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Post--Brown Private White Schools--An Imperfect Dualism

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NOTES

Post-*Brown* Private White Schools—An Imperfect Dualism

I. INTRODUCTION

Historically, the South has had very few private schools. The Seaboard States have had private schools since the days when plantation owners sent their children to them, but the South never rivaled New England in producing a significant number of private schools. Southern states traditionally have had a small number of sectarian schools, but only Louisiana ever sent a significant portion of her children to religiously related private schools. The absence of traditional southern private schools is largely due to the absence of two factors that traditionally have fostered the growth of nonsectarian private schools in American—aristocracy and affluence. The combination of these factors has not been present in the South to a significant degree since Reconstruction. Nevertheless, there has been a tremendous surge of support for private schools in the last ten years. This support for private schools has not resulted from a sudden increase in either aristocracy or affluence; it has resulted from an attempt by private individuals to discriminate in a manner forbidden to the states by the fourteenth amendment.

By virtue of state legislation, the South maintained a racially segregated public school system until 1954. The Supreme Court found this system violative of the equal protection clause of the fourteenth amendment in *Brown v. Board of Education*.[1] The Court held that racially separate facilities are inherently unequal and that such unequal treatment in the area of public education is not consistent with the requirement that every state extend its citizens the equal protection of its laws. The effect of *Brown* was not the swift desegregation of public schools; nor was the effect even gradual desegregation. The effect was the creation of methods more subtle yet very effective in achieving separation of the races. A few private white schools emerged during the period immediately after *Brown*, but it was not until the Civil Rights Act of 1964, when the federal government began to take effective measures to implement desegregation, that the private school movement in the South began to swell. Becoming exasperated at the continuing use of devices to thwart desegregation, the Supreme Court in 1968 slightly

1. 347 U.S. 483 (1954).

modified the emphasis of its former decisions. No longer could a state avoid desegregation by operating a system merely nondiscriminatory on its face; the state would have to take direct action to bring about integration in order to eliminate the residual effect of earlier segregation.[2] Although the Court's statement of the affirmative duty of desegregation manifested no basic change in policy, lower courts correctly interpreted this language to mean that they should take a more demanding look at the effectiveness of school desegregation plans. Thus, a meaningful amount of desegregation eventually resulted, and the private white school movement expanded rapidly in the South. Today, the proportion of children attending such schools in southern states is great enough to create a significant impact on the public education of both blacks and whites.[3]

Private persons, acting without any state involvement, may discriminate in ways that are forbidden the states by the fourteenth amendment. Also, individual citizens have a constitutional right to attend private schools.[4] It is the purpose of this Note to evaluate the extent to which private persons who have formed post-*Brown* private white schools in the South have avoided government involvement in their discriminatory schemes. It is the conclusion of this Note that there has been and is substantial state action within the condemnation of the fourteenth amendment in the creation and operation of private white schools.

II. State Involvement in the Private School System

A. Assistance to Private Schools Coupled with Closing of Local Public Schools.

Early litigation involving the creation and operation of private schools frequently had rather obvious overtones of state involvement. For example, *Hall v. St. Helena Parish School Board*[5] involved a statu-

2. "School boards such as the respondent then operating state compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." Green v. County School Bd., 391 U.S. 430, 437-39 (1968). "[T]he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969).

3. In the 1970-71 school year, approximately 450,000 to 500,000 white children attended private academies; these children represented slightly more than 5% of the total number of white pupils in southern states. Charleston News & Courier, July 12, 1972, at 12. *See also* note 109, *infra*.

4. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

5. 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

tory scheme perhaps best described as state authorization for the conversion of a local public school system into a local private school system. After desegregation orders issued to several parishes, the Louisiana legislature assembled in special session; the products of the session included the "local option" law challenged in *St. Helena Parish*. This set of statutes, carefully drafted without reference to race, authorized elections at which the voters of each parish could vote to close the public school system in that parish and authorized the school board of each parish to act pursuant to the election. The various enactments also authorized the school board to transfer all public school realty to private organizations, provided that teachers, bus drivers, and other school employees employed by private organizations should receive the same salaries received by their public school counterparts, and authorized the transfer of funds from state general funds to a special education expense grant fund. The acts also required the parish school boards to supervise the private schools created in the parish and to administer the payment of tuition grants to the students attending them. The three-judge court found that the purpose of the acts was

> to provide a means by which public schools under desegregation orders may be changed to "private" schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools. In addition, as part of the plan, the school board of the parish where the public schools have been "closed" is charged with responsibility for furnishing free lunches, transportation, and grants-in-aid to the children attending the "private" schools.[6]

Noting the extensive amount of control exercised, financial aid administered, and active participation exercised by the state and parish authorities, and relying heavily on the Supreme Court's opinion in *Cooper v. Aaron*,[7] the court held that the scheme violated equal protection because it was a "transparent artifice" designed to circumvent blacks' "constitutional right to attend desegregated public schools."[8] The court also held that the scheme violated the equal protection clause "because its application in one parish, while the state provides public schools elsewhere, would unfairly discriminate against the residents of that parish, irrespective of race."[9] Under the principle of *St. Helena Parish*, a state

6. *Id.* at 651.

7. 358 U.S. 1 (1958). Federal troops had been necessary to maintain order after the integration of public schools and public officials cited the public disorder as justification for their actions to temporarily delay integration. *Held*, any state endeavor to delay the right of blacks to a desegregated public education was unconstitutional.

8. 197 F. Supp. at 651.

9. *Id.*

clearly may not statutorily authorize county officials to discontinue the public school systems in some counties and convert them to private local school systems.

The situation presented in *Griffin v. County School Board of Prince Edward County*[10] was analogous. The difference lay in that there was no simple conversion of public school property to private school property, but rather a discontinuance of the public school system in the county coupled with the creation by private persons of a private school organization. Prince Edward County public schools had been closed for several years, although every other county in the state operated public schools. Shortly after the closing of the local public system a private group built its own school and operated it for white children only. State and county tuition grants, payable without regard to race to children attending private schools, indirectly supported the all-white school. In addition to the state and county tuition grant legislation, the county enacted an ordinance allowing a property tax credit for contributions to private nonsectarian schools in the county; this device also furnished the private school significant support. After pointing out that the original *Prince Edward County* desegregation case had been a companion case of *Brown* and that Prince Edward County had made no progress in achieving desegregated public education in the intervening ten years, the Court held that the district court properly enjoined the payment of the county tuition grant, the processing of applications for the state tuition grant, and the granting of the property tax credit. The Court also held that the district court could require the county to exercise its taxation power and could require Prince Edward County to operate a public school system comparable to those operated in other Virginia counties. The Court affirmed the district court holding that " 'the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land . . . while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers.' "[11]

Both the *St. Helena Parish* and *Prince Edward County* cases were primarily concerned with the right of black plaintiffs to a desegregated public education in situations in which local authorities had halted the functioning of the local public schools. The private school implications of the two decisions are incidental to that primary concern. Thus, although it was clear under *Prince Edward* and *St. Helena* that a state cannot allow one of its subdivisions to avoid desegregation by ceasing

10. 377 U.S. 218 (1964).

11. *Id.* at 233 (quoting from the district court opinion, Allen v. County School Bd., 207 F. Supp. 349, 355 (E.D. Va. 1962)).

its public education function and subsidizing private education, neither case explicitly denied that the state can assist discriminatory private schools even in situations in which the private school may have a substantial impact on public education. In order to be consistent with *Brown* and *Prince Edward*, a recalcitrant state faced no more than three choices: it could abolish the public school system statewide; it could desegreate its public school system fully; or it could operate a largely black public school system statewide, supplementing it with assistance to a system of private white schools in a manner that would not violate the fourteenth amendment. The first two alternatives were too extreme for any state. The third alternative emerged as a middle course between the intolerable extremes, notwithstanding some misgivings about the legality of the plan caused by the Court's failure to rule explicitly on the right of states to assist private discriminatory schools.

B. Tuition Grants to Private School Students

Southern states accepted that they could not simply close their public school systems wherever integration threatened. Instead, they continued to shoulder the responsibility of maintaining statewide public education systems and, less nobly, began programs to assist private white schools, which developed wherever integration appeared imminent. To meet the high cost of private education among those who frequently could ill afford it, the first expedient adopted by the states was the tuition grant. Though the stated purpose and the details of such laws varied, they essentially operated to create a new state agency to administer a tuition grant program. The state funded the agency out of general funds; and upon proper application, it paid to the student attending the private school a fixed sum unrelated to the financial need of the student or the tuition charge of the school.

Opponents of these tuition grant programs quickly challenged them as unconstitutional state action assisting private discriminators in the destruction of integrated public education. Early decisions on these laws were inconclusive in their exact rationale, but courts frequently reached the same result. In *Lee v. Macon County Board of Education*,[12] a three-judge court considered Alabama's authorization of grants to students attending private nondenominational schools in districts in which no public school was available. The court stated that "such payments would be unconstitutional where they are *designed* to further *or have the effect of* furthering said segregation in the public schools."[13] The

12. 231 F. Supp. 743 (M.D. Ala. 1964).

13. *Id.* at 754 (emphasis added). The tuition grant aspect of the case constituted a rather

court declined to declare the law unconstitutional on its face, but did declare it unconstitutional as applied to all students who enrolled in private schools that discriminated on the basis of race. If the greater issues involved in the *Macon County* litigation[14] had not obscured the test used in considering the tuition grant statute, the decision probably would have become the landmark case in the area of private school support. It was, however, for a three-judge district court from the Fourth Circuit to hear litigation focusing solely on tuition grants laws; and that court applied a more lenient test. The Virginia statute, as was typical, made no eligibility distinction on racial grounds. The state paid funds directly to the student, rather than to the school. The court in *Griffin v. State Board of Education (Griffin I)*[15] stated that not every receipt of state money transmitted via students would make the private school such an instrumentality of the state that the court could impute its discrimination to the state. The court recognized that the private school was the primary beneficiary of the tuition grants and rejected the "child benefit" theory argued by the state. Nevertheless, it held the law constitutional on its face, but conceded that it could be unconstitutionally applied in particular situations.

> Payment of a tuition grant for use in a private school is legal if it does not tend in a *determinative degree* to perpetuate segregation. The test is not the policy of the school, but the measure in which the grant or grants contribute to effect the exclusion on account of race. . . . [T]he extent of such participation determines whether or not the exclusion is State action . . . . Grants for use in an exclusively "white" school within or without Virginia would not be disallowed if the money only insubstantially contributed to the running of the school. . . . On the other hand, if the private school is the creature of, or is *preponderantly maintained by*, the grants, then the operation of the school is State action, and payment of the grants therefor is a circumvention of the equal protection clause of the Constitution.[16]

The court buttressed its constitutional holding that the existence of state action turns upon the amount of state aid received by pointing to the

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insignificant portion of the litigation. Macon County was already under court order to desegregate, and Governor Wallace as Governor and as president of the state board of education had interfered greatly with local authorities' efforts to implement the federal court orders. The primary question before the court was whether it merely should enjoin various state officials from future interference with local school boards or whether the control of state officials in the education process was so great that the court should place the entire state under desegregation orders. The court held that it would issue only an injunction against further interference, because it assumed that such an injunction would be obeyed.

14. *See* note 13 *supra*.

15. 239 F. Supp. 560 (E.D. Va. 1965).

16. *Id.* at 565 (emphasis added). In determining whether state support was insubstantial or preponderant, the court listed several factors to be considered. Among these factors were the ratio of the state grant to the private school tuition and the ratio of tuition grant students to nontuition grant students.

Civil Rights Act of 1964; that statute defines a public school in terms of operation by the state or operation predominantly through the use of government funds. The court enjoined state officials from paying grants to students at certain schools that the court found were preponderantly maintained by tuition grants. However, the court allowed the state to continue grants to students at other racially discriminatory schools, having found that such schools were not maintained preponderantly by the grants.

The major failure of the *Griffin I* decision was that in determining whether or not there was state action, the court approached the situation as if the relief sought were an injunction against discrimination by the private school, rather than only an injunction against payment of the grants. If a state preponderantly supports a private school, the school is "public," not "private." If the school is public, an injunction against discrimination by the school is proper. The "preponderant support" test of *Griffin I* seems to be appropriate for determining whether there is sufficient state action to require the desegregation of a private school. It is too limited a test to apply properly when the relief sought is an injunction against only certain forms of state assistance to private discrimination. Clearly, the payment of state funds is state action, regardless of the amount of support those funds provide the private schools. Although this amount of state action is probably too minimal to justify an injunction against discrimination by the school, surely it would be proper for a court to order a state to cease and desist even this support of private discriminators. The situation presented is one in which there is clearly private discrimination, and the payment of any amount of funds in support of private discrimination should be sufficient state involvement in private discrimination to merit an injunction against that state involvement. Notwithstanding this weakness of *Griffin I*, the preponderant support test was the prime standard for several years; and it has some continuing vitality even today.[17]

In a case again primarily important for other reasons, the three-judge court in the second *Macon County* decision[18] struck down, as applied, a new Alabama tuition grant law. Unlike the earlier statute,

17. *See* Norwood v. Harrison, 340 F. Supp. 1003 (N.D. Miss.), *prob. juris. noted*, 409 U.S. 839 (1972); notes 58-61 *infra* and accompanying text.

18. Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.), *aff'd mem. sub nom.* Wallace v. United States, 389 U.S. 215 (1967). The issue before the court was the same one involved in *Macon County I*. *See* note 13 *supra*. The court noted the ineffectiveness of the injunction to prevent state interference with local boards. In view of the extensive state constitutional and statutory control of education and the exercise of those powers by the control of funds, construction, school consolidation, transportation, and pupil and faculty placement, the court issued a statewide desegregation order.

eligibility turned not on the closing of public schools but on the parent's judgment that attendance at public school would be detrimental to his child's physical and emotional health. Finding that the state had not advanced "any rational basis" for the law,[19] the court in *Macon County II* concluded that Alabama only could have intended it to subvert public school integration and declared it unconstitutional as applied.

The case that rejected the *Griffin I* rationale of "preponderant" support and became the landmark case in tuition grant litigation and many other areas of private school assistance was *Poindexter v. Louisiana Financial Assistance Commission*.[20] The essence of the *Poindexter* decision was that any scheme adopted with segregative intent and providing significant support for segregated education is unconstitutional on its face. The three-judge panel exhaustively surveyed the history of black education in Louisiana and reviewed the effect of the Louisiana's tuition grant law. The court's review of Louisiana history included laws that forbade teaching slaves to read, later laws that required racially segregated education, and a host of post-*Brown* laws employing various devices to close schools under desegregation orders. The instant tuition grant law was the sequel to this history, and the court felt bound to construe it in that context. Under the instant law, Louisiana had transferred 2,500,000 dollars from the Public Welfare Fund to the Education Expense Grant Fund and had authorized the latter fund to appropriate 300,000 dollars per month for tuition grants. Forty-four out of 60 private schools in the state began operating after the first Louisiana desegregation order. Tuition charges for these schools frequently were exactly the amount authorized to each student under the grant program, and the tuition charged by the schools changed each time Louisiana altered the amount payable under the grant program. After the initial *Griffin* decision, the Commission had resolved to reduce the amount paid to students to the extent necessary to preclude the grant program from being the predominant support of any private school. The court found that Louiaiana had "established a second system of schools, competitive with the public school system" and that "[t]he tuition grants damage Negroes by draining students, teachers, and funds from the desegregated public school system into a competitive, segregated 'quasi-public' school system."[21] The court found that the tuition grant program fur-

19. *Id.* at 477. The court indicated that rational bases could include the inadequacy of public educational facilities, the desire to make private schools equally available to poor persons, or the desire to advance the educational opportunities of special classes of students, such as the handicapped or the gifted.

20. 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

21. *Id.* at 851.

nished "almost all" of the funds needed to maintain the post-*Brown* schools.

Judge Wisdom noted with approval the decisions in the two *Macon County* cases and emphatically rejected the *Griffin I* test as without constitutional basis: "But decisions on the constitutionality of state involvement in private discrimion do not turn on whether the state aid adds up to 51 per cent or adds up only to 49 per cent of the support of the segregated institution. The criterion is whether the state is so *significantly* involved in the private discrimination as to render the state action and the private action violative of the equal protection clause."[22] The court contrasted the racially neutral benevolence of the state free textbook law with the traditional racially biased policy underlying the tuition grant law, and held that "[t]he *purpose and* natural or reasonable *effect* of this law are to continue segregated education in Louisiana by providing state funds for the establishment and support of segregated, privately operated schools for white children. . . . Any affirmative and purposeful state aid promoting private discrimination violates the equal protection clause. There is no such thing as the State's legitimately being just a little bit discriminatory."[23] Recognizing the probability that Louisiana might continue to support private white schools, the court then held that "[t]he State is so significantly involved in the discrimination practiced by the private schools in Louisiana that any financial aid from the State to these schools or newly organized schools in the form of tuition grants or similar benefits violates the equal protection clause . . . ."[24] and declared the law unconstitutional both on its face and as applied. The court enjoined all payments of tuition grants.

Upon the facts cited by the court, indicating the extensive effect of the tuition grant program, the decision of the court clearly was correct. The only weakness of the opinion is that, in the course of 25 pages, it used widely varying language. Thus, although it apparently adopted a "significant support coupled with segregative intent" test in condemning the tuition grant law, the court's failure to rest its decision unequivocally on that test has led to wide diversity in later cases considering other means of assistance to private schools; later decisions have split over the relevance of a segregative purpose and over the amount of support required to become significant.[25]

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22. *Id.* at 854.

23. *Id.* at 835 (emphasis added).

24. *Id.* at 857.

25. *See* note 69 *infra* and accompanying text (discussing Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972), *modified on other grounds*, 473 F.2d 832 (5th Cir. 1973)); note 58 *infra* and accompanying text (discussing Norwood v. Harrison, 340 F. Supp. 1003 (N.D. Miss.),

Other courts, rapidly following the lead of *Poindexter*, struck down similar tuition grant provisions. The District Court for South Carolina held the South Carolina law an unlawful circumvention of *Brown* because of its "purpose, motive and effect."[26] Louisiana passed another tuition grant law, this statute having as a stated purpose the prevention of juvenile delinquency. Under the new law, the amount of assistance depended on such variables as net family income and the number of dependents. In *Poindexter II*,[27] the same three-judge court found these differences merely superficial and held the law unconstitutional because of its defective purpose and effect.

The stated purposes of Mississippi's 1964 tuition grant law were to encourage education of all children and to afford each individual freedom in choosing public or private schooling. Notwithstanding the stated purposes, the three-judge court in *Coffey v. State Educational Finance Commission*[28] held the statute unconstitutional because it "encourages, facilitates and supports the establishment of a system of private schools operated on a racially segregated basis as an alternative available to white students . . . ."[29] The *Coffey* court traced the social history of public education in Mississippi from the enactment of the law in 1964, when there were only three private nonsectarian schools in the state, to the school year 1967-68, when there were 49 such schools. Each of these schools except one was all white; they usually had emerged concurrently with the desegregation of public schools. The court further found that "state tuition grants have been critical to most of the schools. The formation and operation of the new schools have been on the thinnest financial basis. Tuition charges often have been scheduled to coincide with the quarterly payments of the state grants. Many individual parents have been either unable or unwilling to pay the balance due above the amount of the grants."[30] The *Coffey* decision is something of an anomaly, however. Although the court indicated that it was aware of all the earlier tuition grant decisions, including *Poindexter*, the court held that the facts found in *Coffey* satisfied the *Griffin I* test because the statute

prob. juris. noted, 409 U.S. 839 (1972)); note 28 *infra* and accompanying text (discussing Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969)); and note 32 *infra* and accompanying text (discussing Griffin v. State Bd. of Educ., 296 F. Supp. 1178 (E.D. Va. 1969)).

26. Brown v. South Carolina State Bd. of Educ., 296 F. Supp. 199 (D.S.C.), *aff'd per curiam* 393 U.S. 222 (1968).

27. Poindexter v. Louisiana Financial Assistance Comm'n, 296 F. Supp. 686 (E.D. La.), *aff'd per curiam sub nom.* Louisiana Educ. Comm'n for Needy Children v. Poindexter, 393 U.S. 17 (1968).

28. 296 F. Supp. 1389 (S.D. Miss. 1969).

29. *Id.* at 1392.

30. *Id.*

tended in a determinative degree to perpetuate segregation. The court did not indicate what it would have done if the tuition grants had constituted only "significant" support instead of "preponderant" support. This unclarified point has become important in later litigation about other methods of support for private schools.[31]

In *Griffin v. State Board of Education*,[32] a three-judge court reconsidered the Virginia tuition grant law considered in the earlier *Griffin* decision in light of the "more exacting test" impliedly endorsed by the Supreme Court in affirming *Poindexter*. The court this time found the entire law unconstitutional on its face.

> To repeat, our translation of the imprimatur placed upon *Poindexter* by the final authority is that *any* assist [sic] *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution. In our judgment, it follows, that neither motive nor purpose is an indispensable element of the breach. The *effect* of the State's contribution is a sufficient determinant . . . .[33]

Thus, *Griffin II* broadened the "significant support" aspect of *Poindexter* by condemning "any" assistance; although this change is of some importance, it probably is not of great significance. Indeed, it is quite likely that a court will hold assistance that is not "significant" to be de minimis, and thus not any support at all. *Griffin II* also explicitly rejected the implication of *Poindexter* that a "segregative purpose" is a necessary prerequisite for holding a scheme unconstitutional.[34]

Thus, fifteen years after the *Brown* decision had fostered the growth of southern private white schools, these schools suffered a telling blow when it became clear that tuition grant plans fell within the condemnation of the fourteenth amendment. Yet, because the destruction of the tuition grant system was not fatal to the movement and because the tuition grant cases form the framework of much of the later private school litigation, it is important to examine them as a group in order to examine both the consistencies and inconsistencies among them. This is not altogether easy, for the brevity of some opinions and the verbosity of others obscures their rationales. Only the *Griffin, Poindexter*, and *Coffey* decisions give extensive statements of facts considered relevant to the condemnation of the grant plans. Such factors were the significance of the ratio between total expense of private school operation and total amount of indirect subsidization furnished by the grants; the crea-

31. *See* Norwood v. Harrison, 340 F. Supp. 1003 (N.D. Miss.), *prob. juris. noted*, 409 U.S. 389 (1972) (state provision of free textbooks).

32. 296 F. Supp. 1178 (E.D. Va. 1969).

33. *Id.* at 1181.

34. *Id.*

tion of private schools simultaneously with the desegregation of public schools; the similarity between the amount charged by the school and the amount paid by the state to the students; the similarity between the dates on which charges were due to the school and the dates grants were paid by the state; the extent to which charges of the school beyond the amount paid by the grants were left unpaid by the parents; and the potentiality of the scheme for having a severely adverse impact on a desegregated public education system. Assuming that most of these elements were present in every case,[35] it seems clear that the amount of support furnished the private schools was sufficient to condemn the grants regardless of whether the court employed the "preponderant," the "significant," or the "any" support test as the standard. Most courts, however, also mentioned the purpose of the statutes in condemning them. *Macon County I* implied that either impermissible purpose alone or impermissible effect alone is sufficient to condemn the statute. The *Poindexter, Poindexter II*, and *South Carolina State Board of Education* courts implied that both an impermissible purpose and an impermissible effect are required to invalidate the scheme. The decisions in *Griffin* and *Coffey* implied that purpose is irrelevant. *Griffin II* clearly held that purpose is irrelevant. Thus, the importance of the purpose-effect dichotomy is quite unsettled; there is ample authority among the tuition grant cases for a variety of positions. Decisions in later cases reflect this confusion.

One factor common to all the cases, however, is the form of relief. The court enjoined state support of the private discriminatory action in each instance. No court enjoined the private discrimination itself or ordered a private school to desegregate; apparently, no plaintiff ever asked for this relief, although only a few cases state that plaintiffs disclaimed seeking such relief. One writer[36] has characterized the tuition grant cases as holding only that unrestricted state grants are unconstitutional in the presence of two conditions: public schools must be under orders to desegregate, and the grants must have defeated the right

35. Some of these factors are certainly more important than others. Also, the factors listed are from cases before *Griffin II*; the standard applied in that case probably makes it almost impossible to create a tuition grant law that could pass fourteenth amendment muster. Of course, a law could make eligibility for the grants turn in part upon attendance at a nondiscriminatory private school; such a restricted grant clearly would withstand constitutional challenge based on racial grounds, but it would not serve the purpose intended by those legislatures that passed unrestricted tuition grant laws. Even a restricted tuition grant law may face first amendment challenge.

36. King, *Rebuilding the "Fallen House"—State Tuition Grants for Elementary and Secondary Education*, 84 HARV. L. REV. 1057, 1064 (1971).

of blacks to desegregated public education because white students transferred to private schools. They did hold at least that; the current problem is the extent to which the rationale is more expansive.

C. *Use of Public Property by Private Schools—Acquisition by Lease or Purchase for Adequate Consideration*

Even before the tuition grant laws were found unconstitutional, private schools struggled to meet their needs for adequate physical facilities. Although many private white schools secured former homes or business locations and many operated in buildings owned by churches, other private school founders turned to their local school boards. These boards frequently were willing to assist in the creation of private schools, as many school systems owned property that was not in use and the members of many boards were relentless in their opposition to racial mixing. The only federal restriction imposed on the use of public property by private discriminatory schools is the fourteenth amendment: at some point, use of state property by private persons becomes state action. The precise location of this point has shifted significantly in recent years.

With some modifications, the rule used today to control disposition of state property by both lease and sale to private discriminatory academies is that stated many years ago in another context in *Derrington v. Plummer*:[37]

> No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person.[38]

In *Derrington*, a county had leased space in the county courthouse for use as a cafeteria primarily for the benefit of courthouse users and personnel. When the lessee refused to serve blacks, plaintiffs sued to restrain the county from leasing the property unless the lessee would cease discrimination. The Fifth Circuit noted that the operation did not satisfy its test because the courthouse basement could not be considered surplus property not used or needed by the county; the space was an integral part of the major complex from which the county administered and supervised public functions. The court also noted that it might be possible to find a joinder of the county in the enterprise because the

37. 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957).
38. 240 F.2d at 925.

county furnished water, electricity, heat, and air conditioning to the tenant. It also noted that there was some doubt whether the county had reserved control over the tenant's activities. Because the situation did not satisfy its "unneeded property" test, because county operation of the courthouse cafeteria would have constituted state action, and because "the lessee stands in the place of the County," the court affirmed the district court order enjoining the lessee from discrimination.

The rule prohibiting discrimination by private lessees of state property continued to develop in litigation in noneducational areas. In *Hampton v. City of Jacksonville*,[39] the court endorsed without question the proposition that the City could not avoid a finding of state action by executing a long-term lease of its municipal golf courses.[40] All leases involve some amount of mutual responsibility and benefit, with both the tenant and the lessor having continuing interests in and control over certain aspects of the property. The long-term lease hypothesized in *Hampton* emphasized the continuity of the city's interest in the operation of the facilities. *Burton v. Wilmington Parking Authority*[41] concerned discrimination by the private lessee of a restaurant in a publicly owned parking garage. The Court noted that the lessee's interest was tax exempt because the building was state property. The state built and maintained the garage with public funds; the state used the garage for public parking; the lessee's restaurant was an integral part of the building; and the lessee received great benefit from the advantageous location inside the garage building. The Court felt that continuity of the relationships and interest in the property made the Authority a "joint participant" having a symbiotic relationship in the operation of the restaurant. "[W]hat we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself."[42]

This general rule against allowing discrimination by lessees of public property, which appears to be premised on the continuous, ongoing

39. 304 F.2d 320 (5th Cir. 1962), *cert. denied*, 371 U.S. 911 (1962). In *Hampton*, the city already had been enjoined from operating its 2 golf courses on a racially segregated basis. The city then sold the courses to local golf professionals on terms very favorable to the purchasers. The deeds contained express reverter clauses under which the courses would revert to the city if the property ever were used for any purpose other than as golf course. The court held that the inclusion of the reversionary clauses made the purchasers agents for purposes of the fourteenth amendment.

40. *Id.* at 321 (dictum).

41. 365 U.S. 715 (1961).

42. *Id.* at 726.

relationship between the state and the discriminator, is applicable in the private school situation. In *Wright v. City of Brighton*,[43] the court noted with approval the district court determination that a lease of unused public school property to a private discriminatory school for a two-year period would be unlawful under the *Burton* and *Hampton* rationales. Nevertheless, this rule has not in all cases ended the leasing of public school property to private schools.[44]

It is in the cases of the sale of public property to private discriminatory schools, however, that the most significant developments have taken place. There is a special rule, not applicable to other publicly owned property and to other forms of private discrimination, concerning the sale of public school property to private schools. Courts have established this extensive control over sales of public property by considerably redefining the term "good faith" as it was used in the *Derrington* case. At the very minimum, under general property law principles, good faith has required that purchases be made for adequate consideration. As the court indicated in *St. Helena Parish*, "[T]o the extent that such conveyances . . . are for less than the fair value of the property, they are gifts constituting continuing state aid to 'private' schools."[45] The general rule pertaining to reservation of control by the state as grantor is also applicable in the private academy situation. Even such tenuous control as the inclusion of a reverter clause may make the private discriminator-grantee subject to the limitations placed on states. In the *Hampton* case, the city sold its golf courses subject to reversion if the grantee ever were to use the property for any other purpose than as a golf course. The Fifth Circuit emphasized that portion of the *Derrington* opinion referring to reservation of control by the governmental unit and held that the express reverter clause was such a reservation of control by the city that the interests of the city continued. Because the interest of the city continued, the court held that the grantees were state agents subject to the limitations against discrimination generally applicable to state activities and enjoined the "private" discrimination. *Wright v. City*

43. 441 F.2d 447 (5th Cir. 1971), *cert. denied sub nom.* Hoover Academy, Inc. v. Wright, 404 U.S. 915 (1971).

44. *E.g.*, Brown v. Lutz, 316 F. Supp. 1096 (E.D. La. 1970). In *Brown*, the parties stipulated that the local school board was leasing unused school buildings to a private school; plaintiff alleged that the private school was segregated. The court dismissed the suit for lack of standing because there was no allegation that plaintiff had children attending either public or private schools, that she had some other connection with such schools, or that she had sustained financial loss. *Id.* at 1097-98.

45. Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, 653 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

of Brighton[46] and *McNeal v. Tate County School District*[47] indicate, however, that there are special rules, not applicable in the broader class of general sales of state property, applicable to the sale of state property to private academies. The special rules pertaining to sales to private schools are quite stringent.

In *Wright*, the city of Brighton bought the school property in question when Jefferson County stopped using the building as part of the county school system; the city never used the building during the three years between its purchase and sale. Upon learning that a private white school that had been functioning locally for six years was interested in the property, the city council authorized a lease for two years with an option to renew or purchase. Plaintiffs brought suit to enjoin both the leasing and the selling of the property. The district court found that a lease of the property would be unconstitutional. The city then authorized the immediate disposition of the building; the property was appraised by three appraisers and purchased by the private school for the highest of the appraised values. The district court, relying on *Derrington*, held that the sale of the building was not a violation of any of plaintiff's rights. The Fifth Circuit reversed. Pointing out that the relief sought was not the integration of the private school but an injunction against the sale of land to it, the court considered irrelevant the protestations of the city that there was no continuous or ongoing relationship and that there was no retained interest or control. The court noted that "it is the sale alone, not the city's involvement in the operation of the academy," that was at issue. Examining the facts before it, the court found that

> the City of Brighton's determination to sell a public school building to an institution which the city knew would operate an all-white segregated school had the ultimate effect of placing a special burden on the black citizens of that community. The city in effect encouraged the maintenance of a segregated facility by its action. It participated in a transaction by which a public building, once open to all on an equal basis, was converted into a segregated facility where the black people of the community were no longer welcome.[48]

Citing numerous Supreme Court decisions from other contexts, the court held that the sale of property to a segregated private school under these circumstances is unconstitutional as a badge of slavery. The Fifth Circuit remanded the case for disposition consistent with its opinion, clearly indicating that the sale should be rescinded.

46. 441 F.2d 447 (5th Cir. 1971), *cert. denied sub nom.* Hoover Academy v. Wright, 404 U.S. 915 (1971).

47. 460 F.2d 568 (5th Cir. 1971).

48. 441 F.2d at 451.

The rationale of *Wright* is applicable to the sale of property owned by any governmental unit; in the limited context of property owned by public school authorities, this tough new rule was tightened even further by *McNeal*. Reviewing the facts found by the district court, the Fifth Circuit noted that the school in question consisted of four buildings on a rural six-acre tract; that after almost 30 years of use, the buildings were badly delapidated; that in the final year of use by the school board, 35 children of both races attended the school; that only three of its seven classrooms were used during that year; that the school board determined that continued operation would be uneconomical; that the school board advertised the property for sale for three consecutive weeks in a local newspaper as required by state law; that the only bid was from an individual who soon reconveyed to the Tate County Foundation; and that it was the goal of the Foundation to establish an all-white private school. The court also noted that school board members were cognizant of a movement afoot in the county to start a private school. The dissent pointed out several additional facts found by the district court: the school board had acted in good faith in all respects; the school district had not needed the property in question since the district was reorganized fifteen years earlier; the board closed the school not to avoid integration, but for sound economic reasons; the rural tract had no commercial value; and the Foundation had spent 20,000 dollars to repair the property after its acquisition, in addition to substantial amounts of free labor donated by persons interested in the Foundation. The court conceded that the board sold the school for valid reasons, that the price received was adequate, and that the board in no way affirmatively participated in the creation of the all-white school. The court then characterized the case as identical with *Wright*, except for "slight variations." The only variation noted by the court was that in *Wright* the city had known that the purchaser planned to operate an all-white school on the property, whereas in *McNeal* the school board had no such knowledge. The court held this distinction "inconsequential" because board members were aware of the private school movement in their county and state. The court would not permit *Wright* to be circumvented by allowing a board to ignore local conditions and then plead lack of knowledge. Noting that since the *New Kent County* case[49] school boards had been under an affirmative duty to take whatever steps necessary to bring about a unitary public education system, the court found that the failure of Tate County officials to reasonably investigate prospective purchas-

49. Green v. County School Bd., 391 U.S. 430 (1968).

ers conflicted with that affirmative duty and amounted to a provision of "aid to a scheme which resulted in more—not less—segregation."[50]

The court indicated that the type of inquiry required would vary with the facts of each particular case, and it did not detail a standard of inquiry. The court initially reversed and remanded with directions to invalidate the sale and to reconvey the land to the school board. On motion for rehearing, the court modified its disposition by directing the district court to sustain the validity of the sale to the Foundation and to enjoin the use of the property on a discriminatory basis. The court stated that the property, if used as a private school, must be operated without discrimination as to race and must "be open at all times to all qualified applicants." In denying the motion for rehearing, the court again enunciated its strict policy concerning disposition of school property.[51]

In a post-*McNeal* case involving the sale of abandoned public school property, District Judge Smith held that the rights of the school board, the purchaser, and black citizens could be protected best by a clause under which the property would revert to the school board if it were used by a discriminatory private school during a ten-year period immediately following the sale.[52] A man and wife partnership sought to purchase the abandoned property for use in their farming operations; they planned to use the facilities for office, warehouse, and shop space, and they specifically disclaimed any desire to direct the use of the land to private schools. The partners preferred a fully unencumbered title, but stated that they would accept a deed containing a reverter clause limited to ten years. Judge Smith ordered the school board to include such a clause in the deed.

Thus, it appears that even when adequate value is given, the use of any public property by a private school discriminator-lessee is constitutionally impermissible. Similarly, the use of any formerly public property by a private school discriminator-grantee is constitutionally impermissible if the vendor is aware of the vendee's intent. In the Fifth Circuit, there is almost a per se rule that a private school discriminator cannot lease or purchase public school property for use in the operation

50. 460 F.2d at 572.

51. "It appears to be appropriate to express a caveat to courts who in the future may have to consider the sale of public school property for use as a private school. Such a sale should be scrutinized with the utmost care and caution to the end that public school property shall not be converted to use by private schools which engage in forbidden discriminatory practices." *Id.* at 574-75.

52. Taylor v. Coahoma County School Dist., 345 F. Supp. 891 (N.D. Miss. 1972).

of a private academy.[53] The clarity of these rules, however, is no indication that they will be obeyed. Control of tuition grant laws in a dozen states was a simple task compared to the problem of policing each property disposition of thousands of local school authorities.[54] There will be much more litigation in this field simply to enforce rights that are clear already.[55] Even though it may take years to enforce the law in the area of public property disposition to private schools, an examination of the relief given in these cases nevertheless indicates a peculiarly potent threat to private school discrimination. In contrast to the tuition grant cases, in which the court enjoined only the state assistance, most of the public property cases have enjoined the *discrimination itself.* This was true in all the lease cases examined; it was also true in *McNeal*, which to that extent abrogates the sale rescission relief indicated by *Wright*. It appears that private white schools which use public property will be on the horns of dilemma: they may either integrate or close. Each alternative equally defeats their intended purpose.

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53. The Fifth Circuit has expanded the *McNeal* rule to apply to lease arrangements. Graves v. Walton County Bd. of Educ., 465 F.2d 887 (5th Cir. 1972). It appears, however, that this expansion is not very significant. Since there is already a general rule condemning leases of any public property to a private discriminator, the imposition of an affirmative duty to investigate the uses a lessee would make of public school property is hardly necessary in order to hold such leases unconstitutional.

54. For example, the private Baker Academy was founded in Baker County, Georgia in 1970, when its 38 pupils attended class in a ramshackle building. Over a 2-year period, the county school board sold to the Academy various "surplus" items, including 20 desks for $200, 4 late model school buses for $850, and the newest school building in the system for $6500. The building conveyed had been built in 1955 for $125,000. Three hundred twenty-five white pupils attended Baker Academy in its new facility, while 107 white and 701 black pupils attended school in the 2 remaining public schools, both of which were of Depression Era construction. Children of 3 members of the 5-man school board attended the Academy. NEWSWEEK, March 27, 1972, at 70.

The problem of policing is further complicated by the fact that the use of publicly owned property by private schools is frequently not very visible even among potential black plaintiffs who reside in the locality. For example, public property not closely connected physically with government building complexes easily could be sold to private schools; the transaction would be especially invisible if the property were undeveloped. There is no clear indication that the *Wright* and *McNeal* rules apply to undeveloped property, but there is no indication that they do not apply. All the cases to date have involved the disposition of developed property formerly open to the public at some time. Future litigation will involve undeveloped property, and the same rules should apply. Their application would not be mandatory, because there would be no conversion of a formerly nondiscriminatory public *facility* to a discriminatory private one. The basic prohibition against assistance to private discriminators clearly is still applicable, however, even in situations involving undeveloped property.

55. Months after the demanding *McNeal* decision, the Fifth Circuit still was hearing similar cases. The Justice Department sought recission of the Baker County conveyance, *see* note 54 *supra*, and the district court dismissed the suit because Baker County was in another district. Atlanta Constitution, May 11, 1972, at 11-A. United States v. Georgia, 466 F.2d 487 (5th Cir. 1972), reversed the district court dismissal.

D. *Use of Publicly-Owned Chattels Gratuitously Acquired*

Modern school systems require the use of great amounts of personal property, including textbooks, libraries, teaching aids, and desks. Private schools, if they are to be at all effective for educational purposes, must have an adequate supply of these materials. The proper bounds of state assistance to private discriminatory academies via the mechanism of allowing use of public chattels is an area not yet determined definitely. Most of the litigation to date has involved the use of public textbooks by or the gratuitous transfer of benefits to private schools. There almost certainly will be more litigation involving other forms of property and nongratuitous methods of conferring benefits. Even in the area of gratuitous transfer of textbooks, there is not much clarity.

States clearly have the power to extend some forms of assistance to pupils in private schools, under the theory that the child and not the school is the primary beneficiary and that expenditure of state funds to benefit children is a public purpose. Under *Cochran v. Louisiana State Board of Education*,[56] one form of assistance to private school pupils that the state may provide is the furnishing of textbooks. States have taken advantage of the child benefit theory of *Cochran* to provide textbooks to students at many private discriminatory academies. Litigation has been recurring, but many cases have been decided on procedural grounds[57] without reaching the substantive issue—resolution of the conflict between permissible benefit to the private school child and the impermissible subsidization of a private school alternative to integrated public schools. Nevertheless, the frequency with which the issue arises is a measure of the prevalence of providing pupils at discriminatory academies with state-purchased materials. The only court to reach the merits of the problem sustained such a law.

56. 281 U.S. 370 (1930). In *Cochran*, state law required the expenditure of state funds to provide books to all school children, regardless of whether they attended private or public school. This practice was challenged as a deprivation of property without due process under the theory that the taking was for a private and not a public purpose. The Court sustained the law, quoting extensively from the Louisiana Supreme Court opinion for the proposition that the children and the state, and not the private schools, were the only beneficiaries of this plan to improve education in the state.

57. *E.g.*, Brown v. Lutz, 316 F. Supp. 1096 (E.D. La. 1970), in which the parties stipulated that the local public school authorities furnished textbooks and other supplies to private schools. This action was taken pursuant to the very statute upheld in *Cochran*. In United States v. Tunica County School Dist., 323 F. Supp. 1019 (N.D. Miss. 1970), *aff'd per curiam*, 440 F.2d 377 (5th Cir. 1971), intervenors challenged the action of the board allowing private school pupils to continue using state texts issued to them during the previous semester when they attended public school. The court dismissed this portion of the suit as moot, the books having been returned to public school officials by the time the court rendered the decision.

In *Norwood v. Harrison*,[58] the court faced a Mississippi textbook law dating from the 1940's, a law clearly passed for educational and not racial reasons. Under the law, the state provided all school children free texts regardless of race and regardless of whether the child attended a public, private, or parochial school. Black plaintiffs attacked this law as applied to those students attending racially segregated private schools established after 1964, the date of the first substantial school desegregation in Mississippi. Thc constitutional challenge was that assistance to pupils at such schools conflicted with the affirmative duty of public school officials to achieve a unitary public school system. The three-judge panel approached the issue in a manner novel in the civil rights context. It noted that the law was constitutional under the first amendment as applied to parochial school students, that the books were furnished to students and not to schools, and that the Supremc Court continually had distinguished between "permissible state aid to the student and impermissible state aid to the church-related school." In the court's opinion, the question then became whether a "more stringent" standard should apply in the fourteenth amendment cases than in first amendment cases.[59] The court concluded that a more stringent test should not apply and sustained the application of the law to late-vintage private white academies. It distinguished the tuition grant cases, saying that the laws involved in those cases were critical to and fostered the development of private academies because of the vital financial support given them. In the court's opinion, this was not true of the textbook law. The court did admit that 34,000 children attended segregated private schools, however, and furnishing texts to that many persons seems significant by *Poindexter* and *Griffin II* standards. The court also noted that the segregative pupose of the tuition grant laws was lacking, ignoring the fact that *Griffin II* held purpose irrelevant. The *Norwood* court concluded by saying:

> We find it wholly illogical to require an alteration in the state's textbook program simply because of the advent of more private schools following the desegregation of the public school system. Depriving any segment of school children of state-owned textbooks at this point in time is not necessary for the establishment or maintenance of statc-wide unitary schools. . . . There is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools, now unitary.[60]

Whether *Norwood* reached the proper result or not, its first amendment rationale hardly seems appropriate. First, the first amendment

58. 340 F. Supp. 1003 (N.D. Miss. 1972), *prob. juris. noted*, 409 U.S. 839 (1972).
59. *Id.* at 1011.
60. *Id.* at 1013.

does not embody a single concept, as *Norwood* seems to suggest; rather, it contains both the establishment clause and the free exercise clause. Plaintiffs have based challenges against state assistance to pupils at parochial schools on the establishment clause; yet courts frequently have allowed this assistance because failure to allow it would infringe on the individual's rights under the free exercise clause. In short, whether the aid to the pupil is constitutional in the religious context requires a careful balancing of considerations under both the establishment and free exercise clauses. Constitutional considerations in the racial context are altogether different, for the equal protection clause is a unitary concept. If the equal protection clause is to be analogized to the first amendment at all, it would prohibit only the establishment of discrimination and not the thwarting of free exercise of discrimination. Thus, striking down state assistance to pupils at discriminatory schools would not involve the frustration of any of their rights. The conflicting values in the religious context are child benefit and free exercise versus establishment of religion; the values in the racial context are child benefit versus the subversion of integrated public education. This difference between the racial and religious contexts is crucial. Secondly, because the first amendment protects specific freedoms, such as religion, and because the equal protection clause gives far more general protection, the latitude given the states in the first amendment religious context is not appropriate in the equal protection context.

Even under its inappropriate first amendment analogy, the court indicated that it might have reached a different result had more persuasive evidence been presented to it on the issue of whether furnishing free textbooks encourages attendance at segregated academies.[61] Encouragement, however, is a very difficult thing to prove. It would seem more appropriate to focus on the *significance* of the support indirectly given private schools, which is the approach mandated by such cases as *Poindexter* and *Griffin II*. Most courts probably would have found substantial support involved in furnishing free textbooks to 34,000 pupils at private academies in Mississippi, for those pupils constituted more than six percent of the school population of the state. The *Norwood* court was of a different persuasion.

E. Subsidization of Private School Teachers

Once capital outlay for the physical plant is complete, the school's most important item of expense is teachers' salaries. This is true of

61. *Id.*

private as well as public schools. Because of the size of this continuing expense item, private schools have tried a number of ways to secure government financial assistance to meet the burden. As part of the early massive resistance programs in which public schools closed in the face of court-ordered desegregation, it was common for state legislatures to include as part of their resistance programs a statute authorizing governmental units to pay salaries of private school teachers in locations in which the public schools were closed. *St. Helena Parish* is an example of those cases striking down private school teacher salary laws. Such schemes constituted obvious state support of private discriminatory academies and could not claim protection under the child benefit theory of *Cochran*. Such support is also clearly significant by the standards applied in the tuition grant cases. Because these difficulties are virtually insurmountable, state legislatures gave up their attempts to pay full salaries. Apparently the payment of salary supplements to private school teachers remains untried and unlitigated. Seemingly, any salary supplement large enough to fulfill the legislative purpose of private school subsidization would run afoul of the same facts that condemned the payment of full salaries.[62]

The legislative struggle leading to the passage of a recent Louisiana private school salary law reveals the conflict between the old and new South. A New Orleans newspaper reported[63] that after a much-publicized nondiscrimination clause and a section prohibiting aid to

62. Less preplanned methods have been used to pay salaries of private school teachers. United States v. Tunica County School Dist., 323 F. Supp. 1019 (N.D. Miss. 1970), *aff'd per curiam*, 440 F.2d 377 (5th Cir. 1971). As part of a prior desegregation plan, the district court had entered an order stating that reassignment of teachers to accomplish faculty desegregation was not dependent on the desire of the teachers or the district, and that contracts interfering with reassignment would be invalid. The 1969-70 contracts reserved to the district the right to reassign teachers and reserved to teachers the right to terminate the contract in the event of reassignment. During the first semester of the 1969-70 school year, the court ordered reassignment of white teachers to predominantly black schools; the teachers submitted resignations effective at the end of the first semester. Before the start of the second semester, the district announced that it would pay the resigned teachers their salaries for the remainder of the year; a lump sum payment of almost $52,000 was made to 18 of the teachers. When the second semester started, 80% of the white pupils who had attended public school the first semester attended a private school operated by 3 local churches. The church school charged no tuition and paid no salaries; 18 of its 21 teachers were those who had resigned from public schools. The United States sued to recover for the district the funds appropriated for the second semester salaries of the resigned teachers. The 3-judge panel noted that after word spread that second semester salaries would be paid to resigned teachers, they "naturally 'gravitated'" to the new school. The court held the payment of salaries to resigned teachers unconstitutional because "[t]he actions of the school board were a major, if not the dominant, influence in making it possible for a segregated private school to function on short notice." *Id.* at 1026. *See* note 57 *supra* for other aspects of the case.

63. New Orleans Times—Picayune, Aug. 7, 1970, at 12.

schools that had been in operation less than three years were dropped from the bill, pro-integration Catholic supporters of the bill reported that other supporters of the bill had assured them that segregated private schools would not benefit from the law. Yet the principal sponsor of the bill statcd that teachers were eligible so long as they taught in private or parochial schools. The private school salary law as finally enacted was declared violative of the state constitution in *Seegers v. Parker*.[64] The Louisiana Supreme Court found that the law required the state to pay qualified teachers at approved nonpublic schools an amount equal to that received by similarly qualified public school teachers, but that the payment would be made only for the teaching of secular subjects. The court noted that fifteen percent of the pupils in the state attended nonpublic schools and that 69 percent of the eligible nonpublic schools were religiously related, 31 percent being nonreligious. It noted that almost 6,800 teachers were eligible for funding, 22 percent of whom were in nonreligious schools. In spite of the limitation of the law to payment for teaching secular subjects, the court found that it violated a Louisiana constitutional provision against establishment of religion and another provision against aid to religion. Also, the court invalidated the law as it applied to nonsectarian private schools. Finding that the law provided an indirect form of support for private schools, the court held that "[s]ection 13 of Article 12 is explicit: 'No appropriation of public funds shall be made to *any* private or sectarian school. * * *' . . . The prohibition is against any appropriation—direct or indirect—to any non-public school."[65] Other state constitutions are not as strict as Louiaiana's. Nevertheless, the difficulty of passing a private school teacher salary law that will withstand fourteenth amendment challenge explains why other states have largely abandoned this method of private academy support.

F. Transportation Benefits to Private Academies

In the context of the religion clauses of the first amendment, it is clear that some forms of state assistance in the transportation of parochial school students is permissible.[66] There has been very little litigation on transportation aid to segregative academies, and what little exists is not definitive or broad in scope. In *Pettaway v. County School Board*,[67] the court faced a Virginia statute authorizing transportation

64. 256 La. 1039, 241 So. 2d 213 (1970).
65. *Id.* at 1066, 241 So. 2d at 222.
66. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).
67. 230 F. Supp. 480 (E.D. Va. 1964).

grants payable to students who were not attending public schools. Finding that the factual circumstances in Surrey County were so similar to those involved in the Supreme Court's *Prince Edward County* decision that the situations were merely "variations upon the same theme," the court enjoined payment of transportation grants because they were unconstitutional as administered. Although the case of *Brown v. Lutz*[68] dealt with a stipulation that local authorities provided transportation of private school pupils to their schools, the court reached no decision on the merits. It appears likely that there will be future litigation defining the scope of the state's power to assist private schools in this and other "marginal" areas of operation. Because the transportation of private school students hardly has the same direct impact on their education as does the providing of textbooks, however, it appears that transportation benefits will have a more difficult time passing constitutional muster. Here, as in *Norwood*, whether the law is a late vintage attempt to frustrate public school integration or an early vintage attempt to assure that all school children are able to get to their schools may be crucial.

G. Benefits to Noneducational Activities

Gilmore v. City of Montgomery[69] involved a motion for supplemental relief in an action brought over a decade earlier to achieve desegregation of public recreational facilities. By the date of the suit, the city was providing football, basketball, and baseball facilities on a nondiscriminatory basis to all private groups that applied; among the many groups using the facilities were private white academies. The relief sought on the supplemental motion was an injunction against the use of the facilities by these schools. District Judge Johnson noted that sports activities by private white schools constitute an important public relations aspect of their programs and that athletic activities are vital to the public acceptability of the schools. Operating from a premise that the sports programs are vitally important, the judge stated that the situation was not distinguishable from the tuition grant situation. Judge Johnson viewed those cases as holding that in situations in which schools were under a duty to desegregate, any state assistance to private schools that frustrated the right of blacks to a public, integrated education was unconstitutional assistance. The court found that the availability of public recreational facilities to private white academies has the effect of "encouraging and facilitating" their establishment, because such availa-

68. 316 F. Supp. 1096 (E.D. La. 1970); *see* note 44 *supra*.

69. 337 F. Supp. 22 (M.D. Ala. 1972).

bility enables schools to enhance their public image more easily via sports programs. Judge Johnson ruled that because the availability of facilities encourages the creation of private academies, and because private academies drain talent, funds, and interest from the public school system and thereby endanger the rights of blacks, the availability of the facilities was unconstitutional. "Thus, this Court concludes from *Griffin* [II] that what is important is the *effect* the state's aid has on the maintenance of a racially balanced public school system, but that the *extent* of the aid provided is immaterial. . . . Even if one assumes, however, that the degree of aid is relevant, the aid provided in the present case is substantial and it significantly affects the Montgomery public school system."[70] The quantitative substantiality of the aid lay in the facts that the private schools saved the considerable expense of constructing their own stadiums and gyms and that they gained considerable revenue from the sale of tickets for and refreshments at sporting contests. Judge Johnson ruled that it was no defense that the facilities were open to all on a nondiscriminatory basis; he stated that the issue was whether their availability endangered the viability of integrated public education. Because the plan endangered the public system, the court enjoined the city from allowing discriminatory private schools to use city recreational facilities.

Because *Gilmore* and *Norwood* are the two most recent decisions based on the tuition grant cases, a brief comparison of them is revealing. The tuition grant cases hold at least that significant state aid to private discriminatory academies is unconstitutional; significance of the aid is determined by examining both the quantitative amount received by private schools and the qualitative effect on public schools. Seemingly, furnishing free textbooks to over 30,000 private school pupils—the practice upheld in *Norwood*—over an entire state is quantitatively more significant than allowing private schools in one city to use recreational facilities generally available to the public—the practice invalidated in *Gilmore*. The qualitative effect on public education in both cases is indirect and appears to be of the same nature—the aid encourages students and public interest to gravitate away from the public system. If only these factors are considered, the results should have been consistent. The difference may turn on two factors, either or both of which may be the basis for the conflicting results. First, it is possible that the different philosophies of the three-judge panel in *Norwood* and Judge Johnson in *Gilmore* made them unequally subject to persuasion by the

70. *Id.* at 24-25.

plaintiffs' argumcnts. Secondly, consistcnt decisions would have had a decidedly different impact on the education of children in private schools. Denying Montgomery's private schools the use of city recreational facilities may have an adverse effect on their athletic programs, but it would not endanger the quality of their education directly. On the other hand, although depriving Mississippi private school children of state texts may encourage some of them to return to public schools, it seems equally likely that many would remain in private schools and use inferior texts or none at all. This would endanger their education. On the basis of their differcnt impacts on the cducation of private school children and the interest of the nation in seeing that all persons receive basic materials for education, perhaps the decision are reconcilable.

H. State Income and Property Tax Benefits

The benefits reccivcd by private schools under tax laws are based on policy values different from the values underlying the benefits received under the laws discussed above. The tax statutes are laws of general application, and their impact on private school cducation usually is the product of a general benevolence toward charitable institutions. Most of the benefits previously discussed were conferred under laws limited to the field of education; state and local governments frequently adopted such laws especially for the benefit of private schools in order to make them more feasible alternatives to integrated public education. Notwithstanding the differcnces in the intent behind and specificity of the laws, the tax statutes of most states do have a significant impact on private schools.

The expenses of most segregatcd academies usually exceed income; few private schools operate at a profit. For this reason, the state income tax laws have little impact on private schools as taxpayers. Because most of the schools own the premises on which they operate, however, the state property tax laws are important. Most states grant exemptions to property owned by religious, charitable, educational, and similar institutions. Although there apparently has been no litigation on the subject, it appears that most states in the South readily apply these exemptions to private white schools. Such exemptions will not necessarily save discriminatory organizations from taxes on their property, however. For example, the Elks Lodge limits its membership to Caucasians. Oregon tax law exempts the property of fraternal organizations from taxation, defining fraternal organizations in such a way that they must be charitable. A three-judge district court, in *Falkenstein v. Department*

of Revenue,[71] declared this exemption unconstitutional. The panel found that a "symbiotic relationship" existed between the state and the lodges because their exemption was based upon the assumption that the lodges performed services that the state otherwise would perform; the exemption and charitable services thus constituted mutual benefits involving the state in the discrimination. By accepting the tax exemption, the Lodge became obligated to comply with the equal protection clause; the state was under a duty to see that the Elks met their obligation. If the Supreme Court leaves the Oregon district court decision undisturbed, this rationale almost certainly will be employed in litigation attacking exemptions for private white educational institutions. Application of the *Falkenstein* principle almost certainly would lead to the invalidation of property tax exemptions for discriminatory schools.

Although private schools as taxpayers have not been affected significantly by state tax laws, those laws have benefited private schools in another manner. Individual taxpayers receive tax deductions and credits for contributions made to private, discriminatory schools. This is especially true of state income taxes. The procedure benefits both the individual taxpayer and the school; it remains unchallenged, although it may lead to future attacks similar to those on federal income tax deductions.[72] States and localities may also use property tax credits for contributions to private schools; such an arrangement existed in the *Prince Edward County* situation, when the Court found it unconstitutional in the particular factual context.[73] Local governments may have attempted this use of property tax credits in other counties in the South, but there has been little litigation specifically on the subject.

III. Federal Involvement in Private Schools Through Tax Laws

A. Charitable Contribution Deduction

Federal income tax statutes allow a deduction from gross income for a "charitable contribution," which is defined in part as "a contribution or gift to or for the use of . . . [a] corporation, trust, or community

71. 350 F. Supp. 887 (D. Ore. 1972). The district court denied the Elks' motion to intervene; the Elks appealed from this ruling, but the Supreme Court dismissed the appeal for lack of jurisdiction. Oregon State Elks Ass'n v. Falkenstein, ___ U.S. ___ (1973). The Department of Revenue has not appealed the district court judgment.

72. See text accompanying notes 83-99 *infra*.

73. Griffin v. County School Bd., 377 U.S. 218, 232 (1964); *see* text accompanying note 10 *supra*.

chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ."[74]

The estate and gift taxes allow similar deductions.[75] Much of the law interpreting the income tax deduction is equally applicable to the estate and gift tax law, but this Note will consider only the income tax deduction. The purposes enumerated by the statute are disjunctive; the ambiguity of each of the purposes varies, with the charitable purpose clearly being the most vague. The relationship of the purposes to each other may be interpreted in two ways. First, the terms can be construed *noscitur a sociis*, by which interpretation each term gives color and meaning to every other term. By this interpretation, contribution to an "educational" purpose is not deductible unless the purpose is also "charitable." Practically every writer considering the applicability of the deduction to segregated academies has interpreted the statute in this manner. On the other hand, the statutory purposes can be interpreted under the maxim *expressio unius est exclusio alterius*. Under such an interpretation, contributions to an "educational" purpose would be deductible even though no "charitable" purpose is served. Practically no writer has chosen to interpret the statute in this fashion. Because the argument most frequently made against the deduction for contributions to segregated academies is that they are not charitable, the importance of the difference in the two methods of statutory interpretation is obvious. Actually, however, contributions to such schools should not be deductible under either interpretation.

B. The Significance of the Federal Tax Benefit

Segregated private schools have benefited to some extent by receiving donations for which the contributors received tax deductions, but there is controversy about the significance of the benefit. An Auburn University researcher studying Alabama private academies found that donations furnish only an insignificant portion of the operating expenses of such schools; tuition provides 85 percent of operating costs, school-sponsored activities provide six percent, and donations provide eight percent.[76] On the other hand, testimony by private school officials shows that donations are very important in the capitalization of schools.[77] The

74. INT. REV. CODE of 1954, § 170(c). Section 501 gives the institution receiving the gifts a tax exemption. Because private schools rarely make a profit, the exemption is significant only for its correlation to the donor's deduction privilege.

75. *Id.* at §§ 2055, 2522.

76. Birmingham News, Aug. 27, 1970, at 2.

77. *See* Green v. Kennedy, 309 F. Supp. 1127, 1135 (D.D.C.), *appeal dismissed*, Cannon v. Green, 398 U.S. 956 (1970), *and* Coit v. Green, 400 U.S. 986 (1971).

availability of the charitable deduction may move wealthy persons to make contributions, but the availability of the standard deduction means that the median income person making small contributions does not value the deductibility of his contribution. Perhaps the best indication of the importance of the federal tax benefit to white academies is that after the benefit has been lost, schools have sued to regain it.[78]

C. *The Evolution of Internal Revenue Service Policy*[79]

Although the nation always has had segregated private schools in all levels of education, it was not until segregated southern academies began to thrive that it became important for the Internal Revenue Service to determine whether such schools qualified for benefits under sections 170 and 501. From 1965 to 1967, the IRS declared a freeze on the processing of applications for section 501 exemptions while it reviewed the legal issues involved. From 1967 to 1970, the Service denied exemptions under section 501 and deductions under section 170 only if the school involved operated with a discriminatory policy and its involvement with local government made its operation unconstitutional. Under this policy, there had to be state involvement in the school that constituted state action. Further, the Service accepted as prima facie proof of a nondiscriminatory policy statements published by the schools; no investigation was made into the validity of the claim of nondiscrimination.[80] In the face of suit in 1970, the IRS was involved in political wrangling with the White House, the Departments of Justice and Health, Education, and Welfare, and southern Republicans when the Service attempted to reformulate its segregated academy policy.[81] The Service eventually reformulated its policy to require educational institutions seeking tax benefits to be charitable in the common-law sense; the school could not discriminate. The Service dropped the state action requirement. This policy prevails today, though the IRS is still reluctant to make independent investigations to substantiate school claims of nondiscrimination. Very recently, the IRS has announced that admission of minority students alone will not necessarily qualify schools for tax privileges; additionally, the school must publicize its nondiscriminatory policy thoroughly among all racial segments of the community

78. *E.g.*, Crenshaw County Private School Foundation v. Connally, 343 F. Supp. 495 (M.D. Ala. 1972). The Foundation failed to regain its tax benefits.

79. Except where otherwise noted, the data in this section is extracted from the texts of Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), and Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

80. Washington Post, July 11, 1970, at A1.

81. Washington Post, July 6, 1970, at A19.

that it serves.[82] This recent statement appears directed toward private colleges and traditional preparatory schools, however, and its significance for recent vintage segregated academies is not great.

One defect in the IRS policy has been the ease with which schools have been able to receive tax benefits by merely stating that they are nondiscriminatory. Statements published in local newspapers usually have been sufficient to prove that a school is not discriminatory, although the facts may have shown the contrary. The IRS is in an awkward position for which it is ill equipped: it must attempt to enforce broad social policy on recalcitrant segregationist taxpayers, although it is structured to operate on the premise that American taxpayers obey the laws and tell the truth. Another defcct is the lack of retroactivity of revocation of exemptions and deductions. This defect means that no tax is paid on many significant capital contributions because the school is considered eligible at the time of the donation and the IRS only later establishes that the school is not eligible. This appears to be an inevitable but unfortunate result of the method of administration of our tax laws.

D. Court Interpretation of the Validity of Federal Tax Benefits to Discriminatory Academies

The ease with which the IRS before 1970 extended federal tax benefits led to a taxpayers' suit challenging the validity of benefits to private white academies in Mississippi. Plaintiffs in *Green v. Kennedy*[83] contended that certain statutory requirements under sections 170 and 501 were not met, that the benefits violated section 2000(d) of the Civil Rights Act of 1964, and that the benefits were unconstitutional because they supported private white schools that subverted the rights of blacks to integrated public education. Because the prcliminary question in *Green* was limited to the propriety of issuing a preliminary injunction against conferring the benefits, the three-judge panel in its initial opinion considered only the jurisdictional issuc: whether a colorable constitutional claim could be based upon the extension of the statutory exemption to segregated private schools that operate without state involvement. The court adopted the *Coffey v. State Educational Finance Commission*[84] holding that such schools in Mississippi operated as alternatives to unitary public schools and found substantial proof that federal tax benefits were very important to both the capitalization and

82. Wall Street J., Dec. 13, 1972, at 1, col. 5.
83. 309 F. Supp. 1127 (D.D.C. 1970).
84. 296 F. Supp. 1389 (S.D. Miss. 1969). *See* text accompanying notes 28-30 *supra*.

operational stages of the Mississippi schools. Acknowledging that Congress had not conferred the tax benefits with an intent to foster discrimination, the court considered the lack of intent irrelevant: "The issue of purpose may be decisive in demonstrating unconstitutionality when a government purpose to foster segregation is affirmatively shown, but the lack of segregative purpose on the part of the Government does not avoid the constitutional issue if the Government action materially supports a program of school segregation."[85] The court found that tax benefits provided indirect, yet very material, support. *Green I* thus rejected the IRS position, finding that federal tax benefits were unconstitutional even though there was no state involvement in the operation of the schools. The court held that because the federal government was under a duty to promote unitary schools under *Bolling v. Sharpe*,[86] "[it] is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual school system that the state formerly supported."[87] The court enunciated a standard for determining the constitutionality of benefits that is more than slightly reminiscent of standards employed in the tuition grant cases: "[T]he validity of tax exemption and deductibility of contributions are to be determined on the basis of (1) their practical tendency to increase the incidence of private discrimination, and (2) whether the discrimination so augmented frustrates the exercise of fundamental liberties."[88] Because the court found that tax benefits increase the incidence of private schools, and because such schools in Mississippi tended to undermine the right of blacks to integrated public education, the court temporarily enjoined the IRS from conferring such benefits until it had "affirmatively" determined that the applying school was not part of a system of private white schools operated as an alternative to desegregated public schools.

The *Green I* litigation continued in *Green v. Connally (Green II)*,[89] in which the court reached the merits of the controversy. The panel acknowledged that the IRS had changed its policy so that private schools that discriminated no longer had favored tax status, but concluded that the issue was not moot because of the instability of administrative rulings. The court then construed the statute *noscitur a sociis* and

85. 309 F. Supp. at 1136.

86. 347 U.S. 497 (1954) (declaring racial segregation in the public schools of the District of Columbia violative of fifth amendment due process).

87. 309 F. Supp. at 1137.

88. *Id.* at 1136.

89. 330 F. Supp.1150 (D.D.C. 1971).

found that institutions operated for educational purposes were not exempt unless they were charitable. The court analogized to the law of charitable trusts to determine whether racially discriminatory trusts were charitable. It concluded that such trusts at one time were considered charitable, but noted that there is great doubt whether such trusts qualify as charitable in the modern social situation. The court then turned aside from the common law of trusts: "[I]t is our conclusion that the ultimate criterion for determination whether such schools are eligible under the 'charitable' organization provisions of the Code rests not on a common law referent but on that [of] Federal policy."[90] Noting that there is a limitation on deductions for business expenses under section 162, in that business expenses incurred in violation of public policy are not deductible, the court ruled that this public policy limitation on tax benefits applies a fortiori in the charitable deduction context. The court pointed to various statutes and court decisions as proof of the stringent federal policy against racial segregation in education and concluded that

> [t]he Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today, they can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors.[91]

The court noted that its statutory decision avoided the necessity of the constitutional interpretation involved in *Green I*. The decision applied to "all private schools practicing racial discrimination"; to that extent, the *Green II* decision is broader than *Green I*, which applied only to such schools operated as alternatives to integrated public schools. Because compliance by Mississippi private schools was doubtful, the court enjoined the IRS from granting exemptions in Mississippi until the schools had (1) adopted and meaningfully publicized racially nondiscriminatory policies and (2) furnished information on the composition of the student body, faculty and staff; on applicants for admission; and on incorporators, founders, and donors and any announced identification of those persons with organizations having as a primary objective the maintenance of segregated schools. The *Green* results met with approval in the law reviews, but there was much criticism of the rationales employed.[92]

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90. *Id.* at 1161.

91. *Id.* at 1164.

92. *Compare* Note, *Civil Rights—Segregation—Federal Income Tax: Exemptions and Deductions—The Validity of Tax Benefits to Private Segregated Schools*, 68 MICH. L. REV. 1410 (1970), *with* Note, *Federal Taxation—Charities—Taxpayers May Contest IRS Allowance of Exempt Status, and Organizations Whose Activities Violate Public Policy May Not Be Accorded*

E. Other Rationales Condemning the Federal Tax Benefit

The *Green II* decision, which is hardly a model of clarity, apparently adopted a frustration-of-policy rationale. Other rationales could deprive segregated educational institutions of tax benefits. One approach would be the creation of a federal tax definition of charity; *Green II* veered away from the possible adoption of this approach when it dropped the analogy to the law of trusts. A federal definition of charity need not coincide with state law definitions of charity, however. Courts could develop a federal statutory common law of charity under section 170 in the same manner in which they have defined "capital asset" under section 1221.[93] One factor to consider in determining whether an activity is charitable for federal law purposes is whether it frustrates federal policy. This approach is valid only if "educational" is construed *noscitur a sociis*; there are, however, at least two methods that will achieve the same result even if "educational" is construed *expressio unius est exclusio alterius*.

One method is based upon the principle that all section 501 organizations must serve a public purpose.[94] If the primary beneficiaries of an organization's activities are the persons who contribute to the organization, then the organization serves a private rather than a public interest.[95] Because private segregated academies usually are financed by contributions from parents whose children are educated by the school, the contribution serves only a private purpose.

A second method is indicated by the statutory proposition that organizations may receive tax benefits only if they are "organized and operated *exclusively* for . . . educational purposes."[96] The existence of

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Favored Tax Treatment, 50 TEXAS L. REV. 544 (1972). Because the statutory arguments are so powerful, the *Michigan* note advocates restraint in reaching constitutonal questions. The *Texas* note urges that the decision should be based on constitutional grounds, rather than on "bizarre contortions of business deduction doctrine." The *Texas* note has blistering criticism for the application of the frustration of policy doctrine outside the business deduction sections in which the doctrinc was created. The author apparently ignores the fact that much tax policy necessarily must be developed around the business deduction sections because the Code strictly limits nonbusiness deductions. To limit the frustration of policy exception to business deductions seems unwise.

93. *See, e.g.*, Corn Prods. Ref. Co. v. Commissioner, 350 U.S. 46 (1955) (corn futures held by corn products manufacturing concern were not capital assets because they were used as an integral part of business operations); Hort v. Commissioner, 313 U.S. 28 (1941) (money received by lessor for cancellation of long-term lease was not a capital asset because it was a substitute for ordinary rental income).

94. Treas. Reg. § 1.501(c)(3)—1(d)(1)(ii) (1959).

95. *See* Weil, *Tax Exemptions for Racial Discrimination in Education*, 23 TAX L. REV. 399, 407-17 (1968). *Compare* Isable Peters, 21 T.C. 55 (1953), *with* Benedict Ginsburg, 46 T.C. 47 (1966).

96. INT. REV. CODE OF 1954, § 170(c)(2)(B) (emphasis added).

a single substantial purpose not mentioned in the statute should deprive the organization of favored status. Certainly one purpose for the organization and operation of private white academies is the avoidance of integrated education; because this purpose is hardly de minimis, its existence should be sufficient to deprive such schools of their favored status.[97]

F. The Proposed Private School Tuition Federal Tax Credit

President Nixon has stated his support of a plan by which parents whose children attend nonpublic schools could receive a federal income tax credit for the tuition expenses they incur.[98] If the plan can be drafted to withstand first amendment attack, it probably would be available to parents whose children attend nonreligious segregated academies. The fact that such schools are ineligible for section 501 benefits would not deprive parents of the credit; such a plan would improve the financial feasibility of private white schools vastly and could swell their number even further. Although the President apparently feels that such a plan would withstand first amendment challenge because of *Walz v. Tax Commission*,[99] that is far from clear.

IV. THE FUTURE OF PRIVATE WHITE ACADEMIES

A. The Future of Private Academies Under Present Conditions

A study of Alabama private academies led researchers to conclude in 1971 that the private school movement was quite strong.[100] Researchers found no evidence to suggest that parents were greatly concerned about the deficiencies of private education and concluded that the movement would continue to grow unless economic conditions worsened dramatically or other factors became significant. Other observers have refused such generalization, feeling that the future of the private academies depends on the nature of the community they serve. Private schools in rural areas face a bleaker future than do those in metropolitan areas,

97. Allen, *The Tax-Exempt Status of Segregated Schools*, 24 TAX L. REV. 409, 424-29 (1969).

98. Nashville Tennessean, Oct. 26, 1972, at 1, col. 4.

99. 397 U.S. 664 (1970). Although the Court sustained the property tax exemption in *Walz* because of the absence of "entanglement," the existence of such exemptions for over 2 centuries, without tending to establish religion, clearly influenced the Court. Property tax exemptions are traditional; the proposed income tax credit is not. The Court should be reluctant to allow the creation of new tactics that indirectly but significantly support religion.

100. Walden & Cleveland, *The South's New Segregation Academies*, PHI DELTA KAPPA, December, 1971, at 234-39. This is the best concise source of information on the social impact of private academies.

for there are fewer persons able to afford the continued cost of private education.[101] It is likely that private schools in counties in which the white proportion of the population is high also will face difficulty, for it is more likely that whites will return to public schools in such counties than in counties with predominantly black public schools.

B. Integration of Private Schools by Court Order

At least one court has considered the possibility of ordering the integration of private white schools: "[I]f the state persists in its efforts dedicated to this end [separate white schools], and its involvement with the private school system continues to be 'significant,' then this 'private' system will have become a state actor within the meaning of the Fourteenth Amendment and will need to be brought under this Court's state-wide desegregation order."[102] The genuineness of the prospects for such an order depends on what state involvement the courts consider to be significant.

A review of the private school cases reveals three important characteristics. First, they have involved in almost every instance the enjoining of state assistance to private discrimination. Although there may have been sufficient state involvement to order the desegregation of private schools, the cases reveal notable reluctance to interfere with the discrimination itself. This was true even in the tuition grant cases, in which plaintiffs showed the clearest state involvement. It is true that in the public property cases courts enjoined the discrimination itself, but those cases are subject to circumvention by merely shifting the site of the discriminatory school to property which has never been public. Thus, the courts have consistently permitted the discrimination, acting only to assure that the discrimination is private, and enjoining only the state involvement. Secondly, the private school cases have shown a decreasing amount of state involvement in the private discrimination. As courts battered down early methods of private school aid, states resorted to less significant methods of assistance. Thirdly, the cases have shown decreasing amount of segregative purpose as inspiration of the assistance. The most recent cases, *Gilmore* and *Norwood*, concern reasonable practices administered in a nondiscriminatory manner. It is true that the purpose of the law is no longer as important as it was after *Poindexter*.

101. Some proof of the importance of the rural-urban dichotomy exists in the small Louisiana town of Port Allen. White school enrollment dropped one year during a boycott from 2,300 to 400; the next year, white enrollment returned to 1,100 and 5 of 7 private schools closed. Charleston News & Courier, July 12, 1972, at 12.

102. Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 478 (M.D. Ala. 1967).

Gilmore and *Tunica County* rejected the importance of purpose, and only *Norwood* indicated that it continued to be significant. The Supreme Court itself has said in the racial discrimination context that "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect."[103] Nevertheless, the purpose of a law is still of some significance in determining its constitutionality, as the court in *Green I* indicated. [104] Yet, given judicial reluctance to enjoin the private discrimination itself, the decreasing importance of the state aid, and the decreased importance of segregative motivation, it appears that before courts will order private academy desegregation they either will have to adopt less stringent criteria for state action or a basically different approach to state action. Authority for both approaches exists.

The Supreme Court remarked in *Cooper v. Aaron* that "[s]tate support of segregated schools through *any* arrangement, management, funds, or property . . ."[105] violates equal protection. Courts have found state involvement in activity more remote to the private discrimination than that involved in the private school cases. In the long Girard College trust litigation, the Third Circuit found that state action existed in such activities as supervision by public officials, rendering of services, provision of tax exemption, and allowance of perpetual legal existence.[106] Private schools usually are involved with the state by perpetual corporate existence (though not all schools are incorporated), by property tax exemption, and by at least limited educational supervision. The *Wright* decision indicated that a court may find state action sufficient to compel private school desegregation in credit terms favorable to the school, since such terms provide an ongoing relationship of the state to the school's discrimination.[107] The state action concept is still viable, but the past century has witnessed a dramatic recharacterization of the activity necessary to constitute state action. If this process continues, courts may find the present slight amount of state involvement in most private schools sufficient state action to bring the otherwise private discrimination within the coverage of the fourteenth amendment.

There also exist several conceptually different theories of state action that could bring private schools within the scope of the fourteenth

103. Wright v. Council of the City of Emporia, 407 U.S. 451, 462 (1972).

104. *See* text accompanying note 85 *supra*. *See also* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207-12 (1970).

105. 358 U.S. 1, 19 (1958) (emphasis added).

106. Commonwealth v. Brown, 392 F.2d 120, 121 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

107. 441 F.2d 447, 450 (5th Cir. 1971).

amendment, regardless of how fully private the schools are.[108] The most readily applicable theory is one under which any organization serving a public function is subject to the equal protection clause because it discharges a state responsibility that otherwise the state would have to discharge. State involvement of any kind is not required, because the function served by the organization is a state function. Education of the citizens of the state unquestionably is an essentially public function, regardless of whether public or private schools provide the education. Such a theory would apply to private academies, making their discrimination unconstitutional under the equal protection clause. Because the breadth of the public function doctrine is so great, however, application of the doctrine should be limited to extreme situations, as when private schools actually appear to be destroying an integrated public educational system.[109] Unless the Supreme Court makes use of the public function or some other innovative doctrine more frequently than it has in the past, however, lower courts probably will not apply such innovations in the private school context.

V. CONCLUSION

Federal courts have endeavored to assure that private discrimination practiced by schools is truly private. In this endeavor, courts have enjoined any significant state involvement as violative of the equal protection clause. The courts have shown no inclination to prohibit the private discrimination itself, however, and it appears unlikely that courts in the near future will take the innovative step of barring discrimination practiced by private white academies.

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108. Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922, 929-33 (1968).

109. Such an extreme situation was presented in Boyd v. Pointe Coupee Parish School Bd., 332 F. Supp. 994 (E.D. La. 1971), although that decision denied black plaintiffs any relief. The judge stated the complete resegregation of the public schools was "an inevitable result of forced integration of schools." *Id.* at 995. This commits the fallacy of *post hoc, ergo propter hoc* and ignores the more deeply rooted underlying causes of public school resegregation.