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State Enforcement of Racially Discriminatory Charitable Trusts

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STATE ENFORCEMENT OF RACIALLY DISCRIMINATORY CHARITABLE TRUSTS AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

I. Introduction

In numerous cases decided under the equal protection clause, the United States Supreme Court has stated that private discrimination is not constitutionally impermissible. Typical is the language in *Shelley v. Kraemer*[1] that, "the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The purpose of this note is to examine the charitable trust, a private means of transferring wealth which is pervaded by public interest; and, more particularly, to consider whether the fourteenth amendment may be used successfully to regulate the purpose of the charitable donor because of the involment of state enforcement of charitable trusts.[2] There has been no Supreme Court decision bearing directly on this point; however, there are several cases in closely related areas from which analogies may be drawn in an attempt to provide some measure of predictability with regard to this question.

II. State Means of Enforcement

Enforcement of charitable trusts varies in method and extent from state to state and is largely regulated by statutes. However, some state courts have held that the right of enforcement by the state, through action of its attorney general, was accorded by common law.[3] In South Carolina, the Attorney General's rights

1. 334 U.S. 1, 13 (1948). The Court went on to find impermissible state involvement, however, for reasons which will be discussed in a later section of this note.

2. The scope of this note will not include a consideration of state provided tax exemptions and other state involvement in charitable trusts except insofar as common principles involved may overlap.

3. *See* Note, *The Attorney General and the Charitable Trust Act—Wills, Contest and Construction,* 14 Clev. Mar. L. Rev. 194 (1965) and Note, *The Enforcement of Charitable Trusts,* 18 Syracuse L. Rev. 613 (1967). One state court (Kentucky) in *Commonwealth ex rel. Ferguson v. Gardner,* 327 S.W.2d 947 (Ky. 1959), held that the attorney general had no right, in absence of statute, to intervene in a will contest action. For a study of the involvement of state courts' powers to construe and enforce charitable trusts, *see* Note, *The Enforcement of Charitable Trusts In America: A History of Evolving Social Attitudes,* 54 Va. L. Rev. 436 (1968).

and duties to represent the public interest in charitable trusts are governed by statute. S. C. CODE ANN. § 1-240 (1962) provides that "[t]he Attorney General shall enforce the due application of funds given . . . to public charities within the State, [and] prevent breaches of trust in the administration thereof . . . ."[4] More specific duties are stated in S. C. CODE ANN. § 67-83 (1962) which demands that:

> [u]pon the failure of the trustees to discharge their duties under this chapter, or when it appears that trustees are not properly discharging the duties imposed upon them by the trust, the Attorney General shall bring an action to compel their compliance with this chapter or to compel them to discharge the duties imposed upon them by trust, as the case may be.

It would seem that the Attorney General must be a party in every proceeding affecting the public's interest in a charitable trust before a binding adjudication can be reached adverse to the public interest.[5]

III. STATE INVOLVEMENT AND THE FOURTEENTH AMENDMENT

In considering whether or not the state's enforcement of charitable trusts which have discriminatory provisions provides a sufficient amount of state action or involvement to submit the trust to the dictates of the equal protection clause it is necessary to examine developments by the Supreme Court in related areas and to draw analogies where they may be found, for, as stated above, the precise question at hand has not been squarely dealt with by the Court. As will be seen, in all the Supreme Court cases dealing with discriminatory charitable trusts there have been one or more added elements of state involvement beyond the mere duty of the Attorney General to enforce. Generally, the relevant cases can be divided into two categories, those evidencing direct or official involvement and those evidencing judicial involvement.

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4. Furman University v. McLeod, 238 S.C. 475, 120 S.E.2d 865 (1961) interpreted S.C. CODE ANN. § 1-240 (1952), of which the present statute is a reinactment, to mean that the Attorney General is a proper party in the enforcement of charitable trusts to protect the interests of the public at large. In *Furman* there was a suit against the Attorney General as the named defendant to determine the effect of language in a deed in the school's chain of title.

5. *See, e.g.*, In Re Pruver's Estate, 390 Pa. 529, 136 A.2d 107 (1957).

A. Direct or Official Involvement

Many of the equal protection cases decided in trust and analogous areas involve some form of direct participation by the state, and, of course, here the Court has had the least amount of trouble in applying the fourteenth amendment. In *Pennsylvania v. Board of Directors of City Trusts*,[6] also known as the *Girard* case, Steven Girard bequeathed a fund in trust for "poor white male orphans" and named the City of Philadelphia as trustee. Pursuant to legislative enactment,[7] the trust was administered by the Board of Directors of City Trusts of the City of Philadelphia, an agency of the State of Pennsylvania. The Court, in a decision, held that the refusal by the Board to admit Negro applicants was discrimination prohibited by the fourteenth amendment.[8] While the Court did not elaborate on the rationale of its decision[9] it can fairly be said that in *Girard* an agency of the state had adopted a policy of discrimination in conformity with the dictates of the will of Stephen Girard.

A state was also involved in the administration of a charitable trust in *Evans v. Newton*.[10] Here United States Senator Augustus O. Bacon devised a tract of land to the Mayor and Council of the City of Macon, Georgia, for use as a park for white people only. When it became evident to the city that it could not continue to operate the park on a segregated basis it had a Georgia Court appoint private individuals as trustees in place of the city, presumably so that discrimination in the park could continue. Justice Douglas, writing for the majority, said that the park had been an integral part of the City of Macon's activities and that "[t]he momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees."[11] Many charitable trusts are also involved with the activities of cities since they provide for schools, hospitals, and other facilities which cities normally furnish; however, the *Evans* Court's opinion seems to be focused upon the fact that there was a firmly established tradition of

6. 353 U.S. 230 (1957).
7. PA. LAWS No. 1258, p. 1276 § 1 (1869), now codified as PA. STAT. ANN. tit. 53, § 16365 (1957).
8. The Court remanded the case to the state court for further proceedings. These proceedings will be examined in the next section under *Judicial Involvement.*
9. The opinion of the Court was only a page and a half long in the Supreme Court Reporter, and the only discrimination case cited was *Brown v. Board of Education*, 347 U.S. 483 (1954).
10. 382 U.S. 296 (1966).
11. *Id.* at 301.

municipal control rather than upon the fact that parks perform a public function.

In providing criteria for predicting the outcome of closer cases such as ones in which the state's involvement is minimal, the Court's dicta is perhaps more interesting than its holding. Justice Douglas said, "[i]f a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered."[12] While Justice Douglas clearly wishes to reserve decision on this point, his words strongly suggest that the fact that Senator Bacon *voluntarily* involved the state in his discriminatory scheme may have been an important factor without which the fourteenth amendment dictates may not have been required. This idea was also seen in *Kerr v. Enoch Pratt Free Library*[13] where the donor, Enoch Pratt, built a library and gave it to the City of Baltimore under the operation of private trustees. The court said that while the donor could have created a private corporation to effectuate his purpose, he instead chose to involve the City of Baltimore in his scheme and thereby subjected it to the confinements of the fourteenth amendment.

While in both of the above cases there was pervasive state involvement, the concept of voluntariness may well be relevant to the case of minimal state involvement. In the above cases the donor did an affirmative act to involve the state. Where the only state involvement is through the duty of the attorney general to enforce the trust there is no call made by the donor upon the state to become involved. Here the state would become involved only because of the importance of charitable trusts to the public. This factor, in addition to the minimal state connection involved, might provide a rationale for a holding that the equal protection clause does not prohibit discrimination in all charitable trusts.

In *Evans v. Newton* there was another factor which the Court did not find it necessary to consider but which may lead to a finding of state action if considered by the Court. This factor is state encouragement of the coercion of discrimination. In *Evans v. Newton* there was a state statute[14] which permitted any

12. *Id.* at 300.
13. 149 F.2d 212 (4th Cir. 1945).
14. Acts of 1905, p. 117 (now codified in GA. CODE ANN. § 69-504 (1967)).

person to grant land to a municipal corporation in trust for the use of the public on a segregated basis. It was argued that this statute had a coercive effect and implicated Georgia in racial discrimination because of the statute's clarification of a previously uncertain area of Georgia trust law.

State encouragement has been dealt with by the Supreme Court in other areas of racial discrimination. In *Peterson v. City of Greenville*[15] there was a city ordinance requiring separate eating facilities for whites and Negroes, and several Negroes were arrested upon complaint of the manager of the Greenville, South Carolina, S. H. Kress store for violating the trespass laws of the state. The Court refused to hear the contention of the state that the manager would have discriminated without the existence of the ordinance because it found that the state had become significantly involved and thus had removed the decision of whether or not to discriminate from the sphere of private choice.[16] Slightly more subtle coercion was involved in *Lombard v. Louisiana*[17] where the Court found that the discrimination practiced by managers of a McCrory Five and Ten Cent Store conformed to state policy and practice and was influenced by orders of the city police chief. State coercion was also found in *Robinson v. Florida*[18] where the Court ruled that Florida Board of Health regulations providing for separate bathroom facilities in integrated eating facilities effectively discouraged integration of such facilities and thus constituted unconstitutional state involvement.

It would seem that if a racially discriminatory charitable trust is attacked on the basis of the state's duty to enforce the trust one of the main arguments advanced would be that such a state statute or policy influenced or encouraged the discrimination. Indeed, in his concurring opinion[19] in *Evans v. Newton*, Justice White would have based the decision of the Court on the involvement of the state through its statute permitting discriminatory charitable trusts; and Justice Brennan, in his dissent in *Evans v. Abney*,[20] would find that the same Georgia statute was one of the factors requiring a finding of unconstitutional state involvement in the devise of the property for use as a segregated park. The attorney general's involvement differs

15. 373 U.S. 244 (1963).
16. *Id.* at 248.
17. 373 U.S. 267 (1963).
18. 378 U.S. 153 (1964).
19. 282 U.S. at 302.
20. 90 S.Ct. 628, 636 (1970) (dissenting opinion).

in its essential nature from the involvement of the state in *Peterson*, *Lombard*, and *Robinson*, and even from the involvement in *Evans v. Newton*. The attorney general's involvement results from purely neutral state statutes intended to protect the public interest in charitable trusts. The statutes involved neither mention nor affirmatively encourage discrimination. They merely provide for the attorney general to enforce any and every charitable trusts regardless of its terms. This neutrality of the attorney general's involvement could very well be the decisive factor in a Supreme Court decision on the issue raised in this note.

Perhaps a better idea of the Court's view of state involvement can be derived from an examination of *Griffin v. Maryland*[21] where the trespass conviction of five Negroes was reversed. Here a private amusement park operator hired a security guard with specific instructions to refuse to admit Negroes. The operator also had the guard deputized as a sheriff, presumably so that he would have the power to arrest trespassers and troublemakers. The Court held that the state was unconstitutionally involved when its sheriff arrested the Negroes because the sheriff had adopted discrimination as his own policy. The Court was careful to distinguish this situation from the permissible situation in which the police would be called to arrest Negro trespassers because of the discrimination of the owner of the property. The duties of the attorney general would seem to be much more analogous to the situation of the police being called to arrest trespassers than to that of the property owner having a sheriff in his employ with instructions to exclude all Negroes.

Also worthy of consideration is the Court's decision in *Reitman v. Mulkey*.[22] The California legislature between 1959 and 1963 had enacted a series of statutes designed to prohibit racial discrimination in many areas. In 1964 California adopted an amendment to the California Constitution which overturned the previous statutes. The Supreme Court, in a five to four decision, found that the state's repeal of its laws constituted an unconstitutional authorization and encouragement of discrimination. It is very interesting to note that, of the five Justices[23] who constituted the majority, two are no longer members of the

21. 378 U.S. 130 (1964).
22. 387 U.S. 369 (1967).
23. Chief Justice Warren, Justices Douglas, Brennan, Fortas, and White. Of these five, Justices Warren and Fortas are no longer on the Court.

Court, since there was a very strong dissent by four members[24] of the Court, only one of whom is not presently sitting. The dissenting members, represented by Justice Harlan, said that "[a] state enactment, particularly one that is simply permissive of private decision-making rather than coercive . . . should not be struck down by the judiciary under the Equal Protection Clause without persuasive evidence of an invidious purpose or effect."[25] The dissenting members said that the test to be used in cases of private discrimination was, as stated in *Burton v. Wilmington Parking Authority*,[26] "whether the State has become 'a joint participant in the challenged activity, which, on that account, cannot be considered to have been so purely private as to fall without the scope of the Fourteenth Amendment.' "[27] Even if the dissenting opinion does not now represent the opinion of a majority of the Court it would seem that the duty of an attorney general to enforce all charitable trusts would not run afoul of the then majority in *Reitman*.

The concept of neutrality can further be seen through an examination of the cases which will be discussed in the next section involving the states' judicial systems.

B. Judicial Involvement

The question of the effect of judicial involvement in private discrimination is one of the most unsettled areas in the equal protection field. One reason for this is the Supreme Court's decision of *Shelley v. Kraemer*.[28] In *Shelley* a number of landowners had signed an agreement which purported to restrict the sale of land to members of the Caucasian race and which was to bind subsequent purchasers. When one landowner tried to sell his land to a Negro, the others objected, and a suit was brought to enforce the covenant. The Supreme Court, reviewing the state court's enforcement of the agreement, held that the state's judicial involvement violated the equal protection clause. After reiterating the rubric that the fourteenth amendment is limited to ". . . only such action as may fairly be said to be that of the States[,]"[29] the Court said that here the state "made available . . . the full coercive power of government to deny to

24. Justices Harlan, Black, Clark, and Stewart. Justice Clark is not presently on the Court.
25. 387 U.S. at 391.
26. 365 U.S. 715, 725 (1961).
27. 387 U.S. at 392 (dissenting opinion quoting *Burton*).
28. 334 U.S. 1 (1948).
29. *Id.* at 13.

petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."[30]

The expansiveness of the holding and statements of the Court in *Shelley* seem to indicate that state enforcement of discriminatory charitable trusts will be swept into the grasps of the equal protection clause. However, this may not be so. Perhaps because the Court felt itself being drawn into a position which would ban all private discrimination, it has not given any indication of an intention to apply *Shelley* beyond its facts. The *Shelley* Court placed emphasis upon the facts that there were willing purchasers and sellers and that the very right of ownership of property was involved. In several more recent cases it seems that the Court declined the opportunity to expand its position in *Shelley* or perhaps even impliedly overruled it.

In *In re Girard College Trusteeship*[31] the Supreme Court of Pennsylvania was confronted with the Supreme Court's remand of the *Pennsylvania v. Board of Directors of City Trusts*[32] case. Upon remand, the Pennsylvania court in turn remanded the case to the Pennsylvania Orphans' Court which removed the Board of City Trusts and substituted thirteen private citizens who had no connection with the state government. The Pennsylvania Supreme Court upheld the action of the Orphans' Court against the attack that this constituted state action and thereby violated the equal protection clause. The court distinguished *Shelley* on the grounds that here there was no general right of the public to share in the benefaction and that there was an important right of Stephen Girard to control the disposition of his property. The Supreme Court denied certiorari[33] in 1958, ten years after its decision in *Shelley*. Of course, eight years after *In re Girard* the Court decided *Evans v. Newton*[34] in which Justice Douglas, after deciding the case on the grounds of public function and municipal control, said, "state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment."[35] However the

30. *Id.* at 19.
31. 391 Pa. 434, 138 A.2d 844 (1958).
32. 353 U.S. 230 (1957).
33. 357 U.S. 570 (1958).
34. 382 U.S. 296 (1966).
35. *Id.* at 302.

Court does not seem to base its decision on judicial involvement, but rather upon the municipal control idea.

The concept of neutrality is best developed in the line of cases involving the state judiciary in *Evans v. Abney*.[36] There the Georgia Supreme Court had refused to apply the *cy pres* doctrine to reform Senator Bacon's will to allow the admission of Negroes to the park created by the will because it found that the segregation of the park was an essential and inseparable part of the testator's plan. Since the condition of the trust could not be met because of the Court's holdings in *Evans v. Newton*, the Georgia Court allowed the property to revert to Senator Bacon's heirs. Upon consideration of the Georgia Court's involvement, the Supreme Court held that the refusal to apply the *cy pres* doctrine and the allowal of the reversion to Senator Bacon's heirs did not violate the equal protection clause. Of primary importance in the Court's decision were the facts that the state's *cy pres* laws were neutral with regard to race and of long standing, that there was no proof that any of the Georgia judges were motivated by discriminatory intent, and that the Senator's racial restrictions were solely the product of his own social philosophy. Rather than expressly overruling *Shelley v. Kraemer* the Court stated that it was distinguishable because here the park was completely eliminated and the loss shared equally by both white and Negro. However, the Court really seemed to ignore *Shelley v. Kraemer* more than attempt to distinguish it. So, twenty-two years after its decision in *Shelley* the Court seems to be making a more recent pronouncement of its philosophy in this immediate area. Justice Black, writing for the majority, said, "[t]he responsibility of this Court . . . is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations."[37] Of course this statement is weakened a bit by the fact that it seems to reflect Justice Black's personal beliefs and may not represent those of the other four members of the majority.[38]

Admittedly, the attorney general's involvement in enforcing discriminatory charitable trusts is not precisely analogous to the court's involvement in *Abney*, largely because the court in

36. 90 S.Ct. 628 (1970).
37. *Id.* at 635.
38. Chief Justice Burger and Justices Harlan, Stewart, and White comprised the majority, while Justices Brennan and Douglas dissented and Justice Marshall took no part in the consideration of the case.

Abney did eliminate the park. However, very strong analogies do exist. The statutes requiring the attorney general to enforce charitable trusts are entirely neutral as to race. The attorney general merely enforces a charitable trust which happens to contain a discriminatory provision, and his actions are certainly not the result of, or motivated by, any personal discriminatory intent. If it can be said that the actions of the attorney general fall somewhere between the ". . . active intervention of the state courts, supported by the full panoply of state power . . . ,"[39] as expressed in *Shelley v. Kraemer* and the findings of the Georgia court in *Evans v. Abney*, then it would seem that the closeness of the situation to *Abney*, coupled with the fact that *Shelley v. Kraemer* and *Abney* do not differ greatly on their facts, and that Abney is a much more recent pronouncement in the area require that the problem posed—that of the attorney general's involvement—be treated analogously to *Abney*.

IV. Policies Involved

Certainly, no matter what course the Court decides to take in its resolution of this question, there are a number of policies which will bear on its decision and may or may not appear in the wording of the case itself. The first of these is suggested by Justice Douglas in *Evans v. Newton* in which he says,

> [t]here are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality . . . ."[40]

In the case of the charitable trust the Court will have to balance the right of disposition of property against the equal protection rights. Professor Louis Henkin has suggested that *Shelley v. Kraemer* is indeed valid but that it must give way in special cases where rights of basic liberty outweigh equal protection rights.[41] The rights of Negroes to be beneficiaries of a charitable

39. 334 U.S. at 19. See also, Williams, *The Twilight of State Action,* 41 Texas L. Rev. 347 (1963).
40. 382 U.S. at 298.
41. Henkin, *Shelley v. Kraemer: Notes For A Revised Opinion,* 110 U. Pa. L. Rev. 473 (1962).

trust would seem weak compared with society's rights of ownership and free disposition of property.

Another policy to be considered is also raised by *Shelley*. There the Court found that the private restrictions were perfectly permissible but that they could not be enforced through the court system. Professor Wechsler of Columbia University School of Law condemns the opinion for banning judicial enforcement of something that individuals have the right to do.[42] It would be a very undesirable situation if individuals were lead to take enforcement of their private rights into their own hands. For this reason the Court may feel that it went too far in *Shelley*. It does seem that in *Abney* the Court has retreated somewhat. If the Court had found state action in *Abney* it would be very difficult to think of a situation, including the enforcement of charitable trusts, where state action could not also be found.

The importance of charitable giving and the part that it plays in our society might lead the Court to refrain from regulating this area.[43] Another reason that has been suggested for non-regulation is that a finding of state action in this area might hurt Negroes more than help them since many racially discriminatory charitable trusts discriminate in favor of Negroes. Of course these would be subjected to the same constitutional decision which would affect those which discriminate in favor of whites. The opponents of racially discriminatory charitable trusts argue that they disrupt the concept of charitable giving[44] and that they detract more from society than they help it. Thus they should not be protected[45] from the mandates of the equal protection clause.

V. CONCLUSION

As is clear from a review of the above discussed cases, the equal protection clause has spawned a great deal of litigation which is neither clear nor easy to synthesize. It appears, more here than in almost any other area of the law, that the Court does not state the true bases for its decisions; rather it seeks to

42. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
43. *See* Clark, *Charitable Trusts, The Fourteenth Amendment and The Will of Stephen Girard*, 66 YALE L.J. 979 (1957).
44. *See* Parker, *Evans v. Newton and The Racially Restricted Charitable Trust*, 13 How. L.J. 223 (1967).
45. Powers, *The Racially Discriminatory Charitable Trust: A Suggested Treatment*, 9 ST. LOUIS U.L.J. 478 (1965).

justify conclusions which were reached by methods other than strict legal construction. This is what makes a prediction in the area of discriminatory charitable trusts difficult. The best that can be done is to try to guage the unexpressed position of the Court through its recent pronouncements. Whatever the Court ultimately decides, whether to follow the *Shelley v. Kraemer* rationale or the *Evans v. Abney* neutrality rationale, it will have adequate precedent with which to justify its decision. The most recent pronouncement of the Court, *Abney*, would seem to lead to a conclusion that the attorney general's duty to enforce a racially discriminatory charitable trust does not constitute impermissible state action in violation of the equal protection clause of the fourteenth amendment.

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