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Constitutional Law - Equal Protection - Legality of Plans for Maintaining School Segregation

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COMMENTS

CONSTITUTIONAL LAW — EQUAL PROTECTION — LEGALITY OF PLANS FOR MAINTAINING SCHOOL SEGREGATION—On May 19, 1954, the Supreme Court of the United States declared that segregation in public schools was a denial of equal protection of the law.¹ Since that date many and varied plans have been proposed to maintain segregated education by avoiding the impact of the decision. The legality of three of these proposed avoidance devices will be analyzed in this comment.

I. *Private School Systems*

Since the restraints of the Fourteenth Amendment apply only to state action² which denies equal protection, any analysis of a

¹ *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

² *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18 (1883); *Shelley v. Kraemer*, 334 U.S. 1, 68

proposed plan to preserve segregation by reliance upon a private rather than public school system must question whether the discriminatory action of private schools can be held to be action of the state. It is impossible to draw a clear distinction between what is private action and what is public action.³ The concept of state action has been continually expanded to include some action formerly regarded as private.⁴ On the hypothesis that a private school has been established and that discrimination by that school has been proved, this comment will first examine the factors which would tend to indicate that this action is, in fact, action of the state.

A. *State Economic Assistance.* The Supreme Court has not yet analyzed thoroughly the impact of state financial assistance on the "private" character of otherwise non-public institutions. It is agreed that state financing may become so crucial to the existence of a private school and may create such a relationship between a state and a school that an otherwise private school must be regarded as a state instrumentality. There is, however, disagreement over the kind and degree of financial aid which will cause a private school to be deemed a state instrumentality.

Whether or not a state retained its public school system, a few private schools would be able to finance their operations almost entirely by tuition payments. At most, state assistance to these schools would be in the form of free bus transportation, free text books, and state tax exemptions. If a state granted this aid only to those private schools which are segregated, and conditioned the aid upon continued segregation by the grantee, the state would clearly be denying equal protection because of race.⁵ If, however, the benefits of this aid were given to integrated as well as to segregated private schools, then, since this would have the same economic effect as a direct subsidy, segregation would deny equal protection only if the aid were considered to convert the private school into a state instrumentality. Tax exemptions have been a tradi-

S.Ct. 836 (1948). To disregard the requirement of state action would materially alter the federal system and transfer control over private rights to the national government.

³ In a sense, private action not prohibited is permitted by the state and thus has its basis in law. What is to be considered private action or state action is a matter of custom and may change with conditions. Barnett, "What is State Action Under the Fourteenth, Fifteenth and Nineteenth Amendments of the Constitution?" 24 ORE. L. REV. 227 (1945).

⁴ Since there is no privilege of national citizenship (U.S. CONST., amend. XIV) to education, Congress cannot protect the Negro against private action.

⁵ Inequality in the selection of subjects of taxation and beneficiaries of a tax exemption does not deny "economic equal protection." *Carmichael v. Southern Coal Co.*, 301 U.S. 495 at 509, 57 S.Ct. 868 (1937).

tional form of assistance to private schools and, standing alone, should be consistent with a school's private character. In the analogous area of state aid to sectarian schools, a tax exemption in favor of a sectarian school or hospital which served only a special class is not a denial of equal protection so long as the exemption is available on equal terms to like institutions of other sects.⁶ The Court has also held that providing free bus transportation and free textbooks for all school children, including pupils in sectarian schools, does not violate the non-establishment principle.⁷ This type of aid was justified by the Court on the theory that it directly benefited only the child, and thus was not aid to a religion as such. By analogy it could be argued that similar aid for the benefit of students of both races is not aid to segregated private schools and thus does not "establish" a public school. The sectarian aid cases, however, offer an ambiguous analogy. On the one hand, since there is an express constitutional policy prohibiting the establishment of religion whereas the prohibition of discrimination in public schools has only been implied from the Fourteenth Amendment, it would seem that if aid to a sectarian school does not establish a religion, similar aid to a segregated private school would, a fortiori, not establish it as a state instrumentality. On the other hand, the principle of religious liberty may allow more state financial assistance to be given to parochial schools of a religious minority than to private schools organized to continue segregation.⁸ When private school segregation is involved, the Court may well abandon its "benefit-to-the-child" theory and recognize that aid to the child is, in fact, aid to the school⁹ since it defrays costs otherwise borne by the school system.¹⁰

But the question of whether a private school would become a state instrumentality by receipt of such minor economic benefits is more academic than real. If a mass private school system were

⁶ See 61 HARV. L. REV. 344 (1948).

⁷ *Everson v. Board of Education*, 331 U.S. 1, 67 S.Ct. 504 (1947); *Cochran v. Board of Education*, 281 U.S. 370, 50 S.Ct. 335 (1930).

⁸ Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C. L.Q. 1 (1954).

⁹ *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E. (2d) 576 (1938).

¹⁰ The power of eminent domain can be constitutionally delegated to a private school only for a public purpose. This test is satisfied if there is any public benefit or advantage from the use of the property to be acquired and even though the benefits are limited to a small class, as long as that class is selected without discrimination from the general public. 53 MICH. L. REV. 883 (1955). A private school may not be able validly to exercise the power if its charter does not guarantee that students are to be selected without discrimination. *Connecticut College v. Calvert*, 87 Conn. 421, 88 A. 633 (1913).

set up in a state, few parents could afford to pay the actual cost per student. Substantial state subsidies would be indispensable if a private school system were to be a successful substitute for the present public school system. The legislature itself would deny equal protection if the subsidy were conditioned upon the school remaining segregated. But even if state subsidies were given to both integrated and segregated private schools, a subsidy might create such a relationship between the state and a segregated private school that the school would be deemed an instrumentality of the state. In *Kerr v. Enoch Pratt Free Library*,¹¹ it was held that an originally private library school became a state instrumentality upon receiving a subsidy equalling ninety percent of its costs. That percentage was the basis for distinguishing the *Kerr* case in a later decision which held that a segregated school receiving merely a twenty-three percent subsidy retained its private character.¹² Completely apart from their merits, these two decisions indicate the dilemma faced in choosing an approach to the question raised, namely, when does a private school become a state instrumentality by reason of state financing? If an arbitrary limit were placed on the amount of state financing which a private school could receive without becoming a state instrumentality, then a limited amount of public assistance equally available to all schools would not necessarily make the action of a segregated school state action.¹³ The personal right to an integrated public school education would thus depend upon small differences in the amount of a state subsidy. The alternative is not to draw any line in these cases, so that *any* subsidization would make the action of a private school state action. Proposed standards for determining when state assistance is such that a private school must be regarded as a state instrumentality suggest that this conclusion should follow when state aid substantially or practically supports a school,¹⁴ or provides its means of existence, since this gives the school the power to discriminate.¹⁵

¹¹ (4th Cir. 1945) 149 F. (2d) 212, cert. den. 326 U.S. 721, 66 S.Ct. 26 (1945). Although there were other factors, the opinion stressed the economic assistance and said that since the state had supplied the means of existence it had supplied the means by which the school was able to discriminate.

¹² *Norris v. Mayor and City Council of Baltimore*, (D.C. Md. 1948) 78 F. Supp. 451. The opinion also relied upon the lack of any public control over the school's management. The test of public control as the exclusive indicia of a state agency was rejected in *Nixon v. Condon*, 286 U.S. 73 at 89, 52 S.Ct. 484 (1932).

¹³ Some public aid is consistent with a private character. *Bull v. Stichman*, 189 Misc. 597 (1947), *affd.* 298 N.Y. 516, 80 N.E. (2d) 661 (1948).

¹⁴ See 62 HARV. L. REV. 126 (1948).

¹⁵ See 29 IND. L.J. 125 (1953). Although state aid is given on a non-discriminatory basis,

As a matter of economics, a private school is supported and given the means of existence by a state whether the subsidy is one hundred percent or only 1 percent of its costs if the subsidy is in fact necessary for the school to remain a solvent and going concern. These proposed criteria do not answer the fundamental issue involved, namely, will state assistance in any amount or only in excess of an arbitrary limit make an otherwise private school a state instrumentality and discrimination by it state action? This issue must be decided in any case where state assistance is the only possible ground present for holding the subsidized private action to be state action. In future private school cases, however, the existence of several factors besides that of financial assistance may support a conclusion of unconstitutional state action and thus will enable the Court to avoid the dilemma involved in a decision based on the factor of economic aid alone.

If and when a state withdraws from public education, the public school facilities would probably be transferred by lease or sale to the private organizations. A transfer for an inadequate consideration would be the economic equivalent of a financial subsidy, thus raising again the question discussed above.¹⁶ Even though the private school pays full rental value for the leased facilities, a state could not avoid its duty to prevent discriminatory use of publicly owned property on the theory that the property was now controlled by a private lessee; a discriminatory admission policy practiced by the lessee would be unconstitutional state action.¹⁷ However, if the property were acquired in fee for full and adequate consideration, the discriminatory exclusion of Negroes should not be held to be state action in and of itself, but, rather, action taken by an owner of private property.¹⁸

and although it does not turn the recipient into a state agency, the note writer argues that the aid can be enjoined if the private recipient discriminates in sharing its benefits. This seems to assume a duty on the part of the state to see that public funds (such as veterans' benefits?) are used without discrimination by the private recipient.

¹⁶ Upon dissolution, a school board is under a duty to obtain the market value of its assets. A dissenting taxpayer can enjoin a gift of the property, even though it is for a worthy cause. Application of Ross, 127 N.Y.S. (2d) 411 (1954).

¹⁷ Lawrence v. Hancock, (D.C. W.Va. 1943) 76 F. Supp. 1004; Muir v. Louisville Park Theatrical Assn., (6th Cir. 1953) 202 F. (2d) 275, revd. per curiam 347 U.S. 971, 74 S.Ct. 783 (1954) ("remanded for consideration in the light of . . . Brown v. Board of Education . . . and conditions that now prevail"). See 29 IND. L.J. 125 (1953).

¹⁸ Huber, "Revolution in Private Law," 6 S.C. L.Q. 8 at 13 (1953), argues that state court enforcement of this right would violate the rule of Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948). Any court judgment is state action; it is invalid only if it balances the rights of neighbors under restrictive covenants over the right to buy land, but probably

Instead of direct financial subsidies a state might use its taxing power to encourage private individuals to contribute to private schools. After abolishing public schools the state might, for instance, increase taxes by five times the amount now appropriated to education and then grant a six dollar credit against taxes for every dollar contributed to any private school in the state. Whether a school financed by contributions obtained in such a manner would retain its private character might depend upon which of two competing lines of reasoning a court would follow. The Social Security Act¹⁹ grants a ninety percent credit against the federal tax for contributions made by employers to similar state funds. The act would have been invalid if the conduct of the state and the taxpayer encouraged by the credit had not been within the scope of congressional power.²⁰ Congress could have collected the tax and provided unemployment compensation under its power to spend for the general welfare. The tax was valid because it served as a substitute for conduct which was within the scope of the taxing power; the tax and the conduct were equivalents. Judged by this standard the suggested state taxing statute would be invalid because a person could avoid the tax only by doing an act which if done by the state would make the discriminatory action of private schools invalid state action.

On the other hand, the federal income, estate, and gift taxes allow deductions for contributions to educational, religious, and charitable institutions.²¹ The rationale of the allowance is the assumption that these institutions, if not supported by private contributions, would have to be supported by Congress under its power to spend for the general welfare. The policy behind the deduction is that society benefits more when people are encouraged to channel their money into what they believe to be the most worthwhile charities than when Congress spends for what it thinks best. The validity of the deduction must then be based, at least in part, on the assumption that the conduct being encouraged is related to activities which could be within the federal spending power. This assumption has never been questioned even though Congress is prohibited by the First Amendment from spending

valid if it balances the right of an owner of land over a stranger's right to enter. See part I-E *infra*.

¹⁹ 49 Stat. L. 620 (1935), 42 U.S.C. (1952) §§301-1305.

²⁰ *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883 (1937).

²¹ I.R.C., §§170, 2055, 2522.

to support a religion, so that the conduct to be encouraged is, to that extent, unrelated to legitimate congressional powers and would be unconstitutional if done directly by Congress. An analogous state tax plan might then be held valid unless defeated by its evasive purpose.

Instead of directly subsidizing private schools, a state might reimburse parents who sent their children to any private school within the state. It could be argued that by the reimbursement method the state has removed itself one step further from the area of education and has made its relationship to the school more indirect. A court could, however, easily trace the subsidy through the parents to the schools and hold that a state cannot do indirectly what it cannot do directly. In such a case the issue would once again arise whether the aid thus received was sufficient to convert the private school into a state instrumentality. In any event, the reimbursement plan would be invalid if state statutes also regulated the management of private segregated schools.

State financial assistance in any form would require supervision in order to minimize waste and corruption. *Smith v. Allwright*²² held that a political party lost its private character and became a state instrumentality because of the duties imposed upon it by statutory regulation of primary elections.²³ By its control of the entire primary and general election procedure, the state had adopted, controlled, and enforced a political party's discriminatory denial of the right to vote in a primary, thus making it unconstitutional state action. In attempts to evade the *Allwright* decision, some states set up different primary systems, proving that they could be run without statutory controls. But the practical operation of a private school system would require the state to provide for such matters as financial aid, compulsory attendance, uniform standards of curricula, and qualifications of teachers.²⁴ State control over the management and affairs of private schools would make a private school system analogous to the primary election system in the *Allwright* case. Such comprehensive statutory control would

²² 321 U.S. 649, 64 S.Ct. 757 (1944).

²³ Statutory regulation also implies recognition of the public or governmental function of an institution. See part I-D *infra*. See also Barnett, "What is State Action Under the Fourteenth, Fifteenth and Nineteenth Amendments of the Constitution?" 24 ORE. L. REV. 227 (1945).

²⁴ Provision might also have to be made for continuing teachers' tenure laws, not only to attract and keep teachers but also to avoid impairing the obligation of present tenure contract rights.

indicate that the private schools were in fact state educational instrumentalities pursuing a policy of segregation adopted and enforced by the state.

B. *The Factor of Withdrawal.* In an attempt to evade the impact of the *Allwright* decision South Carolina repealed its statutes relating to primary elections. Nonetheless, *Rice v. Elmore*²⁵ held that a party's discriminatory denial of the right to vote in its primary was unconstitutional state action even though the primary was conducted under party rules, not state law. The court's rationale was that, despite the repeal of statutes relating to primaries, the state, by its general election procedure, continued to adopt, control, and enforce, as a matter of fact and custom, what was done in the primary. The primary was still as much a part of the general election as if it were regulated by statute. But a different rationale has been ascribed to the *Rice* decision by some writers.²⁶ The purpose of repealing all statutes relating to the primary was to abolish the basis of the *Allwright* decision which protected the Negro's right to vote in a primary, and thus to enable a political party to continue its all-white primary. The action of the state in withdrawing its control from primary elections was taken with the intent to expose the Negro to the potential loss of an existing right to vote in the primary. The withdrawal itself became unconstitutional state action when a political party actually did refuse to give Negroes a vote in the primary. Analogously, by repealing statutes relating to the public school system and withdrawing from the area, it could be argued that a state intended to remove the basis of the *Brown* decision, and thus expose the Negro to potential loss of an existing right to a non-segregated education. The withdrawal becomes unconstitutional state action when a private school refuses to admit the Negro.

The proposition that the action of the state in completely withdrawing from an area becomes unconstitutional when a private group is thus enabled to and does discriminate must rest upon the tacit assumption that when a state completely withdraws from an area of activity it is under an affirmative duty to prevent private persons who subsequently enter that area from discriminating.²⁷

²⁵ (4th Cir. 1947) 165 F. (2d) 387, cert. den. 333 U.S. 875, 68 S.Ct. 905 (1948).

²⁶ See Hale, "Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals," 6 LAW. GUILD REV. 627 (1946); Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C. L.Q. 1 (1954); 47 COL. L. REV. 76 (1947).

²⁷ In *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124 (1921), a state had, by statute, with-

There has been no indication in any case that such a duty exists.²⁸ Moreover, since practical enforcement of the Fourteenth Amendment would require an injunction against the private school, there is a conceptual problem of enjoining a private school because of the unconstitutional action of the state when the school has not been connected in any way with the action of the state. The actual rationale of the *Rice* case would be applicable in this situation if, after repealing its statutes, the state continued, as a matter of fact and custom, to adopt and give effect to what was done by the private schools, so that the private schools could still be regarded as part of a state school system.

C. *State Inaction as Unconstitutional State Action.* No decision of the Supreme Court has expressly accepted or rejected the principle that state inaction may constitute a denial of equal protection.²⁹ The Court has not had to resort to the inaction theory, with all its far-reaching implications, because in most cases state inaction and action have been two sides of the same fact situation involving unequal protection. Thus, in *Shelley v. Kraemer*,³⁰ equal protection was denied by the Court's positive action in enforcing a racial covenant, not by the inaction of the state in failing to bar a widespread pattern of discrimination by private persons. A few decisions have been interpreted as applying the theory of inaction, even though they did not expressly adopt the

drawn the protection previously afforded by the injunction remedy in labor disputes. It was held that this statute deprived an owner of property without due process of law when he lost customers because of unenjoined picket lines. Thus it could be argued that the state's withdrawal placed it under a duty to protect property from injurious strikes made possible by the statutory withdrawal of state protection.

²⁸ When a state leases public property, the private lessee's discriminatory use of the property is invalid state action, not because the state upon withdrawal from active management owed a duty to prevent discrimination by its private lessee, but because the state could not escape its duty to prevent discriminatory use of publicly owned property by leasing it. See note 17 *supra*.

²⁹ This theory has been accepted in lower federal courts: *United States v. Blackburn*, (D.C. Mo. 1874) 24 Fed. Cas. 1159, No. 14,603; *Louisville & N.R. Co. v. Bosworth*, (D.C. Ky. 1915) 230 F. 191 at 207. In *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622 (1935), the Court upheld a "private" political party's exclusion of Negroes from the primary even though the state did nothing to prevent the discrimination. In view of the later case of *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757 (1944), the *Grovey* case seems to mean not that inaction can never deny equal protection, but that there the state was under no duty to act to prevent discrimination by a private "club" in the selection of its membership. In the absence of such a duty, the state's inaction could not breach a duty to act, and thus could not deny equal protection.

³⁰ 334 U.S. 1, 68 S.Ct. 836 (1948). In *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932), the "failure to make an effective appointment of counsel for the accused" was merely part of the over-all state action of not giving the defendant a fair trial.

concept. Thus, in *Terry v. Adams*,³¹ Justice Black's opinion stressed the fact that the state's acquiescence in the Jaybird primary device permitted the discriminatory action of a private political party to produce the equivalent of a prohibited election; in effect, the opinion held this form of inaction to be invalid state action.

The Fourteenth Amendment imposes a duty on a state not to deny equal protection. Usually this is a duty not to act in a particular manner, and is breached by some affirmative state action. A state can also breach this duty by its inaction when it is under an affirmative duty to act in a situation to prevent private discrimination.³² An analysis of the *Civil Rights Cases*³³ indicates that such a duty exists in limited situations. Public inns, common carriers and public utilities are under a common law duty to serve without discrimination every member of the general public who requests their services.³⁴ A refusal to serve a member of the public, when accommodations are available, is an indictable offense.³⁵ If state law has imposed the status of a "public calling" on a business, then the failure of state law to enforce the attendant duty to serve in a nondiscriminatory manner would deny equal protection. Throughout the history of our country a clear distinction has been recognized between "public" and "private" schools. States have imposed upon public schools a duty comparable to that of a common carrier, to serve the general public without discrimination. Thus there would be no basis for finding that state inaction in "permitting" private schools to discriminate, and in failing to give the Negro a right of action against this discrimination, has violated the equal protection clause.

Some writers have approached the problem of state inaction differently and have suggested a duty on the part of the state to prevent discrimination as such in society.³⁶ It is argued that whenever a state does not act to prevent discrimination by a private person or school, this inaction enables the state to accomplish in-

³¹ 345 U.S. 461, 73 S.Ct. 809 (1953). See 67 HARV. L. REV. 91 at 105 (1954), concluding that the mere failure to suppress a practice not unlawful under state law is itself invalid state action—at least if the electoral process is involved.

³² Huber, "Revolution in Private Law," 6 S.C. L.Q. 8 at 13 (1953). *Truax v. Corrigan*, 257 U.S. 312 at 332, 42 S.Ct. 124 (1921), stated that the due process clause . . . "makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress of the legislature may not withhold."

³³ 109 U.S. 3, 3 S.Ct. 18 (1883).

³⁴ *Id.* at 26 for Justice Harlan's dissent in the *Civil Rights Cases*.

³⁵ *Ibid.*

³⁶ 23 TEMPLE L.Q. 209 (1950). The note suggests that the test for the presence of state action is not who acts, but what is done, to whom, and with what effect.

directly the same discriminatory result which would be unconstitutional state action if done directly by statute, and is a tacit admission that the private discrimination has state approval. Since the Court, in cases alleging denial of equal protection, looks not to the means employed but to the final discriminatory results achieved, the conclusion follows that the state inaction denies equal protection. The result of this theory is to create in the state a duty to act to prevent discrimination of any kind by any private person in order to avoid having its inaction held a denial of equal protection. The circularity of this argument indicates that the premise must be accepted that under the Fourteenth Amendment there must be a pre-existing duty to act before inaction is unconstitutional. Another theory proposing a duty as all-pervading as that criticized above suggests that the state's duty to act is co-extensive with, and determined by, the extent to which its power can be used to prevent private discrimination and yet be within the bounds of due process.³⁷ But it is clear from Supreme Court decisions thus far that the mere existence of power to act in certain areas to protect rights does not, in and of itself, impose a duty on the state to act or cause its inaction to be a denial of due process.³⁸ Indeed, as far as can be determined from Supreme Court decisions, the duty to act imposed on a state by the equal protection clause exists only in the traditionally inherent and essential areas of state concern and activity.³⁹ It is not at all clear that discrimination in general, or discrimination in private schools in particular, is such an inherent or essential area of state concern.

The Supreme Court, in the *Brown* case, concluded that only when the state has undertaken to provide the opportunity of education must it be made available to all upon equal terms, thus implying that the equal protection clause does not impose any duty upon the state to provide public education. But even if there were such a duty, imposed either by the Fourteenth Amendment or the state constitution, the failure to provide public schools could be held to be state inaction sanctioning the action of those private groups which did act (and thus denying equal protection to any person discriminated against) if, and only if, it is assumed that

³⁷ See Hyman, "Segregation and the Fourteenth Amendment," 4 VAND. L. REV. 555 at 565 (1951).

³⁸ *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948); *McKane v. Durston*, 153 U.S. 684 at 687-688, 14 S.Ct. 913 (1894).

³⁹ E.g., taxation, elections, and law enforcement are such areas. See note 32 supra. See also 96 UNIV. PA. L. REV. 402 (1948).

public schools alone can act in the area of education.⁴⁰ The question whether education is an exclusive governmental function will be discussed more thoroughly in the next section. It is sufficient to note here that, even when a state constitution imposes a duty on a state to provide public education, this is never thought to exclude private schools. Indeed, the Supreme Court has specifically held that it is unconstitutional for a state to make education a monopoly of public schools by forbidding parents to send their children to qualified private or parochial schools in satisfaction of the compulsory education laws.⁴¹ To the extent that private and parochial schools furnish the education of children they perform a state constitutional duty which the state would otherwise have to perform. Yet this type of state inaction has never been thought to sanction or support the discrimination of private or parochial schools within the meaning of the *Civil Rights Cases*.

D. *State Action Where Private Persons Perform a Governmental Function*. Even if it is assumed that a finding of state action by reason of economic aid, withdrawal or inaction could be avoided, the question still remains whether the federal courts would find state action on a theory that the private school was performing a function necessarily governmental. In light of the express wording of the Fourteenth Amendment this suggestion is a novel one, but there is strong support for it in the cases.⁴²

The origin of the concept can be found in Justice Harlan's dissent in the *Civil Rights Cases*.⁴³ He contended that racially discriminatory action by inns, common carriers, and theatres constituted state action because these businesses were really "agents" of the state "charged with . . . duties . . . to the public."⁴⁴ In essence the argument paralleled the reasoning of *Munn v. Illinois*⁴⁵ where the Court found that certain businesses are "affected with a public interest." Admittedly, the Harlan theory

⁴⁰ In support of such a position, see Emerson, "Segregation and the Equal Protection Clause," 34 MINN. L. REV. 289 (1950); Leflar and Davis, "Segregation in the Public Schools—1953," 67 HARV. L. REV. 377 at 404 (1954). See also *Catlette v. United States*, (4th Cir. 1943) 132 F. (2d) 902 at 907.

⁴¹ *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925).

⁴² See, generally, Hale, "Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals," 6 LAW. GUILD REV. 627 (1946); Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C. L.Q. 1 at 41 (1954); 61 HARV. L. REV. 344 (1948); UNIV. PA. L. REV. 402 (1948).

⁴³ 109 U.S. 3 at 26, 3 S.Ct. 18 (1883).

⁴⁴ *Id.* at 41.

⁴⁵ 94 U.S. 113 (1876).

has not been adopted in the sweeping terms in which it was first announced, but the more recent cases indicate that the actions of private persons performing governmental functions where matters of high public policy are concerned may be considered state action.

The case which is most often cited as the basis for the governmental function concept is *Steele v. Louisville & Nashville R. Co.*⁴⁶ In that case the Court held that racial discrimination by a labor union violated the Fifth Amendment. The Court reasoned that since federal statutes gave the Union its bargaining powers, the union was in fact "clothed" with "powers comparable to those possessed by a legislative body."⁴⁷ Hence its acts were the acts of Congress. Actually, the decision in the *Steele* case is based on the factor of statutory control and not simply the nature of a labor union's functions;⁴⁸ nevertheless, the reasoning of that case has been relied on by the courts using a "governmental function" theory.

A close parallel to the *Steele* decision can be found in *Smith v. Allwright*,⁴⁹ where the Court held that a refusal by the Democratic Party of Texas to permit Negroes a vote in the primary election was state action that violated the Fourteenth Amendment. Clearly, the decision in the *Allwright* case is based on the element of statutory control. Again, however, there is dictum in the opinion of the Court which indicates that weight was given to the public importance of the election process.⁵⁰ In any event, the later "white primary" cases bear out this aspect of the *Allwright* decision. When South Carolina wholly divested the election process of statutory control, state action was still found.⁵¹ While *Rice v. Elmore* could conceivably be rested on the theory of withdrawal, as has been suggested above, that theory is probably not a sound one. On the other hand, these decisions stress that the election process is a function inherent in government. In one of these cases the Court says: "Having undertaken to perform an important func-

⁴⁶ 323 U.S. 192, 65 S.Ct. 226 (1944).

⁴⁷ Id. at 202.

⁴⁸ See *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S.Ct. 1022 (1952), where the *Steele* decision was expanded to cover the case where the discriminatory conduct was directed at persons not entitled to membership in the union to which Congress had delegated the exclusive bargaining powers. See also *Syres v. OWIU, Local No. 23*, 350 U.S. 892, 76 S.Ct. 152 (1955), noted in 54 MICH. L. REV. 567 (1956).

⁴⁹ 321 U.S. 649, 64 S.Ct. 757 (1944).

⁵⁰ Id. at 660.

⁵¹ *Rice v. Elmore*, (4th Cir. 1947) 165 F. (2d) 387, cert. den. 333 U.S. 875, 68 S.Ct. 905 (1948); *Baskin v. Brown*, (4th Cir. 1949) 174 F. (2d) 391.

tion relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution"⁵²

Of all the "white primary" cases, however, the clearest recognition of the governmental function concept came in *Terry v. Adams*.⁵³ In that case the Court held that racial discrimination in the elections of the Jaybird party, where candidates to the Texas Democratic primary elections were nominated, was state action. Here there was no statutory control, and not even any withdrawal by the state from an area previously controlled. Since the winners in the Jaybird election were inevitably elected to office, the Court reasoned that this election was an "integral part . . . of the election process"⁵⁴ and that the organization took on the attributes of government.⁵⁵ This reasoning of the concurring justices, coupled with the fact situation in the *Adams* case, gives clear recognition to the governmental function concept; in fact, it would be difficult to support the decision on any other basis.

The strongest authority for the governmental function concept of state action is the Court's decision in *Marsh v. Alabama*.⁵⁶ There it was held that action by a company town, wholly owned and operated by a private corporation, had led to a denial of liberty without due process of law. In reaching this conclusion the Court stated that there was no reason to treat a privately owned town any differently from a regular municipality for purposes of the state action concept. When viewed in that light, the *Marsh* decision would seem to be a square holding by the Court that when private persons perform a governmental function there is state action.⁵⁷ Although the New York Court of Appeals has refused to follow the *Marsh* case,⁵⁸ this decision has not received wide approval⁵⁹ and there seems to be no indication that the Supreme Court would retreat from the position it took in the *Marsh* case.

⁵² *Rice v. Elmore*, (4th Cir. 1947) 165 F. (2d) 387 at 391.

⁵³ 345 U.S. 461, 73 S.Ct. 809 (1953).

⁵⁴ *Id.* at 469, in the opinion by Justice Black.

⁵⁵ *Id.* at 484, in the opinion by Justice Clark.

⁵⁶ 326 U.S. 501, 66 S.Ct. 276 (1946).

⁵⁷ There were actually two aspects of state action found in the *Marsh* case, one when the company town attempted to exclude a Jehovah's Witness, and the second when the state enforced a criminal trespass statute.

⁵⁸ *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. (2d) 541 (1949), cert. den. 339 U.S. 981, 70 S.Ct. 1019 (1950).

⁵⁹ There was a strong dissenting opinion in the *Stuyvesant* case founded on the governmental function theory, and the majority opinion has been extensively criticized. See 98 UNIV. PA. L. REV. 247 (1949); 15 UNIV. CHI. L. REV. 745 (1948); 61 HARV. L. REV. 344 (1948).

Relying on the labor union cases and the *Adams* and *Marsh* cases, the federal courts have recognized the governmental function concept in other contexts. Thus, where a private library refused to admit Negroes to a training program, state action was found.⁶⁰ In that case, it is true, the element of economic aid played a major role, but at the same time clear recognition was given to the governmental function theory. The concept has also been employed where a franchised monopolistic carrier subjected a "captive audience" to radio broadcasts,⁶¹ but, on the other hand, one federal court has refused to apply the concept to acts by a state board of bar examiners.⁶²

The fundamental question suggested by these cases is whether the courts will find that education is an "inherently governmental function" so that even if the schools are operated by private persons, acts of discrimination will be deemed state action. At the outset it must be noted that there is a basic distinction between education and activities such as operating election machinery or managing a company town. In the latter cases it can be said that the function is intrinsically one of government, going to its very essence; whereas, the function of education, while traditionally performed by government, is a service which is capable of purely private operation. Thus, in the one case the function is directed to the control of human conduct, which is inherently governmental, while in the other case the function is directed to the enlightenment of the human mind, which can be, but does not necessarily have to be, the function of government. In *Pierce v. Society of Sisters*⁶³ it was held that a state could not adopt legislation which would compel all children within a given age group to attend the public schools. In so deciding the Supreme Court stated that, "... the act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁶⁴ Thus, the Court indicated that education is an activity which not only can be validly performed by private groups, but also, that when privately operated, it may not be unreasonably restrained by the state. Nevertheless, when the private school denies racial equality it might yet be argued that, since

⁶⁰ *Kerr v. Enoch Pratt Library*, (4th Cir. 1945) 149 F. (2d) 212, cert. den. 326 U.S. 721, 66 S.Ct. 26 (1945).

⁶¹ See *Pollak v. Public Utilities Commission*, (D.C. Cir. 1951) 191 F. (2d) 450, revd. on other grounds 343 U.S. 451, 72 S.Ct. 813 (1952).

⁶² *Mason v. Hitchcock*, (1st Cir. 1939) 108 F. (2d) 134.

⁶³ 268 U.S. 510, 45 S.Ct. 571 (1925).

⁶⁴ *Id.* at 534.

education is traditionally a function government engages in, it is the kind of activity which falls within the meaning of state action. It must not be forgotten that the states have always recognized education as a primary function of the government. Moreover, the Supreme Court in the *Brown* case expressly stated by way of dictum that education is one of the most important functions of the states.⁶⁵

A more fundamental problem inherent in classifying education as a public function, which when publicly or privately conducted is state action, arises when the question is asked, how far can the doctrine be carried? To rely on the doctrine in all areas of overlapping public and private conduct would seem to work a perversion of any understandable meaning of the term "state action." Certainly grave questions are presented when the governmental function concept is considered in regard to parks, public carriers, golf courses, cemeteries, and parochial schools. Could we say in all these cases that since they are activities which are performed by government they are governmental functions which when performed by private persons become subjected to the restraints of the Fourteenth Amendment? In this regard it may be noted that the courts which have applied the "governmental function" concept have restricted it to cases where matters of "high public policy"⁶⁶ were involved. While such a restriction on the doctrine is ambiguous it does demonstrate that the courts would not be willing to apply the doctrine to all types of conduct performed under both public and private control. At the same time it is likely that the continuance of racial segregation in the schools would present the "high public policy" issue which the courts have contemplated in developing the governmental function concept.

A further question arises as to what the effect would be of state constitutional provisions which affirmatively stipulate that education is no longer a public function. One writer has suggested that these provisions may be given effect by the courts.⁶⁷ On the

⁶⁵ *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954). See also *University of Southern California v. Robbins*, 1 Cal. App. (2d) 523, 37 P. (2d) 163 (1934), cert. den. 295 U.S. 738, 55 S.Ct. 650 (1935).

⁶⁶ See Hale, "Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals," 6 LAW. GUILD REV. 627 at 633 (1946). See also *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512 at 534, 87 N.E. (2d) 541 (1949), cert. den. 339 U.S. 981, 70 S.Ct. 1019 (1950); *Rice v. Elmore*, (4th Cir. 1947) 165 F. (2d) 387 at 391.

⁶⁷ Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C. L.Q. 1 at 44 (1954).

other hand, the reasoning of the South Carolina white primary cases seems compelling here. There, the state legislature expunged all right to control the primary elections from the statute books but it was held that the election remained a governmental function just the same. Certainly the *Marsh* and *Adams* decisions do not indicate that the governmental function concept depends on how the state labels the action. Rather, all of these cases are predicated on the inherent nature of the function itself and not the state's own definition of the activity.

An added problem inherent in the governmental function cases, which the courts have not considered, stems from the reasoning in the majority opinion of the *Civil Rights Cases*. It was there indicated that the rationale for the state action concept was that while a private person can *interfere* with another's rights, only a governmental body can *deprive* one of life, liberty, or property without due process or deny equal protection. While the later decisions of the Court do not reiterate this distinction in the precise wording of the *Civil Rights Cases*, the Court has never indicated that this rationale is erroneous. When the governmental function concept is employed, however, the question arises whether the courts are changing the original understanding of state action and finding that private persons have actually deprived a person of his rights and not merely interfered with them. There are two ways in which the logical difficulty thus presented might be resolved. First, the courts might find that the private group performing the governmental function has become so powerful that it can in fact deprive others of their rights and not merely interfere with them. It is extremely unlikely, however, that the courts will take that view in light of the language of the *Civil Rights Cases*. It is more probable that the courts will find that, by performing public functions the private persons have become instrumentalities of the state, and hence their action state action.⁶⁸ In any event, the courts do follow this theory in the economic aid cases, and it would seem to offer the soundest solution in the governmental function cases.

As developed, a governmental function theory would seem to offer the courts a basis for striking down all of the proposals for continuing racial segregation in education through private

⁶⁸ The reasoning of the governmental function cases seems to support this view. See, e.g.: *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809 (1953).

schools. Although it may be doubted that the concept would be extended to make all action by private schools state action, the forcefulness of the *Brown* decision indicates that the Court may be willing to rely on it to prevent continued racial segregation. In any event, the point should not be overlooked that this theory could always be used in conjunction with facts showing economic aid by the state to find state action.

E. *State Action Through Court Action.* It has long been recognized that the action of a state court can be state action. Thus, where a state court omitted the names of Negroes from its jury lists, it was held that failure to perform this "ministerial"⁶⁹ function was state action. It has also been held that court action can be state action when the state court fails to provide a fair criminal trial,⁷⁰ proceeds to trial in a civil action without giving adequate notice,⁷¹ or enforces the principles of the common law in such a manner as to deprive a person of property without due process of law.⁷² The major step in the recognition of state court action as state action came in *Shelley v. Kraemer*⁷³ where the Court held that state court enforcement of a racially restrictive covenant contained in a deed was state action denying equal protection of the laws. The importance of the *Shelley* case lies in the fact that the prior cases of state action by court action were cases where the actual denial of due process, or equal protection was based simply on the act of the court. The *Shelley* case added the factor of pre-existing private discrimination, which is clearly outside the Fourteenth Amendment, but which becomes state action through the state court's enforcement of it. Thus the rule of *Shelley v. Kraemer* does not prohibit the private discrimination as such, but it does say that a state court cannot enforce this private conduct without transgressing the Fourteenth Amendment.

Although some writers have indicated that the *Shelley* doctrine is so broad that it practically wipes away the old requirement of state action,⁷⁴ it may be doubted whether the case can be given

⁶⁹ *Ex parte Virginia*, 100 U.S. 339 (1879).

⁷⁰ *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265 (1923); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932).

⁷¹ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁷² *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940).

⁷³ 334 U.S. 1, 68 S.Ct. 836 (1948).

⁷⁴ Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C. L.Q. 1 (1954); Barnett, "Race-Restrictive Covenants Restricted," 28 ORE. L. REV. 1 (1948); 48 COL. L. REV. 1241 (1948).

such an expansive interpretation. If a private school corporation, in violation of its charter, entered into a contract with a Negro student to admit him to its course of instruction, the *Shelley* rule would seem to be applicable to a state court enforcement of the discriminatory charter provision. In that type of case, as in the case of court enforcement of a restrictive covenant, the court would be relying on the restrictive covenant or clause to deprive the Negro of a property or a contract right. Since it is unlikely that the suit would arise in the manner suggested, the crucial question is, would it be state action that abridged the Fourteenth Amendment if a Negro sued to gain admittance to a private school and the state court dismissed? In this situation the Negro has no contract or property right of which he is deprived by virtue of the court's dismissal. Consequently, there is grave doubt that the doctrine of *Shelley v. Kraemer* could be applied to bring the court's action within the meaning of state action that denies equal protection to the Negro.⁷⁵

There is some indication, however, that the equal protection issue can be raised in a different manner. In *Barrows v. Jackson*⁷⁶ a white property owner had conveyed his land to a Negro in violation of a restrictive covenant. A suit for damages based on the breach of the covenant was brought against the grantor and the Supreme Court held that damages could not be allowed on the authority of *Shelley v. Kraemer*. In the *Barrows* case it was found that the white property owner could assert the Negro's right to equal protection in defense of the damage suit. While this decision flies in the face of the usual rule that in order to assert a constitutional right a litigant must have standing to raise the question,⁷⁷ the Supreme Court has indicated that the standing question may in some situations be waived. Thus, the Court found in *Pierce v. Society of Sisters*⁷⁸ that a private school corporation could successfully attack the adoption of a state statute which would have compelled every child in the state, within a prescribed age group, to attend public schools. In that case the Court allowed the private school to protect its property interests by asserting the personal right of liberty belonging to parents and children, which persons were not before the Court, as a basis for striking down the

⁷⁵ See *Rice v. Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W. (2d) 110 (1953), affd. 348 U.S. 880, 75 S.Ct. 122 (1954).

⁷⁶ 346 U.S. 249, 73 S.Ct. 1031 (1953).

⁷⁷ *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493 (1943).

⁷⁸ 268 U.S. 510, 45 S.Ct. 571 (1925).

statute. It was this same reasoning which led the Court in the *Barrows* case to find that the injury which would result to the white property owner in the form of the damage remedy permitted him to rely on the Negro's right to equal protection. The Court stated:

"But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."⁷⁹

It must be carefully noted that in the *Barrows* case the Court sought to protect the rights of minority classes who would in the future be prevented from acquiring property interests if the damage remedy were permitted, although these persons had no standing themselves to raise the issue. In both the *Pierce* and *Barrows* cases the crucial fact is that some person or legal entity would be deprived of a valuable contract, property, or other legal right if the statute or covenant, which is unconstitutional by reference to some other group, is enforced. Moreover, in these cases the Court could invalidate any future effectiveness of the statute or covenant since in the future neither could be relied on as a basis of right. Unlike the enforcement of a compulsory public education statute or a restrictive covenant, however, when a private school excludes a Negro it cannot be said in all cases that the act of discrimination will deprive some person or legal entity of a property or contract right. When a restrictive covenant is enforced by a damage remedy the injury to the grantor is direct, immediate, and will occur in all cases. On the other hand, it is difficult to conceive of a case where the Court could protect some person's rights in such a manner as to prevent a private school from performing future acts of discrimination.

In either the *Shelley* type of case or the *Barrows* type of case, therefore, the person or group which seeks to invalidate the private acts of discrimination must have some existing legal right of

⁷⁹ *Barrows v. Jackson*, 346 U.S. 249 at 257, 73 S.Ct. 1031 (1953).

which he would be deprived before the equal protection question can be raised. He might then rely on the denial of equal protection which results to the Negro, when the state court enforces private discrimination, as a basis for protecting this other right. When, however, the private school has done no more than refuse to admit the Negro it cannot be said that there is an injury to an existing right which would entitle some person to sue. In light of this fact it may be doubted that the doctrine of state action through court action will be of much significance in an attack on private school plans.

II. *School Assignment Plans*

A second proposal that has been advanced to permit continued segregation in education is the "individual assignment plan." Unlike the private school plans, this device does not seek to avoid completely the holding of the *Brown* case, but is rather predicated on a philosophy of delay. Generally, the assignment plans provide for the placement of each individual child in the particular public school that educational officials determine he should enter. This determination, by the terms of the statutory plans now in existence, would be made on the basis of such factors as ability, physical proximity to the school, and available school space.⁸⁰ The plans also permit the assignment to be appealed through a hierarchy of administrative boards and finally through the state's court system.⁸¹ When the assignments are being made on an obvious racial basis the crucial question is whether the aggrieved persons can enter the federal courts and obtain an injunction to restrain the action of the assigning board. The hurdle that stands in the path of the federal injunction is the doctrine that before a federal court will enjoin state administrative action, state remedies must have been exhausted.⁸² The Supreme Court has not yet considered the exhaustion rule as it is related to segregation cases, but the sources of the rule, the extent of its application, and the limits which have been imposed upon it, indicate the problems these plans present, and the possible paths the Court may take.

⁸⁰ Ala. Code (1940; Supp. 1955) tit. 52, §61(4); N.C. Gen. Stat. (1953; Supp. 1955) §§115-176 to 115-179. See also La. Rev. Stat. (1950; Supp. 1954) tit. 17, §81.1.

⁸¹ See *Ex parte Board of Education*, (Ala. 1956) 84 S. (2d) 653; Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C.L.Q. 1 (1954).

⁸² See DAVIS, ADMINISTRATIVE LAW §182 (1951); Stason, "Timing of Judicial Redress From Erroneous Administrative Action," 25 MINN. L. REV. 560 (1941); Berger, "Exhaustion of Administrative Remedies," 48 YALE L.J. 981 (1939); 46 ILL. L. REV. 756 (1951).

The doctrine of exhaustion of state administrative remedies is one that is well established in the field of administrative law. While it has been suggested that the rule arose out of the general rule of equity that relief will not be given where there is an adequate legal remedy,⁸³ those cases where a declaratory judgment was denied⁸⁴ for the same reason indicate that the rule has come to stand on its own feet. Perhaps the real foundation of the exhaustion rule is a principle of comity⁸⁵ similar to the Court's holdings that it will not rule on the constitutionality of a state statute until it has been interpreted by the highest court in the state,⁸⁶ and that in habeas corpus proceedings the writ may not be issued by the federal courts to obtain a prisoner's release from state custody until all the available state remedies have been tried.⁸⁷ An additional consideration is found in the cases where the rule was applied to federal administrative action. Here the courts have been able to rely on congressional statutes which grant the agency exclusive jurisdiction or permit appeals only from final orders as a basis for requiring that the administrative remedy be exhausted.⁸⁸ Since the courts have not generally distinguished the federal and state cases in applying the rule, these federal cases have helped to develop the rule as a general principle of administrative law.⁸⁹ It would seem, however, that since different considerations lie behind the rule as applied to federal and to state agencies the courts in proper circumstances should distinguish the federal cases from the state cases where the rule is predicated not on a grant of exclusive jurisdiction but on a principle of comity.

While the foregoing general considerations explain the reason for the development of the rule, it can be supported by more practical considerations today. The courts have recognized that the specialized skills of the agency's personnel make them more adept than judges at handling technical problems.⁹⁰ Moreover, when the administrative action is complete, it is felt that only the basic policy questions will remain for judicial solution. Certainly these argu-

⁸³ See 39 CORN. L.Q. 273 (1954).

⁸⁴ See *Public Service Commission v. Wyckoff Co.*, 344 U.S. 237, 73 S.Ct. 236 (1952).

⁸⁵ *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U.S. 196, 44 S.Ct. 553 (1924). See also Berger, "Exhaustion of Administrative Remedies," 48 YALE L.J. 981 (1939).

⁸⁶ *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 65 S.Ct. 152 (1944).

⁸⁷ *Darr v. Burford*, 339 U.S. 200, 70 S.Ct. 587 (1950).

⁸⁸ See DAVIS, ADMINISTRATIVE LAW §§186, 187 (1951).

⁸⁹ *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459 (1938); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 67 S.Ct. 1493 (1947).

⁹⁰ See DAVIS, ADMINISTRATIVE LAW §184 (1951).

ments have persuasive force in the rate regulation and assessment cases. A corollary of the specialized skill argument is the argument that a federal court should not interfere with legislative action until it is complete. Since action by an administrative body is partly legislative, this argument concludes that the courts should maintain a hands-off policy until it is complete.⁹¹

While the cases indicate that the federal courts have adhered to the exhaustion rule rather strictly, the sources of the rule and the rationale for its present existence suggest that it may not be so strictly applied to the assignment plans. Certainly if a court were to consider that the rule is similar to the old equity rule, that it is basically a principle of comity, and depends largely on the expertise of administrative personnel, it might very well refuse to apply the rule in balancing those factors against continued racial segregation in education. In applying the exhaustion rule to state administrative action the Supreme Court has not made clear whether the rule is mandatory or discretionary. In some cases it has been held that the rule is a prerequisite to federal relief,⁹² and in other cases it has been said the rule is to be applied in the discretion of the federal courts.⁹³ It has been suggested that even where the Court has taken the mandatory approach it actually considered the equities of the case before it.⁹⁴ Which view the Court will take of the rule becomes quite crucial to the success of the school assignment plans; certainly the problems raised by those plans present a strong case for a discretionary application of the rule.

Whatever the general approach may be the cases indicate that the rule is applicable across a wide range of administrative activity. Nevertheless it has had limits placed upon it. If the administrative board is wholly without jurisdiction over a particular case,⁹⁵ or is incapable of giving the relief sought,⁹⁶ or if the ruling of the administrative board is in clear violation of a statute, the courts will not require an exhaustion.⁹⁷ Where the time for obtaining

⁹¹ *Prentis v. Atlantic Coast Line R. Co.*, 211 U.S. 210, 29 S.Ct. 67 (1908).

⁹² *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459 (1938). See also 42 ILL. L. REV. 677 (1947).

⁹³ *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 44 S.Ct. 565 (1924); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300, 58 S.Ct. 199 (1937).

⁹⁴ See 44 MICH. L. REV. 1035 at 1039 (1946).

⁹⁵ *Public Utilities Comm. v. United Fuel Gas Co.*, 217 U.S. 456, 63 S.Ct. 369 (1943). But cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459 (1938).

⁹⁶ *Order of Railway Conductors of America v. Swan*, 329 U.S. 520, 67 S.Ct. 405 (1947).

⁹⁷ *Wettre v. Hague*, (1st Cir. 1948) 168 F. (2d) 825.

administrative relief is unreasonably short,⁹⁸ or where the agency waits an unreasonable time before acting, the courts have likewise excused a failure to exhaust.⁹⁹ These limitations are somewhat mechanical and can be met by a carefully drafted and applied statute. More serious limitations may arise when the litigant alleges that he is suffering irreparable injury or is being deprived of a constitutional right. Generally, the Supreme Court has refused to excuse the exhaustion requirement when the only irreparable injury alleged is the expense of trying a case through a system of complicated administrative procedure.¹⁰⁰ On the other hand, the Court has held that exhaustion can be excused where a public utility's rates were set at a confiscatory level.¹⁰¹ While there must be a clear showing of irreparable injury in the confiscatory rate cases there seems to be a growing tendency for the courts to consider that factor. A recent case indicated by way of dictum that a "paramount consideration" in the application of the rule is the nature of the injury.¹⁰² Although the irreparable injury cases have so far concerned only monetary injuries it would seem that the denial of access to the public schools on a non-segregated basis would provide the courts with an even clearer case to which the same line of reasoning could be applied.

Probably the most confusing aspect of the exhaustion rule is the method by which the courts have applied it when constitutional questions are raised. A litigant desiring to make a constitutional attack on the assignment plans could do so in at least three ways. First, the attack might be directed at the constitutionality of the statute the administrative board is enforcing. It is not clear that exhaustion will be excused in this situation,¹⁰³ although a leading text-writer points out that since the agency has no power to rule on the constitutionality of a statute, there is a strong argument for excusing the requirement.¹⁰⁴ Secondly, a constitutional attack might be directed at the way in which the agency enforces the

⁹⁸ *Munn v. Des Moines Nat. Bank*, (8th Cir. 1927) 18 F. (2d) 269.

⁹⁹ See Stason, "Timing of Judicial Redress From Erroneous Administrative Action," 25 MINN. L. REV. 560 (1941).

¹⁰⁰ *Petroleum Exploration Co. v. Public Service Comm.*, 304 U.S. 209, 58 S.Ct. 834 (1938).

¹⁰¹ *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U.S. 196, 44 S.Ct. 553 (1924); *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 43 S.Ct. 446 (1923). See also DAVIS, *ADMINISTRATIVE LAW* §188 (1951).

¹⁰² *Hardy v. Rossell*, (D.C. N.Y. 1955) 135 F. Supp. 260.

¹⁰³ *Air Craft and Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 67 S.Ct. 1493 (1947).

¹⁰⁴ See DAVIS, *ADMINISTRATIVE LAW* §190 (1951); Stason, "Timing of Judicial Redress From Erroneous Administrative Action," 25 MINN. L. REV. 560 (1941).

statute. Since the agency generally would have power to rule on the constitutionality of the statute as applied, there seems to be no good reason for excusing exhaustion. In any event, in this situation the courts have not relaxed the requirement.¹⁰⁵ Thirdly, and perhaps most effectively, an attack can be made on the constitutionality of the legislation which created the agency. Again, it could be said that the agency would have no power to rule on the constitutionality of the statute. Whether or not that theory is sound, when the attack is made in this manner the courts have indicated that exhaustion may be excused. In *Yakus v. United States*¹⁰⁶ the Supreme Court stated by way of dictum that if it can be said in advance that the administrative remedy is incapable of providing due process, exhaustion of the state remedy will not be required. While the Court has adhered to that rule when the attack is on the basic enabling legislation, it has required a strong showing of incapacity.¹⁰⁷ These cases indicate, in any event, that a procedural setup designed to thwart the raising of constitutional questions may be a denial of due process. Certainly this argument takes on added weight by virtue of the fact that most of the constitutional attacks made on the exhaustion requirement have been in cases where commercial or property rights were concerned. There may be stronger reasons to excuse exhaustion where personal rights of liberty and equal protection are involved.

The foregoing considerations of the source of the exhaustion rule, the extent of its application, and the limits which have been imposed upon it indicate that while the rule has at times been strictly applied it may be excused in proper circumstances. The Supreme Court has not considered the exhaustion rule as applied to the school assignment plans, and the decisions by the lower federal courts have been conflicting. Prior to the decision in the *Brown* case it was held in *Bruce v. Stillwell*¹⁰⁸ that there was no need to exhaust administrative remedies where a Negro was excluded from entering a public school, although in that case there was no specific administrative remedy available. Since the decision in the *Brown* case, the Alabama court¹⁰⁹ and a federal court of appeals¹¹⁰ have found that exhaustion of remedies is a prerequisite

¹⁰⁵ *Allen v. Grand Central Aircraft*, 347 U.S. 535, 74 S.Ct. 745 (1954). But cf. *Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445 (1945).

¹⁰⁶ 321 U.S. 414, 64 S.Ct. 660 (1944).

¹⁰⁷ *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 67 S.Ct. 1493 (1947).

¹⁰⁸ (5th Cir. 1953) 206 F. (2d) 554.

¹⁰⁹ *Ex parte Board of Education*, (Ala. 1956) 84 S. (2d) 653.

¹¹⁰ *Carson v. Board of Education*, (4th Cir. 1955) 227 F. (2d) 789.

to state court or federal court injunctions directed at the administrative assignment. On the other hand, a federal district court has reached a different result on the ground that there had been an exhaustion as a practical matter.¹¹¹ While the present case law on the exhaustion requirement, as it is related to the assignment plans, is not indicative of how the courts will ultimately decide the issue, considering that the rule has for the most part been applied to the tax, regulatory, and rate assessment cases, that it is largely a rule of comity, and that the courts have been willing to limit the rule in cases of irreparable injury and constitutional rights, there would seem to be strong reasons for the courts to refuse to apply it to the school assignment plans.

III. *Exercise of Police Power*

A. *School Districts.* The power of a state to create and alter the geographical boundaries of school districts for the best educational interests of the state is limited only by the standard of reasonableness. As long as the resulting school district is geographically reasonable it would probably be a valid exercise of the power even though the district is also planned to be all-white or all-Negro.¹¹² A school districting plan, however, which prohibited a student from attending the nearest school would deny that student equal protection if other students in the same area could attend the school.¹¹³ Even when districts are drawn without regard to race, many single-race schools result because of residential distribution. The *Brown* case apparently would not require states to set up school districts in such a way as to insure racial integration in every school, but would allow normal geographical school districts even though the result was some degree of segregation.

Since the residential use of land cannot be zoned along racial lines,¹¹⁴ a city could not in this way freeze the racial character of land to conform to present one-race school districts. Continual redistricting of school areas in order to counter racial residential shifts and maintain one-race school districts would indicate an unreasonable alteration of school districts on the basis of racial,

¹¹¹ *Bush v. Orleans Parish School Board*, (D.C. La. 1956) 138 F. Supp. 337.

¹¹² Leflar and Davis, "Segregation in the Public Schools—1953," 67 HARV. L. REV. 337 at 404 (1954).

¹¹³ This was a denial of equal protection even under the separate but equal doctrine [*Carter v. School Board of Arlington County*, (4th Cir. 1950) 182 F. (2d) 531] and even though a child usually has no right to attend the nearest school. *Scown v. Czarnecki*, 264 Ill. 305, 106 N.E. 276 (1914).

¹¹⁴ *Buchanan v. Warley*, 245 U.S. 60, 30 S.Ct. 16 (1917).

not geographical, criteria.¹¹⁵ Just as racial zoning of residential areas is an unreasonable exercise of the police power which denies the equal protection of property rights, so racial zoning of school districts would be an unreasonable exercise of power denying equal protection of the right to a non-segregated public school education.

The practice of gerrymandering political districts has been declared by the Supreme Court to be a non-justiciable "political question," i.e., one to be determined solely by the legislative and executive branches.¹¹⁶ But reliance on that decision to justify discriminatory districting of school areas is misplaced. The Court has seldom treated an issue as a political question, and then only when the Court felt that it lacked adequate judicial criteria for an adjudication of the issue on its merits.¹¹⁷ The Court has felt no such uncertainty in the fields of public education or civil rights.

B. *Classification by Results of Tests.* Since they are inherently unequal, separate schools have meant a lifetime of inferior education for most Negroes. To integrate the races solely upon the factor of age when there is a substantial gap in the quality of their past education, or solely upon the factor of the quality of their past education which would mean a gap in physical ages, is unfair to both races in their competition inside and outside the classroom.¹¹⁸ If a state classified children of equal ages into several groups on the basis of non-discriminatory objective criteria such as knowledge, intelligence and proficiency, and assigned each group to a separate school, this would be a reasonable classification and would perhaps achieve segregation to some extent for a limited time.¹¹⁹ Only if the statute were unjustly administered or so indefinite as to put unlimited and uncontrolled discretion in the hands of administrators would there be a denial of equal protection.¹²⁰

¹¹⁵ See *Webb v. School District*, 167 Kan. 395, 206 P. (2d) 1066 (1949); *Hooker v. Greenville*, 130 N.C. 472 (1902).

¹¹⁶ *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198 (1946).

¹¹⁷ See 56 YALE L.J. 127 (1946).

¹¹⁸ Gradual desegregation for educational or administrative reasons, not racial reasons, would be less vulnerable to constitutional attack. See Garver, "Legal Requirements for Admission to Public Schools," 20 LAW AND CONTEMP. PROB. 23 (1955).

¹¹⁹ A state may properly use literary tests as a reasonable means of classification. *Williams v. Mississippi*, 170 U.S. 213, 18 S.Ct. 583 (1898) ("read or understand" clause valid on face; discrimination in application alleged, not proved); *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926 (1915) (literacy test, though valid, fell because inseparable from invalid "grandfather clause"). But see *Davis v. Schnell*, (D.C. Ala. 1949) 81 F. Supp. 872, affd. 336 U.S. 933, 69 S.Ct. 749 (1949) ("understand and explain" clause invalid on face because standard used was not definite and reasonable enough to minimize chance of discriminatory application; immaterial that race not mentioned in test).

¹²⁰ *Yick Wo v. Hopkins*, 118 U.S. 356 at 373-374, 6 S.Ct. 1064 (1886). *Leflar and Davis*,

C. *Segregation for Public Peace and Safety.* The majority in *Plessy v. Ferguson*¹²¹ held a segregation statute valid as a reasonable exercise of a state's police power to preserve public peace and order. The first attack on this justification came when the Court held that racial residential zoning could not be supported as a reasonable exercise of police power to preserve public peace and order.¹²² The *Brown* case made it clear that racial segregation in education, even though enforced pursuant to a state's police power, denied equal protection. The Court realized that segregation is premised on the inequality of the two races and therefore will necessarily place the minority race at a disadvantage. By their very nature, then, segregation statutes result in unequal protection and are thus inherently unreasonable exercises of the police power.

There will undoubtedly be attempts to maintain segregation indirectly ostensibly by using other criteria than race as a basis for classification.¹²³ History has shown, however, that the Court will more readily look through the form to the substance of legislation when racial discrimination is involved than when other questionable exercises of the police power are alleged.¹²⁴

Conclusion

The multiplicity of legal problems which have arisen from the revolutionary change in judicial thinking wrought by the *Brown* decision indicate that the now wholly rejected "separate but equal doctrine" was founded more on a principle of social expediency than of judicial logic. It is apparent that the resistance proposals are, at best, by-products of the underlying social philosophy which developed and sustained racial segregation not only in the public schools but in other areas of social, economic, and political life. While the foregoing analysis of the individual proposals suggests the variety of answers available to the courts, it would seem fair to say that the courts are still confronted with the same underlying policy question that existed before the *Brown* decision in the

"Segregation in the Public Schools—1953," 67 HARV. L. REV. 377 at 404, 410 (1954).

¹²¹ 163 U.S. 537 at 550, 16 S.Ct. 1138 (1896).

¹²² *Buchanan v. Warley*, 245 U.S. 60, 30 S.Ct. 16 (1917).

¹²³ Segregation is not validated because tied into an approved public policy. *City of Richmond v. Deans*, (4th Cir. 1930) 37 F. (2d) 712, *affd.* 281 U.S. 704, 50 S.Ct. 407 (1930). If the fear of racial intermarriage, and not the maintenance of the South's economic system, is the reason for segregation, then schools segregated on the basis of sex would minimize social contact, achieve integration and probably be a valid basis of educational classification.

¹²⁴ Compare *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926 (1915) with *United States v. Kahriger*, 345 U.S. 22, 73 S.Ct. 510 (1953).

application of the separate but equal test. The question is, should the courts move rapidly in striking down racial segregation, or should the dominant philosophy be one of gradual desegregation. Before, the question was, "what are equal facilities?" Now the question is, "are the resistance proposals valid?" It is clear that in the *Brown* decision the Court recognized the enforcement problem. This might indicate that the gradual approach will dominate the Court's thinking in considering the resistance proposals. On the other hand, the growing desire on the part of the Court to protect personal liberty, coupled with the impact which racial discrimination has on international relations, suggests that the resistance proposals will be subjected to severe judicial scrutiny.

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