# *EVANS v. ABNEY*: REVERTING TO SEGREGATION

By DAVID S. BOGEN*

Last term the Supreme Court approved state court enforcement of a racially restrictive condition for the first time since its decision prohibiting enforcement of such a condition in *Shelley v. Kraemer*.[1] The Court held in *Evans v. Abney*[2] that the Georgia Supreme Court could find that the trustees' constitutional inability to comply with a racial restriction in a will[3] caused the trust property to revert to the testator's heirs. This suggests that *Shelley* and its progeny in estate and trust law should be reexamined to ascertain whether the Court has here acted consistently with the principles of those cases, departed from those principles, or simply misapplied them.

A brief chronology of the background to the Court's decision in *Abney* is necessary. In 1911, Augustus O. Bacon devised a tract of land to the Mayor and City Council of Macon, Georgia, for the purpose of providing a park for white people only. After several years of operating the park on a segregated basis, the city-appointed board of trustees began admitting Negroes on the theory that maintaining a segregated public facility was constitutionally impermissible. Several of the trustees then brought suit against Macon asking that the city be removed as trustee and that the court appoint new trustees to whom title would then be transferred. Several Negroes intervened, urging that the court not appoint new trustees, while several of Bacon's heirs intervened, asking for the reversion of the park in the event that the court did not appoint new trustees. The city then resigned its trusteeship, and the court appointed three new trustees. The Supreme Court of Georgia affirmed this decree.[4]

The Supreme Court reversed, holding that "the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."[5] On remand, the Supreme Court of Georgia held that, regardless of the identity of the trustees, the park must now be operated on a non-discriminatory basis, *i.e.*, in a manner contrary to the specific purpose of Bacon's will.[6] The case was remanded to the trial court for a determination of the validity of the heirs' contentions as to the reversion of the property. The trial

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* Assistant Professor of Law, University of Maryland School of Law; A.B., 1962; LL.B., 1965, Harvard University; LL.M., 1967, New York University.

1. 334 U.S. 1 (1948). The closest the Court came to upholding a racial covenant was its affirmance by an equally divided Court of the use by a party to a contract of a racial covenant in the contract as a defense to an action on the contract. Rice v. Sioux City Memorial Park Cemetery, 348 U.S. 880 (1954). But the Court then granted a rehearing, vacated the affirmance and dismissed the petition for certiorari as improvidently granted. 349 U.S. 70 (1955).

2. 396 U.S. 435 (1970).

3. Evans v. Newton, 382 U.S. 296 (1966).

4. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).

5. Evans v. Newton, 382 U.S. 296, 302 (1966).

6. Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966). The court stated, "Under these circumstances, we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated." 148 S.E.2d at 330.

court held that operation of the *cy pres* doctrine was barred because no general charitable intent could be discerned from the testator's will. The Supreme Court of Georgia affirmed,[7] and the Supreme Court granted certiorari.[8]

The *Shelley* Court had found that state enforcement of a private agreement to discriminate was a denial by the state of equal protection of the laws although the bias was initiated by a private person and the state was merely applying its racially neutral law that private agreements will be enforced by the court. This finding of state responsibility for discrimination was the forerunner of more than two decades of decisions which found sufficient state involvement in discrimination to call for application of the equal protection clause of the fourteenth amendment.[9] The Court in *Abney* did not hold that the state was not responsible for discrimination resulting from enforcement of the reversion, but rather that no discrimination resulted. Nevertheless, the *Abney* opinion contains several references emphasizing the fact that the state law is racially neutral and that the discriminatory result is actually determined by the private bias of an individual long dead.[10] This might suggest that the state is not denying equal protection when it enforces a discriminatory provision in a will. However, analysis of *Shelley* demonstrates that, if the *Abney* Court *had* found discrimination to result from enforcement of the reversion, the Court would have had to find it forbidden or else repudiate *Shelley*.

## I. THEORIES OF "STATE ACTION" FROM *Shelley*

In *Shelley v. Kraemer*,[11] property owners subject to a restrictive racial covenant brought an action to restrain Shelley, a Negro, from taking possession of property which he had purchased in violation of the covenant. The Court held that enforcement of such a covenant by the state court would be state action and that such state action denied Mr. Shelley the equal protection of the laws. Ascertaining precisely why such enforcement is state denial of equal protection has proved to be an elusive task for commentators.[12] At least five theories

7. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).
8. Evans v. Abney, 394 U.S. 1012 (1969).
9. *E.g.*, Hunter v. Ericson, 393 U.S. 285 (1969); Evans v. Newton, 282 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Pennsylvania v. Board of Directors, 353 U.S. 230 (1957); Barrows v. Jackson, 346 U.S. 249 (1953).
10. "Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and non-discriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust." 396 U.S. at 446. "The Baconsfield trust 'failed' under that law not because of any belief on the part of any living person that whites and Negroes might not enjoy being together but, rather, because Senator Bacon who died many years ago intended that the park remain forever for the exclusive use of white people." *Id.* at 447.
11. 334 U.S. 1 (1948).
12. Henkin, *Shelley v. Kraemer, Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949); Nelkin, *Cy Pres and the Fourteenth*

have been advanced. But under any of these theories, the Court could not enforce a provision in a will which required a trustee or a beneficiary to discriminate.

### *A. Statutory Violation*

On one reading, *Shelley* did not involve state action problems. It was simply a case of violation of a federal statute. Justice Black, joined by Justices Harlan and White, dissenting in *Bell v. Maryland,*[13] characterized *Shelley* as follows:

> It seems pretty clear that the reason judicial enforcement of the restrictive covenants in Shelley was deemed state action was not merely the fact that a state court had acted, but rather that it had acted "to deny to 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." In other words, this Court held that state enforcement of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy, and use their property without regard to race or color.[14]

In other words, enforcement of the restrictive covenant violated the Civil Rights Act of 1866.

If the Court were to adopt such an interpretation of *Shelley,* it would still have to decide whether allowance of a reversion results in discrimination. The Civil Rights Act of 1866 gave all citizens the same right as white citizens to "inherit, purchase, lease, sell, hold and convey" property.[15] In *Jones v. Mayer,*[16] the Court held that refusal of a private developer to sell to a Negro was a denial to the Negro of his right to purchase property. Similarly, if the inheritance of the park is limited to white citizens as a class, it may be argued that the black citizen does not enjoy the same right to inherit as the white citizen.

But if *Shelley* was really just a case of enforcement of the Civil Rights Act of 1866, the form of the *Shelley* opinion is unfathomable. The Civil Rights Act is mentioned only as an illustration of the proposition that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property."[17] Assuming that the Act applied to enforcement of a restrictive covenant, the

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*Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts,* 56 GEO. L.J. 272 (1967); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

13. 378 U.S. 226, 318 (1964) (dissenting opinion).

14. *Id.* at 330 (citations omitted). At a time when Congress has exercised a good deal of power to attack racial problems, the Court may be tempted to abdicate the role it has been playing and thrust the burden for securing racial equality onto Congress.

15. 42 U.S.C. § 1982 (1964).

16. 392 U.S. 409 (1968).

17. Shelley v. Kraemer, 334 U.S. 1, 10 (1948).

Court would have to justify the constitutionality of the Act. If the Act is justified under the thirteenth amendment,[18] the emphasis in the *Shelley* opinion on state action is totally irrelevant. If the Act is justified under the fourteenth amendment, the *Shelley* opinion should have focused on how the theory of state action justified the Act. Instead of pointing to violation of a constitutional statute, the Court stated at several points that the state denied equal protection of the laws in violation of the fourteenth amendment.[19] Although it is possible for the Court to construe the holding in *Shelley* in a way totally at odds with the form which the opinion took, it is not likely that a majority of the Court will do so in the future.[20]

### *B. Public Function*

Another reading of *Shelley* is that restrictive covenants are a form of private zoning, that zoning is a function of the state and that the state is responsible if it permits private persons to exercise its functions.[21] Thus, Justice Douglas has said, "Leaving the zoning function to groups which practice discrimination and are licensed by the states constitutes state action in the narrowest sense in which *Shelley* can be construed."[22]

Using the public function rationale, the enforcement of the reversion in *Abney* might be considered state action. Charitable bequests serve a public function, especially where such money is to be used for a public park. The state gives special benefits to charitable trusts including tax exemptions and exemption from the rule against perpetuities. Justice Douglas used this rationale as an alternative basis for finding that the trustees could not discriminate in the operation of the park in *Evans v. Newton.* "Mass recreation through the use of public parks is plainly in the public domain . . .; and 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."[23] Thus, if the court enforcement of the reversion would assist the trustee in discriminating in the operation of the park, such enforcement should be proscribed.

Justice Douglas, however, carefully avoided committing himself to this narrow reading of the *Shelley* case. This narrow public function reasoning was used in the briefs in *Shelley,* but the opinion does not suggest that the Court accepted the argument.

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18. The Act was in fact found constitutional on the basis of the thirteenth amendment in Jones v. Mayer Co., 392 U.S. 409 (1968).

19. "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." Shelley v. Kraemer, 334 U.S. 1, 20 (1948). "Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 23.

20. Even Justice Black in *Abney* indicates that he gives *Shelley* a broader reading. *See* text accompanying note 25 *infra.*

21. Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960).

22. Reitman v. Mulkey, 387 U.S. 369, 384-85 (1967) (Douglas, J., concurring).

23. Evans v. Newton, 382 U.S. 296, 302 (1966).

### C. *All Inclusive*

A third reading of *Shelley* relies on the fact that the state in enforcing the covenant recognized a right to discriminate. Thus, it may be argued that, in asserting a right to treat people unequally, the state is failing to afford equal protection of its laws. "[A]ny court action which enforces or facilitates private discrimination is unlawful state activity if the state itself could not have constitutionally required or encouraged the discrimination in question."[24] This analysis is consistent with Justice Black's reference in *Abney* to *Shelley* as holding "unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes."[25] It also finds support in the statements of Justice Douglas, joined by Justice Goldberg, concurring in *Bell v. Maryland*,[26] which involved the conviction of restaurant sit-in demonstrators for trespass: "Why should we refuse to let state courts enforce *apartheid* in residential areas of our cities but let state courts enforce *apartheid* in restaurants? If a court decree is state action in one case, it is in the other."[27] It turns the attention of the Court to other principles for limiting the reach of the fourteenth amendment — to its collision with other constitutional guarantees[28] or to a distinction between public life and private life.[29] Under this theory of *Shelley* and state action, the enforcement of the reverter in *Abney* would be state action and the only remaining question would be whether such action effected any discrimination.

If this theory of state action were the basis for the *Shelley* Court's decision, a simple cite to *Shelley* would have disposed of many of the civil rights cases which proved to be extraordinarily difficult for the Court.[30] The failure to do so suggests that the Court fears such an expansive principle, and there is no suggestion in the decisions of the Court that they intend to apply *Shelley* in such a fashion in the near future.

### D. *No Enforcement of Racial Restriction*

Justice Brennan, dissenting in *Abney*, said "Shelley v. Kraemer . . . 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 authored racial restriction."[31] This led Justice Brennan to conclude that the Court could

24. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 GEO. L.J. 272, 305 (1967).
25. 396 U.S. at 445.
26. 378 U.S. 226, 242 (1964) (concurring opinion).
27. *Id.* at 259.
28. Henkin, *Shelley v. Kraemer, Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).
29. Black, Foreword: *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967). While a resolution of the state action issue is unnecessary for purposes of examining the effects of the *Abney* decision, it may be appropriate to note here that the approach of Professor Black commends itself to this author.
30. *E.g.*, Evans v. Newton, 382 U.S. 296 (1966); Bell v. Maryland, 378 U.S. 226 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
31. 396 U.S. at 456.

not enforce the reversion. Under this theory the fact that no discrimination resulted would be irrelevant. The majority in *Abney* rejected Justice Brennan's interpretation since they based their opinion on a finding of no discrimination and distinguished *Shelley* as involving discrimination.

### *E. Forcing Third Person to Discriminate*

Professor Pollak has put forth a rationale similar to, but more limited than, the one given by Justice Brennan. He argues that the state is denying equal protection only when it assists private persons in their attempt to force others to act in a manner which the state could not itself require.[32] This reading is consistent with Justice Black's statements in *Abney* quoted earlier[33] and with his discussion in *Bell* distinguishing *Shelley* from discrimination by a store owner: "The property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as *both* parties are willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right."[34] The incompatability of the statutory interpretation theory of Justice Black[35] and the public function theory of Justice Douglas[36] with the form of the *Shelley* opinion and the apparent rejection by the Court of the broader state action theories of Professor Black[37] and Justice Brennan[38] make it likely that Professor Pollak's view would command the broadest support on the Court today.

It may be argued that this theory makes *Shelley* entirely inapplicable to trusts because the trustee is not an independent individual but a mere extension of the settlor and is already charged with the duty to comply with the settlor's wishes as contained in the trust instrument.[39] This seems to overlook the trustee's discretion. If the trust instrument does not specifically limit his administration of the trust, he may administer it in a way in which the testator would surely never have done. Although the trustee gains his power over the trust *res* from the trust instrument and cannot act in violation of it (except insofar as a particular restriction may be unlawful), the grantee of land in *Shelley* also obtains possession by means of an instrument which may limit what use he can make of the property. It is true that the grantee has a selfish interest in the property which the trustee does not have and which would cause him to maximize his own freedom to use or dispose of the property in ways which may be contrary to the desires of the grantor. But this distinction does not seem relevant to the problem of whether the person (grantee or

32. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).
33. *See* text accompanying note 25 *supra*.
34. Bell v. Maryland, 378 U.S. 226, 331 (1964) (dissenting opinion).
35. *See* text accompanying notes 13–20 *supra*.
36. *See* text accompanying notes 21–23 *supra*.
37. *See* text accompanying notes 24–30 *supra*.
38. *See* text accompanying note 31 *supra*.
39. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 GEO. L.J. 272 (1967).

trustee) can be compelled by the settlor to discriminate in the use of the property. Thus, under Professor Pollak's theory of *Shelley v. Kraemer,* the state cannot force a trustee to discriminate against his will in the administration of the trust.[40]

Thus, under any theory of *Shelley,* the Court was required to determine whether enforcement of the reverter resulted in discrimination. The finding that no discrimination resulted enabled the Court to avoid discussing the various theories of state action which might be argued. But it is important to note that nothing in *Abney* suggests that a state can enforce a provision of a will which *does* discriminate.

## II. ESTATES AND TRUSTS PROGENY OF *Shelley*

An understanding of the Court's decision that no discrimination occurred as a result of the enforcement of the reversion requires a review of the case law involving trustees under a will requiring racial discrimination.

### *A. Enforcement of Requirement of Discrimination*

In recent cases where the administrator or trustee has asked a court for a decision that he is not obligated to abide by a racial restriction, the court has applied the doctrine of *cy pres* to free him from the condition.[41] These courts have noted that the main intent of the testator was to aid a functioning institution and that, due to the changing nature of our society, including the non-discrimination requirements attached to federal grants, it is impossible or highly impractical to attempt to achieve the settlor's main goal without violating his subsidiary racially restrictive condition. In order to effectuate the primary desire of the settlor, therefore, it is necessary to eliminate the racial condition.

*Cy pres* is not a resolution for all racially restrictive conditions, however. *Evans v. Abney*[42] is a demonstration that courts, perhaps particularly in the South (either because of the prejudice of the court or a frank recognition of the prejudice of the settlor), may find that the racial restriction is inextricably bound to the settlor's primary intent. Even in the North, courts may find that the settlor would rather have the gift fail than be used by an integrated group.[43]

One reason for the appeal which the doctrine of *cy pres* seems to have in state courts is that it avoids a difficult constitutional question.

40. *See* Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967); Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962). The extension of this theory into trust law need not invalidate the religious trust. The theory may only apply to equal protection. *See* Black, *supra* note 29. Furthermore, permitting trusts for other charitable purposes may make denial of enforcement of such a trust an infringement on free exercise. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

41. *E.g.,* Dunbar v. Board of Trustees of George W. Clayton College, 461 P.2d 28 (Colo. 1969); Bank of Delaware v. Buxton, 255 A.2d 710 (Del. Ch. 1969); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966).

42. 224 Ga. 826, 165 S.E.2d 160 (1968).

43. La Fond v. Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959).

A small group of cases has taken another approach. Citing *Shelley,* they state that a court cannot constitutionally compel a trustee to follow a racially discriminatory condition. In the first of these cases, after finding that Tulane was a private university and could not be compelled to integrate, the federal district court in Louisiana held that the trustees could accept Negro students despite a racial restriction in the original grant of money from Paul Tulane. "Indubitably the Tulane Board is free to act as it wishes since neither this nor any other court may exercise its power to enforce racial restrictions in private covenants."[44] However, there was no possibility of reversion in that case because the heirs of Paul Tulane expressly waived their rights to enforce the racial restriction.

In another case the trustee under a will in California was unwilling to abide by the discriminatory provisions of the will. A California superior court found that it was without power to substitute a new trustee who would obey the restriction:

> If the Court were to appoint some fiduciary other than that designated by Mrs. Walker — some trustee who would be willing to administer the trust with the discriminatory provisions intact — the Court would be lending its hand in aid of discrimination. Mrs. Walker was constitutionally free, as a private individual to discriminate as she did, but the Court is not. . . . State courts cannot promote or give effect to private contracts that deny equal protection of the laws.[45]

Finally, Sweet Briar Institute successfully sought an injunction against state officials to prevent them from enforcing a racial restriction in a testamentary disposition. Under Virginia statutes state officials have a right to bring suit to require trustees to conform to the conditions of their trust. The federal district court granted an injunction against such a suit, saying the "state cannot require compliance with the testamentary restriction because that would constitute state action barred by the Fourteenth Amendment."[46]

In none of these cases was the state court asked by a private person to enforce the terms of the trust. In the first, the heirs waived enforcement; in the second, the case concerned substitution of trustees rather than an order directed at the existing trustee; and, in the third, the injunction prevented the state from enforcing the trust *sua sponte.* Nevertheless, these distinctions were not emphasized in the opinions. Instead, the courts reasoned that *Shelley* prevented any court from enforcing such a restriction. Nothing in *Abney* detracts from this reasoning. The state is surely more involved in the denial

44. Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674, 687 (E.D. La. 1962).

45. *In re* Estate of Ruth Snively Walker, No. 70195 (Cal. Super. Ct. Santa Barbara County, Apr. 23, 1965), *reprinted in* Supplemental Brief for Appellee at 9, 11–12, Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966) and *cited in* Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts,* 56 GEO. L.J. 272, 303 n.166 (1967).

46. Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967).

of equal protection when it orders a trustee to discriminate than when it says that the trustee cannot discriminate and terminates the trust.

For many cases the inability of the state to order the trustee to act on a discriminatory basis in accordance with the testator's will effectively removes the discrimination in the gift. A breach of trust by the trustee does not cause a reversion unless there is a condition subsequent. The only remedy for such a breach is a suit to enforce the terms of the trust; and, where, as here, such a suit cannot be maintained, there is no remedy for breach of trust.

*B. Enforcement of Reversion for Failure to Discriminate*

Nevertheless, in many cases of which *Abney* is an example, there *will* be a condition subsequent. Again, discrimination could be avoided by the use of *cy pres*. But where the intent of the testator is clear that integration should cause the gift to fail, the court is faced with a difficult problem. In *Shelley* and the other cases just discussed, enforcement of the covenant would have resulted in discrimination in the case before the court. Where a reverter is enforced, however, it is obvious that there is no discrimination in the case before the court. If there were discrimination, there would be no reversion.

In *Barrows v. Jackson*,[47] suit was brought for damages against the seller of property for violating a restrictive covenant. No attempt was made to dispossess the Negro who had purchased the land. Enforcement of the covenant would not cause discrimination in the case before the Court since there would have been no case unless the Negro had been able to purchase and retain possession of the property. Thus, Chief Justice Vinson, dissenting, argued:

> The plain, admitted fact that there is no identifiable non-caucasian before this Court who will be denied any right to buy, occupy or otherwise enjoy the properties involved in this lawsuit, or any other particular properties, is decisive to me. It means that the constitutional defect, present in the *Shelley* case, is removed from this case.[48]

But the majority responded that, whatever the result in the case before the Court, the establishment of the principle that the Court will give damages for breach of a racially restrictive covenant would coerce others into obeying such a covenant and thus deprive Negroes of the opportunity to purchase property.

> If a state court awards damages for breach of restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-caucasians or else will require non-caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-caucasians will be unable to purchase, own, and enjoy property on the same terms

47. 346 U.S. 249 (1953).

48. *Id.* at 262 (dissenting opinion).

as caucasians. Denial of this right by state action deprives such non-caucasions, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment.[49]

Similarly, not only would enforcement of a racial restriction of a trust force the trustee to discriminate, but enforcement of a reversionary interest for breach of the restriction would compel the trustee to discriminate in order to maintain the trust. Thus, where enforcement of the reversionary interest compels the trustee to discriminate, such enforcement would seem to be prohibited by the fourteenth amendment.

*Evans v. Abney* presents the rather unique situation where the trustee is prohibited by the Constitution from complying with the terms of the trust even if he so desires. If the limits of state action are defined as broadly as suggested by Professors Black,[50] Henkin,[51] Ming,[52] and Nelkin,[53] all trustees would be so prohibited and *Abney* would take on additional significance. *Abney* relies on the fact that the trustee is legally bound not to discriminate to support its conclusion that acknowledgment of the reversion for failure to discriminate does not result in discrimination. "Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the White and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued."[54]

*Abney* leads to the anamolous position that trustees who wish to administer a trust in a non-discriminatory manner can do so, unless they are required by law to do so, in which case they cannot. This position depends on acceptance of the argument that only where the state does not require integration does the state, by potential enforcement of the reverter, compel the trustee to discriminate. But closer analysis reveals that by its decision in *Abney* the Court is permitting the state to put pressure on the trustee to discriminate.

While no discrimination may be apparent in the reversion to the heirs in *Abney,* the principle of that decision may lead other trustees to discriminate. The natural tendency of any trustee is to attempt to fulfill the trust and to maintain his position as trustee. He may receive remuneration for acting as trustee; he may enjoy the power which he exerts as trustee; or he may simply desire to assure that the beneficiaries receive the testator's largesse. Whatever his reason or combination of reasons for accepting a position as trustee, they will be frustrated if the trust fails. A trustee who might wish to administer the trust in a non-discriminatory fashion will be less

49. *Id.* at 254.
50. Black, *supra* note 29.
51. Henkin, *Shelley v. Kraemer, Notes for a Revised Opinion,* 110 U. PA. L. REV. 473 (1962).
52. Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases,* 16 U. CHI. L. REV. 203 (1949).
53. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts,* 56 GEO. L.J. 272 (1967).
54. Evans v. Abney, 396 U.S. 435 (1970).

likely to do so if he knows that as a result the trust will fail, he will lose his position, and the charitable beneficiary will lose all benefit. After *Abney* the trustee realizes that he will lose his position as trustee and the trust *res* will revert to the heirs if he fails to discriminate. While the trust *res* may eventually revert anyway if the trustee is ordered to integrate by the Court as in *Evans v. Newton,* the trustee may delay such a reversion by an initial decision to administer the trust in accordance with the racial restriction.

Not only does the allowance of the reversion encourage the trustee to discriminate initially in order to delay loss of the trust *res,* it may encourage him to discriminate in order to prevent ever losing the *res.* The heirs may agree with the settlor's desire to racially restrict use of the *res.* Even if they wished to cause a reversion, they may not have standing to force the trustee to integrate. The right they would be asserting would not be theirs. While the heirs would have no standing to challenge the segregated trust, the Negro has no interest. As a result of *Abney,* the Negro will spend large amounts of money in a lawsuit without obtaining any tangible benefit of access.

Negroes might sue in the hope that the Court will apply *cy pres,* but where the settlor has spelled out his intent to encourage segregation that hope will be dim. It will be especially faint in areas of the deep South where racial conditions are most likely to be found. Some individual Negroes might bring suits to prevent whites from enjoying a benefit which Negroes can never get; but the number of individuals whose sense of outrage overcomes the limitations of their pocketbook, the natural hostility of the whites who lose the benefit, and the lack of any tangible benefit for the plaintiff will be small indeed. Only an organization like the NAACP Legal Defense Fund, Inc. would be able to mount a sustained attack against segregation achieved by testamentary provisions. Thus, if discrimination resulting from this decision is to be eliminated, the Legal Defense Fund would have to discover all the instances of such trusts, expend large portions of its budget to bring suits (assuming it has the manpower to deal with violations of the fourteenth amendment on an individual basis) which avert segregation without obtaining any tangible benefit for the plaintiffs. Further, the settlor may set aside a much smaller portion of his estate for the use of Negroes as a correlative park so that victory in a suit would actually deprive the Negro of a benefit he already had. Throughout the history of the civil rights movement, civil rights organizations have sought to obtain equal benefits and advantages. To premise a constitutional decision on the assumption that they will press just as eagerly to deprive whites of benefits which they cannot obtain for themselves seems both unwise and improper.

Finally, the effect of this case is to encourage settlors to promote segregation. The Court has informed them that they have a right to make a reversion based on failure of the trustee to discriminate. Thus, the settlor can leave his property for use by the government on a segregated basis with the assurance that, should anyone challenge this use, the property will not be lost but returned

to the settlor's heirs or the grantees of the reversionary interest. Of course, whenever the state recognizes the right of an individual to discriminate, it is, in a sense, encouraging such discrimination. Here, however, the encouragement is of a much greater character. The individual is not only encouraged to discriminate, but is also encouraged to use the power of the state to put pressure on another individual to discriminate.

## III. COUNTERVAILING INTERESTS

There are a number of problems with a decision that would invalidate the reversion under the fourteenth amendment. It results in a deliberate violation of the settlor's intent and a use of the money for further integration which, it is assumed, would be abhorrent to the testator. It has been argued that removal of class limits merely adds beneficiaries to a class intended to be benefited and thus is not a serious perversion of the testator's interest.[55] This ignores the possibility that the sole intent of the settlor may have been to further separation of the races, so that merely expanding the class of beneficiaries results in total frustration of the settlor's intent. But why should property be disposed of in accordance with the settlor's intent? It is only a policy of state law which permits such transmission of property, and any provision which is contrary to state policy may be struck.[56] It does not seem inappropriate that one risk of the settlor is loss of control of his money when he attempts to violate basic policies of the state.

A practical objection to voiding the reversion is that it would discourage charitable gifts, but discouraging segregated gifts for public use would seem a credit rather than a debit in terms of public policy. A more realistic fear might be that it would deter gifts for the benefit of minority groups. Since it is likely that more gifts and trusts are now being established for minority groups than for whites only, a decision voiding reversions in gifts with racial classifications might, by deterring such gifts, hurt more than it helps the Negro. But a prohibition of favoritism to whites does not necessarily require invalidation of trusts to benefit minority groups;[57] a rational basis exists for distinguishing between gifts to minority groups and to the white majority, in that as long as these minority groups continue to hold an inferior position in our society, gifts to them can only operate to equalize their position with that of the white majority. When and if this rational basis disappears, the reasoning of this article provides a basis for invalidating the minority group limitation despite the wholly compensatory purpose of the testator.

The Court may have considered, however, that the harmful effects of allowing the reversion here were minimal and outweighed

55. Nelkin, *supra* note 53, at 300; Power, *The Racially Discriminatory Charitable Trust: A Suggested Treatment*, 9 ST. LOUIS U.L.J. 478, 495–96 (1965).

56. *See* Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957).

57. *See* Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65 (1969); Power, *supra* note 55, at 494.

by the drawbacks in a decision denying reversion. After all, there are probably very few gifts today of significant amounts which are subject to racial restrictions. If a large movement developed to avoid integration by making such gifts, assuredly civil rights groups would challenge the bequests. In any event, a refusal by the federal government to treat such gifts as charitable and deductible would serve in large measure to deter the imposition of racial restrictions. In fact, for the state or federal government to grant the benefit of a tax deduction to gifts with a racially discriminatory condition would raise serious constitutional issues under the fifth and fourteenth amendments.[58] I would strike the balance the other way. State pressure to discriminate should always be prohibited.

## IV. CONCLUSION

Although *Abney* clearly states that the reversion is permissible because there was no discrimination, the opinion does not fully explain why there was no discrimination. It might be argued that the Court's references to the loss of the park by both blacks and whites show that no discrimination existed in the case before the court. "Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself."[59] But, if court enforcement of a principle which causes discrimination in other cases is not itself impermissible, the Court is overruling the principle of *Barrows v. Jackson* sub silentio. There is no reference to *Barrows* in the opinion, and the Court proffers no reason for establishing any principle that would foster segregation.

The Court might mean that no discrimination results where the pressure to discriminate which the reversion puts on the trustee is balanced by a constitutional command not to discriminate. "[T]he termination of the park was a loss, shared equally by the White and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued."[60] The reversion on its face requires the trustee to segregate, but presumably he will not because he is constitutionally prohibited. Since it is constitutionally impossible to fulfill the trust, the trust is void. The opposing forces balance out; so the result is the same as if the testator never made a charitable gift, but left the property directly to his heirs. The difficulty with this theory is its departure from reality. The charitable gift will have an effect until the case is brought to court. If the charitable trust never took effect, the reasoning might be appropriate. But the probate court will usually not inquire into the validity of the trust,[61] and so the trust will be operative until objection is made to it. Consequently, the reversion will affect the operation of the trust even if discrimination violates the Constitution.

Finally, the Court may here be engaged in a balancing process, determining that the discrimination in this case is too remote and

58. *See* Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970).
59. Evans v. Abney, 396 U.S. 435, 445 (1970).
60. *Id.* at 445.
61. State *ex rel.* Church v. Warren, 28 Md. 338 (1868).

insubstantial in effect for the Court to upset basic estate law by using a testator's property to accomplish a purpose abhorrent to him. The Court did not explicitly take a balancing approach, perhaps from fear that private citizens and lower courts would take a cue that discrimination may be tolerated. Yet the failure to expressly acknowledge the balancing done makes it possible that lower courts will adopt one of the two other approaches to the Court's opinion discussed above.

Although *Abney* may mark a limit on judicial action under the fourteenth amendment to prevent discrimination, it need not signal a general retreat. It may be an aberration caused by the convergence of concerns over individual control of property (that it not be used to defeat the intentions of the property owner) with the indirectness of the pressure to discriminate, whose force is greatly reduced both by the law forbidding that same discrimination and by possible penalties in the form of loss of charitable deductions. It is important, therefore, that lower courts recognize the exceptional nature of the circumstances in *Abney*; and it would be helpful to that end if the Court in future cases would emphasize the limited nature of the *Abney* holding and the combination of factors which brought it about.