

CHARITABLE TRUSTS, THE FOURTEENTH AMENDMENT  
AND THE WILL OF STEPHEN GIRARD

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A charitable trust serves two masters—the property owner who created it and society which is its beneficiary. On the initial assumption that the interests of each coincide, the law guarantees the trust enforcement, perpetual existence and tax immunity. But aware that the harmony in any partnership is sometimes disrupted, it has also evolved methods of adjusting the two interests when they diverge. The process has been criticized as hesitant in application and over-solicitous to the demands of the settlor.<sup>1</sup> Yet one has come to expect few surprises by way of doctrinal innovations. Now, however, a challenge has arisen from a wholly new and unexpected quarter. The attack is levelled at the trust which makes race the criterion for benefit, and the challenge stems from the equal protection clause of the Fourteenth Amendment.<sup>2</sup>

## THE GIRARD CASE: AN INCOMPLETE SOLUTION

On April 29 of this year, the Supreme Court took the first step toward desegregation of charitable trusts.<sup>3</sup> Without dissent, it held in a *per curiam* decision

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1. Two basic devices are used to protect the public interest: first, before the trust becomes operative, a court may withhold the charitable designation and all the privileges which accompany that characterization; and, second, if a valid over-all charitable purpose is present, a court may remove particular provisions which are obsolete, impossible or illegal by applying the doctrine of *cy pres*. These devices are administered in a manner which makes the settlor's intent primary and the public interest subordinate. See text at note 81 *infra*. For criticism of the inevitable abuses, see TAYLOR, *PUBLIC ACCOUNTABILITY OF FOUNDATIONS AND CHARITABLE TRUSTS* (1953). On the possibility of tax advantages to the settlor and his family, see MACDONALD, *THE FORD FOUNDATION* 132-37 (1956); Eaton, *Charitable Foundations and Related Matters Under the 1950 Revenue Act*, 37 VA. L. REV. 1, 253 (1951); Latham, *Private Charitable Foundations: Some Tax and Policy Implications*, 98 U. PA. L. REV. 617 (1950) (written prior to the 1950 amendments to the Internal Revenue Code); Comment, *Colleges, Charities and the Revenue Act of 1950*, 60 YALE L.J. 851 (1951). For discussion of the continuance of obsolete trusts, see FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* (1950); SIMES, *PUBLIC POLICY AND THE DEAD HAND*, 110-40 (1955); Cooper, *Charitable Community Trusts*, 25 CONN. B.J. 17 (1951); Comment, *A Reevaluation of Cy Pres*, 49 YALE L.J. 303 (1939). On the problems of uncontrolled wealth and power, see Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957).

2. U.S. CONST. amend. XIV, § 1.

3. *Pennsylvania v. Board of Directors*, 77 Sup. Ct. 806 (1957).

that the Board of Directors of City Trustees in Philadelphia, while exercising its obligation as trustee to deny Negroes admission to the college created under the will of Stephen Girard, was engaged in state action proscribed by the Fourteenth Amendment.<sup>4</sup> On its face the decision does not pose a threat to charitable trusts generally; for it applies only to the unusual trust which by its terms requires both discrimination and a governmental trustee. But the pattern of race problems in the past demonstrates that, once the door has been pushed ajar, attempts will be made to widen the opening. And the *Girard* case may yet provide the impetus. The Supreme Court remanded "for further proceedings not inconsistent with this opinion." As if anticipating this development, the Supreme Court of Pennsylvania had indicated that if the identity of the trustee required a finding of state action, the proper remedy would be substitution of a private trustee, not excision of the limitation to whites.<sup>5</sup> Should this remedy be effected, the United States Supreme Court will be confronted with a difficult choice if it again reviews the case. It must then either approve the discrimination so returned to a private form, thereby bolstering the determination of the Southern states to preserve school segregation, or it must hold all charitable trusts subject to the standards of the Fourteenth Amendment.

Even before the Supreme Court took action, the *Girard* case had attracted widespread attention.<sup>6</sup> At first glance, this interest is difficult to understand. In the complex of Negro-white relations, the maliciously discriminatory trust is only of peripheral importance. To the relatively few now in existence, the addition of many more is unlikely.<sup>7</sup> Established institutions cannot afford,

4. The decision has attracted attention not only because of its implications but also because of the manner in which it was rendered. Seemingly equating *Girard* with the more routine segregation cases, the Court passed judgment on the petition for certiorari without hearing oral argument. See note 38 *infra*. The brevity of the decision also indicates that the Justices considered the case of routine significance. It has been suggested that a fuller airing of the matter was in order. *New Republic*, June 3, 1957, p. 7.

5. *Girard Will Case*, 386 Pa. 548, 566, 127 A.2d 287, 295 (1956); see text at note 49 *infra*.

6. See Gordon, *The Girard College Case: Desegregation and a Municipal Trust*, 304 ANNALS 53 (1956) (discussion of the use of sociological testimony); Miller, *Racial Discrimination and Private Schools*, 41 MINN. L. REV. 145, 245, 266-76 (1957); Shanks, "State Action" and the *Girard Estate Case*, 105 U. PA. L. REV. 213 (1956); Notes, 56 COLUM. L. REV. 285 (1956), 104 U. PA. L. REV. 547 (1956), 3 WAYNE L. REV. 143 (1957).

7. No compilation of such trusts has been found. The digests list the few which have been litigated on any ground. A sampling includes: *Averill v. Lewis*, 106 Conn. 582, 138 Atl. 815 (1927) (trust for maintenance of free rest for white, Protestant, female teachers); *Beardsley v. Selectmen*, 53 Conn. 489, 3 Atl. 557 (1885) (bequest for worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in Bridgeport); *Woodstown Nat'l Bank & Trust Co. v. Snelbaker*, 136 N.J. Eq. 62, 40 A.2d 222 (Ch. 1944); *Humphrey v. Board of Trustees*, 203 N.C. 201, 165 S.E. 547 (1932) (income of trust to be used for education of white girl orphan selected from specified orphanage each year by Board of Trustees); *Hass v. Hass*, 195 N.C. 734, 143 S.E. 541 (1928) (trust for benefit of indigent, blind, caucasian children); *Columbia v. Monteith*, 139 S.C. 262, 137 S.E. 727 (1926) (trust to establish industrial school for children of indigent white persons).

The *Girard* disposition has apparently served as a prototype for other trusts. Two

from a public relations standpoint, to accept money with this taint upon it.<sup>8</sup> Moreover, it was apparent from the outset that the two Negro boys who had suffered the discrimination in *Girard* would never personally benefit from the action. By the time the litigation is ended, their age will probably foreclose any opportunity to enroll in the school.<sup>9</sup> Fascination in the case stems not so much from the immediate solution as from what that solution portends for the future. And because the present Supreme Court pronouncement is only a prelude to the broader consideration of charitable trusts, the interest remains undiminished.

First, the case highlights the uncertain definition of state action under the Fourteenth Amendment created by past decisions. In *Brown v. Board of Education*, the Court, speaking the conscience of a majority of the nation, took a giant step in the evolution of full equality for the Negro.<sup>10</sup> But the force of this bold thrust may be lost in the welter of confusion attending its implementation. Today Southern states are reconstituting their schools in a form superficially private.<sup>11</sup> Their efforts would be valueless, even as a basis for argument, if the Court's occasional ambiguity concerning the state-private dichotomy did not give the various schemes a semblance of legality.

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citizens of Philadelphia, Robert N. Carson who died in 1907 and Charles E. Ellis who died in 1909, established by their respective wills separate institutions under the trusteeship of corporate fiduciaries setting out the qualifications for admission in language very similar to that of the Girard will except that the limitations were to girls instead of boys. Both wills were litigated, but not on the ground of racial restrictions. See Carson's Estate, 244 Pa. 401, 90 Atl. 719 (1914); Ellis's Estate, 12 Pa. D. & C. 213 (1929). These trusts, along with the Girard trust, are discussed in CLAGUE, CHARITABLE TRUSTS 81-97 (1935). Not every trust spawned by the Girard will has been racially restricted. See McKee Estate, 378 Pa. 607, 108 A.2d 214 (1954) (trust to establish school for "poor colored male orphan children and poor white male orphan children," the number to be kept as nearly equal as possible).

8. The most sensational example of bigoted giving was the offer of George W. Armstrong to establish a \$50,000,000 endowment for Jefferson Military College of Natchez, Mississippi. The gift was conditional upon the exclusion of Jews and Negroes and the teaching of the "true principles of Jeffersonian Democracy and the Constitution, Christianity and the superiority of Anglo-Saxon and Latin-American races." Although the school was alleged to be operating at a deficit, the trustees refused the offer. N.Y. Times, Nov. 13, 1949, p. 64, col. 1. Armstrong then avowed to carry out his program through the Judge Armstrong Foundation, but his trust tax exemption was revoked. N.Y. Times, Dec. 13, 1949, p. 28, col. 6.

9. The will stipulates that the boys must be between the ages of six and ten to be eligible for admission. At the date of the decision one boy was already over the maximum age, and the other close to it. See Philadelphia Evening Bulletin, April 30, 1957, p. 3, col. 4. 10. *Brown v. Board of Education*, 347 U.S. 483 (1954).

11. The statutes are collected in 1 RACE REL. L. REP. 422 (Miss.); 728, 927-28 (La.); 730 (S.C.); 924 (Fla.); 930-40 (N.C.); 1091-1112 (Va.); 2 *id.* at 215-22, 455 (Tenn.); 453 (Ark.); 453-55 (Ga.). The purpose is to stall and confuse implementation of the decision by endless litigation. The statutes are, of course, of dubious constitutionality, but absent action by the President or Congress, they may well produce serious delay. Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377 (1954); Nicholson, *The Legal Standing of the South's School Resistance Proposals*, 7 S.C.L.Q. 1 (1954).

State action cases involving such basic rights of citizenship as voting and housing have followed a pattern of development.<sup>12</sup> A discriminatory statute is first invalidated, only to be replaced by the same discrimination ostensibly in private form. The Court has resolutely held to substance, prohibiting the discrimination regardless of the agency producing it. As a result, the language in the end decision of each sequence provides a definition of state action sufficiently broad to cover almost any type of human activity.<sup>13</sup> Nevertheless, a handful of state decisions, which, despite proof of the same elements of governmental participation, have found no state action, and which the Court has refused, on one ground or another, to set aside, prevents the definition from assuming all inclusive proportions.<sup>14</sup> Except in the primary areas of govern-

12. Many of the cases are collected in EMERSON & HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES*, 993-1172 (1952); *State Action: A Study of Requirements Under the Fourteenth Amendment*, 1 RACE REL. L. REP. 613 (1956).

13. The sequence in the area of voting in primaries moves from *Nixon v. Herndon*, 273 U.S. 536 (1927) (Texas statute making Negroes ineligible to vote in Democratic primary a violation of the Fourteenth Amendment); through *Nixon v. Condon*, 286 U.S. 73 (1932) (determination of qualifications for voting by state executive committee of the Democratic Party under permission of statute also unconstitutional); *Grovey v. Townsend*, 295 U.S. 45 (1935) (qualifications set by the party in convention under permission of statute constitutional); *Smith v. Allwright*, 321 U.S. 649 (1944) (*Grovey v. Townsend* overruled); *Elmore v. Rice*, 72 F. Supp. 516 (D.S.C. 1947), *aff'd*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948) (Democratic Party's continued exclusion of Negroes after all statutes on primaries repealed unconstitutional); to *Terry v. Adams*, 345 U.S. 461 (1953) (exclusion of Negroes from club which held pre-primary elections to determine candidates for state primaries held prohibited state action). For a discussion of the white primary cases, see HALE, *FREEDOM THROUGH LAW* 335-49 (1952); Note, 47 COLUM. L. REV. 76 (1947). The sequence in the area of occupancy of real property has a less comprehensive history starting with *Buchanan v. Warley*, 245 U.S. 60 (1917) (city ordinance forbidding Negroes to occupy houses in white neighborhoods unconstitutional); and ending with *Shelley v. Kraemer*, 334 U.S. 1 (1948) (private restrictive covenants cannot be enforced by injunction); and *Barrows v. Jackson*, 346 U.S. 249 (1953) (nor by damages).

14. The more prominent examples include *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950) (the Metropolitan Life Insurance Company could constitutionally exercise the privilege as landlord to refuse to lease to Negroes although it had constructed the 25,000-person housing development with the help of New York City through tax exemptions and powers of condemnation); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 245 Ia. 147, 60 N.W.2d 110 (1953) (upholding restriction in contract for purchase of burial lot to members of caucasian race), *aff'd per curiam*, 348 U.S. 880 (1954), *judgement of affirmance vacated, cert. dismissed*, 349 U.S. 70 (1955) (original grant improvident because enactment by Iowa legislature of statute which forbids such clauses in the future made question moot); *Charlotte Park and Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956) (gift to city of land on condition that premises not to be used by Negroes created possibility of reverter which could operate without state action); *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955) (Virginia miscegenation statute upheld as legitimate objective of state government), 350 U.S. 891 (1956) (matter returned for clarification of conflicts of law point), 197 Va. 734, 90 S.E.2d 849 (1956) (state court refused invitation to clarify), 350 U.S. 985 (1956) (case dismissed for want of a properly presented federal question). The *Girard* case indicates the difficulties in drawing conclusions from previous refusals to review. Involving the sensitive and highly per-

mental service, no one can predict the reach of the Fourteenth Amendment. Must *Shelley v. Kraemer*, for example, be confined to the area of restrictive covenants, or is it to stand for the broader proposition that any form of judicial action in aid of private discrimination is prohibited state action?<sup>15</sup>

The *Girard* case has the necessary ingredients to supply some of the answers. It already stands as additional proof that the Court will not tolerate any form of assistance by a state agency in a discriminatory scheme. And, should further developments put all charitable trusts in issue, the inextricable combination of the elements of private and public action inherent in such trusts will force the court to consider the over-all scope of the Fourteenth Amendment.

In the possibility of a challenge to long-established principles of charitable trusts lies a second point of interest. It has been suggested that application of the Fourteenth Amendment through a finding of state action would make a shambles of the law of charitable trusts.<sup>16</sup> If a property owner cannot make race the basis of selection, what of the religious trust; the private school and university; and ironically, the trust for the exclusive benefit of the Negro?<sup>17</sup> The argument, so cynically made in other areas of race conflict, that segregation benefits both races, has a ring of truth in this context. Although no statistical proof is available, it might fairly be assumed that there are more trusts favoring Negroes—their depressed position has traditionally been of major concern—than of a converse type. Parenthetically, scholarship funds limited to Negroes

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sonal area of testamentary power, it seemed, in light of the above cases, to be a fit subject for refusal. For view that a denial of certiorari makes law and national policy, see Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950).

15. *Shelley v. Kraemer*, 334 U.S. 1 (1948). For the implications of this case, see HALE, *FREEDOM THROUGH LAW* 366-82 (1952); Note, *The Distintegration of a Concept—State Action Under the 14th and 15th Amendments*, 96 U. PA. L. REV. 402 (1948).

16. See notes 86, 92 *infra*.

17. As indicated in note 7 *supra*, many trusts with discriminatory restrictions are dedicated to quaint purposes popular in the philanthropy of earlier years. They are of slight social importance. If the Fourteenth Amendment is extended into the area of charitable trusts, its greatest effect will undoubtedly be in the field of private education. The funds (other than tuition fees) by which such institutions are supported may take a variety of forms including outright gifts, income from trusts or endowments, and special purpose funds. Orthodox doctrine, however, treats them all, for most purposes, as trusts. Thus the enforcement procedures described herein are available to police the use of such funds by charitable corporations, and a state's attorney general is recognized as the proper party to initiate any necessary actions. 4 SCOTT, TRUSTS § 348.1 (2d ed. 1956); Taylor, *A New Chapter in the New York Law of Charitable Corporations*, 25 CORNELL L.Q. 382, 396-400 (1940); Blackwell, *The Charitable Corporation and the Charitable Trust*, 24 WASH. U.L.Q. 1, 31 n.102 (1938).

A few private schools have already engaged in a measure of voluntary desegregation. For an invaluable study in this area, see Miller, *Racial Discrimination and Private Schools*, 41 MINN. L. REV. 145, 175 (1956). The United Negro College Fund with an annual fund-raising goal in the neighborhood of two million dollars announced that all thirty-one Negro colleges (all but one in the South) which it helps to support were open to white students following the Court's desegregation decision. N.Y. Times, April 2, 1956, p. 22, col. 3.

and administered by state universities now appear highly suspect under the Court's ruling.

#### ANOTHER LOOK AT THE GIRARD TRUST

Girard College is a boarding school for orphan boys of pre-college age. Named after its benefactor, Stephen Girard, one of Philadelphia's most distinguished early citizens, the school has served the community well in its one hundred and nine years of existence.<sup>18</sup> Its annual enrollment exceeds 1,000; it has had its share of eminent graduates; and its endowment, currently quoted at ninety-eight million dollars, ranks it among the select few of privately endowed educational institutions in the country.<sup>19</sup> In one important respect, however, Girard College is out of step with its place and times. It discriminates against Negroes. The persons charged with the management of the college do not defend this discrimination as a matter of educational policy.<sup>20</sup> They discriminate only because a will written over a century and a quarter ago requires them to do so.<sup>21</sup>

Stephen Girard deserves better than to be discredited by a provision which was seemingly only incidental to his overall design.<sup>22</sup> His career marks him as a creative, generous and, by the standards of his time, tolerant man. An immigrant who became a millionaire, Girard was the personification of the American dream. After settling in Philadelphia in 1777, he proceeded by a variety of enterprises, primarily trade and banking, to accumulate a sizeable fortune. Throughout his long life, he was always ready to participate in community affairs, exhibiting in his contributions to the city and its citizens the philanthropic ingenuity apparently characteristic of the city of Franklin in the early

18. See Girard Estate, 4 Pa. D. & C.2d 671, 693-94 (1955).

19. Girard College has been ranked fifth in total endowment behind Harvard, Yale, Columbia and the University of Texas. The college receives no tuition or fees and is therefore entirely dependent upon the income from the trust. Gordon, *The Girard College Case: Desegregation and a Municipal Trust*, 304 ANNALS 53 (1956).

20. At the Orphans' Court hearing, expert testimony was offered on the evils of segregated education. While the Board of Trustees did not argue that segregation was a virtue, it vigorously opposed the experts' arguments with evidence of the contributions which the college had made over the years. For description of the testimony, see *id.* at 57-61. See also Girard Estate, 4 Pa. D. & C.2d 671, 674-75, 692-94 (1955).

21. Sections of the will relevant to the college are set out in *Vidal v. Girard's Ex'rs*, 43 U.S. (2 How.) 117, 119-28 (1844). See also WOLCOTT, BACKGROUND OF THE EDUCATIONAL PROVISIONS OF THE WILL OF STEPHEN GIRARD (1948). In the thirty-five page document the limitation to white boys appears only twice. See *Vidal v. Girard's Ex'rs*, *supra* at 128, 130. However, a similar restriction is imposed on gifts to other charities. THE WILL OF THE LATE STEPHEN GIRARD, Esq. arts. V, VIII (1831).

22. There are two biographies of Girard: McMASTER, THE LIFE AND TIMES OF STEPHEN GIRARD (1918), and WILDES, LONELY MIDAS (1943). A history of the college and of the current litigation is detailed in the opinions of the Pennsylvania courts. Girard Estate, 4 Pa. D. & C.2d 671 (1955) (opinion by hearing judge of Orphans' Court of Philadelphia County), *id.* at 708 (1956) (opinion for full Orphans' Court); Girard Will Case, 386 Pa. 548, 570, 615, 127 A.2d 287, 297, 318 (1956) (majority, concurring and dissenting opinions).

days. His will, a thirty-five page document prepared when he was eighty, represents the ultimate expression of his gratitude to his foster home. He had no children; accordingly, his gifts to individuals took only a relatively small portion of his estate. The rest went to a variety of charities including such community enterprises as the police department, hospitals, highway construction and improvement of internal waterways. These gifts, however, lacked the personal touch. In his residuary estate, on the other hand, he established a school, describing in meticulous detail nearly every aspect of its existence—architecture, qualifications of student and faculty, curriculum and general operation. For the construction and maintenance of the institution, which has endured as a monument to a man of wisdom and vision,<sup>23</sup> Girard left two million dollars to “The Mayor, Aldermen and citizens of Philadelphia,” the city’s official name at that time. He instructed the city to admit only “poor, male white orphan children” between the ages of six and ten.

At Girard’s death the General Assembly, taking immediate steps to implement the will, passed two acts permitting the city to carry out Girard’s instructions and authorizing the Common Council to elect or appoint officers and agents for that purpose.<sup>24</sup> Management was thus vested in the city proper until 1869 when the General Assembly established the special agency by which it is governed to this day.<sup>25</sup> The Girard trust, together with all other trusts under the trusteeship of the city, was transferred to a Board of Directors of City Trustees, composed of the Mayor, the Presidents of the Select and Common Councils and twelve other citizens of Philadelphia appointed by the judges of the Court of Common Pleas of Philadelphia County. Although the statute was apparently designed to establish a more definite line of demarcation between the municipal and trust functions of the city, the members of the Board were specifically made “officers and agents” of the city.<sup>26</sup>

The school did not actually go into operation until some sixteen years after Girard’s death. Construction was slowed by a depression severe enough, so the story goes, to cause the hard-pressed city officials to appropriate some half

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23. In 1950 on the occasion of the two hundredth anniversary of the birth of Stephen Girard, the Newcomen Society of North America gave him a posthumous award for his contributions to Philadelphia. John A. Diemand, the principal speaker, concluded his remarks with the following tribute to Girard’s vision:

“No one who reads the Will can fail to be impressed by the breadth of its plans for the future, the wealth of its detail, and the precision of its terms. It focuses and projects beyond his grave the spirit of a truly great man! As the lawyer-descendant of the man who drafted the document said at the recent Girard College Centennial, this Will shows Mr. Girard to have been ‘a man of tolerance, unselfishness, generosity, a thinker well ahead of his contemporaries, and a pathfinder in educational philanthropy.’”

DIEMAND, STEPHEN GIRARD (1750-1831)—A PROPOSAL FOR POSTHUMOUS AWARD 16.

24. PENNSYLVANIA LAWS—1831-32, No. 93, at 176; *id.* No. 115, at 275.

25. PA. STAT. ANN. tit. 53, §§ 6481-86 (Purdon Supp. 1956).

26. “The said directors, in the discharge of their duties, and within the scope of their powers aforesaid, shall be considered agents or officers of said city. . . .” *Id.* § 6486.

million of the Girard funds to general municipal purposes.<sup>27</sup> A more direct threat to completion came from the first of several attacks brought by a particularly recalcitrant group of disappointed heirs. The Supreme Court, twenty-five years before, had held that equity's jurisdiction over charitable trusts was not inherent but founded on the Statute of Elizabeth.<sup>28</sup> Arguing that Pennsylvania had not retained the Statute as part of the common law, the heirs sought to have the trust invalidated on the ground that no authority existed for enforcement of charitable trusts. Secondly, they claimed that a city was not authorized to act as a trustee. And finally, they contended that the gift was not in any event charitable, because the will directed that no minister should be admitted to the premises lest the students become confused by sectarian bickering.<sup>29</sup> In an opinion still respected as the cornerstone of the American law of charitable trusts, Mr. Justice Story found the earlier decision based on a mistaken historical notion and held that, absent the Statute of Elizabeth, equity could recognize a charitable trust.<sup>30</sup> Furthermore the city, authorized by the state legislature, was held a proper trustee and the trust charitable. Neither this nor any subsequent decision mentioned the discrimination against Negroes.

From a modern perspective, the case stands as a dramatic example of the transitory nature of community attitudes. The decision upholding the once hotly-debated clause excluding ministers from the school grounds has now been hailed as one of the first pronouncements of the American policy on non-sectarian schools.<sup>31</sup> But by 1954, when two Negro boys applied for admission

27. See Girard Will Case, 386 Pa. 548, 631, 127 A.2d 287, 326 (1956) (dissenting opinion). The point is of little significance except to indicate that the city did not always honor the difference between trust and municipal funds as scrupulously as it does today. See note 38 *infra*.

28. Trustees of the Philadelphia Baptist Association v. Hart's Ex'rs, 17 U.S. (4 Wheat.) 1 (1819).

29. Article XXI, para. 9, of the will, reprinted in Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 117, 123 (1844), reads in part:

"Secondly, I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

"In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evidence benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer."

30. Vidal v. Girard's Ex'rs, *supra* note 29.

31. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 215 (1948) (concurring opinion).



to Girard College, the Supreme Court had overruled the separate but equal doctrine, thus proclaiming full equality as the legal and moral position of the country.<sup>32</sup> Pennsylvania had enacted a series of anti-discrimination statutes;<sup>33</sup> the city of Philadelphia had followed a similar course;<sup>34</sup> and the Negro neighborhood was fast encroaching on the Girard campus. The Negro boys, although qualified in all respects save race, were denied admission. In the words of the City Board of Trustees, it had been "advised by its solicitor that it had no power to admit other than white boys to Girard College."<sup>35</sup>

In September of 1954 the two boys brought an action in the Orphans' Court of Philadelphia County to compel the Board to show cause why they should not be admitted. The city, through the Mayor and the Commission on Human Relations, and ultimately the Attorney General of Pennsylvania, filed separate petitions on the side of the rejected applicants.<sup>36</sup> They argued that the Board was an arm of the city and that the limitation to white children was therefore illegal and should be removed by application of *cy pres*. The Board attempted to disassociate itself from the city and thus avoid the label of state action on two grounds: first, that as a matter of fact the Board operated as an independent agency rather than as an arm of the municipal government; and second, that the city, though admittedly retaining its identity in a governmental or proprietary capacity, was not a city in legal contemplation when it acted as trustee.<sup>37</sup>

32. *Brown v. Board of Education*, 347 U.S. 483 (1954).

33. PA. STAT. ANN. tit. 24, § 13-1310 (Purdon Supp. 1956) (elimination of discrimination in public schools); *id.* tit. 18, § 4654 (prohibition of discrimination and discriminatory advertising by privately operated public places such as restaurants, movies, theaters and swimming pools); *id.* tit. 43, § 153 (contractors working on public contracts not to discriminate); *id.* tit. 35, § 1711 (prohibition of discrimination by private housing developers contracting with an urban redevelopment authority); *id.* tit. 43, §§ 951-63 (Fair Employment Practices Act); *id.* tit. 35, § 1590.12 (no discrimination in veterans' housing); *id.* tit. 53, §§ 46187, 53273 (Purdon 1957), *id.* tit. 61, § 331.13 (no discrimination in public employment).

34. Philadelphia Ordinances 74-80 (1948). These ordinances established a Fair Employment Practices Commission to insure equality in employment practices in the city.

Two years later the Commission was expanded into the Commission on Human Relations to perform the functions of the previous Commission and to promote better "understanding among persons and groups of different races, colors, religious and national origins" through educational programs. Brief for Appellants, p. 43, *Girard Will Case*, 386 Pa. 548, 127 A.2d 287 (1956). On July 23, 1953, the City Council urged "the Board of Directors of City Trusts to issue an order to the President and Administrative Staff of Girard College to cease and desist from its policy of discrimination against Negro applicants for admission to Girard College." Resolution No. 433, at 3.

35. *Girard Will Case*, 386 Pa. 548, 623, 127 A.2d 287, 322 (1956) (dissenting opinion). This letter, in view of the later argument of the Board, contained a touch of irony—it carried the official letterhead of the City of Philadelphia. *Id.* at 625, 127 A.2d at 323.

36. Judge Bolger, the hearing judge in the Orphans' Court, requested that the Attorney General enter the case "to fulfill his duty of enforcing the trust . . . and representing the Commonwealth's possible interest in remainder." Apparently the Attorney General initially filed in defense of the Board and the will. This answer was subsequently withdrawn and, on July 7, 1955, he filed a separate petition joining the other petitioners. *Girard Estate*, 4 Pa. D. & C.2d 671, 674. See *N.Y. Times*, April 12, 1955, p. 18, col. 5.

37. The majority and concurring opinions in the Pennsylvania Supreme Court consistently stated that a governmental unit might discriminate when it did so in a fiduciary capacity.

The factual argument was never strong.<sup>38</sup> Girard had named the city as trustee. And the act of 1869 did not purport to oust the city of its authority; it merely specified the agency by which that authority was to be exercised.

But the legal argument persuaded a majority of the Pennsylvania Supreme Court. The city, in the court's view, had no discretion under the specific directions in the will. Thus it was acting as Girard's agent, the discrimination was Girard's, and Girard was a private citizen outside the scope of the Fourteenth Amendment.<sup>39</sup> In reversing, the Supreme Court decided the issue in three

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See Girard Will Case, 386 Pa. 548, 561, 586-87, 127 A.2d 287, 293, 305 (1956). See also *St. Petersburg v. Alsup*, 238 F.2d 830, 832 n.3 (5th Cir. 1956). The word "fiduciary" without some qualification would appear too broad. A city trustee might discriminate even though the will did not impose any racial limitations. Under such circumstances the discrimination would, even under the rule of the Pennsylvania courts, constitute prohibited state action. The element necessary to the analysis was the specific command of the will. The closest analogy to a city functioning as a trustee is in its activities as a proprietor of recreational facilities. In recent years the proprietary argument has been uniformly rejected. *St. Petersburg v. Alsup*, *supra*; *Lawrence v. Hancock*, 76 F. Supp. 1004, 1008 (S.D. W.Va. 1948).

38. The following factors lend support to the Board's argument: the non-political method of appointment; Board members receive no salary; the funds are carefully segregated from the general funds of the city; the intent of the 1869 statute to distinguish more precisely the trust functions from other municipal functions; and the specific omission of the Board from the provisions of the Philadelphia Home Rule Charter, § A-100 (1951). Contrary evidence includes the following factors: the Board is composed of twelve persons appointed by the elected judges of the Court of Common Pleas of Philadelphia County plus the Mayor and the President of the City Council; the City Treasurer acts as treasurer and his office was responsible for the growth of the fund from two million to ninety-eight million dollars; the City Controller audits the accounts; the legislature exercises over-all supervision through visitations; and the Board has regularly held itself out as an agency of the city on its briefs, letterheads and the like. In sum it would appear that the city does not exercise as much control over the Girard property as it does over other municipal property, but that Girard College would never have achieved its present position without the active participation and assistance of the city. The legality of the 1869 severance was subject to an unsuccessful challenge by the city. *Philadelphia v. Fox*, 64 Pa. 169 (1870). For differing interpretations of this decision, see Girard Will Case, 386 Pa. 548, 595, 629, 127 A.2d 287, 309, 325 (1956) (concurring and dissenting opinions).

39. Suggestions that a trustee is the settlor's agent are out of line with traditional understanding of the trustee's obligations to the public. A trustee does not lose his personal identity by assuming his fiduciary office. He is neither an agent of the settlor nor of the trust estate. Thus his torts and contracts are his own, and his liability must be met initially out of his own pocket. That he is acting pursuant to the trust terms or that the settlor attempted to excuse his conduct in advance is no defense against an innocent outsider, even though both are arguments to be made in his action for reimbursement out of the trust estate. Although the rule of personal liability originated in the refusal of the law courts to admit a trust's existence, its modern continuance has been justified as the fairest procedure for allocating responsibility. The law recognizes that no trust is self-executing. It exists only through the acts of living persons who must assume responsibility for those acts. A few statutory alterations of the rule have been made, but they are designed, for the most part, to augment the claimant's remedies and not to relieve the trustee of liability. *Johnston v. Long*, 30 Cal. 2d 54, 181 P.2d 645 (1947); *Kirchner v. Muller*, 280 N.Y. 23, 19 N.E.2d 665 (1939); *In the Matter of Lathers' Will*, 137 Misc. 226, 243 N.Y. Supp. 366 (Surr. Ct. 1930); *Miller v. Jacobs*, 361 Pa. 492, 65 A.2d 362

sentences: "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment."<sup>40</sup>

This summary reversal may be further explained by the practical irrationality of the result reached by the Pennsylvania court. Throughout the South today, the people are, by orderly referendum, vesting their government on the state and local level with authority to continue segregation.<sup>41</sup> Absent questions of legality, the obligation of the officials to comply can hardly be disputed. Their relationship to the electorate is essentially fiduciary. However, no one would assume that these schemes avoid the state action interdiction. Authority derived from many is thus to be denied while authority derived from one—and one who has been dead a century and a quarter at that—was inviolable under the Pennsylvania court's theory.

Although the effect of the decision was to propound this new, inverted theory of democracy, eleven of the twelve judges who passed on the matter believed that trust law demanded it. The crux of the majority argument was the assumption that the city had no choice but to discriminate. This assumption is vulner-

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(1949); *Slakoff v. Foulke*, 323 Pa. 352, 186 Atl. 79 (1936). For a model statute allowing direct rights against the trust estate, see UNIFORM TRUSTS ACT §§ 12-14 (adopted by Louisiana, Nevada, New Mexico, North Carolina, Oklahoma and South Dakota). See, generally, 3 SCOTT, TRUSTS c. 8 (2d ed. 1956); 3 BOGERT, TRUSTS AND TRUSTEES c. 33 (1935); Stone, *A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee*, 22 COLUM. L. REV. 527 (1922). The rule of personal liability for the contracts of charitable trustees remains substantially unchanged. 4 SCOTT, TRUSTS § 403 (2d ed. 1956). The authority on tort liability, however, is divided. The problem in the typical case does not involve the personal liability of the trustee, but rather the extent to which there is liability at all. See note 97 *infra*.

40. 77 Sup. Ct. 806, 807 (1957). *Brown v. Board of Education*, 347 U.S. 483 (1954), was the only citation given by the Court. Appellants sought review by the Supreme Court by invoking the direct appeal jurisdiction of the Court under 28 U.S.C. § 1257(2) (1952) on the ground that the constitutionality of a statute, PA. STAT. ANN. tit. 53, §§ 6365-70 (Purdon Supp. 1956) (creating the Board of Directors of City Trusts), was drawn into question by a construction which permitted racial discrimination and by requesting certiorari under 28 U.S.C. § 2157(3) on the ground that the equal protection clause had been violated. The Court denied the appeal and rendered judgment on the request for certiorari. 77 Sup. Ct. at 806. However, the appellant's argument attacking the 1869 statute may have led the Court to describe the Board as "an agency of the State of Pennsylvania" rather than an arm of the municipal government. The Court has subsequently denied the Board's petition for a rehearing. 25 U.S.L. WEEK 3359 (U.S. June 4, 1957).

41. *E.g.*, a School Placement Law was adopted by the voters of Arkansas at a general election on November 6, 1956. Incomplete and unofficial returns showed that, out of nearly 400,000 votes cast, the plan was favored almost three to one. 1 RACE REL. L. REP. 1077 (1956). In 1954 the Louisiana voters amended the state constitution to permit continuation of segregation as an exercise of the police power. LA. CONST. art. 12, § 1. See Murphy, *Desegregation in Public Education—A Generation of Future Litigation*, 15 MD. L. REV. 221, 232-41 (1955).

able both in fact and law. Compulsion presumes an enforcement procedure in the event of noncompliance. But who was to object, had the city decided to admit the two Negro boys? The city would not have been subject to the usual opprobrium reserved for the faithless trustee. Its moral obligation to the two million citizens of Philadelphia, eighteen per cent of whom are Negro, was scarcely less than that to one dead testator. By orthodox principles, the duty of enforcement belonged to the state's Attorney General. As his later action in siding with the petitioners was to indicate, he was an unlikely candidate for the job. Moreover, any other action by him might well have raised substantial questions as to his own obligations under the Fourteenth Amendment.<sup>42</sup>

Compulsion also assumes the immutability of the testator's words. But it has never been thought that a settlor can compel his trustee to act illegally, immorally or against the public interest.<sup>43</sup> Courts have frequently held that privileges which are allowed to the living cannot be projected beyond death to the detriment of society.<sup>44</sup> It can be argued, however, that this authority, while useful, does not exactly fit the present facts. The restrictions involved in the cases are for the most part administrative rather than dispositive, and they apply to trustees generally; while in *Girard* illegality attached only because of the specific identity of the trustee.<sup>45</sup>

Nevertheless, *Shelley v. Kraemer* appears to control the Board's argument

42. See text at notes 98-114 *infra*.

43. 1 SCOTT, TRUSTS §§ 60-62 (2d ed. 1956); 2 *id.* § 166. While the authorities cited therein are hardly conclusive on the issues presented by the *Girard* case, they do recognize that a trustee cannot be compelled to do an illegal act and that he cannot enforce against the beneficiaries conditions which restrain marriage or interfere with religious liberties and therefore violate public policy. In the Matter of Liberman, 279 N.Y. 458, 18 N.E. 2d 658 (1939); Devlin's Trust Estate, 284 Pa. 11, 130 Atl. 238 (1925). *But see* Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228 (1955).

44. A testator devised in trust real property located in the heart of downtown Waterbury, Connecticut, specifically forbidding leases for more than one year or the erection of new buildings exceeding three stories in height. The usual arguments of unexpected change in conditions were not available inasmuch as the testator fully understood the conditions but imposed the restrictions anyway. Undaunted, the court taking note of the deleterious effects of these restrictions on the normal development of the surrounding neighborhood, held the restrictions illegal as against the community interest. Colonial Trust Co. v. Brown, 105 Conn. 261, 135 Atl. 555 (1926). Had the testator lived he could have imposed these limitations with impunity. In like manner, a living person may refuse to alienate his property, accumulate income and use his property as leverage to affect another person's religious or marital choice. When he attempts to continue these results after death, the law frequently blocks his way. The court's power over a charitable trust is even more firmly established. It may hold the testator's scheme to a standard of public policy both at the time of creation and, under the doctrine of cy pres, throughout its life. See text at notes 60-86 *infra*.

45. More directly analogous are the few cases in which the right of a governmental trustee to administer a religious trust is challenged under the separation of church and state doctrine. However, because of differences in the constitutional prohibitions involved, the parallel is not exact. The Kentucky Supreme Court once found such a trust in violation of the intent of "all our constitutions . . . to entirely separate church and state." Maysville v. Wood, 102 Ky. 263, 43 S.W. 403 (1897); see also Bullard v. Shirley, 153

that its action was private.<sup>46</sup> In *Shelley*, the discrimination was to be achieved by restrictive covenants in private deeds. The obligation of the state courts before which these contracts came for enforcement closely parallels the obligation of the city as trustee. For the covenants were legally made and could have been lawfully performed by private citizens.<sup>47</sup> And when the applicable prerequisites are fulfilled, courts are obliged, notwithstanding the unworthiness of the parties' motives, to decree performance. Thus, in enforcing the covenants, the courts performed a function which the law apparently required of them. Nonetheless, the Supreme Court held that, though voluntary performance would have been lawful, the state courts could not compel observance of the restrictions. In the course of the opinion Chief Justice Vinson seemingly put to rest any argument based on the private source of the discrimination. "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 purpose of the Fourteenth Amendment, refers to exertions of state power in all its forms."<sup>48</sup>

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Mass. 559, 27 N.E. 766 (1891). *Contra* Attorney Gen. v. Dublin, 38 N.H. 459 (1859). See, generally, 10 McQUILLIN, MUNICIPAL CORPORATIONS § 28.31 (1950).

In *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908), the Supreme Court used language which seems to support the view that a governmental agency is not subject to constitutional prohibitions when it functions as a trustee. The decision, however, was on other grounds. The Commissioner of Indian Affairs had made a contract with the Bureau of Catholic Indian Missions whereby Indian parents might send their children to the Bureau's mission schools and the Commissioner would pay the tuition out of the tribal treaty and trust funds which he administered. One member of the tribe challenged the contract as violating a statute providing that "no appropriation whatever" be used to support education in a sectarian school, and also as contrary to the spirit, if not the letter, of the Constitution prohibiting the government from acting in a "sectarian capacity." The Court had no difficulty with the statute. Despite the federal government's technical title, the funds belonged to the Indians and were not, therefore, "appropriated monies" in any sense. The First Amendment supported, rather than invalidated, the contract, for the Indians could not be denied the right extended by the contract without depriving them of freedom of religious choice and expression. On both counts the analogy to the *Girard* situation breaks down. See, generally, Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 429 (1953).

46. 334 U.S. 1 (1948).

47. "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." *Id.* at 13.

48. *Id.* at 20. *Shelley v. Kraemer* and its companion case, *Barrows v. Jackson*, 346 U.S. 249 (1953), are not the only cases in which state assistance to private discrimination has been held prohibited state action under the Fourteenth Amendment. For analogies to the application of the "state action" label to the city's administration of the *Girard* Trust, see *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945) (self-perpetuating library board, originally appointed by private donor, financially dependent on city); *Parker v. University*, 31 Del. Ch. 381, 75 A.2d 225 (1950) (university, originally private, taken over by state and designated a state university);

As the case returns home, the next move belongs to the Orphans' Court. Directed by the Pennsylvania Supreme Court to conduct proceedings not inconsistent with the federal decision, that tribunal will now have to determine whether the proper remedy requires removal of the trustee or excision of the limitation to white children.<sup>49</sup>

On the one hand, the Pennsylvania Supreme Court's original statement about remedy was unequivocal. Should the city's participation prove to be state action, the court reasoned, the city must be removed and the discrimination continued with a private trustee.<sup>50</sup> The court was not forced to this conclusion.

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Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949) (policeman in response to private property owner's request); Dawson v. Baltimore, 220 F.2d 386 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (city operation of recreational facilities); St. Petersburg v. Alsop, 238 F.2d 830 (5th Cir. 1956) (same); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. VA. 1948) (same); cases collected note 13 *supra* ("private" political parties); HALE, FREEDOM THROUGH LAW 337-46 (1952) (explaining state action in election official cases as that of the officials pursuant to orders of the political parties); Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 566 (1951); Shanks, "State Action" and the *Girard Estate Case*, 105 U. PA. L. REV. 213 (1956) (general survey of relevant state action cases); *State Action*, 1 RACE REL. L. REP. 613 (1956) (same). *Cf.* Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952) (labor union authorized by federal act as exclusive bargaining unit); Steele v. Louisville & N.R.R., 323 U.S. 192, 208 (1944) (concurring opinion) (same); Ross v. Ebert, 82 N.W.2d 315, 320 (Wis. 1957) (dissenting opinion). *But cf.* Watkins v. Oaklawn Jockey Club, 183 F.2d 440 (8th Cir. 1950); Norris v. Baltimore, 78 F. Supp. 451 (D. Md. 1948) (distinguishing *Kerr*, industrial art school which received 23% of income from city and state held not a government instrumentality).

The most formidable obstacle to the *Girard* characterization is *Charlotte Park and Recreation Comm'n v. Barringer*, 242 N.C. 511, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956). A donor had given property to the city for a municipal golf course subject to an express reversion in the event that Negroes were permitted to use the facilities. In a test action brought by the Commission, the state court held that since the reversion was a possibility of reverter, and not a right of re-entry, it was effective without judicial enforcement and could therefore stand. The decision is subject to varying interpretations. Obviously the city when bringing the action was interested in more than instruction in esoteric principles of future interest law. It already knew that a municipal golf course could not be segregated, but wanted to find out if the threat of a reversion in any way changed its obligation. Because the state court never mentioned the city's administration of the golf course (which was essentially as a fiduciary), the Supreme Court, in denying certiorari, might have reasoned that the only question decided involved the construction of the reverter and that the issue of discrimination was still open. In the light of *Girard* this would appear to have been the case. The matter has now been concluded by the city's acquisition of the reverter from the grantors and a court order requiring the Commission to admit Negroes. *Leeper v. Charlotte Park and Recreation Comm'n*, Superior Court, 26th Judicial Dist., N.C., February 4, 1957, reprinted in 2 RACE REL. L. REP. 411 (1957).

49. Upon remand from the federal Supreme Court, the Pennsylvania Supreme Court in turn remanded to the Orphans' Court. *Pennsylvania v. Board of Directors*, 26 U.S.L. WEEK 1005 (June 28, 1957).

50. "But finally, even if the Board of Directors of City Trusts were deemed to be engaged in 'State action' in the administration of the *Girard* trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amend-

Cy pres, under which the tainted limitation could have been removed as against public policy, was an available doctrine which had previously been applied to the Girard trust.<sup>51</sup> Thus, the trustee had been relieved from specific directions not to sell real property or to enter into leases exceeding five years' duration.<sup>52</sup> And the alterations have not been exclusively administrative. In another cy pres action, the key limitation to orphans was read to mean fatherless rather than parentless children.<sup>53</sup> Here, however, the issue was viewed as whether Girard's primary intent was to have the city as trustee or to exclude Negroes. Intent is always illusory, particularly when the choice obviously had never occurred to the testator. For this reason, the Pennsylvania court's finding that the primary purpose was to exclude Negroes is hard to refute. On the other hand, its subsequent remand suggests that the Orphans' Court will have free rein to find that Girard's primary purpose was to make the city trustee, and thus to determine that excision of the racial limitation is the proper remedy.<sup>54</sup>

It is ironic that the alternative—removal of the trustee—should return to plague the Orphans' Court. When first raised in the Pennsylvania Supreme Court's decision the argument seemed all profit at no cost. Removal operated as a threat, should administration of the trust be branded state action.<sup>55</sup> It gave the United States Supreme Court, hardpressed in more important areas of race conflict, an excuse not to review the case.<sup>56</sup> And its antecedents were

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ment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee." Girard Will Case, 386 Pa. 548, 566, 127 A.2d 287, 295 (1956).

51. The question is close and it would appear that the court could have gone either way depending on how it chose to interpret the testator's intent. The trustee's identity is infrequently the source of restrictions on the trust. Under these circumstances courts have ordered the appointment of a new trustee, *Wittmeier v. Heiligenstein*, 308 Ill. 434, 139 N.E. 871 (1923), distribution of the fund to the heirs, *Bullard v. Shirley*, 153 Mass. 559, 27 N.E. 766 (1891), and cy pres, see FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* 179-81 (1950).

52. *Girard Estate*, 73 Pa. D. & C. 42 (1950); *In re* Petition of City of Philadelphia, 2 Brewst. 462 (Pa. C.P. 1868).

53. *Soohan v. Philadelphia*, 33 Pa. 9 (1859).

54. See *Pennsylvania v. Board of Directors*, 26 U.S.L. WEEK 1005 (June 28, 1957).

55. See note 50 *supra*.

56. At the time, a prediction that the Court would refuse to review the case seemed reasonable. The close interrelationship of private and public elements presented a difficult choice. In addition to the substantive problems, the possibility of easy evasion through substitution of a private trustee appeared enough to persuade the Court to stay its hand. Slight excuses had been sufficient for refusing review in the past. See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) (certiorari dismissed by the Court because Iowa had enacted a statute giving persons similarly aggrieved in the future an action for damages). See also *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950), where the refusal to review may be explained by New York's subsequent enactment of an ordinance making future discrimination in such housing projects unlawful.

above reproach—it was first used in earlier *Girard* opinions to discount the heirs' claim of ultra vires against the city.<sup>57</sup>

With the court's admonition ignored, the Orphans' Court must consider the prospects of Board removal with deep misgivings. Not only does the possibility that the maneuver would be effective to accomplish the avowed purpose of preserving racial limitation appear doubtful, such a course would have a severe impact on the college. No single bank would or could assume the ninety-eight million dollar endowment and the responsibilities of running the college. The community trust system of organization would probably have to be utilized. Thus, policy functions would be vested in a self-perpetuating board of citizens, and the administration and investment of the funds would be divided among qualified Philadelphia banks.<sup>58</sup> The opportunities and savings achieved through large-scale investment would accordingly be diminished, and the fund would be subject to multiple service charges from which it has heretofore been immune.<sup>59</sup> Unless Girard College is unique among privately endowed institutions, such a drastic upheaval in internal management would make maintenance of its current level of performance highly unlikely. In addition to these considerations, the broader questions of the relationship between charitable trusts and the Fourteenth Amendment must inevitably become an issue.

#### DISCRIMINATORY TRUSTS AND LOCAL LAW

With the United States Supreme Court so easily finding state action in *Girard*, the wisdom of the Pennsylvania Supreme Court's making every decision in

57. See *Vidal v. Girard's Ex'rs*, 43 U.S. (2. How.) 117, 174-76 (1844); *Philadelphia v. Fox*, 64 Pa. 169, 183 (1870).

58. Authority is divided in this manner in most community trusts. The investment and management of the funds are the responsibility of a bank designated by the testator, while distributions are made by a central board of trustees. For a general explanation of the operation and structure of community trusts, see Bogert, *The Community Trust: A Service Opportunity for Lawyers*, 41 A.B.A.J. 587 (1955).

59. During the last few decades a depression, several wars, inflation and taxes have brought about a revolution in the field of trust administration. One persistent drive has been toward the consolidation of funds for investment purposes. This procedure increases both yield and security by maximizing investment opportunities, permitting fuller investment of the funds and minimizing costs. See Stephenson, *Participating Investments—The Common Trust Fund Device*, 12 OHIO ST. L.J. 522 (1951); Comment, 58 YALE L.J. 924 (1949). Charitable institutions have felt that a pooled fund is a practical necessity. Despite questions as to the propriety of the procedure, many universities regularly combine special purpose funds, endowments and trusts in this manner. Blackwell, *The Charitable Corporation and the Charitable Trust*, 24 WASH. U.L.Q. 1, 34 n.103 (1938). A few central church organizations provide a common trust fund for their member churches, e.g., Diocesan Investment Trust of the Bishop and Trustees of the Protestant Episcopal Church in the Diocese of Massachusetts. In recognition of the advantages to collective investing, several states have enacted statutes permitting charitable corporations to pool their various funds. E.g., PA. STAT. ANN. tit. 15, § 2851-318 (Purdon Supp. 1956).

New costs might include trustees commissions (unless waived), expenses in buying, selling and exchanging investments, legal fees, auditing and accounting fees and many other costs which would become apparent only after the new system went into operation.



favor of the trust and against the Negro petitioners is sharply brought into question. The answer lies not in prejudice or obstinacy, but in the traditional attitudes of the law toward charitable trusts. These attitudes are not to be lightly dismissed. They have behind them the force of a wise social policy, and they have paid society rich dividends. The claim of discrimination is a new weapon introduced into an age-old controversy. And the pattern of past battles shows that the law of charitable trusts has been written, almost exclusively, on the settlor's terms. Has the settlor who limited his bounty to whites discriminated against Negroes or only exercised his recognized right to select the specific segment of society which he wishes to benefit? The ingrained habits of centuries permit state courts to resolve this play on words only in a way favorable to the settlor.

At one time in England, a charitable disposition had to conform to rigid standards of public policy.<sup>60</sup> The King, as spokesman of the community conscience, could invoke a broad power to reform a gift which failed to meet public standards, even if the resulting scheme was wholly at odds with the donor's original intention. This power—prerogative *cy pres*—was not always used in the "public interest" as viewed by modern standards. It was sometimes applied as an instrument of religious persecution. Positive law recognized only the established church as the gateway to salvation; gifts to other religions were suppressed as superstitious uses.<sup>61</sup> Against this background, it is not surprising that prerogative *cy pres* is not now aggressively used in England<sup>62</sup> and has never gained a foothold in American law.<sup>63</sup> Although the colonists were not always above engaging in religious persecution themselves, they were not disposed to bring with them a concept so associated with the absolute power of the King. In a new country dedicated to the rights of the individual, govern-

60. 2 BOGERT, TRUSTS AND TRUSTEES § 432 (1935); BOYLE, CHARITIES 237-80 (1837); 4 SCOTT, TRUSTS § 399.1 (2d ed. 1956); TUDOR, CHARITIES 174-78 (5th ed. 1929); Comment, *A Reevaluation of Cy Pres*, 49 YALE L.J. 303 (1939).

61. The classic example of prerogative *cy pres* is *Da Costa v. De Pas*, 1 Amb. 228, 27 Eng. Rep. 150 (Ch. 1754). A Jewish testator left money in trust for the support of an assembly for reading Jewish law and instructing persons in the Jewish religion. The trust was declared void as against public policy, and the money went to a founding home where, ironically, it was used to support a Christian minister and to instruct children in the Christian religion. For the reaction of American courts to this case, see FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 56-91 (1950).

62. Restrictions limiting trusts to the Christian religion have long since been removed. The doctrine of prerogative *cy pres* is, nevertheless, still recognized. It has been suggested that the authority is now vested in Parliament, *Mormon Church v. United States*, 136 U.S. 1, 56-58 (1890), but Professor Scott contends that it remains in the crown, 4 SCOTT, TRUSTS § 399.1 (2d ed. 1956). The doctrine of *cy pres* may well be revitalized in England by permitting more consideration to be given to the community interest in its application. This was one of the recommendations of a parliamentary committee on the administration of charitable trusts. REPORT OF THE COMMITTEE ON THE LAW AND PRACTICE RELATING TO CHARITABLE TRUSTS §§ 698-99 (1952).

63. *Jackson v. Phillips*, 96 Mass. 539, 576 (1867); Comment, 49 YALE L.J. 303, 307-09 (1939).

ment functioned to preserve liberties, not to impose burdens, and high on the list of liberties was the right of every owner to control his property unaffected by governmental intrusion.<sup>64</sup> This heritage of personal freedom is most dramatically exemplified by the trust which exists in perpetuity, controlled by the dictates of the dead and practically oblivious to the demands of the living.

Although the individual's rights have been increasingly conditioned by social duty in other areas of the law, his position of supremacy as settlor of a trust has remained secure. Whatever the justification might once have been, he owes his privileged estate today to the benefits which he has conferred on society, not to any natural rights which inhere in him as the original owner.<sup>65</sup> The law recognizes his privilege because the community's best interests direct that it do so.<sup>66</sup> The world in general and the United States in particular has been enriched beyond calculation by private philanthropy.<sup>67</sup>

64. FRIEDMANN, *LEGAL THEORY* 477-78 (3d ed. 1953).

65. 2 BLACKSTONE, *COMMENTARIES* \*10-11. See *In re Sherwood's Estate*, 122 Wash. 648, 654, 211 Pac. 734, 737 (1922): "The right of the owner of property to direct what disposition shall be made of it after his death is not a natural right which follows from mere ownership. On the contrary, the right has its sanction in the laws of the state having jurisdiction over the person of the donor or jurisdiction over the property. The state may, if it so chooses, take to itself the whole of such property, or it may take any part thereof less than the whole and direct the disposition of the remainder; and this without regard to the wishes or direction of the person who died possessed of it, and without regard to the claims of those to whom he has directed that it be given. Stated in another way, the state's power over such property is plenary, and its right to direct its disposition unlimited. It follows from this that those claiming the property must find the foundation for their claim, in the laws of the state. They can have no claim superior to that which the laws give them." See also MAINE, *ANCIENT LAW* 194-239 (new ed. 1930). *But cf.* *Nunnemacher v. State*, 129 Wis. 190, 108 N.W. 627 (1906); Hoebel, *The Anthropology of Inheritance*, N.Y.U. 1ST CONF. ON SOCIAL MEANING OF LEGAL CONCEPTS 5 (1948).

66. Arguments in support of inheritance and the privilege of testamentary control are: (1) the privilege of ultimate control is an incentive to accumulate wealth and give maximum productive effort during life; (2) hereditary and trust wealth is a significant source of investment capital, necessary to the continued expansion of an economy; (3) the privilege of bequest permits continued support of dependents and is the prime source of support for religious, cultural and charitable trusts and institutions; (4) any unfairness in the institution in so far as it enriches persons already wealthy is mitigated by the fact that most of the traditional recipients (children and spouse) have assisted, if only in intangible ways, in accumulating the wealth. Criticism of the institution takes several forms: (1) inheritance and testamentary control aggravate and perpetuate inequalities and as such are violative of the egalitarian premises of a democratic society; (2) selection of beneficiaries is based on such fortuities as death, survival and a fortunate choice of parents and thus bears no relationship to the extent to which the person has earned the bequest or is capable of putting it to wise uses; (3) prolonged dead hand control is intolerable in that property exists for and should be subject to the demands and control of the living; (4) receipt of large amounts of wealth may be a cause of indolence and thus rob the community of the recipient's best productive efforts. Much of the literature on the subject has been collected and analyzed in WEDGWOOD, *THE ECONOMICS OF INHERITANCE* (1929); see also *Inheritance of Property and the Power of Testamentary Disposition*, N.Y.U. 1ST CONF. ON SOCIAL MEANING OF LEGAL CONCEPTS (1948). The critics have had a measure of success through estate and inheritance taxes. BITTKER, *FEDERAL INCOME, ESTATE AND GIFT TAXATION* 889-904 (1955). The proponents, however, hold the ultimate

While society understandably favors protection of the ability to create trusts in general, this attitude does not furnish a basis for tolerating specific trusts that are whimsical, eccentric and now discriminatory. However, the courts have found no way to make an effective classification. Purposes worthy of community support are as diffuse as the winds. They vary with time. Alms to the poor or gifts to orphan asylums, once favorites on the list of charities, are now considered detrimental to the intended beneficiaries.<sup>68</sup> The attitudes toward charitable purposes also vary with individual prejudices. The Ford Foundation is a case in point. Its programs have been praised as noble, criticized as sterile and damned as subversive.<sup>69</sup> Because of this constant flux, attempts to formalize the community benefit into abstract rules inevitably degenerate into a listing of *ad hoc* responses to particular situations.<sup>70</sup> The courts have clearly perceived these dangers<sup>71</sup> and have adjusted to them by accepting as charitable those trusts which benefit a group larger than the settlor's immediate family and

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trump card in that the abolition of the institution would, within a few generations, bring about complete state ownership of all wealth. See SHULTZ, *THE TAXATION OF INHERITANCE* 198 (1926).

Independent grounds exist for justifying the privilege when it is exercised in favor of a charitable object. The testator's selection of beneficiaries is practically unrestrained because (1) society receives multiple benefits in return; (2) society does not want to discourage future property owners from dedicating their wealth to public purposes; and (3) private charity is better adapted than government to fashioning new and experimental benefits for society. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 132-34 (1955).

67. ANDREWS, *CORPORATION GIVING* (1952); ANDREWS, *PHILANTHROPIC GIVING* (1950); RICH & DEARDORFF, *AMERICAN FOUNDATIONS AND THEIR FIELDS* (1948); TUNKS, *THE MODERN PHILANTHROPIC FOUNDATION AND PRIVATE PROPERTY* (unpublished thesis in Yale Law School Library 1947); Comment, 59 *YALE L.J.* 477 (1950).

68. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 121 (1955).

69. See MACDONALD, *FORD FOUNDATION* 25-35, 119-24, 167-68 (1956). The example is somewhat disingenuous in that the Ford Foundation has launched a multitude of programs, each invoking a different public response. Frequently, however, the statements of praise or criticism, while triggered by a single activity of the foundation, have been general in their application.

70. Commentators do not attempt a definition. "The truth of the matter is that it is impossible to frame a perfect definition of charitable purposes. There is no fixed standard to determine what purposes are charitable." 4 SCOTT, *TRUSTS* 2629 (2d ed. 1956). Professor Scott presents the subject by describing the cases. *Id.* at 2627-733. See also 2A BOGERT, *TRUSTS AND TRUSTEES* 1-189 (1935).

71. Statements frequently appear in the cases to the effect that the judge's personal appraisal of the wisdom or utility of the trust is irrelevant. See *Lewis's Estate*, 152 Pa. 477, 25 Atl. 878 (1893); ZOLLMANN, *AMERICAN LAW OF CHARITIES* 148-49 (1924). Only a few trusts of the many processed each year are rejected. A sampling includes: *Zeisweiss v. James*, 63 Pa. 465 (1870) (gift to an "Infidel Society"); *In re Hill's Estate*, 119 Wash. 62, 204 Pac. 1055 (1922) (income to be used for instruction in homeopathic medicine); *Fidelity Title & Trust Co. v. Clyde*, 143 Conn. 247, 121 A.2d 625 (1956) (trust to publish testator's pornographic works invalid as against public policy although educational or literary merit of trust-distributed books ordinarily is no concern of the courts). It is not uncommon for the invalidity of a trust to be explained on grounds of indefiniteness or uncertainty rather than the more opprobrious label of public policy. See, e.g., *Matter of Carpenter*, 163 Misc. 474, 297 N.Y. Supp. 649 (Surr. Ct. 1937).

friends, and which are not affirmatively absurd, obscene, illegal, excessively selfish or specifically offensive to some considerable segment of the population.<sup>72</sup> The discriminatory trust is easily engulfed in these calm waters leaving scarcely a ripple behind.

Attacks on such a trust may originate from various sources. In *Girard*, the action was brought by two victims of the discrimination. In other cases, the moving party might be a disappointed heir, the trustee, a state's attorney general or tax commissioner. From whatever quarter the action is launched, trust law will reshape it into one of three issues: the validity of the trust as a charity; the applicability of cy pres to the exclusionary clause; or the availability of a tax exemption. Obviously these issues are related, each posing a common question of public policy. They differ only in the time and place of litigation.

The traditional attitude of the law is presented at creation of the trust when charitable status is questioned; the other two actions are merely variants on the same theme. Orthodox theory labels a trust charitable if it combines a worthy purpose with a sufficiently broad classification of beneficiaries. And charitable purpose will be established if the gift is within one of the thousand and one categories—education, relief of poverty and the like—accepted in past decisions.<sup>73</sup> As the law turns from the purpose to the group through which that purpose is to be achieved, one of the frequent compromises between the ideal and the practical must be made. Society, not a specific group of individuals, is the true beneficiary. But society is no more than its individual members, some not as qualified or desirous of utilizing the benefits as others. Here the law assumes that benefit to a few is benefit to all. A trust for a particular church is of immediate benefit only to the parishioners of that church. Legally the trust is nonetheless charitable; since society in general is uplifted by the spirituality of any of its members, financial contributions encouraging spiritual endeavor should be favored. Obviously, this rationale can be extended practically without limit. And the cases illustrate how seldom courts interfere with a settlor's desires. A property owner may designate beneficiaries by sex, age, geographical location or religion.<sup>74</sup> So great is the leeway accorded him

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72. Admittedly this description of the process contains its share of ambiguities. It has the advantage, however, of indicating that the initial presumption is one of validity. A fuller understanding of the process would require a comprehensive analysis of not only the stated purpose of the gift but all other variables as well, including identification of the persons who would otherwise receive the property, the amount involved and the conditions under which the gift was made. See McDougal & Haber, *PROPERTY, WEALTH, LAND* 246-51 (1948).

73. The text discussion assumes a valid charitable purpose. This assumption covers a multitude of difficulties. Analysis of the charitable trust in the context of discrimination defies generalization because the discriminatory provisions, rather than standing alone, are part of an over-all charitable scheme which may take an infinite variety of forms. And it is conceivable that certain purposes might justify a racial limitation. See text at notes 131-132 *infra*.

74. See cases collected in Zollmann, *AMERICAN LAW OF CHARITIES* 286-98 (1924); 4 Scott, *TRUSTS* §§ 369.5, 370.6, 371, 372.2, 375 (2d ed. 1956).

that opinion is not even unanimous as to a limitation to his relatives; in some jurisdictions at least, charity can virtually begin at home.<sup>75</sup> In this context discrimination becomes only another form of permissible selection.<sup>76</sup>

When the validity of the limitation is considered at the creation of the trust, society's stake in the matter seems almost negligible. The choice is usually between toleration of a doubtful trust or an award of the property to heirs whom the testator had, at least to the extent of the gift, disinherited. But the courts fail to recognize the possibility that their initial determination may govern future litigation in which the community interest may appear in a different light. Accepting a trust for enforcement and subsidizing it with tax immunities, for example, are distinct issues.<sup>77</sup> Yet in the run of cases the two are handled in like manner.<sup>78</sup> Although both state and federal tax exemptions are regulated by statute, the purposes listed in the statutes are practically coextensive with

75. Compare *Matter of Beekman*, 232 N.Y. 365, 134 N.E. 183 (1922) (bequest to corporation formed to educate members of the testator's family or aid his poor descendants or ancestors not charitable) with *Goodale v. Mooney*, 60 N.H. 528 (1881) (property to be distributed at discretion of executor among benevolent objects and testator's relatives valid). See Annot., 131 A.L.R. 1277 (1941); 4 SCOTT, TRUSTS § 375.3 (2d ed. 1956).

76. ZOLLMANN, AMERICAN LAW OF CHARITIES § 423 (1924). The settlor's freedom to discriminate may be curtailed by state statute. N.Y. EDUC. LAW § 313 (prohibition against discrimination in private education). See Note, *Fair Educational Practices Acts: A Solution to Discrimination?*, 64 HARV. L. REV. 307 (1950).

77. Not all states grant tax exemptions to trusts which are sufficiently charitable to be enforced. Pennsylvania, for instance, exempts only institutions of "purely public charity" and that term has been construed to be narrower in scope than charity in the general sense. PA. CONST art. IX, § 1, *Hill School Tax Exemption Case*, 370 Pa. 21, 87 A.2d 259 (1952) (distinction depends on whether the institution is entirely free from private profit).

78. PAUL, FEDERAL ESTATE AND GIFT TAXATION §§ 12.05-.17 (1942). But see *Susan Young Eagan*, 17 B.T.A. 694, 702 (1929), *rev'd*, 43 F.2d 881 (5th Cir. 1930):

"Since the issue arises under the Federal revenue act, it must, so far as practicable, be swept clear of confusions in various jurisdictions as to charities, charitable uses and charitable trusts. The historical development, since the Statute of Elizabeth, of the law relating to charitable trusts both in England and the United States has taken place independently of the law relating to taxation. The definitions and implications have arisen out of social and political circumstances having little or no relation to government revenue. In their setting, apart from taxation, they are various and conflicting in different jurisdictions, that which is firmly fixed as a charity in one State being unrecognized in another. Even as to local taxes, the exemptions of each State differ from those of others. While it must be recognized that the deduction of charitable bequests provided in the revenue act was conceived by a purpose to encourage public charity, . . . it is not necessary for the fulfillment of this purpose to import all of the judicial dicta which have been used to safeguard the chancery power.

"The administration of this Act must, in matters such as this, transcend any local law of statute or decision . . . [T]here would be hopeless confusion if deduction were allowed of a bequest because the State of decedent's domicile recognized it as charitable in consonance with the Statute of Elizabeth, and denied a similar bequest of a decedent residing in a State holding a different view."

the categories recognized by the general law.<sup>79</sup> Limits are imposed only on trusts for personal or family benefit; any other restrictions on the composition of a permissible class are presumably determined by traditional doctrine. Both federal and state taxing authorities appear to grant tax exemption to racially selective trusts as a matter of course, probably because no authority has ever denied the exemption.<sup>80</sup>

Cy pres gives the problem still another dimension. The settlor is assumed to have been an intelligent and responsible citizen. Had he foreseen the future course of public policy, it is argued, he would not have intended his limitation to continue. This reasoning has the virtue of accomplishing the public purpose within the framework of the settlor's intent. Here, again, the traditions of judicial restraint often foreclose sensible solution.<sup>81</sup> If cy pres may properly be applied to a trust, the court will not hesitate to manufacture, in the settlor's name, a use for the funds more compatible with contemporary community values.<sup>82</sup> But accepted doctrine allows application of cy pres only when implementation of the settlor's specific purpose is difficult, impossible or illegal.<sup>83</sup> To exclude Negroes is neither difficult nor impossible. Illegality poses the same question confronting the courts at creation of the trust. Since a private citizen may discriminate, he is merely selecting his beneficiaries as the law allows when he projects his prejudices beyond life.<sup>84</sup>

79. INT. REV. CODE OF 1954, §§ 501, 2055, 2522. For the most part state inheritance tax statutes substantially parallel the federal exemptions with the exception that thirty-four states and territories have provisions which impose a tax on non-resident charities. 4 CCH INH. EST. & GIFT TAX REP. ¶ 12,020 (1956).

80. *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). The New York court rejected by a 4-3 decision the argument that a grant of substantial tax immunity to a housing corporation constituted state action. At least for the time being, the matter of tax exemptions is assumed to be controlled by this decision. See note 96 *infra*. There is, however, a point beyond which the settlor may not go. See note 8 *supra*.

81. To apply cy pres, the court must find a general charitable intent within which a new specific use may be designated. It is thus the intent of the settlor rather than the community interest that is primary. On this ground the doctrine of cy pres has been repeatedly criticized. See Comment, *A Reevaluation of Cy Pres*, 49 YALE L.J. 303, 323 (1939); 2A BOGERT, TRUSTS AND TRUSTEES § 436 (1935). It has been suggested that Pennsylvania, having recently enacted a statute which eliminates the requirement of general charitable intent, PA. STAT. ANN. tit. 20, § 301.10 (Purdon Supp. 1956), may now give greater consideration to the public welfare. See FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 5.03 (b), (c) (1950); Note, *Cy Pres in Pennsylvania*, 54 DICK. L. REV. 77 (1949). The approach of the Pennsylvania courts to the *Girard* case would appear to belie this prediction.

82. *McKee Estate*, 83 Pa. D. & C. 492, 520, *aff'd per curiam*, 378 Pa. 607, 108 A.2d 214 (1954): "The Court possesses the broadest possible powers for the application of this fund to fulfill the purposes of the will even to the extent of awarding all of it, principal and income, to an independent agency so long as that agency's purposes conform to what the Court regards as Colonel McKee's intention. . . ." In line with this statement, once a court decides to apply cy pres, the only limit on its discretion is the general outline of the testator's intent. Since the court discussed various alternative plans for the use of the funds, *McKee* is an excellent example of the potential breadth of court discretion.

83. RESTATEMENT, TRUSTS § 399 (1935).

84. *Girard Will Case*, 386 Pa. 548, 558-60, 127 A.2d 287, 291-93 (1956).

This logic hardly defeats contrary argument. Classification by race is altogether different in psychological origin and effect from other methods of classifying beneficiaries. It is designed to hurt, not to benefit, and sociologists tell us that such is its effect.<sup>85</sup> The malevolence of racial selection is the antithesis of charity, and therein might be found the basis for a legal distinction. But such an approach encounters the difficulties which fostered the traditional rule of restraint. Should a trust for the exclusive benefit of Negroes, for example, be distinguished from other types of racial selection? It can be argued that the second-class status which has been forced on the Negro by the dominant white majority provides an affirmative reason for such a classification. Or can the purpose justify a racial limitation? If discrimination is a criterion, a trust for white Southern boys is on its face improper. But what if the purpose is to educate such boys in Northern universities on the legal and sociological background of desegregation? Inevitably a public policy which is called upon to make the distinctions suggested by these hypotheticals will be rooted in the prejudices of judges, not in consistent principles. A new power, heretofore admirably kept in check, will be loosed, upsetting the delicate balance which has so long prevailed and paving the way for a general and more aggressive censorship of the testator's designs.<sup>86</sup>

#### THE FOURTEENTH AMENDMENT

Despite this danger, a maliciously discriminatory charitable trust remains an intolerable contradiction. That state courts offer no remedy is perhaps of

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85. KARDINER & OVESEY, *THE MARK OF OPPRESSION* (1951); Caliver, *Segregation in American Education: An Overview*, 304 *ANNALS* 17 (1956); Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 *YALE L.J.* 730 (1952).

86. For the civil libertarian, no satisfactory solution exists. He may abhor discrimination in all its forms, but if a heavier hand is to be applied to charitable trusts it will be those purposes that are new, imaginative and experimental which will be most seriously affected. The argument for free philanthropy has recently been summarized as follows:

"Another danger in control is even more serious. In America, private enterprise has been creative not only in business but in welfare. From private welfare enterprise have come most of the new ventures, most of the pioneering research, most of the improved techniques that have set the pace of our social progress. Failures have occurred; but many of these have also been useful in pointing out ways *not* to go. The essential ingredient is freedom to experiment.

"This freedom must be a real freedom. Its grantors may not safely forbid even experiments that seem hopeless of success. If a scientific control board had sat over the Wright brothers, it would have pointed out that reputable scientists of the day were convinced that flight by heavier-than-air machines was impossible, and might have forbidden the experiment that succeeded at Kitty Hawk."

Andrews, *Introduction*, TAYLOR, *PUBLIC ACCOUNTABILITY OF FOUNDATIONS AND CHARITABLE TRUSTS* vi (1953). Society can ill afford to lose those trusts which seek to explore new horizons. Philanthropy is already too prone to be conservative and cautious, a characteristic which becomes more pronounced as the funds involved increase in amount. MACDONALD, *FORD FOUNDATION* 165-74 (1956); Embree, *Timid Billions*, Harper's, March, 1949 p. 28, 31.

slight significance, since local public policy will not in any event achieve a national solution. It is inconceivable that a Southern court would find a segregated trust noncharitable or unenforceable as against public policy.<sup>87</sup> This pitfall could be avoided by application of the equal protection clause of the Fourteenth Amendment.<sup>88</sup> Yet requiring the discriminatory charitable trust to conform to the standards of equal protection of the laws may disrupt the essential foundations of the over-all institution in which the segregated trust is so small a part unless the amendment can be confined to the specific evil which it was designed to correct.

As the doctrine of "separate but equal" disappears from the stage, the spotlight turns full strength on the identity of the agency which has committed the discrimination. The equal protection clause of the Fourteenth Amendment extends only to action by a state or some subdivision thereof.<sup>89</sup> The process of adjudication seems easy; either the facts demonstrate governmental intervention or they do not. However, for all their ambiguities, the cases demonstrate that race problems are not to be solved by the formal application of a label alone. "State action"—in terms of result, action which falls within the purview of the equal protection clause—is, like most labels, a term of shifting content. Its application requires two elements conjoined: governmental action in fact, and governmental action in a context of sufficiently grave social implication to persuade the Supreme Court of the necessity of federal correction.

#### *State Action in Fact*

In *Girard*, the Negro applicants appeared to have the best of the argument. The discrimination was conceded, and an administrative agency of the city was a party to it. Petitioners referred only obliquely to the state action inherent in charitable trusts generally,<sup>90</sup> since the city's trusteeship alone seemed to establish state action. The discrimination emanated directly from the Board; and the more inclusive argument posed a threat to every charitable trust, with resulting tactical disadvantages to anyone who dared make it. Ultimately petitioners were successful on the narrow ground; the bolder approach clearly would not have accelerated their victory. For the majority opinion in the Pennsylvania Supreme Court dismissed the argument as too inconceivable to

87. See, e.g., *Charlotte Park and Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956).

88. See *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212, 215 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); Hamilton & Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1354-55 (1941).

89. The Supreme Court is careful to emphasize the immunity of private action even when at its boldest in applying the Fourteenth Amendment. See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1949) ("that Amendment erects no shield against merely private conduct, however discriminatory or wrongful"). See also *Civil Rights Cases*, 109 U.S. 3, 11-19 (1883).

90. The participation of the legislature through enactment of implementing statutes, visitations and general supervision was emphasized in both the majority and dissenting opinions. *Girard Will Case*, 386 Pa. 548, 615, 127 A.2d 287, 318 (1956).



contemplate.<sup>91</sup> And the concurring opinion viewed its ramifications on a level of catastrophe with an atomic attack.<sup>92</sup>

That the implications of the argument are far-reaching cannot hide the state's total involvement in the charitable trust. In *Shelley v. Kraemer*, no judicial action was necessary to bring the covenants into existence or to make them effective if the parties chose to honor their terms.<sup>93</sup> But the charitable trust has no such original vitality. The power to dispose of property at death is a privilege granted by law and supervised through probate and administration by courts and judicially appointed fiduciaries. While these incidents of ministerial control have been thought too slight to constitute state action, the state's role in a charitable trust is all this and much more.<sup>94</sup> The trust becomes operative

91. "It is perfectly clear, therefore, that private trusts for charitable purposes, not being subject to or controlled by 'State action,' are wholly beyond the orbit of the Fourteenth Amendment. Such trusts abound in overwhelming numbers and there can be no question as to their legality however limited be the class of their beneficiaries or whatever be the nature or basis of their restrictions; charitable trusts for limited groups, whether racial or religious, are as valid as if for all the people of the world. We have charitable trusts for ministers of various church denominations, for foreign missions, for churches, priests, Catholics, Protestants, Jews, whites, negroes, for relief of the Indians, for widows or orphan children of Masons or other fraternities, for sectarian old folks homes, orphanages, and so on. Certainly no one would contend that a donor or a testator could not establish a charity, the beneficiaries of which were to be those whom he designated,—persons of any prescribed race, creed or color, or however otherwise differentiated. The court is concerned only with the legal right of such selection by a donor or testator and not with whatever illiberalism he may display in his exercise of the right." *Id.* at 560, 127 A.2d at 292-93.

92. "If the present contention of the City is correct, its effect will be catastrophic on testamentary church and charitable bequests, as well as on the law of Wills in Pennsylvania. The constitutional prohibition against discrimination—the Fourteenth Amendment—is not confined to color; *it prohibits the States* from making any discrimination because of race, creed or color. It follows logically and necessarily that if an individual cannot constitutionally leave his money to an orphanage or to a private home and college for poor white male orphans, he cannot constitutionally leave his money to a Catholic, or Episcopal, or Baptist, or Methodist, or Lutheran or Presbyterian Church; or to a Synagogue for Orthodox Jews; or to a named Catholic Church or to a named Catholic priest for Masses for the repose of his soul, or for other religious or charitable purposes. That would shock the people of Pennsylvania and the people of the United States more than a terrible earthquake or a large atomic bomb." *Id.* at 613, 127 A.2d at 318 (concurring opinion).

93. 334 U.S. 1 (1948).

94. Inequality is basic to the institution of inheritance and testamentary disposition. Although state courts assist in the process through probate, administration and distribution, it does not thereby become actionable under the Fourteenth Amendment. The argument has been made and summarily rejected that the courts, on analogy to *Shelley v. Kraemer*, may not enforce a discriminatory condition to a private gift or trust. See *Gordon v. Gordon*, 332 Mass. 197, 208, 124 N.E.2d 228, 235, *cert. denied*, 349 U.S. 947 (1955); *United States Nat'l Bank v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954). A judicially appointed fiduciary has been held not to be an agent or representative of the state within the meaning of the state action concept. See *Wilcox v. Horan*, 178 F.2d 162, 165 (10th

only after a court has found, either specifically or by inference, that it is charitable.<sup>95</sup> Nor has government remained neutral. To encourage a continuous flow of funds into philanthropic enterprises, it bestows privileges, of which tax immunity is only one.<sup>96</sup> The state creates and defines charitable trusts, grants them perpetual existence, modernizes them through *cy pres*, appoints and regulates the trustees, approves accounts, construes ambiguous language in the trust charter and sometimes goes so far as to impose a less stringent standard of tort liability on such trusts than on their private counterparts.<sup>97</sup> These are practical benefits, granted or withheld by the action of government.

But governmental participation does not end with these benefits. The concept of a fiduciary's stewardship required a trustee to be accountable to somebody. A court alone was not enough.<sup>98</sup> Some other agency was needed to bring

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Cir. 1949); *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1953). The claims of the Fourteenth Amendment are not as easily dismissed when the property has been dedicated to public purposes. See text at note 121 *infra*.

95. When a testamentary trust is involved the approval of the accounts constitutes an approval of the charitable purpose. An *inter vivos* trust may go into actual operation without judicial action. It is not, however, entitled to the privileges accorded a charitable trust such as tax exemption until some official has passed on its validity.

96. It is doubtful whether the split decision in *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950), has put the question of tax exemptions to rest. Direct governmental subsidization of private activities which are discriminatory constitutes prohibited state action. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945). Tax exemptions operate as a subsidy which must be offset by higher taxes on non-exempt persons and organizations. These privileges cannot be excused as insignificant, for many charitable institutions could not survive if they were withheld. In *Girard*, for instance, annual tax exemptions are in excess of half a million dollars. The anomaly of doing by indirection what cannot be done directly is obvious. For discussion of the policy which underlies the exemption, see Eaton, *Charitable Foundations and Related Matters Under the 1950 Revenue Act*, 37 VA. L. REV. 1, 2-16 (1951); Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 143, 148-52 (1949). On the extent to which property owners avail themselves of the privilege, see Harriss, *Federal Estate Taxes and Philanthropic Bequests*, 57 J. POL. ECON. 337 (1949). One element of the charitable trust problem which may discourage the courts from reappraising the validity of such exemptions is the far-reaching effects inherent in any reversal of policy. It would bring all private education under a new type of control and would raise questions in a cognate area as to whether religious exemptions are violative of the principles of separation of church and state which is embodied in the First Amendment. See PFEFFER, CHURCH, STATE AND FREEDOM 183-91 (1953); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 432-33 (1953); Paulsen, *supra*; Punke, *Religious Issues in American Public Education*, 20 LAW & CONTEMP. PROB. 138, 154-57 (1955).

97. For a variety of reasons, including the fear of depleting what are essentially public funds and an analogy to governmental immunity, many decisions have held charitable organizations free from tort liability. Compare *Farrigan v. Pevear*, 193 Mass. 147, 78 N.E. 855 (1906), with *Georgetown College v. Hughes*, 130 F.2d 810 (1942). See also 4 SCOTT, TRUSTS §§ 402-03 (2d ed. 1956); 2A BOGERT, TRUSTS AND TRUSTEES 241-54 (1935); Williams, *Public Charities Not Liable for Tort in Pennsylvania*, 54 DICK. L. REV. 6 (1949). The immunity, where granted, emphasizes the public nature of charitable operations.

98. Indeed, in the early history of American trust law, several states denied equity courts power to enforce charitable trusts without enabling legislation. See Trustees of the

the trustee before the court and demand an accounting.<sup>99</sup> Private trusts posed no problem: the beneficiaries, acting out of self-interest, would hold a trustee true to his obligations. But the beneficiaries of a charitable trust might be the peoples of the world; to vest the enforcement power in such an unconfined group was administratively impossible. In England, the gap was originally bridged by giving the regulatory power to the crown, acting through the Attorney General or Commissioners appointed by the Chancellor.<sup>100</sup> Eventually all the states in this country, either by statute or decision, followed suit and vested responsibility for enforcement in a governmental official, usually the attorney general.<sup>101</sup>

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Philadelphia Baptist Association v. Hart's Ex'rs, 17 U.S. (4 Wheat.) 1 (1819) (jurisdiction over charitable trusts existed only as granted by the Statute of Elizabeth). This decision was later conceded to be based on an erroneous interpretation of the relevant history, but by the time the Court had rectified its error in *Vidal v. Girard's Ex'rs*, 43 U.S. (2. How.) 117 (1844), the earlier doctrine was too firmly entrenched in several states to be altered. The states affected included Maryland, Michigan, Minnesota, New York, Virginia, West Virginia, Wisconsin and the District of Columbia. In those jurisdictions the confusion engendered by the doctrine that an outright gift to a charitable corporation was valid, but a charitable trust failed for want of enforcement procedures, was resolved only after years of travail and, finally, the enactment of statutes. See Blackwell, *The Charitable Corporation and the Charitable Trust*, 24 WASH. U.L.Q. 1 (1938); Lincoln, *A Question on Gifts to Charitable Corporations*, 25 VA. L. REV. 764 (1939); Taylor, *A New Chapter in the New York Law of Charitable Corporations*, 25 CORNELL L.Q. 382 (1940). The lesson was costly, including a much-needed library for New York City. See *Tilden v. Green*, 130 N.Y. 29, 28 N.E. 880 (1891). The New York statute, known as the Tilden Act, now appears as N.Y. REAL PROP. LAW § 113, N.Y. PERS. PROP. LAW § 12.

99. Early Virginia authority recognized that the deficiency resulted not only from failure to give the court jurisdiction, but also from want of a procedure for initiating enforcement. "In short, there cannot be a trust without a *cestui que trust*; and if it cannot be ascertained who the *cestui que trust* is, it is the same thing as if there was none." *Gallego's Ex'rs v. Attorney Gen.*, 30 Va. (3 Leigh) 450, 466 (1832).

100. The Statute of Elizabeth, 1601, 43 ELIZ. 1, c. 4, provided for supervision through the appointment of Commissioners by the Chancellor. Even before that time, chancery had recognized and enforced charitable trusts at the request of the Attorney General. The remedial sections of the Statute of Elizabeth gradually fell into disuse and were ultimately repealed in 1888. Because enforcement by the Attorney General was cumbersome and inefficient, parliament enacted the Charitable Trusts Act, 1853, 16 & 17 VICT., c. 137, whereby supervision of all trusts was vested in a four-man board, known as the Charity Commissioners for England and Wales. Authority over educational purposes was later transferred to the Board of Education. 62 & 63 VICT., c. 33 (1899). The relevant statutes are set out and discussed in TUDOR, CHARITIES 484-552, 680-84 (1929). See also BOURCHIER & CHILCOTT, ADMINISTRATION OF CHARITIES (1912); MITCHESON, CHARITABLE TRUSTS (1887); 4 SCOTT, TRUSTS § 348.2 (2d ed. 1956).

101. 2A BOGERT, TRUSTS AND TRUSTEES § 411 (1935); 4 SCOTT, TRUSTS § 391 (2d ed. 1956). Enforcement by the attorney general's office has left much to be desired. Among the multitude of responsibilities vested in that office, charitable trusts rank as relatively minor. Accordingly, supervision is sporadic, depending for the most part on specific complaints by citizens. A growing movement in recent years advocates strengthening the office and obtaining more effective supervision by establishing therein a registry of charitable

In the venerable case of *Morice v. Bishop of Durham*, a court for the first time indicated that enforcement procedures were prerequisite to validity.<sup>102</sup> The gift in question was to the Bishop of Durham in trust for such objects of "benevolence and liberality" as he should choose.<sup>103</sup> The trust was clearly not private; no specific beneficiaries had been designated. And "benevolence and liberality" were terms too broad to be characterized as charitable, so that the trust fell outside the Attorney General's authority. Because duty without a correlative power of enforcement was indistinguishable from absolute ownership, the trust failed, and the property returned to the estate. Thus early trust law made state action a necessary part of the charitable trust concept. Governmental involvement did not await an actual default by a trustee. The attorney general's authority to initiate enforcement proceedings had to be established before the trust could be allowed even initial existence.

Modern authority with one exception still adheres to the rule as a matter of practical necessity. Prompted perhaps by Professor Ames' cogent criticisms of the reasoning in the *Bishop of Durham* case—he thought the possibility that the Bishop would fail to fulfill his obligations too unlikely to justify invalidating the trust<sup>104</sup>—courts have occasionally allowed non-private trusts for specific, short-term, non-charitable purposes. If enforcement proves necessary, the persons otherwise entitled to the property are the proper parties to initiate the action.<sup>105</sup> But as the label—honorary—attached to such trusts indicates, in the last analysis compliance depends on the trustee's own good faith. Furthermore, although the omission of effective enforcement procedures does not foreclose the trust's creation, duration is limited to the period allowed by the rule against perpetuities.<sup>106</sup> This exception, although demonstrating that the *Bishop of Durham*

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trusts which would contain the information necessary for an evaluation of any trust's performance. Progress in this direction has been made by New Hampshire, Ohio, Rhode Island and South Carolina. Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633 (1954); see also TAYLOR, *PUBLIC ACCOUNTABILITY OF FOUNDATIONS AND CHARITABLE TRUSTS* 23-49, 124-39, 143-49 (1953) (analysis of responses to questionnaire on effectiveness of existing enforcement machinery).

102. 9 Ves. 399, 32 Eng. Rep. 656 (Ex. 1804).

103. *Ibid.*

104. Ames, *The Failure of the "Tilden Trust,"* 5 HARV. L. REV. 389 (1892). This controversy has always intrigued the great scholars of trust law. Professor Scott is the modern spokesman for the Ames point of view. See Scott, *Trusts for Charitable and Benevolent Purposes*, 58 HARV. L. REV. 548 (1945), 2 SCOTT, TRUSTS §§ 123-24 (2d ed. 1956). *But see* 1A BOGERT, TRUSTS AND TRUSTEES § 166 (1935); Gray, *Gifts for a Non-Charitable Purpose*, 15 HARV. L. REV. 509 (1902).

105. American courts have applied the honorary trust doctrine by name in only a few instances. The usual situation involves a trust for a pet. See *In re Estate of Searight*, 87 Ohio App. 417, 95 N.E.2d 779 (1950). See also 2 SCOTT, TRUSTS § 124 (2d ed. 1956). When an attempt to apply the doctrine outside its traditional categories is made, courts tend to be unimpressed. See, e.g., *Fidelity Title and Trust Co. v. Clyde*, 143 Conn. 247, 121 A.2d 625 (1956).

106. SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* § 1394 (1956); Smith, *Honorary Trusts and the Rule Against Perpetuities*, 30 COLUM. L. REV. 60 (1930).

rule is not fixed, everlasting and inexorable, has little relevance to the practicalities of enforcing a long-term charitable trust.<sup>107</sup>

Although judicial action guarantees enforcement whatever the agency bringing the trust before the court, the issue of the agent's identity may be crucial in determining the applicability of the Fourteenth Amendment to such trusts. Court action other than enforcement may not be considered state action.<sup>108</sup> Because the same degree of uncertainty does not exist when an executive officer of the government is a participant,<sup>109</sup> it is highly significant that the attorney general is in fact presently recognized as the proper party to set a court in motion.<sup>110</sup> His power to do so may not always be exclusive; those given a special equity by the terms of the trust are sometimes accorded standing to sue.<sup>111</sup> But

107. The issue is not without a measure of confusion in Pennsylvania. In *In re Dulles' Estate*, 218 Pa. 162, 67 Atl. 49 (1907), the Pennsylvania Supreme Court, considering a disposition for religious, charitable and benevolent objects, found it unnecessary to determine whether a benevolent purpose constituted a technical charity; an intent clear enough for the court to enforce was sufficient. Although the decision can be read to allow a trust that is neither private nor charitable, 2 SCOTT, TRUSTS 860-61 (2d ed. 1956), later Pennsylvania cases indicate that the burden of policing such trusts is on the Attorney General. Compare *Wiegand v. Barnes Foundation*, 374 Pa. 149, 97 A.2d 81 (1953); *In re Miller Estate*, 380 Pa. 172, 110 A.2d 200 (1955) with *In re Mears's Estate*, 299 Pa. 217, 149 Atl. 157 (1930); *In re Thompson's Estate*, 282 Pa. 30, 127 Atl. 446 (1925); *In re Barnwell's Estate*, 269 Pa. 443, 112 Atl. 535 (1921). Some cases refer to the broad visitatorial powers of the Orphans' Court to supervise charitable trusts. See *In re Toner's Estate*, 260 Pa. 49, 103 Atl. 541 (1918). The general statute on correcting breaches of charitable trusts which speaks of "any person or persons interested in the due execution of the trust" bringing the action does not specifically designate the Attorney General as the moving party. PA. STAT. ANN. tit. 20, § 2874 (Purdon Supp. 1956). In the cy pres statute, the Attorney General is mentioned along with other interested persons as a proper party to petition the court. PA. STAT. ANN. tit. 20, § 301.10 (Purdon Supp. 1956).

108. See *Gordon v. Gordon*, 332 Mass. 197, 124 N.E.2d 228, cert. denied, 349 U.S. 947 (1955) (judicial administration of private trust not state action); *United States Nat'l Bank v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954) (same).

109. Since the decision of an attorney general not to participate in an action on an alleged breach of trust is not subject to judicial review, mandamus will not lie against him. *Ames v. Attorney Gen.*, 332 Mass. 246, 124 N.E.2d 511 (1955).

110. See *In re Los Angeles County Pioneer Soc'y*, 112 Adv. Cal. App. 446, 246 P.2d 1029 (1952), modified on other grounds, 40 Cal. 2d 852, 257 P.2d 1, cert. denied, 346 U.S. 888 (1953); *Trustees of New Castle Common v. Gordy*, 33 Del. Ch. 196, 91 A.2d 135 (1952); *Kolin v. Leitch*, 343 Ill. App. 622, 99 N.E.2d 685 (1951); *Boice v. Mallers*, 121 Ind. App. 210, 96 N.E.2d 342 (1950); *In re Owens' Estate*, 244 Ia. 533, 57 N.W.2d 193 (1953); *Schaeffer v. Newberry*, 227 Minn. 259, 35 N.W.2d 287 (1948); *In re Estate of Grblny*, 147 Neb. 117, 22 N.W.2d 488 (1946); *In the Matter of Estate of Pfizer*, 33 N.J. Super. 242, 110 A.2d 40 (1954); *Goetz v. Old Nat'l Bank*, 84 S.E.2d 759 (Sup. Ct. App. W. Va. 1954). See, generally, Annots., 124 A.L.R. 1237-42 (1940), 62 A.L.R. 881-904 (1929). For a breakdown of the enforcement procedures in eighteen states, see TAYLOR, PUBLIC ACCOUNTABILITY OF FOUNDATIONS AND CHARITABLE TRUSTS 148-49 (1953). In some states the obligation to enforce charitable trusts is imposed by statute. 4 SCOTT, TRUSTS 2754 (2d ed. 1956); 2A BOGERT, TRUSTS AND TRUSTEES § 411 (1935).

111. The trustee may, of course, initiate a construction proceeding or ask for instructions. *Carlisle v. Delaware Trust Co.*, 99 A.2d 764 (Del. 1953). A trustee may sue a co-trustee for breach. *Morville v. Fowle*, 144 Mass. 109, 10 N.E. 766 (1887). And a

proper procedure requires that the attorney general at least be made a party to the action in any case.<sup>112</sup>

Accordingly, the administration of a charitable trust must ultimately be characterized as state action. Basic to the grant of enforcement powers to the attorney general was the law's realization that the words of the dead are only as effective as living society, acting through its governmental agents, chooses to make them. Whether the trustee is a governmental unit, as in *Girard*, or a private trust company, the trustee's choice is only first, not final. In the event that he refuses to carry out the testator's limitation, the discrimination can become operative only if the attorney general brings an action on the breach, and the courts command compliance. Under these circumstances, the full panoply of governmental powers stands behind the discrimination. Less obvious is the situation where the trustee exercises the limitation without outside prompting.<sup>113</sup> The burden of going forward now shifts from the trustee to the attorney general. He may, on the assumption that his primary duty is to the settlor, acquiesce in the discrimination. Nevertheless, since the trustee acts without restraint only upon such acquiescence, the attorney general again becomes a participant in the discrimination.

The *Girard* case might offer the trustee an escape from this tangled web, since there the identity of the trustee was controlling. A trustee could claim the discrimination as his own, and therefore private, and further argue that the attorney general and the courts have no standing to intervene to make it public. This premise, however, overlooks the nature of the relationship between

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person with a special interest in the trust may seek enforcement. *Kolin v. Leitch*, *supra* note 110. However, a citizen without a special interest has no standing to sue. *Averill v. Lewis*, 106 Conn. 582, 138 Atl. 815 (1927); *Dickey v. Volker*, 321 Mo. 235, 11 S.W.2d 278 (1928), *cert. denied*, 279 U.S. 839 (1929); *Wiegand v. Barnes Foundation*, 374 Pa. 149, 97 A.2d 81 (1953). The settlor, his heirs or contributors are not usually allowed to sue for enforcement. *Greenway v. Irvine's Trustee*, 279 Ky. 632, 131 S.W.2d 705 (1939); *Leeds v. Harrison*, 15 N.J. Super. 82, 83 A.2d 45 (1951). *Contra*, *Carter v. Mayor*, 197 Md. 70, 78 A.2d 212 (1951). In Wisconsin, if the Attorney General refuses to act, ten or more interested citizens may bring the action in the name of the state. WIS. STAT. § 231.34 (1955).

112. *Thurlow v. Berry*, 247 Ala. 631, 25 So.2d 726 (1946); *Kolin v. Leitch*, 343 Ill. App. 622, 99 N.E.2d 685 (1951); *Carlisle v. Delaware Trust Co.*, *supra* note 111; *In the Matter of Estate of Grblny*, 147 Neb. 117, 22 N.W.2d 488 (1946). When the matter is of no interest to the public, the attorney general is not a necessary party. *Delaware Trust Co. v. Graham*, 30 Del. Ch. 330, 61 A.2d 110 (1948); *Burtman v. Butman*, 94 N.H. 412, 54 A.2d 367 (1947); *cf. Attorney Gen. v. Clark*, 167 Mass. 201, 45 N.E. 183 (1896).

113. This analysis assumes that the trust charter contains a racial limitation. The problem takes on an additional dimension when the discrimination is not required by the terms of the trust, but is imposed solely at the discretion of the trustee. If the trustee is an individual or a private corporation, it can be argued that the discrimination results exclusively from private action. But, again, the trustee's discretion is in no sense absolute, for he cannot exercise it in a manner that is illegal or violative of public policy. See note 44 *supra*. Moreover, the problem remains as to whether the issue of public policy depends on a court's determination of the state action question. *Cf. Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945).

the trustee and the trust property. In the *Girard* litigation, only the alternatives of attributing the discrimination to the settlor or the trustee were considered. Trust law demonstrates another reference point. True, a trustee does not lose his personal identity when he assumes his fiduciary office. But the law does not thereby make the trust property his own. He is in no sense in the position of a private contractor who may voluntarily fulfill the terms of the trust agreement. On the contrary, he may utilize the trust property only as the law requires.

The trustee is forced on this account to justify discrimination as an obligation imposed by law. Yet an obligation exists only on the assumption that the state will retaliate if he breaches. Because retaliation is proscribed by the Fourteenth Amendment, the obligation and the attendant justification disappear.<sup>114</sup> The trustee is, therefore, in reality an agent of the law; for the attorney general and the courts, by direct or threatened action, will ultimately control his course.

### *Charitable Trusts in Context*

In the last analysis, all human activity is controlled by law. That state action in fact is involved should not, standing alone, support invocation of the equal protection clause.<sup>115</sup> If *Shelley v. Kraemer* means that judicial action is state action in every context, it would become a mere procedural matter to make ejection of an undesired guest from a tea party actionable discrimination. But obviously the Supreme Court has no intent to make the Fourteenth Amendment an omnipotent over-law regulating all conduct and usurping much of the traditional jurisdiction of state courts. In this light, the cases indicate that state action requires a qualitative evaluation of the total context within which the discrimination arose.

Certainly, state action will remain the principal legal question involved, as the Fourteenth Amendment requires. But it is sometimes an awkward tool with which to solve the delicate problems of race relations. It tends to make remedy turn on the over-all institutional context rather than the impact of the discrimination in any single case. In the field of charitable trusts this trait is particularly pronounced. Were the Ford Foundation to disperse its millions on a discriminatory basis, society would find the result intolerable. On the other hand, a trust to educate poor children of a minority race seems useful

114. "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922). An analogous situation occurs when the executor of an estate is presented with a claim on which the statute of limitations has run. Most recent cases and statutes tend to prohibit waiver of a good defense by a fiduciary. See *Elliott v. First Nat'l Bank*, 248 Ala. 360, 27 So.2d 623 (1946); *In re Estate of Smith*, 240 Iowa 499, 36 N.W.2d 815 (1949); *Ellis v. Cauhaupé*, 71 Wyo. 475, 260 P.2d 309 (1953). If an executor is not allowed to fulfill the moral duty of paying the just debts of the testator when a defense exists, he should not be allowed to fulfill the moral duty (if any) of carrying out the testator's wishes where they are contrary to public policy and a valid defense, such as the Fourteenth Amendment, may be raised.

115. See *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 536, 87 N.E.2d 541, 551 (1949), *cert. denied*, 339 U.S. 981 (1950) (dissenting opinion).

and worthy of community approval. Yet they are of the same stuff, and when the question is limited to the presence or absence of state action, they must seemingly stand or fall together.

It is unlikely that a federal court, once convinced of the presence of state participation, would refuse to invalidate a charitable trust on the ground that it was not of sufficient social significance to justify federal intervention. Modern philanthropy has assumed the characteristics and dimensions of government.<sup>116</sup> Its wealth, in trusts and related forms, can only be measured in the tens of billions of dollars. And each year a figure approaching four billion more is added.<sup>117</sup> Wealth in such magnitude itself demands the highest degree of social responsibility.<sup>118</sup> The obligations of philanthropy are, however, best described in terms of the similarity of purpose to which both government and philanthropy are dedicated, even though their relative contributions vary. At one time, philanthropy was relied upon to take care of the indigent and the aged. Today government is recognized as better equipped to perform these services. But in the fields of health, education and research, the two continue to function side by side, while in religion and the arts, philanthropy remains in substantial measure supreme.<sup>119</sup> Both, in ways dictated by their particular capacities, seek a common goal—the improvement of mankind. Government is subject to the prohibitions of the Fourteenth Amendment. It would be incongruous if philanthropy, while operating with the helping hand of government and performing the same essential functions, was to be held to a lesser standard.

Even with the elements of state action thus assembled, doubts as to the ultimate result persist. When confronted with such facts, state law withholds a remedy, not because it condones the discrimination, but because it fears the consequences of the remedy. Policy considerations favor disposition of property in ways of the owner's choosing. The Supreme Court in *Girard* did not allow such policy to excuse governmental participation in a discriminatory scheme, despite the

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116. Herein lies an independent basis for holding charitable organizations and trusts to the standards of the Fourteenth Amendment. The Fourteenth Amendment is applicable to private organizations exercising powers similar to those of the states. *Terry v. Adams*, 345 U.S. 461 (1953) (political party primaries); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company-owned town); *Nixon v. Condon*, 286 U.S. 73 (1932) (political party); *Ross v. Ebert*, 82 N.W.2d 315, 320 (Wis. 1957) (dissenting opinion) (labor union). See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 208 (1944) (concurring opinion) (same); Note, 61 HARV. L. REV. 344 (1948). *But see Katz, Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 432-33 (1953) (stating necessity of maintaining a free philanthropy to offset governmental monopoly and control of welfare and cultural activities). For an interesting discussion of the relationship between charitable organizations and government, see *Connecticut College for Women v. Calvert*, 87 Conn. 421, 435-36, 88 Atl. 633, 638 (1913) (because college could maintain racially discriminatory admissions policy, it was not vested with the government power of eminent domain).

117. ANDREWS, PHILANTHROPIC GIVING 74 (1950).

118. See, generally, Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957).

119. ANDREWS, PHILANTHROPIC GIVING 43-49, 172-212 (1950); RICH & DEARDORFF, AMERICAN FOUNDATIONS AND THEIR FIELDS (1948).



Board's argument attributing the discrimination to Girard. But in future cases where the identity of the trustee is not in issue, the policy may require a more specific answer.

Protection of one person's liberty results in the curtailment of another's freedom of action. Thus the process of adjusting individual liberties requires a continuous assessment of priorities between the rights preserved and the rights removed.<sup>120</sup> In so far as the Fourteenth Amendment seeks out purposeful, invidious discrimination, it would appear to command priority over the testator's general privilege to control the future uses of his property. For testamentary disposition is not a natural right but a privilege granted by society. And while a living person may use his property to indulge his discriminatory purposes, he should not be allowed to force the state to effectuate post-death public purposes undermining the standards of society. As Justice Black once said of the rights of property: "The more an owner . . . opens up his property for use by the public in general the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."<sup>121</sup>

State law has always recognized, particularly when a charitable object is involved, the relative nature of the privilege of owner control.<sup>122</sup> Because the elements in the definition of charity are continuously subject to change, the hand of the law is frequently stayed for fear that more rigid control will destroy the good with the bad. Initially, it would appear that the Fourteenth Amendment might run aground on this same all-or-nothing argument. If its application is to depend on the factor of state action alone, all classifications—sex, age, geographical location and above all religion—become suspect, and the basic foundations of the charitable trust are, for all practical purposes, eliminated. Confronted by the specter of catastrophe, a court might well become timorous, retreat behind the private discrimination and deny the presence of state action altogether. Such a result would be too hasty. Wholesale destruction of the charitable trust is not the inevitable consequence. At least three grounds might be suggested whereby certain types of classification could be upheld.

First, a religious trust is sufficiently protected by the First Amendment guarantee of freedom to worship without governmental interference.<sup>123</sup> During

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120. HALE, FREEDOM THROUGH LAW 318-82 (1952); Hamilton & Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1349-57 (1941); Note, 96 U. PA. L. REV. 402 (1948).

121. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

122. While granting charitable trusts extensive privileges and immunities, the law sometimes subjects them to restrictions which are not imposed on any other type of transfer. Testamentary gifts to charity are limited in several states in the following ways: N.Y. DECED. EST. LAW § 17 (amount); PA. STAT. ANN. tit. 20, § 180.7 (Purdon Supp. 1956) (time); CAL. PROB. CODE ANN. § 41 (Deering Supp. 1955) (both). The amount of land which may be held a charitable corporation is sometimes limited. 2 BOGERT, TRUSTS AND TRUSTEES § 327 (1935); SIMES, PUBLIC POLICY AND THE DEAD HAND 110-14 (1955). Judicial control of charitable gifts has always been conceded. See, e.g., Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 429 (1950).

123. U.S. CONST. amend. I. Every will represents an exercise of freedom of speech and as such is entitled to protection up to the point that it requires unlawful conduct of

the debates on that amendment, apprehension was expressed that the separation of church and state doctrine might jeopardize gifts for religious purposes. This fear was dispelled by the authors' conviction that such a result was not to be tolerated.<sup>124</sup> In like manner, the equal protection clause should be kept secondary and relative. Religious institutions are maintained almost exclusively by donations and trusts. Any rule which reduced this source of revenue would significantly curtail the opportunity to worship, a right made fundamental by the First Amendment. The scope of this protective haven may not always prove easy to define. Trusts for religious purposes and institutions such as churches and church-sponsored schools, hospitals and cemeteries would probably be included.<sup>125</sup> Less certain are trusts where the religious classification bears no relationship to the purpose—for example, a trust for the poor of the Protestant faith or for education of Jewish boys in non-sectarian schools. A balance is required, but one that is not new to the law. The existing process for adjusting the competing claims of the separation and religious liberty doctrines of the First Amendment provides a useful parallel.<sup>126</sup>

Second, the Fourteenth Amendment permits a certain degree of discrimination through "rational" classification.<sup>127</sup> Presumably a city or state may establish a school restricted to persons of a particular sex or age if such a classification is justifiable in terms of some legitimate objective. No less privilege should be extended to a property owner. The scope of this exception cannot be set by precise formulae. Up to the point where his selection approaches the basic civil

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others. Situations could arise in which the rights of expression and thought take priority over the inhibitions of the Fourteenth Amendment. Thus it might be argued that a trust which calls for research and education in the justifications for preserving segregation should be permitted as a legitimate exercise of the democratic process of criticizing existing laws. See *Musser v. Utah*, 333 U.S. 95, 101-03 (1948) (dissenting opinion) (conspiracy to counsel and advise polygamy).

124. *Everson v. Board of Education*, 330 U.S. 1, 42-43 (1947) (dissenting opinion).

125. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parochial schools have constitutional right to exist); Miller, *Racial Discrimination and Private Schools*, 41 MINN. L. REV. 145, 150-51 (1957); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 439 (1953); see also, *Rueben Quick Bear v. Leupp*, 210 U.S. 50 (1903). In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), the Court refused to upset an Iowa ruling permitting discrimination in cemetery contracts. Since the discrimination was racial, the Court did not discuss freedom of religion. See note 130 *infra*. A distinction between sectarian hospitals and orphanages, and those sponsored by religious groups but open to the public generally, seems relevant. See *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Kentucky Bldg. Comm'n v. Efron*, 310 Ky. 355, 220 S.W.2d 836 (1949); *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882).

126. Katz, *supra* note 125.

127. *Goeseart v. Cleary*, 335 U.S. 464 (1948) (only wife or daughter of tavern owners eligible for barmaid licenses); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (presently licensed river pilots required to certify license applicants although in practice only relatives of present pilots were certified); *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927) (restriction of poolroom licenses to citizens). *But see Truax v. Raich*, 239 U.S. 33 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

rights, a testator could employ many of the traditional grounds for selecting beneficiaries.

Finally, the cases indicate that not all racial discrimination is proscribed by the Fourteenth Amendment. In *Snowden v. Hughes*, the Supreme Court ruled that discriminatory administration of a non-discriminatory statute—certification of primary election returns—would amount to a violation of the equal protection clause only if the discrimination were “intentional or purposeful.”<sup>128</sup> In that context, purposeful discrimination would necessarily have been malicious.<sup>129</sup> In the charitable trust, on the other hand, discriminatory selection of beneficiaries, though intentional, need not be so designed. For example, the settlor who purposely limits his bounty to aid for a minority group may not be motivated by malice. Yet the *Snowden* approach could be utilized in judging charitable trusts. By reading “malicious” into “purposeful or intentional,” a construction necessitated by the change in context, the courts could develop gradations of racial discrimination in charitable trusts and thus meet the demands of the problem without risking destruction of the institution. But can a trust favoring a minority race be distinguished from one limited to the white majority? A negative answer seems practically inescapable. With a considerable section of the population already in open revolt against its authority, the Supreme Court cannot approve a rule which makes equality of treatment a one-way street. Furthermore, a distinction based on the good or bad intent of a person who may have been dead for many years, as the general law of charitable trusts has long since recognized, is too unreliable to provide a basis for judging propriety of an individual trust.

Other gradation possibilities are suggested in the occasional remarks of individual justices. For example, Mr. Justice Frankfurter commented in *Rice v. Sioux City Memorial Park Cemetery, Inc.* to the effect that even if state action were assumed, the difficult question whether the particular discrimination were subject to the Fourteenth Amendment would remain.<sup>130</sup> This statement recognizes a necessary question beyond the primary inquiry into governmental participation. Equality is a goal never finally attainable, nor even susceptible of complete definition. Governmental action has a varying effect on persons de-

128. 321 U.S. 1, 8 (1944) (direct federal action for damages in which petitioner conceded that discrimination was not based on race).

129. Mr. Justice Douglas, dissenting on a procedural ground, expressed the implicit content of “intentional or purposeful”: “I believe, as the opinion of the Court indicates, that a denial of equal protection of the laws requires an invidious, purposeful discrimination.” *Id.* at 18.

130. “Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked. Such a claim involves the threshold problem whether, in the circumstances of this case, what Iowa, through its courts, did amounted to ‘state action.’ This is a complicated problem which for long has divided opinion in this Court. . . . Were this hurdle cleared, the ultimate substantive question, whether in the circumstances of this case the action complained of was condemned by the Fourteenth Amendment, would in turn present no easy constitutional problem.” 349 U.S. 70, 72 (1955).

pending on their situations and identity. Yet if this constituted inequality of treatment before the law, practical paralysis of governmental operation would result. In the process of charting a course between the permissible and the prohibited, certain racial distinctions must be accepted. Thus state courts deciding questions of adoption and custody may consider racial and religious compatibility as relevant in matching children to parents.<sup>131</sup> And the federal census may classify the population in its racial components. Seemingly at work in these situations, only two of a number of possible examples, is a value judgment that the harm is either insignificant or offset by some counterbalancing benefit. Accordingly, discrimination might be measured by its effect on the community. Is it incidental and harmless or does it touch the essentials of democracy? Thus a distinction could be drawn between the segregated institution and the racially restricted scholarship fund. The first is a proper target since it effects an actual separation of the races, while the second would be permissible so long as the education itself were available on a non-segregated basis.

#### CONCLUSION

The case for making all charitable trusts subject to the Fourteenth Amendment need not stand or fall on the amendment's capacity to reach only a few of the more extreme instances of discrimination. But, so long as the law retains its present inflexibility, the price of a solution may be too high. It has been said that a charitable trust contains "an anomalous dichotomy, [a] manifestation of quasi-socialism on the one hand, and of the most extreme incidents of a regime of private property on the other."<sup>132</sup> These two elements are of the fabric of the institution. Yet the state action concept cannot treat them as equals; it must divide and rate them, making one supreme and the other subordinate. Thus the law is confronted with a choice between two extremes, either one of which creates as many problems as it solves. If a court finds the state's participation in a charitable trust the controlling factor, the owner's power to dispose and the trust's power to use property will be within the purview of limitations heretofore considered inapplicable. Yet society's stake in both of these freedoms militates in favor of their continuance without restriction. And considerations of federalism may point to the retention of the

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131. To the effect that the factors of race and religion may be considered but should not be exclusively decisive, see *In re Adoption of a Minor*, 228 F.2d 446, 448 (D.C. Cir. 1955) (denial of adoption not to rest on distinction between "social status" of whites and Negroes); *Fontaine v. Fontaine*, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956) (custody not to be determined on sole ground of children's racial physical characteristics); *Petition of Gally*, 329 Mass. 143, 148, 107 N.E.2d 21, 25 (1952) (identity of religion not the "sole or necessarily the principal consideration"). See statutes collected in Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715, 722 n.36 (1950) (these statutory restrictions raise a "serious constitutional question under the 'equal protection' clause of the Fourteenth Amendment").

132. SIMES, PUBLIC POLICY AND THE DEAD HAND 111 (1955).

limited federal intervention resulting from a narrow definition of state action.<sup>133</sup> If, on the other hand, the owner's prerogatives are made paramount, society will be compelled to accept and support a trust which frustrates its public policy.

It is too early to determine the influence that the Girard trust will have on the ultimate result. While the Court's holding is limited to direct participation of a governmental trustee, the underlying premise may well presage more comprehensive coverage. The Pennsylvania courts saw the necessity of attributing the discrimination to the testator. By rejecting this line of argument without comment, the Supreme Court substantially weakened, if not removed, the principal defense by which the charitable trust in general might escape constitutional prohibitions. If the testator does not control the operation of his trust, the law must. And should the Girard trust return to the Supreme Court with a new trustee, the already perplexing issues of the charitable trust will be compounded by the fact that the form of the particular trust was designed to evade an earlier decision. Confronted by such situations in the past, the Court has always stood firm against the discrimination. With the vitality of the desegregation cases at stake, it could hardly do less in this event.

In deciding *Girard*, the Court has opened new vistas in the constitutional field of discrimination. The case demonstrates the legal difficulties which result from testing all the variables involved in race conflict by the single doctrine of state action. Future controversies will demand a new ordering of doctrine and a clarification of the substantive evils which the Fourteenth Amendment is designed to prohibit. In terms of practical impact, the case reveals that the opportunities for equality are not confined to the fields of public education and transportation but move broadly into cognate areas exemplified by private charities and educational establishments. The possibilities so engendered for new attacks on an old problem seem literally boundless.

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133. The authority to determine the propriety of charitable trusts has traditionally belonged to the states. However, their jurisdiction is not exclusive since the federal courts in regulating federal tax exemptions may independently withhold one of the privileges which usually accompanies a charitable designation. But federal tax decisions do not affect the basic enforceability of the trust. See PAUL, *FEDERAL ESTATE AND GIFT TAXATION* §§ 12.05-17 (1942). The Court's understandable reluctance to encroach upon the areas of law heretofore reserved to the states is a strong deterrent to any expansion of the state action concept beyond its present limits. *But see* Orleans Parish School Board v. Bush, 242 F.2d 156, 166 (5th Cir. 1957): "However undesirable it may be for courts to invoke Federal power to stay action under state authority, it was precisely to require such interposition that the Fourteenth Amendment was adopted by the people of the United States. Its adoption implies that there are matters of fundamental justice that the citizens of the United States consider so essentially an ingredient of human rights as to require a restraint on action on behalf of any state that appears to ignore them."