

Constitutional Law—Charitable Trusts—Fourteenth Amendment Applicable to Private Trustees of "Public" Park (Evans v. Newton, 382 U.S. 296 (1966))

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RECENT DECISIONS

CONSTITUTIONAL LAW — CHARITABLE TRUSTS — FOURTEENTH AMENDMENT APPLICABLE TO PRIVATE TRUSTEES OF "PUBLIC" PARK. — Under the provisions of a 1911 will, certain land located in Macon, Georgia, was placed in trust to be used as a park exclusively for Caucasians. The city of Macon was designated as trustee, subject to the control of a board of managers. In 1963, the members of this board brought an action against the city, alleging that it had violated the provisions of the will by admitting Negroes to the park. The city was permitted to resign and the Georgia court appointed new trustees. Six Negroes, residents of Macon, intervened and contended that the reservation of the park to white persons violated the equal protection clause of the fourteenth amendment. The United States Supreme Court *held* that the public character of the park required that it be treated as a public institution subject to the limitations of the fourteenth amendment, regardless of who had title under state law. *Evans v. Newton*, 382 U.S. 296 (1966).

The fourteenth amendment was adopted primarily to protect individual rights from infringement by the states.¹ Since the *Civil Rights Cases*,² however, it has been an established principle that *private* discrimination is in no way circumscribed. To the United States Supreme Court, it seemed axiomatic that state action was distinguishable from private action.³ With time, however, the concept of state action has been extended to bring activity formerly viewed as private within constitutional limitations.

Soon after the ratification of the fourteenth amendment, the Supreme Court extended its application to include not only state legislative action (indicated by the word "law" in the privileges and immunities clause), but also action by agencies of the state directly concerned with a governmental function.⁴ Acts of public

¹ For an expansive discussion of the equal protection clause, see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

² 109 U.S. 3 (1882).

³ Difficulty was perceived by Mr. Justice Harlan, dissenting in the *Civil Rights Cases*, 109 U.S. 3, 26 (1882). He maintained that common carriers, inns, and places of amusement were instrumentalities of the state and thus subject to the limitation of the fourteenth amendment. See Weston, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957).

⁴ *E.g.*, *Ward v. Love County*, 253 U.S. 17 (1920) (county); *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 273 (1913) (city); *Ex parte Virginia*, 100 U.S. 339 (1880) (state court).

officials, not authorized or demanded by state law, were also held to be state action in early cases.⁵ Individual action by state officials acting "under color of law" was held subject to the limitations of the fourteenth amendment, even where the official's conduct was criminal,⁶ or where he was not acting in an official capacity.⁷

In *Smith v. Allwright*,⁸ the Supreme Court for the first time applied constitutional restrictions to a private organization. The Court held that the Democratic Party of Texas was engaged in state action, and that the exclusion of Negroes from its membership was violative of the Constitution.

[T]he recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix qualifications of primary elections is delegation of a state function that may make the party's action the action of the State.⁹

This principle was extended in *Terry v. Adams*,¹⁰ wherein it was held that a political organization that conducted its own straw primary prior to the statutory primary was also subject to constitutional limitations in choosing its membership.

In *Smith* and *Terry*, private organizations were held subject to the Constitution when they assumed a function which the Court regarded as the *exclusive* function of the state. Similarly, in *Marsh v. Alabama*,¹¹ a company was engaged in what the Court believed was exclusively a state function, *i.e.*, the operation of a municipality (a company town). A Jehovah's Witness distributed religious literature on the company-owned sidewalk. Upon her refusal to leave, she was arrested and convicted of trespass. The Supreme Court, in reversing the conviction, held that the defendant's freedom of speech and religion had been abridged. By operating a municipality, a private organization was held to act for the state, although no state statute, policy, or official condoned the constitutional violation.

In an important state action case, *Shelley v. Kraemer*,¹² it was held that state court enforcement of racially restrictive covenants was a denial of the equal protection of the laws in violation of the fourteenth amendment. The covenant was judicially unenforceable because the state lacked power to limit land tenure and occupancy by race. Thus, the aid of the court was sought to compel behavior in which the state itself could not have engaged. In *Barrows v.*

⁵ *Ex parte Virginia*, *supra* note 4.

⁶ *Screws v. United States*, 325 U.S. 91 (1945).

⁷ *Griffin v. Maryland*, 378 U.S. 130 (1964).

⁸ 321 U.S. 649 (1944).

⁹ *Smith v. Allwright*, 321 U.S. 649, 660 (1944).

¹⁰ 345 U.S. 461 (1953).

¹¹ 326 U.S. 501 (1946).

¹² 334 U.S. 1 (1948).

Jackson,¹³ the Court indicated its allegiance to this doctrine, holding unconstitutional the award of damages for breach of a racially restrictive covenant.

The Court, however, has never indicated possible limitations to the *Shelley* doctrine. Some writers suggest that the doctrine is limited to discriminatory covenants or to discriminatory contracts where there is a willing seller and a willing buyer.¹⁴ Others suggest that the *Shelley* rationale may be extended so that the only private discrimination that may be practiced is that voluntarily accepted by the parties, and, that once the sanction of a court is sought, state action results.¹⁵ Therefore, one could not refuse to sell to a Negro solely on the basis of his color if the Negro sought judicial aid in enjoining the practice. It is doubtful whether the Court intended to extend the fourteenth amendment to such a degree that it would become an omnipotent law, regulating all human conduct. The *Shelley* doctrine seems to apply only in the situation where a court is asked to enforce private discrimination, and not where a court refuses to interfere with individual discrimination.¹⁶

In 1957, the city of Philadelphia, serving as trustee of an all-white school for orphans created under a will, refused to admit two Negro boys. Citing only *Brown v. Board of Education*,¹⁷ the Supreme Court held that the city was engaged in activity prohibited by the fourteenth amendment.¹⁸ On remand, the Pennsylvania courts held that if the identity of the trustee required a finding of state action the proper remedy would be substitution of a private trustee, not the excision of the limitation to whites.¹⁹ The Supreme Court refused to review this decision,²⁰ declining to pass on the continued discrimination now in private guise. Similarly, in *Evans v. Newton*,²¹ the Georgia courts attempted to avoid constitutional limitations by the mere change from public to private trustees.

Repeatedly emphasizing the particular facts and circumstances before the Court, the majority in *Evans* stated the principle that conduct formally private may become so entwined with governmental policy or endowed with functions so governmental in nature that it becomes subject to constitutional limitations. Assuming that the city would continue to maintain the park, and that the private

¹³ 346 U.S. 249 (1953).

¹⁴ Shanks, "State Action" and the Girard Estate Case, 105 U. PA. L. REV. 213, 235-36 (1956).

¹⁵ Huber, *Revolution in Private Law?*, 6 S.C.L.Q. 8 (1953).

¹⁶ Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 13 (1959).

¹⁷ 347 U.S. 483 (1954).

¹⁸ *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957).

¹⁹ *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958).

²⁰ *Pennsylvania v. Board of Directors of City Trusts*, 357 U.S. 570, *motion for rehearing denied*, 358 U.S. 858 (1958).

²¹ 220 Ga. 280, 138 S.E.2d 573 (1964).

trustees would continue segregation in the park, the Court held that because of the public character and function of the park, the substitution of trustees could not make the park private. Once the tradition of the park as a public function had been established, the fourteenth amendment applied, regardless of who had title under state law.

Mr. Justice White disagreed with the majority's assumption that the city remained involved in the management and control of the park. Indeed, the lower court's record was silent on this point. Nevertheless, he concurred with the conclusion, finding state action in a Georgia law authorizing racially discriminatory charitable trusts.²² He found it unlikely that charitable trusts for a limited class of persons were lawful before the passage of this law; and concluded that the state had become so involved that the racial restriction reflected state policy and therefore violated the fourteenth amendment.

In a separate opinion, Justices Harlan and Stewart contended that no justiciable issue had been presented to the Court.²³ In addition, they objected to the use of the "public function" theory. They could find only one other fourteenth amendment case, *Marsh v. Alabama*,²⁴ in which this theory had been utilized. No stronger case for the "public function" approach could be imagined, they pointed out, and the case was not the basis for any other Supreme Court decision. They concluded:

While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity, the example of schools is . . . sufficient to indicate the pervasive potentialities of this "public function" theory of state action. It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. . . . And it carries the seeds of transferring to federal authority vast areas of concerns whose regulation has wisely been left by the Constitution to the States.²⁵

²² GA. CODE ANN. § 69-504 (1957). This was the approach used in the decisions involving sit-in demonstrations. See, e.g., *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963).

²³ In his dissent, Mr. Justice Black found that the Court's decision was in the nature of an advisory opinion. He pointed out that the lower court had only accepted the resignation of the city as trustee and appointed new trustees. No federal question had been decided and there was no indication that the new trustees would operate the park on a discriminatory basis. *Evans v. Newton*, 382 U.S. 296, 312 (1966) (dissenting opinion).

²⁴ 326 U.S. 501 (1946). The white primary cases, *Terry v. Adams*, 345 U.S. 461 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944), arose under the fifteenth amendment; the principles are the same.

²⁵ 382 U.S. 296, 322 (1966). The press concurred, at least in part, with the dissenters. See N.Y. Times, Jan. 23, 1966, § 4, p. 10; Time, Jan. 28, 1966, p. 40.

It is a matter of conjecture whether the Court's opinion will apply only to trusts which provide for both discrimination and a governmental trustee, or if it will be extended to the degree feared by the dissenters. At least one Supreme Court Justice would extend the concept of state action to include all businesses which serve the public and are licensed and supervised by the state.²⁶ A more moderate and selective approach is probable, but logical limitations are not easily formulated.²⁷

The decision in *Evans* does not make all charitable trusts subject to constitutional limitations. However, it is impossible to escape elements of state action inherent in all charitable trusts, even those administered by private trustees. There are special privileges accorded these trusts as contrasted with private trusts, including exemption from taxation and perpetual existence.²⁸ Sometimes, exemption from tort liability exists.²⁹ Frequently, charitable trusts are enforced by the state attorney general.³⁰ In many instances, the trust funds are utilized for purposes which fall within the Supreme Court's definition of "public function."

To avoid possible invalidation of the majority of charitable trusts, several approaches are available. To obviate the problem before it arises, the settlor's freedom to discriminate may be curtailed by state statute.³¹ Application of the *cy pres* doctrine, generally permitted only when the implementation of the settlor's purpose becomes impossible or illegal, gives courts discretion to alter the trusts within the general intention of the testator.³² Judicial restraint has precluded the use of *cy pres* to any great extent, but

²⁶ *Lombard v. Louisiana*, *supra* note 22, at 282 (Douglas, J., concurring). See also *Bell v. Maryland*, 378 U.S. 226, 242-60 (1964) (Douglas, J., concurring).

²⁷ There are several state court decisions discussing elements of discrimination and state action which the Supreme Court has refused, on one ground or another, to set aside. In *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956), noted in 30 ST. JOHN'S L. REV. 285 (1956), the court held that a gift of land to a city on the condition that it not be used by Negroes created a possibility of reverter which could operate without affirmative state action. See also *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 243 Iowa 147, 60 N.W.2d 110, *aff'd per curiam*, 348 U.S. 880 (1954), *judgment of affirmance vacated, cert. dismissed*, 349 U.S. 70 (1955), in which the state court upheld a restriction in a contract for the purchase of a burial lot to members of the Caucasian race.

²⁸ 4 SCOTT, TRUSTS §§ 348.4, 365 (2d ed. 1956).

²⁹ See generally PROSSER, TORTS § 127 (3d ed. 1964).

³⁰ 4 SCOTT, *op. cit. supra* note 28, § 391. N.Y. REAL PROP. LAW § 113(3); N.Y. PERS. PROP. LAW § 12.

³¹ See N.Y. EDUC. LAW § 313, which prohibits discrimination in private education.

³² Clark, *Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard*, 66 YALE L.J. 979, 1000 (1957); 4 SCOTT, *op. cit. supra* note 28, §§ 367.2, 399.

altering the terms of a trust to permit desegregation may be preferable to transferring the trust property to the holder of the testator's reversionary interest.

Moreover, the fourteenth amendment does not forbid all discrimination. A trust for a religious purpose is sufficiently protected by the first amendment; thus, the equal protection clause is of secondary importance. Discrimination by rational classification is not a denial of equal protection of the laws.³³ For example, a trust for one sex or age group could be established if a reasonable objective would be served. As a corollary, with the realization that absolute equality will never be achieved or even defined, courts might measure discrimination by its effect on the community. Thus, a distinction might be drawn between the psychologically harmful segregated school and the beneficial racially restricted scholarship fund.

The pervasive qualities of the "public function" theory may be limited by the adjective "exclusive." The maintenance of a public park has traditionally been considered a state function, as have been the conduction of elections and the operation of municipalities. Neither orphanages nor schools have been *exclusively* in the public domain.³⁴ This has been the approach of the Supreme Court in the white primary cases as well as in *Marsh*.

In *Evans*, the Court merely affirmed its position that the fourteenth amendment is directed at community arrangements and that its mandates cannot be circumscribed by local concepts of property. By considering the effect of the activity on the community rather than the label of private or public, the Court has looked to the substance of the activity and has refused to follow an inflexible formula similar to the approach of absolute dichotomy between private and public, espoused by the majority in the *Civil Rights Cases*.³⁵

While society favors the creation of charitable trusts, there is no basis for tolerating trusts that are whimsical, harmful, or discriminatory. By cautious application of the term "state action" under the fourteenth amendment, and through utilization of the

³³ Cf. *Goesaert v. Cleary*, 335 U.S. 464 (1948), upholding a state law prohibiting females from being bartenders.

³⁴ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). A helpful, although perhaps inaccurate, analogy may be made to the distinction drawn between governmental and proprietary functions in sovereign tort immunity cases. See PROSSER, *op. cit. supra* note 29. Thus, if a private individual engages in what is considered a governmental function, he is subject to constitutional limitations. Proprietary functions, not the exclusive function of the state, may be engaged in by private persons without such restrictions. This analogy indicates the difficulties that may be encountered.

³⁵ 109 U.S. 3 (1882).

realistic approach of the Supreme Court, courts will avoid the wholesale destruction of charitable trusts while removing discrimination from areas hitherto beyond the reach of the Constitution.



CONSTITUTIONAL LAW—REMOVAL OF FEDERAL JUDGES—RELIEF DENIED FROM INTERLOCUTORY ORDER OF JUDICIAL COUNCIL.—A meeting of the Judicial Council of the Tenth Circuit of the United States reviewed the actions of Chief Judge Stephen Chandler concerning the affairs of the United States District Court for the Western District of Oklahoma. An order was issued, purportedly under authority of a federal statute,¹ stating that Judge Chandler, being presently unable, or unwilling, to discharge efficiently the duties of his office, was to take no action whatever in any case or proceeding then or thereafter pending before his court. Judge Chandler applied to Mr. Justice White, Circuit Judge for the Tenth Circuit, to stay the order of the Judicial Council. The application was referred to the Supreme Court which *held* that since the action was entirely interlocutory in character, the relief requested should be denied pending further proceedings. *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 382 U.S. 1003 (1966).

During the middle ages, royal officials of England held their offices either "during good behavior" or "during the King's pleasure."² In addition, English judges could be disenfranchised by impeachment proceedings in the legislature or by writ of *scire facias* in the courts.³ However, the English Act of Settlement,⁴ enacted subsequent to the Puritan Revolution, was interpreted as providing that English judges held their offices "during good behavior,"⁵ and that they could be removed only for misconduct upon address by both Houses of Parliament.⁶ Since it appears that the writ of *scire facias* had not been employed for some time, there was no

¹ 28 U.S.C. §332 (1964).

² Ross, "Good Behavior" of Federal Judges, 12 U. KAN. CITY L. REV. 119, 120 (1944).

³ *Id.* at 120-22. Late in the 16th century, the word "impeachment" began to acquire its present meaning of accusing a person of a high crime or misdemeanor. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849 (1938). On the other hand, *scire facias* was a writ requesting that authority given be repealed. BLACK, LAW DICTIONARY (4th ed. 1951).

⁴ Act of Settlement, 1700, 12 & 13 Will. 3, c. 2.

⁵ Ross, *supra* note 2, at 119-21.

⁶ Act of Settlement, 1700, 12 & 13 Will. 3, c. 2; see BORKIN, THE CORRUPT JUDGE 193 (1962).