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Taxation—DEDUCTIBILITY OF CONTRIBUTIONS TO SEGREGATED PRIVATE SCHOOLS—*Green v. Kennedy*

*Brown v. Board of Education*<sup>1</sup> set the stage for an extensive series of activities designed to circumvent the Court's intention to abolish segregated public education.<sup>2</sup> However legally futile many of these endeavors have become,<sup>3</sup> there remains one instrument of education over which the fourteenth amendment is powerless: the private school. Since tuition alone inevitably fails to generate sufficient revenue to fund the necessary expenses of construction and operation, private charitable contributions are needed, and are encouraged by their deductibility for federal income,<sup>4</sup> as well as estate<sup>5</sup> and gift<sup>6</sup> tax purposes.

Recently, the constitutionality of a tax-exempt status, necessary for the deductibility of contributions, for the Mississippi private school system was challenged. Since 1967, the Internal Revenue Service has denied tax-exempt status to all schools which are affiliated with a political subdivision to a degree found by the courts to constitute state action.<sup>7</sup> *Green v. Kennedy*<sup>8</sup> enjoined the I.R.S. from granting exempt status to private Mississippi schools established to avoid integration. The court decided that the federal government was not constitutionally free to frustrate, by a tax benefit to the schools and to the donors, the only permissible state policy in favor of an integrated public school system.<sup>9</sup> This decision was predicated upon the finding that the state had participated extensively in the establishment of the private system of schools. To the *Green* court, this *past* state action rendered tax benefits unconstitutional.

The state action concept extends the scope of the fourteenth amendment to all activities, however private, in which the government is significantly involved. This includes state, federal or local government

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> See generally *Poindexter v. Louisiana Financial Asst. Comm.*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968).

<sup>3</sup> *Id.*

<sup>4</sup> INT. REV. CODE of 1954, § 170(c).

<sup>5</sup> INT. REV. CODE of 1954, § 2055(a).

<sup>6</sup> INT. REV. CODE of 1954, § 2522(a).

<sup>7</sup> Allen, *The Tax-Exempt Status of Segregated Schools*, 24 TAX. L. REV. 409, 413 (1969).

<sup>8</sup> 309 F. Supp. 1127 (D.D.C. 1970).

<sup>9</sup> *Id.* at 1137.

at all levels. The type of involvement necessary to invoke the amendment was broadly stated shortly after its passage to include state action of every kind which impairs the privileges or immunities of, or denies to, any citizen due process and the equal protection of the law.<sup>10</sup> This concept has been variously interpreted by the courts, to include the operation of a private restaurant in a leased part of a public structure<sup>11</sup> and the action of a state court in enforcing a private discriminatory covenant in a deed,<sup>12</sup> as well as other activities connected to some level of government by any tenuous link.<sup>13</sup> In these situations, however, the state action which triggered the amendment was present action, not past.<sup>14</sup> The employment of past action as sufficient to invoke the amendment results in unequal application when present action is missing.<sup>15</sup> Yet absent some connection between the activity and the government, the fourteenth amendment does not apply.<sup>16</sup> Hence, it is powerless to prohibit purely private discrimination.<sup>17</sup>

The *Green* court's declaration of unconstitutionality of a tax exemption poses an obvious threat to the future of privately endowed educational institutions practicing racial segregation. Although it is unclear whether the *Green* decision turned on past state action, this is

<sup>10</sup> Civil Rights Cases, 109 U.S. 3 (1883).

<sup>11</sup> *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715 (1961).

<sup>12</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>13</sup> See *Evans v. Newton*, 382 U.S. 296 (1966) (operation of a park left in trust for the use of white residents was within fourteenth amendment although controlled by private trustees); *Simkins v. Moses H. Cone Mem. Hosp.*, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964) (hospital accepting federal funds to aid expansion); *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962) (sale of municipal golf course to private party with reversion unless used for golfing rendered facility subject to fourteenth amendment); *Statom v. Board of Comm'rs.*, 233 Md. 57, 195 A.2d 41 (1963) (city furnished office space free to private boys' club and allowed members access to school playgrounds for recreational purposes).

<sup>14</sup> See cases cited note 13, *supra*.

<sup>15</sup> Given two identical situations, one in which the state had been substantially involved previously but had divorced itself prior to the commencement of the action to invoke the amendment, and the other in which state action had never been present, the *Green* rationale suggests application of the fourteenth amendment in the former, but not the latter.

<sup>16</sup> "[A]ction inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

<sup>17</sup> "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it." *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 722 (1961).

immaterial to those educational institutions, located predominantly in the South, where past state action preceded much of the presently private activity.<sup>18</sup> *Green* found an analogy between the often-litigated state tuition grant practice,<sup>19</sup> and the federal tax exemption, declaring the difference to be solely one of degree.<sup>20</sup> Although the tuition grant practice in aid of segregation has been declared unconstitutional in many of its myriad forms,<sup>21</sup> a similar declaration of tax exemptions has been rejected where tax benefits alone are urged to constitute state action.<sup>22</sup> This is because such declaration would require the extension of the fourteenth amendment to private individuals and possibly to non-educational segregated institutions, including all charitable activity, previously outside its scope.<sup>23</sup>

Implicit in the *Green* rationale is the influence of a public policy opposed to educational segregation. If policy considerations are involved, the court should not overlook the policy of encouraging charitable activities through the stimulation of private benevolence,<sup>24</sup> which has its roots extending deep into our legal system.<sup>25</sup> The restriction of private freedom to discriminate under the guise of unconstitutionality

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<sup>18</sup> See generally *Poindexter v. Louisiana Financial Asst. Comm.*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968).

<sup>19</sup> See generally *Griffin v. Board of Supervisors*, 339 F.2d 486 (4th Cir. 1964); *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969); *Brown v. State Bd. of Educ.*, 296 F. Supp. 199 (D.S.C. 1968), *aff'd per curiam*, 393 U.S. 222 (1968); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

<sup>20</sup> *Green v. Kennedy*, 309 F. Supp. 1127, 1134 (D.D.C. 1970).

<sup>21</sup> See cases cited note 19, *supra*.

<sup>22</sup> "While a tax exemption, by itself, may not impose upon the recipient the restrictions of the Fourteenth Amendment . . . [i]t may attain significance when viewed in combination with other attendant state involvements." *Eaton v. Grubbs*, 329 F.2d 710, 713 (4th Cir. 1964).

<sup>23</sup> "This court . . . is unable to hold that a simple tax benefit evokes state action. Were that the law then every citizen of the United States and every legal creature would be within the proscription of the Fourteenth Amendment. There is not a scintilla of legal precedent in that direction." *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674, 685 (E.D. La. 1962).

<sup>24</sup> This policy is encouraged by the relief provided to the public treasury by private contributions. See *Milward v. Paschen*, 16 Ill.2d 302, 157 N.E.2d 1 (1959).

The exemption of income devoted to charity is due to public policy motives, and should not be narrowly construed. *Helvering v. Bliss*, 293 U.S. 144 (1934).

<sup>25</sup> Charitable trusts were accorded favorable treatment in England prior to the fifteenth century, and remain favored in the law. *Vidal v. Girard's Exec's.*, 43 U.S. (2 How.) 127 (1844); 2 A. SCOTT, SCOTT ON TRUSTS, § 348.2 (3d ed. 1967).

results in the impairment of freedom for all races,<sup>26</sup> and constitutes an unwarranted deviation from judicial precedent. The doctrine of *stare decisis* should not be abandoned for social expediency.<sup>27</sup> Several hundred years' experience indicates the value of charitable activities to our society, whereas the value of educational racial integration is open to serious doubt, and where an irreconcilable conflict exists between these two policies, integration must yield.

C. K. T.

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<sup>26</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."); *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) ("The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals").

"Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental influence. This liberty would be overridden, in the name of equality, if the structures of the [Fourteenth] Amendment were applied to governmental and private action without distinction." *Peterson v. Greenville*, 373 U.S. 244, 250 (1963) (dissenting opinion).

<sup>27</sup> "Negro citizens . . . are entitled to fair and impartial treatment. They are not entitled to special treatment. To emasculate ancient rules which have guided the Judiciary through its long history solely for the purpose of achieving a particular result, is to set the judicial ship afloat in troublesome waters without chart, compass or rudder." *Hampton v. City of Jacksonville*, 304 F.2d 320, 331 (5th Cir. 1962), *cert. denied*, 371 U.S. 911 (1962) (dissenting opinion).