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## RACIAL DISCRIMINATION AND PRIVATE SCHOOLS\*

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### IV. THE PUBLIC NATURE OF PRIVATE EDUCATION

It is clear that the public school administrators are not the only educators who are deeply concerned with racial discrimination. Some of their colleagues in private and denominational schools also face serious problems. Of course these are of a different type, being concerned for the most part with the reaction which may take place in the wake of a private school's decision to integrate the races in its student body. The private school administrator has not had to grapple with problems of imposed integration. His have been or will be voluntarily shouldered. Suppose, however, the decision is made to attempt to extend the principle of the *Segregation Cases* into nonpublic education. Suppose in other words, there is an attempt made to break down existing racial barriers to admission in private schools. Would such an attempt succeed? A development of this as yet nonexistent but nevertheless foreseeable<sup>94</sup> problem area will be made in this section.

That this problem is something more than academic is evident from what is the apparent over-all program of the Negro. His aspirations would seem to include that of full and complete status in the

\*This is the last half of a study on Racial Discrimination and Private Schools. The first half appears in this volume at page 145. Much of the research for this study was made possible through a grant from the Fund for the Republic. All statements made and all conclusions drawn are, however, solely those of the author and should not be attributed to the officers and directors of the Fund.

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94. Compare the attempt to break down the racial barriers at Girard College, a private school in Philadelphia. See, e.g., Gordon, *The Girard College Case: Desegregation and a Municipal Trust*, 304 *Annals* 53 (March, 1956). Compare, also, the Fair Education Practices Acts of New York and New Jersey; Note, 64 *Harv. L. Rev.* 307 (1950).

In 1955 a determined effort was made to require all members of the Association of American Law Schools to eliminate racial barriers to admission. A policy of non-segregation was to be made a condition of becoming or remaining a member. The Association includes both private and public law schools. The attempt was defeated in a close vote at the 1955 convention of the Association. For an account of this attempt to desegregate private as well as public schools, see Association of American Law Schools, 1955 Proceedings 249-71 (1956).

social structure, not merely the elimination of official acts of discrimination, although those acts are the focal point of present-day attacks. "Integration" may be considered to be a concept which carries with it a good deal more than merely commingling whites and non-whites in the same public schools. The goal may be considered to be not only formal equality of treatment by official bodies and governmental institutions but full and complete participation in all societal institutions, both those labelled "public" and those termed "private." The Negro in the United States has not in the past and does not now want a form of society which will preserve his special cultural characteristics or racial attributes. He wants an equal position with full status in white culture and complete participation in white institutions.<sup>95</sup> "What the Negro wants is first-class citizenship without any reservations. He wants nothing not compatible with democracy and the Constitution. On the contrary, his demand is that he share equally in American democracy under the Constitution and participate fully in American life."<sup>96</sup>

It appears, further, that the Negro movement in the United States is, when viewed in perspective, part of a world-wide movement by colored peoples for status. In other countries it takes the form of anti-colonialism and nationalism, of violence and strife. Here it takes the form of achieving goals through the use of legal tactics and strategy in a constitutional framework. But the aim is the same, even though there is no outward identification with different national groups and no verbalization of the essential identity of interest. "The thoughtful American Negro," it has been said,

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95. In now-famous legal language, the Negro does not want "separate but equal" treatment in any important activity. See *What the Negro Wants* (Logan ed. 1944) for statements of Negro leaders of the aspirations of the American colored citizens. In Rowan, *What Do Negroes Really Want?*, *Look*, April 3, 1956, p. 34, a leader of the Louisiana NAACP is quoted as follows: "Many years ago, we asked for school equalization. Then, we couldn't get it; now we don't want it. We want nothing less than total integration in all facets of American life—and we won't stop until we get it."

In the same article, a Negro teacher is quoted as follows: "There is nothing complicated about what we want. We just want the same things other Americans want—the same opportunities, rights and responsibilities." See Richardson, *What the Negro Wants*, 11 *New South*, No. 1, p. 8 (Jan. 1956).

96. Davie, *Negroes in American Society* 455 (1949). Despite the statement quoted in the text, no systematic survey of the aspirations of the Negroes have been made. The statements of Negro leaders are available but they are usually couched in generalities so that it is difficult to ascertain the Negro position on any particular issue. The problem is one which cries out for careful analysis and exploration, as is its other side, the problem of learning exactly what it is that the white man fears or dislikes in the Negro. Some exact knowledge of the facts in both areas should help displace some of the emotion and extreme statements usually heard.

"shares with almost all the other coloured peoples of the world a desire to improve the status of his people in relation to the white race."<sup>97</sup>

It is, accordingly, not fanciful to raise and discuss the question of possible attempts to open the doors of private education. At some time in the future the private school administrator is likely to have to meet the problem head-on.

Moving as he does through legal channels, the Negro can choose between two alternatives in his pursuit of improved social status. He can attempt to have legislation enacted or he can go to court and try for favorable judicial reaction. His choice will no doubt be conditioned by the state in which the action is brought. For example, in New York a successful movement in the legislature has resulted in the enactment of a Fair Educational Practices Act.<sup>98</sup> This statute, which is a part of the series of New York statutes designed to combat discrimination in privately owned and operated establishments, makes it illegal to discriminate on the basis of race, color or religion in the admission of students to private schools. Other states have statutes which, even before the decision in the *Segregation Cases*, forbade racial discrimination.<sup>99</sup>

The main focus of the Negro has, however, been on the judiciary. Recognizing the complete impossibility of getting any favorable legislation enacted in even the border states, to say nothing of the deep South, the courts and the judicial process have been resorted to. And it is the federal, not the state, courts which have been the primary vehicle. For, ultimately, it is the federal Constitution which is invoked in aid of the demand for equality.<sup>100</sup> Ultimately, also, it will be the United States Supreme Court which will be called upon to make the authoritative pronouncement should a movement to open private education be made. Would that Court,

97. Article entitled "The American Negro" in *The London Times*, July 23, 1952, p. 7. See van der Post, *The Dark Eye in Africa* (1955).

98. N.Y. Educ. Law § 313. This act is modelled on the Fair Employment Practices Acts which several states have enacted. The New York statute has the following declaration of policy: "It is hereby declared to be the policy of the state that the American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions without regard to race, color, religion, creed or national origin. . . ." For a discussion of this and other similar statutes, see Note, 64 *Harv. L. Rev.* 307 (1950).

99. These statutes are collected in Murray, *States' Laws on Race and Color* (1950) (Supp. 1955).

100. It is for more than political reasons (the inability of getting an act through Congress) that the Supreme Court, not Congress, has been the vehicle used by the Negro. Congress, under existing interpretation, has no authority to legislate in the field of racial relations. See text at pp. 176-77, *infra*.

under existing and foreseeable legal doctrine and constitutional interpretation, extend the principle of nondiscrimination to encompass all of education?

#### A. The Constitutional Concept of "State Action"

We can start with the *Segregation Cases* themselves and some of the language used by Chief Justice Warren. An important part of the decision, derived not from express language but as a gloss from the entire opinion, is the Court finding a national interest in education, a concern for the child and his development over and above that of the parents and of the local community. The Chief Justice made statements which are perhaps the most extreme yet uttered by the Court on the subject of education:

[We recognize] the importance of education to our democratic society.

[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces.

[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>101</sup>

Language such as that buttresses the view that the societal interest in education is overriding, and transcends the interests of the parents in addition to that of the child. The Court, in using this language, has made an important recognition of a concept which may have far-reaching ramifications. It is possible that it has created the basis for mounting an attack on the citadel of private learning. Does the finding of a national interest in education, when added to the further finding that enforced racial segregation generated feelings of inferiority in the objects of discrimination, suggest that it is a logical step to require integrated education wherever carried on?<sup>102</sup>

It is difficult to forecast what the Supreme Court will do with a case once it is before it. Absent a concrete factual situation out

101. The quoted statements are taken from *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). See *School District v. Alamacence County*, 211 N.C. 213, 189 S.E. 873 (1937), in which the Supreme Court of North Carolina characterized education as a "sacred duty" of the state.

102. Such a fear has been expressed. See Valenti, Woelfl & Shaughnessy, *A Double Revolution? The Supreme Court's Desegregation Decision*, 25 Harv. Educ. Rev. 1 (1955). The authors are members of the faculty of Loyola University in Chicago.

of which the legal and constitutional question is posed, prediction of a future decision is often erroneous. It is possible, however, to discuss the problem area, to point out lines of development in the past, and to attempt an extrapolation. What obstacles would an attempt to force the doors of private education open have to surmount? The chief roadblock is the language of the Constitution itself and an almost unbroken line of interpretation since 1872. The pertinent part of the Constitution is the fourteenth amendment and its provision that "[no] State [shall] 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 key word is "state," for it is in that word that the concept of state action finds its source and its validity. The Constitution, it is often said, "runs against governments only." Thus, those who would break down the barriers in private education must present a factual situation from which it will be possible for the Justices of the Supreme Court to draw the conclusion that the state is somehow intimately involved in privately-controlled education. In the *Slaughterhouse Cases*,<sup>103</sup> decided in 1872 by the Supreme Court, it was said that the restrictions of the fourteenth amendment apply only to the actions of state governments and do not apply either to private individuals or to private institutions. Since that time there has been an evolutionary development of the concept of state action. The result is that today it is possible to predict with fair accuracy whether a particular factual situation so involves a state as to bring it within the purview of the fourteenth amendment. So far as education is concerned the short answer is that the Court has not extended the concept of state action to include anything more than that publicly controlled. Nor, to hazard a guess, is it likely that it would now or in the immediate future. However, it has been said that the "Court has shown that the concept of private action must yield to a conception of state action where public functions are being performed."<sup>104</sup> Hence, this inquiry.

### 1. One Line of Judicial Development

It is, as noted above, *state* action which deprives a person of due process of law or denies him equal protection of the laws that is prohibited by the fourteenth amendment. But the Supreme Court has never drawn a precise and definitive line between what is of-

103. 83 U.S. (16 Wall.) 36 (1872).

104. Freund, *Umpiring the Federal System*, in *Federalism: Mature and Emergent* 159, 162 (MacMahon ed. 1955).

ficial (state) action and what is purely private. However, it has consistently held to the requirement that action (or nonaction, in some cases) by some official or organ of the state is a necessary prerequisite to setting the fourteenth amendment in motion. In the *Civil Rights Cases*<sup>105</sup> in 1883, Mr. Justice Bradley stated that "it is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment." But even before that, the Court had already extended the amendment to actions of individuals exercising state powers, whether they were following state law or not.<sup>106</sup> Thus the amendment applies to more than statutes and the actions of state officials in compliance with statutes. Later on the Court went even further and held that acts of state officials, not only unauthorized by state law but even when prohibited by it, were within the purview of the amendment.<sup>107</sup>

Thus the concept of state action has been an expanding one which has apparently not yet completed its evolution: Two parallel lines of developments are discernible: (1) that noted above in which it can be said that action by any official performing state duties or any organ of the state falls within the concept, and (2) the line of cases which have applied the concept to officials and organizations with no direct connection with the state but which exercise functions similar to those of the state. In both of these situations, the tendency has been for the Court to bring more and more under the tent of state action. Whether this is the "camel's nose soon to be followed by the entire animal" remains to be seen.

In addition to those noted above, other cases have added to the doctrinal development of the concept of state action. In *Virginia v. Rives*,<sup>108</sup> a case involving exclusion of Negroes from the jury in a trial of a Negro for murder, Mr. Justice Field uttered the following relevant language in a concurring opinion:

If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the State is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by [the Supreme Court]: it cannot be

105. 109 U.S. 3, 11 (1883).

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

107. See, e.g., *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278 (1913); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907). See also Hale, *Unconstitutional Acts as Federal Crimes*, 60 Harv. L. Rev. 65, 78-90 (1946).

108. 100 U.S. 313 (1879).

imputed to the State, so as to make it evidence that she in her sovereign or legislative capacity denies the rights invaded, or refuses to allow their enforcement. It is merely the ordinary case of an erroneous ruling of an inferior tribunal. Nor can the unauthorized action of an executive officer, impinging upon the rights of the citizen, be taken as evidence of her intention or policy so as to charge upon her a denial of such rights.<sup>109</sup>

This attempt to engraft the normal rules of agency law upon the Constitution—the agent acting beyond the scope of his authority cannot bind his principal—found Court cognizance and acceptance in 1904. At that time, a unanimous Court held that the action of a state administrative body, which had been taken in direct violation of a state statute, could not be state action “within the intent and meaning of the Fourteenth Amendment.” In the words of Chief Justice Fuller, “it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law.”<sup>110</sup>

But that was the last time the Court was willing to take such a position. Three years later it receded from that view. In *Raymond v. Chicago Traction Co.*<sup>111</sup> it found state action in a case where a state board of tax equalization failed, contrary to the state constitution, to make a uniform property valuation for tax purposes. A violation of due process was found over the dissenting voice of Justice Holmes who stated that he was “unable to grasp the principle on which the State is said to deprive the appellee of its property without due process of law because a subordinate board, . . . is said to have violated the express requirement of the State in its constitution. . . . I should have thought that the action of the State was to be found in its constitution, and that no fault could be found with that until the authorized interpreter of that constitution, the Supreme Court [of the state], had said that it sanctioned the alleged wrong.” The new position of the Court was underscored in 1913 in a case which clearly refuted the earlier (Holmes’) position: “[W]here a state officer under an assertion of power from the state is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the fourteenth amendment cannot be avoided by insisting that there is a want of power. That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the

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109. *Id.* at 334.

110. *Barney v. City of New York*, 193 U.S. 430, 438 (1904).

111. 207 U.S. 20, 41 (1907).



application of the Amendment, deny the power and thus accomplish the wrong."<sup>112</sup>

To further buttress the view that action illegal under state law may still be state action are two more recent cases. In *Iowa-Des Moines National Bank v. Bennett*,<sup>113</sup> the Court in 1931 found state action in a systematic discrimination by tax assessors even though the state court had held the acts to be unauthorized and thus not the action of the state. And in 1945, in *Screws v. United States*,<sup>114</sup> the Court again held to the view that it is "immaterial that the state officer exceeded the limits of his authority" in deciding whether state action is involved. Since the officer "acts in the name and for the State, and is clothed with the State's power, his act is that of the State." Some language by Justice Rutledge in his concurring opinion is of interest: "It is too late now . . . to question that in these matters abuse binds the state and is its act, when done by one to whom it has given power to make the abuse effective to achieve the forbidden ends. Vague ideas of dual federalism, of ultra vires doctrine imported from private agency, do not nullify what four years of civil strife and eighty years have verified."

Similarly, the concept of state action has been expanded to include the actions of any organ of the state. The racial covenant cases provide apt illustration. *Shelley v. Kraemer*<sup>115</sup> in 1948 involved a racial restrictive covenant which had been invoked when the property in question was sold to a Negro. A decree of specific performance of the covenant was granted by a state court, and was challenged on the ground that such state court enforcement of a racial covenant was, first, state action and, second, an invalid discrimination under the equal protection clause. While true that the discrimination had been started by private individuals, "but for the active participation of the state courts, supported by the full panoply of state power," the Negro would have been allowed to purchase and occupy the land. The opinion by Chief Justice Vinson contained the following language which is important to the present inquiry:

Since the decision of this Court in the *Civil Rights Cases* . . . the principle has become firmly imbedded 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.<sup>116</sup>

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112. *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 288 (1913).

113. 284 U.S. 239 (1931).

114. 325 U.S. 91, 110 (1945).

115. 334 U.S. 1 (1948).

116. *Id.* at 18.

*Shelley* was followed by *Barrows v. Jackson* in 1953, a case in which the Court said that the same principle applies to an action for damages against a party who violates such a covenant by selling the land to a Negro. In the course of its opinion, to which Chief Justice Vinson strongly dissented, the Court said, "If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection in violation of the Fourteenth Amendment." So far as finding state action is concerned, the Court reasoned that "it becomes not [the seller's] voluntary choice, but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant . . . would constitute state action as surely as it was state action to enforce such covenants in equity, as in *Shelley*. . . ."<sup>117</sup>

When put together *Shelley* and *Barrows* seem to add up to the proposition that racial discrimination is legal, *i.e.*, not unlawful, when done privately but that there is a stigma attached to it which makes it improper for a court to give official sanction to exercises of this legal "right." This poses a neat jurisprudential question of whether it is possible to have a right for which the possessor cannot get judicial enforcement. In other words, does not the sum of *Shelley* added to *Barrows* equal a judicial declaration of invalidity of the racial covenant?<sup>118</sup>

A sequel to the racial covenant cases came in 1955 in the case of *Charlotte Park and Recreation Comm'n v. Barringer*.<sup>119</sup> It involved the grant of land to a city to be used as a park for white people only, with the provision that the land was to revert to the grantor should it be used by others than whites. This provision the Supreme Court of North Carolina characterized as a fee simple determinable, and reasoned that since it operated without the inter-

117. 346 U.S. 249, 254 (1953). Chief Justice Vinson, dissenting, stated that "these racial restrictive covenants, whatever we may think of them, are not legal nullities so far as any doctrine of federal law is concerned; it is not unlawful to make them; it is not unlawful to enforce them unless the method by which they are enforced in some way contravenes the Federal Constitution or a federal statute." *Id.* at 261.

118. *Cf. Huber, Revolution in Private Law?*, 6 S.C.L.Q. 8 (1953).

119. 242 N.C. 311, 88 S.E.2d 114 (1955).

vention of the state judicial machinery (it was "automatic" said the court) no state action was involved so as to bring it within the scope of the doctrine of the *Shelley* case. The United States Supreme Court refused to review the decision.<sup>120</sup> Eventually, however, it will have to do so. Until that time, the technique of the racial clause in a fee simple determinable would seem to be available for use by those who wish to avoid the impact of the racial covenant cases.

## 2. Another Line of Development

The foregoing series of cases, which makes it clear that *any* action of *any* official or organ of a state falls within the scope of the state action concept, has not as yet been applied to situations where there is a failure to act. The reach of the fourteenth amendment, accordingly, is negative in that it serves to invalidate particular improper action adjudged to be violative of due process or equal protection standards. It has no affirmative thrust in that a state has no constitutional duty to prevent "private" acts of discrimination, although the *Barrows* case may indicate a possible trend in that direction. It takes *action* of a state, moreover, to trigger the amendment. Nonaction, *i.e.*, passive acquiescence in unofficial discrimination, has not been proscribed even though it is of course protected by authority of state law and state power.<sup>121</sup>

Nevertheless, the clear trend of judicial decision is to bring more and more activity within the reach of the limitations of the Constitution. Since the beginning of our national history, more and more governments have been made subject to due process and similar limitations. At the outset, only the federal government was

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120. The case title was changed when it was considered by the United States Supreme Court. *Leeper v. Charlotte Park and Recreation Comm'n*, 350 U.S. 983 (1956).

121. But see Pekelis, *Law and Social Action* 120-23 (1950), for an argument that state inaction can be action under the Constitution. See also Hale, *Force and the State: A Comparison of "Political" and Economic Compulsion*, 35 Colum. L. Rev. 149 (1935). In Comment, 45 Mich. L. Rev. 733 (1947), the following statement appears: "What is action by the state and where it ceases is an interesting speculation in political philosophy. In a final sense, state action permeates society, for the existence of anything and the action of any individual or group is permitted, commanded or forbidden by the state: it can fairly be said that everything in the social organism takes character from its relation to the central collective purpose manifested by the government. But a distinction is made in the common understanding between action by the state and the action of private persons and it is in terms of this distinction that the Fourteenth Amendment has been held to speak. Perhaps the only logical principle on which to found the distinction is to attribute that action to the state which embodies a purpose of the government or of one entrusted with its authority which is separable from the purposes of private individuals."

circumscribed by the Constitution (by the bill of rights). Then the Civil War amendments (the thirteenth, fourteenth and fifteenth) brought the states within that circumscription. Since 1865 judicial interpretation has extended the area to counties and cities and other local sovereignties. True in the line of cases developed above, it is equally true in the parallel line of development of the concept of state action, one which might be termed the application of the Constitution to "private governments."<sup>122</sup> These cases involve situations in which an ostensibly private organization performs acts which are either of the type normally performed by government, or are of such overriding importance as to make those acts, in the language of the California Supreme Court, "quasi-public."<sup>123</sup>

The voting cases (the so-called "white primary" cases) furnish instructive guidance of the length to which the Supreme Court is willing to extend the concept of state action when the activity in question is considered to be of vital importance. These cases have arisen and been decided under both the fourteenth amendment and the fifteenth amendment. The latter reads in pertinent part as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Because the principal problem under both amendments is whether state action is involved, the cases will be considered as a group with the label "white primary cases" being used generically.

Except for a brief period immediately after the Civil War a practice of systematic exclusion of the Negro from the polls has characterized the South. It is only in recent years that any significant number of Negroes has gained the ballot, and even now that number is pitifully small. Moreover, it is diminishing in some sections of the South.<sup>124</sup> The period has been characterized by a series of attempts by Negroes to gain full voting stature through the medium of Supreme Court invalidation of exclusion practices. The

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122. "It seems to me that there is more than an a priori hypothesis to support the notion that our generation of constitutional lawyers is discovering a new dimension in our federal structure—the dimension of private governments." Pekelis, *supra* note 121, at 96.

123. *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944).

124. While there is no doubt that over the years, there has been a marked increase in the number of Negroes voting, at the same time in such parts of the South as the so-called "black belt" the number has been decreasing since the Supreme Court's segregation decisions. See the article by Hodding Carter, *Racial Crisis in the Deep South*, *Saturday Evening Post*, December 17, 1955, p. 26; O'Connor, *Negro Voter in the South*, 29 *Interracial Rev.* No. 1, p. 9 (Jan. 1956).

techniques used to prevent voting by Negroes have included "grandfather" clauses, educational qualifications, registration requirements, and restrictions on membership in a political party. Only the latter device concerns us here.<sup>125</sup>

The decisional development has been fairly uniform and has revealed a consistent trend toward the enfranchisement of the Negro. A state statute which denied Negroes the right to vote in party primary elections was held to be state action and a denial of equal protection.<sup>126</sup> And when the Texas Legislature subsequently tried to avoid the impact of that decision by forming an executive committee to which it gave the power to decide on qualifications for membership in the Democratic Party, the Court again struck it down on the ground that the committee was an agency of the state.<sup>127</sup> The next attempt was to restrict membership through action of the state convention of the party. Here again, after first failing to find state action,<sup>128</sup> the Court invalidated the restriction. The reason given was that state statutes set out performance of certain duties by party officials and made other official uses of the party machinery. And in *Smith v. Allwright*, the Court stated, "The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party."<sup>129</sup>

Following that decision South Carolina repealed all statutory provisions regarding primary elections and political parties. Nevertheless, a requirement of the Democratic Party that only white persons could vote in primary elections was declared to be invalid state action.<sup>130</sup> That decision, by the Court of Appeals for the Fourth Circuit, found that the act of a political party was state action "where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice." The political party, in other words, could not be considered to be a private club. And in a federal district court decision in 1948 a requirement of the Democratic Party of South

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125. In 1939 Justice Frankfurter had this to say: "The [Fifteenth] Amendment nullifies sophisticated as well as simple minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

126. *Nixon v. Herndon*, 273 U.S. 536 (1927).

127. *Nixon v. Condon*, 286 U.S. 73 (1932).

128. *Grove v. Townsend*, 295 U.S. 45 (1935).

129. 321 U.S. 649, 663 (1944).

130. *Rice v. Elmore*, 165 F.2d 387, 391 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

Carolina that white as well as Negro qualified voters, before voting in the primary, take an oath that they will support separation of the races was invalidated.<sup>131</sup> The final link came in 1953 in the Jaybird Primary Case, *Terry v. Adams*.<sup>132</sup> Again, Texas provided the arena for the conflict. This time an attempt to place the primary one step further from the state was made. An organization calling itself the Jaybird Association was formed. This organization controlled the designation of party nominees. Again, the Supreme Court found state action, saying that "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."<sup>133</sup>

A comparable development of the application of due process and equal protection constitutional concepts to ostensibly private organizations is revealed in another group of cases, *Kerr v. Enoch Pratt Free Library*,<sup>134</sup> *Norris v. Mayor and City Council of Baltimore*,<sup>135</sup> *Dorsey v. Stuyvesant Town Corp.*,<sup>136</sup> *Marsh v. Alabama*,<sup>137</sup> and *Betts v. Easley*.<sup>138</sup> These cases pose squarely the problem of whether an organization traditionally and normally considered to be "private" can have sufficient "public" characteristics as to make constitutional proscriptions apply to it. The five cases do not, it should be mentioned, reach uniform results. They display all of the conflicting considerations inherent in the state action problem and all of the doubts raised in the minds of the judges reaching the decisions. Since they afford the closest existing analogy to the inquiry of this section, they deserve exposition in some detail.

*Kerr* involved a privately endowed library in Baltimore, controlled by a board of trustees appointed by the original donor, but the operating funds of which came mostly from the city and state.

131. *Brown v. Baskin*, 78 F. Supp. 933 (E.D.S.C. 1948), *aff'd*, 174 F.2d 391 (4th Cir. 1949).

132. 345 U.S. 461 (1953).

133. *Id.* at 469. Justice Minton, dissenting, stated: "Does [the] failure of the State to act to prevent individuals from doing what they have the right as individuals to do amount to state action? I venture the opinion it does not." *Id.* at 489.

134. 149 F. 2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945).

135. 78 F. Supp. 451 (D.Md. 1948).

136. 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

137. 326 U.S. 501 (1946).

138. 161 Kan. 459, 169 P.2d 831 (1946).

Negroes had been barred from the training school for librarians conducted by the library. This was held to be state action and, accordingly, an invalid discrimination under the equal protection clause of the fourteenth amendment. This case is particularly noteworthy even though it was not rendered by the United States Supreme Court. It went beyond *Smith v. Allwright* and the other voting cases in finding state action in an activity not strictly "governmental" in nature, one which, to use orthodox language, is "proprietary."<sup>139</sup> It would be on *Kerr* and its rationale that any concerted attempt to breach the walls of private education would be based. Hence, the following language of the court of appeals is important: Quoting *Nixon v. Condon*, one of the voting cases, the court said that "The test is not whether the members of the [activity] are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."<sup>140</sup> Of course it would require an extension, a major extension, of the *Kerr* case to breach the walls of private education because there the court was careful to point out the close financial connection which the library had with the city of Baltimore and the fact that the city officials could and did exercise control over the library. The *Norris* case, another arising in Baltimore, shows the importance of this factor. In that case, in an opinion noteworthy for its discussion of the judicial standards of judgment for distinguishing private from public institutions, the federal district judge stated that "The legal test between a private and a public corporation is whether the corporation is subject to control by public authority, State or municipal."<sup>141</sup>

*Dorsey v. Stuyvesant Town Corporation* furnishes further instructive guidance, although that case was decided by only a four-to-three margin in the New York Court of Appeals, has since been reversed by subsequent legislation and, hence, has little value as precedent. Stuyvesant Town was a wholly owned subsidiary of the Metropolitan Life Insurance Company. After entering into a contract with New York City under which the city condemned land and granted a tax exemption, Stuyvesant Town was built in New York City. Under the contract, the corporation agreed to adhere to certain building standards, to permit city auditors to inspect the

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139. The governmental-proprietary distinction is often used by judges to explain a result, particularly in cases involving municipal corporations.

140. 149 F.2d at 219.

141. 78 F. Supp. at 458.

books; and to turn over to the city any cash surplus upon the dissolution of the corporation. Negroes sought to enjoin the corporation from leasing only to white persons, but the injunction was denied. On appeal, the four majority judges of the New York court admitted that the federal courts had held "private groups subject to the constitutional restraints when they perform functions of a governmental character in matters of great public importance." Nevertheless, they sought to distinguish the *Marsh* case (discussed below) on the ground that "the state has lent its power in support of the actions of private individuals or corporations, and in so doing has clothed the private act with the character of state action."

Recognizing that the concept of state action is an expanding one, the four judges still felt that it had been found in the past "only in cases where the state has consciously exerted its power in aid of discrimination or where private individuals have acted in a governmental capacity so recognized by the state." It was then said that if state action were to be found in the circumstances of the case it would come "perilously close to asserting that any State assistance to an organization which discriminates necessarily violates the Fourteenth Amendment. Tax exemption and the power of eminent domain are freely given to many organizations which necessarily limit their benefits to a restricted group. It has not yet been held that the recipients are subject to the restraints of the Fourteenth Amendment."

The three dissenting judges vigorously maintained that "even the conduct of private individuals offends against the [equal protection clause] if it appears in an activity of public importance and if the state has accorded the transaction either the panoply of its authority or the weight of its power, interest and support."<sup>142</sup>

This language can be compared to that of the United States Supreme Court in *Marsh v. Alabama*, the so-called "company town" case. The town of Chickasaw, Alabama, was wholly owned by the Gulf Shipbuilding Corporation, which had built the streets, sidewalks and other public necessities and had maintained a privately organized and paid police and fire department system. Chickasaw looked like any other small American town. Plaintiff, a mem-

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142. 299 N.Y. at 542. Flack, Adoption of the fourteenth amendment 262-63 (1908), suggests that individual action was included in state action, or so many believed at the time the fourteenth amendment became a part of the Constitution. See the dissenting opinion of Justice Harlan in the Civil Rights Cases, 109 U.S. 3, 26, 57-59 (1883). In *Hale, Force and the State*, *op. cit. supra* note 121, it is argued that an omission by a state to enforce or secure the equal rights designed to be protected by the fourteenth amendment is state action. According to *Hale*, a state which omits to secure rights, denies them.



ber of Jehovah's Witnesses, was arrested after she refused to leave the town when ordered to do so by company officials. She was convicted under an Alabama statute which makes it a crime to remain on the property of another after being warned to leave. The conviction was reversed by the United States Supreme Court, on religious freedom grounds. "The more an owner, for his advantage, opens up his property for use by the public in general," the Court said, "the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

This appears to be an explicit recognition of the notion that the Constitution can be applied to private agencies. "Whether a corporation or a municipality owns or possesses the town," the Court went on to say, "the public . . . has an identical interest in the functioning of the community in such manner that the channels of communication remain free. . . . The managers [of Chickasaw] appointed by the corporation cannot curtail the liberty of press and religion . . . consistently with the purposes of the constitutional guarantees." Although not stated expressly this is tantamount to the Court saying that the fourteenth amendment limited the powers of the corporation owning the town, an admittedly private organization which received no help from and had no connection with the state!

The other organizations which are usually called private but which have had constitutional limitations applied to them are labor unions. *Steele v. Louisville & Nashville R. R.*<sup>143</sup> foreshadowed the development. In that case the United States Supreme Court remarked that if the Railway Labor Act conferred an exclusive bargaining power on a union "without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy, or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights." The Court refused to rule on this constitutional question, choosing instead to base its decision on a question of statutory interpretation, but Justice Murphy had the following to say in a concurring opinion: "While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Con-

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143. 323 U.S. 192, 198 (1944). An important extension of this came in 1956 in the case of *Syres v. Oil Workers Int'l Union*, 350 U.S. 892 (1956) (doctrine of *Steele* case extended to unions certified under Taft-Hartley Act).

gress. The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect."

*Betts v. Easley*, a Kansas case, is a direct holding to that effect. There, a labor union designated under the Railway Labor Act as collective bargaining agent for all of the workmen involved, excluded Negro workmen from full participation in the privileges available to others. Negroes were admitted only in a separate, allied organization which was to be "under the jurisdiction of and represented by the delegation of the nearest white local." The Supreme Court of Kansas held that this violated the fifth amendment's due process clause, the court saying that the union could not be regarded as a "private association of individuals free from the constitutional and statutory restraints which attach to public agencies."<sup>144</sup>

The United States Supreme Court, in *Brotherhood of Railroad Trainmen v. Howard*,<sup>145</sup> in like fashion has recognized that labor unions at times have a public character. Other state courts have followed suit. For example, in 1944 the California Supreme Court in a case involving a closed shop said that, "Where a union has . . . attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasipublic position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraints enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."<sup>146</sup>

## B. An Appraisal and Evaluation

Judicial construction of the constitutional concept of state action has been discussed in some detail because the concept is particular-

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144. The *Betts* case is one of several which together add up to the proposition that the limitations of the federal Constitution may, at times, run against individuals. See note 146 *infra*.

145. 343 U.S. 768 (1952).

146. *James v. Marinship Corp.*, 25 Cal.2d 721, 731, 155 P.2d 329, 335 (1944). Cf. Berle, *The 20th Century Capitalist Revolution* (1954). In Note, 54 Mich. L. Rev. 567, 570 (1956), it is asserted that the results of the *Syres* case, *supra* note 143, supports "the view that a federally certified union is, in effect, a quasi-governmental agency, the actions of which are subject to the limitations of the fifth amendment."

ly important at this juncture of our national history. We are in the midst of an era when the Negro, long under the stigma of second-class citizenship or worse, is making determined efforts to improve his over-all status. This assault on historical patterns of discrimination has been in serious operation only twenty years or so. During that time tremendous gains have been made, so much so that there is no doubt that official acts of discrimination, if not already outlawed, will be eliminated and that the Negro will have full status as far as the activities and pronouncements of formal governmental authority are concerned. But it is unlikely that he will be satisfied with mere formal equality of treatment, unless that equality is also true of the operational activities of the important societal institutions, educational, for one, and what is perhaps more important, opportunity to work and earn a better living, for another.

In order to accomplish this expanded goal the Negro would have an easier *legal* row to hoe if he used legislation, as distinguished from judicial action.<sup>147</sup> But of course legislation designed to equalize the status of Negro to white would be impossible of enactment in at least the South, if not much of the rest of the nation. Hence, judicial action would be the only feasible avenue to follow. To be successful, that action would have to be designed to get Supreme Court acquiescence in an even more expanded concept of state action than those accepted in the past. The argument, if and when made, would run like this: the restrictive covenant, white primary, company town, and closed shop cases have shown that ostensible private action must yield to an expanded concept of state action when important public functions are being performed; the Supreme Court in the *Segregation Cases* found an important national interest in education, in other words, indicated that education was an important public function; there is some state governmental subsidy of private (particularly denominational) education in the form of the granting of tax exemptions, free textbooks and bus transportation and similar subventions; therefore, so the argument would go, the constitutional prohibitions should be held to apply to all education, whether public or nonpublic.

What would be the reaction of the Supreme Court to such an argument? First, under present doctrine the Court would doubtless refuse to accept it. The reasons for this are multiple. For one thing, there is no reason to believe that the Supreme Court wishes to carry the doctrine of the *Segregation Cases* to its logical extreme.

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147. Cf. Berger, *Equality by Statute* (1952); Ruchames, *Race, Jobs, and Politics* (1953).

It is fallacious to think that any principle will be projected to its logical conclusion. To think so is to express a "fear, by no means uncommon, that judges are somehow compelled by a sort of iron logical compulsion, to proceed from one conclusion to all others which might seem analgous by any syllogistic extravagance. That no such compulsion exists is the peculiar virtue of the common-law tradition."<sup>148</sup> The law itself can be viewed as a group of concepts which have been stopped short of ultimate extreme. Much of law, as in all of politics, is a balancing of diverse interests. It is seldom indeed that any concept is of such overriding importance that it will be carried out without regard for countervailing interests. This is particularly true of the "great generalities" of the Constitution. The point is that there is no inherent dynamism which would make the principle of nondiscrimination encompass all education, both public and private.

Furthermore, the cases which have found judicial expansion of the concept of state action are distinguishable in part. In most if not all of them the activity in question is not only important (*i.e.*, "governmental" or "fundamental" or whatever other label may be placed upon it) to society (*i.e.*, voting, earning a living, community life) but there is in each instance no available, acceptable alternative or substitute. In education, on the other hand, private education is of course counterbalanced and overshadowed by public education. Desegregation in public education presumably being a fact, an acceptable alternative is available. The reasonable educational goals of the Negro thus are fulfilled by integrated public education plus that part of private education which voluntarily desegregates. Thus, finding state action to be involved in private education would tip the scales too much in the other direction.

In addition, extending the concept of state action to true private education would tend to jeopardize all types of private group activity. Only the most compelling reasons would lead the Court to open that "Pandora's box." And much of the virtues of private education are existent because it is private and not controlled, except in a tenuous manner, by the state. There are values to be preserved, both individual and societal, by a continuation of the present system of education. Finally, it may be said that the well-known reluctance of the Supreme Court to rule on constitutional questions would tend to make it postpone a decision on the question, should it arise, as long as possible.

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148. Sutherland, *The Supreme Court and Private Schools*, 25 Harv. Educ. Rev. 127, 128 (1955).

In sum, it can be stated that there is little or no chance of a successful assault from without on the doors of true private education in the foreseeable future. The "private school" plans of some Southern states, enacted in an attempt to avoid the impact of the Court's decision, are quite another matter. It is probable that they will generally be invalidated judicially when (and if) they are challenged.

### C. Addendum

Before leaving this subject, it should be noted that state legislation designed to open the doors of private education to all, to impose standards of nondiscrimination in admission, would doubtless be upheld under an attack on federal constitutional grounds. Some Northern states, notably New York, in fact have such statutes. They have met no serious challenge. And the possibility of arguing that imposed admission standards would be an interference with religious freedom would doubtless also fail. The principle which upholds state prescription of standards for parochial school education is easily broad enough to include admission practices.<sup>149</sup>

### V. Limitations in Grants and Gifts

One result of the strong preference in American law for the institution of private property has been the fact that a property owner is allowed to control its use, not only during his lifetime, but also long after his death. Liberty of testation has been the rule, although there have been some limitations imposed in every state. These, however, do not alter the basic proposition of control by the "dead hand."<sup>150</sup> In any civilized society, there is no escape from the dead hand. In a sense we live by it. Our literature, our art, our architecture, our science, our religion, all are built upon the achievements of dead men."<sup>151</sup> As much can be said of private education. To a large extent its livelihood, its economic viability, is dependent upon the income derived from gifts and endowments from men long dead. Even when the gifts are made *inter vivos* usually they last until after his death. The fact that those who endow universities and other private schools often attach special conditions to their gifts gives rise to another set of legal problems with respect to racial discrimination and private education.

Dead hand control can and does create two general problem areas for the private school administrator in the context of the

149. See Note, 64 Harv. L. Rev. 307 (1950).

150. See Simes, Public Policy and the Dead Hand c. 1 (1955).

151. *Id.* at 140.

present inquiry. First, it may be that some of the endowment funds or other assets of the school have been granted with the provision that the beneficial use is limited to "whites" or "Caucasians." This problem is neatly posed by litigation now before the state courts of Pennsylvania, involving famed Girard College in Philadelphia. Second, the possibility exists that grants of land may have been made to a school on condition that the land would revert to the grantor or his heirs should it ever be used for Negroes or other non-whites. Another recent case, *Charlotte Park and Recreation Comm'n v. Barringer*,<sup>152</sup> a North Carolina case, illustrates this problem.

It is evident that both of these problems involve essentially the same question. However, there is enough difference in them to make separate discussion advisable. But some general statements, germane to both areas, should precede the particularized development.

First, it is of the essence of the power of an owner over his property that he may limit the beneficial use of it as narrowly as he wishes. Thus, he may create a trust in his will and limit the beneficiaries under the trust to as small a group of people as he desires, and he may grant property to another on condition that it be used for certain purposes only, and if it is not so used that it revert to the grantor or his heirs. Even when explicit provision is made for the exclusion of certain racial groups, *e.g.*, the Negroes, from the beneficial use of trust funds or of property, the restrictions are not invalid *per se*.<sup>153</sup>

Next, attacks on the types of private discrimination involved in the exclusion of racial groups from the beneficial use of trust funds or property have thus far centered around attempts to find some tie to official government action in order to get the requisite "state action" necessary to trigger the fourteenth amendment. No frontal assault has yet been made on the limitations themselves as being invalid *per se*. Thus, in the Girard College litigation, the argument was made that the trust is administered by an official body, the Philadelphia Board of Directors of City Trusts, and that this is sufficient connection to government to constitute state action. And in the *Charlotte Park* case, the attempt was made to establish the proposition that operation of the clause under which the granted property reverted to the grantor was state action within the doctrine of *Shelley v. Kraemer* (discussed in section IV).

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152. 242 N.C. 311, 88 S.E.2d 114 (1955). The Supreme Court refused to review the decision. *Leeper v. Charlotte Park and Recreation Comm'n*, 350 U.S. 983 (1956).

153. See, generally, 3 Scott, Trusts c. 11 (1939).

Third, it may be possible to suggest methods of attacking the restrictive clauses directly. There may, in other words, be chinks in the doctrine of freedom of testation as far as racial limitations are concerned. There are a few judicial statements leaning toward this end. These may be harbingers of the things to come. In other words, it is possible, albeit improbable, that the racial restrictive clause will be outlawed entirely from deeds and grants of property.

Finally, both problem areas raise two questions: (1) May one excluded from the benefits of a trust because of race bring an action to have the trust opened up to include him? and (2) May the trustees of such a trust (or the grantees under a grant of property) refuse to carry out its terms; that is to say, may they ignore the racial restrictions, and when brought to account in court plead that enforcement of the restriction is precluded by the *Shelley v. Kraemer* doctrine?

Since our attention is focused on private education, we will limit the present discussion to the relevant aspects of charitable trusts for educational purposes and to grants of land or other property to private schools. (The *Girard* case involves a charitable trust, but the *Charlotte Park* case dealt with the grant of land to a city.) A charitable trust, it should be noted, differs from the ordinary private trust in that it need not have a definite beneficiary and may be created to exist in perpetuity. Private trusts usually must have a definite beneficiary and cannot be so created as to exist forever.<sup>154</sup>

#### A. The Girard College Litigation<sup>155</sup>

Under the terms of a trust created in 1831 by Stephen Girard for the education of "poor white male orphans," Girard College was established in Philadelphia. The school is administered by the Board of Directors of City (of Philadelphia) Trusts, the trustee, in accordance with a state statute. The Board consists of the Mayor and President of the City Council, both ex-officio, and twelve other members appointed by judges of the courts of common pleas of the county. Its operations are conducted autonomously, free from any control of the city or state, save for the jurisdiction of the

154. Simes, *op. cit. supra* note 150, c. 5, has a good brief discussion of this. See Scott, *Education and the Dead Hand*, 34 Harv. L. Rev. 1 (1920).

155. *In re Estate of Stephen Girard*, 24 U.S.L. Week 1021, 2068 (Phila. County, Pa., Orphans Ct. Jan. 6, 1956), 25 U.S.L. Week 2215 (Pa. Sup. Ct. Nov. 11, 1956) (*affirming*, 24 U.S.L. Week 2311); N.Y. Times, Nov. 13, 1956, p. 33. This litigation has engendered considerable interest. Discussions may be found in Cahn, *Jurisprudence*, 31 N.Y.U.L. Rev. 182 (1956); Gordon, *The Girard College Case: Desegregation and a Municipal Trust*, 304 Annals 53 (March, 1956); Notes, 56 Colum. L. Rev. 285 (1956), 104 U.Pa.L. Rev. 547 (1956).

Orphans' Court of Philadelphia, to oversee the trust administration. The Girard trust is today worth some \$95 million, the income from which goes for the most part to the support of Girard College.

Negro orphans, otherwise fully qualified (being poor and male), applied for admission to the school but were rejected by the trustees because of their race. They then petitioned the Orphans' Court for a determination that they were eligible for admission to the school, arguing (1) that the terms of the trust should be conformed to present-day conditions, (2) that racial discrimination was against public policy, and (3) that administration of the trust by a city-appointed board constituted state action which was invalid under the equal protection clause of the fourteenth amendment. In a comprehensive opinion, Judge Bolger of the Orphans' Court rejected these arguments and upheld the trust in accordance with its terms. Affirmed by the entire Orphans' Court sitting en banc, and again affirmed by the Supreme Court of Pennsylvania, one justice dissenting, it will probably be carried to the United States Supreme Court in an attempt to get the constitutional question settled.

On the merits, the case stands neatly poised in the hazy area separating private from official action, in an area which affords full opportunity for judicial craftsmanship. The decision could have gone either way in the Orphans' Court, for the close connection of the trust and the trustees could easily have brought it within the ambit of state action. The reason given for not finding state action was that the activity of the city was "proprietary" not "governmental" in nature. That comes close to saying that if a city acts like a private individual, then it becomes in law a private individual, and loses the character of a governmental entity. Just how this metamorphosis is supposed to take place was left unstated by the judges of the Orphans' Court. Also left unstated was any justification for a distinction between proprietary and governmental functions in the field of constitutional interpretation.<sup>156</sup> In sum, it would seem to be not unlikely that the decision will be overruled. However, although the tie to the state is close enough to find state action, still the policy considerations which may have motivated the Supreme Court in such a case as *Terry v. Adams* (the Jaybird Primary Case)<sup>157</sup> are not present in the *Girard* case. The deprivation involved at Girard College is not nearly so significant or so

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156. Cf. *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D.W.Va. 1948) (equal protection clause held to apply to municipal corporation in exercise of proprietary function).

157. This case was discussed in section IV.



great as the instances when a Negro is kept from voting or from obtaining a job. Readily available is desegregated public education. And making a compelling argument leading to the desegregation of *all* private schools is far different from making one for the integration of *a* private school.

Be that as it may, whether the Girard trust does or does not involve state action is of less interest to a private school administrator than the attempt made to outlaw the racial clause as being contrary to public policy. Another facet of interest and importance is the attempted application of the doctrine of *cy pres* to the trust. These two aspects of the *Girard College* case bear development in some detail.

The position of the Negro applicant as far as public policy and the racial restrictive clause was concerned was that the clause conflicted with the present public policy of the City of Philadelphia, the State of Pennsylvania and the United States. The argument was based on a series of statutes and municipal ordinances dealing with racial matters and uniformly indicating that the official statements of the three governments pointed ineluctably toward a policy of nondiscrimination.<sup>158</sup> As far as the policy of the United States was concerned, recent cases dealing with racial segregation, the Charter of the United Nations, and various pronouncements of the President, in addition to the platforms of the two principal political parties, were all offered as establishing a national policy against racial discrimination. Both City of Philadelphia officials and the Attorney General of Pennsylvania filed briefs in support not only of the Negroes' applications but also on the specific point that the racial clause violates the present public policy of the city and state.

Neither the hearing judge (Judge Bolger) nor the full bench of the Orphans' Court, in reaching their separate but identical decisions, dealt with this argument.<sup>159</sup> This failure to act is entirely understandable, for the public policy argument leaves the court with a most difficult choice. Either it could say that the public policy of Philadelphia and Pennsylvania and the United States was in favor of, or indifferent to, racial discrimination (scarcely possible

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158. Brief for Exceptants William Ashe Foust and Robert Felder, *In Re Estate of Stephen Girard*, pp. 33-41 (1955).

159. The only mention is in Judge Bolger's opinion, where he stated, after setting out the argument of the petitioners, that "having construed the applicable constitutional provisions, the pertinent acts of assembly and court decisions, [it is decided] that the operation of this trust does not offend public policy as so determined." 1 Race Relations L. Rep. 325, 338 (1956).

today), or it could say that the public policy was against racial discrimination and in so doing, not only open Girard College to Negro orphans, but also strike a body blow at all types of private acts of discrimination. A third choice, that of calling the argument irrelevant, was also theoretically available; however, it was scarcely tenable. The Orphans' Court chose, rather, to ignore the argument and base the decision on a finding that the trust was valid and that no state action was involved.

The question is thus left dangling, though ripe for decision. How long such a decision can be postponed is, of course, unknown. However, it can be said that the law seems to be moving in the direction of the creation of a public policy making racial discriminations invalid *per se*. Not only may the various statutes of many states as well as the federal government be pointed to, but there also exist treaties, including the UN Charter, which serve to buttress the point, and executive orders of President Truman, President Eisenhower, and President Roosevelt.<sup>160</sup> As far as the judiciary is concerned, the decisions are indeed scant which would serve to establish the policy. Some scattered opinions do exist. For example, in *Hurd v. Hodge*<sup>161</sup> in which the Supreme Court refused to enforce a restrictive covenant in the District of Columbia, the Court said that ". . . even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants . . . is judicial action contrary to the public policy of the United States. . . . The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents." The California Supreme Court in 1944 stated that there was "a public policy against racial discrimination . . . [and] that a statute [was unnecessary] to enforce such a policy where private rather than public action is involved."<sup>162</sup> And in *Clifton v. Puente*,<sup>163</sup> the Texas Court of Civil Appeals in 1949 invalidated a racial restrictive covenant. A Canadian case, *Re Drummond Wren*,<sup>164</sup> is a direct holding to the ef-

160. The executive orders establishing the Fair Employment Practices Commission and its successors is an example. See Ruchames, *Race, Jobs, and Politics* (1953), for an account of the history of the FEPC.

161. 334 U.S. 24, 34 (1948).

162. *James v. Marinship Corp.*, 25 Cal.2d 721, 740, 155 P.2d 329, 339 (1944).

163. 218 S.W.2d 272 (Tex. Civ. App. 1948).

164. [1945] 4 D.L.R. 674. The *Wren* case may, however, have been overruled or its effect vitiated. See Comment, 29 Can. B. Rev. 969 (1951).

fect that a racial restrictive covenant is void for the reason that it is contrary to public policy.

The point to all of this, as far as our present inquiry is concerned, is that the clear import of recent occurrences throughout the United States (and the world) is that even private acts of racial discrimination are wrongful and that they cannot be sanctioned by law. Whether this will mean an eventual decision which would overrule the Philadelphia Orphans' Court in the *Girard* case is impossible to tell. Nevertheless, it does have importance to the trustee of any charitable trust which may confine its benefits to certain racial groups. And it has importance to the administrators of those private schools which are beneficiaries of charitable trusts.

### 1. The Doctrine of Cy Pres

A final argument advanced by the Negro applicants in the *Girard* case involved the attempted application of the equitable doctrine of cy pres to the case. The argument was stated in the following manner. The changed circumstances in public policy, constitutional law, education, and social sciences and human relations prevent Stephen Girard's educational objectives from being achieved if the racial restriction is continued. Both the hearing judge and the full Orphans' Court rejected this, the full court saying that "there is . . . no present failure of the purpose of the trust: a fortiori, there is no ground for application of the cy pres doctrine."<sup>165</sup>

Cy pres is a doctrine applied generally by courts of equity to save a trust from dissolution in those cases when the precise intention of the settlor cannot be carried out. When allowed, the trust is continued in operation "as near as possible" to the settlor's intention. The definition given by the *Restatement of Trusts* is frequently quoted: "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."<sup>166</sup> While there is no single uniformly recognized definition of the doctrine, it has been stated that all "would probably agree

165. Estate of Stephen Girard, 1 Race Relations L. Rep. 340, 342 (1956).

166. Restatement, Trusts § 399 (1935). See Scott, Trusts § 399 (1939).

that the value of the rule lies in its ability to provide the flexibility necessary to accommodate perpetual or long-lasting gifts to the exigencies of new conditions."<sup>167</sup>

As far as established doctrine is concerned, the decision in the *Girard* case seems to be in accord with the holdings of most courts, although there have been no precisely similar factual situations litigated heretofore.<sup>168</sup> The case turns on the definition to be given to the word "impracticable" in the *Restatement* version of the cy pres doctrine. Certainly the Girard trust has neither become impossible nor illegal.<sup>169</sup> Now of course what is or is not impracticable is a question not susceptible of solution by mathematical formula. The answer will vary with the facts and circumstances of each case. The novel factual situation in the *Girard* case gives the judiciary an opportunity to extend the cy pres doctrine. Should a new twist to that doctrine be created?

Varying answers will, of course, be given to a question such as that. On the one hand, there is the position of the Orphans' Court that application of the cy pres doctrine "would not only subvert the purpose of [Girard's] will, but would threaten, if not destroy, the entire structure of the law of wills in Pennsylvania."<sup>170</sup> This may be called the argument by logical extension to horrendous possibility. It is based on the assumption that there are no restraints whatever on the disposition of property by will. As the Orphans' Court went on to say, "Jus disponendi is still cardinal and basic law." But of course there are limits on the power of testamentary disposition, and the true question is not as stated by the Orphans' Court but, rather, whether this is an appropriate time to engraft another limitation on the power of the dead hand to control present

167. Fisch, *The Cy Pres Doctrine in the United States* 2 (1950).

168. See Fisch, *op. cit. supra* note 167, *passim*.

169. Comment *m* of section 399 of the *Restatement of Trusts* states:

If it is possible and practicable and legal to carry out the particular purpose designated by the settlor, the doctrine of cy pres is not applicable. In such case the court will compel the trustees to carry out the particular purpose even though in the opinion of the court a more useful disposition of the property might be made.

Thus, if a testator bequeaths a sum of money for the establishment and maintenance of a school of engineering the court will not permit the application of the money to the erection and maintenance of a school of agriculture, merely because it appears that a school of agriculture would be more useful to the community.

On the other hand, the doctrine of cy pres is applicable even though it is possible to carry out the particular purpose of the settlor, if to carry it out would fail to accomplish the general charitable intention of the settlor. In such a case it is 'impracticable' to carry out the particular purpose, in the broad sense in which that word is used in this Section. This is particularly likely to be the case where there has been a change of circumstances after the creation of the trust.

170. 1 *Race Relations L. Rep.* 340, 341 (1956).

use of property. As Justice Frankfurter pointed out in another context, it serves no useful purpose in the decision of cases by "conjuring up horrible possibilities that never happen in the real world." There is, in other words, no reason to think that modifying Girard's will today would result in the destruction of the entire structure of the law of wills.

On the other hand, it is argued that the exigencies of mid-20th century America make it incumbent that policy of racial nondiscrimination be adhered to at least officially, that the effects of discrimination are so invidious as to harm both those who are its object and those who impose it, and that the general purposes of Girard's trust cannot be carried out in an institution which practices racial exclusion. Implicit in this argument is the view that all types of racial discrimination, both public and private, are improper per se, and the notion that traditional doctrines of private property must give way when a sufficient social reason exists. When viewed in this light, it can then be said that the *Girard* case does have implications beyond the immediate issue before the court. Modifying Girard's will through the requested use of cy pres would make a major change in law.

The question, in essence, is really one of policy—what is good social policy in the middle of the twentieth century—and not one of technical legal doctrine. For no matter how much a decision is cloaked in legal language showing ostensible adherence to long-established precedent, the decision is in final analysis based on notions of what is good policy. Holmes said it many years ago: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."<sup>171</sup> The point is, it would appear, that the cy pres doctrine is available for use by a judge in the *Girard* type of situation should he, for whatever reason, decide that the time was ripe for it.

Little or nothing exists as authority to help the judge in this decision. Perhaps some of the language of the *Restatement of Trusts* could be used, language which suggests that a broad interpretation be given to the "impracticability" test for cy pres.<sup>172</sup> There is one

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171. Holmes, *The Common Law* 1 (1881).

172. See *Restatement, Trusts* §§ 381, 399 (1935). See also 3 *Scott, Trusts* § 399 (1939).

English case, *In Re Dominion Students Hall Trust*,<sup>173</sup> which might be used since it bears striking similarity to the *Girard* factual situation. In that case, the court had under consideration a trust originally restricted to dominion students of "European origin." A petition was filed to eliminate the color restriction. This was done, the court giving a narrow definition to the "impossibility" requirement of cy pres and a broad definition to "impracticability." It found that the general purpose of the charity, promoting community of citizenship, culture and tradition among all members of the British Commonwealth, far from being furthered by the color restriction, might in light of the changed times be defeated by creating antagonisms.<sup>174</sup>

If the decision in *Girard* is ultimately one of policy, then we can go a step farther and say that in final analysis the policy argument becomes one of deciding how much credence to give to the opinion of social scientists and others on the socio-psychological effect of patterns of discrimination. It is widely felt, probably erroneously, that the opinions of social scientists had persuasive effect in the decision of the Supreme Court in the *Segregation Cases*.<sup>175</sup> Whether they did or not, it is worth noting that another attempt was made in the *Girard* litigation to use sociological and psychological data in an effort to prove that racial segregation had a deleterious effect, not on the Negroes excluded from attendance at Girard College, but on the white students there who were being deprived of the opportunity to mix with colored colleagues.

The argument ran as follows: Girard's will calls for the establishment of an institution to provide "for such a number of poor male white orphan children, as can be trained in one institution, a better education . . . than they usually receive from the application of public funds"; that they be taught "by every proper means a pure attachment to our republican institutions"; that they have instilled into their minds "the purest principles of morality so that

173. [1947] 1 Ch. 183.

174. Judge Bolger, the hearing judge, discussed the English case in the following manner: "There a trust established and maintained by several contributors was restricted to dominion students 'of European origin.' The court eliminated a racial restriction because the retention of it would have caused a failure of the main purpose of the trust which was to benefit the empire. However, the change was made upon application by or with the approval of the contributors; the court pointing out that had the trust been established under a will, its power to make the change would have been at least doubtful." 1 Race Relations L. Rep. 325, 339 (1956).

175. Cahn, *Jurisprudence*, 30 N.Y.U.L. Rev. 150 (1955); Cahn, *Jurisprudence*, 31 N.Y.U.L. Rev. 182 (1956); Greenberg, *Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation*, 54 Mich. L. Rev. 953 (1956).

on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures. . . .” Testimony of several social scientists, a sociologist, an educator-psychologist, and a psychologist was introduced. They were unanimously of the opinion that the experience of living in a segregated institutional community creates serious conflicts in the mind of the young student who is taught one thing and lives another. This testimony was counteracted by testimony of officers and former students of Girard College, who were of the opinion that no such deleterious effects resulted from racial exclusion.

The conflict in testimony was resolved by both the hearing judge and the full Orphans’ Court on review by summarily dismissing the argument as irrelevant. “This testimony,” the full court said, “does not affect the legal principles here involved.”<sup>176</sup>

The enormously important question of what use should be made of socio-psychological data in the judicial decision-making process is one which is beyond the scope of this inquiry. It is, however, suggested that the manner in which the court handled that testimony was eminently correct. There are at least two reasons for this. First of all, present-day social science is far from being “scientific.” Its propositions are based on what often is at best inconclusive evidence and are nothing more than tentative hypotheses.<sup>177</sup> Secondly, even if the “scientific” propositions of our social scientists are verifiable and have validity, it is questionable that they have relevance. Moreover, it is doubtful that they should be used for more than the limited purpose of indicating a factual basis for legislation. That was what the so-called “Brandeis Brief” sought to do: provide nonlegal data to indicate that legislative action was reasonable. But to use nonlegal data, the testimony of sociologists and psychologists and the like, for the purpose of overturning legislative action or declaring patterns of racial discrimination unconstitutional is quite another matter. Expert testimony of any type no doubt at times has value, but if we are not to turn law courts into forums for balancing the conflicting claims of various kinds of experts, then we should be extremely careful about admitting such testimony, and, if it is admitted into evidence, we should be ex-

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176. 1 Race Relations L. Rep. 340, 342 (1956).

177. See Cahn, *Jurisprudence*, 30 N.Y.U.L. Rev. 150 (1955); Cahn, *Jurisprudence*, 31 N.Y.U. L. Rev. 182 (1956); Judge Jerome Frank’s contribution to the symposium entitled *The Lawyer’s Role in Modern Society: A Round Table*, 4 J. Pub. L. 1, 8 (1955). But see, for a statement of the usefulness of social science data in judicial decision-making. Greenberg, *Social Scientists Take the Stand*, 54 Mich. L. Rev. 953 (1956).

tremely careful to insure that it is not given overriding importance. At best, it would be but one factor among the many which any judge must consider in reaching a judicial decision.<sup>178</sup>

## 2. An Appraisal and a Question

The *Girard* case has important implications for the private school administrator. It may provide the springboard for an assault on the legal validity of racial restrictive clauses. For those institutions which have funds so earmarked this would be particularly important. For all private institutions, denominational or otherwise, it could mean the beginning of an attempt to remove racial barriers to admission. Finally, there is a question left unasked in the discussion of the case which is important and which should be raised. Suppose a trustee or school administrator decided not to await such possible developments. Suppose that, in direct violation of the terms of a trust or other grant of funds, it is decided to make the beneficial use of the funds available to Negroes. What would be the result?

The question is not easily answered. On the one hand, it is obvious that a trustee of trust funds who violates the terms of the trust may be removed and otherwise disciplined by the judiciary.<sup>179</sup> But that would mean the intervention of the state and resultant state action in what would, in essence, be the enforcement of a racial restriction. Under the Supreme Court decisions in *Shelley v. Kraemer* and *Barrows v. Jackson* (discussed in section IV) judicial enforcement of a racial clause is a denial of equal protection of the laws and thus unconstitutional. Does this mean that a trustee may safely ignore a racial restrictive clause?

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178. Despite the oft-repeated statement to the contrary, facts do not "speak for themselves." Still necessary, no matter how voluminous the accumulation of factual data may be, is a judgment upon those facts, a mental effort which cannot be escaped. There is, in the context of race relations, little or no dispute over the *facts* of discrimination or, to use the language of Chief Justice Warren, of "a feeling of inferiority" which segregation engenders. The lack of agreement is on what judgment should be placed on those facts, an entirely different matter, or what the legal result of those facts should be, still different. This act of judgment is a profound, complex matter. Those who propose the use of social science data in racial cases presuppose the judgment to be rendered.

Furthermore, facts are not the easily ascertainable creatures they are usually considered to be. Rather, just what the facts of any given situation may be is an inquiry which at best is fraught with uncertainty. We assume, for example, that a jury finds the facts in a trial, but that is scarcely true. At best, the jury finds what it considers to be the facts and it is obvious that its view of the facts may be widely at variance with what actually took place. Cf. Frank, *Courts on Trial* 211-12 (1949); Easton, *Shifting Images of Social Science and Values*, 15 *Antioch Rev.* 3 (1955).

179. See, e.g., 3 Bogert, *Trusts and Trustees* § 527 (1946).



The question asks too much for answer here. It will have to suffice merely to raise it and to forego attempting an extended discussion. One thing, however, is clear and should be mentioned. The recent court decisions on racial matters, when added to other official pronouncements in the area, have importance beyond the immediate context in which they are made. There is no doubt that they will have important effects in many areas of what has traditionally been called "private law," including the law of contracts, of trusts, and of property.<sup>180</sup>

#### B. The *Barringer*<sup>181</sup> Case

In 1955 the North Carolina Supreme Court rendered a decision which has importance to our present inquiry. The case was *Charlotte Park & Recreation Comm'n v. Barringer*, involving the question of a grant of property with the provision that the beneficial use of the property should be limited to members of the white race. The facts are that in 1929 Barringer conveyed land to a public corporation in Charlotte, North Carolina, for use as a municipal park, with the limitation that "in the event that the said land . . . shall not be kept, used and maintained for park, playground, and/or recreational purposes, for use by the white race only, and if such disuse or nonmaintenance continue for any period as long as one year, . . . then . . . the lands hereby conveyed shall revert in fee simple to the [grantor]."

The North Carolina court construed this limitation to be a valid fee simple determinable which would revert automatically, without the intervention of the state judiciary, should Negroes use the land. "The determinable fee . . . automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert [to the grantor], by virtue of the limitation in the deed." *Shelley v. Kraemer*, the restrictive covenant case, was held to have no application.

As with the *Girard* case, so it is that the *Barringer* case has relevance and importance to our inquiry. The technicalities of property law need not overly concern us. Whether the court was technically accurate in terming the racial clause a fee simple determinable may be of interest to property lawyers, but is not germane here. There is no doubt that a clause which would operate

180. Cf. Huber, *Revolution in Private Law?*, 6 S.C.L.Q. 8 (1953).

181. *Charlotte Park and Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955). Of the several comments on this case in legal periodicals, see especially Note, 34 N.C.L. Rev. 113 (1955).

automatically could easily be drafted by anyone knowledgeable in the field.

Agree with the North Carolina court or not, it stands as law in that state, for the United States Supreme Court has refused to review the decision.<sup>182</sup> Even so, there are some important questions left dangling by the North Carolina court. For instance, why wasn't the racial condition void as being contrary to law and public policy? And since the title to the land reverted to the grantor "by operation of law," that is, by operation of the common law of North Carolina, why isn't that state action within the rule of *Shelley v. Kraemer*? Finally, assuming that a grantee would refuse to give up possession of the property, would an action of ejectment by the grantor involve invalid state action?

It would have done no violence to widely accepted legal doctrine had the North Carolina court declared the condition void and refused to enforce it. A limitation of an estate conveyed is often considered to be invalid and unenforceable if it is contrary to law or established public policy. An illustration is the case of *Trustees of Eureka College v. Bondurant*,<sup>183</sup> involving a conveyance of land to a college on condition that the land would revert to the grantor if the receipts therefrom were not used in a certain manner. The Illinois Supreme Court found that the condition was in conflict with a provision in the college charter and held the condition void. In the *Barringer* case, the conduct required by the grantee of the land to carry out the condition is unlawful under present-day law. The Commission would have had to exclude Negroes from a municipal golf course. Such exclusion is unlawful since the decisions by the United States Supreme Court in late 1955 in the *Holmes* and *Dawson* cases.<sup>184</sup> It is of course true that *Barringer* was decided before *Holmes* and *Dawson*, thus, in a technical sense the law had not yet been established. Nevertheless, it was clearly foreseeable. Furthermore, there is no doubt that racial discrimination by a public body in the use of public facilities is against national public policy.

All of which makes the denial of certiorari by the United States

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182. *Leeper v. Charlotte Park and Recreation Comm'n*, 350 U.S. 983 (1956).

183. 289 Ill. 289, 124 N.E. 652 (1919).

184. *Holmes v. Atlanta*, 350 U.S. 879 (1955) (held a denial of equal protection to exclude Negroes from municipally-owned golf course); *Baltimore v. Dawson*, 350 U.S. 877 (1955) (unconstitutional to deny Negroes access to public bathing beaches).

Supreme Court inexplicable. In so doing it left standing a case which bids fair to undercut the effectiveness of the *Shelley v. Kraemer* doctrine, a case which cries out for authoritative decision. Of course, the Court has discretion in such matters. It can review or not as it wishes. But even so, the Court does have a responsibility to render decisions on constitutional questions, a responsibility which should not be lightly shrugged off. Having assumed the power of decision, and exercising it for more than 150 years, the Court is hardly fulfilling its high judicial purpose when it leaves the type of question raised in the *Barringer* case unresolved.<sup>185</sup>

As with the question of the validity of the reverter clause itself, so it is with the second question left unanswered by the *Barringer* case; that it would do no violence to accepted methods and notions for the North Carolina court to have found state action in the fact that title to the land would revert in the grantor on the happening of the contingency "by operation of law." Such a finding would be an extension of the state action doctrine of the *Shelley* and *Barrows* cases, but it is a logical one, perhaps the next logical move. For law, despite neverending arguments over definitions, exists only when the full force of society acting through government is behind it. As was said by Justice Brandeis, quoting Justice Holmes, "law in the sense in which the courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in A state . . . [is] the law of that State existing by authority of that State."<sup>186</sup> The reverter clause in *Barringer* did operate "automatically," as the North Carolina court

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185. The Court moves in mysterious ways its wonders to perform. It will refuse to review a case and leave the decision below standing while at the same time stoutly maintaining that its decision is not to be construed as indicative of its feeling on the issues of the case denied review. But of course the Court is relatively alone on that position. In the mind of the general public at least and perhaps generally throughout the bar, a denial of certiorari is given more weight.

But it is a fairly general practice. One reason for the refusal to review the *Barringer* decision may be that members of the Court feel that they have gone about as far as is feasible at this time in altering the legal pattern in racial relations. The school cases and the recreation cases taken together make a large mouthful for the South to chew and swallow. In going that far, the Court took what may certainly be thought of as a calculated risk. The reaction generated in the South may have been enough for the Court to steer clear of further acerbation of conditions. This could serve to explain, partially at least, the Court's action in the *Barringer* case as well as its seizing upon the weakest and flimsiest of reasons to refuse to make a decision in the Virginia miscegenation case. See *Naim v. Naim*, 350 U.S. 891 (1955). A subsequent opinion in the *Naim* case may be found in 1 *Race Relations L. Rep.* 404 (1956).

186. *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938).

maintained, but that was true only because North Carolina law (with the full force of the state behind it) allowed it to do so.<sup>187</sup>

The third question left dangling by the North Carolina court is basically similar to those already discussed. That question is, would an action of ejectment brought by the holder of the reversionary interest against a recalcitrant grantee who refused to give up the property involve state action within the scope of the doctrine of *Shelley v. Kraemer*? While this question could be decided by a court using conceptualistic reasoning—stating that the court would not be enforcing the racial condition but merely removing a person whose right to possession had terminated automatically upon breach of the condition—the result would be that the racial clause would be enforced by indirection. As the Texas Court of Civil Appeals said in *Clifton v. Puente*,<sup>188</sup> it is as much state action to “deny to a person a legal right to which he would be entitled except for the covenant as it would be to expressly command by judicial order that the terms of the covenant be recognized and carried out.” The same sort of reasoning would apply in the converse situation. Suppose the reversioner got possession in some manner and the grantee sought to eject him, with the reversioner setting up “title” through automatic reversion as a defense. Conceptualistically, this could provide a basis for decision. But again, the true nature and the practical result would be the same, indirect enforcement of a racial clause which admittedly could not be directly enforced.

What a court would do in such a situation depends in part on the extent to which it would be willing to pierce the form of a situation and get to the substance. In other words, the question would be whether the court would be willing to cut through to the

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187. However, it is clear that if this line of argument is followed and accepted, then it would be difficult to see what activities would fail to be state action. For example, a country club limiting its membership on racial grounds gains its status through the operation of the law in which it exists. If it is state action for the automatic operation of a fee simple determinable, then why wouldn't it be equally state action when a state agency incorporated the country club? The principle seems to be the same in both cases. What, then, is the end? Once the concept of state action is pushed beyond the usual activities of state organs into situations usually considered to be private or nonofficial, then it would seem that there would be no limit to what could be called state action. Some have suggested that the fourteenth amendment was designed to eliminate individual acts of discrimination. See Flack, *Adoption of the Fourteenth Amendment 262-63 (1908)*. But the Court has never so held.

In the final analysis, what is state action depends, as in all constitutional questions, upon what the Supreme Court says it is. And what the Court says is, as usual, based in turn upon notions of what good public policy should be at the time the decision is rendered. There exists no table of logarithms, no formula, no *vade-mecum* by which this decision may be made.

188. 218 S.W.2d 272 (Tex. Civ. App. 1948).

core and recognize the practical results of a decision. Whether it would or not depends, in final analysis, not on a judge's view of what "the law" is, for here the judge must choose between competing statements of law. Rather, it depends upon subjective views of what the individual judicial decision-maker believes is desirable or acceptable social policy in the world as it is today.<sup>189</sup>

### C. Evaluation

We may be moving into an entire new era in the field of racial relations. At a time when the Negro and other minority groups are battling to attain formal equality in treatment from official bodies—and certainly that battle is far from won, although significant strides have been made—there seems to be a parallel movement developing. Perhaps by inadvertence, perhaps by design, there are definite indications that more than the absence of official governmental acts of discrimination is wanted. Of course, the Negro wants "first class citizenship" with full voting rights and an opportunity to enjoy fully the facilities—recreational, educational, and the like—which his taxes help pay for. But he wants, and is demanding, more; full and free opportunity for employment for one thing. The parallel movement, thus, is one which is aimed at crumbling the walls of racial discrimination in activities and institutions long considered to be entirely within the domain of "private" action.

Seen in this light then, the actions of the Negro applicants to gain entry into Girard College take on added significance. It could well be the opening gun in a battle to breach the walls of private education. At the very least, it attempts to add another large segment to the expanding net of state action. Hence, the case has importance for the private school administrator in two ways. One is that just stated, a possible attack on the admission policies of pri-

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189. This statement does not, of course, coincide with what Morris R. Cohen called the "phonograph" theory of justice and what others have called the "slot machine" theory of the judicial process. Those theories, long exploded but still hanging tenaciously on, are bottomed on the view that a judge has no creative role in making a decision, but merely applies known law to the facts in a mechanical fashion. The job of the judge is to find the law. After that the result is preordained. This naive notion is part of the basic theory that ours is a government "of laws, not of men." A present-day variation is the hue and cry from Southern spokesmen that the Supreme Court engaged in "judicial legislation" in the *Segregation Cases*. The simple truth of the matter is that the judiciary have always "legislated," that is to say, have always been policy-makers. The common law itself is a product of this process. A judge cannot avoid making policy—"legislating"—when he renders a decision. See Cahill, *Judicial Legislation* (1952); Cardozo, *The Nature of the Judicial Process* (1921); Levi, *An Introduction to Legal Reasoning* (1949).

vate schools. The other is in the possibility that the ultimate outcome will be the elimination of racial clauses in trusts and grants of funds or property through the judicial recognition of a public policy against such clauses or a judicial outlawing of them.

Whether either one of these possibilities will take place is pure speculation. But it is not so speculative to say that the demands the colored ten per cent of the American population are making are aimed at more than the elimination of official discriminations. That being so, it is possible to forecast that a continued use of law and the American legal machinery will be made as the Negro continues his efforts to gain full status in the American social structure.

## VI. CONCLUSIONS

We have discussed the legal problems inherent in any attempt of a private school to admit both Negroes and whites to its student body. A number of conclusions, most of them admittedly tentative, have been drawn. Others may now be added.

Before doing so, it is important to point out that the problems discussed are but one facet of the over-all question of Negro-white relations in the United States and the changes which will be made in existing patterns of practice in those relations. An understanding of the aspirations of the Negro citizens, together with insight into the fears of the white citizens about the Negroes, would seem to be indispensable to an understanding of Negro-white relations now and in the future. The legal problems involved, whether in education or elsewhere, spring after all out of the greater milieu and are to be understood only as a part of that context. A valid view of the problem of racial integration of the private schools has to include insight into the over-all pattern.

But it is precisely there that we do not have that exact knowledge of factual conditions which is a prerequisite to understanding. We do not know, save in the broadest of generalities and then only from a few spokesmen, what the Negroes actually want. We do not know, except for certain emotion-packed statements, what it is that the white man fears and dislikes about close association with the Negro. The thrust of race relations, if not of all society, is manifestly toward the creation of conditions of equality. In the past one hundred years the Negro has vaulted from slavery to a position of being able to insure equality of treatment from governmental officials. Possibly, the dynamics of the Negro movement will allow the Negro to stop when the goal of equality under the law has full

operational reality as well as reality in the statements of courts and legislatures, at such time, that is, that the Negro is in fact accorded full access to all public privileges or services. Possibly, however, the movement will continue until the Negro reaches that equality of conditions which de Tocqueville thought was the unique feature of the United States. For, as de Tocqueville also said, equality in several areas of life will ineluctably result in equality in all: "To conceive of men remaining forever unequal upon one single point, yet equal in all others, is impossible; they must come in the end to be equal upon all."

The demands being made by the Negro, the demands which he will be making in the future, the reaction that the white man and society generally makes to those demands—all of this we do not know. And not knowing it, any conclusions which we have drawn or may draw from the present study can be based only upon incomplete evidence and those trends which are presently discernable. For the dynamics of the Negro movement will unavoidably color and influence the conditions under which all education will operate. With that limitation in mind, what can be said about the intermixture of the races in denominational and other private schools?

1. As a beginning, we can state that opposition, whether of governmental official or private individual, to a private school integrating the races will vary in relation to the incidence of Negroes to whites in the geographical area in which the school operates, and, in addition, will vary in direct proportion to the number of Negroes who are admitted to a former all-white school (regardless of geographical area). The first half of this statement is obvious from what has transpired since the May 1954 decision in the public school segregation cases. The greatest opposition to the decision has come from the areas where the Negroes are thickest population-wise. The second half is not so obvious, but nevertheless it is valid. When it is seen that the white students in any public school will far outnumber the colored, then the opposition is slight at most and easily overcome. The same thing can be said about a private school. No problem that cannot be easily handled arises anywhere if the private school admits one or even several Negroes. This has happened often at all levels of education and in some of the most highly regarded private schools in the country. But it would be quite another matter for any school to admit one hundred Negroes or, say, twenty or thirty per cent of its student body. It is doubt-

ful indeed, should such an unlikely event take place, that it would be accomplished without incident. And geography would have nothing to do with the matter.

The point is that any institution or group (*e.g.*, a fraternity or sorority) can easily assimilate into its ranks one or even a few who do not fully conform to the usual characteristics of its members. The group can even take pride in or gain satisfaction from such an "enlightened" policy. But what would happen if the institution or group was faced with the possibility that half its membership were to be "strange" or "nonconforming"? The conclusion must be that there would be strong opposition not only from the "ins" of the group but also from those outside (alumni, donors, etc.) who feel closely identified with it or are otherwise affected or influenced by it. Racial integration in the private schools of the North, through which a handful of Negroes are admitted to schools formerly denied to them, proves nothing so far as the creation of a model for other schools is concerned.

2. In those sections of the South where the incidence of colored to white is greatest—in the so-called "black belt"—any *publicised* decision by a private school administration to integrate would probably be met by strong opposition. This hostility would be from official (governmental) and non-official (private) sources.

Publicity would seem to be the key factor here, and also the number of schools involved is of importance. An individual private school, operating quietly and without fanfare, could probably admit Negroes and suffer few, if any, adverse consequences. Evidence of this may be found in the examples of Spring Hill College in Mobile, Alabama, Vanderbilt University in Nashville, Tennessee, and Loyola University in New Orleans, Louisiana. Although these examples are at the university level where it is demonstrated that the least opposition is made to racial integration, they were done quietly and without public announcement. Compare the furore which was raised when Archbishop Rummel announced the decision to integrate the parochial schools of Louisiana. The publicity (plus the number of schools involved) caused an immediate fierce reaction.

Lack of publicity means a concomitant lack of wide public knowledge and the opportunity for public officials to ignore the occurrence. The officials can close their eyes, even when the integration means the violation of state law. No one is putting pressure



upon them. Accordingly, they are not forced to make a decision. Let, however, the integration become widely publicized, let it have the cognizance of the mass of the people, and it is likely that the officials would have to make a decision. When that time comes, the result is entirely predictable. The officials would be forced to take action to uphold the statute or, in any event, to oppose the integration policy. To a large extent, it can be said that what took place in the over-publicized Autherine Lucy incident at the University of Alabama is an illustration of this point.

3. Mentioned in Section II was the fact that in some of the states, notably Kentucky, Tennessee and Oklahoma, which have statutory provisions designed to prevent integration of private schools, a number of institutions of higher learning have announced and put into effect integration policies without adverse reaction. Just why this challenge to state law has been allowed to go on without official objection is a question for which there is no ready answer. Whether it will be allowed to continue unhampered in like fashion cannot be answered. Should, however, governmental sanctions be invoked at some time against an integrating school and its administration it is likely that the sanctions would eventually be found to be invalid under the Constitution. The reach of the due process and equal protection clauses of the fourteenth amendment would appear to be great enough to proscribe both affirmative acts of discrimination by state governments and governmental actions designed to make individuals follow discriminatory practices. The Constitution, in other words, not only means that governments must be color-blind but further that governments cannot require individuals to make color distinctions.

4. It would, however, be far more difficult to get a judicial decision of invalidation should the state outwardly comply with a policy of nondiscrimination but administratively make distinctions so that law is in fact applied with an uneven hand. The difficulties relate to proof, however, and not to the principle involved. The law would be clear. It may be somewhat of a burden to prove violations.

Should a law enforcement official seek to enforce strictly a safety or sanitary regulation or other example of the state's police power against an integrating private school, in all probability this would be found to be almost impossible to combat judicially. It is a breakdown of the democratic system for such occurrences to take

place, but there is nothing in the Constitution which would prevent such action. The lengths to which officials could go would be limited only by their imagination and perhaps their consciences.

5. It is in the area of unofficial sanctions privately imposed that the school could suffer the most severe deprivations. Physically, economically, psychologically, the techniques of social control which could be brought to bear would transcend those which the state could do officially. The school administrators, faculty and students all could feel the full weight of social pressures exerted by other members of the status groups with which they lived. These sanctions are in the realm of private action which could not, under any tenable theory, be brought within the reach of law.

6. If it is true that the dynamics of the Negro movement will include efforts to breach the walls of separation and discrimination in whatever form they take and wherever located, then it is possible that an attempt will be made to have racial admission barriers in private education lowered by court action. In one sense, this would be the next logical step for the flow of doctrine to take. It is a step which could be taken without doing too much damage to existing concepts and principles. But in this area and, for that matter, in other areas of constitutional interpretation, logic plays at best a minor role. It is unlikely that a court would take the step, now or in the foreseeable future.

7. Nevertheless, it can be forecast with some certainty that efforts will be made to have racial clauses in private agreements outlawed as a matter of public policy. The decisions in recent years have been edging toward that end. In fact, it can be said that the purport of recent decisions in racial cases has been to make the racial clauses in effect a dead letter.

8. The denominational school would, as a general rule, be treated in the same manner as other private schools. A possible argument which could be made is that a state statute seeking to regulate the activities of parochial schools is invalid as a violation of the first amendment's guarantee of religious freedom. However, there does not appear to be any real substance in such an argument, for under existing doctrine the parochial school would doubtless be held to be a "practice of religion" and thus subject to regulation. Such regulation could be directed toward admission practices of denominational schools. A statute which forbade re-

fusal of admission on racial grounds would be upheld in the event of an attack based on religious freedom grounds.

9. Finally, it may well be that racial integration in the denominational and other private schools will be the wedge which opens the doors of the public schools in many parts of the South. If the pattern already started in an increasing number of private institutions of desegregating their student bodies continues, then the private school may operate as a proving ground for testing racial relations in education. Assuming some comparatively high degree of success in private school integration, the road ahead for the public schools may possibly be found. If the fears, rational or irrational, of the white man are not realized in one system of education, perhaps he will withdraw his opposition to integration in the other (public) school system.

Accordingly, what happens in the nonpublic schools in the South and elsewhere has an importance which transcends the school itself. As a testing ground for new patterns of racial relations, it could be the harbinger of things to come. Whether the future will include general racial integration or not may depend, to some large extent, upon the individuals now groping their way on to the unfamiliar ground of Negro-white educational commingling in the South.