed to make it possible for their states to continue separate schools in the event their segregation laws were declared invalid. The tempo of the consideration of such measures increased following the Court's decision and by this time all of the Southern states most directly affected by the decision, because of the proportion of Negroes present in each, have outlined their plans for the attempt to sidestep the invalidation of their segregation mandates.

But just as the leaders of the white populace of these states are determined to retain separate schools, so the Negro leaders spear-heading the attack on segregation are resolved, with equal determination, to fight every such attempt to sidestep the decision. These leaders speak of such plans as have been developed as sham and subterfuge and have avowed their intention to meet the institution of any or all of such plans with immediate court action.[10]

With the stage thus set—the white South poised to begin evasive action and the Negro leaders equally poised to upset such action—thoughtful Southerners, concerned that their always touchy racial problems should be beset with such direct conflict, are pondering the future. They are, of course, deeply

8. For a general review of this progress, see N. Y. TIMES, March 16, 1952, p. 82, col. 4. Dr. Benjamin Fine, education editor of the TIMES, termed the progress "remarkable" and "phenomenal." However, his optimistic report was rebutted and criticized as "misleading" by C. H. Thompson, editor of THE JOURNAL OF NEGRO EDUCATION. N. Y. TIMES, April 6, 1952, IV, p. 8, col. 5. In South Carolina, the chairman of the state's Educational Finance Commission, set up to run the school equalization program, could report, after three years, that South Carolina's school progress had been a "thrilling story." Since 1951, the official stated, the state had allotted 96-million dollars for school construction and was allotting, in 1954, three million per month. Two-thirds of all the building funds were reported to have been spent on Negro schools. GREENVILLE NEWS (Greenville, S. C.), May 12, 1954, p. 5, col. 6-7.

9. Governor Byrnes, Address before the South Carolina Association of School Boards, October 16, 1952, THE STATE, October 17, 1952, p. 1, col. 4.

10. Walter White, executive secretary of the Association for the Advancement of Colored People, told a meeting of the Association's leaders in January of 1954: "Just as we have carried the fight against openly avowed segregation to the highest court in the land, so shall we fight any subtle forms of segregation or any attempts to evade a possible decision of the court . . . ." N. Y. TIMES, Jan. 5, 1954, p. 25, col. 5. A local N.A.A.C.P. official in South Carolina earlier called for a $10,000 fund "to slap the school cases back into court at once" if the state attempts to evade the Court's decision. THE STATE, Nov. 3, 1952, p. 1, col. 5.

disturbed over the possible effect of the eventual abolition of the keystone of racial segregation—separation in the schools. They are more immediately concerned, however, with the effect and future of the steps which will be undertaken to circumvent the invalidation of the segregation laws.

Those Southerners more passionately devoted to maintaining separation, remembering the results of their similar attempts to sidestep the Court's decision opening the "white primaries" to Negroes, are naturally questioning the effectiveness of the circumvention measures which have been proposed, and the ability of such measures to withstand attacks on their legality and constitutionality. Others, perhaps not as fearful of the immediate results of the removal of the segregation laws, are concerned more with the impact of the circumvention measures themselves, and of the effect of such measures upon the lives of the people of the South and upon the area's established educational systems.

Still other, more rational Southerners, feeling that the removal of the segregation mandates will not result in any serious surge of Negro children to white schools, are questioning the advisability of proceeding with the varied evasive steps. They fear that such steps will aggravate the already ruffled tempers of the racial protagonists and produce unnecessary strife and bitter feeling. Those who have expressed such opinions feel that the tension produced by the Court's decision could best be alleviated through racial cooperation and common sense compromise. They do not feel that the probability of success of the circumvention measures is sufficient to warrant the conflict and increased agitation which they will produce.

For these reasons it is only logical that the proposed measures, calculated as they are to resist a decision of the Supreme Court, should be analyzed and then examined in the light of the imminent attacks which they will encounter and the theories upon which such attacks will be based.

In undertaking this study, the author, a native Southerner, has had in mind what are considered apt words of advice directed to the South in its present time of crisis:

> . . . we should try above all to keep clearly in mind the probable consequences of our decisions. If we do *this,* what will happen? If we do *that,* what will happen? And after that, what else is likely to happen? It takes straight thinking to foresee the logical consequences of some ac-

> tion which one is tempted to take in the heat of the moment.[11]

By probing into the "standing in court" of the various circumvention proposals, the author has earnestly endeavored to make a contribution to the very serious business of determining what measures should be undertaken.

ANALYSIS OF BASIC PLANS

The threat to the South's segregated school systems, which began in 1950 with a barrage of suits against the color line in education, prompted the quick formation of what one report termed "resistance movements"[12] to preserve the region's traditional bi-racial system. As early as 1951 the legislatures of Florida and Georgia hastily improvised measures to prevent any sudden commingling of the races in the event cases against their state schools should result in an adverse decision.[13] And in the same year, 1951, South Carolina created its committee to study means by which separation of the races could be continued despite such a decision.[14]

Those Southern states who entered into the "resistance movements" have, by this time, removed or laid the basis for removing all obstacles to the implementation of planned circumvention measures. A quick account of the action which has been taken in each state will show the plans which each has studied and has ready for use.

Georgia: Under the leadership of Governor Herman Talmadge, who has been outspoken in his resolve to maintain

11. Johnson, *The Impending Crisis of the South*, NEW SOUTH, May, 1953, p. 5.
12. N. Y. TIMES, June 11, 1950, IV, p. 9, col. 1.
13. Because Negroes had filed suits seeking admission to white educational institutions of both states, the legislatures of Florida and Georgia included in the states' appropriation bills for 1951 a proviso that should any court order the admission of a Negro to any state-supported school or should any such school disregard the mandate of the two states requiring separate schools, the state funds allotted to such institution should be immediately cut off. The Florida provision to this effect was vetoed by the state's governor. Letter of Florida Attorney General Richard W. Ervin to the author, of date March 22, 1954. However, the similar Georgia provision was signed into law by Governor Talmadge. Ga. Laws 1951, No. 218, p. 421, *et. seq.* Fortunately for Georgia's educational system, the school suits in question are still pending and thus the provision did not have to be utilized during the year in which it was in force. Such a provision has not been included in appropriation bills of later years.
14. N. Y. TIMES, May 28, 1951, p. 16, col. 3.

separation,[15] Georgia has devised, as its central evasive measure, a private school plan based on the grant by the state of tuition funds to individual white children. The state's General Assembly has proposed the following constitutional amendment as an addition to the existing public school provision, Article VIII of the Constitution of Georgia:

> Section XIII, Paragraph I, Grants for Education: Notwithstanding any other provision of this Constitution, the General Assembly may by law provide for grants of State, county or municipal funds to citizens of the State for educational purposes, in discharge of all obligation of the State to provide adequate education for its citizens.[16]

This proposed amendment will be voted on by the people of Georgia in November of 1954.[16a] While this is the only definite proposal which Georgia's legislators have yet passed, other of the circumvention plans have been studied by her planners and will undoubtedly be further considered.

Louisiana: This state's leaders did not hesitate, following the Court's ruling, to indicate their resolve to continue separate schools. With Louisiana's legislature in session during the summer of 1954, proposals were immediately forthcoming as to methods of countering the adverse ruling, and the state's legislators enacted, early in July, three such proposals.

Of two statutes, one is an individual assignment measure, similar to that passed earlier in Mississippi, giving school superintendents power to make an individual assignment of each child to the school which the pupil should attend.[17] The other statute simply requires that separate public elementary and secondary schools should be operated for the two races, and is expressly specified to be in an exercise of the " . . . State police power to promote and protect public health,

15. See N. Y. TIMES, June 6, 1950, p. 19, col. 2; *id.*, June 14, 1952, p. 34, col. 7. As late as January of 1954, Governor Talmadge, while noting that he would "hate for the necessity to arise for extreme action," declared that he would ". . . use every resource, including the militia and the state police if necessary, to maintain segregation in Georgia's schools." N. Y. TIMES, Jan. 19, 1954, p. 28, col. 8.

16. Ga. Laws, E.S. Nov.-Dec. 1953, No. 156, p. 241.

16a. According to unofficial returns from 1,461 precincts out of 1,903, this amendment passed by a vote of 185,809 to 165, 848. The heavy vote against the amendment stemmed from the activity of "a hastily organized state-wide 'Committee to Save Our Schools'. They argued that the amendment would not preserve segregation and ultimately would destroy the Georgia School system." N. Y. TIMES, Nov. 4, 1954, p. 32, col. 1.

17. Act No. 556, Louisiana Laws 1954.

morals, better education and the peace and good order in the State *and not because of race.*"[18] This statute concludes by providing that any school disregarding the provisions of the act should be refused both recognition or approval and aid in the form of state funds.

In addition to the two statutes, Louisiana's legislators further proposed a constitutional amendment which would add the following to the state's constitutional provision that the races should be separated in public elementary and secondary schools:

> . . . This provision (for separate schools) is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race. The Legislature shall enact laws to enforce the state police power in this regard.[19]

The proposed amendment would further add a provision empowering the Legislature to authorize special elections for consideration of future amendments to Article XII, the education section of the state constitution, thus ensuring speedy action on any further constitutional changes which may be deemed necessary. This amendment will be submitted to the state's voters in November of 1954.[19a]

Mississippi: Not being directly concerned with the school cases, since none of them were directed at Mississippi schools, the state's legislators declined, late in 1953, to pass a proposed constitutional amendment designed to allow a shift from state-

18. Act No. 555, Louisiana Laws 1954. This police power enactment is prefaced with the following preamble:

> Whereas the exercise of the State police power shall never be abridged as provided in Section 18 of Article XIX of the Constitution of Louisiana, and as reserved in the Tenth Amendment to the United States Constitution; and
>
> Whereas, in the exercise of said State police power, laws have been enacted throughout the history of the State requiring the maintenance of separate schools for the education of white and colored children, in the collective wisdom and experience of all its people, regardless of race, to promote the health, peace, morals, better education, and good order of the people *and such separate schools are required not on the basis of race* but for the advancement, protection and better education of all children of school age in Louisiana regardless of race, and the enforcement of the State police power requiring separate schools because of these serious considerations is of the utmost importance to all of the people of Louisiana, *regardless of race.* (Emphasis supplied.)

19. Act No. 752, Louisiana Laws 1954.

19a. The Louisiana amendment was adopted by a vote of about 5 to 1. N. Y. TIMES, Nov. 4, 1954, p. 32, col. 1.

supported schools to private school systems.[20] The state's leaders reaffirmed their intention to maintain separate schools,[21] however, and did proceed to enact, before the Supreme Court's decision was rendered, a measure known as the individual assignment plan, under which local school officials would be empowered to assign each child to the school which that child should attend.[22] And shortly after the Court's decision, the constitutional amendment proposal was again before the state's lawmakers. The Mississippi Legal, Educational Advisory Committee, specially created to study such measures, recommended in July, 1954, that the following provisions be added to the state's constitution:

> Section 213-B. (a) Regardless of any provisions of Article 8 (that the state should maintain public schools), or any other provisions of this Constitution to the contrary, the Legislature shall be and is hereby authorized and empowered by a two-thirds (2/3rds) vote of those present and voting in each House, to abolish, and may authorize the counties and school districts to abolish, the public schools in this State and enact suitable legislation to effect the same.
>
> (b) In the event the Legislature shall abolish, or authorize the abolition of, the public schools in this State, then the Legislature shall be and is hereby authorized and empowered to enact suitable legislation to dispose of school buildings, land and other school property by lease, sale or otherwise.

20. Under the terms of the proposed amendment, the state legislature would have been empowered, after deletion of the public school guaranty in the state's constitution, to abolish the public school system, dispose of school property, and both appropriate state funds and authorize counties and cities to so appropriate funds to aid educable children to attend private schools. CLARION-LEDGER (Jackson, Miss.), Dec. 6, 1953, p. 16, col. 2. The Mississippi House of Representatives passed the resolution proposing this amendment by a barely sufficient two-thirds vote (92 to 43). *Id.*, Dec. 11, 1953, p. 1, col. 8. When the measure reached the Senate, however, its opponents were successful in rejecting it by a 20 to 20 tie vote. *Id.*, Dec. 16, 1953, p. 1, col. 1; N. Y. TIMES, Dec. 20, 1953, p. 46, col. 5. Opposition to this measure in the Mississippi House and Senate generally centered around the argument that it was premature. CLARION-LEDGER (Jackson, Miss.), Dec. 16, 1953, p. 1, col. 1. The arguments were also advanced that it posed a threat to the state's educational system and that the scheme embodied in the amendment was impractical and would probably be held unconstitutional. *Id.*, Dec. 9, 1953, p. 1, col. 8, and Dec. 16, 1953, p. 1, col. 1.

21. The Mississippi House adopted a resolution in January, 1954, vowing to "resist by all lawful means" any attempt to abolish separation in the schools. N. Y. TIMES, Jan. 19, 1954, p. 28, col. 8.

22. House Bill No. 45, Laws of Mississippi of 1954.

(c) The Legislature may appropriate state funds and authorize counties, municipalities and other governmental subdivisions and districts to appropriate funds, including poll tax and sixteenth section funds, to aid educable children of this State to secure an education.

(d) The Legislature may do any and all acts and things necessary for the purposes of this section, and this section is declared to be, and is, supplemental to all other provisions of this Constitution, and legislation enacted under authority hereof shall prevail, whether in conflict with other sections or not.[23]

Mississippi has thus outlined two possible circumvention plans, either or both of which may be undertaken by the state if such action is deemed necessary.

South Carolina: In January, 1952, South Carolina's Governor Byrnes recommended to the state's legislature the proposal of a constitutional amendment deleting from the state's constitution the mandate that the state should provide free public schools. The legislature complied with this request and in November of the same year the people of the state gave the amendment their stamp of approval by a vote of almost two-to-one. The required second passage of this far-reaching step by the state's General Assembly was delayed pending the decision of the school cases before the Supreme Court, but in March of 1954 the final approving resolution was passed by the South Carolina House of Representatives.[24]

Thus South Carolina completely eliminated from its constitution any mention of public schooling as an obligation on the part of the state, and left its lawmakers free to shift to private schools if such a plan should be deemed feasible. No definite plan of action has yet been set forth, but most of the various circumvention plans have been mentioned by South Carolina political figures as possible courses of action, including the individual assignment plan, the individual tuition scheme of the private school plans, and the tri-school plan

23. It was expected that Mississippi's legislature would consider this amendment in a special session in the early fall of 1954. This would enable a vote on the proposal by the state's people in the general election of this year.

24. THE STATE (Columbia, S. C.), March 18, 1954, p. 1, col. 6. South Carolina thus erased from its Constitution the following provision, formerly Section 5 of Article XI: "The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the Counties into suitable school districts."

under which the state would maintain a central integrated school in addition to the present two separate schools.[25] The special study committee created by Governor Byrnes three years ago sat throughout the summer of 1954 and will undoubtedly have its recommendations ready for the legislative session of 1955, if a special session is not called before that date.

These are the only Southern states to thus far undertake any steps toward evading the full effect of the segregation decision. Most of the area's border states which had constitutional or statutory mandates requiring segregation are apparently either going to attempt an integration of their separate school systems or are adopting a "wait and see" attitude until they become directly concerned by virtue of suits against their own school systems.

From this consideration of the action within the states of the deep South, there appear certain basic proposals which have been considered, either alike or in varying versions, in all of those states well advanced in designing circumvention measures. These measures, which may be taken as the basic plans for attempts to continue separate schools, can be outlined in the following manner.

(1) TRANSITION TO A SYSTEM OF PRIVATE SCHOOLS, WITH OR WITHOUT DIRECT OR INDIRECT STATE SUPPORT

As a preliminary preparedness step, both in time and legal logic, for the shift to private schools, the states must first eliminate or amend the provisions of their state constitutions which guarantee the maintenance by the state of a system of free public schools.

South Carolina, as noted, has completely executed this preliminary step and the Mississippi proposal will likewise allow that state's legislature to entirely erase public schooling as an obligation of the state. However, the less drastic Georgia amendment will simply add a provision to that state's public school guaranty to the effect that the state may satisfy its obligation by making grants to individuals to use for the purpose of schooling.

25. Both the tri-school plan and the proposal to provide state funds to individual children for use as tuition were advocated by office-seekers during South Carolina's 1954 Democratic primary race. THE STATE (Columbia, S. C.), April 15, 1954, p. 8-A, col. 6; *id.*, May 18, 1954, p. 10-A, col. 2.

All such measures are designed to leave the state and its subdivisions free to withdraw from the field of public schooling. However, the action of a state in removing or amending its constitutional provision for the maintenance of a school system does not necessarily commit the state to so withdrawing from the field of education. If a shift to a private school plan is not considered feasible, then the state's lawmakers can continue its present public school system without interruption.

A consideration of the preparedness measures designed to allow the states to shift their schools to private groups does not produce a definitive outline as to how the transition would be made or the private schools organized and conducted. However, the action already taken or proposed and comments on such proposals afford an indication as to how such items as school buildings and property and financial support would be managed.

Buildings: The present school buildings and property, owned by local school districts, counties or municipalities, would be either given, leased or sold to private groups incorporated for the express purpose of conducting elementary and secondary schools.[26] It would be desirable, from the standpoint of legal theory, that the property be leased or sold to the private groups at its full marketable sale or rental value. However, it seems doubtful that sufficient funds can be initially secured to work such an arrangement in all instances, and it is probable that many of the school properties would have to be leased or sold for nominal sums only.[27]

Financial Support: In both of the states in which definitive private school plans have been advanced, the device of grants

26. For example, the original proposal of a constitutional amendment in Georgia, made in 1951, included the following provision: "In so providing (for individual grants to individual persons for educational purposes), the General Assembly may provide for the delivery over of any property now owned by the state or any institution or agency of the state or any county of the state to private individuals to be used for educational purposes." N. Y. TIMES, Feb. 1, 1951, p. 27, col. 6. And in the debate on the proposed Mississippi amendment, an advocate of the private school plan urged that the state could sell its school properties to private corporations formed for the purpose of conducting schools. CLARION-LEDGER (Jackson, Miss.), Dec. 9, 1953, p. 1, col. 8.

27. The transfer of the school properties to private groups would apparently be facilitated by existing statutory provisions under which school district trustees and/or county boards of education are authorized to sell school buildings and property when such are no longer used by the district. Examples are: ALA. CODE tit. 52, § 99 (1940); GA. CODE ANN. (1952 Revision), § 32-909; S. C. CODE OF LAWS, 1952, § 21-238 and 21-629.1.

by the state to individual children forms the crux of the plans,[28] and apparently will be the prevailing strategy for support of the private schools. Under this device, the present cost of the public schools of each local area could be divided by the number of school children in the area, and the resulting common sum would be provided each child for the payment of his or her tuition fees to the private schools. Thus, the tuition charged by the private schools of each local area would equal the present cost of the operation and maintenance of the public schools of the area.

The provision of the sums making up these tuition grants could apparently be divided between the state and local governments upon the same basis as the present financial structure of the free public schools.[29] Thus, while the state governments would continue to bear the larger portion of school expenses,[30] the continuation of the division of responsibility for financing between the state and the locality would enable a like continuation of the present tax structures from which the school expenses are derived.[31]

In addition to the foregoing scheme of providing individual grants for tuition purposes, the states could, of course, support the private schools by outright and continuing subsidies, or could render services, such as transportation of children and provision of textbooks. On the other extreme, there is the possibility of attempting to have the private schools financed solely through private means, such as tuition and contributions, with no aid, either direct or indirect, from state or local governments. While this drastic step of removing completely all vestiges of governmental aid will remain a possibility, it must be noted that at no time during the formulation of the

28. Both the Georgia and Mississippi amendments are centered on this device. See text supported by notes 20 and 27, *supra*.

29. Again, both the Georgia and Mississippi proposals would allow units of local government to make these tuition payments.

30. A table prepared by the Research Division of the National Education Association shows that, in 1952-53, the percentage of school expenditures attributable to the state governments of the Southern states ranged from a high of 83 per cent in Alabama to a low of 54.6 per cent in Mississippi. THE BOOK OF THE STATES 1954-55, p. 245. These percentages contrast sharply with the national average of 44.6 per cent. *Id.*, p. 239.

31. One of the more desirable features of the payment of state aid, or subsidies, to local school districts has been the alleviation of the burdensome nature of local property taxes, the basic and original source of school funds. State subsidies derived from state sales taxes, income taxes, etc., have generally been acknowledged to be a more effective method of taking care of a large portion of the school costs. THE BOOK OF THE STATES 1954-55, p. 240.

private school plans has it been proposed that such a step be taken. The immense cost of the operation and maintenance of adequate schools virtually necessitates support of the schools by taxation on both local and state levels, and the private school planners have apparently accepted this as obvious. Their principal device, as noted, calls for the continuation of state aid by the indirect method of providing grants to individual children.

It has also been suggested that such state subsidy of the private schools could be disguised in the form of state payments for "public services" rendered by the private schools, such as adult education programs, aid to handicapped children, and programs of specialized vocational training. The payments by the state for such services and programs could perhaps be based upon an enhanced valuation of the worth of the services, and thus the excess of such payments over the costs of the services rendered would go toward operating expenses of the private schools.

Still further means by which the states will possibly attempt to aid the operation of the private schools are the provision of tax exemption and the power of eminent domain.

Internal Organization and Management: The private corporations which would be set up to take over the conduct of elementary and secondary schools would not only use the same buildings and be financed basically by the same taxes, but would also be internally organized in the same fashion as the present school districts or governing units. Apparently each present school district would be incorporated as a private corporation, whose board of directors would supplant the present school boards and whose managing executives, such as superintendents, could be continued in the same positions with only slight changes in titles. Thus the same territorial limits and managing personnel of the present school districts could be utilized under the private school systems.

All these factors of similarity between the present public school systems and the proposed private school plans caused one commentator to exclaim that the private school proposals called for only a "paper changeover".[32] Such, in fact, may be the case.

Supervision of Standards and Attendance: While the formulators of the private school plans appear to have developed

32. N. Y. TIMES, Nov. 17, 1953, p. 19, col. 3.

possible schemes by which the only radical changes in the structure of the schools will be made on paper, they do not seem to have given adequate consideration to the problems inherent in supervision. For example, will there be any statewide standards to which the private corporations must adhere in regard to such factors as teachers' qualifications, curriculum, and course content? If so, who will set such standards and supervise adherence thereto, an agency of the state government or an agency voluntarily formed by the private groups?

More vitally, since the state and its subdivisions will be giving each child a sum which he will supposedly use to pay his school tuition, who will see to it that each child does use the money for that purpose? This apparent difficulty may be eased by giving, instead of outright grants, "orders" on the state to pay so much for private school tuition, which the state would honor when presented by a private school. However, the danger of loose management of these funds remains. Moreover, will the state attempt to continue enforcement of its compulsory school attendance law, on the established premise that the required attendance need not be at a free public school,[33] or will it leave all attendance requirements to the private schools?[34]

Such questions pose perplexing problems. It is possible that the private school planners will not attempt any supervisory requirements whatever, because of the evident desirability, in legal theory, of removing the state's influence from all factors except those essentially necessary for the maintenance of the schools. However, in such case the lurking danger of decadent schools and backward progress in education is evident.

Two Alternatives: In the initial organization of their private school systems, there appear to be two alternatives upon which the Southern states could proceed. The first would be to continue the present public school systems, with direct state support, for the Negroes and the establishment of private schools only for the white children. The second alternative would be to abandon the present public school systems entirely,

33. Pierce v. Society of Sisters, 268 U.S. 510 (1924).
34. It is highly probable that the Southern states will remove their compulsory attendance laws to avoid, in the event integration in some schools is accomplished, the forced attendance of white children at such schools. Such a measure has received definite consideration in Mississippi and has been mentioned in South Carolina. THE STATE (Columbia, S. C.), July 12, 1954, p. 8-A, col. 6.

including the present Negro schools, and to set up private schools for both races.

No clear indication has been given by the formulators of the private school plans as to which of these alternatives will be followed. However, the former, that is, continuation of the present Negro schools with direct support and operation by state and local governments, will undoubtedly be the procedure utilized.[35] For one reason, this would not involve the Negroes directly in the private school schemes. Consequently, an easier transition to the private school systems might be had because of the absence of a possible dissenting element, the Negro children and parents. In addition, the private school plans will be subjected to sufficient condemnation and suspicion without adding the possibility of having them scrutinized for failure to provide Negroes with an adequate education.

It should further be noted that in the organization of private school systems, upon either of the stated alternatives, the planners will necessarily rely upon what they hope will be the unanimous and concerted desire of their white citizenry to avoid integration of the races in the schools. This unanimous cooperation will be an essential factor in the effective organization and conduct of the private schools, for any dissent on the part of white children and parents would seriously disrupt the private school schemes.[36]

35. The intimation has been made that the power in the state legislatures to abolish public schools, after the constitutional guaranties of free schooling had been removed, would be used as a means of coercion against the Negroes. The Negro parents would be told, in effect, to cooperate and be satisfied with separate schools or lose your public schools. The author is confident, however, that few white Southerners would condone such a threat. He is satisfied that the expressions of such men as Governor Byrnes of South Carolina represent the true feeling of the vast majority of the whites. Byrnes early stressed that the state must not forget its duty to provide an adequate education to "innocent Negro children." N. Y. TIMES, May 28, 1951, p. 8-A, col. 6. And South Carolina's special school study committee, in an interim report issued in the summer of 1954, termed its task to be the formation of a plan whereby South Carolina might continue its public education program ". . . without unfortunate disruption by outside forces and influences which have no knowledge of recent progress and no understanding of the problems . . . ." The committee significantly added that it sought a course of action under which the state might ". . . offer to all children, regardless of race, color, creed or circumstances, equal educational opportunities in an atmosphere free of social conflicts and tensions which would tend to impede and inhibit the learning process." THE STATE (Columbia, S. C.), July 29, 1954, p. 2-A, col. 7.

36. For example, if direct state support is continued for the Negro schools, a dissenting white child, forced to depend upon the state's indirect support of his private school, could logically contend that the state was denying him the equal protection of the laws if the state refused to permit him to attend the state-provided school for Negroes.

(2) INDIVIDUAL ASSIGNMENT OF ALL STUDENTS TO PARTICULAR SCHOOLS

Unlike the private school proposals, which involve an abandonment of the presently constituted public school systems, there have been proposed individual assignment plans under which the public school systems would be retained without change. Such measures have received definite consideration in several Southern states, the more advanced being Mississippi and Louisiana, where details of the individual assignment proposal have been outlined in legislative form.

The following would apparently be the pertinent and essential elements of an individual assignment plan:

Power to Assign: The school district board of trustees would have the power to designate the particular school within the district which each enrolling child should attend. No enrollment would be final until such designation had been made, and attendance would be limited to the school to which the child was assigned.[37]

Basis of Assignment: Each assignment would be made on an individual basis, considering the educational needs and welfare of the particular child involved. However, additional factors which would be taken into consideration are, as stated in the Mississippi plan:

> . . . the welfare and best interest of all the pupils attending the school or schools involved, the availability of school facilities, sanitary conditions and facilities . . . health and moral factors at the school or schools, and in the community involved, and all other factors which the board of trustees may consider pertinent, relevant or material in their effect on the welfare and best interest of the school district and the particular school or schools involved.[38]

37. The Mississippi statute provides as follows: "SECTION 1. When any child shall apply or present himself for enrollment in or admission to the public schools of any school district of this state the board of trustees of such school district shall have the power and authority to designate the particular school or attendance center of the district in which such child shall be enrolled and which he shall attend, and no enrollment of a child in a school shall be final or permanent until such designation shall be made by said board of trustees. No child shall be entitled to attend any school or attendance center except that to which he has been assigned by the board of trustees . . . ." House Bill No. 45, Laws of Mississippi of 1954.

38. *Id.*, Section 2.

It must be frankly stated that such careful and lengthy enumeration of the factors to be considered in making the assignments is only intended as a blind for the realistic basis upon which the assignments would be made—the basis of race. The formulators of such individual assignment measures hope to be able to rely upon such phrases of "welfare and best interest" to support a continued division of the races in separate schools.

Territorial limits: In making the assignments, the school district board of trustees would not be limited by any previous specification on their part of boundaries for particular attendance areas within the district. They would be empowered to alter or disregard such boundaries and would be free to assign a child of one residential area to a school located in another residential area. Thus, if a few Negro children chanced to live in a predominantly white area and within several blocks of a white school, they could be assigned to the school of an all-Negro area, even though such school might be several miles from their homes.

Appeals: The finishing touches in the attempt to make the individual assignment plan effective for the purpose of continuing separate schools will be the establishment of an extensive system of appeals from the initial assignment. Under the plans as proposed, a person feeling aggrieved by the assignment of any child, presumably a Negro parent or guardian, would appeal first to the board of trustees for a reconsideration of the assignment, then to the county board of education, then to the county's circuit court to be tried *de novo* as a regular case, and hence to the state supreme court. This elaborate detail of the method of appealing from the assignments would be intended to make such appeal as cumbersome and difficult a process as possible, so as to discourage those who would complain of the assignments. Also, through use of the specified channels of appeal, the formulators of the assignment plans would seek to keep all such appeals within the state courts and beyond the jurisdiction of federal district courts.

Transfer of individual pupils: Almost identical to the individual assignment plan is a proposal that the school district boards of trustees be vested with the power to freely transfer students from one school to another. This transfer device would be based upon the same principles and utilize the same

theory as the individual assignment plan. The only difference in the operation of the two plans would be that under the transfer device, the determination of what school the child should attend would be made after his initial attendance at the school of his choice. Thus, in practice, if a Negro child appeared at a school set aside for whites, he could immediately be transferred to an all-Negro school.[39]

(3) GERRYMANDERING AND REARRANGEMENT OF SCHOOL DISTRICTS

Another possible device which the Southern planners may utilize in their attempts to retain separate schools is a scheme of gerrymandering and rearrangement of school districts or attendance areas within each district. Under this device, present boundaries of attendance areas could be altered and revised so as to sharply differentiate between white and Negro areas of residence, attempting to include within each attendance area only an all-white or all-Negro population.[40]

The best utilization of this scheme could be made in Southern towns and cities, in many of which the residence areas of whites and Negroes have remained distinguished and apart from each other. Thus it would not be difficult, in some cities, to label a Negro area as one school attendance zone and a white area as another. If necessary, there being no school buildings presently in such designated areas, new buildings could be built within the area.

However, difficulty would be encountered in residential fringe areas in which whites and Negroes have become intermingled. And the rural areas of the South would offer a seemingly insurmountable obstacle to gerrymandering Negro and white families into separate districts, since in such areas the

39. While the transfer proposal would seem to involve less trouble than the assignment plan, since the board of trustees would have to act only if a Negro sought admittance to a white school and would not be bothered with the technical assignment of every child, it would seem to be less advantageous in affording a disguise or blind for the actual basis of the transfer. Although the resulting division of the races would be the same, the impact of coercing would be softened by an assignment of all pupils, both white and Negro, instead of action only in scattered cases of Negroes alone. It is perhaps for this reason that the transfer scheme has not received more serious consideration by the South's planners.

40. A popular definition of "gerrymander" gives as an example the following: ". . . to arrange school districts so that children of certain religions or nationalities shall be brought within one district and those of a different religion or nationality in another district." BLACK, BLACK'S LAW DICTIONARY (3rd ed. 1933).

residences of the two races are interspersed with no distinguishable pattern of grouping.

Perhaps it is because of these obstacles to a successful use of the gerrymandering scheme that it has not been more seriously proposed as a "circumvention measure." However, the use of the device does remain a definite possibility in those urban communities in which the residences of the two races have remained separated in distinct groups. In such areas, it is entirely possible that no new creation of school zones would be necessary. The school authorities may well rely upon present divisions as a sufficient reason for declining to admit a Negro from across the existing boundary to a white school.

(4) TRI-SCHOOL PROPOSAL

One of the more interesting and novel proposals of the Southern planners attempting to devise means to avoid the effect of a decision against segregation has been the idea of setting up a tri-school system. Under this proposal, where there are presently two separate schools there would be created three schools. The first of these schools would be operated on a basis of complete integration and would be freely open to whites and Negroes alike. However, if a white child elected not to attend the integrated school, he would have the choice of going to a second school, operated for whites only and attended by white children on a voluntary basis. Similarly, if a Negro child desired to attend school with Negroes only, he could attend a third school which would be maintained for his race.

Thus, by providing a school which would be open on an integrated basis, the proponents of this plan would hope to avoid the complaint that they were failing to comply with the spirit of a decision declaring segregation in the schools to be invalid.

(5) EXERCISE OF POLICE POWER

A relatively simple means of resisting the segregation decision, requiring no administrative action or change in the present public school system, is the proposal to rely upon state police power as a sufficient justification for the continuation of separate schools for the two races. This proposal is typified by Louisiana's enacted statute and proposed constitutional amendment.

To warrant the use of police power to maintain segregation, a state's legislators would explain that separate schools are essential to the protection of public health, morals, and peace and good order. Such a police power enactment would carefully state that while race was not its basis, the better education of both the whites and Negroes required the prohibition of mixed schools.

* * *

Such are the basic plans which might, and obviously will, be utilized in the Southern states in an effort to maintain their present systems of separate schools for the races. These plans have necessarily been stated in an alternative fashion. Obviously all could not be undertaken by one state. For example, abandonment of the public school system and a shift to private schools would mean that the state would not attempt the individual assignment plan, since the latter involves a continuation of the present public schools without change.

However, certain of the plans could be utilized at the same time. The individual assignment plan could, for example, be joined with a scheme of gerrymandering school attendance areas. Another effective combination might be the juncture of the tri-school proposal with the provision of tuition to private schools. By maintaining an integrated school open to all, the states would be technically complying with the spirit of the Court's decision. But to all children who might elect not to attend an integrated school, the state could furnish tuition money to attend private schools.

The foregoing outline is not represented as being exclusive, although all proposals which have received public attention have been noted. Since a number of the Southern states have maintained strict silence as to what their action might be, it should not be doubted that other proposals may be forthcoming.

Theories of Attack

The basic evasive plans, by which the Southern states will attempt to retain their separate school systems, will be subjected to both obvious and subtle theories of invalidation.

In considering these theories, it must be remembered that the Court has ruled that constitutional and statutory provisions requiring the separation of the races for the purpose of public schooling are invalid as a denial of the equal protec-

tion of the laws to Negro school children. This decision has the effect of endowing Negro children with a right not to be segregated and not to be denied admission to state schools heretofore set aside for whites on the basis of their race or color.

The attacks on the circumvention measures will, in essence, be based upon this established right, and the charge will be made that the various evasive proposals, as substitutes, are equally a denial of equal protection. However, unlike the statutory mandates which could be declared invalid because of their very wording, the circumvention measures will not lend themselves to any such "on the face" attack. Those attacking such measures will necessarily have to show that the practice, under each specific measure, in regard to the admission of Negro children to schools, has been one of discrimination because of race or color, and further, that such discriminatory acts are the equivalent of the formerly directly required segregation, in so far as the applicability of the Fourteenth Amendment is concerned.

Such attacks will be leveled against each of the outlined evasive measures. The following is a consideration of the possible theories of attack to each of the basic circumvention plans, with an estimation of the probable success of each attack.

(1) TRANSITION TO PRIVATE SCHOOLS, WITH OR WITHOUT DIRECT OR INDIRECT STATE SUPPORT

The plans to shift from state supported and managed schools to state-wide systems of private schools are based upon the theory that the mandate of the Fourteenth Amendment against the denial of equal protection of the laws, i.e., against discrimination, on the basis of race or color, is directed solely against what is termed "state action"—action of a state or one of its subdivisions.[41] Consequently, the Southern planners theorize that if the state and its subdivisions, with their support, management and influence, are removed from the area of public schooling, the substituted private management and conduct of the schools would not be subject to the provisions of

41. The pertinent provision of the Fourteenth Amendment is as follows: ". . . 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."

the Fourteenth Amendment. Hence, if this theory is effective, the action of the private schools in discriminating or denying admission to Negroes would not incur the inhibitions of the Amendment.

The effectiveness of this theory is directly dependent upon the ability of the state to completely disassociate itself and its subdivisions from the maintenance of schools.[42] Any vestige of state support, management or supervision would seriously hamper the efforts to utilize the theory of private action.

The Southern planners have apparently acknowledged this principle, and have recognized that their private school plans are confronted by a complex dilemma. Simply stated, the problem they face is how to remove all vestiges of state action from the area of schooling and yet provide the financing necessary to run any type of school system.

Faced with this formidable roadblock, the formulators of the private school plans have resorted to the idea of having the states indirectly aid and support the private schools. Under their principal device, as noted, the states will grant a sum to each child to be used by the child to pay his tuition fee charged by the private school. Other such modes of indirect aid have been noted and will undoubtedly be undertaken.

It is upon the courts' acknowledgment that the states will have thus divorced themselves from the provision of schooling that the success of the private school plans principally depends. And to so acknowledge, the courts will necessarily have to find that no action on the part of the state or its subdivisions, within the meaning of the Fourteenth Amendment, is present in the financing, management or supervision of the private schools.

It is therefore apparent that the success or failure of the private school plans will depend to a large measure upon the utilization and application by the courts of the principle of state action as necessary to make the Fourteenth Amendment operative. Before considering the various alternatives possible under the private school plans, it would be well to explore this principle of state action, its ramifications and the extent to which it has been developed.

42. In the subsequent discussions of state action, it should be remembered that action of any subdivision or unit of the state government, including counties and municipalities, is deemed to be the action of the state for the purposes of the Fourteenth Amendment, upon the principle of delegation by the state of its authority. For the application of this principle to the board of trustees of a school district, see Gonzales v. Sheely, 96 F. Supp. 1004 (1951).

The Basic Concept of State Action. The Fourteenth and Fifteenth Amendments,[43] proposed and ratified during the aftermath of the War Between the States, were intended, at the least, to protect the recently freed Negroes against the use of the governmental authority of the states in a manner prejudicial to them.

It was not made entirely clear by the proponents of the Amendments what types of governmental authority their inhibitions directed toward, but it has since been suggested that the formulators of the Amendments and the Congress passing them had in mind only direct state legislative action.[44] Certainly the first tests of state action as incurring the inhibitions of the Amendments were of state statutes.[45]

It was evident even then, however, that a state could infringe upon protected rights in other ways than by positive legislation, and in 1879, the Court, in a meaningful dictum, suggested that state executive and judicial acts were equally within the concept of state action.[46] Subsequent cases fully justified this dictum and have included within the sphere of state action all acts of a state's administrative agencies and political subdivisions.[47] In addition, the courts have recognized that state action exists when officials of a state's judiciary act both in denying due process in procedural matters and in formulating and applying a state's substantive law.[48]

Only shortly after establishing the bases of the new concept of state action, however, the Supreme Court was faced with the necessity of limiting the bounds of the concept to avoid its complete obliteration. The test came to the Court as a result of the enactment by Congress in 1875 of the Civil Rights Act,[49] which established both civil and criminal of-

43. The two amendments contain identical phraseology as to their requirement of state action, and have been treated alike by the courts and legal writers in the development of the concept of state action.

44. Note, 96 U. OF PA. L. REV. 402, 403 (1948).

45. Slaughter-House Cases, 16 Wall. 36 (U.S. 1872); Strauder v. West Virginia, 100 U.S. 303 (1879).

46. Virginia v. Rives, 100 U.S. 313, 318 (1879).

47. Examples are: *public service commission,* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894); *tax board,* Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907); *governing board of state educational institution,* Hamilton v. University of California Regents, 293 U.S. 245 (1934); *municipal corporation,* Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913). See Rottschaeffer, *Constitutional Law* 441 (1939).

48. *Ex parte* Virginia, 100 U.S. 339 (1879); American Federation of Labor v. Swing, 312 U.S. 321 (1941). See also Note, 96 U. OF PA. L. REV. 402, n. 22 and n. 23 at 404 (1948).

49. 18 STAT. 335 (1875).

fenses for discrimination on the basis of race or color by private owners of inns, theaters, places of amusement and public conveyances. Considering this statute in the light of the Fourteenth Amendment's requirement of state action, the Court declared that individual invasion of individual rights was beyond the bounds of the Amendment and that the statute was therefore unconstitutional.[50]

This theoretical holding has been reiterated to this day. As recently as 1948 the Court said:

> Since the decision of this Court in the Civil Rights Cases, . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[51]

It would thus appear that the Court had adopted and consistently applied an obvious and commonly understood interpretation of state action, as official acts of the state through one of its official agencies. This interpretation was in accord with the basic constitutional theory that Federal regulation was addressed only to the states and policing of individuals was to be left to the states. To conclude that this principle has been strictly adhered to, however, would be both erroneous and misleading.

Expansion of the Concept. Despite the apparent immunization of private or individual acts from the inhibitions of the Amendments, decisions of recent years have so extended the application of the state action concept that the originally established distinctions between state and private action have become practically meaningless. The supposed immunity of private acts has been increasingly stripped away and private organizations and persons, under varying circumstances, have

50. Civil Rights Cases, 109 U.S. 3, 11 (1883). The Court subsequently ruled in the same vein in regard to a similar statute enacted in pursuance of the Fifteenth Amendment, holding a statute making it a crime for any person to delay by bribe, threat or force a citizen in qualifying himself to vote was unconstitutional because, among other reasons, it was not confined to the interdiction of state action. James v. Bowman, 190 U.S. 127 (1903).

51. Shelley v. Kraemer, 334 U.S. 1, 13 (1948). The significance of this statement in view of the effect of the Court's holding is doubtful, as later discussion will point out.

been held subject to the same limitations as those directly placed upon the states by the Amendments.[52]

It has been aptly suggested that this expansion of the concept of state action has been correlated to and has accompanied increased governmental regulation of the individual, the increasing exercise by private agencies of functions previously considered public, and attempts to circumvent the Amendments by use of subterfuges of purported individual action.[53] It may indeed be true that if the concept were not so expanded many areas of discrimination would have been left without the effective instruments of correction present in the Amendments. But for whatever reason, it is evident that in the "continuous spectrum" of which public and private action are "opposite poles,"[54] state action as a legal concept has moved relentlessly into the area previously considered to be private action.

The paths of this extension of state action have been neither logical nor coherent. Adding to the inherent confusion has been the inability of legal writers, attempting to analyze the increasing encroachment into the sphere of private action, to agree upon their characterizations of the expansion.[55]

The best such characterization appears to be that the expansion has developed under the following two distinguishable facets: (1) the instrumentality theory, under which action of apparent private organizations has been considered to be state action because of various sub-theories; and, (2) the determination of what action by an admittedly state agency is to be considered as state action within the scope of the Amendments.

The instrumentality theory, under which acts of purportedly

52. See Notes, APPLICABILITY OF THE FOURTEENTH AMENDMENT TO PRIVATE ORGANIZATIONS, 61 HARV. L. REV. 344 (1948) and THE DISINTEGRATION OF A CONCEPT—STATE ACTION UNDER THE 14TH AND 15TH AMENDMENTS, 96 U. OF PA. L. REV. 402 (1948). The author of the latter note significantly commented: "The extension of state action might appear cause for concern. From a conceptual point of view state action has undergone a gradual disintegration which makes definition today illusory; and from a constitutional point of view there has been an encroachment by the federal power upon the state's traditional domain." *Id.*

53. Huber, REVOLUTION IN PRIVATE LAW, 6 S. C. L. Q. 8, 17 (1953).

54. Comment, 57 YALE L. J. 426, 434 (1948).

55. For three different treatments of the expansion see the articles heretofore noted, notes 52 and 53, *supra*. The author of the latter article commented: ". . . the expansion has failed to follow any logical road, unless a general though erratic trend toward effectuating the purpose of the Amendments, no matter how, can be considered logical development." Huber, *supra* note 53, at 19.

private organizations have been stamped as state action, has had both its origin and its furtherest extension in the cases dealing with the attempts of Southern political party organizations to exclude Negroes from voting in their primary elections.

It has been employed to find the existence of state action in such cases in the following situations:

Where a state statute permitted the party's executive committee to prescribe qualifications for its members—*Nixon v. Condon.*[56]

Where the state prescribed statutory regulations for the conduct of the primary election and connected it by statutes with the ensuing general election—*Smith v. Allwright.*[57]

Where all statutes regulating or affecting the primary had been repealed by the state, but the primary remained both an integral part of the election procedure and the only realistic part of the election—*Rice v. Elmore*[58] and *Baskin v. Brown.*[59]

Where there had never been any statutory recognition of the primary, regulation of it, or connection of it with the other parts of the election machinery, but the primary effectively controlled the choice of the election—*Terry v. Adams.*[60]

The primary decisions do, of course, have distinguishable criteria of their own—the tests that the primaries were an integral part of the election machinery or that they effectively controlled the choice of the election and were its only realistic part. Nevertheless, it is evident that they also involved arbitrary findings of the presence of state action in situations where the courts had previously been unable to discern such. One commentator said of *Terry v. Adams*, the most extensive use of the instrumentality theory:

> Yet this decision is *a startling one* in finding state action in the exercise of political choice by a private association *in no special way assisted by the state.* No previous decision had found state action except in state statutes, the use of state funds, the acts of state officials,

56. 286 U.S. 73 (1932). This case may be considered the origin of the instrumentality theory.

57. 321 U.S. 649 (1944). That these decisions do evidence a definite liberalization of the Court's attitude toward state action is clear when it is remembered that only nine years before Smith v. Allwright, the Court had declined to rule that the statutory connections between the party primary and the state rendered the party's act state action. Grovey v. Townsend, 295 U.S. 45 (1935).

58. 165 F. 2d 387 (4th Cir. 1947), *cert. denied,* 333 U.S. 875 (1948).

59. 174 F. 2d 391 (4th Cir. 1949).

60. 345 U.S. 461 (1953).

> or the discriminatory application by a state of its laws. *This decision effects a substantial change in the meaning of this vital constitutional requirement . . . .*[61] [Emphasis supplied.]

The underlying theoretical bases of the findings of state action in these cases have been variously defined. Some would attribute it to the state's provision or regulation of the means by which the private party has been able to discriminate, thus giving the private party cause to be considered a state instrumentality since the state had, in essence, endowed it with the power to make its discrimination effective.[62] This theory would appear sufficient to explain the *Smith v. Allwright* decision, where there was in existence a statutory web connecting the primary with the state's election machinery, but it is difficult to apply the idea of state-supplied ability to the subsequent cases where there were no such statutory connections.

These later decisions would appear to be in accord with a further basis which has been advanced as underlying the instrumentality theory—that the performance by the private parties of a governmental function made them a state instrumentality.[63]

Thus, the proposition seems well established that the limits of the Fourteenth Amendment are applicable to the activities of a private organization which either exercises a governmental function and/or has a connecting web with the state of state supervision, financing, or sponsorship.[64]

The second avenue of the expansion of the state action concept has been classified as the area of determination of

61. Howe, THE SUPREME COURT, 1952 TERM, 67 HARV. L. REV. 91, 105 (1953).

62. Huber, *supra*, note 53, at 17; Note, 96 U. OF PA. L. REV. 402, 408 (1948).

63. See Hyman, SEGREGATION AND THE FOURTEENTH AMENDMENT, 4 VAND. L. REV. 555, 558 (1951). Both of these theoretical bases have been supported by decisions outside the area of the primary cases. One such case involved the act of a *privately-owned town* (governmental function) in abridging the religious freedom of an alleged trespasser upon its streets. Marsh v. Alabama, 326 U.S. 501 (1946). Another involved the discriminatory act of a city library system which owed its powers to the state and which was dependent for financial support upon the city's voluntary appropriations (state-supplied ability to discriminate). Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945). *But cf.* Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948).

64. The only doubts which exist as to this proposition have been aptly attributed to these circumstances: "(1) The Supreme Court, while implicitly subscribing to this view, has never expressly stated the proposition; (2) much uncertainty exists as to the exact relationship necessary to invoke the Amendment." Note, 61 HARV. L. REV. 344, 347 (1948).

what action by an admittedly state agency is to be considered as state action for the purpose of invoking the Fourteenth Amendment.[65] This area has seen development of the concept in two ways.

The first of these has been the establishment of the view that a state acts even when its agencies abuse or exceed the limits of their technical legal authority by acting in a manner either unauthorized by state law or actually prohibited by it.[66]

Further expansion of state action in this area has occurred in the significant decisions which have enhanced the role a state court may play in the creation of state action. In the first of these decisions, *Shelley v. Kraemer*,[67] the Court construed the action of a state court in enforcing a racial restrictive covenant which had been privately entered into as sufficient state action to support the applicability of the Fourteenth Amendment. The second decision, *Barrows v. Jackson*[68] utilized the state action theory of the *Shelley* case and held the equal protection clause of the Amendment to be equally applicable to a state court's award of damages for the violation of such a restrictive covenant.

Prior to 1948, and *Shelley v. Kraemer*, the prohibited state action, while having been expanded, was still confined to instances of direct discrimination by groups which were either obvious state agencies or which could be labeled state instrumentalities. The influence of a state court in acting upon and enforcing private discriminatory agreements was considered too attenuated to be itself the prohibited state action.[69]

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65. "The problem is one of determining whether the causal relation between acts of what is admittedly a state agency and the resultant denial of a civil right is sufficiently direct to bring that action within the constitutional ban." Note, 48 COL. L. REV. 1241, 1242 (1948).

66. Since this particular facet of expansion will have little application to the private school plans under consideration, no extensive attempt is made to show the pattern of its development. This theory was first employed in *Ex parte* Virginia, 100 U.S. 339 (1879), was questioned in Barney v. New York, 193 U.S. 430 (1904), but was subsequently reiterated in Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907) and Screws v. United States, 325 U.S. 91 (1945). The illogic of this particular expansion of state action has been generally criticized. See Huber, *supra* note 53, at 19, and Note, 96 U. OF PA. L. REV. 402 (1948). The latter commentator, in describing the above cases, wrote: "The courts . . . in dealing with the misuse of state power have not followed the dictates of pure logic, but seem to have taken an analogy to *respondeat superior*, with a resulting extension of state action." *Ibid.* *But cf.* Hyman, *supra* note 63, at 558; Hale, FORCE AND THE STATE . . . , 35 COL. L. REV. 149, 182-183 (1935).

67. 334 U.S. 1 (1948).

68. 346 U.S. 249 (1953).

69. See Note, 48 COL. L. REV. 1241, 1242-43 (1948).

Shelley v. Kraemer cut sharply across this established cleavage between direct acts of discrimination and indirect enforcement or sanction of private discriminatory acts. The import of the decision is vast.

At the very least, *Shelley v. Kraemer* and *Barrows v. Jackson* establish that if a state court lends *its sanction* to a private act of discrimination which would be a denial of equal protection if done directly by the state (either by admitted state agency or an apparent state instrumentality), then such sanction *is* a sufficient indication that the state has acted as a party to the discriminatory act to support the invocation of the Fourteenth Amendment.

Broadly interpreted, the decisions would seem to make " . . . any and all action by any arm of the state, whether direct or indirect, close or distant, alone or in conjunction with private individuals or groups, state action under the Fourteenth Amendment."[70]

It is quite probable that the Court did not foresee that these decisions could be logically applied to render largely unimportant all previous distinctions between state and private action.[71] It is also probable that the court did not intend the logic of its decisions to be applied to any and all acts of discrimination by private individuals.[72]

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70. Huber, *supra* note 53, at 24. This article is an excellent analysis of the varied effects of Shelley v. Kraemer. See Note, 48 COL. L. REV. 1241 (1948), *with* Comment, 45 MICH. L. REV. 733 (1947) for divergent views as to the desirability of the *Shelley* rationale.

71. See Huber, *supra* note 53, at 25-26, where the author illustrates the undermining effect of Shelley v. Kraemer upon the instrumentality theory. He notes that previous utilizations of the instrumentality theory have led to court actions. Since this is true, he points out, the plaintiffs in such actions would no longer have to rely upon the establishment of a state instrumentality, but could, under Shelley v. Kraemer, point to the state court's action upon the alleged discrimination as the necessary state action.

72. The realistic effect of the two decisions can be simply stated: suppose a private apartment owner rents only to whites, having no basis for excluding Negroes other than their race or color; suppose further that a Negro alleges the owner's action to be a denial of equal protection, and a state court dismisses the Negro's suit for failure to state a cause of action. Has the state acted and become a party to the discrimination? The logical import of the decisions is that it has. The same reasoning would seem to apply to a property owner's refusal to sell to a Negro. See Comment, 45 MICH. L. REV. 733, 742 (1947). The author of this article, written prior to the Shelley decision, commented: "If it should be held that court enforcement of race restrictive covenants is state action, the basis for this distinction (between private and state action) would be obscured; and on the theory that the state is sanctioning final consequences whenever it protects a citizen in the exercise of any of his property or contract rights, the Fourteenth Amendment would emerge with unforeseeable implications for our daily lives." *Id.* at 747.

Nevertheless, the decisions stand as delivered. Their language cannot now be retracted. Whether their use of the philosophy of state sanction of private discriminatory acts will be restricted or extended in future cases is an interesting speculation. One commentator who intensively studied the effect of the decisions concluded:

> Past constitutional history would suggest . . . that even if the *Shelley* doctrine should be limited in the near future, and not be extended as far as we have determined that it logically could be, *the more distant future holds the promise, or threat, that the more extreme view will be accepted.* We have seen that the Court has continually expanded its concept of what constitutes state action. While it may have used language in the *Shelley* case which took it rather further than it expected, any limiting of the effect of the case is likely to be temporary, and, in time, we can expect the broader interpretation of its language to determine what constitutes state action.[73]

Such is the present status of the legal concept of state action as a prerequisite to the invocation of the Fourteenth Amendment. It is against the aura of expansion of the concept that the private school plans under consideration will be tested. In examining these plans, the courts may well be required to either limit this expansion or crystallize it as accepted doctrine. Either way, the present doubts as to the intention underlying the expansion will be resolved.

All of the theories of attack on the private school plans rest upon the basis of the Fourteenth Amendment's mandate that no state should deny a person equal protection of the laws because of his race or color. As has already been noted, two factors are necessary to make the Amendment applicable. The first is an actual act of discrimination or denial of equal protection, and the second is the presence of state action sufficient to make the act attributable to the state. In considering each of the following theories, the basic assumption has been made that a denial of equal protection is present. This necessary discriminatory act will exist in the refusal of a private school, organized exclusively for whites, to enroll an otherwise qualified Negro.

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73. Huber, *supra* note 53, at 31. Emphasis supplied. Prior to his conclusion the author noted the possibilities of restricting the Shelley doctrine.

Hence, the crux of each of the theories involves a finding of the necessary state action to permit a direct suit against the discriminating private organization. An outline of the possibilities of state action existing in each of the variations possible under the private school plans follows.

* * *

Action: Direct state support of the private school.

Attack: An obvious creation of state instrumentalities.

The improbable possibility has been noted that a state may attempt to evade the invalidation of its segregation statutes by forming private corporations to replace its present public schools for whites, but continue present direct state support of the schools. This direct support might involve one or more such factors as an original grant of the land and school buildings, direct state subsidies to the private school groups, and continued state supervision.

This type of action has been termed improbable because it is obviously open to successful attack.

The attack would be based upon the established state instrumentality concept of state action, and would rely upon the theory of *Nixon v. Condon*[74] and *Smith v. Allwright*[75] that where the state supplies the means by which a private group is able to discriminate, then the act of the purported private organization is, in fact, the act of the state.

A closely analogous situation to that which would be presented by direct state support of the private schools has already been examined by the courts and exposed as state action. *Kerr v. Enoch Pratt Free Library*[76] involved an originally privately-endowed library system whose affairs were conducted by a board of trustees incorporated as a private group. The physical facilities used by the library were owned by the city of Baltimore and annual sums contributed by the city and state amounted to 99 per cent of the library's total budget. In addition, the library's employees were given the same status as other city employees as to salary schedules and retirement benefits, and the city both approved and paid all library disbursements through regular city channels. The court of appeals did not hesitate, in reversing the district

74. 286 U.S. 73 (1932).
75. 321 U.S. 649 (1944).
76. 149 F. 2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945).

court's decision,[77] to term the library's act of discrimination in excluding a qualified Negro from its training school to be the act of the state, saying that the library has been supported from its inception by the state. Asking how the library's discriminatory act could be justified when the state, through the municipality, continued to supply it *with its means of existence*, the court found its duty to be the simple application of the state instrumentality theory.[78]

This case very well illustrates what types of direct action on the part of the state in contributing to the support of the private schools would be prohibited. The original grant of land and buildings (or use of state-owned facilities), direct state subsidies, continued state supervision, and treatment of school personnel as state employees would all be caught under the *Kerr* decision as state action.

It is perhaps true that this case presented a combination of more factors and involved a greater connection with the state than might be present under this plan of action for private schools. Because of the overwhelming web of connections with the state, it is uncertain what importance the court attributed to each of the factors present. However, the court's stress upon the state's provision of the *means of existence* of the institution does indicate that the economic features were the principal basis for the finding of state action. The *Kerr* case can fairly be taken as authority for the proposition that if the state furnishes virtually all of the funds upon which the institution operates and allows it to use state buildings without charge, the institution's acts will be imputed to the state. Supporting the latter point, use of state facilities, is the case of *Lawrence v. Hancock*,[79] which found the presence of a state instrumentality in a swimming pool conducted by a non-profit private organization which had leased the pool, *without consideration*, from the city.

Suppose, however, the state should provide only a portion of the funds of the private group, make some charge for the lease or sale of land and buildings, and completely cut off all ties with the schools in so far as personnel regulation and right to control are concerned. *Would the provision by direct subsidies of only a portion of the school's funds, plus the use of*

77. 54 F. Supp. 514 (D. Md. 1944).
78. 149 F. 2d 212, 219.
79. 76 F. Supp. 1004 (S.D.W.Va. 1948).

facilities obtained from the state, be sufficient to stamp the private school as a state instrumentality?

In pondering this question, the defenders of the private schools may find some solace in a subsequent case arising in Baltimore, *Norris v. Mayor and City Council of Baltimore.*[80] Here a private art school denied admission to a Negro. It appeared that in exchange for a state subsidy which amounted to 23 per cent of the school's total budget, the school admitted, tuition free, a certain number of students (5 per cent of total enrollment) appointed by state political officials. The school further rented from the city for $500 one building which would have rented commercially for $12,000. These were the only factors of state aid or control present. Considering them, the same district judge who was reversed in the *Kerr* decision ruled that the school corporation had retained its private status and that its discriminatory act could not be attributed to the state. The court rejected as untenable the argument that whenever the state or city advances money to a private corporation of an educational nature, which funds become mingled with the general funds of the institution, that thereafter action of the institution is state action within the scope of the Fourteenth Amendment.

The decision has been variously criticized for its close distinction of the *Kerr* case (relied on differences as to control) and for its strict reliance upon the right to control test—that a corporation is of a public nature only when there is reserved public control over the management of its affairs.[81]

But even had the *Norris* decision been more soundly developed and rendered solely on the actual issue involved—the presence of state aid, it must be conceded that it does represent, in so far as the instrumentality theory alone is concerned, a border-line situation. In its rapid development of the instrumentality theory of state action, the Supreme Court was not faced with the necessity of defining the exact relation-

80. 78 F. Supp. 451 (D. Md. 1948).

81. For criticisms which roundly denounce the Norris decision as contrary to the trend of expansion of the state action concept, see 62 HARV. L. REV. 126 (1948), and Reppy, CIVIL RIGHTS IN THE UNITED STATES, 146-147 (1951). And significantly, the application of the right to control test to such cases was impliedly repudiated by the Supreme Court in Nixon v. Condon when the Court began the development of the theory of state-supplied means of discrimination even though the state exercised no control over the affairs of the organization. This repudiation was made even clearer by Rice v. Elmore, 165 F. 2d 387 (4th Cir. 1947), applying the instrumentality theory even though the state had expressly repealed all regulatory statutes.

ship which would be necessary to invoke the theory.[82] Nor did the Court deal with any cases applying the theory to situations involving economic assistance by the state. Consequently, the determination of whether an instrumentality exists can only be a matter of individual interpretation in each case, with little authoritative guide. A court could thus use the theory but conclude that the proportion of state assistance present was not sufficient to make the organization involved a state instrumentality. If such a court should close its eyes to precedent outside the immediate area of the instrumentality theory, then the amount of state assistance which it deemed insufficient to constitute state action could well vary in greater or lesser proportions from the 23 per cent present in the *Norris* case.

However, the expansion of the state action concept, the Court's determination that a state should not be able to perform, by indirect means, discriminatory acts which it could not do directly, and the Court's zeal in over-turning all such circumventions, all combine to indicate that a court would not be able to close its eyes and fail to recognize the existence of a state instrumentality.

Considering the extent to which the Court has already disregarded previously established dogma[83] in striking down what it considered to be subterfuges of state action, can it be doubted that, in considering another such subterfuge, the Court would adopt as its precept the argument rejected in the *Norris* decision—that whenever the state or city advances money to a private corporation of an educational nature, which funds become mingled with the general funds of the institutions, that thereafter action of the institution is state action within the prohibitions of the Fourteenth Amendment?

* * *

Action: Indirect state support of the private schools.

82. See note 64, *supra*.

83. It is generally conceded that in Terry v. Adams, 345 U.S. 461 (1953), the Court abandoned a mechanical approach in utilizing the instrumentality theory and resolved that it would look to the realistic result which the instrumentality was able to accomplish. See 33 BOSTON U. L. REV. 511, 515 (1953), and text supported by note 61, *supra*. And the logical extension of Shelley v. Kraemer, 334 U.S. 1 (1948), to prohibit any aid by the state, however far removed from the actual act of discrimination, has already been noted. See text supported by notes 70 and 73, *supra*. The only obstacle to the application of the logic of these decisions to the present situation would be the Court's willingness to so apply them.

Attack: Although less obvious, equally a creation of state instrumentalities.

Apparently conceding that direct state aid of the private schools, whatever proportion the aid might be to the schools' total expenses, could be successfully attacked, the formulators of the private school schemes have never seriously proposed that direct support be attempted, and have instead focused their energies upon devising means of indirectly channelling to the private schools the financial support which they will require.

The means of indirect financial support, as have been outlined, may take the form of special payments for public services rendered by the private schools, direct provision of services by the state such as transportation of students and provision of textbooks, and principally, the device of providing each child with tuition grants to pay his expenses in attending the private schools. Other features of this indirect aid may be the grant of tax exemption and the power of eminent domain to the private schools. In addition, the present school lands and buildings may be made available to the private schools through either lease or sale at nominal sums.

Through the adoption of such or similar measures, the state will have nominally divorced itself from the conduct and management of the private schools which white children may elect to attend. Will this apparent removal of the state from the provision of such schools be effective, however, when tested for the presence of state action? All indications are that it will not.

It will require no remarkable feat of deduction for the courts to conclude that through the combination of such indirect modes as have been noted, the states will have in factual reality provided the means of existence of the private schools. The result will then follow that by providing the schools with their ability to exist, the states will have, in fact, enabled the discrimination of the private schools to be effected.

Ample evidence is available to indicate that this process of tracing the finances of the schools through their intermediate diversions back to their source would be undertaken. The striking similarity between the more extensive primary decisions and the courts' probable construction of the private school plans is again evident.

After first declaring the primaries to be permeated with state action because of the existence of statutory connections

with the state, the courts then extended this holding to cover primaries where the statutory connections had been repealed or had never existed.[84] In addition, the courts struck down attempts of the political parties involved to accomplish the inhibited exclusion of Negroes by indirect measures. Since direct limitation of their membership to whites had been invalidated, the parties adopted, as requisites for registration, oaths and qualification tests which, because of their nature, would have effectively excluded Negroes. All such measures were declared invalid.[85] The court ruling on the oath requirement termed the measure an attempt " . . . to do by indirection that which we held . . . they could not do . . .," and said: "The devices adopted showed plainly the unconstitutional purpose for which they were designed . . . ."[86]

Since, when considering the private school plans, the courts will have before them a ruling that segregation for the purpose of public schooling is unconstitutional, it becomes inconceivable that similar language would not be used in striking down indirect support of private schools which continue segregation.

The comments already made as to the applicability of *Terry v. Adams* and *Shelley v. Kraemer*[87] apply with equal force to this situation of indirect aid. The language used by the Court in the *Shelley* opinion—"State action refers to exertion of state power in all forms"[88]—has already been employed by members of one court in urging that an organization accorded indirect state aid had become a state instrumentality for the purposes of the Fourteenth Amendment.[89] The features of indirect aid involved in *Dorsey v. Stuyvesant Town Corp.* were tax exemption and use of the power of eminent domain to assist a New York City housing redevelopment project. Although a majority of the New York court rejected the Negro plaintiff's thesis that such assistance had rendered the organization a governmental instrumentality and thus that its discrimination was attributable to the state, the effect of this holding is lessened by the closeness of the decision (4-3)

84. See notes 58 and 60, *supra.*
85. Baskin v. Brown, 174 F. 2d 391 (4th Cir. 1949)—oath; Davis v. Schnell, 81 F. Supp. 872 (S.D.Ala. 1949), *aff'd mem.*, 336 U.S. 933 (1949) —qualification test.
86. Baskin v. Brown, *supra* note 85, at 393.
87. See note 83, *supra.*
88. 334 U.S. 1, 20.
89. See dissenting opinion in Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E. 2d 541, 553 (1949), *cert. denied,* 339 U.S. 981 (1950).

and the fact that it can fairly be termed one of expediency.[90]

The remarkable factor in the *Dorsey* case is that the court did consider the features of state aid present (tax exemption and power of condemnation, together with certain regulatory powers given the city to over-see the project) sufficient to raise a serious question as to whether the organization had become a state instrumentality.[91] The insistence by the dissenting members of the court that these features had in fact imbued the project with a governmental character adds to the strength of the case. The dissenters, after pointing to an "aggressive expansion" of the concept of state action, said:

> As long as there is present the basic element, an exertion of governmental power in some form, as long as there is present something "more" than purely private conduct . . . the momentum of the principle carries it into areas once thought to be untouched by its direction.[92]

Although the majority opinion in the *Dorsey* decision points out that the features of tax exemption and eminent domain had never been considered sufficient to render the recipients thereof subject to the Fourteenth Amendment,[93] it can well be asked whether such a finding might not be forthcoming

90. The city, in entering into the contract to assist the housing project, made a deliberate decision not to demand non-discrimination. Immediately after the institution of this project, however, the city prohibited any further assistance to similar projects which did discriminate. See Hyman, *supra* note 63, at 558.

91. While tax exemptions may have the same economic effect as direct subsidy from tax funds, the Supreme Court has treated the two differently, declaring that the restraints of due process and equal protection do not impose a rigid rule of equality on a state in selecting subjects of tax exemption. *Compare* Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937), *with* Loan Ass'n v. Topeka, 20 Wall. 655 (U.S. 1875). Significantly, the court made no point of this distinction in the Dorsey case, and it does not appear that the distinction, having been developed in cases involving economic equal protection, could be logically utilized in a case alleging the denial of equal protection to exist in racial discrimination. Unlike tax exemption, the grant of the power of eminent domain to institutions has already been considered such assistance as to require that the organization receiving the power not discriminate. *See* Connecticut College v. Calvert, 87 Conn. 421, 88 A. 633 (1913); Univ. of So. Calif. v. Robbins, 1 Cal. App. 2d 523, 37 P. 2d 163 (1934); Note, 61 HARV. L. REV. 344, 351 (1948).

92. 87 N.E. 2d 541, 553. The dissenting opinion added that this liberalized philosophy of state action runs through the decisions which deny to a state or city ". . . the power to avoid their constitutional responsibilities by leasing or assigning to private persons important projects or functions in which discrimination is practiced." *Id.* at 555.

93. *Id.* at 551.

after the Court declares that a state may not require segregation in its schools.[94]

Several of the other features which may be included in a state's indirect support of the private schools, notably provision of school bus transportation and textbooks, have been considered by the courts. This consideration was occasioned by an attack on such features of state assistance which is somewhat, though not wholly, analogous to the present theory of state action—that state aid to sectarian schools, or to children attending such schools, violated constitutional inhibitions against state support of religious institutions.[95]

The Supreme Court has had before it challenges of both these services rendered by the state, school bus transportation[96] and textbooks.[97] In both cases, however, the Court declined to term such services as being within the prohibited sphere, treating both such forms of state aid as being aid to the students attending the sectarian or private schools, rather than to the schools themselves.

The defenders of the private school plans being considered might, therefore, use these cases and the apparent analogy which they present to argue that such indirect aid by the states as provision of school bus service and textbooks would be an

94. This result has been suggested as a logical probability. Note, 61 HARV. L. REV. 344, 350 (1948). Such a finding would, of course, have enormous consequences. Virtually all of the private schools and colleges of the nation have been granted exemption from property taxes. A holding that this assistance rendered them state instrumentalities would extend the Court's invalidation of segregation to completely remove all existing racial barriers, even in presently-existing private institutions.

95. The analogy can be found in the over-all comparison of the inhibitions against state aid present in the two situations. The Fourteenth Amendment's requirement of state action prohibits such state support as leaves the supported organization, in fact, a state instrumentality. This includes direct state financial assistance and any indirect assistance which is, in substance, the same. The inhibitions against aid to sectarian institutions likewise prohibit direct state financial subsidy. See Note, 60 HARV. L. REV. 793, 795 (1947) for an account of what has been held to constitute direct support. Strikingly, for present purposes, this prohibition has been held to include aid in the form of students' tuition or teachers' salaries. Williams v. Stanton Dist., 173 Ky. 708, 191 S.W. 507 (1917).

96. Everson v. Board of Education, 330 U.S. 1 (1947). This was a 5-4 decision. The dissenting members of the Court would apparently have outlawed any aid which directly or indirectly benefitted sectarian schools. *Id.* at 18 and 28.

97. Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930). This case, while having in its background aid to sectarian schools, was instead based upon the attack of an unconstitutional use of public funds for a private purpose. The Court held the provision of textbooks to be for a public purpose, however, upon the theory that the students alone were the beneficiaries of the aid, not the private schools.

aid to the individual school children and not sufficient state support to constitute the private schools involved state instrumentalities. It should be noted, however, that the theory upon which the Court relied can be logically criticized[98] and that the Court's decision in at least one of the cases was contrary to substantial authority.[99] Above all, the public policy considerations inherent in these decisions, especially *Everson v. Board of Education* (the fact that it was rendered in the crucial area of the relation of the state to religious minorities), should deter any strong reliance upon the theory which they expounded. The Court may have been willing to make concessions in the area of state assistance to sectarian schools which it would not be willing to similarly grant to private schools which are organized as substitutes to carry on segregation.

However, the foregoing features of tax exemption, eminent domain, and provision of textbooks and school bus facilities may very well be considered by a court as not sufficient state action to make the Fourteenth Amendment applicable, especially in view of the effect which such a finding would have on the distinctions between public and private institutions. But it is extremely doubtful that any court would have such features alone to consider in construing a state's indirect support of private schools. The presence of indirect financial support, through such a device as the tuition grants, will probably render these additional factors academic.

The realities of financing adequate elementary and secondary education for its children (especially for the children of its poorer classes who could not afford high tuition fees if tax support of the schools were eliminated) necessitates that a state continue to levy taxes for this purpose and support the schools through tax funds. To the credit of the states of

98. One writer has termed the theory of "aid to students" a "clumsy and ineffective" device. Note, 96 U. OF PA. L. REV. 230, 238 (1947). A New York court had earlier struck down the theory, saying, of the furnishing of books and supplies: ". . . if not directly in aid of the parochial schools, it certainly is in indirect aid. The scholars do not use text-books and ordinary supplies apart from their studies in the school. They want them for the sole purpose of their work there." Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715, 719 (1922).

99. For cases contrary to Everson v. Board of Education, see Annotation, 168 A.L.R. 1434 (1947). Of the cases noted, all except three (including Everson) held the provision of school bus service to pupils of parochial or private schools to be unconstitutional. In a decision subsequent to the Everson case, the court of the State of Washington reiterated its earlier opinion that such service was prohibited and disagreed with the Everson decision. Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P. 2d 198 (1949). Again note the vigorous dissents in the Everson case, note 96 *supra*.

the Deep South, it has not been seriously proposed that such support be ended.

But in facing up to this reality, the South will be plunged into its inescapable dilemma—its inability to effect a means of divorcing the states from the support of the schools.

Although it is possible that the Supreme Court, having discerned the effect of its expansion of the state action concept, may desire to limit that expansion, it does not appear probable that it would do so in considering an attempt on the part of a state to maintain, by indirect means, the forbidden segregation.

The realistic effect of the scheme of supplying individual children with tuition to the private schools is obvious—the state will thus be channelling to the private school its means of existence.[100] In condemning such a scheme, a court would have only an easy step to make from the finding in *Kerr v. Enoch Pratt Free Library*[101] of the presence of a state instrumentality where there exists state financial support.

* * *

Action: Organization of purely private schools, with no logically discernible state aid or support.

Attack: (A) The performance by the schools of a governmental function is sufficient to place them under the sphere of state action.

(B) The affirmative action in taking the state out of the school business is sufficient state action.

(C) The state's failure to prohibit the discrimination practiced by the private schools and its acquiescence in such conduct would be sufficient to constitute state action.

As has been noted, it is extremely doubtful that support of the private schools through tax-raised funds will be eliminated. However, assuming that this improbable step would be taken,[102] there remain several logical theories of attack which

100. Note that assistance in the form of providing students with tuition has been held within the analogous prohibition of aid to sectarian schools. Williams v. Stanton Dist., *supra* note 95.

101. See note 76 *supra*.

102. The possibility exists that a Southern community would attempt to supplant the present school taxes with purely voluntary contributions to the private schools by taxpayers in equivalent amounts. These con-

could be leveled against the purely private schools continuing the practice of segregation.

(A) *Performance of a governmental function.* To some extent, all of the cases which have been discussed as utilizing the instrumentality theory of state action have involved the performance by the alleged instrumentality of a function of a governmental nature or pertaining to a high public purpose. Several of these cases, however, are considered as presenting situations in which the performance of a governmental function was the crux and only rational basis of the finding of a state instrumentality.

The most notable of these is *Terry v. Adams.*[103] The primary reached by the Court in this decision was conducted by a local county political organization, the Jaybird Democratic Association, which had been in existence since 1889. The Jaybird party completely regulated its own affairs and conducted its primary two months before the regular Democratic primary. However, the candidates nominated for county offices in the Jaybird election had regularly entered the ensuing Democratic primary (although there was no legal compulsion on them to do so), and they had with few exceptions won the Democratic primary elections without opposition. As rules of conduct, the Jaybirds had apparently followed the rules prescribed by the state for the conduct of the Democratic Party primaries.

The Court did not hesitate to find the necessary state action, although the language used in the varied opinions,[104] went far beyond the narrow confines of the present interpretation of the decision.[105] Running through all the opinions in the case, however, is at least the implied idea of the exercise of the local party of a function of government. True, the decision revolved around the control by the Jaybird party of the only effective choice in the series of two primaries and the following general election. But how can it be concluded that the exercise of such control is the equivalent of state ac-

tributors would include industrial organizations and businesses, who presently supply the major portion of the school funds. The effectiveness of such a scheme without the compulsory influence of government is open to doubt. And attempts by state or local governments to compel such contributions would supply state action.

103. 345 U.S. 461 (1953). See text at notes 61 and 63, *supra.*

104. The eight justices finding state action split into three concurring opinions, plus one dissent.

105. See text at and following note 134, *infra.* Another possible interpretation of the decision is there presented.

tion without also embracing in such a conclusion any combination of individuals which exercises such influence as to effectively control the outcome of an election? This distinction, which is obviously fundamental, can only be made by interpreting the decision to be that any group which adopts machinery similar to that authorized by the state or normally used, with the state's blessing, for similar purposes, is, if that purpose is the accomplishment of a necessary and essential function of government, an instrumentality of the state.

This result had been foreshadowed by *Rice v. Elmore*,[106] although it was less obvious from that case because of the party's use of the identical procedures and regulatory requirements which had only shortly before been repealed by the state, and also because the primary involved was that conducted by the regular Democratic Party, only one step removed from the general election.

This extensive step, to brand as state action for the purposes of the Fourteenth Amendment the acts of a group exercising a normal function of government, had also been foreshadowed in previous decisions of the Court. In 1944 a union, which had been endowed as sole bargaining agent for its craft under a federal statute, attempted to discriminate against minority members of the craft through an agreement with the employer. The Court held that the union must represent all the members of the craft and struck down the discriminatory attempt, saying: "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body . . . but it has also imposed on the representative a corresponding duty."[107] Later, only a year before it was to decide *Terry v. Adams*, the Court was presented with a similar instance of union discrimination. The Court reiterated its previous decision, holding that bar-

106. 165 F. 2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). This conclusion had also been foreseen by legal writers, one of whom noted the Court's emphasis in Smith v. Allwright, 321 U.S. 649 (1944), on the degree of statutory control over the primary, but stated: ". . . in fact the statutes merely recognized the public character already attained through the self-development of the organizations . . . ." Barnett, WHAT IS "STATE" ACTION . . . , 24 OREGON L. REV. 227, 230 (1945). Another writer concluded that a political party performs a vital state function and that a realistic court could therefore ". . . extend the meaning of state action to political parties, regardless of the absence of statutory regulation." Note, 47 COL. L. REV. 76, 89-90 (1947).

107. Steele v. L. & N. Ry. Co., 323 U.S. 192, 202 (1944). The "duty" referred to was implied by the Court because of the status given the union as sole bargaining agent. The statute did not affirmatively impose such a duty.

gaining agents who enjoyed the advantages of the federal statute must honor their trust not to invade the rights of minority workers.[108]

In 1946 the Court had also dealt with this exercise of power of government. In *Marsh v. Alabama*,[109] a state court's conviction of a Jehovah's Witness for trespass upon the property of a privately-owned town was reversed. While the Court had an element of state action present in the action of the state court, it did not specifically dwell upon this element and intimated that the public nature of the privately-owned premises involved supplied the necessary state action. The Court rejected the contention that the private corporation's right to control the streets and sidewalks of its town was coextensive with the right of a homeowner to regulate the admission of guests to his home, and said: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[110]

Having established the principle that the expanding concept of state action should include the acts of private organizations exercising a governmental function, the only obstacle to the application of this principle to cases of discrimination by private schools which had been organized to replace public schools (since the state-supported institutions could no longer maintain racial separation), would be a finding that the new institutions were exercising a function of government. It does not appear that such a finding would entail lengthy debate.

The cases are replete with statements to the effect that the education of youth is a "fundamental" and "indispensable"

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108. Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952). Three dissenting justices in this case expressed their inability to discern the presence of state action, saying (per Justice Minton): "I do not understand that private parties . . . may not discriminate on the ground of race. Neither a state government nor the Federal Government may do so, but I know of no applicable federal law which says that private parties may not." *Id.* at 778. See also, Hargrove v. Brotherhood of Locomotive Engineers, 116 F. Supp. 3 (D.D.C. 1953); Wood v. Randolph, 209 F. 2d 634 (8th Cir. 1954). *But cf.*, Williams v. Yellow Cab Co., 200 F. 2d 302 (3rd Cir. 1952).

109. 326 U.S. 501 (1946). See note 27, *supra.*

110. *Id.* at 506. The conclusion that the governmental function exercised by the private corporation was the principal thesis of the Court is supported by the fact that a companion case, Tucker v. Texas, 326 U.S. 517 (1946), similarly reversed such a conviction where the private town involved was owned by the Federal Government. See 33 VIR. L. REV. 643, 645 (1948).

governmental function.[111] The Supreme Court itself spoke of this function in its decision invalidating segregation:

> Today, education is *perhaps the most important function* of *state and local governments.* Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.[112]

In facing this question, however, the courts would be dealing with a situation where the sovereign people of a state had acted, through constitutional amendment, to abnegate or amend the state's responsibility to maintain public school institutions.[113] Thus, they would have to ask—if the people of a state wish to declare that schooling should no longer be considered a function of their government, has a court the power to override their decision? This question may logically cause some courts to ponder, but it would not appear to be a serious hindrance to a declaration that the new private schools had taken over the exercise of a governmental function.

The nature of education made it an essential of government before the states of this nation insured it to be such by constitutional provisions. Such mandates in the state constitutions merely took cognizance of a function already essentially of a public nature. Taking this as its precept, and having its usual zeal to overturn all attempts to circumvent its decisions, the Supreme Court could, with apparent ease, apply its test of *Terry v. Adams* to the private schools.[114] The sig-

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111. "The power over education is an attribute of government that cannot be legislatively extinguished. It cannot be bargained away or fettered." Malone v. Hayden, 329 Pa. 213, 197 A. 344, 352 (1938). "It is unquestionably the function of government to establish and maintain public schools. Indeed the Constitution of Oregon . . . specifically commits to the legislative assembly the establishment . . ." of public schools. Campbell v. Aldrich, 159 Or. 208, 79 P. 2d 257, 261 (1938) (the court inferred that education is a function of government, over and above constitutional mandates).

112. Brown v. Board of Education, — U.S. —, 98 L. ed. 583, 589 (1954); see also, Meyer v. Nebraska, 262 U.S. 300, 400 (1922).

113. The elimination or amendment of the state constitution's requirement of the maintenance of a public school system is a prerequisite to the shift to private schools.

114. One writer has predicted that Terry v. Adams may have a wide effect in areas of schooling, transportation and the like. He said that these public services, as much as elections, ". . . relate in some manner to the state even without specific statutory control. Arguably, if a state attempts to repeal its statutes relating to such services rather than bow to an order prohibiting discriminatory segregation, the question may be raised whether a state can so sever its connections and divest the facilities of their public nature." 32 TEXAS L. REV. 223, 225 (1953).

nificant comment has already been made that the *Terry* decision, with its finding of state action in the exercise of a function of government, "serves as a useful forewarning that if segregation in the public schools is invalidated, the impact of this invalidation may not be avoided by turning the schools over to private organizations."[115]

(B) *State's positive action in removing its control of public schooling.* Another quite possible theory of attack, in the event that purely private schools could be established, is the view that the affirmative action of a state in actively taking the state out of the school business supplies the necessary state action to make the subsequent discrimination by the private schools subject to the Fourteenth Amendment.

This theory was apparently first employed, in the cases involving racial discrimination, in *Elmore v. Rice*[116] where South Carolina had attempted, by repeal of all statutes regulating or in any way referring to the Democratic primary, to classify the primary as a purely privately-conducted election of a private club. The argument was there made that the action of the state in repealing all such statutes amounted to a deprivation of the Negro's right to vote in the primary election, since under the combined effect of the previous statutory regulation of the primary and the *Smith v. Allwright*[117] decision, the Negroes had a Court-endowed right to vote in the primary, and that the repeal of the primary laws, by removing the basis of the *Smith v. Allwright* decision, deprived them of this right.

The district court judge noted this contention that the state's act, while apparently negative in form, was actually positive in application, and termed it a novel but interesting doctrine.[118] He declined to elaborate on it, however, and based his decision on other grounds.[119]

115. Howe, THE SUPREME COURT, 1952 TERM, 67 HARV. L. REV. 91, 105 (1953).
116. 72 F. Supp. 516 (E.D.S.C. 1947), *aff'd* 165 F. 2d 387 (4th Cir. 1947).
117. 321 U.S. 649 (1944).
118. 72 F. Supp. at 524.
119. Both the district court and the circuit court recognized the primary as the only effective phase of the election, and apparently treated it as the performance by a private organization of a governmental function. See text supported by note 106, *supra*. Commentators on Rice v. Elmore have insisted that the theory here discussed could have been a logical basis for the decision. See Note, 47 COL. L. REV. 73, 86 (1947); 96 U. OF PA. L. REV. 441, 442 (1947). *But cf.*, 28 NEB. L. REV. 154, 155 (1949), where this theory is termed untenable.

This "novel" proposition was based principally on a decision of the Supreme Court which can be so analyzed as to present an almost perfect analogy,[120] and upon an apparent passing recognition of the principle in another case.[121]

To apply this proposition to an instance of a private school's discriminatory act in refusing to admit a Negro, the Negro would contend that the decision declaring segregation in the public schools to be invalid had endowed him with the right to attend such schools in conjunction with white students and not to be segregated. He would then reason that the state had created the possibility of a potential infringement upon this right by taking itself out of the school business (since the right would have to be recognized at a state-supported school), and that this potential invasion of his right became actual when the private school refused to admit him. He would thus be relying on the premise that the removal by the state of the protection previously afforded him by the existence of public, state-supported schools supplied the necessary state action to make the Fourteenth Amendment applicable in a suit against the private school.[122]

Although it might appear that this theory is academic because no state will remove the present public school provisions for Negroes and thus not infringe upon their right to schooling as such, this fact would not prevent the use of this proposition in an attack on private schools which supplant the present public schools for whites and which thus continue the forbidden practice of segregation. The right involved will be the right not to be segregated, rather than the mere right to attend some school. The reasoning underlying this theory

120. Truax v. Corrigan, 257 U.S. 312 (1921). The case involved a state statute which precluded any injunction against picketing except such accompanied by violence, whereas it was conceded that the state's previous common law principle would have entitled the employer to an injunction under the circumstances present (use of libelous and threatening language). The Court, considering the state court's construction of the statute as denying the employer any remedy under the circumstances, held the statute to be both a denial of a property right without due process and a denial of equal protection. Conceding that no one has a vested interest in any particular rule of common law, the Court pointed out that the fundamental principle of due process prevailed over the state's legislative power, and that an arbitrary exercise of that power, such as to "practically sanction" a wrongful invasion of property rights and to strip the owner of remedy, was at variance with due process. *Id.* at 329.

121. Senn v. Tile Layers' Union, 301 U.S. 468, 482 (1937).

122. See Hale, RIGHTS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS AGAINST INJURIES INFLICTED BY PRIVATE INDIVIDUALS, 6 LAW. GUILD REV. 627, 636 (1946) for a similar analysis of Truax v. Corrigan, *supra* note 90.

seems tenuous, but its possible use as a theory of attack on private schools which are otherwise outside of the discernible area of state action should be noted.

(C) *State's inaction or failure to prohibit discriminatory acts and acquiescence therein.* Similar to the theory of attack just discussed, but even broader, is the proposition that if a state fails or refuses to exercise its available power to correct or prohibit the discriminatory acts of apparent private groups, it has denied the equal protection of the laws to those affected by the discrimination. Simply stated, this theory, which would undoubtedly be employed if purely private schools were to be established in Southern communities, is that a state's inaction or acquiescence is equivalent to direct state aid to the discriminating organizations, and supplies the element of state action necessary to invoke the Fourteenth Amendment.

The view that a state can deny equal protection equally as effectively by its failure to act as by positive action was originally conceived during the controversy over whether the Fourteenth and Fifteenth Amendments were intended to allow Congress to legislate to check the discriminatory acts of private individuals. Substantial evidence can be cited to show that Congress, in construing its power to extend to the protection of Negroes from the abuses of individuals, where the states had failed to provide such protection, also considered the state's failure to prohibit the discrimination an affirmative denial of equal protection.[123] As has been noted, however, the Supreme Court declared the sweeping enactments of Congress which reached all private discriminatory acts unconsti-

123. See Flack, ADOPTION OF THE FOURTEENTH AMENDMENT, 262-263 (1908); Barnett, *supra* note 106, at 228 and 232; Frank & Munro, THE ORIGINAL UNDERSTANDING OF "EQUAL PROTECTION OF THE LAWS", 50 COL. L. REV. 131, 163-164 (1950). The latter authors concluded: "The prevailing view (in Congress at time of passage of Amendments) . . . was that a state denied equal protection when it permitted repeated outrages against one class in the community." *Id.* at 164. Among the evidence relied on by those reaching such a conclusion are the following statements of congressman: "Denying includes inaction as well as action." CONG. GLOBE, 42nd Cong., 1st Sess. 501 (1871). "What the state permits by its sanction, having the power to prohibit, it does in effect itself. . . . There are sins of omission as well as commission." 2 CONG. REC., pt. 2, 412 (1874). See 46 COL. L. REV., n. 61, pp. 105-106, for a detailed account of these and other congressional statements. The enactments of Congress also evidence this intent. One of the civil rights measures, popularly known as the Ku Klux Klan bill, provided that should the state for any reason fail to enforce the laws, ". . . such facts will be deemed a denial by the State of the equal protection of the laws." 14 STAT. 176, 177 (1866).

tutional and restricted the scope of the Amendments to direct state action.[124]

With the bounds of the state action concept thus set, little was heard of the inaction theory until the primary cases and recurring attempts to circumvent the Court's decisions prompted its revival. The interesting proposition had, however, remained an object of speculation,[125] and had in fact been employed by courts in a slightly different sense and on a less extensive level. The Supreme Court had in several cases considered the refusal of a particular state agency to act, or its unreasonable delay in doing so, a sufficient denial of equal protection, apparently theorizing that the inaction or delay enabled the state to accomplish a prohibited result.[126] Also, in at least one instance, a court had indicated that failure of an individual state official to protect a person from a clear infringement of his civil rights might be considered the equivalent of direct invasion of such rights by the official.[127]

Following *Smith v. Allwright* and South Carolina's attempt to circumvent the decision by repealing all statutory connections with the Democratic primary, the inaction theory began to be prominently mentioned as a possibility for upsetting such evasive tactics. The use of the theory in the attack on

124. Civil Rights Cases, 109 U.S. 3 (1883); James v. Bowman, 190 U.S. 127 (1903). See note 50, *supra*, and text supported thereby.

125. Borchard, THE SUPREME COURT AND PRIVATE RIGHTS, 47 YALE L. J. 1051, 1072 (1938); Hale, FORCE AND THE STATE . . . , 35 COL. L. REV. 149, 185 (1935).

126. Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 591 (1925)—a long-continued and unreasonable delay by a state board in putting an end to confiscatory public utility rates; Lawrence v. Mississippi Tax Comm., 286 U.S. 276, 282 (1931)—the refusal of a state court to decide a claim of denial of equal protection was considered as effective a denial of constitutional rights as an erroneous decision would be. See Rottschaefer, CONSTITUTIONAL LAW 444 (1939).

127. In Catlette v. United States, 132 F. 2d 902 (4th Cir. 1943), there were sufficient direct acts on the part of a state officer in subjecting a prisoner to indignities to support his prosecution under a federal civil rights statute (18 U.S.C. 52). The court commented, however, that the failure of the official to protect the victim from mob violence would also bring the case under this statute, saying: "It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official state inaction may also constitute a denial of equal protection." *Id.* at 907. The cases relied on as support for this statement were not in point, however, and the court's comment remains unexplainable. The Supreme Court's decision of Screws v. United States, 325 U.S. 91 (1945), which dealt with affirmative acts of official mistreatment, again brought on renewed urging that an official's failure to prevent such treatment would be the equivalent (i.e., that failure to stop a lynch mob would be a denial of equal protection). See Cohen, THE SCREWS CASE: FEDERAL PROTECTION OF NEGRO RIGHTS, 46 COL. REV. 94, 105 (1946).

the South Carolina scheme was accurately predicted,[128] and the possibility was noted, but not utilized, in declaring the circumvention to be ineffective.[129]

The Supreme Court had not, at this time, had any occasion to consider the applicability of this inaction proposition, either on the lower level of the failure of an individual official to protect an individual from discriminatory acts, or on the higher plane of a widespread pattern of discrimination which the state, by failing to check, tacitly acquiesced in. And in its 1948 decision of *Shelley v. Kraemer*,[130] where a facet of the inaction theory could logically have been employed, the Court's language and the basis of its decision were sufficient to indicate that it did not see the necessity of adding inaction to the already expanded concept of state action.[131]

In actual effect, however, the *Shelley* decision enhanced the possibility that the inaction theory might in fact be the basis of some future decision. Considering the extensive implications of *Shelley v. Kraemer*, long-standing proponents of inaction urged it as a possible stopping point to logical extensions of the *Shelley* principle.[132]

The continued insistence that a state denied equal protection when, in the face of actual discrimination, it failed to exercise available power to correct and prohibit the acts,[133] culminated in the apparent recognition of the principle and reliance upon it by some members of the Supreme Court in the far-reach-

128. Note, 47 COL. L. REV. 76, 87 (1947). This writer concluded: "It is not unlikely that where . . . the state inaction can be viewed as part of a comprehensive plan to disenfranchise the Negro, the Supreme Court will not hesitate to apply the appellation of 'state action' to what might be regarded as state inaction." *Id.* at 87-88.

129. Elmore v. Rice, 72 F. Supp. 516, 524 (E.D.S.C. 1947). Conflicting views were expressed as to the applicability of the inaction theory to the case. Compare 96 U. OF PA. L. REV. 441, 442 (1947) with 28 NEB. L. REV. 154, 155 (1949).

130. 334 U.S. 1.

131. A limited application of the theory could have been made in the Shelley case, in view of the existence of a marked pattern of discrimination by means of private restrictive covenants in the state involved. See Huber, REVOLUTION IN PRIVATE LAW, 6 S. C. LAW Q. 8, 30 (1953). But the Court stated: "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit." 334 U.S. 1, 19. The Court proceeded to find the necessary state action in the sanction and enforcement by the state court of the private agreement.

132. See Hyman, SEGREGATION AND THE FOURTEENTH AMENDMENT, 4 VAND. L. REV. 555, 568-569 (1951). This author pointed out the logical implication of Shelley as reaching any state sanction of private discrimination, and suggested the adoption of the inaction concept, in the limited sense of its application to a state's refusal to prohibit the discriminatory acts of places of public resort.

133. See Barnett, *supra* note 106, at 232-233; Note, 96 U. OF PA. L. REV. 402, 412 (1948).

ing *Terry v. Adams* decision.[134] As has already been pointed out, no clear basis for the *Terry* decision can be gleaned from its three concurring majority opinions; but the more rational explanation of the decision is apparently that the exercise by the political party involved of a governmental function brings it within the sphere of state action.[135] However, one of the opinions written in the *Terry* case, that of Justice Black (concurred in by Douglas and Burton), and certain language used by Justice Frankfurter in his separate opinion, reveal definite reliance upon the principle of the state's permissive conduct or acquiescence as supplying the necessary state action.

Justice Black, pointing out that the primary involved, because of its exclusion of Negroes, was "precisely the kind of election that the Fifteenth Amendment seeks to prevent," wrote:

> For a state *to permit* such a duplication of its election processes is *to permit* a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment *for a state, by such circumvention, to permit within its borders the use of any* device that produces an equivalent of the prohibited election.[136]

Justice Black presented no other basis for his three-judge opinion, other than that the Jaybird primary was an integral part, and the only effective part, of the elective process.[137]

Justice Frankfurter, for his finding of state action in the Jaybird party's exclusion of Negroes, relied upon an *assumed* participation by county election officials in the conduct of the primary, holding that such officials could not divest themselves of their state-endowed trust to abide by existing legal principles even if they had not acted in their official capacities.[138]

134. 345 U.S. 461 (1953).

135. See text supported by and following note 103, *supra*. The most concurred-in opinion in the Terry case, that of Justice Clark (joined by three others), comes closest to placing the decision squarely upon the governmental function theory. 345 U.S. 461, 477.

136. 345 U.S. 461, 469. Emphasis supplied.

137. A commentator already quoted on Terry v. Adams concluded: "It seems that Justice Black has taken *the extraordinary position that mere failure to suppress a practice* not even unlawful under state law *is itself state action*—at least if the practice involves the electoral process." Howe, *supra* note 115, at 105. Emphasis supplied.

138. 345 U.S. 461, 475-476. Howe said of Frankfurter's opinion: ". . . *equally unprecedented* in holding that participation by state officials not purporting to carry out their official duties is state activity; moreover, there is *no evidence that state officials did participate in the Jaybird election.*" Howe, *supra* note 115, at 105. Emphasis supplied.

Admitting that the Court was faced with a "border-line" situation and that the stipulated evidence showed a total lack of formal state action, Justice Frankfurter proceeded, however, to state what may justly be considered a liberal definition of the requirement:

> This phrase (state action) gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. *The vital requirement is state responsibility*—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored.[139]

Noting what he considered to be the "participation and *acquiescence*" of state authorities in the invalid election, Justice Frankfurter concluded: "The evil here is that the State, through the action and abdication of those whom it has clothed with authority, *has permitted* white voters to go through a procedure which predetermines the legally devised primary."[140]

Although Justice Frankfurter confined his holding to his assumption of the participation of local election officials, his stress upon acquiescence and permissive conduct can only be interpreted as lending support to the inaction theory, at least on the lower level of the theory—that the inaction or permissive conduct of particular state officials in the face of discriminatory acts is sufficient to constitute the necessary state action. However, Justice Black's opinion and the language quoted therefrom would seem to go even further and can fairly be interpreted as a statement of the inaction theory in its broadest concept—that the failure of a state to check a pattern of existing discrimination or its permissive allowance of such is equivalent to direct state action.[141]

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139. 345 U.S. 461, 473. Emphasis supplied. Justice Frankfurter's statement of the requisite is even more striking when compared with his previous more-restricted concept of state action. See his concurring opinion in Snowden v. Hughes, 321 U.S. 1, 13 (1943), and the dissent in which he joined in Screws v. United States, 325 U.S. 91, 140 (1945).

140. 345 U.S. 461, 477. Emphasis supplied.

141. The lone dissenter in the Terry case, Justice Minton, similarly analysed the opinions, pointed out that he could find no "iota" of state action present, and asked: "Does such failure of the state to act to prevent individuals from doing what they have the right as individuals to do (join in concerted action for political purposes) amount to state

Whether, in their zeal to end all vestiges of discrimination in Negro suffrage,[142] the members of the Court realized and considered the effect of their language is open to doubt. But just as with the logical implications of *Shelley v. Kraemer*, the opinions in *Terry v. Adams* stand as delivered. On its face, the language used would seem to have completed the cycle of the state inaction or acquiescence concept from its apparent repudiation in the *Civil Rights Cases* to its tacit recognition and limited application. Because this inaction theory comes so very close to implying that every act of a private individual is state action if the state does not actively forbid it,[143] the Court may very well, if forced to consider its direct utilization, disavow the language of the *Terry* case and validly rationalize the decision on other grounds. However, the use of the theory, in the event purely private "white schools" attempt to continue segregation, is almost certain.

* * *

Such are the direct attacks which can be brought, either separately or in combined form, against private schools which are established without state aid in any form or manner. Two of these theories, finding state action in the exercise by the schools of a governmental function or in the state's failure to prohibit their discriminatory acts, have both been recognized to such an extent that they stand ready for use should the Court desire to implement them against the evasive attempt to continue separate schools.

Whether the Court would desire to do so is an indeterminable question. Any case presenting such theories alone would involve questions of constitutional law, public policy and sociological import perhaps even more immense than those faced by the Court in considering the constitutionality of segregation *per se*.

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action? I venture the opinion it does not." *Id.* at 489. At least one commentator has concluded that the only meaning of the Terry case is the use of the inaction theory. 33 NEB. L. REV. 96 (1953).

142. The temper of at least two members of the Court toward remaining evidences of disenfranchisement of Negroes is strikingly indicated by the dissent of Justices Douglas and Black from the Court's refusal to consider an attack upon Georgia's county-unit electoral system. South v. Peters, 339 U.S. 276 (1950). The two justices cited the county-unit system as the "last loophole" around the primary decisions. *Id.* at 278.

143. See Note, 96 U. OF PA. L. REV. 402, 412 (1948); Hyman, *supra* note 132, at 570.

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Action: A state court's enforcement or sanction of the discriminatory act of a private school.

Attack: The principle of *Shelley v. Kraemer* supplies, in the act of the state court, the necessary state action.

To complete a discussion of the varying applicability of the state action concept to the private school proposals and possibilities, there remains one extensive facet of the concept which, although it is almost as far-reaching in consequences as the previously discussed inaction theory, has, unlike that theory, been definitely and unequivocally established.

This is the doctrine of *Shelley v. Kraemer*,[144] where the Court construed a state court's enforcement of a private discriminatory agreement (restrictive covenant) as supplying the necessary state action to make the Fourteenth Amendment applicable. This holding was subsequently more firmly settled by *Barrows v. Jackson*,[145] finding similar "state sanction" in the act of a state court in allowing the recovery of damages for the breach of such a covenant.

The rationale of these decisions could logically be applied to the instance of state court enforcement of any private discriminatory acts which infringe upon established rights. To a private school's denial of admission to a Negro because of his race, the theory the cases present could be used whether there were present direct or indirect state support of the school or whether there were no discernible features of state aid. This theory could further be employed in the instance of state court sanction of apparent discriminatory acts arising from the operation of any of the evasive measures which may be undertaken by the Southern states. Thus, the proposition here discussed applies equally to all plans of action which are noted. The theory is discussed at this point simply to present a compact view of the impact of the state action concept upon the circumvention plans.

The implications arising from the *Shelley* decision and its subsequent enhancement in the *Barrows* case have already been discussed.[146] Their method of utilization in an attack on the private school plans is evident. From the holding in these cases that a state court's enforcement of a restrictive covenant in equity, or the allowance of the use of such covenant as a

144. 334 U.S. 1 (1948).
145. 346 U.S. 249 (1953).
146. See notes 70, 71 and 72, *supra*, and text supported thereby.

basis for the recovery of damages, supplies the necessary element of state action, it logically follows that a similar state court enforcement or sanction of a private school's refusal to admit a Negro, despite the Negro's right not to be denied admission solely on the basis of his race or color, would also be deemed state action for the purposes of the Fourteenth Amendment. Even though the initial discriminatory act may not have been sufficient to support an invocation of the Amendment, being the act of a purely private organization without any element of state aid sufficient to make it a state instrumentality, the entrance of the state court in a supporting role would supply the requisite element of state action.[147]

Considering this premise, a state court of one of the Southern states, if faced with a request for an injunction to restrain an alleged discriminatory refusal of a private school to admit a Negro, would obviously be plunged into a complex dilemma. If the court should grant the requested relief, it would be deciding that even the discriminatory act of a private person or organization is a denial of equal protection, disregarding the state action requirement of the Fourteenth Amendment. However, if the court should refuse the relief and dismiss the action, it would be sanctioning the private act and thus the *Shelley* principle would become applicable, adding the state court sanction to the discriminatory act to supply the necessary state action.[148] Certainly, it would seem to be true that this apparent implication of the *Shelley* case makes the following conclusion of one commentator seem realistic: "Whether an action will remain private, and not through a judicial suit become that of the state, seems to depend primarily on the aggrieved party."[149]

Because of the clear dilemma which would face a state court in this situation, however, and because of the apparent coercion which would be placed upon such a court to include purely private action within the reach of the Fourteenth Amendment, the possibility remains that the Supreme Court may not wish to extend the principle of *Shelley v. Kraemer* and *Barrows v. Jackson* beyond the confines of the actual decisions. The Court could obviously limit the theory of the

147. For a thorough discussion of the apparent effect of the Shelley principle upon the state instrumentality theory of state action, see Huber, *supra* note 131, at 25-28. This author concluded: "Substantively, the results would now seem to be the same, whether we have an instrumentality theory or not." *Id.* at 28.
148. *Id.* at 27.
149. *Id.* at 29.

two cases to the peculiar fact situation involved in both cases —state court action on restrictive covenants, or, since the actual result of the two cases was to prevent a state court from coercing a private individual to discriminate,[150] the Court could refuse to apply the theory to instances where the private person involved actually desired to discriminate.[151]

Whether the Court would so limit the doctrine of the *Shelley* case can only be a matter of conjecture, but it seems doubtful that any hesitancy in applying the doctrine would be encountered should the acts of the state court in denying relief to Negroes excluded from the private schools be viewed as part of a systematic scheme of maintaining the invalidated separate schools.

That the Court will be urged to so utilize the doctrine should not be doubted.

(2) INDIVIDUAL ASSIGNMENT AND TRANSFER PLANS

If some of the foregoing theories of attack on the private school plans seem more or less obvious, the theory which would be used against the individual assignment and the individual transfer proposals appears to be even more obvious.

This theory, which would undoubtedly be employed if a state official acted under either of such plans to assign (or transfer) a Negro child to an all-colored school after the child had indicated his preference to attend an integrated school, would simply allege that the statute creating the power to so assign or transfer, while not discriminatory in its terms, enabled the official acting under such statute to make the assignments or transfers arbitrarily on the basis of race or color, and that they had in fact been made on that arbitrary basis.

This theory is termed obvious, and its success apparent, because such assignment or transfer proposals contain no element of tact or subtleness. The enumeration in statutes creating these plans of the factors which school officials are to consider in making the assignments or transfers (general welfare, etc.) will be a poor disguise for the actual basis upon which the officials act. After such plans have been implemented and a number of assignments or transfers made, the pattern of continued separation on the basis of race would be

150. Hyman, *supra* note 132, at 569.
151. See Huber, *supra* note 131, at 31 for a statement of this possibility.

too evident for any court to fail to recognize such schemes as an open subterfuge.

It is, of course, true that school officials and boards of education are vested with a broad power of discretion in assigning pupils to various schools within the district concerned, such discretion being essential to the orderly administration of the school systems.[152] The fact that a certain school may be more conveniently located for a pupil or preferred by him is not determinative of his right to attend that school.[153] The exercise of this power of discretion in making assignments of children to school has normally been qualified only by the condition that it be reasonable and have been done in good faith for the promotion of the best interests of the educational system. To these qualifications on their assignment power, however, Southern school administrators must now evidently add another—that the assignment must not have been made on the basis of race or color. And continued separation of the races can manifestly no longer be considered a furtherance of the best interests of the schools and students.

Even in the earliest cases arising under the Fourteenth Amendment, the Court found state action in the discriminatory enforcement by state officials of a statute which was not discriminatory in its terms.[154] And the Court has never hesitated to look behind the terms and specifications of a statute to see if in fact arbitrary discrimination had been practiced.

A case arising as a result of attempts to circumvent the Court's "white primary" decision can again be used as illustrative. To exclude Negro voters, the Alabama Democrats added to their already existing qualification for registration, that the applicant be able to read and write any article of the United States Constitution, the provision that such applicant should also be able to "understand and explain" the same. The Court testing this addition stressed its impractical nature and the vast discretion which it gave the registration examiners (since there were many varying explanations of numerous articles of the Constitution, the examiners could conclude that the applicant had not given a correct construction) and concluded that the boards of registrars administering this provision had, in fact, power to establish two classes, those whom

152. Hamilton, THE LAW AND PUBLIC EDUCATION 465 (1941).
153. *Ibid.*
154. Virginia v. Rives, 100 U.S. 313 (1879); *Ex parte* Virginia, 100 U.S. 339 (1879). See Rottschaefer, CONSTITUTIONAL LAW 441 (1939).

they permitted to vote and those whom they did not.[155] Quoting statistics to show that the added provision has been arbitrarily used to exclude Negroes and that it had been used only against Negroes, the Court quickly found that the existence and use of such arbitrary power amounted to a denial of equal protection.[156]

It should not be questioned that similar statistics would be brought forth to show that the individual assignment or transfer powers had been arbitrarily used to enforce a continued separation of the races. The Court has said that the Amendments nullify "sophisticated as well as simple-minded modes of discrimination. . . ."[157] The individual assignment and transfer proposals would not seem to have even the legal standing of "sophistication."

* * *

(3) GERRYMANDERING OR REARRANGEMENT OF SCHOOL DISTRICTS

Attempts to maintain more or less separate school systems by rearranging the borders of present school districts would again result in an obvious theory of attack—that as a subterfuge, such a gerrymandering scheme would be an attempt to continue the prohibited segregation.

It is conceded that state legislatures have broad power to create, alter or destroy school districts, or endow a subordinate agency with power to do so, as it may deem to be in the best educational interests of the state.[158] In considering the exercise of such power, the courts have taken cognizance of both educational and economic problems involved in the particular rearrangement, and have only imposed the restraint that the exercise of the power be not arbitrary or unreasonable.[159]

However, just as with its power to allow individual assignments of students to schools, any legislature must now add a new condition—that the power be not exercised so as to infringe upon the established right of a Negro student not to be arbitrarily separated from children of other races. With

155. Davis v. Schnell, 81 F. Supp. 872, 878 (S.D. Ala. 1949), *aff'd* 336 U.S. 933 (1949).
156. *Ibid.*
157. Lane v. Wilson, 307 U.S. 268, 275 (1938).
158. Hamilton, *op. cit. supra* note 123, at 527-528; Phelps v. Witt, 304 Ky. 473, 201 S.W. 2d 4 (1947); Powers v. State Educational Finance Comm., 222 S.C. 433, 73 S.E. 2d 456 (1952).
159. Hamilton, *op. cit. supra* note 152, at 533.

this addition, any alteration of school district borders, even though such might not mention a division along racial lines, would be immediately subject to suspicion.

Attempts to require separation of the races in residential areas by statutory mandate were early struck down as an undue interference by the state with property rights.[160] The cases establishing this principle would be utilized in the attack on any gerrymandering scheme, shifting the reliance in such cases upon property rights to the now settled right of Negro children to attend any school (without refusal because of color) for which they may be qualified and properly situated in regard to residential proximity. The attacks upon a re-zoning device would thus rest upon the simple analogy of such an attempt to the similar zoning of residential areas on the basis of race. Even if such a school district rearrangement did not specifically proceed upon racial lines, it would not be difficult to show that it had in fact created such a division.

The invalidation of a gerrymandering plan might also be hastened by the effect of several decisions holding Negro school students to have been denied equal protection because they were required to travel further to get to their schools than white children of the same area.[161] These cases, concerning inter-county schools where the counties involved had too few Negroes to afford a separate school in each, could be relied on as showing that if, under a district re-zoning scheme, the result was to require Negro children in some parts of the new district to travel further than white children in similar districts, such would be sufficient alone to invalidate the scheme.

Although in many Southern communities and cities, there already exists a distinct division of the residential areas of the two races, even such previously existing groupings into separate school attendance areas would also become subject to scrutiny by new attempts to arrange geographically fantastic school zones in areas, principally rural, where the two races are intermingled. Perhaps this will be one of the more unfortunate consequences of the segregation decision for the

160. Buchanan v. Warley, 245 U.S. 60 (1917). Reiterated in: Harmon v. Tyler, 273 U.S. 668 (1927); City of Richmond v. Deans, 281 U.S. 704 (1939).

161. Corbin v. County School Board of Pulaski County, 177 F. 2d 924 (4th Cir. 1949)—inconvenience and loss of time in going to and from school pointed to as one of factors contributing to inequality; Carter v. School Board of Arlington County, 182 F. 2d 531 (4th Cir. 1950)—a direct holding that such factors constituted inequality.

South, that all of her unpremeditated racial distinctions will likely be caught in the maelstrom of the attacks upon the varied circumvention measures.

(4) TRI-SCHOOL PLAN

Proposals to establish a three-pronged school system, in which one school would be open on an integrated basis to all comers and the other two only to Negro and white children, respectively, seem to be both impractical and legally illogical.

Although the operation of such a plan would, of course, evidence the public sentiment of a community, and perhaps result in a virtual continuation of the same school systems now existing, the ban upon Negro admission to even one part of the system would seem to render it susceptible to successful attack. The refusal of the "white" school section of this system to admit Negroes is exactly the type of refusal which the Court's decision has prohibited. The state, having maintained the discriminating "white" school, would have accomplished the same act which the Court has ruled that it cannot do by direct statutory mandate, and this would be especially evident if, as is probable, few or no white children elected to attend the integrated division of the system.

Any court might be reluctant to upset such an optional school attendance plan when the white citizenry of a community would have indicated overwhelmingly that they did not desire an integrated school system, but, if subjected to attack, such a court would seem to have little choice but to invalidate the refusal of a "white" school directly maintained by the state to admit an otherwise qualified Negro child.

(5) EXERCISE OF POLICE POWER

Among the obvious theories of attack upon the circumvention proposals is that which would be leveled against an attempt to exercise state police power to continue separate school systems.

The Supreme Court long ago overruled the use of police power in an almost identical situation—a municipal ordinance zoning residential areas on the basis of race.[162] The Court's characterization of that ordinance shows its similarity to the present proposal:

162. Buchanan v. Warley, 245 U.S. 60 (1917).

> This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity . . . .[163]

While the Court has conceded the broad power of the state to exercise its police power, by reasonable means, for the promotion of the public health, safety and general welfare,[164] it has also carefully pointed out, and definitely ruled, that such power does not justify laws which conflict with the Federal Constitution, including the Fourteenth Amendment.[165] In so ruling in *Buchanan v. Warley*, the Court acknowledged the difficult problems arising because of racial hostility and conflicts, but concluded that the solution of such problems " . . . cannot be promoted by depriving citizens of their constitutional rights and privileges."[166]

Remembering that the Court has ruled that the Fourteenth Amendment, as a part of the supreme law of the land, endows Negro children with the right not to be segregated for the purpose of schooling because of their race, and recognizing that phrases such as health and welfare are but a poor disguise for the factor of race, should it be doubted that the Court would simply reiterate the language of the *Buchanan* opinion in declaring similar police power enactments to be unconstitutional.

(6) LESS PROBABLE THEORIES

The foregoing theories of attack are those which appear more likely to be utilized. There are, however, several other theories which should be noted and considered by those who may formulate any of the particular evasive measures.

(A) If a state should attempt to support, with tax-raised funds, a school purporting to be private or if it should provide individual children with funds to be used for their individual education, the charge would be possible that such amounted to an unconstitutional use of public funds for a private pur-

163. *Id.* at 73-74.
164. *Id.* at 74; Jacobson v. Massachusetts, 197 U.S. 11 (1905).
165. Buchanan v. Warley, 245 U.S. 60, 74.
166. *Id.* at 80-81. The Court added, in the Buchanan opinion: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

pose and a deprivation of the property of either a white or Negro taxpayer without due process of law.[167]

In considering this possible theory of attack, however, it must be remembered that the already-outlined plans for a shift of the white school systems to private groups are based upon a constitutional provision such as that proposed in Georgia and Mississippi—that the state may lawfully provide individual children with funds to be used for their individual education. Any Southern state undertaking an extensive transition of its school systems to a private base would undoubtedly, or certainly should, preface the transition with such a constitutional amendment. Thus, if the people of a state, the repository of its sovereign power, should so direct that the use of state funds in such a manner should be considered a use for a public purpose, it would be difficult for any court to overrule that direction and condemn such use of state funds as having been for private purposes.

If a state should fail, however, to have such a constitutional provision as a base for its support of private schools, there is some slight, but outweighed, precedent that the provision of funds to private schools or to individual children could be challenged on this ground of misuse of public funds. Attacks upon the provision of state aid to sectarian schools have utilized this theory, but only two of these cases (both from the same state) employed the theory in striking down the state support as unconstitutional.[168] In four other similar cases, the courts have declined to rule that the state aid involved was unconstitutional on this ground.[169]

The possibility exists, therefore, that state aid to private schools, either directly or indirectly through the grant of tuition funds to individual children, could be challenged as the use of taxation to support a private cause. Considering the sentiment of American society that education of children is a public function of the highest order, however, the success of such an attack is open to doubt.

(B) If a state, in shifting its white school systems to private institutions, should thereby completely disrupt the previously

167. See Loan Association v. Topeka, 20 Wall. 655 (1874), and Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 158 (1896), for the development of this principle.

168. Mitchell v. Consolidated School District, 17 Wash. 2d 61, 135 P. 2d 79 (1943); Visser v. Nooksack Valley School District, 33 Wash. 2d 699, 207 P. 2d 198 (1949).

169. See Annotation, 168 A.L.R. 1434. The cases so holding include Everson v. Board of Education, 330 U.S. 1 (1947).

existing public school system and terminate all features of that system, one of the terminated features would be a teachers' tenure system which a state may have instituted. In such event, a white teacher whose contract with the state under the tenure system had been impaired, could contend that this had amounted to an unconstitutional impairment of her contract. This contention has been upheld by the Supreme Court, in a case where the state legislature repealed the teacher tenure law.[170]

A similar attack could also be brought by a Negro teacher whose status might be similarly affected, but, as has been consistently pointed out, it is highly improbable that any Southern state attempting to evade the school decision would disrupt the presently existing Negro school systems.

CONCLUSION

The South's attempts to circumvent the school decision seem doomed to legal failure. The Court has ample theories to utilize in avoiding all circumvention proposals—ranging from the relatively simple state instrumentality concept to the all-permeating doctrine of *Shelley v. Kraemer*.

The only hope for success of any of these measures would seem to rest in a showing of a concerted desire on the part of the white citizenry of a community that, even in the absence of a coercive mandate from the state government, they did not wish to undergo integration in their schools. The best apparent means of making this desire clearly evident would seem to lie in the tri-school plan or perhaps in a combination of this plan with the grant of education funds to individual children.[171] Under this plan, an optional attendance program

170. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 113 A.L.R. 1482 (1938). See also Hamilton, THE LAW AND PUBLIC EDUCATION 25 (1941).

171. For example, a central integrated school could be established and opened to children of both races. But to all children who desired not to attend this school, the state could provide a sum to pay their tuition to private schools. These schools would presumably be former public schools taken over by local private groups. Under this device, the state would be technically complying with the spirit of the Court's decision. In addition, this combination plan has an advantage over the basic tri-school proposal in that the Court, to invalidate the refusal of a white private school to admit a Negro, would first have to overcome the hurdle of a finding of the presence of state action in the state's indirect support of the private school through the provision of tuition funds. It is, of course, true that there would be serious practical difficulties involved in putting this plan into actual operation in any given community. For example, which of the present schools are to be integrated and which are to be converted to private groups? Must the integrated school, even though its attendance be small, have equal facilities, etc.?

would be offered white parents. They could either send their children to an integrated school or to a separate school enrolling only white pupils. If these parents should elect overwhelmingly to send their children to the separate school, this indication on their part that they wished to continue separate schools even without the aid of the state's coercive power[172] would undoubtedly be an inducement to any court construing an attack on this device to overlook the element of state action present in the state's direct or indirect maintenance of the separate white school which refused to admit Negroes.

However, when one recalls the basis of the South's present crisis—the decision invalidating segregation, the force and strength of that decision, and the fact that in declaring constitutional provisions requiring segregation to be invalid the Court, in effect, overruled similar expressions of desire on the part of the people of Southern states, then there is little cause for optimism as to the success of another showing of the same desire. Past experience indicates that the Court, in viewing the various evasive steps, will undoubtedly think as lawyers and reason in strictly legal terms. While the Court may have used principles of psychology and sociology to declare segregation invalid, there is little reason to think that it would give serious thought to the psychological advantages inherent in allowing the Southern populace to retain their separate schools, at least for a time, or that it would consider sociological factors demanding such retention.

Despite their apparent legal futility, however, the evasive tactics may nevertheless serve a realistic purpose. If, by delaying the full application of the decision, time is thus gained for the South's people to absorb its shock and measure its effects, the evasion will have been worthwhile.

The more militant of the Negro leaders will undoubtedly press for full recognition of their newly-won right. The tenor and quantity of their demands are admittedly unpredictable.

172. The tri-school plan, or its combination with the provision of tuition funds to individual children, are the only plans which offer white parents and children an opportunity to express their wishes before receiving any state assistance to aid them in the accomplishment of that desire. All of the other plans are based on the exercise of the coercive power of government to maintain separate schools. This is evident in the use of state police power, in the individual assignment plan and in the proposal to gerrymander school attendance areas. And under the private school plans, if the state should simply discontinue its public schools for white children and offer to send them to private schools, without having in advance consulted the children or their parents or without giving them any choice, then compulsion on the part of the state would also be clear.

It seems inconceivable, however, that they will demand, within the next few years, anything approaching a complete reshuffling of the South's school children.

If the integration into white schools within the next few years of even a relatively few Negroes would, in fact, cause the temper of the South's more ardent racial separatists to explode, then the evasive measures may be the best means of providing time for such extremists to accept the apparent inevitable.

The proponents of the circumvention proposals could well afford, however, to measure the probabilities existing before acting hastily and irrevocably. Time has already been gained since the school cases were first filed. Additional time has been wisely granted by the Court before it will attempt to make its decrees final. The effects of the decision have been measured by the South's people. Is it possible that they would be willing to admit Negroes in the scattered instances where admission would be demanded? This question should at least be pondered and its answer measured against the apparent futility of the evasive proposals and their only profit as delaying steps.

Perhaps common sense compromise between the more militant groups, a tactic not hitherto used in the South's racial conflicts, would be the best approach in this time of crisis.