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Social Investing, IOLTA* and the Law of Trusts: The Settlor's Case Against the Political Use of Charitable and Client Funds

Charles E. Rounds, Jr.**

Almost all political issues have become legal issues these days, and it is also increasingly true that many legal cases are essentially political.

L. Gordon Crovitz in the Wall Street Journal

There's a debate on whether or not [social investing is] really a movement. I think it's a movement in the sense that it's very political. The reason it's political is because it involves the movement of capital. If you're going to change society in any appreciable fashion, the most rapid way you can change it is to move substantial amounts of capital, meaning money, because the only thing that's understood in our society is the control of money, and the control of huge amounts of capital.

John Harrington in the Socialist Review

I. INTRODUCTION

In the United States, trustees hold title to property worth more than two trillion dollars. Today some of this economic power serves political ends. This article considers whether the person who creates a trust lawfully can prevent or halt subsequent polit-

* Interest on Lawyers' Trust Accounts
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2. Harrington, Putting Your Money Where Your Politics Are: Is the Left Ready to Do Business?, Socialist Rev., Spring 1987, at 65 (Mr. Harrington was associated with Franklin Research and Development, a money management organization).
3. An estimated $2.3 trillion currently are administered in the United States in pension funds alone, of which $700 billion are assets held in public employee retirement funds. See Wall St. J., Dec. 5, 1989, at C1, col. 3. "Total university endowments alone doubled between 1984 and 1987 to $47.9 billion and increased an additional 14% last year." Wall St. J., Mar. 12, 1990, at A10, col. 2.

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ical exploitation of the trust. Charitable funds and client trust accounts are particularly vulnerable to such exploitation.

Trustees are being pressured, for example, to divest charitable trust portfolios of interests in companies doing business in South Africa. The purpose of such pressure is to assist indigenous groups in their campaign to end state-sanctioned racial segregation and to influence indirectly the domestic politics of the United States.4 Another movement is attempting to influence the policies and practices of Northern Ireland’s political system.5 A similar movement against the government of the People’s Republic of China is in its infancy.6 Many trustees of charitable trusts already have

4. Consider, for example, the following developments in the “divestment” movement:

TransAfrica, the small organization that deserves much of the credit for making apartheid an issue in the United States, was founded in 1977 by the Congressional Black Caucus. The Caucus, a group of some twenty members of the House, established TransAfrica in the hope of representing black African (and Caribbean) interests to Congress and influencing U.S. policy toward South Africa. . . . . . .

In 1985 and again in 1986 the South Africa issue went through a cycle of spring rallies and protests leading to late summer political climaxes in Congress. This annual cycle had much more to do with the rhythms of American politics than with events in South Africa. Indeed, the continuing violence in South Africa did not govern the surges of publicity and political activity in the United States. Rather, the anniversaries of Martin Luther King’s birth and death became prominent dates in the divestment and sanctions campaigns, explicitly bringing these into the context of American racial politics. . . . . .

The divestment and sanctions campaign was presented as an apolitical good cause with mainly humanitarian stakes at issue; but the campaign had sharp ideological and political undertones.


Angry MIT students scuffled with campus and Metropolitan Police yesterday while confronting their board of trustees and demanding its members pull the school’s investments from firms doing business in South Africa.

The group of 70 students at the Massachusetts Institute of Technology seized the chance to raise concerns about MIT’s role in South Africa as MIT Corporation members visited the Cambridge campus for a quarterly meeting.

“It’s really important that political statements be made now to keep the sanctions issue alive,” said Ron Francis, an MIT graduate student and member of the Coalition Against Apartheid, which helped organize the rally.


5. On December 11, 1990, Massachusetts Governor Michael S. Dukakis signed into law a bill which prohibits the City of Boston from investing trust funds in a corporation operating in Northern Ireland, unless such corporation “adheres to principals of nondiscrimination in employment and freedom of workplace opportunity.” Act approved Dec. 11, 1990, ch. 293, 1990 Mass. Acts.

6. Fang Lizhi, an outspoken opponent of the current government of the People’s Republic of China, recommended that western companies use their economic leverage to prod the Chinese government to recognize the freedom aspirations of the Chinese people.

yielded to this pressure to practice politically oriented social investing.  

Lawyer-trustees are not insulated from these forces. Most states, for example, now encourage or compel lawyers who administer client trust funds to combine “nominal” amounts in IOLTA pools. IOLTA administrators then divert the income from these pools to organizations that purport to serve the legal needs of the community. In California, however, one such ostensibly charitable organization has financed with IOLTA income a challenge to a parental-consent abortion statute. In Massachusetts, a recipient of IOLTA income has been involved in legislative redistricting initiatives and the filing of class action suits. In 1988, an IOLTA

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7. See 112 Colleges That Have Divested, CHRONICLE HIGHER EDUC., May 14, 1986, at 2 (listing the institutions of higher education that have sold all or part of their holdings in companies with operations in South Africa).

8. IOLTA income grants are made from the Legal Services Trust Fund, which is administered by the offices of the State Bar of California through the Legal Services Trust Fund Commission (Commission). The Commission selects California IOLTA income grant recipients. One such recipient is the National Center for Youth Law (NCYL). NCYL also receives funds from Legal Services Corporation (LSC), a federal agency. NCYL represented plaintiffs in American Academy of Pediatrics v. Van de Kamp, 214 Cal. App. 3d 831, 263 Cal. Rptr. 46 (1989). That case challenged the constitutionality of a California statute which would require minors seeking abortions to obtain the prior consent of a parent or a court order. Cordova & Baxter, California IOLTA Faces New Challenge to Control, 6 IOLTA UPDATE, No. 2, at 6 (1989). LSC reduced its 1990 grant to NCYL because the Van de Camp plaintiffs were not indigents. The Commission, however, continues to support the prochoice political activities of NCYL with the income from client trust funds. PR Newswire (Jan. 4, 1990) (LEXIS, Nexis library, Current 1988-file).


   Minority rights advocates are mounting a congressional district challenge that could force three heavyweight congressmen . . . to either move or run against each other in a single Boston district in 1992.

   The motive is to pave the way for the potential election of Boston’s first black congressman. . . .

   That effort is part of an ambitious plan by the Lawyers Committee for Civil Rights to use the 1990 Census to shake up power “at every level throughout the state. . . .”

   . . .


   Boston Herald, Dec. 22, 1989, at 5, col 1. “[The] Lawyers Committee for Civil Rights has for over twenty years provided pro-bono representation to racial and ethnic minority citizens. . . . Seventy one cases were handled in fiscal ’87, over eighty in 1988. Many of
income grant was made to the Connecticut Civil Liberties Union. In most cases the political exploitation of this flow of IOLTA income occurs without the clients' knowledge or informed consent.

IOLTA tests the limits of state power. On the one hand, tax monies may be appropriated for political purposes. On the other hand, the United States Supreme Court ruled in Keller v. State Bar that the use of a lawyer's nonentrusted compulsory dues by an integrated bar to finance political and ideological activities with which the lawyer himself disagrees violates his first amendment rights. This infringement occurs when such expenditures are not necessary for the regulation of the legal profession. Keller, however, did not address the political use of income generated by client funds entrusted to lawyers.

Social investing tests the limits of a trustee's discretion, particularly the limits of a trustee's discretion to use trust funds for political purposes in the absence of an express or implied grant of authority by the trust settlor. Commentators have considered some aspects of the issue. In 1980, Professors Langbein and Posner applied classic trust law principles to the social investing of trust property and found the practice troubling. They, however, focused on the adverse impact that social investing may have on interests other than those of the settlor and on the possible legal
consequences to a trustee in the event that social investing causes 
economic injury to the trust.  

Some thought also has been given to interests, if any, retained by 
a settlor. For example, a 1949 note appearing in the Harvard Law 
Review questioned the position, long held by Professor Scott and 
others, that no rights of enforcement are reserved by a nonbenefi-
ciary, nontrustee settlor of an irrevocable trust in the absence 
of language to the contrary.  

In 1984, Professor Gaubatz suggested that a settlor has an “expectation interest” in having the terms of 
the trust carried out. Neither the note nor Professor Gaubatz’s 
article, however, discussed the practice of social investing. 

This Article partially closes the circle of analysis by exploring 
the possibility that the settlor of a trust has a protectable expecta-
tion interest in not having the trust property socially invested or 
otherwise exploited to further the political agenda of the trustee or 
others. The IOLTA system provides a case study in the political 
exploitation of revocable trusts. The practice of socially investing 

Past donors—more likely their heirs or successors—may claim that since so-
cial investing constitutes a diversion from the educational purposes for which 
the funds were given, it breaches an implied or express condition and ought to 
trigger defeasance of the funds in favor of the donor. In Illinois, legislation in 
force since 1874 denies to universities the “power to divert any gift . . . from the 
specific purpose designed by the donor.” Donors would have a strong argu-
ment against applying the cy pres doctrine in order to prevent defeasance, since 
cy pres applies only when it “becomes impossible or impracticable or illegal to 
carry out the original charitable purpose.” Thus, trustees who yield to pres-
sures to divert endowment funds from education to other causes are exposing 
their endowments to the restitutionary claims of donors and heirs. 

Id. at 110 (footnotes omitted).  

18. See id. at 96-112. Langbein and Posner consider how such injury can be defined 
and quantified. See id. at 77-96. The authors conclude that “the usual forms of social 
investing involve a combination of reduced diversification and higher administrative costs 
not offset by net consumption gains to the investment beneficiaries.” Id. at 76. 

19. Note, Right of a Settlor to Enforce a Private Trust, 62 HARV. L. REV. 1370 
(1949).

20. See, e.g., 2 A. Scott, TRUSTS § 200.1 (1939); 1 G. Bogert, TRUSTS AND 
TRUSTEES § 42 (1935).

21. The author questioned the widely held assumption that, “in the absence of ex-
press retention of supervisory powers or the availability of indirect relief, neither the 
settlor nor his surviving representatives may maintain an action against a trustee to com-
pel the performance of a trust or enjoin a breach.” The author suggested that “[i]his 
assumption, which leaves the supervision of trusts exclusively to the beneficiaries and the 
trustee, together with courts of equity, has also been accepted by the text writers without 
qualification despite the almost complete absence of judicial decision on the question.” 
Note, supra note 19, at 1371.

22. Gaubatz, Grantor Enforcement of Trusts: Standing in One Private Law Setting, 62 
This author concludes that a settlor, under certain circumstances, possesses a right grounded in the law of trusts to enjoin the trustee from engaging in political activity with the trust property. It is suggested, therefore, that a lawyer advise each client, before the establishment of the lawyer-client relationship, of any potential political uses of the client’s funds. Trustees of charitable trusts would have a similar duty of advance disclosure. A settlor-benefactor who does not wish a charitable contribution to become the subject of political exploitation should include language in the trust instrument reserving to himself and others the right to direct the trustee to cease use of the trust property for such purposes. Adequate disclosure and express provisions should help avoid confrontations over the political use of trust property, but clarity of language is critical.

Clarity of language is also critical to meaningful debate of the issues arising from IOLTA programs and social investing practices. Proponents and opponents of these programs and practices have failed to define the key terms of the discourse, specifically political activity, ideology, moral behavior, and charitable activity. Advocates stifle debate merely by labeling a questioned activity as either charitable or immoral, rather than political. Therefore, in order to narrow and facilitate this discussion, the author now defines these terms.

Political activity is activity intended to influence a domestic or foreign state’s exercise of its power to limit certain personal rights and privileges, raise tax monies, administer and dispose of its property, take by eminent domain, or conduct its foreign policy. In other words, political activity is intended to influence the state’s exercise of legislative, executive, judicial, or administrative power.  

23. Political activity has been described as “the process by which authoritative decisions about who gets what in society are made.” See J. Eisenstein, Politics and the Legal Process 4 (1973). Unlike charitable activity, political activity directs its efforts at the legitimate coercive functions of the state. If a trustee publicly announces that it is culling out the stock of a bank doing business in China from the trust portfolio to exert pressure on the United States Congress to enact legislation or on the President to issue an executive order that would limit the rights of United States citizens to do business in China, then the trustee is using the trust property for the trustee’s own political purposes. If the trustee openly or secretly culls out the target company from the portfolio because, in the opinion of the trustee, the social and political unrest in China is likely to jeopardize the short- or long-term health of the target company, then the trustee’s act of disinvestment is impelled by economic, not political, considerations. The act is no less economi-
It is for others to fashion a general working definition of ideol-

cally motivated because it incidentally may influence the Chinese government’s domestic exercise of its instruments of physical and economic coercion or the United States government’s limitation of a citizen’s right to transact business abroad. If political activity is limited to activity intended to solicit the state’s involvement in a particular objective, then perhaps the erosion of the distinction between charity and politics may be halted. See 4A W. FRATCHER, SCOTT ON TRUSTS §§ 374.4-.5 (4th ed. 1989). This erosion surely originates in a drift away from the relatively objective criteria of the Statute of Charitable Uses. See infra notes 72-74 and accompanying text.

The state’s involvement in limiting certain personal rights and privileges, raising tax monies, administering and disposing its property, exercising its right to take by eminent domain, and conducting its foreign policy can result from the actions of any one or more of the four functions of government. It long has been acknowledged that the acts of the executive, judicial, and administrative functions are in practice subtle legislative acts. See B. LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 39-46 (1938); M. COHEN, LAW AND THE SOCIAL ORDER 112-47 (1967). One need only witness the action or inaction of an attorney general exercising prosecutorial or enforcement discretion, a commissioner exercising administrative discretion, or a judge exercising judicial discretion to know that the process of legislation is at work not only in the legislative branch, but in all branches and functions of government. See Langbein & Posner, supra note 16, at 108-09.

The state’s coercive involvement in taxation and appropriation, eminent domain, and foreign policy is self-evident. The police, the state’s domestic instrument of economic and physical coercion, enforces the laws that relate to the transfer of property between an individual and the state. The state’s army, its extraterritorial instrument of economic and physical coercion, buttresses its foreign policy.

The state’s coercive involvement in the allocation of certain rights and privileges, however, is not always self-evident to the trust administrator. The judicial remedy of busing is a dramatic example. The state’s institution of an involuntary busing program arguably limits the right of a Caucasian child to have state services allocated on the basis of criteria unrelated to race. Conversely, the state’s failure to institute or its dismantling of an involuntary busing program arguably limits a non-Caucasian child’s right to a remedy for the alleged past failure of the state to allocate governmental services on the basis of criteria unrelated to race.

It is important to test the proposed definition of political activity in the areas of non-property rights (personal rights and privileges that relate to the body and spirit of a human being) and property rights (personal rights and privileges that relate to physical things). See generally Hohfeld, Fundamental Legal Conceptions, 23 YALE L.J. 16 (1913); RESTATEMENT OF PROPERTY ch. 1 introductory note (1936). With respect to nonproperty rights, the state limits rights of selective association when it effectively destroys the financial viability of certain single sex clubs through the licensing process. See New York State Club Ass’n v. City of New York, 487 U.S. 1 (1988). The state limits rights of personal expression when it prohibits by legislation the defacement of the American flag. See Texas v. Johnson, 109 S. Ct. 2533 (1989). In the case of liquor licensing, the erosion of these nonproperty rights is a consequence of political activity within or directed at the state’s administrative function. In the case of flag legislation, the erosion of these rights is a consequence of political activity operating within or directed at the state’s legislative function. With respect to the limitation of property rights, it is now settled that property rights are a category of personal rights, ownership being merely a collection of personal rights relating to a tangible or intangible thing. See RESTATEMENT OF PROPERTY ch. 1 introductory note (1936). Through the enactment of rent control ordinances, the state limits the property right of the landlord to maximize the economic return on real estate and bestows on the tenant a right to occupy someone else’s real estate at a cost that is below market. Through flag defacement legislation, the state attempts to limit property rights, in this case a person’s use of his flag.
ogy. Karl Marx, for example, considered ideology to be "[t]he phenomenon of collective thinking, which proceeds according to interests and social and existential situations," simply a working definition. Be that as it may, the purpose of an ideology in the political context is to articulate political objectives and provide a rationale and justification for the pursuit of those objectives.

In the context of trust administration—insofar as the official actions of a trustee are concerned—moral behavior should be defined simply as behavior that is not prohibited by law and is in accord with the settlor's express or implied wishes. In the context of


25. Karl Mannheim, for example, attributed what he considered the "historical conservatism" of Edmund Burke to an ideology intended to rationalize and justify the political objective of keeping the reins of state in the hands of the aristocratic class of late eighteenth century Germany and England. Id. at 120. At the core of the ideology is the notion that there is a "je ne sais quoi element in politics [that] can be acquired only through long experience and reveals itself as a rule only to those who for many generations have shared in political leadership." Id.

With respect to late eighteenth century North America, it might be said that the political objective of the Framers of the United States Constitution was to erode the power and authority of the constituent states. See THE FEDERALIST No. 1, at 1-5 (A. Hamilton) (Johns Hopkins 2d ed. 1981). The ideological rationale and justification for the ratification was to secure the safety and liberty of the free citizens of the constituent states. Id.

Capitalism, it might be said, is an ideology that rationalizes and justifies the state's use or threatened use of its instruments of economic and physical coercion to maintain conditions that permit the unequal distribution of property among individuals. It also articulates the means of maintaining those conditions. See, e.g., 1 A. SMITH, THE WEALTH OF NATIONS 129 (Everyman's Library ed. 1977). Socialism, on the other hand, is an ideology that rationalizes and justifies the political objective of causing the state to use or threaten to use its instruments of economic and physical coercion to limit the property rights of individuals. It also articulates the means of achieving that limitation. See generally THE DEFENSE OF GRACCHUS BABEU 54 (Scott trans. Schocken Paperback ed. 1972).

26. For a trustee to adopt any other standard of morality would be arbitrary and capricious. Whose moral code other than that of society, as reflected in the law, and the trust settlor, to the extent that it reasonably can be ascertained, should guide the trustee in the administration of the trust? The moral code of a board of trustees or an interest group, as a practical matter, is not susceptible of divination. To be sure, one can imagine situations in which the application of this legalistic and mechanical standard could lead to consequences that, in the minds of some, are morally offensive. A trustee, for example, could not, under this standard, invest trust assets in a profitable shipment of proven but unlicensed anticancer miracle drugs, but could invest in a profitable shipment of cigarettes.

Whether to "capitalize" or "decapitalize" South Africa in order to end state-sponsored racial segregation is an issue of political strategy and tactics. Surely, honorable people who embrace an ideology that rationalizes and justifies the political objective of ending state-sponsored racial segregation can disagree on whether the means should be evolutionary or revolutionary.

It would seem inappropriate to call upon a trustee, in his official capacity, to involve
trust administration, engaging in unauthorized self-dealing and failing to carry out the lawful purposes of the trust are perhaps the only two actions which subject a trustee in his official capacity to criticism based on moral considerations. Therefore, it would be perverse to subject a trustee to moral criticism because the trustee declines to commit someone else's property to a political battle. With these definitions in mind, the Article will discuss charitable activity in depth.

Unfortunately, this Article cannot examine political exploitation of all types of trusts. Since the perspective of this Article is that of the settlor, exploitation of pension trusts for political purposes is not discussed. Additionally, the use of irrevocable personal trust property for political purposes is not discussed since social invest-

himself in a political controversy over matters such as the regulation of tobacco products and the strategy and tactics of fighting state-sponsored racial segregation. The halls of a trust department are not a proper arena for political battle over such public policy issues.


28. Under classic principles of trust law, it is not always clear whether the settlor of a pension trust is the employer or the employee.

In a defined benefit [pension] plan, the benefits to be received by the employee on retirement are specified in advance. The employer is responsible for paying these benefits, and the purpose of the pension trust fund is to assure that the employer has the assets to pay them in full even if the income from his business is insufficient. In a defined contribution plan, the employee on retirement receives an amount determined by his own and his employer's contributions plus accumulated income and appreciation on these contributions; he is not entitled to an amount specified in advance.


Thus, as a matter of state property law, it is not always clear, particularly with respect to property allocable to the employer's contributions to a defined benefit pension trust, who would qualify as the trust settlor. Because this article focuses on the speech and associational rights of trust settlors, the author feels that the use of pension trust funds for political purposes ought to be the subject of a separate article.

With respect to private pension trusts, it should be noted that the Department of Labor apparently opposes sacrificing investment performance to advance the social welfare of a group or region. Knickerbocker, Trust Law with a Difference: An Overview of ERISA Fiduciary Responsibility, 23 REAL PROP. PROB. & TR. J. 633, 659 n.150 (1988). By implication, the Department of Labor, however, would not consider the mixing of politics and pensions to be imprudent per se. A trustee who, with the state's sanction, socially invests public pension funds may be even less vulnerable to attack by employees than a private pension trustee because "taxpayers may be required to financially support governmental programs and messages to which they are ideologically opposed." Keller v. State Bar, 47 Cal. 3d 1152, 1181, 767 P.2d 1020, 1039, 255 Cal. Rptr. 542, 561 (1989) (Kaufman, J., dissenting), rev'd on other grounds, 110 S. Ct. 2228 (1990); see also Pension Funds to Politicians: Hands Off, Wall St. J., Dec. 5, 1989, at C1, col. 3 (discussing alleged political exploitation of public pension funds). The editors of the Wall Street Journal have suggested that "pension funds are very likely to become the next great political honey pot." Wall St. J., Dec. 6, 1989, at A14, col. 2.
ing advocates have focused little attention on such trusts. Whether a trustee may exploit the property of any type of noncharitable trust for purposes traditionally considered charitable—which is to say, purposes that fall within the spirit of the Statute of Charitable Uses—also falls outside the concerns of this Article. Finally, the Article forgoes examining the legal issues that arise when a trustee's practice of social investing causes economic injury to a trust. Others have investigated that aspect of the practice.

29. But see Boston Herald, Sept. 15, 1987, at 4, col. 1 (reporting that Michael S. Dukakis, the 1988 Democratic Presidential candidate and cotrustee with a bank of an irrevocable personal trust established by his late father, was criticized by some for acquiescing in the bank's investment of the trust property in companies that were doing business in South Africa).

30. "A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." RESTATEMENT (SECOND) OF TRUSTS § 348 (1959). A charitable trust is valid although it is to continue beyond the period of the rule against perpetuities. 4A W. FRATCHER, supra note 23, § 365.

It is impossible to enumerate all the purposes that have been held by the courts to be charitable purposes or that may hereafter be held to be charitable purposes. Certain purposes are clearly charitable. . . . In addition to these purposes there must be added a more general and indefinite category, a general catchall, to include the vast number of miscellaneous purposes that are properly held to be charitable. Perhaps these can best be included under the heading of other purposes the accomplishment of which is beneficial to the community. Id. § 368.

In 1601, shortly before the death of Queen Elizabeth, Parliament enacted the famous statute known as the Statute of Charitable Uses [or the Statute of Elizabeth, 43 Eliz., ch. 4 (1601)]. This statute provided that the chancellor might from time to time award commissions to the bishop of every diocese and to other persons, authorizing them to inquire into abuses and breaches of trust where property is given for charitable purposes, and to make such orders, judgments, and decrees as should be necessary to carry out the purposes for which the donors had given the property, and which should be valid until altered by the chancellor. The statute thus provided machinery for the enforcement of charitable trusts. The importance of the statute, however, lies not in the procedure thus authorized, for it appears after a time to have been little employed, but in the provisions of the preamble of the statute, which contains an enumeration of charitable purposes. . . . This enumeration is not and clearly was not intended to be exhaustive. It merely gives typical instances of purposes that are charitable. The courts, both in England and the United States, have frequently had recourse to the statute as showing the kind of purpose that is charitable. Id. § 368.1; see also infra notes 72-74 and accompanying text.

31. Some data suggests that a trust fund runs an increased risk of sustaining economic injury when political considerations enter into the investment management process. For example, the transactional costs directly attributable to the divestment of the New York State employee pension fund of holdings in companies doing business in South Africa are conservatively estimated to be $824,000 as of August 27, 1988. See STATE INVESTMENT COUNCIL, N.J. DEP'T OF THE TREASURY, THIRTY-EIGHTH ANNUAL REPORT FOR FISCAL YEAR ENDED JUNE 30, 1988, at 45 (1988); see also Martin, supra note 4, at 299 (estimating that divestment could reduce Columbia University's re-
With these limitations in mind, the discussion now turns to the history of IOLTA and social investing.

II. HISTORY OF IOLTA AND SOCIAL INVESTING

A. History of IOLTA

In the United States, clients sometimes will entrust funds to their lawyers. A lawyer may, for example, temporarily hold an insurance company's personal injury settlement disbursement or an alimony payment. Ordinarily, the lawyer, as trustee, has a duty to invest the funds for the client's benefit with all net investment income accruing to the client. Historically, however, "nominal" sums held in trust and sums to be held for only a short period were not subject to this general rule. Because it was considered administratively impractical and economically counterproductive to put these sums to work, generally accepted practice in the United States allowed lawyers to deposit these funds in bank accounts bearing no interest. Any economic benefit resulting from the use of these funds accrued to the banks' shareholders.

In the late 1970s, however, things changed when other states, following Florida's lead, began either to allow or to require lawyer-trustees to pool nominal and short-term client funds and disburse the income generated by these pools to certain institutions whose purposes were characterized as charitable. These purposes often involve subsidizing legal representation and advocacy in civil matters or sponsoring law reform projects. IOLTA is the term...

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turn on equity by nearly $5 million annually, or roughly half the university's 1986-87 tuition increase); Langbein & Posner, supra note 16, at 76-96 ("[c]onclud[ing] that the usual forms of social investing involve a combination of reduced diversification and higher administrative costs not offset by net consumption gains to the investment beneficiaries").


34. See Comment, supra note 32, at 415.

35. At least one court has noted, however, that "[p]resent technology makes . . . calculations [of interest accruing on nominal or short-term investments] simple and inexpensive." In re Ind. State Bar Ass'n Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts, 550 N.E.2d 311, 314 (Ind. 1990) [hereinafter Indiana State Bar Petition]. Thus, an attorney easily could subaccount each client's funds and credit accrued interest to the client. "This, of course, is where that interest money belongs and it is the duty of the lawyer and the legal profession to see to it that the client gets it if possible and practical." Id.

36. Comment, supra note 32.

37. Alan Rogers, Director of the Massachusetts Law Reform Institute, confirmed that the Institute uses IOLTA funds to sponsor housing and health-care legislation. Tele-

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used to describe these state-authorized or state-mandated programs that exploit the income from pools of client funds for ostensibly charitable purposes.\textsuperscript{38} By December 1989, forty-eight states and the District of Columbia had implemented IOLTA programs.\textsuperscript{39} Since their inception, these programs have generated an aggregate $261,865,322.00 for IOLTA recipients.\textsuperscript{40}

In the 1980s, the possibility that the Internal Revenue Service might apply the assignment of income doctrine to the diversion of IOLTA pool income troubled proponents of the programs.\textsuperscript{41} Insertion in IOLTA programs of a requirement that clients have no control over selection of IOLTA income recipients appears to have laid IRS concerns to rest.\textsuperscript{42} Proponents also faced the possibility that a client successfully would challenge the income diversion as an unconstitutional taking of the client’s beneficial interest in the trust property.\textsuperscript{43} Fifth and fourteenth amendment constitutional challenges to IOLTA, however, have not succeeded. The courts to

\textsuperscript{38} As of December 1989, only five states—California, Connecticut, Maryland, New York, and Pennsylvania—were operating IOLTA programs under legislative authority. All other programs were operating by judicial fiat. Seven states compelled attorneys, under threat of disbarment, to use IOLTA accounts. These mandatory IOLTA programs are euphemistically called “comprehensive.” ABA/IOLTA Clearinghouse, IOLTA Program Profiles (based on figures available December 1989) (copy on file with author).

\textsuperscript{39} Participation in Florida’s program became mandatory on October 1, 1989, pursuant to a new Florida Supreme Court rule. A state representative immediately thereafter introduced a bill that would require a client to specify permissible uses of income generated by his funds. The bill’s sponsor argued that use of the income “for free legal aid to sue someone whose money generated the interest in the first place . . . should be the client’s prerogative.” UPI report (March 11, 1990) (LEXIS, Nexis library, Current 1988-file).

\textsuperscript{40} ABA/IOLTA Clearinghouse, IOLTA Program Profiles (based on figures available December 1989) (copy on file with author). Indiana steadfastly has refused to adopt an IOLTA program, reasoning that such a program violates ethical standards. See Indiana State Bar Petition, supra note 35. West Virginia is the only other state without an IOLTA program. Brennecke, A Look Back, IOLTA UPDATE, Vol. 6, No. 2, at 1 (1989).

\textsuperscript{41} Rev. Rul. 81-209, 1981-2 C.B. 16; see also Lucas v. Earl, 281 U.S. 111, 114-15 (1930) (income is taxable to the person who earned it regardless of any anticipatory arrangement which prevents the income from vesting in that person).

\textsuperscript{42} See Rev. Rul. 81-209, 1981-2 C.B. 16; cf. Priv. Ltr. Rul. 89-51-022 (Dec. 27, 1989) (interest is taxable to client where program allows deposit election by client and requires recoupment in the event generated interest exceeds a specified amount).

\textsuperscript{43} See Comment, supra note 32, at 425.
date have declined to find that a client reasonably may expect to earn income on a nominal or short-term sum held in a client trust account. The United States Supreme Court, however, never has ruled upon the taking issue, twice declining to review lower court decisions adverse to clients.

Currently IOLTA thrives. Well-staffed, committed bureaucracies propagandize on behalf of the IOLTA concept and foster a public perception that IOLTA’s legal status is a settled matter. Some IOLTA income, however, is being used for political rather than charitable purposes. Reexamination of the IOLTA concept, therefore, is warranted because uses in furtherance of a political objective may abridge a client’s first and fourteenth amendment rights of speech and political association in judicially cognizable ways.

B. History of Social Investing

Professor Schotland noted in 1980 that social investing raises the “more-heat-than-light issue[ ]... of whether pension [trust] funds should diverge from their traditional goal of maximizing investment return at an appropriate level of risk in order to pursue other goals.” In his view, control of the semantic high ground is an object of the battle. He argued that the label “social” is too broad and thus impedes analysis. He concluded that “alternative” or “divergent” is a more accurate label for this type of investing.

Professor Schotland cited as the earliest explicit advocacy of...
“divergent” investing a 1931 Wisconsin legislative proposal that the state teachers’ retirement fund should favor investment in Wisconsin farm mortgages.\textsuperscript{50} Recently, the social investment movement exerted enormous pressure on university trustees to “divest” endowment trusts of companies doing business in South Africa.\textsuperscript{51}

A wide range of interest groups, movements, and causes, including some that espouse ideologies that do not articulate political objectives, have found that the practice of social investing is an effective instrument of communication.\textsuperscript{52} Special purpose mutual funds have emerged to service individuals who wish to socially invest their own funds.\textsuperscript{53} The amount of entrusted and nonentrusted property being socially invested is estimated to exceed \$400 billion.\textsuperscript{54}

The standards determining which entities will be social investment targets seem arbitrary unless ideology and politics are taken into account. For example, why is a manufacturing concern on a target list, but its bank and suppliers are not? Why is it acceptable to consume the concern’s products, but not to invest in the concern itself? Why do social investors demonize one oppressive regime but ignore another equally oppressive regime? These inconsistencies grow out of political and ideological motivations.\textsuperscript{55}

\textsuperscript{50} Id. at 11.
\textsuperscript{51} See supra note 4 and accompanying text.
\textsuperscript{52} When determining whether or not to invest in a particular company, social investors frequently use the following criteria: (1) equal employment opportunity, particularly for women and minorities; (2) treatment of employees with respect to safety and health, participatory management, fair labor practices, or pay and benefits; (3) environmental protection; (4) consumer protection and product purity; (5) innovation and quality-of-life enhancing technologies, products, or services; (6) involvement with nuclear power; (7) defense contracts and weapons development; (8) business with repressive regimes, notably South Africa; (9) charity; (10) alcohol, gambling, or tobacco; (11) special economic or social contributions to the community; (12) miscellaneous, e.g., draining capital from the United States. Rockness \& Williams, \textit{A Descriptive Study of Social Responsibility Mutual Funds}, 13 ACCT. ORGANIZATIONS \& SOC’Y 397, 401 (1988); see generally \textit{Putting Your Money Where Your Politics Are: Is the Left Ready to Do Business?}, SOCIALIST REV., Spring 1987, at 65.
\textsuperscript{53} Schlesinger, \textit{Investing Based on Social Issues Is Gaining Adherents Among the Children of the ’60s}, Wall St. J., July 11, 1984, at 33, col. 4.
III. THE REVOCABLE LIVING TRUST WITH A FOCUS ON IOLTA

A. How Does IOLTA Fit into the Framework of Trust Law?

A lawyer who participates in a state-sanctioned or state-compelled IOLTA program commingles the assets of revocable living trusts established on a temporary basis by clients. The lawyer is the trustee of these trusts. Each client is settlor, beneficiary, and remainderman of his trust. The client reserves the right to revoke the trust, a right in the nature of a general inter vivos power of appointment.

In most IOLTA programs, the IRS finds no nexus between the client and the portion of the IOLTA income stream attributable to the client's monies. Thus, temporary availability of the client's property for IOLTA income generation imposes no income tax consequences on the client. As a matter of state property law, however, the fact that trust property produces no taxable income in no way affects possession of a beneficial interest in the property. If, for example, unproductive land replaced an income-producing stock portfolio as the trust res, the trust beneficiaries would not lose their beneficial interest in the trust to the trustee or to third parties merely because the trust property ceased producing income. The beneficial interest thereafter might consist of the right to enter upon the land and the right to evict third parties.

Courts considering IOLTA programs essentially have ignored or rejected the longstanding principle of state property law that such beneficial interests constitute property. If there is no property, then there is nothing for the state to take. Courts also have found that allocation of IOLTA pool income to entities other than the client class does not constitute a levy and appropriation of tax monies by the state. If such an allocation were a legitimate exer-

57. See Restatement (Second) of Property § 11.4(1) (1986). "A power of appointment is general if it is exercisable in favor of any one or more of the following: the donee of the power, the donee's creditors, the donee's estate or the creditors of the donee's estate." Id. In the case of a sum belonging to a client that is held in trust by the attorney, the client is both the settlor of the trust and the donee of the general inter vivos power of appointment.
58. See Comment, supra note 32, at 425.
60. See 2A id. §§ 175, 181 (1987).
cise of the state's power to tax, then an IOLTA program's use of the client-settlor's beneficial interest for political purposes would not be an issue since appropriation of tax monies for political purposes is constitutional.\textsuperscript{63}

B. Are the Purposes of IOLTA Political?

Proponents of IOLTA consistently define its objectives as charitable.\textsuperscript{64} That characterization should not go unchallenged. The determination that an activity is either charitable or political often seems subjective. Two decisions involving trusts for the support of newspapers illustrate the reality that one person's charity is another person's politics.\textsuperscript{65} \textit{In re Strakosch},\textsuperscript{66} a 1949 English case, involved a trust created to ameliorate South Africa's racial problems. That trust was held noncharitable because it was established to strengthen the bonds of unity between South Africa and the mother country, and to reduce racial tension between the Dutch and English-speaking segments of South Africa.\textsuperscript{67} Lord Greene justified the court's decision by noting that appeasement of racial feeling in a community is a political problem. He suggested that a newspaper which supports such an objective is a political instrument.\textsuperscript{68} \textit{Strakosch} stands in contrast to \textit{Jackson v. Phillips},\textsuperscript{69} an 1867 Massachusetts case. In that decision, the court implicitly confirmed that a trust established to prepare and circulate abolitionist newspapers was charitable in nature.\textsuperscript{70}

Some commentators suggest that charitable activity and political activity are essentially the same. They offer two arguments in support of this conclusion. First, judicial characterization of an activ-

\textsuperscript{64} See Comment, supra note 32, at 441.
\textsuperscript{65} See, e.g., Jackson, Cranston's Use of Voter-Registration Charities to Benefit Campaign Highlights Gray Legal Area, Wall St. J., Mar. 1, 1990, at A18, col. 1.
\textsuperscript{66} 2 All E.R. 6 (1949).
\textsuperscript{67} Id. at 7.
\textsuperscript{68} Lord Greene wrote for the court:

The problem of appeasing racial feeling within the community is a political problem, perhaps primarily political. One method conducive to its solution might well be to support a political party or a newspaper which had such appeasement most at heart. This argument gains force in the present case from the other political object, namely, the strengthening of the bonds of unity between the Union and the mother country. It would also we think be easy to think of arrangements for mutual hospitality which would be conducive to the purposes set out but would not be charitable.

\textit{Id.} at 9.
\textsuperscript{69} 96 Mass. (14 Allen) 539 (1867).
\textsuperscript{70} \textit{Id.} at 541.
ity as charitable is a political act. Second, the overseer of public charities, usually an attorney general, is a politician with prosecutorial and enforcement discretion. Despite state involvement in the regulation of both political and charitable activities, the two are not the same because their purposes are different. Political activity attempts to influence the exercise of state power. Legitimate charitable activity does not. In the context of donative transfers, charitable activity is associated with the private, voluntary transfer of property for the benefit of the community at large. By way of illustration, a Republican or Democrat might say in all sincerity that a voluntary donative transfer of $1000 in trust for the benefit of his party also benefits the community at large. Each, however, would agree that such a transfer is a political and not a charitable contribution because the transfer clearly is intended to influence the exercise of state power.

The best source of guidance for determining whether a particular trust activity is charitable remains the catalogue of uses set forth in the preamble to the Statute of Charitable Uses. The enumerated charitable uses include relief for the poor, maintenance of schools, and support for government projects such as the repair of bridges, ports, and roads. Inherent in the spirit of the preamble is the notion that a trust created for the conduct of political activity is not a charitable trust.

Determining what constitutes political activity in the context of the Statute of Charitable Uses has always been difficult. The test appears to be whether the activity relates in some way to the exercise of state power. When a trust provides shelter for a homeless person, for example, it engages in charitable activity. But when the trust hires a lobbyist to persuade a city councilor to support a rent control ordinance, it engages in political activity.

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72. 43 Eliz., ch. 4 (1601).
73. The charitable uses listed in the preamble are:
   - Relief of aged impotent and poore people, . . .
   - Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Univsities, . . .
   - Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highwaies, . . .
   - Educacon and pfermente of Orphans . . .
   - Reliefe Stocke or Maintenance for Howses of Correcon . . .
   - Mariages of poore Maides, . . .
   - Supportacon Ayde and Helpe of younge Tradesmen, Handiecraftesmen and psions decayed, . . .
   - reliefe or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitants . . .

Id.
74. See 4A W. FRATCHER, supra note 23, § 374.6 (1989).
75. Id.
A trust that funds the dissemination of information on homelessness may fall into the gray area between these extremes. The absence of an objective and workable definition of education makes characterizing such activity difficult. Such a definition would distinguish the motives and objectives of the lobbyists and the propagandists from those of the educators working in "schooles of learninge" contemplated by the preamble to the Statute of Charitable Uses. Each presumably considers his activity beneficial to the community as a whole. The lobbyist and the propagandist, however, attempt to influence with words the state's use of its instruments of economic and physical coercion. The educator does not.

Many IOLTA grants subsidize legal representation and advocacy in civil matters or sponsor law reform projects. Activity such as civil legal representation and advocacy, intended to stimulate and influence the state's adjudicative function, is political activity because the judicial function itself is intimately involved with the exercise of state power. The judiciary exists in part to effect the state's orderly limitation of certain rights and privileges of one or more parties to a dispute. It legislates when disposing of cases, because no two cases have all the same facts. Moreover, the judiciary has at its disposal the state's instruments of economic and physical coercion.

An IOLTA grant fueling litigation by a tenant group against a landlord exemplifies a use for political purposes. That grant could result in the temporary use of the landlord's own property, perhaps in the form of a nominal sum held in an IOLTA account, to help bring about, for good or for ill, a limitation of the landlord's property rights and privileges. Such use also might infringe on the landlord's political rights of expression and association, an injury that should not be discounted or ignored merely because the value of the IOLTA trust property allocable to the landlord is nominal. Likewise, if a "law reform project" relates to the potential limitation of someone's personal rights and privileges, then, to borrow a term from the Internal Revenue Service, that project is a political

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77. See J. Eisenstein, supra note 23, at 4.
78. Oliver Wendell Holmes Jr. went so far as to suggest that "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." O. W. Holmes, The Common Law 1 (1881); see generally M. Cohen, supra note 23, at 122.
“action” activity. On the other hand, an IOLTA income grant to improve the physical facilities of a court system is not a use for political purposes. Such a use would fit comfortably within the charitable spirit of the “bridge repair” section in the preamble to the Statute of Charitable Uses.

C. Under Current Law, May the Attorney-Trustee Use IOLTA Funds for Political Purposes?

A lawyer in possession of funds belonging to a client is a trustee of those funds and not merely a bailee or a debtor of the client. The lawyer, functioning as a trustee, has a fiduciary duty under trust law principles to disclose fully to the client-beneficiary the potential uses of the trust property. As a lawyer, he or she also has an affirmative duty of disclosure under the Rules of Professional Responsibility.

Despite the transfer of title to the lawyer-trustee, the client typically reserves a general inter vivos power of appointment over the funds. The client thus possesses the lesser inherent power to direct the trustee to keep the funds uninvested. Therefore, under classic

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80. See 5 C.F.R. §§ 733.121-.122 (1990); see also supra note 35 and accompanying text; Sabbath, Tax Exempt Political Educational Organizations: Is the Exemption Being Abused?, 41 TAX L. 847 (1988) (explaining that the IRS defines a noncharitable political action organization as one that either attempts to influence legislation by propaganda or otherwise, or participates or intervenes, directly or indirectly, in any political campaign).

81. See supra note 73 and accompanying text.

82. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1983); 1 W. FRATCHER, supra note 23, § 2.

83. “The trustee is under a duty to . . . beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust.” See 2A W. FRATCHER, supra note 23, § 173 (1987).

84. With respect to a lawyer’s duty to disclose information to his client, the Model Rules of Professional Conduct provide that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983); but see Indiana State Bar Petition, supra note 35, at 314 (indicating that, “[i]ncredibly, courts adopting IOLTA programs have . . . provided that once an attorney decides to participate in an IOLTA program it is not necessary to inform his client”).

85. The Model Rules of Professional Conduct state:

Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15(b) (1983); cf. In re Estate of Walbridge, 138 N.Y.S.2d 847 (Sur. Ct. 1955) (where testator granted life beneficiary a testamentary power of appointment over the trust remainder, and the donee-beneficiary
principles of trust law, the attorney-trustee would be in breach of trust upon his failure to honor any direction that constitutes a partial exercise of the client's reserved general inter vivos power of appointment.

Moreover, without full and fair advance disclosure of the political uses of IOLTA income, and in the face of the substantial state action involved in establishing and administering the IOLTA system, such political use might interfere with the client-beneficiary's first amendment speech and associational rights. While courts consistently have rejected arguments that the administration of an IOLTA program represents an unconstitutional taking by the state of a client's property, no case has attacked an IOLTA program on the grounds of unconstitutional interference with the client's first amendment rights of free speech and political association.

IV. THE IRREVOCABLE CHARITABLE TRUST WITH A FOCUS ON SOCIAL INVESTING

A. What Is Social Investing and How Does It Fit into the Framework of the Law of Trusts?

In the context of trust administration, a trustee engages in social investing when he applies criteria not related to the trust's economic welfare or administration in making investment decisions. Professors Langbein and Posner define social investing in general terms as the "pursuit of an investment strategy that tempers the conventional objective of maximizing the investor's financial interests by seeking to promote nonfinancial social goals as well." The advocates of social investment seek a modification of the fundamental rule of trust administration that the trustee must act solely in the beneficiaries' interests. The practitioner of social investing considers the interests of certain other groups along with those of the beneficiaries. Which groups are eligible and to what extent their interests may be considered remain open legal questions.

exercised that power by creating a trust for her sons, but required in her will that the trust corpus be invested and reinvested in accordance with state banking laws, the donee-beneficiary's will governed the investment powers of the trustee of the sons' trusts, despite the fact that the original testator's will authorized investment in nonlegals). See generally 1 W. F R A T C H E R, supra note 23, § 17.2 (1989).

86. For a discussion of the constitutional dimensions of this issue, see infra text accompanying notes 109-15.


88. See id. at 96-107.
B. Are the Purposes of Social Investing Political?

Social investment movements acquire a political orientation when they attempt to attain their goals by enlisting the power of the state. For example, elements of the antiapartheid movement currently lobby for legislation limiting the rights of United States citizens to conduct business in South Africa. These lobbyists also seek modification of American foreign policy regarding South Africa. Similarly, members of the peace movement advocate state closure of nuclear weapons production facilities. The rhetoric of the debates may be laced with references to moral considerations, but ultimately the goal, whether for good or ill, is to make someone, be it the entrepreneur or the shareholder in a nuclear weapons company, the object of a state’s instruments of coercion.

Social investing theoretically may be apolitical. Investments made by a trust fiduciary for the purpose of furthering the fiduciary’s own political agenda constitute only one form of social investing. A trustee engages in apolitical social investing, for example, when he, with much fanfare, eliminates tobacco stocks from a

89. “[T]he major groups [of the U.S. antiapartheid lobby] are working specifically on public education on South African issues, lobbying Congress for more thorough bans on commerce with and investment in South Africa. . . .” Howard, Lobbying Against Apartheid, AFR. REP., Mar.-Apr. 1988, at 40. “[T]he South African issue was understood from the beginning as American racial politics as much as foreign policy.” Martin, supra note 4, at 293.

90. Political activist Leon Wofsy stated: “As a peace activist, I work with others — as hard as all of us can — to overcome the policies and mentality of the Cold War. We seek to commit our government to joint action with the Soviet Union to stop testing and building nuclear weapons. . . .” Survival In the Nuclear Age: An Interview with Leon Wofsy, MONTHLY REV., June 1987, at 41. One author described the causal link between movements and policy: “Coalition movements . . . cause people to act on their opinions, and they cause these opinions to be seen as important. This, in turn, influences policy when conditions are right in the political structure.” Everts, Where the Peace Movement Goes When It Disappears, BULL. OF ATOMIC SCIENTISTS, Nov. 1989, at 28.

The United States Supreme Court most recently addressed issues related to political advocacy in another context in Keller v. State Bar, 110 S. Ct. 2228 (1990). There the Court noted:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

Id. at 2237.
trust's portfolio in order to publicize a voluntary private boycott of cigarette products. Of course, most real world ideological objectives will not fall neatly into either the political or the apolitical category. Almost any act can trigger a chain of events ultimately resulting in some state response. A boycott, for example, may lead to a statutory ban on the sale of tobacco products.91 Whether a trustee may engage in apolitical social investing of trust funds and whether that would compromise a settlor's speech and associational rights must be the subject of another article.

C. Under Current Law, May a Trustee Use Charitable Trust Funds for Political Purposes?

A settlor who authorizes a trustee to engage in political activity with trust property ought to be estopped from objecting to such activity. In the absence of such express or implied authorization, however, the issue is whether a trustee may use trust property to further his own political agenda. The answer depends on whether, by operation of law, the settlor retains any rights over the trust property. If so, do such rights include the right not to have the settlor's property used for political purposes? Where state action is involved, as in the case of an IOLTA program, abridgement of first amendment rights of free speech and political association may occur.92 Where state action arguably is absent, as in the case of a private university endowment trust, private tort liability may lie.93

1. Does the Settlor of an Irrevocable Trust Who Is Not a Beneficiary and Who Retains No Powers of Appointment or Administration Retain Any Right to Compel the Trustee to Carry Out the Terms of the Trust?

When a settlor reserves a beneficial interest in trust property, as is the case with a nominal amount temporarily entrusted to an attorney under an IOLTA trust arrangement, the settlor in his ca-

91. See Deveney & Bacon, Tobacco Is Facing New Attacks, Wall St. J., May 24, 1990, at 1, col. 6 (reporting that "Health and Human Services Secretary Louis Sullivan is planning to recommend curbs on the [tobacco] industry as part of a stepped-up campaign against smoking").
93. Cf. RESTATEMENT (SECOND) OF TORTS § 865 (1979) (stating that "[o]ne who by a consciously wrongful act intentionally deprives another of a right to vote in a public election or to hold public office or who seriously interferes with either of these rights is subject to liability to the other").
pacity as a beneficiary has a right to compel enforcement.  

When the settlor does not expressly retain an interest in or power over the trust property, however, it has been assumed dogmatically that neither the settlor nor the settlor's representatives can compel performance of the trust or redress a breach.  

This position, however, finds little judicial authority. The position, at first glance, appears to take support from the Restatement (Second) of Trusts, which provides that neither a settlor nor his heirs can enforce the trust or remedy a breach unless the settlor retained an interest in the trust property.  

Upon reflection, however, one realizes that although this section might apply to the settlor of a trust with a general charitable purpose, it does not apply to the settlor of either a noncharitable personal trust or a trust with a limited charitable purpose.  

The settlor of a personal or limited charitable purpose trust retains a vested reversionary interest in the trust property. The reversionary interest exists because of the possibility that the trust may fail at some future time for want of a purpose or beneficiary.  

Upon the failure of the trust, a resulting trust would arise in favor of the settlor or the settlor's estate.  

Thus, the Restatement

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94. See Ritchie, Alford & Effland, supra note 27, at 1335.
95. See Note, supra note 19, at 1370-71.
96. The pertinent section of the Restatement provides:
Neither the settlor nor his heirs or personal representatives, as such, can maintain a suit against the trustee to enforce a trust or to enjoin or obtain redress for a breach of trust. Where, however, the settlor retains an interest in the trust property, he can of course maintain a suit against the trustee to protect that interest. Thus, if the settlor is also a beneficiary of the trust, or if he has an interest by way of resulting trust, or if he has reserved power to revoke the trust, he can maintain a suit against the trustee to protect his interest.

RESTATEMENT (SECOND) OF TRUSTS § 200 comment b (1959).

97. The Massachusetts Supreme Court defined the doctrine of cy pres in terms of an alternative to the resulting trust:

[W]hen a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the [settlor], and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the [settlor] becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, [as would be the case with a noncharitable personal trust or a charitable trust with a limited charitable purpose], but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the [settlor's] particular directions as possible to carry out his general charitable intent.


suggests that a reversionary interest in trust property gives many settlors sufficient standing to compel trustees to carry out the provisions of their trusts.

A note in the 1949 Harvard Law Review took a different approach to support the proposition that a settlor retains some right of enforcement against the trustee. That note analogized the status of the nonbeneficiary-settlor to that of a promisee under a third-party beneficiary contract. The note suggested, in view of the courts' equitable enforcement of third-party beneficiary contracts, that preventing serious abuses of the trust system required a reappraisal of the settlor's remedial rights. The reference to abuse of the trust system apparently reflected a concern that trustees and beneficiaries, or trustees and attorneys general, may conspire to subvert settlors' legitimate express or implied intentions.

Professor Gaubatz picked up this theme when he suggested that a settlor has, or ought to have, an "expectation interest" in the trustee's compliance with the express and implied terms of the trust. This interest arises out of the promise made by the trustee upon accepting the trust. According to Professor Gaubatz, if the trustee's act is such that the settlor would not have established the trust had he known what would transpire, then the settlor may attack the trustee's action "regardless of a continued economic interest in the trust."

2. Are Any Expectation Interests of a Settlor Harmed if the Trustee Uses Trust Property for Political Purposes?

Let us assume that Mrs. Smith, a vociferous advocate of either a woman's right to choose an abortion or the unborn's right to life, endowed the Smith Chair for the Study of Astrophysics at the Institute of High Technology with a large block of stock in her company. Essentially the endowment was accomplished when Mrs. Smith, as settlor, transferred the stock in trust to the governing

100. Note, supra note 19, at 1377.
101. Id.
102. Id.
103. See Ritchie, Alford & Effland, supra note 27, at 651.
105. Gaubatz articulated the criterion for a settlor's possessing an expectation interest in the trust property:

[If] the nature of the trustee's act is such that it is reasonable to assume that the grantor would not have established the trust if he had known that the act would occur, then the grantor has standing to litigate the trustee's action, regardless of a continued economic interest in the trust.

Id. at 921-22.
body of the Institute for the limited charitable purpose of furthering the study of astrophysics. Five years after the stock transfer, the Institute’s governing body, as trustee of the stock, began to diversify the portfolio, ostensibly in accordance with the prudent man rule.106 The Institute also announced at a press conference its intention to take a position on state regulation of abortion. Its position, however, was opposite to that of Mrs. Smith. The governing body would accomplish its purpose by investing or not investing the trust corpus in companies that produce medical and surgical devices used in abortion procedures. Before the announcement, no potential Institute benefactor reasonably could have expected that the governing body would exploit trust funds for political purposes. Mrs. Smith, who holds her convictions strongly, is enraged and seeks legal advice. Assuming the economic consequences of the trustee’s social investment practices are not susceptible of legal determination,107 does Mrs. Smith, as settlor, have any recourse against the governing body, as trustee, for making political statements with the trust property? The issue is whether Mrs. Smith retained any protectable expectation interest that would require the governing body, as trustee, to act apolitically in administering the trust.

If the Institute were a state agency, the social investment of the trust assets might abridge Mrs. Smith’s first amendment freedoms of speech and of political association. A similar issue arose before the United States Supreme Court in *Abbood v. Detroit Board of Education.*108 That case involved the alleged use of dues by a public employees’ union for economic, political, professional, scientific, and religious purposes.109 Payment of dues to the union was a condition of employment. Plaintiffs objected to the use of their dues for such purposes, claiming infringement of their right of political association. Plaintiffs argued that they had a right not to associate110 that was protected by the first and fourteenth amendments.111 The *Abbood* Court agreed and held that a state may not require an individual, as a condition of public employment, to relinquish rights guaranteed by the first amendment. It ordered the

106. The classic enunciation of the prudent man rule appears in Harvard College v. Amory, 26 Mass. (9 Pick.) 446, 461 (1831).
109. *Id.* at 213.
union to remit to the employees that portion of their dues allocable to the support of the union's political activity. The Court reasoned that requiring employees to make contributions for political purposes works as great an infringement of their constitutional rights as any prohibition against such contributions. The Court noted James Madison's observation that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." The Court also cited Thomas Jefferson's warning that "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."

Turning back to Mrs. Smith's case, although taxpayers may be compelled to support governmental programs that they oppose, one would be hard pressed to find that Mrs. Smith's case falls into that category. Thus, assuming some substantial state involvement in the trust's administration, one reasonably could argue that Mrs. Smith's first amendment speech and associational rights have been abridged even more severely than those of the Abood plaintiffs. The Abood plaintiffs at least had a choice—albeit a constitutionally unacceptable one—regarding the political use of their money. The abridgement was not absolute because they could have quit their jobs. In contrast, unless Mrs. Smith has standing to vindicate her expectation interest, the abridgement of her rights is absolute. Mrs. Smith and her postmortem representatives can take no lawful nonjudicial action which would prevent the trustee from exploiting the trust property for political purposes.

In the absence of state involvement in the trust's administration, the governing body of the Institute, as trustee, may be liable in tort. This liability emanates in part from Mrs. Smith's common law right to engage in political activity. The Restatement (Second) of Torts acknowledges the existence of a private civil wrong of inter-

113. Id. at 234, 235 n.31 (quoting J. Madison, The Writings of James Madison 186 (Hunt ed. 1901)).
114. Id. at 235 n.31; (quoting I. Brant, James Madison: The Nationalist 354 (1948)).
ference with the right to vote. Furthermore, the negative phrasing of the first amendment, with its focus on state action, presupposes the existence of certain common law political rights. Arguably, tortious interference with common law political rights should encompass tortious interference with the right to associate or not associate for political purposes. Such interference should be actionable even without state action. If Mrs. Smith has a right, she deserves a remedy.

V. RECOMMENDATIONS AND OBSERVATIONS

A. IOLTA

1. Survey of Political Uses

The author lacked the financial resources needed to acquire enough unprocessed data relating to the national IOLTA income stream to calculate the proportion of the stream that subsidizes civil legal representation, class actions, rights-limiting legislation, and other activities that fall outside the spirit of the preamble to the Statute of Charitable Uses. This data probably cannot be extrapolated from information currently on the public record. The typical disclosure statement of a nonprofit organization, for example, does not reveal much about what portion, if any, of an IOLTA grant directly or indirectly supports efforts to solicit and certify plaintiffs in a class action. The IOLTA promotional literature itself, however, suggests that at least some portion of the IOLTA income stream is directed to that purpose. A survey of political uses of the national IOLTA income stream, conducted by an independent, nonpartisan body constituted especially for that purpose, would be helpful. Such a survey would provide context and perspective for anyone wishing to pursue the first amendment and fiduciary legal issues addressed in this article.

2. Full and Fair Advance Disclosure

Regardless of whether such a systematic, independent, nonparti-

117. See Restatement (Second) of Torts § 865 (1979).
118. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
119. See Ashby v. White, 92 Eng. Rep. 126 (K.B. 1702). Of course, whether the Institute is liable in damages to Mrs. Smith for interfering with her rights of political association remains unclear. Surely, however, Mrs. Smith is entitled to injunctive relief.
120. See supra notes 72-74 and accompanying text.
121. See supra notes 8-9 and accompanying text.
san survey is conducted and its results published, a lawyer remains charged with protecting the interests of his client in matters arising out of the lawyer-client relationship. IOLTA is such a matter. The literature generated by IOLTA administrators, however, falls just short of advocating that lawyer-trustees conceal from their settlor-beneficiary clients information regarding recipients of IOLTA income grants. Repeatedly, the lawyer-trustee is assured that, unless asked, he has no duty to disclose such information. The pronouncements of IOLTA bureaucracies notwithstanding, a lawyer-trustee who participates, voluntarily or by compulsion, in an IOLTA program has a fiduciary, ethical, and perhaps moral obligation to ascertain the ultimate recipients of income from the IOLTA pool. The lawyer-trustee also has a duty to fully inform his settlor-beneficiary client of any possible political uses of that income, despite the “nominal” character of the client’s temporary contribution to the pool. A lawyer-trustee who fails to reveal, until asked, his compelled or voluntary involvement in matters that affect a client’s rights of free speech and political association comes perilously close to engaging in behavior inappropriate and unbecoming of a person who occupies a position of trust.

3. Accountability

As a matter of state trust law, the IOLTA system is accountable to clients, who are not only settlors but also beneficiaries, for the administration of the IOLTA income stream. As a practical matter, there can be no effective independent accountability in the administration of IOLTA programs that operate by judicial fiat. Such programs might not be subject to, for example, Freedom of Information Act requests or even the normal processes of discov-

122. For example, the Massachusetts Bar Association IOLTA Committee, in a pamphlet distributed to members of the Massachusetts Bar, addressed the issue of disclosure.

[Q] Must clients receive notice of our enrollment in the IOLTA Program?

[A] No notice is required. Nor do clients have any decision to make as to the destination of funds which cannot be placed at interest for them. However, discussions with clients will continue to include matters traditionally raised in a lawyer’s determination of whether a client’s deposit justifies placement in an interest-bearing account. There is no prohibition against a lawyer or a firm advising all clients of the existence and purposes of IOLTA.

IOLTA COMMITTEE, MASS. BAR ASS’N, IOLTA: ALL LAWYERS MUST COMPLY BY JANUARY 1, 1990 (copy on file with the author); cf. Indiana State Bar Petition, supra note 36, at 314 (expressing dismay at the fact that most IOLTA programs do not require disclosure to the client).

123. Id.

124. See supra note 83 and accompanying text.

125. See supra note 84 and accompanying text.
ery. Therefore, whether a client has a remedy in the face of unauthorized political exploitation of IOLTA income is an issue that needs further exploration.

**B. Social Investing**

1. **Full and Fair Disclosure**

   Each prospective trustee who intends to practice social investing for political purposes should disclose fully all social investing principles and practices to a prospective settlor-benefactor. Otherwise, the trustee's exploitation for political purposes of property voluntarily transferred by the settlor-benefactor would constitute a judicially enjoinable invasion of the settlor-benefactor's expectation interest. Unless the settlor-benefactor reasonably could have expected that the trustee would undertake such activity, there is a breach of trust.

2. **Express Language**

   With respect to charitable gifts in trust, an attorney general is a politician vested with prosecutorial and enforcement discretion. Thus the attorney general cannot be relied upon to respond to a settlor-benefactor's pleas to take action against a trustee of a charitable trust who is using the settlor-benefactor's gift to pursue the trustee's own political objectives, particularly when the trustee and the attorney general share the same objectives. Therefore, a prospective settlor-benefactor might consider having counsel insert into the governing trust instrument a provision that reserves to the settlor-benefactor and his postmortem designees the right to direct the trustee to cease using the trust property for political purposes. The settlor-benefactor might also consider allocating to himself and his postmortem designees sole responsibility for reasonably determining what activity will be deemed political in nature for purposes of the trust's administration.

   Such a provision should not violate public policy because engaging in nonincidental political activity falls outside the charter or authority of most, if not all, charitable entities. Moreover, the recommended provision should not render a nonfraudulent transfer incomplete for income, gift, or estate tax purposes. Such a transfer also should not be susceptible to attack either by the set-

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lor's surviving spouse or by the settlor's inter vivos or postmortem creditors because the provision would not limit the exercise of the trustee's lawful administrative and discretionary authority.\(^{128}\)

VI. CONCLUSION

The use of a client's money for political purposes,\(^{129}\) no matter how nominal the sum, under a state-authorized or state-mandated IOLTA program unconstitutionally abridges the client's rights of free speech and political association. The abridgement occurs unless the client, after full and fair disclosure, gives express permission for such use. The investment of a benefactor's charitable gift in furtherance of political ends, a form of social investing, without consent, violates first amendment rights of free speech and political association if state action is involved. Where no state action is involved, such use arguably may be enjoined as a tortious act that interferes with the benefactor's rights of free speech and political association.

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129. Particularly for purposes relating to civil legal representation and law reform involving substantive rights and privileges.