COMMENTS

In re Estate of Wilson: Constitutional and Trust Law Tests for the Validity of Gender-Restricted Scholarship Trusts

*By Loren E. Hillberg**

Introduction

Charitable trust funds set up to distribute scholarships provide substantial sums of money for education.[1] These trusts generally provide funds for particular classes or groups of individuals. Trusts may fund education for students or graduates of a particular school,[2] athletes,[3] underprivileged students,[4] or other groups of restricted membership.[5] Certain restrictions in charitable trust disbursements have been held to violate constitutional provisions; restrictions based on race[6] and religion[7]

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1. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1984, at 167 (104th ed. 1983).

2. *See* Harrold v. First Nat'l Bank, 93 F. Supp. 882 (N.D. Tex. 1950); *In re* Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983) (both the Johnson and the Wilson trusts restricted their scholarships to graduates of particular schools). *See generally* G.G. BOGERT & G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 375 (rev. 2d ed. 1977); 4 A. SCOTT, THE LAW OF TRUSTS § 370 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 370 comment j (1957); Annot., 68 A.L.R.3d 997 (1976).

3. *See In re* Fleming's Estate, 183 P.2d 295 (Cal. Ct. App. 1947), *rev'd on other grounds*, 31 Cal. 2d 514, 190 P.2d 611 (1948) (scholarship recipients chosen based on performance in golf tournament). *See also* 4 A. SCOTT, *supra* note 2, at § 370.2.

4. *See* Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978) (en banc) (scholarships for Missouri boys financially unable to attend college).

5. *See generally* G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 375; 4 A. SCOTT, *supra* note 2, at § 370; RESTATEMENT (SECOND) OF TRUSTS § 370 (1957).

6. *See* Trustees of the Univ. of Delaware v. Gebelein, 420 A.2d 1191 (Del. Ch. 1980); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966); 4 A. SCOTT, *supra* note 2, at § 399.4; Note, *Restricted Scholarships, State Universities and the Fourteenth Amendment*, 56 VA. L. REV. 1454, 1468-71 (1970). *See generally* Adams, *Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions*, 25 CLEV. ST. L. REV. 1 (1976); Lusky, *National Policy and the Dead Hand: The Race-Conscious Trust*, 28 REC. A.B. CITY N.Y. 265 (1973).

7. *Cf.* Mormon Church v. United States, 136 U.S. 1 (1890); *see* Note, *supra* note 6, at 1475-76. *See generally* G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 378; 4 A. SCOTT,

are examples. Most cases attacking gender-based restrictions on constitutional grounds, however, have been unsuccessful.[8] In *In re Estate of Wilson*,[9] the Court of Appeals of New York[10] refused to strike down gender restrictions in two trusts. The court held that the restrictions did not violate the Equal Protection Clause since there was no "state action."[11] Further, they did not violate traditional trust law public policy criteria.[12] The decision, while imperfect, recognizes that constitutional law is not the only method available to challenge gender discriminatory provisions in charitable scholarship trusts.[13]

Charitable trusts may be invalidated and the provisions of the trusts reformed under the common law of trusts.[14] This Comment will examine two possible grounds for reformation or invalidation of gender discriminatory provisions. First, if carrying out the beneficial provisions of a trust violates the Equal Protection Clause, a trust may be distributed to the heirs of the settlor who established the trust. This process is called reversion. In addition, the offending provision may be reformed to eliminate its discriminatory effect through the process of cy pres.[15] If the trust or the offending provision contains an element of state action and violates the Equal Protection Clause, its discriminatory provisions will not be enforced by the courts.[16] Second, under the somewhat different trust law

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supra note 2, at § 399.4; Adams, *supra* note 6; Lusky, *supra* note 6. *But see* RESTATEMENT (SECOND) OF TRUSTS § 371 (1957); 4 A. SCOTT, *supra* note 2 at § 371; G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 376.

8. *See* Trustees of the Univ. of Delaware v. Gebelein, 420 A.2d 1191 (Del. Ch. 1980) (court struck a race restriction but refused to strike a gender restriction); Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 361 N.E.2d 225 (1977) (court avoided constitutional analysis but interpreted the phrase "young men" in a will as a generic description that included women); Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978) (en banc) (the court did not find state action and sustained a demurrer). *See also* Lockwood v. Killian, 172 Conn. 496, 375 A.2d 998 (1977) (court rejected constitutional analysis due to a lack of state action but reformed a trust to include women and increase trust distributions because the beneficial provisions of the trust were too restrictive to distribute the available funds). *But see In re* Crichfield Trust, 177 N.J. Super. 258, 426 A.2d 88 (N.J. Super. Ct. Ch. Div. 1980) (trustee succeeded in having trust for boys opened up to both male and female students on constitutional grounds since board of education was trustee).

9. 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

10. The Court of Appeals is New York's highest court. The appellate courts are known as supreme courts.

11. *Wilson*, 59 N.Y.2d at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

12. *Id.*

13. Most prior decisions focused exclusively upon constitutional issues without consideration of general trust principles. *See, e.g.*, Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978) (en banc); Trustees of the Univ. of Delaware v. Gebelein, 420 A.2d 1191 (Del. Ch. 1980).

14. *See infra* text accompanying notes 86-91.

15. *Id.*

16. *See infra* text accompanying notes 89-90.

analysis,[17] a court may force reversion or reformation of a trust's beneficial provision, if that provision violates public policy.[18]

In re Estate of Wilson is the first decision to fully analyze the reformation of charitable scholarship trusts by applying both constitutional and traditional trust law principles. However, the court focused almost exclusively on constitutional issues, and failed to analyze adequately the trust law grounds for invalidation of the trust.[19] It thus typifies numerous cases that neglect the straightforward policy discussions inherent in trust law analysis. This Comment examines key issues in the gender discrimination area by exploring the New York Court's decision. Part I explains the facts of *Wilson* and critiques the court's constitutional and trust law discussions. Part II examines various "state action" theories as they apply to the "middle-tier"[20] equal protection test. Part III discusses trust law reformation of charitable trust provisions that violate public policy. Finally, part IV compares the policy elements of the gender-discrimination equal protection test with trust law analysis for determining charitable trust validity.

This Comment concludes that courts may find gender-restrictions in scholarships invalid, either constitutionally or by application of trust law. The critical issue for the courts is whether or not these restrictions in charitable scholarship trusts do in fact violate public policy.[21] The ac-

17. For purposes of this Comment, the use of cy pres to correct a constitutional wrong will be considered a constitutional approach, although cy pres, a traditional trust law remedy, is used in both situations.

18. *See infra* notes 107-10 and accompanying text.

19. *Wilson*, 59 N.Y.2d at 472-74, 452 N.E.2d at 1233-34, 465 N.Y.S.2d at 905-06.

20. The middle-tier test is the Equal Protection Clause analysis applied in cases of gender discrimination. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

21. Different theories of public policy abound. Since some settlors are only willing to establish scholarships for one sex, society could allow gender discrimination in order to increase the total funds available for such scholarships. *Compare* IRS LETTER RUL. (CCH) 7744007 (July 28, 1977):

> If administrators of a scholarship fund are required to name only male scholarship recipients, such a classification based on sex is not against declared Federal public policy and is educationally and socially beneficial to the community at large. Accordingly, it is held that the restriction contained in the decedent's will authorizing scholarships to only males is not a bar to a charitable deduction under [I.R.C. § 2055].

with Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (rejecting charitable tax status for schools discriminating on the basis of race).

Society could refuse to sanction discrimination unless it involves an attempt to overcome past discrimination. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 317 (1977) ("reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-26 (1978). Finally, gender-based discrimination in charitable scholarship trusts could be rejected as not furthering goals of equal opportunity for individuals of either sex. *Cf.* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (suggesting the standard of review in gender-based equal protection cases should be "strict scrutiny"); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982) (reserving judgment on whether gender classifications are inherently suspect).

ceptable boundaries of gender discrimination are the subject of national debate far beyond the scope of this discussion. Consequently, this Comment focuses on the methods courts may use to consider whether this gender discrimination contravenes constitutional law or, alternatively, public policy.

I. Background

A. Facts

In re Estate of Wilson consolidated two actions involving charitable trusts established by the wills of Edwin Irving Johnson and Clark W. Wilson. Wilson died in 1969; he left a will that established a trust to provide funds for "five (5) young men" who attained the highest grades in high school science courses "as may be certified to by the then Superintendent of Schools."[22] The trust operated until the high school refused to certify the names of candidates on the theory that the trust's gender restrictions violated the provisions of Title IX.[23] The New York Supreme Court concluded that it was impossible to carry out the terms of the trust, since the school was under no obligation to provide the candidate's names. The court then used its cy pres power to modify the trust so that male candidates within the trust's terms could apply directly to the trustee for the scholarships.[24] The court did not strike the offending gender restriction, although this action was within its power.[25] The New York Court of Appeals affirmed the supreme court's ruling.[26]

The Johnson trust was created by will when Edwin I. Johnson died in 1978. The will appointed the local board of education as one of the fund's trustees. The Johnson trust was to "be used . . . for bright and deserving young men . . . whose parents are financially unable to send them to college . . . [as] selected by the Board of Education."[27] The supreme court reversed the trial court's decision to appoint a new, private trustee who could carry out the gender restrictive terms. The court determined that this trust reformation constituted judicial state action

22. *Wilson*, 59 N.Y.2d at 469, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903.

23. *Id.* A complaint had been filed with the Office of Civil Rights, Department of Education. The Department said this complaint would result in prosecution under 20 U.S.C. § 1681 (Title IX) (1976) if the school district continued to provide financial information based on nongender neutral criteria. Section 1681 states in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

24. *In re* Estate of Wilson, 87 A.D.2d 98, 104, 451 N.Y.S.2d 891, 894-5 (N.Y. App. Div. 1982).

25. *Id.* at 103, 451 N.Y.S.2d at 894.

26. *Wilson*, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

27. *Id.* at 470, 452 N.E.2d at 1231, 465 N.Y.S.2d at 903.

and an impermissible enforcement of gender discrimination.[28] The supreme court then used its cy pres power to eliminate the gender restriction as the "only" legal action it could take that would allow the trust to operate.[29] The New York Court of Appeals however, disagreed, reversing the supreme court's holding on the state action issue and reinstating the trial court ruling.[30]

The New York Court of Appeals concluded that trust reformation was not state action, and therefore allowed the appointment of private trustees to carry out the gender restrictive terms of the two trusts.[31] In addition, the court of appeals determined that the trusts' settlors, Wilson and Johnson, only intended to provide funds for men.[32] Finally, the court concluded that the public policy implications of gender discrimination would not "frustrate a paramount charitable purpose" of the the two trusts;[33] the trusts' provisions, therefore, were allowed to stand even though they discriminated based upon gender.

B. Critique

The *Wilson* court examined two prominent issues. The first was whether judicial reformation of trusts constitutes state action when it allows private discrimination to continue. The decisions of the United States Supreme Court provide little guidance on this issue.[34] The issue is critical, however, because each time a trust becomes impossible to administer, a court may apply its cy pres power to reform the trust.[35] If courts find use of the cy pres power to be state action, courts could then justify striking private discriminatory restrictions that violate the equal protection guarantees of the Fourteenth Amendment whenever they reformed trusts.

28. *In re* Johnson, 93 A.D.2d 1, 460 N.Y.S.2d 932 (N.Y. App. Div. 1983).

29. *Id.* at 15, 460 N.Y.S.2d at 942.

30. *Wilson*, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

31. *Id.* at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

32. *Id.* at 472, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905.

33. *Id.* at 474, 452 N.E.2d at 1234, 465 N.Y.S.2d at 906. *See infra* notes 118-20 and accompanying text.

34. *See, e.g.*, Evans v. Abney, 396 U.S. 435 (1970) (allowing reversion of a trust establishing a public park instead of enforcing segregation); Shelley v. Kraemer, 334 U.S. 1 (1948) (rejecting court enforcement of restrictive property covenants). *See generally* Note, *An End to Gender-Restrictive Charitable Trusts: An Idea Whose Time Has Almost Come?*, 48 UMKC L. REV. 66, 70-73 (1979) [hereinafter cited as Note, *Gender-Restrictive Charitable Trusts*]; Note, *Sex Restricted Scholarships and the Charitable Trust*, 59 IOWA L. REV. 1000, 1002-08 (1974) [hereinafter cited as Note, *Sex Restricted Scholarships*]. Several commentators have discussed the dearth of Supreme Court legal analysis in this area. *See, e.g.*, L. TRIBE, *supra* note 21, at § 18-2; Black, *The Supreme Court, 1966 Term-Forward: 'State Action,' Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (state action was termed "a conceptual disaster area"); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-31 (1959).

35. RESTATEMENT (SECOND) OF TRUSTS § 399 comment a (1957).

The second issue related to the court's application of trust law. While *Wilson* is the first gender restrictive scholarship trust case which takes serious aim at the trust law policy issues, the court's formulation of these policy considerations misses the mark. The court focused on whether the gender restrictions impaired the trusts' overall charitable purpose. It failed to consider whether gender restrictions are so contrary to public policy that these trusts should not be granted the privileges of charitable status regardless of their overall purpose.[36]

II. State Action

A. What Constitutes State Action?

State action has received wide ranging treatment by the Supreme Court. In *The Civil Rights Cases*,[37] the Supreme Court held that private discrimination did not violate the Fourteenth Amendment to the Constitution.[38] Since then the Court's decisions have advanced a variety of tests to determine whether a state is sufficiently involved in private activity to implicate constitutional guarantees.[39] In *Burton v. Wilmington Parking Authority*,[40] the Court stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[41] With this vague guidance, courts have found state action where there is a statute,[42] an official action by a state agency,[43] a state employee acting under "color of law,"[44] judicial enforcement of private discrimination,[45] state control of private enterprise,[46] and private activity that has taken on a public nature.[47]

State action issues recur in three scholarship trust situations:

(1) when public schools or public school boards are named as trustees of a trust containing a discriminatory provision;

(2) when public schools are integrally involved in the approval of applicants who will receive funds from the trust; and

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36. *See infra* notes 107-10 and accompanying text.

37. 109 U.S. 3 (1883).

38. *Id.* at 11.

39. *See generally infra* notes 42-47 and accompanying text.

40. 365 U.S. 715 (1961).

41. *Id.* at 722.

42. Brown v. Board of Education, 347 U.S. 483 (1954).

43. Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971) (Internal Revenue Service decision to withdraw tax exempt status from private schools).

44. Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913); L. TRIBE, *supra* note 21, at § 18-4.

45. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

46. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

47. Evans v. Newton, 382 U.S. 296 (1965); L. TRIBE, *supra* note 21, at § 18-5.

(3) when courts exercise their cy pres power to change the trustee, instead of the class of beneficiaries, and thus allow private discrimination to continue.

In addition, courts may also consider whether all charitable trusts involve state action, since all are accorded special publicly generated benefits.[48]

When a public school or its board is vital to the charitable trust scheme, then its involvement certainly qualifies as state action. With few exceptions, courts have found state action when the state directly administers the trust,[49] or when a public school is closely involved in determining which students are eligible for funds.[50] These trusts require action by state officials and are thus analogous to trusts that provide public services or goods; their very nature requires state action.[51] A more difficult question is whether court reformation of a trust instrument constitutes state action, especially when it leaves discriminatory provisions intact.

In *Wilson*, the court carefully considered the legal ramifications of trust reformation that retains unconstitutional provisions. The United States Supreme Court held that similar judicial conduct constituted "state action" in *Shelley v. Kraemer*.[52] In *Shelley* the Court directly discriminated by using its enforcement powers to enforce racially restrictive private covenants. The court in *Wilson* distinguished its actions from those of the Court in *Shelley* by stating:

> 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 execution 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.[53]

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48. *See infra* notes 56-63 and accompanying text.

49. *See, e.g.*, Trustees of the Univ. of Delaware v. Gebelein, 420 A.2d 1191 (Del. Ch. 1980); *In re* Crichfield Trust, 177 N.J. Super. 258, 426 A.2d 88 (N.J. Super. Ct. Ch. Div. 1980).

50. Bank of Delaware v. Buckson, 255 A.2d 710 (Del. Ch. 1969) (race restriction); *Wilson*, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983) (both the Johnson and Wilson trusts involved the state in supplying scholarship applicants). *Contra* Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978) (en banc) (state university's involvement in processing applicants for a trust that excluded women did not constitute state action).

51. Evans v. Newton, 382 U.S. 296 (1965); L. TRIBE, *supra* note 21, at § 18-5.

52. 334 U.S. 1 (1948).

53. 59 N.Y.2d at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909. *See contra In re* Crichfield Trust, 177 N.J. Super. 258, 426 A.2d 88 (N.J. Super. Ct. Ch. Div. 1980); *In re* Will of Potter, 275 A.2d 574 (Del. Ch. 1970).

The court of appeals thus concluded that judicial application of cy pres was not state action.[54]

The New York Court of Appeals failed to consider whether the charitable trust itself constituted state action.[55] It has been argued persuasively that charitable trusts are state action by their very nature.[56] They benefit from legal and financial options such as tax exemptions and deductions,[57] immunity from tort liability,[58] freedom to designate an indefinite class of beneficiaries,[59] exemption from the Rule Against Perpetuities,[60] perpetual duration,[61] and enforcement by the state attorney general.[62] While each of these traditional benefits may be insufficient to constitute state action individually, their aggregation may suffice.[63] As the Supreme Court stated in *Moose Lodge No. 107 v. Irvis*:[64]

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54. 59 N.Y.2d at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909. Similar treatment might be expected from the Supreme Court based upon dicta in subsequent cases explaining the *Shelley v. Kraemer* decision. *See* Evans v. Abney, 396 U.S. 435, 445 (1970) (in allowing reversion of a park that had been segregated, the court noted, "this case is also easily distinguishable from that presented in Shelley v. Kraemer, 334 U.S. 1 (1948), where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes"); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972) ("[*Shelley*] makes it clear that the application of state sanctions to enforce such a [discriminatory] rule would violate the Fourteenth Amendment").

55. 59 N.Y.2d at 479, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909. The court may have alluded to this issue when it noted: "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." (citations omitted). This statement, however, does not address whether the state may be fostering discrimination, solely by providing trusts with tax benefits, tort immunities, and other exemptions from standard trust requirements.

56. *See* Evans v. Abney, 396 U.S. 435 (1970) (Brennan, J., dissenting); Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1003-04 (1957); Lusky, *supra* note 6; Note, *Gender-Restrictive Charitable Trusts, supra* note 34, at 75-82; Note, *Sex Restricted Scholarships, supra* note 34, at 1005-07.

57. *See* Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971); IRS LETTER RUL. (CCH) 7744007 (July 28, 1977). *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

58. *See* RESTATEMENT (SECOND) OF TRUSTS § 402 comment d (1957). This immunity is predicated on the general immunity accorded charitable organizations and is becoming more limited.

59. RESTATEMENT (SECOND) OF TRUSTS § 364 (1957): "A charitable trust can be created although there is no definite or definitely ascertainable beneficiary designated."

60. *See* RESTATEMENT (SECOND) OF TRUSTS § 365 comment a (1957). *See also* Najarian, *Charitable Giving and the Rule Against Perpetuities*, 70 DICK. L. REV. 455, 456 (1966).

61. RESTATEMENT (SECOND) OF TRUSTS § 365 (1957): "A charitable trust is not invalid although by the terms of the trust it is to continue for an indefinite or an unlimited period."

62. *Id.* at § 391: "A suit can be maintained for the enforcement of a charitable trust by the Attorney General."

63. Some cases suggest that a grant of tax-exempt status alone may qualify as state action. *See* Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971). For an extensive discussion of this issue see Brown, *State Action Analysis of Tax Expenditures*, 11 HARV. C.R.-C.L. L. REV. 97 (1976).

64. 407 U.S. 163 (1972).

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.[65]

Thus, a strong argument can be made that the substantial benefits accorded charitable trusts by the state and federal governments constitute sufficient involvement to make these trusts state action. Another possibility is that these benefits may give the trusts a public character.[66]

Neither argument is persuasive, however, since policy considerations indicate that a charitable trust does not constitute state action in and of itself. Trusts are used extensively to finance religious activities,[67] ethnic fundraising activities,[68] and a variety of other socially beneficial, albeit discriminatory, purposes that the government must forego.[69] If a trust were state action in and of itself, then each restrictive condition could be scrutinized under the Equal Protection Clause, and few beneficiary specific trusts could withstand this challenge. Thus, a court determination that charitable trusts constitute state action solely because of governmental benefits would raise doubts about the validity of most beneficiary-specific charitable trusts. Moreover, while charitable trusts derive certain key characteristics from the government, it seems clear that these trusts are essentially the product of private action. Charitable trusts should only be considered state action when government involvement extends beyond traditional trust benefits and thereby gives charitable trusts a public character.

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65. *Id.* at 173.

66. *See* L. TRIBE, *supra* note 21, at § 18-5. This is a more tenuous argument, but it might be effective when the state has been involved peripherally with trust administration over such an extended period of time that a particular trust is identified as a "public asset."

67. *See* G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 376; 4 A. SCOTT, *supra* note 2, at § 371.

68. *See, e.g.*, Estate of Murphy, 7 Cal. 2d 712, 62 P.2d 374 (1936) (upholding bequest to benefit the American Jewish Congress as charitable).

69. *See generally* RESTATEMENT (SECOND) OF TRUSTS §§ 368-74 (1957) (relief of poverty, education, health, municipal purposes, and other purposes beneficial to the community). The problem is not so much that government may not act in these areas, but that individual settlors would not be permitted to discriminate in order to benefit a proscribed group of individuals. Limitations on a settlor's ability to benefit such groups could result in severe reductions in the level of charitable contributions, since one reason a settlor is inclined to donate funds is his or her knowledge of the specific beneficial use to which the funds will be devoted.

B. What Type of State Action Violates the Equal Protection Clause?

After determining that particular conduct constitutes state action, courts then determine whether the activity violates the Equal Protection Clause.[70] The Supreme Court has concluded that in gender cases, discrimination will be allowed only if the state can show that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' "[71] This "middle-tier" test of equal protection falls between a rational basis examination[72] and the heightened strict scrutiny approach applied in restrictions involving race,[73] origin,[74] or religious beliefs.[75]

The supreme court in *Johnson* concluded that the gender restriction violated the Constitution. "[Equal protection] guarantees would plainly be violated by the award of scholarships pursuant to the bequest's sex-based discriminatory restriction because such restriction had no substantial relation to the goal of promoting higher education."[76] The supreme court in *Wilson*, however, did not reach this issue and held only that the school was within its rights to refuse to provide the scholarship candidates' names; therefore, the trust became impossible to administer according to its terms. The court of appeals indicated one limitation on the *Johnson* court's equal protection analysis[77] when it quoted from *Califano*

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70. *But cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting) (suggesting that the Court examines the constitutional violation first and then applies the different state action standards).

71. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)).

72. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); New Orleans v. Dukes, 427 U.S. 297 (1976).

73. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

74. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

75. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (religious beliefs are protected by the First Amendment).

Perhaps the most forthright appraisal of the scope of the various tests was made by Justice Powell when he noted:

> As has been true of *Reed* [v. Reed, 404 U.S. 71 (1971)] and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization . . . , candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification.

Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring).

76. *In re* Johnson, 93 A.D.2d 1, 6-7, 460 N.Y.S.2d 932, 937 (N.Y. App. Div. 1983).

77. The *Wilson* court may have impliedly accepted the validity of the *Johnson* court's analysis when it noted: "Proscribing the enforcement of gender restrictions in private charitable trusts would operate with equal force towards trusts whose benefits are bestowed exclusively on women." 59 N.Y.2d at 473, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905. Thus, it may

v. Webster:[78] " '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.' "[79] Since historically the number of women who excel in math and science has not equaled the number of men in these areas, these fields are male dominated.[80] If a fund similar to Wilson's were restricted to women, it would qualify as an important governmental objective within the *Califano v. Webster* formulation.[81] If the Wilson trust had been restricted to young women, it probably would have survived challenge by a young man under this formulation.

The supreme court in *Johnson* and the court of appeals in *Wilson* ignored alternate governmental objectives outside the education area that constitute important governmental interests. These additional governmental interests could justify discriminatory provisions contained in a charitable trust instrument. For example, a state may wish to increase scholarship funding by offering testators the flexibility to fund scholarships for groups the testators feel are deserving.[82] The court of appeals considered testator flexibility in analyzing the public policy aspects of gender restrictions in trusts. The supreme court, however, focused solely on "promoting higher education,"[83] and ignored the potential for other "important" objectives to which sex-based restrictions in scholarships could be "substantially related."[84]

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have been concerned that the *Johnson* analysis would lead inevitably to the abolition of similar scholarships for women. To avoid this result, the court found no state action.

78. 430 U.S. 313 (1977).

79. *Wilson*, 59 N.Y.2d at 473, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905, (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)).

80. San Francisco Chron., Apr. 11, 1984, at 1, col. 6; Wash. Post, Apr. 11, 1984, at A-3, col. 1.

81. The important objective would be the reversal of past discriminatory activities, and a trust benefiting only women in math and scientific fields would be substantially related to the goal of overcoming the past discrimination. Were the trust fund for the woman with the best performance in home economics classes, the result would probably be different. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

82. The significance of this policy was eloquently described by Justice Friendly:

> Philanthropy is a delicate plant whose fruits are often better than its roots; desire to benefit one's own kind may not be the noblest of motives but it is not ignoble. It is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law, which stimulates much private giving and interest.

Friendly, *The Dartmouth College Case and the Public-Private Penumbra*, 12 TEX. Q. 5, 30 (2d Supp. 1969).

83. *In re* Johnson, 93 A.D.2d 1, 6-7, 460 N.Y.S. 2d 932, 937 (N.Y. App. Div. 1983).

84. *Id.* Gender restrictions in scholarship trusts are not as closely related to settlor flexibility as they are to educational interests. It is possible that prohibiting gender-restricted charitable trusts would not impair the benefit of flexiblity to settlors to a significant extent. If so, there would be no substantial relation to this important governmental interest.

In many respects, the equal protection standard applied to gender discrimination analyzes the *public policy* aspects of each individual case of state involvment in discrimination.[85] A similar public policy review is required within the trust law context. Moreover, trust law considers discrimination regardless of state involvement and, therefore, is not burdened by the state action analysis and its concomitant vagueness.

III. Trust Law

Traditional common law principles applied to charitable trusts predate the Statute of Uses of 1601.[86] Cy pres is the judicial tool used to alter trusts that have a general charitable purpose but which fail in some other manner.[87] Under this doctrine, instead of requiring trust reversion, courts are empowered to change the disposition of trust funds; further, a court may alter either the administrative or dispositive provisions of a trust through the use of the equitable cy pres power.[88] The *Second Restatement of the Law of Trusts* describes cy pres:

> If property is given in trust to be applied to a particular charitable purpose, and *it is or becomes impossible or impracticable or illegal* to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[89]

A trust that violates the Equal Protection Clause will be reformed or will revert to the heirs of the testator. In part, this fact explains the courts' tendency to rely on constitutional grounds as a basis for altering trust terms in the discrimination area.[90]

However, strict illegality is not the sole basis on which a court may act to strike an offending provision. Trust purposes that violate public

85. *Compare* Korematsu v. United States, 323 U.S. 214 (1944) (announcing the strict scrutiny standard for equal protection review of race discrimination) *with* Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969) (court reformed a racial restriction that was not illegal, because it violated public policy against discrimination).

86. 4 A. SCOTT, *supra* note 2, at § 368.1.

87. *Id.* at § 399; *see also* G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 431; RESTATEMENT (SECOND) OF TRUSTS § 399 (1957).

Courts occasionally use another power referred to as equitable deviation. This power permits the alteration of administrative provisions in private trusts, but it may not be used to alter their dispositive or beneficial provisions. The scope of the doctrine of cy pres is much broader than that of equitable deviation. *See* 4 A. SCOTT, *supra* note 2, at § 381; RESTATEMENT (SECOND) OF TRUSTS §§ 165-67, 381 (1957).

88. 4 A. SCOTT, *supra* note 2, at § 399; G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 431; RESTATEMENT (SECOND) OF TRUSTS § 399 (1957).

89. RESTATEMENT (SECOND) OF TRUSTS § 399 (1957) (emphasis added).

90. Illegality is a specific basis on which to render a decision, whereas a violation of public policy is more amorphous. *See generally infra* notes 107-10 and accompanying text.

policy also support the use of cy pres power.[91] This aspect of traditional trust law offers an alternative to constitutional analysis for the examination of the validity of gender restrictive trusts.

A. Cy Pres Authority

Courts apply the cy pres power in two different situations: when an invalid trust is created,[92] or when a valid trust later becomes invalid.[93] In *Wilson*, it was argued that the Johnson trust, which never distributed funds, was invalid at creation.[94] The Wilson trust, which became impossible to administer after eleven years, was circumstantially invalid due to the school's refusal to continue to supply the trust with the names of the scholarship candidates. Courts are more inclined to alter, rather than void, a trust that becomes invalid due to changes occurring over a period of time.[95]

Courts follow a two-step approach to determine the validity of charitable trusts. Initially, the court identifies public policy to determine whether or not the trust is socially beneficial. Traditionally, education has been recognized as a valid public purpose.[96] Next, the court reviews the trust's terms and instructions to determine whether its administrative or dispositive provisions abrogate its charitable benefits. Courts accord great deference to the settlor's intent in both the form and substance of the trust instrument:[97]

> Where property is given in trust for a particular purpose and it is legal and possible and practicable to carry out that purpose, the court will not ordinarily permit the property to be applied to other purposes, although the other purposes appear to the court to be more useful and desirable than the purpose designated by the testator.[98]

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91. RESTATEMENT (SECOND) OF TRUSTS § 377 comment c (1957). *See also infra* notes 108-10 and accompanying text.

92. G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 438; 4 A. SCOTT, *supra* note 2, at § 399.2.

93. 4 A. SCOTT, *supra* note 2, at § 399.3.

94. *In re* Johnson, 93 A.D.2d 1, 460 N.Y.S.2d 932 (N.Y. App. Div. 1983).

95. 4 A. SCOTT, *supra* note 2, at § 399.3. The court in *Wilson* did not discuss the length of time the Wilson trust had been operating. Courts interpret older trust provisions with greater lenience, in order to prevent costly and ineffective reversion of the trust corpus after many years. *See infra* notes 100-01. If either trust had been substantially older, it seems probable that the court of appeals would have taken a less restrictive reading of the gender restrictions in the trusts.

96. RESTATEMENT (SECOND) OF TRUSTS § 370 (1957) ("A trust for the advancement of education is charitable."); G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 375; 4 A. SCOTT, *supra* note 2, at § 370.

97. "The court will not substitute a new scheme merely because the trustee or the court believes it would be a better plan than that which the settlor provided." G.G. BOGERT & G.T. BOGERT, *supra* note 2, at §§ 368, 439.

98. 4 A. SCOTT, *supra* note 2, at § 399.4.

Despite this judicial deference to the settlor's intent, courts nonetheless scrutinize specific dispositive provisions that restrict the trust's beneficiaries based on gender.[99]

The rationale supporting the cy pres doctrine is twofold. First, it provides courts with a method of updating trust provisions and ensuring that the funds are not wasted in situations where the settlor did not anticipate changed conditions.[100] Second, reversion—the only alternative to the exercise of cy pres—is unsatisfactory after many years have passed.[101] Cy pres allows a court to apply funds to a purpose generally within the scope of the settlor's intent. Any policy supporting reversion of the funds to the settlor's heirs is outweighed if it is possible to further the settlor's wishes through equitable redrafting of the trust instrument.

Hence, when reviewing a trust, the court must find a general charitable purpose in order to apply the cy pres power.[102] Absence of a general charitable purpose makes it impossible for the court to reform the trust to further the settlor's charitable intent. Thus, if the charitable purpose is specific, then the court cannot use cy pres to alter this definitive charitable plan and the trust will revert to the heirs of the settlor.[103] In gender-restricted scholarship situations, only a few settlors demonstrate specific intent to create a discriminatory instrument.[104] In most instances, the court could apply cy pres and strike the offending gender restriction based upon the settlor's general charitable purpose to further education.[105]

In addition, the court must determine whether the discriminatory trust provision violates public policy or law. The court then decides whether the particular circumstances merit application of cy pres or failure of the trust instrument.[106] Cy pres will be applied if the court has practical and viable means to reform either the trust's dispositive or administrative provisions while furthering the testator's intent.

B. Public Policy as Grounds for Exercise of Cy Pres Powers

A showing of an illegal trust purpose mandates reversion or refor-

99. *See supra* note 8 and accompanying text.

100. *See* 4 A. SCOTT, *supra* note 2, at § 399.3.

101. *Id.* The cost of tracing the heirs of the settlor is often so high that the trust's expenditures greatly diminish the amount of funds ultimately delivered.

102. G.G. BOGERT & G.T. BOGERT, *supra* note 2, at §§ 436-37; 4 A. SCOTT, *supra* note 2, at §§ 398.1-.2.

103. G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 436; RESTATEMENT (SECOND) OF TRUSTS § 399 comment c (1957).

104. *See infra notes* 134-36 and accompanying text.

105. *See, e.g.*, Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 361 N.E.2d 225 (1977).

106. The cy pres power may be preempted by specific gift-over provisions or instructions as to the distribution of the trust funds.

mation through the cy pres power.[107] Inherent in the illegality rule is the notion that a violation of public policy may also support a court's use of cy pres: "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid."[108] This rule is supported by a variety of cases.[109] Although private gender discrimination is not illegal absent a showing of state action or a specific statute, in many situations gender discrimination may contravene public policy.[110] It is on this public policy basis, in addition to constitutional grounds, that courts should review gender-based restrictions in trust instruments.

In order to apply the cy pres public policy standard, the court must first identify the appropriate public policy standard to be applied to the particular trusts. This identification may be difficult, since society's conception of what constitutes a valid charitable purpose may change.[111]

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107. RESTATEMENT (SECOND) OF TRUSTS § 377 (1957) ("a charitable trust cannot be created for a purpose which is illegal").

108. *Id.* at § 377 comment c.

109. *See, e.g.*, Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969) (court reformed a racial restriction that was not illegal, because it violated public policy against discrimination). *See also* Sweet Briar Inst. v. Button, 280 F. Supp. 312 (W.D. Va. 1967) (court refused to allow enforcement of a racial restriction in a bequest to establish a girl's school); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966) (court permitted deviation of trust terms to allow admittance of nonwhite students based upon the testator's general charitable intent); *In re* Hill's Estate, 119 Wash. 62, 204 P. 1055, *aff'd on rehearing*, 119 Wash. 67, 207 P. 689 (1922) (court refused to permit a trust to support the teaching of arcane medical knowledge given the potential danger to prospective patients and an obvious public policy protecting such patients).

In certain instances the court is not asked to strike the controversial provision, but is instead asked to enforce it. Courts may refuse to do so on similar public policy grounds. *See* United States v. Hughes Memorial Home, 396 F. Supp. 544 (W.D. Va. 1975) (court ordered a charitable children's home to ignore a racial restriction in a trust); Wachovia Bank & Trust Co., N.A. v. Buchanan, 346 F. Supp. 665 (D.D.C. 1972) (court refused to require reversion of a trust, and instead struck a discriminatory clause limiting trust distributions to "white boys and girls"); *In re* Estate of Vanderhoofven, 18 Cal. App. 3d 940, 96 Cal. Rptr. 260 (1971) (court remanded the case to require the lower court to determine whether testator would have preferred reversion or reformation of a trust which limited particular scholarship recipients to "all-white" applicants).

110. *Wilson*, 59 N.Y.2d at 472-73, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905 (citing New York state statutes requiring equal treatment of both sexes with regard to education and other matters). *See also* Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) (enforcing a Minnesota statute that required equal access for both sexes at public meeting places).

It is clear that society rejects gender discrimination in a variety of contexts and education is one of the more significant areas. *See* 20 U.S.C. § 1681 (1976) (Title IX). Moreover, permitting discrimination in the area of education may be more harmful than in many other contexts given the significant role education has in shaping both individual and group opportunities. Finally, it seems that any justification for such discrimination is based on antiquated notions of the roles of men and women in society that no longer hold true, much as racial discrimination was once justified by courts but is now uniformly condemned.

111. RESTATEMENT (SECOND) OF TRUSTS § 368 comment b (1957) ("There is no fixed standard to determine what purposes are of such social interest to the community."). *See also*

Laudable community interests "vary with time and place."[112] For example, some religions did not qualify as valid charitable purposes originally, but are now accepted as socially beneficial.[113] In the past, gender discrimination was fully accepted.[114] Although it remains unclear whether *all* gender discrimination violates public policy,[115] any permissible gender discrimination by a state must be supported by a valid public purpose.[116]

The *Wilson* court's application of these general principles governing cy pres is incomplete in two respects. First, the *Wilson* court did not properly identify the public policy issue involving gender discrimination in scholarships. Even though the Wilson and Johnson trusts were administratively impracticable as written and therefore subject to change, the gender restrictions could have been invalidated because they violated public policy.[117] The court suggested that gender discrimination violated public policy with regard to education, but determined that the violation did not "mitigate" the effect of the gift:

> A provision in a charitable trust . . . 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.[118]

The court's use of this "mitigation" analysis is misplaced.[119] If in distrib-

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Green v. Connally, 330 F. Supp. 1150, 1159 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971) (upholding a decision by the Internal Revenue Service revoking charitable tax status from racially discriminatory private schools based on the change in public policy).

112. RESTATEMENT (SECOND) OF TRUSTS § 368 comment b (1957).

113. 4 A. SCOTT, *supra* note 2, at § 377 ("In England, . . . it was once held that a trust to promote any religion but that of the established church was illegal.").

114. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding a state law limiting the practice of law to males: "[T]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."); Hoyt v. Florida, 368 U.S. 57, 62 (1961) (the Court upheld a law placing women on jury list only upon request noting that the "woman is still regarded as the center of home and family life").

115. *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion), *with* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). *See generally* L. TRIBE, *supra* note 21, §§ 16-25 to 16-28.

116. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

117. *Wilson*, 59 N.Y.2d at 471, 452 N.E.2d at 1232, 465 N.Y.S.2d at 904.

118. *Id.* at 473, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905.

119. The court cited 4 A. SCOTT, *supra* note 2, at § 399.4. In this section, Scott simply restates a general rule according great deference to the settlor's intent as to the trust's form and nature. Moreover, the RESTATEMENT (SECOND) OF TRUSTS § 377 equates public policy and illegality, as does Scott. *See* 4 A. SCOTT, *supra* note 2, at § 377.

Initially, a court should examine whether the trust is valid or invalid. The question of invalidity does not lend itself to a mitigation analysis, especially when it is based on public policy or illegality grounds. The concept of mitigation is only meaningful when the trust's

uting funds the trust offends public policy, whether or not some individuals derive benefit is not germane. Presumably, an individual who receives a scholarship from an invidious race-restricted trust will still receive educational benefits; thus, the effect of the gift would not be "mitigated." Society does not wish to promote the dedication of resources to goals at odds with recognized public policy.[120]

After this statement of the law, the *Wilson* court continued its public policy analysis with an excellent review of those policy issues that support gender discrimination in trust instruments.[121] The court noted that although continued private support for the charitable cause of female-restricted scholarships was desirable, these sex-based conditions in trusts could be declared invalid.[122] The court felt that settlors must be allowed flexibility in establishing the terms and conditions of trust instruments in order to encourage continued giving.[123] Thus, the court could have concluded that gender restrictions in scholarship trusts do not violate public policy.[124]

A second *Wilson* court shortcoming was the court's analysis of the settlor's intentions. Inherent in any analysis of the public policy aspects of disposition of trust resources is a determination of the general and specific intent of the settlor.[125] The United States Supreme Court considered this issue in *Evans v. Abney*.[126] There the Court affirmed a decision that required reversion of a segregated public park held in trust, rather than reformation of the trust to require the park's desegregation.[127] Former Senator Bacon of Georgia estabished the trust in his will. It provided that:

> [T]he said property under no circumstances . . . [is] to be . . . at any time for any reason devoted to any other purpose . . . [and] I am, however, without hesitation in the opinion that in their social

purpose may be frustrated administratively by waste of funds, duplication of effort, or a lack of sufficient funds to achieve the purpose.

120. 4 A. SCOTT, *supra* note 2, at § 399. The purpose of the charitable trust is to provide a private source of funding for public activities; thus, if those resources are contributed to the public in such a way as to injure the public welfare the purpose is defeated. *See supra* notes 89, 102-04 and accompanying text.

121. *Wilson*, 59 N.Y.2d at 473, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905.

122. *Id.*; *see supra* note 77.

123. *Id.*

124. The court stated that gender-restricted trusts should not be altered because the policy opposing gender discrimination is not sufficient to "mitigate" the value of the contribution of scholarship funds; students will still benefit from the trusts. 59 N.Y.2d at 473, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905. Instead, the court could have concluded that gender-restricted scholarship trusts are not contrary to public policy since both women and men receive benefits from restricted sources and perhaps the total quantity of contributions is increased because the settlor is free to donate according to his or her wishes. *Id.*

125. *See supra* text accompanying notes 89, 102-04.

126. 396 U.S. 435 (1970).

127. *Id.* at 446.

> relations the two races . . . should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common.[128]

Senator Bacon's general charitable intent to establish a park was clear, but it was limited by his specific segregative purpose. Given the explicit language requiring segregation, the Court held that the park could not be desegregated; even though the trust that created the park had operated for over sixty years, the park could still revert to the heirs of Senator Bacon.[129] Thus, the Court did not apply the doctrine of cy pres due to the specificity of the trust instrument.[130]

In *Wilson*, however, the settlors did not restrict the use of the trust funds with explicit language such as that used by Senator Bacon. Yet, the court opted for a very narrow reading of both Wilson's and Johnson's intentions: "In establishing these trusts, the testators expressly and unequivocally intended that they provide for the educational expenses of male students."[131] Elsewhere the court found gender discrimination "central" to the charitable purpose.[132] While it has been noted that construing a testator's intent is not an exact science,[133] the court's analysis was, at best, conclusory. Although each testator expressly stated that the trust recipients should be male, their overriding goal appears to have been to aid prospective college students from the school districts.[134] The settlors' designation of a male class of trust beneficiaries did not manifest the discriminatory intent obvious in Senator Bacon's will.[135] Thus, the court in *Wilson* may have overemphasized the trust's restrictions.[136]

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128. *Id.* at 441-42.

129. *Id.* at 444.

130. *Id.* at 447.

131. *Wilson*, 59 N.Y.2d at 472, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905.

132. *Id.* at 472, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905.

133. G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 436; 4 A. SCOTT, *supra* note 2, at § 399.2.

134. While each settlor designated that recipients should be male, the trust instruments did not include any additional language that would indicate that the designation of males was of any special significance. 59 N.Y.2d at 474, 452 N.E.2d at 1234, 465 N.Y.S.2d at 906.

135. An illuminating explanation of the distinction of charitable intent can be found in Trammell v. Elliot, 230 Ga. 841, 199 S.E.2d 194 (1973). The Georgia Supreme Court distinguished *Evans* from a scholarship trust for white boys and girls and used cy pres to strike a race restriction in the instrument. The court correctly noted that cy pres may be applied unless there is a showing of intent which is "clear, definite and unambiguous." *Id.* at 847, 199 S.E.2d at 198-99.

136. Additional language on a particular subject or numerous references in the trust document seem to be a prerequisite to a court finding an "unequivocal" intent. *See, e.g.*, Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 361 N.E.2d 225 (1977). In *Ebitz*, the court used extrinsic evidence and a lack of additional references to the restriction to interpret the phrase, "to aid and assist worthy and ambitious young men to acquire a legal education . . ." as a generic use of the word men that included women. *Id.* at 209-11, 361 N.E.2d at 226-27.

IV. The Middle-Tier Test: A Test of Public Policy?

Constitutional law provides one approach for reviewing and altering gender restrictions. Traditional trust law, however, provides a similar though not identical opportunity without having to address the state action issue. Despite the similarities between trust law's public policy test and constitutional law's middle-tier test, courts have not compared them. Both fields of law weigh the public policy objectives involved against the necessity for contravening that policy in a specific case. In the trust law area, the court identifies the general charitable purpose that justifies the dedication of funds to a particular goal.[137] Under the middle-tier test, the court isolates public policy when it identifies the important governmental interest.[138]

A review of the *Wilson* decision and the supreme court decision in *Johnson* demonstrates the similarities and differences between the important governmental interest requirement of constitutional law and the charitable purpose requirement of trust law. The constitutional law analysis by the supreme court in *Johnson*,[139] identified the state's interest in "higher education" as an important governmental interest sufficient to support gender discrimination.[140] The *Johnson* court then analyzed the gender restriction in the trust to determine whether it was "substantially related" to achievement of the higher education goal. The Court concluded that it was not,[141] but did not consider that other important state objectives may also be involved, or alternatively that settlor flexibility furthers higher education by encouraging scholarship contributions.[142]

The *Johnson* court's interpretation of the substantial relation requirement is narrower than that of the United States Supreme Court. The Court examines a variety of factors to determine whether discriminatory restrictions bear a "substantial relation" to a valid state objective.[143] For example, the Court recently approved federal legislation that

137. *See supra* notes 89, 102-04 and accompanying text.

138. *See supra* notes 71-75 and *infra* note 140 and accompanying text.

139. The court of appeal in *Wilson* never reached the equal protection standard since it found no state action. *See supra* notes 53-54 and accompanying text.

140. The United States Supreme Court's gender discrimination holdings support this view, since the Court has found a variety of state interests "important." *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974) (the reduction of economic disparity caused by past discrimination was a valid state interest); Craig v. Boren, 429 U.S. 190 (1976) (increased highway safety was a legitimate state objective, but the disputed statute was substantially unrelated to the objective).

141. *In re* Johnson, 93 A.D.2d 1, 460 N.Y.S.2d 932 (N.Y. App. Div. 1983).

142. *Wilson*, 59 N.Y.2d at 473, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905.

143. *See* Craig v. Boren, 429 U.S. 190, 198 (1976) (the Court usually takes action only when the statute uses gender as a "proxy for other, more germane bases of classification"); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725-26 (1982) ("The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.").

reinstituted discriminatory provisions it had previously struck down.[144] The Court held that the discriminatory provisions were the only effective way to achieve the important governmental objective of protecting the reliance interest of certain social security recipients whose benefits had been removed.[145] Thus, the Court considers the purpose of the classification and upholds discrimination if the discrimination is necessary to further valid and important state interests.[146]

Alternatively, the Court will strike provisions if the state interest supporting the discrimination is insufficient.[147] For instance, in *Mississippi University for Women v. Hogan*,[148] the Court considered whether past discrimination against women in higher education could support a restriction excluding men from a nursing school. The Court concluded that it could not, since women have traditionally dominated the nursing profession.[149]

The weighing of important governmental interests is similar to the policy analysis used to determine the validity of a charitable trust. In *Wilson*, the New York Court of Appeals identified education as the charitable purpose supporting the trusts. However, unlike the supreme court in *Johnson*, it also considered settlor freedom in its broad analysis of the trusts' overall charitable nature.[150] Just as a court analyzes the relationship between the gender discrimination and the state's interest when using constitutional law, the *Wilson* court then determined whether the gender restrictions comported with the general charitable purpose of the two trusts. The court concluded that the general charitable purposes were not mitigated, although public policy opposed gender discrimina-

144. Heckler v. Mathews, 104 S. Ct. 1387 (1984).

145. *Id.* at 1400.

146. Craig v. Boren, 429 U.S. 190, 200 (1976).

147. *Id.* at 204 (the Court recognized highway safety as a policy rationale, but found that the evidence did not demonstrate that the statute achieved the objective).

148. 458 U.S. 718 (1982).

149. *Id.* at 727-31.

150. The trust review covers a wide scope and courts may consider the impact of numerous potential state interests. In Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971), the court noted: "Analysis of the contribution of a trust purpose to the benefit of the community must take into account broad principles of the general welfare, as expounded, *inter alia*, in constitutions, statutes, and court decisions." Courts "will not only carefully examine the trust instrument and the circumstances of the donor in the light of social, economic and political conditions of which the court takes judicial notice, but will also receive the testimony of experts as to the probable effect of the trust." 330 F. Supp. at 1159. G.G. BOGERT & G.T. BOGERT, *supra* note 2, at § 368. Thus, in the trust law context, the court may consider any possible evils that may result from the trust's operation. *See, e.g., In re* Hill's Estate, 119 Wash. 62, 204 P. 1055, *aff'd on rehearing*, 119 Wash. 67, 207 P. 689 (1922) (the court refused to permit a trust to support the teaching of arcane medical knowledge given the potential danger to prospective patients and an obvious public policy protecting these patients).

In contrast, the constitutional standard is more confined in scope since equal protection analysis only considers any possible evils that may result from *discrimination*.

tion in education.[151]

The *Wilson* decision illustrates the various public interests considered under the trust law public policy analysis. The variety of interests is reviewed to determine whether discriminatory restrictions offend public policy and destroy the charitable nature of the instrument. For example, the *Wilson* court approved the gender restrictions, despite its determination that such restrictions were opposed to educational public policy.[152] The court determined that gender discrimination served the public interests of remedying past discrimination,[153] and of increasing the funds available for education.[154] Thus, courts consider competing public policy goals and uphold gender discrimination if the balance of policy objectives favors the restriction. In particular, trust law may allow a single instrument to impinge upon a recognized public policy against discrimination, on the premise that the entire collection of charitable trusts depend upon settlor flexibility.[155] Consequently, while trust law may provide an alternative analysis, courts may be unwilling to strike gender restrictions on this basis. *Wilson* dramatizes the case-by-case nature of the analysis.

Thus, just as constitutional analysis allows gender discrimination when the discrimination achieves important state interests, trust law allows divergence from recognized public policy when the divergence furthers a paramount policy of implementing the settlor's intent. In both contexts, some gender discrimination is permissible.[156] However, trust law dispenses with the frustrating state action issue and allows the trust to be challenged directly.[157]

Conclusion

Doubtless, a long chain of challenges to gender discrimination in scholarship trusts will be presented to courts. While challenges thus far have focused on the trusts' illegality based on equal protection grounds, an additional approach is available within the context of traditional trust law. In fact, trust law challenges require a public policy analysis similar to the gender-discrimination middle-tier standard, *without* the attendant difficulty of establishing state action.

In re Estate of Wilson is the first gender discrimination scholarship trust decision that seriously considers and discusses the trust law alternative. A careful analysis of the policy issues that support and oppose gen-

151. *See supra* notes 118-19 and accompanying text.
152. *Wilson*, 59 N.Y.2d at 472-73, 452 N.E.2d at 1233, 465 N.Y.S.2d at 905.
153. *See supra* text accompanying note 122.
154. *See supra* text accompanying note 123.
155. *See supra* text accompanying notes 82, 123.
156. Heckler v. Mathews, 104 S. Ct. 1387 (1984).
157. *See supra* notes 53-54 and accompanying text.

der discrimination in charitable scholarship trusts may in some cases offer an alternative basis on which a court could strike the discriminatory provisions. However, the policy that underlies the charitable trust—the ability of a settlor to direct the disposition of his or her wealth—directly conflicts with efforts to remedy gender discrimination in the trust context and poses a very difficult puzzle.[158] The resolution of the policy tug-of-war between the public goals of prohibiting gender discrimination and implementing an individual's request as to the distribution of trust property is essential if either goal is to be effective. Courts must consider this dilemma, and the common law relating to charitable trusts provides one method of resolving the tensions inherent between these policies.

158. *See supra* notes 21, 82 and accompanying text.