

THE IMPACT OF THE CIVIL RIGHTS ACT OF 1866 ON RACIALLY DISCRIMINATORY DONATIVE TRANSFERS

*Florence Wagman Roisman**

If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State . . . arguendo . . . no constitutional difficulty would be encountered.

Evans v. Newton¹

All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase . . . [and] hold . . . real and personal property.

Civil Rights Act of 1866²

* Professor of Law and Paul Beam Fellow, Indiana University School of Law-Indianapolis. This Article is dedicated to the memory of Minde Glenn Browning, M.L.S., J.D., who was the Assistant Director for Reader Services at the Library of the Indiana University School of Law-Indianapolis until her untimely death on May 21, 1999. Minde was a vibrant and effective colleague; she is sorely missed.

I am grateful for two Summer Faculty Fellowships and a Research Semester, all provided by the Indiana University School of Law-Indianapolis; for the extraordinarily detailed and thoughtful criticism of Professor Edward C. Halbach, Jr., Reporter for the Restatement (Third) of Trusts, and the very helpful comments of Professors Richard Chused, Jonathan L. Entin, Mary Louise Fellows, Thomas P. Gallanis, Robert A. Katz, Ronald J. Krotoszynski, Laura K. Ray, Robert G. Schwemm, Louis Michael Seidman, Joseph William Singer, E. Gary Spitko, Mark V. Tushnet, Lawrence W. Waggoner, and participants in a faculty colloquium in Indianapolis; for the excellent research assistance of Reference Librarian Richard Humphrey, Victoria Deák, and Paul Jefferson; and for the careful, patient, and exemplary secretarial work of Mary R. Deer and Melissa Gardner.

I am very conscious that this Article brings together two bodies of law, civil rights and donative transfers, and that I have an appreciable background in only one of them. I have tried to avoid errors by consulting others who are experts in the field of donative transfers, but of course I am responsible for any mistakes and misjudgments that remain. While this Article expresses the conclusions I have reached at this point, my goal is to encourage further consideration of these issues.

1. 382 U.S. 296, 300 (1966).
2. 42 U.S.C. § 1982 (1998).

I.	PRE-1968 LEGAL CONSTRAINTS ON RACIALLY DISCRIMINATORY DONATIVE TRANSFERS.....	468
	A. <i>The Use of Common Law Principles to Invalidate Racially Discriminatory Donative Transfers Before 1968</i>	468
	B. <i>The Use of the State Action Doctrine to Invalidate Racially Discriminatory Donative Transfers Before 1968</i>	473
II.	LEGAL CHANGES BEGINNING IN 1968	477
III.	RACIALLY DISCRIMINATORY DONATIVE TRANSFER CASES SINCE 1968.....	480
	A. <i>Evans v. Abney</i>	481
	B. <i>The Exceptions: Decisions that Apply Title VIII of the 1968 Civil Rights Act to Racially Discriminatory Donative Transfers</i>	484
	C. <i>The General Rule: Post-1968 Decisions that Do Not Consider the Pertinence of Title VIII or the 1866 Civil Rights Act to Racially Discriminatory Donative Transfers</i>	487
	D. <i>A 1999 Decision that Considers But Rejects the Pertinence of Title VIII and the 1866 Civil Rights Act to a Racially Discriminatory Donative Transfer</i>	501
IV.	THE IMPACT OF SECTIONS 1981 AND 1982 ON RACIALLY DISCRIMINATORY DONATIVE TRANSFERS	503
	A. <i>The Development of the Law Regarding Sections 1981 and 1982</i>	504
	B. <i>The Application of Sections 1981 and 1982 to Discrimi- natory Donative Transfers—In General</i>	513
	C. <i>Grantor Autonomy and the Civil Rights Laws</i>	519
V.	CIRCUMSTANCES IN WHICH DONATIVE TRANSFERS MAY BE PERMISSIBLE EVEN IF THEY ARE RACIALLY DISCRIMINATORY	524
	A. <i>May There Be Constitutional Protection for Some Ra- cially Discriminatory Donative Transfers?</i>	524
	B. <i>Donative Transfers that Favor Minorities</i>	530

VI.	THE APPLICATION OF THE 1866 CIVIL RIGHTS ACT TO RACIALLY DISCRIMINATORY DONATIVE TRANSFER CASES THAT WERE DECIDED WITHOUT CONSIDERATION OF THAT STATUTE.....	535
	A. <i>Discriminatory Donative Transfers Held Not to Involve State Action Nonetheless May Violate Section 1982</i>	535
	B. <i>That A Discriminatory Donative Transfer Violates Section 1982 as Well as the Fourteenth Amendment May Affect the Remedy for the Illegality</i>	539
	1. <i>Evans v. Abney</i>	542
	2. <i>Connecticut Bank & Trust Co. v. Johnson Memorial</i>	545
	3. <i>Smyth v. Anderson</i>	547
	4. <i>Hermitage Methodist Homes of Virginia v. Dominion Trust Co.</i>	548
	5. <i>Home for Incurables of Baltimore City v. University of Maryland Medical System Corp.</i>	550
VII.	CONCLUSION.....	553

Donative transfers invariably are discriminatory, as grantors exercise their power to distinguish among the possible objects of their bounty.³ Certain kinds of discriminatory donative transfers, however, invite special concern. In particular, discriminatory transfers based on race,⁴ religion, or gender have given rise to considerable litigation.⁵

3. See Linda Hamilton Krieger, *The Content of Our Categories*, 47 STAN. L. REV. 1161, 1186-218 (1995) (discussing cognitive and social psychological insights into the nature of discrimination); George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 127-28 (1995) (discussing the meaning of "discrimination").

4. The term "race" lacks fixed meaning. As the Supreme Court has recognized, "[m]any modern biologists and anthropologists . . . criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations." *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987). In addition to the authorities cited by the Supreme Court in *St. Francis College*, see also 1 THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA* (vol. 1 1994, vol. 2 1997); RACE AND OTHER MISADVENTURES: ESSAYS IN HONOR OF ASHLEY MONTAGU IN HIS NINETIETH YEAR (Larry T. Reynolds & Leonard Lieberman eds., 1996); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION'S DEFINITION* (1993); IVAN HANNAFORD, *RACE: THE HISTORY OF AN IDEA IN THE WEST* (1996); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); RACE AND ETHNIC CONFLICT: CONTENTING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE (Fred L. Pincus & Howard J. Ehrlich eds., 2d ed. 1999); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kinberlé Crenshaw et al. eds.,

Before 1948, racial discrimination in donative transfers generally received no particular attention from the courts;⁶ racially discriminatory donative transfers were enforced routinely.⁷ However, with the Supreme Court's 1948 decision in *Shelley v. Kraemer*,⁸ it became evident that government enforcement of such racial restrictions might violate the Equal Protection Clause, and the 1954 decision in *Brown v. Board of Education*⁹ strongly signaled the end of state-sponsored racial distinctions.¹⁰ Thereafter, in litigation involving racially discriminatory donative transfers, the issue generally was whether state action were involved: if it were, the racial restriction would be held unlawful; if it were not, the racial restriction would be upheld. If the restriction were held unlawful, the court then would have to decide whether to excise only the racial restraint or the entire gift to which it attached.

With respect to racially discriminatory donative transfers, courts and commentators have paid very little attention to two federal statutes that outlaw discrimination on the basis of "race"—provisions of the Civil Rights Act of 1866 that now are codified as 42 U.S.C. §§ 1981(a) and 1982.¹¹ Until 1968, it generally was understood that these statutes

1995); AUDREY SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW 11, ch. 14 (1999).

5. With respect to gender, which is not discussed further in this Article, see, e.g., Trustees of Univ. of Del. v. Gebelein, 420 A.2d 1191 (Del. Ch. 1980) (upholding a women-only scholarship fund administered at state university as compensation for past discrimination); *In re Crichfield Trust*, 426 A.2d 88 (N.J. Super. Ct. Ch. Div. 1980) (employing the *cy pres* doctrine to allow scholarships for female as well as male students); *In re Wilson*, 452 N.E.2d 1228 (N.Y. 1983) (holding privately created and administered charitable trusts to finance the education of male students to be state action); *In re Certain Scholarship Funds*, 575 A.2d 1325 (N.H. 1990) (changing the requirement that a scholarship recipient be a "boy" to a "student" under the *cy pres* doctrine); see also David Luria, *Prying Loose the Dead Hand of the Past: How Courts Apply Cy Pres to Race, Gender, and Religiously Restricted Trusts*, 21 U.S.F. L. REV. 41 (1987); Steven F. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 U. PITT. L. REV. 153 (1986).

6. Such discrimination was not uncommon. See, e.g., A. S. Klein, Annotation, *Validity and Effect of Gift for Charitable Purposes which Excludes Otherwise Qualified Beneficiaries Because of their Race or Religion*, 25 A.L.R.3d 736 (1969).

7. See Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 980-81 n.7 (1957) (identifying some pre-1948 trusts); LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 119 (1955) [hereinafter DEAD HAND] (noting, among charitable devises, one "for the care and support of worthy white women" and quoting *Woodstown Nat. Bank v. Snelbaker*, 40 A.2d 222, 223 (N.J. Ch. 1945)).

8. 334 U.S. 1 (1948).

9. 347 U.S. 483 (1954).

10. See Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1049-52 (1989) (discussing the gradual extension of *Brown v. Bd. of Educ.* from public education to other areas); Rutherglen, *supra* note 3, at 122-23 (noting that "it was only several years later . . . that the scope of the decision [in *Brown v. Bd. of Educ.*] became clear: it prohibited all forms of intentional [racial] discrimination by the states") (footnote omitted).

11. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified with some differences in language at 42 U.S.C. §§ 1981(a), 1982 (1998)). Professor Jonathan Entin is an exception. See Jonathan L. Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 WM.

applied only to state action, so there was no particular reason to refer to them rather than to the Equal Protection Clause. In 1968, however, the Supreme Court held, in *Jones v. Alfred H. Mayer Co.*,¹² that section 1982 applies to private as well as government action.¹³ This potentially enlarged the scope of the 1866 Act's application to donative transfers.

Section 1982 provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, . . . [and] hold . . . real and personal property."¹⁴ The Supreme Court held in *Jones* that the statute protected a potential homebuyer from being rejected as a purchaser because of his race.¹⁵ Analysis of the statute suggests that, in the same way, section 1982 may protect a potential beneficiary from being rejected as a grantee of property, whether by inheritance or other form of transfer, because of her race. Surprisingly, since the 1968 decision in *Jones*, the courts generally have not assessed the impact on donative transfers of either section 1981(a) or section 1982.¹⁶

This Article considers the relevance of the 1866 Civil Rights Act to donative transfers. It suggests that this Reconstruction statute does apply to donative transfers, that it invalidates some discriminatory donative transfers heretofore thought to be permissible, and that it alters the relief appropriate in other discriminatory donative transfer cases.

Part I of the Article outlines the pre-1968 judicial treatment of donative transfers that discriminated on the basis of race. Part II describes the important legal changes that began in 1968, when the Supreme Court held that 42 U.S.C. § 1982 applies to acts of private discrimination. Part III reviews discriminatory donative transfer cases that were decided after 1968, showing that they ignore the pertinence of sections 1981(a) and 1982.

& MARY L. REV. 769, 793 (1993) [hereinafter *Defeasible Fees*].

12. 392 U.S. 409, 413 (1968).

13. *Jones*, 392 U.S. at 413 ("[Section] 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and . . . is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.").

14. Section 1982 provides in full as follows: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

15. *Jones*, 392 U.S. at 413.

16. Sections 1981(a) and 1982 were part of section 1 of the Civil Rights Act of 1866. The focus of this Article is on section 1982, but there will be references also to section 1981(a). Section 1981(a) provides as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).

Part IV considers the impact that the changes in the law should have had in discriminatory donative transfer cases. Part IV.A reviews the post-1968 developments with respect to sections 1981 and 1982 and Part IV.B analyzes how sections 1981 and 1982 would apply to donative transfers in general. It concludes that section 1982 invalidates donative transfers that discriminate on the basis of race even where there is no state action. Part IV.C addresses a principal objection to this thesis: grantor autonomy.

Part V considers whether there are circumstances in which donative transfers may be permissible even if they are racially discriminatory. Part VI examines the consequence of the thesis advanced in Part IV by analyzing donative transfer cases in which discriminatory restraints were held to be lawful and donative transfer cases in which the invalidation of discriminatory restraints led to destruction of the underlying gift. Part VI argues that the restraints that were held lawful should have been invalidated under section 1982 and that the remedy for violation should have been enforcement of the underlying gift with elimination of the discriminatory restraint.

I. PRE-1968 LEGAL CONSTRAINTS ON RACIALLY DISCRIMINATORY DONATIVE TRANSFERS

Before 1968, litigation involving racially discriminatory donative transfers was resolved on either common law or constitutional grounds.¹⁷ The relatively limited use of common law principles is discussed below in subpart A. Much more often, decisions about racially discriminatory donative transfers were based on constitutional grounds: when government officials were involved in the administration of the property, or the property had acquired a public character, courts held that the Fourteenth Amendment's Equal Protection Clause had been violated. These cases are discussed below in subpart B.

A. *The Use of Common Law Principles to Invalidate Racially Discriminatory Donative Transfers Before 1968*

Before 1968, courts did not invalidate racial restraints in donative transfers on the ground that they violated general public policy.¹⁸ This

17. See Swanson, *supra* note 5, at 157 (“[T]he two legal sources which have historically been used to challenge such [racially and sexually discriminatory] trusts [are] traditional trust law and the Equal Protection Clause.”).

18. See Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291, 302 (1984) (noting that, prior to 1983, “neither the cases nor nonjudicial authorities discerned a public policy bar to racially restrictive charitable trusts as a matter of trust law”) (footnote omitted). Galston states that:

was true even after the Supreme Court's 1948 decision in *Hurd v. Hodge*,¹⁹ a companion case to *Shelley v. Kraemer*.²⁰ While *Shelley* was decided on the ground that judicial enforcement of racially restrictive covenants was state action forbidden by the Fourteenth Amendment, *Hurd* arose in the District of Columbia, where the Fourteenth Amendment does not apply. The Supreme Court held in *Hurd* that "judicial enforcement of the restrictive covenants by the courts of the District of Columbia is prohibited by the Civil Rights Act" of 1866.²¹ The Supreme Court also said, however, that judicial enforcement of the covenants is "contrary to the public policy of the United States."²²

Despite the Supreme Court's reference to public policy in *Hurd*, even after 1948, courts routinely enforced racially discriminatory donative transfers unless the transfers had been held to involve state ac-

there is no suggestion in any of the . . . cases . . . that a charitable gift to benefit the members of a single race was void as against public policy, [and while] . . . the second edition of Bogert's treatise [in 1964] no longer affirms the validity of racially discriminatory charitable trusts [as did the first edition in 1935], . . . Bogert only asserts that racist charitable trusts may be impermissible if there are problems of state action, . . . reflect[ing] a constitutional concern, rather than provid[ing] a commentary on the common law.

Id. at 301 (footnotes omitted).

There were, however, cases in which racially restrictive covenants were invalidated on public policy grounds. For example, as early as 1892, a court refused to enforce a racially restrictive covenant on the ground of public policy. See *Gandolfo v. Hartman*, 49 Fed. 181 (C.C.S.D. Cal. 1892); see also *Letteau v. Ellis*, 10 P.2d 496 (Cal. Ct. App. 1932). Justice Traynor of the California Supreme Court would have so held in 1944. See *Fairchild v. Raines*, 151 P.2d 260, 269 (Cal. 1944) (Traynor, J., concurring) ("Race restriction agreements, undertaking to do what the state cannot, must yield to the public interest in the sound development of the whole community."). In 1947, Judge Henry W. Edgerton, of the District of Columbia Circuit, wrote that public policy invalidated racially restrictive covenants and stated that:

they do great and varied harm, are therefore clearly contrary to public policy, and should be held void for that reason. Moreover the Civil Rights Act [42 U.S.C. § 1982] . . . would be, if it were nothing more, a declaration by Congress that the public policy of the United States forbids preventing Negroes from buying homes because they are Negroes.

Hurd v. Hodge, 162 F.2d 233, 243 (D.C. Cir. 1947) (Edgerton, J., dissenting). Judge Edgerton's view was endorsed by the Supreme Court, which reversed the decision from which he dissented. *Hurd v. Hodge*, 334 U.S. 24 (1948). See CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANTS CASES 95-99* (1959) (discussing Judge Edgerton's dissent).

For an argument that trust law doctrine could have been used to invalidate racially discriminatory provisions, without regard to state action, see Roy M. Adams, *Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions*, 25 CLEV. ST. L. REV. 1, 8-10 (1976) Adams states that:

[I]t is worth considering to what degree the nation's commitment to racial equality should also activate equity's hand to reform charitable trusts tainted by racial discrimination [because] . . . the law may . . . be making discrimination even more effective when it occurs in the name of charity than when it occurs privately.

Id.

19. 334 U.S. 24 (1948).

20. 334 U.S. 1 (1948).

21. *Hurd*, 334 U.S. at 33-34.

22. *Id.* at 34.

tion.²³ When government involvement was lacking, or when the government involvement was characterized as simply judicial explication of racially neutral principles of state law, the courts usually allowed the discriminatory provisions to take effect.²⁴ The courts frequently indicated that the law did not prevent a donor from discriminating on the basis of race, so long as she did not involve the state in that action.²⁵

In the 1966 case *Coffee v. William Marsh Rice University*, a racial restriction in a donative transfer was invalidated on trust law princi-

23. See Adams, *supra* note 18, at 10. Adams states that:

The majority of courts are not relying on trust law or general equitable powers to upset racial barriers in eleemosynary trusts. The dominant trend is to find conflict with the fourteenth amendment which removes the racial restrictions and then turn to equity to determine what to do with the trust.

Id. at 10. See Swanson, *supra* note 5, at 160 (noting that in the cases that did not involve government action, and therefore did not use the Equal Protection Clause, the courts generally allowed private trusts to operate on a discriminatory basis).

24. See, e.g., *Moore v. City of Denver*, 292 P.2d 986 (Colo. 1956) (enforcing a trust established to benefit "poor, white male orphans" with no discussion of state action); *Guillory v. Tulane Univ.*, 212 F. Supp. 674 (E.D. La. 1962) (holding Tulane University a private institution which is permitted to refuse to admit Negroes, but stating that "the Tulane Board is free to act as it wishes since neither this nor any other court may exercise its power to enforce racial restrictions in private covenants" and citing *Shelley v. Kraemer* and *Barrows v. Jackson*, 346 U.S. 249 (1953)); *In re Weaver's Trust*, 43 Pa. D. & C.2d 245 (1967) (refusing to alter an educational trust benefiting "deserving, white, male, Protestant student[s]"); *Smith v. Moore*, 225 F. Supp. 434, 443 (E.D.Va. 1963) (construing a trust "for indigent sick of the white race from Eastern Virginia," and stating that while "non-whites could not be refused admission in a hospital [that is] . . . a recipient of Hill-Burton funds, *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), such portion of the fund reserved for endowment purposes could still be used solely for white persons").

The limitation in the trust at issue in *Moore v. City of Denver* was held illegal on state action grounds in 1969. See *Dunbar v. Bd. of Trustees*, 461 P.2d 28 (Colo. 1969) (en banc); *infra* notes 162-171 and accompanying text discussing *Dunbar*.

The term "Negroes" is used in discussing decisions in which the courts use that term. Where the courts shift to "blacks," the text shifts as well. The Supreme Court refers to "Negroes" in *Tillman v. Wheaton Haven*, 410 U.S. 431 *passim* (1973), but uses "blacks" in *City of Memphis v. Greene*, 451 U.S. 100 *passim* (1981).

25. See, e.g., *Charlotte Park & Recreation Comm'n v. Barringer*, 88 S.E.2d 114 (N.C. 1955), *cert. denied sub nom. Leeper v. Charlotte Park & Recreation Comm'n.*, 350 U.S. 983 (1956). The *Charlotte Park* case concerned private parties who had conveyed land to the city of Charlotte, North Carolina, for use as a park for "white" people only; if the park were not used in this manner, the land was to return to the grantors. The Supreme Court of North Carolina interpreted the conveyance as creating a fee simple determinable with a possibility of reverter in the grantor who would take automatically if the limiting event occurred (as it did when the city park was constitutionally unable to exclude "Negroes"). *Charlotte Park*, 88 S.E.2d at 123. The North Carolina court held that "*Shelley v. Kraemer* . . . has no application" because "[t]he operation of this reversion provision is not by any judicial enforcement." *Id.* The state court said further that it knew "of no law that prohibits a white man from conveying a fee determinable upon the limitation that it shall not be used by members of any race except his own." *Id.*

The United States Supreme Court's denial of certiorari allowed the land to return to the grantors. The city acquired the grantors' interests, and a court order required the Commission to admit Negroes to the park. *Leeper v. Charlotte Park & Recreation Comm'n*, 2 RACE REL. L. REP. 411 (1957). Professor Entin suggests that one of the deeds may not have created a fee simple determinable. See Entin, *Defeasible Fees*, *supra* note 11, at 782 n.58.

ples.²⁶ Interpreting a 1891 trust instrument that created an endowment fund for “the instruction of the white inhabitants of the City of Houston, and State of Texas,”²⁷ the jury found, and the appellate court held as a matter of law, “that the primary purpose of the donor was to establish an educational institution of the first class.”²⁸ The court also found that:

[N]o university that discriminates in the selection of teachers or students on the basis of race could attain or retain the status of a university of the first class because it could not recruit the necessary faculty, and would be at a disadvantage in seeking grants for research from foundations and the government.²⁹

The jury found that “it [was] impossible or impracticable under present conditions to carry out” the donor’s intent to benefit only whites.³⁰ The appellate court held that the trial court therefore had acted properly in employing the doctrines of *cy pres* and deviation to excise the racial restraint.³¹

With restraints based on religion and national origin, as with restraints based on race, the courts generally did not consider that the restraints violated public policy *per se*. The courts did, however, invalidate conditions that conflicted with particular policies, such as those against imposing unreasonable restraints on marriage or encouraging divorce.³² The use of the unreasonable restraint-on-marriage principle is illustrated by *Gordon v. Gordon*, a 1955 decision in which the Supreme Judicial Court of Massachusetts upheld the validity of a will that di-

26. 408 S.W.2d 269, 271 (Tex. Civ. App. 1966).

27. *Coffee*, 408 S.W.2d at 271.

28. *Id.* at 283.

29. *Id.* at 286.

30. *Id.* at 283.

31. The *cy pres* doctrine holds that:

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

Id. § 399. The deviation doctrine holds that:

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

RESTATEMENT (SECOND) OF TRUSTS § 381 (1959); *see also id.* §§ 166, 167.

32. Restraints based on religion and national origin are discussed because, under the Civil Rights Act of 1866, the concept of racial discrimination encompasses some such claims. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *see also infra* notes 297-301 and accompanying text.

rected as follows: "If any of my . . . children shall marry a person not born in the Hebrew faith, then I hereby revoke the gift . . . made to or for such child."³³

Reviewing many similar cases, the court held that the restraint was not unenforceable for vagueness and that it was a partial, and therefore not unreasonable, restraint on marriage.³⁴ The Restatement (Second) of Trusts specified that a restraint on marrying "a person of a particular religious faith or one of a different faith from that of the beneficiary, is not ordinarily invalid."³⁵ The Restatement (Third) of Trusts would change this rule and make such a condition invalid for violating public policy.³⁶ The Reporter's Notes for the Tentative Draft state that "both the amount and force of the supporting authorities cited [in prior section 6.2] are diminished by close examination."³⁷ The Reporter's Notes indicate that he would consider a racial restriction even more obviously violative of public policy.³⁸ In *Gordon*, the court rejected, without substantial discussion, an argument that judicial enforcement of the restraint was unconstitutional state action³⁹ forbidden by *Shelley v. Kraemer*,⁴⁰ *Brown v. Board of Education*,⁴¹ and *Bolling v. Sharpe*.⁴²

The encouragement-of-divorce principle is illustrated by *In re Keffalas Estate*,⁴³ a 1967 decision of the Supreme Court of Pennsylvania. There, a testator made gifts to his children conditioned on their marrying (or re-marrying after the death or divorce of a spouse) only persons of "true Greek blood and descent and of Orthodox religion."⁴⁴ The court held that the restrictions on the religion of potential spouses did

33. 124 N.E.2d 228, 230 (Mass. 1955).

34. *Gordon*, 124 N.E.2d at 232-33. This ruling was consistent with the Restatement (Second) of Property and the Restatement (Second) of Trusts, which allowed restraints on first marriages "if, and only if . . . the restraint does not unreasonably limit the transferee's opportunity to marry." RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 6.2; RESTATEMENT (SECOND) OF TRUSTS § 6.2 cmt. h (approving such a condition "if it does not impose an undue restraint on marriage").

35. RESTATEMENT (SECOND) OF TRUSTS § 6.2 cmt. h.

36. See RESTATEMENT (THIRD) OF TRUSTS § 29(b) cmt. f (Tentative Draft No. 2, 1999). Tentative Draft No. 1, vol. 1., sections 1 through 25 was approved in 1995.

37. RESTATEMENT (THIRD) OF TRUSTS § 29 Reporter's Notes (Tentative Draft No. 2, 1999); see also *id.* (noting that a restraint on the religious choice of a spouse is invalid).

38. See *id.* § 29 Reporter's Notes (Tentative Draft No. 2, 1999) (quoting and disagreeing with Professor Jones' doubt of the invalidity of such religious restrictions, while noting with apparent agreement Jones' observation that "[i]t is more likely . . . that the temper of society will reject restraints involving race as contrary to public policy") (quoting Gareth H. Jones, *The Dead Hand and the Law of Trusts*, in DEATH, TAXES AND FAMILY PROPERTY 126-29 (Edward C. Halbach ed., 1977) [hereinafter *Dead Hand and the Law of Trusts*]).

39. *Gordon*, 124 N.E.2d at 235.

40. For discussion of *Shelley v. Kraemer* and the state action argument, see *infra* notes 65-73 and accompanying text.

41. 347 U.S. 483 (1954).

42. 347 U.S. 497 (1954).

43. *In re Keffalas' Estate*, 233 A.2d 248 (Pa. 1967).

44. *In re Keffalas' Estate*, 233 A.2d at 250.

not infringe freedom of religion (although restraints on the donee's own religious choice would be invalid).⁴⁵ However, the court invalidated the provisions regarding remarriage on the ground that they were "conducive to divorce and thus violative of public policy."⁴⁶

B. The Use of the State Action Doctrine to Invalidate Racially Discriminatory Donative Transfers Before 1968

While there were the few cases in which discriminatory donative transfers were invalidated under common law principles, the usual situation was that racial restraints were invalidated, if at all, only on state action grounds. When a conveyance included an unlawful racially discriminatory gift, the courts would have to decide whether to simply excise the racial restriction or invalidate the gift altogether. These cases generally were of three types: those in which the grantor had made a specific gift over (to a charitable or non-charitable beneficiary) in the event the discriminatory gift should fail; those in which the grantor had not made a specific gift over, but had provided a general residuary clause (again, to a charitable or non-charitable beneficiary); and those in which the grantor had made no alternative provision, so that state law would determine the consequence of invalidating the gift. While the *cy pres* and deviation doctrines allowed excision of invalid racial restraints and preservation of the underlying gifts, the courts that invalidated racial restraints sometimes declined to apply *cy pres* or deviation and instead invalidated the underlying gift, thereby carrying out the grantor's intention that the first gift be forfeited if it did not enforce racial discrimination.⁴⁷

The bedrock principles governing racially discriminatory donative transfers were established by the United States Supreme Court in litigation involving Girard College in Philadelphia, Pennsylvania and Baconfield Park in Macon, Georgia. Girard College owed its existence to Stephen Girard, a wealthy Philadelphian who died in 1831.⁴⁸ In his will, Girard left a fund in trust for the creation and maintenance of a

45. *Id.* The court treated the "true Greek blood and descent" requirement as if it were the same as the "orthodox religion" requirement. *Id.*

46. *Id.*

47. *See, e.g.,* LaFond v. City of Detroit, 98 N.W.2d 530 (Mich. 1959). The evenly divided court affirmed a trial court judgment that a gift to the city of Detroit "for a playfield for white children," was unlawful. *Id.* at 530. It was impossible to achieve the testator's specific intent, and the entire bequest therefore failed, so as "to defeat the charitable trust in its entirety and have the trust res distributed to heirs to whom it is patent [the testatrix] . . . did not intend to leave this money." *Id.* at 534 (Edwards, J. dissenting).

48. *See* Pennsylvania v. Brown, 392 F.2d 120, 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968).

school for "poor white male orphans."⁴⁹ The will named the City of Philadelphia as the trustee. The City of Philadelphia and the State of Pennsylvania carried out the provisions of the will, opening the school in 1848.⁵⁰ Beginning in 1869, pursuant to state legislation, the trust was administered and the school—called "Girard College"—was operated by the "Board of Directors of City Trusts of the City of Philadelphia."⁵¹

In 1954, Girard College received applications from two young men who satisfied all of the qualifications—"except that they were Negroes."⁵² The Board of the College rejected the applications. The applicants, supported by the state and the city, sued to secure admission; the state courts rejected the argument that government involvement in the trust made its racial discrimination unconstitutional.⁵³ In 1957, the United States Supreme Court reversed, holding that:

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 . . . because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment.⁵⁴

On remand, the Pennsylvania Orphans' Court removed the Board of City Trusts as trustee and replaced it with thirteen private citizens.⁵⁵ The applicants, the state, and the city challenged that order, but the Pennsylvania Supreme Court affirmed, saying that "the real issue involved" was "the right of a private individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced."⁵⁶ In 1958, the United States Supreme

49. *Pennsylvania v. Bd. of Dir.*, 353 U.S. 230, 231 (1957).

50. *Pennsylvania v. Bd. of Dir.*, 353 U.S. at 231.

51. *Id.*

52. *Id.*

53. *In re Girard's Estate*, 127 A.2d 287, 295 (Pa. 1956).

54. *Pennsylvania v. Bd. of Dir.*, 353 U.S. at 231 (1957).

55. *In re Girard Coll. Trusteeship*, 138 A.2d 844, 846 (Pa. 1958), *appeal dismissed, cert. denied*, 357 U.S. 570 (1958).

56. *In re Girard Coll. Trusteeship*, 138 A.2d at 847. There was a powerful dissent by Justice Musmanno, who argued that "Girard College is public because Girard so planted it and because its whole growth has been accomplished in the orchard of governmental care." *In re Girard Coll. Trusteeship*, 138 A.2d at 857. Justice Musmanno noted that:

Girard was so determined to prevent his estate from falling into the classification of a private institution that he declared that if the City . . . failed to carry out the provisions of his will, his estate would pass to the Commonwealth . . . , and if the State violated his wishes, the United States would become the final beneficiary.

Id. at 858. See also Steven B. Spector, *Judicial Activism in Prose: A Librarian's Guide to the Opinions of Justice Michael A. Musmanno*, 86 LAW LIBR. J. 311 (1994) (discussing Justice Musmanno's dissents). Musmanno's dissent in this case, however, is referred to only for a nautical reference. *Id.* at 316 n.49 (analogizing judicial reversal to "the Andrea Doria at the bottom of

Court refused to review the decision of the Pennsylvania Supreme Court, thus allowing the substitution of the trustees.⁵⁷

The Girard College story did not end there, but was influenced by later developments with respect to Baconsfield, the park in Macon, Georgia. Having declined to review the substitution of trustees issue in the *Girard College* case in 1958, the United States Supreme Court did address a substitution of trustees issue in *Evans v. Newton*⁵⁸ in 1966. This case involved the 1911 will of United States Senator A.O. Bacon, who devised a tract of land to his home city, Macon, Ga., "to be used 'as a park and pleasure ground' for white people only."⁵⁹ Senator Bacon said "in the will that while he had only the kindest feeling for the Negroes he was of the opinion that 'in their social relations the two races (white and negro) should be forever separate.'"⁶⁰

After years of operating the park—which was called Baconsfield—on a segregated basis, the city determined that it could not continue to do so constitutionally.⁶¹ At the request of individual managers of the park and others, the Georgia courts allowed the appointment of new trustees, private persons who would operate the park on a segregated basis.⁶²

When this substitution of private trustees to operate the park on a segregated basis was challenged in *Evans v. Newton*, the United States Supreme Court said that "[f]or years [the park] . . . was an integral part of the City of Macon's activities. . . . The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees."⁶³ The Court held that "the public character of Baconsfield requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."⁶⁴

Meanwhile, in the Girard Trust litigation, the applicants, the City of Philadelphia, and the State of Pennsylvania sued in federal court to challenge the substitution of trustees for Girard College. The district court rejected the argument that the involvement of the Orphans' Court in appointing the substitute trustees was itself unconstitutional state action under *Shelley v. Kraemer*.⁶⁵ Relying on the Supreme Court's deci-

the sea").

57. *In re Girard Coll. Trusteeship*, 138 A.2d 844 (1958), *appeal dismissed, cert. denied*, 357 U.S. 570 (1958).

58. 382 U.S. 296 (1966).

59. *Newton*, 382 U.S. at 297.

60. *Id.*

61. *Id.*

62. *Id.* at 297-98.

sion in *Evans*, and noting the Supreme Court's "studious avoidance in *Evans* of any reference to *Shelley*," the district court said that "[b]y its silence, the Court seems to indicate that the mere substitution of trustees without more is not constitutionally objectionable. Something more is required; something which transforms the purportedly private activity into a public function."⁶⁶ The district court then said that "the question further posed by *Evans* is whether the 'momentum', if any, of 128 years of direct State involvement continues to brand discrimination at Girard College with the imprimatur of State approval. We think that it does."⁶⁷

The Third Circuit affirmed. The court of appeals agreed with the holding that, in this case, as in *Evans*, "[t]he momentum . . . acquired as a public facility is . . . not dissipated . . . by the appointment of 'private' trustees."⁶⁸ However, the Third Circuit also added that *Shelley* "surely points to the affirmance" of the holding that the Orphans' Court's substitution of trustees constituted unconstitutional state action.⁶⁹ The court said that it did not "consider the move of the state court in disposing of the City Trustees and installing its own appointees to be a non obvious involvement of the State."⁷⁰ Rather, the court said, the finding of state action

does not simply emanate from the momentum of the Commonwealth and City legitimate participation in the establishment of Girard and its institutional life from its beginning to the present moment. It is in addition . . . the obvious net consequence of the displacement of the City Board by the Commonwealth's agent and the filling of the Girard Trusteeships with persons selected by the Commonwealth and committed to upholding the letter of the will.⁷¹

The Third Circuit was careful to "note that the general topic of the sanctity of wills is not before us," and state that "[o]ur total concern . . . is a will in which the testator has deliberately and specially involved the State in the designated use of his testamentary property."⁷² The Supreme Court denied certiorari.⁷³

66. *Brown*, 270 F. Supp at 787.

67. *Id.* at 789.

68. *Pennsylvania v. Brown*, 392 F.2d 120, 124 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968) (quoting *Evans v. Newton*, 382 U.S. 296, 301 (1966)).

69. *Id.*

70. *Id.* at 125.

71. *Id.* Judge Kalodner concurred on the basis of *Shelley v. Kramer. Id.*

72. *Brown*, 392 F.2d at 123 n.2.

73. 391 U.S. 921 (1968). It is interesting to note that certiorari was denied on May 20, 1968, while *Jones v. Alfred H. Mayer Co.* was decided on June 17, 1968. For a discussion of *Jones*, see *infra* notes 81-94 and accompanying text.

Thus, by 1968, the state of the law regarding discriminatory donative transfers was that they generally were upheld unless they violated a specific policy (such as those against unreasonably restricting marriage or encouraging divorce) or the Equal Protection Clause; and the Equal Protection Clause applied when government actors administered the trust or private trustees administered property that had acquired “momentum . . . as a private facility.”⁷⁴

The year 1968, however, saw the introduction of dramatic changes in the law—changes with potentially powerful impact on discriminatory donative transfers. These changes are discussed in Part II.

II. LEGAL CHANGES BEGINNING IN 1968

In the 1960s, several civil rights laws became available to persons who were challenging private discriminatory conduct. The Civil Rights Act of 1964 banned discrimination in, inter alia, privately owned places of public accommodation and private employment.⁷⁵ Title VIII of the Civil Rights Act of 1968 banned many forms of discrimination in private housing.⁷⁶ Most pertinently for our purposes, in 1968, the United States Supreme Court vastly expanded the reach of that portion of the Civil Rights Act of 1866 now codified as 42 U.S.C. § 1982, which prohibits discrimination with respect to real and personal property.⁷⁷

The federal courts initially had interpreted the 1866 Act and other Reconstruction statutes generously, but by 1873 the Supreme Court began to read these enactments restrictively.⁷⁸ One aspect of this restrictive interpretation was a general understanding that the 1866 Act applied only to state action.⁷⁹ It is not clear whether the initial reading

74. *Evans v. Newton*, 382 U.S. 296, 304 (1966).

75. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246 (1964) (“The Act . . . was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facilities, federally secured programs and in employment.”).

76. 42 U.S.C. § 3601 (1994).

77. 42 U.S.C. § 1982 (1994).

78. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 327-30 (1997) [hereinafter *CIVIC IDEALS*]; WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 148-49 (1988); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at xii-xiii (1985).

79. *Hurd v. Hodge*, 334 U.S. 24, 31 (1948) (“The action toward which the provisions of the statute . . . is directed is governmental action. Such was the holding of *Corrigan v. Buckley*.”); Joseph William Singer, *No Right to Exclude: Public Accommodation and Private Property*, 90 NW. U. L. REV. 1283, 1431 (1996) (“Prior to *Jones v. Mayer*, . . . sections 1981 and 1982 were thought to apply only to ‘state action.’”); CHARLES F. ABERNATHY, *CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION: CASES AND MATERIALS* 426-27 (3d ed. 2000). Abernathy states:

In dicta in *The Civil Rights Cases* . . . and other important decisions in the late nineteenth century, the [Supreme] Court interpreted §§ 1981 and 1982 as requiring

of the 1866 Act was that it applied to private conduct.⁸⁰

However, in the 1968 decision *Jones v. Alfred H. Mayer Co.*, the Supreme Court held that section 1982 applied to—and invalidated—a private owner's refusal to sell a home because a purchaser was "a Negro."⁸¹ The plaintiffs, Barbara Jo Jones and Joseph Lee Jones, a married couple, had sought to purchase a home in a subdivision being developed in Saint Louis County, Missouri.⁸² The defendants "refused to consider Plaintiffs' application . . . because Joseph Lee Jones is a Negro, and it is Defendants' general policy not to sell said houses and lots to Negroes."⁸³ Plaintiffs initially did "not contend that every person who offers a home for sale has no right to refuse to sell his property on racially discriminatory grounds."⁸⁴ They argued that defendants were subject to section 1982 because they were "not simply proposing to sell just a house, but rather 'they are building a community.'"⁸⁵

The district court granted defendants' motion to dismiss, holding that state action was required to establish liability under section 1982 and no state action had been shown. The court said that "the property involved is private property which belongs to defendants, or at least to one of them, and that plaintiffs have no property interest whatever therein;"⁸⁶ "defendants did no more than politely refuse to enter into a contract of sale with plaintiffs;"⁸⁷ and plaintiffs have no "rights to compel an unwilling seller to convey his property to them in the absence of a statute so requiring."⁸⁸

The Eighth Circuit affirmed. In an opinion by then-Judge Blackmun, the court said that "it would not be too surprising if the Supreme Court" were to allow such a complaint to stand, but that the change

state action [citing *The Civil Rights Cases*, 109 U.S. 3, 16-17 (1883); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); and *Virginia v. Rives*, 100 U.S. (10 Otto) 313, 318 (1879)]. One can see the effect of the dicta in the rare reported opinions of the twentieth century which rather consistently assumed that such statutes as § 1981 only apply to state actors.

Id.

80. Compare KACZOROWSKI, *supra* note 78, at 7-8 (interpreting *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866), as endorsing the view that the 1866 Act authorized the federal courts to deal directly with private violations of national civil rights), with SMITH, CIVIC IDEALS, *supra* note 78, at 328, 586-87 n.104 (assessing this reading as "ingenious" but "strained" and stating that it is unclear whether the author of the Rhodes opinion "saw the act as aimed at state violations or as authorizing direct federal action against private infringements of every right it specified").

81. 392 U.S. 409, 444 (1968).

82. *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33, 35 (8th Cir. 1967).

83. *Jones*, 379 F.2d at 35 (quoting the allegations in the complaint, which were taken as true for purposes of this case, which was resolved on the basis of a motion to dismiss).

84. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 119 (E.D. Mo. 1966).

85. *Jones*, 255 F. Supp. at 127.

86. *Id.* at 126.

87. *Id.* at 129.

88. *Id.* at 130.

should not be made "by us as an inferior tribunal."⁸⁹ The Supreme Court, justifying Judge Blackmun's prediction, reversed, holding that section 1982 forbade private as well as governmental acts of discrimination and that section 1982 so construed was authorized by the Thirteenth Amendment, which reached private as well as state action. Despite the recent enactment of the fair housing provisions of Title VIII of the 1968 Civil Rights Act, the Supreme Court reviewed the legislative history of the 1866 Civil Rights Act and concluded that:

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.⁹⁰

The Court said in *Jones* that its ruling applied to section 1981 as well.⁹¹ section 1981 also would apply to private action.⁹² In 1975, in *Johnson v. Railway Express Agency*,⁹³ the Court explicitly extended the holding of *Jones* to the portion of the 1866 Act now codified as 42 U.S.C. § 1981(a), which affords "all persons" the same rights as "white citizens" to "make and enforce contracts."⁹⁴ In 1976, in *Runyon v. McCrary*,⁹⁵ the Court applied that principle to ban racial discrimination in private schools.⁹⁶

In 1988, having heard argument in *Patterson v. McLean Credit Union*, another case involving section 1981, the Court asked the parties to brief and argue the question "[w]hether . . . *Runyon v. McCrary* . . . should be reconsidered."⁹⁷ Then, in its final decision in *Patterson*, the Court expressly declined to overrule *Runyon*.⁹⁸ The Court did, however, interpret section 1981 as inapplicable "to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."⁹⁹ This limitation then

89. *Jones*, 379 F.2d at 44-45.

90. *Jones*, 392 U.S. at 436.

91. *Id.*

92. See ABERNATHY, *supra* note 79, at 458 (stating that the lower courts "almost uniformly" so held).

93. 421 U.S. 454 (1975).

94. *Johnson*, 421 U.S. at 459 (holding that section 1981 applies to racial discrimination in private employment). Section 1981 became section 1981(a) in the Civil Rights Act of 1991. Pub. L. No. 102-166, § 1, 105 Stat. 1071 (Nov. 21, 1991).

95. 427 U.S. 160 (1976).

96. *Runyon*, 427 U.S. at 170 n.8 ("The square holding . . . in *Johnson v. Railway Express Agency* . . . [is] that § 1981 reaches private conduct.").

97. 485 U.S. 617, 617 (1988).

98. *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989).

99. *Patterson*, 491 U.S. at 171.

was overturned by Congress in the 1991 Civil Rights Act, which denoted as section 1981(a) what had been section 1981, and added new section 1981(b), which defined the term "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."¹⁰⁰

The Supreme Court has developed the law regarding section 1982 in a variety of ways, establishing some rules that are clear and some that are less than clear. These developments are discussed in detail below in Part IV.A. Here, the important point is that the dramatic holding that the 1866 Civil Rights Act applies to private discrimination was not taken into account in the donative transfer cases decided after *Jones*. A few donative transfer cases took into account civil rights laws enacted in the 1960s.¹⁰¹ In general, however, the courts continued to decide donative transfer cases as they had before *Jones*—usually invalidating racial restraints only if they involved rather direct forms of state action, and sometimes enforcing a racially discriminatory intention by holding that if it could not be effectuated, the entire gift would fail.

This Article suggests two things about the impact of the 1866 Civil Rights Act on racially discriminatory donative transfers. The first is that section 1982 (and section 1981(a)) may make unlawful racial restrictions that would survive the state action test. The second is that where a racial restriction is unlawful under this statute as well as the Constitution, the fact that the statute is violated may be a reason for simply excising the racial restriction and preserving the underlying gift, rather than allowing the underlying gift to be destroyed to honor the donor's racially discriminatory intent. These consequences are discussed in Part IV.B, C, and D. Part III, which follows, describes the racially discriminatory donative transfer cases that have been decided since 1968, showing that they do not take *Jones* and its consequences into account.

III. RACIALLY DISCRIMINATORY DONATIVE TRANSFER CASES SINCE 1968

Despite the Supreme Court's 1968 decision in *Jones*, racially discriminatory donative transfer decisions after that date generally continued to apply the principles of the earlier cases, without considering the possible pertinence of the 1866 Civil Rights Act.¹⁰² There were a few

100. Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994).

101. See *infra* Part III.B and notes 126-147 and accompanying text.

102. The pertinence of the 1866 law to other forms of private discrimination also may have been inappropriately ignored. See, e.g., G. Sidney Buchanan, *A Conceptual History of the State*

references to the new federal, state, or local civil rights laws, but there was no reliance upon the 1866 statute reinterpreted by the Supreme Court.

The first major discriminatory donative transfer case after 1968 was the next step in the Baconsfield saga in Macon, Georgia—the Supreme Court’s 1970 decision in *Evans v. Abney*.¹⁰³ It is discussed in Part A, below. Part B describes two exceptional cases, in which Title VIII of the 1968 Civil Rights Act was applied to discriminatory donative transfers. Finally, Part C describes the usual post-1968 discriminatory donative transfer cases in the state and lower federal courts: decisions which did not take into account the 1866 Civil Rights Act or Title VIII.¹⁰⁴

A. *Evans v. Abney*

After the United States Supreme Court held, in *Evans v. Newton*,¹⁰⁵ that administration of the Baconsfield park was state action even when conducted under the aegis of private trustees, the Supreme Court of Georgia held that, because the park could not be operated on a segregated basis by either public or private trustees, “the sole purpose for which the trust was created has become impossible of accomplishment and [the trust] has been terminated.”¹⁰⁶ The Georgia court relied on a state statutory provision that stated: “[w]here a trust is expressly created . . . [and] fail[s] from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.”¹⁰⁷ The Supreme Court of Georgia remanded the case to the trial court, which upheld the claim of Senator Bacon’s heirs that the property reverted to them because the trust had failed.¹⁰⁸ The trial court refused to apply the *cy pres* doctrine, holding it inapplicable “because the park’s segregated, whites-only character was an essential and inseparable part of the testator’s

Action Doctrine: The Search for Governmental Responsibility (Part II of II), 34 HOUS. L. REV. 665, 709 n.277 (1997) [hereinafter *Conceptual History*] (discussing unsuccessful constitutional challenges to restrictions on the ownership “rights” of non-resident aliens claiming land in the United States). While section 1982 protects only “citizens,” section 1981 protects “all persons,” and therefore might protect non-resident aliens who were considered racial minorities in the nineteenth century. See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

103. 396 U.S. 435 (1970).

104. Many of the cases in Part III are discussed in Swanson, *supra* note 5, and in Stephen J. Leacock, *Racial Preferences in Educational Trusts: An Overview of the United States Experience*, 28 HOW. L.J. 715 (1985).

105. 382 U.S. 296 (1966).

106. *Evans v. Newton*, 148 S.E.2d 329, 330 (Ga. 1966).

107. *Newton*, 148 S.E.2d at 330-31 (quoting GA. CODE § 108-106(4)).

108. *Evans v. Abney*, 396 U.S. 435, 439 (1970) (describing the trial court’s decision). The Letter Opinion of the Superior Court also is reproduced in the Appendix to the Petition for a Writ of Certiorari filed in the United States Supreme Court on March 3, 1969. Brief for Petitioner at Appendix, 396 U.S. 435 (1970) (containing the Letter Opinion of the Superior Court).

plan."¹⁰⁹ The Supreme Court of Georgia affirmed, noting that Senator Bacon had said that he was "without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."¹¹⁰ The Georgia Supreme Court rejected the argument that such a judicial interpretation of the will was unconstitutional state action under *Shelley v. Kraemer*.¹¹¹

In 1970, the United States Supreme Court affirmed this decision in *Evans v. Abney*.¹¹² Allowing the trust property to revert to the heirs of Senator Bacon, the Supreme Court held that the state courts had simply applied state law to interpret the will, and that the Georgia courts' application of neutral principles of state law governing estates and trusts did not constitute state action.¹¹³ Justice Black, writing for the Court, found this case "easily distinguishable" from *Shelley*.¹¹⁴ "Surely," he wrote:

the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.¹¹⁵

Justice Black concluded that "the loss of charitable trusts such as Bacon'sfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death."¹¹⁶

Justices Douglas and Brennan dissented, Justice Brennan finding state action on three bases and concluding that:

there is state action whenever a State enters into an arrangement that creates a private right to compel or enforce the reversion of a public facility. Whether the right is a possibility of reverter, a right of entry, an executory interest, or a contractual right, it can be created only with the consent of a public body or official, for example the official action involved in Macon's accep-

109. *Abney*, 396 U.S. at 439; see also *Evans v. Abney*, 165 S.E.2d 160, 163-64 (Ga. 1968) (describing the trial court's decision).

110. *Abney*, 165 S.E.2d at 164.

111. *Id.* at 166.

112. *Evans v. Abney*, 396 U.S. 435 (1970).

113. *Abney*, 396 U.S. at 439.

114. *Id.* at 445.

115. *Id.* at 446.

116. *Id.* at 447.

tance of the gift of Baconsfield. The State's involvement in the creation of such a right is also involvement in its enforcement.¹¹⁷

Abney is significant in at least three respects. First, it set limits to the state action doctrine, holding that judicial decisions based on neutral and nondiscriminatory state laws do not constitute state action, even when the effect is to enforce racial discrimination.¹¹⁸ The Court had suggested a contrary rule in *Shelley*, where it held that judicial enforcement of racially restrictive covenants was state action,¹¹⁹ but *Abney* "narrowly confined *Shelley* to its precise facts,"¹²⁰ signaling that the Supreme Court would not apply *Shelley's* reasoning in other situations.¹²¹

117. *Id.* at 454; see also Buchanan, *Conceptual History*, *supra* note 102, at 717 (analyzing this decision).

118. Professor Gunther has suggested that the Court's restriction of the state action doctrine "may well be related to the increasing scope and exercise of congressional power to reach private activities under § 5" of the Fourteenth Amendment and under the Thirteenth Amendment. GERALD GUNTHER, *CONSTITUTIONAL LAW* 915 (12th ed. 1991); see also Buchanan, *Conceptual History*, *supra* note 102, at 724 n.358. In the donative transfer cases, however, the restriction on the state action doctrine has not been accompanied by congressional action in the field, save as indicated by the two cases involving the 1968 Civil Rights Act. See *infra* notes 126-147 and accompanying text.

119. An earlier state supreme court decision, that said that judicial use of neutral rules would constitute state action, has been considered well within the principles established in *Shelley*. In *Capitol Federal Savings & Loan Assn. v. Smith*, 316 P.2d 252 (Colo. 1957), what the court characterized as a racially restrictive covenant provided that if any parcel subject to the covenant were conveyed or leased in violation of the covenant, the interest "shall be forfeited to and rest in such of the then owners of all of said lots and parcels of land not included in such conveyance or lease who may assert title thereto by filing for record notice of their claim." *Id.* at 268. The grantors argued that they had created an executory interest which "vested automatically in the defendants upon the happening of the events specified . . . , and the validity of the vesting did not in any way depend upon judicial action by the courts." *Id.* at 269. The Colorado court rejected this argument, holding that *Shelley* invalidated the restriction "no matter by what ariose terms the covenant . . . may be classified by a state counsel." *Id.* at 255. If the interest were a covenant, then, although "the opinion's . . . language suggests . . . broader applications," the case was "clearly controlled by the narrow holdings in *Shelley* and *Barrows* [*v. Jackson*, 346 U.S. 249 (1953)]." Buchanan, *Conceptual History*, *supra* note 102, at 720 n.342. But see, Entin, *Defeasible Fees*, *supra* note 11, at 789 n.86 (maintaining that defendants in *Capitol Federal* were right in characterizing the crucial clause as an executory limitation rather than a covenant, but that the limitation violated the Rule Against Perpetuities and the racial restriction should therefore have been stricken altogether).

120. Buchanan, *Conceptual History*, *supra* note 102, at 723; see also Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 352-53 (1998) (discussing *Shelley* and its successor, *Barrows v. Jackson*, 346 U.S. 249 (1953)).

121. This position is vulnerable and has been subjected to substantial criticism. See, e.g., G. Sidney Buchanan, *The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997) [hereinafter *Governmental Responsibility*]. Buchanan states:

In the common law setting, . . . the state courts are performing two roles, legislative and judicial [Nonetheless,] a state court decision upholding the legality of a private act authorized by the common law is no different from a state court decision upholding the legality of a private act authorized by state statute.

Buchanan, *Conceptual History*, *supra* note 102, at 706 n.267; Ronald J. Krotoszynski, Jr., *Back*

Second, *Abney* showed the Supreme Court's aversion to racial discrimination to be significantly limited.¹²² The Court had discredited the racial exclusion in Senator Bacon's will to the extent of forbidding its implementation by public officials or in the public venue of the park. But the Court was willing to honor the racial restraint by allowing the state courts virtually to create and then to enforce an alternative to race-neutral implementation of the Bacon will.¹²³ The Supreme Court allowed the discrimination to be effected in an alternative form, by invalidating the gift to which the racial restraint attached.¹²⁴ In colloquial terms, the Court held that when a grantor did not want to share with blacks, he would be allowed to take his bat home rather than be required to share with all the players. Thus, the Court verbalized disapproval of the racial restraint, but gave effect to the grantor's desire for racial exclusion. The Court prevented only a particular form of discrimination, and allowed the discriminatory grantor to discriminate in other ways.

The third significant aspect of the 1970 decision in *Abney* is that it did not take into account the Court's 1968 holding, in *Jones*, that section 1982 prohibits private as well as public discrimination.¹²⁵ This is discussed in Part IV.D of this Article.

B. *The Exceptions: Decisions that Apply Title VIII of the 1968 Civil Rights Act to Racially Discriminatory Donative Transfers*

After as well as before 1968, most racially discriminatory donative transfer cases were decided, as *Abney* had been, by asking whether state action were involved. There were, however, a few cases in which

to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations, 94 MICH. L. REV. 302 (1995); Barbara Rook Snyder & Robert A. Hillman, *Private Motivations, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1053 n.1 (1990) (citing a significant amount of state action scholarship). The point of this Article, however, is not to criticize the Supreme Court's limitation of the state action doctrine but, acknowledging it, to consider statutory bases for restricting what the Court has held to be private acts of discrimination that are not subject to constitutional constraints.

122. See GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 5 (1993) (arguing that "for structural reasons, the institutional role that the Court is destined to play . . . is the role of assuring the continued subordination of racial minority interests," and that "the most potent method of perpetuating minority subordination . . . has proven to be through the intermittent issuance of highly visible minority victories").

123. *Evans v. Abney*, 396 U.S. 435 (1970).

124. See THOMAS ROSS, JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS 64-67 (1996) (discussing how, by determining their own competence, "judges are rendered helpless by their choice to be helpless").

125. There is no reference to either section 1982 or *Jones v. Alfred H. Mayer Co.* in the Petition for a Writ of Certiorari, the Brief for Petitioners, the Brief for Respondents, or the Memorandum for the United States as Amicus Curiae filed in *Evans v. Abney*.

reference was made to newly-enacted federal civil rights laws (or to state or local civil rights statutes), but there were only two cases in which civil rights laws were independent bases for decision. In each of these, Title VIII of the 1968 Civil Rights Act was the statute that was applied to the discriminatory donative transfer.

The two cases are *United States v. Hughes Memorial Home*¹²⁶ and *In re Long's Estate*.¹²⁷ In *Hughes Memorial Home*, a will, admitted to probate in 1922, created a trust, pursuant to which the Hughes Memorial Home was established as an "orphanage for the white children of the States of Virginia and North Carolina."¹²⁸ In 1975, the United States challenged the racial restriction under Title VIII, arguing that the Home violated 42 U.S.C. § 3604(a), which declares it unlawful to "make unavailable or deny . . . a dwelling to any person because of race."¹²⁹ The Home argued that Title VIII did not apply to it because it did not satisfy the statute's definition of "dwelling," a structure "occupied as . . . a residence by one or more" persons.¹³⁰ The Home also argued that "the activities of the Home are not covered by the Act because it is not engaged in the commercial sale or rental of residential facilities."¹³¹

The district court found that "the Home . . . [was] far more than a place of temporary sojourn to the children who live there, and . . . they . . . [were] in fact, as the Home's officials refer to them, residents."¹³² It held, therefore, that the orphanage was a "dwelling" under the Act.¹³³ The court also held "that the Act also reaches noncommercial activities, and that the Home . . . [was] prohibited from discrimination even with respect to residents for whom no payment is made."¹³⁴ The court noted that Title VIII contains a narrow exemption for religious organizations that limit to co-religionists access to "dwellings which it owns or operates for other than a commercial purpose."¹³⁵ The court said that "[t]he existence of the limited exemption for religious organizations demon-

126. 396 F. Supp. 544 (D. W. Va. 1975).

127. 5 Pa. D. & C.3d 602 (1978). See also Swanson, *supra* note 5, at 159.

128. *Hughes Mem'l Home*, 396 F. Supp. at 547 n.2.

129. 42 U.S.C. § 3604(a) (1994). Although the will specified "orphans," the Home was "open to needy and dependent children, whether orphans or not, who . . . [were] determined to be in need of a residence at the Home because of unsatisfactory conditions in their families." *Hughes Mem'l Home*, 396 F. Supp. at 547. The court did not indicate on what authority those who administered the Home had implemented this deviation from the terms of the will, nor did the court discuss why ignoring the testator's specification of "orphans" had been considered permissible while his specification of "white" was considered sacrosanct.

130. See 42 U.S.C. §§ 3602(b), (c) (1994) (defining "dwelling" and "family").

131. *Hughes Mem'l Home*, 396 F. Supp. at 549.

132. *Id.* at 549.

133. *Id.*

134. *Id.*

135. 42 U.S.C. § 3607(a).

strates that charitable agencies not embraced by the exemption are covered by the Act."¹³⁶ The court then addressed the question of what to do with a will provision that violated Title VIII; it applied the *cy pres* doctrine to keep the orphanage operating without the racial restraint.¹³⁷

In re Long's Estate, a 1978 Pennsylvania case, involved a will, effective in 1889, that imposed restrictions based on race and sex by creating a "single woman's asylum" for "respectable white women."¹³⁸ The Attorney General of Pennsylvania petitioned for reformation of the will, invoking Title VIII, the Pennsylvania Human Relations Act, the 1964 Civil Rights Act, the 1866 Civil Rights Act, and the U.S. Constitution.¹³⁹ The court, relying on *Hughes Memorial Home*, held that the Henry G. Long Asylum was a dwelling under Title VIII.¹⁴⁰ The court held also that the principles enunciated in *Hughes Memorial Home* were "sufficiently conclusive to dispose of the trustees' contention that there existed a legislative intent to limit the act to the commercial housing market."¹⁴¹

The trustees also argued that the Henry G. Long Asylum was within Title VIII's exemption for "a private club . . . which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, . . . limiting the rental or occupancy of such lodgings to its members or . . . giving preference to its members."¹⁴² The trustees argued that "[t]he Long Home is . . . more like a private club than a commercial housing establishment which was the focus of this Act."¹⁴³ The court held, however, that a club "consist[s] of the individuals who are associated" with one another, and that the asylum was not a club because those who occupy the building are separate from those who govern it.¹⁴⁴ Furthermore, the court said, even if Long Asylum were a club, it would not satisfy the exemption in section 3607 because it does not limit lodging or give preference as an "incident to its primary purpose or purposes."¹⁴⁵ Rather, the court said, "the providing of lodgings . . . is the sole purpose of the asylum, not incident to any other purpose."¹⁴⁶ Therefore, the exemption was inapplicable and operating the asylum on a racially and sexually discrimina-

136. *Hughes Mem'l Home*, 396 F. Supp. at 550.

137. *Id.* at 552.

138. *In re Long's Estate*, 5 Pa. D. & C.3d at 604.

139. *Id.*

140. *Id.* at 610-13.

141. *Id.* at 610-11.

142. 42 U.S.C. § 3607(a).

143. *In re Long's Estate*, 5 Pa. D. & C.3d at 611.

144. *Id.* at 612.

145. *Id.* at 612-13.

146. *Id.* at 613.

tory basis violated the Fair Housing Act of 1968.¹⁴⁷ The court reformed the will by applying the doctrine of *cy pres* and eliminating the racial and gender restrictions.

C. *The General Rule: Post-1968 Decisions that Do Not Consider the Pertinence of Title VIII or the 1866 Civil Rights Act to Racially Discriminatory Donative Transfers*

Aside from the two Title VIII cases discussed in Part III.B, the post-1968 cases involving racially discriminatory donative transfers generally did not consider the pertinence of federal civil rights laws, and no cases were decided on the basis of sections 1981 or 1982.¹⁴⁸ On occasion, a court did reform a racially discriminatory trust solely on the basis of trust principles. Usually, however, the courts determined the validity of the transfers solely on the basis of state action principles. The Restatements and treatises—as well as the judges—generally continued, after 1968, to ignore the pertinence of sections 1981 and 1982 to racially discriminatory donative transfers.¹⁴⁹ The rare commentary that considered civil rights statutes usually also ignored the 1866 Act.¹⁵⁰ A chronological review of those cases follows.

Bank of Delaware v. Buckson,¹⁵¹ a 1969 Delaware case, concerned the will of Dr. Joseph P. Pyle, who died in 1917. Dr. Pyle's will directed his trustee to establish college scholarships for "white youths or young men" residing and attending high school in Wilmington, Delaware.¹⁵² From its first meeting in 1933, the committee that selected the scholarship recipients had included state officials.¹⁵³

The 1969 decision responded to a request from the trustee for instructions as to whether applications from non-whites might be ac-

147. *Id.*

148. *Conn. Bank & Trust Co. v. Johnson Mem'l Hosp.*, 294 A.2d 586 (Conn. 1972), was decided on state action grounds, but the court noted that the Connecticut public accommodations law also was violated by the racial restriction. See *infra* note 206 and accompanying text.

149. See, e.g., GEORGE T. BOGERT, TRUSTS 230-31 (6th ed. 1987) ("A settlor may limit the class to be educated as he desires, . . . if, in the case of gifts to a state or an agency, he does not deprive persons of their constitutional rights to equal protection of the laws."); Leacock, *supra* note 104, at 716-17 ("Constitutional law issues become significant . . . when racial preferences are included in trusts."); *id.* at 717, 725 (discussing "constitutional and trust law perspectives").

150. See, e.g., Adams, *supra* note 18, at 10 (stating that "in some circumstances unequal treatment is as much a statutory illegality as other activities the encouragement of which has caused trust failure (e.g., perjury, adultery)," citing the Civil Rights Act of 1964, and suggesting that the statutory prohibition should be applied by indirection rather than of its own force). But see Entin, *Defeasible Fees*, *supra* note 11, at 793 (suggesting the relevance of section 1982); Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 85 (1968) (asking, after Jones: "Will no bequest stand up which includes a racial discrimination . . . ?").

151. 255 A.2d 710 (Del. Ch. 1969).

152. *Bank of Delaware*, 255 A.2d at 712.

153. *Id.* at 714.

cepted. The Delaware Court of Chancery held that non-whites could be assisted under the trust. The court found that Dr. Pyle's "primary purpose . . . was the creation of scholarships to benefit young men in the community," and that "the single reference to 'white youths' must be read against this background of purpose."¹⁵⁴ The court also noted that the racial composition of the Wilmington public schools had changed significantly since Dr. Pyle's death, so that while 10% of the city population had been non-white in 1914, the percentage in 1969 was 40% and increasing, and 61% of the students in grades 10-12 in the public schools were non-white.¹⁵⁵ Thus, the court said, limiting eligibility to whites would greatly circumscribe the committee's choice.¹⁵⁶ The court also said that the involvement of state officials raised questions about the constitutionality of the restraint.¹⁵⁷ Taking all of these factors into account, the court concluded that it "should apply the principle of deviation,"¹⁵⁸ authorized where "compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust."¹⁵⁹ The court said that "[c]umulatively the changed circumstances—the law which may now substantially affect the majority of the selection Committee . . . and the enormous change in racial population of the schools—. . . are circumstances not known to Dr. Pyle and not anticipated by him."¹⁶⁰ The court also concluded "that the Court may not advise the Trustee to reject applications from non-whites because such advice would amount to state (judicial) enforced discrimination in violation of the Fourteenth Amendment."¹⁶¹

A similar case, *Dunbar v. Board of Trustees*,¹⁶² was decided in 1969 in Colorado.¹⁶³ George W. Clayton died in 1899.¹⁶⁴ His will provided for the establishment of Clayton College, to serve "poor, white, male orphans between the ages of 6 and 10."¹⁶⁵ The trustees of the College and the George W. Clayton Trust Commission petitioned for the application of the *cy pres* doctrine on the ground that the racial and other

154. *Id.* at 713.

155. *Id.* at 714.

156. *Id.*

157. *Bank of Delaware*, 255 A.2d at 714.

158. *Id.* at 717. The court applied the standard of the RESTATEMENT (SECOND) OF TRUSTS § 381. See *supra* note 31 (discussing section 381).

159. *Bank of Delaware*, 255 A.2d at 715.

160. *Id.* at 717.

161. *Id.* at 715.

162. 461 P.2d. 28 (Colo. 1956).

163. *Dunbar*, 461 P.2d. at 29. The trust previously had been upheld by the Colorado Supreme Court. See *Moore v. City of Denver*, 292 P.2d. 986 (Colo. 1956).

164. *Dunbar*, 461 P.2d at 29.

165. *Id.*

restrictions were both illegal and impracticable.¹⁶⁶ The state Attorney General opposed the petition with respect to the other restrictions, but agreed that the racial restriction was illegal and unenforceable.¹⁶⁷ The Supreme Court of Colorado held the racial restriction illegal because "the method of operation of Clayton College under the terms of the Clayton will involved 'state' action."¹⁶⁸ The court did not even discuss whether the entire gift should be invalidated. Citing *Evans v. Newton*¹⁶⁹ and the *In re Girard College Trusteeship*¹⁷⁰ decisions, it affirmed the trial court's decision simply striking the racial restriction.¹⁷¹

*Wooton v. Fitz-Gerald*¹⁷² was a 1969 Texas case seeking construction of a holographic will that created a trust "for a home for aged white men in Midland Co., Texas."¹⁷³ The testator, who died in 1964, left her "home and acreage . . . to be used for a home for aged white men in Midland Co., Texas, in memory of [her] first husband Capt. W.E. Wallace."¹⁷⁴ Her "living relatives and heirs" attacked the trust on several grounds, arguing, inter alia, that the will created "a private and not a public trust" and that the racial restraint "is void as being racially discriminatory and repugnant to state and federal regulations under which funds are dispensed."¹⁷⁵ The trial and appellate courts upheld the gift as a public charitable trust. With respect to the racial restraint, the trial court deleted the word "white."¹⁷⁶ The appellate court affirmed, without careful analysis on this point, relying on the *Girard College* cases but concluding that the trial court "was within its equitable powers in deleting the word 'white' . . . by applying the doctrine of approximation or cy pres."¹⁷⁷ The court said:

Here we have no contact with the state or any agency or arm thereof, except in the administrative enforcement of any such provision. It is not believed that the entire trust would fail because a portion contained such a clause as here contravened some applicable law. In conclusion, we feel that the trial court was correct in its ruling that a general charitable intent appears on the face of the will, and that the word 'white' rightfully was

166. *Id.*

167. *Id.*

168. *Id.* The Supreme Court of Colorado did not indicate what this "method of operation" was.

169. 382 U.S. 296 (1966).

170. 138 A.2d 844 (Pa. 1958).

171. *Dunbar*, 461 P.2d at 29.

172. 440 S.W.2d 719 (Tx. Civ. App. 1969).

173. *Wooton*, 440 S.W.2d at 722.

174. *Id.*

175. *Id.* at 723.

176. *Id.*

177. *Id.* at 725.

deleted by the court, and that when the trust begins actual administrative operation, there will be no state action involved which would be prohibited by the dictates of the Fourteenth Amendment. It must be noted, too, that while Mrs. Wallace did use the term 'aged white men,' her last reference to the purpose of her trust refers to 'aged men.'¹⁷⁸

In re Potter's Will was a 1970 Delaware case regarding an 1839 will that created a trust for the benefit of "poor white citizens" of Kent County, Delaware.¹⁷⁹ The agent administering distribution of the trust income asked if she were to continue refusing applications from non-whites.¹⁸⁰ The chancery court held that the agent could not continue to discriminate on the basis of race, resting its decision on *Evans v. Newton* and the Constitution.¹⁸¹ The appellate court found state action in various facts:

[T]he Chancellor of the State of Delaware was named [in the will] as one of the parties authorized and directed to sell the testator's residuary real estate and to reinvest the proceeds. The original trustee and all succeeding trustees as well as agents have been appointed by the Chancellor. . . . [T]wo special statutes were passed by the Legislature . . . authoriz[ing] the Court of Chancery to sell trust lands, and . . . requir[ing] the recording of trust property leases. Finally, the authority of the Chancellor to order the sale of trust properties was established . . . by the opinion of the Supreme Court of Delaware . . . and as a result some of the Potter lands were sold under order of the Court of Chancery.¹⁸²

The court found that this "extraordinary state involvement" constituted "State action subject to the strictures of the Fourteenth Amendment."¹⁸³

Having determined that the racial restraint could not be enforced, the court then had to decide whether to honor the gift without the restraint or invalidate the entire gift. To make this decision, the court considered Colonel Potter's presumed intent. The court noted that Colonel Potter's will referred to race only by the expression "white citizens" and that a codicil directed the manumission of a slave when she became twenty-one. "Nowhere in the will or codicils," the court said, "is found language which indicates any racial bias, which is read-

178. *Wooton*, 440 S.W.2d at 725.

179. 275 A.2d 574, 581 (Del. Ch. 1970).

180. *In re Will of Potter*, 275 A.2d at 581.

181. *Id.* at 579.

182. *Id.* at 580. The court also noted state involvement in the bank that served as trustee. *Id.* at 582.

183. *Id.* at 583.

ily understandable considering that the care of Negroes in general was the responsibility of their masters at the time the documents in question were executed."¹⁸⁴ The court considered that this distinguished the case from *Evans v. Abney*, which was "concerned with the unambiguous desires of the late Senator Bacon . . . , whose will was written many years after enactment of the Fourteenth Amendment."¹⁸⁵

The court held that Colonel Potter's "paramount" intention had been "to aid the poor citizens of his county," and that "it would frustrate his intent to find that the trust" had failed.¹⁸⁶ The court therefore applied *cy pres* and deviation "to give force and effect to his paramount intention," and directed the entry of an order "striking the word white."¹⁸⁷ The court in the *Potter* case rested its decision on the finding of state action, noting expressly that

there seems to be no doubt . . . but that as a matter of state trust law, a testator or trustor may cause the creation of a private trust for the benefit of one "race" just so long as the state does not become so involved in the affairs of such a legal entity as to run afoul of the constitutional guarantees.¹⁸⁸

*Estate of Vanderhoofven*¹⁸⁹ was a 1971 California case involving a will (effective in 1962) that provided:

I will not not [sic] give or bequith [sic] any of my real property [sic] or holdings . . . to anyone other than my fambly [sic] I do give one dollar each to my brothers & sisters and the rest to some Protestant school that is all white of Engineering training [sic]"¹⁹⁰

The trial court held that the "all white" restriction was illegal,¹⁹¹ and refused to apply the *cy pres* doctrine, thus allowing the entire estate to pass to the decedent's siblings and other claimants.¹⁹² The appellate court reviewed only the refusal to apply *cy pres*, without deciding why

184. *In re Will of Potter*, 275 A.2d at 581.

185. *Id.* at 583.

186. *Id.* at 583. The court also noted that the trust would lose its federal and state tax-exempt status if the restraint were not removed. *Id.*

187. *Id.* at 583.

188. *In re Will of Potter*, 275 A.2d at 579 (repeating the language of *Bank of Delaware v. Buckson* and holding that "the Court may not advise the Trustee to reject applications" on the basis of race). The *Potter* court said "[t]here is no doubt but that this Court may not instruct the agent to discriminate solely on the basis of race." *In re Will of Potter*, 275 A.2d at 579 (citing *Shelley v. Kraemer*).

189. 96 Cal. Rptr. 260 (Cal. Ct. App. 1971).

190. *Estate of Vanderhoofven*, 96 Cal. Rptr. at 261.

191. *Id.* at 263.

192. *Id.* at 261.

the will could not be enforced as written ("whether through illegality, impossibility or impracticality").¹⁹³ Indeed, the court said that "[n]o case has been cited to us in which a testamentary trust for education of students in a private all-white school has failed on that account."¹⁹⁴

The appellate court's resolution of the *cy pres* issue was to remand to the trial court to determine whether the "dominant intent of the decedent" was "to perpetuate the separation of races" or "to provide for the education of engineering students, preferably but not exclusively in a protestant all-white school."¹⁹⁵ The trial court had decided, without taking extrinsic evidence, that the racial restriction was crucial to decedent, and that he would have preferred distribution as in intestacy to a non-discriminatory trust.¹⁹⁶ The appellate court held that the text of the will did not compel either result, and remanded for the trial court to consider whether extrinsic evidence could resolve the question.¹⁹⁷

In 1972, the United States District Court for the District of Columbia decided *Wachovia Bank & Trust Co. v. Buchanan*.¹⁹⁸ The will of the testator, who died in 1966, left the great bulk of his estate in trust to provide scholarships for "white boys and girls who reside in Alamance County" to attend the University of North Carolina.¹⁹⁹ The recipients of the scholarships were to be selected by a group "comprised principally of persons holding elective or appointed public positions."²⁰⁰ The parties and the court agreed that public officials' involvement in the administration of the trust constituted state action, and that substitution of private persons would not make the restraint constitutional.²⁰¹ Citing, inter alia, the *Buckson*, *Rice University*, and *Wooten* cases, the court applied both *cy pres* and deviation to "salvage" the trust, excising only the racial restriction.²⁰²

Connecticut Bank & Trust Co. v. Johnson Memorial Hospital,²⁰³ a 1972 Connecticut case, involved the will of a testator who died in 1968.

193. *Id.* at 263. See Adams, *supra* note 18, at 21 ("The *Vanderhoofven* opinion obscured as many issues as it resolved, for it leaped ahead to consider *cy pres* without initially articulating why the trust [could not] be enforced as written.").

194. *Estate of Vanderhoofven*, 96 Cal. Rptr. at 262 (upholding the creation of a charitable trust despite the fact that the will did not specifically mention a trust or name a trustee).

195. *Id.* at 263.

196. *Id.*

197. *Id.* at 264-65.

198. 346 F. Supp. 665 (D.D.C. 1972).

199. *Wachovia Bank & Trust*, 346 F. Supp. at 667.

200. *Id.*

201. *Id.* at 667-68. Public officials participated in selecting the scholarship recipients and the scholarships were for attending the University of North Carolina, an instrumentality of the State of North Carolina. *Id.* at 667 & n.3.

202. *Id.* at 668-71. The *Buckson*, *Rice University*, and *Wooten* cases are discussed *supra* at notes 151-161, 26-31, and 172-178 respectively.

203. 294 A.2d 586 (Conn. Super. Ct. 1972).

The will, which had been executed in 1964,²⁰⁴ created, among several trusts, one that would fund a private hospital room to "be used only by patients who are members of the Caucasian race."²⁰⁵ The parties and the court agreed that the hospital could not lawfully comply with the racial restriction for several reasons: the hospital's participation in the Hill-Burton program made it a state actor, so that racial discrimination by it would violate the federal and Connecticut constitutions and the Connecticut public accommodations law.²⁰⁶ With respect to the remedy for the illegality, the will explicitly provided, with respect to this and another trust, that "if by their terms said trusts either violate any law or are not effective due to a lack of sufficient directions," then the assets were to become part of the residue of the estate.²⁰⁷ The court held that the directive controlled, and neither *cy pres* nor deviation could be applied.²⁰⁸

Milford Trust Co. v. Stabler,²⁰⁹ a 1973 Delaware case, involved a trust created by the will of a testator who died in 1937. The trust was to assist "white boys and girls . . . in securing an education."²¹⁰ The court found that "over a period of many years the administration of the Trust has been intimately involved with the Public School District of the Milford area and the State educational system."²¹¹ The committee that selected recipients "consisted of persons who hold or who have held positions in State educational administration or teaching."²¹² The court concluded "that the formal participation of the Milford School District . . . , in combination with the service of public officers as the Selection Committee, amounts to State action,"²¹³ despite the fact that the trust instrument itself did not require any of this governmental involvement.²¹⁴ The court excised the racial restriction under the doctrine of deviation.²¹⁵

Trammell v. Elliott,²¹⁶ a 1973 decision of the Supreme Court of Georgia, involved a will (executed and effective in 1962) that created a

204. *Conn. Bank & Trust Co.*, 294 A.2d. at 592.

205. *Id.* at 588.

206. *Id.* at 589-90.

207. *Id.* at 591.

208. *Id.*

209. 301 A.2d 534 (Del. Ch. 1983).

210. *Milford Trust Co.*, 301 A.2d at 536.

211. *Id.*

212. *Id.* at 537.

213. *Id.*

214. The court also repeated and relied upon the *Potter* and *Buckson* courts' prohibition of judicial approval of racial discrimination, citing, inter alia, *Shelley v. Kraemer* for the proposition that "this Court may not instruct a trustee to honor racial restrictions in a trust instrument." *Id.* at 536.

215. *Milford Trust Co.*, 301 A.2d at 538.

216. 199 S.E.2d 194 (Ga. 1973).

scholarship fund for "poor white boys and girls" to attend Emory University, Agnes Scott College, or the Georgia Institute of Technology.²¹⁷ While the first two are private institutions, the Georgia Institute of Technology is and was a public entity, and the State Attorney General conceded that, because each institution was to act as trustee, the Georgia Institute's involvement constituted state action.²¹⁸ The court "proceed[ed], therefore, on the basis that . . . the racial restrictions in the devise" violated the Fourteenth Amendment.²¹⁹

The court said that a party seeking to defeat the use of *cy pres* or deviation to validate such a trust bore a heavy burden, holding that:

[i]n view of the public policy expressed in Code §§ 108-202 and 113-815 favoring the effectuation of charitable grants promoting the public good and our own rule disfavoring forfeitures, . . . demonstration of a specific intent of the settlor as would result in a failure of the devise must be clear, definite, and unambiguous.²²⁰

The court concluded that the trial court had not erred in applying the doctrine of *cy pres* to preserve the trust without the racial restriction, apparently for all three institutions.²²¹ In reaching this result, the court distinguished its decision in *Evans v. Abney* in which, it said, the will had exhibited a "specific intent of the testator [which] conclusively negated any general charitable intention."²²²

With respect to discrimination involving ancestral and ethnic characteristics, as well as discrimination based on race, the courts continued to apply the rules that had been developed before 1968, and did not consider whether the 1866 Civil Rights Act might apply to these private acts of discrimination as it had applied to the private discrimination in *Jones v. Alfred H. Mayer Co.* Thus, in *Shapira v. Union National Bank*,²²³ in 1974, an Ohio court considered a will that conditioned a bequest to a son upon the son's being "married at the time of my death to a Jewish girl whose both parents were Jewish."²²⁴ The son challenged the restraint as unconstitutional, contrary to public policy, and unenforceable as an unreasonable restraint upon marriage.²²⁵ The court re-

217. *Trammell*, 199 S.E.2d at 196-97.

218. *Id.*

219. *Id.*

220. *Id.* at 198-99.

221. *Id.* The court did not discuss the possibility of excluding the Georgia Institute of Technology from the gift.

222. *Trammell*, 199 S.E.2d at 199.

223. 315 N.E.2d 825 (Ohio Ct. Com. Pl. 1974).

224. *Shapira*, 315 N.E.2d at 826.

225. *Id.*

jected all three claims.²²⁶ It rejected an argument based on the *Evans v. Newton* and *In re Girard College* cases by citing the "revealing" comment of Justice Douglas in *Evans v. Newton*: "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that no constitutional difficulty would be encountered."²²⁷ The court then considered whether the restraint imposed an unreasonable restriction on the opportunity to marry; finding that it did not, it upheld the restraint.²²⁸

First National Bank of Kansas City v. Danforth,²²⁹ a 1975 Missouri suit, involved the will of Homer McWilliams, who died in 1965.²³⁰ The will established a trust to, inter alia, contribute to "the maintenance, support and care of sick and infirm patients in said ["Protestant Christian" non-profit] Hospitals, born of white parents in the United States of America."²³¹

The court held that no state action was involved in the creation or administration of the trust and that it therefore was valid.²³² The court held that:

the trustee has the discretion to select deserving individuals of the class of 'sick and infirm patients in said hospitals born of white parents in the United States' No public body is involved in the latter selection because payments to any such beneficiaries would flow directly from the trustee to them.²³³

In 1977, the Supreme Court of Georgia again addressed the discriminatory donative transfer issue, in *Smyth v. Anderson*.²³⁴ This suit involved a 1931 will, probated in 1937, that left income to the trustees of the Social Circle schools "for the benefit of the white children of the

226. *Id.* at 828-32.

227. *Id.* at 828.

228. *Id.* at 829. This rule (and the *Shapira* case) are criticized in, and would be changed by, RESTATEMENT (THIRD) OF TRUSTS §29(b), cmt. e, illus. 1, and Reporter's Notes at 71-72, 76-77 (Tentative Draft No. 2, 1999). See also BOGERT, *supra* note 149, § 48 at 148 (stating that because "the common law has a well-defined interest in preserving freedom of marriage and of religion," restraints requiring obedience to instructions regarding marriage or adoption of a certain religion "may be held illegal as against public policy"). The *Shapira* court noted the distinction "between testamentary gifts conditioned upon the religious faith of the beneficiary and those conditioned upon marriage to persons of a particular religious faith." *Shapira*, 315 N.E.2d at 829.

229. 523 S.W.2d 808 (Mo. 1975).

230. *First Nat'l Bank of Kansas City*, 523 S.W.2d at 812.

231. *Id.* at 812. Despite the grammatical error, the court understood that the patients, not the hospitals, had to be "born of white parents." See STRUNK & WHITE, *THE ELEMENTS OF STYLE* 28-30 (4th ed. 1999).

232. *First Nat'l Bank of Kansas City*, 523 S.W.2d at 822.

233. *Id.* at 821.

234. 232 S.E.2d 835 (Ga. 1977).

Social Circle Militia District, inclusive of the Town of Social Circle."²³⁵ The unconstitutionality of the gift was assumed, but the Supreme Court of Georgia reversed the trial court's application of the *cy pres* doctrine to preserve the trust and extend its benefit to "all of the children of the schools."²³⁶ The state supreme court held that "[t]he authorities are universally in accord that the doctrine of *cy pres* is simply inapplicable if there is a reversionary clause or valid gift over in the event the charitable gift fails for any reason."²³⁷ Since this will contained "a controlling reversionary clause," the state supreme court reversed the ruling applying *cy pres* and directed, in effect, that the trust be terminated.²³⁸

Lockwood v. Killian,²³⁹ a Connecticut case, dealt with a will (executed and effective in 1957) that created a trust to fund college scholarships for "caucasian boys graduating from high schools in Hartford County who profess themselves to be Protestant Congregationalists."²⁴⁰ Those responsible for selecting the recipients sought court advice because the restrictions left them unable to identify a sufficient number of beneficiaries and because the racial and sexual restrictions made the trust subject to federal income taxation.²⁴¹ The trial court initially removed the racial and sexual restrictions but held the religious restriction neither illegal nor impracticable.²⁴² The state attorney general appealed only the refusal to eliminate the religious restraint.²⁴³ The Supreme Court of Connecticut first held, in 1977, that there was no state action involved in the trust.²⁴⁴ It criticized the trial court's having proceeded solely upon a limited stipulation of facts and remanded for a

235. *Smyth*, 232 S.E.2d at 836.

236. *Id.* at 838-39.

237. *Id.* at 839. The accord was not as universal as the court indicated. A 1976 article on the subject had said that "[d]isagreement exists as to whether a gift-over should operate automatically or merely be weighed as but one factor negating a general charitable intent. A look at the discrimination cases that have contained gifts-over suggests that, standing alone, such gifts will not necessarily preclude further inquiry by a court." Adams, *supra* note 18, at 28.

238. *Smyth*, 232 S.E.2d at 839.

239. 425 A.2d 909 (Conn. 1979) [hereinafter *Lockwood II*].

240. *Lockwood II*, 425 A.2d at 911.

241. *Lockwood v. Killian*, 375 A.2d 998 (Conn. 1977) [hereinafter *Lockwood I*]. With respect to the denial of federal tax exemptions to institutions that discriminate on the basis of race, see *Green v. Connally*, 330 F. Supp. 1150 (D. D.C.), *aff'd mem. sub nom.*, *Coit v. Green*, 404 U.S. 997 (1971), and *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983), which upheld the denial of tax exemption to a school that discriminated on the basis of race, because "racial discrimination in education violates a most fundamental national public policy." With respect to gender, however, the public policy argument has not been decided. See sources cited *supra* note 5.

242. *Lockwood I*, 375 A.2d at 1000-01.

243. *Id.* at 1000.

244. *Id.* at 1002-03 (stating that there was a "double 'state action' standard," under which "state action apparently will be found much more readily if racial discrimination is claimed, as opposed to any other form of discrimination").

new trial.²⁴⁵ On remand, the trial court left the racial, gender, and religious restrictions in effect but removed the geographical limitation.²⁴⁶ On the second appeal, the state supreme court rested its decision on all parties' agreement that the restrictions made it "impossible to choose a sufficient number of recipients."²⁴⁷ It also was unquestioned that the testator's "dominant intent . . . was to provide higher education for deserving recipients."²⁴⁸ The court said:

The size of the trust established by the will, the fact that the scholarship fund received all of the residuary estate with no gift over in case the trust fund failed, the testator's affirmation that individual bequests fully satisfied his obligations to his family, and the magnitude of the other charitable bequests support the court's finding of a general charitable intent.²⁴⁹

The court held that the doctrine of approximation (*cy pres*) should be applied to enable the trust to carry out its purpose; that the restrictions that were most impeding the use of the trust and least important to the trustor were the racial and sexual restrictions; and that those restrictions therefore should be removed.²⁵⁰

Tinnin v. First United Bank of Mississippi,²⁵¹ a 1987 Mississippi case, involved a will (effective in 1968) that directed trustees to "make loans to students of a state college or university of and operated by the State of Mississippi, who are found worthy and who are of the Caucasian [sic] race and to none other."²⁵² The trustee, First United Bank, disregarded the racial restriction, the heirs at law sued, and the trial court sustained the trust without the racial restraint.²⁵³ On the first appeal to the Supreme Court of Mississippi, all parties agreed that the racial restraint could not be enforced by the court.²⁵⁴ The court said that "[h]ad the Bank sought to administer the trust adhering to the racial restrictions thereof, *sans* IRS exemption status, of course, and without reliance upon any arm of the state in aid of enforcement thereof, the Fourteenth Amendment may not have been offended."²⁵⁵ While the

245. *Id.* at 1005.

246. *Lockwood II*, 425 A.2d 909, 910 (1979).

247. *Lockwood II*, 425 A.2d at 911.

248. *Id.*

249. *Id.* at 911-12.

250. *Id.* at 913-14. A dissent criticized the continuance of the religious restraint and argued that "the administration of a charitable trust is always . . . state action." *Id.* at 916.

251. 502 So. 2d 659 (Miss. 1987).

252. *Tinnin*, 502 So. 2d at 659.

253. *Id.*

254. *Id.* at 665-66.

255. *Id.* The court said: "It is . . . incorrect to ask . . . whether Allan Hobgood might have prevented any of his money from going to black college students, if only he had expressed

court cited *Evans v. Abney*, it apparently considered its state action issue different from that in *Abney*.²⁵⁶

The state supreme court reversed the trial court, and remanded for consideration of extrinsic evidence to determine what the testator would have wanted had he known that he could not have the trust with the racial restraint.²⁵⁷ On remand, the chancery court concluded that the testator "would have preferred that the trust survive without the racial restriction."²⁵⁸ On the second appeal, the excision of the racial restraint was upheld by the Supreme Court of Mississippi.²⁵⁹

Hermitage Methodist Homes of Virginia v. Dominion Trust Co., a 1990 Virginia decision, involved the Prince Edward School Foundation, one of the private academies that had been established in Virginia to enable white students to avoid attending desegregated public schools.²⁶⁰ Professor Entin's article about the case explains that the background to the lawsuit:

resonates deeply in modern American history. The Prince Edward School Foundation was founded in June 1955 to establish private schools for white pupils in the event that the federal courts ordered the public schools of Prince Edward County to desegregate. Such an order seemed certain because the county school board was one of the defendants in *Brown v. Board of Education*. The order finally came in 1959. Local officials responded by shutting down the public schools. At the same time, the Foundation opened a private school known as Prince Edward Academy that enrolled almost every white student in the county. The Academy continued to enroll a large majority of the county's white pupils for some years after the Supreme Court ordered the public schools reopened on a desegregated basis in 1964.

clearly his intent in that regard in his will. Of course, he could have done that." *Id.* at 666-67.

256. The court said expressly that it would have upheld a will provision making an alternative gift if the racial restriction were invalidated. *Tinnin*, 502 So. 2d at 666-67.

257. *Id.* at 670.

258. *Tinnin v. First United Bank of Miss.*, 570 So. 2d 1193, 1194 (Miss. 1990).

259. *Tinnin*, 570 So. 2d at 1196.

260. 387 S.E.2d 740 (Va. 1990), *cert. denied*, 498 U.S. 907 (1990). The case is discussed in several law review articles. See Entin, *Defeasible Fees*, *supra* note 11; Jonathan L. Entin, *Litigation, Political Mobilization, and Social Reform: Insights from Florida's Pre-Brown Civil Rights Era*, 52 FLA. L. REV. 497 (2000) [hereinafter *Litigation, Political Mobilization*]; Joseph William Singer, *For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism: Part One: A Diversity of Influence: Re-Reading Property*, 26 NEW ENG. L. REV. 711, 725 (1992) (noting that "cases striking down racially restrictive future interests have vast implications for the structure of the legal system and the relation between the public and the private sphere") (footnotes omitted); Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L.J. 327 (1997). The case is also noted in JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 643-45 (2d ed. 1997) and appears in EDWARD E. CHASE, *PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS* 218-22 (2002).

The Foundation adhered to a whites-only admissions policy for almost thirty years despite two important legal setbacks. The more serious of these was the loss of its federal tax exemption in 1978 under a Internal Revenue Service ruling that denied favorable tax status to racially discriminatory private schools. The federal courts upheld the revocation after protracted litigation. Several years later, when enrollment at the Academy had fallen to half its earlier high levels and most white pupils were attending public schools, the Foundation sought to regain its tax exemption. In the fall of 1986, soon after the exemption was restored, Prince Edward academy enrolled five African-American students.²⁶¹

Jack Adams, who died in 1968, left money in trust to the Prince Edward School Foundation “[s]o long as [it] . . . admits . . . only members of the White Race.”²⁶² The Adams will further provided that “[i]n the event that the said Foundation should . . . at any time permit to matriculate . . . any person who is not a member of the White Race, no further payment of income shall be made to the said Foundation; but all income . . . shall be paid” to a series of beneficiaries, concluding with Hermitage Methodist Homes.²⁶³ Only the final gift over, to Hermitage Methodist Homes, had no racial restriction.²⁶⁴

A Virginia statute that was in effect when the testator died had been characterized by the Virginia Supreme Court “as validating a charitable gift for the education of members from one of the two races, but not from both.”²⁶⁵ Moreover, that statute “required discrimination with respect to educational trusts, [but] it did not impose such a requirement with respect to general charitable gifts, such as the gift over to Hermitage.”²⁶⁶

When, after many years, the school began to admit non-white students, the trustee sought guidance from the courts, asserting that it was “uncertain as to the proper income beneficiary . . .’ and ask[ing] the court to . . . determine the rights of the parties.”²⁶⁷ The first beneficiary, Prince Edward School Foundation, argued that because the state

261. Entin, *Defeasible Fees*, *supra* note 11, at 774-75 (footnotes omitted). *See also* Griffin v. County Sch. Bd., 377 U.S. 218 (1964); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 451-79 (1976) (recounting the role of Prince Edward County with respect to the background of *Brown v. Board of Educ.*); *id.* at 480-507 (recounting the trial); *id.* at 575-77 (recounting the argument in the U.S. Supreme Court).

262. *Hermitage Methodist Homes*, 387 S.E.2d at 741.

263. *Id.* at 742.

264. *See* Spreng, *supra* note 260, at 411 (stating that Hermitage Homes “had never had a discriminatory admissions policy”).

265. *Hermitage Methodist Homes*, 387 S.E.2d at 744.

266. *Id.*

267. *Id.* at 742.

statute had been interpreted by the state court to require segregation—allowing gifts to schools only on condition that the schools be segregated—state action was implicated in the discrimination.²⁶⁸ The Prince Edward School Foundation argued that the discriminatory language should be stricken and the trustee ordered to pay all trust income to Prince Edward School Foundation.²⁶⁹ The trial court so held.²⁷⁰

Prince Edward School Foundation relied on an earlier Virginia case, *Meek v. Fox*, in which an invalid restraint had been stricken and the underlying gift made absolute.²⁷¹ *Meek* concerned a devise to a daughter who “shall have it forever, except she should marry, then at her death I desire that it shall revert to her legal heirs.”²⁷² The *Meek* court held that the restraint was a condition subsequent, that the restraint against marriage was void as against public policy, and that the daughter therefore took a fee simple absolute.

In *Hermitage Methodist Homes*, the Virginia Supreme Court assumed, without deciding, that the racial restriction was void.²⁷³ That left the question whether, the restriction being void, the underlying gift would become absolute or would be voided with the restriction. That decision, the court held, turned on the nature of the restriction, whether it were a “limitation” or a “condition subsequent.” The reason this mattered, the court said, was that when a gift is made subject to a condition subsequent, and the condition subsequent is invalid, the court simply strikes the invalid condition subsequent and leaves the underlying gift absolutely valid. On the other hand, the court said, when a gift is subject to a limitation, “a limitation marks the utmost time of continuance of the estate,” so that “where a gift or estate subject to a limitation is unlawful, in order to cure the defect the court must terminate the entire gift or estate.”²⁷⁴

The *Hermitage Methodist Homes* court said that the gift in *Meek* had been on condition subsequent, so that when the condition was declared invalid, the underlying gift became absolute.²⁷⁵ In the *Hermitage*

268. *Id.* at 744 (“The ability of Mr. Adams to create this educational trust had its sole source in a state law which required him to discriminate on the basis of race in order to give effect to his intent to further education.”).

269. *Id.* at 742-43.

270. *Hermitage Methodist Homes*, 387 S.E.2d at 743.

271. 88 S.E. 161, 161 (Va. 1916).

272. *Id.*

273. *Hermitage Methodist Homes*, 387 S.E.2d at 744.

274. *Id.* at 746. This is not universally true. See WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* §2.7 at 49-50 (3d ed. 2000). Courts do grant relief against forfeiture when a condition subsequent has been breached. *Id.* (stating that while “[c]ourts have more difficulty with the idea that equitable relief is possible when a fee simple determinable has expired ‘naturally’ by virtue of its special limitation . . . there is at least some authority in support of granting equitable relief in such cases”) (footnote omitted).

275. *Hermitage Methodist Homes*, 387 S.E.2d at 745.

Methodist Homes case, however, the court said that the language of the racial restriction included the words '[s]o long as,' classic indicators of a limitation.²⁷⁶ And, the court said, because the limitation was invalid, and the limitation defined the life of the underlying gift, the underlying estate also automatically terminated. This occurred, the court said, rejecting a state action argument, not because of court action but "[b]y the natural operation of this limitation."²⁷⁷ The court held that "the interests of the educational charities fail completely . . . not because we give effect to an invalid trust provision . . . [but] because the offending language cannot be stricken from the provision without changing the essential nature and quality of the estate."²⁷⁸ For this, of course, the court relied on *Evans v. Abney*.²⁷⁹

The court also rejected an argument based on the *cy pres* doctrine. On that point, the court relied on the statutory definition of *cy pres*, which was that the doctrine applied only in the case of "indefiniteness or uncertainty of the beneficiaries named . . . or . . . indefiniteness of the purpose of the trust itself."²⁸⁰ Here, the court said, "there is no indefiniteness or uncertainty regarding the beneficiaries."²⁸¹ The court disregarded the fact that the precise reason the trustee had filed this suit was, as the court repeated, that "the trustee asserted it was 'uncertain as to the proper income beneficiary of said trust' and asked the court to . . . determine the rights of the parties."²⁸² Thus, in 1990, the Supreme Court of the Commonwealth of Virginia enforced a testator's determination to strip a school of funding because it admitted students who were not "members of the White Race."²⁸³

D. A 1999 Decision that Considers But Rejects the Pertinence of Title VIII and the 1866 Civil Rights Act to a Racially Discriminatory Donative Transfer

Most recently, the Maryland courts have been asked to determine the consequence of a will that provided that, after the death of the last survivor of certain annuitants, a trust should terminate and all of its assets and unpaid income:

be paid over free of trust unto The Keswick Home . . . with the request that said Home use the estate and property thus passing

276. *Id.* at 746.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Hermitage Methodist Homes*, 387 S.E.2d at 747 (quoting VA. CODE ANN. § 55-31).

281. *Id.*

282. *Id.* at 742 (punctuation omitted).

283. *Id.* at 741.

to it for acquisition or construction of a new building to provide additional housing accommodations to be known as the "Coggins Building" to house white patients If not acceptable to the Keswick Home, then this bequest shall go to the University of Maryland Hospital.²⁸⁴

The testator died in 1963. The last annuitant died in 1998. The trustee, Mercantile-Safe Deposit & Trust Company, then filed an interpleader action to determine to whom it should transfer the residuum of the estate (worth \$28.8 million in 1999).²⁸⁵ The trial court, relying on *Evans v. Abney*, concluded that:

[t]he Fourteenth Amendment is not violated when, as here, the Court fairly applies its normal principles of construction to determine Dr. Coggins['] intent in establishing a charitable trust, even if that leads to a conclusion with regard to that intent, that because of the operation of neutral and nondiscriminatory state trust laws, effectively denies all patients at Keswick, white as well as African Americans, the benefit of the trust.²⁸⁶

The court held that the *cy pres* doctrine was inapplicable because the gift over to the University of Maryland hospital system indicated that the testator had a specific, not a general charitable intent. The trial court did refer to *Jones v. Alfred H. Mayer Co.*, as well as to Title II of the Civil Rights Act of 1964, and the Maryland Health Code which prohibits racial discrimination in hospitals and related institutions.²⁸⁷ The trial court said, however, that "[i]t was not until 1968, after the execution of Dr. Coggins' Will, that the Supreme Court, in *Jones v. Alfred H. Mayer Co.*, . . . extended . . . § 1981 [sic] to private contracts," and that the federal and state statutes had been enacted in 1964 and 1972, respectively. The trial court apparently concluded that neither the 1866 Act nor the 1964 and 1972 statutes applied to a will effective in 1963 or distribution in 1998.²⁸⁸

Thus, as late as 1999, a Maryland court endorsed a racially discriminatory donative transfer by enforcing a bequest that deprived a nursing home of funds because of the home's refusal to honor a testator's intent to benefit only "white patients."

284. *Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp.*, No. 24-C-99-001226, slip op. at 2 (Cir. Ct. Baltimore City Nov. 9, 1999), *cert. granted*, 743 A.2d 245 (2000).

285. *Home for Incurables*, No. 24-C-99-001226, slip op at 2-4.

286. *Id.* at 7.

287. *Id.* at 4.

288. *Id.*

IV. THE IMPACT OF SECTIONS 1981 AND 1982 ON RACIALLY DISCRIMINATORY DONATIVE TRANSFERS

As the summary in Part III indicates, even after *Jones*, the courts generally continued to decide discriminatory donative transfer cases without any consideration of sections 1981 and 1982. Except for the two Title VIII cases,²⁸⁹ the central federal issue in each case was state action. With respect to donative transfers that did not involve what was held to be state action, the courts continued to hold and say that racially discriminatory transfers would not be unlawful.²⁹⁰ There were occasional references to such federal laws as the Hill-Burton Act and Titles II and VI of the 1964 Civil Rights Act, but these were not central to the decisions.²⁹¹

I suggest, however, that after the Supreme Court's decision in *Jones*, the courts should have assessed the legality of racially discriminatory donative transfers in light of that ruling, and should have considered whether these racially discriminatory transfers violated sections 1981 and 1982.²⁹² Had they done so, they should have concluded that

289. See *supra* notes 126-147 and accompanying text.

290. See, e.g., *Lockwood v. Killian*, 425 A.2d 909, 915 (Conn. 1979) (including a dissenting opinion arguing that all charitable trusts involve state action, also maintaining "that were the present scholarship fund simply a private trust, the sexual, racial and religious restrictions would be protected from state interference"); *In re Will of Potter*, 275 A.2d 574 (Del. Ch. 1970); *Milford Trust Co. v. Stabler*, 301 A.2d 534, 536 (Del. Ch. 1973) (stating that "a trust with racial restrictions but which is entirely private and which does not involve, in any way, action by the State or its agents is constitutional"); *Tinnin v. First United Bank of Miss.*, 502 So. 2d 659, 666 (Miss. 1987) (indicating that absent state action, the discriminatory restraint might have been enforced); *First Nat'l Bank of Kansas City v. Danforth*, 523 S.W.2d 808, 821 (Mo. 1975) (stating that "the trustee has the discretion to select deserving individuals . . . born of white parents").

291. See, e.g., *Home for Incurables*, No. 24-C-99-001226, slip op. at 5-7.

292. Once the Supreme Court had held in *Jones* that section 1982 applied to private action, it was very likely to reach the same result with respect to section 1981. See, e.g., 6 LARSON, EMPLOYMENT DISCRIMINATION § 100.02, at 100-02 (2000) ("[I]t was not until 1968 that the Supreme Court established that the Act of which § 1981 is a part covers discriminatory actions by private persons.") (footnote omitted); *id.* § 101.01[3], at 101-09 ("*Jones* involved section 1982, but it also revitalized section 1981 The Court at two points indicated that its holding would apply to section 1981."); *id.* at §§ 101-8, 101-9, n.28 ("Shortly after *Jones* appeared, the original author of this Treatise took the position that section 1981 must logically support a cause of action for racial discrimination in the area of private employment."). In 1975, the Court explicitly confirmed that section 1981 provides a remedy against race discrimination in private employment. *Id.* at 100.01 (citing *Johnson v. Ry. Express Agency*, 421 U.S. 454 (1975)). See also *supra* note 92 and accompanying text (stating that lower courts considered that *Jones* applied to section 1981); *Runyon v. McCrary*, 427 U.S. 160, 168 (1976) (stating that the Court had held that section 1981 prohibited private discrimination in *Tillman v. Wheaton-Haven Recreation Assn.* and *Johnson v. Ry. Express Agency*). For a discussion of section 1981 in *Tillman v. Wheaton-Haven*, see *infra* notes 334-340 and accompanying text.

It may well be that more courts also should have been analyzing the impact of other legal changes of the 1960s, notably Titles II and VI of the 1964 Civil Rights Act, which prohibit discrimination in places of public accommodation and in programs that receive federal financial assistance. Consideration of these provisions might well have dictated a different result in several

sections 1981 and 1982 do apply to racially discriminatory donative transfers in which there is no state action.

This analysis should have had three consequences. First, it should have led to the invalidation of some discriminatory donative transfers that had been held lawful under the state action test. Second, with respect to discriminatory donative transfers held invalid for involving state action, the recognition that sections 1981 or 1982 also was violated should have influenced the relief that was provided, leading courts to excise the discriminatory restraint and preserve the underlying gift, rather than invalidate the entire gift and allow the corpus to pass to another donee. Third, it is likely that some racially discriminatory donative transfers never have been challenged because they seemed to involve no state action. The analysis in this Article suggests that these discriminatory donative transfers should have been, and now should be, subjected to scrutiny under sections 1981 and 1982.

Part IV elaborates upon the implications of this suggestion. Subpart A discusses the development of the law regarding sections 1981 and 1982,²⁹³ and subpart B analyses the application of section 1982 to discriminatory donative transfers in general. Subpart C considers the principal objection to this thesis: the principle of grantor autonomy.

A. *The Development of the Law Regarding Sections 1981 and 1982*

Some of the principles developed since *Jones* are clear; others are somewhat uncertain. The Supreme Court has held that intentional discrimination must be proved to establish liability under section 1981, and this requirement is generally understood to apply to section 1982 as well.²⁹⁴ The lower courts generally have agreed that section 1982 is violated if the impermissible motivation is part of the reason for the action; it need not be the exclusive reason.²⁹⁵

cases. See, e.g., *First Nat'l Bank of Kansas City v. Danforth*, 523 S.W.2d 808 (Mo. 1975). This Article addresses sections 1981 and 1982, however, and refers to these other changes only incidentally.

293. While the focus of this Article is on section 1982, its interpretation is so intertwined with that of section 1981 that both must be considered together. The two were, after all, originally part of the same section of the 1866 Civil Rights Act. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (quoting section 1 of the Civil Rights Act of 1866).

294. The Supreme Court held in *General Building Contractors Assn. v. Pennsylvania* that section 1981 is violated only by intentional discrimination, not by actions with disparate impact. 458 U.S. 375, 382-91 (1982). Courts and commentators assume that the intent standard also applies to section 1982. See JAMES A. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* § 3.07, at 153-55 (2d ed.1995); ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 27.5 (1996) (stating that "the intent issue as to § 1982 may not be totally foreclosed" and citing cases).

295. *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1970) (holding that the presence of other factors cannot justify discrimination based on race); *Payne v. Bracher*, 582 F.2d 17, 18 (5th Cir. 1978) (holding that race of the tenant was not to be considered in any

The Court has established that section 1981 protects white as well as non-white persons against discrimination, and the lower courts have applied this to section 1982 as well.²⁹⁶ The Court has also made it clear that "race," for purposes of sections 1981 and 1982, means what it did at the time sections 1981 and 1982 were enacted—"identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."²⁹⁷ The Supreme Court has held that this includes Arabs²⁹⁸ and Jews,²⁹⁹ and has said that it includes Finns, Gypsies, Basques, Swedes, Norwegians, Germans, Greeks, Italians, Spaniards, Mongolians, Russians, Hungarians, Chinese, and Latins.³⁰⁰ Therefore, sections 1981 and 1982 prohibit actions that intentionally discriminate not only between "whites" and "non-whites," but also on the basis of "race," which means, as the Supreme Court has explained, because a person is of Jewish, Arab, German, Italian, or other particular ancestry.³⁰¹

The Supreme Court also has determined that the protection of section 1982 extends to whites who have been subjected to discriminatory action because of their association with blacks. In *Jones*, "the Court allowed Mrs. Jones, who was white, to sue along with her husband."³⁰² In the 1969 case of *Sullivan v. Little Hunting Park*, a white homeowner, Mr. Paul Sullivan, rented his house to Mr. T. R. Freeman, Jr., a Negro.³⁰³ Mr. Sullivan owned a membership share in a community

way); SCHWEMM, *supra* note 294, § 27.5, at 27-40 & n.214, and cases cited therein. This principle for section 1982 is analogous to the "mixed motive" principle established for the Fourteenth Amendment in *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 429 U.S. 252, 255 n.21 (1977).

296. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (considering section 1981); *Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977) (considering section 1982); *Rebel Van Lines v. City of Compton*, 663 F. Supp. 786, 787, 793 (C.D. Cal. 1987) (considering sections 1981 and 1982).

297. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (stating that in enacting 42 U.S.C. § 1981, which is now § 1981(a), "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics"); *see also Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (applying the same standard to 42 U.S.C. § 1982 and holding that "Jews . . . were among the peoples then considered to be distinct races and hence within the protection of the statute").

298. *Saint Francis Coll.*, 481 U.S. at 613.

299. *Shaare Tefila Congregation*, 481 U.S. at 617.

300. *Saint Francis Coll.*, 481 U.S. at 611-12 (identifying these categories); *see also Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 45 F.3d 223, 229-30 (7th Cir. 1995) (noting that Italians may be protected under section 1981).

301. The Supreme Court warned, in *Saint Francis College*, that neither a "pure" national origin case nor a "pure" religion case would fall under section 1981: to secure relief under section 1981, the plaintiff must show that she suffered discrimination not only because of "the place or nation of his origin" but because she "was born as an Arab." *Saint Francis Coll.*, 481 U.S. at 613. SCHWEMM, *supra* note 294, § 27.3(1), at 27-10 to 27-11, and cases cited therein (discussing this distinction).

302. *See* SCHWEMM, *supra* note 294, § 27.5, at 27-36.

303. 396 U.S. 229 (1969).

park and playground operated by Little Hunting Park, Inc., for residents of the area.³⁰⁴ Under the corporation's by-laws, a person who owned a membership share could assign it to a tenant, subject to approval by the board of directors.³⁰⁵

Mr. Sullivan assigned his membership to Mr. Freeman, and "[t]he Board refused to approve the assignment because Freeman was a Negro."³⁰⁶ Mr. Sullivan protested, and was expelled from the corporation.³⁰⁷ The Supreme Court held that the white property owner's expulsion violated § 1982, reasoning that to allow discrimination against whites for advocating the rights of blacks "would give impetus to the perpetuation of racial restrictions on property."³⁰⁸ The Court said that "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 . . . from which § 1982 was derived."³⁰⁹ The Court referred to its statement in *Barrows v. Jackson*,³¹⁰ "that the white owner is at times 'the only effective adversary' of the unlawful" discrimination.³¹¹ Since *Jones and Sullivan*, the lower courts have "consistently recogniz[ed] § 1982 standing in spouses, roommates, parents with adopted black children, and other whites who were denied housing because they lived with blacks."³¹²

The Supreme Court has also established that section 1982 protects the right to be free from discrimination with respect to a particular piece of property, as well as from discrimination with respect to one's general capacity to exercise property rights. This was, of course, the ruling in *Jones*, in which the Court held that a particular homeseller was required to transfer a home to the plaintiffs. The *Jones* Court said

304. *Sullivan*, 396 U.S. at 234-35.

305. *Id.* at 234.

306. *Id.* at 235.

307. *Id.*

308. *Id.* at 237.

309. *Sullivan*, 396 U.S. at 237.

310. 346 U.S. 249, 259 (1953).

311. *Id.*; see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (holding that a ban on intermarriage and interracial dating is racial discrimination and noting that "decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination"); *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

312. The Fifth Circuit has said that "[i]t is well-established that whites have a cause of action under Section 1982 when discriminatory actions are taken against them because of their association with blacks." *Woods-Drake v. Lundy*, 667 F.2d 1998, 1201 (5th Cir. 1982) (holding that section 1982 was violated by a landlord who refused to continue to rent to tenants who entertain black guests and citing several cases in which "the courts have held that denial of housing to whites because of their association with blacks violated Section 1982"). See also *W. Va. Human Rights Comm'n. v. Wilson Estates, Inc.*, 503 S.E.2d 6 (W.Va. 1998) (holding under West Virginia Fair Housing Act and federal fair housing decisions that it is unlawful to discriminate against a Caucasian because of her association with blacks—in this case having black friends as guests); SCHWEMM, *supra* note 294, § 27.5, at 27-36.

that it had previously interpreted section 1982 in this way in the 1948 case of *Hurd*.³¹³ Writing in *Jones* about *Hurd*, the Court said:

The agreements . . . covered only two-thirds of the lots of a single city block, and preventing Negroes from buying or renting homes in that specific area would not have rendered them ineligible to do so elsewhere in the city. Thus, if § 1982 had been thought to do no more than grant Negro citizens the legal capacity to buy and rent property free of prohibitions that wholly disabled them because of their race, judicial enforcement of the restrictive covenants at issue would not have violated § 1982. But this Court took a broader view of the statute. Although the covenants could have been enforced without denying the general right of Negroes to purchase or lease real estate, the enforcement of those covenants would nonetheless have denied the Negro purchasers "the same right 'as enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property.'" That result, this Court concluded, was prohibited by § 1982. To suggest otherwise, the Court said, "is to reject the plain meaning of language." *Hurd v. Hodge* squarely held, therefore, that a Negro citizen who is denied the opportunity to purchase the home he wants "solely because of his race and color," has suffered the kind of injury that § 1982 was designed to prevent.³¹⁴

An important aspect of *Jones* is that the Court compelled an unwilling seller to transfer property. In *Hurd*, both seller and buyer were willing, but a third party sought to undo the transfer.

The Supreme Court also has established that sections 1982 and 1981 apply to conduct on the part not only of the transferor of property but also of others. In *Jones*, the complaint was "the refusal of [the] defendants to sell a house and lot to plaintiffs solely because of Jones' race."³¹⁵ In *Sullivan*, the Supreme Court indicated that the nonprofit company that operated the recreational facilities had violated section 1982 with respect to not only the white property owner but also the Negro tenant.³¹⁶ With respect to Mr. Freeman, the Negro tenant, the Court did not seem to be treating Little Hunting Park, Inc. as the owner of property (the membership share); rather, the Court spoke of the

313. 334 U.S. 24 (1948).

314. *Jones*, 392 U.S. at 418-19 (internal citations and punctuation omitted).

315. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 118 (E.D. Mo. 1966), *aff'd.*, 379 F.2d. 33 (8th Cir. 1967), *reversed*, 392 U.S. 409 (1968). One defendant in the suit, Paddock Country Club, Inc., was alleged to exist "for the primary use and benefit of the people who will reside in the subdivision," but the claims against the country club were not developed. *Jones*, 255 F. Supp. at 118.

316. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237-38 (1969).

company's interference with Mr. Freeman's "right to 'lease'" the home from Mr. Sullivan.³¹⁷ Thus, it appears that the liability of Little Hunting Park, Inc. was premised not on its refusal to transfer property that was within its control (the membership share), but on its interference with Mr. Freeman's full enjoyment of the property he was leasing from Mr. Sullivan.

Tillman v. Wheaton-Haven Recreation Ass'n was a similar case.³¹⁸ In *Tillman*, a community pool that served residents of a particular area refused to admit Dr. and Mrs. Harry C. Press, Negroes who had purchased a home within the geographic preference area.³¹⁹ The Supreme Court agreed with the Negro homebuyers that the "§ 1982 claim is controlled by *Sullivan*."³²⁰ As in *Sullivan*, the Court treated the membership in the non-profit organization not as property itself, but as part of the interest the new resident was acquiring from the owner of the house.³²¹ The Court said that for Dr. and Mrs. Press, "the right to acquire a home in the area is abridged and diluted" by the pool administration's rejection of them.³²² Thus, in *Tillman*, as in *Sullivan*, the Supreme Court indicated that section 1982 prohibited conduct on the part of a third party with influence over the extent or nature of the property interest transferred.

In *City of Memphis v. Greene*,³²³ in 1981, the Court emphasized that section 1982 protects the right "to hold" as well as the right "to acquire" property, and said that this protects "the right of blacks not to have property interests impaired" not only by transferors but also by others.³²⁴ The Court said that section 1982 "would support a challenge to municipal action benefiting white property owners that would be refused to similarly situated black property owners," that the statute "might be violated by official action that depreciated the value of property owned by black citizens," and that "[t]he statute might be violated if [defendants]. . . severely restricted access to black homes, because

317. *Sullivan*, 396 U.S. at 237 ("Respondents' actions in refusing to approve the assignment of the membership share . . . was clearly an interference with Freeman's right to 'lease.'"). *But see id.* at 236 ("It is not material whether the membership share be considered realty or personal property, as § 1982 covers both.").

318. 410 U.S. 431 (1973).

319. The Supreme Court speaks of "petitioner, Harry C. Press, a Negro who had purchased . . . a home." *Tillman*, 410 U.S. at 433. However, the court of appeals makes clear that both Dr. and Mrs. Press purchased the home. *Tillman v. Wheaton-Haven Recreation Assoc.*, 451 F.2d 1211, 1213 (4th Cir. 1971). Both Dr. and Mrs. Press were plaintiffs and petitioners. *Tillman*, 410 U.S. at 434.

320. *Id.* at 435.

321. *Id.* at 437.

322. *Id.*

323. 451 U.S. 100 (1981).

324. *Greene*, 451 U.S. at 122-23.

blacks would then be hampered in the *use* of their property."³²⁵ Subsequently, in *Shaare Tefila Congregation v. Cobb*, the Supreme Court entertained the claim that by the "desecration of the[ir] synagogue" by vandals,³²⁶ the members of the congregation, as well as the synagogue itself, had been "deprived of the right to hold property in violation of § 1982."³²⁷ Referring to *Shaare Tefila* in a separate opinion in *Patterson v. McLean Credit Union*, four justices of the Supreme Court said: "Though our holding in that case was limited to deciding that Jews are a group protected by § 1982, our opinion nowhere hints that the congregation's vandalism claim might not be cognizable under the statute because it implicated the use of property, and not its acquisition or disposal."³²⁸ Lower courts have extended this notion of section 1982's protecting the right to "use" property.³²⁹

Following these decisions, the lower courts have applied section 1982 against a variety of defendants, private as well as public, in addition to the transferors of the property interest. In some cases, these decisions have been based exclusively upon the third party's interference with a sale or lease of property; in others, the decisions relied as well on section 1982's guarantee of the "right to hold" property. For example, in the 1989 case of *Stirgus v. Benoit* an Illinois district court upheld a claim under § 1982 against whites who had firebombed the home of new black residents.³³⁰ The court stated that "when a racially-motivated firebombing destroys a person's home, that person does not truly enjoy the same freedom to acquire and 'hold' property as a similarly situated white citizen."³³¹

The Supreme Court also has evidenced a broad conception of the nature of "property" under section 1982. In *Sullivan*, the Court spoke of the membership share in *Little Hunting Park* as property, and said that "it is not material whether the membership share be considered

325. *Id.* at 123 (emphasis added); see also SCHWEMM, *supra* note 294, § 27.3(2)(c).

326. 785 F.2d 523, 526 (4th Cir. 1986), *rev'd*, 481 U.S. 615 (1987).

327. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616 (1987); see *Patterson v. McLean Credit Union*, 491 U.S. 164, 207 n.12 (1989).

328. *Patterson v. McLean Credit Union*, 491 U.S. 164, 207 n.12 (1989). (Brennan, J., writing for himself and Justices Marshall, Blackmun, and, as to this portion of the opinion, Stevens).

329. *United States v. Brown*, 49 F.3d 1162, 1165-68 (6th Cir. 1995), *cert. denied*, 516 U.S. 940 (1995) (holding that section 1982 protects the right to "use" a synagogue); *United States v. Greer*, 939 F.2d 1076, 1091 (5th Cir. 1991), *aff'd en banc*, 968 F.2d 433 (5th Cir. 1992), *cert. denied*, 507 U.S. 962 (1993) (holding that section 1982 protects the right to use a park). *But see* *United States v. Brown*, 49 F.3d at 1169-73 (Batchelder, J., dissenting); Stephen J. Zailer, *Civil Rights—42 U.S.C. 1982—Expanding Protection to Include Non-Owner Users of Property*, *United States v. Brown*, 49 F.3d 1162 (6th Cir. 1995), 63 TENN. L. REV. 471 (1996) (agreeing with the dissent).

330. 720 F. Supp. 119, 121-22 (N.D. Ill. 1989).

331. *Stirgus*, 720 F. Supp. at 121-22; see also SCHWEMM, *supra* note 294, §27.3(2)(i) and cases cited therein.

realty or personal property, as § 1982 covers both."³³² Other courts have considered club memberships as property,³³³ although a 1995 district court opinion holds that club membership dissociated from such a real property interest as was involved in *Sullivan* or *Tillman* would be covered as a contract interest under section 1981 but not as property under section 1982.³³⁴

The courts also have indicated that guests have a protected property interest. The *Tillman* case involved not only the Negro homebuyers, but also white members of the pool and a Negro woman who was their guest.³³⁵ The pool administration reacted to the white members' bringing the Negro guest by changing the guest policy to allow only guests who were relatives of members.³³⁶ Mrs. Rosner, the Negro guest, was refused admittance under the new policy.³³⁷ This was challenged by both the white members and the Negro guest, all relying on section 1981, section 1982, and Title II of the Civil Rights Act of 1964.

The focus in *Tillman* was on the defendants' claim that the community swimming pool was a private club exempt from section 2000a(e) of the Civil Rights Act of 1964, and thus, defendants argued, also exempt from sections 1981 and 1982.³³⁸ The Supreme Court rejected the claim that this was a private club, and remanded the case to the district court, with directions to "evaluate the claims of the parties free of the misconception that Wheaton-Haven is exempt from §§ 1981, 1982, and 2000a."³³⁹ The Supreme Court did not indicate in *Tillman* whether the claims with respect to the guest policy would fall under section 1981, section 1982, or the 1964 Act. The court of appeals had said that "Mrs. Rosner is said to have an enforceable interest in the Tillmans' membership contract as a third party beneficiary, or, if their membership be considered as a leasehold, she has an enforceable easement of ingress and egress."³⁴⁰

332. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969).

333. See *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 314 n.12 (4th Cir. 1980) ("[I]t is not at all clear that club membership must be connected to ownership of other property to fall within the terms of § 1982. . . . In light of the broad meaning of the statutory language, club membership may in itself be real or personal property.").

334. *Yates v. Hagerstown Lodge No. 212*, 878 F. Supp. 788, 801 (D. Md. 1995) ("Absent evidence of a nexus between club membership and some other distinct property interest, as required by *Tillman* and *Sullivan*, there is no reason to expand the reach of § 1982 and hold that membership in a club shall be considered property."). That decision acknowledges the contrary dictum in *Wright v. Salisbury Club*. *Yates*, 878 F. Supp. at 799.

335. *Tillman v. Wheaton-Haven Recreation Assoc.*, 410 U.S. 431 (1973).

336. *Tillman*, 410 U.S. at 433.

337. *Id.* at 434.

338. *Id.* at *passim*.

339. *Id.* at 440 (footnote omitted).

340. *Tillman v. Wheaton-Haven Recreation Assoc.*, 451 F.2d 1211, 1214 (4th Cir. 1971). Judge Butzner, dissenting for himself and Judges Winter and Craven, also would have relied on section 1982 for the guest:

Guests and other invitees have been held by other courts to have property rights protected under section 1982. An early and influential case was the 1969 decision *Walker v. Pointer*, in which the district court held that prospective black visitors to an apartment were protected under section 1982 against a landlord's eviction of white tenants for having black guests.³⁴¹ The court said that "[i]n light of the decision . . . in *Jones [v. Alfred H. Mayer]* it is reasonable to characterize the freedom of Negro persons to come and go at the invitation of one lawfully in control of the premises as sufficiently pertaining to a condition of property to be a right to 'hold' under section 1982."³⁴² The court identified "tangible property interests which Negroes would have had an opportunity to possess but for the racially motivated" eviction.³⁴³ The court said:

While these interests are lesser in magnitude than power to lease or own the property, they are property interests nonetheless—interests Negro persons are entitled to receive and hold under section 1982.

First, Negro invitees along with all other social and business guests would have been able to enjoy an implied easement of ingress and egress over the common area controlled by defendants immediately adjacent to the Walker leasehold

Second, Negro guests of the Walkers would have had an opportunity to receive possessory interests in the property amounting to licenses. To create a license the Walkers need only grant to their guests authority to do some act on the premises³⁴⁴

The Second Circuit has said that "implicit in the Supreme Court's statement in *Tillman* . . . is an indication that a discriminatory guest policy can be a deprivation of rights protected by those sections."³⁴⁵ In *Olzman v. Lake Hills Swim Club*, members of the Lake Hills Swim Club invited a group of black children to use the club's facilities as guests of the members.³⁴⁶ After an initial season of controversy and some compromise, the Board of Directors of the swim club adopted a

The *Tillman* membership is a valuable property right, an incident of which is the right to invite guests. The right would be empty indeed unless the guests have the right to accept. Racial restrictions on the right to invite guests, and to accept invitations, are racial restrictions on the right to hold property that violate § 1982. A white host can vindicate this right.

Id. at 1224 (Butzner, J., dissenting).

341. 304 F. Supp. 56, 56 (N.D. Tx. 1969).

342. *Id.* at 61.

343. *Id.* at 62.

344. *Id.*

345. *Olzman v. Lake Hills Swim Club*, 495 F.2d 1333, 1338 n.10 (2d Cir. 1974).

346. *Olzman*, 495 F.2d at 1335.

new set of rules governing guests.³⁴⁷ The new rules had "the effect of denying the plaintiff members from inviting underprivileged children to the pool as they had done the year before under the then existing rules."³⁴⁸ These new rules were challenged by members of the club, by the pastor of a church whose congregation included the black children who were barred from use of the pool, and by a parent of some of those children.³⁴⁹ The court found it unnecessary to determine whether the pastor, parent, or a former club member had standing, holding that "it is enough to say that the plaintiffs who are present members have standing as did the Tillmans on behalf of their guest, Mrs. Rosner."³⁵⁰ The court also said that "[w]hile the condition of being a guest is not normally considered a 'property' right one can 'hold,' there is authority and justification for considering it such under § 1982."³⁵¹ Quoting the Supreme Court's explanation in *Jones* that "one of the 'great fundamental rights' sought to be preserved by the Civil Rights Act of 1866 was 'the right to go and come at pleasure,'" the Second Circuit said that:

It is reasonable to characterize the freedom of blacks to go and come as guests of a swim club member as sufficiently pertaining to a condition of property to be a right capable of being held under § 1982. Upon being invited by a member of the club, a black child becomes an invitee of that member with certain rights pursuant thereto. Whether these rights are denominated licenses, easements or usufructs, the guest has an interest in his guest status which the law may protect from certain invasions. . . . Here plaintiffs allege that the rule change was a direct result of the black children being invited as guests and of their acceptance of that invitation. As such, the allegation states a cause of action under § 1982, because so to change the guest rules would be to penalize the black guests for exercising their 'property' rights, thereby violating § 1982.³⁵²

With this overview of the development of the law regarding sections 1981 and 1982, subpart B considers how these principles apply to donative transfers.

347. *Id.* at 1338.

348. *Id.*

349. *Id.*

350. *Id.* at 1338 n.11.

351. *Olzman*, 495 F.2d at 1339.

352. *Id.* (internal citations omitted). The *Olzman* court also held that:

entry conditioned on payment of a fee thereby became a contract between the guest and the club (or between the member and the club to which the black guest would be a third-party beneficiary . . .). To change the guest rules so as to exclude black guests would . . . prevent them from making these contracts, if not penalize them for having made them in the past. This would constitute a violation of § 1981.

Id. at 1339.

B. *The Application of Sections 1981 and 1982 to Discriminatory Donative Transfers—In General*

Section 1982 includes three words describing acquisition of property—"inherit," "purchase," and "lease"—and the more general verb, "hold."³⁵³ Plainly, the statute encompasses at least one form of donative transfer, inheritance, since "inherit" is explicit in the statute. We consider below what "inherit" means in § 1982, whether any other forms of donative transfer are encompassed within the statute, and the meaning of the guarantee of "the same right"—recognizing that "the meaning and scope of the . . . Civil Rights Act of 1866 remain among the most controversial issues of American . . . law."³⁵⁴

"Inherit" is a "chameleon-like word"³⁵⁵ that may have any of the following meanings: taking land in intestacy;³⁵⁶ taking land or personalty in intestacy;³⁵⁷ taking land or personalty either in intestacy or under a will, or taking land or personalty either in intestacy or under any will, trust, or donative instrument, at the death of the donor or either at the donor's death or inter vivos.³⁵⁸

Two considerations suggest that Congress, in enacting the 1866 statute, used "inherit" to encompass testate as well as intestate transfers at death. First, this is how the word "inherit" was commonly used at

353. 42 U.S.C. § 1982 (1998).

354. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 864 (1986); see also ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 243-47 (1988); SMITH, *CIVIC IDEALS*, *supra* note 78, at 305 (noting that the laws enacted by the Thirty-Ninth Congress "long served as interpretive arenas for struggles among distinct conceptions of citizenship and civic rights that their language alone cannot resolve").

355. See David M. Becker, *Uniform Probate Code Section 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them*, 47 UCLA L. REV. 339, 385 n.150 (1999) ("'[H]eirs' is a chameleon-like word that can radically shift in meaning according to the context in which it is used.").

356. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 comment b (stating that in the English law of intestate succession "the word 'inheritance' was reserved for intestate succession to *land* . . . [and that s]uccession to *personal property* was often called 'distribution'"); MARK REUTLINGER, *WILLS, TRUSTS, AND ESTATES: ESSENTIAL TERMS AND CONCEPTS* 11 (2d ed. 1998) (defining "heir" as "[a] person who is entitled to another's real property by intestate succession"). Definitions of "heir" may be used to define "inherit," as "inherit" is defined as "to take as heir." BLACK'S LAW DICTIONARY 704 (5th ed. 1979).

357. See, e.g., UNIFORM PROBATE CODE § 1-201(21) (1993) (defining "heirs" as "persons . . . who are entitled under the statutes of intestate succession to the property of a decedent").

358. See, e.g., 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 315 (Peter Newman ed., 1988) ("The word 'inherit' has a narrow technical meaning, referring only to taking by the laws of descent and distribution, . . . [but it is also used] in a broader sense, to include taking by will or even, un-idiomatically, taking from an inter vivos trust."); Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in *DEATH, TAXES AND FAMILY PROPERTY*, *supra* note 38, at 11 ("*Inheritance* . . . deal[s] . . . with transfers at death."); BLACK'S LAW DICTIONARY 704 (5th ed. 1979) ("The word is also used in its popular sense, as the equivalent of to take or receive.").

that time. Encyclopedias and dictionaries of that era,³⁵⁹ as well as the Supreme Court,³⁶⁰ used the word to encompass testate as well as intestate succession. Second, the condition that section 1982 was enacted to overcome was not rooted in distinctions between testate and intestate succession. One of the characteristics of slave status was an inability to take property either by intestacy or by will,³⁶¹ and it therefore is likely that Congress intended "inherit" to mean taking either by intestacy or by will.

Moreover, even if the word "inherit" were given its narrowest meaning (i.e., taking under the laws governing intestacy), not only wills but also other donative transfers would seem to be covered by section 1982, again for two reasons: because of the statute's language,

359. Compare *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612 (1987) (including a statement that the Supreme Court "would expect the legislative history of § 1981 . . . to reflect [the] common understanding" at the time of enactment and using dictionaries and encyclopedias of that era to ascertain the "common understanding"), with *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994) (relying on dictionaries contemporary with statutory enactment). The dictionaries and encyclopedias that the Court used in *St. Francis College* confirm that "inherit" was used in a broad sense around 1866. See, e.g., CHAMBERS'S ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE (1878); THE CENTURY DICTIONARY 3098 (1911) ("In law it is used in contradistinction to acquiring by will; but in popular use this distinction is often disregarded.").

360. See, e.g., *Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994) (determining "ordinary or natural meaning" by considering, among other things, court decisions contemporaneous with the statutory enactment); *Gaines v. Hennen*, 65 U.S. 553, 568 (1860) (referring to "inheritance" under a will); *id.* at 592 (stating that "[t]hey take or inherit by will"); *id.* at 597 (discussing "inheritance" and "heirs" with respect to wills); *id.* at 602 (stating that "children . . . inherit . . . either in a case of intestacy or to take by testament"); *Adams v. Norris*, 64 U.S. 353, 362 (1859) (references to "heir" under a will); *Fouvergne v. New Orleans*, 59 U.S. 470, 472 (1855) (including references to "heir" and "inherit" under a will); *Carpenter v. Pennsylvania*, 58 U.S. 456, 461 (1854) (including a reference to a statute which taxed inheritances whether by intestacy or by will); *id.* at 462 (discussing "laws of inheritance" affecting a will).

361. See THOMAS READ ROOTES COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA § 262 (Univ. of Georgia Press 1999) (1858) ("If a legacy were given to an African Slave . . . the title would vest . . . in the master."); STANLEY M. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 59 (3d ed. 1976) (noting that a slave "could make no will, nor could he, by will, inherit [sic] anything"); Hans W. Baade, *The Gens de Couleur of Louisiana: Comparative Slave Law in Microcosm*, 18 CARDOZO L. REV. 535, 566 (1996); JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH 69-71 (1990). But see Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 233-37 (1999) (discussing *Bates v. Holman*, 139 Va. (3 Hen. & M.) 502 (1809), a case in which an enslaved daughter was shown to have no right in intestacy but stating that the court "gives very strong indication that it would have upheld" a testamentary grant to the daughter); Ellen D. Katz, *Personal Liberty and Private Law: African-American Freedom in Antebellum Cumberland County, Va.*, 70 CHI.-KENT L. REV. 927, 957-58 (1995) (stating that free blacks in Virginia "could also devise property to enslaved relatives, directly or in a trust"); *id.* at 972 (noting "the infrequent use of wills among" free blacks in Cumberland County, Va., hypothesizing that "[f]ree blacks may have eschewed wills, fearing their heirs would have difficulty claiming the devise," and citing John Hope Franklin, *The Free Negro in the Economic Life of Ante-Bellum North Carolina (Part 2)*, 19 N.C. HIST. REV. 359, 366 (1942)). Franklin noted that "[f]ree Negroes, as other individuals, sometimes had difficulty in establishing their rightful claim to property left them in a will." Franklin, *supra* at 366. Note that Katz, too, uses "heir" with respect to a will. Katz, *supra* at 972.

and because of the disabilities Congress was addressing. In 1866, as today, the word “purchase,” at least with respect to real property, included gratuitous as well as commercial transfers, and was used to denote acquisition by any means other than intestacy. Thus, for example, the *Encyclopedia Britannica* of 1881 specified that: “A purchaser in law means one who acquires an estate otherwise than by descent, e.g. by will, by gratuitous gift, or by purchase in the ordinary meaning of the word.”³⁶² The 1887 edition of Emory Washburn’s *Treatise on the American Law of Real Property* says that:

In one thing all writers agree, and that is in considering that there are two modes only . . . of acquiring a title to land; namely descent and purchase; purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law.³⁶³

Moreover, part of the problem that Congress addressed was a prohibition of slaves’ taking not only by intestacy or will but also by any form of inter vivos conveyance, gratuitous or commercial. “[A] slave could not take title to, nor hold real property either by descent, grant or purchase. Such was the inexorable mandate of the common law.”³⁶⁴ This pervasive incapacity was understood by members of Congress, and it was this incapacity—to take either by descent or by purchase—that

362. *ENCYCLOPEDIA BRITANNICA* 77 (1881) (discussing “inheritance”); CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 31 (1962) (stating that, at least for real property, “[a] purchaser is any person acquiring an estate in any way other than by descent”); *accord*, *BLACK’S LAW DICTIONARY* 1248 (7th ed. 1999) (stating that a purchase is “the acquisition of real property by one’s own or another’s act (as by will or gift) rather than by descent or inheritance”).

363. EMORY WASHBURN III, *A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY* § 2, at 4 (5th ed. 1887). With respect to “purchase,” as with respect to “inheritance,” see *supra* note 356, nineteenth century legal definitions sometimes distinguished real property from personalty in ways the twentieth (and twenty-first) centuries have abandoned. To some extent, this may be related to the fact that property in the nineteenth century was more likely to be realty, while much property today is not. See, e.g., John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 *MICH. L. REV.* 722, 722-23 (1988) (describing “fundamental changes in the very nature of wealth,” from the eighteenth century, when “land was the dominant form of wealth,” to the “*financial assets*—that is, stocks, bonds, bank deposits, mutual fund shares, insurance contracts, and the like—which now comprise the dominant form of wealth”). Whether “inherit” or “purchase” might be limited to real property in some other context, Congress expressly applied both terms to “real and personal property” in the 1866 Act.

364. *Arents v. Long Island R. Co.*, 50 N.E. 422, 423 (N.Y. 1898); *accord*, KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 197 (1956) (“Legally a bondsman was unable to acquire title to property by purchase, gift, or devise.”); *Jones v. Jones*, 234 U.S. 615, 617 (1914) (involving intestate succession and stating that slaves “cannot take property by descent or purchase, and all they find and all they hold, belongs to the master”); Judith Kelleher Schafer, *Roman Roots of The Louisiana Law of Slavery: Emancipation in American Louisiana, 1803-1857*, 56 *LA. L. REV.* 409, 418 (1995) (discussing a slave’s incapacity to receive by testament or donation).

the 1866 Civil Rights Act was enacted to overturn. As the Supreme Court emphasized in *Jones*, the Act's objective was to "affirmatively secure for all men . . . what the Senator³⁶⁵ called the 'great fundamental rights:' the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property."³⁶⁶ The legislative history of the 1866 statute is replete with references to protecting the right to "acquire" property, without distinguishing testate from intestate succession or gratuitous from commercial purchase.³⁶⁷

Thus, if we consider the language and the purposes of the statute, it seems that by specifying "inherit" and "purchase" in section 1982, Congress encompassed all means of acquiring property: by will as well as by intestacy and by gratuitous as well as commercial conveyance.³⁶⁸ Furthermore, the statute also protects the equal right to "hold" real and personal property, which the Supreme Court has said protects "the right of blacks not to have property interests impaired."³⁶⁹ At least four justices of the United State Supreme Court and several lower courts have said the statute includes the right to "use" property.³⁷⁰

If, then, wills and other donative transfers are encompassed within section 1982, what is the impact of the statute on donative transfers? What does it mean to say that a citizen has "the same right" as a white citizen to take by inheritance or other gratuitous transfer and to "hold" and "use" such property interests?

In *Jones*, the Supreme Court held that section 1982 means that one who seeks to acquire property by purchase cannot be refused by the prospective transferor if the refusal is because of the transferee's

365. Senator Trumbull of Illinois, Chairman of the Judiciary Committee, introduced the legislation that became the 1866 Civil Rights Act.

366. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968); see also JACOBUS TENBROEK, EQUAL UNDER THE LAW 185, 185 n.14 (describing Senator Trumbull's speech as an expression of a generally shared natural rights philosophy underlying both the Thirteenth Amendment and the 1866 statute, and crediting that philosophy with protecting the broad right to acquire property by any means).

367. TENBROEK, *supra* note 366, at 188 (quoting Senator Jacob Howard of Michigan, in the debate over the 1866 Act, decrying the fact that the slave "could not take real or personal estate either by sale, by grant, or by descent, or by inheritance"); *id.* at 190 (quoting Rep. William Lawrence, speaking of the civil rights bill as protecting "the right to acquire property").

368. This would include inter vivos gifts and transfers commonly used as substitutes for wills, such as life insurance, pension accounts, joint accounts, "POD" bonds, trusts, joint tenancies, designation of death beneficiaries on pension plans, bank accounts, or contracts, and making gifts of remainder interests. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) (identifying will substitutes); JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 11 (6th ed. 2000) (noting that joint tenancy, designation of death beneficiary, and gift of remainder interest are common substitutes for wills).

369. *City of Memphis v. Greene*, 451 U.S. 100, 122 (1981).

370. See *supra* note 328 and accompanying text.

race.³⁷¹ This indicates that “the same right” means that “race” cannot disqualify one from acquiring property by purchase—that an unwilling transferor is legally compelled to make the transfer if his or her reason for declining to make the transfer is the transferee’s race.³⁷² Thus, “the same right” seems to mean that if race is the reason that a transferor declines to make a transfer, the transfer must be made despite the transferor’s unwillingness.³⁷³ The same meaning has been given to § 1982 in cases involving rental of real property: a landlord who declines to initiate or continue a tenancy, or approve a sublease, because of race, thereby violates section 1982.³⁷⁴

The courts also have held that private parties other than the transferor of property may be liable under section 1982. As discussed above, the Supreme Court so indicated in *Sullivan v. Little Hunting Park* and *Tillman v. Wheaton-Haven Recreation Assoc.*, and the lower federal courts have so held in a variety of other situations.³⁷⁵ What is forbidden is an action (or omission) that is motivated by the race of a person, whether race be part or all of the motivation and whether the complaint be made by the person whose race is at issue or by a person who associates with the person whose race is at issue.³⁷⁶

Section 1982 uses six verbs consecutively. We know how the section is interpreted with respect to “purchase” when the purchase is commercial and with respect to “lease.” If the section has the same meaning with respect to “inherit” and to gratuitous “purchase,” then a testator, grantor, trustee, or any other person would be forbidden to deprive a potential beneficiary of an inheritance or any other gift because of the race of the beneficiary or of a person with whom the beneficiary associates. Similarly, section 1982 would be violated by one who sought in any other way to interfere with an inheritance or gift because of the race of a potential beneficiary or of a person with whom the potential beneficiary associates.

The protected person, in these cases, would include any citizen who

371. 392 U.S. at 413.

372. *Id.* at 414.

373. Recall that, as the district court explained, “defendants did no more than politely refuse to enter into a contract of sale with plaintiffs.” *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 129 (E.D. Mo. 1966).

374. See, e.g., *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982) (holding that an eviction because of black guests violates section 1982); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970) (holding that a refusal to approve sublease because of race violates section 1982).

375. See *supra* notes 316-331 and accompanying text; SCHWEMM, *supra* note 294, at 27-13 to 27-14 (“Section 1982 does not specify who may be held responsible for violating the rights it establishes, but the general assumption has been that, apart from [some limitations regarding government defendants and respondeat superior] . . . anyone who engages in conduct prohibited by the statute is subject to suit.”).

376. See *supra* notes 302-312 and accompanying text.

would enjoy a property interest as a result of a transfer, not necessarily one who would hold a fee or leasehold interest, just as the guests in *Olzman* and other cases have been held to have property rights protected under section 1982.³⁷⁷ When people would benefit from a bequest or a trust, even if the bequest or trust would not vest any interest directly in them, their interests would be protected by section 1982. Moreover, just as the Supreme Court said in *Barrows v. Jackson*, and repeated in *Sullivan v. Little Hunting Park*, "the white owner is at times 'the only effective adversary' of the unlawful" discrimination,³⁷⁸ the interests of the person whose race is the basis for the denial may be represented by another person.

Thus, if section 1982 has the same meaning with respect to donative transfers as it does with respect to commercial sales and leases of property, the statute makes it unlawful for private persons—grantors, trustees, and others—to act on the basis of race to deprive or interfere with any citizen's ability to acquire or hold property. This would protect those who would benefit from donative transfers even indirectly (although there may well be limits to the extent of indirect benefit that would be protected).

This seems a startling proposition, but it is not clear why it seems so. It is not startling to include donative transfers under section 1982: if a contemporary state law prohibited blacks from taking legacies under wills or from being beneficiaries of trusts, few would be surprised by a ruling that this law was unlawful under section 1982. It is not startling to invalidate "private" as well as "official" interferences with property rights:³⁷⁹ if a bank or trust company announced that it would not administer trusts of which Asians were beneficiaries, few would be surprised by a ruling that this was unlawful under section 1982.³⁸⁰ It is not startling to compel an unwilling transferor who refuses to make a transfer because of race: this was the holding in *Jones*.³⁸¹ What makes the proposition startling is its application to an unwilling grantor (or other participant) in a private donative transfer. This seems to conflict with the principle of grantor autonomy and to invade what has seemed an area of personal, private conduct. These issues are addressed below.

377. See *supra* notes 335-352 and accompanying text.

378. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)).

379. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616 (1987) ("[S]ection [1982] forbids both official and private racially discriminatory interference with property rights.").

380. If the Negro homeowners in *Hurd* had acquired their property by inheritance rather than commercial purchase, the ruling in that case, which the Supreme Court attributed to section 1982, surely would have been the same. See *supra* notes 19-22 and accompanying text.

381. 392 U.S. at 413.

C. Grantor Autonomy and the Civil Rights Laws

The cases and commentary are replete with references to the high value we place on grantor autonomy,³⁸² particularly testamentary autonomy.³⁸³ In *Evans v. Abney*, Justice Black, writing for the Court, explained why the testator's intention would be implemented even though "[w]hen a city park is destroyed because the Constitution requires it to be integrated, there is reason for everyone to be disheartened."³⁸⁴

the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages. The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.³⁸⁵

Testamentary autonomy recently has received special protection from the Supreme Court, which held that "the right to pass on valuable property to one's heirs is itself a valuable right."³⁸⁶

Despite the paeans to it, testamentary autonomy always has been subject to substantial restraint.³⁸⁷ The Supreme Court has made clear that the "valuable right" of testamentary autonomy is not immune from regulation. Indeed, the Supreme Court said that:

382. See *In re Girard Coll. Trusteeship*, 138 A.2d 844, 847 (Pa. 1958) (including a reference to the "constitutionally safe-guarded . . . right of a benefactor to have enforced the limitations and restrictions affixed to his testamentary gift" and stating that "the exercise of that right is but one of the manifestations of the right of private property which is fundamental to our social, economic and political order and whose preservation unimpaired is as vital to our negro citizens as it is to their white brethren"); Friedman, *supra* note 358, at 19 ("American law is quite special . . . in the degree of freedom of testation that it grants.").

383. See, e.g., RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 10.1 cmt. a (Tentative Draft No. 1, 1998) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.").

384. *Evans v. Abney*, 396 U.S. 435, 443 (1970).

385. *Abney*, 396 U.S. at 447.

386. *Hodel v. Irving*, 481 U.S. 704, 705 (1987) (upholding a challenge under the Takings Clause to legislation that allowed certain transfers only if made inter vivos); see also *Babbitt v. Youpee*, 519 U.S. 234 (1997) (invalidating an amended statute that allowed devises in some circumstances). *Hodel v. Irving* has been described as "potentially revolutionary" and has been subjected to sharp criticism. RONALD CHESTER, *Inheritance in American Legal Thought, in INHERITANCE AND WEALTH IN AMERICA* 23, 33, 35 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).

387. See Friedman, *supra* note 358, at 12 (stating that although freedom of testation is "a leading principle" in the U.S. and Europe, "it is not absolute and unrestricted"); SIMES, *DEAD HAND*, *supra* note 7, at 6, 20 (considering the "loose statements to the effect that complete freedom of testation exists in England and America" and concluding that "to say . . . that there is complete freedom of testation in every state is to ignore statutes in every one of them").

In holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause.³⁸⁸

Testamentary autonomy is limited by a variety of common law and legislative constraints. It is limited by the doctrine of dower and by forced succession laws,³⁸⁹ as well as by principles disfavoring direct restraints on alienation, restricting trusts for accumulation, and prohibiting conditions in restraint of (first) marriage, in support of divorce, and otherwise considered contrary to public policy.³⁹⁰ Testamentary autonomy is limited by the constitutional prohibition against the involvement of state actors in discriminatory activities.³⁹¹ It is also limited by a variety of federal and state statutes including tax,³⁹² family allowance, and homestead laws.³⁹³ One of the most dramatic limits on testamentary autonomy is the Rule Against Perpetuities, initially developed by judges and now embodied in both statutes and common law.³⁹⁴

388. *Hodel v. Irving*, 481 U.S. at 717 (citing *Irving Trust v. Day*, 314 U.S. 556 (1942), and *Jefferson v. Fink*, 247 U.S. 288 (1918)). The Supreme Court and commentators have long held that the power to control the transfer of property is a matter of positive, not natural, law. See *Jones v. Jones*, 234 U.S. 615, 618 (1914) ("Inheritance is governed by the *lex rei sitae*. It is not a natural or absolute right, but the creation of statute law.").

389. *SIMES, DEAD HAND*, *supra* note 7, at 13-15, 19 (discussing dower and forced succession statutes); see also Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

390. *In re Keffalas' Estate*, 233 A.2d 248, 250 (Pa. 1967) (stating that while "a man's prejudices are part of his liberty, . . . the liberty of prejudice cannot transgress the interests of the Commonwealth"); RESTATEMENT (SECOND) OF TRUSTS § 62 (1959) ("A trust or a provision in the terms of a trust is invalid if the enforcement of the trust or provision would be against public policy"); RESTATEMENT (THIRD) OF TRUSTS §§ 28, 29(g) (Tentative Draft No. 2, 1999) (providing that a term in a trust is invalid if implementation would be "contrary to public policy."); RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. h (Tentative Draft No. 2, 1999) (providing that it is against public policy to enforce a trust provision that is "detrimental to the community"); RESTATEMENT (THIRD) OF TRUSTS § 29 Reporter's Notes, at 63 (Tentative Draft No. 2, 1999) (contemplating that this could encompass restraints involving race); BOGERT, *supra* note 149, § 48 (noting that a trust "to secure results which are contrary to public policy" is illegal); *SIMES, DEAD HAND*, *supra* note 7, at 33. Under this standard, a court would be authorized to invalidate a racial restraint on the ground that the restraint was contrary to public policy, regardless of such statutory authority as is discussed in this Article.

391. See *supra* notes 48-73 and accompanying text (illuminating the restrictions on the autonomy of Stephen Girard, A.O. Bacon, and other grantors who wished to involve state actors in racial discrimination).

392. *Adams*, *supra* note 18, at 5 (discussing the advantages enjoyed by charities—the property may be exempt from local property taxes and income may be exempt from federal income tax—and noting that the donor also enjoys the advantages of deductibility from the donor's income and that federal estate and gift tax laws allow a full 100% deduction).

393. *SIMES, DEAD HAND*, *supra* note 7, at 18.

394. See LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS §§ 121, 122 (2d

The courts also impose very substantial limits on testamentary autonomy by their interpretation and application of formality requirements and the doctrines of capacity, undue influence, fraud, *cy pres*, and deviation.³⁹⁵

In all of these situations, courts are balancing an interest in “testamentary autonomy” against some other interest—grantee autonomy, or alienability, or marketability, or a concern for surviving spouses—and every expression of judicial solicitude for the former is balanced by an expression of judicial solicitude for the latter. Courts and commentators consistently subordinate grantor autonomy to judges’ conceptions of public policy.³⁹⁶

Of all the ways in which grantor autonomy is constrained, prohibiting grantors from intentionally discriminating on the basis of race is one of the most readily justifiable. A court would be fully justified in refusing to implement intentional racial discrimination because it violates a firm public policy against racial distinctions in the private as well as the public sphere. The Supreme Court has spoken strongly about our “public policy against racial discrimination,”³⁹⁷ admonishing that “this Court has consistently repudiated ‘[d]istinctions between citi-

ed. 1966) [hereinafter FUTURE INTERESTS]; SIMES, DEAD HAND, *supra* note 7, at 33-34 (discussing the origins of the Rule Against Perpetuities).

395. See *supra* notes 26-31 and 151-259 and accompanying text; Leslie, *supra* note 389, at 243-64 (1996) (describing such interference with testamentary autonomy); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 280-85 (1999) (describing such interference with testamentary autonomy). Restraints on testamentary autonomy have a long history. See also Adams, *supra* note 18, at 8 (“Several states have provisions that restrict or prevent charitable testamentary dispositions in excess of a certain proportion of the decedent’s estate or contained in a will executed during a specified time period immediately prior to death.”); Alex M. Johnson, Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America’s Cup Litigation*, 74 IOWA L. REV. 545, 584 (1989). Johnson and Taylor state that:

Cases abound in which traditional *cy pres* doctrine is employed to transcend the settlor’s express intent due to a change in societal values and policies. For example, when the settlor has placed an explicit racially or sexually restrictive covenant or condition in the trust, courts should properly overrule the settlor’s specific intent, as expressed textually and historically, to effectuate the ideals and mores of modern society.

Johnson & Taylor, *supra* at 584 (footnotes omitted).

396. Spitko, *supra* note 395, at 276, 278-86 (discussing use of legal doctrines “to undermine the testamentary freedom of the nonconforming testator.”); SIMES, DEAD HAND, *supra* note 7, at 59 (arguing that the most important reason for the Rule Against Perpetuities is that “it is socially desirable that the wealth of the world be controlled by its living members and not by the dead”); Adams, *supra* note 18, at 22 (“The exact result in any given case will depend upon the presence or absence of several factual variables and upon the priorities assigned to competing policies in the jurisdiction involved.”); *id.* at 4 (“[T]he allowance of such a trust is a policy decision, a conscious community choice to permit perpetual dead hand control of property when the purpose of that control is of greater benefit to society than preservation of alienability for the testator’s survivors.”).

397. *Bob Jones Univ. v. United States*, 461 U.S. 574, 594 (1983).

zens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'³⁹⁸ Leading authorities in donative transfer law have maintained that this public policy alone would be sufficient to justify judicial invalidation of donative transfers that are intentionally racially discriminatory.³⁹⁹

This public policy has been embodied in positive legislation; as the Supreme Court has said, "[t]he law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension."⁴⁰⁰ The Supreme Court recently reminded us of "the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property."⁴⁰¹ Some of the states have used this authority to prohibit racial discrimination in donative transfers.⁴⁰² The United States Congress did this in Title VIII of the Civil Rights Act of 1968, as demonstrated by *United States v. Hughes Memorial Home*⁴⁰³ and *In re Long's Estate*,⁴⁰⁴ two cases in which racially discriminatory provisions of donative transfers were invalidated because they conflicted with the provisions of Title VIII.⁴⁰⁵

In the same way, while enacting the Civil Rights Act of 1866, Con-

398. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)). See also Akhil Reed Amar, *Remember The Thirteenth*, 10 CONST. COMM. 403, 407 (1993) (arguing that the policy prohibits the use of "private economic power" in "racially oppressive ways").

399. See, e.g., RESTATEMENT (THIRD) OF TRUSTS, Reporter's Notes, at 63 (indicating that he would consider a racial restriction violative of public policy); see also Jones, *Dead Hand and the Law of Trusts*, *supra* note 38, at 126-29 (noting that racial restriction is violative of public policy); Adams, *supra* note 18, at 8-10 (arguing that trust law doctrine could invalidate racially discriminatory provisions).

400. *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989).

401. *Hodel v. Irving*, 481 U.S. 704, 717 (1987).

402. California law states:

Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance . . . to any person of a specified sex, race, color, religion, ancestry, national origin, or disability, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's sex, race, color, religion, ancestry, national origin, or disability is void.

CAL. CIV. CODE § 53(a) (1997). New Jersey law states:

Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property . . . which limits, restrains, prohibits or otherwise provides against the sale, grant, gift, transfer, assignment, conveyance, ownership, . . . use or occupancy of real property to or by any person because of race, creed, color, national origin, ancestry, marital status or sex is hereby declared to be void as against public policy, wholly unenforceable The invalidity of any such . . . restriction . . . shall not affect the validity of any other provision . . . , but no reverter shall occur, no possessory estate shall result, nor any right of entry or right to a penalty or forfeiture shall accrue by reason of the disregard of such promise, covenant or restriction.

N.J. STAT. ANN. § 46:3-23 (1998) (citations omitted).

403. 396 F. Supp. 544 (D. W. Va. 1975).

404. 5 Pa. D. & C.3d 602 (1978).

405. See *supra* notes 126-147 and accompanying text.

gress considered protection against racial discrimination so important as to override racially discriminatory "inheritance." It should not be startling that Congress used its authority to limit the ability of people to require that, after their deaths, their property be distributed and administered in a way that reinforced the distinctions that are "odious to a free people whose institutions are founded upon the doctrine of equality."⁴⁰⁶ Indeed, this follows from the holding in *Jones*. In *Jones*, the Supreme Court held that, in the interest of eliminating odious racial distinctions, the Constitution authorized Congress to limit—and Congress had limited—the ability of a living person to decide to whom he would sell or lease property, to decide with whom he would share his community. The law generally allows an individual more freedom to act directly, in his or her lifetime, than by instructing others to act after his or her death.⁴⁰⁷ It should not be surprising that this constraint should be imposed on a testator, as it is imposed on a person who would make an inter vivos transfer.

For these reasons, testamentary autonomy should not prevent the application of the 1866 Civil Rights Act to donative transfers. There may be, however, some donative transfers that should not be subject to that statute. This issue is considered in section V.

406. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The modern Supreme Court's approach to the Reconstruction civil rights statutes has been to "accord [them] a sweep as broad as [their] language." *Griffen v. Breckenridge*, 403 U.S. 88, 97 (1970) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966), and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968)). The judicial decisions that immediately followed enactment did so as well, but that development was ended by the *Slaughterhouse Cases*. See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS 1866-1876*, at xii-xiii (1985); SMITH, *CIVIC IDEALS*, *supra* note 78, at 286-97, 330-37 (discussing radical Reconstruction emasculated by Southern resurgence); *id.* at 346 ("[T]he greatest reforms of the era, passed on the crest of war fervor, remained on the nation's lawbooks thereafter as enduring resources for efforts to achieve racial justice."); Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congress*, 34 *LAW & SOCIETY REV.* 315, 361-62 (2000).

407. See RESTATEMENT (THIRD) OF TRUSTS § 81 cmt. h, Reporter's Notes (Tentative Draft No. 2, 1999); RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (stating that capricious purposes that an individual might implement are not allowed in a trust); *Adams*, *supra* note 18, at 4. *Adams* states that the testamentary charitable trust "inherently creates the disutility of dead hand control, restricting the alienability of property by those who survive the testator." *Id.* "From this perspective, the burden of proof shifts to the testator to show why his or her post-mortem instructions should be carried out by society for the potentially unlimited duration permitted charitable trusts." *Id.* See *Jones*, *Dead Hand and the Law of Trusts*, *supra* note 38, at 119, 126 ("A settlor may destroy his own Rembrandt but he cannot establish a trust and order his trustees to destroy it. Society will not assist him."); SIMES, *DEAD HAND*, *supra* note 7, at 140 ("[T]he dead hand should not rule us. . . . [O]ur property institutions must be shaped in part by the dead hand. But working compromises must be found, whereby the dead are forever barred from withholding the scepter from the hand of the living.").

V. CIRCUMSTANCES IN WHICH DONATIVE TRANSFERS MAY BE PERMISSIBLE EVEN IF THEY ARE RACIALLY DISCRIMINAORY

This section addresses the question whether some donative transfers that discriminate on the basis of race may not violate § 1982 (i.e., whether it is possible to offer justifications that would warrant donative action that is racially discriminatory). In particular, this section considers whether some donative transfers warrant constitutional protection so that they should be permitted even if they are racially discriminatory, and whether donative transfers that benefit minorities as well as those that prejudice them violate § 1982. These questions require much more detailed consideration; this Article simply outlines the issues, and invites further analysis of them.

A. *May There Be Constitutional Protection For Some Racially Discriminatory Donative Transfers?*

There are several situations in which invalidating donative transfers may raise constitutional issues. Invalidating some donative transfers may substantially burden the free exercise of religion⁴⁰⁸ or interfere with rights of free expression, association, or privacy.⁴⁰⁹ The rights claimed may be those of the grantor, the beneficiaries, or others associ-

408. Compare other situations in which enforcement of civil rights laws is challenged as an interference with the free exercise of religion. *See, e.g.*, *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979 (1994) (Thomas, J., dissenting) (discussing the conflict between state fair housing law and a landlord's free exercise of religion); *Thomas v. Anchorage Equal Rights Comm'n.*, 220 F.3d 1134 (9th Cir. 2000) (en banc) (declining to address the issue); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (discussing the conflict between state fair housing law and a landlord's free exercise of religion); David B. Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176 (1994); Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L. J. 699 (1995) (discussing the conflict between state fair housing law and a landlord's free exercise of religion); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996) (discussing the issue in the employment context).

409. The associational and privacy rights might be implied also from the cognate statutes (e.g., by applying to §§ 1981 and 1982 exemptions in twentieth century civil rights laws, like Titles II or VII of the 1964 Civil Rights Act or Title VIII of the 1968 Civil Rights Act). While the courts have not decided whether the private association exemption of Title II applies to sections 1981 and 1982, see *supra* notes 338-339 and accompanying text, the courts do generally consider that the exemptions of Title VIII do not apply to section 1982. *See* SCHWEMM, *supra* note 294, at 27-33. On the other hand, with respect to Title VII, "the 'bona fide seniority system' exemption . . . has been held by a number of courts to apply to § 1981 suits," and courts are said often to hold that the standards of liability are the same for Title VII as they are for section 1981. *See* 6 LARSON, EMPLOYMENT DISCRIMINATION §101.10[3][a] at 101-54 and n.15. Larson suggests also that "this position seems to have been endorsed by the Supreme Court at least in part when it pronounced, in *New York City Transit Authority v. Beazer*, that § 1981 'affords no greater substantive protection than Title VII.'" *Id.* at 101-55 (quoting *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24 (1979)).

ated with the donative transfer.

The grantor's decision to spend money or direct resources in a particular way may constitute protected speech.⁴¹⁰ In *Evans v. Newton*, the Court spoke of "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses."⁴¹¹ A gift may involve freedom of expressive association on the part of the grantor or beneficiaries, if there is an association such that "forc[ing] the group to accept members it does not desire . . . may impair the ability of the group to express those views, and only those views, that it desires to express."⁴¹²

Regulation of donative transfers also may conflict with a right "to engage in certain highly personal activities."⁴¹³ The Supreme Court has protected "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny," recognizing "the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."⁴¹⁴ These cases safeguard, inter alia, the individual's power to make decisions with respect to "child rearing and education" and "family relationships."⁴¹⁵

410. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1975); *Jackson v. Wendell Phillips*, 96 Mass. 539 (1867) (considering a will that established trusts "for the preparation and circulation of books, newspapers, . . . speeches, lectures . . . [to] create a public sentiment that will put an end to negro slavery in this country" and to secure equal rights for women); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 59-60 (2000) ("When money is 'speech,' . . . are we in danger of obscuring the main idea for which so much blood was shed in the . . . Civil War?"). See also *Texas v. Johnson*, 491 U.S. 397 (1989); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968).

411. 382 U.S. 296, 298 (1965); see also *NAACP v. Alabama*, 357 U.S. 449 (1958).

412. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). The first question would be whether interference with the donative transfer would "impose any serious burdens" on "collective effort on behalf of [the group's] shared goals" or force the group "to communicate any message it does not wish to endorse." *Id.* at 665 (Stevens, J., dissenting) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984)); *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). If this standard were met, the second question would be whether that burden were justified by a compelling interest in eradicating racial discrimination. *Rotary Club of Duarte*, 481 U.S. 537 at 549 (stating that even if the law worked a "slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the state's compelling interest in eliminating discrimination against women").

413. See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.26, at 567 (3d ed. 1999).

414. *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting).

415. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); see also *Cleveland Bd. of Ed. v. La Fleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving v. Virginia*, 388 U.S. 1 (1966) (recognizing a fundamental right to marriage); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (recognizing a "private realm of family life which the state cannot enter"); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (regarding family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating a requirement that children attend public schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a prohibition on teaching modern language other than English to young students).

The Supreme Court's decisions involving the 1866 Civil Rights Act indicate a concern with the extent to which that statute may interfere with highly personal matters. All of the Supreme Court cases decided under section 1982 have involved market transactions, and the Court has not had to decide whether exemptions in other statutes or constitutional concerns about privacy and personal association impose limits on liability under sections 1981 and 1982. In *Jones*, the Supreme Court was careful to describe its holding as affecting "the sale or rental of property."⁴¹⁶

Moreover, some justices have expressed concern about the application of civil rights laws to non-market transactions. In his separate opinion in *Runyon v. McCrary*, discussing section 1981, Justice Powell wrote that "choices . . . that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts."⁴¹⁷ In a similar vein, Justice White wrote in his *Runyon* dissent that "[a] racially motivated refusal . . . to admit a Negro or a white to a private association cannot be called a badge of slavery."⁴¹⁸

To some extent, these comments seem plainly inapt. Section 1982 unquestionably applies to some personal relationships, since it explicitly applies to inheritance, which generally is "not part of a commercial relationship."⁴¹⁹ And the exclusion of blacks from the "private association" of inheritance literally was "a badge of slavery": slaves were not permitted to take by intestacy or by will.⁴²⁰ Moreover, the Court has said that "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."⁴²¹

This concern seems inapplicable to donative transfers involving charitable trusts. Charitable trusts, by definition, have a communal—that is, public—quality. A charitable trust is one that the law allows to

416. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1967) ("[Section] 1982 bars all racial discrimination, private as well as public, in the sale or rental of property."). *Id.* at 421-22.

417. *Runyon v. McCrary*, 427 U.S. 160, 189 (1975). Justice Powell also wrote that some contracts are so personal that they evidence "a purpose of exclusiveness" rather than "the desire to bar members of the Negro race." *Runyon*, 427 U.S. at 187-88.

418. *Runyon*, 427 U.S. at 211 (White, J., dissenting). There is no textual basis in section 1981 (or section 1982) for distinguishing between contracts or conveyances that are more or less commercial or personal. Neither Justice Powell nor Justice White cited any legislative history to support the distinction they suggested.

419. See *Runyon*, 427 U.S. at 189.

420. See *supra* notes 354 to 370 and accompanying text.

421. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

have perpetual existence because the purpose of the trust is to benefit the community.⁴²² “A purpose is charitable if its accomplishment is of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity.”⁴²³ The relationships that are affected by a charitable trust are public, not private, in their character. Charitable trusts do not have “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship”—the qualities that lead to “an understanding of freedom of association as an intrinsic element of personal liberty.”⁴²⁴ We increasingly recognize “the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.”⁴²⁵ Indeed, as we have noted, a strong case can be made that racial discrimination is forbidden to charitable trusts as a matter of trust law.⁴²⁶ One may accord great value to the “interest in preserving an area of untrammelled choice for private philanthropy” and still reject racial discrimination, as did Justice Powell in *Bob Jones*.⁴²⁷ A charitable trust in particular “exists at the sufferance of the community so long as it furthers societal ends and is not simply an emolument of private ownership of property.”⁴²⁸

With respect to considerations of personal association, the grantor’s interests are weakest (if extant at all) in a testamentary situation, where the grantor, being dead, will not be associating with anyone, but is attempting to dictate the nature of the associations others will enjoy. Even with an inter vivos trust, however, claims of personal association do not seem very compelling with respect to the public charitable trusts that are at issue in most of these cases. With respect to the right to privacy, decisions about charitable trusts—particularly when they are testamentary—are not likely to meet the standard of being “fundamental liberties that are ‘implicit in the concept of ordered liberty,’ such that

422. RESTATEMENT (SECOND) OF TRUSTS § 368a (“The common element of all charitable purposes is that they are designed to accomplish objects which are beneficial to the community.”).

423. RESTATEMENT (SECOND) OF TRUSTS § 368b. See also *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (noting charitable exemption justified by “public benefit.”).

424. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

425. *Id.* at 626.

426. See *supra* note 18; *Bob Jones Univ.*, 461 U.S. at 591 (referring to “the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not . . . violate established public policy”).

427. See *Bob Jones Univ.* 461 U.S. at 610 (Powell, J., concurring in part and concurring in the judgment) (“[I]f any national policy is sufficiently fundamental to constitute such an overriding limitation . . . it is the policy against racial discrimination in education.”).

428. *Adams*, *supra* note 18, at 4.

'neither liberty nor justice would exist if [they] were sacrificed.'"⁴²⁹

The Title VIII cases illustrate situations in which the antidiscrimination principle of civil rights laws takes precedence over the personal associational rights involved with charitable trusts. In *United States v. Hughes Memorial Home*⁴³⁰ and *In re Long's Estate*,⁴³¹ the civil rights law was held to override whatever may have been the personal associational rights of the settlor of the trust or of the beneficiaries. The "white children" who lived in the Hughes Memorial Home, and the "respectable white women" who benefitted from the devise in *Long's Estate*, might well have preferred not to associate with non-white children and women. But the courts that decided those cases, and the United States Department of Justice and the Attorney General of the Commonwealth of Pennsylvania, who brought the cases, considered that those personal associational preferences had to be subordinated to the Congressional prohibition of racial distinctions.⁴³²

However, it may be that even if section 1982 applies to public charitable trusts, it should be interpreted as not applying to private, familial donative transfers. Under such a rule, in situations such as those presented in *Shapiro*⁴³³ and *Keffalas*,⁴³⁴ intentional racial discrimination would be permitted. This would honor private decision-making within the family. There are, however, reasons not to honor even such relatively intimate discrimination.

First, one may question the extent to which such choices truly are private. As Richard Banks has said in the context of adoption, "personal racial preferences are not natural, but rather are products of the ways in which legal rules and social policy have shaped racial identity and race-consciousness."⁴³⁵

429. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Conn.*, 302 U.S. 319, 325, 326 (1937)). The discriminatory trusts might be said to be "deeply rooted in this Nation's history and tradition," but it is in a history and tradition which have been rejected since the *Girard College* case. *Bowers*, 478 U.S. at 192.

430. 386 F. Supp. 544 (W.D. Va. 1975).

431. 5 Pa. D. & C.3d 602 (1978).

432. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1983) ("Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."); Robert A. Burt, *Constitutional Law and the of Teaching the Parables*, 93 Yale L.J. 455, 489 (1984) (criticizing Supreme Court decisions involving racial minorities for treating the white majority's "simple assertion of the wish to avoid association as intrinsically justified without any need to account for, or listen to, competing claims").

433. *Shapiro v. Union Nat'l Bank*, 315 N.E.2d 825 (Ohio Com. Pl. 1974); see discussion *supra* notes 223-228 and accompanying text.

434. *In re Keffalas' Estate*, 233 A.2d 248, 250 (Pa. 1967); see discussion *supra* notes 43-46 and accompanying text.

435. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 Yale L.J. 875, 883 (1998); *id.* at 920-22. See also Louis Michael Seidman, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 64-66 (2001) (distinguishing private-regarding and

Second, long-established doctrines in trust and property law already impose limits on private, familial donative transfers. The law limits the ways in which one family member may control another's actions: one may not prevent another from marrying, at least for the first time, or unreasonably limit the choice of marriage partner, or encourage a person to divorce a spouse.⁴³⁶ The law does not permit a person to disinherit his spouse.⁴³⁷ Indeed, one of the signal aspects of the Reconstruction era was the expansion of public authority over subjects that had been considered private. As Eric Foner writes: "The law altered relations within the family, widening the grounds for divorce, expanding the property rights of married women, protecting minors from parental abuse, and holding white fathers responsible for the support of mulatto children."⁴³⁸

Third, the public—the community—has a more profound interest in preventing distinctions based on race than it does in protecting marriage or preventing divorce. Strong public policies are served when the law refuses a person the power to exclude a family member from a gift if the donee does or has become part of or formed an association with a "race" of which the donor disapproves.⁴³⁹ As the Supreme Court has said, it has "always been reluctant to expand the concept of substantive due process" and "must therefore exercise the utmost care whenever . . . asked to break new ground in this field."⁴⁴⁰

The central point of section 1982 seems to be that interfering with or influencing property rights because a person is a member of or associates with a despised racial group is impermissible. This principle would seem to be as important in familial as in commercial settings. As Professor Buchanan writes of a hypothetical discriminatory condition imposed on marriage, "Mary should not be penalized legally for her willingness to enter into a marriage transaction in a racially non-discriminatory manner. The legal system should encourage, not discourage, such unbiased action."⁴⁴¹

Moreover, the transfer of personal wealth, particularly in family property settlements, is "the means by which the reproduction of the

public-regarding "rights" and suggesting "that merely permitting a private sphere to exist is, itself, a government decision").

436. See *supra* notes 32-46 and accompanying text.

437. See, e.g., UNIFORM PROBATE CODE §§ 2-201 to -214; LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, & MARY LOUISE FELLOWS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 516 (1997).

438. FONER, *supra* note 354, at 364.

439. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting the notion that any form of intimate activity is immune from regulation).

440. *Washington v. Glucksburg*, 521 U.S. 702, 720 (1996) (internal quotations omitted).

441. See Buchanan, *Conceptual History*, *supra* note 102, at 722 n.349.

social system is carried out."⁴⁴² To the extent that we do not want this social system to be reproduced, we should not be eager to facilitate the transfer of family wealth on terms that explicitly perpetuate intentional discrimination on the basis of race.⁴⁴³

For these reasons, considerations of personal association do not seem sufficient to prevent the application of section 1982 even to familial donative transfers that are characterized by intentional racial discrimination.

B. Donative Transfers that Favor Minorities

Another question that requires further consideration is whether the 1866 Civil Rights Act would ban donative transfers that favor minorities just as it bans donative transfers that dis-favor them. The question assumes particular significance because of several recent private gifts that have been made to provide scholarships for minority students.⁴⁴⁴

It is important to emphasize that this question arises under the 1866 Civil Rights Act, rather than under the Equal Protection Clause or Titles VII or VIII of the 1964 and 1968 Civil Rights Act, and that it is posed with respect to private, rather than public, actors.⁴⁴⁵ The provi-

442. JACK GOODY, INTRODUCTION TO FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE, 1200-1800, at 1 (J. Goody et al. eds., 1976); Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1241 (1985).

443. Barbara H. Fried, *Who Gets Utility from Bequests? The Distributive and Welfare Implications for a Consumption Tax*, 51 STAN. L. REV. 641, 642 (1999) ("[B]equests appear to be a luxury good—that is, they are heavily concentrated (as a percentage of lifetime income) among the very wealthy (the top quintile in lifetime income, and even more dramatically the top 5 percent)."). Avoiding undue concentration of wealth is a policy motivation to which has been credited, among other things, the Rule Against Perpetuities. SIMES, DEAD HAND, *supra* note 7, at 56-57 (attributing this view to Professor W. Barton Leach). See also Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990) (arguing against inheritance save in exceptional situations); Jeremy Waldron, *Supply Without Burthen Revisited*, 82 IOWA L. REV. 1467, 1485 (1997) (considering "morally problematic" the system that allows resources to "be distributed in a way that leaves a few with a lot, a lot with a very little, and a considerable number with nothing at all").

444. Press Release, Hispanic Scholarship Fund, Lilly Endowment Pledges \$50 Million to Hispanic Scholarship Fund, at <http://www.hsf.net/lilly.htm> (July 8, 1999); Cynthia Flash, *Gates gift: \$1 billion in scholarships; Minority college students will get the awards over the next 20 years*, NEWS TRIBUNE (TACOMA, WASH.), Sept. 16, 1999, at A1, available at 1999 WL 3266065; *Bank of America Foundation Makes \$1 Million Gifts to Hispanic Scholarship Fund, Nine Southern California Students Received Scholarships for 1998-99*, PR NEWSWIRE ASSOCIATION, INC., Sept. 22, 1999.

445. There is a prescient discussion of trusts exclusively for minority group members, but the discussion is based on constitutional principles involving public actors. See Adams, *supra* note 18, at 15-19. With respect to minority scholarships challenged under the Fourteenth Amendment, see *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995) (finding race-based scholarship program not narrowly tailored); *Washington Legal Found. v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993) (upholding dismissal—for lack of cause of action—of suit claiming that the U.S. Department of Education violated Title VI of the Civil Rights Act of 1964 by funding institutions that offer some scholarships only to minority students).

sions and judicial interpretations of the Constitution and of Titles VII and VIII may inform the interpretation of the 1866 Act, but the ultimate question is whether, in what circumstances, and to what extent, the Congress that enacted the 1866 Act would have intended to permit pro-minority race-conscious actions.

In the constitutional context, an action that is *prima facie* discriminatory can be justified by a showing that the action serves a compelling government interest and is narrowly tailored to achieve that interest.⁴⁴⁶ Thus, even the government may justify drawing a distinction based on race if it can satisfy this "strict scrutiny."

The Supreme Court has held that the legislative history of Title VII "makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."⁴⁴⁷ The Court said that

it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.⁴⁴⁸

With respect to Title VIII, the courts also have indicated that some forms of pro-minority, race-conscious action are permissible. In *United States v. Starrett City Associates*,⁴⁴⁹ the Second Circuit addressed racial and ethnic quotas that imposed on Blacks and Latinos much longer waiting periods for apartments than were established for white Anglos.⁴⁵⁰ The court invalidated those quotas, but said that it did:

not intend to imply that race is always an inappropriate consideration under Title VIII in efforts to promote integrated hous-

446. See *Adarand v. Peña*, 515 U.S. 200, 236 (1995) (stating that strict scrutiny is fatal in theory but not necessarily in fact); *United States v. Paradise*, 480 U.S. 149, 168-70 (1987) (describing factors that can justify action that *prima facie* is discriminatory).

447. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201-02 (1979) (upholding affirmative action program based on race); see also *Johnson v. Santa Clara County Transp. Agency*, 480 U.S. 616, 620 (1987) (upholding a voluntary affirmative action program that takes sex into account).

448. *United Steelworkers of Am.*, 443 U.S. at 204. In posing the question whether Title VII were "the first" such law, the decision suggests that no consideration was given to the question whether section 1981 would have prohibited the voluntary affirmative action program. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979). Apparently the *Weber* suit was brought only under Title VII.

449. 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988).

450. *Starrett City Assoc.*, 840 F.2d at 1096.

ing. We hold only that Title VIII does not allow . . . rigid racial quotas of indefinite duration to maintain a fixed level of integration . . . by restricting minority access to scarce and desirable rental accommodations.⁴⁵¹

In *South Suburban Housing Center v. Greater South Suburban Board of Realtors*⁴⁵² and *Raso v. Lago*,⁴⁵³ the Seventh and First Circuits approved different forms of non-preferential action that extended opportunities to non-whites.⁴⁵⁴

In 1866, Congress was concerned to invalidate the imposition of disabilities because of race. These disabilities were imposed most often on blacks and Asians (and those who supported them).⁴⁵⁵ The 1866 Civil Rights Act was passed in an atmosphere of radical antislavery fervor, by a Congress that did not then include representatives of the states that had seceded from the Union.⁴⁵⁶ While the statute's precise meaning is in many respects unclear, it plainly repudiated the racial ideology of white supremacy with respect to such "fundamental rights" as that of property, and contemplated national, rather than state, protection of these rights.⁴⁵⁷ The Freedmen's Bureau bill that was considered

451. *Id.* at 1103.

452. 935 F.2d 868 (7th Cir. 1990), *cert. denied*, 525 U.S. 811 (1998) (upholding affirmative marketing, limitations on real estate broker solicitation, and regulation of size, placement and number of "for sale" signs).

453. *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (limiting displacees' preference to 55% of replacement units, and making 45% available to all persons).

454. Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395 (1998) (discussing race-conscious, non-preferential affirmative action). A challenge to pro-integrative actions was made under section 1982 in the *South Suburban Housing Center* case, but the trial court found that there was no evidence of intentional racial discrimination and the claim under section 1982 was abandoned on appeal. *See S. Suburban Hous. Center v. Greater S. Suburban Bd. of Realtors*, 713 F. Supp. 1068, 1089 (N.D. Ill. 1988), *rev'd in part*, 935 F.2d 868, 878 n.8 (7th Cir. 1990).

455. *See NELSON*, *supra* note 78, at 45-46.

456. *See Kaczorowski*, *supra* note 354, at 877 n.53. Kaczorowski states that:

For the most part, the Reconstruction of the Union after the Civil War by Congress did not involve the participation of the congressmen and senators of the former Confederate states. Those states had withdrawn their representatives at the time of their secession from the Union and did not obtain a voice in Congress until their representatives were allowed to return beginning in 1868.

Id.; TENBROEK, *supra* note 366, at 178-82; NELSON, *supra* note 78, at 41-43.

457. *See SMITH*, CIVIC IDEALS, *supra* note 78, at 305; TENBROEK, *supra* note 366, at 178-83. The Thirty-Ninth Congress of 1866-67 passed three measures—the extension of the Freedmen's Bureau, the Fourteenth Amendment, and the Civil Rights Act of 1866; "[c]ollectively, these measures overturned the entire structure of antebellum state-centered, all-white citizenship delineated by Taney in *Dred Scott*." SMITH, CIVIC IDEALS, *supra* note 78, at 305. *See Kohl*, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 Va. L. Rev. 272, 280 (1969) ("Since in 1866 the stakes were so high, it is no surprise that a Congress composed of northern representatives should have enacted legislation which by hindsight seems too 'radical' for its time."); *id.* at 289 (arguing that Congress condemned "the 'custom' of white supremacy."); *id.* at 292 ("[T]he general feeling that the bill was radical was quite accurate. It sought to alter long-held customs and traditions and to create a new economic framework

with the 1866 Civil Right Act "was part of a large and comprehensive system for the care of freedmen."⁴⁵⁸

The Congress that enacted the 1866 Civil Rights Act was made up of people who considered it essential to provide for the Negroes. Thaddeus Stevens said that "[t]his Congress is bound to look after them until they can take care of themselves."⁴⁵⁹ Abolitionists were widely active in providing educational and other benefits specifically for the freedmen.⁴⁶⁰

This subject is one that requires at least an article of its own, but the historical record indicates that it would be surprising to conclude that an 1866 statute designed to end the degradation of non-whites prohibited private donors from using their funds for that very purpose.⁴⁶¹ I suggest that donative transfers that serve the underlying purposes of the 1866 Act are not forbidden by it; that for sections 1981 and 1982, as for Titles VII and VIII, there are some circumstances in which a prima facie violation would be held to be defensible under standards similar to those established for Titles VII and VIII; and that gifts favoring minority groups would be permitted under this standard.

In addition, transfers that benefit minorities should be justifiable as compensation for past disadvantage. Discriminatory donative transfers that were in effect for many years have bestowed valuable benefits on favored groups, usually white males, and withheld those benefits from non-whites.⁴⁶² Uncounted numbers of white men were educated at Gi-

within which black citizens could prosper.").

458. See TENBROEK, *supra* note 366, at 179; JOHN EATON, GRANT, LINCOLN AND THE FREEDMEN: REMINISCENCES OF THE CIVIL WAR vi (1907) (referring to "[t]he superintendency established by the Union over the welfare of the Negro during the height of the conflict"). The Freedmen's Bureau bill was passed by the Thirty-Ninth Congress and vetoed by President Johnson. See FONER, *supra* note 354, at 250. President Johnson also vetoed the 1866 Civil Rights Act, but Congress overrode that veto. FONER, *supra* note 354, at 250-51 (stating that "for the first time in American history, Congress enacted a major piece of legislation over a President's veto").

459. CONG. GLOBE, 39th Cong., 1st Sess. 74 (1866), *quoted in* TENBROEK, *supra* note 366, at 174.

460. See, e.g., JAMES M. MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION 386-416 (1964) (discussing the "important part" that abolitionists played "in the efforts to bring education and land to the freedmen"); EATON, *supra* note 458, at 32-33, 36-37, 121-22, 129-31, 144-47, 155, 162-63, 193-96, 202-03, 206-07, 221-23 (discussing the well-known essential work of private philanthropy in assisting the Freedmen); Jackson v. Wendell Phillips, 96 Mass. 539 (1867) (holding that will that benefited slaves was effective in 1861).

461. *But see* SCHWEMM, *supra* note 294, §11:2(2)(e), at 11-29 to 11-30 (suggesting that "Title VIII's special prointegration legislative history could be interpreted to mean that the statute is more receptive to race-conscious programs designed to promote residential integration than the equal protection clause is," but that the 1866 statute "does not contain any special legislative history advocating residential integration," and that "it is possible, therefore, that race-conscious prointegration programs could be judged by a stricter standard under the 1866 Act than under Title VIII").

462. See, e.g., Dunbar v. Bd. of Trustees, 461 P.2d 28 (Col. 1968); Smyth v. Anderson, 232

rard College in Philadelphia,⁴⁶³ and Clayton College in Colorado.⁴⁶⁴ Scholarships were awarded to the "white children of the Social Circle Militia District,"⁴⁶⁵ "white youths" in Wilmington, Delaware,⁴⁶⁶ and "caucassion boys graduating from high schools in Hartford County," Connecticut.⁴⁶⁷ Loans were made to "Caucassion" students at state colleges and universities in Mississippi.⁴⁶⁸ Scholarships were awarded to white students who attended many institutions, including the University of North Carolina,⁴⁶⁹ Georgia Institute of Technology, Emory University, and Agnes Scott College.⁴⁷⁰

These educational opportunities provided long-term, multi-generational advantages to the white students who enjoyed them. Education is perhaps the most important part of the "human capital" that enables one to accumulate wealth.⁴⁷¹ And wealth is transferable from one generation to another, available "for improving life chances; providing further opportunities," to succeeding generations.⁴⁷² While

S.E.2d 835 (Ga. 1977).

463. See *supra* notes 48-57, 65-73 and accompanying text.

464. *Dunbar v. Bd. of Trustees*, 461 P.2d 28 (Col. 1968); see discussion *supra* notes 24, 163-171 and accompanying text.

465. *Smyth v. Anderson*, 232 S.E.2d 835 (Ga. 1977); see discussion *supra* notes 234-238 and accompanying text.

466. *Bank of Delaware v. Buckson*, 255 A.2d 710 (Del. Ch. 1969); see discussion *supra* notes 151-161 and accompanying text.

467. *Lockwood v. Killian*, 425 A.2d 909 (Conn. 1979); see discussion *supra* notes 239-250 and accompanying text.

468. *Tinnin v. First United Bank of Miss.*, 502 So. 2d 659 (Miss. 1973); see discussion *supra* notes 251-259 and accompanying text.

469. *Wachovia Bank & Trust Co. v. Buchanan*, 346 F. Supp. 665 (D.D.C. 1972); see discussion *supra* notes 198-202 and accompanying text.

470. *Trammell v. Elliott*, 199 S.E.2d 194 (Ga. 1973); see discussion *supra* notes 216-222 and accompanying text.

471. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 730-33 (1988); E.P. Thompson, *The Grid of Inheritance: A Comment*, in FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE 1200-1800, at 328, 359 (J. Goody et al. eds., 1976) ("[E]ven for the landless rural labourer, and certainly for an urban proletariat, the critical point of familial transmission has not been *post mortem* but at the point of giving the children a 'start in life.'"). It also is the most expensive. See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 734-36 (1988); *College Costs Still Racing Ahead of Inflation, Study Says*, CHICAGO TRIBUNE, Oct. 17, 2000, at 5, available at 2000 WL 3721789 (reporting college board study); Gary Klott, *Report Helps Parents Assess Costs of College for Children*, FT. LAUDERDALE SUN-SENTINEL, Nov. 6, 2000, at 22, available at 2000 WL 28988714 (stating that College Board survey shows college costs "rising faster than inflation and family incomes"). See also MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 154 (1995) (reporting also that education was the form of cultural capital with respect to which the authors found the greatest racial differences); *id.* at 37; *id.* at 81-82 ("High educational achievement leads typically to better-paying jobs, which in turn results in greater wealth accumulation....Wealth permits differential access to educational opportunity. Both income and wealth data demonstrate similarly positive resource returns from educational opportunity and achievement."); *id.* at 87.

472. OLIVER & SHAPIRO, *supra* note 471, at 32; JOHN A. BRITAIN, INHERITANCE AND THE INEQUALITY OF MATERIAL WEALTH 1 (1978).

remediation for those relative disadvantages is difficult and very expensive, it should not be precluded by the 1866 Civil Rights Act.⁴⁷³

If section 1982 applies to donative transfers in the manner indicated above, then some donative transfers that were held not to violate the Fourteenth Amendment because they did not involve state action should have been held illegal under section 1982. And some donative transfers that were held to violate the Fourteenth Amendment and therefore require invalidation of the underlying gift, also violate section 1982, which may call for validating the underlying gift but excising the racial restriction. These consequences are considered below in Part VI.

VI. THE APPLICATION OF THE 1866 CIVIL RIGHTS ACT TO RACIALLY DISCRIMINATORY DONATIVE TRANSFER CASES THAT WERE DECIDED WITHOUT CONSIDERATION OF THAT STATUTE

Part VI re-examines the discriminatory donative transfer cases that were decided after *Jones*, analyzing how consideration of section 1982 should have affected the decisions in those cases. Subpart A addresses cases in which the transfers were held to be lawful because they did not involve state action; subpart B considers cases in which the transfers were held to be unlawful, but the underlying gift was invalidated.⁴⁷⁴

A. *Discriminatory Donative Transfers Held Not to Involve State Action Nonetheless May Violate Section 1982*

Two cases illustrate the principle that donative transfers held not to violate the Fourteenth Amendment because they involve no state action

473. The separate article that this subject requires would have to address whether, and to what extent, societal discrimination could be remedied pursuant to a statute that was enacted for the specific purpose of remedying societal discrimination. See *Smith v. Univ. of Washington*, 233 F.3d 1188, 1187-201 (9th Cir. 2000) (discussing societal discrimination in the constitutional context).

474. The timing of these racially discriminatory provisions is interesting. In 1957, Professor Clark wrote that "the maliciously discriminatory trust is only of peripheral importance. To the relatively few now in existence, the addition of many more is unlikely." Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 980 (1957). The unlikely occurred: at least nine of the wills considered in this Article became effective (that is, the testators died) after 1957. See *Estate of Vanderhoofven*, 96 Cal. Rptr. 260 (Cal. Ct. App. 1962); *Wachovia Bank & Trust Co. v. Buchanan*, 346 F. Supp. 665 (D.D.C. 1972); *Conn. Bank and Trust Co. v. Johnson Mem'l Hosp.*, 294 A.2d 586 (Conn. Super. Ct. 1972); *Trammell v. Elliott*, 199 S.E.2d 194 (Ga. 1973); *Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp.*, No. 24-C-99-001226, slip op. at 2 (Cir. Ct. Baltimore City Nov. 9, 1999), cert. granted, 743 A.2d 245 (2000); *Tinnin v. First United Bank of Miss.*, 502 So. 2d 659 (Miss. 1987); *First Nat'l Bank of Kansas City v. Danforth*, 523 S.W.2d 808, 821 (Mo. 1965); *Wooton v. Fitz-Gerald*, 440 S.W.2d 719 (Tex. Civ. App. 1969); *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E. 2d 740, 746 (Va. 1990). The testator in the *Lockwood* case executed his will and died in 1957, the year Professor Clark's prediction was published. See *Lockwood v. Killian*, 425 A.2d 909 (Conn. 1979).

may nonetheless violate section 1982.

The first is the decision of the Supreme Court of Missouri in *First National Bank v. Danforth*.⁴⁷⁵ That case concerned a trust that contributed to "the maintenance, support and care of sick and infirm [hospital] patients . . . born of white parents."⁴⁷⁶ The court said that there were "two identifiable classes of beneficiaries . . . to which [the] trustee . . . is empowered to distribute the income from [the] trust estate."⁴⁷⁷ One class of beneficiaries was a set of hospitals; the other was "the class of . . . patients . . . born of white parents."⁴⁷⁸ "Sick and infirm patients" in these hospitals were divided into two groups—those who were, and those who were not, "born of white parents." Those who were not "born of white parents" were precluded from being beneficiaries under the will. The court upheld the trust because, it said:

'state action' was not involved in the creation of the trust, nor is it required to carry out its terms. Mr. McWilliams was a private individual, and the corpus of his trust derived solely from his private funds. The trustee is a privately owned bank and it selects beneficiaries in each class in an exercise of unlimited discretion.⁴⁷⁹

The court emphasized that a finding of state action was essential to a determination that the racial restriction was illegal. "Absent such required state action," the court said, "such discrimination would not be illegal because 'If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State, . . . arguendo . . . no constitutional difficulty would be encountered.'"⁴⁸⁰

What the *Danforth* court did not take into account, however, was the dramatic change in the state of the law that had been effected by *Jones*. The Supreme Court had said in *Evans v. Newton*, arguendo, that a private discriminatory transfer would present "no constitutional difficulty."⁴⁸¹ But *Jones* held that a private discriminatory transfer would present a difficulty under section 1982.⁴⁸²

If *Jones* and section 1982 had been taken into account in the *Danforth* case, the result should have been different. As the court acknowledged, of all "sick and infirm patients" in certain hospitals, those who were white—that is, those who were "born of white parents"—were,

475. 523 S.W.2d 808 (Mo. 1975).

476. *Danforth*, 523 S.W.2d at 812.

477. *Id.* at 817.

478. *Id.*

479. *Id.* at 821.

480. *Id.* at 821 (quoting *Evans v. Newton*, 382 U.S. 296 (1966)).

481. *Evans v. Newton*, 382 U.S. 296, 300 (1966).

482. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

and those who were non-white were not, eligible to benefit under Mr. McWilliams' will.⁴⁸³ The non-white patients were thereby denied the same right to benefit from the will. If enjoying the benefits of a will is "inheriting," then this seems to deny the non-white patients "the same right to inherit" and therefore to violate section 1982. Indeed, the court in the *Danforth* case referred to the patients as beneficiaries under the will.⁴⁸⁴ Those who are beneficiaries under a will certainly seem to be those who inherit under the will, and these beneficiaries seem therefore to have been denied "the same right . . . to inherit."⁴⁸⁵ Moreover, even if "inherit" were interpreted so restrictively as to exclude the non-white patients, the non-white patients are denied "the same right" as white patients to "hold"—that is, to enjoy—the benefits under the will.

*Shapira v. Union National Bank*⁴⁸⁶ is the second case that illustrates how section 1982 may make illegal a transfer that was held to be legal. *Shapira* involved a bequest to a son conditioned upon the son's being "married at the time of my death to a Jewish girl whose both parents were Jewish."⁴⁸⁷ In *Shapira*, as in *Danforth*, the court relied upon the Supreme Court's "revealing" comment in *Evans v. Newton* that "[i]f a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that no constitutional difficulty would be encountered."⁴⁸⁸ In *Shapira*, as in *Danforth*, if the court had taken *Jones* and section 1982 into account, the result might well have been different.⁴⁸⁹

In *Shapira*, the testator was depriving his son of the "same right" to inherit that the son would have had if he married "a Jewish girl whose both parents were Jewish."⁴⁹⁰ Five aspects of the *Shapira* case are distinctive. First, *Shapira* involved Jewishness, rather than whiteness; second, the discrimination in *Shapira* was not against those who are Jewish but against those who are not Jewish; third, *Shapira* focused not on the ancestry of the person who was to inherit directly—the son—but rather on the ancestry of a person with whom the son would associate; fourth, *Shapira* involves a situation in which the issue is whether a po-

483. *Danforth*, 523 S.W.2d at 812.

484. See, e.g., *id.* at 817 (finding that "there are two identifiable classes of beneficiaries designated by Mr. McWilliams . . . [of which the] second is the class of sick and infirm patients . . . born of white parents"); *id.* at 818 (discussing "the second group of beneficiaries").

485. 42 U.S.C. § 1982 (1998).

486. 315 N.E.2d 825 (Ohio Com. Pl. 1974).

487. *Shapira*, 315 N.E.2d at 826.

488. *Id.* at 828 (quoting *Evans v. Newton*, 382 U.S. 296, 300 (1966)).

489. The result in *Shapira* would be different under the new RESTATEMENT (THIRD) OF TRUSTS § 29 Reporter's Notes (Tentative Draft No. 2, 1999). See discussion *supra* notes 35-38 and accompanying text.

490. *Shapira*, 315 N.E.2d at 826.

tential beneficiary will or will not do something, rather than a comparison between or among potential beneficiaries; and, finally, *Shapira* involves a private trust, rather than a public charitable trust.

As to the first, while the Supreme Court had not addressed the point in 1974 when *Shapira* was decided, the Supreme Court subsequently held, in 1987, that section 1982 concerns any "intentional discrimination solely because of . . . ancestry or ethnic characteristics,"⁴⁹¹ specifically including discrimination against a person because that person's ancestry or ethnic characteristic is Jewish.⁴⁹² It is not clear whether the Jewishness in *Shapira* is religious or ancestral. If it is religious, it is not covered by section 1982;⁴⁹³ if it is ancestral or ethnic, it is covered by section 1982.

Second, the discrimination in *Shapira* against a person because she is not of a particular race should be as suspect under section 1982 as is discrimination against a person because she is of a particular race. The Supreme Court held in 1976 that the 1866 Act forbids discrimination against as well as in favor of whites.⁴⁹⁴ The Court said that "the Act was meant . . . to proscribe discrimination . . . against, or in favor of, any race."⁴⁹⁵

Third, the Supreme Court had held in *Sullivan*, in 1969, and indicated again in *Tillman*, in 1973, that discrimination on the basis of the race of those with whom one associates is unlawful.⁴⁹⁶ The Supreme Court held in *Sullivan* that the white property owner's expulsion violated section 1982, reasoning that to allow discrimination against whites for advocating the rights of blacks "would give impetus to the perpetuation of racial restrictions on property."⁴⁹⁷ The Court said that "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, . . . from which § 1982 was derived."⁴⁹⁸ The Court referred to its statement in *Barrows v. Jackson*, "that the white owner is at times 'the only effective adversary' of

491. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

492. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987).

493. See Adams, *supra* note 18, at 19-22 (discussing the special issues of religious discrimination).

494. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). While *McDonald* involved section 1981, the Court's discussion was of the entire 1866 Civil Rights Act, including what is now section 1982.

495. *McDonald*, 427 U.S. at 295.

496. Furthermore, the son's wife presumably would have her own claim under section 1982, for she has been denied "the same right" to share in the inheritance and to "hold" and enjoy the inherited property.

497. *Sullivan*, 396 U.S. at 237 (1969); see also *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982) (citing several lower court cases in which "the courts have held that denial of housing to whites because of their association with blacks violated Section 1982").

498. *Sullivan*, 396 U.S. at 237.

the unlawful restrictive covenant."⁴⁹⁹ Just as the Supreme Court held that one cannot be disadvantaged because he associates with blacks, the son here cannot be disadvantaged because of his association with a person who is not Jewish.

Fourth, section 1982 can be violated even when there is no person or group with whom to compare the treatment of the complaining party. Thus, in *Clark v. Universal Builders, Inc.*,⁵⁰⁰ the "Contract Buyers' League case," the Seventh Circuit held that section 1982 would be violated by the imposition of onerous home financing terms and conditions on blacks, even though blacks were the only people who participated in these financing arrangements.⁵⁰¹ In the same sense, the conditions imposed on the son in *Shapira* would be unlawful under section 1982 even though there were no persons other than the son who were subject to the conditions under the gift.

Finally, the gift in *Shapira* was a private, familial gift, rather than a public charitable trust. If, however, no exception is made for application of section 1982 to such "inheritance," "purchase," and "holding,"⁵⁰² and if the Jewishness in *Shapira* were ancestral or ethnic rather than religious, then the provision would seem to violate section 1982, since it intentionally prevents a person from exercising a property interest because of the race of a person with whom he will or may associate.

B. That a Discriminatory Donative Transfer Violates Section 1982 as Well as the Fourteenth Amendment May Affect the Remedy for the Illegality

In several of the discriminatory donative transfer cases decided after 1968, the court held or assumed that the discriminatory provision was invalid, and concluded that since the discriminatory provision was invalid, the gift to which it was attached failed entirely, and another taker would benefit. In some of these cases, the donor had designated a specific or residuary alternative beneficiary; in others, the alternative was set by state law.⁵⁰³

In each of these cases, under the analysis presented in this Article, the discriminatory gift may have violated the 1866 Civil Rights Act as well as the Constitution (and any other laws considered in those cases).

499. *Id.* at 259 (citing *Barrows v. Jackson*, 364 U.S. 241, 259 (1953)).

500. 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974).

501. *Clark*, 501 F.2d at 324. The Supreme Court cited *Clark* with apparent approval in *City of Memphis v. Greene*, 451 U.S. 100, 122 (1981); SCHWEMM, *supra* note 294, at 27-17 n.81. *See id.* at 27-16 to 27-17 (discussing cases following and distinguishing *Clark*).

502. *See supra* notes 355-363 and accompanying text.

503. *See supra* note 105-124, 151-288 and accompanying text.

If the 1866 Act had been considered in those cases, the relief granted might have been different: the statutory limitation might have led the court simply to excise the discriminatory restraint, rather than invalidate the entire gift. This is because the focus is different when the 1866 Civil Rights Act is at issue than when the Equal Protection Clause is at issue.

When only the Equal Protection Clause is considered, the illegality is in the government involvement, not in the racial restraint. The remedial task before the court is to disengage the government from the discrimination. That result is achieved equally either by excising the discriminatory provision or by eliminating the underlying gift in which the government is involved. Eliminating the underlying gift may carry out the donor's discriminatory purpose, by punishing a beneficiary who transgresses a racial restraint, but that is permissible, so long as the government is not involved in discrimination. As the courts repeatedly have said in those cases, a gift that draws racial distinctions without involving the government is lawful.⁵⁰⁴

In those cases, when the courts had to decide whether simply to excise the discriminatory provision or to invalidate the entire gift, they made that decision by assessing the intention of the donor. If the court determined that the donor's intention was more charitable than discriminatory, the court simply excised the discriminatory restraint. If, however, the court determined that the donor's dominant intention was to discriminate, then the court invalidated the entire gift and allowed the property to pass to the next taker. This the court would do specifically for the purpose of enforcing the racially discriminatory intention of the donor.

However, when sections 1981 and 1982 are considered, the focus is not on government involvement but on the intentionally unequal treatment of some people because of "race." The central concern under the 1866 Act was the protection of the newly-freed slaves and their supporters. And the heart of the illegality under sections 1981 and 1982 is one person's treating another differently because of race. As the Supreme Court said in *Jones*, the 1866 act "was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute."⁵⁰⁵ It is the intentional drawing of a racial distinction itself that is illegal. When the focus is on the victims of the discrimination, and the illegal act is the intentional racial distinction, the appropriate remedy for the

504. See *supra* notes 113-116 and accompanying text.

505. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1967); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 290 (1976) ("[T]he very object of the bill is to break down all discrimination between black men [sic] and white men [sic].") (quoting CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866)) (statement of Senator Trumbull, who introduced what became the 1866 Act) (alteration in original).

illegality is the protection of the victims and the elimination of that restraint.

In the cases we are considering, either a park has been closed, or a school or hospital has lost funding, because the park, school, or hospital would not carry out a donor's racially discriminatory intention. The deprivation of the park, school, or hospital to carry out the donor's discriminatory intention may have satisfied the Equal Protection Clause by dissociating the government from the discrimination.⁵⁰⁶ But the deprivation to carry out the donor's discriminatory intention does not satisfy the 1866 Civil Rights Act. That intention itself violates the 1866 Act, by intentionally depriving blacks of the same rights as are enjoyed by whites to acquire and hold property and to enter into contracts. The law honors the discriminatory intention when it enforces the donor's determination to deprive a beneficiary of a gift for transgressing the donor's discriminatory intention; but sections 1981 and 1982 forbid imposing negative consequences for non-discriminatory action.

These are the kinds of considerations that led the Supreme Court to hold, in *Sullivan v. Little Hunting Park*,⁵⁰⁷ that the white homeowner, Sullivan, had standing under section 1982 to challenge his expulsion from the swim club.⁵⁰⁸ If Sullivan could be expelled for advocacy of the cause of Mr. Freeman, "then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property."⁵⁰⁹ Just as the Supreme Court recognized Mr. Sullivan's right to sue in order to vindicate the statute, so the courts should recognize that the remedy for violation of the 1866 Act should be excision of the racial restraint and enforcement of the underlying gift without racial distinctions. If an alternative gift is enforced to punish the disregard of racial distinctions, enforcement of that alternative gift itself violates sections 1981 and 1982 by denying equal rights on the basis of race.⁵¹⁰

These principles are illustrated by consideration of the post-1968 discriminatory donative transfer cases in which the courts invalidated

506. Not all commentators agree that this satisfies the Constitution. See, e.g., Buchanan, *Conceptual History*, *supra* note 102, at 720 (saying, with respect to a hypothetical devise creating a racially discriminatory defeasible interest, that "[t]o prevent the institutionalization of . . . racial discrimination, the legal system should regard the *race* restriction as nonexistent, a mere precatory statement without legal consequences") (emphasis added).

507. 396 U.S. 229 (1969).

508. *Sullivan*, 396 U.S. at 237.

509. *Id.* at 237.

510. This argument also calls into question the result in such cases as *Palmer v. Thompson*, 403 U.S. 217 (1971) (upholding, 5-4, the city's closing of municipal swimming pools after segregation ended). In *Palmer*, the Court rejected a Thirteenth Amendment argument because "Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities." *Id.* at 227. Although the Court cited *Jones*, it did not consider whether the closing of the swimming pools violated sections 1981 or 1982.

the discriminatory restraint and the underlying gift.⁵¹¹

I. *Evans v. Abney*

Evans v. Abney was decided some eighteen months after *Jones*.⁵¹² In *Evans v. Newton*, the United States Supreme Court had held that Bacon's field park could not continue to be operated on a segregated basis because Senator Bacon's will implicated the City of Macon in the discrimination and because the park had assumed an ineradicable public character. Faced with this ruling, the Georgia courts held that racial discrimination was "an essential and indispensable part" of Senator Bacon's intention,⁵¹³ and that because "the sole purpose for which the trust was created had become impossible of accomplishment,"⁵¹⁴ the "property has reverted by operation of law to [Senator Bacon's] . . . heirs."⁵¹⁵ Reviewing this state court decision, the United States Supreme Court affirmed. The Court addressed only the question whether the state court's conduct constituted state action. It held that it did not, and that the action of the Georgia courts "presents no violation of constitutionally protected rights, and any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will."⁵¹⁶

What the Supreme Court did not consider in *Abney* was whether Senator Bacon's intention itself was unlawful—not because of any state action but because, after *Jones*, it may be unlawful for an individual to deprive non-whites of the "same right" to inherit, acquire, or hold real or personal property. The Georgia and United States Supreme Courts made clear in *Abney* that the intention of Senator Bacon expressed in his will effected the reversion of the property. Until 1968, that was a complete resolution of the controversy: an action would be unlawful

511. See *Evans v. Abney*, 396 U.S. 435 (1970); *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 746 (Va. 1990); *Smyth v. Anderson*, 232 S.E.2d 835 (Ga. 1977); *Conn. Bank and Trust Co. v. Johnson Mem'l Hosp.*, 294 A.2d 586 (Conn. Super. Ct. 1972); *Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp.*, No. 24-C-99-001226 (Cir. Ct. Baltimore City Nov. 9, 1999), *cert. granted*, 743 A.2d 245 (2000).

512. *Jones* was decided on June 17, 1968 and *Abney* on January 26, 1970. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 409 (1968); *Evans v. Abney*, 396 U.S. 435, 435 (1970).

513. *Evans v. Abney*, 165 S.E.2d 160, 163-64 (1968) The court stated:

There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, white women and children of Macon, and the language of the will clearly indicates that the limitation to this class of persons was an essential and indispensable part of the testator's plan for Bacon's field.

Id.

514. *Abney*, 165 S.E.2d at 164.

515. *Id.*

516. *Evans v. Abney*, 396 U.S. 435, 444 (1970).

only if "it is the State and not a private party which is injecting the racially discriminatory motivation."⁵¹⁷ But the Supreme Court changed that rule in *Jones*, when it held that section 1982 applies to private as well as public discrimination. Having characterized the action in *Abney* as private action—the testator's "exercise [of] continuing control over assets"⁵¹⁸—the Supreme Court then should have asked the same question it asked in *Jones*: is this kind of private "control over assets," a refusal to allow the assets to be used by persons of color, a violation of sections 1981 or 1982?⁵¹⁹ Did Senator Bacon, by directing in his will that the park admit only whites, violate section 1982? Was that direction in his will not only "impossible to fulfill"⁵²⁰ but also illegal?

In *Jones*, the Supreme Court held that § 1982 invalidated a private party's refusal to sell a house to a "Negro." In *Sullivan*, the Supreme Court held that section 1982 invalidated Little Hunting Park's refusal to allow a "Negro" to use a swimming pool. In *Abney*, the Court should have considered whether sections 1981 and 1982 invalidated Senator Bacon's refusal to allow Baconsfield to be used by "Negroes."

I suggest that, in light of *Jones*, the racial restraint in Senator Bacon's will should have been invalidated under section 1982. The Georgia Supreme Court had said of the "Negro" intervenors that "[t]hey have not been deprived of their right to inherit, because they were given no inheritance."⁵²¹ It is their having been given no inheritance—their having been excluded from inheritance on the basis of race—that violates section 1982.

The ability to use the park is a license.⁵²² A license generally is regarded as a property interest.⁵²³ If "inherit" means taking an interest under a will,⁵²⁴ it would seem that Senator Bacon's will prevented "Ne-

517. *Abney*, 396 U.S. at 445.

518. *Id.* at 447.

519. *Jones*, 392 U.S. at 420.

520. *Id.* at 436.

521. *Abney*, 165 S.E. 2d at 166.

522. "A license is usually defined as a revocable privilege to do an act or series of acts on land in the possession of another." MOYNIHAN, *supra* note 362, at 68 n.12; *see also* RESTATEMENT OF PROPERTY § 512 (1944) ("[A] 'license' . . . denotes an interest in land in the possession.").

523. There is dispute about whether a license is an interest in real or in personal property. *See* STOEUBUCK & WHITMAN, THE LAW OF PROPERTY § 8.1, at 438 (3d ed. 2000) (stating that licenses are not interests in land); *Roehm v. Orange County*, 196 P.2d 550, 552 (Cal. 1948) (stating that a license is a property interest between the licensee and a third party because it has value and can be sold); Ellen R. Pierce & Richard A. Mann, *Time-Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment*, 59 NOTRE DAME L. REV. 9, 24 n.123 (1983) (discussing a dispute about the nature of the license); *see supra* notes 341-352 and accompanying text (discussing the property interests of guests). *See also* *Marrone v. Wash. Jockey Club*, 227 U.S. 633, 636 (1913) (Holmes, J.) (holding that a license is a contract but not an interest in the real property).

524. *See* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 315 (Peter Newman ed., 1988).

gro" citizens from exercising "the same right" to "inherit" property, that is, to take an interest (the right to use the park) under the will. If "inherit" is defined more narrowly, but "purchase" is understood as encompassing any form of acquisition other than descent, it would seem that the will denied Negroes "the same right as white citizens" to "purchase" property interests in Baconsfield. Moreover, even if "inherit" and "purchase" were defined very narrowly, it would seem that Senator Bacon's will denied Negro citizens "the same right as white citizens" to hold (i.e., to use) the property interest (i.e., the license) in Baconsfield.⁵²⁵

If the Court had taken into account the 1866 Civil Rights Act, and had focused on the illegality of Senator Bacon's will itself, the case might well have been decided differently. The basis for the decision in *Evans v. Abney* was that the discrimination had been effected by Senator Bacon. The question that should have been asked was whether it was unlawful for Senator Bacon to effect that discrimination.

If, as I have suggested, Senator Bacon's will directed that Negroes be denied "the same right . . . to inherit, purchase . . . [or] hold . . . property" and therefore contravened section 1982, the next question would be: what should be the consequence of that illegal discriminatory intention? I suggest that the consequence of that illegality should not be to deprive everyone of the inheritance; the remedy for an illegal deprivation of one group should not be to make the deprivation more general.⁵²⁶ Rather, the remedy that carries out the purpose of the statute is the kind of relief the Supreme Court ordered in *Jones* and in *Sullivan*: that the withheld property interest be extended to the people from whom it had been withheld. In *Abney*, the relief should have been an order that Baconsfield Park be opened to all users, Negro as well as

525. If a license were not considered property at all, see Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1581 (1982) (noting that the status of licenses as property or non-property has been uncertain), it may be that Senator Bacon's will violated section 1981 by depriving the Negroes who proposed to use the park of "the same right . . . to make . . . contracts," 42 U.S.C. § 1982 (1998). See *Patterson v. McLean Credit Union*, 491 U.S. 164, 210 (1989) (Brennan, J., concurring in part and dissenting in part) (citing *Wyatt v. Security Inn Food & Beverage, Inc.*, 819 F.2d 69 (4th Cir.1987), and stating that "[t]he lower federal courts have found a broad variety of claims of contractual discrimination cognizable under § 1981"); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978) (finding that bank policy to offer its services on different terms dependent upon race); *Hall v. BioMedical Application, Inc.*, 671 F.2d 300 (8th Cir. 1982) (medical facility's refusal to treat black person potentially cognizable under section 1981); *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C. 1971) (regarding admission to barber school); *Scott v. Young*, 307 F. Supp. 1005 (E.D. Va. 1969) (regarding discrimination in amusement park admission policy), *aff'd*, 421 F.2d 143 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970)).

526. See TENBROEK, *supra* note 366, at 93 (characterizing the legislative history of the 1866 statute as providing not that one man would have no complaint if neither he nor another received protection, but that both are entitled to the "full" and "equal" protection of the law).

white.

2. Connecticut Bank & Trust Co. v. Johnson Memorial Hospital

In *Connecticut Bank & Trust Co. v. Johnson Memorial Hospital*,⁵²⁷ the testatrix was very clear about what she wanted: a hospital room to be used “only by patients who are members of the Caucasian race.”⁵²⁸ The court thought it likely that the testatrix had anticipated that her racially discriminatory direction might not be lawful,⁵²⁹ and that that was why she had provided explicitly that if the trust “violate[d] any law,” the assets of that trust should be made part of the residue of her estate.⁵³⁰

The court considered it irrelevant *why* the trust was illegal, noting that “none of the parties claims that the racial restriction . . . can be implemented by the hospital” and that “[t]he principal dispute . . . is over the consequences” of this circumstance.⁵³¹ With respect to the consequence, the court said that “[t]he essential question is whether the testatrix would have preferred the alternative disposition to the charities listed in the residuary clause over the establishment of the hospital trust without the racial limitation.”⁵³² “If the gift over provision was meant to be an expression of her preference, it must be respected.”⁵³³

The court then found that the will, executed in 1964, indicated that the testatrix’s preference would have been to have the trust fail.⁵³⁴ The court said that “[t]he line of cases expanding the protection of the fourteenth amendment into areas of discrimination previously tolerated by the law was well developed and widely publicized by that time.”⁵³⁵ Nondiscrimination principles had been established in such decisions as *Shelley v. Kraemer*, *Brown v. Board of Education*, and *Pennsylvania v. Board of Directors*. “More significantly, so far as this case is concerned,” the court said, “private hospitals which participated in the Hill-Burton program had been required to admit Negro patients and doctors.”⁵³⁶ Therefore, the court said:

[I]t is highly improbable that the testatrix or her draftsman was unaware of the complications which would be created by the in-

527. 294 A.2d 586 (Conn. Super. Ct. 1972).

528. *Conn. Bank & Trust Co.*, 294 A.2d at 588.

529. *Id.* at 589.

530. *Id.* at 589.

531. *Id.* at 589-90.

532. *Id.* at 591.

533. *Conn. Bank & Trust Co.*, 294 A.2d at 591.

534. *Id.* at 592.

535. *Id.*

536. *Id.* (citing *Simkins v. Cone Mem’l Hosp.*, 323 F.2d 959 (4th Cir. 1963)).

sertion of this restriction to Caucasians only. More probably than not the draftsman of the will realized that the racial restriction placed upon the bequest might ultimately be held invalid. . . . The racial restriction would appear, to any reasonably knowledgeable legal practitioner, as the most obvious source of potential illegality. . . . It is a fair conclusion that . . . the very event most prominent in the mind of the testatrix as a condition for the gift over was the declaration of invalidity of the racial restriction, which has come to pass.⁵³⁷

Thus, the crucial aspects of the court's decision were the determination that the testatrix's intention had been to enable whites, but not blacks, to benefit from her will, and her intention that, if blacks would share in a benefit to the hospital, then the property otherwise designated for the hospital would go elsewhere. In the court's words, "[t]he only policy to be implemented is the intention of the testatrix."⁵³⁸

But the question that the court never addressed was whether the testatrix could lawfully enforce that intention. The court focused on the agreement "that the racial restriction . . . can[not] be implemented by the hospital."⁵³⁹ Under section 1982, however, what is illegal is not simply an effort on the part of the hospital to restrict the use of the room to "Caucasians," but also the effort on the part of the testatrix to impose that restraint. If the court had focused on section 1982, and the will's violating section 1982 by preventing "non-whites" from exercising the same right to inherit, purchase, or hold property interests under the will, then the court should have concluded that the consequence of the testatrix's illegal conduct should be that the racial restraint is voided and the gift to the hospital enforced without the racial restraint. In other words, without considering section 1982, the court's concern was to validate the intention of the testatrix but, under section 1982, the court should have treated the testatrix's intention as itself unlawful.⁵⁴⁰

537. *Id.*

538. *Conn. Bank & Trust Co.*, 294 A.2d at 592.

539. *Id.* at 589-90.

540. One irony of the court's decision is its reliance upon the testatrix's deliberate intention to enforce racial discrimination. The court's decision suggests that, if this will had been executed decades earlier, when the testatrix would not have been likely to have imagined that non-whites might have used the hospital room, then the will probably would have been interpreted so as to excise the racial restraint and preserve the underlying gift. What persuaded the court to enforce the testatrix's intention was the clarity of its illegality.

Another aspect of the *Connecticut Bank & Trust Co.* decision that is worthy of note is the court's statement that no equitable principles argue for preserving the underlying gift. The court said that "[w]here the alternative beneficiaries . . . are other recognized charitable organizations . . ., there is little reason for the law to show any preference among them." *Conn. Bank & Trust Co.*, 294 A.2d at 592 (citations omitted). In 1972, when this case was decided, other courts would have considered that eschewing enforcement of racial discrimination would be more than a "little reason for the law to show" a preference for validating the underlying gift here. *See, e.g.*,

3. Smyth v. Anderson

In *Smyth v. Anderson*,⁵⁴¹ the testator, who died in 1937, left a will that bequeathed property "to the Social Circle Schools, for the benefit of the white children of the Social Circle Militia District."⁵⁴² The will further provided that "[i]n the event said property is not accepted by said Social Circle Schools or used for any other purpose than above indicated and directed, it is to revert to my estate and go to my next of kin."⁵⁴³ The court took it as given that the racial restraint was illegal,⁵⁴⁴ but held that in this case, unlike *Trammell v. Elliott*,⁵⁴⁵ an earlier Georgia case, the doctrine of *cy pres* could not be applied because the testator had evidenced not a general but a specific charitable intent, by providing a "controlling reversionary clause."⁵⁴⁶ The court said that "[t]he authorities are universally in accord that the doctrine of *cy pres* is simply inapplicable if there is a reversionary clause or valid gift over in the event the charitable gift fails for any reason."⁵⁴⁷ For this reason, the court held that the property would pass in accordance with the terms of the will, thus depriving the Social Circle Schools of any interest in the property.⁵⁴⁸

In this case, too, there was no consideration of the possible application of section 1982. The court held that the testator had a "specific charitable intent," that the property be used "for the benefit of the white children" of the district, and, if the property could not be used for that specific purpose, it revert to his estate and go to his next of kin.⁵⁴⁹ The court enforced that "specific charitable intent," holding that, because the trustees of the school district could not use the property for white children only, the property should revert to the testator's estate.⁵⁵⁰ What the court did not consider was whether that "specific charitable intent" itself violated section 1982.

It appears that the testator's intent does violate section 1982. The

Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

541. 232 S.E.2d 835 (Ga. 1977).

542. *Smyth*, 232 S.E.2d at 836.

543. *Id.*

544. This was presumably based on state action grounds, because the trust was to be administered by the trustees of the local school district.

545. 199 S.E.2d 194 (Ga. 1973).

546. *Smyth*, 232 S.E. 2d at 839.

547. *Id.* (citations omitted). *But see* Adams, *supra* note 18, at 28 ("Disagreement exists as to whether a gift-over should operate automatically or merely be weighed as but one factor negating a general charitable intent. A look at the discrimination cases that have contained gifts-over suggests that, standing alone, such gifts will not necessarily preclude further inquiry by a court.").

548. *Smyth*, 232 S.E. 2d at 839.

549. *Id.* at 836, 839.

550. *Smyth*, 232 S.E.2d at 839.

testator established that his gift was to benefit the district's white schoolchildren, but not the non-white children.⁵⁵¹ This plainly seems to deprive the non-white children of "the same right" to enjoy a benefit under the will. If that is the meaning of "inherit," then the non-white children have been deprived of the same right to inherit as is enjoyed by the white children. If not, then it would seem that the non-white children have been deprived of the same right to acquire or to hold or enjoy property interests under the will.

In this case, as in *Evans v. Abney*, consideration of section 1982 might well change the result. If all that makes the transfer unlawful is the Equal Protection Clause, then eliminating the state action, by eliminating any involvement of the school district or its trustees, eliminates the illegality. But if it is unlawful for the testator to have distinguished between white and non-white children, then that illegality is not cured by depriving all the children of the benefit of the will. If the illegality is the distinction based on race, then the cure for that illegality is excision of that distinction, and enforcement of the gift to all the schoolchildren of the district, white and non-white.

4. *Hermitage Methodist Homes of Virginia v. Dominion Trust Co.*

The 1990 decision of the Virginia Supreme Court in *Hermitage Methodist Homes v. Dominion Trust Co.*,⁵⁵² is subject to criticism on several grounds. First, the court chose to decide a case with powerful constitutional resonance on the basis of a highly formalistic test.⁵⁵³ The court did not even consider what the testator's intention might have been had he known that he could not enforce the racial restriction in the gift to the schools.⁵⁵⁴ In this case, unlike *Evans v. Abney*, there was no indication that the settlor had a personal discriminatory intent.⁵⁵⁵ The gift to the schools may have been made subject to the racial restraint only because the state statute so required. Moreover, the fact that the gift over was without racial restriction could have been taken to indicate an absence of interest in discrimination.

Second, in applying the highly formalistic test, the court misunderstood the formalities. The court said that the gift in *Meek v. Fox*,⁵⁵⁶ the

551. *Id.* at 836.

552. 387 S.E.2d 740, 746 (Va. 1990).

553. See *Hermitage Methodist Homes*, 387 S.E.2d at 745. The formalistic distinction that the court drew, between conditions precedent and subsequent, was not one that commanded universal agreement. See, e.g., *In re Sterne's Estate*, 263 N.Y.S. 304, 308 (N.Y. Sup. Ct. 1933) (stating that the distinction was immaterial to a decision to eliminate a condition that would be void).

554. See *Hermitage Methodist Homes*, 387 S.E.2d at 744-45.

555. See *id.* at 741-42.

556. 88 S.E. 161, 161 (Va. 1916).

prior decision upon which Prince Edward School Foundation relied, was subject to a condition subsequent, while the gift in *Hermitage Methodist Homes* was a subject to a "special limitation."⁵⁵⁷ But neither of these descriptions is accurate, for "condition subsequent" and "special limitation" are terms that apply when the gift over is to the grantor.⁵⁵⁸ When the party who will take if the restriction is breached is a third party, not the grantor, the gift is one "subject to executory limitation."⁵⁵⁹ The court recognized that such an interest had been created here, saying that "the estate in personalty created here is defeasible subject to an executory limitation";⁵⁶⁰ but the court failed to recognize that precisely the same kind of estate had been created in *Meek*.

Third, the court never considered whether the Adams' will violated sections 1981 and 1982. Here, as in *Evans v. Abney, Connecticut Bank & Trust Co. v. Johnson Mem'l Hosp.*, and *Smyth v. Anderson*, the court assumed that the racial restraint was void,⁵⁶¹ but the result might have been different had the court also considered whether the racial restraint violated the 1866 Act. Here, as in those cases, unconstitutional state action can be cured by eliminating the gift to which the state action is to attach. But the question under the 1866 Act is not simply whether impermissible government action has been involved. Rather, the question under section 1982 is whether the statute makes invalid the testator's direction that the school is to benefit from the will only if it serves only whites, and is to lose the benefits if it admits non-whites. If this direction by the testator is a violation of section 1982 or section 1981, that violation cannot be cured by depriving all of the students of the benefit of the will. The only way to redress that illegality is to eliminate the racial restriction and have non-white students sharing fully in the gift to Prince Edward School Foundation.

In *Hermitage Methodist Homes*, it is hard to escape the conclusion that the trust violates the 1866 Act. The will forbids non-white students from sharing in the benefits under the will, which fits the usual defini-

557. *Hermitage Methodist Homes*, 387 S.E.2d at 745.

558. See Entin, *Defeasible Fees*, *supra* note 11, at 77 (citing RESTATEMENT OF PROPERTY § 46 (1936)); see also WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 2.8, at 50 (3d ed. 2000) ("A fee simple subject to an executory limitation is a fee simple estate which, upon the happening of a designated event, will automatically pass to a designated person other than the person who created the defeasible estate or his (or her) successors in interest.") (footnote omitted). While the *Meek* court characterized the restraint on marriage as a condition subsequent, the devise is not a fee simple subject to condition subsequent, for the future interest is not in the grantor but in a third party. This kind of interest is not recognized in property law: "the catalogue of defeasible fees contains no counterpart to a fee simple subject to condition subsequent under which a third party must invoke something like a power of termination upon the breach of a restriction." *Id.* at 773-74 (citations omitted).

559. Entin, *Defeasible Fees*, *supra* note 11, at 77.

560. *Hermitage Methodist Homes*, 387 S.E.2d at 745 (citations omitted).

561. *Id.* at 744.

tion of "inheriting." If the students are considered not to be "inheriting" or acquiring a property interest by gratuitous purchase, they seem to be "holding" a property interest under the will. And even if section 1982 could be read so narrowly as not to apply, the Adams will clearly seems to violate section 1981. As written, the Adams trust denies non-white children the opportunity to contract with Prince Edward School Foundation. The Supreme Court held in 1976 that section 1981 "prohibits private schools from excluding qualified children solely because they are Negroes."⁵⁶² Indeed, the Prince Edward School had participated in the litigation that produced that holding: an association to which Prince Edward School Foundation belonged was in intervenor in *Runyon v. McCrary*.⁵⁶³ If the court had focused on the statutory violations, it should have concluded that its mission was to vindicate the Congressional directive, not the grantor's discriminatory intent.

5. Home for Incurables of Baltimore City v. University of Maryland Medical System Corp.

In *Home for Incurables of Baltimore City v. University of Maryland Medical System Corp.*,⁵⁶⁴ as in *Connecticut Bank & Trust Co. v. Johnson Memorial Hospital*,⁵⁶⁵ there was evidence the testator both had understood that the racially discriminatory restraint he included in his will might not be valid, and intended that if he could not prevent blacks from sharing in his bequest to the Home (now called "Keswick"), he wished to deprive Keswick of the bequest altogether. "Beginning in 1944, and continuing through ten different testamentary instruments (wills and codicils), Dr. Coggins always had named Keswick as the sole

562. *Runyon v. McCrary*, 427 U.S. 160, 163 (1976).

563. See *Gonzales v. Fairfax-Brewster Sch., Inc.*, 363 F. Supp. 1200, 1204 (E.D. Va. 1973), *aff'd* in part and *rev'd* in part on other grounds *sub nom.* *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975) (en banc), *aff'd*, 427 U.S. 160 (1976).

Professor Entin says that "any attempt by the Adams Trustee to compel the Foundation to maintain a discriminatory admissions policy might itself violate § 1981." See Entin, *Defeasible Fees*, *supra* note 11, at 793 n.103. "The Foundation was legally bound by this ruling because an association to which it belonged intervened in the litigation." *Id.* at 775 n.30, 793 n.103. The District Court said that its decision was binding on "the named plaintiffs, the named defendants, and those schools which actually comprised the intervenor." *Gonzales*, 363 F. Supp. at 1203. See also *McCrary v. Runyon*, 515 F.2d at 1091 (Butzner, J., concurring in part and dissenting in part) (finding that "appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association"). *But see* *Martin v. Wilks*, 490 U.S. 755 (1989) (applying the general rule that one cannot be bound by a proceeding to which she was not herself a party or in control of a party); *Richards v. Jefferson County*, 517 U.S. 793 (1996) (discussing circumstances in which one might be bound by a prior proceeding in which one's interests had been adequately represented).

564. *Home for Incurables of Baltimore City v. Univ. of Md. Med. Sys. Corp.*, No. 24-C-99-001226, slip op. at 9 (Cir. Ct. Baltimore City Nov. 9, 1999), *cert. granted*, 743 A.2d 245 (2000)

565. *Conn. Bank & Trust Co. v. Johnson Mem'l Hosp.*, 294 A.2d 586 (Conn. Super. Ct. 1972).

charitable remainderman."⁵⁶⁶ It was only in 1962 that Dr. Coggins' intent changed, when he inserted for the first time the requirement that Keswick "house white patients" only, and that if the bequest were not acceptable to Keswick, the gift should go to the University of Maryland Hospital.⁵⁶⁷ The trial court said that:

[a]t the time of Dr. Coggins' last will, there was an extraordinary ferment in the civil rights movement. In 1962 there were escalating efforts at desegregation, as well as a year of confrontation and rioting due to the admission of a black student at the University of Mississippi. The contention is that the change in Dr. Coggins' will was motivated at least to some extent by all of these events.⁵⁶⁸

The trial court found that "the racial clause in Dr. Coggins' Will inserted for the first time in his last Will, was an inseparable part of his intent with respect to the Keswick bequest."⁵⁶⁹ The trial court said:

it is . . . evident from the surrounding circumstances including the civil rights movement, which were occurring, Dr. Coggins made the changes at issue to the bequest because Dr. Coggins believed there was a possibility that Keswick might find it impossible to take the bequest, and in that circumstance, Dr. Coggins preferred to bequeath the funds to University Hospital.⁵⁷⁰

The court enforced that preference.

The *Home for Incurables* case discusses *Jones v. Alfred H. Mayer Co.*, which, according to the trial court, "extended . . . [section 1981] to private contracts."⁵⁷¹ The court noted, however, that this decision was not reached "until 1968, after the execution of Dr. Coggins' Will."⁵⁷² The court seems, therefore, to be suggesting that sections 1981 and 1982 might have been applied to Dr. Coggins' will if the will had been executed (or, perhaps, if Dr. Coggins had died) after the Supreme Court's decision in *Jones*.

But this suggestion that *Jones* would have only prospective application is not persuasive. In *Jones*, the Court was not interpreting a new statute; rather, it was interpreting a hundred-year-old statute and explained that this interpretation always had been the meaning of that

566. *Home for Incurables*, No. 24-C-99-001226, slip op. at 9.

567. *Id.*

568. *Id.* at 4.

569. *Id.* at 6.

570. *Id.* at 11.

571. *Home for Incurables*, No. 24-C-99-001226, slip op. at 4.

572. *Id.*

statute, however imperfectly it may have been understood.⁵⁷³ In *Jones* itself the Court applied the statute to facts that had occurred before the Court rendered its new interpretation of section 1982. The employees of the Mayer Company, who in 1965 declined to sell a home to Mr. and Mrs. Jones because Mr. Jones "is a Negro",⁵⁷⁴ had no more reason to expect that section 1982 applied to that transaction than Dr. Coggins did when he was making his will in 1963.⁵⁷⁵ In *Jones*, the Supreme Court applied sections 1981 and 1982 to situations that arose before the Court clearly held that those statutes applied to private action.⁵⁷⁶ Therefore, there should have been no bar to the Maryland court's applying section 1982 to the will of Dr. Coggins.

And if the court had done so, it should have concluded that Dr. Coggins' restriction of Keswick to house only "white patients" in the Coggins Building was unlawful under section 1982, because it prohibited non-white patients from exercising the equal right to "inherit," "purchase," and "hold" property under Dr. Coggins' will. If the "same right" to inherit property means the same right to benefit from an interest under a will, then section 1982 is violated by a legacy that is conditioned on benefits being limited to whites. If "purchase" includes all forms of acquisition other than descent, then the non-white patients were deprived of the same right to purchase the benefits under the will. And if the same right to "hold" property means the same right to enjoy the opportunity to use a room in a nursing home, then section 1982 is violated by a legacy that is conditioned on excluding non-whites from the rooms in a nursing home.

This case, like *Connecticut Bank & Trust Co. v. Johnson*, makes particularly clear the necessity of excising the racial restraint and not invalidating the entire gift. In this case, we see the testator's determination to impose racial discrimination. After years of repeated will making without any racial restraint and without any gift over, Dr. Coggins suddenly introduces, in one codicil, both the racial restraint and a gift over, thus making very clear the donor's determination to enforce the racial restraint. This intentional act of racial discrimination is precisely the kind of conduct forbidden by section 1982; it should be invalidated and cured by excision of the racial restraint in the will.

573. See *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33, 35 (8th Cir. 1967), *rev'd*, 392 U.S. 409 (1968).

574. *Jones*, 379 F.2d at 35 (giving the date of occurrence as June 1965).

575. There were earlier intimations that such a result was possible. See *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903), *cited in Jones*, 379 F. 2d at 37. See also discussion *supra* notes 91-92; *Jones*, 379 F. 2d at 41-44 (Blackmun, J.).

576. See, *e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

VII. CONCLUSION

In *Jones*, the Supreme Court resuscitated the Civil Rights Act of 1866, by which Congress had prohibited the imposition of racial distinctions by "custom, or prejudice", as well as by state or local law.⁵⁷⁷ While most of the cases since 1968 have focused on the Act's protection of the rights to buy or rent property, the Act broadly protects the rights to "inherit," "purchase," and "hold" real and personal property.

Analysis of the 1866 Act indicates that it is violated when intentional racial discrimination in a donative transfer is the basis for attempting to deny to citizens the right to acquire or hold property, regardless whether state action has been implicated in those transfers. The consequence of this analysis should be to invalidate some discriminatory donative transfers that had been considered free of state action, and to remedy other discriminatory donative transfers by excising the discriminatory restraint rather than eliminating the underlying gift.

577. See *Jones*, 392 U.S. at 423 (discussing An Act to establish a Bureau for the Relief of Freedman and Refugees, ch. 90, 13 Stat. 507 (1865)).

