
IS RACIAL DISCRIMINATION EVER CHARITABLE?

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“The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.”¹

–Ibram X. Kendi

“Eliminating racial discrimination means eliminating all of it.”²

–Opinion of the Court, *Students for Fair Admissions v. Harvard*

INTRODUCTION

Purported Charity *A* discriminates in favor of White individuals and against Black individuals. Purported Charity *B* discriminates in favor of Black individuals and against White individuals. Is either form of racial discrimination³ permissible for a charity?

The question is salient and timely. Our nation faces a stark choice between two competing visions of how the law should assess racial discrimination. One view, articulated in the epigraph above from Professor Ibram X. Kendi, is that racial discrimination in favor of members of minority groups is an appropriate response to society’s prior discrimination against them. A competing view, articulated in the epigraph above from *Students for Fair Admissions v. Harvard*,⁴ is that racial discrimination is odious *tout court*.

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1. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 19 (2019).

2. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181, 206 (2023).

3. By “racial discrimination,” I mean discrimination “on the ground of” or “because of” or “based on” race as these terms are used in civil rights statutes. *See, e.g.*, 42 U.S.C. § 2000d (“on the ground of”); 42 U.S.C. § 2000e–2(a)(1) (“because of”); 42 U.S.C. § 3604(a) (“because of”); 42 U.S.C. § 3604(c) (“based on”).

4. *See* 600 U.S. at 206.

This Article tackles an aspect of the question that has not received much scholarly attention.⁵ The Supreme Court's decision in *SFFA v. Harvard* has prompted commentary on racial discrimination and the Equal Protection Clause of the U.S. Constitution and Title VI of the Civil Rights Act of 1964,⁶ the latter of which prohibits discrimination by programs and activities receiving federal financial assistance.⁷ The commentary in the aftermath of *SFFA v. Harvard* also extends to Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment,⁸ and Section 1981, which prohibits discrimination in, among other things, the making and enforcing of contracts.⁹

5. For some articles on charities and charitable trusts predating *SFFA v. Harvard*, see Steven R. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 U. PITT. L. REV. 153 (1986); James W. Colliton, *Race and Sex Discrimination in Charitable Trusts*, 12 CORNELL J. L. & PUB. POL'Y 275 (2003); Nicholas A. Mirkay, *Is It "Charitable" to Discriminate?: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, 2007 WIS. L. REV. 45 (2007).

For some articles on federal charitable tax exemption predating *SFFA v. Harvard*, see David A. Brennen, *The Power of The Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000); David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167 (2001) (arguing that antidiscrimination laws should apply to charities); David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779 (2002); David A. Brennen, *Race-Conscious Affirmative Action by Tax-Exempt 501(c)(3) Corporations After Grutter and Gratz*, 77 ST. JOHN'S L. REV. 711 (2002); David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1 (2007); Alex Zhang, *Antidiscrimination and Tax Exemption*, 107 CORNELL L. REV. 1381 (2022).

For an article swiftly following *SFFA v. Harvard*, see David A. Brennen, *Race Conscious Affirmative Action by Tax-Exempt 501(c)(3) Institutions After Students for Fair Admissions v. Harvard and UNC*, 21 PITT. TAX REV. 49 (2023) (arguing that charities not subject to Title VI have more latitude to make race-conscious decisions than charities subject to Title VI).

6. Codified at 42 U.S.C. § 2000d.

7. For examples of recent scholarly commentary, see Deborah Hellman, *Diversity by Facially Neutral Means*, 110 VA. L. REV. 1901 (2024); Issa Kohler-Hausmann, *What Did SFFA Ban? Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305 (2024).

8. Codified at 42 U.S.C. § 2000e. For examples of recent scholarly commentary, see Caroline L. Ferguson, *Diversity Hiring in the Workplace: The Implications of Students for Fair Admissions on Title VII*, 57 TEX. TECH. L. REV. 443 (2025); Jack Mairs, Note, *Title Trouble: How Affirmative Action May Kill DEI in Employment*, 19 OHIO ST. BUS. L. J. 311 (2025).

9. See 42 U.S.C. § 1981. Section 1981 was the statute at issue in the recent litigation against Fearless Fund Management (FFM). FFM had held a Strivers Grant Contest to award grants to businesses owned at least 51 percent by Black women. Entering the contest signified assent to the competition's rules, which constituted a contract between FFM and the entrant. The American Alliance for Equal Rights sued FFM under Section 1981. *See Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 769 (11th Cir. 2024). FFM settled rather than risk an adverse ruling. *See* Alexandra Olson, *Fearless Fund Drops Grant Program for Black Women Business Owners in Lawsuit Settlement*, ASSOCIATED PRESS (Sept. 11, 2024, 14:45 CDT), <https://apnews.com/article/fearless-fund-dei-lawsuit-ed-blum-227a457ded5460061b4300a7ad16d18a> [<https://perma.cc/JY4C-7CVG>].

Section 1981 also was one ground for the recent litigation against Southwest Airlines, challenging its ¡Lanzate! Travel Award program providing free flights to Hispanic students. After the American Alliance for Equal Rights filed suit, Southwest agreed to terminate the program "unconditionally and irrevocably." *Am. All. for Equal Rts. v. Southwest Airlines Co.*, 2024 WL 5012055 at *1 (N.D. Tex. 2024). Southwest's offer of one cent did not moot the plaintiff's claim for nominal damages. *See id.* at *5.

For examples of scholarly commentary on Section 1981 after *SFFA v. Harvard*, see George R. La Noue, *The Widening Effect of Students for Fair Admissions*, 26 FED. SOC. REV. 95 (2025); Marissa C. Meredith, *The Domino*

Recent actions taken by the Trump Administration vis-à-vis Harvard University raise the issue of racial discrimination as a basis for revoking federal tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.¹⁰ But little attention has been given to the law of charity, which derives from the law of charitable trusts. In order to qualify for tax exemption as a charity, a charity must *be a charity*.¹¹ What does and should the law of charity say about racial discrimination after *SFFA v. Harvard*?

This Article proceeds in four main parts. Part I examines the law of charity and its requirement that a charitable purpose or a specific restriction on a charitable asset must not violate (fundamental) public policy. Part II explores three Supreme Court decisions salient to fundamental public policy and racial discrimination. The public policy limitation in the law of charity derives from the law of charitable trusts, but it is influenced by federal law, including the Court's decisions; also, state law influences federal law when federal courts determine the issue of federal tax-exempt status. Part III examines the legal landscape after the Court's decision in *SFFA v. Harvard*. Part IV proposes a path forward, arguing that the time has come for state and federal courts and taxing authorities to declare that racial discrimination by a charity violates fundamental

Effect: Discussing the Future Implications of Students for Fair Admissions, Inc. v. Harvard, 67 DUQUESNE L. REV. 312 (2024).

10. Section 501 provides in pertinent part:

(a) Exemption from taxation.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503. . . .

(c) List of exempt organizations.—The following organizations are referred to in subsection (a): . . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C §501.

11. The text of Section 501(c)(3) appears not to require this, as “charitable” is not the sole adjective modifying the noun “purposes.” See 26 U.S.C §501. In *Bob Jones Univ. v. United States*, the petitioners argued that they should be tax-exempt under Section 501(c)(3) on the basis of their religious purposes even if those purposes failed to qualify as charitable. See, e.g., Brief of Petitioner, *Goldsboro Christian Sch., Inc.*, at 15–17, *Goldsboro Christian Sch., Inc. v. United States*, 1981 WL 769747 (1981) (No. 81-1). (The *Goldsboro* and *Bob Jones* cases were consolidated on October 13, 1981. See *Goldsboro Christian Sch., Inc. v. United States*, No. 81-1, Docket.) The Supreme Court rejected the petitioners’ argument, holding instead that tax exemption under Section 501(c)(3) on the basis of religious purposes requires also that the purposes are charitable as defined by the law governing charitable trusts. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 585–90 (1983). The same holds true for tax exemption on the basis of educational purposes. See also RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.01 cmt. b (AM. L. INST. 2021) (“The list of charitable purposes in subsection (b) of this Section is identical to the list found in Restatement Third, Trusts § 28.”).

public policy irrespective of the race of the individuals harmed by it. A brief conclusion follows.

I. THE LAW OF CHARITY AND (FUNDAMENTAL) PUBLIC POLICY

A charity must have “exclusively charitable purposes.”¹² The well-settled law is that charitable purposes are “the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.”¹³ The Restatement of Charitable Nonprofit Organizations emphasizes that a purpose within one or more of these categories is nonetheless “not charitable if it is unlawful, its performance requires the commission of criminal or tortious activity, or it is otherwise contrary to fundamental public policy.”¹⁴ The Restatement uses the phrase “contrary to fundamental public policy” to refer “to the rare case in which a proposed purpose is invalid because it violates a widely accepted and critically important view of justice.”¹⁵

A charity with a valid charitable purpose still may run afoul of public policy if there is an invalid specific restriction on charitable assets, for example an invalid specific restriction imposed by a donor. As explained in the Restatement,

Invalid specific restrictions on charitable assets can take varied forms. For example, a donor may specify that a charity is to use donated assets for a purpose that is unlawful or otherwise contrary to fundamental public policy. Alternatively, the donor may specify that the charity is to use the donated assets for a valid charitable purpose but, in accomplishing that purpose, the charity is to abide by a restriction that is unlawful or otherwise contrary to public policy.¹⁶

The Restatement gives the following example:

Mia Pratt bequeathed a large sum to Bearclaw University, a charity, and directed that the income be used to fund an annual lecture series at Bearclaw’s medical school, with the lectures to be limited to discussing the treatment of chronic diseases by a specified branch of medicine and as prescribed in specified texts. The specified texts are outdated, and the treatments

12. RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.01(a) (AM. L. INST. 2021). *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. e (AM. L. INST. 2003) (on trusts with mixed charitable and other purposes, stating “[i]f the charitable and other purposes are distinctly divided either by time or into separate and independent shares, the period or share devoted to charity will be treated as a charitable trust just as if separate trusts had been created for the different purposes.”).

13. UNIF. TR. CODE § 405(a) (UNIF. L. COMM. 2020). *Accord* RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.01(b) (AM. L. INST. 2021).

14. RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.01(c) (AM. L. INST. 2021). Compare the Restatement (Third) of Trusts, which refers to purposes that are against “public policy” without adding the word “fundamental.” RESTATEMENT (THIRD) OF TRUSTS § 29(c) (AM. L. INST. 2003). The Restatement of Charitable Nonprofit Organizations, however, is more recent and contains the American Law Institute’s latest statement of the law.

15. RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 4.01 cmt. c (AM. L. INST. 2021).

16. *Id.*

prescribed therein would be detrimental to the public health. The portion of the specific restriction limiting the discussion of treatments to those prescribed in the outdated texts is invalid as contrary to public policy.¹⁷

In this example, Bearclaw University has a valid charitable purpose: the advancement of education. This charitable purpose is not contrary to fundamental public policy. But the law also requires that a specific restriction on charitable assets must not be contrary to public policy, and here the specific restriction is so contrary. The Restatement uses the phrase “contrary to public policy” to include violations of fundamental public policy but also to embrace additional reasons why specific restrictions may be invalid, “such as because they violate statutes or regulations or would undermine the effective administration of the charity or its assets.”¹⁸

In sum, a purpose is not charitable if it is contrary to fundamental public policy. A specific restriction on charitable assets is invalid if it is contrary either to fundamental public policy or to public policy.

Let us now turn to racial discrimination and the law of charity. We begin with racial discrimination *against* members of minority groups. Here, the law is clear. A proposed charitable purpose or a proposed specific restriction on charitable assets that discriminates, say, in favor of White individuals and against Black individuals is invalid.¹⁹ Thus, a university established to educate only White students does not have a valid charitable purpose because its stated purpose is contrary to fundamental public policy. A restriction on an otherwise charitable scholarship fund limiting the eligible recipients to students who are White violates public policy²⁰ and is an invalid restriction.

What about racial discrimination *in favor of* members of minority groups? The Restatement of Charitable Nonprofit Organizations and the earlier Restatement (Third) of Trusts on which it draws to some extent²¹ were approved by the American Law Institute when affirmative action in university admissions for reasons of diversity was permissible under U.S. Supreme Court precedents. Thus, the Restatements equivocate. Here is the relevant commentary from the Restatement (Third) of Trusts:

It is particularly common, however, for provisions to be included in various types of charitable trusts, especially those created for educational or health purposes or for the relief of

17. *Id.* at illus. 9.

18. *Id.* at cmt. c.

19. See RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.01 cmt. h(2), § 4.01 cmt. c (AM. L. INST. 2021). See also RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. f (AM. L. INST. 2003) (“[A] trust to provide land and maintenance for a playground from which Black children are excluded . . . is not enforceable under those terms as a charitable trust. Similarly, although the exclusions are not *explicit*, a trust to provide research grants for which only ‘white, Anglo-Saxon Protestants’ may apply is invidious and noncharitable.”).

20. See RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 4.01 cmt. c (AM. L. INST. 2021) (evaluating a donor-imposed racial restriction on a charitable asset in terms of whether it is contrary to “public policy” rather than contrary to fundamental public policy).

21. See *supra* notes 11, 14; see *infra* notes 22–23 and accompanying text.

poverty, limiting the direct benefits or eligibility to persons of a particular national origin, religion, gender, sexual orientation, age group, political affiliation, or other characteristics or background. Of course, federal and state constitutions, legislation, and other binding expressions of applicable law and policy are to be respected in the administration of trusts and in determining the enforceability of the terms of trusts. These matters, and such implicit issues as what may constitute state action, are beyond the scope of this Restatement. The issue for present purposes, however, remains what provisions of this general type may, as a matter of trust law and policy, be inconsistent with the nature of charitable purposes.

Provisions of these types in charitable trusts are not valid if they involve *invidious* discrimination (see below). . . .

It is not always possible to state with certainty what constitutes an “invidious” form of discrimination for these purposes. What the law of charitable trusts does or does not allow inevitably varies from time to time and place to place, as well as from context to context.

When a scholarship or other form of assistance or opportunity is to be awarded on a basis that, for example, explicitly excludes potential beneficiaries on the basis of membership in a particular racial, ethnic, or religious group, the restriction is ordinarily invidious and therefore unenforceable. . . .

. . . [T]he law of charitable trusts as such does not object to what is sometimes called “affirmative action,” attempting to respond to a social problem in its own terms, at least as reasonably perceived by a substantial (even if not majority) segment of society or of the affected community.²²

The Restatement of Charitable Nonprofit Organizations relies on the Trusts Restatement’s distinction between “invidious” and non-invidious discrimination:

Donors have often made gifts to charity and specified that the assets are to be used to benefit only individuals of a specific race, gender, or religion. Depending on the nature of the specific restriction and the manner of its administration, such a restriction may be invalid because it violates federal or state constitutional laws, civil-rights laws, or tax laws, or is otherwise contrary to public policy. It is not always clear when a racial, gender, religious, or other restriction limiting eligibility for the benefits of a charitable gift is unlawful or otherwise contrary to public policy. Restatement Third, Trusts § 28, Comment f, provides that terms restricting the benefit of charitable assets to persons of a particular national origin, religion, gender, sexual orientation, age group, political

22. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. f (AM. L. INST. 2003).

affiliation, or other characteristics or background are invalid if they involve “invidious” discrimination. The Restatement acknowledges, however, that:

It is not always possible to state with certainty what constitutes an “invidious” form of discrimination for these purposes. What the law of charitable trusts does or does not allow inevitably varies from time to time and place to place, as well as from context to context. ...²³

II. THREE SUPREME COURT DECISIONS

We now turn to three salient U.S. Supreme Court decisions. They shed important light on the question of public policy and racial discrimination. The public policy limitation in the law of charitable trusts is a matter of state law, but it is influenced by federal law, including the Court’s decisions;²⁴ also, state law influences federal law when federal courts determine the issue of federal tax-exempt status.

Two of the Supreme Court decisions examined here are recent: *SFFA v. Harvard* and *Ames v. Ohio Department of Youth Services*. One decision is older: *Bob Jones University v. United States*.

SFFA v. Harvard, the full caption of which is *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, was decided in 2023.²⁵ The case concerned the race-conscious undergraduate student admissions policies of Harvard University and the University of North Carolina. The fact-finding revealed that the universities took race into account in student admissions in favor of Black and Hispanic applicants, to the detriment of White and Asian applicants.²⁶ The universities justified the race-conscious admissions practices on the ground, accepted by Justice Powell in *Regents of the University of California v. Bakke*²⁷ and reaffirmed in *Grutter v. Bollinger*,²⁸ that affirmative action in favor of Black and Hispanic applicants was not prohibited because it was needed in order to obtain “the educational benefits that flow from a racially diverse student body.”²⁹ In *SFFA v. Harvard*, the Court’s majority rejected this argument, holding that diversity is not a sufficiently compelling governmental interest to overcome the prohibitions on racial discrimination in the Equal Protection Clause and Title VI. Writing for the Court, Chief Justice Roberts explained that “[e]liminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies ‘without regard to any differences of race, of color, or of nationality’—it is ‘universal in

23. RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 4.01 cmt. c (AM. L. INST. 2021) (quoting the Restatement (Third) of Trusts § 28 cmt. f).

24. For more on this, see the final paragraph of Part III.

25. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

26. *See id.* at 192–97 (summarizing the facts).

27. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

28. *See Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

29. 600 U.S. at 209.

[its] application.”³⁰ The Court’s reasoning applied equally to the University of North Carolina, a public university subject to the Equal Protection Clause and Title VI, and Harvard University, a private university subject to Title VI. With respect to racial discrimination, the requirements of the Equal Protection Clause and Title VI are coterminous.³¹

Ames v. Ohio Department of Youth Services was decided in 2025.³² The case concerned the reverse discrimination claim under Title VII brought by a heterosexual woman who alleged that her employer discriminated against her in favor of a lesbian and a gay man.³³ Under applicable precedent in the Sixth Circuit, members of majority groups were required to meet a heightened burden: they had to show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.”³⁴ Writing for a unanimous Court, Justice Jackson rejected the “background circumstances” requirement, explaining that “Title VII’s disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs.”³⁵ As she emphasized, “[o]ur case law . . . makes clear that the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group.”³⁶

Bob Jones University v. United States was decided in 1983.³⁷ The case presented the question whether the Internal Revenue Service (“IRS”) properly denied federal tax-exempt status to two private educational institutions—Bob Jones University and Goldsboro Christian Schools—with policies discriminating against Black applicants and students.³⁸ Until 1970, the IRS granted tax-exempt status under Section 501(c)(3) to private educational institutions even if those institutions discriminated on the basis of race. In 1970, the IRS announced that it would no longer do so, and this policy was published in 1971 in Revenue Ruling 71-447, which stated in pertinent part:

Under common law, the term “charity” encompasses all three of the major categories identified separately under section 501(c)(3) of the Code as religious, educational, and charitable. Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being “organized and operated exclusively for religious, charitable, . . . or

30. *Id.* at 206 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

31. *See id.* at 191, 230 (referring to the Equal Protection Clause with respect to both universities).

32. *Ames v. Ohio Dep’t of Youth Servs.*, 145 S. Ct. 1540 (2025).

33. *See id.* at 1544 (summarizing the facts).

34. *Ames v. Ohio Dep’t of Youth Servs.*, 87 F.4th 822, 825 (6th Cir. 2023) (quoting *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008) (cleaned up)).

35. 145 S. Ct. at 1546.

36. *Id.*

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

38. *Bob Jones University* accepted no Black students until 1971; from 1971 until May 1975, it accepted Black students only if they were “married within their race”; from May 1975, it also accepted unmarried Black students but imposed “a disciplinary rule prohibit[ing] interracial dating and marriage.” *Id.* at 580. Goldsboro Christian Schools “for the most part accepted only Caucasians. On occasion, however, the school has accepted children from racially mixed marriages in which one of the parents is Caucasian.” *Id.* at 583.

educational purposes” was intended to express the basic common law concept. Thus, a school asserting a right to the benefits provided for in section 501(c)(3) of the Code as being organized and operated exclusively for educational purposes must be a common law charity in order to be exempt under that section. . . .

Developments of recent decades and recent years reflect a Federal policy against racial discrimination which extends to racial discrimination in education. . . .

The issue here is whether a private school that does not have a racially nondiscriminatory policy as to students is “charitable” within the common law concepts found in section 501(c)(3). The foregoing discussion demonstrates that racial discrimination in education is contrary to Federal public policy. Therefore, a school not having a racially nondiscriminatory policy as to students is not ‘charitable’ within the common law concepts reflected in sections 170 and 501(c)(3) of the Code and in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax.³⁹

The Court upheld the denial of the petitioners’ federal tax-exempt status. Writing for the Court, Chief Justice Burger observed:

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not “charitable” should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. . . . Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education. . . .

There can thus be no question that the interpretation of § 170 and § 501(c)(3) announced by the IRS in 1970 was correct. That it may be seen as belated does not undermine its soundness.⁴⁰

III. THE LEGAL LANDSCAPE AFTER *SFFA V. HARVARD*

The Supreme Court’s decision in *SFFA v. Harvard* was a legal landmark. The *SFFA* decision reaffirmed the core principle of justice that “[d]istinctions

39. Rev. Rul. 71-447 (1971).

40. 461 U.S. at 592-93, 595.

between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”⁴¹

State and federal cases decided after *SFFA v. Harvard* emphasize the importance of avoiding racial discrimination even if the racial discrimination benefits members of minority groups. Examples include:

Ultima Services Corp. v. U.S. Department of Agriculture, which invalidated a presumption that members of specified racial minority groups qualified for a federal program awarding government contracts;⁴²

Nunziard v. Minority Business Development Agency, which invalidated a presumption that members of specified racial minority groups qualified for a federal program assisting small businesses;⁴³

Strickland v. U.S. Department of Agriculture, which granted a preliminary injunction against a federal program of farm relief allocating more funds for members of specified racial minority groups, among others;⁴⁴

American Alliance for Equal Rights v. Founders First Community Development Corp., which granted a preliminary injunction under Section 1981 against a nonprofit organization’s grant program for members of specified racial minority groups, among others;⁴⁵

Mid-America Milling Co. LLC v. U.S. Department of Transportation, which granted a preliminary injunction against a federal program awarding highway construction funds because the program presumed that members of specified racial minority groups qualified for funds;⁴⁶ and

Rabiebna v. Higher Educational Aids Board, which invalidated a Wisconsin state program providing student grants to members of specified racial minority groups, among others.⁴⁷

These federal and state decisions reaffirm the principle that racial discrimination violates our civil rights laws irrespective of the race of the individuals harmed by it.

SFFA v. Harvard and these subsequent cases are not directly about the law of charity. But our civil rights laws, and the judicial decisions applying and interpreting them, do and should influence our understanding of what violates fundamental public policy within the law of charity. This is especially so for our civil rights laws and decisions protecting individuals against racial discrimination, a particularly shameful aspect of our nation’s past and present.

41. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181, 208 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), itself quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

42. *Ultima Servs. Corp. v. U.S. Dep’t of Agric.*, 683 F. Supp. 3d 745, 774 (E.D. Tenn. 2023).

43. *Nunziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 509 (N.D. Tex. 2024). *See also* *Nunziard v. Minority Bus. Dev. Agency*, 2024 WL 4416885 (N.D. Tex. 2024) (awarding attorneys’ fees and costs).

44. *Strickland v. U.S. Dep’t of Agric.*, 736 F. Supp. 3d 469 (N.D. Tex. 2024).

45. *Am. All. for Equal Rts. v. Founders First Cmty. Dev. Corp.*, 2024 WL 3625684, at *5 (N.D. Tex. 2024).

46. *Mid-America Milling Co. LLC v. U.S. Dep’t of Transp.*, 2024 WL 4267183, at *13 (E.D. Ky. 2024). For a subsequent clarification of the court’s order, see *Mid-Am. Milling Co. LLC v. U.S. Dep’t of Transp.*, 2024 WL 4635430 (E.D. Ky. 2024).

47. *Rabiebna v. Higher Educ. Aids Bd.*, 20 N.W.3d 742, 773 (Wis. App. 2025).

Brown v. Board of Education's insistence on equal treatment for individual students of all races shaped the charitable public policy that was at issue in *Bob Jones University*.⁴⁸ Note that some states had reached the same conclusion decades before *Brown*.⁴⁹

IV. THE PATH FORWARD

This Article proposes a path forward for the law of charity. The time has come for state and federal courts and taxing authorities to declare that racial discrimination by a charity violates fundamental public policy irrespective of the race of the individuals harmed by it.

The law of charitable public policy evolves.⁵⁰ In earlier times, the promotion of atheism—or in England, any religion other than the established Church—was invalid as a charitable purpose.⁵¹ Today in the U.S., the approach to religion is pluralistic, and a charity for the promotion of atheism no longer violates public policy.⁵² With respect to racial discrimination, charities discriminating against members of racial minority groups were considered by the federal government to be charitable until 1970—but thankfully, no longer.⁵³

A charitable purpose or a specific restriction on a charitable asset violates fundamental public policy when it “violates a widely accepted and critically important view of justice.”⁵⁴ Does racial discrimination satisfy that test irrespective of the race of the individuals harmed by it?

This Article argues that the answer is yes. The Supreme Court's decision in *SFFA v. Harvard* was a legal and cultural landmark akin to *Brown v. Board of Education*.⁵⁵ A Gallup poll conducted some months after the *SFFA* decision found that the decision was favored by 68 percent of all U.S. adults, 52 percent of Black U.S. adults, 68 percent of Hispanic U.S. adults, 63 percent of Asian U.S. adults, and 72 percent of White U.S. adults.⁵⁶ Indeed, even before *SFFA v.*

48. See *Brown v. Board of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493–96 (1954); *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983).

49. One example is the State of New Jersey. See the history recounted in *In re Petition*, 854 A.2d 327, 336 (2004) (“Long before the United States Supreme Court decision in *Brown v. Bd. of Educ. of Topeka*, New Jersey had rejected [racial] segregation in the public schools of this State” as against public policy) (citations omitted).

50. See, e.g., *Green v. Connally*, 330 F. Supp. 1150, 1159–61 (D.D.C. 1971) (describing the evolution of trust law governing racially discriminatory charitable purposes).

51. For discussion, see AUSTIN WAKEMAN SCOTT & MARK L. ASCHER, SCOTT & ASCHER ON TRUSTS § 38.11 (2024).

52. See *id.* The law of England continues not to recognize the promotion of atheism as a religious purpose within the law of charity. See Emma Park, *How Taxpayers Subsidize Evangelism*, NEW HUMANIST (June 6, 2023), <https://newhumanist.org.uk/articles/6127/how-taxpayers-subsidise-evangelism> [<https://perma.cc/72NP-EFBS>].

53. See *supra* notes 39–40 and accompanying text.

54. RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 4.01 cmt. c (AM. L. INST. 2021).

55. For *Brown*'s holding and rationale, see 347 U.S. at 493–96.

56. See Justin McCarthy, *Post-Affirmative Action, Views on Admissions Differ by Race*, GALLUP NEWS (Jan. 16, 2024), <https://news.gallup.com/poll/548528/post-affirmative-action-views-admissions-differ-race.aspx> [<https://perma.cc/7PCA-AMWR>]. The 68 percent of U.S. adults approving in this poll of the *SFFA* decision is a noticeably larger percentage than the 54 percent of U.S. adults approving of the decision in *Brown v. Board of Education* shortly after it was announced. See Jack Ludwig, *Race and Education: The 50th Anniversary of Brown*

Harvard, the voters in the states of California and Washington had approved referenda—Proposition 209 and Initiative 200, respectively—abolishing racial preferences and had rejected subsequent attempts to repeal those referenda.⁵⁷ After *SFFA v. Harvard*, the Supreme Court’s decision in *Ames v. Ohio Department of Youth Services* reaffirmed the principle that the nation’s civil rights laws apply equally to all individuals without regard to the individual’s membership in a majority or minority group. The Supreme Court and nearly 70 percent of the country have rejected the view that the “remedy for [society’s] past discrimination is present discrimination.”⁵⁸ The Executive Branch similarly has rejected this view,⁵⁹ as has Congress by enacting statutes that protect individuals from racial discrimination without distinguishing between members of minority or majority groups.⁶⁰

We have not reached unanimity, of course. The view expressed in the epigraph from Professor Kendi has its adherents. The adherents will argue that there is not yet a sufficient consensus to invalidate a charity’s racial discrimination in favor of members of minority groups. They will argue that it is too soon to declare this discrimination against charitable public policy or to deny tax-exempt status to charities that practice it.⁶¹ They will argue that this

v. *Board of Education*, GALLUP NEWS (Apr. 27, 2004), <https://news.gallup.com/poll/11521/race-education-50th-anniversary-brown-board-education.aspx> [https://perma.cc/9ZFU-86XN].

57. California Proposition 16, to repeal Proposition 209, was defeated in November 2020. See Alexander Nieves, *California Voters Reject Affirmative Action Measure Despite Summer of Activism*, POLITICO (Nov. 4, 2020, 13:14 EST), <https://www.politico.com/states/california/story/2020/11/04/california-voters-reject-affirmative-action-measure-despite-summer-of-activism-9424555> [https://perma.cc/D4A4-E8F4]. The Washington legislature attempted to repeal Initiative 200 in April 2019 by enacting Initiative 1000, but Initiative 1000 was rejected by the voters in November 2019 (Referendum 88). See *Washington Voters Reject Affirmative Action Referendum*, ASSOCIATED PRESS (Nov. 12, 2019, 18:00 CDT), <https://apnews.com/general-news-f7995816ccfa40f0bd04df81533ca697> [https://perma.cc/8UMK-D6P6].

58. KENDI, *supra* note 1, at 19.

59. See Exec. Order No. 14173, 3 C.F.R. 8633 (Jan. 21, 2025).

60. See, e.g., 42 U.S.C. § 2000d [Title VI]; 42 U.S.C. § 2000e-2(a) [Title VII]; 42 U.S.C. § 3604 [Fair Housing Act]; 15 U.S.C. § 1691 [Equal Credit Opportunity Act].

61. See, e.g., David A. Brennen, *The Chilling Effect of SFFA v. UNC/Harvard on Race-Based Affirmative Action by Tax-Exempt Charities*, 29 FLA. TAX REV. ____ (forthcoming 2025) (drawing a distinction between charities subject to Title VI and charities that are not subject to Title VI), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5193533 (last visited July 6, 2025) [https://perma.cc/5K2D-LXYZ]; Roger Colinvaux, *The Legality of Charitable Remedial Discrimination*, 135 YALE L.J. ____ (forthcoming 2025), draft available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5099785 (last visited July 6, 2025) [https://perma.cc/9TKW-RFJN].

These articles suggest that it is a holding of *Bob Jones University* that a consensus among the three branches of the federal government is a prerequisite for a court to find a public policy sufficient to support the removal of federal tax-exempt status. See Brennen, *Chilling Effect*, at draft p. 5; Colinvaux, *Legality*, at draft p. 19.

I read *Bob Jones University* differently. Chief Justice Burger used the cross-branch consensus as evidence that it was blindingly obvious that racial discrimination excluding Black applicants and students from educational opportunities was against public policy; he did not frame the cross-branch consensus as a prerequisite. Indeed, writing in 1983, he commented that the IRS’s announcement in 1970 can be viewed as “belated” (461 U.S. at 595)—in other words, that the IRS need not have waited sixteen years after *Brown v. Board of Education*, which applied to public educational institutions, to deny federal tax-exempt status to private educational institutions still discriminating against Black individuals.

discrimination by charities should be permitted because it serves as a remedy for society's past discrimination,⁶² yet the remedial rationale approved by the courts for otherwise impermissible racial discrimination ordinarily has been focused on remedying specific discrimination, not societal discrimination in general.⁶³ And they will argue that this discrimination should be permitted because charities are private actors, not governmental actors,⁶⁴ even though this argument downplays the requirement that charities, unlike private individuals, must exclusively benefit the community and adhere to public policy in exchange for the special legal privileges they enjoy.

A crucial question is: how long to wait? *Brown v. Board of Education* was decided in 1954, applying to public educational institutions. The IRS waited sixteen years to deny tax-exempt status to comparably racially discriminatory private educational institutions.⁶⁵ Chief Justice Burger suggested that the IRS's action was "belated."⁶⁶ Will we have to wait sixteen years after *SFFA v. Harvard* for the law of charitable public policy to concur that "[e]liminating racial discrimination means eliminating all of it"?⁶⁷ This Article encourages state and federal courts and taxing authorities not to wait so long. A charity's purposes must be "beneficial to the community."⁶⁸ Racial discrimination is a stain on the community and violates charitable public policy.

CONCLUSION

The Restatement of Charitable Nonprofit Organizations rightly speaks of "[t]he importance of the charitable sector to the U.S. economy, the civic life of its residents, and the aspirations of its people."⁶⁹ In fiscal year 2023, there were more than 1.5 million 501(c)(3) organizations in the United States.⁷⁰

Charities enjoy privileges under state and federal law and, in exchange for these privileges, must have "exclusively charitable purposes"⁷¹ that are "not

Moreover, there *is* a consensus among the three branches with respect to racial discrimination. The text of the nation's civil rights statutes enacted by Congress prohibit racial discrimination against individuals without regard to whether the individuals are members of minority or majority groups. *See supra* note 60 and accompanying text. This view is shared by the Executive Branch (*see* EO 14173, *supra* note 59) and by the Judiciary (*see* *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181, 206 (2023); *Ames*, 145 S. Ct. at 1546).

62. *See* Colinvaux, *Legality*, *supra* note 61, at draft pp. 33–56, 69–70.

63. For discussion, *see* Olatunde C.A. Johnson, *The Remedial Rationale After SFFA*, 54 SETON HALL L. REV. 1279, 1288–89, 1295–1302 (2024).

64. *See* Colinvaux, *Legality*, *supra* note 61, at draft pp. 20–21, 27–28.

65. *See supra* note 39 and accompanying text.

66. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983).

67. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181, 206 (2023). *See also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (opinion of Roberts C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.")

68. UNIF. TR. CODE § 405(a) (UNIF. L. COMM. 2020).

69. RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS, Introduction (AM. L. INST. 2021).

70. *See* Abigail Tierney, *U.S. Number of Nonprofit Organizations in Fiscal Year 2023, by 501(c) Subsection*, STATISTA (Sept. 16, 2024), <https://www.statista.com/statistics/1373603/number-nonprofit-organizations-irs-subsection-us/> [<https://perma.cc/U3LG-CDQL>].

71. RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.01(a) (Am. L. Inst. 2021).

contrary to fundamental public policy.”⁷² In addition, any specific restrictions on charitable assets must not be “contrary to public policy.”⁷³

The conclusion that a charity’s purposes or specific restrictions on a charity’s assets are contrary to (fundamental) public policy should not be reached lightly. As Chief Justice Burger noted, “determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected.”⁷⁴

What is the proper public policy with respect to racially discriminatory purposes or specific restrictions on otherwise charitable assets? The epigraphs at the beginning of this Article summarize two incompatible approaches.

The unfortunate reality is that legal silence works to the advantage of the view expressed in the epigraph from Professor Kendi. Charities and their donors wanting to engage in discrimination in favor of members of minority groups, believing it to be an appropriate remedy for society’s past discrimination against them, will continue to do so until state and federal courts and taxing authorities prohibit it. The way to prohibit it is to be clear that the law of charity accords with the epigraph from *SFFA v. Harvard*.

Racial discrimination violates the fundamental public policy to which charities must adhere. Ending it means ending all of it.

72. *Id.* at § 1.01(c).

73. *Id.* at § 4.01(d).

74. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).