

Constitutional Law - Trusts - State Action Under the Fourteenth Amendment - *Evans v. Abney*, 90 S. Ct. 628 (1970)

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an increased burden on the ability of the consumer to judge, for himself, the quality of the products he will purchase, and thus makes the role of the independent tester-endorser increasingly more significant. As this role enlarges, the duty of care which the independent tester-endorser owes to the public must increase accordingly.

BRUCE E. TITUS

Constitutional Law—TRUSTS—STATE ACTION UNDER THE FOURTEENTH AMENDMENT. *Evans v. Abney*, 90 S. Ct. 628 (1970).

The will of Senator A. O. Bacon of Georgia conveyed property in trust to his hometown of Macon, Georgia, to be used as a public park exclusively for white people. In 1966, the Supreme Court held that the park could not be operated on a racially discriminatory basis.¹ Following that decision, the Supreme Court of Georgia ruled that since the testator's intent to provide a park for the exclusive use of white people had been legally frustrated, the trust must fail, and therefore, the property by state law² must revert to the Senator's heirs.³

The Supreme Court affirmed⁴ the Georgia decision on the ground that the interpretation of wills has always been governed by state law,⁵ and that the termination of the trust was a proper application of Georgia's racially neutral trust law.⁶ Justice Black, speaking for the

1. *Evans v. Newton*, 382 U.S. 296 (1966). See 52 A.B.A.J. 276 (1966); 8 WM. & MARY L. REV. 152 (1966).

2. GA. CODE ANN. §§ 108-06(4) (1959). "Where a trust is expressly created, but . . . [its] uses . . . fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." See *Adams v. Bass*, 18 Ga. 130 (1855) (testator's intent to settle his slaves in Indiana and Ohio was frustrated by statutes of the latter states, the government held that *cy pres* was not applicable and that the testator died intestate as to his slaves and that a trust resulted for his heirs).

3. *Evans v. Abney*, 224 Ga. 826, 165 S.E.2d 160 (1968). The Court also found that the doctrine of *cy pres* was not applicable as segregation was an essential and inseparable part of the testator's plan.

4. *Evans v. Abney*, 90 S. Ct. 628 (1970). Mr. Justice Brennan dissented on the ground that the closing of the park was the result of discriminatory state action. *Id.* at 636. Mr. Justice Douglas dissented on the ground that reversion of the park to the heirs is less in accord with the Senator's intent than retention of the park by the city for municipal use. *Id.* at 635.

5. *Id.* at 633. See *Lyeth v. Hoey*, 305 U.S. 188, 193 (1938).

6. See 90 S. Ct. at 631. Other jurisdictions have reached similar results: *First Universalist Society v. Swett*, 148 Me. 142, 90 A.2d 812 (1952) (bequest for support of a specific church that had ceased to exist reverted to testator's estate by virtue of a resulting trust); *Bullard v. Shirley*, 153 Mass. 559, 27 N.E. 766 (1891) (bequest to town for support of a Unitarian clergyman was illegal, therefore the gift failed and

Court, reasoned that the fourteenth amendment⁷ is not violated when a state court applies "neutral and non-discriminatory" trust laws and therefore, reaches a result that denies whites, as well as negroes, the benefits of a trust. The Court did not find "state action" where there existed at the time Senator Bacon executed his will a Georgia statute permitting racial restrictions in trusts.⁸ The Court regretted the loss of the city park as a result of a constitutional requirement to integrate, but characterized the loss as a "part of the price we pay" for freedom of testation.⁹

In segregation cases, the existence of "state action" is a prerequisite to obtaining the protection of the fourteenth amendment.¹⁰ In the past, city ownership of a building containing a segregated restaurant,¹¹ administration of a segregated college by a public board of directors,¹² use of the courts to enable a "public" park to remain segregated,¹³ judicial enforcement of a restrictive covenant,¹⁴ suppression of free-

the money went to the testator's next of kin; *La Fond v. City of Detroit*, 357 Mich. 362, 98 N.W.2d 530 (1959) (bequest of a residuary estate to a city for a playfield for white children was void as against public policy and the doctrine of *cy pres* was not applicable). 4 A. SCOTT, *THE LAW OF TRUSTS* § 399, at 3085 (1967), which states that when the only purpose of the testator is impossible to accomplish, then the *cy pres* doctrine is not applicable. See generally Comment, *A Revaluation of Cy Pres*, 49 YALE L.J. 303 (1939).

7. U.S. CONST. amend. XIV, § 1: "No State shall make or enforce any law . . . nor deny to any person . . . the equal protection of the laws."

8. GA. CODE ANN. § 69-504 (1967):

Any person may . . . devise . . . to any municipal corporation of this State, . . . in trust, . . . lands . . . dedicated in perpetuity to the public use as a park, pleasure ground, . . . and . . . by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property . . . shall be limited to the white race only, or to white women and children only, or to the colored race only

9. 90 S. Ct. at 633.

10. Civil Rights Cases, 109 U.S. 3, 11 (1883): "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment." See generally Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *The Misleading Search For "State Action" Under The Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

11. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

12. *Pennsylvania v. Board of Trustees*, 353 U.S. 230 (1957).

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

14. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

dom of speech in a company-owned town,¹⁵ prevention of Negro voting in a primary election,¹⁶ orders of a private park guard acting under the color of his authority as a deputy sheriff,¹⁷ and the statements of city officials that they would not permit negroes to seek desegregation,¹⁸ have all been held to constitute "state action."

In *Evans v. Abney*, the Court begins to delineate those acts of state agencies that are insufficient to constitute state involvement in racial discrimination. The decision enumerates two activities that lie beyond the uncertain line that defines the limits of "state action." A state court may enforce a neutral principle of trust law even if the result is to aid a private testator's scheme of discrimination. The existence of a state statute permitting racially restrictive trusts is not sufficient "state action" to invalidate a trust made under the authority of such a statute.¹⁹

To the extent that predictability in the law is desirable, the decision will benefit society. Those seeking to discriminate against racial groups may be encouraged, however, to push their activities to the limit of what is now a more clearly defined area of law.

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Constitutional Law—THE IN-SERVICE CONSCIENTIOUS OBJECTOR.
Goguen v. Clifford, 304 F. Supp. 958 (D. N.J. 1969).

After his induction into the United States Army, Private Philip W. Goguen applied for discharge on the basis that he had become a conscientious objector to all war.¹ Although his sincerity was unquestioned, Goguen's commanding officer denied the application on the grounds that his request was based on "essentially political, sociological or philosophical views, or a merely personal moral code" and not upon religious

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

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

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

18. *Peterson v. Greenville*, 373 U.S. 244 (1963).

19. *But cf. Reitman v. Mulkey*, 387 U.S. 369 (1967) (article of state constitution prohibiting state from denying right of any person to decline to sell his real property to such person as he in his absolute discretion chooses would involve the state in unconstitutional racial discrimination).

1. ARMY REGULATION 635-20 (May 1, 1967) provides for a procedure whereby request for discharge may be made on grounds of conscientious objection to war which arose after admission to the military. The regulation was implemented in accordance with DEPARTMENT OF DEFENSE DIRECTIVE 1300.6 (revised May 1968).