

Race and Sex Discrimination in Charitable Trusts

James W. Colliton

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Recommended Citation

Colliton, James W. (2003) "Race and Sex Discrimination in Charitable Trusts," *Cornell Journal of Law and Public Policy*: Vol. 12: Iss. 2, Article 2.

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RACE AND SEX DISCRIMINATION IN CHARITABLE TRUSTS

James W. Colliton†

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INTRODUCTION

This article argues that charitable trusts that discriminate on the basis of race or sex are invalid and should not be enforced. It reaches this

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conclusion on two grounds. First, courts and public officials are so deeply involved with the administration of all charitable trusts that there is enough state involvement in discriminatory charitable trusts that they violate the Equal Protection Clause of the Fourteenth Amendment. Second, discriminatory trusts are contrary to public policy and should not be enforced under traditional trust law.

Courts have traditionally viewed charitable trusts as private arrangements that may discriminate on the basis of race, sex, or other characteristics, provided that public officials are not trustees.¹ Courts have held that charitable trusts administered by private parties are valid and do not violate the Equal Protection Clause.² Additionally, the courts generally have refused to invalidate discriminatory charitable trusts on public policy grounds.³

But the law is changing. Recent cases have refused to enforce discriminatory charitable trusts, although the reasoning of these cases is strained or nonexistent. The trend toward the denial of enforcement of discriminatory trusts is fitful, sporadic, uncoordinated, and unacknowledged.

This article contends that the law is in a transition from generally upholding discriminatory charitable trusts that have no direct state administration to generally invalidating discriminatory charitable trusts, regardless of whether state officials have a direct role in their administration. It asserts that this transition represents the correct conclusion arrived at from the premises of the Equal Protection Clause of the Fourteenth Amendment and the public purpose doctrine of state charitable trust law.

The current inclination of courts not to enforce discriminatory trusts has led to inconsistencies. Although the recent cases do not specifically hold that all racially discriminatory trusts are invalid, no court has upheld a racially discriminatory trust since 1975.⁴ There is little reasoning in these cases, but recent cases are consistent in denying enforcement. Sexually discriminatory charitable trusts, on the other hand, have come under attack in recent years, but the results have been mixed. With some exceptions, sexually discriminatory trusts have been upheld. Even though intellectual consistency requires charitable trusts that discriminate

¹ *In re Estate of Wilson*, 452 N.E.2d 1228 (N.Y. 1983); *First Nat'l Bank v. Danforth*, 523 S.W.2d 808 (Mo. 1975), *cert. denied sub nom. Lakeside Hosp. Ass'n v. First Nat'l Bank*, 421 U.S. 1016 (1975).

² See *infra* note 3 and accompanying text. Trusts that are administered by public officials, however, may not discriminate on the basis of race or sex. See *infra* Part I.C.1.

³ See *infra* Part II.B.

⁴ The last cases to uphold discriminatory trusts are *First Nat'l Bank v. Danforth*, 523 S.W.2d 808 (Mo. 1975), *cert. denied sub nom. Sutt v. First Nat'l Bank*, 421 U.S. 992 (1975), and *Lakeside Hosp. Ass'n v. First Nat'l Bank*, 421 U.S. 1016 (1975).

on gender to be treated the same as racially discriminatory trusts, they have not been. The cases refusing to enforce both varieties of discriminatory charitable trusts are correct, even if their reasoning is disingenuous or nonexistent. This article contends that there are separate constitutional and common law trust doctrines that provide an intellectual basis for the invalidation of discriminatory trusts.⁵

I. THE CURRENT LAW

A. RACIALLY DISCRIMINATORY CHARITABLE TRUSTS

There are two kinds of racially discriminatory trusts: those that have public officials directly involved in their administration as trustees and those that do not. The case law is consistent in holding that direct administration of discriminatory trusts by public officials is state action that violates the Fourteenth Amendment.⁶ In the case of racially discriminatory charitable trusts that are administered by public officials, either the public officials or the discriminatory provisions must be removed in order for the trust to be valid. The law on this is clear.

The validity of racially discriminatory charitable trusts that are not administered by public officials is much less clear. Although some cases give lip service to the idea that there is no constitutional problem in the operation of these trusts,⁷ every reported case decided in the past twenty-five years has refused to enforce the racially discriminatory requirement. Courts, litigants, and attorneys general seem quite unwilling both to enforce racially discriminatory trusts and to admit that the law prohibits them from enforcing them. The courts now uniformly refuse to enforce these trusts, but no court has directly declared that these trusts are unenforceable. The time has come for courts to declare that racially discriminatory charitable trusts are not enforceable.

The change in the law from allowing the enforcement of racially discriminatory trusts to refusing enforcement has not come with a single

⁵ Steven R. Swanson argues that legislation prohibiting discrimination in trusts would also be a solution to the problem of discriminatory trusts. Steven R. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 U. PITT. L. REV. 153 (1986). In his 1986 article, Swanson outlines a possible legislative solution based on the assumption that "traditional trust law and the Fourteenth Amendment provide inadequate solutions." *Id.* at 157. Despite the logic of Swanson's suggestions, legislatures have shown little interest in enacting statutes that prohibit discrimination. In any event, as time goes on, there is reason to be more optimistic that the courts will eventually prohibit race and sex discrimination in charitable trusts without the help of statutes. *But see* Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp., 797 A.2d 746 (Md. 2002).

⁶ This result is required by the Supreme Court decisions in *Evans v. Newton*, 382 U.S. 296 (1966); *In re Girard Coll. Trusteeship*, 138 A.2d 844 (Pa. 1958), *cert. denied*, 357 U.S. 570 (1958); and *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 989 (1957).

⁷ *See, e.g.*, *Wooten v. Fitz-Gerald*, 440 S.W.2d 719 (Tex. Civ. App. 1969); *In re Will of Potter*, 275 A.2d 574 (Del. Ch. 1970).

landmark case or series of cases. Rather, it has come in a series of cases that refuse to enforce racially restrictive charitable trusts for a variety of stated or unstated reasons. The reasoning of the cases is varied, inconsistent, and sometimes nonexistent, but the results are consistent. Given the steady rejection of racially discriminatory trusts, a court could simply declare that all racially restrictive charitable trusts are unenforceable under current law.

The law concerning racially discriminatory charitable trusts has been profoundly influenced by two series of cases, both involving charitable entities with substantial public involvement. In the first series of cases, the *Girard College* cases, an institution was established to provide for the training and care of "poor male white orphan children."⁸ The second landmark series of cases, *Evans v. Newton*⁹ and *Evans v. Abney*,¹⁰ involved a city as trustee operating a park for white people only. The trusts in both of these situations managed entities that were essentially public. These cases firmly establish the rule that the direct operation of discriminatory charitable trusts by public officials violates the Equal Protection Clause of the Fourteenth Amendment. However, they do not provide clear answers when public officials do not administer discriminatory charitable trusts.

The *Girard College* cases involved a trust established in 1831 for white, male orphans, naming the city of Philadelphia as trustee.¹¹ In a brief opinion, the U.S. Supreme Court held that the refusal to admit non-white children violated the Fourteenth Amendment.¹² The Court held that the board that operated Girard College was an agency of the state of Pennsylvania that was forbidden from engaging in race discrimination.¹³

The Supreme Court of Pennsylvania read the U.S. Supreme Court decision as not invalidating the trust but merely requiring that private trustees administer the trust.¹⁴ Accordingly, the Pennsylvania Supreme Court affirmed the orphan's court substitution of private trustees and refused to order the admission of black children.

The final chapter in the *Girard College* cases came with the decision of the Third Circuit Court of Appeals in *Pennsylvania v. Brown*,¹⁵ holding that there was impermissible state involvement in the Girard College trust. The court reached the conclusion that "the displacement of

⁸ *In re Girard Coll. Trusteeship*, 138 A.2d 844, 855 (Pa. 1958), *cert. denied*, 357 U.S. 570 (1958).

⁹ 382 U.S. 296 (1966).

¹⁰ 396 U.S. 435 (1970).

¹¹ *See supra* note 5.

¹² *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230 (1957).

¹³ *Id.* at 231.

¹⁴ *See supra* note 6.

¹⁵ *Pennsylvania v. Brown*, 392 F.2d 120 (1968).

the City Board by the Commonwealth's agent and the filling of the Girard Trusteeships with persons selected by the Commonwealth and committed to upholding the letter of the will . . . pushed the College right back into its old and ugly unconstitutional position."¹⁶ The state court's appointment of replacement trustees was also state action under the reasoning of *Shelley v. Kraemer*,¹⁷ because it involved the state court's enforcement of race discrimination. Additionally, the court pointed out that the state had been involved for 127 years in the administration of the trust.¹⁸

The second landmark series of cases was *Evans v. Newton*¹⁹ and *Evans v. Abney*.²⁰ These cases involved a testator whose will gave property to the city of Macon, Georgia, to be used as a park for white people only. The city resigned as trustee, and the Georgia court appointed three individuals as new trustees. The U.S. Supreme Court refused to accept the proposition that the trust had become private with the resignation of the city as trustee and, therefore, could continue operation as a private entity following the will's discriminatory provisions. The park had been serving a public function for many years. The Court held that there had been a firmly established tradition of municipal control and service, comparing it with a police or fire department. It held that substitution of private trustees was not sufficient to move "this park from the public to the private sector."²¹

However, even though the Court held that the facts in *Evans v. Newton* violated the Fourteenth Amendment, it stated that "[i]f a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered."²² This litigation ended with U.S. Supreme Court decision in *Evans v. Abney*.²³ The Court affirmed the decisions of the Georgia courts that the trust had failed and that the property should revert to

¹⁶ *Id.* at 125.

¹⁷ 334 U.S. 1 (1948). See *infra* Part II.D. for discussion of the application of *Shelley* to discriminatory trusts.

¹⁸ *Brown*, 392 F.2d at 124.

¹⁹ 382 U.S. 296 (1966).

²⁰ 396 U.S. 435 (1969).

²¹ *Newton*, 382 U.S. at 301.

²² *Id.* at 300. See also *In re Will of Potter*, 275 A.2d 574 (Del. Ch. 1970). In *Potter*, the court stated:

There seems to be no doubt, however, but that as a matter of state trust law, a testator or trustor may cause the creation of a private trust for the benefit of one race just so long as the state does not become so involved in the affairs of such a legal entity as to run afoul of the constitutional guarantees of the [E]qual [P]rotection [C]lause of the Fourteenth Amendment to the Constitution of the United States.

Id. at 579.

²³ 396 U.S. 435.

the heirs of the testator.²⁴ The Court also affirmed the Georgia court's refusal to reform the trust and eliminate the racial restrictions by use of the *cy pres* doctrine.²⁵ The final result was destruction of the charitable trust and reversion of the property to private ownership.²⁶

Evans v. Newton and the *Girard College* cases provide clear guidance in some situations but leave others unresolved. They have firmly established that it is unconstitutional for public officials to administer discriminatory trusts.²⁷ In contrast to *Evans v. Abney*, however, most cases allow the trust to continue in existence, either removing the public officials from trust administration or removing the discriminatory provisions from the trust.

However, both of these situations involved entities that were largely public in character. The orphanage in the *Girard College* cases had been run as a public institution for more than a century. The park in *Evans v. Newton* had been run by the city of Macon as a public park for many years. The cases provide little guidance when the charitable trust does not have an openly public nature or public officials administering it. For example, a typical problem trust has a private person or institution as trustee of a trust that is to provide scholarships for white students only. Such a trust does not have the public nature of the entities or the public administration that were involved in *Evans v. Newton* and the *Girard College* cases. Accordingly, the *Girard College* cases and *Evans v. Newton* do not provide clear guidance in such cases.

B. RECENT RACE DISCRIMINATION CASES

Traditionally, courts have upheld racially discriminatory charitable trusts not administered by state officials on the theory that they are private arrangements that do not involve state action.²⁸ Provided that government officials are not trustees and do not participate in the

²⁴ *Abney*, 396 U.S. at 445-47.

²⁵ *Abney*, 396 U.S. at 447. "The rule of *cy-pres* is a rule for the construction of instruments in equity, by which the intention of the party is carried out *as near as may be*, when it would be impossible or illegal to give it literal effect." BLACK'S LAW DICTIONARY 387 (6th ed. 1990).

²⁶ *Id.* at 447-48. While the law represented by these cases appears to have been validly applied, the result is not a good one. A charitable testator left a substantial piece of property for the benefit of a large group of people, but the property ended up in the hands of the testator's heirs. The testator affirmatively decided not to give the property to his family, but they ended up with it. He made the gift with the intention that the property would be used by a large segment of the public, but the property ended up benefiting none of the public.

²⁷ *Conn. Bank and Trust Co. v. Johnson Mem'l Hosp.*, 294 A.2d 586 (Conn. Super. Ct. 1972) (applying *Evans v. Newton* and *Girard College* in reaching its decision).

²⁸ *First Nat'l Bank v. Danforth*, 523 S.W.2d 808 (Mo. 1975), *cert. denied sub nom. Lakeside Hosp. Ass'n v. First Nat'l Bank*, 421 U.S. 1016 (1975).

administration of discriminatory trusts, the traditional case law holds that there is no constitutional or public policy impediment to enforcement.

First National Bank v. Danforth,²⁹ decided in 1975 by the Missouri Supreme Court, appears to be the last case upholding a racially discriminatory charitable trust. The trust in *Danforth* provided for the support of hospital patients "born of white parents in the United States of America."³⁰ The Court directly confronted the argument that the trust was invalid because it violated the Fourteenth Amendment. It found no constitutional violation because there was no state action. Although racially discriminatory trusts have been the subject of litigation in a number of later cases, none has enforced the trusts, and none has followed *Danforth*.³¹

C. CASES REFUSING TO ENFORCE RACIALLY DISCRIMINATORY CHARITABLE TRUSTS

Since *Danforth*, courts have decided a number of cases involving racially discriminatory charitable trusts. All of these recent cases have refused to enforce the discriminatory provisions of the trusts, relying on a variety of legal theories or no theory at all.

1. *Trusts Involving Public Officials*

A number of cases involve racially discriminatory charitable trusts that have a public official as trustee or that holds other administrative power over the trust. The law is clear that these trusts may not be enforced. They violate the Equal Protection Clause under the reasoning of the *Girard College* cases and *Evans v. Newton* because they unlawfully involve the state in discrimination. Faced with these facts, a court has three possible courses of action. First, it can hold that the trust is completely void and return the trust assets to the heirs of the settler, as was done in *Evans v. Abney*. Second, the court can remove the public officials from the administration of the trust and allow it to continue as a private discriminatory charitable trust, but no recent cases have followed this course.³² Finally, the court can remove the discriminatory provision

²⁹ *Id.*

³⁰ *Id.* at 812. The trust limited the support to patients at "Protestant Christian Hospitals" in Jackson County, Missouri. *Id.* The court held that the religious restrictions on the hospitals that could use the funds did not invalidate the trust. *Id.* at 820. The term "Protestant Christian Hospitals" was not ambiguous, and the religious limitations on the hospital beneficiaries did not violate the Equal Protection Clause. *Id.* at 818, 820-21.

³¹ Even though no cases have followed *Danforth*, none has explicitly disavowed its reasoning.

³² *But see In re Estate of Wilson*, 452 N.E.2d 1228 (N.Y. 1983) (removing public officials from the administration of gender discriminatory trusts).

from the trust and allow it to continue as a non-discriminatory charitable trust.

The first possible course for a court evaluating a discriminatory trust administered by public officials is to terminate the trust and transfer the assets to the creator or the creator's heirs. Such was the case in *Connecticut Bank and Trust Co. v. Johnson Memorial Hospital*.³³ In that case, the court invalidated a trust created to provide medical care for "members of the Caucasian race."³⁴ The court refused to revise the trust to eliminate the offending state action. Rather, it invalidated the trust and returned the trust assets to the testator's estate, noting that the will of the testator provided that the property was to go to the residue of her estate if operation of the trust violated any law.³⁵ Although terminating the trust and returning the assets to the testator's estate is often a reasonable alternative, courts almost never use it.³⁶

The second course of action when public officials are involved in the administration of a discriminatory charitable trust is simply to remove the public officials from the administration of the trust and allow it to go forward as a private discriminatory trust without state action. Although this has been done with gender discriminatory trusts,³⁷ no recent case has followed this course in a racially discriminatory trust. If we assume, as old cases did, that private discriminatory trusts are valid, removal of the public officials would be completely effective to eliminate

³³ 294 A.2d 586 (Conn. 1972).

³⁴ *Id.* at 588.

³⁵ *Id.* at 593. Many cases have found general charitable intent allowing courts to apply the *cy pres* doctrine and remove the discriminatory requirements in charitable trusts. See *Daggett v. Children's Ctr.*, 266 A.2d 72 (Conn. Super. Ct. 1970); *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir. 1968); *Smith v. Moore*, 225 F. Supp. 434 (E.D. Va. 1963), *aff'd* 343 F.2d 594 (4th Cir. 1965); *Dunbar v. Bd. of Trustees of Clayton Coll.*, 461 P.2d 28 (Colo. 1969); *In re Will of Potter*, 275 A.2d 574 (Del. Ch. 1970); *Howard Sav. Inst. v. Peep*, 170 A.2d 39 (N.J. 1961); *In re Estate of Hawley*, 223 N.Y.S.2d 803 (N.Y. Sur. Ct. 1961); *Wooten v. Fitz-Gerald*, 440 S.W.2d 719 (Tex. Civ. App. 1969); *Coffee v. Rice Univ.*, 408 S.W.2d 269 (Tex. Civ. App. 1966); *Trammell v. Elliott*, 199 S.E.2d 194 (Ga. 1973); *Wachovia Bank & Trust Co. v. Buchanan*, 346 F. Supp. 665 (D.D.C. 1972).

The court noted in *Connecticut Bank and Trust Co.* that the cases allowing the trusts to continue without the discriminatory provisions did not contain a gift over provision as existed in the trust in question. *Conn. Bank & Trust Co.*, 294 A.2d at 591. *But see* *Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp.*, 797 A.2d 746 (Md. 2002).

³⁶ The court in *Conn. Bank and Trust Co.* noted only two cases that returned the trust assets to the testator's estate, *Evans v. Abney*, 396 U.S. 435 (1970), and *La Fond v. Detroit*, 98 N.W.2d 530 (Mich. 1959). *Conn. Bank & Trust Co.*, 294 A.2d at 591.

Generally, these cases involve the question of whether the assets should be used for revised charitable purposes or should go to the testator's relatives. In each case, a generous testator decided to use the property for charitable purposes and not to give the property to family members. It is not surprising that judges often try to find a way to let the assets be used for charitable purposes rather than transferring them to distant and perhaps greedy relatives of the testator.

³⁷ *In re Estate of Wilson*, 452 N.E.2d at 1237.

the prohibited state action in racially discriminatory trusts. Courts in recent years seem loath to do it, however.³⁸ The refusal to remove the state actors, at least in race discrimination cases, may indicate that courts simply are not willing to permit the discriminatory trust to continue even without direct state supervision.³⁹

The third approach that courts use with respect to racially discriminatory trusts administered by public officials is to eliminate the discriminatory provisions from the trust and allow it to continue to operate. Elimination of the discriminatory provisions does not eliminate the role of the state officials. It just makes their function constitutionally acceptable. Most of these cases hold that the enforcement of the discriminatory trust is impossible and apply the *cy pres* doctrine to eliminate the offending discriminatory provision.⁴⁰

2. *Racially Discriminatory Charitable Trusts Not Administered by Public Officials*

Most discriminatory charitable trusts are not administered by public officials. The issues raised by these trusts are more difficult, and the courts' reasoning with respect to their validity is not consistent. As with racially discriminatory trusts administered by state officials, recent decisions refuse to enforce the racial provisions. Some refuse enforcement on vaguely stated public policy or changed circumstances grounds. A few directly address the constitutional problems of judicial enforcement of these trusts. Other courts simply assume that the trusts are not enforceable and proceed on that basis.

A few cases eliminate racial restrictions from trusts by use of the *cy pres* doctrine on the theory that it is impossible or impractical to operate the trust with the racial restrictions. For example, in *Coffee v. Rice Uni-*

³⁸ The thesis of this article is that the conclusions in cases that refuse to enforce discriminatory trusts are correct and that there are legal justifications for these conclusions. But rather than directly holding that racially discriminatory charitable trusts are not valid, the courts find ways to remove the offending provisions of the trusts. These decisions give the impression that the judges are simply unwilling to sanction racial discrimination and grasp any tool at hand to avoid continuation of a racially discriminatory trust.

³⁹ *But see In re Estate of Wilson*, 452 N.E.2d at 1232 (N.Y. 1983).

⁴⁰ *See Trammell*, 199 S.E.2d at 199. In this case, the trust created scholarships for white students at a state university. *Id.* at 197. The involvement of the university was impermissible state action. *Id.* Removal of the discriminatory provision by use of the *cy pres* doctrine eliminated the problem. *Id.* at 198-99. In order to apply *cy pres*, the court had to determine that the operation of the charitable trust without the discriminatory trust was consistent with the general charitable intent of the testator. *Id.* *See also In re Will of Potter*, 275 A.2d 574; *Wachovia Bank & Trust Co.*, 346 F.Supp. 665; *Colin McK. Grant Home v. Medlock*, 349 S.E.2d 655 (S.C. Ct. App. 1986). *But see Hermitage Methodist Homes of Va., Inc. v. Dominion Trust Co.*, 387 S.E.2d 740 (Va. 1990) (refusing to apply *cy pres*).

versity,⁴¹ the Court of Civil Appeals of Texas upheld a jury verdict allowing the trustees of Rice University to deviate from its founding document and admit nonwhite students.⁴² According to the court, it was impossible or impractical for a university to discriminate racially.⁴³ The race discrimination, according to this court, would interfere with recruitment of faculty and limit research and the acquisition of grants.⁴⁴ The result of this case is reasonable, but its expressed reasoning is weak. Operation of a racially discriminatory university would not be impossible or impractical.⁴⁵ It would be merely embarrassing and inconvenient. This decision would have been more persuasive if the court had held that trusts that racially discriminate are simply unacceptable in quasi-public institutions such as universities.

Other cases reform trusts to eliminate racial limitations without clearly explaining the justifications for their conclusions. For example, *Grant Home v. Medlock*⁴⁶ involved a home established "for Elderly white Presbyterians of Charleston, South Carolina," to be built at a particular location.⁴⁷ The heirs of the testator asserted that the trust should be dissolved and the assets distributed to them because of the racial restriction and because the specified location of the home was no longer practical.⁴⁸ The trustees had agreed that the racial restriction was invalid but wanted the trust to continue without the racial restriction and with the home in another location. The Court of Appeals of South Carolina eliminated the racial restriction and allowed the trust to continue to function. The court simply stated that society has changed with respect to race relations and referred to the fact that discrimination in housing is illegal. It may be that the court and all of the parties in this case realized that the law has, in effect, changed to prohibit enforcement of racially discriminatory trusts even though there is no definitive authority requiring this result.

⁴¹ 408 S.W.2d 269, 287 (Tex. Civ. App. 1966). See also *Estate of Vanderhoofven v. Biechner*, 18 Cal. App. 3d 940, 948 (Cal. Ct. App. 1971) (implying that *cy pres* should be applied to eliminate the requirement that assets be used only for a "white" engineering school); *Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp.*, 797 A.2d 746, 754 (Md. 2002).

⁴² *Coffee*, 408 S.W.2d at 287.

⁴³ *Id.*

⁴⁴ *Id.* at 286.

⁴⁵ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–81 (1983). In *Bob Jones University*, the university was quite willing and able to continue operation as a racially discriminatory institution. *Id.* at 581.

⁴⁶ 349 S.E.2d 655 (S.C. Ct. App. 1986).

⁴⁷ *Id.* at 656.

⁴⁸ *Id.* at 657. The court in this case was confronted with the typical situation of distant relatives of a long-dead and generous testator trying to obtain the assets that the testator intended to be devoted to charitable uses. This case is an example of how courts allow the trust to continue without the offending provision.

Another typical case refusing enforcement is *Lockwood v. Killian*,⁴⁹ a case involving a trust that provided scholarships for needy and deserving Congregationalist Caucasian boys who graduated from high schools in Hartford County, Connecticut. Since there were too few people who satisfied these criteria, the scholarship fund instituted an action requesting instructions. Having previously decided that there were no constitutional objections to this trust,⁵⁰ the Connecticut Supreme Court modified the trust to eliminate the sex and race restrictions but allowed the religious and other limitations to remain in force.⁵¹ Although the court could have expanded the pool of qualified beneficiaries in a variety of ways, the court chose to eliminate the race and sex limitations.⁵² As is typical in these cases, the court did not explicitly hold that racially (or sexually) discriminatory trusts are invalid,⁵³ but managed to refuse to enforce the discriminatory provisions.⁵⁴

The most recent case refusing to enforce a racially discriminatory trust is *Home for Incurables of Baltimore City v. University of Maryland Medical System Corporation*,⁵⁵ decided by the Maryland Court of Appeals in 2002. In this case, the testator's will created a trust providing trust income to four individuals for life.⁵⁶ On the death of the last income beneficiary, the trust assets were to go to the Keswick Home to provide accommodations for "white patients."⁵⁷ If the bequest was "not

⁴⁹ 425 A.2d 909 (Conn. 1979).

⁵⁰ *Lockwood v. Killian*, 375 A.2d 998, 1007 (Conn. 1977).

⁵¹ *Lockwood*, 425 A.2d at 914. Cf. *Hermitage Methodist Homes of Va. v. Dominion Trust Co.*, 387 S.E.2d 740 (Va. 1990), in which the Supreme Court of Virginia dealt with a trust that provided benefits for charitable organizations "so long as" the organizations provided benefits only to members of the "White Race." *Id.* at 741. If the organizations provided benefits to people who were not white, the benefits were ultimately to go to another organization with no limitations with respect to the race of people served. *Id.* at 742. The Virginia court was willing to "assume, without deciding, that the . . . racially discriminatory provisions are unconstitutional and void." *Id.* at 744. It, however, decided the case on state property law grounds by following the alternative disposition plan of the trust. *Id.* at 744. This resulted in the assets passing to the non-discriminatory beneficiary organization. *Id.* at 747.

The decision in *Hermitage Methodist Homes* has been criticized as enforcing a racially discriminatory trust by following the alternative disposition scheme of the trust. Dean Barclay, *Dead Hands and State Actors: The Racially Discriminatory Charitable Trust in Hermitage Methodist Homes*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 85 (2001). This is an intellectually consistent argument. But the most important result of this case is that all parties agreed that the racially discriminatory provisions could not be enforced.

⁵² The court could have expanded the geographical area from which beneficiaries could come; it could have eliminated the religious limitation or it could have eliminated the requirement of recent high school graduation.

⁵³ A vigorous dissent by Justice Bogdanski contended that there was state action in the participation of the attorney general and that the discriminatory provisions could not be enforced. *Lockwood*, 425 A.2d at 915 (Bogdanski, J., dissenting).

⁵⁴ *Id.* at 914.

⁵⁵ 797 A.2d 746 (Md. 2002).

⁵⁶ *Id.* at 748.

⁵⁷ *Id.*

acceptable” to the Keswick Home, the assets were to go to the University of Maryland Hospital free of any racial restriction.⁵⁸

A Maryland statute prohibited hospitals from discriminating on the basis of race,⁵⁹ which made it impossible for the Keswick Home to accept the bequest as written.⁶⁰ The Maryland Court of Appeals held that the assets should go to the Keswick Home free of the racial restriction rather than to the alternative beneficiary.⁶¹ The court believed that ordering the distribution of the assets to go to the alternative beneficiary would have been enforcement of the racially restrictive provision. The court noted that “[t]oday in Maryland, there are few if any public policies stronger than the policy against discrimination based on race or color.”⁶² Additionally, the court stated that “where a condition attached to a bequest is clearly illegal and violates a strong public policy, the illegal portion of the condition should be excised and the bequest enforced without regard for the illegal condition.”⁶³

3. *State Action by Court Enforcement*

A few cases have directly addressed the question of whether courts may enforce racially discriminatory trusts. For instance, in *Bank of Delaware v. Buckson*,⁶⁴ a Delaware court dealt with a trust administered by public officials for “white youths or young men.”⁶⁵ The court eliminated the racial restriction because the law and the racial population of the schools had changed.⁶⁶ The court noted *Shelley v. Kraemer*⁶⁷ and stated that “the Court may not advise the Trustee to reject applications from non-whites because such advice would amount to state (judicial) enforced discrimination in violation of the Fourteenth Amendment.”⁶⁸ In invalidating the discriminatory provisions, the court rested its opinion on the judicial role, rather than on the administrative role of public officials.⁶⁹ While it fell short of holding that all racially discriminatory charitable trusts are unconstitutionally unenforceable, the case appears to require that conclusion.

⁵⁸ *Id.*

⁵⁹ MD. CODE ANN., HEALTH-GEN. II § 19-355 (2000).

⁶⁰ *Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp.*, 797 A.2d 746, 747 (Md. 2002).

⁶¹ *Id.* at 756.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 255 A.2d 710 (Del. Ch. 1969).

⁶⁵ *Id.* at 713.

⁶⁶ *Id.* at 717.

⁶⁷ 334 U.S. 1 (1947). See also discussion *infra* Part II.C.4.

⁶⁸ *Bank of Del.*, 255 A.2d at 715. See also *In re Will of Potter*, 275 A.2d 574, 579 (Del. Ch. 1970) (taking a similar approach).

⁶⁹ *Bank of Del.*, 255 A.2d at 715.

*Tinnin v. First United Bank*⁷⁰ dealt with a charitable trust intended to provide loans to white college students. The court referred to *Shelley v. Kraemer* in holding that the racially discriminatory provision could not be enforced and that the trust should continue without it. However, because all parties agreed that the provision was unenforceable,⁷¹ the Supreme Court of Mississippi did not discuss the issue in depth or specifically hold that there was constitutionally prohibited state involvement.⁷² The court assumed, without objection by the parties, that the racial exclusion was unenforceable and focused on whether the trust should be terminated and the assets given to the heirs or whether the trust should continue without the offending limitation.⁷³

4. *Racially Discriminatory Trusts — The Current Law*

No court has enforced a racially discriminatory trust since 1975.⁷⁴ The reasoning that courts have used has been varied and often insubstantial. However, the cases seem to reflect a general, unstated, and possibly unrecognized feeling on the part of judges that charitable trusts are not really private and that it is not appropriate in our society to allow them to be racially discriminatory. They seem to show a general, but inadequately articulated, shift in our law away from enforcing these trusts. This general shift may be reflected in the fact that no party in a number of recent cases has been willing to argue for the validity of the discriminatory provisions. Trustees, heirs, attorneys general, and judges often agree that the discriminatory provision is invalid and move to the question of whether to reform the trust or terminate it.⁷⁵ Attorneys general, in particular, seem loath to argue in favor of the racially discriminatory provisions.⁷⁶ The refusal of attorneys general to argue for enforcement of

⁷⁰ 502 So. 2d 659 (Miss. 1987).

⁷¹ This appears to be another case in which the court and all parties realized that current law does not permit enforcement of racially discriminatory trusts even though there was no clear authority to cite for the conclusion.

⁷² See *Tinnin*, 502 So. 2d 659.

⁷³ *Id.* at 666.

⁷⁴ The last case to enforce a racially discriminatory provision is *First Nat'l Bank v. Danforth*, 523 S.W.2d 808 (Mo. 1975), cert. denied sub nom. *Lakeside Hosp. Ass'n v. First Nat'l Bank*, 421 U.S. 1016 (1975).

⁷⁵ See *Tinnin*, 502 So. 2d 659; Colin McK. Grant Home v. Medlock, 349 S.E. 655, 656–57 (S.C. Ct. App. 1986); Wachovia Bank & Trust Co. v. Buchanan, 346 F. Supp. 665 (D.D.C. 1972); *In re Will of Potter*, 275 A.2d 574 (Del. Ch. 1970); *Hermitage Methodist Homes of Va. v. Dominion Trust Co.*, 387 S.E.2d 740 (Va. 1990).

In re Will of Cram, 606 P.2d 145 (Mont. 1980), dealt with a sexually discriminatory trust with public officials having administrative responsibilities. *Id.* at 147. The Montana Human Rights Commission and the Superintendent of Public Instruction requested the court to eliminate the discriminatory provisions. *Id.* at 147–48.

⁷⁶ See, e.g., *Lockwood v. Killian*, 425 A.2d 909 (Conn. 1979); *Buchanan*, 346 F. Supp. 665; *Dunbar v. Clayton Coll.*, 461 P.2d 28, 29 (Colo. 1969). Cf. *Ebitz v. Pioneer Nat'l Bank*, 361 N.E.2d 225, 225 n.1 (Mass. 1977) (noting that the attorney general supported the female

racially discriminatory charitable trusts may reflect our current legal and social values. As a matter of policy and politics, it is unlikely that attorneys general would argue for race discrimination in any form. The law, public policy, and practical politics seem to have come together to inspire attorneys general to refuse to try to enforce race discrimination through charitable trusts.

D. SEX DISCRIMINATION

The law is much less clear with respect to sex discrimination. There are fewer sex discrimination cases than race discrimination cases,⁷⁷ and the conclusions are not consistent. There is no consensus, express or otherwise, concerning whether sexually discriminatory trusts may be enforced. Although it would be logical for sex discrimination to be treated the same as race discrimination, this has not happened. Some cases allow sexually discriminatory trusts to go forward, while others invalidate the discriminatory provisions.

In 1983 the Court of Appeals of New York decided *In re Estate of Wilson*,⁷⁸ a case dealing with two trusts, the Wilson trust and the Johnson trust, that provided scholarships for "young men."⁷⁹ The court allowed the trusts to continue but only after removing the state involvement.⁸⁰ *In re Estate of Wilson* is the most recent of the cases upholding the validity of sexually discriminatory trusts, and it may turn out to be the last. Under the terms of each trust in *Estate of Wilson*, there was substantial involvement of public officials in trust administration.⁸¹ In the Wilson trust, young men who satisfied the trust's requirements for excellence in science were to be certified for the scholarships by the superintendent of schools.⁸² The Court of Appeals affirmed the Appellate Division's decision to strike the clause in the will providing for the school superintendent's certification of the qualified candidates but allowed the gender restriction to stand.⁸³ In the Johnson trust, the scholarship recipients were to be selected by the Board of Education with the assistance of the

plaintiffs who contended that a trust providing scholarships limited to "young men" should also provide scholarships to women).

⁷⁷ Litigants have sometimes decided not to litigate the sex discrimination issue. For example, in *Estate of Zahn*, 16 Cal. App. 3d 106 (Cal. Ct. App. 1971), *cert. denied sub nom. Zahn v. Sec. Nat'l Bank*, 404 U.S. 938 (1971), a testator directed that her assets were to be used to establish a rest home for "Christian women and girls." *Id.* at 110. In trying to defeat the trust, the decedent's heirs argued that the religious restriction made the trust invalid. *Id.* at 111. They did not raise the gender discrimination issue. *Id.*

⁷⁸ 452 N.E.2d 1228 (N.Y. 1983).

⁷⁹ *Id.* at 1231.

⁸⁰ *Id.* at 1234.

⁸¹ *See id.* at 1231.

⁸² *Id.*

⁸³ *Id.* at 1237.

high school principal.⁸⁴ The Court of Appeals reinstated the Surrogate's Court's decision to retain the sex restrictions and to reform the trust by replacing the school district with a private trustee.⁸⁵ The result in *Estate of Wilson* was that both sexually discriminatory trusts were allowed to continue, but without the involvement of public officials.⁸⁶ The court in *Estate of Wilson* held that the discriminatory gender provisions in the trusts did not violate the Equal Protection Clause and were not contrary to public policy.⁸⁷

In an earlier case, *Shapiro v. Columbia Union National Bank*,⁸⁸ the Supreme Court of Missouri dealt with a trust providing scholarships for "deserving Kansas City Missouri boys" at Yale University or the University of Kansas City.⁸⁹ A bank was trustee, but officials of the University of Missouri at Kansas City,⁹⁰ a public institution, processed scholarship applications and made a "tentative award" that was subject to approval by the private trustee.⁹¹ The court held that there was no state action and that the trust could proceed with benefits limited to males.⁹²

Shapiro and *Estate of Wilson* are notable because they demonstrate the willingness of courts in the late 1970s and early 1980s to permit sex discrimination in charitable trusts. By this time, courts in similar cases involving race were searching for ways not to enforce them.⁹³ The courts appear to be more willing to permit sex discrimination in trusts than they are to permit race discrimination.

In contrast, the Supreme Court of New Hampshire dealt with gender discriminatory trusts in *In re Certain Scholarship Funds* in a different way.⁹⁴ This case involved two charitable scholarship trusts providing scholarships to male students in public high schools.⁹⁵ To be eligible for an award, the student had to be recommended by his high school principal.⁹⁶ Furthermore, one of the trusts limited the scholarships to Protes-

⁸⁴ *Id.* at 1231.

⁸⁵ *Id.* at 1237.

⁸⁶ The Supreme Court of Montana reached a similar conclusion in *In re Will of Cram*, 606 P.2d 145, 150 (Mont. 1980). The conclusions of these cases are illogical, but they are conclusions that courts have consistently made.

⁸⁷ *In re Estate of Wilson*, 452 N.E.2d at 1234.

⁸⁸ 576 S.W.2d 310 (Mo. 1978).

⁸⁹ *Id.* at 312-13.

⁹⁰ The trust instrument had been amended by court order to substitute the University of Missouri at Kansas City. *Id.* at 313.

⁹¹ *Id.* at 316.

⁹² *Id.* at 321.

⁹³ See, e.g., *Lockwood v. Killian*, 425 A.2d 909 (Conn. 1979), and *Colin McK. Grant Home v. Medlock*, 349 S.E.2d 655 (S.C. Ct. App. 1986).

⁹⁴ 575 A.2d 1325 (N.H. 1990).

⁹⁵ *Id.* at 1325.

⁹⁶ *Id.*

tant boys.⁹⁷ The school board selected the scholarship recipients on the basis of the recommendation of the principal.⁹⁸ The school board sought to have the trusts reformed to eliminate the discriminatory provisions.⁹⁹ The trial court exercised its *cy pres* powers to replace the terms "boy" and "protestant boy" in the trusts with "student."¹⁰⁰ The defendant attorney general of New Hampshire subsequently appealed.¹⁰¹ The Supreme Court of New Hampshire affirmed.¹⁰² The attorney general argued to the New Hampshire Supreme Court that the court should exercise its powers of equitable deviation, rather than *cy pres*, and eliminate the requirement of participation of public officials in the administration of the trust, as was done in *Estate of Wilson*.¹⁰³ If the attorney general had prevailed, the sexually and religiously discriminatory trust limitations would have continued under the supervision of private individuals.

Relying on the equal protection clause of the New Hampshire constitution and the state *cy pres* statute, the New Hampshire Supreme Court removed the discriminatory provisions from the trust. The court chose not to remove the public involvement and allow the discriminatory trust to continue as was done in *Estate of Wilson*. As the court saw the issue, it had to decide "whether its first priority is to end the discrimination or to preserve it by substituting a private administrative mechanism that would, if chosen by the testator, have carried no unconstitutional implication."¹⁰⁴ The court stated that "when the decision-making mechanism, as here, is so entwined with public institutions and government, discrimination becomes the policy statement and product of society itself and cannot stand against the strong and enlightened language of our constitution."¹⁰⁵

Apparently the New Hampshire court believed that it would violate its state equal protection clause to have the court reforming an unconstitutional discriminatory trust. However, it did not invalidate discriminatory trusts generally but instead stated that the appointment or reappointment of trustees in discriminatory trusts that did not have state officials involved in the administration did not violate the constitution.¹⁰⁶

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ This case is an example of the unease that government officials and trustees feel when they are required to administer discriminatory trusts.

¹⁰⁰ *In re Certain Scholarship Funds*, 575 A.2d at 1326.

¹⁰¹ It is notable that the attorney general was willing to appeal a case eliminating sex and religious provisions. By 1990 most attorneys general were quite reluctant to support racially discriminatory trusts.

¹⁰² *In re Certain Scholarship Funds*, 575 A.2d at 1329.

¹⁰³ 452 N.E.2d 1228 (N.Y. 1983).

¹⁰⁴ *In re Certain Scholarship Funds*, 575 A.2d at 1329.

¹⁰⁵ *Id.* at 1330.

¹⁰⁶ *Id.* at 1329.

Even though *Certain Scholarship Funds* rests narrowly on the state constitution and *cy pres* statute, it is important because it reflects the idea that court supervision of discriminatory trusts may, at least in some limited circumstances, constitute state action that impermissibly involves the state in discrimination. Although the case involved only sex and religious discrimination, the New Hampshire court would undoubtedly reach the same conclusion if race discrimination had been involved.

In *Ebitz v. Pioneer National Bank*,¹⁰⁷ the Supreme Judicial Court of Massachusetts affirmed a Probate Court decision that interpreted the phrase “worthy and ambitious young men” to include women in a trust providing law school scholarships.¹⁰⁸ According to the court, there was an ambiguity but the will as a whole showed that the testator “used the term ‘men’ in its generic sense, which includes women.”¹⁰⁹ Although the Probate Court and the Supreme Judicial Court refused to address equal protection issues raised by the plaintiffs and the attorney general,¹¹⁰ the Supreme Judicial Court stated that “if some ambiguity should remain, we think the declared policy of the Commonwealth (art. 106 of the Amendments to the Massachusetts Constitution) regarding equal treatment of the sexes should lead us to resolve it in favor of the plaintiffs.”¹¹¹

It is difficult to take the reasoning of the majority opinion in *Ebitz* seriously.¹¹² A simple reading of the words used in the will indicates that the testator meant what he said — that the scholarships were to be for men but not women. Why then did the court declare the startling proposition that “young men” really meant “young men and young women?” While it is inherently speculative to try to determine the “real” reasoning of a court, my impression of the holdings of the Probate Court and Supreme Judicial Court is that they simply felt it was unacceptable for a charitable trust to discriminate on the basis of sex.¹¹³ The reference to the declared policy of the Massachusetts constitution requiring equal treatment of the sexes supports this conclusion. The holding of *Ebitz* is effectively the same as if the court held the sex limitation void as contrary to public policy and used its *cy pres* or deviation powers to reform

¹⁰⁷ 361 N.E.2d 225 (Mass. 1977).

¹⁰⁸ *Id.* at 225 n.2.

¹⁰⁹ *Id.* at 227.

¹¹⁰ *Id.* at 226.

¹¹¹ *Id.* at 227.

¹¹² *See id.* (Quirico, J., dissenting).

¹¹³ However, other courts have allowed sexually discriminatory trusts to continue without the involvement of public officials. *See In re Estate of Wilson*, 452 N.E.2d 1228 (N.Y. 1983); *Shapiro v. Columbia Union Nat'l Bank*, 576 S.W.2d 310 (Mo. 1978), discussed *supra* at Part I.C.2.

the trust. In any event, a holding of invalidity because of public policy would be much easier to believe.¹¹⁴

In summary, there is no consistent approach to sexually discriminatory trusts. Sexually discriminatory trusts are not challenged as often as racially discriminatory trusts, and some courts are willing to enforce them, provided that there is no direct state involvement in the management of the trust. In my view, the opinion of the New Hampshire Supreme Court in *Certain Scholarship Funds* represents the better rationale for not allowing enforcement of a gender discriminatory trust.

II. A UNIFIED APPROACH TO DISCRIMINATORY TRUSTS

A. INTRODUCTION

The current law is fragmented and inconsistent. The courts do not generally enforce racially discriminatory trusts, although there is no consistent reasoning. Sexually discriminatory trusts are sometimes enforced. I believe that both types of discriminatory trusts represent unacceptable discrimination and that neither should be enforced, regardless of whether state officials participate directly in the operation of the trust.

There are two separate arguments compelling this conclusion. First, racially and sexually discriminatory trusts violate public policy and should not be enforced under traditional trust law. While this argument is especially strong with respect to racially discriminatory trusts, I believe that it should also apply to sexually discriminatory trusts and that neither should be enforced.

Second, racially and sexually discriminatory charitable trusts violate the Equal Protection Clause of the Fourteenth Amendment. Charitable trusts are public entities by their very nature and should not be permitted to discriminate on the basis of race or sex, regardless of whether state officials are trustees or otherwise directly administer the trusts. There is state involvement through the enforcement by state attorneys general and through the enforcement mechanisms of the courts. As noted by the New Hampshire Supreme Court, the decision-making mechanisms of charitable trusts are intimately entwined with public institutions and government.¹¹⁵ The discriminatory nature of the trusts along with the state involvement through the courts and attorneys general violate the Equal Protection Clause.

Both arguments rest on the fact that all valid charitable trusts are essentially public entities that serve public purposes. Charitable trusts

¹¹⁴ The court may have wished to base its conclusion on the narrowest possible ground — that of interpretation of the will's words rather than on the broad and unruly basis of public policy or the state and federal constitutions.

¹¹⁵ *In re Certain Scholarship Funds*, 575 A.2d 1325, 1330 (N.H. 1990).

are treated generously by the law and, because of their public nature, relieved from many of the rules that limit private trusts.¹¹⁶ For example, charitable trusts are exempt from federal income taxation.¹¹⁷ Additionally, general trust law relieves charitable trusts from many of the restrictions that apply to private trusts. They are free from the limitations of the rule against perpetuities and may last forever.¹¹⁸ They are not subject to some of the rules with respect to accumulations,¹¹⁹ those against remoteness in vesting,¹²⁰ and those against suspension of the power of alienation.¹²¹ Additionally, courts are permitted to modify charitable trusts to meet changed circumstances under the *cy pres* doctrine.¹²²

In addition, charitable trusts are public entities because they have substantial involvement with the state through the courts and attorneys general. Given the public nature of charitable trusts, they should be held to higher standards than those that apply to purely private entities. They should not be allowed to engage in race or sex discrimination. As stated by Justice Black, “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”¹²³ The creator of a charitable trust creates an entity devoted to the public good and gives up many of the privileges of private ownership. Such trusts should be governed by the standards that apply to public entities.

¹¹⁶ See *Green v. Connally*, 330 F. Supp. 1150, 1157 (D.D.C. 1971) (discussing the privileges afforded to charitable trusts), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

¹¹⁷ I.R.C. § 501(c)(3) (West 2002).

¹¹⁸ RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. e (1957); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 2.1 (1983). According to George Bogert:

The courts have refused to apply any rule limiting the duration of trusts to charitable trusts because they have felt that the social advantages of such trusts more than offset the disadvantages of permitting a donor to make provisions for the disposition of his property far into the future and to fix the status of property indefinitely.

GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 351 (2d ed. rev. 1992 & Supp. 2001).

¹¹⁹ RESTATEMENT (SECOND) OF TRUSTS § 401 cmt. k (1959); RESTATEMENT (SECOND) OF PROPERTY § 2.2(2) (1983). See also BOGERT, *supra* note 118, at § 352 (discussing the rule against accumulations).

¹²⁰ RESTATEMENT (SECOND) OF TRUSTS § 365 (1959); RESTATEMENT (SECOND) OF PROPERTY § 1.6 (1983). See also BOGERT, *supra* note 118, at § 342 (discussing the rule against remoteness of vesting).

¹²¹ See BOGERT, *supra* note 118, at § 350 (discussing the suspension of the power of alienation).

¹²² RESTATEMENT (SECOND) OF TRUSTS §§ 395–401 (1959).

¹²³ *Marsh v. Alabama*, 326 U.S. 501, 506 (1946), *quoted in Lockwood v. Killian*, 425 A.2d 909, 916 (Conn. 1979) (Bogdanski, J., dissenting).

B. PUBLIC POLICY

1. Introduction

Charitable trusts that accomplish purposes against public policy are invalid.¹²⁴ Although there are relatively few cases dealing with the issue of public policy in charitable trusts,¹²⁵ it is clear that trusts seeking to accomplish ends inconsistent with our current fundamental values are not valid.

The clearest analysis of the public policy doctrine has been in the context of the tax treatment of charities. In *Bob Jones University v. United States*,¹²⁶ the Supreme Court dealt with whether a university that had racially discriminatory admissions and other policies was exempt from federal income taxation.¹²⁷ Basing its conclusion on the common law of charitable trusts, the Court held that the university was not charitable and therefore did not qualify for the tax exemption and other benefits accorded charitable organizations.¹²⁸ In interpreting the charitable tax exemption statute, the Court stated that "entitlement to tax exemption depends on meeting certain common law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."¹²⁹ The Court explained:

¹²⁴ RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. c (1959). This comment states: "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid." This limitation on the purposes of charitable trusts is a more specific application of the rule provided for trusts generally by RESTATEMENT (SECOND) OF TRUSTS § 62, which states that "[a] trust or a provision in the terms of a trust is invalid if the enforcement of the trust or a provision would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee."

The U.S. Supreme Court announced the principle in 1861, stating that "it has now become an established principle of American law, that courts of chancery will sustain and protect . . . a gift . . . to public charitable uses, provided the same is consistent with local laws and public policy. . . ." *Perin v. Carey*, 65 U.S. (24 How.) 465, 501 (1860), cited in *Bob Jones Univ. v. United States*, 461 U.S. 574, 588 (1983). Cf. *Ould v. Wash. Hosp. for Foundlings*, 95 U.S. 303 (1877) (stating that a charitable trust is almost anything that promotes public well-being, provided that the use does not violate public policy or law).

The public policy principle is also supported by authoritative treatises. See BOGERT, *supra* note 118, at § 361; AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* § 377 (1939).

¹²⁵ See, e.g., *In re Estate of Mealy*, 204 P.2d 971 (Cal. Dist. Ct. App. 1949) (holding that a bequest to a newspaper associated with the Communist Party was not void as against public policy); *Eckles v. Lounsberry*, 111 N.W.2d 638 (Iowa 1961) (finding that a trust to promote vocal music and proper development of lungs in school children did not violate public policy).

¹²⁶ 461 U.S. 574 (1983). The majority opinion by Chief Justice Burger is a comprehensive work of scholarship on the common law of charitable trusts and taxation.

¹²⁷ Specifically, the case deals with tax-exempt status under I.R.C. § 501(c)(3). In addition, the Court decided the related issue of whether contributions to the university were tax deductible under I.R.C. § 170.

¹²⁸ *Bob Jones Univ.*, 461 U.S. at 595.

¹²⁹ *Id.* at 586.

The form and history of the charitable exemption and deduction sections of the various income tax Acts reveal that Congress was guided by the common law of charitable trusts. . . . The House Report on the Tax Reform Act of 1969 . . . stated that the § 501(c)(3) exemption was available only to institutions that served “the specified charitable purposes” . . . and described “charitable” as “a term that has been used in the law of trusts for hundreds of years.”¹³⁰

The Court went on to evaluate race discrimination in education against the common law requirement that charitable trusts must not violate public policy and concluded that charitable trust law does not permit race discrimination.¹³¹ The Court supported its conclusions by pointing out that each of the three branches of government has unequivocally taken the position that race discrimination in education violated national public policy. It noted that “[a]n unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court’s view that racial discrimination in education violates a most fundamental national public policy. . . .”¹³² Further, it pointed out that “[t]he Executive Branch has consistently placed its support behind eradication of racial discrimination,” citing the actions of presidents Truman, Eisenhower, and Kennedy.¹³³ Additionally, the Court noted, “Congress, in Titles IV and VI of the Civil Rights Act of 1964 . . . clearly expressed its agreement that race discrimination in education violates a fundamental public policy. Other sections of that Act, and numerous enactments since then, testify to the public policy against race discrimination.”¹³⁴

The Court’s reasoning in *Bob Jones University* is clear and persuasive. It demonstrates that racially discriminatory trusts are contrary to the public policy of the United States. Accordingly, a trust or other organization discriminating on the basis of race should not receive the favorable tax treatment accorded charitable organizations. Although the decision ultimately dealt with the tax status of the university, its reasoning rested squarely on common law charitable trust analysis.

¹³⁰ *Id.* at 588 n.12. In addition, the Court stated, “[w]e need not consider whether Congress intended to incorporate into the Internal Revenue Code any aspects of charitable trust law other than the requirements of public benefit and a valid public purpose.” *Id.*

¹³¹ *Id.* at 592–604.

¹³² *Id.* at 593.

¹³³ *Id.* at 594. The Court cited President Truman’s executive orders prohibiting racial discrimination in federal employment, President Eisenhower’s employment of military forces to ensure compliance with federal standards in school desegregation programs, and President Kennedy’s order prohibiting racial discrimination in the granting of federal assistance housing and related facilities.

¹³⁴ *Id.* at 594 (referring to “[o]ther sections of that Act,” such as the Voting Rights Act of 1965, Title VIII of the Civil Rights Act of 1968, and the Emergency School Aid Act of 1972).

State case law, statutes and administrative pronouncements are consistent with federal authorities in demonstrating that race and other discrimination is contrary to our public policy. Even a cursory examination of state authorities uncovers hundreds of pronouncements that race discrimination is not acceptable in a vast array of circumstances. Some state constitutions have provisions prohibiting race and other discrimination.¹³⁵ Many state statutes prohibit race and other discrimination.¹³⁶ State regulations, not surprisingly, are consistent in prohibiting discrimination.¹³⁷ State courts have also decided many cases that demonstrate that discrimination is not acceptable.¹³⁸

2. *Application of the Public Policy Trust Concept to Racially Discriminatory Trusts*

The Court in *Bob Jones University* applied state common law public policy concepts in determining that racially discriminatory entities are not charitable for tax purposes.¹³⁹ It would be anomalous for courts to apply state trust public policy concepts and conclude that such trusts are charitable for state law purposes, even though they are not charitable for tax purposes. A trust that is not charitable for federal tax purposes should also not be charitable for state law purposes. The analysis used to determine charitable status for state public policy purposes and for fed-

¹³⁵ See, e.g., CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."); ILL. CONST. art. I, § 17 ("All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property."); ILL. CONST. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."); N.Y. CONST. art. I, § 11 ("No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.").

¹³⁶ There are many such statutes in every state. See, e.g., FLA. STAT. § 27.182 (1998) (requiring state attorneys to eliminate compensation inequities based on gender or race for assistant state attorneys); OHIO REV. CODE ANN. § 125.111 (Anderson 2001) (prohibiting race, gender, and other discrimination in hiring by people performing state construction contracts).

¹³⁷ See, e.g., ALA. ADMIN. CODE r. 130-X-1-.09 (1991) (requiring people receiving state grants to comply with federal anti-discrimination laws); IND. ADMIN. CODE tit. 210, r. 3-1-15 (1992) ("Inmates shall not be subject to discrimination based on race[,] . . . sex" or other characteristics); OR. ADMIN. R. 571-040-0382 (1996) (stating that the University of Oregon is prohibited from contracting with any entity that practices race, sex, or other discrimination).

¹³⁸ See, e.g., *Civil Serv. Comm'n v. Comm'n on Human Rights & Opportunities*, 487 A.2d 201 (Conn. 1985); *In re Certain Scholarship Funds*, 575 A.2d 1325 (N.H. 1990) (applying New Hampshire discrimination law that paralleled federal law), discussed *supra* at Part I.D.

¹³⁹ Although *Bob Jones University* dealt with a university, charitable trusts are treated in the same manner as universities for tax exemption and charitable deduction purposes. The same Internal Revenue Code provisions govern exemption, I.R.C. § 501(c)(3), and charitable income tax deductions for contributions, I.R.C. § 170.

eral tax purposes is identical. It would be strange indeed for this analysis to lead to opposite conclusions on the same facts.

Holding that racially discriminatory trusts are uncharitable and unenforceable¹⁴⁰ would be consistent with the holdings, if not the reasoning, of the modern state trusts law cases dealing with racially discriminatory trusts. As discussed above,¹⁴¹ courts in recent decades have uniformly refused to enforce racially discriminatory trusts.

We have reached the point in our history where courts can reasonably declare that trusts that discriminate against blacks and other minority racial groups are contrary to public policy and not enforceable as charitable trusts. The reasoning of *Bob Jones University* provides authoritative support for this conclusion.

However, public policy is a vague and malleable concept, and some trusts that differentiate on the basis of race may not contravene public policy. In particular, trusts discriminating in favor of traditionally disadvantaged groups may be justifiable as attempts to rectify past discrimination or to correct economic and opportunity imbalances. A trust providing benefits for needy blacks or Latinos may not violate public policy even though it excludes other racial or ethnic groups. Such trust should be enforced if there are public policies or traditional charitable purposes such as elimination of poverty, compensation for past discrimination, or the support of religion that are advanced by the enforcement of the trusts.¹⁴² Additionally, attempts through charitable trusts to provide educational and other opportunities to economically disadvantaged racial groups should be favored and enforced.

No charitable trust, however its beneficiaries are defined, will provide equal benefits to every racial group. No group of potential beneficiaries of a charitable trust, short of all of the people in the world, would provide benefits that do not favor one racial group or another. For example, a trust providing scholarships to students at a particular school will benefit some racial groups more than others because no school (or other organization) exactly represents the racial makeup of the world. Even

¹⁴⁰ A finding that a purportedly charitable racially discriminatory trust violated public policy would not by itself void the trust. The trust, in theory, would be a private trust that could discriminate. However, a purportedly charitable discriminatory trust that failed as a charitable trust would almost certainly also fail as a private trust because a valid private trust must have identifiable beneficiaries who could enforce the trust. A failed charitable trust would be unlikely to have identifiable beneficiaries. For example, a trust that provided scholarships for needy students but which excluded black students should fail to be a charitable trust because of its racial discrimination. It would also fail as a private trust because there would be no identifiable beneficiaries.

¹⁴¹ See *supra* Part I.B.

¹⁴² See, e.g., *Trustees of the Univ. of Del. v. Gebelein*, 420 A.2d 1191 (Del. Ch. 1980) (allowing a public university to administer a trust that provided scholarships to women but not to men because the discrimination was benign and compensated for past discrimination).

though the trust would benefit some racial groups and exclude others, the educational benefits of helping an educational institution and needy students should outweigh the racially discriminatory effects of the trust. Such a charitable trust would not violate public policy.¹⁴³

Decisions about whether any particular trust violates public policy would need to be made on a case-by-case basis.¹⁴⁴ While it is impossible to state a rule that will provide clear answers in all cases, I believe that public policy can be defined with sufficient accuracy to reach reasonable results in most circumstances. First, trusts that exclude groups that have traditionally suffered discrimination should be viewed skeptically and perhaps presumed contrary to public policy. Second, courts should determine if the beneficiaries are defined in a rational manner that does not rest on race. For example, a trust for the members of a particular church or residents of a particular city should be valid even if the members of the church or the residents of the city were predominantly of one race, provided there is a rational, non-discriminatory reason for the trust to exist. Trusts of this sort would not violate public policy and should be enforced. Third, the court should examine the definition of beneficiaries to determine if some people who would otherwise be members of the class of beneficiaries are eliminated because of race and there is no other public policy to justify the racial classification. Such trusts would be against public policy and should be void. For example, a trust providing scholarships for only white members of a particular church or only for white residents of a city would be contrary to public policy and should not be enforced. Finally, even if a trust defines beneficiaries on a racial basis, it may not contravene public policy if there are other public policies that justify the racial classification. For example, a trust that provides scholarships to black residents of a particular city might be justified if the effect of the trust is to counter past race discrimination or to relieve poverty among a racial group that is poorer than the rest of the community. Similarly, scholarships for women enrolled in engineering

¹⁴³ This reasoning is parallel to the constitutional reasoning that the Supreme Court has used with respect to state statutes or actions that have a disproportionate impact on racial groups but that do not have a racially discriminatory purpose. In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court stated:

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of a government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. at 242 (citation omitted).

¹⁴⁴ To some extent, the decision that a particular trust does or does not violate public policy will rest on the feel and impression of the case. We will recognize violations of public policy when we see them, not before.

schools might be justified as a means of encouraging women to enter a profession where they are underrepresented.

While I believe that it is possible to articulate rational considerations for courts to use in applying public policy to charitable trusts, determination of individual cases will often come down to the emotional feel and impression of each case. The cases of recent decades refusing to enforce racially discriminatory trusts appear to be based on the impression that enforcement of these trusts is just not the right thing to do. The suggestions that I make here simply attempt to provide reasonable intellectual support for the decisions that courts are already making.

While decisions would have to be made on a case-by-case basis, reasonable conclusions can be achieved in most cases. For example, a trust that provides scholarships for white students from Iowa appears discriminatory on first impression and should be held to violate public policy because it discriminates against non-white people. This trust, on its face, has race discrimination as one of its purposes and should be held to violate public policy. On the other hand, a trust created by a church member that provides scholarships for members of his or her church that includes no black members does not seem discriminatory and should not be held, absent other evidence of discrimination, to violate public policy.¹⁴⁵ It should be enforced, even though all of the benefits would pass exclusively to white beneficiaries. There can be valid, non-discriminatory reasons to establish such a trust, even though the benefits pass inordinately to one race.

3. *Application of the Public Policy Trust Concept to Sexually Discriminatory Trusts*

As with racially discriminatory trusts, sexually discriminatory trusts should also be held invalid because they violate public policy, provided that there is no other public policy justifying them. It is abundantly clear at the start of the twenty-first century that sex discrimination violates our fundamental social values. Gender stereotypes and gender-based discrimination, especially when imposed upon women, are now clearly contrary to prevailing core values of our society. As with race

¹⁴⁵ However, in *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court held that government activities that had a disproportionate impact on blacks did not violate the Due Process Clause of the Fifth Amendment because there was no discriminatory purpose. While it may seem to be exalting form over substance, there is a real difference between a trust that exists to benefit a particular group and a trust that exists to benefit one group while excluding another group. Both trusts exclude groups of people. But the trust with a discriminatory purpose is harmful because it allows settlers to improperly discriminate on the basis of race and other improper characteristics. The trust that has no discriminatory purpose does not harm any of our constitutional or social values even though it may have a disproportionate impact on racial, religious, or other groups.

discrimination, the fact that gender discrimination still exists does not alter the conclusion that it is unacceptable and contrary to public policy in our present society.¹⁴⁶

The Supreme Court in *Bob Jones University* examined a variety of sources and found widespread evidence that race discrimination violated present public policy. It examined decisions of the courts,¹⁴⁷ federal statutes,¹⁴⁸ and administrative decisions of the executive branch.¹⁴⁹ In each of these areas, the Court found overwhelming evidence that race discrimination violated our public policy.¹⁵⁰

Applying the same sort of analysis to sex discrimination that the Supreme Court used in *Bob Jones University*, we find, not surprisingly, that there is convincing evidence in all three branches of the government that gender discrimination is not acceptable in our current society. First, it is useful to examine decisions of the U.S. Supreme Court, both for their holdings and for what they tell us about our present values — our present public policy. In 1996, the Court decided *United States v. Virginia*,¹⁵¹ a case dealing with the males-only admission policy of the Virginia Military Institute (VMI), a state institution providing education to men in a military environment. The specific issue was whether the males-only admission policy violated the Equal Protection Clause of the Fourteenth Amendment. Acknowledging that views of gender discrimination have changed over the course of the past century,¹⁵² the Court stated its present view of racial classifications:

To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine

¹⁴⁶ When it became clear that racial discrimination was unacceptable in our society, there was (and there continues to be) considerable racial discrimination. The same is true of gender discrimination. It is still common, but enlightened public opinion now rejects gender discrimination as being contrary to our social values.

¹⁴⁷ *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983).

¹⁴⁸ *Id.* at 594.

¹⁴⁹ *Id.* at 594–95.

¹⁵⁰ *Id.* at 593–95.

¹⁵¹ 518 U.S. 515 (1996).

¹⁵² The Court observed:

As a plurality of this court acknowledged a generation ago, “our Nation has had a long and unfortunate history of sex discrimination.” Through a century plus three decades and more of that history, women did not count among voters composing “We the People”; not until 1920 did women gain a constitutional right to the franchise. And for half a century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any “basis in reason” could be conceived for the discrimination.

Id. at 531 (citations omitted).

whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding and it rests entirely on the State.¹⁵³

The Court in the *VMI* case relied upon *Mississippi University for Women v. Hogan*¹⁵⁴ for the proposition “that a party seeking to uphold government action based on sex must establish an ‘exceedingly persuasive justification’ for the classification.”¹⁵⁵ The plaintiff in *Mississippi University for Women* was a male nurse who wished to enroll in the nursing program at a university that only accepted women. The Supreme Court held that the university’s gender discriminatory admissions policy violated the Equal Protection Clause. The Court pointed out that it has invalidated many gender discriminatory statutes “that relied upon the simplistic, outdated assumption that gender could be used as a ‘proxy for other, more germane bases of classification.’”¹⁵⁶ For example, the Court has invalidated a state statute that specified a higher age of majority for males rather than females¹⁵⁷ and a statute that granted husbands the right to manage and dispose of jointly owned property without the spouse’s consent.¹⁵⁸ Additionally, the Court invalidated a statute that required a widower, but not a widow, to show he was incapacitated from earning before he could recover benefits for a spouse’s death under worker’s compensation laws.¹⁵⁹ It also invalidated a statute providing that only men could be ordered to pay alimony following divorce.¹⁶⁰ It is abundantly clear that the courts view sex discrimination in statutes as highly suspect and will uphold discriminatory statutes only if there is a compelling reason.¹⁶¹

¹⁵³ *Id.* at 532–33.

¹⁵⁴ 458 U.S. 718 (1982).

¹⁵⁵ *United States v. Virginia*, 518 U.S. at 524.

¹⁵⁶ *Miss. Univ. for Women*, 458 U.S. at 726 (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)).

¹⁵⁷ *Stanton v. Stanton*, 421 U.S. 7 (1975).

¹⁵⁸ *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

¹⁵⁹ *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980).

¹⁶⁰ *Orr v. Orr*, 440 U.S. 268 (1979). In addition, the Court has invalidated statutes that provided that women could purchase “nonintoxicating beer” at a younger age than could men, *Craig v. Boren*, 429 U.S. 190 (1976), that provided that widows, but not widowers, could collect survivors benefits under the Social Security Act, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), that conditioned determination of a spouse’s dependency upon the sex of the member of the armed forces claiming dependency benefits, *Frontiero v. Richardson*, 411 U.S. 677 (1973), and that preferred men to women as administrators of estates, *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁶¹ These cases do not apply directly to state trust law public policy, but they do illustrate general judicial disapproval of gender distinctions. This is parallel to the Court’s citing *Brown v. Board of Education*, 347 U.S. 483 (1954), in *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983), to illustrate that racial discrimination violates public policy.

Looking to federal statutes, we find, not surprisingly, that there are many statutes prohibiting sex discrimination. Title VII of the Civil Rights Act of 1964¹⁶² prohibits employment discrimination because of a person's sex.¹⁶³ The Title VII discrimination prohibition by its terms applies equally to sex and race discrimination,¹⁶⁴ an indication that sex and race discrimination are equally contrary to the public policy of the United States. Similarly, Title IX of the Education Amendments Act of 1972¹⁶⁵ prohibits sex discrimination in education programs that receive federal financial assistance. There are many other federal statutes that prohibit sex discrimination in many circumstances.¹⁶⁶

The administrative policies of the executive branch of the federal government also illustrate a firm commitment to the principle of non-discrimination on the basis of sex as well as race, religion, and national origin. For example, an executive order states, "it is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin. . . ."¹⁶⁷ The general policy of prohibiting sex discrimination is also reflected in hundreds of federal regulations. For example, operators of hotels in national parks are prohibited from discriminating against employees on the basis of sex,¹⁶⁸ and the Commodity Futures Trading Commission may not meet in places that discriminate on the basis of sex.¹⁶⁹

Bob Jones University demonstrated that race discrimination is contrary to our public policy by examining the pronouncements of the three

¹⁶² 42 U.S.C. §§ 2000e–2000e-17 (2000).

¹⁶³ *Id.* § 2000e-2(a).

¹⁶⁴ *Id.* (prohibiting discrimination on the basis of "race, color, religion, sex, or national origin").

¹⁶⁵ 20 U.S.C. §§ 1681(a)–(c) (2000).

¹⁶⁶ For example, sex discrimination is prohibited in the issuance of immigrant visas, 8 U.S.C. § 1152(a)(1)(A) (2000), in service as jurors in the federal courts, 28 U.S.C. § 1862 (2000), and in the Air Force Sergeants Association, 36 U.S.C. § 20204(b) (2000).

¹⁶⁷ Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970), *reprinted as amended in* 42 U.S.C. § 2000e app., at 609–10 (2000). *See also* Exec. Order No. 11,375, 3 C.F.R. 684 (1966–1970) (stating that the Secretary of Labor or other contracting agency may require certain bidders and contractors to submit a statement that they do not discriminate on the basis of "race, color, religion, sex or national origin").

¹⁶⁸ 36 C.F.R. § 5.8 (2002). Specifically, this section prohibits discrimination because of "race, creed, color, ancestry, sex, age, disabling condition, or national origin."

¹⁶⁹ 17 C.F.R. § 147.3(a) (2002). There are hundreds of examples of federal regulations that prohibit sex discrimination. *See, e.g.*, 34 C.F.R. § 106.1 (2002) (prohibiting sex discrimination in educational programs receiving federal financial assistance); 24 C.F.R. § 100.5 (2002) (implementing Department of Housing and Urban Development regulations enforcing the Fair Housing Act's prohibition of discrimination in housing). Typically, one section of the particular regulations prohibits discrimination on the basis of race, sex, religion, and other factors. For example, no child in the National School Lunch Program may be discriminated against because of "race, color, national origin, age, sex, or disability." 7 C.F.R. § 210.23 (2002).

branches of our federal government. The courts, the administrative agencies, and Congress have followed a similar pattern with respect to sex discrimination. Each branch has declared many times and in many situations that sex discrimination is not to be tolerated. Applying the reasoning of *Bob Jones University*, it is clear that trusts that discriminate on the basis of sex violate public policy and may not be enforced as charitable trusts.

C. EQUAL PROTECTION

1. Introduction

The Equal Protection Clause of the Fourteenth Amendment prohibits race¹⁷⁰ and sex¹⁷¹ discrimination by states. Parties seeking to uphold sex classification by states “must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification.”¹⁷² According to the Supreme Court “[t]he burden is met only by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”¹⁷³ Charitable trusts have significant state involvement through the courts and through the states’ attorneys general. The significant involvement of judges and other public officials in the administration of charitable trusts raises serious equal protection questions.¹⁷⁴ I believe that the state involvement in charitable trusts is so significant that discriminatory charitable trusts violate the Equal Protection Clause and are not valid.

¹⁷⁰ See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.”); *Strader v. West Virginia*, 100 U.S. 303, 307–08 (1880).

¹⁷¹ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (“Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.”).

¹⁷² *Id.* at 724 (quoting *Kirchberg v. Feenestra*, 450 U.S. 455, 461 (1981)); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

¹⁷³ *Miss. Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

¹⁷⁴ Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957), is a classic early discussion of this issue. See also Katherine F. Voyer, Note, *Continuing the Trend Toward Equality: The Eradication of Racially and Sexually Discriminatory Provisions in Private Trusts*, 7 WM. & MARY BILL RTS. J. 943 (1999). This note contends that racially discriminatory provisions in private trusts violate the Fourteenth Amendment and should not be enforced. This argument is based on the fact that all trusts, charitable or private, have significant involvement by the state through the courts. While this argument has merit, it is far beyond what the courts are now willing to do, given that they are only reluctantly beginning to refuse enforcement of discriminatory charitable trusts having far more state involvement than private trusts.

2. State Action Requirement

The Equal Protection Clause is not violated unless there is state action.¹⁷⁵ In discriminatory charitable trusts, the race or gender discrimination is usually clear on the face of the trust, and the question is whether there is sufficient state action to make enforcement of the trust a violation of the Equal Protection Clause. Private discrimination, however offensive, does not violate the Constitution.

The very nature of charitable trusts is public.¹⁷⁶ Their purpose is to accomplish public goals, and the law treats them generously because they are intended to help society as a whole. They are public because they depend heavily on the courts and attorneys general to oversee and enforce them. Although private individuals usually establish charitable trusts with private assets, their purposes and operation make them public entities. Government is deeply entwined in charitable trusts through the courts and attorneys general.

A central characteristic of charitable trusts is that they must advance some public charitable purpose.¹⁷⁷ The Restatement of Trusts states that

¹⁷⁵ The Supreme Court has stated:

Since the decision of this Court in the Civil Rights Cases . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (citing *Civil Rights Cases*, 109 U.S. 3 (1883)).

¹⁷⁶ The term "charitable" has never been defined precisely and changes as society changes. See SCOTT, *supra* note 124, at § 368. The law of charitable trusts can be traced to the Statute of Charitable Uses enacted by Parliament in 1601. Stat. 43 Eliz. I, c. 4 (1601). The Statute of Charitable Uses lists a number of charitable purposes:

[S]ome for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

Id. The charitable purposes listed in the Statute of Charitable Uses have generally been treated as examples of the types of charitable uses, rather than an exclusive list. Lord Macnaghten expressed a more current view of charitable purposes in 1891:

"Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.

Comm'rs for Special Purposes of Income Tax v. Pemsel, [1891] A.C. 531, 583.

¹⁷⁷ *Ould v. Wash. Hosp. for Foundlings*, 95 U.S. 303 (1877), *cited in* *Bob Jones Univ. v. United States*, 461 U.S. 574, 588 (1983). The Court stated in *Ould*: "A charitable use, where

charitable purposes include the relief of poverty, the advancement of education or religion, and the promotion of health and governmental purposes.¹⁷⁸ In addition to these specified purposes, the Restatement notes that charitable purposes include "other purposes the accomplishment of which is beneficial to the community,"¹⁷⁹ and the comments to the Restatement note that "[t]he common element of all charitable purposes is that they are designed to accomplish objectives which are beneficial to the community."¹⁸⁰

Of course, the fact that a trust must be beneficial to the community at large does not by itself make the actions of the trust state involvement for the purposes of the Fourteenth Amendment. People may do many things with the intent and purpose of benefiting the community that are not charitable for purposes of the law.¹⁸¹ However, the essence of charitable trusts is that they exist for public purposes. Their public purposes combined with the substantial involvement of courts and attorneys general subject them to the requirements of the Equal Protection Clause.

3. *State Action Through Attorneys General Enforcement*

Charitable trusts do not have specific individuals as beneficiaries because charitable trusts are, by definition, devoted to the good of the community rather than to individuals. Therefore, charitable trusts often have no identifiable beneficiaries to enforce them against trustee incompetence or malfeasance.¹⁸² In such cases, state attorneys general have the power and duty to represent the public in enforcing the trusts.¹⁸³

neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man." *Ould*, 95 U.S. at 311.

The most frequently quoted definition of charity is contained in *Jackson v. Phillips*, 96 Mass. 539, 556 (1867):

A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

¹⁷⁸ RESTATEMENT (SECOND) OF TRUSTS § 368 (1959).

¹⁷⁹ *Id.* § 368(f).

¹⁸⁰ *Id.* § 368 cmt a. In addition, according to the Restatement, "[a] trust for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment is charitable." *Id.* § 374.

¹⁸¹ For example, if a generous person provides support for a specific poor person, it is simply a private act of generosity regardless of the fact that it may benefit the community to have the poor person supported.

¹⁸² Trustees, of course have the duty to properly administer the trusts and to protect them from the improper acts of others.

¹⁸³ According to the Restatement of Trusts:

A suit may be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special

The Supreme Court of Pennsylvania analyzed the role of the attorney general in a case involving the possible termination of a charitable trust and reversion of the assets to the testator's family.¹⁸⁴ It held that the trial court should not have heard the case because the attorney general was an indispensable party who was not represented.¹⁸⁵ In holding that the trial court decree was void, the court summarized the role of the attorney general:

The beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts accrue. But because the public is the object of the settlors' benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised. The responsibility for public supervision traditionally has been delegated to the attorney general to be performed as an exercise of his *parens patriae* powers. . . . These are the ancient powers of guardianship over persons under disability and of protectorship of the public interest which were held by the Crown of England as the "father of the country" . . . and which as part of the common law devolved upon the states and federal government. . . . Specifically, these powers permitted the sovereign, wherever necessary, to see to the proper establishment of charities through his officer, the attorney general, and to exercise supervisory jurisdiction over all charitable trusts.¹⁸⁶

interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.

RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

With respect to the public interest in charitable trusts, "[t]he community has an interest in the enforcement of such trusts and the Attorney General represents the community in seeing that the trusts are properly performed." SCOTT, *supra* note 124, § 391.

With respect to people having a special interest, it is possible to create a charitable trust entitling a particular person to benefits. For example, a charitable trust may be created to benefit the minister of a particular church. The current minister of the church may enforce the trust. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c.

Settlors or their heirs generally may not enforce charitable trusts. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. e.

¹⁸⁴ Estate of Pruner, 136 A.2d 107 (Pa. 1957).

¹⁸⁵ *Id.* at 110.

¹⁸⁶ *Id.* at 109 (citations omitted); *see also* Glenmede Trust Co. v. Dow Chem. Co., 384 F. Supp. 423 (E.D. Pa. 1974); Estate of Zahn, 93 Cal. Rptr. 810 (Cal. App. 1971), *cert. denied sub nom.* Zahn v. Security Pac. Nat'l Bank, 404 U.S. 938 (1971); Averill v. Lewis, 138 A. 815 (Conn. 1927).

The Supreme Court of Pennsylvania went on to hold that "in every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, the attorney general must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented."¹⁸⁷

There are some circumstances in which an attorney general is the only party who has standing to contest the actions of a trustee of a charitable trust. For example, only the attorney general can enforce the trust if there is only one trustee and there is no one else in a special relationship with the trust.¹⁸⁸ It is absolutely necessary that some one have the power of enforcement because a trust with no one to enforce it is simply not a trust. By definition, a trust imposes fiduciary duties upon the trustee. Unenforceable fiduciary duties are not fiduciary duties at all, and the arrangement fails as a trust because it lacks a trustee.¹⁸⁹ Accordingly, the enforcement powers of attorneys general are a critical element in the existence of a charitable trust. The attorney general protects the community's interest in charitable trusts.

In addition to enforcing charitable trusts against trustees, attorneys general are heavily involved with the administration of charitable trusts. In many states, the attorney general must maintain a register of charitable trusts within the state.¹⁹⁰ Attorneys general typically require charities to file periodic reports concerning the trusts assets and administration of trusts.¹⁹¹ Of more importance, attorneys general may investigate a charitable trust in order to determine if it is properly administered. The attorney general may compel people to appear to provide information about the operation of the trust.¹⁹² In some states, the attorney general must consent to termination of the trust.¹⁹³ Finally, attorneys general are given the authority to institute proceedings to secure compliance with the law and proper administration of the trust.¹⁹⁴

The relationship between charitable trusts and attorneys general is close and has existed throughout the history of charitable trusts. However, the fact that states are substantially involved with charitable trusts does not, by itself, mean that there is state action for equal protection

¹⁸⁷ *Estate of Pruner*, 136 A.2d at 110.

¹⁸⁸ An example would be a trust having one trustee created for the purpose of alleviation of poverty. No individual would have standing to enforce the trust.

¹⁸⁹ A charitable trust is a fiduciary relationship that imposes equitable duties upon the trustee. RESTATEMENT (SECOND) OF TRUSTS § 348 (1959). A necessary part of equitable duties and of a fiduciary relationship is that someone must be able to enforce the duties against the trustee. In many cases the only party who can enforce the trust is the attorney general.

¹⁹⁰ See, e.g., Illinois Charitable Trusts Act, 760 ILL. COMP. STAT. 55/5 (1993).

¹⁹¹ See, e.g., *id.* § 55/7.

¹⁹² See, e.g., *id.* § 55/9.

¹⁹³ See, e.g., *id.* § 55/15.

¹⁹⁴ See, e.g., *id.* § 55/12.

purposes. While it is often not easy to determine when routine state regulatory activities cross over the line and become state action,¹⁹⁵ it appears that the supervisory activities of attorneys general are state action for equal protection purposes.

The Supreme Court's decision in *Moose Lodge No. 107 v. Irvis*¹⁹⁶ is useful in this analysis. This case involved the racially discriminatory activities of a private club that had by-laws that limited membership to "white male Caucasians."¹⁹⁷ It allowed non-members to be served only if they were eligible for membership and were accompanied by a member.¹⁹⁸

Irvis, a black guest of a member of a Moose Lodge, was refused service because of his race. He contended that the state's issuance of a liquor license to the club amounted to state involvement with the club's discriminatory practices that were prohibited by the Equal Protection Clause.¹⁹⁹ The Court held that the issuance of liquor license was not a sufficiently significant state involvement in the activities of the club to be prohibited state action under the Fourteenth Amendment.²⁰⁰

However, the Court reached a different conclusion in *Moose Lodge No. 107* with respect to Pennsylvania Liquor Control Board Regulations that required "every club licensee [to] adhere to all of the provisions of its Constitution and By-Laws."²⁰¹ The effect of the regulation was that the state required individual private clubs to comply with the requirement of race discrimination contained in the by-laws of the parent organization. The Court enjoined the enforcement of the Liquor Control Board regulation because "the result of [the regulation's] application in a case where the constitution and bylaws of a club required race discrimination would be to invoke the sanctions of the State to enforce a concededly

¹⁹⁵ The Supreme Court has stated:

While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "state action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

¹⁹⁶ 407 U.S. 163 (1972).

¹⁹⁷ *Id.* at 166.

¹⁹⁸ *Id.* at 178 n.6.

¹⁹⁹ *Id.* at 165.

²⁰⁰ *Id.* at 173-77. The issuance of the liquor license and other regulation of the club are similar in nature and function to the registration and reporting requirements that apply to charitable trusts. Accordingly, the state requirements of registration and reporting that apply to charitable trusts are probably not state action under the reasoning of *Moose Lodge No. 107*.

²⁰¹ *Id.* at 177 (quoting Regulations of the Pa. Liquor Control Bd. § 113.09 (June 1970 ed.)).

discriminatory private rule.”²⁰² Even though private actors in the operation of their private club created the discriminatory by-laws, requiring compliance with the by-laws was prohibited state action. State enforcement of a racially discriminatory private arrangement violates the Fourteenth Amendment.

There is a striking parallel between the situation in *Moose Lodge No. 107* and discriminatory trusts. The discriminatory by-laws in *Moose Lodge No. 107* were the result of an agreement among private individuals — the members of the club. Private individuals can act, and can agree to act, in a discriminatory manner without implicating the state or the Constitution. There was a violation of the Equal Protection Clause only because the state enforced the discriminatory private by-laws.

Trusts are created by the agreement of private parties — the settlor and the trustee.²⁰³ In the case of a private trust, the actors are private parties and the discriminatory nature of the trust does not create constitutional problems. However, discriminatory charitable trusts are private agreements enforceable by the state. They are not merely regulated by the state; they are enforced by the state through the attorney general. This certainly appears to be prohibited discriminatory state action. The Supreme Court has noted that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”²⁰⁴ The supervisory and enforcement powers of attorneys general over charitable trusts result in states acting to enforce private biases.

Although the role of the attorneys general in supervising discriminatory charitable trusts raises obvious state action concerns, few cases ad-

²⁰² *Id.* at 178–79.

²⁰³ Of course, government entities may create trusts as part of their government activities, and they may serve as trustees. Obviously, if the creator or the trustee of a trust is the state, the trust may not discriminate on prohibited grounds. See *In re Estate of Wilson*, 452 N.E.2d 1228 (N.Y. 1983) (holding that public officials are not permitted to select scholarship recipients on behalf of a gender discriminatory trust).

²⁰⁴ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). This case dealt with the custody of a child after divorce. The white mother had custody of the child. She began cohabiting with a black man. The court held that it was a violation of the Equal Protection Clause for the trial court to consider race in awarding custody to the father. Cf. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding that the city was not permitted to enforce popular biases by requiring a special use permit for a proposed group home for the mentally retarded).

dress this issue.²⁰⁵ In *Lockwood v. Killian*,²⁰⁶ the Supreme Court of Connecticut considered the state action question in the context of a trust restricting benefits to caucasian, Congregational boys.²⁰⁷ The trial court removed the race and sex restrictions²⁰⁸ by use of the *cy pres* doctrine, and the Connecticut Supreme Court considered the state action issue in the context of the religion restriction.²⁰⁹ It held that neither the actions of the court²¹⁰ nor the participation of the attorney general constituted state action.²¹¹

However, Justice Bogdanski had a different view of the discriminatory charitable trusts in *Lockwood v. Killian*. According to Justice Bogdanski, writing in dissent:

The power to dispose of property at death is a privilege granted by law, supervised through probate and administered by courts and judicially appointed fiduciaries. While these incidents of ministerial control have been thought too slight to constitute state action, the state's role in a charitable trust is all this and much more. The trust becomes operative only after a court has found, either specifically or by inference, that it is charitable. The state bestows privileges, of which tax immunity is only one. It creates and defines charitable trusts, grants them perpetual existence, modernizes them through the *cy pres* doctrine, appoints and regulates the trustees, ap-

²⁰⁵ The failure to address this issue is even more surprising because there are many cases in which the attorney general is an active party in litigation over what is to be done with a discriminatory trust. See, e.g., *Trammell v. Elliott*, 199 S.E.2d 194, 197 (Ga. 1973) (involving a situation in which the attorney general conceded state action in a case concerning a state university). Cf. *Estate of Pruner*, 136 A.2d 107, 110 (Pa. 1957) (holding that the attorney general was an indispensable party to an action involving termination of a charitable trust). *But see Shapiro v. Columbia Union Nat'l Bank*, 576 S.W.2d 310, 314 (Mo. 1978) (involving an attorney general who moved to dismiss because there was no state action).

²⁰⁶ 375 A.2d 998 (Conn. 1977), *appeal after remand*, 425 A.2d 909 (Conn. 1979).

²⁰⁷ *Lockwood v. Killian*, 375 A.2d at 1000.

²⁰⁸ The Connecticut Attorney General apparently approved of removal of the race and gender restrictions and contended that the religion restriction should be eliminated as well. *Id.*

²⁰⁹ *Lockwood v. Killian*, 425 A.2d 909, 914 (Conn. 1979).

²¹⁰ The court stated: "The Court did not create the religious restriction or independently substitute it as a condition of eligibility. The Court merely applied neutral and non-discriminatory principles of the doctrine of approximation in deleting two of the testator's restrictions and leaving the third." *Id.* at 1003.

²¹¹ The court stated:

In the present case, the necessary participation in the action for instructions by the attorney general, who does not seek to maintain the religious restriction, and the impartial application of the doctrine of approximation by the trial court, do not amount to such significant state action within the purview of the [E]qual [P]rotection [C]lause as will shift the responsibility for the testator's private discrimination to the state.

Id. at 1004.

proves accounts, construes ambiguous language and sometimes imposes a less stringent standard of tort liability on such trusts than on their private counterparts. These are practical benefits, granted or withheld by action of the state.

But state action does not end with the conferral of those benefits. Accountability to somebody is required. Some entity is needed to protect the public and bring the trustee before the court for an accounting. All the states in this country, either by statute or decision, have vested that responsibility for enforcement in a governmental official, usually the attorney general.

Accordingly, the administration of a charitable trust is always characterized as state action.²¹²

In my opinion, Justice Bogdanski's thoughtful dissent represents what the law should be and what the law will probably become.

In *Sweet Briar Institute v. Button*,²¹³ a federal district court enjoined a commonwealth's attorney and the attorney general of Virginia from enforcing the provisions of a trust requiring racial segregation in a college established by the trust. Although the decision in this case may be correct, it is a peculiar decision with almost no reasoning.²¹⁴ Citing the *Girard College* case, *Commonwealth of Pennsylvania v. Board of Directors of City Trusts*,²¹⁵ the District Court held that enforcement of the trust by the state would constitute prohibited state action. The *Girard College* case is weak authority for the court's conclusion. In *Girard College*, the board that operated the college was an agency of the commonwealth of Pennsylvania and its administration of the trust was clearly government action carried out through an administrative agency. In *Sweet Briar Institute*, however, the college was operated by a private board and not by

²¹² *Id.* at 1006–07 (Bogdanski, J., dissenting). In support of his dissent, Justice Bogdanski cited BOGERT, *supra* note 118, § 401, and Clark, *supra* 174.

²¹³ 280 F. Supp. 312 (W.D. Va. 1967).

²¹⁴ The district court in a previous decision abstained from deciding the issue because the matter was still under consideration by the Virginia courts. After being directed by the U.S. Supreme Court to decide the substantive issue, the court noted that its previous decision relating to its decision to abstain recited the history of the litigation. It then decided the substantive issue in four cryptic sentences:

[W]e go immediately to the issue at hand: whether the State of Virginia may enforce the provision in the will of the founder of the college restricting enrollment to "white girls and young women."

We conclude it cannot. . . . This was the express holding in the *Girard* case, *Commonwealth of Pennsylvania v. Bd. of Dirs. of City Trusts*.

Sweet Briar Institute, 280 F.Supp. at 312 (citation omitted).

²¹⁵ 353 U.S. 989 (1957).

an agency of the state. The Commonwealth of Virginia could act only through its attorney general and commonwealth's attorney, quite a different set of facts from those of the *Girard College* cases. I believe that the conclusion of the court in *Sweet Briar Institute* is nonetheless correct for the reasons outlined in this article.²¹⁶ However, the single snippet of reasoning that the decision contains does not address the crucial question: Is the enforcement of a discriminatory charitable trust prohibited state action under the Equal Protection Clause?

Courts and attorneys general should examine the relationship of states and charitable trusts. Examination of the involvement and responsibility of attorneys general will show that the role of attorneys general is extensive and goes well beyond simple regulation. They are responsible for the effective management of these trusts and represent the public in litigation involving them. Accordingly, courts and attorneys general should decide that the activities and powers of attorneys general represent prohibited state action with respect to charitable trusts.

4. *State Action Through Judicial Action* — *Shelley v. Kraemer*

This section of the article discusses state action resulting from the enforcement of discriminatory trusts by courts. As discussed above, there is state action in the administrative supervision that attorneys general exercise over charitable trusts. In addition to executive or legislative action, states act through their courts.²¹⁷ The judicial enforcement of discriminatory private agreements is also prohibited state action under the Supreme Court's reasoning in *Shelley v. Kraemer*.²¹⁸

There is significant state involvement in the supervisory activities over charitable trusts of both the attorneys general and of the courts. The involvement of either the courts or of the attorneys general is sufficient enough state action to render discriminatory charitable trusts invalid. The fact that there is significant involvement of both attorneys general and courts in charitable trust enforcement makes the case for invalidity of discriminatory charitable trusts even more compelling.

²¹⁶ The discriminatory provision in this case limited benefits to white females. The decisions seem only concerned with the racial limitation and assume that the gender limitation created no problems. As I outline in this article, I believe that race and gender should be treated in the same manner with respect to the validity of discriminatory charitable trusts.

²¹⁷ The Supreme Court has stated:

It is doubtless true that a State may act through different agencies — either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.

Virginia v. Rives, 100 U.S. 313, 318 (1880).

²¹⁸ 334 U.S. 1 (1948).

In *Shelley v. Kraemer*, the Supreme Court dealt with judicial enforcement of a racially restrictive covenant against occupancy of real estate by blacks.²¹⁹ The restrictive covenant was created by a group of private property owners agreeing among themselves that their property was not to be owned or occupied by “people of the Negro or Mongolian Race.”²²⁰ Property subject to the restrictive covenant was sold to blacks, and other property owners sought to judicially enforce the covenant. The Court noted that the Fourteenth Amendment “erects no shield against merely private conduct, however discriminatory or wrongful.”²²¹ The Court stated:

[T]he restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.²²²

Having stated this, the Court went on to hold that the judicial enforcement of the private restrictive covenant was prohibited state action.²²³

Shelley v. Kraemer establishes the proposition that use of the courts for enforcement of private race discrimination constitutes prohibited state action.²²⁴ Since the power of courts is often invoked to enforce charitable trusts, the question arises whether judicial action enforcing charitable trusts is prohibited state enforcement of race and sex discrimination under its reasoning. Although the issue is fairly obvious, there are surprisingly few cases on this issue.

²¹⁹ *Id.*

²²⁰ *Id.* at 5.

²²¹ *Id.* at 13.

²²² *Id.*

²²³ *Id.* at 23.

²²⁴ In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), the Supreme Court dealt with the issue of state action in the context of the Due Process Clause and notice to estate creditors. In this case, Oklahoma had a statute requiring only notice by publication to creditors of a decedent who had a claim against an estate. The issue was whether this was deprivation of property by the state without adequate notice under the Due Process Clause. It could only violate the Due Process Clause if the proceedings of the state probate court were state action.

The Supreme Court held that since the probate court’s appointment of the executor started the time bar to claims against the estate, there was sufficient state involvement through the court to constitute state action for Fourteenth Amendment due process purposes.

The court’s involvement in charitable trusts, especially where the court is exercising its powers of *cy pres* or equitable deviation, are more extensive than the powers exercised by the court in *Tulsa Professional Collection Services*. Accordingly, the holding and the reasoning of this case are consistent with the conclusion that the court’s responsibilities with respect to charitable trusts amounts to state action.

The final *Girard College* case, *Pennsylvania v. Brown*,²²⁵ specifically dealt with whether the involvement of the court in removing state officials from supervision of the trust constituted state action under the reasoning of *Shelley*. The Third Circuit held that the replacement by the Orphans' Court of the City of Philadelphia as trustee "demonstrates that the Orphans' Court of Philadelphia County has been substantially involved with the supervision of the Girard Estate."²²⁶ The Third Circuit further noted:

What the State Court did was to turn the matter over to its Orphans' Court which eliminated the City as trustee and installed its own group, sworn to uphold the literal language of the Girard will, a move effectively continuing the very segregation which had been condemned by the United States Supreme Court.²²⁷

The Third Circuit affirmed a lower court injunction prohibiting Girard College from excluding otherwise qualified applicants on the basis of race. The effect of *Pennsylvania v. Brown* was that the court used its power to eliminate the race discrimination of a charitable trust, requiring it to go forward on a constitutionally permitted non-discriminatory basis, rather than allowing it to go forward as a discriminatory trust without the involvement of the City of Philadelphia.

The New York Court of Appeals considered the issue in *Estate of Wilson*,²²⁸ a case dealing with trusts that provided scholarships only to males. Public officials participated in the selection of the scholarship recipients.²²⁹ The involvement of the state officials in administering the trusts clearly constituted prohibited state action. The question in the case was how to remedy the prohibited state involvement in discrimination.²³⁰

As in other cases of this sort, the court could have solved this problem by either eliminating the involvement of the public officials or by eliminating the discriminatory provisions. The court chose to exercise its powers of equitable deviation to modify the trust by eliminating the involvement of the state officials, but leaving the discriminatory provisions intact and the trusts otherwise unchanged.

After removing the participation of the state officials, the New York Court of Appeals went on to consider whether the discriminatory nature

²²⁵ 392 F.2d 120 (3d Cir. 1968); see discussion *supra* Part I.A.

²²⁶ *Id.* at 122.

²²⁷ *Id.* at 123. The court stated further that "[t]he Commonwealth's Orphans' Court, through its assumed power of appointment and reappointment of the Trustees, is significantly concerned with the current administration of the college." *Id.*

²²⁸ 452 N.E.2d 1228 (N.Y. 1983); see discussion *supra* Part I.D.

²²⁹ *Id.* at 1231.

²³⁰ *Id.* at 1232.

of the trust violated the Equal Protection Clause. The court held that there was no state action because of the minimal involvement of the state. After noting that private discrimination violates no constitutional provisions and that the state is under no obligation to prevent purely private discrimination, it concluded that the reasoning of *Shelley v. Kraemer* did not make the court's involvement state action.²³¹ It is difficult to reconcile the holding of this case with that of *Pennsylvania v. Brown*.

The New York Court of Appeals held that the trusts were private discriminatory trusts and that while the state regulated the trusts, "the coercive power of the State has never been enlisted to enforce private discrimination."²³² The court stated that "[t]his court holds only that a trust's discriminatory terms are not fairly attributable to the State when a court applies trust principles that permit private discrimination, but do not encourage, affirmatively promote, or compel it."²³³

The court in *Estate of Wilson* appears to have misapplied the reasoning of *Shelley v. Kraemer*. The power, involvement, and discretion of courts in discriminatory charitable trusts is even broader than those that were involved in *Shelley v. Kraemer*. In *Shelley*, the state court had only the power to enforce the discriminatory covenants or to refuse to enforce them as unconstitutional. The power to enforce the covenants constituted state action, according to the Supreme Court. In discriminatory charitable trusts such as those in *Estate of Wilson*, the courts also have additional powers. As in *Shelley v. Kraemer*, the courts can enforce the discriminatory agreement or refuse to enforce it on constitutional grounds.

However, the courts have two substantial additional powers with respect to charitable trusts. First, the courts in both charitable and private trusts have the power essentially to revise the administrative provisions of the trust instrument through the doctrine of equitable deviation if the trust cannot be administered as written.²³⁴ The court in *Estate of Wilson* exercised this power to revise the trusts by removing the state officials from administration of the trusts. The court had exercised this power to

²³¹ *Id.* at 1236.

²³² *Id.* at 1237. In support of this conclusion, the Court of Appeals cited the U.S. Supreme Court cases of *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978), and *Evans v. Abney*, 396 U.S. 435 (1970) (Brennan, J., dissenting).

²³³ *Estate of Wilson*, 452 N.E.2d at 1237.

²³⁴ The RESTATEMENT (SECOND) OF TRUSTS § 381 (1959) provides:

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

An essentially identical rule applies to noncharitable trusts. See RESTATEMENT (SECOND) OF TRUSTS § 167.

remove a trustee and replace it with another trustee and to revise the selection process for scholarships. The power to revise the administration of the trusts and to appoint a new trustee is significant and greater than the powers of the courts in *Shelley*.

Second, courts in charitable trusts have the power of *cy pres*. *Cy pres* allows courts to revise the actual purposes of charitable trusts when the original purposes become impossible or impractical.²³⁵ This again is an important power that the courts did not have in *Shelley*. Some courts have used their *cy pres* powers, as well as their equitable deviation powers, to remove the discriminatory provisions from charitable trusts.²³⁶

Accordingly, the court in *Estate of Wilson* had essentially the same powers that the U.S. Supreme Court in *Shelley* held to be sufficient to create prohibited state action. In addition, the courts in *Estate of Wilson* and in all charitable trusts have sweeping additional powers through equitable deviation and *cy pres* to restructure the administration and operation of the charitable trusts. The argument that there was state action through judicial enforcement was more compelling in *Estate of Wilson* than it was in *Shelley*,²³⁷ notwithstanding the conclusion of the New York Court of Appeals.

²³⁵ The RESTATEMENT (SECOND) OF TRUSTS § 399 provides:

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

²³⁶ See *United States v. Hughes Mem'l Home*, 396 F. Supp. 544 (W.D. Va. 1975) (using *cy pres* to eliminate a racial restrictions trust that operated a children's home), and *Coffee v. Rice Univ.*, 408 S.W.2d 269 (Tex. Civ. App. 1966) (using *cy pres* and equitable deviation to eliminate racial restrictions of a university). See also Mark Petrucci, *The Cy Pres Doctrine — Is It State Action?*, 18 CAP. U. L. REV. 383 (1989) (concluding that judicial modification of charitable trusts through use of *cy pres* is prohibited state action), and Richelle E. Searing, Note, *Discriminatory Charitable Trusts: The Rule of Approximation and the Fourteenth Amendment*, 4 CONN. PROB. L.J. 279 (1989) (discussing judicial modification of charitable trusts as state action).

Kathryn F. Voyer suggests that discriminatory *private* trusts violate both public policy and the Constitution and should not be enforced. Voyer, *supra* note 174. While this conclusion is far beyond what the courts are willing to hold presently, it is not illogical. Although there is much less public involvement in private trusts than in charitable trusts, the courts do have significant involvement in private trusts that could be characterized as state action.

²³⁷ *In re Will of Fuller*, 636 N.E.2d 1333 (Mass. 1994), illustrates the extent of the power of the courts to supervise charitable trusts. In this case the attorney general, exercising his statutory powers of supervision over charitable trusts, settled with testamentary trustees in a controversy involving depletion of trust assets. The Supreme Judicial Court of Massachusetts held that the settlement with the attorney general did not deprive the Probate and Family Court of the power to require the trustees to account to the court for their management of the trust. This case illustrates the broad scope of judicial power to supervise charitable trusts, as well as the parallel power of the attorney general to supervise these trusts.

We need simply to look at the results of *Estate of Wilson* to see the depth of the power and involvement of the courts in charitable trusts. The Court of Appeals made significant decisions about the structure and operation of the trusts that showed judicial involvement and discretion far beyond the involvement in *Shelley*. The Court of Appeals had the power to enforce the trusts as written. It had the power to hold them unenforceable as discriminatory state action. It had the power of equitable deviation to revise, as it did, the administrative provisions and to remove the trustee. It had the power, which it chose not to exercise, to use *cy pres* to change the trust and remove the discriminatory provisions. With all of these options available to it, the Court of Appeals chose a course of action that preserved the discriminatory nature of the trusts. This was a more persuasive case for state action through the courts than the facts in *Shelley*.

In contrast, in *In re Certain Scholarship Funds*,²³⁸ the Supreme Court of New Hampshire reached a different conclusion in a case involving a scholarship that was to be awarded to Protestant boys who were recommended by the high school principal and approved by the Board of Education. The New Hampshire court relied primarily on the state equal protection clause and *cy pres* statute in affirming a decision that removed the discriminatory provisions,²³⁹ rather than removing the state officials from decision-making. Although the general applicability of the decision is limited by the reliance on New Hampshire law, *Certain Scholarship Funds* is a clear holding that it would be state action for the court to remove the state administrators and allow the discrimination to continue.²⁴⁰ Despite the importance of the issue, *Estate of Wilson* and *Certain Scholarship Funds* seem to be the only cases that have seriously addressed the question of court involvement in administering discriminatory trusts. Accordingly, we have no clear trend in the cases on this issue.

Courts play a more significant role in the operation of charitable trusts than they do in other arrangements. They have the power to change the purposes and operation of trusts through *cy pres* and equitable deviation and general equitable power to supervise trusts. These powers involve the courts, and through the courts, the state in the management of these trusts.

²³⁸ 575 A.2d 1325 (N.H. 1990); see discussion *supra* at Part I.D.

²³⁹ The terms "boy" and "protestant boy" were replaced with "student." *Id.* at 1328.

²⁴⁰ In addition, the New Hampshire court stated that the "court's powers to appoint or reappoint a trustee in those cases where the trust involved is, and has been from its inception, a privately administered lawful discriminatory trust, does not rise to the same level of State involvement so as to be considered significant." *Id.* at 1329.

CONCLUSION

Charitable trusts that discriminate on the basis of race or gender should not be enforced.²⁴¹ First, race and gender discrimination is contrary to our public policy, and therefore these trusts are contrary to the common law trust principle prohibiting enforcement of trusts that violate public policy. Second, these trusts should not be enforced because enforcement violates the Equal Protection Clause of the Fourteenth Amendment. The state involvement necessary to trigger the Equal Protection Clause exists in two separate aspects of charitable trusts. There is state action because of the significant role of states' attorneys general in the supervision and administration of charitable trusts. There is also state action in the involvement of the courts in the supervision and operation of courts.

Ultimately, the unenforceability of discriminatory charitable trusts rests on the public nature of these trusts. Their purpose is to benefit the public and they are given favorable tax treatment and exempted from the rule against perpetuities and other rules because of their public nature. Because they are public entities, the law requires substantial involvement of both the attorney general and the courts.

Our courts have ceased to enforce racially discriminatory charitable trusts but stop short of declaring that these trusts are always unenforceable. The Supreme Court has held that discriminatory trusts are not charitable for tax purposes. It is time for the courts generally to acknowledge that racially discriminatory trusts are never enforceable under our current law. They should recognize that the reasons for making racially discriminatory trusts unenforceable also apply to gender discriminatory trusts, and thus gender discriminatory trusts are unenforceable.

²⁴¹ As with the state law public policy doctrine, the Equal Protection Clause would not prohibit enforcement of all charitable trusts that had disparate impact on different racial groups. The Constitution would only deny enforcement to charitable trusts that have the purpose of excluding racial or gender groups from their benefits. For example, in *Lockwood v. Killian*, 375 A.2d 998 (Conn. 1977), the trust in question provided benefits only for Caucasian boys who were members of the "Protestant Congregational Faith." *Id.* at 1000. The Supreme Court of Connecticut invalidated the race and gender restrictions but allowed the religion restriction to remain. *Id.* at 1005 (Bogdanski, J., dissenting). Such a trust shows that one of the purposes of the trust is to exclude non-white and female students from its benefits.

On the other hand, a trust that provided scholarships to students who graduated from a particular high school would be enforceable, even if there were few female or non-white students at the high school. However, this trust would not be enforced if there were other evidence that the purpose of the trust was to discriminate. The Supreme Court has concluded that state action having a disproportionate impact on racial or gender groups does not violate the Constitution unless the purpose of the state action is to discriminate. *Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, charitable trusts for the members of a particular church or the residents of a particular community would be enforceable, provided that there was no other evidence of a discriminatory purpose.