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DISCRIMINATORY CHARITABLE TRUSTIN HERMITAGE  
METHODIST HOMES**

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# DEAD HANDS AND STATE ACTORS: THE RACIALLY DISCRIMINATORY CHARITABLE TRUST IN HERMITAGE METHODIST HOMES

Dean Barclay<sup>1</sup>

"Prejudices . . . , like odorous bodies, have a double existence both solid and subtle—solid as pyramids, subtle as the twentieth echo of an echo, or as the memory of hyacinths which once scented the darkness . . . Mr. Casaubon had taken a cruelly effective means of hindering her: even with indignation against him in her heart, any act that seemed a triumphant eluding of his purpose revolted her."<sup>2</sup>

## I. HISTORICAL INTRODUCTION

In the 1990 case of *Hermitage Methodist Homes v. Dominion Trust Company*,<sup>3</sup> Virginia's Supreme Court let a private school's interest in a charitable trust come to an end because the school began admitting African Americans.<sup>4</sup> The court thereby kept alive the testamentary wishes of a man who had died more than twenty years earlier.<sup>5</sup> Poetically, this outcome may have been just; the same racism that for two decades the school had exploited<sup>6</sup> defeated it in the end. On a positive note, the school regained its dignity, by washing its hands of unclean money and so atoning for past transgressions. While cleansing the school, though, the decision tacitly, by omission, implicated the court itself; that is, the court reached its conclusion "without deciding" whether enforcement of the testator's will and codicil violated the

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1. J.D. Candidate, Washington and Lee University School of Law, 2002. The author wishes to thank his family and friends, Professors Halper, Henneman, and Massie, and the editorial board of the *Race and Ethnic Ancestry Law Journal* for their encouragement and guidance.

2. GEORGE ELIOT, *MIDDLEMARCH*, BK. V, "The Dead Hand," 300, 342 (Bert G. Hornbeck, ed., W. W. Norton & Co. 1977) (1874) (describing widow's feelings about codicil that would divest her of late husband's property if she married certain young man).

3. 387 S.E.2d 740 (Va. 1990), *cert. denied*, 498 U.S. 907 (1990); see Jonathan L. Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 WM. & MARY L. REV. 769, 796 (1993) (using *Hermitage Methodist Homes* to illustrate problems with traditional approach to defeasible fees).

4. See *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 746 (Va. 1990) (stating that, after black student matriculated, natural operation of will's special limitation terminated school's interest in trust's income).

5. See *id.* at 741 (reporting that testator Jack Adams died in 1968).

6. See *id.* at 742 (reporting that trust's first-named beneficiary, private school admitting only whites, received trust's income from 1968 until 1987).

United States Constitution.<sup>7</sup> Rather, the court based its opinion on “principles of real property law,” which divested the school of equitable title by a “natural operation” of the will’s “four corners.”<sup>8</sup> In so ruling, the court applied the avoidance doctrine, as articulated by Justice Brandeis: “Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”<sup>9</sup>

The Virginia Supreme Court’s use of the avoidance doctrine showed amnesia, given the deeper history beneath *Hermitage Methodist Homes*: Prince Edward County’s gargantuan struggle between 1951 and 1987 to thwart integration of its schools—a struggle called Massive Resistance.<sup>10</sup> That history began in 1951, when African American school children in Prince Edward County first filed a suit arguing that Virginia’s segregation laws violated the United States Constitution.<sup>11</sup> In 1952, the United States District Court for the Eastern District of Virginia ruled against the children and found that the Commonwealth could educate white and non-white children in separate but equal public schools.<sup>12</sup> The court also, however, ordered the county school board to remove any inequality between public facilities for white and non-white students “with diligence and dispatch.”<sup>13</sup> Appealed to the United States Supreme Court, the case became part of the first *Brown v. Board of Education*

7. *Id.* at 744 (stating that court would only assume but not decide that racially discriminatory provisions were unconstitutional and void).

8. *Id.* at 744-48 (stating that principles of real property law produced same result whether discriminatory provisions were valid or not).

9. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (stating that “[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of”). Note, however, that another of Justice Brandeis’s avoidance rules, “The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits,” *id.* at 348, may also come into play here. That is, the Prince Edward Foundation was itself questioning the constitutionality of a testamentary provision from which it had benefited for nearly two decades. See *Hermitage Methodist Homes*, 387 S.E.2d at 742. Even so, a party may argue “alternately” and “regardless of consistency,” FED. R. CIV. P. 8(e)(2). In addition, two of the three educational institutions to whom the will’s successive gifts over had previously delivered no money also questioned the terms’ constitutionality. See *Hermitage Methodist Homes*, 387 S.E.2d at 742-43.

10. See Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L. J. 327, 346 (1997) (dramatizing how Prince Edward County’s segregationists, trying to prevent integration, closed all public schools and replaced them with private ones).

11. See *Davis v. County School Bd. of Prince Edward County*, 103 F. Supp. 337, 338 (E.D. Va. 1952) (paraphrasing plaintiffs’ argument that Virginia’s separation of white and non-white children in public schools violated Privileges and Immunities Clause and Equal Protection Clause).

12. See *id.* at 340 (stating that federal court lacked authority to adjudge as right or wrong Virginia’s separation of white and non-white children in public schools); compare *Plessy v. Ferguson*, 163 U.S. 537, 550-52 (1896) (stating that separate but equal facilities did not violate Equal Protection, Due Process, or Privileges and Immunities Clauses of Fourteenth Amendment, or stamp African Americans with badges and incidents of slavery in violation of Thirteenth Amendment).

13. *Davis* at 340-41 (ordering county school board to remove inequality in public buildings and facilities provided separately to white and non-white students).

(*Brown I*),<sup>14</sup> which held that separate educational facilities were inherently unequal, and that their maintenance by governmental authority violated the Fourteenth Amendment's Equal Protection Clause.<sup>15</sup> In 1955, therefore, the United States Supreme Court remanded the case to the district court with instructions to enter such orders as necessary and proper to end racial discrimination in public schools "with all deliberate speed."<sup>16</sup> Rather than comply, the Board of Supervisors of Prince Edward County closed all its public schools and let the people replace them with private ones.<sup>17</sup> An amendment to the Virginia Constitution at that time<sup>18</sup> empowered the General Assembly and local governments to shut down integrated public schools, to stop funding them, to pay tuition grants instead to children attending nonsectarian private schools, and to extend state retirement benefits to the private schools' teachers.<sup>19</sup> At precisely this moment, in 1956, the testator in *Hermitage Methodist Homes* executed the first version of his racially discriminatory will.<sup>20</sup>

In 1962, the same United States District Court for the Eastern District of Virginia held that the county could not lawfully close its public schools to avoid the Supreme Court's order while the Commonwealth permitted other public schools to remain open at taxpayers' expense.<sup>21</sup> One year later, however, the Supreme Court of Appeals of Virginia upheld as valid under state law the closing of the Prince Edward County public schools; state and county tuition grants for children who attended private schools; and the county's tax concessions to those who contributed to private schools.<sup>22</sup> In 1964 the

14. 347 U.S. 483 (1954).

15. See *Brown v. Board of Ed. (Brown I)*, 347 U.S. 483, 493-95 (1954) (holding that segregated public schools were unconstitutional, because their very existence promoted inequality).

16. See *Brown v. Board of Ed. (Brown II)*, 349 U.S. 294, 301 (1955) (remanding case to district courts to enter such orders as necessary and proper to admit non-whites to public schools with both care and dispatch).

17. See *Allen v. County School Bd. of Prince Edward County*, 207 F. Supp. 349, 350 (E.D. Va. 1962) (reporting that Board of Supervisors had shut down public schools).

18. VA. CONST. ART. VIII, § 10 (numbered § 141 in 1956) (generally prohibiting appropriation of public funds to educational institutions not owned or exclusively controlled by Commonwealth or political subdivision thereof, but allowing exception for Virginia students' education in nonsectarian private schools); *responding to Almond v. Day*, 89 S.E.2d 851, 857 (Va. 1955) (concluding that public grants to children attending private schools violated § 141 of Virginia Constitution, as it stood in 1952).

19. See VA. CODE ANN. §§ 22-188.3 *et seq.* and 511-111.38:1 (1956) (closing segregated public schools and effectively replacing them with private ones) (repealed by Acts, 1959 Ex. Sess., c. 53); *cited in Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 221 n. 2 (1964) (describing legislation by which General Assembly prevented desegregation of public schools).

20. *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 741 (Va. 1990) (reporting that Jack Adams executed his will in 1956).

21. See *Allen*, 207 F. Supp. at 355 (holding that Prince Edward County could not lawfully close its public schools to avoid Supreme Court's order, while Virginia permitted other public schools to remain open at taxpayers' expense).

22. See *County School Bd. of Prince Edward County v. Griffin*, 133 S.E.2d 565, 579-80 (Va. 1963) (upholding as valid under state law Prince Edward County's closing of its public schools, tuition grants to

Supreme Court of the United States acknowledged Virginia's authority to interpret its own laws<sup>23</sup> but also held that closing the Prince Edward County public schools while giving tuition grants and tax concessions to assist white children in private segregated schools denied non-white students the equal protection that the Fourteenth Amendment guaranteed.<sup>24</sup> By way of remedy, the United States Supreme Court directed the District Court to end the county's racial discrimination by such means as (a) enjoining Prince Edward County's Board of Supervisors, its School Board, its Treasurer, and its Division Superintendent of Schools, as well as Virginia's Board of Education and its Superintendent, from paying tuition grants and giving tax credits while public schools remained closed; (b) requiring the Supervisors to levy taxes; and (c) ordering the county to reopen its public schools without racial discrimination.<sup>25</sup> That same year, 1964, the testator in *Hermitage Methodist Homes* executed the codicil to his racially discriminatory will.<sup>26</sup>

During the two decades after the testator's death in 1968, the Prince Edward School Foundation fought a related battle to regain its tax-exempt status, which the IRS revoked with the courts' help beginning in 1970.<sup>27</sup> For purposes of this argument, the key historical moments were 1956 and 1964. A person does not become a state actor solely because he or she racially discriminates during the same decade and in the same county as does the government.<sup>28</sup> But in this case, the Commonwealth of Virginia, through its

children attending private schools, and tax concessions to those who contributed financially to them).

23. See *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 230 (1964) (conceding that state court's validation of school closings, tuition grants, and tax breaks was definitive and authoritative holding of Virginia law, binding on United States Supreme Court).

24. See *id.* at 232 (holding that closing public schools while financially assisting white children in private segregated schools violated Equal Protection Clause).

25. See *id.* at 233 (directing district court to find and implement means necessary and proper to end county's racial discrimination in public education).

26. *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 741 (Va. 1990) (reporting that Jack Adams executed codicil in 1964).

27. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (holding that, when nonprofit private schools prescribed and enforced racial discrimination, IRS could disqualify them as tax-exempt organizations under 26 U.S.C. §§ 170 and 501(c)(3)); *Prince Edward Sch. Found. v. Commissioner*, 478 F. Supp. 107, 113 (D.D.C. 1979) (finding that school by failing to admit non-white students had failed affirmatively to show that it did not racially discriminate), *cert. denied* 450 U.S. 944 (1981) (Rehnquist, J., dissenting); *Gonzales v. Fairfax-Brewster Sch., Inc.*, 363 F. Supp. 1200, 1205 (E.D. Va. 1973) (stating that 42 U.S.C. § 1981 prohibited private schools from excluding qualified children solely because they were black), *aff'd sub nom. Runyan v. McCrary*, 427 U.S. 160, 172 (1978); *Green v. Connally*, 330 F. Supp. 1150, 1157 (D.D.C. 1971) (doubting whether educational organization that practiced racial discrimination could qualify as charitable trust under general trust law), *aff'd in part sub nom. Coit v. Green*, 404 U.S. 997 (1971); Rev. Rul. 71-447, 1971-2 C.B. 230 (ruling that private school having racially discriminatory policy as to students was not charitable within common law concepts reflected in 26 U.S.C. §§ 170 and 501(c)(3)); *Green v. Kennedy*, 309 F. Supp. 1127, 1140 (1970) (enjoining IRS from granting tax-exempt status under §§ 170 and 501(c)(3) to racially segregated private schools in Mississippi).

28. See *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (stating that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful"); *cp. Keyes v. Sch. Dist.*

courts, created the historical context in which testator Jack Adams believed his grant would be legal and enforceable. By 1990, the Virginia Supreme Court appeared to have forgotten this history or else to have underestimated its legal relevance.

In *Hermitage Methodist Homes*, this article will argue, the Virginia Supreme Court's very avoidance of the constitutional question was itself unconstitutional state action. Part II will recite the basic facts and holding of the case. Part III will explain and criticize the property law principles by which Virginia's highest court let the racially discriminatory will and codicil deprive African Americans of equal protection of the laws. Part IV will argue that the Commonwealth's legislative encouragement, executive support, and judicial enforcement of the testamentary provisions were unconstitutional state action. Part V will contend that the Virginia Supreme Court's application of the avoidance doctrine compounded the unconstitutional state action that the court had sought not to address. By way of solution, Part VI will call for a more ambitious statutory abolition of the property-law distinction that permitted the court to reach its conclusion, statutory prohibition of racial discrimination in charitable trusts, prudential restrictions on application of the avoidance doctrine, and political restoration of the balance between property rights and civil rights.

The court claimed not to be deciding whether the racially discriminatory provisions were valid or void.<sup>29</sup> It also claimed not to be enforcing them, if they were in fact invalid.<sup>30</sup> Logically extended, however, the court's interpretation of the will and application of property law created a "safe harbor" for racial discrimination.<sup>31</sup> The court explicitly kept open the possibility that in a future case it would permit a will to terminate a nondiscriminatory school's present interest and deliver that interest to a discriminatory school instead, if the testator named the latter in a carefully worded gift over.<sup>32</sup> Seen in the larger historical context of an ever-shifting "property

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No. 1, 413 U.S. 189, 208 (1973) (holding that finding of intentional segregation in portion of school system led to presumption of segregation in others, not excused by remoteness in time).

29. See *Hermitage Methodist Homes*, 387 S.E.2d at 744 (stating that, whether discriminatory provisions were valid or void, case would come out same way).

30. See *id.* at 746 (stating that interests of educational charities named successively in will failed completely "not because we give effect to an invalid trust provision," and thereby implying either that court did not give effect to provision or that provision was valid).

31. See *Entin*, *supra* note 2, at 769 (speculating that perpetrators of racial discrimination could use essentially semantic distinction between special limitations and conditions subsequent to create constitutional "safe harbor").

32. See *Hermitage Methodist Homes*, 387 S.E.2d at 746 (stating that "because as counsel have represented, the educational institutions [named successively in will] have all admitted black students, their respective interests in the trust proceeds can never vest into possession"—implying that if such schools had not admitted blacks, gifts over might or might not vest).

rights/civil rights dichotomy,"<sup>33</sup> the court's decision protected property rights more vigorously than civil liberties. It thus marked a retreat from the *Carolene Products* era of highly protected suspect classes and fundamental rights,<sup>34</sup> back to the *Lochner* era of economic due process and *laissez-faire*.<sup>35</sup>

Ultimately, the court, like the school that lost income through the decision, resembled Dorothea Brooke, the protagonist of George Eliot's *Middlemarch*.<sup>36</sup> A codicil to the will of Brooke's dead husband, Edward Casaubon, would divest her of property if she married Will Ladislaw, whom Casaubon had disliked.<sup>37</sup> Whether she married Ladislaw and lost the property, or remained single and kept it, her late husband's intentions would still control her.<sup>38</sup> The testator in *Hermitage Methodist Homes* similarly controlled the Virginia Supreme Court, despite its protestations that it was merely applying the avoidance doctrine.

## II. THE FACTS AND HOLDING OF *HERMITAGE METHODIST HOMES*

In *Hermitage Methodist Homes*, Lynchburg testator Jack Adams's duly executed will and codicil declared his intention that his estate be held in trust and that the trustee distribute the trust's income to the Prince Edward School Foundation "so long as" the private school it supported admitted only white persons.<sup>39</sup> "In the event that" the school admitted any non-white student, the trust's income would go instead to a second school, "so long as" it, too, admitted only whites.<sup>40</sup> "In the event that" the second school also admitted a

33. See David Schultz, *Scalia, Property, and Dolan v. Tigard: The Emergence of a Post-Carolene Products Jurisprudence*, 29 AKRON L. REV. 1, 20-34 (1995) (arguing that Justices Scalia and Rehnquist, by rethinking *Carolene Products* era jurisprudence, had increased civil rights' vulnerability to political process).

34. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) (indicating that economic regulation was subject to rational-basis test but that legislation restricting political processes and rights of discrete and insular minorities was subject to strict scrutiny).

35. See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that statute limiting baker's work to 60 hours per week or 10 hours per day violated Fourteenth Amendment liberty of employer and employee to contract).

36. See ELIOT, *supra* note 1, at 342 (describing widow's feelings about codicil restraining remarriage).

37. See *id.* at 339 (explaining testamentary condition by which widow would lose property if she married wrong person); cf. *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 832 (Ohio C.P. 1974) (upholding will that would divest two sons of residuary estate if they married non-Jewish women); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1315 (1999) (finding no constitutional objection to state court's enforcing testamentary condition that affected religious practice).

38. See ELIOT, *supra* note 1, at 342 (stating that "the living, suffering [late husband] was no longer before her to awaken her pity," but that "painful subjection" to him nevertheless survived: "As for the property which was the sign of that broken tie, she would have been glad to be free from it . . . , if there had not been duties attached to ownership, which she ought not to flinch from").

39. *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 741 (Va. 1990).

40. *Id.* at 742.

non-white, the codicil provided for successive gifts over to yet a third school and then to a college, both subject to the same whites-only contingency, and finally, without limitation, to Hermitage Methodist Homes, a nursing facility.<sup>41</sup> The will and codicil, executed in 1956 and 1964, respectively, were probated in 1968.<sup>42</sup> The private school that was the first-named beneficiary, and that admitted only whites, received the trust's income from 1968 until 1987.<sup>43</sup>

By 1987, however, all three educational institutions named successively in the will had enrolled black students.<sup>44</sup> Dominion Trust Company, the trustee at that time, filed suit to find out what it should do with the trust's income.<sup>45</sup> Interested parties on several sides declared the racially discriminatory provision void under the Virginia and United States Constitutions, but they then reached different answers to the central question: who should get the money?<sup>46</sup>

The Virginia Supreme Court's holding had three parts. First, the court chose not to decide whether the racially discriminatory provisions were unconstitutional and void.<sup>47</sup> Second, the court found that, whether the provisions were enforceable or not, the nursing home would ultimately benefit, because a special limitation, rather than a condition subsequent, restricted the interests of the successively named educational institutions and because, by contrast, no limitation restricted the interest of the nursing home.<sup>48</sup> Third, the court decided that *cy pres* did not apply, because the testator clearly intended a gift over to Hermitage Methodist Homes, after the Prince Edward School Foundation's interest ended.<sup>49</sup>

### III. FUTURE INTEREST LAW AS A MEANS TO AVOID REACHING THE CONSTITUTIONAL QUESTION

This article criticizes the Virginia Supreme Court's application of property law not only because the court thereby avoided a constitutional question but also because the court ignored a relevant Virginia statute.<sup>50</sup> Before grasping

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41. *Id.*

42. *See id.* at 741.

43. *See id.* at 742.

44. *See id.*

45. *See id.*

46. *See id.* at 744.

47. *See id.*

48. *See id.* at 746.

49. *See id.* at 747.

50. *See infra* Part III.B. Furthermore, one commentator has suggested a second flaw in the court's interpretation of property law: the court's having ignored respectable authorities that would delete the offending provision while leaving the prior estate intact. *See infra* note 64.



this potential error, a reader must understand the court's analysis of property law.

### A. *The Virginia Supreme Court's Interpretation of Property Law*

Virginia case law has sometimes distinguished between two types of condition, occurrence of which may terminate a defeasible fee or life estate. One such condition is a "special limitation" (what other jurisdictions call an "executory limitation" or "fee simple determinable"), and the other is a "condition subsequent."<sup>51</sup> The words "from O to A for life, *so long as* A does not remarry; and *in the event* she does, then to B" create a fee subject to a *special limitation*.<sup>52</sup> The words "from O to A for life, *but if* A remarries, then to B" create a fee subject to a *condition subsequent*.<sup>53</sup>

How do the two differ? Suppose that the determinative event occurs—that, in the example, A remarries. If the will creates a condition subsequent, A, on remarriage, does not lose her estate until the next beneficiary, B, exercises an option to terminate the preceding estate.<sup>54</sup> If, however, the will creates a special limitation, A, on remarriage, loses her estate to B immediately and automatically.<sup>55</sup> A fee simple subject to a special (executory) limitation thus resembles the more familiar "fee simple determinable," which, if the specified event happens, automatically reverts to the grantor (who holds a "possibility of reverter").<sup>56</sup> A fee simple subject to a special (executory) limitation, however, is divested in favor not of the grantor but of a third party

51. See *Dickson v. Alexandria Hosp.*, 177 F.2d 876, 878-79 (1949) (holding that, because will devised property to wife of deceased only so long as she remained widow, and because it devised property to others in event of her remarrying, words created special limitation rather than condition subsequent and so produced defeasible fee simple estate); *Vaughan v. Vaughan's Ex'x*, 33 S.E. 603, 604 (Va. 1899) (finding that, because will reduced estate of decedent's widow in event she remarried, and because part she thus lost would go to children, testator intended special limitation rather than condition subsequent); see generally *RESTATEMENT OF PROPERTY* §§ 24-25, 45-46 (1936) (contrasting conditions subsequent and executory limitations, as well as defining powers of termination); RICHARD R. POWELL AND PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* ¶¶ 188, 189, 272 (One-Volume Edition 1968) (contrasting conditions subsequent and executory limitations, as well as defining powers of termination).

52. See *Dickson*, 177 F.2d at 878 (distinguishing special limitations from conditions subsequent).

53. See *id.* (distinguishing special limitations from conditions subsequent).

54. See *Neal v. State-Planters Bank and Trust Co.*, 184 S.E. 203, 205 (Va. 1936) (stating that breach of condition subsequent did not ipso facto execute forfeiture and revest grantor with title but that title remained with grantee until grantor took appropriate action to revest self with it); *Pence v. Tidewater Townsite Corp.*, 103 S.E. 694, 696 (Va. 1920) (stating that, after grantee breached condition subsequent, forfeiture did not execute itself, and that title remained in grantee until judgment of ejectment in grantor's favor reinvested him).

55. See *Trice v. Powell*, 191 S.E. 758, 762 (Va. 1937) (stating that when will created fee simple subject to special limitation, determinative event itself terminated estate).

56. See *Entin*, *supra* note 2, at 785 (comparing fee simple subject to executory limitation and fee simple determinable, and contrasting both to fee simple subject to condition subsequent).

(the person who holds an “executory interest”).<sup>57</sup> The *Hermitage Methodist Homes* court strongly differentiated special limitations from conditions subsequent,<sup>58</sup> though this article will argue that a Virginia statute has limited the distinction’s continuing legal effect.<sup>59</sup>

Moreover, if found unconstitutional, prohibited by a federal or state statute, or void as against public policy or for some other reason, special limitations and conditions subsequent demand different remedies.<sup>60</sup> Given an unlawful condition subsequent, a Virginia court will strike the offensive restriction but leave the prior estate otherwise intact.<sup>61</sup> In the above example, A will get her life estate, despite remarriage. In the case of an unlawful special limitation, by contrast, Virginia will let the prior estate fail.<sup>62</sup> In the example, A will lose her interest. The *Hermitage Methodist Homes* court went farther, concluding that, if the prior estate failed, a gift over not subject to an unlawful condition would survive.<sup>63</sup> In the above example, B (not the grantor) would take the estate.<sup>64</sup>

57. *Id.*

58. See *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 746 (Va. 1990) (finding that if educational beneficiary violated restrictive provisions, its interest terminated immediately without successor’s having to invoke power of termination).

59. See *infra* Part III.B.

60. See *Meek v. Fox*, 88 S.E. 161, 162-63 (Va. 1916) (stating that, when condition subsequent was void, estate became free from condition, but that when special limitation was void, entire estate ceased).

61. *Id.*

62. *Id.*

63. See *Hermitage Methodist Homes*, 387 S.E.2d at 746 (finding that nursing home’s interest survived because testator placed no limits on it).

64. But see *Entin*, *supra* note 2, at 777 (questioning precedential value of case on which *Hermitage Methodist Homes* court relied, to decide outcome if prior estate was subject to unlawful special limitation but gift over was not). *Entin* cites several authorities: RESTATEMENT (SECOND) OF TRUSTS, § 65 and cmts. e-f (1959); 4 GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 211, at 130-32 (3d ed. 1990); 1A AUSTIN W. SCOTT & WILLIAM F. FLETCHER, THE LAW OF TRUSTS § 65, § 65.2, at 379, § 65.3 at 382 (4th ed. 1989). See *Entin* at 777 n. 43. According to *Entin*, when a special limitation is unlawful, the common law rule usually strikes either the unlawful restriction alone, leaving the rest of the prior estate intact, or both the prior estate and the gift over, depending on the testator’s intent—in either case, not just the prior estate, as did the Virginia Supreme Court. *Id.* at 777-78. The court in *Hermitage Methodist Homes* used as its authority the dictum from a 1916 case. See *Meek*, 88 S.E. at 162-63 (stating that, when condition subsequent was void, estate became free from condition, but that when special limitation was void, entire estate ceased), cited in *Hermitage Methodist Homes*, 387 S.E.2d at 746 (stating that “[a]lthough it does not address the issue of what happens when a gift subject to a special limitation offends constitutional considerations, the essential nature of a limitation as described by the court in *Meek* points to the decision of the issue in this case”). In the three quarters of a century after 1916, observes *Entin*, no Virginia court had ever before cited *Meek* as authority for the rule that an illegal special limitation invalidated the estate to which it applied. See *Entin* at 777. *Entin* points to one far more recent potential precedent supporting a different outcome: eliminating the invalid restriction while leaving the prior estate intact. See *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 552-53 (W.D. Va. 1975) (ordering Virginia children’s home to admit black children, despite testator’s intent to create orphanage for “white children”), cited in *Entin* at 794 n. 110. In *Hughes Mem’l Home*, a federal court interpreting Virginia law had ordered a Virginia children’s home to comply with the Fair Housing Act of 1968. 42 U.S.C. §§ 3601-3619 (1994) (exercising Congressional power under Thirteenth Amendment to bar discrimination in housing). Henceforth the home must operate on a nondiscriminatory basis. See *Hughes Mem’l Home*, 396

Finally, according to the United States Supreme Court, the automatic default associated with a special limitation's determinative event can enable racially discriminatory special limitations to operate without state action, thereby protecting them against a charge of having violated the Fourteenth Amendment's Equal Protection Clause.<sup>65</sup> Again, this article questions the finding, when a later section examines the constitutional issue in *Hermitage Methodist Homes*.<sup>66</sup>

Table 1 summarizes the differences between a special limitation and a condition subsequent, according to the Virginia Supreme Court's interpretation of property law.

TABLE 1. POINTS OF CONTRAST BETWEEN CONDITION SUBSEQUENT AND SPECIAL LIMITATION.

	Condition Subsequent	Special Limitation
Words that create the interest	"but if"	"so long as," "in the event"
Property-law effect when determinative event occurs (assuming restriction is effective)	Before taking, next beneficiary must first affirmatively exercise her option to declare forfeiture	Estate vests immediately and automatically in next beneficiary, without her having to act <sup>67</sup>

F. Supp. at 546. Applying *cy pres* and carrying out the testator's general charitable intent, the *Hughes Mem'l Home* court excised a racial restriction deemed incidental to the trust's main purpose ("an orphanage for . . . white children"). *Id.* at 552-53. The *Hermitage Methodist Homes* court, however, either overlooked this case or deemed it distinguishable. See *Hermitage Methodist Homes*, 387 S.E.2d at 746-47 (affirming trial court's ruling that *cy pres* was inapplicable, because trust's purpose and beneficiaries were certain and definite and because valid gift over expressed testator's intent). Perhaps the *Hermitage Methodist Homes* court did not see the *Hughes Memorial Home* will's provision "for the purpose of establishing, organizing and maintaining an orphanage for . . . white children" as creating a special limitation, because the words "so long as" and "in the event that" did not appear. See *Hughes Mem'l Home*, 396 F. Supp. at 547 n. 2.

65. See *Evans v. Abney*, 396 U.S. 435, 444-45 (1970) (finding that operation of racially neutral common law, along with private parties' intentions, enabled trust to fail and land to revert without state action, which would have violated Fourteenth Amendment).

66. See *infra* Part IV.

67. Arguing that a Virginia statute has changed the common law rule, however, this article questions the Virginia Supreme Court's view that when a determinative event occurs, so violating a special limitation, the next beneficiary's estate vests immediately and automatically, without her having to act. See *infra* Part III.B.

	Condition Subsequent	Special Limitation
Remedy when restriction violates a constitution, statute, or public policy	Restriction is stricken, but prior estate otherwise remains intact	Prior estate is forfeited, but gift over not subject to the invalid condition survives <sup>68</sup>
Constitutional implications when determinative event occurs or when law forbids restriction	State action results	No state action results <sup>69</sup>

Applying the above-stated law to the facts of *Hermitage Methodist Homes*, the Supreme Court of Virginia found that the whites-only provision was a special limitation rather than a condition subsequent, because the codicil was worded “so long as” instead of “but if.”<sup>70</sup> The court then assumed *arguendo* two alternative premises: first, that the special limitation was effective; and second, that it was not.<sup>71</sup>

If the special limitation were effective, the court concluded, the first-named school’s interest terminated as soon as it admitted a black student, without any successor’s having to invoke a power of termination.<sup>72</sup> The interests of the second-, third-, and fourth-named beneficiaries would never vest, the court found, because those schools already admitted blacks.<sup>73</sup> Only the nursing home’s executory interest would survive, because the will and codicil imposed no limits on it in the first place.<sup>74</sup>

68. *But see supra* note 64.

69. Arguing that the Commonwealth’s legislative encouragement, executive support, and judicial enforcement of the testamentary provisions were unconstitutional state action, this article questions the Virginia Supreme Court’s assumption that its application of property law did not implicate the government in racial discrimination. *See infra* Part IV.

70. *See Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 745 (Va. 1990) (finding that testamentary provision at issue was not condition subsequent but special limitation).

71. *See id.* at 744 (stating that “[w]hether the discriminatory provisions are valid or void, the result is the same”).

72. *See id.* at 746 (stating that violation of restrictive provisions terminated first-named beneficiary’s interest immediately).

73. *See id.* (finding that prior admission of blacks prevented interests of second-, third-, and fourth-named beneficiaries from vesting).

74. *See id.* (finding that nursing home’s unlimited interest survived).

Even if the provisions were unconstitutional and void, however, the first-named school's estate would end, since it flowed from a special limitation and was therefore itself limited before granted, rather than restricted subsequently.<sup>75</sup> The court could not excise only the offensive language and leave the prior estate intact, as it could with a condition subsequent that were unconstitutional and void.<sup>76</sup> In any case, the court said, the gift over would survive because no unlawful restriction tainted it.<sup>77</sup>

Because the nursing home would get the money in either case, the court elected not to decide whether its own involvement, or that of Virginia's legislative and executive branches, constituted "state action," and thus whether the racially discriminatory provisions were unconstitutional and void.<sup>78</sup> In short, the court chose not to denounce the provisions because it believed that whatever it did would not quash their effect.

### B. Relevant Virginia Statute Ignored

Part IV will analyze and evaluate the Virginia Supreme Court's avoidance of the constitutional question. Another potential error, however, tainted even the statements of property law on which the court relied. Namely, a Virginia statute has changed the common law rule that, when a determinative event occurs and violates a special limitation, the next beneficiary's estate vests immediately and automatically, without her having to act.

According to section 8.01-255.1 of the Virginia Code, in pertinent part: "No person shall commence an action for the recovery of lands, nor make an entry thereon, by reason of a breach of a condition subsequent, or by reason of the termination of an estate of fee simple determinable, unless the action is commenced or entry is made within ten years after breach of the condition or within ten years from the time when the estate of fee simple determinable has been terminated."<sup>79</sup> This enactment focuses on real rather than personal property<sup>80</sup> and therefore may not seem expressly applicable to the facts of *Heritage Methodist Homes*. Significantly, however, the code provision equates a fee on condition subsequent and a fee simple determinable.<sup>81</sup> That is, the statute treats no differently the right of entry that a successor in interest may or may not exercise (associated with a condition subsequent) and the

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75. *See id.* (stating that court would not excise offensive provisions alone but would terminate gift that was subject to them).

76. *Id.*

77. *See id.* (finding that nursing home's unlimited interest survived).

78. *See id.* at 744 (assuming, but not deciding, that discriminatory provisions were inoperative).

79. VA. CODE ANN. § 8.01-255.1 (Michie 2000).

80. *See id.* (imposing statute of limitations on "action for recovery of lands").

81. *See id.* (requiring action or entry, whether triggered by "breach of a condition subsequent" or "termination of an estate of fee simple determinable").

possibility of reverter that vests automatically (associated with a fee simple determinable).<sup>82</sup> Add the assumption, explained above,<sup>83</sup> that a fee simple determinable functions the same way as a special (executory) limitation.<sup>84</sup> The Virginia legislature thus has required the holder of a gift over, even one authorized by a special limitation, to act affirmatively to perfect his or her right.<sup>85</sup> That the legislature has created a limitations period, after which the action could not transfer title, reinforces the view that the gift over does not vest automatically.<sup>86</sup> The required action and statutory period of limitations together reverse the common law rule of automatic termination and reversion.<sup>87</sup> The Virginia legislature must have intended to eliminate such hypertechnical distinctions as the one that the *Hermitage Methodist Homes* court used.<sup>88</sup> The Virginia Supreme Court thus overlooked the statutory equivalence between special limitations and conditions subsequent.

The rest of this article argues that the testamentary provisions in *Hermitage Methodist Homes* involved unconstitutional state action. Prince Edward County's long history of state-supported racism in education fostered the provisions, with encouragement from not only the state legislature<sup>89</sup> but also the executive branch<sup>90</sup> and the county school board.<sup>91</sup> Both judicial enforcement<sup>92</sup> and judicial avoidance<sup>93</sup> further implicated the state, aggravating the violation of equal protection rights.

#### IV. ENFORCEMENT OF DISCRIMINATORY PROVISIONS AS STATE ACTION

The Fourteenth Amendment of the United States Constitution prohibits states from denying any person in their jurisdictions equal protection of the laws.<sup>94</sup> Legal classifications based solely on race, though not unconstitutional per se, are immediately suspect, and courts must scrutinize them with particular care.<sup>95</sup> A compelling state interest in remedying identifiable past

82. *Id.*

83. *See supra* text accompanying notes 56 and 57.

84. *See Entin, supra* note 2, at 785 (stating that "a fee simple subject to executory [i.e., special] limitation is functionally identical to a fee simple determinable").

85. *See* VA. CODE ANN. § 8.01-255.1 (Michie 2000) (requiring person to "commence an action" or "make an entry," whether faced with condition subsequent or estate of fee simple determinable).

86. *See id.* (imposing ten-year limitation period for action for entry).

87. *See supra* text accompanying notes 54 through 59.

88. *See Entin, supra* note 2, at 787-92 (proposing unified law of defeasible fees, because form of restriction should not control its constitutionality).

89. *See infra* Part IV.A.

90. *See infra* Part IV.B.

91. *See infra* Part IV.C.

92. *See infra* Part IV.D.

93. *See infra* Part V.

94. U.S. CONST. amend. XIV, § 1, cl. 2 (commanding that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

95. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that solely racial legal

discrimination might rationally justify a narrowly tailored, affirmative action plan.<sup>96</sup> The racially discriminatory will provision in *Hermitage Methodist Homes*, however, was hateful,<sup>97</sup> and Virginia's interest in preserving testamentary freedom or educational plurality did not compel protecting this form of conveyance, any more than public policy compels allowing a person falsely to shout "Fire!" in a crowded theater.<sup>98</sup> The restriction would therefore not survive strict scrutiny if a court considered suspect classification alone. Indeed, no one has suggested that the will provision at issue would be enforceable if it appeared in a statute.<sup>99</sup>

Another factor exists, though. The Fourteenth Amendment prohibits only state action, not private.<sup>100</sup> And only by "sifting facts and weighing circumstances," the United States Supreme Court has written, can one discern "the nonobvious involvement of the State in private conduct."<sup>101</sup> To help people fairly attribute private conduct to the state, the Court has articulated a two-part test.<sup>102</sup> First, the "exercise of a right or privilege having its source in state authority" must cause the deprivation.<sup>103</sup> Second, an objective observer must be able to describe the hurtful private party "in all fairness as a state actor."<sup>104</sup> Lest the second prong seem circular, the Court has subdivided it into

classifications are immediately suspect but not unconstitutional per se); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (stating that "[d]istinctions between citizens because of ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"); *United States v. Carolene Prods.*, 304 U.S. 144, 152 n. 4 (1938) (stating that Court need not yet consider "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

96. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (holding that, absent evidence of past discrimination by City of Richmond or in local construction industry, city failed to demonstrate compelling interest in apportioning public contracting opportunities on basis of race).

97. See *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 741-42 (Va. 1990) (reporting that will and codicil conditioned gifts to Prince Edward School Foundation and its successors in interest on their admitting "only members of the White Race," as testator defined that term).

98. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (stating that every free speech case raised question of "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent").

99. See *Hermitage Methodist Homes*, 387 S.E.2d at 742-43 (paraphrasing arguments by Prince Edward School Foundation, Miller School, Seven Hills School, and Virginia Attorney General that state's enforcement of discriminatory provisions in will and codicil would violate Fourteenth Amendment, and argument by *Hermitage Methodist Homes* that state's enforcement of same provisions would carry out testator's plainly expressed intent, not state's).

100. See *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (stating that Fourteenth Amendment applied to State action only, not private action by individuals).

101. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (noting absence of any readily applicable formula defining state action).

102. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (using two state-action questions to clarify where governmental sphere ended and private sphere began); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (suggesting that cases alleging state action reflected two-part approach to fair attribution).

103. *Leesville Concrete*, 500 U.S. at 620.

104. *Id.*

three parts.<sup>105</sup> The fairness of describing the private party as a state actor depends on the extent to which: (a) the allegedly depriving party relies on “governmental assistance and benefits”;<sup>106</sup> (b) the party performs “a traditional govern-mental function”;<sup>107</sup> and (c) “the incidents of governmental authority” uniquely aggravate the injury.<sup>108</sup> Table 2 below summarizes these factors of state action.

TABLE 2. FACTORS OF STATE ACTION, AS DEFINED IN *EDMONSON V. LEESVILLE CONCRETE COMPANY*,<sup>109</sup> CORRELATED WITH ROLES PLAYED BY BRANCHES OF THE VIRGINIA GOVERNMENT.

State action	
“exercise of a right or privilege having its source in state authority”	Ability to describe the hurtful party “in all fairness as a state actor”

105. *See id.* at 621-22 (extracting, from Court’s previous cases, three principles of general application for determining whether law in all fairness could describe private party as government actor).

106. *Id.* at 621; *see Evans v. Newton*, 382 U.S. 296, 301-02 (1966) (finding that city’s maintenance of racially segregated private park was unconstitutional state action because it implied government approval of racial discrimination); *Burton*, 365 U.S. at 726 (stating that racial discrimination by restaurant located in government facility and leasing space from it was state action even though restaurant received no government subsidy); *but see Jackson*, 419 U.S. at 350-52 (finding that government regulation of public utility and grant of monopoly status to it, did not implicate state in utility’s terminating service without notice); *Moose Lodge*, 407 U.S. at 177 (holding that government’s grant of liquor license to racially discriminatory private club did not constitute state action).

107. *Leesville Concrete*, 500 U.S. at 621; *see Newton*, 382 U.S. at 301-02 (holding that Fourteenth Amendment prohibited city from allowing private trustee to operate racially segregated park because operation of park was traditional government function); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (finding that Fifteenth Amendment applied to private club’s election of nominees for Democratic primary because operation of election system was traditional government function); *Marsh v. Alabama*, 326 U.S. 501, 507-09 (1946) (finding that company town’s not letting Jehovah’s Witness distribute leaflets violated First and Fourteenth Amendments because regulation of residential and commercial districts was traditional government function); *but see Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (finding that operation of privately owned shopping center, not in company town, was not traditional government function); *Jackson*, 419 U.S. at 352-54 (finding that operation of power company, despite monopoly status and licensing by state, was not traditional government function).

108. *Leesville Concrete*, 500 U.S. at 622. Ultimately, the *Leesville Concrete* Court held that a private litigant could not use peremptory challenges to exclude jurors based on race, because the jury selection system was an essential public function and because state involvement therefore violated the Fifth Amendment rights of the challenged juror. *Id.* at 616; *see Barrows v. Jackson*, 346 U.S. 249, 253-59 (1953) (stating that court’s imposition of civil damages against property owner who breached racially restrictive covenant, by selling to minority buyer, was unconstitutional state action in violation of Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (stating that court order enforcing racially restrictive covenant, by enjoining property owner from voluntarily selling to black purchaser, was unconstitutional state action in violation of Fourteenth Amendment); *but see Evans v. Abney*, 396 U.S. 435, 439 (1970) (stating that city’s letting property, previously devised to establish racially segregated public park, revert to testator’s heirs did not constitute state action).

109. 500 U.S. 614 (1991); *see id.* at 620-22.



State action			
<u>[Virginia legislature's role]</u>			
	“governmental assistance and benefits” <u>[Virginia executive branch's role]</u>	“traditional government function” <u>[County School Board's Role]</u>	“incidents of governmental authority” <u>[Virginia judiciary's role]</u>

The Prince Edward School Foundation’s racial discrimination involved state action in at least four ways. First, the Commonwealth’s legislative encouragement made “state authority” the “source” of the right that the trust exercised.<sup>110</sup> Second, executive support—especially the attorney general’s obligation to administer the trust’s terms, should a private trustee ever refuse to do so—imbued the testamentary provision with “governmental assistance and benefits.”<sup>111</sup> Third, the Prince Edward County School Board’s Massive Resistance, closing all public schools, delegated to racially discriminatory private schools a quasi-“public function.”<sup>112</sup> Fourth, judicial enforcement of the testamentary provisions in the *Hermitage Methodist Homes* case itself caused the “incidents of governmental authority” uniquely to aggravate the injury.<sup>113</sup>

*A. The Virginia Legislature’s Role: “Right or Privilege Having its Source in State Authority”*

The facts of *Hermitage Methodist Homes* satisfy the first prong of the *Leesville Concrete* test (“exercise of a right or privilege having its source in state authority”) because the Virginia legislature mandated that the will contain the racial restriction.<sup>114</sup> When the testator died, the Virginia Code permitted

110. See *infra* Part IV.A.

111. See *infra* Part IV.B.

112. See *infra* Part IV.C.

113. See *infra* Part IV.D.

114. Also relevant is that the Virginia Legislature created the right to convey property to a charitable trust in the first place, given that the testator’s exercise of this right caused the alleged deprivation. See VA. CODE ANN. § 55-26.1 (Michie 2000) (validating almost any “gift, grant, devise or bequest” made for “literary purposes,” for “education,” or for “charitable purposes,” as if the donor had made it “to or for the benefit if a certain natural person”). State action here created not the right to draft a will but the right to fill a charitable trust with assets. The Virginia Supreme Court has explicitly stated that the Code allowed charitable bequests that would otherwise not exist: “There was a time in the life of this State when charitable bequests were not valid . . . The attainment of this desired end was in the power of the legislature

charitable conveyances for “the education of white persons” or for “the education of colored persons,” but not for the education of both, commingled.<sup>115</sup> In 1937 the Virginia Supreme Court expressly interpreted this statute as not permitting gifts to integrated schools.<sup>116</sup> Indeed, the Virginia Constitution at that time even prohibited integrated schools.<sup>117</sup> The revised Virginia Constitution of 1971 eliminated this prohibition, and the General Assembly repealed the offensive statute on charitable gifts in 1975, replacing it the next year with nondiscriminatory language.<sup>118</sup> Thus, the segregationist legislation and Constitution were still effective during the years the testator executed his will and codicil, as well as in the year he died.<sup>119</sup> The state therefore did not merely create the testator’s capacity to devise his property to a charitable trust<sup>120</sup> but also dictated the racially discriminatory form his gift took. He had no choice. Virginia’s mandate itself was unconstitutional. The *Hermitage Methodist Homes* court acknowledged this history in its statement of facts<sup>121</sup> but disregarded it when rendering an opinion.<sup>122</sup>

The government of Virginia might counter by pointing to a causal gap between the statute and the will: the testator could have acted as he did even without the Commonwealth’s prodding.<sup>123</sup> That objection, however, misinterprets this article’s argument as contending that the private schools and the testator were *themselves* state actors. Rather, the state *legislature* acted unconstitutionally in its proffered aid. A state may not legislatively encourage

and it has exercised it.” *Roller v. Shaver*, 17 S.E.2d 419, 423-24 (Va. 1941).

115. VA. CODE ANN. § 55-26 (Michie 1942) (repealed 1975).

116. See *Triplett v. Trotter*, 193 S.E. 514, 516 (Va. 1937) (concluding that Virginia Code permitted gift to establish college for “worthy and dependent young men” only if trustee interpreted phrase as meaning either white or non-white students, but not both).

117. VA. CONST. art. IX, § 140 (1942) (repealed 1971) (commanding that “[w]hite and colored children shall not be taught in the same school”).

118. 1975 VA. ACTS ch. 547; see *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 742 (Va. 1990) (reporting that Commonwealth repealed Va. Code Ann. § 55-26 in 1974 and replaced it with present § 55-26.1 in 1976).

119. See *Hermitage Methodist Homes*, 387 S.E.2d at 741 (stating that testator executed will and codicil in 1956 and 1964 respectively, and that he died in 1968).

120. See *supra* note 114.

121. See *Hermitage Methodist Homes*, 387 S.E.2d at 742 (quoting Virginia Code § 55-26 and summarizing *Triplett*’s interpretation of it), 743 (paraphrasing school’s allegations that Virginia Code § 55-26 compelled testator’s discrimination and that divestiture would give continuing effect to statute), and 744-45 (paraphrasing school’s argument that Virginia Supreme Court’s interpretation of Virginia Code § 55-26 in *Triplett* compelled testator’s discrimination).

122. *Id.* at 745 (assuming but not deciding that will’s racially restrictive provisions were unconstitutional).

123. See *Evans v. Abney*, 396 U.S. 435, 445 (1970) (finding no “indication that Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia statutes”); *Evans v. Newton*, 382 U.S. 296, 318 n. 1 (Harlan, J., dissenting) (finding “absolutely no indication in the record that Senator Bacon would have acted otherwise but for the statute, a gap in reasoning that cannot be obscured by general discussion of state ‘involvement’ or ‘infection’”); *Sweet Briar Inst. v. Button*, 280 F. Supp. 312, 322 (W.D. Va. 1967) (reporting defendants’ denial “that § 55-26 compelled the testatrix to insert the racially restrictive provision in her will”).

private discrimination, even when the state does not compel it, as the following case law indicates.

In 1973, for example, the United States Supreme Court held that decisions on the presence of state involvement in segregated private schools' racial discrimination did not turn on proof that a child enrolled in private school would, if deprived of free state-owned textbooks, withdraw and enter public school.<sup>124</sup> State aid to a discriminatory school thus violated the Constitution even when "no precise causal relationship" showed that ending the state's aid would end the discrimination.<sup>125</sup> If the state's conduct had "a significant tendency to facilitate, reinforce, and support private discrimination," the aggrieved party need not establish but-for causation to establish a constitutional violation by the state.<sup>126</sup>

Foreshadowing this position, the United States District Court for the Western District of Virginia held in *Sweet Briar Institute v. Button*<sup>127</sup> that the Commonwealth could not enforce a will limiting the recipient institution's enrollment to "white girls and young women."<sup>128</sup> Section 140 of the Virginia Constitution, section 55-29 of the Virginia Code, section 55-26 of the Virginia Code, and the Virginia Supreme Court's interpretation of the latter, the *Sweet Briar* court found, involved state action, even though the will could have

124. See *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973) (stating that court's finding of state involvement in racially discriminatory admissions policies of schools to which it lent textbooks did not require establishment of but-for causation).

125. *Id.* at 466.

126. *Id.*

127. 280 F. Supp. 312 (W.D. Va. 1967).

128. See *Sweet Briar Inst. v. Button*, 280 F. Supp. 312 (W.D. Va. 1967) (holding that Virginia could not enforce racially discriminatory provision in will of college's founder, because enforcement would constitute state action barred by Fourteenth Amendment). In *Sweet Briar*, the United States District Court for the Western District of Virginia considered whether the Commonwealth could enforce a testamentary restriction by which the founder of Sweet Briar Institute limited enrollment to "white girls and young women." *Id.* at 312. Having matriculated a non-white applicant as a precondition to receiving federal aid, the college as trustee brought suit to enjoin Virginia's Attorney General and the Commonwealth's Attorney of Amherst County from enforcing the racial restriction. *Id.* at 312-13. Following the United States Supreme Court's express holding in *Pennsylvania v. Board of Dirs. of City Trusts of Philadelphia*, 353 U.S. 230, 231 (1957) (holding that, though acting as trustee for Girard College when it denied admission to two non-white applicants solely on basis of race, Philadelphia's Board of Directors of City Trusts was state actor and so violated Fourteenth Amendment), the *Sweet Briar* court found unconstitutional state action in four texts, *inter alia*: (1) section 55-26 of the Virginia Code of 1950, which validated charitable trusts for education only when the institutions they created let whites or non-whites attend but not both; (2) the Virginia Supreme Court's interpretation of the above statute, as expressed in *Triplett v. Trotter*, 193 S.E. 514, 515 (Va. 1937) (interpreting the Virginia Code as allowing trustees to accept applicants from one racial class or the other, but not to accept applicants from both); (3) section 55-29 of the Virginia Code, which empowered state courts, on a motion of the commonwealth's attorney, to replace any trustee who refused to act in accordance with the testator's intent; and (4) section 140 of the Virginia Constitution, forbidding the education of whites and non-whites in the same school. *Id.* at 313 and 320. The *Sweet Briar* court therefore held that Virginia could not enforce the racially discriminatory provision in the will of the institute's founder because enforcement would constitute state action barred by the Fourteenth Amendment. *Id.* at 312.

discriminated without them.<sup>129</sup> In other words, the Commonwealth had legislatively encouraged the *Sweet Briar* testator to create a racially discriminatory will.

Concurring and dissenting opinions from the United States Supreme Court cases of *Evans v. Newton*<sup>130</sup> and *Evans v. Abney*<sup>131</sup>—both involving efforts by the City of Macon, Georgia, to transfer a racially segregated park from the public to the private sector<sup>132</sup>—argued similarly. The majority in *Newton* found that new private trustees could not, without violating the Fourteenth Amendment, give effect to a charitable trust's racial condition that Macon itself had been enforcing.<sup>133</sup> The majority reasoned that the park served a public function and had received public benefits,<sup>134</sup> but a footnote observed that the opinion deliberately did not reach the question of whether Georgia's

129. See *id.* at 313 and 320-22 (finding unconstitutional state action in all four texts).

130. 382 U.S. 396 (1966).

131. 396 U.S. 435 (1970).

132. See *Evans v. Newton*, 382 U.S. 296, 301-302 (1966) (holding that mere substitution of trustees did not *per se* transfer racially segregated park from public to private sector because park's history and function firmly established municipal control); *Evans v. Abney*, 396 U.S. 435, 439 (1970) (stating that in refusing to apply *cy pres*, allowing trust to fail, and letting park property revert to testator's heirs, Georgia courts did no more than apply well-settled principles of Georgia law to determine Georgia will's meaning and effect). In *Newton*, the Supreme Court considered whether a state court's appointment of new private trustees after the City of Macon, Georgia resigned from that role, constituted state action subject to the Fourteenth Amendment's equal protection requirements. *Id.* at 297. United States Senator Augustus O. Bacon had devised land to the Mayor and Council of Macon, Georgia, thereby creating a park for white people only. *Id.* After the City, alleging it could not legally enforce racial segregation, resigned as trustee, a state court appointed three new private trustees. *Id.* at 298. According to the *Newton* Court, however, the racially segregated park was for years an integral part of Macon's activities, as evidenced by the City's sweeping, manicuring, watering, patrolling, and maintaining the park, as well as by its statutorily granted tax exemption. *Id.* at 301. The mere substitution of trustees did not *ipso facto* transfer the park from the public to the private sector, because the park's public character made it a public institution regardless of who now had title under state law. *Id.* at 301-302. The Court thus held that, because the park's history and function had entwined the municipality in the park's management, the park was subject to the Fourteenth Amendment's equal protection requirements. *Id.* In *Abney*, the United States Supreme Court considered whether termination of the trust by Georgia's Supreme Court, after *Newton* made the testator's primary intention impossible to fulfill, violated the Fourteenth Amendment Equal Protection and Due Process rights of Macon's black citizens. 396 U.S. 435, 437 (1970). Finding the park's segregated, whites-only character to be an inseparable part of the testator's plan, the Georgia courts had on remand let the trust fail and its property revert by law to the testator's heirs. *Id.* at 439. The Supreme Court affirmed, holding that the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will. *Id.* When a charitable trust's main purpose failed, the *Abney* Court wrote, not even Georgia's *cy pres* statutes could prevent the entire trust from failing. *Id.* at 440-41. The state did not thereby penalize constitutionally mandated desegregation, the Court argued, because a private party, not the state, had closed the park for racially discriminatory reasons. *Id.* at 444-45. That the will had not expressly provided for a reverter in the event that the trust's racial restrictions failed did not make Georgia's interpretation of the testator's intent gratuitously discriminatory, the Court suggested, because the neutral operation of Georgia's trust laws closed the park to whites as well as blacks. *Id.* at 445-46. The Court thus declined to legislate social policy and called loss of the park merely the price Americans pay to enjoy freedom of testation. *Id.* at 447.

133. *Newton*, 382 U.S. at 301-02 (holding that firmly established tradition of municipal control prevented mere substitution of trustees from instantly transferring park to private sector).

134. *Id.*

legislative action had facilitated the park's establishment.<sup>135</sup> Though Justice White concurred in *Newton*,<sup>136</sup> he then went farther, seeing the trust as "incurably tainted by discriminatory state legislation validating such a condition under state law."<sup>137</sup> That is, arguably "the validity of the racial condition in Senator Bacon's trust would have been in doubt but for the 1905 statute," permitting charitable trusts dedicated in perpetuity to public use as a park only if the park were segregated.<sup>138</sup> This statute, Justice White hypothesized, "removed such doubt only for racial restrictions, leaving the validity of nonracial restrictions still in question."<sup>139</sup> If White's assumptions were correct, such an enactment "would depart from a policy of strict neutrality in matters of private discrimination."<sup>140</sup> The statute would, in fact, enlist "the State's assistance only in aid of racial discrimination."<sup>141</sup> The legislation "would so involve the state in the private choice as to convert the infected private discrimination into state action subject to the Fourteenth Amendment."<sup>142</sup> Perhaps Justice White overstates the argument here. The school itself is not a "state actor;" rather, the legislature that aids and abets the school's discriminatory admissions policy is. In short, the statute singled out race for special treatment, favoring private racial discrimination over other kinds of private discrimination.<sup>143</sup>

Weakening *Newton*'s holding that the city and trustees could not enforce the testator's intent to run a park for whites only,<sup>144</sup> the Court in *Evans v. Abney* found that letting such land revert to the testator's heirs did not involve state action.<sup>145</sup> Justice Brennan's strong dissent in *Abney*, however, echoed White's concurrence in *Newton*. Expressly permitting a testator to devise

135. See *id.* at 300 n. 3 (discussing potentially coercive effect of Georgia's policy letting charitable trusts create segregated public facilities).

136. *Id.* at 305 (White, J., concurring).

137. *Id.* (White, J., concurring).

138. *Id.* at 306; see *Robinson v. Florida*, 378 U.S. 153, 156-57 (1964) (concluding that state legislation requiring restaurants to provide separate toilet facilities for minorities made restaurants' racially restrictive practices state action); *Lombard v. Louisiana*, 373 U.S. 267, 273-74 (1963) (stating that city officials' condemnation of sit-ins made stores' discriminatory use of trespass laws state action, even though stores might have pressed charges against demonstrators anyway, without official encouragement); *Peterson v. City of Greenville*, 373 U.S. 244, 247-48 (1963) (finding that state legislation commanding restaurants to serve food on racially segregated basis made discrimination by restaurants state action).

139. See *Newton*, 382 U.S. at 306 (White, J., concurring) (concluding that Georgia statutes involved state in private choice).

140. *Id.*

141. *Id.*

142. *Id.*

143. See *id.* (arguing that statute, by permitting charitable trusts dedicated in perpetuity to public use as park only if park were segregated, elevated racial discrimination above other kinds of private charitable intent).

144. See *id.* at 301-02 (holding that, because park's history and function had entwined municipality in park's management, park was subject to Fourteenth Amendment's equal protection requirements).

145. See *Evans v. Abney*, 396 U.S. 435, 439 (1970) (deciding that Georgia courts did no more than apply well-settled principles of Georgia law to determine Georgia will's meaning and effect).

land for a public park only if it were racially segregated, wrote Brennan, the Georgia legislature “undertook to facilitate racial restrictions as distinguished from other kinds of restriction on access to a public park.”<sup>146</sup> When the majority attributed the racially discriminatory motive to a private party rather than to Georgia, argued Brennan, the majority “inexcusably” disregarded “the State’s role in enacting the statute without which Senator Bacon could not have written the discriminatory provision.”<sup>147</sup>

Beyond citing White’s concurrence in *Newton*, Brennan’s dissent in *Abney* cited favorably<sup>148</sup> the United State Supreme Court case of *Reitman v. Mulkey*.<sup>149</sup> According to that case, a section of the California Constitution preventing the state from limiting a person’s right for any reason to refuse to sell or lease property encouraged, and so significantly involved the state in, private discrimination, even though the state did not compel it.<sup>150</sup> “Encouragement” similarly describes the link between the Virginia statute on charitable gifts and the racially discriminatory will in *Hermitage Methodist Homes*. The Virginia legislature’s requirement that any charitable bequest take a racially discriminatory form involved the state in discrimination, even if the gift could have taken the same discriminatory form without the state’s mandate.

The *Reitman* majority praised the lower court’s examination of the state law’s constitutionality in terms of its “immediate objective,” “ultimate effect,” and “historical context and the conditions existing prior to its enactment.”<sup>151</sup> This trio of concerns leads generally to another factor in state-action analysis, “governmental assistance and benefits.”<sup>152</sup> Virginia’s executive branch supplied these.

### *B. The Virginia Executive Branch’s Role: “Governmental Assistance and Benefits”*

Substantial assistance and benefits from the executive branch attended the racially discriminatory legacy in *Hermitage Methodist Homes* because the gift created a charitable trust,<sup>153</sup> subject under certain circumstances to enforcement

146. *Id.* at 458 (Brennan, J., dissenting).

147. *Id.*

148. *Id.* at 457 (Brennan, J., dissenting) (comparing facts of *Abney* to those in *Reitman*).

149. 387 U.S. 369 (1967).

150. See *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (finding that California Constitution impermissibly gave discrimination preferred legal status).

151. *Id.* at 373 (praising lower court’s use of three criteria to examine constitutionality).

152. *Edmonson v. Leesville Concrete*, 500 U.S. 614, 621 (1991).

153. See *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 741 (1990) (stating that suit arose from charitable, testamentary trust).

by the Commonwealth's Attorney General.<sup>154</sup> Because it was charitable, the trust enjoyed at least four privileges that do not attend other kinds of testamentary trust.<sup>155</sup> First, it did not have to pay income tax on the donations and interest it received,<sup>156</sup> and those persons donating money to it received tax deductions.<sup>157</sup> Second, the trust was exempt from the Rule Against Perpetuities, which would otherwise prohibit grant of an estate unless the interest had to vest, if at all, no later than twenty-one years after the death of some person alive when the interest was created.<sup>158</sup> Third, if at any time the gift's original purpose became impossible to fulfill, the equitable doctrine of *cy pres* would enable a court to reform the trust's specific purpose, limited only by the settlor's general charitable intent.<sup>159</sup> Fourth, and most importantly, the state attorney general's office would enforce the trust's terms, should a private trustee ever refuse to do so.<sup>160</sup> In other words, if a trustee refuses to act and the Commonwealth's Attorney makes a motion in accordance with her

154. See *id.* at 743 (reporting Attorney General's explicit request for interpretation of will and for action not adverse to public interest in charitable trusts).

155. See Kathryn F. Voyer, *Continuing the Trend Toward Equality: The Eradication of Racially and Sexually Discriminatory Provisions in Private Trusts*, 7 WM. & MARY BILL OF RTS. J. 943, 971-73 (1999) (arguing that public policy alone should invalidate racially and sexually discriminatory private trust provisions); Steven R. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 U. PITT. L. REV. 153, 175 (1986) (proposing model statute that would prohibit discrimination in charitable trusts, because state effectively created them by granting benefits of tax immunity, attorney general enforcement, and exemption from restrictions such as rule against perpetuities); Stephen J. Leacock, *Racial Preferences in Educational Trusts: An Overview of the United States Experience*, 28 HOW. L. J. 715, 723-24 (1985) (stating that racially discriminatory trusts should not qualify as charitable, because exemption from rule against perpetuities, tax immunity, and ability to use *cy pres* give charitable trusts special treatment not accorded private trusts); Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L. J. 979, 979 (1957) (stating that law falsely assumes harmony between interests of settlor and society by guaranteeing charitable trust's enforcement, perpetual existence and tax immunity).

156. See 26 U.S.C. § 501(c)(3) (1994) (exempting from federal income taxation certain corporations organized and operated exclusively for, *inter alia*, religious, charitable, or educational purposes); *but see* Rev. Rul. 71-447, 1971-2 C.B. 230 (ruling that private school having racially discriminatory policy as to students was not charitable within common law concepts reflected in 26 U.S.C. §§ 170, 391(B) and 501(c)(3)); *also* Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) (holding that when nonprofit private schools prescribed and enforced racial discrimination based on religious doctrine, they did not qualify as 26 U.S.C. §§ 170 and 501(c)(3) tax-exempt organizations).

157. See 26 U.S.C. § 170(a) (1994) (allowing tax deductions for certain charitable contributions).

158. See *Shenandoah Valley Nat'l Bank v. Taylor*, 63 S.E.2d 786, 789 (Va. 1951) (stating that trust offending Rule Against Perpetuities was valid only if charitable and therefore public in nature). In a statute applicable to nonvested property interests and powers of appointment created on or before July 1, 2000, the Virginia Code now provides a kinder, gentler Rule Against Perpetuities. See VA. CODE ANN. § 55-12.1 (Supp. 2000) (adopting Uniform Statutory Rule Against Perpetuities). *But see* VA. CODE ANN. § 55-12.4 (Supp. 2000) (listing seven exceptions to statutory Rule Against Perpetuities).

159. See *United States v. Hughes Mem'l Home*, 396 F. Supp. 544, 552-53 (W.D. Va. 1975) (applying *cy pres* to let home for needy children operate on nondiscriminatory basis, because racial restriction was merely incidental to charitable trust's main purpose); *cf.* VA. CODE ANN. § 55-31 (Michie 2000) (stating that indefiniteness of charitable trust's beneficiaries or purpose shall not defeat it).

160. See VA. CODE ANN. § 55-29 (Michie 2000) (stating that when trustee refuses to act court may, after Commonwealth's Attorney makes motion in accordance with duty, appoint replacement trustee, and that Commonwealth may proceed against trustee when no other party can do so).

duty, a Virginia court may appoint a replacement trustee.<sup>161</sup> Similarly, the Common wealth may proceed against the trustee when no other party can do so.<sup>162</sup> Such executive aid, privileging the trust in *Hermitage Methodist Homes* because it purported to serve the public good, involves the state in the private testator's action.

*C. Prince Edward County School Board's Role: "Traditional Government Function"*

The County School Board's closure of all public schools when the testator in *Hermitage Methodist Homes* was creating his will and codicil involved the state in discrimination through yet another factor of unconstitutional state action: the private schools themselves arguably fulfilled a "traditional government function."<sup>163</sup>

Some constitutional scholars will not accept this proposition. Arguing, on one hand, that racially discriminatory private schools perform a traditional public function conflicts with arguing, on the other, that they should lose their tax exemption because, being against public policy, they are not charitable.<sup>164</sup> In other words, given the shutdown of Prince Edward County's public schools, the county's private schools performed a public function only ironically—to the extent that racial discrimination was itself public policy in Virginia. Such an argument equivocates, using the phrase "public policy" simultaneously in

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161. *Id.*

162. *Id.*

163. *Edmonson v. Leesville Concrete*, 500 U.S. 614, 621 (1991).

164. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983) (holding that when nonprofit private schools prescribed and enforced racial discrimination based on religious doctrine they did not qualify as § 501(c)(3) tax-exempt organizations). In *Bob Jones*, the Supreme Court considered whether two nonprofit private schools that prescribed and enforced racially discriminatory admissions standards based on religious doctrine qualified as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954. *Id.* at 577. Bob Jones University denied admission to applicants engaged in interracial marriage or known to advocate interracial marriage or dating. *Id.* at 581. Goldsboro Christian Schools denied admission to children not having at least one white parent. *Id.* at 583. Both institutions challenged an Internal Revenue Service (IRS) ruling that would revoke the tax-exempt status of any private school whose admissions standards clashed with a national policy to discourage racial discrimination in education. *Id.* at 579. According to the *Bob Jones* Court, an organization wishing tax-exemption under § 501(c)(3) must meet two elements: (1) it must fit into a statutorily designated, presumptively charitable category (religious, educational, etc.); and (2) it must promote common-law charity, both by providing a public benefit and by not violating an established public policy. *Id.* at 585-91. Racial discrimination in education, the Court stated, was against public policy. *Id.* at 595. The IRS did not exceed its authority when it concluded that § 501(c)(3) embraced the common-law charity concept, as Congress subsequently showed by not correcting the agency's interpretation. *Id.* at 599. Moreover, the government's compelling interest in eradicating racial discrimination substantially outweighed the burden that denial of benefits placed on the schools' exercise of religious freedom. *Id.* at 604. Bob Jones University's prohibitions against interracial dating and marriage constituted racial discrimination, the Court found, even though the University allowed all races to enroll. *Id.* at 605. Therefore, the Court held, neither Bob Jones University nor Goldsboro Christian Schools qualified as tax-exempt under § 501(c)(3). *Id.* at 599.



two very different senses. Even if "traditional government function" excluded racial discrimination, not only governments fund schools.<sup>165</sup>

Again, however, this article does not allege that the private schools or the testator were themselves state actors. Rather, the County School Board was a state actor, proceeding unconstitutionally when it constructively delegated its public function to private contractors. The County not only knew they would discriminate on the basis of race but also intended them to do so.

#### D. *The Virginia Judiciary's Role: "Incidents of Governmental Authority"*

The facts of *Hermitage Methodist Homes* also fulfill a final prong of state action, aggravation of the injury by the "incidents of governmental authority,"<sup>166</sup> because the Virginia Supreme Court effectively enforced the testator's discriminatory purpose against unwilling participants.

In *Shelley v. Kraemer*,<sup>167</sup> the United States Supreme Court held that enforcement of racially restrictive private covenants by courts in Missouri and Michigan denied willing African American homebuyers the equal protection of the laws.<sup>168</sup> Taking *Shelley* a step farther, the Court in *Barrows v.*

165. *Cp. Evans v. Newton*, 382 U.S. 296, 301 (1966) (stating that any "service rendered even by a private park of this character is municipal in nature"); *Evans v. Abney*, 396 U.S. 435, 450 (1970) (Douglas, J., dissenting) (arguing that heirs to whom Senator Bacon's property would revert became City of Macon's agents—"a State cannot divest itself by contract of the power to perform essential governmental functions" and "[t]he decision whether or not a public facility shall be operated in compliance with the Constitution is an essentially governmental decision"); *Reitman v. Mulkey*, 387 U.S. 369, 384 (1967) (Douglas, J., concurring) (citing *Terry*) (stating that "[z]oning is a state and municipal function" and that "[w]hen the State leaves that function to private agencies or institutions which are licensees and which practice racial discrimination and zone our cities into white and black belts or white and black ghettos, it suffers a governmental function to be performed under private auspices in a way the State itself may not act"). An objective examination, however, will distinguish the cases: a landlord-as-zoning-board and a private park opened up to the public arguably perform more public functions than does a private school.

166. *Leesville Concrete*, 500 U.S. at 622.

167. 334 U.S. 1 (1948).

168. *See Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of racially restrictive covenants violated Fourteenth Amendment). In *Shelley*, the United States Supreme Court considered whether, by enforcing racially restrictive private agreements, state courts in Missouri and Michigan had denied willing African American purchasers the equal protection of the laws. *Id.* at 8. In the Missouri case, owners of property subject to a restrictive covenant prohibiting occupancy by "any person not of the Caucasian race" sued African Americans who had bought neighboring property subject to the same covenant. *Id.* at 4-6. The Michigan case presented materially the same circumstances. *Id.* at 8. The *Shelley* Court distinguished the facts at hand from those in two precedents (*Corrigan v. Buckley*, 271 U.S. 323 (1926) (upholding validity of similar covenant) and *Hansberry v. Lee*, 311 U.S. 32 (1940) (upholding right of petitioners to challenge similar covenant)), because neither of the earlier cases had raised the same constitutional issue. *Id.* at 8-9. The Court further observed that the restrictive covenants at hand sought not to proscribe a particular use of the property but rather to exclude a designated class of persons. *Id.* at 10. The Court then asserted that the Fourteenth Amendment prohibited only state action, not private conduct, and that the restrictive covenants standing alone therefore did not deny anyone the equal protection of the laws. *Id.* at 12-13. Judicial enforcement of the private agreements, however, did constitute state action, because "the full coercive power of government" and "the clear and unmistakable imprimatur of the State" would restrain the actions of willing sellers and willing purchasers. *Id.* at 18-20. The Court accordingly

*Jackson*<sup>169</sup> said that a state could not impose damages on a seller who violated a racially restrictive covenant, because such judicial action coerced the holder to use her property in a discriminatory way.<sup>170</sup> In *Barrows*, owners of residential real estate subject to a restrictive covenant prohibiting occupancy by “any person or persons not wholly of the white or Caucasian race” sought damages at law for breach from a neighbor who had sold to African Americans.<sup>171</sup> The *Barrows* Court found that judicially compelling the seller to pay damages at law would be as coercive as granting an equitable injunction was in *Shelley*.<sup>172</sup> “If the State may thus punish respondent for her failure to carry out her covenant,” wrote the *Barrows* Court, “she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant.”<sup>173</sup> Judicial enforcement of civil damages therefore constituted state action in violation of the Fourteenth Amendment.<sup>174</sup>

In *Hermitage Methodist Homes*, the Virginia Supreme Court allowed the testator to cut off a private school’s interest in a charitable trust because the school now admitted African Americans.<sup>175</sup> Effectively punishing the school

rejected the plaintiffs’ contentions that judicial willingness to enforce covenants excluding whites justified enforcement of covenants excluding blacks and that not to enforce such private agreements violated their constitutionally protected rights to hold property and form contracts. *Id.* at 21-23. The Court therefore held that, by judicially enforcing the racially restrictive covenants, the states had denied African Americans equal protection of the laws. *Id.* at 20.

169. 346 U.S. 249 (1953).

170. See *Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953) (comparing judicial enforcement of racially restrictive private agreement and court’s making seller who violated such agreement pay damages). In *Barrows*, the Court considered whether awarding damages at law against a co-covenantor who allegedly broke a racially restrictive covenant amounted to judicial enforcement of that covenant in equity, violating the Fourteenth Amendment. *Id.* at 251. Owners of property subject to a restrictive covenant prohibiting occupancy by “any person or persons not wholly of the white or Caucasian race” sought damages at law for breach from a neighbor who had sold to African Americans. *Id.* at 251-52. The Court cited *Shelley*’s holding that, while voluntary adherence to a racially discriminatory private agreement involved no state action, judicial enforcement of that agreement against unwilling participants put the state’s coercive power behind the discrimination. *Barrows*, 346 U.S. at 253. The *Barrows* Court then found, by analogy, that compelling the seller to pay damages at law constituted state action under the Fourteenth Amendment, because a damage award was as coercive as granting an injunction in equity. *Id.* at 254. Such state action would deprive African Americans of equal protection of the laws and thereby violate the Fourteenth Amendment. *Id.* Although the neighbors had sued the seller, and not the African American buyers, the seller had standing to vindicate the African Americans’ constitutional rights, because a damage award would compel her to lose money. *Id.* at 254-59. In addition, the *Barrows* Court rejected the neighbors’ arguments that judicial refusal to award damages denied the neighbors themselves of due process and equal protection of the laws, or impaired the obligation of their contracts. *Id.* at 259-60. The Court thus found that awarding damages at law against a co-covenantor who allegedly broke a racially restrictive covenant amounted to judicial enforcement of that covenant in equity, violating the Fourteenth Amendment. *Id.* at 253-59.

171. *Id.* at 251-52.

172. See *id.* at 253-54 (finding that compelling seller to pay damages constituted state action under Fourteenth Amendment).

173. *Id.* at 254

174. See *id.* (finding that judicially compelling seller to pay damages at law would be as coercive as granting equitable injunction was in *Shelley*).

175. See *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 746 (Va. 1990) (stating that, after black student matriculated, natural operation of will’s special limitation terminated school’s interest in trust’s income).

with pecuniary loss (analogous to the damage award in *Barrows*), the *Hermitage Methodist Homes* decision would coerce the unwilling school to continue using the trust's income in a discriminatory way.

The Commonwealth might counter that the school was not entitled to the testator's money, except in accordance with his wishes, and that any coercion came from the testator, not the court. So had the United States Supreme Court seemed to decide in *Abney*.<sup>176</sup> Further support for this position might come from *Matter of Wilson*,<sup>177</sup> decided by the Court of Appeals of New York in 1983. According to the *Wilson* court, judicial application of equitable powers to allow a private party to administer a trust did not implicate the Fourteenth Amendment, because the state thereby merely permitted private discrimination but did not encourage, affirmatively promote, or compel it.<sup>178</sup> By analogy, a court's enforcing neutral trespass laws, after a homeowner refused to let racial minorities enter his or her home, did not deny the trespassers equal protection of the laws.<sup>179</sup>

But even conservative constitutional scholars like John E. Nowak and Ronald D. Rotunda would limit the application of cases like *Abney* and *Wilson*: "Note that the principle of *Evans v. Abney* would not apply to a

176. See *Evans v. Abney*, 396 U.S. 435, 439 (1970) (deciding that Georgia courts did no more than apply well-settled principles of Georgia law to determine Georgia will's meaning and effect).

177. 452 N.E.2d 1228 (N.Y. 1983).

178. See *Matter of Wilson*, 452 N.E.2d 1228, 1237 (N.Y. 1983) (holding that, when court's application of trust law neither encouraged, nor affirmatively promoted, nor compelled private discrimination but allowed private parties selectively to devise property by financing education of males and not females, choice was not state action subject to Fourteenth Amendment strictures). In *Wilson*, the Court of Appeals of New York considered whether two lower courts' facilitation of the administration of private charitable trusts according to testators' intentions to finance the education of male and not female students violated the equal protection clause of the Fourteenth Amendment. *Id.* at 1230-31. In one matter (the *Wilson Trust*), a public school superintendent annually gave a private trustee the names of five "young men" who had attained the best grades in high school science courses that year. *Id.* at 1231. In the other matter (the *Johnson Trust*), a public board of education and high school principal themselves served as trustees, selecting "bright and deserving men" who needed financial assistance to attend college. *Id.* In the former case, an intermediate appellate court, exercising what it believed to be *cy pres* power, struck the clause in the will requiring the school superintendent to certify the students' names and grades. *Id.* In the latter case, the intermediate court, likewise seeing itself as exercising *cy pres*, eliminated the gender restriction to overcome a perceived dilemma: on one hand, enforcement of the restriction by state actors—the board of education and the principal serving as trustees—would violate the equal protection clause; on the other hand, judicial substitution of a private trustee able and willing to enforce the restriction would, according to the intermediate court, itself constitute impermissible state action. *Id.* at 1232. The *Wilson* court, however, distinguished a court's deviation power, which amended a trust's administrative provisions, from the *cy pres* power, which altered a trust's purpose. *Id.* at 1234-35. Both severance of the school district's role in certifying names (for the *Wilson Trust*) and appointment of a successor trustee (for the *Johnson Trust*) were, the court found, more administrative than substantial. *Id.* Judicial application of equitable powers to let a private party administer a trust, the court held, therefore did not implicate the Fourteenth Amendment, because the state thereby merely permitted private discrimination but did not encourage, affirmatively promote, or compel it. *Id.* at 1237.

179. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.3 (6th ed. 2000) (stating that court may uphold trespass convictions based on private party's decision not to open home to racial minorities).

condition (or reverter clause) which would divest a property owner of the title to his property if he attempted to sell it to black persons."<sup>180</sup> "Such a clause," write Nowak and Rotunda, echoing *Barrows*, "would be the equivalent of monetary damages for failure to follow a restrictive covenant."<sup>181</sup> Instead, the court should "declare an end to the discriminatory practices" and do so "without penalizing those who would use the land for racially neutral practices and without encouraging racial discrimination in the future."<sup>182</sup>

In addition, *Hermitage Methodist Homes* differs from *Abney*, in that, unlike Jack Adams's gift in *Hermitage Methodist Homes*, Senator Bacon's gift in *Abney* did not include a gift over.<sup>183</sup> Rather than enforcing the testator's expressed wishes, as did the *Hermitage Methodist Homes* court constructively, the *Abney* Court allowed the trust to fail completely and its property to revert by operation of Georgia law to the testator's heirs.<sup>184</sup> Moreover, the Virginia Supreme Court decided *Hermitage Methodist Homes* in 1990, whereas the United States Supreme Court decided *Abney* in 1970. Given the historical distance between the two rulings, the *Hermitage Methodist Homes* court should not have decided so significant a case on property-law grounds.

*Hermitage Methodist Homes* also differs from *Wilson*, in that the former involved racial discrimination, the latter gender-based discrimination. Virginia's historical treatment of African Americans does not exactly parallel New York's historical treatment of women. And the United States Supreme Court has not yet explicitly ruled gender classifications to be suspect; for now, they are subject to heightened, but not strict, scrutiny.<sup>185</sup>

A counterprecedent to *Wilson* is *Pennsylvania v. Brown*,<sup>186</sup> which the Court of Appeals for the Third Circuit decided in 1968.<sup>187</sup> In *Pennsylvania v.*

180. *Id.*

181. *Id.*

182. *Id.*

183. See *Evans v. Newton*, 382 U.S. 296, 297 (1966) (describing Senator Bacon's desire to create park for white people only but not indicating his intention if trust ever failed).

184. See *Evans v. Abney*, 396 U.S. 435, 436-37 (1970) (affirming Georgia Supreme Court's ruling that testator's intention to provide park for whites only had become impossible to fulfill and that trust therefore failed entirely).

185. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 136-37 (1994) (finding that government attorney's gender-based use of peremptory challenges violated Equal Protection Clause under intermediate level of review, but neither confirming nor denying that gender might one day be considered suspect classification: "We need not determine . . . whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history").

186. 392 F.2d 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968); see Richard Raskin, Note, [*Recent Case: In re Estate of Wilson*], 53 U. CIN. L. REV. 297, 318 (1984) (stating that better rule than one announced in *Matter of Wilson* would have had court exercise equitable modification powers to remove discriminatory provisions, when state official's refusal to participate in discrimination made management of charitable trust impossible).

187. See *Pennsylvania v. Brown*, 392 F.2d 120, 125 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968) (holding that state court's replacement of city board with private trustees sworn to uphold private college's racially discriminatory admissions standards violated equal protection clause of Fourteenth Amendment). In *Pennsylvania v. Brown*, the Third Circuit considered whether a state court's removal of the Board of

*Brown*, a state court had removed the Board of Directors of City Trusts as trustee of Girard College, a private institution created to educate "poor male white orphan children," and appointed a private successor trustee, sworn to enforce the racial and gender-based restrictions.<sup>188</sup> The court found that the new private trustee's refusal to admit non-white applicants involved state action, on three grounds. First, the close, indispensable relationship between the College, Philadelphia, and Pennsylvania for 127 years implicated the state in Girard's discriminatory intent.<sup>189</sup> Second, the state's involvement paradoxically increased when it replaced itself as trustee, thereby deliberately allowing Girard's intent to continue in effect.<sup>190</sup> Third, the state court's assumed power of appointment and reappointment significantly involved it in the college's current administration, whether the state court explicitly wanted the new private trustee to enforce Girard's will or not.<sup>191</sup> What Professor Elias Clark of Yale Law School wrote in 1957, commenting on an earlier incarnation of the Girard College litigation,<sup>192</sup> applied as well to the 1968 case: "Accordingly, the administration of a charitable trust must ultimately be characterized as state action."<sup>193</sup> That is, "[w]hether the trustee is a governmental unit, as in *Girard*, or a private trust company, the trustee's choice is only first, not final."<sup>194</sup> The court's enforcement power parallels that of the

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Directors of City Trusts as trustee of Girard College, a private institution created to educate "poor male white orphan children," and judicial appointment of a private successor trustee, solely to enforce the racial and gender-based restrictions, violated the Fourteenth Amendment. *Id.* at 123. According to the Third Circuit, the new private trustee's refusal to admit non-white applicants involved state action, on three grounds: (1) the ouster's historical context, (2) its immediate objective, and (3) its ultimate effect. *Id.* at 123-125. That is, (1) the close, indispensable relationship between the College, Philadelphia, and Pennsylvania for 127 years implicated the state in Girard's discriminatory intent. *Id.* (2) The state's involvement paradoxically increased when it replaced itself as trustee, thereby deliberately allowing Girard's intent to continue in effect. *Id.* And (3) the state court's assumed power of appointment and reappointment significantly involved it in the college's current administration, whether the state court explicitly wanted the new private trustee to enforce Girard's will or not. *Id.* The Third Circuit therefore held that the state court's replacement of the City Board with private trustees sworn to uphold racially discriminatory admissions standards violated the equal protection clause of the Fourteenth Amendment. *Id.* at 125.

188. *Id.* at 123.

189. *See id.* (finding state action in historical context of new trustee's refusal to admit non-white applicants).

190. *See id.* (finding state action in immediate objective of new trustee's refusal to admit non-white applicants).

191. *See id.* (finding state action in ultimate effect of new trustee's refusal to admit non-white applicants).

192. *See Pennsylvania v. Board of Dirs. of City Trusts*, 353 U.S. 230, 231 (1957) (holding that, though acting as trustee for Girard College when it denied admission to two non-white applicants solely on basis of race, Philadelphia's Board of Directors of City Trusts was state actor and so violated Fourteenth Amendment).

193. Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1008 (1957).

194. *Id.*

state attorney general, implicating the government in otherwise private discrimination.<sup>195</sup>

#### V. AVOIDANCE AS, UNDER THE CIRCUMSTANCES, ITSELF STATE ACTION

In basing its opinion on “principles of real property law,”<sup>196</sup> the *Hermitage Methodist Homes* court applied the avoidance doctrine, as articulated by Justice Brandeis: “Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”<sup>197</sup> Though the Virginia Supreme court did not expressly say why the avoidance doctrine applied to *Hermitage Methodist Homes*, respect for the other branches of government generally necessitates judicial restraint. The court probably did not wish to decide more than it had to. The United States Constitution empowers the judiciary to resolve “cases and controversies,” not to make gratuitous constitutional generalizations.<sup>198</sup> And gratuitous judicial review undermines majoritarian rule.<sup>199</sup>

In avoiding constitutional questions when a deprivation of rights belonging to discrete and insular minorities presents them, however, courts breach the separation of powers just as much as when they step on the toes of legislatures.<sup>200</sup> A constitutional question was central to the *Hermitage Methodist Homes* case. If the judiciary has no duty to address constitutional questions when a case presents them, and nothing but them,<sup>201</sup> why does the judiciary exist?<sup>202</sup> According to the United States Supreme Court, if the parties themselves press *only* constitutional grounds “the prudential rule of avoiding constitutional questions has no application.”<sup>203</sup> In other words, “that there may

195. See *supra* Part IV.B.

196. *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 744 (Va. 1990) (stating that principles of real property law produced same result whether discriminatory provisions were valid or not).

197. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (stating that “[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of”).

198. U.S. CONST. art III, § 2, cl. 1 (empowering Court should exercise power of judicial review only in context of deciding cases).

199. See NOWAK & ROTUNDA, *supra* note 179, § 2.12(g) (offering pragmatic considerations behind policy of judicial self-restraint).

200. See Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1054-55 (1994) (describing circumstances where applying last resort rule to avoid constitutional adjudication constitutes abdication of federal courts’ counter-majoritarian responsibility).

201. *But see Hermitage Methodist Homes*, 387 S.E.2d at 743 (describing nursing home’s motion for summary judgment, based on argument that court should give language its plain meaning to carry out testator’s intent).

202. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that “[i]t is emphatically the province and duty of the judicial department to say what the law is”).

203. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke this rule."<sup>204</sup> Moreover, at least one commentator has argued that the avoidance doctrine is not absolute.<sup>205</sup> A court should reject it if reaching the constitutional issue is the only way to repair a violation of minority rights.<sup>206</sup>

But one need not resort to such policy considerations to fault the ruling. In *Hermitage Methodist Homes*, no non-constitutional grounds existed, because every resolution entailed state action. Unfortunately, *Hermitage Methodist Homes* is not the only case involving racial discrimination in which an American court has avoided ruling on the merits.<sup>207</sup>

## VI. CONCLUSION

Given the problem's complexity, a satisfactory solution must combine at least four actions: (1) more ambitious statutory abolition of distinctions between a special limitation and a condition subsequent; (2) statutory prohibition of racial discrimination in charitable trusts; (3) prudential restrictions on application of the avoidance doctrine; and (4) political restoration of the balance between property rights and civil rights.

(1) *Statutory abolition of distinctions between a special limitation and a condition subsequent.* The General Assembly should make more explicit and generally applicable Virginia's partial statutory abolition of the distinction between a special limitation and a condition subsequent.<sup>208</sup> A new statute broader than section 8.01-255.1 of the current Virginia Code<sup>209</sup> would expressly transform all possibilities of reverter and executory interests into powers of termination, thereby both reducing automatic forfeitures and making judicial enforcers keep equal protection in mind when scrutinizing their own decisions. If, for example, such a statute had visibly governed the *Hermitage Methodist Homes* court, it could not as easily have suggested that its application of property law involved no state action.<sup>210</sup>

204. *Id.*

205. See Kloppenberg, *supra* note 200, at 1005 (1994) (calling for less rigid applications of "last resort rule").

206. *Id.*

207. See, e.g., *Bell v. Maryland*, 378 U.S. 226, 228 (1964) (not reaching question of whether custom alone—refusing to serve minorities and prosecuting them for trespass—turned private activities into state action in violation of Equal Protection and Due Process Clauses).

208. See generally Entin, *supra* note 2 (using *Hermitage Methodist Homes* to argue for abolishing limitation-condition distinction).

209. VA. CODE ANN. § 8.01-255.1 (Michie 2000) (equating condition subsequent and fee simple determinable, in context of action for recovery of lands).

210. See *Hermitage Methodist Homes v. Dominion Trust Co.*, 387 S.E.2d 740, 744-48 (1990) (stating that principles of real property law produced same result whether discriminatory provisions were valid or not).

(2) *Statutory prohibition of racial discrimination in charitable trusts.* One proposed statute prohibiting racial discrimination in charitable trusts would, except when the trust purported to remedy past discrimination, not only strike any provision defining benefits based on a racial classification but also leave the charitable gift otherwise intact.<sup>211</sup> As applied to the trust in *Hermitage Methodist Homes*, the proposed statute would have invalidated the objectionable restriction but would not have invalidated the gift beneath it.<sup>212</sup> That is, the testator could not lawfully have both enjoyed the governmental benefits associated his trust's being deemed "charitable" and penalized the school for racially neutral admissions practices.

(3) *Prudential restrictions on application of the avoidance doctrine.* When an alleged constitutional violation involves minority rights, judges should not merely "assume without deciding" that the violation exists.<sup>213</sup> By applying the avoidance doctrine in *Hermitage Methodist Homes*, for example, the Virginia Supreme Court abdicated its duty to counter the traditionally more political branches.<sup>214</sup> Prudential restriction on application of the avoidance doctrine, by contrast, would have made the court reach the constitutional question, take advantage of its relative insulation from political pressure, and so protect the rights of minorities.

(4) *Political restoration of the balance between property rights and civil rights.* Arguably, the current United States Supreme Court has "retreated" to the *Lochner*-era position, letting the demands of the market triumph over personal freedom.<sup>215</sup> Given that property rights are themselves civil rights,<sup>216</sup> property right claims should protect individual freedom, not run roughshod over it. Why, for example, should not the rationales of *Shelley* and *Barrows* apply as much to testamentary restrictions on property interests as to contractually created restrictive covenants? In a better political climate, the

211. See Swanson, *supra* note 155, at 191-92 (proposing statute to prohibit discriminatory charitable trusts).

212. See *Hermitage Methodist Homes*, 387 S.E.2d at 746 (stating that if educational beneficiary violated restrictive provisions, its interest terminated immediately, without successor having to invoke power of termination).

213. See Kloppenberg, *supra* note 200, at 1047-55 (criticizing both overly cautious theory [positing duty always to avoid constitutional questions] and overly daring theory [positing duty always to address them]).

214. In the final analysis, of course, all branches are political, including the judicial. See FREDERIC G. GALE, *POLITICAL LITERACY: RHETORIC, IDEOLOGY, AND THE POSSIBILITY OF JUSTICE* 126 (SUNY Press 1994) (stating that critical theories "enable us to recognize the power of language to control, to dominate, and to exploit, and that exploitation depends on ignorance, especially ignorance of the methods by which language is used to accomplish political ends"; and concluding that "[a]wareness of the exploitive power of language does not enable us to escape the social reality created by language, but it constitutes a movement in the right direction, in the direction of self-empowerment and democratic citizenship").

215. See Schultz, *supra* note 33, at 34 (stating that Justice Scalia's "post *Carolene Products*" legal philosophy constituted a "retreat to the market").

216. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 551-52 (1972) (stating that federal courts could not easily draw line between personal and property rights) (*cited in* Schultz, *supra* note 33, at 33).



Virginia Supreme Court would have seen the *Hermitage Methodist Homes* case as presenting not issues to finesse, but opportunities to engage. If the court had only let property rights and human rights work together, the Commonwealth could have partially atoned for a time in its history when human beings *were* property.<sup>217</sup>

Ultimately, application of the avoidance doctrine in *Hermitage Methodist Homes* spawned what Greek tragedians would call a "*peripeteia*"—a reversal, whereby the hero's own actions produced an effect opposite to the one intended.<sup>218</sup> The court in this case accomplished the very effect it purported to prevent: enforcement of the discriminatory provisions. Perhaps some such coercion flows from any gratuitous transfer.<sup>219</sup> Striving to escape the dead hand's grasp, both a private entity and a state actor unavoidably embraced it, thereby letting prejudices solid and subtle infuse the darkness.<sup>220</sup>

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217. See Entin, *supra* note 2, at 797-98 (stating that *Hermitage Methodist Homes* court "squandered an opportunity to help Virginia come to terms with one of its most painful historical episodes," referring not to slavery but to Prince Edward County's thirty years of Massive Resistance during school desegregation).

218. See ARISTOTLE, *POETICS*, Ch. XI, 19 (Leon Golden trans., Florida State University Press 1981) (c. 347-322 B.C.) ("Thus, in the *Oedipus* the messenger comes to cheer Oedipus and to remove his fears in regard to his mother; but by showing him who he actually is he accomplishes the very opposite effect.").

219. See D.W. Haslett, *Is Inheritance Justified?* 15 *PHILOSOPHY & PUBLIC AFFAIRS* 122 (1986) (arguing that inheritance contradicts capitalism's basic tenets); *cp.* STEPHEN R. MUNZER, *A THEORY OF PROPERTY*, 382 n. 1 and 409-11 (Cambridge Univ. Press 1992) (1990) (rejecting Haslett's argument because abolition of gratuitous transfers would undermine reciprocity between generations).

220. See ELIOT, *supra* note 1, at 300 (finding prejudices to be "solid as pyramids, subtle as the twentieth echo of an echo, or as the memory of hyacinths which once scented the darkness").