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# Charitable Trusts-Discrimination-Fourteenth Amendment

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# COMMENT

## CHARITABLE TRUSTS—DISCRIMINATION—FOURTEENTH AMENDMENT

Within the last decade there has been a considerable amount of litigation involving the issue of segregation of the races. Segregation has been challenged and defeated in every area where the public is directly affected by discriminatory practices. The legal basis for the strangulation of discrimination has been that it is in violation of the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States.[1]

In the most recent litigation of the will of Stephan Girard, the legal microscope has been focused upon the question of the extent to which segregation can be practiced in an educational institution established by a charitable trust. The Orphans' Court of Philadelphia County, in the latest action by the courts in this case, pronounced in *Pennsylvania v. Board of Directors,* 9 D. & C. ——, 137 Legal Intelligencer 52 (September 12, 1957), what it believed to be the proper solution. It said that a private trustee would be appointed to administer the charitable trust established by Stephan Girard. It is now to be questioned whether this action is appropriate and whether it will be sustained as being consistent with the policy, pertaining to racial discrimination, set down by the Supreme Court of the United States.

The instant case arose when two Negro boys, who had applied for admission to Girard College and were refused admission upon the ground that they were of the Negro race, brought an action against the trustee, the Board of Directors of City Trusts.[2] Girard's will laid down many precise terms as to how the school was to be established and what restrictions were to be imposed. Among these restrictions was the term "poor male white orphan children." [3]

Girard's will provided that the funds to be used for the college were given to "the mayor, aldermen, and citizens of Philadelphia . . . in trust . . ." [4]

[1] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[2] The Board of Directors of City Trusts admitted that the sole reason for its refusal was that it had no authority to admit the applicants because of their race. See dissenting opinion of Mr. Justice Musmanno, Girard Will Case, 386 Pa. 548, 623, 127 A. 2d 287 (1956).

[3] The college was established and maintained exclusively by the trust funds left by the will.

[4] Section XX of Stephan Girard's will.

In 1869 the Pennsylvania legislature provided for the establishment of the Board of Directors of City Trusts.[5] The Plaintiffs attacked the exclusion on the ground, *inter alia,* that the trustee was actually an agent of the Commonwealth of Pennsylvania, and that therefore, the Fourteenth Amendment applied and such discrimination was unconstitutional. The Orphans' Court did not agree with this contention, and ruled that the Board's disapproval of the applications was proper. Upon appeal to the Pennsylvania Supreme Court, this decision was upheld.[6] The United States Supreme Court said in its *per curiam* opinion:

> "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. *Brown v. Board of Education,* 347 US 483, 98 Led 873, 74 SCt 686, 38 ALR 2d 1180. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion." [7]

The Pennsylvania Supreme Court further remanded this order to the Orphans' Court,[8] which recently ruled that a private trustee would be appointed.[9]

It is to be noted that this comment does not include treatment of the issue of whether the Board of Directors of City Trusts is an agent of the state so as to bring action by the Board within the scope of the Fourteenth Amendment. The purpose here is to treat the possible effects these and any subsequent decisions in this litigation may have upon the trust area of the law.[10] It will be assumed here that the Supreme Court does not intend to broaden the legal meaning of "state action" to the point at which there is always sufficient state action involved in charitable trust administration to bring into play the Fourteenth Amendment.[11]

The Orphans' Court of Philadelphia County has been faced with the problem of construing the meaning of the Supreme Court's order and what action should be taken. The policy of the Supreme Court up to this point has

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[5] Act of June 30, 1869, P. L. 1276, 53 P.S. §§ 16365-16370 (1957).
[6] Girard Will Case, 386 Pa. 548, 127 A. 2d 287 (1956).
[7] Pennsylvania v. Board of Directors, 353 U. S. —— (1957).
[8] Pennsylvania v. Board of Directors, 26 U.S.L. Week 1005 (June 28, 1957).
[9] Pennsylvania v. Board of Directors, 9 D. & C. 2d ——, 137 Legal Intelligencer 52 (September 12, 1957).
[10] However, it is important to point out that the enactment of the Pennsylvania legislature, which was for the purpose of establishing the Board of Directors of City Trusts, used agency language. This is, of course, only one facet of many, involved in any discussion of this issue. Act of June 30, 1869, P. L. 1276, 53 P.S. § 16370 (1957).
[11] A certain degree of "state action" is involved in every charitable trust, *e. g.,* probation of the will. See 66 YALE L. J. 979 (1957).

been unmistakably clear that segregation of the races will not be condoned where the Fourteenth Amendment applies.[12] Although it only further remanded the Supreme Court's order to the Orphans' Court, the Pennsylvania Supreme Court has suggested what it thinks to be the proper solution. Upon the initial appeal of this case to that court, it stated, by way of dictum, that if the United States Supreme Court should hold that the Board of Directors of City Trusts could not act as trustee and still discriminate, the only solution would be to appoint a new trustee.[13] When the Girard will was litigated in 1844 and 1868, the United States Supreme Court intimated on each occasion that if the named trustee could not carry out the provisions of the trust, a private trustee should be appointed.[14]

The usual question raised at this point is, "What was the primary object of the intentions of the settlor—to have the terms of his will carried out in exact detail, i. e., 'poor male white orphan children,' or to have the appointed trustee to continue in such capacity?" However, this is a very unrealistic question. Stephan Girard has been dead for a century and a quarter, and it would be mere conjecture to say what his dominant intentions would have been had he foreseen present day influences. At best, the only thing that could be done would be to construe all the surrounding facts existing at the time of the creation of the will. On the one side it could be argued that he wanted the terms of the devise to be carried out to the letter, if at all possible. This

[12] To cite a few of the most prominent cases in which the Supreme Court has struck down discrimination: Morgan v. Virginia, 328 U.S. 373 (1946) and Henderson v. United States, 339 U.S. 816 (1950) (interstate commerce); Missouri *ex rel. Gaines v. Canada,* 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950); and Lucy v. Adams, 350 U.S. 1 (1955) (colleges and universities); Shelley v. Kraemer, 334 U.S. 1 (1947) (restrictive covenant upon land); Rice v. Arnold, 340 U.S. 848 (1950) and Holmes v. Atlanta, 350 U.S. 879 (1955) (public golf courses); Brown v. Board of Education, 347 U.S. 483 (1954) and Bolling v. Sharpe, 347 U.S. 497 (1954) (public education); Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954) (public parks); and Gayle v. Browder, 353 U. S. —— (1956) (wherein the Supreme Court overruled Plessy v. Ferguson, 163 U.S. 537 (1896) concerning intra-state commerce).

[13] Girard Will Case, *supra* at page 566. "But finally, even if the Board of Directors of City Trusts *were* deemed to be engaged in 'State action' in the administration of the Girard trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee."

[14] In Vidal v. Girard's Executors, 43 U.S. (2 Howard) 127, 188 (1844) the Supreme Court stated:

> "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction to enforce and perfect the objects of the trust."

In Girard v. Philadelphia, 74 U.S. (7 Wallace) 1, 12 (1868) the Court again said:

> "Now, if this were true [that the city could not act as trustee], the only consequence would be, not that the charities or trust should fail, but that the Chancellor should substitute another trustee."

contention could be supported by such items as the great detail of the instrument; the term "poor male white orphan children"; defined administration of the college; and other terms of the will, such as that no clergyman be permitted on the grounds of the college. On the other hand, it could be maintained that Girard, during his life, was a very generous and grateful man; that he wanted the City of Philadelphia to benefit from his devise, and that therefore he was not too concerned about the segregation terms. Also other provisions of the will made bequests to the municipality of Philadelphia and to the Commonwealth of Pennsylvania.[15] Notwithstanding these contentions, Girard's primary object was expressly stated to be at least the establishment of the college.[16]

There are other considerations that must not be overlooked. Girard drafted his will in 1830, thirty years before the Civil War and the Fourteenth Amendment. At that time, not only was segregation legal, but enslavement of the Negro race was lawful. It therefore, could be successfully contended that such practices were accepted by the nation as a whole at the time of the probation of the will.

There were several courses of action available to the Orphans' Court. Probably the two most obvious alternatives to come to mind are the application of the doctrine of *cy pres* and appointment of a private trustee. *Cy pres* is usually applied by the courts only where the purposes of the trust have become impossible or impractical to satisfy or where the trust purpose itself has become illegal.[17] Although it might be argued successfully that *cy pres* should be applied, it is nevertheless difficult to see the justification of such application in this situation. If the Board of Directors desires to carry out the terms of the trust, it would certainly not be impossible nor impractical to discriminate by reason of race in acting upon the applications to Girard College. In fact, it definitely appears that the Board desired to exercise discriminatory practices when acting upon applications to the school.[18]

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[15] These bequests included: $500,000 to the city to pave certain streets; $300,000 to the Commonwealth of Pennsylvania; $30,000 provision for his "black" woman; $20,000 to deaf and dumb institution; $10,000 to an orphan asylum; $10,000 to public schools; and others.

[16] Section XXIV of Stephen Girard's will provides in part: "To all which objects the prosperity of the city and the health and comfort of its inhabitants I devote the said fund as aforesaid, and direct the income thereof to be applied yearly, and every year for ever, after providing for the college as hereinbefore directed as my primary object."

[17] RESTATEMENT, TRUSTS § 399 (1935).

[18] It is interesting to note that if the trustee, had decided to breach the term of the will and thereby refuse to exclude the applicants, the present controversy would more than likely not be before the courts. Normally the Attorney-General is charged with the responsibility of ensuring performance of the terms of a charitable trust. However, if the Board breached the trust in this manner, the Attorney-General would be unable to bring suit against the trustee, because this would clearly constitute state action and thereby come within the scope of the Fourteenth Amendment.

However, the doctrine might be applied upon the basis that it was illegal to discriminate. This conclusion could be reached only if the opinion of the United States Supreme Court could be so construed. There is no statute, nor is there case law dealing with this exact situation in which it is pronounced that exclusion by reason of race is illegal. In the opinion of the Supreme Court the cause was remanded for further proceedings not inconsistent with the opinion. There is considerable doubt as to what this statement means. Is the opinion to be followed in accordance with what is stated on its face, or in accordance with some underlying policy? Perhaps this order could be interpreted as the Supreme Court's intention that discrimination in this case is *illegal*. Thus, on this basis, the Orphans' Court could have applied the doctrine of *cy pres* and have eliminated the questioned exclusion term.

If the Supreme Court intended this interpretation, it was not apparent in the language of the opinion. On its face the opinion indicated that because of the relationship between the trustee and the State of Pennsylvania, this discrimination was unconstitutional under the Fourteenth Amendment. Illegality for the purposes of application of *cy pres* has heretofore been predicated upon the issue of whether the trust property is to be used for an object which is in violation of the criminal law, or if the trust tends to induce the commission of crime, or if the accomplishment of the purpose is otherwise against public policy.[19] If such action were intended, the Supreme Court would be employing *cy pres* to change the term of the trust instrument without expressly declaring that the object was against public policy, and without a suggestion as to how it contravened public policy in this instance.

*Brown v. Board of Education* dealt with segregation in public education.[20] By subsequent decisions it has become apparent that the Supreme Court did not intend its ruling to be narrow, but to be applied in other areas of public intercourse.[21] It is questionable whether that court desires the *Brown* case to apply to *private* education. This statement is predicted upon two main characteristics of the *Brown* case. First, the court spoke only of segregation in *public* education, and second, the underlying notion evolving from this opinion, that when segregation is practiced by any public institution, it has the effect of placing an official stamp of approval upon such conduct, which in turn has a detrimental psychological effect upon discriminated children.

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[19] Restatement Trusts §§ 370, comment i; 371, comment e; 374 comment j; and 381 (1935).

[20] 347 U.S. 483 (1954).

[21] Holmes v. Atlanta, 350 U.S. 879 (1955) (public golf courses); Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954) (public parks); and Gayle v. Browder, 353 U.S. —— (1956) (intra-state commerce).

The Orphans' Court of Philadelphia County refused to employ *cy pres,* but instead ordered that a private trustee would be appointed.[22] By this action it appears that this court is following the suggested solution offered by the opinion of the Pennsylvania Supreme Court.[23] As was pointed out by Mr. Chief Justice Stern in that opinion, it is hornbook law that a trust will not fail for want of a trustee.[24] If a trustee dies or becomes incapacitated to carry out the objects of the settlor, the courts are not hesitant in appointing a new trustee, unless it was clearly shown in the trust instrument that the settlor intended the named trustee to be the only trustee.[25] Once again the question of the settlor's primary object or intent presents itself, as has been discussed above. In the appointment of another trustee, the Orphans' Court is now faced with many incidental, but not unimportant, obstacles which must be overcome.[26] The next question is whether this latest ruling has solved the problem involved.

Since the Pennsylvania Supreme Court has to some extent committed itself by dicta when this case was appealed to that court, it is reasonably certain that it will affirm the appointment of the private trustee, if that court has the opportunity to rule upon it.[27] However, the United States Supreme Court might reverse this attempted solution on several grounds. One possible basis would be that the policy underlying the *Brown* case applied even to private education. Although it is doubtful the Supreme Court would rule in this manner, such action would indeed have great impact upon private educational institutions; but this aspect will not be treated here. Another basis for reversal of the Orphans' Court action would be that such discrimination of the races is against public policy. This would not be predicated upon the Fourteenth Amendment, because the Amendment applies only to state action (assuming that the Court would not rule there was sufficient state action in the appointment of a private trustee). It would be upon the ground that the object of the trust itself, or at least the provision in controversy, is an object which is against the public policy. This conclusion could be reached in one

[22] Pennsylvania v. Board of Directors, 9 D. & C. 2d ——, 137 Legal Intelligencer 52 (September 12, 1957).

[23] See note 13 *supra.*

[24] Girard Will Case, *supra* at page 566.

[25] Restatement, Trusts § 101 (1935).

[26] Some of the problems involved are: the feasibility of transferring the $98,000,000 of assets to a new trustee; whether there should be one trust company or several of them to act as trustee or whether the court should appoint an individual or a group of individuals; how much the college would suffer financially; possible requirement that the statute pertaining to administration of the school be repealed (Act of February 27, 1847, P. L. 178, P.S. §§ 16339-16344 (1957); and whether the college would continue to qualify for tax exemption under the Pennsylvania Constitution (Art. IX, Sec. 1).

[27] Counsel for applicants announced that it was contemplating a direct appeal to the United States Supreme Court. *The Philadelphia Inquirer,* page d 3, (September 13, 1957).

of several ways: the Supreme Court could announce that such discrimination was against public policy and then proceed to give the basis for such a conclusion, this being an application of *cy près;* or the Court could simply say that such action will not be condoned and then cite *Brown v. Board of Education,* making it very clear that the *Brown* case is intended to reach to the farthest corner—even where the Fourteenth Amendment does not apply. There is little doubt but that there would not be a ruling striking down the whole trust as being against public policy or that the trust failed as a charitable trust. A prior decision by the Supreme Court held that this is a valid charitable trust,[28] and certainly the institution is beneficial to the public.

However, if the Supreme Court reverses the appointment of a private trustee, it will be upon the most narrow ground available. In his opinion on the initial decision by the Orphans' Court, Judge Bolger distinguished this case from *Shelley v. Kraemer.*[29] In the *Shelley* case a landowner breached a restrictive covenant by selling a plot of land to a Negro, which resulted in suit being brought to enforce the covenant. Judge Bolger said:

> "The Shelley, Buchanan and related cases are readily distinguishable from the instant one, both factually and legally. For example, in those cases the sellers of the properties were independent contractors who had the right to elect to abide by or to breach their covenants. It was their breaching of their covenants which resulted in the opportunity of the colored purchasers to exercise their rights to buy and to occupy the properties. Here the Board is a fiduciary, the mouthpiece of Stephan Girard. Its decision was to abide by the terms of the will and to refuse to admit the applicant. From the Board's viewpoint, unless the applicant can demonstrate he is a member of the class, 'poor male white orphans', he has no right to admission, *Soohan v. The City of Philadelphia et al.,* 33 Pa. 9, and no authority was presented to the board which would sustain the existence of such a right." [30]

At that stage of the litigation, such a distinction was valid—there being no state action required to compel the trustee to abide by the provisions of the trust. Since the decision of the Supreme Court on the matter that the trustee was an agent of the State, the situation has now been completely reversed. In order for the exclusionary term in Girard's will to continue to be effective, the Orphans' Court has decided to appoint a private trustee. In other words the *court* is taking affirmative action to avoid rendering the term "white" inactive.

Mr. Chief Justice Vinson in writing the opinion of the Supreme Court in *Shelley v. Kraemer* said:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the

[28] Vidal v. Girard's Executors, 43 U.S. (2 Howard) 127 (1844).
[29] 334 U.S. 1 (1947).
[30] Girard Estate, 4 D. & C. 2d 671, 688 (1955).

> Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated . . . .
>
> "But here there was more. These are cases in which the purposes of the agreements were secured only by judical enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judical enforcement of private agreement does not amount to state action; or, in any event, the participation of the States is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment . . . .
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> "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteneth [Fourteenth] Amendment, is a proposition which has long been established by decisions of this Court."

It would seem, therefore, that under this interpretation the Supreme Court has no other alternative than to declare the appointment of a private trustee by the Orphans' Court also to be "state action" and accordingly, within the scope of the Fourteenth Amendment. If this were the course to be taken, once again it would be illustrative of how the Supreme Court has been gradually extending the fingers of the Fourteenth Amendment. By such a decision, segregation apparently could not be continued under a charitable trust, presently in existence with an "agent" of the state acting as trustee. Only by initial appointment by the settlor of a private trustee could discrimination be condoned. However, this too would be subject to the Supreme Court's broadening of the term "state action".[31]

If the Supreme Court affirms the appointment of a private trustee, this would impose the first significant limitation upon the policy behind the Brown case, in that the principle announced there applies only to publicly controlled and administered areas. Such affirmance would indicate also that exclusionary practices in charitable trusts administered by private trustees are not sufficiently harmful to justify alteration.

However, there might be another possible solution to the problem presented by this case, even though there might have been found a crystal clear intent on the part of the settlor to have the exclusionary clause perpetuated. It is well-established that the courts attempt to reach the most just result by sound and established methods, but on occasion, when such methods are not desirable or are unavailable, the courts will tend to improvise an approach which will best satisfy justice's requirements.[32] It is undisputable that citizens of a society are subordinate to laws which reflect the policies and beliefs of

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[31] See note 11 *supra.*

[32] McKee Estate, 83 D. & C. 492 (1954), *aff'd per curiam* 378 Pa. 607, 108 A. 2d 214 (1954).

that society.[33] If such were not the case, chaos would result from the practice of complete individualism. When an individual dies and attempts to continue his influence upon society, there is no reason why his program should suddenly be granted an immunity from the effect of these flexible and ever-changing laws and regulations. It is difficult to visualize how a reasonable settlor would expect to have terms of his trust to be performed in exact detail, as drafted, especially where the trust is beyond the scope of the rule against perpetuities.

As has been previously pointed out, Girard's will has been in effect for a century and a quarter, and since probation of it, this country has experienced, *inter alia,* a war over the issue of differential treatment of the black and white races, and has enacted the Fourteenth Amendment. No one could logically argue that public notions of discrimination have not changed to a considerable degree.

Coupled with this is a necessity to examine upon what a charitable trust depends for its existence. The usual notion for the justification of such a trust is that it is one which is for the public benefit. The usual connotation of the term "public benefit" is that society should receive worthwhile fruits from the objects of the proposed trust. In other words, the public is the named beneficiary under the terms of the instrument. It would not be a shocking proposition to say that in order for a charitable trust to be established and to continue as such, it must meet the demands of society of those things which the latter believes to be for its own good.

Therefore, if it be deemed that the term, "white", in Girard's will is of no benefit to society, or even that such a requirement is a detriment to the public, the courts could very easily strike the term. This is not a new concept to trust law. This method has been employed innumerable times by the courts under the fiction of "probable intent of the settlor".

It is true that the provisions of the trust include a large enough segment of the public to be declared charitable, when speaking of the requirement *numerically,* but perhaps from the effect of the term pertaining to discrimination, the charitable purpose would be nullified by being of no benefit to *any* segment of the public. The present public notion of discrimination by race is that its only purpose is to hurt or harm or impose shame and hardship upon the minority. In other words, the present trend of public belief is such that discrimination by reason of race is undesirable and therefore, such action would be of no benefit to *either* of the races—an illusory benefit.

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[33] *In re* Sherwood's Estate, 122 Wash. 648, 211 P. 734 (1922).

However, another important consideration comes into its own at this point, namely, the potential deterrent effect if such action were to be taken. Society has long been handsomely rewarded by its recognition of the charitable trust. It will continue, no doubt, to be the desire to encourage future gifts of charity of this sort. However, it is also a requirement of present-day society to permit a private individual sufficient liberty to have his own personal prejudices so long as they do not come in conflict with community values. If the charitable trust were to be subjected too severely to the whims of the public policy, the probable effect would be that those potential settlors, desiring restrictions upon the application of their gifts, would turn to the use of some other method of perpetuating their ideals. Perhaps this evasion would also be socially undesirable, and therefore, it is paramount that reasonable prudence should be applied in determining where this nebulous line should be drawn.

The employment of such a device would not necessarily mean a sudden death for charitable trusts which contain other types of exclusionary terms. For example, the charitable trust for the Negro, or the trust for girls, would probably not be condemned. The test of whether it coincides with the public benefit would have to be applied. It is generally believed that society is always ready to help the "underdog" and this would no doubt influence the conclusion reached by the courts. The fallacy of such a test is that it is not an easily ascertainable standard, and could be misapplied or overemployed to either extreme. However, if the courts should employ this method of affecting a cure on the ailing Girard trust, such action, and legal maneuvering included therein, would be brightly spot-lighted by the keen interest now focused by society upon any question involving segregation.

Humanity is constantly striving to improve itself, and on this road, society frequently encounters crossroads. Under our system of judicial review the courts are expected to aid in pointing to the correct way by their interpretation of community values as well as of legal precedents. The Girard case may be likened to one of these crossroads in the development of ideals and notions pertaining to discrimination.

The Supreme Court of the United States must make a choice between two basic avenues—to hold that the appointment of a private trustee is proper and thereby permit discrimination in this situation, or to strike down the provision in the Girard trust. If the former course is followed, either the charitable trust will have evaded public policy at this point, or society has not been as seriously offended by the exclusion as it might appear.

If the latter approach is to be taken, the results will depend upon the manner in which the Supreme Court reverses. If it concludes that the best solution is to apply the concept of state action to this situation where the lower court merely appointed a private trustee, then there is a possibility that the effects would be far reaching. Such a concept could be pulled and stretched to the point at which all forms of discriminatory behavior would be subjected to fatal attack. Perhaps such an extreme effect would also be contrary to public benefit. At present, however, the question remains, "Where is this line of demarcation?"

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