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Constitutional Law - Estates - Reversion of the Res of a Charitable Trust Which Failed Because It Necessitated Racially Discriminatory State Action Is Not Violative of the XIVth Amendment Where the Reversion Is by Operation of State Law, and Due to the State Court's Refusal to Apply the Doctrine of *Cy Pres.*

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CONSTITUTIONAL LAW—ESTATES—Reversion of the Res of a Charitable Trust which failed because it necessitated racially discriminatory state action is not violative of the XIVth Amendment where the Reversion is by operation of state law, and due to the state court's refusal to apply the doctrine of Cy Pres.

In 1911, United States Senator A. O. Bacon of Georgia drew a will which conveyed certain vacant property in trust to the Senator's hometown of Macon. The property was to be maintained as a park for the exclusive use of the white people of Macon and their white guests. The city integrated the park in 1964 as part of a general desegregation program. Subsequently, individual members of the park's board of managers brought suit in the state court against the City of Macon, requesting that the city be removed as trustee and that the court substitute private trustees.

Several black citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and thus requested that the court refuse to appoint private trustees. Subsequently, the city resigned as trustee, and the heirs of Senator Bacon requested reversion of the trust property to the Bacon estate should the petition to substitute private trustees for the public ones be denied. The Supreme Court of Georgia affirmed the lower court's decisions, holding that Senator Bacon had the right to devise his property to a limited class, and that an equity court could appoint new trustees to save the trust.[1]

In *Evans v. Newton*,[2] the United States Supreme Court reversed the above decision, holding that the park was a public facility, and as such could not be maintained on a segregated basis, even if private trustees were substituted for the public ones. Mr. Justice Douglas, speaking for the Court, used a governmental function approach in resolving the issue:

> [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become

1. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).
2. 382 U.S. 296 (1966).

> agencies or instrumentalities of the State and subject to its constitutional limitations[3] [i.e. the Fourteenth Amendment].

Strengthening its rationale, the Court stressed the past history of the municipality's expenditures with regard to this park. Consequently, the Court held that merely transferring title from public to private trustees would not transform the park from a public to a private facility. Therefore, the "state action" requirement of the Fourteenth Amendment was satisfied, and further segregation of the park was unconstitutional.

On remand, the Georgia trial court, in granting a motion by successor trustees of Senator Bacon's estate, held that the trust had become unenforceable, and thus the property should revert back to the Senator's heirs. It refused to apply the doctrine of *cy pres* to save the trust, on the ground that the Senator did not have the requisite general charitable intent.[4] The Supreme Court of Georgia affirmed.[5]

The United States Supreme Court, in *Evans v. Abney*,[6] affirmed the decision of the Georgia court. It held that construction of wills is essentially a state law question.[7] The Supreme Court adhered to the Georgia courts' construction that Senator Bacon would rather have had the trust fail than have the park integrated. Since construction of wills is essentially a state law question, and since Georgia had its own *cy pres* statute,[8] the Court logically held that the determination of whether or not to apply the *cy pres* doctrine also belonged to the state.

After the United States Supreme Court affirmed the Georgia courts' refusal to save the trust by applying *cy pres*, or imputing general charitable intent to the testator, the Court held that allowing the trust to fail, and thus permitting the trust property to revert back to Bacon's heirs,

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3. *Id.* at 299.
4. The trial court was considering application of judicial *cy pres*, which is the only form of *cy pres* traditionally used in the United States. Judicial *cy pres* is an intent effectuating device, and therefore requires general charitable intent to have existed in the settlor at his creation of the trust. If a court holds that general charitable intent was present, it will apply (judicial) *cy pres* and thereby save a trust, which would otherwise fail for the impossibility or illegality of its purpose, by appropriating it for a similar purpose. Indeed, the Georgia Code Ann. itself, i.e. § 113-815, required such general charitable intent for the application of *cy pres*. The above form of *cy pres* is to be distinguished from prerogative *cy pres*, a type stemming from the power of the Crown in early English law. Prerogative *cy pres*, which has never been practiced in the United States, applied the failing trust's property to a use or purpose agreeable to the Crown, in spite of the settlor's intent. A. Scott, *The Law of Trusts*, § 399.1, pp. 3089-3094 (3rd ed. 1967); Restatement (Second) of the Law of Trusts, § 399 (1959).
5. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).
6. Evans v. Abney, 396 U.S. 435 (1970).
7. The court cited Lyeth v. Hoey, 305 U.S. 180 (1938).
8. Ga. Code Ann. § 113-815 (1959).

did not violate the Fourteenth Amendment. The Court reasoned that in this case a private party, rather than the State, injected the racially discriminatory motive.[9] It cited the testator's social philosophy favoring segregation, unequivocally expressed in his will, as proof that the condition excluding non-whites arose from his own convictions, and not from the enabling Georgia statute.[10] Mr. Justice Black, writing for the Court, distinguished *Shelley v. Kraemer*,[11] on the ground that *Shelly* dealt with unconstitutional state judicial action which "affirmatively enforced a private scheme of discrimination against Negroes."[12] The Court further stated that the instant case was also distinguishable because the present Georgia decision eliminated the park itself, thus causing equal loss to blacks and whites alike.

In one of its concluding passages, the Court expressed what assuredly was one of the major reasons for its decision: "[T]he loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death."[13] Thus, the Court seems to have been influenced by the reverence of American law for the testator's own intent and desires when testamentarily disposing of his property.

The most important aspect of the *Abney* decision is its effect upon the development of the concept of state action as related to the Equal Protection Clause of the Fourteenth Amendment. Discussion of this area must necessarily involve the issue of whether or not this case narrows, or at least defines outer limits to this heretofore widening concept.

State Action

Ever since the *Civil Rights Cases*[14] held that the Fourteenth Amendment applied only to the states, and not to private individuals,[15] an extremely difficult and recurrent task for the United States Supreme Court has been to determine where state action violative of the Fourteenth Amendment exists. At first, the concept of state action was narrowly construed, as evidenced by the Court's decision in these *Civil Rights*

9. See note 6 *supra*, at 444.
10. In 1905 (just six years before the creation of Bacon's will), the Georgia legislature passed § 69-504 of the Georgia Code Ann., permitting one to dedicate land for use as a racially discriminatory public park.
11. 334 U.S. 1 (1948).
12. See note 6 *supra*, at 445.
13. *Id.* at 447.
14. 109 U.S. 3 (1883).
15. The relevant portion of the Fourteenth Amendment, commonly referred to as the Equal Protection Clause, provides "no state shall . . . deny to any person within its jurisdiction equal protection of the laws."

Cases, which held that federal statutes guaranteeing blacks equal public accommodations and facilities were unconstitutional, since they limited purely private as well as state activity.

After several years of rigid adherence to this narrow interpretation of state action, the Court began a more liberal interpretation in 1946, when it held, in *Marsh v. Alabama*,[16] that people on the streets of a privately owned company town have Fourteenth Amendment rights that cannot be infringed by the owners of the property. In that case the Court adopted a type of governmental function approach (which was follwed in *Newton*),[17] holding that the property owners' denial of the people's Fourteenth Amendment rights constituted state action.

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[18]

Most significantly, as related to the *Abney* decision, the Supreme Court in the 1948 case of *Shelley v. Kramer* held: "[T]he action of the state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment. . . ."[19] Specifically, the Court held that state court enforcement of a racially restrictive private covenant constituted state action violative of the Fourteenth Amendment. This decision has since produced a myriad of speculation as to whether the Court would extend this reasoning, or whether the decision would be confined merely to its specific holding. Five years later, the Court did slightly extend *Shelley*. In *Barrows v. Jackson*,[20] it was held that not only would state judicial enforcement of a racially restrictive covenant constitute state action violative of the Equal Protection Clause, but additionally a state court's awarding of damages to a non-breaching party, at the expense of a party breaching such a covenant, would also constitute violative state action.

The Court has since applied the state action concept, often without use of *Shelley* or *Barrows* as a basis, to the following: local statutes and ordinances requiring or encouraging segregation in public accommodations;[21] private associations of white voters to choose primary candidates in local Democratic primaries;[22] various forms of state inaction;[23]

16. 326 U.S. 501 (1946).
17. See note 2, *supra*.
18. See note 16, *supra*.
19. See note 11, *supra*, at 14.
20. 346 U.S. 249 (1953).
21. Robinson v. Florida, 378 U.S. 153 (1964); Peterson v. City of Greenville, 373 U.S. 244 (1963).
22. Terry v. Adams, 345 U.S. 461 (1953).

and other types and methods of state encouragement of racial discrimination.[24] Even in *Evans v. Newton*,[25] the Court did not base its decision on the state judicial action of appointing private trustees to substitute for the public ones, but rather on a governmental function approach.[26] Thus, it was not surprising that Mr. Justice Black, writing for the Court in *Abney*, briefly distinguished *Shelley*;[27] however, Mr. Justice Brennan was not so willing to dismiss its applicability:

> A finding of discriminatory state action is required here on a second ground. *Shelley* . . . stands at least for the proposition that where parties of different races are willing to deal with one another a state court cannot keep them from doing so by enforcing a privately devised racial restriction. . . . [T]his is a case of a state court's enforcement of a racial restriction to prevent willing parties from dealing with one another. The decision of the Georgia courts thus, under *Shelley v. Kraemer*, constitutes state action denying equal protection.[28]

Mr. Justice Brennan's general position is tenable since both *Shelley* and *Barrows* employ a quantitative approach regarding state action, in that *any* state involvement regardless of its nature, is sufficient. Under this type of approach, state action is clearly present in *Abney*. First, the very right to dispose of one's property at death is both granted and regulated by the state; and second, though Baconsfield reverted back to Bacon's heirs by operation of law, it was the operation of state law which produced this result.[29] Thus, though no state court was required to overtly produce the result or enforce the racially restrictive direction, the state, as in *Shelley*, still was involved.

This leads to the question of how significant the state involvement was, and whether it violated the Fourteenth Amendment. In examining these issues, Justice Brennan's dissent points to years of city maintenance, expenses for park improvements, and Works Progress Administration expenses and efforts based on the city's representation that the

23. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court held that discrimination by a private restaurant owner on property leased to him by the state, was an unconstitutional violation of the Equal Protection Clause, since the state as lessor had a duty to see to it that lessees did not discriminate. State inaction was also deemed violative of the Equal Protection Clause in the landmark case of Baker v. Carr, 369 U.S. 186 (1962). The inaction here involved state failure to correct blatant malapportionment.

24. Reitman v. Mulkey, 387 U.S. 369 (1967); and, Hunter v. Erickson, 393 U.S. 385 (1969).

25. See note 2, *supra*.

26. See page 396, *supra*.

27. See note 6, *supra*, at 445.

28. *Id.* at 456-457.

29. *Restatement (Second) of the Law of Trusts*, §§ 412, 413 (1959), discussing § 108-106(4) of the Georgia Code Ann. which provides for this reversion by operation of law.

park was open to all Macon citizens.[30] Additionally, Justice Brennan cited the state statute which authorized public dedication for racially discriminatory parks,[31] as evidence of state encouragement of Bacon's expressed racial retrictions.[32] Mr. Justice Brennan here cites *Reitman v. Mulkey*[33] as impressive precedent that even indirect state encouragement of racial discrimination may violate the Equal Protection Clause. In *Reitman*, the Court affirmed the California Supreme Court's decision that an amendment to the state constitution which nullified prior open housing legislation by providing that a property owner could rent, sell or decline so to do, to anyone at his absolute discretion, was state action encouraging racial discrimination, and thus violative of the Equal Protection Clause. The United States Supreme Court took notice of the background of local fervor relating to recent open housing legislation, against which this amendment was enacted, and concluded that the amendment was intended to, and in fact did, authorize racial discrimination in the housing market.

In *Reitman*, the Supreme Court adhered to the position that states could remain neutral with respect to discrimination, but held that, due to California's previous open housing legislation, an amendment granting complete freedom to discriminate was state encouragement and thus contrary to the Fourteenth Amendment.

The *Reitman* holding striking down legislation which was nondiscriminatory on its face, goes perhaps further in proscribing state action than any other Court decision. Indeed, by comparison, the *Abney* decision seems superficially inconsistent with *Reitman*. The issue in *Reitman*, however, was the constitutionality of the legislative amendment. It is unqestioned that the Georgia Code provision authorizing discriminatory charitable trusts, was also invalid. The parallel issue in *Abney*, however, was whether the operation of law reversion was repugnant to the Fourteenth Amendment because of the mere existence of this statute which permitted Bacon's bequest.

Mr. Justice Brennan asserted that since the Georgia trust statute encouraged the discriminatory provisions in Bacon's will, the "motivation" for the discriminatory provision, and consequently the racial restriction necessitating reversion to Bacon's heirs, was not purely private, but significantly state induced.[34] The majority responded, "Nor is there

30. See note 6 *supra*, at 450-451.
31. See note 10, *supra*.
32. See note 6, *supra*, at 458.
33. See note 24, *supra*.
34. A similar case of comparable interest is the *Hunter* case, see note 24 *supra*,

any indication that Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such were permitted by the Georgia trust statutes."[35] The Court concluded from the evidence that the Senator's racial restrictions were solely the product of his own social philosophy recited in his will. This position seems to be supported by a recitation from Bacon's will alluded to by the Court:

> I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common.[36]

This aspect of the Court's reasoning does not adequately respond to Mr. Justice Brennan's argument. Obviously, no one will devise property and direct that it be segregated *because* a statute permits him to do so, just as more generally, people do not perform other acts *because* of statutory permission. For instance, if one has no desire or motivation to act, he will hardly change his behavior because a statute allows this action.

It cannot be said, however, that men are not motivated by laws. It is obvious that a testator who devises property and directs that it be segregated has disdain for integration, but, absent a recent law permitting such segregation, precisely in the manner of the desired devise (dedication of a public park), it is tenable that the testator would not have particularly prescribed its segregation in his will. Moreover, in the 1911 South, where public facilities were segregated as a matter of course, there would be little reason for a testator to feel any need to expressly provide for a devise's segregation, unless he were specifically encouraged by a statute which, at least impliedly, promoted such a restriction. Thus, the Court's finding that the discriminating motivation here was not at all state induced seems questionable, though not necessarily determinative of the case.

Extended to its logical conclusion, Justice Brennan's position may be stated as follows: state action in various forms, including several years of municipal maintenance and expenditures, coupled with statutory encouragement of the segregation, have so "significantly involved"

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where in response to a recently enacted fair housing ordinance, an amendment to the Akron city charter was passed providing that any ordinance regulating the use, sale, leasing, etc., of real estate on the basis of race, religion, ancestry, etc., must be approved by a majority of the voters before becoming effective. The Court held that since the charter amendment contained an explicit racial classification treating racial housing matters uniquely, and thereby making it more difficult to secure housing legislation advantageous to minorities, it denied minorities equal protection of the laws.

35. See note 6 *supra*, at 445.

36. *Id.* at 442.

the state in this discrimination, that to give effect to the racial restriction through this reversion by operation of *state* law, would be an unconstitutional application of the reversionary statute.

No doubt, both the state of Georgia, through its statute encouraging racial discrimination, and the City of Macon, through its years of improvement and maintenance of the segregated park, had unconstitutionally involved themselves with racial discrimination. Today, the relevant provision of the Georgia Code would certainly be held unconstitutional; furthermore, Macon could not now accept such a discriminatory trust. These factors, however, should not be misunderstood, or what is an admittedly regrettable result would appear an unconscionable decision. The state action issue involved must be clearly delineated. Only the effect of these state activities on the constitutionality of the action of the state in allowing automatic reversion of Baconsfield to Bacon's heirs is determinative.

When considering the possible impact of the *Abney* decision on the Equal Protection Clause, one must remain cognizant that the Court now applies a balancing approach, carefully considering the facts in each case. "[G]eneralizations do not decide concrete cases,"[37] and only by "sifting facts and weighing circumstances,"[38] can the Court determine the scope of the Fourteenth Amendment as related to any given case. This balancing process has been described as follows:

> [G]enerally, the equal protection clause precludes state enforcement of private discrimination. There is, however, a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced, in close cases, against the right not to have the state enforce discrimination against the victim. In the few instances in which the right to discriminate is protected or preferred by the Constitution, the state may enforce it.[39]

Thus, the Court does appear to have been moving from a purely quantitative approch to a more qualitiative one.

Since the racial restriction to which the state court gave effect by allowing the "automatic" reversion was imposed by a will, it is at least possible that the Court's analysis of state action might differ if the instrument producing the discriminatory design were a deed or a non-testamentary declaration of trust.

In addition to the significance of the fact that a will was involved in

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37. See note 2 *supra*, at 299.
38. See the Burton case, note 23, *supra*, at 722.
39. Louis Henkin, "*Shelley v. Kraemer*: *Notes for a Revised Opinion*," 110 U. Pa. L. Rev. 473, at 496 (1962).

Abney, one hidden yet important problem was present, that of the remedy. If the majority had agreed with the dissenters that the operation of state law producing a reversion back to Bacon's heirs was so tainted with discriminatory state action that it violated the Fourteenth Amendment, and yet held that the Goergia court's declaration that the trust failed was not state action, what would have happened to the trust property? The trust would fail for impossibility and could not be saved by *cy pres* because of the lack of Bacon's general charitable intent, and yet the trust property could not revert back to Bacon's heirs, since this would violate the Equal Protection Clause.

There are only two alternatives, public escheat to the state, or return of the property to its original state of nature. Ordinarily, the former of these two alternatives would be employed, since, effectively, the testator has unwittingly become intestate regarding the trust property, and now has no heirs who can legally receive it. While this result would seemingly raise no constitutional problems, since the state would own the property subject to all constitutional requirements, it does produce a bizarre irony. Since it is the state action that constitutes the violation, the state would here be acquiring absolute ownership in property by violating the Fourteenth Amendment! Consequently, a state, by significantly involving itself with a discriminatory charitable trust in which the settlor has no general charitable intent could thereby prevent reversion to the heirs by operation of law, and thus acquire absolute ownership in property it was never intended to receive. Furthermore, if the Court were to prevent this alternative by applying an estoppel theory, the result could be utter chaos. Since the property would then revert back to its original state of nature, the first person who would go out and possess the property would acquire *original title* to it. This would clearly be the least desirable alternative.

It cannot be denied that in *Abney*, the Court refused to extend *Shelley* and *Barrows* to a similar, if not analogous situation. The Court refused to extend its reasoning concerning judicial enforcement of express racial restrictions, to a situation where a similar result is attained by operation of state law. This occurred even though the operation of such state law was significantly influenced by other state activities encouraging and giving effect to the purportedly private discrimination.

While in *Shelley* and *Barrows* the Court held judicial enforcement of a discriminatory covenant in a deed was state action, in *Abney*, they refused to hold that enforcement of a discriminatory restriction in a trust constituted such state action. True, the type of enforcement was

different, in that the primary object, that is, maintenance of a segregated park, was denied. However, the secondary object, that the trust fail rather than be operated on an integrated basis, was enforced. If, in *Abney*, the settlor had expressly stated that the land was to revert to him or his heirs if the park was operated on an integrated basis, and this were judicially enforced, a much closer case to that of *Shelley* would be presented. Nevertheless, this is similar to how the Georgia court interpreted Bacon's will.

If, under *Barrows*, awarding damages for breach of a discriminatory restriction is state action, it seems that the declaration that the trust failed for failure of legal impossibility of compliance with an equally discriminatory restriction could also be deemed state action. Thus, it seems possible that under *Abney* one can achieve indirectly what he cannot achieve directly. In *Charlotte Park and Recreation Commission v. Barringer*,[40] the Supreme Court of North Carolina held that where a reverter clause in a deed provided that an estate would automatically revert to the grantor if non-whites used the park, operation of such reversion would not require state judicial enforcement and thus *Shelley*,[41] was inapplicable. The Supreme Court denied certiorari.[42] While a denial of certiorari is of little value in determining the Court's position on any particular issue, the *Charlotee Park* denial seems to at least be an indication that the Court was not eager to extend *Shelley* to an operation of law situation. Coupling this with the Court's refusal to so extend the *Shelley* rationale in *Abney*, it seems unlikely that the Court will extend this *Shelley* approach (focusing on the *effect* of state judicial decisions upon racial restrictions) to the operation of law area (*e.g.* possibilities of reverter and operation of law reversions by way of resulting trust).

It would seem that the few private racial restrictions which are given effect "automatically," by the operation of law, will not be struck down as involving state action violative of the Equal Protection Clause. The *Shelley* premise was valid and its effect desirable, but extending its approach to operation of law situations would create extreme and unforeseen results. The Court may have wisely chosen to effectively limit the purely quantitative approach evidenced by *Shelley* and *Barrows* to their unique facts.

The possible holding that any state judicial proceeding concerning

40. 242 N.C. 311, 88 S.E.2d 114 (1955).
41. See note 11, *supra*.
42. Leeper v. Charlotte Park and Recreation Commission, 350 U.S. 983 (1956).

the enforcement of a restriction in a trust constitutes state action could have discouraged the creation of future charitable trusts. Moreover, such discouragement is not limited to a testator who, due to his own personal prejudices or archaic "social philosophy" might wish to racially discriminate. It would apply to a settlor who wishes to create a charitable trust exclusively for any ascertainably designated class of beneficiaries. Thus, while an enlightened individual deplores racially discriminatory trusts, and indeed the creation of such may be the very antithesis of "charity," care must be taken not to invalidate them with an approach which could simultaneously injure other types of charitable trusts.

State judicial enforcement of a charitable trust for the benefit of any particular religion, sex,[43] or even philosophy might be held to violate the Equal Protection Clause.[44] Perhaps, while working toward a society in which people are not apt to create racially discriminatory trusts, it would be more prudent to permit them to survive when such is unequivocally intended and doesn't overtly involve state action. Of course, if private individuals significantly involve the state in their discriminatory schemes, such as giving the property to an agency thereof, this will be struck down as state action violative of the Fourteenth Amendment.

Trust Law Aspects of Abney

The result in *Abney* was unfortunate. A park, long devoted to and supported by the public, passed into private hands. To a large degree this result was affected by the decisions of the Georgia Court on issues of fact and state law which were outside the scope of review of the Supreme Court in its capacity of reviewing final decisions of the highest

43. One can envision a woman, sincerely and passionately concerned about the plight of her sex, asserting that a trust restricted only in that it was for the benefit of male orphans, could not be enforced by the state on the ground that such would be state action discriminating against women.

44. Once mere state enforcement of a racially discriminatory trust, standing alone, is deemed sufficient state action to violate the Equal Protection Clause, what formerly were normal human preferences and allegiances based on personal experiences and relationships, now, also become insidious state discriminations, and even establishments of religion (e.g. when a charitable trust is created for the benefit of any particular religion). Consequently, the mere act of neutral state enforcement of charitable trusts should not be considered to consist of individual state policy decisions or active selections, just as state agencies available to all citizens should not be deemed to be preferring particular persons or organizations that they benefit at any given time. In a racially discriminatory trust discrimination is made by the settlor, while the state, merely by its enforcement of all valid charitable trusts, is making no "insidious discrimination" itself. Even if the Court were to decide it proper to draw the line as to separate only racially discriminatory trusts, what then of the foreseeably increasing number of charitable trusts left by blacks for the benefit of members of their own race? The Court surely could not hold it unconstitutional for a state to enforce a charitable trust for the benefit of whites, and yet uphold the validity of a charitable trust for blacks.

courts of the states. A trial court considering the problem of a trust which contains unconstitutional provisons has a much greater choice of alternatives available.

There has been much speculation that courts might, or should, always apply *cy pres* to save failing charitable trusts, especially if the failure of the trust occurred long after its creation.[45] While this option was open to the Georgia courts, it could not be said to be constitutionally required. If, of course, general charitable intent can be found, there is no difficulty in applying *cy pres*. If, on the other hand, general charitable intent is questionable, the result could still be achieved though wrongfully, by arbitrary judicial ascription of general charitable intent to the testator, as seemingly exemplified by the Third Circuit Court of Appeals in *Commonwealth of Pennsylvania v. Brown*,[46] which was the culmination of the Girard College litigation.

The Girard litigation involved the 1831 will of Stephen Girard which provided for a "college" for poor, white, male orphans. The Supreme Court had held that the City of Philadelphia could not, as trustee, manage said trust without violating the Equal Protection Clause.[47] The Supreme Court of Pennsylvania subsequently affirmed a lower state court's substitution of private trustees so that the school could still discriminate, since the "dominant intent of Stephen Girard was to benefit poor, male, white orphans."[48] This decision stood[49] until *Evans v. Newton*[50] was decided, whereupon additional black applicants to the school sued in the federal court system. Citing *Newton* as precedent, they contended that the substitution of private trustees and the continued discrimination violated their constitutional right of equal protection. The black applicants' success in the district court was affirmed by the appellate court.[51] That court, in contradiction of the previous construction of the will by the Pennsylvania Supreme Court, simply stated:

> Giving [*sic*] everything we know of Mr. Girard, it is inconceivable that in this changed world he would not be quietly happy that his cherished project had raised its sights with the times and joyfully recognized that all human beings are created equal.[52]

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45. *Restatement (Second) of the Law of Trusts*, § 399 at 302 (1959).
46. 392 F.2d 120 (3rd Cir. 1968).
47. Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).
48. In Re Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958). The quoted words in the text constitute the federal district court's own interpretation of the Supreme Court of Pennsylvania's decision, Commonwealth of Pennsylvania v. Brown, 270 F. Supp. 782, at 787 (E.D. Pa. 1967).
49. Cert. denied, 357 U.S. 570 (1958).
50. See note 2, *supra*.
51. See note 46, *supra*.
52. *Id.* at 125.

The Supreme Court denied certiorari.[53]

The *Brown* case, as distinguished from *Abney*, had been originally filed in the Federal court system. Hence, the Federal courts served as the trier of fact, and were free to find the actual intent of the testator, a freedom not available to the Supreme Court in *Abney*. Yet, in light of the state court's prior interpretation of the will in *Brown*, the refusal of the Federal court to follow the state interpretation was inconsistent with the Supreme Court's statement that "construction of wills is essentially a state-law question."[54]

Another possible approach is the adoption of prerogative *cy pres* as a matter of state law. Mr. Justice Douglas' dissent in *Abney* stated that the Georgia decision "[s]hould fail as the imposition of a penalty for obedience to a principle of national supremacy."[55] This remark seems to suggest, and possibly recommend, the effective, if not technical, application of prerogative *cy pres*. This approach would "apply the failing trust's property to a use or purpose agreeable to the 'Crown' in spite of the settlor's intent."[56] While the *Abney* decision leaves this a question of primarily state law, the vaguest, most indirect suggestion of applying an arbitrary concept like prerogative *cy pres* to prevent this unfortunate result is, at best, questionable.[57]

Had the court applied prerogative *cy pres*, or arbitrarily imputed general charitable intent to enable application of judicial *cy pres*, the decision might well have had a serious and unintended impact on charitable trusts generally. Many a testator or other prospective settlor might be deterred from creating a charitable trust if the perilous possibility of the state's invocation of prerogative *cy pres* loomed in the background. A similar, though probably not as severe misgiving, might be created by almost automatic imputation of general charitable intent to enable application of judicial *cy pres* to a failing trust.

Another issue mentioned by Mr. Justice Douglas in his dissent pertaining to trust law should not be overlooked. Mr. Justice Douglas' dissent begins, "Bacon's will did not leave any remainder or reversion in 'Baconsfield' to his heirs. He left 'all remainders and reversions and every estate in the same of whatsoever kind' to the City of Macon."[58]

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53. Cert. denied, 391 U.S. 921 (1968).
54. See note 6 *supra*, at 444.
55. *Id.* at 450.
56. A harsh example of the abhorrent possibilities of prerogative *cy pres* is DaCosta v. DePas, 1 Amb. 228 (1754), where a gift to a rabbinical school for reading the Jewish law was applied to sustain a Christian chapel at a hospital. The expansiveness and diversity of the United States magnify the risk of initiating into our system such an arbitrary concept with such abusive possibilities.
57. See note 4, *supra*.
58. See note 6, *supra*, at 448.

Justice Douglas' contention is that the majority, by allowing the property to revert back to Bacon's heirs, was perverting his intent as surely as if it had converted the park from "all-white" to "all-Negro."[59] The majority rebutted this rationale by reiterating the Georgia Court's position that the above language did not relate to Bacon's desire should the trust fail, but only to the initial vesting of legal title in the city.[60] This latter view is clearly substantiated by reading the phrase in the context of the will:

> [I]t is my will that all right, title and interest in and to said property . . . both legal and equitable, *including* all remainders and reversions of every estate in the same of whatever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust. . . . (emphasis added).[61]

Thus, when the Senator granted all remainders and reversions to Macon, he was merely further indicating his intent that the full legal title to said property vest in the city for purposes of the trust, rather than expressing any desire of disposition of the property should the trust fail.

To further clarify the issue involved, when a charitable trust fails, a resulting trust is created by operation of law for the benefit of the settlor and his heirs. There are only two ways to prevent this formation of a resulting trust: (1) the application of the *cy pres* doctrine; or (2) the settlor's proper manifestation that no resulting trust should arise. Examples of the latter include, providing for a gift over to a third party should the trust fail.[62] Consequently, any possible significance to Bacon's aforementioned direction regarding remainders and reversions, must be based on the construction of it as a manifestation that should the trust fail, no resulting trust was intended, and the trustee should hold the property free of the trust. This construction is clearly untenable here, absent any indication or manifestation from the settlor that he anticipated the possibility of failure of the trust. Additionally, as discussed above, the clear import of the questioned phrase in context of the will was that it was used merely to vest absolute legal title in the trustee for purposes of the trust.

CONCLUSION

> [T]he loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a con-

59. *Id.*
60. *Id.* at 443, note 2.
61. *Id.*
62. *Restatement (Second) of the Law of Trusts*, §§ 412 and 413 (1959).

> tinuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has it(s) advantages and disadvantages.[63]

Is the price too high? As the Court then indicated, this question must be answered by the American people through their elected representatives.[64]

While remaining cognizant of the private right involved in *Abney* (freedom of testation), it would seem that the Court indicated it will not extend the *Shelley* and *Barrows* approach, i.e. looking solely to the ultimate effect of the state activity on a particular racial restriction, to the neutral operation of state law.

By impliedly distinguishing two types of state activity (overt judicial enforcement as opposed to judicial acknowledgement of the result of operation of state law), the Court was employing a qualitative approach absent in *Shelley* and *Barrows*. Evidence of this approach was manifested in the Court's following expression of failure to find state racially discriminatory motivation:

> We do not understand petitioners to be contending here that the Georgia judges were motivated either consciously or unconsciously by a desire to discriminate against Negroes. In any case, there is, as noted above, absolutely nothing before this Court to support a finding of such motivation.[65]

Interestingly, "motivation" was never discussed in *Shelley* or *Barrows*, and it would seem doubtful that the *Abney* Court is implying that "racially discriminatory motivation" existed in those respective state judiciaries; yet, that is precisely what the Court's "motivation" approach seems to imply.

Disregarding the wisdom of such a "motivation" criterion or test, it does demonstrate a qualitiative approach, i.e. looking beyond the mere presence of state action and its naked ultimate effect. Moreover, later in its opinion, the Court referred to the operation of state trust law here involved as "neutral" and "nondiscriminatory."[66] Thus, at the very least, the *Abney* decision seems to indicate that the Court is using a more qualitative approach to state action and that neutrality and "motivation", e.g., existence of a state scheme intended to promote racial discrimination, are significant factors when determining whether or not particular state activity is prohibited by the Equal Protection Clause.

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63. See note 6 *supra*, at 447.
64. *Id.*
65. *Id.* at 446.
66. *Id.*

The *Abney* Court apparently felt that the neutral and reasonable state application of the operation of its law, (and judicial acknowledgment thereof) was not the sort of state action that was intended to fall within the proscriptions of the Fourteenth Amendment.

LAWRENCE J. CASAZZA