Continuing the Trend Toward Equality: The Eradication of Racially and Sexually Discriminatory Provisions in Private Trusts

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Racially and sexually discriminatory private trusts are presumed to be valid under traditional common law governing dispositions of property. Most courts have held that if the state plays a "passive" role, only private actors are involved and the Fourteenth Amendment is not implicated. The United States Supreme Court, however, has declared in one context that discriminatory charitable trusts violate public policy and are unconstitutional. This Note argues that because private trusts involve unlawful state action and are not purely private, courts have an affirmative obligation imposed by the Supreme Court and a moral responsibility because of well-established public policy against racial and sexual discrimination to invalidate discriminatory terms in private trusts.

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INTRODUCTION

Patty MacElroy is a twenty-five year old white female. Her boyfriend of five years (soon to be fiancé) is a twenty-seven year old African-American male named Ben Jackson. Ben and Patty have encountered numerous obstacles to their interracial relationship during the past five years. The most adamant opposition has come from Patty's father. Due to his concern that his daughter might marry Ben, Edward MacElroy III executed a new will to compound the adversity facing the devoted couple. The will set up a testamentary trust composed of one-half of his entire estate and named Patty as the beneficiary. One term of the trust imposed a condition that if Patty married a black man the trust would revert to the residuary beneficiary Richard Lewellan, Edward's yachting partner. Upon Patty's marriage to a white male, however, she would continue to receive interest from the trust and could receive distributions of the trust corpus upon showing sufficient need. By oversight, Mr. MacElroy failed to appoint a trustee in his will. He died one month after its execution; and the will was admitted to probate.¹

¹ This hypothetical demonstrates one form of egregious conduct on the part of private individuals that can operate contrary to important social values such as equality and abhorrence of discrimination. Another variation upon the example presented would entail the appointment of a trustee in the decedent's will who is unwilling to perform the discriminatory tasks set forth in the instrument. That situation also would place courts in a position to enforce the discriminatory trust provisions by compelling the trustee to act according to its terms. Should the appointed trustee refuse the appointment, the court would select a trustee. See Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 568 (5th ed. 1995). This problem creates the same concerns as the situation in which the settlor of a
Because the trust failed to name a trustee, the court administering the estate during probate must perform that function. Under general rules of trust law, "[a] trust will not fail for want of a trustee." Even if the court appoints a private individual and not a public official or employee to manage the trust, the court remains significantly involved in the supervision, administration, and enforcement of the discriminatory trust provision. Without a trustee or the court's ability to supply one, a resulting trust would arise and the corpus would revert to the decedent's only heir, in this case, Patty.

Other scenarios in which Edward MacElroy could condition his bequest to his daughter remain. If Mr. MacElroy had a son he might bequeath one-half of his estate to his son outright and one-half to his daughter in trust with a reversion to his heirs (in this case his son) should his daughter marry a black male. In such an instance, the trust would be both racially and sexually discriminatory: MacElroy could limit his disposition to his daughter while leaving his son free to alienate his property in any way his son may choose. In addition, the marital limitation imposed on his daughter forces her to discriminate against potential suitors because of their race. The trustee administering and enforcing the trust by authority of the court also must discriminate to avoid violating the terms of the trust. Courts should not compel such spiteful and egregious conduct as private racial or gender discrimination.

trust simply failed to name a trustee.

2 Id. (emphasis omitted).

3 A resulting trust may arise when a disposition is incomplete or an express trust fails. See id. at 587.

4 This Note will not discuss trusts that discriminate on the basis of religion because suggestions of limiting religious provisions raise serious conflicts between the Equal Protection Clause and the right to free exercise of religion that this Note cannot address adequately. The policy implications are not nearly as strong for eliminating provisions that show preferences for one religion over another. See, e.g., Gordon v. Gordon, 124 N.E.2d 228 (Mass. 1955) (upholding a provision in a trust revoking a gift to children if they marry outside the Jewish faith because the terms did not impose an unlawful restraint on marriage), cert. denied, 349 U.S. 947 (1955). Only Pennsylvania and Virginia have contrary holdings in similar cases in which courts found that the provisions mandated virtual prohibitions of marriage. See id. at 232 (citing Drace v. Klinedinst, 118 A. 907, 908 (Pa. 1922) (supporting the same proposition); In re Devlin's Trust Estate,., 130 A. 238, 239 (Pa. 1925) (holding that a "condition that a cestui que trust be reared in a certain faith...[was] void as against public policy"); see also Maddox v. Maddox's Adm'r, 52 Va. (11 Gratt.) 804, 814 (1854) (holding that a bequest conditioned that the legatee "should be a member of any religious sect or denomination, as directly violative of [public policy]"). The Pennsylvania Supreme Court also noted:

The policy of the law is to keep the alienation of land free from embarrassing impediments, and it endeavors to strip devises and grants of restrictive conditions, tending to fetter free disposition; therefore, if the language of the condition is not clear, or is hostile to a state policy in any form, it is not given effect.
This Note challenges the traditional common law approach of affording presumptive validity to private trusts that contain racially or sexually discriminatory provisions. Part I sets forth Fourteenth Amendment requirements regarding and relationship to private discrimination. Part II discusses courts' views of racially and sexually discriminatory provisions in the contexts of private and charitable trusts, including the primary way in which the courts have challenged, acquiesced in, or expunged these racially and sexually discriminatory trust provisions previously. Part III presents a brief review of the state action requirement under the Fourteenth Amendment to expose the inadequacies of the strict causal nexus that courts traditionally require for state action to violate Fourteenth Amendment protections. Application of state action to discriminatory private trust provisions should reflect the harmful effects of state sanction and enforcement of racial and gender discrimination in light of strong public policies against discrimination and the impact trust provisions have to compel others to discriminate. This section also proposes that the Supreme Court's holding in Shelley v. Kraemer\(^5\) should extend to prevent private discrimination in private trusts. Yet, as presented in Part IV, a test for determining when express private trusts violate public policy and the Equal Protection Clause must be based on the involvement of third party trustees and courts in active discrimination. Private trusts involving third party trustees are never entirely private enterprises or exercises of private rights; they converge with the public arena.

Part V considers a balance between testators' interests, the interests of future generations, and societal interests in preventing discrimination. Under this balancing test, states have affirmative duties and a moral responsibility to squelch racial and sexual discrimination in trusts involving any degree of state action.\(^6\) The existence of these duties demonstrates the necessity to apply state action analysis, as originally contemplated in the Civil Rights Cases,\(^7\) to private trusts. When courts accommodate discrimination in such a manner, they circumvent the public policy rationale and the antidiscrimination principles underlying the Fourteenth Amendment. Courts are instruments of state action when they validate and enforce mechanisms for

\(^5\) 334 U.S. 1 (1948).

\(^6\) But see Stephen R. Swanson, Discriminatory Charitable Trusts: Time for a Legislative Solution, 48 U. Pitt. L. Rev. 153, 196-97 (1986) (arguing that legislative failure to regulate private discriminatory trusts, even though the state regulates trusts in general, is not state action reaching the ambit of the Fourteenth Amendment because the inaction only permits the continuation of such trusts). This view is consistent with the proposition that private execution creates and implements the discrimination, while state law only provides recourse to the courts for administration, not enforcement. In other words, "[i]t compels no discrimination." Id. at 183 (quoting In re Estate of Wilson, 452 N.E.2d 1228, 1237 (N.Y. 1983)). The central question remaining is whether the state action test should require strict compulsion of discrimination rather than promotion through acquiescence or permission.

\(^7\) 109 U.S. 3 (1883).
discrimination. This Note concludes by suggesting that the solution for these problems involves the invalidation of discriminatory provisions in private trusts. In this context, such public policy dictates the dynamics of equal protection.

I. THE FOURTEENTH AMENDMENT AND PRIVATE DISCRIMINATION

The Supreme Court's interpretation of the Equal Protection Clause prohibits states, but not private individuals, from acting to deny persons due process or equal protection in violation of the Fourteenth Amendment. The Fourteenth Amendment of the United States Constitution provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the Civil Rights Cases, the Court decided that "[s]tate action of a particular character . . . is prohibited. Individual invasion of individual rights is not the subject matter of the amendment." This staunch refusal to consider private action as a violation of the Equal Protection Clause permeates all state action analysis. Courts have not invalidated discriminatory private trust provisions because the Fourteenth Amendment does not prohibit purely private forms of discrimination. Many courts,

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8 The United States Code also provides individuals with the basis for a cause of action arising out of equal protection violations under the Fourteenth Amendment. See 42 U.S.C. § 1983 (1994). That section states, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

Section 1983 requires an action be under color of law in order to violate the Fourteenth Amendment. This standard is the state action requirement under which a state, through its executive, legislative, or judicial branches, acts to deprive individuals of their rights under the Constitution. Purely private actors who impinge on the rights and liberties of others are not subject to the strictures of the Fourteenth Amendment. See 42 U.S.C. § 1983.

9 U.S. CONST. amend. XIV, § 1.

10 Shelley, 109 U.S. at 11. The state action doctrine developed after the Civil Rights Cases were decided. According to the Supreme Court of Washington, "the fundamental purpose of the Fourteenth Amendment was the eradication of slavery and racial discrimination." Kennebec, Inc. v. Bank of the West, 565 P.2d 812, 814 (Wash. 1977) (en banc).
however, acknowledge a dichotomy between state action and state neutrality that merely allows private individuals to act, despite the fact that those private actions are highly discriminatory.\(^{11}\)

In 1948, however, the United States Supreme Court held in *Shelley v. Kraemer* that the enforcement of discriminatory restrictions defined by private individuals was unlawful state participation in the discrimination.\(^{12}\) The judiciary has regressed in its enforcement of public policy against discrimination since that decision. Refusal to extend and apply the principles in the *Shelley* decision has led to state acquiescence in and enforcement of racial and gender discrimination, particularly in the context of private trusts. The judiciary acts to appoint trustees, to enforce trusts in accordance with their terms, and to compel trustees to discriminate as trust provisions require, therefore, those acts cross over the line dividing state neutrality from unlawful state action.\(^{13}\)

Judicial or state enforcement of, promotion of, and explicit grant of authority for private actors to discriminate based on race and gender in trust provisions demonstrates the continuing need to reevaluate the state action doctrine in the trust context. Trusts provide mechanisms for testators to impose their discriminatory views upon the liberties of others and to compel others to discriminate in a testator’s place. Unfortunately, testators use the judicial system to enforce that discrimination. Recently, however, some courts have lowered the state action standard in cases addressing racial discrimination.\(^{14}\) Courts may invoke public policy considerations to find state action more readily. The Court of Appeals for the Second Circuit has stressed the offensiveness of racial discrimination to justify lesser state involvement before finding unlawful state action in some circumstances: “[R]acial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment.

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11 See King v. South Jersey Nat'l Bank, 330 A.2d 1, 4 (N.J. 1974) (understanding that the Equal Protection Clause “‘erects no shield’” against purely private conduct (quoting *Shelley*, 334 U.S. at 13)).

12 See *Shelley*, 334 U.S. at 23.

13 Unlike living trusts, testamentary trusts are subject to “the ‘rigor mortis’ of deadhand control [which] is not present while a property owner is able to respond to persuasion and evolving circumstances.” *Restatement (Third) of Trusts* § 29 cmt. b (Tentative Draft No. 2, 1999). For this reason, court action to continue and to perpetuate trusts containing discriminatory provisions provides the requisite state action to violate the Fourteenth Amendment.

14 See Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970); see also Taylor v. Consolidated Edison Co. of N.Y., Inc., 552 F. 2d 39, 42 (2d Cir. 1977) (holding that “[b]ecause of the generally recognized anathematic status of any government-sponsored racial discrimination, for instance, . . . a lesser degree of state involvement is needed to meet the state action requirement in cases alleging such discrimination” in a case involving a claim of deprivation of property without due process by an electric company (citing *Jackson v. Statler Found.*, 496 F.2d 623 (2d Cir. 1974))).
Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts.\textsuperscript{15}

Discussion surrounding the application of the Equal Protection Clause, state action analysis, and public policies encouraging the eradication of all forms of discrimination in trust provisions have addressed these concepts primarily in the context of charitable trusts. Unfortunately, most courts and commentators have failed to extend the public policy abhorrence of discrimination to private trusts\textsuperscript{16} that contain discriminatory provisions.\textsuperscript{17}

A. Common Law Right of Disposition

Under the common law, testators and settlors have significant control over the disposition of their property.\textsuperscript{18} The common law provides an unrestrained right to devise property and presumes the validity of such private trusts despite provisions which contravene equal protection guarantees under the Fourteenth Amendment, state constitutional equal protection, and public policy.\textsuperscript{19} The right to dispose of property is not a natural right, however, but arises out of state law.\textsuperscript{20}

\textsuperscript{15} Coleman, 429 F.2d at 1127.
\textsuperscript{16} Private trusts concern beneficiaries who usually are ascertainable (unless a testator bequeaths his estate to unborn descendants), whereas charitable trust beneficiaries need not be identifiable individuals. See Dukeminier & Johanson, supra note 1, at 599.
\textsuperscript{17} Some courts, however, have applied state action analysis under the Fourteenth Amendment to trusts created for educational purposes that discriminate on the basis of race and/or gender. See In re Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990); In re Estate of Wilson, 452 N.E.2d 1228 (N.Y. 1983); First Nat'l Bank of Kansas City v. Danforth, 523 S.W.2d 808 (Mo. 1975); Milford Trust Co. v. Stabler, 301 A.2d 534 (Del. Ch. 1973); In re Will of Potter, 275 A.2d 574 (Del. Ch. 1970).
\textsuperscript{18} Numerous cases cite traditional views of freedom of disposition. See Evans v. Newton, 382 U.S. 296, 315 (1966) (Harlan, J., dissenting); Certain Scholarship Funds, 575 A.2d 1325 (Brock, C.J., dissenting); Claffin v. Claffin, 20 N.E. 454, 456 (Mass. 1889). See also Hodel v. Irving, 481 U.S. 704 (1987), in which the Supreme Court presumed a fundamental right to dispose of property by will or intestacy. Even after death, testators retain control over future generations: "though death eliminates a man from the legal congeries of rights and duties, this does not mean that his control, as a fact over the devolution of his property has ceased. A legal person he may not be; but the law still permits his dead hand to control." Lewis M. Simes, Should the Dead Hand Distribute: Free Will vs. Family, in Public Policy and the Dead Hand 55, 60-61 (1955).
\textsuperscript{19} The rule presuming validity at common law states that "[t]here is no doubt but that it is firmly established at common law that a testator may, within reason and good morals, devise and bequeath his estate as he sees fit." Will of Potter, 275 A.2d at 580 (citing In re Girard College Trusteeship, 138 A.2d 844 (Pa. 1958)), cert. denied, 357 U.S. 570 (1958) (holding that a state agency was unable to administer an orphanage created by will for poor white male orphans without violating the Fourteenth Amendment).
originated at common law in England, but the Statute of Wills later codified the right to devise certain lands by will in 1540.\(^{21}\)

Legislatures later began limiting the right to devise property further and defining stricter public policies to govern the inalienability of property\(^{22}\) and dead hand control.\(^{23}\) One major concern about alienability arose because the “dead hand” of a testator or settlor inevitably would extend to “enforce his will in distant future generations[,] destroy[] the liberty of other individuals, and presume[] to make rules

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**Footnotes:**

1. *Fourteenth Amendment and the Will of Stephen Girard*, 66 *Yale L.J.* 979, 996 (1957). The Court of Appeals of Indiana asserted in a will dispute (a statutorily granted right) that “[i]t has long been held in Indiana that the right to take property by devise and descent is a creature of statute.” *In re Estate of Wilson*, 610 N.E.2d 851, 857 (Ind. Ct. App. 1993) (citing Donaldson v. State *ex rel* Honan, 101 N.E. 485 (Ind. 1913)).

One issue raised by the codification of the common law into state statutes that grant the freedom of disposition is determining the point at which the common law becomes state action. The majority of courts have held that mere codification of the common law into statutory form is not state action in itself. See, e.g., King v. South Jersey Nat’l Bank, 330 A.2d 1, 6-7 (N.J. 1974).

For a discussion of the evolution of thought concerning the common law of contracts and prohibition of discrimination in that context, see Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 *Georgetown L. Rev.* 183 (1994), which explores the means through which the common law of contracts can prohibit racial discrimination and asks “why state common law should prohibit racial discrimination even though there are already federal (and, in some cases, state) statutes that do so.” Id. at 185.

2. See DUKE MINIER & JOHANSON, supra note 1, at 564. Prior to the Statute of Wills, primogeniture dictated that property descend to the eldest son. The concept of the use or trust emerged out of the division between courts of law and equity. Courts of law refused to enforce the duties of a feoffee to uses, so settlors turned to courts of equity to compel the performance of duties pursuant to a use. In 1535, the Statute of Uses executed the use and placed legal title in the hands of the beneficiary. *See id.* The concept of the active trust developed from the Statute of Uses by giving active duties to trustees. The modern trust remains an outgrowth of active trusts. *See id.* Indeed, “[t]he power to dispose of property at death is a privilege granted by law and supervised through probate and administration by courts and judicially appointed fiduciaries.” Clark, supra note 20, at 1003. The ministerial actions of the state are inseparable from the process of property disposition.

21 Limitations imposed on property by a “dead hand” often prohibited individuals from investing freely or using it for purposes other than capital investments. *See Simes, supra note 18, at 60-61.* Lack of alienability also created concerns over waste.

22 See LEWIS M. SIMES, *The Policy Against Perpetuities: Dead Hand vs. Alienability*, in *PUBLIC POLICY AND THE DEAD HAND* 32, 33 (1959). *See In re Liberman*, 18 N.E.2d 658 (N.Y. 1939) (holding that testamentary conditions in partial restraint of marriage are not against public policy as long as they do not impose unreasonable or prohibitive restraints); *In re Haight’s Will*, 64 N.Y.S. 1029 (N.Y. App. Div. 1900) (holding that the condition of a trust paying the legatee as long as he remained with his present wife was not void as against public policy).
for distant times."  

Professor Simes also considered that "[i]t is socially desirable that the wealth of the world be controlled by its living members and not by the dead."  

In one sense, the Rule Against Perpetuities sought to balance the interests of different generations in liberty over property and demonstrate the tension between the freedom of disposition and the liberties of future generations to receive property unrestricted.

Because the right to dispose of property freely at death originates from state law extensions of privilege to citizens, it is an anomaly that private individuals can use the privilege that a fiduciary enforces to effectuate purposes so clearly contrary to constitutional rights of liberty and public policy against racial and gender discrimination. Public policy should govern the development of state law and mandate the invalidation of racially and sexually discriminatory terms in private trusts. The New York Court of Appeals has followed this rationale and acknowledged that "[a]nalysis [of a trust] starts with the general rule that the law permits a person possessing testamentary capacity to dispose of property to any person in any manner and for any object or purpose so long as such disposition is not illegal or against public policy."  

In addition, the latest Tentative Draft of the Restatement (Third) of the Law of Trusts reflects some willingness to limit "socially undesirable" trust provisions by providing courts the discretion to invalidate trust terms because of conflicts with public policy:  

"Thus, although one is free to give property to another or to withhold it, it does not follow that one may give in trust with whatever terms or conditions one may wish to attach."  

The common law provides a testator with several devices to effectuate his control over property after death. These methods of restraint on future generations include

24 SIMES, supra note 18, at 59 (quoting JOSEF KOHLER, PHILOSOPHY OF LAW (Adalbert Albrecht trans., MacMillan 1921)).

25 Id. (discussing the implications of societal changes on trust provisions). Professor Simes relates examples of absurdities such as failing to wear stockings in public or failing to become a citizen of England as conditions for beneficial interests in trusts. In regard to these provisions, he recognizes "[b]ut as the world moves and society changes, their enforcement becomes little short of absurd. It is true, some of them may be struck down by another doctrine of the common law, namely, that conditions against public policy are void." SIMES, supra note 18, at 62-63.

26 The rule balanced the testator’s or settlor’s interest in an unhampered or unrestricted right to devise property and the desires of future generations to be free from restrictions on the property interests. See SIMES, supra note 18, at 58-59.


28 RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. b (Tentative Draft No. 2, 1999).

29 Id. Section 29 and the comments following it, however, fails to list or discuss racially or sexually discriminatory trust provisions specifically in section 29 which provides a means for courts to invalidate trust provisions that are “otherwise contradictory to public policy.” Id. § 29(b).
One problem that arose with the increased use of trusts to avoid the probate system was the inability of the judiciary to classify trusts in ways to limit and expunge their use for capricious or whimsical purposes. Professor Clark raised this issue in his article dealing with charitable trusts and the Fourteenth Amendment: "While society understandably favors protection of the ability to create trusts in general, this attitude does not furnish a basis for tolerating specific trusts that are whimsical, eccentric and now discriminatory. However, the courts have found no way to make an effective classification" to restrict such uses. Recent trends in the law governing charitable trusts, however, reflect a movement toward judicial intolerance of racial and gender discrimination and away from liberal rules of construction deferential to every whim of the testator. Despite the recent development allowing courts the discretion to invalidate trust provisions that are contrary to public policy in the tentative Restatement (Third) of the Law of Trusts, courts currently are resisting extension of these public policy rationales to noncharitable private trusts.

II. RACIALLY AND SEXUALLY DISCRIMINATORY TRUST PROVISIONS

In re Estate of Wilson represents the trend, in the context of private charitable trusts, for courts to deviate from discriminatory trust terms and effectuate the charitable purposes of trusts despite the presence of those discriminatory provisions. In Wilson, the New York Court of Appeals held that a gender-restrictive private charitable testamentary trust providing scholarships for five young men from Canastota High School, three with the highest grades in science and two with the highest grades in chemistry, for use during their first year of college did not violate the Equal Protection Clause of the Fourteenth Amendment. The court's rationale for this holding was that the trust simply enlisted state aid to allow continuation of private discrimination: "When a court applies trust law that neither encourages, nor affirmatively promotes, nor compels private discrimination but allows parties to engage in private selection in the devise or bequest of their property, that choice will not be attributable to the State and subjected to the Fourth Amendment's strictures." In addition, the court held that the judiciary, using its power of deviation, also could

30 See SIMES, supra note 23, at 32.
31 Clark, supra note 20, at 997.
32 Specifically, courts have resisted application of public policy to private trusts involving slighter forms of judicial participation, including ministerial roles of supervision and/or administration.
33 45 N.E.2d 1228 (N.Y. 1983).
34 See id. at 1234-37.
35 Id. at 1231.
appoint a private successor trustee in place of the school board without violating Equal Protection.\textsuperscript{36}

The court in \textit{Wilson} reasoned that “[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.”\textsuperscript{37} The rationale behind the \textit{Wilson} decision was that courts were not compelling discrimination by allowing the administration of the trust to continue and providing the means for it to do so.\textsuperscript{38} Trust law, however, remains a state-regulated field. The privilege to create trusts and dispose of property emanates specifically from rights granted under common law and codified by state law.\textsuperscript{39} For this reason, the acquiescent application of trust law to allow the continuance of racial and sexual discrimination by private actors raises serious concerns of Fourteenth Amendment violations under both the federal and state constitutions. To allow the trust incorporating gender-based discrimination to continue, the New York Court of Appeals had to appoint a successor trustee to the school board who would discriminate as the trust required.\textsuperscript{40} This cold-shoulder approach has created a mistaken per se perception that the Fourteenth Amendment does not apply to discriminatory private trust provisions.

Private trusts are not purely private. Private actors do supply the funds which are subject to the restrictive provisions, and private actors do bring their own intentions to disposition to the trust instruments. The traditional assumption, however, that private trusts only involve nominal administrative acts that do not amount to state action is erroneous. States do promote the continuation of discrimination actively when they furnish the mechanism by which private actors accomplish racial and gender discrimination.

The New York Court of Appeals in \textit{Wilson} exercised its own discretion as a state actor to appoint a new trustee and leave the trust terms that discriminated on the basis of gender. The court just as easily could have applied the doctrine of cy pres rather than deviation to article six of the trust to replace “men” with “persons.”\textsuperscript{41} In that way, the court could have supported the underlying charitable purpose of the educational trust without discriminating against female candidates. Instead, the court sanctioned the gender discrimination by appointing a successor trustee after explicitly acknowledging and disavowing the state’s “important public policy” to eradicate

\textsuperscript{36} See id. The Supreme Court of New Hampshire declined to follow the \textit{Wilson} holding in \textit{In re Certain Scholarship Funds}, 575 A.2d 1325, 1329 (N.H. 1990).

\textsuperscript{37} \textit{Wilson}, 452 N.E.2d at 1237.

\textsuperscript{38} See id.

\textsuperscript{39} See id.; supra notes 18-26 and accompanying text.

\textsuperscript{40} See id. at 1234.

\textsuperscript{41} Id. at 1232.
gender-based discrimination "in education, employment, housing, credit, and many other areas."42

In addition, state constitutions do not demand the strict standards for state action found in the federal Constitution’s Equal Protection Clause. In contexts other than discriminatory trust provisions, New Jersey courts have held that its state constitutional guarantees of equal protection are "not expressly directed against state action [and] have been held to protect citizens against encroachments against their rights by wholly private conduct."43

A. Insufficiency of Traditional Trust Law to Invalidate Discriminatory Trust Provisions

Traditional trust law governing charitable trusts has developed more quickly than that dealing with private trusts by considering the implications of discriminatory provisions. Courts apply liberal rules of construction and interpretation to charitable trusts because they provide benefits to the public or gifts to charitable organizations that states want to encourage and preserve.44 Because the law favors charitable trusts, they "are often upheld where a private trust would fail."45 Courts afford generous privileges to charitable trusts by exempting them from the Rule Against Perpetuities, giving tax exemptions and gift and estate tax deductions, and possibly exempting charitable trusts from inheritance and ad valorem property taxes.46

The lenient rules governing charitable trusts developed from societal interests encouraging philanthropy. Indeed, "[a]t one time in England, a charitable disposition had to conform to rigid standards of public policy."47 The English King’s courts exercised their broad powers of reform to maintain strict adherence to these public policies in the uses of trusts.48 The charitable purposes that trusts can benefit 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."49

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42 Id. at 1233.
44 See First Nat'l Bank of Kansas City v. Danforth, 523 S.W.2d 808, 817 (Mo. 1975).
45 Id. at 817 (citing Burrier v. Jones, 92 S.W.2d 885, 887 (Mo. 1966); Ervin v. Davis, 199 S.W.2d 366, 368 (Mo. 1947)).
47 Clark, supra note 20, at 995 (citing 2 GEORGE GLEASON BOGERT, TRUSTS AND TRUSTEES § 432 (1935)).
48 See id.
Because of the unique nature of charitable trusts, courts are more willing to reform their terms to preserve generally charitable gifts. This pattern of reformation has not extended to private trusts yet.

The increasing intolerance of any form of discrimination, not just racial discrimination, has led the movement to seek changes in traditional trust law concerning private trusts. The conflicting interests of society to promote philanthropy and, at the same time, to eradicate discrimination are juxtaposed in the trust context. Until recently, courts refused to invalidate discriminatory private trusts using principles founded in traditional trust law, equal protection, and public policy. An established trust law doctrine such as cy pres emerged as one means for courts to justify reformation of charitable trusts to exclude racially and sexually discriminatory terms due to equal protection violations. Unfortunately, these mechanisms are not as conducive in their application to private trusts.

B. Charitable Trusts and the Doctrine of Cy Pres

Charitable trusts are supposed to benefit public communities. The major dilemma arising with the use of racially and sexually discriminatory provisions in such trusts is their conflict with public policy prohibiting discrimination. This problem became most evident in the context of discriminatory trusts set up for educational purposes. In Pennsylvania v. Board of Directors of Philadelphia, the Supreme Court first considered the use of a trust that erected a college for the benefit of "poor white male orphans."

The doctrine of cy pres focuses on the reformation of dispositive provisions containing illegal purposes in charitable trusts, while attempting to preserve the...
The doctrine only applies to charitable, not private trusts; and allows courts to extend the beneficence of the testator to a purpose other than that designated in the trust. The Restatement (Second) of Trusts provides that the doctrine of cy pres may apply

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

In her article considering charitable trusts and the Fourteenth Amendment, Professor Richelle Searing discusses "the state's discretionary power to modernize discriminatory trusts under the cy pres doctrine." The prevailing perception of these trusts shows that courts no longer use trust law as a mechanism to eliminate discrimination. Instead, Fourteenth Amendment violations provide courts with the means to effectuate change. The test to invalidate racially discriminatory charitable trusts has become the degree of state involvement or entwinement with the discrimination.

Judicial inaction through refusal to apply the cy pres doctrine becomes just as poignant and compelling a means of state action favoring discrimination as direct action or enforcement of those provisions. Even apparent neutral actions of the judiciary, such as appointing private trustees for previous state agent trustees, have been found to violate the Equal Protection Clause. The same principle of neutrality

54 See In re Estate of Wilson, 452 N.E.2d 1228, 1234 (N.Y. 1983); See also Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 679 N.E.2d 1084, 1091 (Ohio 1997) (arguing that the doctrine of cy pres is the "saving device" of charitable trusts and enumerating equitable circumstances when it applies as a rule of construction).

55 See 2 RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. a (1959).

56 2 RESTATEMENT (SECOND) OF TRUSTS § 399. "Cy Pres" means "as near" in Norman French. See In re Certain Scholarship Funds, 575 A.2d 1325, 1332 (N.H. 1990). According to the Restatement, the overriding purpose of the doctrine is to carry out the purpose of the testator "as nearly as possible. 2 RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. a; see also Smith v. Moore, 225 F. Supp. 434, 441 (E.D. Va. 1963) (holding that the court should honor the intent of the testator).


58 See id. at 282.

59 See id.

60 See id. at 288.

applies to the application of some reformative or expunging doctrine to eliminate the discriminatory provisions. Professor Richard Raskin, contemplating the effect of judicial inaction and the present "shifting and enigmatic body of case law" that should mold constitutional evaluation of discriminatory trust issues contends:

The advantage of the rule proposed above is that it recognizes the functional equivalence of a judicial command to discriminate and the judicial substitution of an actor who may discriminate for one who may not. Moreover, it encourages courts faced with alternative methods of effectuating charitable bequests to choose the course of nondiscrimination and dissuades them from facilitating the administration of discriminatory trusts.63

The court in Wilson erroneously refused to classify any involvement of judicial action in a situation in which the court actively intervened and supplied a mechanism for the fulfillment of the discriminatory provision of the trusts. The court propounded notions of "neutral regulation" by the state and "voluntary adherence" to the terms of the trust.64 Only when state action rose to the level of direct use of the coercive power of the state to enforce a discriminatory provision would the court agree to recognize equal protection and due process dilemmas.65 Because judicial enforcement and state action are ambiguous and amorphous principles governing constitutional issues, courts must regard the well-established public policies favoring equality under the law and frown upon any form of discrimination to develop restrictive, rather than deferential, tests for private discriminatory trust provisions.66

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62 Raskin proposes that a better rule for the court in Wilson in light of the facts of the case would state:
When management of a discriminatory charitable trust becomes impossible due to a state official's refusal to participate in discrimination, and the trustee petitions a court for instructions, the court must exercise its equitable modification powers, if at all, to remove the discriminatory provisions. If modification would violate the testator's general charitable purposes, the trust should be permitted to fail. Any other course is judicial state action violative of the [F]ourteenth [A]mendment.

63 Id. (footnote added).
64 See In re Estate of Wilson, 452 N.E.2d 1228, 1236 (N.Y. 1983).
65 See id.; see also Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (hesitating to find governmental regulation concerning private acts sufficient state action).
66 See Raskin, supra note 62, at 318 (suggesting a new principle of judicial enforcement contrary to the application the court used in Wilson).
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2. Private Trusts and Deviation

Traditional trust law does not provide an equitable means for courts to reform discriminatory private trusts. Cy pres does not apply to express private trusts. Another mechanism available for courts to use at their discretion to modify certain terms of a trust is the doctrine of deviation. The doctrine of deviation, although equitable, differs from the cy pres doctrine in two major ways. Deviation applies to private and charitable trusts alike. Deviation, however, only permits changes to incidental requirements in the terms of a trust such as the alteration of administrative provisions. The Restatement (Second) of Trusts also provides specifically for deviation from the terms of private trusts in certain circumstances. These circumstances include impossibility, illegality, contradiction with public policy, and changes in circumstances not anticipated by the settlor. Deviation may apply even when compliance injures the interests of the beneficiary. Section 166 of the Restatement also provides that “[t]o the extent to which a term of the trust doing away with or limiting duties of the trustee is against public policy, the term does not affect the duties of the trustee.” This doctrine incorporates the notion that trusts should not be enforced when they act against public policy. Typically, the deviation doctrine does not alter the central provisions of a trust’s purpose. Because deviation gives courts a narrower power to alter trusts than the power of cy pres, courts use deviation more liberally. Because the doctrine is strictly limited to use on

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67 See id.
68 See 1 RESTATEMENT (SECOND) OF TRUSTS §§ 165-67 (1959). In an analogous provision with a more limited scope applicable to charitable trusts the Restatement states:
The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.
Id. § 381. The latest Tentative Draft of the Restatement (Third) of Trusts includes a more expansive section allowing the invalidation of trust terms contrary to public policy. See RESTATEMENT (THIRD) OF TRUSTS § 29 (Tentative Draft No. 2, 1999).
69 See id. § 165.
70 See id. § 166.
71 See id.
72 See id. § 167.
73 See id. § 166(2).
74 Id. § 166(3).
75 See id. § 62 (stating under the heading “Enforcement against Public Policy” that “[a] trust or a provision in the terms of a trust is invalid if the enforcement of the trust or provision would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee”). See also id. § 166 cmt. b (“A trustee is not bound by a term of the trust which directs him to do an act, although the act itself is not criminal or tortious, if it is against public policy to compel the performance of such an act.”).
76 See Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 679 N.E.2d 1084, 1092 (Ohio
administrative provisions in private trusts, however, it fails to provide courts any means to reform the substantive provisions of discriminatory private trusts. Due to the failure of traditional means of modification, courts must use public policy to effectuate this end. Using a new public policy standard, courts could refuse to enforce trust provisions in private trusts that contain restrictions contrary to public policy.\textsuperscript{77}

III. THE FOURTEENTH AMENDMENT, STATE ACTION, AND PRIVATE TRUSTS

Very few limitations restrict the freedom of disposition. As long as individuals do not run afoul of Fourteenth Amendment guarantees and other statutory limitations they may create any form of testamentary disposition. Traditionally, such dispositions may discriminate even on the basis of race or gender. This deferential view toward settlors' rights simply has lost its place when racial or sexual discrimination are concerned. Abhorrence of discrimination in general has led courts to limit private discrimination in a number of contexts.

The most poignant issue involving application of the Fourteenth Amendment to private discrimination is state action. According to most courts, "judicial administration of [a] private trust [is] not state action;"\textsuperscript{78} therefore, discriminatory private trusts do not fall within the ambit of Fourteenth Amendment protection. As applied to charitable trusts, however, traditional views of state action analysis under the Fourteenth Amendment change. State action increases beyond merely ministerial tasks when courts are forced to administer and to monitor the progress of charitable

\textsuperscript{77}The Restatement (Second) of Trusts § 62 already provides this power to courts, but the judiciary has refused to exercise it.

\textsuperscript{78}Clark, supra note 20, at 1007 n.108 (citing Gordon v. Gordon, 124 N.E.2d 228 (Mass.) (holding that a will provision revoking the gift should the testator's son marry outside of the Jewish faith was not vague as to be unenforceable), cert. denied, 349 U.S. 947 (1955)); see also United States Nat'l Bank v. Snodgrass, 275 P.2d 860 (Or. 1954) (affirming a decision that a testamentary provision requiring as a condition precedent to beneficiary's taking, that she prove that she had not, before age of 32, embraced a particular religious faith or married a man of that faith, was neither an invasion of beneficiary's right to religious freedom, nor unconstitutional discrimination, nor a violation of public policy arising from either category).
trusts. In some instances, state departments or governmental bodies serve as the trustees of charitable trusts.

No dispositive test exists for determining when sufficient state action exists to violate the Fourteenth Amendment in the context of private discrimination. The

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79 See Clark, supra note 20, at 1003, 1008. In addition, state courts must find that a general charitable purpose exists within the trust for it to become operative and qualify to receive benefits accorded such trusts. See id. at 1003-04. The practice of court administration and establishment of trusts as charitable applies equally to inter vivos charitable trusts which come into existence through their own operation during the life of the settlor. Until state courts define them as "charitable," inter vivos trusts are not accorded privileges either. See id. at 1004 n.95. The law favors charitable trusts by exempting them from the Rule Against Perpetuities and accord them favorable tax status. See In re Estate of Wilson, 452 N.E.2d 1228, 1232 (N.Y. 1983).


81 See Reitman v. Mulkey, 387 U.S. 369, 378 (1967) (advocating a case by case determination, based on the facts and circumstances of each situation, of whether state action exists). Courts have proposed numerous approaches to state action analysis in the context of private trusts. The Supreme Court of Missouri recognized four theories for determining the quality of state action: the public arena theory, the state function theory, the state property theory, and the sifting facts and weighing circumstances theory. See First Nat'l Bank of Kansas City v. Danforth, 523 S.W.2d 808, 819 (Mo. 1975), cert. denied, Sutt v. First Nat'l Bank of Kansas City, 421 U.S. 1016 (1975).

The public arena theory stands for the proposition that when municipal control has been established firmly, the mere substitution of trustees will not transfer automatically from the public to the private sector and thus avoid the mandates of the Constitution. See Evans v. Newton, 382 U.S. 296, 301 (1966) (holding that the restriction of use of a public park to the white population of the city of Macon violated "the public policy of the United States of America and violat[ed] ... the Constitution and laws of the State of Georgia"); Searing, supra note 57, at 290.

The state function theory (usually employed in cases in which only whites were allowed to vote in a political primary) applies when private individuals assume functions traditionally reserved to public services. See Nixon v. Herndon, 273 U.S. 536 (1927). Public function is not a per se rule or determination when an activity falls within the ambit of the government. "[H]istory of governmental activity" in the area remains dispositive. Searing, supra note 57, at 291 (citing Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (considering that a warehouseman's proposed sale of goods in his care was not fairly attributable to the State of New York)). Public functions in the administration of private trusts could include the entire probate process, disposition of property, assignment of a trustee by the court, monitoring the progression of the trust, and interpreting and enforcing the provisions of the trusts. When testators take responsibility for disposing of property they assume the role of the state which has been granted to individuals through this privilege. The state still provides for its own disposition through intestacy laws.
general standard provides that "the conduct allegedly causing deprivation of a federal right [must be] fairly attributable to the state."\(^2\) The threshold to determine when private action becomes sufficiently entwined with state action to violate the Fourteenth Amendment is undetermined.\(^3\) Yet, the Supreme Court has observed that "[p]rivate discrimination may violate equal protection of the law when accompanied by State participation in, facilitation of, and in some cases, acquiescence in the discrimination."\(^4\)

A. In the Aftermath of Shelley v. Kraemer

In *Shelley v. Kraemer*,\(^5\) the Supreme Court refused to enforce a racially restrictive covenant between private individuals because such enforcement would violate the Fourteenth Amendment.\(^6\) Thirty-nine caucasian property owners entered into an agreement that restricted the use and transfer of fifty-seven lots in a St. Louis, Missouri neighborhood for fifty years.\(^7\) The covenant at issue prohibited the occupancy or ownership of property of those fifty-seven parcels of land by African-Americans.

The dispute in the case arose from a contract to sell one of the lots subject to the restrictive covenant at issue to a black couple, the Shelleys.\(^8\) Community members sought to enforce the convenant and divest the Shelleys of the title to their new

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The sifting facts and weighing circumstances theory requires courts to engage in a fact-specific analysis to determine whether state action is involved. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). Under this theory, courts must look to evidence beyond the four corners of the trust document and consider all of the latent and possible ways the state may be involved with a private trust.

\(^{82}\) *Wilson*, 452 N.E.2d at 1235 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). The New York Court of Appeals even acknowledged that "[i]t is argued before this court that the judicial facilitation of the continued administration of gender-restrictive charitable trusts violates the equal protection clause of the Fourteenth Amendment." *Id.* at 1235.

\(^{83}\) *See Burton*, 365 U.S. at 722.

\(^{84}\) *Wilson*, 452 N.E.2d at 1235. See *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Shapiro v. Columbia Union Nat'l Bank & Trust Co.*, 576 S.W.2d 310, 318 (Mo. 1978) (drawing the line for state action when the nexus between the state becomes a “joint participant” or “so entwined” in the action that the state assumes a “position of interdependence”), *cert. denied*, 444 U.S. 831 (1979).

\(^{85}\) 334 U.S. 1 (1948).

\(^{86}\) *See id.* at 23.

\(^{87}\) *See id.* at 4-5.

\(^{88}\) *See id.* at 5.
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home.\textsuperscript{89} The Court specifically acknowledged that action by "state legislatures or city councils"\textsuperscript{90} was not involved in the circumstances of the case; however, "the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined . . . by the terms of agreements among private individuals."\textsuperscript{91} In this landmark case, the Court refused to enforce a purely private agreement because doing so involved a state mandate of discrimination. Though the agreement in itself did not violate the Fourteenth Amendment because it was purely private discrimination,\textsuperscript{92} Court compulsion of the racial discrimination blatantly violated equal protection guarantees. The Court noted that the Fourteenth Amendment protects many civil rights, including "rights to acquire, enjoy, own and dispose of property."\textsuperscript{93} The uniqueness of the facts in Shelley and the distinction that the Court drew between state enforcement of private agreements for discrimination contradict the traditional view that the Fourteenth Amendment does not prohibit any form of private discrimination.

The holding in Shelley appeared to extend the initial prohibition the Supreme Court established against state action of any and all kinds in the promulgation of discrimination.\textsuperscript{94} The distinction in Shelley from prior cases considering state or judicial enforcement of discrimination was that the racial discrimination in that case arose out of a purely private agreement.\textsuperscript{95} The Court found that "the purpose of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."\textsuperscript{96} The Court specifically rejected the respondents’ argument that the state involvement was too attenuated in that instance to constitute impermissible state action,\textsuperscript{97} because the Court included actions of state courts and judicial officers in proceedings among the forms of state action that violate the guarantees of the Constitution.\textsuperscript{98}

The factual situation involved in Shelley is analogous to the judicial enforcement or administration of a private trust containing discriminatory provisions. Though some courts have claimed that they have no affirmative obligation to prevent private discrimination,\textsuperscript{99} the Court in Shelley did make clear that "when the effect of that

\textsuperscript{89} See id. at 6.
\textsuperscript{90} Id. at 12.
\textsuperscript{91} Id. at 13.
\textsuperscript{92} See id. at 9 (stating that the issue in the case was the judicial enforcement of the restrictive covenant, not the validity of the private agreement itself); id. at 13 (finding that the convenant alone did not violate any rights guaranteed by the Fourteenth Amendment).
\textsuperscript{93} Id. at 10.
\textsuperscript{94} See The Civil Rights Cases, 109 U.S. 3, 11 (1883).
\textsuperscript{95} See id. at 13.
\textsuperscript{96} Id. at 13-14 (emphasis added).
\textsuperscript{97} See id. at 14.
\textsuperscript{98} See id. (citing Virginia v. Rives, 100 U.S. 313, 318 (1880)).
\textsuperscript{99} See In re Estate of Wilson, 452 N.E.2d 1228, 1236 (N.Y. 1983) ("Nor is the State
[state] action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional demands."

In Burton v. Wilmington Parking Authority, the plaintiff challenged that the Supreme Court of Delaware erred by refusing to find his equal protection rights were violated when a restaurant leasing public property and entitled to state agency maintenance services discriminated against him and other black customers. The Delaware court had held that Eagle Coffee Shoppe, though leasing its location from Wilmington Parking Authority, was acting solely in a private capacity when it refused to serve black customers, more particularly, the plaintiff, Mr. Clark. The Supreme Court reversed, holding that "by its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service [based upon race], but has elected to place its power, property and prestige behind the admitted discrimination." The circumstances surrounding the Parking Authority's "interdependence" with the restaurant that discriminated led the Court to find that the discrimination involved was not "purely private" and, therefore, violated the Fourteenth Amendment.

In the context of trusts, as in the context of the leasing agreement in Burton, courts should not measure the degree state action by the mere language of the instrument involved. The participation of a state agency with a private restaurant in Burton was sufficient to allow the Court to look to the substance, not the form, of the "nonobvious involvement of the State." Courts, therefore, must look to the facts and circumstances surrounding the creation, implementation, administration, and supervision of discriminatory trust provisions when determining whether those provisions violate the Fourteenth Amendment.

under an affirmative obligation to prevent purely private discrimination.

100 Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (emphasis added). See also Wilson, 452 N.E.2d at 1236 (noting that the state is responsible for private discrimination when its actions have "the effect of compelling the private discrimination").


102 See id. at 816.

103 See id. at 721.

104 Id. at 725.

105 Id.

106 See, e.g., Milford Trust Co. v. Stabler, 301 A.2d 534, 573 (Del. Ch. 1973) (holding that the court could not instruct a trustee to follow the racially discriminatory terms in an educational trust, therefore, the trustee should implement the trust without racial restrictions). According to the Court of Chancery of Delaware, "[a] judge is such an officer [bound by the law against discrimination] and he may not take any judicial action based upon racial discrimination." Id. at 536 (emphasis added) (citing Cooper v. Aaron, 358 U.S. 1 (1958); Shelley v. Kraemer, 334 U.S. 1 (1948); State v. Brown, 195 A.2d 379 (Del. 1963)).

107 Burton, 365 U.S. at 722 (attributing "its true significance" to the action of the state).

108 See Milford, 301 A.2d at 573.
The principles underlying the Civil Rights Cases of 1883\(^{109}\) established that private discrimination does not impinge on the Fourteenth Amendment as established in *Shelley v. Kraemer*;\(^ {110}\) however, these cases can be read to suggest a standard by which courts should find state action and responsibility sufficient to invalidate discriminatory private trusts. The Supreme Court posed the rhetorical question in *Shelley v. Kraemer* of whether any judicial action that furthers private discrimination is state action.\(^ {111}\) The Court also stated in *Shelley* that "[s]tate action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."\(^ {112}\) In addition, the Court asserted that the Fourteenth Amendment is not inoperative simply because an incident of discrimination arose from private agreements.\(^ {113}\) The extension of these rationales led to a conclusion that the enforcement of restrictions defined by private individuals amounts to state participation in discrimination.\(^ {114}\)

IV. PRIVATE TRUSTS CONVERGE WITH THE PUBLIC ARENA

One commentator made the argument that determining the quality of state action becomes a problem "of defining the constitutionally prescribed line between the individual and the state."\(^ {115}\) The Supreme Court acknowledged that line in *Shelley*.\(^ {116}\) As of yet, however, courts have been reluctant to judge state action that permits, acquiesces in, or facilitates private discrimination as crossing that line and violating the Fourteenth Amendment.

The Pennsylvania Supreme Court resolved this line-drawing problem correctly and in accordance with public policy in *In re Girard's Estate*\(^ {117}\) by holding that a court's substitution of a private trustee for public, city trustees—previously involved

\(^{109}\) 109 U.S. 3 (1883).


\(^{111}\) See *Clark*, *supra* note 20, at 983.

\(^{112}\) *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (stating that any action in the context of actors which are the legislature, judiciary, and executive is state action).

\(^{113}\) See *id.* (stating further that an action arising out of the common law policy of a state is not immune from Fourteenth Amendment).

\(^{114}\) See *id.* at 13-14 (distinguishing between the validity of the agreements which contained discriminatory provisions under the Fourteenth Amendment and the illegal judicial enforcement of the terms to effectuate the discriminatory purpose of the agreement). As long as individuals alone promote the discriminatory purposes of the agreements by voluntary adherence to the terms, no violation has occurred.


\(^{116}\) See *Shelley*, 334 U.S. at 13-14.

in the administration and maintenance of a private trust providing for the education of “poor male white orphan children” of Philadelphia—rose to the level of unconstitutional state action. The Supreme Court, however, consistently has been hesitant to find governmental regulation as sufficient state action in private acts.

Another issue that arises in this context concerns the point at which application of the common law may become state action. Because the right of disposition and the concept of the trust originated at common law, state law grants individuals the privilege to determine the fate of their property. The overwhelming majority of courts have held that mere codification of the common law does not constitute state action within the meaning of the Fourteenth Amendment.

The dichotomy between passive state action and active state involvement has become the deciding factor in determining whether states participate sufficiently to modify the common law that may violate the Fourteenth Amendment. Not surprisingly, the Supreme Court anticipated this dilemma in Shelley. The Court addressed this problem in the context of judicial enforcement of common law rules or substantive due process. Enforcement by state courts of common law rules can constitute impermissible state action.

Under this rationale, state court enforcement and facilitation of discriminatory private trusts may be sufficient state action to violate the Fourteenth Amendment. The effect of court administration that modifies a trust to effectuate private discrimination by allowing the trust to continue is to allow courts to sanction discrimination and enforce the discriminatory provisions by compelling a trustee to comply with the discriminatory terms of a trust. This effect denies protected rights and was prohibited by the Supreme Court as constituting improper state action in Shelley because it “bears the clear and unmistakable imprimatur of the State.”

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118 Id. at 288. See also Pennsylvania v. Brown, 392 F.2d 120, 125 (3d Cir.) (“The action in this instance [of Girard’s will] and its motivation are to put it mildly, conspicuous. And what happened to Girard does . . . significantly encourage and involve the State in private discriminations.”) (quoting Reitman v. Mulkey, 387 U.S. 369, 381 (1967)).

119 See Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that regulation of the Lodge by an alcohol license was not sufficient for a finding of state action in the Lodge’s discrimination against African-Americans).

120 See, e.g., King v. South Jersey Nat’l Bank, 330 A.2d 1, 7 (N.J. 1974) (stating that “[c]odification is merely a legislative reorganization of existing law into acceptable statutory form” concerning a due process challenge to repossession of a car); Kennebec, Inc. v. Bank of the West, 565 P.2d 812 (Wash. 1977) (holding that a legislative act providing for nonjudicial foreclosure of deeds of trust did not violate due process because the mere enactment of the statute was not sufficient state action).

121 See Shelley, 334 U.S. at 17.

122 Id. at 20. The Supreme Court imposed an affirmative obligation on courts to prevent exactly this type of effect. See id.
Such action also would violate state constitutional mandates against discrimination based on race or gender.123

A. Classification of Discriminatory Private Trusts

Courts have declined to use public policy principles to eliminate discriminatory trust provisions because of the lack of a system by which to determine when such discrimination converges with public functions to violate equal protection guarantees. Courts should not prohibit purely private discrimination that does not involve any state action. For example, if a settlor creates an inter vivos trust for the benefit of his son and names himself trustee, but provides upon his death for the corpus of the trust to pass to his son unrestricted, courts may not restrict his freedom to determine the terms of the trust. Because the settlor is trustee, his own discriminatory intent will not be enforced by the court. Such an inter vivos trust would not involve a third party trustee or court administration. Direct delivery of the monetary benefit of the trust from the settlor to the beneficiary would not involve action subject to eradication, even though the discrimination is egregious.

Under a different scenario such as the initial hypothetical of this Note, a testator could create a testamentary trust that requires court administration to become effective or to continue. In addition to court involvement, the trust may require a third party trustee. In order for the trust to survive, the court must compel the trustee to act in accordance with the discriminatory terms of the trust. If the trustee has a duty to discriminate, it derives from the authority of the court. The court compels the trustee to perform his discriminatory duties. In that situation, the court would force others to discriminate based upon state authority and state law. Courts should eliminate discriminatory provisions from private trusts whenever, as in Shelley, the court would be placed in the position of enforcing or facilitating discriminatory duties. This basic distinction provides the framework in which courts may exercise their discretion based on public policy mandates against discrimination.

V. BALANCING THE TESTATOR’S INTERESTS WITH THE INTERESTS OF SOCIETY TO PREVENT DISCRIMINATION124

Societal values concerning racial and gender discrimination are reflected in the context of charitable trusts.125 Some sources attribute the “lack of [clear] direction”

to the competing interests presented between society, the testator, and the beneficiaries. In this balancing test, however, the interests presented by society, the state, and the beneficiaries in eradicating discrimination should prevail:

The constitutional strength of the government’s interest in preventing even private racial discrimination is underscored by the recent decision in Jones v. Alfred H. Mayer Co., interpreting the Civil Rights Act of 1866, wherein that interest was held to prevail over the ordinary liberty of a citizen to buy and sell land and other property.

Courts should extend this principle to private trusts that contain discriminatory provisions and that require court administration, facilitation, or acquiescence to operate. In other contexts, courts have refused to enforce trust provisions in violation of public policies against restraints on marriage and encouragement of divorce.

A. State Responsibility

Actions by state entities to promote, acquiesce in, and validate discrimination in private trusts are unlawful and violate courts’ duties to follow antidiscrimination policies. Under traditional trust law, a court’s responsibility is to divine the intent of the testator and implement that purpose if it is not illegal or impossible. Respect may be accorded to the intentions of testators; however, courts and states should have affirmative duties to prevent racial and gender discrimination in private trusts. The New York Court of Appeals in In re Estate of Wilson held that no affirmative duty exists on the part of the state to prevent “purely private discrimination.” In the trust context, discriminatory provisions may come from the terms of a testator’s will

126 See, e.g., Swanson, supra note 6, at 156.
127 Connally, 330 F. Supp. at 1163 (citations omitted). The court in Connally held: “Racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities.” Id. at 1160. See also 2 GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 328 (2d ed. rev. 1977). The trends reflected in charitable trust law must continue to develop and extend to private trust law.
130 See First Nat’l Bank of Kansas City v. Danforth, 523 S.W.2d 808, 815-16 (Mo. 1975).
131 452 N.E.2d 1228, 1236 (N.Y. 1983) (stressing that state abstention from participation and further allowance of private discrimination did not violate the Fourteenth Amendment). See also DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989) (holding that states have no affirmative duty to aid in a case in which the state did not act to remove a child from his father’s custody after complaints of child abuse were filed).
or a settlor's trust document; however, unlike a purely private act of discrimination, the privilege to produce the discriminatory provisions originates from common law and has been codified by state trust law. State courts are the mechanisms for administration and enforcement of the discrimination. Professor Richelle Searing's proposition in her article, Discriminatory Charitable Trusts: The Role of Approximation and the Fourteenth Amendment, substantiates this view: "Thus, a state that allows a discriminatory provision in a charitable trust to stand—be it racial, gender, or religious—can be seen as perpetuating discrimination." Professor Searing continues to emphasize the egregious consequences of state validation and enforcement of discrimination in trust provisions:

It is important to note that dead hand control of property that fosters racial discrimination is particularly harmful because it imposes the grantor's discriminatory views on future generations. Moreover, the chance of success for this type of discriminatory exclusion is greater when the state refuses to invoke cy pres, allowing the trust to remain forever discriminatory.

The lasting consequences of trust discrimination are severe, especially in light of the fact that court validation of trusts with discriminatory provisions imposes substantial burdens on future generations. Even though private trusts are not exempt from the Rule Against Perpetuities—unlike charitable trusts, which may operate for an infinite amount of time—their infringement on individual rights and promulgation of discrimination has just as severe an effect.

B. Application of State Action Analysis to Private Trusts

State action is a separate test used to determine the constitutionality of a trust provision. Because state action analysis incorporates numerous approaches, courts can tailor their evaluation of the facts surrounding discriminatory private trusts to arrive at equitable outcomes. The Supreme Court in Burton v. Wilmington Parking Authority cited Cooper v. Aaron for the proposition that the state is responsible whenever "state participation [emerges] through any arrangement, management, management, and control of private property that was originally owned or controlled by the state".

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132 Searing, supra note 57, at 290.
133 Id. But see Raskin, supra note 62, at 300 (commenting on the reconciliation of the Johnson and Wilson cases: "Judicial application of trust principles that permit, but do not encourage, promote or compel private discrimination on the basis of gender does not constitute state action violative of the [F]ourteenth [A]mendment").
134 See Searing, supra note 57, at 290.
funds or property."\textsuperscript{137} Incorporating this view of state involvement in private acts of discrimination using trust provisions, any action of the state, including administration of a testamentary estate, that sets up a discriminatory private trust would violate the Fourteenth Amendment.

The opposing view counters that "[w]hen the state regulates private conduct . . . it may be held responsible for private discrimination in the regulated field 'only when enforcement of its regulation has the effect of compelling the private discrimination.'\textsuperscript{138} This proposition does not hold the state responsible for blatant discrimination in private trusts or for state condonement and management of that discrimination because the legislature does not expressly forbid discriminatory trust provisions.

Courts have a mechanism available to rectify the effects of discriminatory trust provisions by invalidating them under the auspices of public policy antidiscrimination mandates and the illegality of state preservation of discrimination. This rule would allow courts to make case-by-case determinations concerning discriminatory private trust provisions to balance mitigating factors. Such factors include remedial measures for past discrimination often used in educational trusts to provide scholarship funds for women and minorities. In addition, courts may consider whether an absolute lack of state action exists in relation to the trust. Typically, purely private discrimination does not violate the Fourteenth Amendment. The Court proposed the view in the \textit{Civil Rights Cases} that "[i]ndividual invasion of individual rights is not the subject matter of the [Fourteenth] [A]mendment."\textsuperscript{139} But states should, and do, have affirmative duties to strike racially and sexually discriminatory provisions from private trusts and implement the testator's intent "as near as" possible, in light of principles underlying the cy pres doctrine, without the discriminatory terms.\textsuperscript{140}

In \textit{Shelley v. Kraemer}\textsuperscript{141} and \textit{Barrows v. Jackson},\textsuperscript{142} the Court promoted a broad interpretation of state action that courts should extend to eliminate the state action requirement in cases involving private discriminatory trusts. As of yet though, the Supreme Court has refused to apply this broad interpretation to trusts, even though no definitive test for state action as applied to private conduct exists.

\begin{itemize}
  \item \textsuperscript{138} Raskin, \textit{supra} note 62, at 311 (quoting \textit{In re Estate of Wilson}, 452 N.E.2d 1228, 1236 (N.Y. 1983)).
  \item \textsuperscript{139} 109 U.S. 3, 11 (1883).
  \item \textsuperscript{140} This proposal incorporates invalidation of the discriminatory terms and implementation of the trust in accordance with the policies surrounding cy pres and the doctrine's application to charitable trusts.
  \item \textsuperscript{141} 334 U.S. 1 (1948).
  \item \textsuperscript{142} 346 U.S. 249 (1953). See Raskin, \textit{supra} note 62, at 301-02.
\end{itemize}

Courts must focus on the consequences of state action when determining whether discriminatory provisions of private trusts implicate state action. By allowing discriminatory trusts to pass through court administration and become active, the judiciary sanctions discriminatory conduct. State laws also affirmatively provide testators with the ability to effectuate their discrimination through inter vivos trusts—whether funded during the testator’s life or by a testamentary pourover. Courts and states have developed intricate policies sanctioning discrimination in trust law.¹⁴³

Courts act unlawfully even through acquiescence to state laws providing the ability to discriminate. In its discussion of Burton, the Supreme Court of Missouri observed in Shapiro v. Columbia Union National Bank and Trust Co.¹⁴⁴ that “[a]lthough the state neither commanded or expressly authorized or encouraged discrimination, the state by its inaction made itself a party to the refusal of services which could not be considered the purely private choice of the restaurant operator.”¹⁴⁵

The inaction of the judiciary in the context of discriminatory private trust provisions makes the state a party to the discrimination. Courts shield and sanction gender and racial discrimination by validating testamentary trusts in probate proceedings and by acquiescing in and enforcing discriminatory provisions in inter vivos trusts. This connection with the state as the final or only barrier before a trust becomes active violates the strict public policy against discrimination and the Fourteenth Amendment.

1. The Equal Protection Clause

Though the Fourteenth Amendment does not allow courts or other state actors to sanction the private invasion of individual rights, the Amendment does prohibit private discrimination if state action is involved, because it specifically refers to “no State” in its language. The Equal Protection Clause of the Constitution provides:

¹⁴³ See generally Pennsylvania v. Brown, 270 F. Supp. 782, 790 (E.D. Pa. 1967) (“[T]he involvement (between the state and the discriminating facility) exists [no matter what form it takes] and that it lends sustenance, actual or apparent, to a policy of discrimination.”), aff’d, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968)). The court in Brown held that the transfer to a private trustee of control over the racially discriminatory trust did not remove the state from involvement in the discriminatory purposes and policies. See id.

¹⁴⁴ 576 S.W.2d 310 (Mo. 1978) (en banc), cert. denied, 444 U.S. 831 (1979).

¹⁴⁵ Id. at 319 (addressing a female law student’s claim that she was denied aid from a charitable trust established for the benefit of males).
[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{146}

States act only through their judiciary, legislative, and executive offices and agents.\textsuperscript{147} A judge is an officer of the state and, therefore, a court may not order others to honor racially discriminatory trusts even if the trusts are private.\textsuperscript{148} For this reason, the state action test is a test independent of constitutionality.\textsuperscript{149}

D. Traditional Trust Law

The common law governing trusts and disposition of property gives testators and settlors free reign over the terms and beneficiaries of these instruments. Delaware trust law also extends to testators and settlors the unequivocal right to dispose of property even if the private individuals use state law and the judiciary to activate and implement the discriminatory terms, because

as a matter of [Delaware] 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{150}

Because society abhors discrimination in any form, and federal law prohibits discrimination by state actors, any action by states implicates them and runs afoul of the underlying principles of the Fourteenth Amendment. Applying the effect test enumerated above to state action in the context of private trusts demonstrates that judiciary inaction and administration of discriminatory trusts mandates racial and gender discrimination as a consequence.

\textsuperscript{146} U.S. CONST. amend. XIV, §1.
\textsuperscript{147} See In re Will of Potter, 275 A.2d 574, 582 (Del. Ch. 1970) (citing Ex parte Virginia, 100 U.S. 339, 347 (1879)).
\textsuperscript{148} See Milford Trust Co. v. Stabler, 301 A.2d 534, 536 (Del. Ch. 1973) (reading the trust without the race restriction).
\textsuperscript{149} See id. at 537.
\textsuperscript{150} Will of Potter, 275 A.2d at 579.
CONCLUSION

In some instances, courts will not enforce provisions in violation of public policy. Though courts use their power to restrict disposition based on public policy sparingly, public policy can limit the manner of disposition of property though a testator or settlor has the right to bequeath the property. Even though many courts admit that some trust restrictions are contrary to public policy, the judiciary remains reluctant to review these provisions. This neutral reaction to the central public policy doctrine surrounding case law is an anomaly because courts traditionally have had the authority to invalidate trusts designed to accomplish ends contrary to public policy even though the trust purposes are not illegal.

A consideration of the Restatement’s views on the role of public policy’s ability to restrain personal conduct and dictate “constructional preferences” elucidates the movement toward compliance with public policy mandates in trust and property law. The Restatement specifically considers the implications of and need for restrictions on disposition:

American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law. The term “rule of law” is used in a broad sense to include rules and principles derived from the U.S. Constitution, a state constitution, or public policy... In addition, “impermissible racial or other categoric restrictions” are “[a]mong the rules of law that prohibit or restrict freedom of disposition in certain instances.” The Restatement specifically identifies a preference for construction of “donative

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151 See In re Estate of Walker, 476 N.E.2d 298, 301 (N.Y. 1985) (supporting the view that restrictions on the right to marry and provisions encouraging divorce or separation are void as against public policy).

152 See id.

153 As applied in the context of a charitable trust containing gender restrictions, “[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.” In re Estate of Wilson, 452 N.E.2d 1228, 1233 (N.Y. 1983) (citing 4 AUSTIN WAKEFIELD SCOTT, THE LAW OF TRUSTS § 399.4 (3d ed. 1967) (detailing a reluctance to expunge restrictions based on public policy)).


155 RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 11.3 cmt. m (Tentative Draft No. 1, 1995).

156 Id. at § 10.1 cmt. c.

157 Id.
dispositions" in agreement with public policy. Even the Restatement (Second) of Property: Donative Transfers contains an entire division devoted to social and personal restrictions imposed by donative transfers. Courts could refuse to enforce racial restrictions based on this public policy.

According to Professor Stephen R. Swanson, "[d]espite this strong public policy against racial discrimination, apparently no court has invalidated a racially discriminatory trust on grounds of public policy." It is time for courts to use their discretionary powers to invalidate discriminatory trust provisions in private trusts in accordance with well established public policy abhorring racial and gender discrimination.

Misuse of state privileges to compel and to extend private discrimination limits the liberties of individuals and strikes at the heart of the Equal Protection Clause of the United States Constitution and state constitutions. Public policy alone should be sufficient to invalidate racially and sexually discriminatory private trust provisions. Though state law provides individuals the freedom to bequeath property and to establish trusts (evolved from the Statute of Wills and Statute of Uses), these laws and liberties cannot permit testators to rule with dead hands and restrict the lives and liberties of others. Although society previously tolerated private discrimination, changing values should dictate the course of the common law:

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158 Id. at § 11.3 cmt. m.
160 See id. (stating explicitly that an ambiguous restriction that "might plausibly be construed either to impose or not to impose a discriminatory restriction deemed to be against public policy, such as one promoting racial injustice, should, unless overcome by evidence of a contrary intention, be construed against imposing such a restriction"). The section expands upon that constructional preference to discuss complete elimination of provisions for reasons of public policy.
161 Swanson, supra note 6, at 160 (advocating a solution for the problem of discrimination in charitable trusts "by excluding from the definition of charitable any trust that discriminates on the basis of sex or race").
162 See generally Green v. Connally, 330 F. Supp. 1150, 1159 (D.D.C.) (citing 4 G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 369, at 63 (2d ed. 1964); 4 SCOTT, supra note 127, § 368, at 2855-56, aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971)). Developments in the application of tax exemption requirements for charitable trusts demonstrate the continuing trend prohibiting racial discrimination in the trust context. The IRS changed its policy regarding charitable trusts by mandating that private schools that discriminate on the basis of race fail the requirements to qualify for tax exempt status as a per se rule. This approach fundamentally alters the common law definition of "charitable" to exclude any discriminatory purposes contained within those trusts. See Connally, 330 F. Supp. at 1156.
163 But cf. Swanson, supra note 6, at 160 (stating that "public policy considerations alone do not justify either invalidating or modifying a racially discriminatory trust").
Our society permits discrimination in the private sector in recognizing that the nature of human beings is to associate with, and confer benefits upon, other human beings and institutions of their own choosing. Such private decision-making is a part of daily life in any society. However, when the decision-making mechanism, as here, is so entwined with public institutions and government, discrimination becomes the policy statement and product of society itself and cannot stand against the strong and enlightened language of our Constitution.\(^{164}\)

States should not act in ways that preserve discrimination merely because courts hide behind traditional common law approaches codified by state trust laws to ignore the pervasive problems of discrimination. Courts should eliminate discriminatory provisions in private trusts and implement the testator’s intended bequest absent discriminatory restrictions.

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\(^{164}\) \textit{In re} Certain Scholarship Funds, 575 A.2d 1325, 1329-30 (N.H. 1990).