DISCRIMINATORY CHARITABLE TRUSTS: TIME FOR A LEGISLATIVE SOLUTION†

Steven R. Swanson*

Despite society's increasing intolerance of discrimination, courts have seldom invalidated charitable trusts which discriminate on the basis of race or sex in the selection of their beneficiaries. Courts' failure in this respect is due to the inability of traditional legal principles—traditional trust law and equal protection—to deal effectively with discriminatory charitable trusts. In this Article Professor Swanson demonstrates that deciding whether to enforce a racially or sexually discriminatory trust necessitates balancing the creator's interest in having the trust enforced against society's interests in preventing discrimination. Neither traditional trust law nor equal protection law properly balances these interests and thus have led to inconsistent and erroneous decisions. To remedy the inadequacy of traditional law, legislatures must draft anti-discrimination statutes which articulate the states' resolutions of this balancing process and license courts to modify discriminatory trust provisions when necessary. Towards this end, Professor Swanson proposes a model anti-discrimination statute designed to accommodate the creator's and society's interests by deleting sexually or racially discriminatory provisions of a charitable trust, but otherwise retaining the trust's benefits.

TABLE OF CONTENTS

I. Introduction................................................. 154

II. Traditional Trust Law Solutions ...................... 157
    A. Refusal to Consider Racially and Sexually
       Discriminatory Trusts as Charitable............. 157
    B. Prohibition of Sexually or Racially Discriminatory
       Trusts as Illegal or Contrary to Public Policy 158
          1. Racial Restrictions .......................... 160
          2. Sexual Restrictions ........................... 166
    C. "Cy Pres" Doctrine ................................. 170

III. Constitutional Solutions ............................... 171
    A. State Action Resulting from State Administration of
       the Trust ............................................ 172

† Copyright © 1986, University of Pittsburgh Law Review.
* Associate Professor of Law, Hamline University School of Law. A.B., Bowdoin College, 1978; J.D., Vanderbilt, 1981; LL.M., Yale, 1984. Associate, Milbank, Tweed, Hadley & McCloy, 1981-83. While at Milbank, the author was of counsel to Jonathan Blattmachr, the guardian ad litem for the male beneficiaries of the sexually discriminatory trust in the Johnson case discussed herein. The views presented in the Article, however, are solely those of the author. The author wishes to express his appreciation to Carol Swanson, Esquire and Pat Spott, Hamline '86 for their assistance in preparing this Article.
I. INTRODUCTION

Discrimination has become a very powerful word in our language. Any perception of injustice is greeted with the cry of discrimination. Whether the purported injustice actually amounts to an unconstitutional or illegal differentiation in treatment is another matter. With this sensitivity, perhaps oversensitivity, to the appearance of a discriminatory purpose, one would think that the law would have rid itself of unambiguous examples of discrimination. Unfortunately, this is not the case.

One area in which this failure is painfully obvious is the law relating to charitable trusts that discriminate on the basis of race or sex. Imagine the following situations. A settlor creates a trust with a bank as trustee to provide scholarships for white college students. A testamentary trust is created with a public entity as trustee to benefit only male orphans. A trust is created to establish a hospital for the treatment of illnesses affecting only women. Would any of these trusts be voided because of their discriminatory provisions? Could they be altered to delete the discriminatory provision while retaining the public benefit? Courts have provided inadequate answers to these questions.

The courts are not alone to blame for the inadequacy of the law. In most states the attorney general is responsible for representing the interests of both the charitable trust and the public. In representing those interests, the attorney general is in the best position to commence litigation or take other, less formal, steps to rid charitable trusts of sexual and racial discrimination. In order to determine whether state attorney generals have been active in this area, the author surveyed the attorney generals of all fifty states. Each was asked whether his (they were all male at the time of the survey) office was
currently involved in litigation regarding discriminatory charitable trusts and whether the office has any policies relating to the supervision and enforcement of such trusts.¹

Thirty-five responses were received. None of the attorney general’s offices responding was currently involved in litigation relating to racial or sexual provisions in charitable trusts. Twenty-one of the attorney general’s offices had no specific policy relating to discriminatory charitable trusts.² Three denied having any supervisory authority.³ Two offices were investigating their position regarding such trusts.⁴ Even those states that were willing to comment on their approach to discriminatory charitable trusts did not make forceful policy statements. Two states said they would not object to deleting these restrictions.⁵ Two states asserted that they would intervene in cases in which there is state action in the administration of the trust.⁶ One office said that it knew of no laws, other than general trust law, preventing discrimination,⁷ and another alleged that such a trust might violate the state’s strong anti-discrimination law.⁸ Only three

¹ The following letter was sent to each attorney general’s office:

Dear Sir:

I am currently doing research on charitable trusts that discriminate on the basis of race, sex, or religion. As you may well know, a series of cases including the Girard College case, the Evans cases, and a more recent case in New York, In re Wilson, have left the status of discriminatory charitable trusts unclear. Questions of state action violative of the equal protection clause and discriminatory provisions contrary to public policy persist. I am writing to ask whether your office, which supervises charitable trusts, has any policies relating to the supervision or enforcement of discriminatory charitable trusts and whether you are currently involved in any litigation regarding such issues.

I would appreciate your taking the time to respond to my inquiry even if you currently have no policy regarding such trusts or feel that it would be inappropriate to disclose your approach to the problem. Thank you for your assistance.

Sincerely yours,

Steven R. Swanson
Assistant Professor of Law

Copies of the response are on file with the author.

² Colorado, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Maryland, Missouri, New Hampshire, Nevada, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Vermont, Virginia, Wisconsin and Wyoming.

³ Arizona, Montana and West Virginia.

⁴ Mississippi and New Mexico.

⁵ Pennsylvania and Washington.

⁶ Minnesota and North Carolina.

⁷ Idaho.

⁸ New Jersey.
attorney general’s offices indicated a strong policy against discrimi-
nation. The results of the survey demonstrate that the state offi-
cers charged with representing the public interest have neither the
time nor inclination to take the initiative to rid charitable trust law of
discrimination. Strong leadership from this group could, through the
courts, alleviate the problems created by discriminatory charitable
trusts. This leadership has been lacking, however.

This lack of direction stems, at least in part, from the two con-
flicting interests that must be considered in any study of charitable
trusts. First, the charitable trust must serve the interest of the creator
of the trust. Within the bounds of what is considered charitable, the
law allows the charitable settlor great latitude in choosing the object
of the trust. The other interest to be protected is that of society. A
charitable trust may more appropriately be considered a public trust
because the purpose of the trust is to benefit society as a whole.

Numerous examples of public support given to charitable trusts
demonstrate the public nature of such trusts. Charitable trusts are
given preferential treatment under the law, which exempts such trusts
from taxation and releases them from restrictions on perpetual exist-
ence, remoteness of vesting, accumulations and suspension of the
power of alienation. Furthermore, the attorney general represents
the interests of the charitable trust in most states. Public support of
charitable trusts stems from society’s recognition of the benefits flow-
ing from these trusts.

Professor Clark pointed out the conflict between the interests of
the public and the creator in his seminal article responding to
Pennsylvania v. Board of Directors (the Girard College case)—the
Supreme Court’s first attempt to deal with racially discriminatory
trusts.

A charitable trust serves two masters—the property owner who cre-
ated it and society which is its beneficiary. On the initial assumption that
the interests of each coincide, the law guarantees the trust’s enforcement,

[hereinafter G. BOGERT].
11. Id. § 361.
12. A. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS § 391 (1960). See also Gray, State
Attorney General-Guardian of Public Charities???, 14 CLEV.-MAR. L. REV. 236 (1965); Note, The
Enforcement of Charitable Trusts in America: A History of Evolving Social Attitudes, 54 VA. L. REV.
436 (1968).
perpetual existence and tax immunity. But aware that the harmony in any partnership is sometimes disrupted, it has also evolved methods of adjusting the two interests when they diverge. The process has been criticized as hesitant in application and over-solicitous to the demands of the settlor. Yet one has come to expect few surprises by way of doctrinal innovations. Now, however, a challenge has arisen from a wholly new and unexpected quarter. The attack is levelled at the trust which makes race the criterion for benefit, and the challenge stems from the equal protection clause of the Fourteenth Amendment.  

Since Clark's article in 1957, little has been written on the issue of discriminatory charitable trusts.  

This Article focuses on accommodating the interests of the creator and the public in the case of sexually and racially discriminatory charitable trusts. In the next two Sections, the Article reviews the two legal sources which have historically been used to challenge such trusts: traditional trust law and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Article concludes that traditional trust law and the fourteenth amendment provide inadequate solutions. New statutory schemes offer the best possibilities for eliminating racially and sexually discriminatory aspects of charitable trusts while protecting the creator's interests. The fourth and last Section of this Article proposes a model statute designed to best accommodate the conflicting interests in connection with discriminatory charitable trusts.

II. TRADITIONAL TRUST LAW SOLUTIONS

A. Refusal to Consider Racially and Sexually Discriminatory Trusts as Charitable

One possible way to void discriminatory trusts is to decide that they are not charitable. The Restatement (Second) of Trusts defines a charitable trust as "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties


15. Most of the writings in the area have been either overly optimistic in the belief that constitutional challenges will solve the problems or practitioners' pieces describing the pitfalls that could befall the unwary lawyer. See, e.g., Clark, supra note 14; Adams, Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions, 25 CLEV. ST. L. REV. 1, 11 (1976); Note, Sex Restricted Scholarships and the Charitable Trust, 59 IOWA L. REV. 1000, 1015 (1974).
to deal with the property for a charitable purpose.”16 Exactly what constitutes a charitable purpose is not always easy to determine. According to the Restatement (Second), charitable purposes include:

(a) the relief of poverty;
(b) the advancement of education;
(c) the advancement of religion;
(d) the promotion of health;
(e) governmental or municipal purposes; and
(f) other purposes the accomplishment of which is beneficial to the community.17

Under this imprecise definition, the meaning of charitable purposes has changed over time with changing community perceptions.18

The problem of discriminatory charitable trusts could be solved by excluding from the definition of charitable any trust that discriminates on the basis of sex or race. The courts, however, have avoided this approach.19 So long as the trust accomplishes one of the specified purposes, courts traditionally have refused to find that the charitable trust fails because the settlor chose to enumerate arbitrarily those who would receive the benefits of his largesse.20 The reason for this hesitance is twofold. To hold otherwise could cause the trust to fail, depriving society of its benefits.21 In addition, courts may be able to mitigate the discriminatory effect of such a trust. Once the threshold question of whether the trust has a charitable purpose has been answered, the courts may be able to alter the offensive provisions of the trust by applying the doctrine of cy pres,22 thus preserving the trust’s public benefits.

B. Prohibition of Sexually or Racially Discriminatory Trusts as Illegal or Contrary to Public Policy

A charitable trust may not be created for a purpose that is illegal or against public policy.23 Determining when a trust provision is ille-

17. Id. § 368.
20. Id.
21. Id.
22. See infra text accompanying notes 64-66.
gal is relatively simple. The provisions of a charitable trust requiring the violation of a federal or state law against discrimination on the basis of sex or race would be void.24

It is more difficult, however, to ascertain whether such a provision contravenes public policy. Public policy changes over time. For example, unconventional ideas such as anti-Christian views once were considered contrary to public policy.25 More recently, the concept of public policy has been equated with public welfare rather than conformity with mainstream thought.26 Because of the difficulty in ascertaining public policy, courts have invalidated trust provisions on this basis only when the violation is unquestionable, such as when the trust induces the commission of a crime.27 One court summarized this policy:

[T]he Courts have consistently held that the mere restriction of beneficiaries to a limited class of persons does not invalidate the trust so long as the general purpose of such trust is charitable or educational in nature, and so long as the beneficiaries constitute a reasonable number of persons and are not limited to the natural object of testator's bounty.28

24. In Long Estate, 5 Pa. D. & C.3d 602 (1978), for example, the court reformed the provisions of a charitable trust that had been created to establish a “single woman's asylum, in the City of Lancaster, in which respectable white women . . . shall be admitted and maintained.” Id. at 604. The petitioners alleged that this trust provision violated the Fair Housing Act of 1968, the Pennsylvania Human Relations Act, the Civil Rights Act of 1964, the Civil Rights Act of 1866, and the Fifth and Fourteenth Amendments to the United States Constitution. Id. The court concluded that operating the asylum on a racially and sexually discriminatory basis violated the Fair Housing Act of 1968. Id. at 613. Finding a general charitable intent, the court modified the trust by applying cy pres to delete the sexual and racial restrictions. Id. at 613-15.

25. See Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206 (1838) (pronouncement of pantheistic ideas); Updegraff v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824) (denial of infallibility of the Bible), cited in 4 A. Scott, supra note 23, § 377; Regina v. Moxon, 4 St. Trials 694 (Q.B. 1841) (publishing Shelley's “Queen Mab”); Rex v. Williams, 26 Howell's St. Trials 653 (K.B. 1797) (publishing Paine's “Age of Reason”); Rex v. Woolston, 2 Str., 834, 93 Eng. Rep. 881 (K.B. 1779) (denial of miracles of Christ); Regina v. Petcherini, 7 Cox Crim. Cas. 79 (Dublin Comm'n Ct. 1855) (burning an authorized version of the Bible). For a more recent case, see Fidelity Title and Trust Co. v. Clyde, 143 Conn. 247, 121 A.2d 625, 629 (1956) (“The law will not declare a trust void when the object of the trust, as the finding discloses, is to distribute articles which reek of the sewer.”).


28. In re Folsom's Will, 155 N.Y.S.2d 140, 145 (Sur. Ct. 1956), aff'd, 6 A.D.2d 691, 174 N.Y.S.2d 116 (1958), aff'd, 6 N.Y.2d 886, 190 N.Y.S.2d 381 (1959) (finding that the general purpose of the trust, which had been set up for the purpose of aiding young men whose ancestry was similar to the testator's in their education and training, was charitable and the restriction with respect to the selection of beneficiaries was valid and enforceable).
1. Racial Restrictions

In determining whether a discriminatory trust is contrary to public policy, courts have viewed racial and sexual restrictions differently. Racial discrimination is more easily seen as being contrary to public policy than is sex discrimination. The government has a long history of trying to rid society of the evils of racial restrictions through the Equal Protection Clause, fair housing legislation, and affirmative action programs meant to redress former wrongs. Despite this strong public policy against racial discrimination, apparently no court has invalidated a racially discriminatory trust on grounds of public policy.

In Moore v. City & County of Denver,\textsuperscript{29} for example, the Supreme Court of Colorado refused to modify the terms of a trust created for “poor, white, male orphans” because it was not impossible to effectuate the trust purpose.\textsuperscript{30} In In re Will of Potter,\textsuperscript{31} the Delaware Chancery 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 equal protection clause of the Fourteenth Amendment to the Constitution of the United States.\textsuperscript{32}

Similarly, in Weaver Trust,\textsuperscript{33} a Pennsylvania County Court refused to alter an educational trust whose income was designated for “deserving white, male, Protestant students.”\textsuperscript{34} Thus, courts have found that public policy considerations alone do not justify either invalidating or modifying a racially discriminatory trust.

Two more recent decisions, however, have denied tax exemptions for racially discriminatory trusts. These decisions may bear on the question of the enforceability of discriminatory trusts. The Internal Revenue Code (Code) requires that an organization be for “charitable” purposes in order to obtain a tax exemption. These tax decisions, therefore, interpret the term “charitable” and in doing so frequently refer to traditional trust law for guidance.

\textsuperscript{29} 133 Colo. 190, 292 P.2d 986 (1956).
\textsuperscript{30} Id. at 988.
\textsuperscript{31} 275 A.2d 574 (Del. Ch. 1970).
\textsuperscript{32} Id. at 579. The court found that there had been an extraordinary amount of state involvement and reformed the trust provisions. Id. at 583.
\textsuperscript{33} 43 Pa. D. & C.2d 245 (1967).
\textsuperscript{34} Id. at 254.
In *Green v. Connally*\(^{35}\) the plaintiffs, parents of black students attending public schools in Mississippi, challenged Internal Revenue Service (Service) policies granting tax exempt status and deductibility of contributions to private schools that discriminate against black students.\(^{36}\) The plaintiffs alleged that the Code prohibited charitable treatment for racially discriminating entities and that, if the Code did not, its provisions were necessarily unconstitutional.\(^{37}\)

The *Green* court denied tax exemption and deductibility of contributions to the defendant schools on the ground that the schools’ discriminatory admission standards violated public policy. The court applied a two-step analysis. It first looked to traditional trust law and determined that a discriminatory educational trust violates public policy. It then found that permitting tax exemption for such a trust would be inconsistent with the congressional intent underlying the Code. The court stated that the public nature of charitable trusts re-

---

36. *Id.* at 1153.
37. *Id.* at 1155. The relevant portions of the Code were I.R.C. §§ 170, 501 (1964) (current versions at I.R.C. §§ 170, 501 (1982)). Section 170 provided:

- Charitable contribution defined.

- For purposes of this section, the term “charitable contribution” means a contribution or gift to or for the use of—

- - - - -

- (2) A corporation, trust, or community chest, fund, or foundation—

- (A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

- (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

- (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

- (D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

Section 501 provided:

- List of exempt organizations—

- - - - -

- (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.
quires that they be "beneficial to the community," and not contrary to public policy.

Although trust law traditionally allowed racial limitations in educational trusts, the court asserted that the law appeared to be evolving towards the position that "racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities." In support of its assertion, the court cited a treatise by Professor Bogert. In fact, that treatise, The Law of Trusts and Trustees, takes the position that constitutional law, rather than trust law, may prohibit a racially restrictive educational trust. The court also justified its assertion by citing a number of cases in which racial restrictions were removed from charitable trusts. In none of those cases, however, did the court rely on public policy to remove the racial restriction.

Having concluded that racial restrictions are contrary to public

38. 303 F. Supp. at 1158.
39. Id. at 1159-60.
40. Id. at 1160. The court cited Nelkin, Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts, 56 Geo. L.J. 272 (1967); Spratt, Federal Tax Exemption for Private Segregated Schools: The Crumbling Foundation, 12 WM & MARY L. REV. 1 (1970); and Annotation, Validity and Effect of Gift for Charitable Purposes Which Excludes Otherwise Qualified Beneficiaries Because of Their Race or Religion, 25 A.L.R.3d 736 (1969). These commentaries cannot be cited for the proposition that trust law is changing. They do, however, support the idea that constitutional analysis is being used in a new way to reach discriminatory charitable trusts.
41. G. BOGERT, supra note 10, § 375, at 123-24, states: The settlor may describe the class to whom educational advantages are to be brought in any way he chooses, subject to possible constitutional difficulties where the trustee is a state or subdivision thereof or obstacles arise on account of the rules of a personal trustee selected. Thus, in the case of a trust to educate poor, white, male orphans, where the City of Philadelphia was named trustee, administration of the trust by it was held unconstitutional as denying to Negro orphans the equal protection of the law, but substituted natural persons were allowed to carry out the trust. The Green court did not seem to understand the basic distinction between the constitutional and trust law analysis.
43. In Howard Savings Inst., for example, the court applied the doctrine of cy pres because Amherst College refused to administer a scholarship trust containing racial and religious restrictions. 170 A.2d at 48. The court found that the settlor's purpose had become impractical and that it was more in line with the testator's intent to delete the restriction than to appoint a new trustee. Id. In Rice Univ., the court utilized cy pres to delete a racial restriction that ran counter to the settlor's primary intent. 408 S.W.2d at 285. In Buckson, the court ordered relief on a reading of the trust instrument and the provisions of the fourteenth amendment. 255 A.2d at 713-14. In Wooten, the
policy under traditional trust law, the *Green* court then analyzed congressional intent underlying the Code. The court concluded that Congress did not intend to provide deductions or exemptions to activities that are illegal or contrary to public policy. While recognizing that pluralism in charitable giving can be beneficial to society, the court held that freedom to designate beneficiaries must be limited when a trust assumes a discriminatory character:

The indulgence of individual whim or preference has values but like all principles it cannot be pushed beyond sound limits to extremes that cannot be approved. The individual philanthropist cannot be indulged in his own vagaries as to what is charitable; he must conform to some kind of norm, else he cannot obtain subsidy or tax exemption. Similarly, the general principle of a "desire to benefit one's own kind" is an acceptable incentive to philanthropy as applied to a wide range of causes. But it takes on a different and unacceptable hue when it is manifested as racial discrimination. We are persuaded that there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation.

Thus, the court concluded that racially discriminatory private schools are not entitled to tax exempt status and contributors to such schools are not entitled to deductions for their contributions.

Much of the reasoning behind the *Green* decision seemed to rest on the special nature of education and may not apply to other charitable trusts. As a result of this decision, the Service issued regulations

---

court deleted a racial restriction because its enforcement would have violated the fourteenth amendment, not because it was contrary to public policy, stating as follows:

Appellants also attack the validity of the trust set up under the will of Jessie Wallace as being based on the proposition that a charitable trust for "aged white men" is racially discriminatory in its terms and thus violates the law and public policy. We do not find merit in this position, as we believe the court was within its equitable powers in deleting the word "white" from the trust by applying the doctrine of approximation or cy-pres . . . .

We do not feel that this inclusion of the word "white" defeats the purpose of the testatrix but, at most, it is an unenforceable word and properly deleted by the lower court.


44. 330 F. Supp. at 1161.

in which it determined that it could no longer give tax exempt status to private schools that discriminate on the basis of race and changed its regulations.46

Two private schools with racially discriminatory policies challenged these Treasury regulations in *Bob Jones University v. United States*.47 Writing for the Supreme Court, Chief Justice Burger applied a two-step approach like that in *Green*. As to the second step, the Chief Justice held that the policies underlying the Code required that the term "charitable" not include activities that are against public policy.48 He reasoned:

When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors." Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. History buttresses logic to make clear that, to warrant exemption under [the charitable tax exemption], an institution must fall within a category specified . . . and must demonstrably serve and be in harmony with the public interest.49

This position is similar to that in *Green*.

Unlike the court in *Green*, however, Chief Justice Burger relied exclusively on federal law to determine what activities are contrary to public policy. He found that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."50

---

47. 461 U.S. 574 (1983).
48. Id. at 588. Chief Justice Burger reached this conclusion using the following reasoning:

'Like other expositions of the charitable trust doctrine, the second step of the approach it was developed to protect the public interest and to ensure that the public, not the private sponsor, would benefit from such institutions.'

49. Id. at 579-80. Chief Justice Burger cited the following cases as support for this reasoning:


50. Id. at 592. In support of this assertion, Chief Justice Burger cited a number of federal cases, statutes, and executive proclamations against racial restrictions. Id. at 594-97.
Thus, in *Bob Jones University*, as in *Green*, the Court concluded that the Code requires that “charitable” activities be consistent with public policy and that public policy precludes discriminatory effect. The private schools at issue in *Bob Jones University* presented an easy case for Chief Justice Burger because he found that they did not benefit the public. Because of this, the trusts were not “charitable” and therefore were not exempt.

The *Bob Jones University* opinion, however, left unresolved the status of a charity that provides a public benefit, yet in some ways violates public policy. In a footnote, Chief Justice Burger addressed the problem:

In view of our conclusion that racially discriminatory private schools violate fundamental public policy and cannot be deemed to confer a benefit on the public, we need not decide whether an organization providing a public benefit and otherwise meeting the requirements of § 501(1)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy.\(^{51}\)

The Court suggested a balancing approach in this kind of situation. Discriminatory institutions will lose their exempt status if their activities “so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of a charitable status.”\(^{52}\)

In summary, courts which have ruled on the enforceability of discriminatory charitable trusts—*Weaver*, *Moore* and *Potter*—have upheld those trusts. Two more recent decisions denying tax exemption for discriminatory private schools—*Green* and *Bob Jones University*—suggest that public policy considerations preclude classifying as charitable an entity which racially discriminates in providing education. Similar considerations underlie the eligibility for tax exemption of a charitable entity as underlie the eligibility for judicial and executive enforcement of a charitable trust. Thus, the most recent test, articulated in *Bob Jones University*, arguably could be applied to determine the validity of racially discriminatory trusts.

The *Bob Jones University* test, however, probably will not provide a satisfactory solution to the problem of deciding when to enforce racially discriminatory charitable trusts. The test thus far has only been applied to determine the eligibility of an organization for tax exempt status. Prior to *Bob Jones University*, courts had refused to invalidate racially discriminatory trusts on public policy grounds.

---

51. *Id.* at 596 n.21.
52. *Id.* at 597-98.
When faced with the issue in the future, courts may choose not to adopt the *Bob Jones University* standard. Furthermore, for the *Bob Jones University* test to apply, the organization must violate "fundamental public policy."

Clearly, racial discrimination in education violates fundamental public policy. Whether discrimination in other areas violates fundamental public policy is unclear. The Court's willingness in *Bob Jones University* to resort to a balancing test in a case involving racial discrimination is troubling. Chief Justice Burger's reasoning exhibits a willingness to ignore discrimination as long as the benefits are substantial. A rule which recognizes that even a modicum of discrimination violates the public interest is more appropriate in the case of charitable trusts.

Thus, traditional trust law will not satisfactorily resolve the question of when a racially discriminatory charitable trust should be invalidated. A legislative solution, such as the one suggested in Section IV of this Article, is needed.

2. **Sexual Restrictions**

Establishing that a sexually discriminatory provision of a charitable trust contravenes public policy could prove even more difficult. Trusts containing gender restrictions have been found to be valid charitable trusts in numerous cases.\(^\text{53}\) Courts that have specifically addressed the issue have stated that such discrimination is lawful as long as there is no state action implicating the fourteenth amendment.

Three recent cases are of particular interest. In *In re Will of Cram*,\(^\text{54}\) the testator had created a trust under his will to benefit male members of the Future Farmers of America of Montana and the 4-H Club of Montana, which were part of the Montana educational system. The lower court modified the will by removing the state participation in the trust. The Supreme Court of Montana held that the will

---

53. See, e.g., Moore v. City & County of Denver, 133 Colo. 190, 292 P.2d 986 (1956); Shapiro v. Columbia Union Nat'l Bank and Trust Co., 576 S.W.2d 310 (Mo. 1978), cert. denied, 444 U.S. 831 (1979); *In re Will of Cram*, 186 Mont. 37, 606 P.2d 145 (1980); Butterworth v. Keeler, 219 N.Y. 446, 144 N.E. 803 (1916); Weaver Trust, 43 Pa. D. & C.2d 245 (1967); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969). In many of these cases, the issue of sexual discrimination was not raised, but it is difficult to imagine that the trusts would have been found valid had their provisions been illegal or against public policy.

54. 186 Mont. 37, 606 P.2d 145 (1980).
as modified could be enforced. In Shapiro v. Columbia Union National Bank and Trust Co., a charitable trust was established to assist “boys” in obtaining college educations. The Missouri Supreme Court upheld the discriminatory provision, stating: “Discrimination on the basis of sex results from [the testator’s] personal predilection. That is clearly not unlawful.”

The most significant case to deal with this question in recent years was decided by the New York Court of Appeals in In re Estate of Wilson. The court in Wilson ruled on the validity of two charitable trusts that discriminated on the basis of sex. The first was a testamentary trust created by Clark W. Wilson to defray the education and other expenses of the first year at college of five (5) young men who shall have graduated from the Canasta High School, three (3) of whom shall have attained the highest grades in the study of science and two (2) of whom shall have attained the highest grades in the study of chemistry, as may be certified to by the then Superintendent of Schools.

The second trust was created in the will of Edwin Johnson to be used and applied, each year to the extent available, for scholarships or grants for bright and deserving young men who have graduated from the high school of the Croton-Harmon Union Free School District, and whose parents are financially unable to send them to college, and who shall be selected by the Board of Education of such School District with the assistance of the Principal of such High School.

The court of appeals rejected the argument that a sexually restrictive charitable trust should not be enforced because it violates public policy:

Nor are the trusts’ particular limitation of beneficiaries by gender invalid and incapable of being accomplished as violative of public policy. It is true that the eradication in this State of gender-based discrimination is an important public policy. Indeed, the Legislature has barred gender-based discrimination in education . . ., employment . . ., housing, credit, and many other areas . . . . As a result, women, once viewed as able to assume only restricted roles in our society . . ., now project significant numbers “in business, in the professions, in government and, indeed, in

55. Id. at 150. Other aspects of Cram are discussed infra at notes 123-24 and accompanying text.
56. 576 S.W.2d 310 (Mo. 1978), cert. denied, 444 U.S. 831 (1979).
57. Id. at 320.
59. 452 N.E.2d at 1231.
60. Id.
all walks of life where education is a desirable, if not always a necessary, antecedent" . . . The restrictions in these trusts run contrary to this policy favoring equal opportunity and treatment of men and women. A provision in a charitable trust, however, that is central to the testator's or settlor's charitable purpose, and is not illegal, should not be invalidated on public policy grounds unless that provision, if given effect, would substantially mitigate the general charitable effect of the gift . . . .

The court found that restricting scholarship funds to male recipients did not substantially mitigate the general charitable effect of the trusts. It believed the educational benefits provided by the trusts justified enforcing the trusts notwithstanding their discriminatory provisions. The court seemed concerned that a contrary finding could require that trusts discriminating in favor of women be found to violate public policy:

Proscribing the enforcement of gender restrictions in private charitable trusts would operate with equal force towards trusts whose benefits are bestowed exclusively on women. "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as * * * an important governmental objective" . . . . There can be little doubt that important efforts in effecting this type of social change can be and are performed through private philanthropy . . . . It is evident, therefore, that the focusing of private philanthropy on certain classes within society may be consistent with public policy. Consequently, that the restrictions in the trusts before this court may run contrary to public efforts promoting equality of opportunity for women does not justify imposing a per se rule that gender restrictions in private charitable trusts violate public policy.  

Such a conclusion is not required. Courts may allow some unequal treatment in order to compensate for past discrimination.

61. Id. at 1233 (citations omitted).
62. Id. at 1233-34 (citations omitted).

In the last decade both New York State and the federal government have taken strong and clear actions against sex discrimination. This public policy is evident in recent United States Supreme Court and New York court opinions as well as the actions of the federal and state legislatures. The Guardian Ad Litem for Male Beneficiaries, like the Surrogate, simply overlooked the sweeping changes in the status of women in the last decade, which are similar in scope to the changes relating to race resulting from the civil rights movement of the 1960's.

The dramatic change in courts' perceptions of the proper role of women in society and the legal rights of women is highlighted by a comparison of two Supreme Court opinions, one written in 1873 and the other in 1975. In Bradwell v. State, 83 U.S. 130, 141 (1873),
The Wilson rule is similar to the Bob Jones University test. Both may invalidate a trust when its discriminatory effect significantly outweighs any public benefit. The Wilson rule, like the Bob Jones Univer-

Justice Bradley, concurring in the decision that women could constitutionally be barred from practicing law, explained it thus:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

In Stanton v. Stanton, 421 U.S. 7, 14 (1975), the Court rejected the argument that a boy had a greater right than a girl to parental support to enable him to complete his education. The Court held, in language which speaks directly to this case, that under the Constitution a boy cannot be given greater rights to a college education than a girl.

No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and proper subject of judicial notice.

... [T]he Supreme Court has consistently struck down statutes which are based on the "baggage of sexual stereotypes." Orr v. Orr, 440 U.S. 268, 283 (1979).

In the last decade, the body of federal statutory law prohibiting sex discrimination has also grown steadily, building on the Equal Pay Act (1963), and Title VII of Civil Rights Act of 1964, and continuing in the area of education with Title IX of the Education Amendments of 1972, the Equal Educational Opportunities Act of 1974 and the National Science Foundation Authorization and Science and Technologists Equal Opportunity Act of 1980. . . . [T]he School District's award of the Johnson scholarships is specifically prohibited by federal law.


This court has held that the New York Human Rights Law goes even further in protecting women from discrimination in employment than federal law such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. In Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84, 390 N.Y.S.2d 884 (1976), this court held that the Human Rights Law prohibited private employers from denying women sick leave benefits for pregnancy-related disabilities even though in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the United States Supreme Court had rejected the argument that this conduct was illegal under Title VII, which contained language very similar to that of the Human Rights Law. Similarly, in State Division of Human Rights ex rel. Schwabenbauer v. Board of Education, 46 A.D.2d 483, 487, 363 N.Y.S.2d 370, 374 (4th Dep't. 1975), the Fourth Department held that the Human Rights Law "reflects a more positive and direct focus through the use of sanctions" on sex discrimination than even the Fourteenth Amendment.

In recent years, New York courts, relying on both New York State and federal laws, have struck down a variety of statutes that set different conditions for men and women in the areas of marriage, child support, paternity proceedings, alimony, restrictions on em-
sity test, cannot adequately resolve the conflicting interests of the creator and the public when applied to decide the validity of a discriminatory charitable trust. As with the Bob Jones University test, the Wilson rule has a high threshold requirement. Wilson requires a "substantial mitigation" of the charitable effect of the gift, and Bob Jones University requires a "fundamental" violation of public policy. Neither rule reflects the true nature of charitable trusts. In fact the benefits associated with such trusts seldom justify the discriminatory provisions. Furthermore, to date neither rule has been applied to invalidate a trust on public policy grounds.

C. Cy Pres Doctrine

The preceding Sections demonstrated how traditional trust law is inadequate to deal with either sexually or racially discriminatory trusts. In the case of a sexually or racially discriminatory trust, some courts have turned to the cy pres doctrine, with mixed results.

The doctrine of cy pres may be applied to reform a trust found to
be illegal or contrary to public policy. Traditional trust law provides that a charitable trust may be reformed under cy pres if the testator had a general charitable intent, but a specific trust provision has become illegal, impossible or impractical to administer.\textsuperscript{64} In a number of cases, courts have deleted racial and sexual restrictions because of the impracticability of enforcing the restriction.\textsuperscript{65} Cy pres may also apply when enforcement of the discriminatory provisions has become illegal under the Equal Protection Clause\textsuperscript{66} or when the provisions have been found to be illegal. Although cy pres could be used when restrictions violate public policy, courts have used it primarily when restrictions were impractical, contrary to statute, or in violation of the Equal Protection Clause of the United States Constitution. Given the conservative nature of the probate system, it seems unlikely that courts in the future will use cy pres to remove racial or sexual restrictions because they are contrary to public policy.

III. CONSTITUTIONAL SOLUTIONS

While most courts have refused to use traditional trust law to strike down racial and sexual restrictions in charitable trusts, they have been more willing to attack these provisions as a violation of the Equal Protection Clause of the fourteenth amendment. Constitutional law, like traditional trust law, has significant drawbacks as a remedy to discriminatory charitable trusts. Given that it is difficult for such a restriction to survive the "strict scrutiny" given to racial differentiations\textsuperscript{67} or the "substantial relationship to an important governmental objective" test used in sex discrimination cases,\textsuperscript{68} the valid-

\textsuperscript{64} Restatement (Second) of Trusts § 399 (1959).

\textsuperscript{65} See, e.g., Howard Savings Inst. v. Peep, 34 N.J. 494, 170 A.2d 39, 45-48 (1961) (striking a discriminatory provision after Amherst College refused to accept scholarship funds with racial, sexual, and religious provisions); In re Estate of Hawley, 32 Misc. 2d 624, 223 N.Y.S.2d 803, 805-08 (Sur. Ct. 1961) (removing religious and ethnic restrictions on scholarships when restrictions reduce school's ability to award scholarships, undermining settlor's charitable objective); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 282-87 (Tex. Civ. App. 1966) (removing restriction to allow nonwhite students to attend university when primary purpose of settlor was to have a first-rate educational institution); In re Dominion Students' Hall Trust, 1 Ch. 183, 186-87 [1947] (striking racial restriction from charity's memorandum of association when restriction interfered with charity's purpose of promoting community of citizenship among members of Commonwealth).


\textsuperscript{67} Korematsu v. United States, 323 U.S. 214, 216 (1944).

\textsuperscript{68} Craig v. Boren, 429 U.S. 190, 197 (1976).
ity of a sexual or racial restriction is often decided when the court makes its initial determination of whether the Equal Protection Clause applies. Purely private actions are not subject to the strictures of the fourteenth amendment. Some form of state action is required. Exactly what constitutes state action has been addressed and readdressed by scholars to the point that the doctrine has become a morass of confusion. A review of the state action decisions is crucial to an understanding of the role that the fourteenth amendment can play in dealing with discriminatory charitable trusts.

In analyzing whether state action can be found in the creation, administration or supervision of a charitable trust, it is helpful to divide the area into two principal types of state action. The first form of review analyzes individual trusts, finding state action in some charitable trusts and not in others. The second form of analysis would find that state action exists in all charitable trusts, regardless of who is benefitted, who administers the trust or how entwined the state has become in that particular charitable trust. The two approaches will be reviewed and critiqued in turn.

A. State Action Resulting from State Administration of the Trust

A number of decisions have found state action when an agency of the state is appointed as trustee under the trust instrument. In two decisions, the United States Supreme Court has found state action because a state agency has acted as trustee. In Pennsylvania v. Board of Directors, Stephen Girard appointed the city of Philadelphia as trustee to establish a school for “poor white male orphans.” When

69. The Civil Rights Cases, 109 U.S. 3 (1883).


71. There is some dispute over whether the threshold level for a finding of state action is different in cases involving race and sex. The Second Circuit Court of Appeals has adopted a “double standard” of review for state action. New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975) (reversing district court’s finding of state action). Under this standard, courts are less likely to find state actions when they do not involve racial discrimination. Whether this higher standard applies to sex is unclear. See Weise v. Syracuse Univ., 522 F.2d 397, 405-08 (2d Cir. 1975).

two black orphans were refused admission because of their race, the
Supreme Court found unconstitutional state action:

The Board which operates Girard College is an agency of the State of
Pennsylvania. Therefore, even though the Board was acting as trustee,
its refusal to admit Foust and Felder to the College because they were
Negroes was discrimination by the State. Such discrimination is forbid-
den by the Fourteenth Amendment.73

In Evans v. Newton (Evans I),74 the Supreme Court expanded its
holding in Pennsylvania v. Board of Directors. Evans I involved a suit
to enforce a trust created in Senator Bacon’s will. Bacon had ap-
pointed the city of Macon to act as trustee of a trust set up to build
and operate a city park for whites only. When suit was brought
against the city for failing to operate the park in a discriminatory
fashion, the city resigned as trustee, and the Georgia court appointed
new private trustees who would not be constitutionally restrained
from discriminating.

Although the city was no longer acting as trustee, the United
States Supreme Court found state action because of the city’s prior
role as trustee: “When the tradition of municipal control had become
firmly established, we cannot take judicial notice that the mere substi-
tution of trustees instantly transferred this park from the public to the
private sector.”75 Thus, not only may the state not become involved
in the administration of a racially restrictive trust, but it cannot resign
in such a way that will allow the discriminatory purpose of the trust’s
creator to continue.

A number of state courts have followed these two cases.76 In In
re Crichfield Trust,77 the New Jersey Superior Court found state ac-

---

73. Id. at 231.
75. Id. at 301.
76. See, e.g., Milford Trust Co. v. Stabler, 301 A.2d 534, 537 (Del. Ch. 1973) (finding state
action in the state’s participation in the process of selecting scholarship recipients); In re Potter’s
Will, 275 A.2d 574, 582-83 (Del. Ch. 1970) (Court of Chancery’s involvement in administration of
discriminatory charitable trust state action); Bank of Delaware v. Buckson, 255 A.2d 710, 714 (Del.
Ch. 1969) (finding state action resulted from state officials’ membership on scholarship committee
set up by trust); In re Crichfield Trust, 177 N.J. Super. 258, 426 A.2d 88, 89-90 (1980) (applying cy
pers to remove a sexually discriminatory provision in a trust with a school board as trustee); Trammell
v. Elliot, 230 Ga. 841, 199 S.E.2d 194, 197 (1973) (finding state action in the appointment of a
state university as trustee). See also Wachovia Bank & Trust Co. v. Buchanan, 346 F. Supp. 665,
667 (D.D.C. 1972) (“Fourteenth Amendment precludes [administrative group comprised principally
of state officials] from administering . . . trust on a discriminatory basis”), aff’d, 487 F.2d 1214 (D.C.
Cir. 1973).
tion in a Board of Education's acting as trustee of a sexually discriminatory trust. Similarly, the Georgia Supreme Court found state action in connection with a racially discriminatory educational trust, one of the trustees of which was a Georgia state university.\textsuperscript{78} A Delaware Chancery Court found state action when the state participated in selecting scholarship recipients in \textit{Milford Trust Co. v. Stabler}.\textsuperscript{79}

In some cases, the courts have found the state's involvement in trust administration to be insufficient to constitute state action.\textsuperscript{80} The Supreme Court of Missouri in \textit{Shapiro v. Columbia Union National Bank and Trust Co.}\textsuperscript{81} found no state action when state officials became involved in selecting recipients of a sexually restrictive scholarship trust. The participation of the state in this case was similar to that in \textit{Milford}. State officials reviewed applications for aid and made a tentative award that was approved by a private trustee.

In a case involving the admission of blacks to Tulane University, \textit{Guillory v. Administrators of Tulane University},\textsuperscript{82} no state action was found despite the fact that state officers automatically served on the board of the University, state property had been transferred to the University, and the University had a special tax exemption. The position of the state in \textit{Guillory} was similar to that of a trustee. The Tulane Educational Fund was incorporated pursuant to a gift made by Paul Tulane. Under a Louisiana statute, Tulane University received property from the state. In return the state obtained the privilege of appointing three administrators to the board: the Governor of the State, the State Superintendent of Education, and the Mayor of New Orleans. Despite the presence of these high state officials on the board, the court found no state action.

Attempting to synthesize these cases to provide predictability is difficult. Cases with similar fact patterns have often been decided differently. The trend appears to favor finding state action when the state actually serves as trustee of the trust and no state action when the state is less involved. As the \textit{Milford} and \textit{Guillory} cases establish, however, this is not always the case.

\textsuperscript{78} Trammell v. Elliot, 230 Ga. 841, 199 S.E.2d 194 (1973).
\textsuperscript{79} 301 A.2d 534 (Del. Ch. 1973).
\textsuperscript{81} 576 S.W.2d 310 (Mo. 1978), \textit{cert. denied}, 444 U.S. 831 (1979).
\textsuperscript{82} 212 F. Supp. 674 (E.D. La. 1962).
B. All Charitable Trusts Contain Elements of State Action

In his seminal article on the relationship between the fourteenth amendment and charitable trusts, Professor Clark concludes that all charitable trusts are imbued with state action:

[T]he administration of a charitable trust must ultimately be characterized as state action. Basic to the grant of enforcement powers to the attorney general was the law’s realization that the words of the dead are only as effective as living society, acting through its governmental agents, chooses to make them. Whether the trustee is a governmental unit, as in [Pennsylvania v. Board of Directors], or a private trust company, the trustee’s choice is only first, not final. In the event that he refuses to carry out the testator’s limitation, the discrimination can become operative only if the attorney general brings an action on the breach, and the courts command compliance. Under these circumstances, the full panoply of governmental powers stands behind the discrimination. Less obvious is the situation where the trustee exercises the limitation without outside prompting. The burden of going forward now shifts from the trustee to the attorney general. He may, on the assumption that his primary duty is to the settlor, acquiesce in the discrimination. Nevertheless, since the trustee acts without restraint only upon such acquiescence, the attorney general again becomes a participant in the discrimination.83

This conclusion is correct; the elements of judicial and executive supervision alone may be enough to amount to state action.

The state is involved in the creation of a charitable trust by granting certain benefits to the trust. Generally, charitable trusts are exempt from taxation.84 In most states, the attorney general must supervise, and represent the interests of, charitable trusts.85 Finally, a charitable trust is exempt from the durational limitations of the rule against perpetuities, the restrictions on accumulations and the suspension of the power of alienation.86 An argument can be made that this regulatory structure, combined with the special aid of tax exemptions, amounts to state action, although no cases have specifically held as such.

The United States Supreme Court has been hesitant to find that government regulation of an otherwise private activity amounts to

83. Clark, supra note 14, at 1008.
84. As noted earlier, federal law may no longer allow tax exemptions for charitable trusts that discriminate on the basis of race, at least in the area of education. Bob Jones Univ. v. United States, 461 U.S. 574, 598 (1983). See supra notes 46-52 and accompanying text. On the other hand, tax exemptions are still allowed for sexually discriminatory trusts.
85. A. Scott, supra note 12, § 391.
86. G. Bogert, supra note 10, § 361.
state involvement sufficient to constitute state action. In *Moose Lodge No. 107 v. Irvis*, the Court determined that a private club with a liquor license granted under an extensive state regulatory system was not subject to the strictures of the fourteenth amendment. Similarly, in *Jackson v. Metropolitan Edison Co.*, a public utility’s service termination procedure was found not to constitute state action despite the utility’s monopoly in providing electric services and the extensive government regulation of the industry.

Charitable trusts, however, may be distinguished from these cases. The attorney general, a government agent, enforces charitable trusts. In fact, early cases determining which purposes were charitable found that trusts for benevolent purposes were not charitable and thus not within the authority of the attorney general to enforce. Without this government authority, the trust fails. Thus, the attorney general’s role is an integral element of all charitable trusts. The attorney general must take part in judicial proceedings relating to a charitable trust.

The notion of a charitable trust also has important public policy implications not present in other trusts. The reason for the special benefits and regulation is that a charitable trust is thought to remedy some existing public problem by providing certain governmental services, such as health, alleviation of poverty and enlightenment. Coupled with the requirement of supervision by the attorney general, the charitable trust appears to be fairly attributable to the state.

The tax relief and special benefits unique to charitable trusts

---

90. *Id.* at 1006.
91. *Id.*
92. *Id.* at 1007.
93. As one author has noted:

[It is apparent that the state affords a large number of benefits to charitable trusts, many of which are not provided to ordinary trusts. These benefits could be accumulated to demonstrate substantial governmental involvement and approval of charitable trusts. Among these benefits are exemption from various forms of taxation and tax benefits for the settlor; immunity from tort liability; court application of legal doctrines to alter the terms of a trust; release from the normal trust requirements of specificity of beneficiaries and compliance with the Rule Against Perpetuities; permission for the trust to be perpetual in duration; exemption from rules against accumulations, remoteness of vesting, and suspension of the power of alienation; and enforcement of trust provisions by state attorneys general.]

may form an additional basis for a finding of state action in charitable trusts although not in other trusts. One authority has explained:

When the government provides some direct subsidy to an entity which impairs fundamental constitutional rights there can be no question but that the government aid program violates the Constitution. Regardless of whether the private party has a right to act free of constitutional restraints, it is clear that the government has no authority to provide specialized benefits to those who effectively burden the exercise of constitutional rights.

When the aid is provided to only a limited group, rather than all members of the public, it can be viewed as equivalent of a direct subsidy to the alleged wrongdoer and the challenged practices. 94

Following this line of reasoning, the Supreme Court has found granting free books to all students impermissible because doing so would benefit racially restrictive schools. 95 Similarly, the benefits given to discriminatory charitable trusts may suffice to attribute state responsibility to such trusts. Apparently, no cases have taken this position. 96

Another aspect of charitable trusts that supports the argument that all charitable trusts are imbued with state action is that all such trusts are subject to judicial supervision and enforcement. For example, if a trust is testamentary, courts will be involved in probating the testator’s will and creating the trust. Generally, a court must issue letters of trusteeship. In addition, the court may be involved in construction and accounting proceedings and other challenges to the trust. 97

The argument that judicial enforcement may amount to state action is found in Shelley v. Kraemer, 98 a decision more often discussed in law review articles than followed by the courts. The facts of Shelley are well known. The case involved a challenge to the judicial enforcement of racially restrictive land covenants. The Supreme Court


95. Norwood v. Harrison, 413 U.S. 455 (1973). In another case, a similar statute was upheld as it applied to giving free books to parochial school students. Board of Educ. v. Allen, 392 U.S. 236 (1968).

96. See J. NOWAK, supra note 94, at 519-20.

97. A. SCOTT, supra note 12, § 394.

98. 334 U.S. 1 (1948).
found that the state courts' enforcement of the restrictive covenant amounted to state action:

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.

. . . .

. . . It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. 99

Whether Shelley applies to a charitable trust is unclear, although some cases discuss the issue. In subsequent cases, the Supreme Court has refused to extend the logic of Shelley beyond its facts. Following the remand in Evans I, 100 the Georgia courts determined that Senator Bacon's primary intent had been to give the city of Macon a park that would be operated in a racially restrictive fashion. 101 Because this was no longer possible, the Georgia courts applied race neutral cy pres principles. Finding that the application of cy pres would not be appropriate because of Bacon's discriminatory primary intent, the Georgia courts allowed the trust to fail. The property reverted to Bacon's heirs. The blacks seeking to integrate the park appealed to the United States Supreme Court, claiming that the Georgia courts' actions in allowing the trust to fail amounted to state action. In Evans v. Abney (Evans II) 102 the Supreme Court found no wrongdoing on the part of the Georgia courts.

Writing for the Court in Evans II, Justice Black found that "the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will." 103 Black argued that the harsh result, termination of the trust,

99. Id. at 14, 19.
103. Id. at 439.
could be attributed only to Senator Bacon and not the state. The case was distinguishable from *Shelley* because

here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park’s facilities had it continued.

Justice Black concluded that the loss of the park “is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death.”

*Evans II* indicates that a court’s application of race neutral trust law does not violate the fourteenth amendment as long as the court’s action does nothing to perpetuate the discriminatory purpose. It is worth noting, however, that Justice Black had voted in *Evans I* to uphold the Georgia court’s decision to replace public trustees (who had chosen to resign) with private trustees, who would have undoubtedly continued to discriminate. Thus, one may question whether the perpetuation of a discriminatory purpose necessarily voids a court’s actions.

The state action issue also arose in one of the many cases surrounding the charitable trust creating Girard College under the will of Stephen Girard. Girard’s will, written in 1830, provided for the creation of a trust to provide education for poor, white, male orphans of the city of Philadelphia. To achieve this purpose, he left property to the city of Philadelphia. From the time of Girard’s death until the 1950’s, the city acted as trustee. In 1954, two applicants, who had been rejected only because they were black, sued. In *Pennsylvania v. Board of Directors*, the United States Supreme Court found that the operation of the college by a state entity that discriminates on the basis of race amounts to state action.

The Supreme Court remanded the case to the Pennsylvania Supreme Court, which remanded the case to the Orphans’ Court of Philadelphia County. That court replaced the city of Philadelphia with private trustees. Following an unsuccessful appeal in the state

104. *Id.* at 444.
105. *Id.* at 445.
106. *Id.* at 447.
108. *Id.* at 312-13.
courts, the orphans brought their challenge to federal court. The Third Circuit Court of Appeals found the substitution of new trustees to be unconstitutional state action:

We do not consider the move of the state court in disposing of the City Trustees and installing its own appointees to be a non obvious involvement of the State as mentioned in the test outlined in Burton v. Wilmington Parking Authority. . . . The action in this instance and its motivation are to put it mildly, conspicuous. And what happened to Girard does "* * * significantly encourage and involve the State in private discriminations."110

The breadth of this holding is uncertain. The Supreme Court acquiesced in the Third Circuit’s decision by denying certiorari.111 Because the case was decided prior to the Evans decisions it is difficult to assess its import. As in Evans I, there had been years of state involvement in the management of the trusts. In addition, the unrequested removal and replacement of trustees exhibited the kind of active state involvement which the fourteenth amendment targets. Evans II lacked this element of active state involvement. The state courts in that case were merely asked to apply race neutral state trust law. Where the line can be drawn between the two cases is difficult to discern; the courts have continued to use a case-by-case factual analysis to determine when state action is present.

Although the Supreme Court has refused to extend Shelley,112 a number of state courts have applied the Shelley rationale in cases involving charitable trusts. Particularly noteworthy is a line of Delaware cases. In Bank of Delaware v. Buckson,113 for example, the trustee of a charitable trust created to provide scholarships for whites asked the court to determine whether it could accept applications from a nonwhite. Although the case was decided on another basis, the court determined that Shelley prevented it from requiring “the trustee to reject applications from non-whites because such advice would amount to state (judicial) enforced discrimination in violation of the Fourteenth Amendment.”114 In In re Will of Potter,115 the Del-

---

111. 391 U.S. 921 (1968).
114. Id. at 715.
115. 275 A.2d 574, 582-83 (Del. Ch. 1970) (holding that the involvement of the Chancery Court in the supervision of the trust was state action).
aware court once again stated that judicial involvement in the administration of a charitable trust may constitute state action. The court found, however, that not all court supervision amounts to state action:

[H]ad the trustees named in [the testator's] will actually served as such or had a corporate trustee been named so that the function of the Chancellor had become relegated to purely administrative acts, such as the appointment of successor trustees when required so as to ensure continuance of trust purposes and approval of trustee accounts, as is the case in ordinary, private testamentary trusts, such conduct might well be deemed nonstate involvement . . . .

Thus, according to the court in Potter, there must be more judicial involvement than is normally found in the administration of a charitable trust to constitute state action. Milford Trust Co. v. Stabler, the last of the Delaware cases, adopted the reasoning of the earlier cases, but noted that "a trust with racial restrictions but which is entirely private and which does not involve, in any way, action by the State or its agents is constitutional."

Two other, more recent, cases suggest that courts are willing to find state action in judicial supervision of charitable trusts. In In re Crichfield Trust, the court modified a trust providing scholarships for "boys" to include "girls." In doing so, it stated that "[t]he involvement of the court itself in supervising and directing the administration of a charitable trust is state action." A New York court in In re Will of Hoffman found that the word "issue" standing alone should be construed to include illegitimate descendents of the testator, because to do otherwise could amount to a "substitution of judicial preference for a testator's intent," which would constitute state action.

Other courts have been less willing to extend the Shelley rationale. In a Massachusetts case involving a private trust revoking gifts if the beneficiary married a "person not born in the Hebrew faith," Gordon v. Gordon, the court rejected the contention that upholding the condition would be improper under Shelley. The court felt that different "conditions" applied in a case involving "the right to dispose

116. Id. at 580.
119. Id. at 90.
of property by will."\textsuperscript{122} In another case, \textit{In re Will of Cram},\textsuperscript{123} the Supreme Court of Montana upheld a lower court's decision to continue administrating a sexually discriminatory trust after state agents were no longer involved in that administration. Although the court did not discuss \textit{Shelley}, it apparently did not regard the lower court's involvement as problematic.\textsuperscript{124}

\textit{In re Estate of Wilson},\textsuperscript{125} a consolidated appeal of two lower court decisions, \textit{In re Estate of Wilson} \textsuperscript{126} and \textit{In re Estate of Johnson},\textsuperscript{127} relating to sexually discriminatory charitable trusts, presented the most recent and thorough discussion of the issue. Considering whether the lower courts' replacement of a state trustee in \textit{Johnson} or using \textit{cy pres} to delete a trust provision requiring a school superintendent to name those qualified for a scholarship in \textit{Wilson} amounted to state action, the New York Court of Appeals concluded:

A court's application of its equitable power to permit the continued administration of the trusts involved in these appeals falls outside the ambit of the Fourteenth Amendment. Although the field of trusts is regulated by the State, the Legislature's failure to forbid private discriminatory trusts does not cause such trusts, when they arise, to be attributable to the State . . . . It naturally follows that, when a court applies this trust law and determines that it permits the continued existence of private discriminatory trusts, the Fourteenth Amendment is not implicated.

In the present appeals, the coercive power of the State has never been enlisted to enforce private discrimination. Upon finding that requisite formalities of creating a trust had been met, the courts below determined the testator's intent, and applied the relevant law permitting those intentions to be privately carried out. The court's power compelled no discrimination. That discrimination had been sealed in the private execu-

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} 186 Mont. 37, 606 P.2d 145 (1980). In \textit{Cram}, the trust was created to benefit members of the Future Farmers of America of Montana (FFA) and the 4-H Club (4-H). Beneficiaries were required to be members of one of those organizations and "'boys between the ages of fourteen (14) and eighteen (18) years, both inclusive, of American born parents and such beneficiaries shall be of honest and upright character, worthy of such assistance, and without financial means of his own, and manifest an interest in the sheep raising business.'" \textit{Id.} at 147. FFA and 4-H leaders were employees of the State of Montana. The leaders were involved in the selection process and were co-payees of the checks that were issued. The court removed the state officials from the scheme, but otherwise upheld the trust. \textit{Id.} at 148-50.

\textsuperscript{124} \textit{See id.} at 148-50.


tion of the wills. Recourse to the courts was had here only for the purpose of facilitating the administration of the trusts, not for enforcement of their discriminatory dispositive provisions.

This is not to say that a court’s exercise of its power over trusts can never invoke the scrutiny of the Fourteenth Amendment. This 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.

The testators’ intention to involve the State in the administration of these trusts does not alter this result, notwithstanding that the effect of the courts’ action respecting the trusts was to eliminate this involvement. The courts’ power to replace a trustee who is unwilling to act as in Johnson or to permit a deviation from an incidental administrative term in the trust as in Wilson is a part of the law permitting this private conduct and extends to all trusts regardless of their purposes. It compels no discrimination. Moreover, the minimal State participation in the trusts’ administration prior to the time that they reached the courts for the constructions under review did not cause the trusts to take on an indelible public character . . .

In sum, the Fourteenth Amendment does not require the State to exercise the full extent of its power to eradicate private discrimination. It is only when the State itself discriminates, compels another to discriminate, or allows another to assume one of its functions and discriminate that such discrimination will implicate the amendment. 128

Thus, the court of appeals distinguished between the application of sex neutral state trust law to allow a discriminatory purpose to continue and the enforcement of a private discriminatory purpose. Dubious as the distinction may appear, the court was unwilling to find state action in cases involving the first type of judicial action. The state need not affirmatively destroy the testator’s discriminatory purpose.

Of course, it can be argued that this distinction is unrealistic because any supposedly neutral state act that allows a discriminatory purpose to continue, when it could not have continued without the judicial intervention, amounts to an affirmative act. In addition, the implications of such a distinction are troublesome. In Johnson, for example, the school board had refused to serve as trustee because of the sexually discriminatory nature of the trust. A court may further the testator’s discriminatory purpose by appointing a new private trustee who will undoubtedly discriminate. Suppose, however, that Johnson had arisen in a different way. Assume that the school board had concluded that it could no longer grant scholarships on a sexually

128. 59 N.Y.2d at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909 (citations omitted).
discriminatory basis because of fears that the school might lose federal funding, and because of the constitutional and moral implications of doing so. Instead of resigning or asking the court for instructions, however, suppose the school board itself begins making scholarship determinations on a sex-blind basis. Outraged by this obvious breach of fiduciary duty, Bill Johnson, a male graduate who did not receive a scholarship only because the money went to a female, sues the school board. Bill also happens to be Mr. Johnson’s only heir. 129 Bill argues that the trust should be administered as written or should fail, in which case he would receive the principal. Under the Wilson rationale, the court could not affirmatively order the trustee to discriminate, but would have to look to the testator’s intent to determine whether cy pres should apply or the trust should fail and the principal be distributed to the heirs. This result is very different from that which occurred in Johnson when the trustee refused to serve. Therefore, under Wilson, the posture of the case dictates the outcome of the fourteenth amendment issue.

The New York Court of Appeals’ reasoning in Wilson is unsound. Procedural posture should not decide a case involving important constitutional questions. Instead, the degree of judicial involvement in perpetuating the testator’s discriminatory purpose should determine the outcome of a case.

Thus, the state of the law on the issue of when a charitable trust is imbued with state action remains unclear. Courts approach the issue on a case-by-case basis. The applicable Supreme Court cases have provided muddy guidelines at best, and the state courts’ attempts to follow those guidelines have led to inconsistent decisions. Given the importance of eliminating racial and sexual discrimination from charitable trusts, the state action analysis has been inadequate.

These inconsistent attempts to apply traditional state action analysis in the area of charitable trusts are evidence that traditional analysis has inherent limitations when applied to discriminatory charitable trusts. The traditional state action analysis fails because “it directs attention to formal questions instead of the real interests which compete for constitutional recognition.” 130 Those real interests include “both the value of the challenged practice and the nature of the complainant’s asserted rights.” 131 Traditional state action analysis is also

129. Bill is a fictional character. Mr. Johnson in the Johnson case died without heirs.
130. Van Alystyne & Karst, supra note 70, at 7.
131. Glennon & Nowak, supra note 70, at 224.
deceptive, because it leads one to believe there are easy answers to difficult questions. A finding of no state action establishes that there is no violation of the fourteenth amendment, and the challenged activity is allowed to continue. Thus, a state action decision is really a decision on the merits.\textsuperscript{132} A finding of no state action is one way that a court can eliminate a claim against a practice that does not violate the fourteenth amendment. While espousing traditional theories, the courts often have balanced competing interests in deciding whether state action exists:

Confronted with a conflict between individual rights, the court must determine whether the Fourteenth Amendment dictates a preference for one over the other. The court must balance the relative merits of permitting the challenged practice to continue against the limitation which is imposed on the asserted right. If the value of the right clearly outweighs the value of the challenged practice, the Amendment proscribes the practice. If the importance of the right is not clearly greater than that of the challenged practice, the effect of the practice on the right does not violate the Amendment.\textsuperscript{133}

The law must explicitly recognize that determining whether state action exists necessitates balancing interests.

What interests should be balanced in determining whether it is appropriate to find state action? A number of factors argue against finding state action. First, and perhaps most importantly, our society cherishes individual freedom. One major aspect of this freedom is the importance placed on the individual’s ability to dispose of his property as he sees fit. Although there are certain restrictions on this right relating to fraud on creditors, marital property and other public policy restraints, an individual is generally free to use and dispose of his property freely. This individual freedom has positive effects, particularly in the area of charitable giving. It encourages pluralism in the form that such gifts may take.\textsuperscript{134} If the state were to choose the form or object of all charitable gifts, charity would soon take on the lifeless existence of some welfare programs. Allowing freedom of choice in this area encourages experimentation. Society should seek a multiplicity of forms of giving in hopes that the most effective uses of money to combat social ills will be found. In addition, providing this

\textsuperscript{132} Id. at 228-29.
\textsuperscript{133} Id. at 231. See also H. Friendly, The Dartmouth College Case and the Public-Private Penumbra (published as Supplement to 12 Tex. Q. (1969)) (originally delivered as Oliver Wendell Holmes Devise Lecture, Dartmouth College (May 10, 1968)).
\textsuperscript{134} H. Friendly, supra note 133, at 20.
sort of freedom should encourage individuals to give freely. Society benefits from charitable gifts. The inability to choose the objects of one's bounty could discourage charitable giving.

On the other hand, the state has a strong interest, established in the fourteenth amendment and massive amounts of legislation, in combatting the evils that are created by irrational differentiations based on sex or race. In particular, the state has an interest in not furthering discriminatory practices. The state also has an interest in encouraging charitable giving. Giving of this sort alleviates the burden on the state's treasury to provide social services. Restrictions on the forms of giving may discourage individual contributions, thereby increasing the state's burden.

Balancing these interests in the case of a private trust leads to the conclusion that discrimination should be allowed. In a private trust, the individual's interests weigh heavily against relatively insignificant state interests. The state does not grant special treatment to private trusts because such trusts do not benefit the public. The state's only interest in a private discriminatory trust is a general interest in discouraging private discrimination. The charitable trust differs from the private trust, however. Because charitable trusts receive special treatment, the state has a much stronger interest in not becoming involved in or encouraging discrimination. The unlimited duration of the charitable trust means that a settlor may perpetuate his discriminatory purpose. This is particularly offensive, as the dead hand can perpetuate racial and sexual discrimination long after society has determined that race and sex are no longer acceptable bases upon which to make distinctions. The active involvement of the state's attorney general in upholding the trust, court supervision of the trust, tax benefits given a charitable trust, relief from the rules against perpetual existence and accumulations, and the special nature of racial and sexual distinctions all weigh heavily in favor of finding state action in all charitable trusts that discriminate on the basis of race or sex.

It has been argued that finding state action in all charitable trusts

---

135. The state may also be interested in other unreasonable differentiations, such as illegitimacy, but charitable trusts rarely distinguish on these bases. One distinction that is often found is that based on religion. The state's interest in these differentiations is counterbalanced by the Establishment and Free Exercise Clauses of the Constitution.

136. This, of course, does not mean that there would be a violation of the fourteenth amendment. The discriminatory purpose may pass a compelling state interest or strict scrutiny test. It may be benign discrimination. In any event, all charitable trusts that discriminate on the basis of sex or race should have to withstand this scrutiny.
could prove unwieldy.\textsuperscript{137} If one finds state action in a racially or sexually discriminatory charitable trust, does that necessarily mean that state action exists in charitable trusts for the purpose of all constitutional analysis? Must the testator show that his choices are not "arbitrary and capricious"? Will courts prevent the testator from distinguishing on the basis of faith or ideology? In the long run, would not a finding of state action require that the state, rather than the individual, choose the beneficiaries? The answer to all of these concerns is "no." State action could be found under the balancing test suggested above because of the state's special interest in racial and sexual discrimination, which weighs heavily in the balancing process. The state simply does not have a comparably important interest in the other examples. In fact, in the case of religious differentiations, state involvement may be constitutionally prohibited. The balancing test suggested tailors the constitutional analysis to the concern that charitable trusts will be used to perpetuate racial and sexual discrimination. It serves to solve the problem rather than to destroy the beneficial results of charitable trusts. To date, however, the courts have not adopted this approach, and they do not seem to be moving in this direction.

Thus, under current case law, the fourteenth amendment is hopelessly inadequate to deal with the important issues raised by discriminatory charitable trusts. Unless the courts are willing to adopt the balancing approach discussed earlier, the Constitution is unlikely to provide a solution to this problem. Nevertheless, a means of dealing with racially and sexually discriminatory trusts must be implemented. The strong national policy against sexism and racism, the vestiges of which are simply no longer acceptable in our society, mandate this action. This is particularly important in this area when the state is involved. State involvement has at least three deleterious effects. It provides state-sanctioned support to those who wish to discriminate. It also correspondingly decreases the likelihood that the public will retain respect for the legal system. Finally, and most importantly, the dead hand must be weakened. Many discriminatory charitable trusts were created prior to the social revolution that made sexual and racial

\footnotesize{\textsuperscript{137} Professor Clark suggests three additional reasons why these dire results are unlikely to occur. First, he argues that religious differentiations would be protected by the first amendment. Clark's second argument is that even the fourteenth amendment allows rational classifications. Finally, Clark argues that not all racial discrimination is prohibited by the fourteenth amendment. As an example, he suggests affirmative action. Clark, \textit{supra} note 14, at 1011-13. These bases may not be comforting to those concerned that the settlors retain a great deal of freedom of testation.}
forms of differentiation unacceptable. In order to break completely with the past, the perpetual existence of these trusts must be terminated. Given that the constitutional analysis has failed to achieve this result, despite persuasive arguments that it should, it is time for a new approach. Legislative action is needed to remove discrimination from charitable trusts.

IV. LEGISLATIVE SOLUTION

As illustrated above, it is time for a legislative solution to the problems created by charitable trusts that discriminate on the basis of sex or race. The next question is what form this legislation should take. Certainly, the legislation should reflect the policy goals that have already been discussed. The impact of the statute should not be so broad that it discourages charitable giving. Society retains an interest in encouraging individuals to give in the pluralistic fashion most likely to solve its problems. Limiting the statute’s scope to racial and sexual discrimination—differentiations that society views as inappropriate—should not substantially lessen giving. On the other hand, a statute that limits an individual’s right to give funds to his own church or local school could have a significant detrimental effect on charitable giving. The statute must also retain the true charitable effect of a discriminatory trust. Because causing such trusts to fail would burden the state, the statutory formulation should simply continue the charitable purpose without the racial or sexual distinction.

In addition to retaining the incentive for charitable giving, the legislation should eliminate racial and sexual discrimination in charitable trusts. As established earlier, this goal is particularly important because of the state’s substantial involvement in such trusts. Although formulated to rid the law of discrimination, the statute must allow the continued existence of trusts created to alleviate the burdens placed on those who have traditionally been the subject of discrimination. Thus, so-called “benign” discrimination should be allowed in order to remedy prior injustice. The statute must apply retroactively to all charitable trusts, not only to those created after the statute’s enactment, because numerous discriminatory trusts already exist. Because charitable trusts are not subject to the rules against perpetual existence of a trust, those discriminatory trusts will continue to have a negative effect. Due to changed attitudes about racism and sexism, fewer such trusts are probably created today. Therefore, a statute that only operates prospectively would be of little value. The
statute must rid all charitable trusts of sexually and racially discriminatory provisions.

Having identified the major policy goals behind any anti-discrimination statute, one may find it helpful to examine past attempts to deal with the problem. In the area of land transactions, some states have passed statutes allowing the registrar of titles to remove racial restrictions from land documents. For example, Minnesota has the following provision:

Cancellation of memorial. At the request of a registered owner or other person in interest the examiner of titles by a written directive may order the amendment or cancellation of a memorial relating to racial restrictions, rights which are barred by a statute or rights which have expired by the terms of the instrument creating the rights.\(^{138}\)

The provision deletes, without court order, racial restrictions or other illegal provisions from already existing documents. A charitable trust statute could similarly delete racial and sexual differentiations from a charitable trust instrument.

\(A\). \textit{A British Example}

The United Kingdom has adopted the following provision as part of its Race Relations Act [of] 1976:

A provision which is contained in a charitable instrument (whenever that instrument took or takes effect) and which provides for conferring benefits on persons of a class defined by reference to colour shall have effect for all purposes as if it provided for conferring the like benefits

(a) on persons of the class which result if the restriction by reference to colour is disregarded; or

(b) where the original class is defined by reference to colour only, on persons generally;

but nothing in this subsection shall be taken to alter the effect of any provision as regards any time before the coming into operation of this subsection.\(^{139}\)

The statute is notable because it is retroactive, applying to all charitable trusts regardless of when they were created. It does not apply to the administration of a trust prior to the enactment of the statute.

In addition, the statute "blue pencils" all restrictions relating to "colour," a term which is unclear. One author has suggested that the


\(^{139}\) Race Relations Act, 1976, § 34(1).
Act is limited to specific designations based on skin tone. If this is true, the word "black" would be deleted from a trust for "black engineering students," but the words "native Africans" would not be blue penciled from a trust benefitting "native Africans who wish to attend engineering schools." Such an interpretation, if correct, would be ludicrous. A court interpreting the statute should be able to look beyond the words of the statute to its underlying purpose, which is to rid charitable trust law of distinctions based on race.

The statute is, nevertheless, relatively narrow. National and ethnic distinctions are apparently allowed, and sexual discrimination is not forbidden. In fact, another British statute, the Sex Discrimination Act [of] 1975, has a specific savings clause for charitable giving based on sexual discrimination.

The blue pencil approach to "colour" restrictions in the British statute is also overly restrictive because a charitable trust created to alleviate prior discrimination would be affected just as one created to perpetuate discrimination. Both a trust for the education of whites and one for the education of blacks who had been the object of years of discrimination would be dealt with by striking the "colour" provision. This approach would not effectuate the purpose of the charitable trust—to better the condition of the downtrodden.

Another criticism that has been leveled at the English statute is that it does not consider the testator's intent. Contrary to the doctrine of cy pres, which will be used to alter the provisions of a charitable trust only if a primary charitable intent can be found, this statute removes the racial provision without regard to intent. In other words, if the Grand Dragon of the Ku Klux Klan created a trust for the education of white children only, cy pres would not apply because there is no general charitable intent to educate children. The Grand Dragon's specific intent, to educate only white children, is paramount to educating children generally. Under cy pres, given the impossibility of fulfilling the specified purpose, the trust would fail. Under the British statute, the trust would be preserved, and the money used for the education of all children. Failing to preserve the intent of a racist while retaining the educational benefits to society does not seem at all

142. Sex Discrimination Act, 1975, § 43. See Watkin, supra note 140, at 131.
143. Watkin, supra note 140, at 133.
144. Id. at 134.
troubling; the Grand Dragon chose the charitable trust mechanism, with all of its attendant benefits, as his means of discriminating. Certainly, society has some right to channel his perverse motive into a socially acceptable one.

Some may object to this intrusion on the right of free testation. They will point to the use and misuse of the doctrine of prerogative _cy pres_ in English history. Under that system, all charitable bequests had to be made in accordance with public policy as defined by the King.\(^{145}\) Those that did not were altered to conform with the King's policy, and the testator's intention was not an issue. The system was often abused to stifle attempts to benefit unorthodox religious views.\(^{146}\) American courts thus were reluctant to adopt the doctrine in the nation's early history.\(^{147}\)

One can easily distinguish this early misuse of _cy pres_ from the English statute. First, the English statute does not arbitrarily frustrate certain laudable goals, but focuses on racial and sexual discrimination. One of the major developments of the twentieth century has been an awareness that differentiations based on considerations other than merit are not acceptable. Unlike the English prerogative _cy pres_, which sought repression, the English statute seeks liberation.

**B. Proposed Anti-Discrimination Statute for Charitable Trusts**

Considering the criticisms of the English statute, it is possible to rewrite it to fit the needs of American jurisdictions:

Charitable Trusts Anti-Discrimination Statute

Section 1. A provision contained in a charitable trust which provides benefits for persons of a class defined by reference to sex or race shall be given effect as if it provided for conferring the benefits on persons of the class that results if the restriction by reference to race or sex is disregarded.

Section 2. This Act is applicable to all charitable trusts, whenever the trust was or will be written. Nothing in this Act is applicable to any measures taken by the trustee of a charitable trust before the effective date of this Act.

Section 3. The provisions of this Act do not apply to charitable trusts that serve to remedy past racial or sexual discrimination, so long as the effects of that discrimination continue to exist.

---

145. G. BOGERT, _supra_ note 10, § 432.

146. _See_, e.g., Da Costa v. De Pas, 1 Amb. 228, 27 Eng. Rep. 150 (Ch. 1754) (voiding a trust established to teach Jewish law and religion and applying the funds to instruct foundlings in the Christian faith).

147. G. BOGERT, _supra_ note 10, § 432; Clark, _supra_ note 14, at 995.
The statute as rewritten comports with the policy goals enumerated in this Article. The model statute, which requires that any racial or sexual restriction in a charitable trust simply be ignored or blue penciled from the document, is broader than the English statute. This eliminates sexual and racial discrimination in charitable trusts. The model statute would apply to all presently existing and future trusts, breaking the stranglehold of the dead hand. Because the statute merely alters an unacceptable provision, society will not lose any of the benefits of discriminatory charitable trusts.

Section 3 of the model statute has been added to deal with the problems created when a trust serves to remedy prior discrimination. For example, a trust to benefit the United Negro College Fund might be altered under the terms of the British statute, but not under Section 3. Such a trust would be identified as one designed to compensate for past discrimination against blacks. Section 3 does contain a reservation, however. A charitable trust containing such a "benignly" discriminatory provision should be allowed to exist for no longer than the effects of the past discrimination remain.

Courts face a thorny issue in determining when the effects of past discrimination have disappeared. There is no question that a charitable trust to educate blacks still alleviates the burdens created by slavery and subsequent racial discrimination. A trust created in 1960 to provide scholarships for women seeking college degrees presents a more difficult situation. At the time the trust was created, only thirty-four and one half percent of students graduating from college were women. By 1979, however, the percentage of women graduates had increased to fifty percent. This does not necessarily mean that the sexually restrictive provision of the trust should be stricken. Although the total number of women graduates may equal the number of male graduates, this does not establish that the remnants of sexism have been driven from higher education. A court looking into the area may find that women are channelled away from certain career-oriented majors or that women are under-represented in the sciences. It may also find that faculties are predominantly male or that women entering the job market after college are being placed in,

148. Statistics show that in the early 1950's, while 74% of whites finished high school, only 57% of blacks did so. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 127, figure 5.1 (1955).
150. Id.
lower-prestige or lower-paying jobs. A court wishing to remove an affirmative action provision must look closely before proceeding, and the parties before the courts, one of whom will be the attorney general, must establish that the relics of discrimination have been buried.

Perhaps the strongest argument against the model statute is that it allows for no examination of the trust creator's intent. The statute merely reflects a legislative decision to alter the intent by striking the offending racial or sexual restriction. In Public Policy and the Dead Hand, Simes suggested that questions relating to the perpetual existence of a charitable trust demand a balancing of two interests:

The rule allowing the perpetual trust for charity is a balancing of two imponderables. On the one hand, there is the desire of testators for perpetual dead hand control, an objective which, in itself, is recognized to be socially undesirable. On the other hand, there is the actual or presumed benefit to the public. In weighing these interests one against the other, the law has said that the public benefit tips the scale.151

This reasoning applies equally to deciding the validity of discriminatory charitable trusts. One must balance the interests of the testator in freedom of testation and perpetual existence against society's interest in perpetuating the benefits of the trust in a nondiscriminatory manner. This Article previously suggested that it is quite easy to balance these two interests by comparing the "evil" racist or sexist to the state with a pure motivation. Of course, given this example, one has no problem concluding that the state's interests weigh more heavily in the balance. After all, why should a dead bigot's intent outweigh the important policy goal of eliminating all elements of racism and sexism? This answer is too easy, however. It fails to take into account the intrinsic value of providing choice for all people, including the bigot. Society has offered this freedom of choice to the charitable giver in return for his dedication of his property to a public purpose. A free society guarantees free choice. It should not be easily discarded. This is why courts have not attempted to list charitable purposes or require that charitable gifts be made to the most needy. This is also why society allows unorthodox forms of giving.

Three considerations overcome these concerns. First, the horrors of Nazi Germany, apartheid in South Africa and the crisis in the Middle East all stem from intolerance. Closer to home, we see discrimination in housing, education and employment continuing despite

efforts to alleviate these problems. These forms of discrimination are basic attacks on human dignity, and we are all harmed by them. Two of the most discredited forms of differentiation without regard to merit are racism and sexism. These "isms" pervade society and increase tensions so as to tear its very fabric. Only when issues are this important must we ignore the testator's intent. Certainly, steps to rid our society of injustice outweigh even the noble objectives of the discriminating, deceased testator.

Second, the model statute proposed above does not deprive the currently living settlor of choice. Even if the proposed statute were enacted, the discriminatory giver can choose to create a private discriminatory trust. Such a trust would not receive the benefits normally granted to a charitable trust. It would be of limited duration and would have to pay taxes. In other words, the state would refuse to aid the testator in his discriminatory purpose. This is a positive result, given the policy concerns and constitutional limitations outlined above.

Finally, courts traditionally alter charitable trust provisions. Provisions found impractical, illegal or contrary to public policy may be altered or removed using the doctrines of *cy pres* or deviation. Society can thus retain the benefits of the trust, even when the testator's specific intent can no longer be furthered. The testator is presumed to know this when he chooses to give through this device. In addition, the testator has attempted to benefit society by choosing the charitable trust mechanism. Altering the provisions of the discriminatory trust to benefit society furthers this intent.152

C. Constitutional Concerns

The model statute proposed as a legislative solution to discriminatory charitable trusts raises several constitutional questions. Does the statute violate the Contract Clause? Is it void because of its retroactive effect? Finally, do the affirmative action exclusions violate the Equal Protection Clause?

152. Some will claim that removing the right to discriminate on these bases is the first step down a slippery slope at the bottom of which the state will determine how all charitable gifts are to be allocated. This will not happen. In the past, judges, lawyers and even scholars have been able to draw a line on numerous slippery slopes to avoid the abysmal depths they conjure up. More important, the fact that a person must choose to give will act as a control in and of itself; if the area becomes over-regulated, people will refuse to give. They will use other means to give or simply not give at all. At that point, the burden on the state to provide the services previously funded through giving would force the state to loosen the reins of control.
1. Contract Clause and Retroactivity

Article I, section 10 of the United States Constitution provides "No State shall . . . pass any . . . law impairing the obligation of Contracts." Arguably, the model statute interferes with the "contract" created between the trust's settlor and the trustee. This argument finds some support in very early Supreme Court cases, in which the Court used the Contract Clause to protect private property interests from intrusive state legislation. During the last century, this provision was not widely used to strike down state legislation. More recent cases have shown, however, that the Clause still has effect. In *Allied Structural Steel Co. v. Spannaus*, the Supreme Court found that a Minnesota statute altering pre-existing employee pension benefits violated the Contract Clause. Justice Stewart's majority opinion held that nothing in the Contract Clause prohibited a state from passing legislation limiting contractual rights when that legislation is meant to deal with an important social problem and the chosen means are not overly broad.

The model anti-discrimination statute proposed above seems to meet these requirements. It deals with the important social evils of racism and sexism in charitable giving. The statute specifically alleviates these problems by removing the offending provision without otherwise altering the trust. Thus, the statute does not appear to violate the Contract Clause.

Although the model statute does not attempt to affect discriminatory acts that occurred prior to its effective date, it may still be viewed as retroactive because it alters pre-existing obligations. This approach sounds similar to the Contract Clause issue discussed above. In fact, the courts have used a similar analysis. Because the ex post facto clauses of the Constitution apply only to criminal statutes,

---

154. Id. It can also be argued that the contract is between the settlor and the state, given the high degree of state involvement. Courts may be more willing to find a violation of the Contract Clause when one of the state's obligations is violated. See United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). These cases depend on the state's attempt to gain some advantage from an alteration in its obligations, however, as in the United States Trust Co. case. A heightened standard of review does not seem appropriate here, as no financial advantage is to be gained by the state.
156. Id.
158. Id. at 244-45.
159. U.S. CONST. art. I, § 10, cl. 1; U.S. CONST. art. I, § 9, cl. 3.
the courts have applied the due process requirements of the fifth and fourteenth amendments to strike down statutes that are infirm because of retroactive effect.\textsuperscript{161} The courts weigh three factors to determine whether a statute with retroactive effect is constitutional:

1. the nature and strength of the public interest served by the statute;
2. the extent to which the statute modifies or abrogates the asserted preenactment right; and
3. the nature of the right which the statute alters.\textsuperscript{162}

The model statute is constitutional according to this balancing test. As indicated under the Contract Clause analysis, the state wants to eliminate racism and sexism. The alteration of the settlor’s expectations is relatively minor because the creator of a charitable trust has chosen a vehicle that courts have traditionally altered using the \textit{cy pres} doctrine. Thus, the settlor should not be surprised by minimal state intervention to remove a discriminatory provision. This preserves the settlor’s primary purpose, to provide a charitable benefit to society.

2. \textit{Unconstitutional Affirmative Action}

As written, the model statute precludes some racial and sexual restrictions but allows others. A trust for “white agricultural workers” has the word “white” removed, while a trust for “black college students” is left untouched. The statute allows racially and sexually discriminatory charitable trusts for the purposes of affirmative action, which arguably may violate the Equal Protection Clause. Although the constitutional validity of affirmative action is a matter of public debate, the statute does not seem to be infirm. In \textit{United Steelworkers of America v. Weber},\textsuperscript{163} the Supreme Court dealt with a similar question. The Court was asked to decide whether Title VII of the Civil Rights Act of 1964 allowed employers and unions in the private sector to create race conscious affirmative action plans. Title VII makes it unlawful to “discriminate . . . because of . . . race” in hiring.\textsuperscript{164} It does not mention affirmative action programs. A white employee who was not placed in a training program because of the affirmative

\textsuperscript{161} See generally Hochman, \textit{The Supreme Court and the Constitutionality of Retroactive Legislation}, 73 HARV. L. REV. 692 (1960).
\textsuperscript{162} Id. at 697-726.
\textsuperscript{163} 443 U.S. 193 (1979).
action program sued, alleging a violation of Title VII. Justice Brennan, writing for the Court, felt that the statute must be interpreted in light of congressional intent, which was to integrate blacks into society.\textsuperscript{165} Congress did not intend to impede those who wished to aid this process. "Private, voluntary, race conscious affirmative action plans" were permissible.\textsuperscript{166} Without discussing whether a statute allowing such affirmative action programs is constitutional, the Court’s decision in \textit{Weber} to interpret the statute in this fashion necessarily establishes that such affirmative action programs are constitutional. Affirmative action programs are well-established in the law\textsuperscript{167} and seem likely to remain so. If a provision allowing affirmative action programs can be implied in Title VII, a specific provision allowing affirmative action trusts in the model statute should be valid as well.

\textbf{D. Other Legislative Possibilities}

Less intrusive legislation relating to discriminatory charitable trusts might be possible. Although the alternatives do not reflect all of the policy goals outlined above, they would clarify the law and rid charitable trusts of discriminatory purposes.

One alternative would be legislation providing that discriminatory charitable trusts be treated as private trusts. None of the benefits normally given to charitable trusts would be granted to these trusts. They would have to pay taxes. The attorney general would not represent the trust. Perpetuities and accumulation rules would apply. Private trust rules relating to perpetuities and identification of beneficiaries would in most cases cause the trust to fail. This outcome will not preserve the societal benefit provided by charitable trusts because any attempt to exempt some trusts from these rules in order to preserve the charitable purpose would put the state in the position of granting special benefits to discriminatory charitable trusts. Thus, such legislation would either cause many trusts to fail or fail to alleviate the problem under examination.

Another, more workable, solution would be to make it unlawful for a trustee of a charitable trust to discriminate on the basis of race.

\begin{footnotes}
\footnote{165. 443 U.S. at 202.}
\footnote{166. \textit{Id.} at 208.}
\end{footnotes}
or sex.\textsuperscript{168} Although this may sound like the model statute, there is one fundamental difference. Under the model statute, the trust is given effect as if it did not contain such provisions. This alternative legislation would merely prevent a trustee from acting in a discriminatory fashion. At that point, it would become illegal or impossible for the trust to be administered as written, and the doctrine of \textit{cy pres} would be used to determine whether the creator of the trust had a general charitable intent. Without such a general charitable intent, the trust would fail. Unlike the model statute, this alternative would deprive society of the benefit of charitable trusts if a court is unable to find a general charitable intent. This alternative statute, however, would be less troublesome to those who are concerned about the testator's intent. Although the model statute best meets all of the policy goals outlined earlier, this alternative is not a bad second choice. Although it would eliminate some charitable trusts, courts could preserve the societal benefits of most trusts by liberally finding a general charitable intent and using \textit{cy pres} to remove the offending provision.

\textbf{V. Conclusion}

In the thirty years since the Supreme Court's decision in \textit{Pennsylvania v. Board of Directors}, little has occurred to clarify charitable trust law as it relates to trusts that discriminate on the basis of race or sex.

Charitable trust law has a number of mechanisms that could be helpful in eliminating discrimination. The settlor must have a charitable purpose to create a charitable trust. Although courts can determine that racially or sexually discriminatory trusts do not have a charitable purpose, they are reluctant to do so because society would lose the benefit of the trusts.

Courts could also eliminate discrimination by finding racial and sexual restrictions illegal, impractical or contrary to public policy. They have been willing to attack the problem in cases in which the restriction is illegal or impractical, applying the doctrine of \textit{cy pres} to alter the provision. They have hesitated, however, to declare that all such restrictions are contrary to public policy. The one strong statement in this area was made in \textit{Bob Jones University}, which found that allowing tax exemptions to institutions that discriminate on the basis

\footnote{168. The same result could be achieved through a legislative declaration that sex and race discrimination in charitable trusts is contrary to public policy.}
of race in education is contrary to federal public policy. Although the Supreme Court found a violation of public policy in *Bob Jones University*, its holding was narrow and therefore of limited precedential value. In the area of sex discrimination, the courts seem even less likely to find a violation of public policy.

Constitutional challenges based on the Equal Protection Clause have been equally ineffective. The few isolated attempts to apply the Equal Protection Clause to discriminatory charitable trusts have been limited to cases in which there has been an active history of state involvement. Attempts to view the participation of the state more broadly in the creation and maintenance of such trusts have been sorely lacking, perhaps because of a concern that a finding of state action would have far-reaching effects on charitable giving. Such concerns are unfounded. Using a balancing approach to determine whether state action is present would allow the courts to tailor the state action analysis to avoid limiting the freedom of creators of charitable trusts in all cases.

In light of this failure on the part of judicial and the executive branches of state government, the legislature should act to eliminate racial and sexual discrimination in charitable trusts. The model statute proposed in this Article would terminate the negative impact of such trusts, while at the same time preserving the benefits for society. Narrowly tailoring such a statute would eliminate concern that the Constitution may be too powerful a weapon to use in the fight against discriminatory charitable trusts. Although the testator’s intent would be disregarded, the option of creating a private, discriminatory trust is left open to those who chose to do so. Finally, the model statute would preserve charitable trusts created to aid the victims of past discrimination.

Too many years have passed since the Supreme Court’s decision in *Pennsylvania v. Board of Directors* for the law to be in the state of confusion that exists today. Enacting an anti-discrimination charitable trust statute would untangle the morass of decisions and provide greater certainty for both society and the creators of trusts. More importantly, it would end the state’s acquiescence in and assistance to the discriminating settlor’s unacceptable purpose. Finally, the model statute effectively cures the unacceptable dichotomy between the beneficial purpose of all charitable trusts and the inherently unjust nature of racial and sexual discrimination.