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TRUSTS—STATE ACTION IN CHARITABLE TRUSTS—*Evans v. Newton*, 382 U.S. 296 (1966).

I. INTRODUCTION

In 1914 United States Senator Augustus O. Bacon devised a hundred-acre tract in trust for the lives of his wife and two daughters, and upon the death of the last survivor the property was to vest in the mayor and council of the city of Macon, Georgia, in trust to be used as a "park and pleasure ground" for the benefit of "white women, white girls, white boys and white children of the City of Macon." The control of the park was vested in a board of managers of seven white persons. For many years the city maintained the park on a segregated basis, but after it became apparent that it could not constitutionally continue segregated maintenance, Negroes were allowed to use the park. Thereupon, Newton and other individual members of the board of managers brought an action in the state court alleging that the city of Macon had failed to enforce the discriminatory provisions of the will and praying that the city be removed as trustee, that the court appoint private trustees, and that the legal title to the park be transferred to them. The city answered admitting that it could not legally enforce racial segregation and resigned as trustee. Evans and other Negro citizens of Macon intervened on the grounds that the equal protection clause of the fourteenth amendment prohibited the court from accepting the resignation of the city and appointing private trustees for the purpose of operating this public property in a discriminatory manner. Other heirs of Senator Bacon also intervened asking for a reversion of the trust property to the Bacon estate in the event that the prayer of the city was denied. The trial court, which was sustained by the Georgia Supreme Court,[1] accepted the resignation of the city as trustee and appointed three new private trustees, finding it unnecessary to pass on the claims of the Bacon heirs.

On a writ of certiorari, the Supreme Court in an opinion by Justice Douglas held that the park could not be operated on a segregated basis even under private trustees and that the court was barred from transferring title to the private trustees. Noting the tradition of municipal control and that the record showed nothing to indicate a disengagement, the majority attempted to limit the holding to the fact that municipal involvement and management of the park had not been sufficiently disproved merely by the substitution of private trustees for public trustees.[2] However, the opin-

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

[2] Twice the opinion intimates that the court might have reached a different conclusion if a fully developed record had conclusively shown that

ion heralds a broader meaning to "state action" by suggesting that the public character of the park and the "municipal" nature of its services require that it be subject to the commands of the fourteenth amendment regardless of who holds title. Justice White's concurring opinion argued that the restrictive conditions of the charitable trust could not be implemented because they were incurably tainted by discriminatory legislation that validated such racial restrictions while leaving the validity of non-racial restriction still in question, thus giving state inducement to racially restrictive charitable trusts.[3] Justice Black in his dissent thought that the writ should have been denied since no federal constitutional question was decided by the lower state court.[4] Justice Harlan, joined by Justice Stewart, also thought that the writ had been improvidently granted[5] and further dissented on the grounds that the case was merely one of private discrimination, beyond the protection of the fourteenth amendment.

Perhaps the reason the writ of certiorari was granted in spite of the unclear state of the record was to settle important questions of constitutional law left open by the famous case, *Pennsylvania v. Board of Trusts*.[6] In his will Stephen Girard provided for a charitable trust for the maintenance of a school for poor white male or-

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the city had ended all involvement with the trust property. First, this would seem to have been a good reason for the court to have refused to adjudicate the constitutional issue. See the dissenting opinion of Justice Harlan, Evans v. Newton, 382 U.S. 296, 319 n.3 (1966). Second, the reasoning of the majority that the public character of the park requires that it be treated as a public institution leaves serious doubt whether the park could be operated on a segregated basis even if the city had in fact disengaged itself.

[3] As the validity of a trust for general community purposes limited by non-racial restrictions was still in doubt, the case was one where the state had forbidden all private discrimination except racial discrimination. Such a statute involved the state to such a significant extent in the trust plan as to reflect a state policy and therefore violate the fourteenth amendment. Robinson v. Florida, 378 U.S. 153 (1964).

[4] The Georgia lower court purported to hold only that no error was committed under state law in accepting the resignation of the city as trustee and the appointment of successor trustees. This was an adequate non-federal ground which was independent of the federal question of whether the new trustee could voluntarily enforce the racial restrictions. Fox Film Corp. v. Muller, 296 U.S. 207 (1935). The majority avoided such problems by treating the federal question to be whether, under the circumstances, the acceptance of the resignation of the city and the appointment of new trustees amounted to "state-sponsored racial inequality."

[5] Evans v. Newton, 382 U.S. 296, 315 (1966).

[6] 353 U.S. 230 (1957).

phans. The city of Philadelphia was named trustee and the trust was administered by a board of directors of that city. When the board refused to admit two qualified Negro applicants, the Supreme Court held that it was acting as an agency of the state and therefore engaged in state action proscribed by the fourteenth amendment.[7] On remand, the Pennsylvania courts decided that the dominant purpose of Stephen Girard was to limit the college to "white" orphan boys rather than to have the city as trustee, and substituted private trustees; the exclusion of the Negro applicants was again sustained and the Supreme Court denied certiorari.[8] The outcome of the case was to establish that governmental trustees denote state action. This opened the possibility that charitable trusts could be within the confines of the fourteenth amendment, but left uncertain whether the amendment's restrictions could be circumscribed by the transfer of title to private trustees.

The *Evans* case resolves the question by holding that discriminatory trusts established with a governmental trustee cannot avoid the commands of the equal protection clause by a transfer to private trustees. But with the introduction of the "public function" theory, the opinion creates new questions of whether all publicly oriented charitable trusts are not subject to constitutional restrictions.

II. ACTIVE GOVERNMENTAL INVOLVEMENT IN CHARITABLE TRUSTS

Ever since the *Civil Rights Cases*[9] the fourteenth amendment has been considered to be only a prohibition upon the states not reaching to private discrimination by individuals. In all charitable trusts, the discrimination originates privately in the expressed wishes of the settlor. But the settlor's actions are not completely devoid of state involvement, for the power to dispose of property at death is a privilege granted by law, and in addition the state grants many benefits to charitable trusts which are not applicable to ordinary dispositions.[10] This administrative control and the

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[7] See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957); Shanks, *"State Action" and the Girard Estate Case*, 105 U. PA. L. REV. 213 (1956).

[8] *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958), *appeal denied, cert. denied,* Pennsylvania v. Board of Trusts, 357 U.S. 570 (1958).

[9] 109 U.S. 3 (1883).

[10] Most states provide that the attorney general or other governmental agency shall be the official responsible for enforcing charitable trusts, the trusts are granted sizable tax benefits from the local and federal

state-conferred benefits had not been thought to sufficiently constitute state involvement,[11] except in the clear case where a governmental agency was made trustee. It was to avoid all official governmental involvement that the Georgia court transferred title and control to private trustees,[12] and yet the opinion suggests that even if such transfer was accomplished in fact, the trust property may not be managed on a privately segregated basis because it is of a "municipal character." If such is to develop as the real basis of Justice Douglas's opinion, the broadened meaning of "state action" would affect almost all charitable trusts.[13]

The majority opinion assumes as a basic premise that discrimination originating between private parties becomes subject to the commands of the fourteenth amendment whenever it has become so entwined with governmental management or control that governmental policies are involved, or when the private activity is so impregnated with a governmental character as to be a governmental function. The first ground has long been accepted,[14] but seems inapposite where the governmental agency has been removed as trustee. While the removal of a governmental trustee avoids the problem of state control, yet the possibility remains that governmental policy favoring discriminatory trusts may be found in

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government, the state may alter the terms of the trust through the doctrine of cy pres, they are granted perpetual existence, and have a less stringent tort liability. It has been argued that these elements involve the state to a significant extent in all charitable trusts, and the relevant consideration should be whether the restrictions impose "irrational, invidious," discrimination prohibited by the fourteenth amendment. Clark, *supra* note 7, at 1009-15.

11 See, *e.g.*, Guillory v. Administrators to Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962).

12 Such attempts to transfer control to private parties has resulted in a pattern of development whereby the definition of state action has been consistently expanded to cover discrimination ostensibly in private form in other areas. Griffin v. County School Bd. of Prince Edward, 377 U.S. 218 (1964) (schools); Barrows v. Jackson, 346 U.S. 249 (1953) (restrictive covenants); Terry v. Adams, 345 U.S. 461 (1953) (franchise); Shelley v. Kraemer, 334 U.S. 1 (1948) (restrictive covenant); Smith v. Allwright, 321 U.S. 649 (1944) (franchise); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), *cert. denied*, Ghiotto v. Hampton, 371 U.S. 911 (1962) (golf course).

13 From the very nature of charitable trusts in benefiting the community, it appears that almost all parallel analogous fields of governmental activity would constitute "state action." For example private schools, orphanages, libraries, museums, and old-folk homes. See Evans v. Newton, 382 U.S. 296, 315 (1966) (dissenting opinion).

14 Griffin v. Maryland, 378 U.S. 130 (1964); Turner v. City of Memphis, 369 U.S. 350 (1962); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

state legislation. Georgia had enacted a series of statutes which removed any uncertainty as to the validity of discriminatory charitable trusts for parks.[15] Such legislation could be held to indicate a state policy[16] favoring racially restrictive trusts and evince a "coercive effect"[17] implicating the state in the charitable trust. Whether such a pattern of legislative action may involve the state in private discriminatory trusts was not decided by the *Evans* case.[18] While this would have been a more logical ground for the Court's opinion,[19] it would have left the way free to validate racially discriminatory charitable trusts through the judicial process of the common law. However, the constitutional validity of a discriminatory trust which was facilitated through a legislative pattern enabling the creation of such trusts must be seriously questioned.[20] It is still undetermined whether a private charitable trust for a clearly private purpose, in which the state was involved only through its qualifying legislation on trusts, and not in the supervision, control, or management of the property, would constitute state action.[21]

In those rare cases where a charitable trust significantly entwines the government by the utilization of governmental trustees, the tradition of governmental involvement prohibits the state from sanctioning the transfer to "private trustees."[22] Once government

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15 GA. CODE ANN. §§ 69-504, 69-505 (1957) provided for devises in trust of land for parks to be limited by racial restrictions and empowered municipalities to accept such trusts and enforce their exclusive use by police provisions.

16 Robinson v. Florida, 378 U.S. 153 (1964).

17 Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963).

18 Evans v. Newton, 382 U.S. 296, 300 n.3 (1966).

19 The role of the state is much more evident where it has thus endorsed such discrimination, but the scarcity of such qualifying legislation and the possibility of its revocation followed by the upholding of similar restrictions under the law of trusts probably induced the court to forsake such a limited holding. *Id.* at 302 (concurring opinion).

20 A legislative enactment "authorizing discriminatory classification based exclusively on color" has been thought to be clearly violative of the fourteenth amendment. Burton v. Wilmington Parking Authority, 365 U.S. 715, 726-27, 729 (1961). See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 485 (1962).

21 See Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

22 In other areas it is clear that a state cannot relieve itself of constitutional restrictions by transferring the management of its affairs to a private organization. Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954); Terry v. Adams, 345 U.S. 461 (1953); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948). See Note, 20 OHIO ST. L.J. 132 (1959).

management and control is brought actively into union with the trust, its influence cannot be dissipated by the appointment of "private trustees."[23] This is the more evident when the absence of all continuing governmental management and control of the park in *Evans* is considered.[24]

III. PUBLIC FUNCTION THEORY AND DISCRIMINATORY CHARITABLE TRUSTS

A tradition of prior municipal involvement in a charitable trust is no longer the only test to determine whether such trusts are subject to the fourteenth amendment. For the real crux of the *Evans* case was whether private trustees could observe the racial restrictions in the trust and voluntarily operate the park on a segregated basis.[25] The answer comes in the court's premise that some charitable trusts may be "so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[26] From the fact that the services rendered even by a private park are municipal in nature, the public character of the trust property required that it be treated as a public institution subject to the commands of the fourteenth amendment regardless of who held title.

It is this "public function" theory of state action that foretells the greatest import for charitable trusts and which has invoked the bitterest dissent. Almost all charitable trusts perform a service that is in some way public, for their rationale is some beneficial purpose of social interest to the community which justifies per-

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[23] Alternatively, the state continues to be responsible for discrimination where it once sought to regulate private activity and later seeks to disengage itself. Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952). Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 19-22 (1959). Such a ground would invalidate racial restrictions in a trust where the state passed enabling legislation and then repealed it. See Henkin, *supra* note 20, at 483 n.20.

[24] The lower Georgia court relied upon *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958), as holding that the appointment of private trustees removed all governmental control and action. The park was not dependent upon governmental financial aid, as the trust provided that the income from other property should go towards its maintenance. As for any inference of continuing municipal involvement, under the circumstances it would be more reasonable to assume that the city would do everything it could to divorce itself from management of the park.

[25] Evans v. Newton, 382 U.S. 296, 302 (1966) (concurring opinion).

[26] *Id.* at 299.

mitting property to be devoted to that purpose in perpetuity.[27] However, the opinion admits that because the government has engaged in a particular activity does not necessarily mean that a charitable trust undertaking of the same character suffers the same constitutional inhibitions.[28] The only criteria offered is whether the predominant character and purpose is traditionally municipal in serving the whole community.

The theory that certain activities "clothed with a public interest" constitute state action subject to the fourteenth amendment has a history beginning almost with the ratification of the amendment.[29] Private persons exercising powers similar to those of the government are subject to its limitations.[30] And recently, it has been argued that any activity by an enterprise "affected with a public interest"[31] constitutes state action.[32] The *Evans* case marks the first time, however, that a majority of the court has applied the "public function" theory to an activity that was not strictly governmental.[33]

The basis for the "public function" theory in the area of chari-

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[27] BOGERT, TRUSTS AND TRUSTEES § 375 (2d ed. 1964); RESTATEMENT (SECOND), TRUSTS § 368 (1959); 4 SCOTT, TRUSTS § 368 (2d ed. 1956).

[28] Evans v. Newton, 382 U.S. 296, 300 (1966).

[29] The view was first advanced by the first Justice Harlan in his dissent to the *Civil Rights Cases*, 109 U.S. 3, 26 (1883). See Canfield, Jr., *"Our Constitution is Color Blind:" Mr. Justice Harlan and Modern Problems of Civil Rights*, 32 U. KAN. CITY L. REV. 292 (1964).

[30] Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945).

[31] The term was adopted into constitutional law in Munn v. Illinois, 94 U.S. 113 (1877), which adopted it as the test for the validity of price regulations by the state. The phrase was attributed to Lord Hale, who wrote that when "private property is 'affected with a public interest' it ceases to be *juris privati* only." For a criticism of this borrowing from Lord Hale, see McAllister, *Lord Hale and "Business Affected with a Public Interest,"* 43 HARV. L. REV. 759 (1929); Hamilton, *Affectation With Public Interest*, 39 YALE L.J. 1089 (1930).

[32] Bell v. Maryland, 378 U.S. 226, 298 (1964) (Goldberg, J. concurring); Garner v. Louisiana, 368 U.S. 157, 176 (1961) (Douglas, J. concurring). *But see* the dissent of Justice Black as to the applicability of the doctrine in racial discrimination cases. Bell v. Maryland, *supra* at 341, n.37.

[33] The doctrine had previously been limited to company-owned towns and voting cases. The Court had declined to extend it to privately operated, governmentally financed housing developments. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1941), *cert. denied*, 339 U.S. 981 (1950); Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433 (1948), *cert. denied*, 335 U.S. 886 (1948).

table trusts is a dedication of one's property to public use. If the settlor accepts the privilege of setting aside his property in perpetuity for use by a segment of the public, he must do so subject to the statutory and constitutional rights of others.[34]

The "public function" theory offers an inadequate standard for determining when a charitable trust shall be held to the limitations of the fourteenth amendment. In the first place, all charitable trusts by their nature are, in varying degrees, of a public nature. Second, it is almost impossible to formulate acceptable criteria for determining what is a public use. Third, any test devised would entangle the court in a case by case morass of determining which charitable trusts were public.[35] Fourth, such analysis avoids the important considerations of the nature of the state's action and its consequences.

IV. JUDICIAL ACTION IN AID OF DISCRIMINATION

As the "public function" theory is unacceptable, the real basis of the *Evans* opinion may be found in the state's sponsorship of racial inequality through its judicial process. In accepting the city's resignation and appointing new trustees, the state judicially aided private parties attempting to operate the park on a segregated basis.[36]

Shelley v. Kraemer[37] established that the action of state courts and judicial officers in their official capacities may constitute state action, and that racially restrictive covenants may not be enforced. Analogous to a restrictive covenant, the racial restrictions in a charitable trust originate privately by the act of the settlor. If the state is not otherwise involved in the trust, the restrictive provisions of the trust agreement may be effectuated by voluntary adherence to its terms.[38]

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[34] "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Marsh v. Alabama, 326 U.S. 501, 506 (1946).

[35] Any "public function" test is sure to suffer the same fate reserved for the "affected with a public interest" test in the economic rate regulation area. From its first pronouncement, the Court was involved in endless litigation as to what industries affected the public interest. In Nebbia v. New York, 291 U.S. 502 (1934), such criteria was discarded as not susceptible of definition and forming an unsatisfactory test.

[36] Evans v. Newton, 382 U.S. 296, 320 n.4 (1966) (dissenting opinion).

[37] 334 U.S. 1 (1948); *accord*, Barrows v. Jackson, 346 U.S. 249 (1953). See Henkin, *supra* note 20; Note, *Impact of Shelley v. Kraemer on the State Action Concept*, 44 CALIF. L. REV. 718 (1956).

[38] The court in *Evans* assumed arguendo that no constitutional difficulties would be encountered by a charitable trust of a school or center for

But if the state's judiciary is involved, it must first be determined if the nature of the judicial action is of the character as to constitute state action. It is clear that not all actions by the courts may be considered state action, for if this were true every judicial action in relation to a charitable trust would be open to possible constitutional objections. The *Shelley* case suggests that only active intervention by the state courts constitutes "state action." The administration of a trust agreement or the probate of a testamentary trust should not sufficiently involve the state.[39] However, enforcement of racial restrictions,[40] the application of the cy pres doctrine, or the appointment of new trustees contrary to the trust agreement involve greater judicial discretion than administrative actions. Such non-ministerial actions involve the state "to a significant extent" in the charitable plan of the testator.[41]

After the requisite state action has been established, it is necessary to determine whether the character of the judicial action complained of is condemned by the fourteenth amendment.[42] It is clear that not all acts of the state result in a denial of equal protection,[43] but only those involving purposeful, invidious discrimination.[44] It need hardly be doubted today that classifications based upon race or color may constitute prohibited discrimination. However, certain discriminations may be upheld on the bases of a "rational" classification in relationship to the purpose of the trust.[45]

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the use of one race only as long as the state was in no way implicated in the supervision, control, or management of the facility.

39 See Note, 20 OHIO ST. L.J. 132 (1959); Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1003 n.94 (1957). The argument has been made and rejected that the courts, on analogy to the *Shelley* case, may not enforce a discriminatory condition to a private gift or trust. Gordon v. Gordon, 332 Mass. 197, 208, 124 N.E.2d 228, 235 (1955), *cert. denied*, 349 U.S. 947 (1955).

40 In Guillory v. Administrators to Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962) the court held that no court could enforce racial restrictions in the trust agreement, and the trustees were free to admit Negro applicants in violation of such restrictions.

41 See Powers, *The Racially Discriminatory Charitable Trust: A Suggested Treatment*, 9 ST. LOUIS U.L.J. 478, 485 (1965).

42 Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 72 (1955).

43 *Cf.* Griffin v. Maryland, 378 U.S. 130 (1964); Shelley v. Kraemer, 334 U.S. 1 (1948) (by implication).

44 Snowden v. Hughes, 321 U.S. 1, 8, 18 (1944). *Accord*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

45 See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1012 (1957).

In addition, the claim to equality must be balanced with any competing constitutional claim.[46] Under such balancing, the guarantee of freedom to worship protected by the first amendment should sustain charitable trusts for the establishment of parochial schools and other church related purposes.[47] However, the testator's liberty to devise his property to whom he chooses is clearly outweighed in the *Evans* case by the claim to equality free from classifications based on race.

Moreover, the effect of the state's appointment of private trustees would have been to sanction discrimination where there had been none before, since for several years the city had refrained from enforcing the racial restrictions of the trust. As in the *Shelley* case, but for the active intervention of the state court, the petitioners could have been free to continue using the park.[48]

Such an analysis as the above would probably also preclude the possibility of a resulting trust in favor of the grantor's heirs where the racial conditions of the trust have become incapable of being carried out.[49] Where the trust agreement itself contains a reversion clause, the question becomes more difficult because the trust terminates by its own limitations without the aid of a state court. However, the time when the niceties of property law can thwart constitutional rights is long past and enforcement of the reversion would probably be denied.[50] Any such questions could be avoided

[46] See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 487-96. In any balancing test, one begins with the principle that generally the state is responsible and is violating the equal protection clause when its courts enforce private, irrational discrimination. Only when this claim to equality is outweighed by some right constitutionally protected from state interference or which the Constitution requires the state to prefer, may the state allow the discrimination. Such preferred rights might be the freedom of religion and freedom of speech secured by the first amendment. See Musser v. Utah, 333 U.S. 95, 101-03 (1948) (dissenting opinion).

[47] Pierce v. Society of Sisters, 268 U.S. 510 (1925). The *Evans* case noted that religious sects may maintain their own parochial schools, even though the state would be prohibited from excluding religious groups from public schools. See Clark, *supra* note 45, at 1011-12.

[48] *Accord,* Guillory v. Administrators to Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962), where if the court had held that the terms of the trust were binding, the active intervention of the court would have prohibited the trustees from undertaking a voluntary, non-racial admission policy.

[49] For alternate grounds for denying a reversion to the grantor's heirs, see Powers, *supra* note 41, at 496. *But cf.* Evans v. Newton, 382 U.S. 296, 312 (1966) (Black, J. dissenting).

[50] Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), *cert. denied,* Ghiotto v. Hampton, 371 U.S. 911 (1962); Capital Fed. Sav. and

by the purchase of any possible reversion from the grantor's heirs.[51]

V. CONCLUSION

The charitable trust has become a major source of social beneficence and public welfare. Its significance extends from the national research foundations to the relatively limited municipal trusts, but each affects large numbers of people. Added to this is the American belief in allowing a person to dispose of his property to whom he wishes and under whatever restrictions. However, it has become evident that the great social influence made possible by charitable trusts will not permit invidious, irrational discriminations. The answer in large part appears in requiring that charitable trusts conform to the principle of equality contained in the fourteenth amendment.

While such a solution preserves the local law of charitable trusts unaltered, it presents difficult problems in finding the necessary nexus of "state action." The *Girard* case established that charitable trusts are subject to some constitutional limitations and that a settlor could not actively engage the state in his charitable plan by making it a trustee. The *Evans* case goes one step further in denying the termination of governmental involvement by the appointment of private trustees. Once governmental management and control is brought actively into union with the trust, the property remains subject to the principle of equality. In addition, the court suggests that the public character of certain charitable trusts requires that they be treated as public institutions regardless of the private character of the trustees. Such a "public function" theory is unworkable for determining when a charitable trust conforms to constitutional principles.

A more relevant and workable analysis is to determine whether the state has actively interfered through its judicial process. Any significant intervention constitutes "state action." It is then necessary to determine whether such action constitutes "invidious" discrimination of the kind prohibited by the fourteenth amendment. The state's action may not be considered invidious if some countervailing constitutional right rationally supports it.

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Loan Ass'n v. Smith, 136 Colo. 265, 316 P.2d 252 (1957). *Contra,* Charlotte Park and Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied,* Leeper v. Charlotte Park and Recreation Comm'n, 350 U.S. 983 (1956).

[51] Leeper v. Charlotte Park and Recreation Comm'n, 2 RACE REL. L. REP. 411 (1957).