1976


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ARTICLES

RACIAL AND RELIGIOUS DISCRIMINATION IN CHARITABLE TRUSTS: A CURRENT ANALYSIS OF CONSTITUTIONAL AND TRUST LAW SOLUTIONS

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IT IS THE PURPOSE of this article to chronicle and analyze the process by which constitutional and trust law have blended together in the charitable trust field. The questions to be posed and answered are essentially these: Can a settlor expect racial and religious restrictions in a charitable trust to be allowed to operate? If such restrictions may operate, under what conditions and circumstances? If not, why not, and what will happen to the trust property thereafter?

It will be seen that whenever the courts find state participation in a discriminatory charitable trust, the exclusionary trust features are held to work a denial of equal protection, in contravention of the fourteenth amendment,¹ and must cease to operate. The state action concept is not wielded sparingly; peripheral governmental involvement is often enough to necessitate the dismantling of exclusionary trust instructions. Generally, the trust property will then be preserved for charitable purposes through application of the doctrines of cy pres or deviation, unless the testator has unmistakably manifested an intention that a gift-over or lapse occur in the event the discrimination is disallowed.

The significance of current treatment of racial and religious discrimination in charitable testamentary trusts is best understood when contrasted with prior practice. Current trends may surprise lawyers who have not had recent occasion to review this subject, but a close scrutiny of the enduring precepts of charitable trust law demonstrates a consistency between contemporary judicial decisions and their historical foundation. Indeed, the assault on exclusionary trusts could legitimately have been mounted by trust law itself although, as will be discussed below, reliance on the state action concept more readily facilitates saving the trust for charity.

I. DEFINITION AND HISTORY OF THE CHARITABLE TRUST

Initially, an attempt should be made to define a charitable trust. The Restatement (Second) of Trusts presents a characterization that, in its simplicity, is more beguiling than informative:

A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to

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¹ U.S. CONST. amend. XIV, § 1.
create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.²

Basically, this explains that a charitable trust is like any other trust, but intended for a charitable purpose, leaving incomplete the elusive task of identifying “charitable purpose.” Ultimately, charitable purpose has become whatever, at a given moment, has been publicly acknowledged as a proper exercise in generosity for communal good. But first the fundamental concept of creating trust relationships for such charitable uses had to gain acceptance.

Once a matter of dispute, the origin of the charitable trust in the common law is now believed to predate the Statute of Charitable Uses enacted in England in 1601.³ Most recipients were religious persons or bodies that took land under official disfavor and could be made to forfeit their gift to the feudal overlord, or to the Crown, unless license were obtained to retain it. Consequently, the practice arose of private parties holding land for the use of religious parties, but the Chancellor would not always enforce these uses. To supplement the original proceeding in equity, the Statute of Charitable Uses then created a new remedy which authorized the Chancellor to establish a commission that would investigate abuses of charitable donations and issue decrees. Those who believed they had been injured by the commission’s pronouncements could petition the Chancellor for redress. The commission procedure eventually lost popularity and was seldom used when the Statute, except for its preamble, was repealed in 1888.⁴

It was in the preamble that the Statute attempted to define a charitable use, presenting a list of purposes for which property had previously been appropriately donated.⁵ The list was not intended to be final and analogous uses were upheld as properly benevolent.⁶ In this regard, the Statute’s drafters showed an appreciation for the recurring difficulty of codifying the charitable use. What constitutes charity must vary with time and place; there is no immutable formula that can assure that generosity will fulfill contemporary notions of public good when consensus on both “public” and “good” is forever evanescent. An operational definition (a catalog of what is being done), coupled with a policy that untried uses will have an opportunity to demonstrate

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² Restatement (Second) of Trusts § 348 (1959).
⁴ Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict., c. 42.
⁵ Stat. 43 Eliz. I, c. 4 (1601) stated: [S]ome for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsman and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

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their merit, gives greater flexibility than a prescriptive definition of what should be done, unless the latter is sufficiently broad to embrace changing societal needs as they can be identified. As Professor Scott has said:

[It] would seem that even the Parliament cannot frame a definition which would successfully include what should be included and exclude what should not be included. Matters of grave policy like this cannot be solved by definition.

Accordingly, many of the charitable purposes enumerated in the Statute of Uses have since become governmental functions (repair of bridges, ports), are performed by private noncharitable organizations such as labor unions (aid and help of young tradesmen), or are handled by shifting partnerships of government, charitable groups, and private industry. Others (for marriages of poor maids) have disappeared altogether as public concerns.

Mistakenly believing that the charitable trust was a product of the Statute of Charitable Uses, seven states formerly refused to recognize such trusts because the Statute had been repealed or had never been adopted in those states. Thus in 1819, the United States Supreme Court, in Trustees of Philadelphia Baptist Association v. Hart's Executors, did not enforce a testamentary trust created on behalf of a religious association for the education of Baptist youth. It was the view of Chief Justice Marshall that the testator's plan failed as a private trust for want of a definite beneficiary and could not be maintained as a charitable trust because the Statute of Charitable Uses had been repealed in Virginia. But when later research proved that charitable trusts were not dependent upon the Statute for their legitimacy, the Supreme Court reversed itself in Vidal v. Girard's Executors, the first case in what would eventually be more than a century of litigation over the will of Stephen Girard.

The Vidal opinion still did not presage unanimous acceptance of eleemosynary trusts in America; New York withheld its imprimatur until passage of the Tilden Act in 1893. The courts of that state had been unwilling on policy grounds to validate benevolent trusts, expressing a preference in Bascom v. Albertson for gifts to charitable corporations which were felt to be more amenable to control through the state's power to prevent incorporation. Allowing any person the right to create a trust that could last in perpetuity was considered unwise.

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7 Id. § 368, at 2856.
8 Maryland, Michigan, Minnesota, New York, Virginia, West Virginia, and Wisconsin. The statutes that eventually validated charitable trusts in these states are compiled in A. Scott, supra note 6, § 348.3, at 2785 n.9.
10 43 U.S. (2 How.) 127 (1844).
12 34 N.Y. 584 (1866).
II. THE CHARITABLE TRUST AS AN INSTRUMENT OF PUBLIC POLICY

The charitable trust is today welcome in all fifty states, but its gradual adoption in some jurisdictions, as well as its historical roots both preceding and subsequent to the Statute of Charitable Uses, unmistakably demonstrates that it exists at the sufferance of the community so long as it furthers societal ends and is not simply an emolument of private ownership of property. The existence of the testamentary charitable trust results from a balancing of conflicting public policies, for it inherently creates the disutility of dead hand control, restricting the alienability of property by those who survive the testator. From this perspective, the burden of proof shifts to the testator to show why his or her post-mortem instructions should be carried out by society for the potentially unlimited duration permitted charitable trusts. This is not to suggest that the charitable trust is disfavored — the truth is precisely opposite — but the allowance of such a trust is a policy decision, a conscious community choice to permit perpetual dead hand control of property when the purpose of that control is of greater benefit to society than preservation of alienability for the testator’s survivors. Specifically, the purpose of control must be charitable, i.e., it must enhance a contemporary concept of public good.

The question then arises: Is it ever in the public good to encourage racial or religious discrimination? Irrespective of constitutional requirements, this question is one that might have been customarily posed by trust law itself in fitting cases; benevolent trusts have always faced the litmus test of charitable purpose. This moment of threshold inquiry is a proper occasion to decide whether “charity” contemplates, for example, a hospital open only to whites. For too long it was simply assumed that the benefits to public health that would accrue from such a trust would outweigh the damage wrought to the excluded group. This assumption, however, is of questionable validity in light of the Supreme Court’s conclusions in Brown v. Board of Education regarding the effects of prejudice on the disadvantaged group. The Court’s observations are instructive:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group.

13 In any civilized society, there is no escape from the dead hand. In a sense we live by it. Our literature, our art, our architecture, our science, our religion, all are built upon the achievements of dead men. But the dead hand should not rule us. Just so, our property institutions must be shaped in part by the dead hand. But working compromises must be found, whereby the dead are forever barred from withholding the scepter from the hand of the living.


15 Id. at 494. In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), it was claimed that discrimination also harms members of the dominant social group. The Trafficante plaintiffs, suing under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et. seq.,
Transposing the *Brown* findings to the charitable trust context, it is at the very least arguable that the burdens of society will not be lessened, on balance, by an otherwise eleemosynary trust which by its language and effect inflicts social and psychic harm upon a racial group and inescapably upon the entire community.

Subjecting any charitable trust that bears racial restrictions to a social cost-benefit analysis is especially fitting in view of the indulgent treatment these trusts receive. The community makes certain tax exemptions and other support mechanisms available to the charitable trust that are not similarly offered to private trusts.

Among the benefits bestowed, for example, are those resulting from the favored position of charitable trusts under various tax laws. Certain of these advantages are enjoyed by the charities themselves: Property held by charities and used for charitable ends is generally exempt from local property taxes; income charities receive from invested funds is not subject to federal income tax, provided the income is not derived from actual operation of an unrelated business. Advantages also accrue to the benevolent donor. Charitable gifts are deductible from the donor's income up to a maximum of 50 percent of adjusted gross income. Moreover, federal estate and gift tax laws allow a full 100 percent deduction for philanthropic donations to qualified charities under the Internal Revenue Code of 1954.

Besides the tax benefits, there are other differences in treatment claimed that they had suffered embarrassment and economic damage as a result of living in a "white ghetto" (their apartment complex was over 99 percent white-occupied, allegedly due to the practices of the owners of the complex).

But certain of these benefits will no longer be automatically awarded when the applicant is practicing racial exclusion. The all-white private academies established throughout the state of Mississippi to evade the consequences of desegregation of public schools have been denied tax exempt status by the Internal Revenue Service. Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971). The deductibility of contributions to such schools has also been withdrawn. In Green, the three-judge panel adopted the Internal Revenue Service's construction of applicable Internal Revenue Code provisions — announced after the litigation had begun — to the effect that when an ostensibly charitable institution was nonetheless frustrating federal policy on racial discrimination, it would not be afforded tax advantages.

The individual philanthropist cannot be indulged in his own vagaries as to what is charitable; he must conform to some kind of norm, else he cannot obtain subsidy or tax exemption. Similarly, the general principle of a "desire to benefit one's own kind" is an acceptable incentive to philanthropy as applied to a wide range of causes. But it takes on a different and unacceptable hue when it is manifested as racial discrimination. We are persuaded that there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation.

*Id.* at 1163.

In Peoples-Merchant Trust Co. v. Schneider, 4 Ohio App. 2d 52, 211 N.E.2d 93 (1964), a gift in trust to create a scholarship fund for Catholic boys was denied exemption from succession taxes on the ground that the religious restriction prevented the trust from being "for purposes only of public charity."


18 *INT. REV. CODE OF 1954*, § 170(b)(3).

19 *Id.* § 2055.

20 *Id.* § 2522.

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between private and charitable trusts which tend to aid the latter. Although private trusts are subject to the Rule Against Perpetuities, or the rule against remoteness of vesting, charitable trusts are exempted in some situations. Private trusts are also not permitted to accumulate funds indefinitely by using income to enlarge the trust principal rather than paying the income to the beneficiaries; charitable trusts, by virtue of their unlimited duration, can accumulate income for extended periods, though usually under the supervision of a court ready to apply a reasonableness standard. Whereas a private trust must either designate definite beneficiaries or provide a method by which they can accurately be identified, the specific identity of a charitable trust’s beneficiaries can be, and indeed must be, uncertain. A consequence of this beneficiary indefiniteness is that the states’ attorneys general, augmented by district and county attorneys in a few jurisdictions, are charged with enforcement of these trusts. Additional-

21 J. Gray, Rule Against Perpetuities § 201, at 191 (4th ed. 1942). The Rule requires a contingent interest to vest, if at all, no later than 21 years after some life in being at the time the interest is created. Nearly every state follows the Rule and the effect of violating it is that the contingent interest is void.

22 Najarian, Charitable Giving and the Rule Against Perpetuities, 70 Dick. L. Rev. 455, 458 (1966). A gift to one charity may be followed by a contingent gift-over to a second charity even though the gift-over will not necessarily occur during the Rule’s time limit. Because the beneficial interest is vested in the public, a charitable trust may exist indefinitely. Restraint upon alienation of property is tolerated because the property is committed to eleemosynary ends by the terms of the trust instrument. If, however, the gift goes first to a noncharitable donee and then goes over to a charity, it must vest within the time limit set by the Rule Against Perpetuities. Id. at 464.

23 See, e.g., In re Wheelock Estate, 401 Pa. 193, 164 A.2d 1 (1960). The limitation is often the same as the perpetuities period — ownership of the accumulations must be vested in someone within a life in being plus 21 years, although a few states vary from this. See generally G. Bogert, Trusts and Trustees §§ 341 - 60 (2d ed. 1964).

24 See, e.g., St. Paul’s Church v. Attorney Gen., 168 Mass. 188, 41 N.E. 231 (1895); Estate of James, 414 Pa. 90, 199 A.2d 275 (1964); N.Y. Pers. Prop. Law § 16 (McKinney 1962); N.Y. Est., Powers & Trusts Law § 9.21 (McKinney 1967); Restatement of Property § 442 (1944); A. Scott, supra note 6, § 401.9, at 3167 n.4.

25 This is not to say that the trust instructions must be so vague or so broad that the objects of the settlor’s generosity would be indiscernible. It is enough that the trust serve a charitable purpose and that the class of potential beneficiaries be large enough to satisfy the courts that the community as a whole will benefit from performance of the trust. See, e.g., Harrison v. Baker Annuity Fund, 90 F.2d 256 (7th Cir. 1937) (trust for retired employees of a defunct corporation); Kern v. Thompson, 365 Ill. 149, 6 N.E.2d 131 (1936) (trust for the benefit of survivors of a particular tragedy); In re Pattberg, 252 App. Div. 770, 123 N.Y.S.2d 564 (Sup. Ct. 1953) (trust for the unemployment fund of a labor union local). See generally A. Scott, supra note 6, § 375, at 2938.

At the same time, certain indefinite philanthropic gifts have also received charitable trust status because the courts are assured some acceptable charitable purpose will be served. See, e.g., In re Voegly, 396 Pa. 90, 151 A.2d 593 (1959) (purposes to be chosen by trustee); In re Jordan’s Estate, 329 Pa. 427, 197 A. 150 (1938) (“to charity”); Boyd v. Frost Nat’l Bank, 145 Tex. 206, 196 S.W.2d 497 (1946) (charities to be chosen by trustee).


Whether the attorney general’s role is authorized by statute (some states have adopted the Uniform Supervision of Trustees for Charitable Purposes Act (1934), e.g., Ill. Ann. Stat.
ly, when a charitable trust is incapable of being carried out or continued as initially directed by the settlor, the court can use the doctrine of cy pres\(^{28}\) to preserve the trust by redirecting it to another charitable use.\(^{29}\) When a private trust is in this situation a court is limited to authorizing only a "deviation"\(^{30}\) from the trust instructions in order to sustain the trust.\(^{31}\) A final benefit in a diminishing number of states grants charitable trustees some degree of immunity against liability for torts committed by agents and employees of the trust in the course of their employment.\(^{32}\) Before bestowing these various benefits and tax advan-

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There has been some disenchantment with the record established by the attorneys general, whose offices have seldom ranked enforcement of charitable trusts high on their lists of priorities. See Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L.J. 979, 1005-06 n.101 (1957). Public registry of charitable gifts and periodic accounting have been required in some states. See A. Scott, supra note 6, § 391, at 3002 nn.12 & 13. Additionally, the Internal Revenue Service polices the activities of tax-exempt benevolent organizations and requires annual reports. Int. Rev. Code of 1954, §§ 6033, 6034, 6104.

There is a dispute whether enforcement is the sole province of the attorney general. Among other parties who have been granted standing to enforce a charitable trust have been trustees challenging the conduct of co-trustees, see Holt v. College of Osteopathic Physicians & Surgeons, 61 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964), and persons with a direct and defined interest in proper performance of the trust, see Cannon v. Stephens, 18 Del. Ch. 276, 159 A. 234 (1932), Northwestern Univ. v. Wesley Memorial Hosp., 290 Ill. 205, 125 N.E. 13 (1919). Settlers have generally not been given standing to enforce their charitable trusts, though Wisconsin grants this right by statute. Wis. Stat. Ann. § 701.10 (1969). Intervenors may be permitted to join an action along with the attorney general. See Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968), aff’d 396 U.S. 435 (1970).

Enforcement proceedings are not the only means by which philanthropic trusts come to court. See, e.g., In re Estate of Vanderhoofven, 18 Cal. App. 3d 940, 96 Cal. Rptr. 260 (1970) (will contest); Dunbar v. Board of Trustees of Clayton Coll., 461 F.2d 28 (Colo. 1969) (trustees seeking changes in instructions); Milford Trust Co. v. Stabler, 301 A.2d 534 (Del. Ch. 1973) (trustees seeking initial instructions); In re Girard’s Estate, 356 Pa. 548, 127 A.2d 287 (1956) (direct constitutional challenges to trust restrictions); Wooten v. Fitzgerald, 440 S.W.2d 719 (Tex. Civ. App. 1969) (petitions by administrators for construction and interpretation of testamentary instruments).

Similarly, there is dispute whether the attorney general, on behalf of the people, is always a necessary party plaintiff or defendant whenever a charitable trust comes before the courts. Usually the attorney general must be involved, if only nominally, while other named parties undertake the litigation. In re Estate of Schloss, 56 Cal. 2d 248, 363 P.2d 875, 14 Cal. Rptr. 643 (1961). Contra, Delaware Trust Co. v. Graham, 30 Del. Ch. 330, 61 A.2d 110 (1948); Rohlff v. German Old People’s Home, 193 Neb. 636, 193 Neb. 636, 10 N.W.2d 686 (1943). It is generally thought that the more indispensable the attorney general’s participation, the more the charitable trust may be regarded as a public entity.

\(^{28}\) Restatement (Second) of Trusts § 399 (1959); see note 120, infra.

\(^{29}\) So long as the testator has demonstrated a general intention to dedicate the property to charitable purposes, the court will divert the trust property to a benevolent enterprise that is as similar as is practicable to the settlor’s original scheme.

\(^{30}\) Restatement (Second) of Trusts § 381 (1959); see note 155, infra.

\(^{31}\) Deviation accomplishes a change in administrative detail, but cannot be resorted to when the essential purpose of the trust is frustrated. See discussion accompanying notes 155-59, infra.

tages upon a racially exclusive trust, it would be well to consider that the law may thereby be making discrimination even more effective when it occurs in the name of charity than when it occurs privately.

Yet the road for the charitably inclined is not without its "chuck holes." At the same time that charitable contributions are encouraged and facilitated by the aforementioned devices and exemptions, there are countervailing public interests that are expressed in some jurisdictions through limitations on benevolent giving. Several states have provisions that restrict or prevent charitable testamentary dispositions in excess of a certain proportion of the decedent's estate or contained in a will executed during a specified time period immediately prior to death. The intention of such limitations is twofold: to deter overreaching by charitable solicitors under circumstances when the potential donor is particularly susceptible to such requests and to protect the testator's family from depletion of the estate. The existence of these statutes underscores the conflicting policy considerations that bear upon the charitable bequest.

III. TRUST LAW WEAPONS AGAINST DISCRIMINATION: AN INITIAL EXPOSURE

Having surveyed mechanisms that reinforce and others that inhibit a charitable trust, one is returned to the question of whether the acknowledged national rejection of racial and religious discrimination in famous Supreme Court cases and acts of Congress should take precedence over the policy that welcomes charitable contribution. The fact remains


33 A state-by-state review of each of the ten jurisdictions imposing such restrictions appears in Comm. on Succession, Restrictions on Charitable Testamentary Gifts, 5 REAL PROP., PROB. & TRUST J. 290, 301-06 (1970).

34 Pennsylvania also controls inter vivos gifts, thus partially thwarting circumvention of the statutes. PA. STAT. ANN. ch. 20, § 6115 (Supp. 1975).

35 In other states these same objectives can be achieved by the common law concepts of undue influence and testamentary incapacity. There are also related legislative schemes, such as "forced heir" statutes guaranteeing members of the deceased's family a certain share of the estate, regardless of testamentary instructions to the contrary, e.g., ILL. ANN. STAT. ch. 3, § 11 (1961), or a set percentage upon renunciation of the will, e.g., ILL. ANN. STAT. ch. 3, § 16 (1961). The "augmented estate" concept embodied in N.Y. EST. POWERS & TRUST LAW § 5-1.1 (McKinney 1967), enlarges the estate to include certain inter vivos transfers by the deceased.

36 It is instructive that these statutory restrictions on charitable donation also apply to outright gifts, which have greater weight on the policy scale because they do not involve the disutility of dead hand control, as do charitable trusts. For an excellent summary of arguments pro and con regarding the value of the testamentary prerogative see Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 YALE L.J. 979 (1957).

37 The question presupposes that both policies cannot coexist and that a significant number of charitable donors would be so frustrated by obstructions to discrimination or by the general notion of restraints on their donative prerogative, that necessary sums will be diverted from charitable ends. There is no hard evidence to support or refute this contention. It would seem reasonable to assume, however, that donors will continue to be attracted by the tax advantages associated with philanthropy.

Those for whom discrimination is the first priority may find acceptable donees becoming increasingly scarce, whether due to changing attitudes or because discrimination can induce
that exclusionary charitable trusts have not been dealt with by a threshold refusal to classify such trusts as charitable. This is not necessarily unfortunate, for to do so would mean the irrevocable loss of the trust property for public purposes and would prevent the utilization of trust law devices to remove racial limitations and still salvage the trust for the benefit of the community.

No trust, public or private, can be dedicated to illegal ends or ends contrary to public policy, nor can there be improper conditions imposed upon trusts intended for otherwise acceptable purposes. A trust solely for prohibited purposes will fail, whereas one burdened by unenforceable conditions can operate with the conditions deleted. It would be consistent with principles of trust law to declare, wherever reasonable, any color-conscious trust instructions to be void conditions contrary to public policy. The proposed result would be that "the beneficiary takes under the will as if no conditions had been annexed to the gift to him, or as if he had complied with the void condition." It is one thing to characterize exclusionary trusts as undeserving of the special status of the charitable trust. It is going one step further to say that racially discriminatory trust directions are always fully contrary to public policy (regardless of state action) and therefore voidable.

31 See A. Scott, supra note 6, §§ 60-62.9, at 570, for a discussion of cases illustrating which ends are illegal and against public policy.


40 In re Liberman, 279 N.Y. 458, 469, 18 N.E.2d 658, 662 (1939). In In re Sterne's Estate, 147 Misc. 59, 263 N.Y.S. 304 (Sur. Ct. 1933), it was found that a trust for the benefit of nonprofit hospitals carried terms that would cause fee-splitting by physicians. The latter provision was dropped as a void condition, while the trust became otherwise effective. Sterne also declared that it was immaterial whether the condition was subsequent or precedent. Id. at 308.

Certainly, there could be cases in which this would not be a fitting procedure, primarily because a discriminatory provision had been so tightly woven into the trust that only by the most strenuous construction could it be regarded as a separable condition. An extreme example would be a trust to finance research to develop a means of increasing the incidence of sickle cell anemia. The trust should simply fail. But a trust to finance research facilities for white medical students could only be properly salvaged by removing the white-only restriction as a condition contrary to public policy, while still establishing a place for research by students of any color. In Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969), the court simply denominated "white" to be an "unenforceable word" in the trust instrument and, relying on its general equitable powers, deleted it. (There was a suggestion that state action was present in Wooten, but this was never clarified nor, apparently, important to the outcome of the case.)
Obviously, there are important differences between returning the trust property to the decedent's estate (the effect of withholding charity status from a trust) and passing that property on for societal use, minus some of the testator's expressed wishes (the proposed result of voiding conditions). The latter action conjures livelier visions of governmental intrusion into private affairs.

Actually, courts have rendered unmistakably punitive decisions when the prohibited trust purposes have been particularly opprobrious. When trusts have been intended to perpetrate fraud upon creditors, induce crime or immorality, suppress prosecution, or encourage divorce, judges have, upon failure of the trust, directed trust property toward the "cleanest hands" available rather than return it to the settlor or his estate. These "equitable distributions" have apparently been founded on the premise that the settlor, having abused the dispositive prerogative, has forfeited the prior right to determine the property's use. If equity courts can exercise these powers for the benefit of creditors, it is worth considering to what degree the nation's commitment to racial equality should also activate equity's hand to reform charitable trusts tainted by racial discrimination. In some circumstances, unequal treatment is as much a statutory illegality as other activities, the encouragement of which has caused trust failure (e.g., perjury, adultery). In the event of a trust that would, say, induce a hospital to violate federal civil rights statutes by denying admission to minority persons in order to obtain the trust property, the court could properly direct the trust corpus as equity dictated.

IV. STATE ACTION: CONSTITUTIONAL SOLUTION FOR DISCRIMINATION IN TRUSTS

The majority of courts are not relying on trust law or general equitable powers to upset racial barriers in eleemosynary trusts. The dominant trend is to find conflict with the fourteenth amendment which removes the racial restrictions and then turn to equity to determine what to do with the trust. There are certain advantages to using the state action concept rather than employing trust law itself to overturn racially exclusionary trusts.

Trust law can continue to operate as before, drawing upon the

42 E.g., MacRae v. MacRae, 37 Ariz. 307, 294 P. 280 (1930); Mushaw v. Mushaw, 183 Md. 511, 39 A.2d 465 (1944); Wanstrath v. Kappel, 356 Mo. 210, 201 S.W.2d 327 (1947); Pattison v. Pattison, 301 N.Y. 65, 92 N.E.2d 890 (1950).

43 See A. Scott, supra note 6, §§ 60-62.9, at 570.


48 If a gift-over or reverter to the testator's estate were present and ready to operate upon failure of the primary, discriminatory purpose, it might be that the trust property would pass in accordance with those alternative provisions. Restatement (Second) of Trusts § 401(1) (1959). If the alternative donee were another charity the result would be salutary; otherwise, the courts should implement their preference for retaining property for public use.
strength of precedent developed over many years. There is no necessity to remodel familiar trust principles to make them conscious of color because the equal protection doctrine will act from the "outside" to remove the offensive provisions. In addition, the doctrine of equal protection is itself time-honored. From past adjudication in diverse situations, a doctrine has emerged by which the importation of equal protection into fresh territory — here, charitable trust law — may be regulated. Lawyers and judges thus have preexisting standards to consult for guidance in the particular situations that confront them. Moreover, finding that a charitable trust, as created by the settlor, will run afoul of the equal protection clause does not necessarily prevent public use of the trust property. Frustration of administrative details or specific charitable schemes will only prove fatal to a benevolent trust if the court concludes that the doctrines of deviation and cy pres cannot be utilized under the existing circumstances to salvage the trust for the benefit of the community. Recent decisions indicate that charitable trusts seldom fail after exclusionary instructions are omitted.

It was settled in Pennsylvania v. Board of Directors of City Trusts,49 that when the state is involved in management of charitable trusts they must be in conformity with fourteenth amendment requirements. Thus, in this case, when black applicants were denied admission to Girard College on the basis of racial restrictions in the school's founding trust instrument, the discriminatory provisions were declared unconstitutional violations of the fourteenth amendment. Evans v. Newton50 extended this principle to include management by private parties who had replaced public trustees. As a result, the remaining dispositive question in subsequent cases has become whether the state is indeed sufficiently enmeshed in the operation of a eleemosynary trust to warrant application of the fourteenth amendment.

The Supreme Court has developed two methods for determining whether there exists the requisite "state action" to activate the fourteenth amendment prohibition against discrimination. The first examines the actions of the judiciary in enforcing a discriminatory trust to determine whether the court's activities amount to judicial state action. The second method requires an evaluation and weighing of the unobvious manifestations of state participation in the operation of a discriminatory trust to determine whether the state is involved to a "significant" extent.

Judicial state action, as articulated in Shelley v. Kraemer,51 stands for the proposition that the fourteenth amendment governs the judiciary just as it controls the actions of the other branches of state government.52 A court order, then, by itself and irrespective of the private nature of the activity before the bench, is enough to entangle the state in prohibited

51 334 U.S. 1 (1948).
52 [T]he action of 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. . . .

Id. at 14.
discrimination. Thus, in *Shelley*, the Missouri state courts were prohibited from enforcing a restrictive covenant by which private real property owners had agreed not to sell or rent certain property to non-whites. In *Barrows v. Jackson* the Supreme Court expanded *Shelley* to preclude damage awards from one covenantor to another, upon breach of the promise to exclude racial minorities. *Shelley* and *Barrows* clearly cut a broad swath for state action and have been relied upon in some of the more recent discriminatory trust cases.

The significance test, as explained in *Burton v. Wilmington Parking Garage*, can be seen as qualifying *Shelley*. The plaintiff in *Burton*, a black man, was refused service in a restaurant located in a parking lot building managed by a state agency. The restaurant space was leased from the agency. Upon the facts, the Supreme Court concluded that the basis for a fourteenth amendment violation had been established, adopting as its test for state action:

> [T]hat private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state, in any of its manifestations has been found to have become involved in it.

As judicial action is one of the state's "manifestations," it would seem that it too may be subjected to the significance test. The Court, however, has not yet directly made this observation.

"Significance" is not a self-defining term. As explained in *Burton*, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Some limitations on the potential reach of state action were indicated in *Moose Lodge No. 107 v. Irvis*, which rejected a claim that discrimination by a private club was unconstitutional because the club held a state liquor license. The black plaintiff, who had entered the club as a guest of a white member, had been denied dining room and bar service. Justice Rehnquist, for the majority, acknowledged the thrust of *Shelley*, but nonetheless refused to hold,

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53 Judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands. *Id.* at 20 (footnotes omitted).
54 346 U.S. 249 (1953).
55 See notes 160-203 *infra* and accompanying text.
57 *Id.* at 722.
59 365 U.S. at 722.
60 407 U.S. 163 (1972).
that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever.61

The Court also distinguished Burton on the facts.

With the above cases describing some rough boundaries for state action, certain general questions emerge that transcend any individual charitable trust with discriminatory provisions. First, do the exemptions and support and enforcement mechanisms provided for charitable trusts constitute, per se, a significant state involvement? No court has yet reached this conclusion. Second, does the judicial state action doctrine espoused in Shelley prohibit a court from ordering enforcement of an exclusionary feature in a benevolent trust? Delaware has consistently answered this affirmatively and there have been positive hints in other states.62 In contrast, the courts in other jurisdictions have generally examined the governing instrument and the actual operation of the trust in each case to determine if significant state action is present. Invariably, sufficient governmental involvement has been found to make the discriminatory trusts unenforceable, although the significance test has seldom received explicit application.

V. REMOVAL OF DISCRIMINATORY PROVISIONS

The application of equal protection presumes that the activities in question would be constitutionally permissible if the state were not a participant and would theoretically allow the continuance of a discriminatory trust once government had terminated its involvement. In some circumstances, the trust activity can never be carried on wholly in the private sector, as when state and federal civil rights laws might forbid any hospital, whether public or private, from rendering services on a discriminatory basis. In other situations, though, it might be possible to find a violation of the fourteenth amendment yet permit the trust to pass to a private rather than a public charitable trustee in order to avoid state involvement in the trust's administration and to permit the trust to discriminate. No recent case has reached this result. Judicial treatment of this situation, as in Evans v. Newton,63 has relied on two themes. First, a trust that has received nurture from the state may have become irrevocably public. In addition, private parties performing essentially governmental roles must also share the governmental commitment to racial and religious equality regardless of the private ownership of the trust property. Second, state courts have ordinarily found that state participation in accomplishing trust purposes is more important to a testator than the requirements for exclusion in the trust and will therefore jettison the latter element when the two cannot legally co-exist.

In Evans v. Newton, the testator, United States Senator Augustus O.
Bacon, devised a parcel of land to the city officers of Macon, Georgia, to be used as a park for white persons. The park was controlled by an all-white Board of Managers and blacks were refused access to the park for a number of years. When the city took the position that it could no longer lawfully enforce segregation in a public facility, the Board of Managers initiated suit, asking that the city be replaced by private trustees to whom title in the park would be transferred. Black intervenors from Macon opposed the change. Nonetheless, after the city resigned, private trustees were appointed by the court. The Georgia Supreme Court affirmed their appointment on appeal by the black intervenors. In reversing, the United States Supreme Court, Justice Douglas writing the opinion, followed two themes. First, governmental involvement in the operation of a charitable trust can affix a public identity to the trust property and subsequent severance of state participation will not necessarily leave a constitutionally neutral trust. "The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees." Second, trust property which is "municipal in nature" should be treated as a public institution, "regardless of who now has title under state law." Drawing an analogy to fire and police protection, public streets, the elective process, and mass transit, the Court indicated that certain matters were simply too public for restricted management by private parties.

The Third Circuit in Pennsylvania v. Brown, relied on the first of the Newton themes to find continuing state involvement in the Girard College trust. In 1957, the United States Supreme Court had ordered the termination of all state involvement in the administration of the trust. Private trustees were then appointed by the Orphans' Court of Philadelphia County and the college was allowed to continue its segregated operation, an action affirmed by the Supreme Court of Pennsylvania. A decade later, in Pennsylvania v. Brown, the school's continuing policy of segregation was challenged as being in violation of the fourteenth amendment. The court found the requisite state action to support the challenge, even though the college's trust was no longer administered by the state. Unable to point to the inherent municipal nature of schools and colleges, the Brown court could not rely on the second of the Newton rationales. The court found, however, that a

65 382 U.S. at 301.
66 Id. at 302.
70 [I]n . . . the conception, creation and functioning of Girard College, the close, indispensable relationship between the College, the City of Philadelphia and the Commonwealth of Pennsylvania intended by Mr. Girard, meticulously set out in his will and faithfully followed for one hundred and twenty-seven years is self-evident.

century-old history of public management of the institution had created a momentum that had not been checked.70

A different situation arises when a testamentary charitable trust is brought before a probate court for its initial construction. Courts called upon to rule on testamentary trusts at their inception have no opportunity to consider any past state participation in the trust property. The two-pronged Newton rationale, requiring elimination of exclusionary language rather than substitution of a private trustee, would not automatically be controlling on the facts. Nevertheless, Newton has been cited without elaboration in a case involving the initial construction of a testamentary trust providing white-only scholarships at a state university.71

In cases where the judicial state action of Shelley v. Kraemer is followed, it would seem that the courts could not allow themselves to appoint private trustees to enforce a charitable trust on a discriminatory basis. In Delaware, where the judicial state action concept is adhered to, this has been implicit in recent cases. That state's courts have declared themselves unable to issue a discriminatory enforcement order and have turned to cy pres and deviation to determine what orders they would issue.72 Generally, however, the issue of substituting private trustees or otherwise exercising state action has not been raised. Instead, the courts have simply deleted discriminatory trust directions and proceeded to apply the trust-saving mechanisms.

VI. TRUSTS EXCLUSIVELY FOR MINORITY GROUP MEMBERS

During the post-Civil War period, the courts were confronted by a number of testamentary trusts that had been elicited as a result of the national focus on slavery and the plight of blacks. Perhaps the epitome of these was the trust in Jackson v. Phillips,73 executed before emancipation with the purpose of creating a treasury with which abolitionists such as Wendell Phillips and William Lloyd Garrison (named as trustees) could finance a public opinion attack upon slavery. Another fund was created for the benefit of runaway slaves. Since the Civil War and the thirteenth amendment had already ended the institution of slavery, the Supreme Judicial Court of Massachusetts utilized cy pres to divert the trust property to another organization, again to aid directly only black people. An excerpt from that court's opinion, couched in the stylistic zeal of another era, insisted that a "perpetual obligation" existed to "strengthen and confirm the sentiment" that halted the subjugation

70 Wachovia Bank & Trust Co. v. Buchanan, 346 F. Supp. 665, 668 (D.D.C. 1972). This seems consonant with the spirit of Newton, but the matter is definitely arguable. Consider this language from Newton:
We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.
382 U.S. at 301.
71 See, e.g., Milford Trust Co. v. Stabler, 301 A.2d 534 (Del. Ch. 1973); see generally notes 160-203 infra and accompanying text.
73 96 Mass. (14 Allen) 539 (1867).
of a racial group within our society. If there is such an obligation, then justification is present for holding today that equal protection does not merely require equal treatment. Whenever the vestiges of slavery still remain — whenever blacks as a group are in a subservient position reminiscent of slavery — equal treatment would only solidify inequality, thus arguably failing to meet the "perpetual obligation" Jackson declared.

In 1974, the Supreme Court declined the opportunity to resolve this issue in De Funis v. Odegaard. De Funis was a rejected white applicant to the University of Washington Law School who challenged admission policies that gave preference to minority group members whose credentials did not meet entrance criteria as well as those of some white applicants, including De Funis. His equal protection challenge was rejected by the Supreme Court of Washington in favor of what that court believed to be a greater state interest in overcoming the history of oppression that had been suffered by now-favored minority groups (including Indians, Chicanos, and Filipinos as well as blacks). The case attracted some of the nation's keenest legal talent on behalf of both sides, producing numerous amicus briefs, but the Supreme Court, nonetheless, elected to sidestep a constitutional interpretation and declared the case moot, leaving intact the decision of the state court.

There have been few analogous cases in the trust law field which may be attributable to the insignificant amount of monies earmarked for exclusively minority charity. In Fox Estate, the testator chose a Pennsylvania trust company as trustee of a fund for the benefit of a South Carolina school that was attended only by black students. The trust instrument directed that the fund should continue to attach to the

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74 Negro slavery was recognized by our law as an infraction of the rights inseparable from human nature; and tended to promote idleness, selfishness and tyranny in one part of the community, a destruction of the domestic relations and utter debasement in the other part. The sentiment which would put an end to it is the sentiment of justice, humanity and charity, based upon moral duty, inspired by the most familiar precepts of the Christian religion, and approved by the Constitution of the Commonwealth. The teaching and diffusion of such a sentiment are not of temporary benefit or necessity, but of perpetual obligation. Slavery may be abolished; but to strengthen and confirm the sentiment which opposed it will continue to be useful and desirable so long as selfishness, cruelty, the lust of dominion, and indifference to the rights of the weak, the poor and the ignorant, have a place in the hearts of men.

Id. at 595.


76 82 Wash. 2d 11, 507 P.2d 1169 (1973).

77 The matter becomes complicated when other minority groups enter the equation. The fourteenth amendment was aimed at rectifying the subjugation of black people; other groups endeavoring to establish a right to preferential treatment cannot directly rely on the same legislative history. See also Edgeter v. Kemper, 136 N.E.2d 630 (Ohio P. Ct. 1955).

78 De Funis had entered the law school by virtue of a lower state court order and was scheduled to graduate shortly after the Supreme Court's ruling.

79 But see In re Robbin's Estate, 57 Cal. 2d 718, 371 P.2d 573, 21 Cal. Rptr. 797 (1962), involving a substantial trust fund solely for black children. No fourteenth amendment issue was joined.

school should its management be assumed by local government, but only so long as the student body was exclusively black. Otherwise, a gift-over was required. When the school’s operation was later assumed by county authorities, the accountant for the trust, believing that Supreme Court decisions had made further funding of a segregated public school unlawful, submitted the trust’s accounts for audit and suggested that the trust fund henceforth be distributed under the terms of the gift-over. The Orphans’ Court of Philadelphia County agreed that the trust could not be allowed to help finance an all-black public school and ordered accordingly. The court explained that it deemed itself controlled by *Brown v. Board of Education* and *Pennsylvania v. Board of Directors,* and said, in reference to the latter case:

> It is just as improper for a municipality in a representative capacity to operate educational facilities solely for the benefit of Negro students, thereby excluding white children, as it was in the Girard College case for the City of Philadelphia, acting through the Board of Directors of City Trusts, to operate Girard College exclusively for white orphans, thereby excluding the Negro applicants.

The reasoning of *Fox Estate* would furnish a resolution to the issues in *De Funis,* for it basically sounds a “sauce for the gander” theme that demands equivalency of treatment, regardless of the context. Applied across the board, this would create discomfort for the many affirmative action programs that have been instituted to increase minority employment and would call into question the public housing cases that have required large-scale dwelling construction in white-occupied neighborhoods. It could be argued, however, that these actions create no fourteenth amendment controversy; rather than preferential handling, they are simply remedial measures designed to curtail the continuing effects of past discrimination. Essentially, this is a theory of restitution that attempts to make whole those persons previously denied certain societal benefits by offering them first choice until an equivalency is achieved. The Supreme Court accepted this theory in the employment context in *Griggs v. Duke Power Co.* There, black employees of the defendant utility challenged the use of written tests and educational background

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81 347 U.S. 483 (1954). It is ironic that the Fox court relied on *Brown,* in that if the latter case had been implemented in good faith there would not have been an all-black public school in South Carolina for the Fox trust fund to support.


83 16 Pa. D. & C.2d at 430.


85 See, e.g., Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969). Both cases essentially required affirmative action in housing and accordingly ordered housing site selection to proceed on a “color-conscious” basis until public housing had been dispersed beyond certain core-city neighborhoods.

as promotion criteria, asserting that such use violated the Civil Rights Act of 1964. The employees conceded that the company had halted a prior policy of restricting blacks to low-level jobs and the lower courts found that the promotion criteria were neutrally applied. Still, the blacks argued, the defendant’s white employees had never been required to meet these criteria because they had initially been hired into the better departments. The black plaintiffs, on the other hand, had to prove themselves solely because earlier discrimination had confined them to the bottom of the job hierarchy. The Fourth Circuit agreed with the plaintiffs and enjoined the application of the promotion criteria to those blacks hired before the criteria were instituted — in substance, ordering special treatment that white employees would not receive. The Supreme Court affirmed in an opinion in which Chief Justice Burger said: “[P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”

An important distinction between Griggs and Fox Estate is that the parties in Griggs were identifiable, their interrelationship was direct and traceable, and the Court was able to grant relief with an order aimed at the party responsible for the wrong. In the charitable trust situation represented by Fox Estate, the parties blur into social abstractions; all black persons would qualify for the special treatment described in the trust instrument and all nonblacks would face exclusion. Blame and compensatory privilege are thus assigned in accordance with broad social and historical generalizations rather than because of the conduct of the particular parties before the bench or their identifiable predecessors.

What then of the “perpetual obligation” of Jackson v. Phillips to eradicate the remnants of slavery? When the Supreme Court upset private housing discrimination in Jones v. Alfred H. Mayer Co., it referred to the power of Congress under the thirteenth amendment to put an end to the “badges and incidents of slavery” by appropriate legislation. For the judiciary to assume such power, and use it to authorize charitable trusts exclusively for minority benefit, is another matter. The time may be approaching, however, when a response will have to be formulated for the questions left unanswered in De Funis. As greater wealth comes into the hands of minority persons, and as population trends place urban governmental machinery under minority control, the charitable trust designed solely for nonwhites, and involving state action, may

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89 401 U.S. at 430.
90 Still, the Supreme Court did not balk at tying together broad causes and effects in Gaston County v. United States, 395 U.S. 285 (1969), where even an impartial administration of a voters’ literacy test was struck down because the county’s prior dual school system had left black voters inadequately prepared to pass the test. According to Justice Harlan for the Court, the use of the test would perpetuate the effects of earlier de jure segregation, with the result that blacks would be denied the right to vote.
91 392 U.S. 409 (1968).
be expected to appear more frequently than such trusts have appeared to date.

VII. RELIGIOUS DISCRIMINATION

Having examined the charitable trust and its own potential for dealing with racial discrimination, and having considered the impact of the fourteenth amendment on these trusts, we are returned to the original question: Can a testator expect exclusionary provisions in a charitable trust to be allowed to operate? The answer with regard to racial exclusion is unmistakably no. The religious context is not as clear. It is immediately distinguishable from the racial context because of the existence of specific constitutional protection for religious activity in the first amendment. Religion is accorded a special status in the sense that it is intended to be exclusively and perpetually private. Absent a compelling state interest in advancing some secular goal, the free exercise clause requires that private religious practitioners be left alone by government. The establishment clause of the first amendment prohibits both religious intrusion into state functioning and governmental participation in, or support of, the private religious "monopoly," though it is not an absolute bar to public aid for religious persons and entities.

In *Lemon v. Kurtzman*, the United States Supreme Court promulgated a three-part test, gleaned from prior decisions, to detect whether governmental action had violated the establishment clause. The test required that a statute have a secular purpose, that its primary effect neither advance nor inhibit religion, and that it not foster an excessive governmental entanglement with religion. Local charitable trust laws would seem to fail the first two sections of the test in that they grant benefits to religion *qua* religion. As we have seen, the earliest trusts were created on behalf of religious beneficiaries and the advancement of religion has always been considered a proper charitable purpose. Excessive entanglement, the third element in the *Lemon* test, is a different matter. As a policy question, in view of the controversy surrounding the parochial school funding cases which involved public funds, it is unlikely that the courts will use the establishment clause to impede donations of private wealth to religious charities. Charitable donors and donees could also raise a free exercise argument, drawing upon the doctrinal import of the tithe, although their loss of the particular advantages of the charitable trust would not foreclose other forms of contribution.

Thus far, when religious charitable trusts have been attacked, the

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92 U.S. CONST. amend. I.
96 403 U.S. 602 (1971). *Lemon* was one of three cases decided together that concerned various forms of state aid to nonpublic schools.
97 One commentator has indicated that religious gift-giving was intended by the framers of the first amendment to be left undisturbed. See Clark, *supra* note 36, at 1011-12 & n.124; Everson v. Board of Educ. 330 U.S. 1, 42-43 (1947) (dissenting opinion).
assault has been lodged not on first amendment grounds, but on the basis of the fourteenth amendment. One key distinction is at least implicit in the few cases available. Trusts directly in support of religion, such as a fund to maintain a parish church, are unanimously accepted as charitable and apparently immune from constitutional attack. On the other hand, when religious restrictions are affixed to a trust providing a service or benefit ordinarily available to the general public, the fourteenth amendment may be offended. The distinction between the two situations is that the first example, a trust for the direct use of a religious recipient for internal maintenance or propagation of the faith, has not been found to involve a legally significant quantum of state action. In contrast, a trust to establish a scholarship fund for Jewish students at a public university, for example, would make the state a partner in the distribution of benefits to religious adherents generally, and Jewish people in particular, when equal protection inhibits the state from dealing with its citizens on the basis of their religious classification. This conclusion is necessitated by an amalgam of sources, including the few religious trust cases, the rationale of the race discrimination decisions, the first amendment and related holdings, and the federal civil rights acts. Nonetheless, case law precisely on point remains scarce.

The California appellate courts, however, have had two opportunities to deal with religious exclusion in testamentary dispositions. The testatrix in In re Estate of Zahn directed that her residence be willed to the Salvation Army for a "Music Home for Deserving Christian Students," and expressed a desire that another parcel of property in her estate become the site of a rest home for "Christian women and girls who have no relatives, no smokers or drinkers only deserving citizens who are Na-

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98 See cases compiled in A. Scorr, supra note 6, § 371.1, at 2879 n.1.

99 In theory, the judicial state action doctrine could prevent a court from issuing an order awarding trust property to a sectarian donee, even in the absence of other state involvement. But the courts that have subscribed to judicial state action in race discrimination cases have not extrapolated it to the religious context.

100 Religious sects are entitled to establish and maintain their own parochial educational systems, for instance, even though religious segregation in a public school is prohibited. See, e.g., In re Estate of Zahn, 16 Cal. App. 3d 106, 116, 93 Cal. Rptr. 810, 816, cert. denied, 404 U.S. 938 (1971).

In Peoples-Merchant Trust Co. v. Schneider, 4 Ohio App. 2d 52, 411 N.E.2d 93 (1964), the testator had nominated a bank as trustee to administer a scholarship trust on behalf of male Catholic graduates of a named high school who would attend Notre Dame University. The trust was denied an exemption from succession taxes on the grounds that the combined religious and sexual limitations imposed upon acceptable beneficiaries made the trust disposition not "for the purposes only of public charity." Under Ohio law, it appears that had the trustee been "an established religious organization," the trust would have qualified for exemption.

101 See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968) ("fundamentalist sectarian conviction" could not exclude the teaching of competing doctrines in public schools); United States v. Seeger, 380 U.S. 163 (1965) (military draft laws were obligated to respect all religions and parallel beliefs).

tive Californians."103 No donee was named in connection with the latter property (although the Salvation Army was mentioned as an appropriate party to select occupants of the proposed rest home) and the decedent's will never specifically spoke of a trust. Nevertheless, the trial court, in a will contest initiated by cousins of the testatrix, impressed a charitable trust upon both parcels and awarded them to the Salvation Army. On appeal, the will challengers raised a fourteenth amendment claim for the first time. Evading a constitutional ruling, the court explained that the decedent's designation of Christian beneficiaries was not intended to be absolute, nor had it been demonstrated that the Salvation Army would permit only Christians to enjoy the devised property. Zahn concluded its discussion of equal protection with the cryptic comment that an organization "devoted to nonsectarian religious purposes is entitled to receive and administer trust funds on a charitable bequest consistent with its established aims."104 If this may be interpreted to mean that such an organization could exclude nonreligious persons from enjoying the benefits of the trust, if those benefits were otherwise made publicly available, then Zahn is clearly in error.

Both racial and religious discrimination were included in the testator's will in In re Estate of Vanderhoofven, which arose within a different district of the California Court of Appeals than Zahn, and which made no reference to the latter case. The Vanderhoofven will left one dollar to each of the testator's brothers and sisters and donated the remainder of his estate "to some Protestant school that is all white of Engineering training."105 This distribution was contested by the decedent's siblings and other claimants, who successfully charged that the dispositive scheme ran counter to the fourteenth amendment and were awarded the decedent's estate in equal shares in accordance with a stipulation offered by them to the trial court. The state attorney general prosecuted an appeal on the sole issue of whether cy pres should have been employed to save the trust for charitable purposes.

The Vanderhoofven opinion obscured as many issues as it resolved, for it leaped ahead to consider cy pres without initially articulating why the trust "[could not] be enforced as written (whether through illegality, impossibility or impracticability)."106 The probate court had made a definitive ruling in this regard, holding that the racial designation made the bequest illegal. This portion of the lower court's ruling was left undisturbed by the appeals court, but the appellate opinion left the cause of illegality in doubt by implying that no state action was present. As for the religious restrictions, the reviewing court declared that they would not bring about a disqualification of the trust on constitutional grounds.107

104 Id. at 116, 93 Cal. Rptr. at 816.
106 Id. at 946, 96 Cal. Rptr. at 263.
107 [W]e do not think the specification of a "protestant" school as the place at which the engineering training was to be given is significant. It would not be so regarded if a specific school, whether of sectarian or nonsectarian origin, had been
The case was remanded with instructions to reconsider the applicability of *cy pres* after gathering additional evidence.

Taken together, *Vanderhoofven* and *Zahn* appear to say that a gift to a sectarian or generally religious donee, even if intended to fund an activity suffused with state action, will not offend the fourteenth amendment unless it becomes clear that members of the public have been, or will be precluded from taking advantage of the trust property. In other words, a religious entity may become a charitable trustee of a trust for purposes that are not directly religious or doctrinal in the same manner as any other body. No ripe constitutional issue will surface unless that trustee practices (or is likely to practice) religious discrimination while administering the trust. The will in *Vanderhoofven* did not require the recipient school to turn away non-Protestants, nor had it occurred that a discriminating Protestant engineering school had actually been made trustee. *Zahn* accepted the Salvation Army as trustee on the same, albeit somewhat tenuous, assumptions. Both decisions may fairly be said to imply that future events could justify a reexamination of their respective trusts.108

If the above cases had been decided differently, the right of religious bodies to accept charitable trustee ships could have been jeopardized. As they stand, *Zahn* and *Vanderhoofven* take away nothing from the earlier conclusion that religious restrictions in a charitable trust will not survive if the trust activity involves significant state action.

**VIII. CY PRES AND DEVIATION: A SECONDARY CONSIDERATION OF TRUST LAW**

Once it has become inescapable that a charitable trust will not be able to operate in accordance with the settlor's primary instructions, assuming that the cause of failure is not the destruction of the trust property, what will happen to that property? There are a number of possibilities. The property may be retained for benevolent use through application of either deviation or *cy pres*; a gift-over can pass the property to an alternative use designated by the settlor; the property may also revert via a resulting trust to the settlor's estate109 where it would come to rest in the testator's residuary estate or pass by intestacy to the settlor's heirs at law. The exact result in any given case will depend upon the presence or absence of several factual variables and upon the priorities assigned to competing policies in the jurisdiction involved. Those poli-

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108 Several parties would potentially have standing to initiate a subsequent suit. A rejected applicant or the state attorney general readily come to mind. A persistent heir or gift-over donee would also be a likely plaintiff.

109 An exception to enforcing a resulting trust on behalf of the settlor occurs when the trust purpose has been found illegal. Stone v. Lobsien, 112 Cal. App. 2d 750, 247 P.2d 357 (1952); Caines v. Sawyer, 248 Mass. 368, 143 N.E. 326 (1924). Arguably, a trust that would foster violation of a civil rights law or constitutional provision would lead to the same result. In such case, the trustee would retain the trust property, unburdened by the illegal features. See note 41, supra.
cies are in turn traceable to fundamental notions about the nature of property.

The ascendant policy looks to preserve property for community purposes so that once an initial philanthropic intent has been demonstrated by a donor, only the most unmistakable language in a dispositive instrument will permit withdrawal of that property from public use. The policy that purports to safeguard the notion of private ownership finds its expression in an often careful search for donative intent before a failing charitable trust is rehabilitated or allowed to collapse. The latter notion appears to be on a decline, though receiving an undiminished supply of lip-service. Historically, the gift would fail if the donor's intent could not be completely fulfilled.

Until 1900 the common law emphasis on individual rights and private property led to a judicial reluctance to deviate from the original plans of the donor. Where the choice was between a variance and failure of the gift the latter alternative was adopted. The wishes of the donor were superior to the necessities of changing conditions and the interests of society as a whole.¹¹⁰

That this once-established policy has metamorphosed into an anachronism today means that philanthropists and their counsel will need to precisely draft their trust instruments if they desire the final say in property disposition.

A. Cy Pres

Cy pres has been the pivotal concept in the changing picture of charitable trust preservation. Once suspected of being a likely tool for despots and unacceptable in some American states, it is now just one mechanism by which a court can implement a preference for salvaging charitable trusts. The earlier suspicion had its origin in the blurring of two distinct powers, one judicial, and the other monarchical, that existed at common law. The monarchical power, or prerogative cy pres, was reserved by the English Crown, as parens patriae, to direct trust property toward whatever charitable purpose it might choose. The power would be activated when a donor had selected a use that was charitable in general nature but nonetheless illegal. Some of the notable abuses of prerogative cy pres seem offensive more because they reflect the religious intolerance of earlier English society than because of the inherent nature of prerogative cy pres. Still, it is true that the King could wield prerogative cy pres arbitrarily, with no duty to seek out a charitable purpose consonant with the donor's original intent.

The Crown would also employ prerogative cy pres when a donor had made a gift to charity generally, without nominating a specific purpose.

or use and without evincing any desire for a trust arrangement.\(^{111}\) Since the decedent had offered no instructions of his own, the exercise of the prerogative power in these cases did not frustrate testamentary intent, but an apprehension about unfettered executive discretion in the distribution of property precluded importation of this use of prerogative \textit{cy pres} to the United States.\(^ {112}\) Today a blank gift “to charity” would generally be preserved for public use by the judiciary, which would impress the property with a trust and appoint a trustee who in turn would select a beneficiary, subject to court approval.\(^ {113}\)

The preference for judicial property distribution was made clear in the early American cases that accepted judicial \textit{cy pres} while rejecting its prerogative counterpart.\(^ {114}\) Judicial \textit{cy pres} is regarded in some states as but one example of the equitable authority of the courts,\(^ {115}\) while other jurisdictions have believed it necessary to empower their judges to use \textit{cy pres} by statute.\(^ {116}\) Even judicial \textit{cy pres} was formerly rejected in a number of states,\(^ {117}\) either through a confusion with prerogative \textit{cy pres} or because, standing on its own right, this doctrine was viewed suspiciously as imperiling the sanctity of private dispositive power. A few states still have not formally adopted \textit{cy pres} but appear to resort to parallel doctrines, such as “approximation” or “liberal construction,” to reach similar results.\(^ {118}\)

Contemporary \textit{cy pres}, then, is a somewhat amorphous doctrine, vary-

\(^{111}\) See cases collected in A. Scott, \textit{supra} note 6 § 399.1, at 3089 n.1. In DeCosta v. De Pas, 27 Eng. Rep. 150 (1754), a sum of money had been left in a testamentary trust with directions that the income be put toward the establishment of a jesuba, or assembly for reading Jewish law. The chancellor refused to enforce the trust because it promoted a creed other than that of the officially recognized Church of England. The matter was referred to the King, who ordered the trust res be used to support a Christian preacher at a foundling hospital. \textit{See also} Cary v. Abbot, 32 Eng. Rep. 198 (1802).

\(^{112}\) It [prerogative \textit{cy pres}] has never, so far as we know, been introduced into the practice of any court in this country; and if it exists anywhere here, it is in the legislature of the Commonwealth as succeeding to the powers of the king as parens patriae. Jackson v. Phillips, 96 Mass. (14 Allen) 539, 576 (1867).

\(^{113}\) See \textit{In re} Jordan’s Estate, 329 Pa. 427, 197 A. 150 (1938) (“[c]harities have always been favorites of our law, . . . and gifts for such objects have been repeatedly sustained over the objections that they were too uncertain”). \textit{Id.} at 429, 197 A. at 150. \textit{See also} \textit{In re} Estate of Quinn, 156 Cal. App. 2d 684, 320 P.2d 219 (1958); Klumpert v. Vrieland, 142 Iowa 434, 121 N.W. 34 (1909). \textit{Contra}, Wentura v. Kinnerk, 319 Mo. 1068, 5 S.W.2d 66 (1928).


\(^{115}\) In \textit{Opinion of the Justices}, 101 N.H. 531, 133 A.2d 792 (1957), the New Hampshire Supreme Court declared unconstitutional a statute that it believed would compromise judicial hegemony over the \textit{cy pres} power. \textit{See generally} G. Bocert, \textit{supra} note 23, § 433, at 406.

\(^{116}\) See G. Bocert, \textit{supra} note 23, § 433, at 407 n.61; A. Scott, \textit{supra} note 6, § 399, at 3084 n.2.

\(^{117}\) See G. Bocert, \textit{supra} note 23, § 433, at 411-12 nn.65-73; A. Scott, \textit{supra} note 6, § 399.2, at 3094 n.2.

ing from one jurisdiction to the next in its source, applicability, and vitality. There has been little impetus for standardization, although the rule in the Restatement (Second) of Trusts has been frequently cited in recent decisions. The dissimilarities that exist, however, tend to arise, in discriminatory trust cases, from different treatment of two elements of cy pres: the extent and cause of trust failure and the existence of a general charitable intent.

In the matter of trust failure, an initial decision that a trust has not fully failed obviates the need to apply cy pres. Such a decision, however, can be deceiving because it implies that the trust is continuing in accordance with the testator's directions. Especially in jurisdictions that have been reluctant to embrace cy pres, a court may prefer to leave that doctrine rest, even though it appears indisputable that the trust has failed. In Zevely v. City of Paris, the settlor created a trust fund to provide cost-free medical care for "deserving young" male occupants of a designated hospital room. A reversion to the settlor's estate was to occur should the hospital close, but when the hospital was sold some years later, the court diverted the trust income to the construction of a nursing home at another site. The court stated that the trust purpose was still being accomplished by the diversion of funds.

Whereas Zevely illustrated judicial manipulation of the extent of trust failure, Howard Savings Institution v. Peep considered the cause of failure, particularly the possibility of a recipient institution ridding itself of trust restrictions it does not favor by inviting failure. In Howard, 120

119 The rule contained in the Model Act Concerning the Administration of Charitable Trusts, Devises and Bequests, promulgated by the National Conference of Commissioners on Uniform State Laws, provides that:

> If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, a court of equity may, on application of any trustee, or any interested party or the attorney general of the state, order an administration of the trust, devise or bequest as nearly as possible to fulfill the general charitable intention of the settlor or testator.

120 RESTATEMENT (SECOND) OF TRUSPs § 399 (1959) provides:

> If a property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.


122 298 S.W.2d 12 (Ky. 1957). Zevely contained restrictions based on sex and age. The efficacy of classifying persons on the basis of these characteristics is now coming under steady and often intensive scrutiny. Sex discrimination in probate law was successfully challenged in Reed v. Reed, 404 U.S. 71 (1971) (statute giving preference to males in appointments as administrators of decedents' estates held to deny equal protection). The ratification of the twenty-sixth amendment, guaranteeing the voting rights of 18-year-olds, U.S. CONST. amend. XXVI, and the increasing protests by the elderly against job discrimination would suggest that age is no longer a benign category. The states, on the other hand, may in certain instances be able to demonstrate a countervailing interest sufficient to meet the test enunciated in Weber v. Aetna Casualty & Surety Co., 406 U.S. 184 (1972), thereby legitimizing unequal treatment based on sex or age classifications.

the testator gave $50,000 to Amherst College to hold in trust as a scholarship fund for "deserving American born, Protestant Gentile boys." The college's board of trustees concluded that religious limitations were inconsistent with Amherst's charter and resolved to decline the gift unless the offending restrictions were eliminated. During the ensuing action for construction of the will, the executor argued that the college was attempting to "bootstrap" itself — in otherwords, having by its own act frustrated the donor's intent, it was then asking the court to use that frustration as a basis for altering the trust terms. The court conceded that there did exist a "rule" prohibiting trustees from voluntarily precipitating trust failure, but decided that the rule had not been violated, explaining that the source of failure, the Amherst charter's anti-exclusionary provisions, was beyond the control of the college. The explanation is not fully persuasive. The Amherst trustees had their choice, and though one would not have expected them to undertake charter revision to accommodate a $50,000 gift with religious strings attached, it does not necessarily follow that failure was therefore the result of external circumstances, or that the college retained first call upon the trust fund. If the *Howard* decision can be interpreted to say that when an organization rejects a gift that clashes with its by-laws and policies, it may still claim the gift after causing removal of the objectionable features, one might properly ask how it serves a donor to bother drafting trust instructions.

At the same time, the ultimate resolution of *Howard* does not appear unwarranted. As frequently occurs, the trustee originally nominated by the charitable settlor is, under the circumstances, the best party for carrying out the donative intent. When the trustee insists upon altering the literal face of the trust instructions, it is arguably making the type of managerial decision that the settlor expected to be made. Still, it is settled law that a fiduciary is held by an exacting standard of loyalty to honor the terms of the trust and its class of beneficiaries. As the

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124 *Id.* at 510, 170 A.2d at 47, *citing* Connecticut College v. United States, 276 F.2d 491 (D.C. Cir. 1960).

125 "The settlor's executor had put forth the alternative of appointing a substitute trustee who would administer the trust on behalf of Amherst students who met the settlor's qualifications. Though the college had declared it would "avoid any involvement whatsoever in the administration of the trust" it had also informed the court that it would not refuse to make normal academic records available upon a student's direct request. The executor's plan was dismissed as impractical, though it would have operated no differently than existing scholarship funds.

One cannot help but surmise that the *Howard* court would have preferred to dispose of the case on constitutional grounds, for it noted preliminarily that none of the parties had raised a fourteenth amendment issue regarding the religious restrictions. The court then cited two timely law review articles on the topic of discrimination, which the litigants themselves had no reason to call to the court's attention because the issue was not before the bench.

126 In *Attorney Gen. v. President and Fellows of Harvard College*, 350 Mass. 125, 213 N.E.2d 840 (1966), the University had received land for an arboretum, plus gifts for its maintenance. Various materials were diverted from support of the arboretum and deposited elsewhere for study. The transfers were held not to violate the conditions under which the gifts were made:

In the light of this, in a gift to a university of trust funds to create a specific subdivision of scientific or cultural activity of the university (that is, broadly, a de-
A fiduciary of a philanthropic trust seeks to adjust testamentary instructions in order to better satisfy its own institutional objectives (which is often necessary when unsophisticated testators have misunderstood the methods and goals of their donees), the duty of loyalty can lose its priority. This may be the inevitable price of keeping charitable contributions fluid and responsive to community needs. It would benefit judicial credibility to acknowledge this as a policy decision rather than, as in Howard, attempting to characterize a trustee's voluntary refusal to abide by a testator's wishes as a trust "failure" for reasons beyond the trustee's control.

Another cause of trust failure is the changing of key circumstances in the operation of the trust. In determining which circumstances are germane to the effective functioning of the trust plan and in deciding when changes in those circumstances have become sufficiently material to justify trust revision, the courts have shown considerable resource in saving trusts from both lethargy and extinction.

Dunbar v. Board of Trustees of George W. Clayton College involved an application by the trustees of Clayton College, an orphanage in Colorado, to remove certain restrictions on the admission of children to the college. In a manner reminiscent of the Girard College will, George Clayton had limited access to his school to "poor white male orphans, between the ages of 6 and 10," whose fathers were deceased. The trustees convincingly recounted the evolution in child care that had rendered the founder's instructions obsolete. The school's age requirements had settled into diametric opposition to the contemporary preference for placing younger children in private homes rather than institutional settings. Welfare services had reduced the importance of poverty as a sole cause for institutionalization of a child and death of a male parent (as opposed to desertion, divorce, or incarceration) had become a relatively infrequent cause of deprivation of care. Plainly these factors, even considered together, had not made the precise terms of the Clayton trust impossible or even impractical of fulfillment. The court nonetheless wisely concluded that cy pres should be applied:

\[127\] The trustees of a charitable trust, like those of a private trust, are under a duty of loyalty; they must administer the trust solely with a view to the accomplishment of the purposes of the trust and not with a view to promoting their own interests. Self-dealing is clearly improper.

A. Scott, supra note 6, § 379, at 2979-80.

\[128\] Id. at 138, 213 N.E.2d at 847-48.

\[129\] Id. at 328, 461 P.2d at 29. The state attorney general, the defendant in Dunbar, declined to defend the racially discriminatory provision. The lower court's order to strike the racial references was affirmed.
It is not necessary that it become finally impossible to further administer the college in exact compliance with the wishes of the testator. Where, as here, it is evident to the trial court that the operation of the trust has failed to fulfill the general charitable intention of the settlor, and the only possibility is that the situation will become worse in the future, the court is justified in applying the doctrine of *cy pres* on the basis of impracticability.\(^\text{130}\)

*Dunbar* is essentially a vote against paying unquestioning homage to testamentary schemes under circumstances where dead hand control leaves present needs unanswered.\(^\text{131}\) Entities, systems, and customs ordinarily become obsolete long before they disappear altogether. Clinging to a rigid standard of impossibility or impracticability can render charity less adaptable than changing conditions demand. It may be that "failure" is a misleading term for the condition that must exist before a court will consider an application for deviation or *cy pres*.

The concept of general charitable intent is the other component of *cy pres* that has received a variety of treatment from state to state. The general rule in most jurisdictions is that an overriding general benevolence will be presumed, thus justifying retention of the trust corpus for some related charitable use, unless the testator has exhibited unalterable opposition to all but a pet charity or has provided for a gift-over.\(^\text{132}\) Disagreement exists as to whether a gift-over should operate automatically or merely be weighed as but one factor negating a general charitable intent. A look at the discrimination cases that have contained gifts-over suggests that, standing alone, such gifts will not necessarily preclude further inquiry by a court.\(^\text{133}\)

In *Connecticut Bank & Trust Co. v. Johnson Memorial Hospital*,\(^\text{134}\) where a testatrix created a trust fund to underwrite the expenses of "Caucasian" patients in a designated hospital room, it was provided that the trust property should become part of the residue of her estate in the event that the trust terms were held to "violate any law." The residue was itself dedicated to the use of a number of charitable organizations. The executor of the will brought an action to obtain a construction of the trust provisions, particularly the legality of the racial restriction. Once the court had determined that nonwhites could not properly be

\(^{130}\) Id. at 334, 461 P.2d at 32.

\(^{131}\) But see Estate of McKee, 378 Pa. 607, 108 A.2d 214 (1954), where the court would not apply *cy pres* to a plan to establish a naval academy for poor male orphans. Instead, the trustee was directed to spend five years seeking supplementary financial support for the proposed scheme.


\(^{133}\) Generally, however, the gift-over is controlling. See cases collected in *A. Scott*, *supra* note 6, § 399.2, at 3094 n.384.

denied access to the trust benefits, it framed the issue remaining before it as follows:

The essential question is whether the testatrix would have preferred the alternative disposition to the charities listed in the residuary clause over the establishment of the hospital trust without the racial limitation. In this case, no other evidence having been presented, the court is confined to the will in attempting to ascertain her intentions. If the gift-over provision was meant to be an expression of her preference, it must be respected.135

The court ultimately gave effect to the gift-over, emphasizing that the alternative beneficiaries were also charitable, thus suggesting that a gift-over to a private party might elicit a different result.

If a gift-over is no more than evidence of a limited charitable intent, estate planners should wonder how they can draft an instrument with confidence that their instructions will be followed.136 The Connecticut Bank court acknowledged that it was heavily influenced by the “violate any law” clause which specifically anticipated the precise reason for trust failure. An attorney could easily predict the likely constitutional causes for failure of an exclusionary trust and link those causes to the operation of the gift-over. But if the potential causes of trust failures are spelled out too minutely, a court may hold that only those causes will activate the gift-over.137 Finally, the absence of a gift-over will be taken as positive evidence of a general charitable intent.138

The necessity of a general intent is being subjected to reevaluation. In Pennsylvania, a statute permits application of cy pres whether the donor’s intent was “general or specific.”139 Professor Bogert recommends that other states follow the Pennsylvania example or that they adopt a presumption that a general charitable intent is extant unless expressly denied by the settlor.140 The reply could certainly be made that this would amount to a serious diminution of the philanthropist’s prerogative, but the effect would be felt more in the realm of theory than actual practice, for the courts have been notably resourceful in finding a general intent. If anything, there is often a fictional quality to the entire process of answering questions about the donor’s preferences when the donor probably never formed any such preferences.141

135 Id. at 8, 294 A.2d at 581 (emphasis added).
136 See also Trammell v. Elliot, 230 Ga. 841, 848, 199 S.E.2d 194, 199 (1973):
Other evidence supportive of the establishment of a specific and exclusive intention was also absent from the will, for there was no provision in the devise, for example, for a reverter clause or an alternative gift over in the event of a failure of the grant.
137 E.g., Brice v. Trustees of All Saints Memorial Chapel, 31 R.I. 183, 76 A. 774 (1910).
138 See cases collected in G. Bogert, supra note 23, § 437, at 426 n.33.
139 20 PA. CONSOL. STAT. ANN. tit. 20, § 6110 (1972).
140 G. Bogert, supra note 23, § 436, at 424.
141 In some instances, long-dead testators have been vested by the court with exalted qualities, but alas victimized by the unenlightenment of their times:
Given everything we know of Mr. Girard, it is inconceivable that in this changed
When the controlling will is silent on trust failure, the claims against a general intent are not so much spurious as meaningless. Arguing as adversaries to charity, unsupported by countervailing public policies (unless the complainants are now helpless dependents of the deceased), the challengers engage the court in hypothecation in the name of preserving the testator's wishes. Given the guesswork involved and recognizing the predilection for saving property for charity, this use of overburdened judicial resources hardly seems worth the effort. It would be preferable to identify precisely what an estate planner must do to avert the application of *cy pres* and retain property for public use if those steps are not taken.

Only twice in recent years has a general charitable intent been found absent when trusts have been unenforceable as written on account of racial or religious discrimination. The more questionable decision was rendered in *La Fond v. City of Detroit*, which concerned a one-sentence residuary bequest. When the Detroit Common Council resolved to accept the bequest (about $25,000) only if the proposed Sagendorph Field could be available to all children irrespective of color or creed, litigation subsequently ensued to determine whether the testatrix had possessed an overriding charitable sentiment and thus would have preferred an integrated playground over failure of the gift. The lower court characterized the words "for white children" as words of command that prohibited a finding of general intent and held the gift void, thereby permitting it to pass intestacy to the heirs of the testatrix. The Michigan Supreme Court deadlocked four to four resulting in an affirmation of the lower court decision. The opinion for the justices opposed to applying *cy pres* displayed a conceptual rigidity that has virtually disappeared from analogous cases:

> There is nothing in the will nor in the record disclosing a more general purpose than the specified purpose — a playfield for white children — and there is nothing in the will or record which in the slightest way indicates deceased desired the money to be applied to any other purpose than a “playfield for white children.”


142 Connecticut Bank & Trust Co. v. Cyril & Julia C. Johnson Memorial Hosp., 30 Conn. Supp. 1, 294 A.2d 586 (Super. Ct. 1972), is omitted here because the gift there was allowed to fail due to a gift-over, also in favor of a charitable beneficiary. Thus, the case does not appear to represent a situation where general charitable intent was declared missing.


144 The balance of my estate after deducting the above bequests is to be given to the city of Detroit, Wayne county, Michigan for a playfield for white children, and known as the "Sagendorph Field."

145 Id. at 363, 98 N.W.2d at 530.
Presumably, the quoted passage was designed to uphold the inviolability of two legal constructs: the written instrument and the testamentary prerogative. The former objective was likely achieved, although at the expense of losing the legacy for the community. As for the second construct, *La Fond* adequately demonstrated the disutility of disputes about general charitable intent. The testatrix's relatives, the champions of her donative rights, argued that she was motivated by "hatred for children of all races except white,"\(^{146}\) that her "intentions were more of a striking back at the Negro population than as a charitable effort,"\(^{147}\) and that at the same time she was striving to keep her property from her legal heirs. The justices for affirmance agreed with none of this, but still concluded that Mrs. Sagendorph's racial restrictions were central to her dispositive scheme. As a result, the legacy passed to the heirs and the memorial for the deceased's husband, which all the justices believed the playfield was to be, was never created — a resolution that hardly graced the testatrix, advantaged the community, or facilitated the flow of wealth toward eleemosynary use.

This is not to say that in the final analysis the *La Fond* court was surely wrong about the testatrix's preferences. Rather, the defect in the decision is in its process, in its presumption that charitable trusts will fail when their initial plan is obstructed unless a case can be made out for preservation. In this respect, *La Fond* flows against the current of recent authority that salvages charitable trusts whenever feasible.

The other recent discriminatory trust case in which a general charitable intent was found absent was *Evans v. Abney*,\(^{148}\) another in the series of actions regarding the will of Senator Augustus Bacon, discussed earlier. After the attempt to remove state involvement from the management of the trust property by replacing the municipal authorities with private trustees was thwarted by the Supreme Court in *Evans v. Newton*,\(^{149}\) the successor trustees moved to have the trust declared unenforceable, so that the trust property would revert to the testator's heirs. The Georgia Supreme Court affirmed a lower court decision granting the request, rejecting the contentions of both the state attorney general and the black intervenors that *cy pres* should be employed to salvage the trust. The United States Supreme Court affirmed.\(^{150}\)

Unlike *La Fond v. Detroit*, the trust instrument in *Evans* presented the court with a clear insight into the opinions of the testator on the exact issue at bar,\(^{151}\) as well as some unequivocal language about the propriety of swerving from his trust directions. Purely from the perspective of trust law, the Bacon will would seem to have offered suf-

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146 Id. at 367, 98 N.W.2d at 532.
147 Id.
151 224 Ga. 826, 830, 165 S.E.2d 160, 164 (1968):
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.
sufficient information to justify the conclusion of the Georgia courts, although it was not necessarily the only conclusion impelled by the totality of the evidence.\footnote{152}

The constitutional ramifications of the Supreme Court's decision understandably provoked a wealth of commentary, much of which is beyond the scope of this article. What is of importance here is that \textit{Evans v. Abney} confirmed the primacy of the state courts in nonconstitutional trust and probate questions. The applicability of \textit{cy pres} in any given case, according to \textit{Evans}, is a local determination that the Supreme Court will not disturb — a rule that the high Court indicated it would have adhered to had \textit{Evans} been decided differently in Georgia: "Nothing we have said here prevents a state court from applying its \textit{cy pres} rule in a case where the Georgia court, for example, might not apply its rule."\footnote{154} The action, then, regarding \textit{cy pres} is in the state courts.

\textbf{B. Deviation}

Deviation,\footnote{155} also referred to as "approximation" and "modification," is a mechanism that has increasingly converged with \textit{cy pres}, though its origins and formalities of usage are quite distinguishable, often in important respects. In contrast to \textit{cy pres}, with its unfortunate identification with prerogative \textit{cy pres} and its checkered pattern of acceptance, deviation emanates from the general equitable powers possessed by the courts as they oversee trusts, both charitable and private.\footnote{156} Deviation theoretically entails a more limited alteration in the original trust plan than does \textit{cy pres} because it countenances changes in the

\footnote{152} The will had been executed in 1911, and reserved a life estate in the land known as Baconsfield for the testator's wife and daughters so that title would not pass to the city until the death of the survivor of them. Allowing the land to be withdrawn from public use 50 years after it had been acquired by the city (which had purchased the interest of Senator Bacon's surviving daughter in 1920) sets a potentially ruinous precedent for charitable beneficiaries who might similarly discover that changing social values had left them in violation of trust terms after years of operation. An analogy to the Rule Against Perpetuities suggests itself — perhaps a statute permanently retaining property for charitable purposes after it has been so used for a stated number of years.


\footnote{154} 396 U.S. at 447.

\footnote{155} \textit{RESTATEMENT (SECOND) OF TRUSTS} § 381 (1959):

The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

\footnote{156} \textit{See generally A. SCOTT, supra} note 6, § 381, at 2983.
management of the trust rather than in its ultimate purpose. By characterizing an intrusion into a charitable trust as a deviation, rather than cy pres, a court is thus drawing from a deeper well of legitimacy to effect, ostensibly, a lesser change in the dispositive instructions.

When employing deviation there is no need to search for a general charitable intent because no change in specific intent is contemplated, save for a reworking of administrative details. Nor does the presence of a reverter or gift-over prevent a court from utilizing deviation, again because the primary purpose of the trust remains capable of fulfillment after its method of accomplishment has been altered. For these reasons it is somewhat regrettable that, from the standpoint of technical precision, trust deviation and cy pres are often treated identically. In the discrimination cases, the proposed change in the trust instrument is usually the deletion of the words of racial or religious classification. Obviously, there is a significant difference in holding that "white only" is an administrative detail instead of a dominant element in the fabric of a trust. Practically speaking, the ultimate outcome of a given case may not be affected by the blurring of this difference, but it should be understood that the task of counsel looking to preserve a charitable trust will be demonstrably easier if the results of cy pres can be achieved by proving the requirements for deviation.

CONCLUSION

A settlor cannot expect racially discriminatory provisions in a trust to operate, although provisions which discriminate in favor of a religion may be sustained under certain circumstances. As to discriminatory race provisions in a trust, the elimination of such provisions on constitutional grounds, or as a result of the application of the trust law doctrines of voiding conditions, cy pres, or deviation may not mean that the trust will terminate. Instead, the trust may continue without the offensive provisions if enough of a trust purpose can be salvaged to justify continuation. There is a great hesitation on the part of courts to terminate charitable trusts. Nonetheless, there is still the possibility that the elimination of racial provisions which discriminate may cause the trust to fail and the trust property to revert to the settlor, to the settlor's heirs.

157 Restatement (Second) of Trusts, Explanatory Notes § 381, Comment a at 273 (1959):

The rule stated in this Section has to do with the powers and duties of the trustees of charitable trusts with respect to the administration of the trust; it has to do with the methods of accomplishing the purposes of the trust. The question of the extent to which the court will permit or direct the trustee to apply the trust property to charitable purposes other than the particular charitable purpose designated by the settlor where it is or becomes impossible or illegal or impracticable to carry out the particular purpose involves the doctrine of cy pres . . . .

158 See generally Reed v. Eagleton, 384 S.W.2d 578, 585 (Mo. 1964). Cases which recognize that finding a general charitable intent is unnecessary are, Essex County Bank & Trust Co. v. Attorney Gen., 351 Mass. 701, 220 N.E.2d 926 (1966); Craft v. Schroyer, 81 Ohio App. 253, 74 N.E.2d 589 (1947).

159 "[T]his is sometimes described as cy pres, sometimes as deviation. But the label is not important. The power and its application are." Bank of Delaware v. Buckson, 255 A.2d 710, 716 (Del. Ch. 1969).
or to pass to the parties designated in the trust as a gift-over. A careful draftsman can ensure termination of the charitable trust if he is told by his client that an instrument of trust must contain a racially discriminatory provision but the objective is a gift-over of the trust property to designated parties if (indeed, when) the discriminatory provision should fail. Such a client would be best advised to eliminate the racially discriminatory provision, or to plan on the gift-over.

APPENDIX

SURVEY OF RECENT DECISIONS

Thus far, the components of the discriminatory charitable trust and resultant litigation have each been examined in isolation. In order to convey a working perspective for the attorney in a particular jurisdiction, there follows a survey of those jurisdictions that have had occasion to pass judgment on exclusionary philanthropy in recent years. A few states have confronted the problem more than once and the evolution and clarification that have occurred within these jurisdictions are as illuminating as interstate differences. Some of the following cases have already been considered in part and those discussions will not be repeated in detail.

Delaware. Bank of Delaware v. Buckson160 concerned a trust created to provide one college scholarship each year for a white male graduate between 17 and 21 years of age from any Wilmington high school. The recipient was to be selected by a three-person committee consisting of the Chief Justice of the state supreme court, the principal of Wilmington High School, and the president of the bank serving as the testator’s trustee, or their successors in office (or named alternative parties). The trust began operation in 1933, and the committee was always composed of the Chief Justice,161 the principal, and officers of the bank; only the applications of white students were accepted until the trustee initiated an action seeking instruction on the validity of the white-only requirement.

Buckson discussed whether the makeup of the selection committee permeated the trust with sufficient state involvement to violate the fourteenth amendment but never decided the matter. Instead, the court concluded that it was prohibited by the rationale of Shelley v. Kraemer162 from issuing a judicial order that would contravene the Constitution.163

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160 Id.
161 The presence of the Chief Justice on the committee might have raised some interesting questions had the case been appealed. Additionally, the Chancellor, author of the Buckson opinion, was a designated alternate for the committee. No chancellor, however, ever actually served as a member of the committee.
162 334 U.S. 1 (1948).
163 These rulings by the highest courts in our Country and State quite clearly limit this Court in what instructions it may give the Trustee. The short of it is that the Court may not advise the Trustee to reject applications from non-whites be-
By focusing on the role of the judiciary rather than the workings of the trust, *Buckson* made state action an inevitable consequence of obtaining judicial assistance in the maintenance of a trust. The logic of this position, if adhered to, would similarly bind the state courts whether the trust was charitable or private, whether the testamentary disposition was by trust, gift or otherwise, and whether the excluded class was measured by religion, race or any other constitutionally forbidden classification. At least in the context of racial discrimination, later cases, as will be seen, show that Delaware has not retreated from the reasoning of *Buckson*.

The court’s declaration on judicial state action meant that the trust could not be enforced as written. To determine what instructions it would give the trustee, the court looked to see if deviation or *cy pres*, which it regarded as fungible concepts, were applicable. Recounting the changes in the social order that had transpired since the settlor’s death, the court concluded that deviation was warranted. The court also observed that the testator had exhibited a general charitable intent, which was technically superfluous to the application of deviation.

*Buckson* created confusion when it embarked on a discussion of state action other than judicial. There would seem to be no need to find both elements once judicial state action had bound the court’s hands. The confusion was not altogether alleviated in subsequent cases.

In *In re Will of Potter* the testator, who had died in 1843, left a testamentary trust for the benefit of “poor white citizens of Kent County.” When the State Department of Public Welfare referred a black applicant to the trust agent, the latter party petitioned the court for instructions, in particular to find out whether continued rejection of black applicants would be unconstitutional.

The *Potter* court reiterated the *Buckson* position that the court could not constitutionally order discrimination, but also took the position that a solely private trust could constitutionally discriminate. The court further postulated that the *Potter* trust itself could have remained private if the Chancellor “had become relegated to purely administrative acts, such as the appointment of successor trustees when required so as

cause such advice would amount to state (judicial) enforced discrimination in violation of the Fourteenth Amendment.

255 A.2d at 715.

164 Sixty-one percent of the students in Wilmington’s high schools were black at the time of the *Buckson* litigation, as was the principal of Wilmington High School — a member of the selection committee.

165 255 A.2d 574 (Del. Ch. 1970).

166 See Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962), where black applicants who had been denied admission to Tulane University because of their race had sought injunctive and declaratory relief that would permit their enrollment. The school’s administrators were willing to admit the black applicants but averred that they were precluded from doing so by the terms of a trust that had been incorporated into the University charter. The court concluded that Tulane was a private school with insufficient state connection to violate the fourteenth amendment. Yet the court also held that, in view of Shelley v. Kraemer, 334 U.S. 1 (1948), and Barrows v. Jackson, 346 U.S. 249 (1953), the court would not be able to enforce the racially exclusionary provisions in the trust if Tulane officials chose to ignore them. The University subsequently opened its facilities to black students.
to ensure continuance of trust purposes and approval of trustee accounts."\(^{167}\) (The Chancellor had appointed all trustees and agents since the inception of the trust, although the trust had directed a different method of selection.)

Apparently *Potter* differentiated between the limited judicial role of which it approved and an outright order enforcing discrimination. This is not consistent with *Shelley v. Kraemer*, upon which *Potter* relied. Just as *Shelley* prohibited judicial support of a purely private covenant, it would seem evident that a chancery court could not, to use the court's words, "ensure continuance of trust purposes" if the trust excluded non-whites. Nonetheless, the *Potter* court attempted to set some limits on the judicial state action doctrine in Delaware and accordingly laid down a foundation of dictum for future cases.

In *Potter* itself, the court found sufficient state action, primarily judicial, to establish a violation of the fourteenth amendment. It was noted that the state legislature had occasionally enacted special statutes to facilitate trust operation, that the state owned 49 percent of the outstanding stock in the bank currently serving as trustee, and that state agencies channelled applicants for trust monies to the trust agent. But the court especially emphasized the significance of the Chancellor's involvement in supervision of the trust.\(^{168}\)

The court then determined that *cy pres* and deviation (treated fungibly, as in *Buckson*) would be employed to preserve the trust after the racial limitations were excised. *Potter* also discussed changing social circumstances to provide a perspective on the testator's intent. As the court seemed to be operating more in terms of *cy pres* than deviation, the search for general intent was procedurally sound.

In *Milford Trust Co. v. Stabler*,\(^{169}\) the Chancellor's concise opinion proclaimed that "[by] now the law against discrimination is settled beyond argument."\(^{170}\) The testator in *Milford* had established a trust to provide educational opportunities for "white boys and girls." From 1939, the trust was specifically used to furnish scholarships for graduates of a public high school.

*Milford*, which was decided by the author of *Buckson*, seemed to say that the latter case, rather than *Potter*, was the definitive statement in Delaware on judicial state action. The retrenchment in *Potter*, permitting some minimum judicial entanglement, did not reappear in *Milford*. Instead, the court spoke unequivocally, declaring that a judge "may not take any judicial action based upon racial discrimination."\(^{171}\) No excep-

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\(^{167}\) 275 A.2d at 580.

\(^{168}\) [The involvement of the Court of Chancery in the supervision and direction of the administration of the charitable trust set up under the will of Benjamin Potter is of such an established and pervading nature that such involvement constitutes that type of governmental entwinement with the affairs of a charitable trust which calls into play the protection of the Fourteenth Amendment.]

*Id.* at 583.

\(^{169}\) 301 A.2d 534 (Del. Ch. 1973).

\(^{170}\) *Id.* at 536.

\(^{171}\) *Id.* (emphasis added).
tions were offered. Although *Milford* allowed that "entirely private" trusts could constitutionally discriminate, the court defined a private trust as one "which does not involve, in any way, action by the State or its agents . . . ."172 *Milford* appeared to say that a racially exclusionary trust would receive no help whatsoever in a Delaware court. As the court specifically spoke only of racial discrimination, it may be inferred that the constitutionality of religious or other forms of exclusion were not decided by *Milford*. *Potter*, on the other hand, had also referred to discrimination "for any other unconstitutional or unreasonable purpose."173

*Milford* also formulated a definition of nonjudicial state action that widened that concept in Delaware. While in *Buckson* and *Potter*, state participation had been contemplated in the trust instrument, there were no such orders in the *Milford* trust. The court, however, found that the history of the trust administration, particularly of the process by which recipients were selected, showed that the public school system had maintained an intricate involvement. Thus, "apart from what an instrument may say, actual State participation is an independent test of constitutionality."174 This kind of analysis, peering beyond the trust instructions "to the way in which its affairs are actually conducted,"175 provides a safeguard against cases of willful discrimination where the settlor hopes to circumvent the law with a seemingly neutral trust instrument. With state action making racial exclusion illegal, the court sought and found a general charitable intent, although it declared that the trust was being preserved by deviation rather than *cy pres*.

In sum, the Delaware cases stress two significant notions: that judicial state action prohibits the courts from furthering impermissible discrimination, and that even unobtrusive forms of state action in trust terms or actual management can run afoul of equal protection guarantees.

**Connecticut.** In *Daggett v. Children's Center*,176 a trust fund was established for the care of orphans in the New Haven area. The trustees were to pay the trust income to the managers of a named orphanage, provided that the managers were all "of the Protestant faith." The managers were solely Protestant until 1968 when the state governor issued an executive order forbidding discriminatory practices by state agencies. The managers of the orphanage then abandoned the religious restriction so as not to jeopardize its contractual relationship with the state welfare commissioner. An action was then instituted by the trustees to obtain the court's instructions regarding future payments of the trust funds.

All of the parties had stipulated that the trustees should continue to contribute to the orphanage, then known as The Children's Center,

172 Id.
173 275 A.2d at 579.
174 301 A.2d at 537.
175 Id.
and the court agreed, relying on what was termed "approximation" (functionally, *cy pres*). To support its finding that the original group of settlors had borne an overriding charitable intent, the court performed an historical analysis of the circumstances surrounding the orphanage since its founding, especially the once-pervasive sectarian influence in custodial child care. Not only had that influence dwindled, but even the nature and reliance on custodial care itself had been drastically revised. Therefore, the court concluded, if the settlors had been interested in aiding deprived children in the manner such aid was administered in 1864, it was reasonable to assume they would have a similar desire in 1970, regardless of the religious affiliation of the Center's managers. If philanthropy is to be kept responsive to contemporary public needs, the *Daggett* reasoning is sound.

Two years later, *Connecticut Bank & Trust Co. v. Johnson Memorial Hospital*, 177 arose in the form of a will construction, and there, as discussed earlier, the trust was allowed to fail. The testatrix in *Connecticut Bank* had created a trust fund to pay the medical expenses of white patients in a certain hospital room. Not only did the court find sufficient potential state action to raise a fourteenth amendment violation,178 but it was also held that the trust would cause the recipient hospital to contravene the state constitution and a state public accommodations law enforced by criminal penalties. These latter considerations appear in the discriminatory trust cases less frequently than might be expected, for the very nature of many benevolent entities is to hold out services to the community at large.179

As a consequence of the above determinations, the court considered both deviation and *cy pres* — properly distinguishing the two — and declined to use them. The reasons have already been stated: the presence of a gift-over to other charitable purposes, specifically to take effect upon a finding that the trust was in violation of law. What is notable about *Connecticut Bank* is some of its dicta assigning a narrow scope to the trust saving doctrine of deviation.180 Although the *Connecticut Bank* position is clearly in the minority, at least in discrimination cases, it is probably correct. Particularly when a trust instrument was recently drafted, as was the trust here (in 1964), it seems a bit facile to say that "white only" was a mere incidental or a product of a less tolerant era.


178 The court relied on *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 958 (1964), where it was held that participation by a private hospital in the Hill-Burton federal hospital construction program constituted enough governmental involvement to apply the fourteenth amendment to hospital admissions practices.


180 This rule of deviation would not authorize the elimination of the restriction to Caucasians in this bequest because the limited scope of this principle would not permit the class of beneficiaries to be enlarged to include persons whom the testatrix intended to exclude.

30 Conn. Supp. at 8, 294 A.2d at 592-93.
Connecticut Bank should be seen as staking out boundaries for the acceptable use of cy pres and deviation rather than as weakening those doctrines. The court carefully limited its holding to the facts before it, and evinced no intention to disturb Daggett. At most, Connecticut Bank served as a reminder that the testamentary prerogative retains vitality and will prevail under certain circumstances. In this regard, the court questioned the obvious judicial willingness to unearth a general charitable intent, and its skepticism is well-taken. Indeed, judicial credibility would only be enhanced if the strong preferences for frustrating discrimination and upholding charitable trusts were more readily acknowledged.

Georgia. The saga of the Bacon trust has already been recounted, here and elsewhere. It is ironic that a little over three years after the lengthy Bacon sequence came to an end in Evans v. Abney, the Georgia Supreme Court explained in Trammell v. Elliot that Evans had been no more than an exception to the generally successful use of cy pres to salvage charitable trusts. The testatrix in Trammell had intended to create scholarship funds at three named Georgia colleges for “deserving and qualified poor white boys and girls.” The executor of her will sought construction and the lower court struck the racial criterion, using cy pres to maintain the trust property in the public realm.

On appeal, the state supreme court declared that unconstitutional government entanglement was present although only one of the three named universities was a public school. Rather than treat them separately, the court apparently regarded the trust fund as unitary and proceeded on that basis.

The remaining issue was the propriety of cy pres in light of the facts. The court commendably introduced its analysis with a frank statement of rules of construction, buttressed by statute, that favored preserving charitable trusts and preventing forfeitures. Trammell made it plain that a general charitable intent, sufficient to justify cy pres, would be presumed, absent an expression of exclusive specific intent that was “clear, definite and unambiguous.” Predictably, the appellant relied on Evans v. Abney in arguing that no general charitable intent existed. The dispatch with which Trammell distinguished and strictly narrowed

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181 Court ought not to attribute to donors a nobility of purpose or loftiness of sentiment beyond that warranted by the evidence in order to achieve a result inconsistent with their intentions as expressed. Id. at 11, 294 A.2d at 592-93.


184 The public policy expressed in these provisions favoring the validation of charitable trusts is supported by the long standing rule of construction of this court by which forfeitures because of restrictive conditions attached to grants or devises of property are not favored, and as well by related Code provisions immunizing such trusts from the Georgia law against perpetuities. Id. at 846, 199 S.E.2d at 198, construing GA. CODE ANN. § 85-707 (1970).

185 Id. at 847, 199 S.E.2d at 198-99.
Evans to its own facts\textsuperscript{186} cannot fail to surprise those who had closely followed the Bacon sequence. Standing on its own, however, the Trammell result is consistent with the public policy announced by the court and generally a scrupulous and progressive decision.

Texas. The Texas cases offer some interesting points of contrast to those surveyed thus far. Although Texas achieves identical results — discrimination precluded and trusts saved for eleemosynary ends — it has drawn upon somewhat different theoretical sources. Most importantly, the Texas cases have not contained an element of state action.

Coffee \textit{v. William Marsh Rice University}\textsuperscript{187} arose when Rice University and its trustees sued to obtain an interpretation of the trust instrument that led to the founding of the university (and which was quoted verbatim in the school's corporate charter). The instrument stated that the school was to provide instruction for "the white inhabitants of the City of Houston, and State of Texas." The plaintiffs prayed for a construction that would allow the admission of students without regard to color, and alternatively, that \textit{cy pres} or deviation be applied to reach the desired end. They argued that the racial restrictions harmed the university's reputation in the academic community and placed it at a disadvantage or disqualified it altogether from receiving government or foundation grants, with the result that the founder's primary interest — to create a greater center of learning — was not being fulfilled.

At the trial level, the case was heard by a jury which made two key findings: (1) that the settlor had indeed intended to favor white citizens, but that this was no longer practicable or possible; (2) that his overriding purpose had been to establish a first-class educational institution regardless of the color of its users. The appellate court agreed with these findings but went further, concluding that the latter finding was correct as a matter of law. The trial court's order permitting the University to ignore racial criteria in its admissions policies was affirmed.\textsuperscript{188}

\textit{Coffee} is a straightforward example of charitable trustees asking to delete a trust instruction and an appropriate court complying with the request after becoming convinced that the trust would benefit from the change and that the change was consonant with the settlor's intentions. The court's decision was predicated simply on its "equitable power to

\textsuperscript{186} In \textit{Evans} we held that from the contents of the will, in addition to the provision for racial restrictions on the use of a park, there was exhibited an intention on the part of the testator which would preclude the use of such park in any manner except that as exclusively and clearly demanded by the testator. \textit{Evans}, therefore, upon its facts, stood for the recognized exception in the use of \textit{cy pres} whereby from the will the specific intent of the testator conclusively negated any general charitable intention. \textit{Id.} at 847, 199 S.E.2d at 199 (emphasis added).

\textsuperscript{187} \textit{408 S.W.2d 269} (Tex. Civ. App. 1966).

\textsuperscript{188} \textit{Id.} at 283. \textit{Coffee} also contains considerable dicta on the permissible uses of evidence during construction of written instruments. This is a subject beyond the bounds of this article, but it is worth a reminder here that showing or disproving charitable intentions can require a skillful use of parol evidence. There are many instructive examples in \textit{Coffee}.
authorize a deviation from the terms of the trust . . . .” The court alternatively relied on cy pres and never really clarified its theories, although the outcome clearly did not hinge on the name the court attached to its equitable power.

There is also strong dictum in Coffee in support of the discretionary power of charitable trustees. Among the discrimination cases, Coffee is unique in this regard, for other decisions have not appeared to assign any importance to the fiduciary’s judgment, concentrating instead on discerning the intentions of the settlor. This aspect of Coffee would suggest that a trustee might be wise to act unilaterally to alter the trust instructions, thereby shifting the burden of proof to those who would challenge the actions taken.

It would seem that constitutional issues could easily have been raised in Coffee. It is inconceivable that an institution as large as Rice University would not have acquired enough connection with various governmental agencies to at least make a state action claim arguable. The cases from other jurisdictions discussed above suggest that the quantum of state involvement that a court will require to present a fourteenth amendment question is not large.

In Wooten v. Fitz-Gerald the testatrix had left property to be used as a home for “aged white men,” also giving support funds for the same purpose. Her successor administrator requested construction and interpretation of the will to determine whether the racial restriction was valid. Heirs of the testatrix contended, inter alia, that the gift must fail because illegal discrimination was central to the testamentary plan. The trial court deleted the word “white” and used cy pres or “approximation” to uphold the trust. The court of appeals affirmed. The Wooten court relied on its general equitable powers to dismiss the racial classification as an “unenforceable word,” although there was no explanation of why it was unenforceable. The court did indicate that there might have been a state action problem in the “administrative enforcement” of the racial provisions, but that the problem had been prevented by dropping the word “white” from the will. This would suggest that Wooten had adopted the judicial state action doctrine of Shelley v. Kraemer but instead of citing Shelley, the court referred to the

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189 Id. at 285.
190 While the discretionary powers of the Trustees are not unlimited, the provisions of the trust instrument clearly vest in them wide powers in determining the method and procedure to be used in effectuating the purposes of the donor. . . . This Court cannot substitute its discretion for that of the Trustees, and can interfere with their exercise of discretionary powers only in case of fraud, misconduct, or clear abuse of discretion.

Id. at 284.
No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
193 Id. at 725.
cases in the Girard College sequence, which were not judicial state action cases.

On the whole, Wooten was vague in its handling of the white-only restriction. The court’s conclusion that it possessed a “power and a duty” to excise “an objectionable limitation contained within a charitable trust” begs the question of how the limitation happened to become legally “objectionable.” Coffee cannot be consulted for an answer because the issue did not arise there. As a result, while it is evident that racial discrimination in charitable trusts will not survive in Texas, it is not clear why this is so.

Colorado. The Colorado cases contain no doctrine or approach not already analyzed. Moore v. City & County of Denver involved the construction of a testamentary instrument that had created an orphanage for white male orphans between six and ten years of age. The trustees petitioned the court to loosen these restrictions, but the request was denied. In dicta, it was said that cy pres was inappropriate because the original instructions had not become incapable of fulfillment and because the testator had evinced only a specific intent. Thirteen years later, in Dunbar v. Board of Trustees of George W. Clayton College, a similar request was granted, permitting the admission of children between the ages of six and eighteen, regardless of color, and whether or not they were orphans. Moore was distinguished summarily; essentially, the Dunbar court explained that Moore did not really say what it had plainly said.

California. In re Estate of Vanderhoofven and In re Estate of Zahn have already been adequately considered. Neither mentioned a prior unreported opinion, In re Estate of Ruth Snively Walker, which held that appointment of a trustee willing to administer a racially restrictive trust would constitute judicial state action, in violation of the fourteenth amendment.

Michigan. La Fond v. City of Detroit was analyzed previously.

New York. In re Estate of Hawley was decided in 1961 but has virtually been relegated to historical interest by the flurry of cases that

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195 440 S.W.2d at 726.
196 133 Colo. 190, 292 P.2d 986 (1956).
198 18 Cal. App. 3d 940, 96 Cal. Rptr. 260 (1971); see notes 105-08 supra and accompanying text.
199 16 Cal. App. 3d 106, 93 Cal. Rptr. 260 (1971); see notes 103-08 supra and accompanying text.
201 357 Mich. 362, 98 N.W.2d 530 (1959); see notes 142-47 supra and accompanying text.
followed. In *Hawley* the trustee of a scholarship fund at a named school was allowed to drop requirements relating to religion and national origin which only a decreasing number of students could meet. The court held that the trustee had made out a sufficient case for utilization of *cy pres*.

*New Jersey. Howard Savings Inst. v. Peep* \(^\text{203}\) preceded *Hawley* and stands as the pioneer state decision in the assault upon racial and religious discrimination in charitable trusts. The case was evaluated earlier in this article and the critical commentary above should be tempered by an appreciation for the difficulties inherent in being the first to act.

\(^{203}\) 34 N.J. 494, 170 A.2d 39 (1961); *see* notes 123-27 *supra* and accompanying text.