

FLORIDA TAX REVIEW

VOLUME 5

2002

NUMBER 9

Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*

David A. Brennan **

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**Associate Professor of Law, Mercer University School of Law. B.B.A. Florida Atlantic University; J.D., LL.M., University of Florida College of Law. I would like to thank my colleagues at Mercer and elsewhere who provided guidance to me on this paper, including Alice Abreu, Alice Baker, Anthony Baldwin, Robert Chapman, Beverly Moran, David Oedel and Virginia Williams. I would also like to thank Shelly All, Denise Gibson, Wesley Person and Amber Pride for valuable research assistance. Thank you also to Randall W. Roth for his insights on the Kamehameha schools. As always, thanks to my wife for her lasting support. Earlier versions of this article were presented and discussed at the Critical Tax Theory Conference held at St. Louis University School of Law on April 21, 2001, and at the Law, Culture and Humanities conference held at The University of Pennsylvania School of Law on March 8, 2002. Research for this article was funded in part by a summer research grant awarded by Mercer University School of Law.

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PROLOGUE

The judicial assault on constitutionally permissible social justice efforts including affirmative action for minorities and ending discrimination against homosexuals continues. Through the rubric of “neutrality,” “equality” and “free expression,” courts today are using constitutional law principles to arrest efforts by state and federal governments either to (1) remedy present effects of historical discrimination or (2) end current discrimination. Accordingly, various federal circuit courts have interpreted Equal Protection Clause strict scrutiny as prohibiting government from considering race as a factor when making university admissions decisions or granting scholarships.¹ Thus, it is not

1. See, e.g., *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) (state of Georgia could not use race as a factor in University admission decision); *Hopwood v. Tex.*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996) (state of Texas cannot consider race as a factor when making law school admissions decisions); *Podberesky v. Kirwan*, 38 F.3d 147, 161-62 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995) (race-exclusive scholarship program offered by state university violates the Equal Protection Clause). But see *Grutter v. Bollinger*, 2002 U.S. App. LEXIS 9126 (6th Cir. 2002) (holding that the University of Michigan School of Law’s use of race as a factor in its admission decision does not violate the Equal Protection Clause); *Smith v Univ. of Wash. Law School*, 233 F.3d 1188 (9th Cir. 2000), cert denied, 532 U.S. 1051 (2001) (affirming district court conclusion that “race could be used as a factor in educational admissions decisions, even where that was not done for remedial purposes”).

Another example of this race-neutral application of the Equal Protection Clause is a recent decision by a federal circuit court to expand application of strict scrutiny to government recruiting, not just hiring, of minorities. See *Broadcasters Ass’n v. Fed. Communication Comm’n*, 236 F.3d 13 (D.C. Cir. 2001). In *Broadcasters Ass’n*, the District of Columbia Circuit court invalidated an FCC rule that required outreach efforts in hiring by FCC licensees. This is in stark contrast to the prevailing view announced by the Supreme Court in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), that race could be considered in such outreach efforts. When the Supreme Court invalidated the UC Davis medical school’s affirmative action plan in 1978, it objected to the medical school’s use of race as a factor when making its admissions decisions. See discussion *infra* notes 123-27 and accompanying text. The Court indicated that the medical school could achieve its goal of a diversified student body in a constitutionally permissible manner such as increasing efforts to attract minority applicants, so long as the actual admissions decision was not based on race. See *Bakke*, 438 U.S. at 316 (discussing the acceptability of Harvard College’s efforts to recruit “not only Californians or Louisianans but also blacks and Chicanos and other minority students”). In fact, the Supreme Court has never invalidated government outreach efforts to attract minorities so long as the actual decision to grant the government benefit at issue (e.g., to admit a student or try to hire an employee.) was not based on race. However, in *Broadcasters Ass’n*, the District of Columbia federal circuit signaled its intention to reverse this state of affairs when it invalidated an FCC rule that required outreach efforts

inconceivable that the Supreme Court might soon rule that a state school's consideration of race, in order to obtain a more diverse student body, violates Equal Protection Clause strict scrutiny – either because racial diversity is not “compelling” or because considering race is not “necessary.”² Additionally, the Supreme Court invalidated, under the guise of free expression, state law attempts to lessen discrimination against homosexuals.³

Though appealing on its face, this race-neutral and free expression trend in constitutional decision-making actually hinders efforts by government to achieve social justice through elimination of both current discrimination and lingering effects of past discrimination. For example, race-neutrality under the Equal Protection Clause's strict scrutiny test does not generally permit government to make proper distinctions between different types of racial preferences like invidious discrimination against racial minorities and benign affirmative action for such minorities. Tax-exempt charities, because they generally are not government actors, are not ordinarily subject to the requirements of constitutional law principles like Equal Protection Clause strict scrutiny. Thus, even if the Supreme Court ultimately rules that the Constitution prohibits state schools from considering race in their admissions decisions, private schools that have 501(c)(3) tax-exemption would not necessarily be prohibited from considering race in their admissions decisions.⁴ However, these

in hiring by FCC licensees. The rule violated the Equal Protection Clause by putting pressure on FCC licensees to “focus recruiting efforts upon women and minorities in order to induce more applications from those groups.” See *Broadcasters Ass'n*, 236 F.3d at 19. This was held not narrowly tailored and violative of the Equal Protection Clause. *Id.*

2. In fact, the Eleventh Circuit in *Johnson* recently refused to decide whether racial diversity is a “compelling” state interest. *Johnson*, 263 F.3d at 1244. “We need not, and do not, resolve in this opinion whether student body diversity ever may be a compelling interest supporting a university's consideration of race in its admissions process,” in part, because that court expects the United States Supreme Court to address this issue. *Id.* at 1245 “[A] majority of the Supreme Court may eventually adopt Justice Powell's opinion as binding precedent, and even now the opinion has persuasive value” *Id.* However, the court in *Johnson* did conclude that considering race in college admissions is not constitutionally “necessary.” *Id.* at 1244-45. “Even assuming that UGA's asserted interest in student body diversity is a compelling interest, UGA's 1999 freshman admissions policy is unconstitutional because UGA has plainly failed to show that its policy is narrowly tailored to serve that interest.” *Id.*

3. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

4. Private actors are not directly subject to the restrictions imposed by constitutional law provisions like the Equal Protection Clause of the Fourteenth Amendment. See *United States v. Morrison*, 529 U.S. 598, 620-27 (2000) (invalidating the Violence Against Women Act's civil remedies holding that Congress could not regulate private behavior pursuant to its Fourteenth Amendment Section 5 enforcement powers); *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating Civil Rights Act of

private schools, like all other charities, are subject to the public policy limitation which prohibits violations of “established public policy.” This Article examines the question of how the Service should rely on constitutional law principles when it applies the public policy limitation to particular tax-exempt charities such as private schools.

This Article expands the discussion of whether tax-exempt charities, for constitutional law purposes, should be treated as government actors, as private actors or as something in between. While government actors are subject to constitutional law restrictions concerning discrimination and free speech, private non-government actors are not generally subject to these same restrictions.⁵ Although tax-exempt charities are often thought of as sovereigns and, thus, government-like,⁶ the fact remains that charities are private entities

1875 that provided for the full enjoyment of public accommodation because the Fourteenth Amendment only applied to state action and did not give Congress the power to prohibited private behavior). But see *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Lopez*, 514 U.S. 549 (1995) (private discrimination that has a substantial effect on the economy can be regulated by Congress through the Commerce Clause under art. 1, section 8, clause 2). However, private actors may be subject to any number of civil rights statutes that impose restrictions that are similar in many respects to those imposed by the Constitution.

5. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment.”); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982) (“Our cases have accordingly insisted that the conduct allegedly causing that deprivation of a [constitutional] federal right be fairly attributable to the State.”); *United States v. Morrison*, 529 U.S. 598, 621 (2000) (“[T]he Fourteenth Amendment, by its very terms, prohibits only state action.”).

6. See, e.g., Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 *Iowa J. Corp. L.* 585 (1998):

The modern U.S. political economy is traditionally described in terms of three sectors: the public sector (government), the proprietary sector (business), and the nonprofit sector (private, but with public purposes). No one would argue that the nonprofit sector enjoys true co-sovereignty with the public sector, because the nonprofit sector lacks the compulsory powers that inhere in a sovereign. Nevertheless, tax exemption carries with it a sense of leaving the nonprofit sector inviolate, and the very concept of sovereignty embodies the independent power to govern. Indeed, a major trade association of charities takes a most sovereign-sounding name, calling itself “The Independent Sector.”

Id. at 588 (footnotes omitted).

created to serve public purposes.⁷ As private entities, charities – like all other private entities – are not necessarily bound by constitutional law principles.⁸ Still, the many “public” aspects of charities seem to dictate allegiance to some higher principle than merely being permitted to do what every other private entity may do.⁹ Hence, the Supreme Court ruled that charities may not violate a principle called “established public policy.”¹⁰ But what does this mean? Surely it does not mean that charities, because of the public policy limitation, are somehow transformed into government actors limited by constitutional law

7. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 587-88 (1983). “[I]n enacting . . . § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.” *Id.*

8. But see Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 *Hastings L.J.* 407, 457-59 (1999) (outlining an approach under which the Equal Protection Clause could be applied against the government for allowing tax deductions for contributions to charities that discriminate based on race). Professor Sugin suggests that the Service’s knowing grant of tax-exempt charitable status to organizations that discriminate based on race, like Bob Jones University, might violate the Equal Protection Clause. See *id.* at 452-53 (asserting that application of § 501(c)(3) “to authorize exemptions for racially discriminatory private schools, such as Bob Jones University, could potentially violate equal protection” because of the view that “the government actively approves of a private party’s discrimination by affirmatively granting a discriminating party an exemption and placing that organization on the official and public list of approved organizations”).

9. Though private in a constitutional law sense, tax exempt charities have many public qualities. But see discussion *supra* note 8. For instance, a charity must, in accordance with IRC § 501(c)(3), provide a benefit to the public and avoid providing either private benefits or private inurement to members, insiders and others. IRC § 501(c)(3). Additionally, a charity is required to make public much of its typically private corporate (or trust) information concerning officers, directors, finances and operations. See generally IRC § 6104 (providing for public inspection of a variety of information relative to tax-exempt charities, such as applications for tax exemption including any papers submitted in support of such application and any letter or other document issued by the Service with respect to such application and annual information returns).

10. See *Bob Jones Univ.*, 461 U.S. at 586. “Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity – namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.” *Id.*

principles. Nor does it mean that charities are completely “free” of societal responsibility in the same sense that other private entities are “free.”¹¹ Thus, charities exist in an undefined space somewhere between government and private in which constitutional law principles do not directly apply, but something constitutional-like (i.e., the public policy limitation) surely does apply. The question is: how is it applied?

I. INTRODUCTION

Recently the United States Supreme Court issued two opinions that concern the constitutionality of racial preferences and sexual orientation discrimination. In the first opinion, *Rice v. Cayetano*, the Court held that the Fifteenth Amendment prevents Hawaii from using racial preferences for native Hawaiians to determine the right to vote for trustees of a state fund benefitting native Hawaiians.¹² In the second opinion, *Boy Scouts of America v. Dale*, the Court held that the First Amendment permits the Boy Scouts to exclude homosexuals from adult membership in its charitable organization, even though a state statute prohibits such discrimination.¹³ Ostensibly, these recent constitutional law cases have nothing to do with tax law; however, because of the Court’s holding in *Bob Jones University v. United States*, these decisions may have everything to do with tax law as it relates to the public policy limitation. In *Bob Jones University*, the Court, relying on the statutory-based concept of “established public policy,” upheld the Service’s revocation of the tax-exempt status of a private school that discriminated against black people.¹⁴ In concluding that there was an “established public policy” against such discrimination, the Court analyzed decisions by various federal authorities which concluded that discrimination against black people in public education is unconstitutional and against public policy.¹⁵ Emboldened by the Court’s

11. Indeed, while for-profit non-charitable entities may engage in any lawful purpose and not-for-profit non-charitable entities may engage in non-charitable activities, charities are uniquely restricted to engaging mostly charitable functions. See IRC § 501(c)(3).

12. See *Rice v. Cayetano*, 528 U.S. 495 (2000).

13. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

14. See *Bob Jones Univ.*, 461 U.S. at 595-96. “Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the ‘charitable’ concept discussed earlier, or within the congressional intent underlying § 170 and § 501(c)(3).” *Id.*

15. See David A. Brennan, *The Power of The Treasury: Racial Discrimination, Public Policy and “Charity”* In *Contemporary Society*, 33 U.C. Davis L. Rev. 389, 403 (2000) (noting that Court in *Bob Jones University* based its conclusions about the existence of a national public policy against racial discrimination on “such notable events as *Brown v. Bd. of Education*, Congress’s passage of civil rights laws in the

analysis in *Bob Jones University*, the Service recently intimated that it will rely significantly on constitutional law principles to ascertain “established public policy” on matters involving racial preferences by tax-exempt charities.¹⁶ In an administrative decision issued in 1999 to a tax-exempt charitable trust that operates a grade school in Hawaii, the Service approved the trust’s process of using racial preferences for native Hawaiians when choosing beneficiaries.¹⁷ After referring to *Bob Jones University* and several cases concerning permissible racial preferences under constitutional law, the Service concludes in the administrative decision that the trust’s preference for Hawaiians does not violate any “established public policy.”¹⁸ However, the Service also indicates that its decision about the trust should be re-examined after the Supreme Court’s ruling in *Rice v. Cayetano*, a then-pending constitutional law voting rights case concerning racial preferences for Hawaiians.¹⁹ Notably, the entity making the racial preference in *Rice* was a governmental entity – the state of Hawaii’s Office of Hawaiian Affairs – and not a non-governmental tax-exempt charity.

The apparent implication of the Service’s re-examination statement in its administrative decision is that the Service makes its public policy determinations about tax-exempt charities based on constitutional law principles that concern the permissible bounds of government action. Should private charities and government actors be subject to the same legal restrictions in regard to preferences based on matters like race and sexual orientation? That is, should constitutional law principles that limit government action also *necessarily* limit, in the same way, the Service’s ability to determine “established public policy” with respect to activities of non-governmental tax-exempt charities?²⁰ This Article contends that constitutional law doctrine

1960s and 1970s, and various executive orders issued between the 1940s and early 1980s”).

16. See National Office Technical Advice Memorandum from the IRS to the Kamehameha Schools/Bernice Pauahi Bishop Estate (Feb. 4, 1999) (on file with the Florida Tax Review) [hereinafter “Bishop Estate TAM”]. The Service performed a similar action in a 1977 private letter ruling issued to a tax-exempt scholarship fund. See Priv. Ltr. Rul. 7744007 (July 28, 1977) (relying on constitutional distinction between concepts of “inherently suspect” and “rationality,” Service concludes that, although public policy requirement applied to foundation generally, requirement does not extend to gender-based exclusions).

17. See Bishop Estate TAM, *supra* note.

18. See discussion *infra* notes 77-86 and accompanying text.

19. See Bishop Estate TAM, *supra* note.

20. See, e.g., Sugin, *supra* note, at 473. Professor Sugin writes:

The anti-discrimination approach in equal protection analysis parallels the . . . approach in traditional tax policy. They are both

cannot, and indeed should not, so limit or dictate the Service's regulatory activities with respect to private charities. True, no government agency can be in the business of holding itself to be above and beyond constitutional strictures and the Court that interprets that Constitution. However, the public policy doctrine is a statutory principle applicable to private charities, not a constitutional one. Accordingly, it is inappropriate for the Service to make its public policy determinations about tax-exempt charities based almost exclusively on constitutional law principles that concern limits on government actors.²¹

Part II briefly recounts the origins and effects of tax law's public policy limitation, which requires that tax-exempt charities not violate "established public policy." Part II also examines those statements by the Service indicating its view that constitutional law decisions should dictate when a public policy is sufficiently "established" for purposes of the public policy limitation. Part III begins a discussion of constitutional law by providing an overview of the Supreme Court cases concerning constitutional equality as a general limitation on the government's use of racial preferences. Part III also discusses the extent to which private groups may use the constitutional right of freedom of expressive association as a shield to escape government restrictions imposed by state anti-discrimination laws. Finally, Part III demonstrates how these various constitutional law doctrines might impact the Service's ability to enforce the public policy limitation against tax-exempt charities. Part IV argues that the Service's primary reliance on constitutional law principles when making its public policy determinations is inappropriate for theoretical reasons as well. Reliance on constitutional law principles is inconsistent with the public benefit subsidy theory, which holds, in part, that tax-exempt charities are private actors intended to provide goods and services that government either

concerned with the government treating like-situated people alike, without inquiring into the historical, social and institutional questions that surround what it means to be alike. While formal justice in this sense may be all that the Constitution requires for equal protection. . . , tax policy's aspirations can be more expansive. Tax policy can be about defining and achieving substantive equality, even if it is beyond what the Constitution requires, and even though it requires explicitly linking tax policy to ideas that are outside its traditional borders.

Id.

21. See Brennen, *The Power of The Treasury*, *supra* note , at 431-445 (arguing that public policy with respect to affirmative action, for example, should be based upon various legal sources, including non-constitutional sources at both state and federal levels). See also Francis R. Hill and Barbara L. Kirschten, *Federal and State Taxation of Exempt Organizations, Operational Issues: Public Policy Requirement*, ¶2.03[6][c] (1998) (explaining that Service's reliance on constitutional law standards when making public policy decisions is "flaw[ed]").

cannot or will not, often for constitutional or political reasons, provide. Thus, subjecting charities to the same standards as government actors necessarily means that charities will be less likely to accomplish their intended tasks.

This Article concludes that the Service should await guidance from Congress on the issue of how constitutional law principles should affect tax law decisions about the charitable tax-exemption authorized by section 501(c)(3) of the Internal Revenue Code. Alternatively, the Service could engage in a type of analysis that considers a variety of sources – constitutional, non-constitutional, federal and non-federal – in deciding if a particular charity is in violation of “established public policy.” Thus, this Article examines the relationship between constitutional law and tax law in an effort to continue the discussion of how federal tax authorities should respond when a tax-exempt charity engages in activities that would be unconstitutional if done by a government actor.²² Additionally, this Article examines the matter of whether a private charity should be permitted to use the Constitution as a shield in tax cases, like the Boy Scouts did in a non-tax case, to prevent revocation, on public policy grounds, of its 501(c)(3) tax exemption.

II. TAX LAW’S PUBLIC POLICY LIMITATION

In 1983, the United States Supreme Court announced in *Bob Jones University v. United States* that the Service has authority to make certain tax law decisions on public policy grounds. For example, if the Service determines that a charity is discriminating against black people it can terminate that charity’s tax-exempt status because the charity is violating an “established public policy” against invidious racial discrimination.²³ This Part demonstrates that the effect on a charity’s continued existence of the Service’s power to make public policy decisions is real and, often, substantial.

22. See Brennen, *The Power of The Treasury*, supra note ; David A. Brennen, *Tax Expenditures, Social Justice and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Private Charities*, 2001 B.Y.U. L. Rev. 167 (2001), for background discussion of this issue.

23. See, e.g., *Calhoun Academy v. Commissioner*, 94 T.C. 284, 305 (1990). After a comprehensive review of the administrative record, we find that petitioner has not carried its burden to show that it operates in good faith in accordance with a racially nondiscriminatory policy as to students. . . . [a]ccordingly, petitioner has not shown that [the service] was erroneous in denying petitioner tax-exempt status under § 501(c)(3).

Id. See also *Va. Educ. Fund v. Commissioner*, 85 T.C. 753 (1985) (discussing acceptable standards of proof for a charity to show that it has not violated nondiscrimination requirements).

A. *The Origins of the Public Policy Limitation*

The public policy limitation emanated from the Court's analysis in *Bob Jones University v. United States*.²⁴ In *Bob Jones University*, the Supreme Court held that the Service properly revoked the tax-exempt charitable status of a private university that discriminated against black people in its admissions process.²⁵ Bob Jones University discriminated against black people by denying them admission to the university and, later, by denying them admission to the university if they were engaged in an interracial romantic relationship.²⁶ In sustaining the Service's revocation of Bob Jones University's tax-exempt status, the Supreme Court reasoned that it is inconsistent with charitable trust law principles for an entity that provides a "public benefit" to also engage in behavior that violates "established public policy."²⁷ In explaining the reasoning for its decision that the public policy denouncing discrimination against black people was "established," the Court in *Bob Jones University* referred to judicial, legislative and executive statements of anti-discrimination law.²⁸ Though some of these statements were constitutional in nature, some were not.

Regarding judicial statements of the public policy against invidious racial discrimination, the Court notes that prior to 1954, public education was racially segregated under authority of the "separate but equal" constitutional principle of *Plessy v. Ferguson*.²⁹ The "separate but equal" principle provided that racially segregated educational facilities are permissible under the Constitution if the separate facilities are substantially equal to each other.³⁰ The

24. 461 U.S. 574 (1983). See generally Brennen, *The Power of The Treasury*, supra note, at 400-410 (explaining origins of tax law's public policy limitation).

25. See *Bob Jones Univ.*, 461 U.S. at 605.

26. See id. at 580-81. "To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May 1975, the University accepted no applications from unmarried Negroes, but did accept applications from Negroes married within their race." Id.

27. See id. at 591. "A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy." Id.

28. See id. at 593-95. "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." Id.

29. See *Bob Jones Univ.*, 461 U.S. at 592-93 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

30. See, e.g., *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, 161-162 (1914). "It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority

Court in *Bob Jones University* explains that, beginning in 1954, it began to eradicate the “separate but equal” doctrine from constitutional law.³¹ That year, the Court declared in *Brown v. Board of Education*³² that the “separate but equal” doctrine was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment.³³ Later, in 1958, the Court explained in *Cooper v. Aaron* that racial segregation laws also violate constitutional due process principles.³⁴ The *Bob Jones University* Court did not end its analysis with references to these constitutional judicial statements of the anti-discrimination public policy. Indeed, the Court remarks that the non-discrimination policy was also reflected in laws applicable to private schools, noting that the “legitimate educational function [of private schools] cannot be isolated from [racially] discriminatory practices.”³⁵

In its analysis of legislative statements about the public policy against racial discrimination, the Court in *Bob Jones University* did not directly rely on any constitutional law principles. Indeed, the *Bob Jones University* Court highlights the Civil Rights Act of 1964’s prohibition of racial discrimination in education, voting and housing as a premier legislative statement of the federal government’s anti-discrimination public policy.³⁶ These civil rights statutes impose limitations on private non-governmental actors that often

of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.”

31. See *Bob Jones Univ.*, 461 U.S. at 592-93. “Prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson*, 163 U.S. 537 (1896) . . . This Court’s decision in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), signaled an end to that era.” *Id.*

32. 347 U.S. 483 (1954).

33. See *Bob Jones Univ.*, 461 U.S. at 593.

34. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 19 (1958). “The right of a student not to be segregated on racial grounds in schools . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.” *Id.*

35. *Bob Jones Univ.*, 461 U.S. at 593-94 (quoting *Norwood v. Harrison*, 413 U.S. 455, 468-69 (1973)).

36. See, e.g., Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c, 2000c-6, 2000d (1994) (providing that members of class of persons similarly situated are entitled to equal protection of laws and may not be denied admission to or prohibited from continuing attendance at public college by reason of race, color, religion, sex or national origin; prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin); Voting Rights Act of 1965, 42 U.S.C. § 1971 (1994) (stating that race, color, or previous condition not permitted to affect right to vote); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1994) (providing fair housing within constitutional limitations).

parallel constitutional limitations imposed on government actors.³⁷ However, civil rights statutory limits on private actors are not necessarily the same as constitutional limits on government. Civil rights statutes may impose greater or lesser limits on private actors than the Constitution imposes on government actors. For example, certain civil rights statutes extend constitutional-like protections to “forms of discrimination not covered in any meaningful way by the Constitution,”³⁸ such as discrimination based on age or disability.³⁹ Also, civil rights statutes may broaden the “substantive principles governing discrimination,”⁴⁰ such as by allowing claims to be based upon disparate impact, rather than proof of discriminatory intent.⁴¹

Finally, civil rights statutes permit private actors to be more proactive than government in advancing social justice objectives via methods like race based affirmative action.⁴²

37. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978). “In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.*

38. Rodney A. Smolla, *Federal Civil Rights Act*, § 1.01[2] (3d ed., 2000).

39. See, e.g., *The Education of the Handicapped Act*, 20 U.S.C. §§ 1401-20; *The American With Disabilities Act of 1990*, 42 U.S.C. §§ 12101-213; *The Age Discrimination in Employment Act*, 29 U.S.C. § 621.

40. Smolla, *supra* note, at § 1.01[2].

41. See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (providing remedies for discrimination based on race on showing of discriminatory impact); *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 584 (1983) (indicating that five Justices of Supreme Court interpret Title VI as not requiring proof of discriminatory intent, as is case with the Equal Protection Clause); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (providing remedies for employment discrimination on a showing of disparate impact); Compare *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (concluding that Title VII outlaws employment “practices that are fair in form, but discriminatory in operation”). With *McCleskey v. Kemp*, 481 U.S. 279 (1987) (requiring proof of “discriminatory intent” for showing of Equal Protection violation by governmental actor); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (the Equal Protection Clause prohibits only intentional discrimination). The requirement of proof of discriminatory impact only, and not discriminatory intent, for civil rights statutory purposes is limited to situations in which the requested relief is declaratory or injunctive in nature, not compensatory. See *Smolla*, *supra* note, at § 8.02[3]; *Guardians Ass’n*, 463 U.S. at 584, 597-606 (White, J.) (concluding that “unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations”).

42. See Brennen, *Tax Expenditures*, *supra* note 22, at 181-182. Professor Brennen writes:

Regarding executive statements of the government's anti-discrimination public policy, the Court in *Bob Jones University* referenced executive orders since President Truman that prohibited racial discrimination in federal employment decisions and in classifications for the Selective Service.⁴³ The Court also highlighted President Eisenhower's use in 1957 of military force to ensure compliance with federal school desegregation requirements and President Kennedy's statement in 1962 that providing federal assistance for racially discriminatory housing facilities "is . . . inconsistent with . . . public policy."⁴⁴ These executive statements of anti-discrimination public policy reflect enforcement of the constitutional principle that governmental discrimination based on race is highly suspect, especially in areas such as education, housing and employment. However, while these statements are premised on constitutional law principles like those contained in the Equal Protection Clause, they are not synonymous with these constitutional provisions which only apply to government actors.⁴⁵ Indeed, these statements were made as a result of the political will of various presidents and, even though constitutionally permitted, were not constitutionally required.

In essence, the Court's analysis in *Bob Jones University* demonstrates that "established public policy" is not synonymous with that which is

[P]rivate employers have long enjoyed greater freedom under Title VII of the Civil Rights Act of 1964, [sic] than government employers under the Constitution to engage in aggressive voluntary affirmative action programs aimed at recruiting, hiring and promoting race and gender minorities. When properly structured, an employer's voluntary affirmative action plan will not be invalidated under Title VII so long as the plan is consistent with Congress' goal of eliminating discrimination against traditional minorities. However, if a government employer were to implement a similar voluntary affirmative action plan (such as one based on race) and that plan were evaluated under the Constitution, a court would more likely invalidate the plan as unconstitutional.

Id. (citations omitted).

43. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 594 (1983). "Several years before this Court's decision in *Brown v. Bd. of Education*, supra, President Truman issued Executive Orders prohibiting racial discrimination in federal employment decisions, Exec. Order No. 9980, 3 CFR 720 (1943-1948 Comp.), and in classifications for the Selective Service, Exec. Order No. 9988, 3 CFR 726, 729 (1943-1948 Comp.)" Id.

44. Id. at 594-95 (quoting Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963)) (prohibiting racial discrimination in housing).

45. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment." Id.

constitutional. Thus, while constitutional law principles may be *relevant* in making determinations about when a particular public policy is clearly established, such principles alone do not *dictate* public policy. Further analysis of constitutional law doctrine will show how inappropriate it is for the Service to rely almost exclusively on constitutional law principles when making specific public policy determinations.⁴⁶ But first, the remaining sections of this Part explain the effect on tax-exempt charities of losing that exemption and the nature of the Service's statements that a public policy violation is virtually synonymous with a constitutional law violation.

B. The Consequences of Violating the Public Policy Limitation

As the *Bob Jones University* case demonstrates, the necessary consequence of a finding that a tax-exempt charity violates "established public policy" is that the charity loses its 501(c)(3) tax-exemption. While the Service's revocation of Bob Jones University's tax-exempt status did not result in the end of that school,⁴⁷ the denial or revocation of tax-exempt charitable status may be, and often is, devastating to the affected organization. Tax-exempt charitable status often opens the door for many organizations to thrive at doing whatever it is they are purposed to do. Thus, when this prized status is lost or denied, the affected organization may be forced to cease its public benefit activities.

Among the many advantages of tax-exempt charitable status that are lost upon revocation is entitlement to a variety of federal tax benefits. The most visible of these federal tax benefits are the federal income tax exemption⁴⁸ and the right to receive tax-deductible contributions from the public.⁴⁹ The advantage of the federal income tax exemption is readily apparent: with certain exceptions not relevant here,⁵⁰ tax-exempt charities do not pay federal income taxes on income earned during the year.⁵¹ The advantage gained by being able to receive tax-deductible contributions is not as direct as the federal income tax exemption, but may be just as vital, if not more vital. Because contributors are

46. See discussion *infra* Part III.

47. Reportedly, Bob Jones University is now trying to change its image as a "racist" institution. See "Bob Jones University Seeks Black Students In Bid To Improve Its Image," *Jet* (March 4, 2002). "In trying to eradicate its racist image, Bob Jones University, the fundamentalist Christian college in Greenville, SC, that banned interracial dating until two years ago, recently began to recruit minorities." *Id.*

48. IRC § 501(a).

49. IRC § 170.

50. See IRC §§ 511-514 (discussing income tax imposed on unrelated business taxable income of organizations otherwise exempt from federal income tax by § 501(a)).

51. IRC § 501(a) provides: "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."

permitted to take a deduction for federal income tax or estate tax purposes for contributions made to charities during the year, individuals and corporations are arguably more willing to contribute money to a tax-exempt charity than to an organization that is not a recognized charity.⁵² Eligibility to receive these tax-deductible contributions clearly gives charities an advantage over non-charities when it comes to fund-raising because it costs contributors less than one dollar to give one dollar to charity.⁵³ Thus, in terms of maximizing financial profit and in terms of raising funds through charitable contributions, charities clearly have an advantage over non-charities.⁵⁴

In addition to the many federal benefits of tax-exempt charitable status, state and local governments also offer benefits to charities that often hinge on the charity maintaining its tax-exempt charitable status at the federal level. For example, many states exempt tax-exempt charities from the requirement to pay

52. See IRC § 170 (authorizing an income tax deduction for charitable contributions). Even though Congress authorizes a charitable deduction in § 170, not all such deductions are in fact deductible. In order to actually receive the full benefit of the charitable contribution deduction, one must itemize deductions and not be adversely impacted by the § 68 overall limitation on itemized deductions. See IRC §§ 63 (defining itemized deductions); 68 (imposing overall limitation on itemized deductions).

53. Actually, the cost to the contributor of a one dollar contribution to a tax-exempt charity is one dollar minus the amount of the the tax deduction available to that contributor. Thus, if the contributor has a marginal tax rate of 30%, the cost of a one dollar contribution to a tax-exempt charity is \$0.70, computed as follows: \$1.00 contribution - $(\$1.00 \times 0.30) = \$1.00 - \$0.30 = \0.70 .

54. There are a number of other federal tax benefits associated with tax-exempt charitable status. For example, qualifying charities are exempt from the requirement to pay federal unemployment taxes. IRC § 3306(c)(8). Under the present system, charities only have to pay the equivalent of the former employee's unemployment compensation. Bazil Facchina, Evan A. Showell & Jan E. Stone, *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. Rev. 85, 102 (1993). Also, tax-exempt charities have access to tax-exempt government bonds as provided for under § 145(a)(1), which allows state and local governments to issue bonds paying interest, exempt from federal income tax, to organizations described in § 501(c)(3). IRC § 145(a)(1). However, 95 percent of the net proceeds from these bonds must be used by the charity and all property purchased with the bond proceeds has to be owned exclusively by the charity. IRC § 145.

In addition to the many federal tax benefits that are lost as a result of a charity losing its tax-exempt status, one very important non-tax federal benefit vanishes along with the tax-exemption: preferred postal rates. The current postal regulations give religious, educational, scientific, philanthropic, agricultural, labor, veterans', and fraternal organizations second and third class nonprofit rates. Facchina, *supra*, at 112. The only requirement is that the nonprofit mailers must be organized and operated for the primary purpose of the organization. *Id.* at 113.

state and local income taxes.⁵⁵ A number of states also exempt charities from both collecting and paying sales or use taxes on goods and services.⁵⁶ Sales and use tax exemptions for charities are usually limited to transactions related to the charity's exempt purposes.⁵⁷ Finally, many states exempt charities from the requirement to pay real property taxes.⁵⁸

This brief listing of benefits of tax-exempt charitable status provides a rather clear picture of the enormity of the financial impact of a charity losing its tax exemption. Thus, while some charities, like Bob Jones University, may continue to operate after loss of exemption, many other charities would likely have to cease operations altogether without these benefits. Therefore, any mechanism, like the Service's authority to revoke a charity's tax-exempt status

55. For example, under the Georgia Code a 501(c)(3) organization is exempt from state income taxes "in the same manner and to the same extent as for federal purposes." Ga. Code Ann. § 48-7-25 (2001)..

56. See, e.g., Fla. Stat. Ann. § 212.08(7)(p) (2001). Section 212.08(7)(p) provides:

(p) *Section 501(c)(3) organizations.*—Also exempt from the tax imposed by this chapter are sales or leases to organizations determined by the Internal Revenue Service to be currently exempt from federal income tax pursuant to s. 501(c)(3) of the Internal Revenue Code of 1986, as amended, when such leases or purchases are used in carrying on their customary nonprofit activities.

Id.

57. Facchina, et al., supra note 54, at 103-04.

58. See, e.g., Tex. Tax Code § 11.18 (1992). Section 11.18 provides:

(a) An organization that qualifies as a charitable organization as provided by this section is entitled to an exemption from taxation of:

(1) the buildings and tangible personal property that:

(A) are owned by the charitable organization; and

(B) except as permitted by Subsection (b), are used exclusively by qualified charitable organizations; and

(2) the real property owned by the charitable organization consisting of:

(A) an incomplete improvement that:

(i) is under active construction or other physical preparation; and

(ii) is designed and intended to be used exclusively by qualified charitable organizations; and

(B) the land on which the incomplete improvement is located that will be reasonably necessary for the use of the improvement by qualified charitable organizations.

Id.

if it violates “established public policy,” that enables the Service to effectively end a charity’s operations is certainly worth close examination.

C. *Service Statements That the Constitution Dictates When a Public Policy Is Sufficiently “Established”*

I. *Introduction*

The Service has issued various decisions concerning the public policy limitation and its applicability in particular contexts. For example, the Service has held that tax-exempt charities that favor Indians over non-Indians do not violate “established public policy” because of the history of special treatment of Native Americans by the federal government.⁵⁹ However, in many of these situations involving the Service’s determinations about particular public policies, the Service has relied almost exclusively on the Supreme Court’s position regarding certain constitutional issues that relate directly to the public policy at issue.⁶⁰ A recent example of this strong reliance by the Service on the Court’s constitutional jurisprudence to determine “established public policy” involves the Service’s administrative decisions concerning the Bishop Estate.⁶¹

The Service issued at least two technical advice memorandums “TAM’s” to the Bishop Estate on the issue of that trust’s denial of admission of non-Hawaiians to the trust’s grade school. The first TAM, issued in 1975, concluded that Bishop Estate’s policy of restricting admissions to children of Hawaiian ancestry was “consistent with Federal policy” and, therefore, charitable.⁶² The second TAM, issued 24 years later in 1999, similarly concluded that “the Estate’s admission policy is consistent with the requirements for recognition of exemption as an organization described in

59. See Bishop Estate TAM, *supra* note 16.

60. See, e.g., Bishop Estate TAM, *supra* note 16 (Service relying “upon several Supreme Court opinions addressing the constitutional challenges to governmental actions under the Equal Protection clauses”); *Calhoun Academy v. Commissioner*, 94 T.C. 284 (1990) (Service relying on a Supreme Court position that private schools which discriminate on the basis of race violate public policy).

61. For a discussion of various issues, both tax and non-tax, concerning the Bishop Estate, see generally Symposium Issue on the Bishop Estate Controversy, 21 U. Haw. L. Rev. 353 (1999). See also John Tehranian, *A New Segregation? Race, Rice v. Cayetano, and the Constitutionality of Hawaiian-Only Education and the Kamehameha Schools*, 23 U. Haw. L. Rev. 109 (2000); Judge Robert Mahealani M. Seto and Lynn Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 U. Haw. L. Rev. 393 (1999); Evelyn Brody, *A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance?*, 21 U. Haw. L. Rev. 537 (1999).

62. See Bishop Estate TAM, *supra* note 16.

section 501(c)(3) of the Code.”⁶³ However, in this second TAM the Service suggested that the Supreme Court’s decision in a then-pending constitutional law case, *Rice v. Cayetano*, might cause the Service to re-think its position on the acceptability of the Bishop Estate’s admission practice.⁶⁴

2. *The Bishop Estate Schools*

The Bishop Estate is a tax-exempt charitable trust created by the will of Bernice Pauahi Bishop, last direct descendant of Ali`i nui Kamehameha I.⁶⁵ The purpose of the trust is “to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools.”⁶⁶ The single-sex schools referenced in the will were formally created in 1883,⁶⁷ have been continuously maintained since that time and are now combined into one co-educational school enrolling both boys and girls.⁶⁸ The trustees of the Bishop Estate believe that Bernice Bishop created the schools out of her deep concern for “the decline of the Hawaiian people following Western contact.”⁶⁹ The trustees assert that Bernice Bishop “believed that a sound, formal education was the key to

63. See *id.*

64. See *id.*

65. See Will of Bernice Pauahi Bishop, Thirteenth Article, at <http://www.ksbe.edu/endowment/bpbishop/will/will.html> (Jan. 15, 2002).

66. *Id.* The entire residuary clause of the will provided:

I GIVE, DEVISE AND BEQUEATH all the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely:

to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools.

I direct my trustees to expend such amount as they may deem best, not to exceed however one-half of the funds which may come into their hands, in the purchase of suitable premises, the erection of school buildings and in furnishing the same with necessary and appropriate fixtures, furniture and apparatus. *Id.*

67. In 1883, a seal was affixed to Bernice Bishop’s will, which formally established the Bishop Estate to carry out Bernice Bishop’s desire to build a school for boys and a school for girls. The school for boys opened in 1887 and the school for girls opened in 1894. See *id.*

68. See Bishop Estate TAM, *supra* note 16.

69. [Http://www.ksbe.edu/campus/campus.html](http://www.ksbe.edu/campus/campus.html) (Feb. 29, 2000).

survival [of the Hawaiian people].”⁷⁰ Accordingly, the school operated by the Bishop Estate requires that all admitted students have “at least one Hawaiian ancestor.”⁷¹

The Hawaiian lineage requirement is only one of many factors considered by the Bishop Estate when making admissions decisions for the Kamehameha schools. Indeed, the admissions process is quite competitive. Because each school receives more applications per year from potential students than it can accommodate, it has to turn away many persons who are interested in attending.⁷² In order to decide who is admitted and who is not, each school has special admissions screening criteria.⁷³ Even with these special criteria, however, the admitted students have a variety of racial and ethnic backgrounds.⁷⁴ Further, despite the competition for admission into the Kamehameha schools, the schools are able to reserve space for orphans and indigent children.⁷⁵ However, the orphans and indigents, like all other students, must have at least one Hawaiian ancestor. This aspect of the Kamehameha schools (*i.e.*, limiting admission to students with some Hawaiian lineage) prompted the Service to consider whether the Bishop Estate’s admissions policy violated an established public policy against racial discrimination.⁷⁶

70. *Id.*

71. Bishop Estate TAM, *supra* note 16.

72. See *id.* “The Schools process between 5,000 and 6,000 applications per year. Because there are more applicants than available seats at the School, competition for entrance is keen . . .” *Id.*

73. See *id.* “The selection process includes a ‘first screening’ based on development skills and an ‘observation phase.’” *Id.*

74. See *id.* “For the 1997/98 school year 78.3 percent of the students were of Caucasian ancestry, 73.7 percent Chinese ancestry, 30.9 percent Filipino ancestry, 27.7 percent Japanese ancestry, and 23.4 percent were of other ancestries . . . [including] African American . . .” *Id.*

75. See *id.* “Hawaiian children who are orphaned and/or living in indigent circumstances are given special consideration for kindergarten.” *Id.*

76. It is not at all clear whether the Bishop Estate’s Hawaiian lineage requirement is the same type of racial preference that was contemplated by the Supreme Court when it concluded that discrimination against black people violates established public policy. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983). “Whatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy.” *Id.* First, Hawaiian people are not black people and do not share a unique characteristic of black people in that they do not have a history of being taken away from their homeland and forced into slavery in a foreign land. Second, ancestry is not necessarily the same as race. Thus, the Bishop Estate’s requirement that one have Hawaiian ancestry in order to be admitted to the Kamehameha schools, could be something other than a preference based on race such as a political classification. See Robert J. Deichert, Note: *Rice V. Cayetano: the Fifteenth Amendment at a Crossroads*, 32 *Conn. L. Rev.* 1075, 1098

3. *The Service's Public Policy Findings with Respect to the Bishop Estate Schools*

The Service issued the Bishop Estate TAM in 1999, shortly after the Supreme Court decided a series of cases concerning the constitutional permissibility of race-based affirmative action.⁷⁷ In the Bishop Estate TAM, the Service advised the Bishop Estate that its policy of only admitting children with Hawaiian ancestry to the trust's schools is consistent with established public policy.⁷⁸ Accordingly, the Service concluded that in denying admission to non-Hawaiians, the Bishop Estate, a private tax-exempt charity, does not violate tax law's public policy limitation. The Service continued, however, that the Bishop Estate "should consider requesting a private letter ruling on whether the [then-pending Supreme Court's] decision [in *Rice v. Cayetano*] has any effect on the [Service's] analysis."⁷⁹ *Rice v. Cayetano* concerns the constitutionality of Hawaii's practice of denying non-native Hawaiians the fundamental right to vote for trustees of the Office of Hawaiian Affairs.⁸⁰ One year later, the United States Supreme Court held in *Rice v. Cayetano* that Hawaii's denial of voting rights to non-Hawaiians is unconstitutional.⁸¹

(2000). "This relationship, and the special treatment afforded Native Hawaiians, is similar to that between the United States government and Native Americans and therefore should be looked upon as a political rather than racial classification, or at least be given a greater level of deference." *Id.* Finally, even if the preference for persons with Hawaiian lineage is a racial classification for some purposes, it may not necessarily be a racial classification for all purposes. For example, the Hawaiian lineage requirement might be a racial classification for Fifteenth Amendment purposes, but might not be a racial classification for Fourteenth Amendment purposes. Also, the Hawaiian lineage requirement might be a racial classification for constitutional law purposes, but not for purposes of the public policy doctrine. Thus, the Service's conclusion in the Bishop Estate TAM that the Bishop Estate's preference for persons having Hawaiian lineage is a racial preference, is not necessarily a valid one. Nonetheless, this Article assumes that such a conclusion is valid, but only for purposes of demonstrating the inappropriateness of the Service's reliance on constitutional law doctrine to determine when an "established public policy" is violated.

77. See discussion *infra* notes 123-66 and accompanying text.

78. See Bishop Estate TAM, *supra* note 16.

79. *Id.*

80. See *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), cert. granted, 526 U.S. 1016 (1999).

81. See *Rice v. Cayetano*, 528 U.S. 495 (2000). It remains to be seen whether the Bishop Estate will, pursuant to the Service's advice, request a private letter ruling in light of the Supreme Court's decision in *Rice*. See *id.* See also Milton Cerny, Federal Public Policy: The IRS Historic Challenge to Racially Discriminatory Private Schools, American Bar Association Section of Taxation, 2000 Midyear Meeting Materials, January 21, 2000, available in LEXIS, ABA Library, ABA Tax File (stating that "[i]n

The Bishop Estate TAM clearly demonstrates the Service's abject reliance on constitutional law standards as its means of determining whether the Bishop Estate's preference for Native Hawaiians violates an established public policy against racial discrimination. The rationale section of the Bishop Estate TAM begins by reciting a brief history of how the public policy limitation came into being – that is, how the Service arrived at the conclusion that tax-exempt charities could not violate established public policy. This historical discussion highlights various situations in which private tax-exempt educational institutions discriminated against black people. Indeed, each of the Service's "specific and prominent [case law] examples" of the public policy against discrimination involves invidious racial discrimination against black people⁸². Granted, there is nothing in the Bob Jones University opinion that necessarily limits the public policy limitation to situations involving discrimination against black people. In fact, the Supreme Court so much as indicated an expansive view of the universe of possible public policy arenas when it announced a broad rule prohibiting violation of any clear established public policy⁸³. The point here, though, is that these "specific and prominent [case law] examples" highlighted by the Service do not, by themselves, make the case that a preference for Native Hawaiians violates any public policy with respect to racial discrimination. Thus, the Service had to extend the Bob Jones University public policy rationale so that it could apply, not only to invidious discrimination against non-blacks, but also to benign preferences in favor of non-blacks.

By far, the most telling indication that the Service relied almost exclusively on constitutional law as its basis for deciding if the public policy rationale could be extended to apply to the Bishop Estate situation is its explicit statement concerning the cases upon which it relies. These cases include "several Supreme Court opinions addressing the *constitutional challenges to governmental actions* under the Equal Protection clauses of the Fourteenth

light of this [TAM] and the United States Supreme Court review of *Rice v. Cayetano*, it would be well to revisit the application of the public policy doctrine as it applies to the exemption of organizations described in section 501(c)(3))" (citations omitted).

82. See Bishop Estate TAM, supra note 16 (citing *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub nom., *Coit v. Green*, 404 U.S. 997 (1971); *Norwood v. Harrison*, 382 F. Supp. 921 (N.D. Ms. 1974), on remand from the Supreme Court, 413 U.S. 455 (1973); *Brumfield v. Dodd*, 425 F. Supp. 528 (E.D. La. 1976); *Prince Edward School Foundation v. United States*, 478 F. Supp. 107 (D.D.C. 1979), aff'd (D.C. Cir. 6/30/80), cert. denied, 450 U.S. 944 (1981); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Calhoun Academy v. Commissioner*, 94 T.C. 284 (1990).

83. See *Bob Jones Univ.*, 461 U.S. at 592. "[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." Id.

Amendment and the Fifth Amendment.”⁸⁴ Based on this statement, one can easily – and quite reasonably – conclude that the Service accepts as a given that the constitutional law standards for equality and, arguably, due process, define that which is consistent (or inconsistent) with public policy. Indeed, the Service explains in the Bishop Estate TAM that remedial affirmative action for racial and ethnic minorities may at times further compelling government interests and, thus, be constitutionally permissible⁸⁵. Because such remedial efforts are constitutionally permitted to be done by government, then such efforts are, according to the Service, also consistent with established public policy. As a result of this implicit (if not explicit) assumption about the equivalency of constitutional standards with public policy standards, the Service evaluated the Bishop Estate's remedial activity with respect to Native Hawaiians in light of constitutional law principles concerning remedial activity by government concerning racial minorities.

Consistent with this constitutional equivalency approach, the Service looked to how the Supreme Court would likely determine the constitutional permissibility of Hawaiian preference rules imposed by government, as opposed to those imposed by non-governmental entities such as charities. Relying on the Court of Appeal's decision in *Rice v. Cayetano* that Hawaiian preferences by government are political (rather than racial) classifications subject to mere rational constitutional scrutiny for Equal Protection Clause purposes, the Service concluded that the Bishop Estate's preference for Native Hawaiians is likewise not the type of preference that requires close scrutiny. As such, according to the Service, because the Native Hawaiian preference would not be unconstitutional if performed by government, it is not contrary to established public policy.

Recognizing that the *Rice v. Cayetano* case was to be appealed to the Supreme Court, the Service advised the Bishop Estate that its conclusion that Hawaiian preference policies do not violate public policy might change after the Supreme Court's decision in the case. This hesitancy to rely on an intermediate court decision as support for its “political classification” conclusion was a good idea given the procedural posture of the *Rice v. Cayetano* case. However, this hesitancy also supports this Article's claim that the Service relies quite heavily on the direction of constitutional jurisprudence when making its decisions about the parameters of “established” public policy. Presumably, the reason for the hesitancy was the Service's assumption that if

84. Bishop estate TAM, *supra* note 16 (emphasis supplied).

85. In regard to *Regents of the University of California v. Bakke* and *Adarand Constructors, Inc. v. Peña*, the Service states that “The Court in both cases, however, recognized that there would be situations in which benefits to ethnic minorities would be appropriate to further compelling governmental interests.” See Bishop Estate TAM, *supra* note 16.

the Supreme Court reversed the Court of Appeal and concluded that Hawaiian preferences are unconstitutional (which it did), then the Service would likewise have to “reverse” its position and conclude that such preferences are inconsistent with established public policy. Though the Service has yet to revisit this matter since the Supreme Court’s ruling in *Rice v. Cayetano*, the Bishop Estate TAM has given every indication that it is indeed well aware of this eventuality.⁸⁶

Implicit in the Service’s analysis in the Bishop Estate TAM is that, to the extent the Constitution permits government to engage in a particular activity, the activity is consistent with established public policy. As a corollary, the Service’s analysis also means that if an act would violate the Constitution if performed by government, then that act is necessarily inconsistent with established public policy. Thus, the Service has essentially equated public policy standards with constitutional standards. Indeed, the Service has given no indication of when, if ever, it would deviate from constitutional law standards when making public policy decisions. This Article’s view is that such strong reliance on constitutional law standards to determine public policy in any particular context is, quite simply, too extreme. This is not to say that the Service should ignore constitutional law principles when it makes its public policy determinations. For if the Service were to turn a blind eye to constitutional principles that would be too extreme in the other direction. Instead, the Service should use constitutional law standards only as a starting point for determining whether or not a tax-exempt charity’s particular activity is consistent or inconsistent with established public policy.

Parts III and IV of this Article explain in greater detail how inappropriate it is for the Service to rely so much on constitutional law standards when determining public policy.

86. Newspapers recently reported that the Bishop Estate schools “recently admitted a student not of Hawaiian ancestry,” allegedly as a means of avoided additional government scrutiny. See generally “School Set Aside for Hawaiians Ends Exclusion to Cries of Protest,” *New York Times* (July 27, 2002); “Decision viewed as peasement to IRS,” *HonoluluAdvertiser.com* (July 16, 2002); “Hawaiians’ concerns go beyond school issues,” *HonoluluAdvertiser.com* (July 21, 2002).

III. INTERPRETATIONAL CONCERNS WITH USING CONSTITUTIONAL LAW PRINCIPLES TO DEFINE THE SCOPE OF THE PUBLIC POLICY LIMITATION

A. Introduction

The scope of the public policy limitation, as announced by the Court in *Bob Jones University v. United States*, is unclear.⁸⁷ This lack of clarity stems in large part from the Court's failure clearly to delineate how the Service might use various sources of public policy to determine "established public policy" on particular matters.⁸⁸ In other words, the Court did not address the limits of the Service's authority to determine when or if a public policy is sufficiently "established" in any context other than an historically advantaged group discriminating against members of an historically disadvantaged group. For example, the Court did not discuss whether affirmative action programs aimed at attracting racial minorities, which might require denying benefits to non-minorities, are consistent or inconsistent with "established public policy."⁸⁹ Is it not conceivable that a Service official might view these programs as contrary to "established public policy" because they involve racial preferences, albeit *for* minorities instead of against them?

To its credit, the Service has not interpreted the *Bob Jones University* case as prohibiting *all* racial preferences by charities. Accordingly, the Service permits charities to have some race-based policies, like affirmative action, even though such policies may involve racial preferences.⁹⁰ However, this

87. See *Bob Jones Univ.*, 461 U.S. at 574.

88. See Brennen, *The Power of The Treasury*, supra note 15, at 403 (describing analysis used by United States Supreme Court to conclude that Treasury has authority to determine the public purpose of a charity).

89. See *Bob Jones Univ.*, 461 U.S. at 591. The Treasury has indicated that other matters besides discrimination against blacks are areas contemplated by the public policy power. See 1994 Service Exempt Organization CPE Technical Instruction Program Textbook, Chapter L: Illegality and Public Policy Considerations: Section 4.b., 94 TNT 71-47 [hereinafter IRS Exempt Organization Textbook]. "Just as the Service responded to public outrage over racial discrimination in education in *Bob Jones* and to possible kickbacks in *GCM 39862*, the Service can be expected to re-evaluate positions in other areas as the public policy considerations become more clearly focused because of Congressional action, decisions of the Executive Branch, or court actions." *Id.*

90. Although the Service indicates a willingness, under the current the constitutional law climate, to permit affirmative action by charities, it does not view absence of affirmative action policies as proof of discrimination by a charitable entity. See, e.g., *Calhoun Academy v. Commissioner*, 94 TC 284 (1990):

willingness only seems to exist when the affirmative action at issue would be Constitutional if done by the government, as is the case when the affirmative action policy is not inconsistent with the Equal Protection Clause of the Fourteenth Amendment.⁹¹ But courts and commentators predict that the Supreme Court may soon decide that race-based affirmative action is never consistent with the Equal Protection Clause, and therefore, never Constitutional.⁹² If this prediction comes true, and if the Service continues to rely on constitutional law principles to determine public policy, the Service would likely no longer consider affirmative action by private charities to be consistent with “established public policy.” This strong reliance by the Service on constitutional law principles in its public policy decision-making only exists because of the lack of specific guidance on how to determine public policy in particular contexts. Thus, the Court’s failure in *Bob Jones University* to clarify

Granted, the facts before the Supreme Court [in *Bob Jones University*] did not raise an affirmative action issue because both subject schools discriminated within the Rev. Rul. 71-447 definition. The Supreme Court emphasized, however, that an institution should be deemed not charitable under its analysis only when there can be “no doubt” that the activity involved is contrary to a fundamental public policy. Declining to take affirmative steps to seek out black students and teachers does not fall within this standard.

Id. at 304 (citations omitted).

91. See discussion supra Part II.

92. See, e.g., *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1245 (11th Cir. 2001) (“[A] majority of the Supreme Court may eventually adopt Justice Powell’s opinion as binding precedent, and even now the opinion has persuasive value”); Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admission*, 32 *Akron L. Rev.* 181, 228 (1999) (noting that, even though the Supreme Court has not explicitly acted to outlaw the use of race to achieve diversity, universities should begin to implement race neutral programs because of the many appellate decisions that invalidated programs that use race to achieve diversity). See also Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 *B.C. L. Rev.* 429 (1998). Professor Westley notes:

Affirmative action for Black Americans as a form of remediation for perpetuation of past injustice is almost dead. Due to a string of Supreme Court decisions beginning with *Bakke* and leading up to *Adarand*, the future possibility of using affirmative action to redress the perpetuation of past wrongs against Blacks is now in serious doubt. Whereas some believe that the arguments supporting affirmative action as a remedy or even a tool of social policy are still sound, affirmative action programs continue to encounter strong political headwinds and judicial disapprobation.

Id. at 429 (footnotes omitted).

the scope of the public policy limitation requires the Service to both determine *and* enforce law in this area without appropriate statutory or judicial guidance.⁹³

This Part focuses more specifically on the role constitutional law principles might play in the Service's task of delineating the scope of the public policy limitation. As primary examples, this Part considers legal doctrine regarding constitutionally permissible preferences based on race and sexual orientation by examining two constitutional law principles: equality and freedom of expressive association. Close examination of these constitutional law principles reveals various interpretational concerns the Service faces if it chooses to continue to rely significantly on constitutional jurisprudence as its guide-star for defining public policy.

B. *Equality: a Sword Against Charitable Status*

1. *Introduction*

The linchpin of equality under the Constitution is the standard of review (or level of scrutiny) with which a court will evaluate whether an admitted case of unequal treatment by government is fair or unfair.⁹⁴ This section focuses on the appropriate standard of review for racial preferences by government under two constitutional equality provisions: the Fourteenth Amendment's Equal Protection Clause and section one of the Fifteenth Amendment. The purpose of this two-fold examination is to evaluate the appropriateness of the Service's use of Equal Protection Clause strict scrutiny standards, as it seems to do in the Bishop Estate TAM, to determine if a charity's racial preference violates "established public policy."

This Article's use of Fourteenth Amendment Equal Protection analysis in order to demonstrate principles of equality under the Constitution is made in light of a similar analysis applicable for purposes of the equal protection component of the Due Process Clause of the Fifth Amendment. Technically, the Fourteenth Amendment's Equal Protection Clause only applies to states and the equal protection component of the Due Process Clause of the Fifth Amendment

93. Without such guidance, the Court's failure also means that tax advisors to charities cannot state with any degree of certainty whether a policy on any subject, other than white people discriminating against black people, is violated or not. See Hill & Kirschten, *supra* note 21, at ¶2.03[6][c]. "In the absence of specific guidance. . . it is neither possible nor prudent to state with certainty what 'clear public policies' other than racial discrimination might lead to nonrecognition or revocation of exempt status." *Id.*

94. See Gerald Gunther, *Forward: In Search of Evolving Doctrine On a Changing Court: A Model For A Newer Equal Protection*, 86 Harv. L. Rev. 1 (1971) (explaining how the standard of review often determines whether a particular classification is constitutional or not).

only applies to the federal government.⁹⁵ Nevertheless, despite the fact that the Fifth Amendment was adopted almost one hundred years before the Fourteenth Amendment and the Fifth Amendment has no Equal Protection Clause,⁹⁶ the Supreme Court recognizes that “equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”⁹⁷

Thus, except as otherwise indicated, analysis throughout this Article of the Equal Protection Clause of the Fourteenth Amendment applies equally as well to the equal protection component of the Due Process Clause of the Fifth Amendment.

2. *Equality principles concerning discrimination and minority preferences*

Equality, for constitutional law purposes, is significantly defined by the Equal Protection Clause of the Fourteenth Amendment and section one of the Fifteenth Amendment. These constitutional amendments were adopted around the same time in American history to alleviate state-sanctioned discrimination against former slaves and other people of color.⁹⁸ The Fourteenth Amendment prohibits discrimination generally, no matter the basis or the subject.⁹⁹

95. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

96. In *Bolling*, 347 U.S. at 497, the Supreme Court held that the equal protection standards announced in *Brown v. Bd. of Education*, would apply to the District of Columbia public schools:

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an Equal Protection Clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. at 499.

97. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

98. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). “Enacted in the wake of the Civil War, the immediate concern of the [Fifteenth] Amendment was to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom.” Id.

99. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the

However, the Fifteenth Amendment only prohibits discrimination based on race or color in voting.¹⁰⁰ Thus, while both Amendments are intended to guarantee a certain level of equal treatment by government, the Fifteenth Amendment has a quite different (and much narrower) scope of applicability than the Fourteenth Amendment.¹⁰¹ As a result of this difference, certain discriminatory acts that violate the Equal Protection Clause do not necessarily violate the Fifteenth Amendment. Further, and more importantly for purposes of this Article, certain discriminatory acts that violate the Fifteenth Amendment do not necessarily violate the Equal Protection Clause. Thus, the Service's reliance on *Rice v. Cayetano*, a case potentially implicating both the Equal Protection Clause and the Fifteenth Amendment,¹⁰² is at best confusing and at worst inappropriate.¹⁰³

The Fourteenth and Fifteenth Amendments are directed at preventing unequal treatment by government that is constitutionally "unfair." Fairness for these purposes is principally determined by two factors: (1) the subject about which the government discriminates and (2) the basis upon which the government discriminates. The Fourteenth Amendment concerns unequal treatment by government on any basis (e.g., race, gender, sexual orientation, etc.) no matter what the subject (e.g., voting, college admissions, awarding of government contracts, etc.).¹⁰⁴ The Fifteenth Amendment, on the other hand, concerns unequal treatment by government that is based on race and concerns the subject of voting.¹⁰⁵ Historically, these constitutional equality provisions have been used as legal tools to thwart discrimination by government against traditionally disadvantaged groups like black people and other persons of

laws." U.S. Const. amend. XIV. See also, *The Slaughterhouse Cases*, 83 U.S. 36 (first case to analyze the Fourteenth Amendment).

100. Section 1 of the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

101. See *Rice*, 528 U.S. at 495. "The Fifteenth Amendment has independent meaning and force." *Id.*

102. See discussion *infra* notes 178-95 and accompanying text.

103. See discussion *infra* notes 123-66 and notes 178-200, and accompanying text.

104. See discussion *infra* notes 123-66 and accompanying text. While, in form, the Equal Protection Clause applies to any type of unequal treatment, the standard of review often dictates whether such application will have a substantive effect. Thus, even though the Equal Protection Clause applies to discrimination based on sexual orientation, because sexual orientation is not a suspect class, it does not receive strict scrutiny. The result is that statutes that discriminate based on sexual orientation are rarely stricken as an unconstitutional violation of the Equal Protection Clause.

105. See discussion *infra* notes 178-200 and accompanying text.

color.¹⁰⁶ However, the Supreme Court has repeatedly stated that the protections available under the Fourteenth and Fifteenth Amendments are not available only to traditionally disadvantaged groups. Instead, these equality protections are available to all people without regard to their societal status as disadvantaged or not.¹⁰⁷

3. *Use of equality principles as a sword to invalidate affirmative action remedial efforts*

Simply asserting that members of both disadvantaged and advantaged groups are entitled to equal treatment by government does not necessarily mean that equality for members of each group is judged by the same standard. For instance, one might claim that a particular type of unequal treatment by government that advantages members of an historically disadvantaged group is beneficial to society overall. In fact, it might be so beneficial, the claim might go, that the government's unequal treatment need not be judged as critically as it would be if the unequal treatment disadvantaged (instead of advantaged) members of that historically disadvantaged group. On the other hand, one might also claim that all unequal treatment that disadvantages any person, whether that person is a member of an historically disadvantaged group or not, should be judged by the same standard. In essence, one's membership in a particular group, the claim might go, should not dictate the level of scrutiny applied to the government's unequal treatment of that person. Constitutional jurisprudence with respect to racial equality has clearly addressed this matter in a series of Fourteenth and Fifteenth Amendment cases.¹⁰⁸

The standard of review under the Fourteenth and Fifteenth Amendments for determining whether government distinctions based on race are "fair" is generally rather high. Under current law, the high standard applies whether or not the claimant is a member of a disadvantaged race.¹⁰⁹ Thus,

106. See *Rice*, 528 U.S. at 512. "Enacted in the wake of the Civil War, the immediate concern of the [Fifteenth] Amendment was to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom." *Id.*

107. See *id.* at 512. "The [Fifteenth] Amendment grants protection to all persons, not just members of a particular race." *Id.*

108. See discussion *infra* notes 123-66 and notes 178-200 and accompanying text.

109. See *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citation omitted) ("[T]he basic principle is straightforward: 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'"); *City of Richmond v. J.A. Croson Constr. Co.*, 488 U.S. 469 (1989) (the Court used strict scrutiny analysis to invalidate a race preference program that benefitted under-represented minority contractors, the program was challenged by a non-minority

claims of discrimination by members of a traditionally advantaged race are ordinarily judged by the same high standard as claims by members of a traditionally disadvantaged race. Indeed, white people have successfully claimed that they are unconstitutionally discriminated against when they are denied a government benefit, like admission to a state school, because of government affirmative action efforts to attract racial minorities.¹¹⁰ Similar claims of discrimination with respect to voting have been raised under the Fifteenth Amendment.¹¹¹ As a result of these atypical claims of racial discrimination, the constitutional “fairness” of affirmative action by government has been challenged, often resulting in the constitutional invalidity of the government’s affirmative action efforts.¹¹² For example, the UC Davis medical school’s affirmative action plan, which considered the race of applicants in its aim to increase diversity in the student body, was invalidated because it impermissibly discriminated against white applicants.¹¹³ It is in this way that constitutional equality principles are used by some as a sword to invalidate government affirmative action efforts aimed principally at repairing harm caused by past government discrimination.

4. *Problems with using constitutional equality principles as a sword against tax-exempt charities that engage in affirmative action*

The Service has indicated its inclination to rely on constitutional law principles when fulfilling its legal obligation to determine in the “first

contractor); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (white teacher challenged the school board’s policy of extending preferential protection against layoffs to some employees because of their race; the Court, using strict scrutiny analysis, held that the policy violated the Fourteenth Amendment.)

110. See, e.g., *Smith v. Univ. of Wash.*, 233 F.3d 1188 (9th Cir. 2000) (involving claims by white law school applicants that they were discriminated against when they were denied admission to law school, but some black applicants were not.)

111. See *Rice*, 528 U.S. at 513.

112. For example, the federal Circuits are currently split on the issue of whether preferences for racial minorities that stem from affirmative action efforts are constitutionally “fair” under the Fourteenth Amendment. See, e.g., *Smith*, 233 F.3d at 1188 (concluding that, in the Ninth Circuit, *Bakke* permits government to consider race as one of many factors when making decisions about public law school admissions). But see *Hopwood v. Tex.*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996) (concluding that, in the Fifth Circuit, government can never use race as a factor when making decisions about public law school admissions).

113. See discussion *infra* notes 123-27 and accompanying text.

instance”¹¹⁴ whether a particular public policy is sufficiently “established” for purposes of the public policy limitation.¹¹⁵ This subpart outlines several aspects of the constitutional principle of equality as espoused through the Fourteenth Amendment’s Equal Protection Clause and section one of the Fifteenth Amendment. As a method of demonstrating how the Service might rely on constitutional equality principles when making its public policy decisions, it is useful to re-visit the matter of the appropriateness of the Bishop Estate trust’s native Hawaiian preference policies. For example, what if the Service were to re-examine, in light of the Supreme Court’s interpretation of constitutional equality in *Rice v. Cayetano*, the trust’s policy of admitting only Hawaiian children to the trust’s school. Such re-examination would necessarily require the Service to answer two related, yet very different, questions. First, if denying non-native Hawaiians admission to the trust’s school would violate the Equal Protection Clause if the school were a state actor, does this necessarily mean that the school’s racial preference is contrary to “established public policy?” Second, does the Supreme Court’s conclusion in *Rice* that denying non-Hawaiians the right to vote for trustees of the OHA violates Fifteenth Amendment equality principles necessarily mean that denying non-Hawaiians admission to the trust’s school violates “established public policy?” The following analysis demonstrates how problematic it would be for the Service to rely significantly on either of these constitutional equality provisions to make its public policy determinations about tax-exempt charities.

a. *Differences between Fourteenth Amendment equality and Fifteenth Amendment equality*

The parameters of what constitutes a violation of “established public policy” are much different if viewed through the lens of the Fourteenth Amendment’s Equal Protection Clause rather than section one of the Fifteenth Amendment. Under current Equal Protection Clause standards, racial distinctions by government are subject to strict scrutiny review.¹¹⁶ This means that unequal treatment based on race violates the Equal Protection Clause unless the unequal treatment is necessary to accomplish a compelling

114. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 597-98 (1983). “[T]he IRS has the responsibility, in the first instance, to determine whether a particular entity is charitable for purposes of . . . § 501(c)(3). . . We emphasize, however, that these sensitive determinations should be made only where there is no doubt that the organization’s activities violate fundamental public policy.” *Id.*

115. See discussion *supra* notes 59-81 and accompanying text.

116. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all racial classifications will be subject to strict scrutiny).

governmental interest.¹¹⁷ The Service, using this Equal Protection Clause standard for equality, would likely focus on whether the trust's denial of admission to non-Hawaiians passes Equal Protection Clause strict scrutiny.¹¹⁸ Service analysis would thus center on the issues of whether the trust has a "compelling" interest to exclude non-Hawaiians and, if so, whether exclusion of non-Hawaiians from the school is "necessary" to accomplishing that compelling interest.

If the Service were to rely on Fifteenth Amendment standards, the parameters of what constitutes a violation of "established public policy" would involve no discussion of compelling interests or the necessity of a racial distinction to accomplishing those interests. Instead, because racial distinctions in voting are absolutely prohibited under the Fifteenth Amendment,¹¹⁹ the necessary result under a Fifteenth Amendment analysis is that exclusion of non-Hawaiians, for whatever reason, violates "established public policy."¹²⁰ Thus, the first major problem with the Service relying on constitutional standards of equality to decide if a particular charity is violating "established public policy" is that no guidance exists as to which constitutional equality standards apply – those of the Equal Protection Clause or those of the Fifteenth Amendment. That is, is it enough that the Service determines that a charity makes racial distinctions; or should the Service also determine that the racial distinction is not "necessary" to accomplish a "compelling" governmental interest?

The absence of either legislative or judicial guidance on this issue of which equality standard applies might have devastating consequences. For example, assume that the Service took a Fifteenth Amendment type approach to racial discrimination. Pursuant to such an approach, the Service might conclude that a particular instance of racial preference that might be appropriate for Equal Protection Clause purposes is inappropriate for Fifteenth Amendment purposes and, thus, violates "established public policy." The particular instance of racial preference might be appropriate under the Equal Protection Clause because the purpose of the racial preference is to remedy

117. See *id.* at 235. "[R]acial classifications . . . must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980)).

118. This assumption that strict scrutiny analysis would apply assumes that preferences based on Hawaiian lineage are a type of racial classification for Equal Protection Clause purposes.

119. See *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). "Fundamental in purpose and effect and self-executing in operation, the [Fifteenth] Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Id.*

120. See generally Deichert, *supra* note 76, at 1078, arguing that the Fifteenth Amendment is broad in its reach and "mandates that racial discrimination in voting is not permissible under any circumstances."

“specific acts of prior discrimination” (a compelling interest) and the preference might be the “only practical” way of instituting a remedy for the prior discriminatory acts. If the Service had, instead, taken an Equal Protection Clause-type view of equality, its conclusion would be that the particular racial preference is appropriate and, thus, does not violate “established public policy.” In the end, the Service’s determination about which type of constitutional equality standard to apply would have a definite impact on its conclusions about whether affirmative action like racial preferences are consistent or inconsistent with “established public policy.”¹²¹ Aside from the concern over the essential differences between Equal Protection Clause equality and Fifteenth Amendment equality, additional concerns exist with respect to using either equality standard. The next section discusses these concerns.

b. Fourteenth Amendment equality

Should the Service necessarily equate a violation of the Equal Protection Clause by a charity, if that charity were a government actor, with a violation of tax law’s public policy limitation? The following analysis suggests not. Although the type of invidious discrimination at issue in *Bob Jones University* is necessarily unconstitutional, benign affirmative action policies may not be unconstitutional because courts sometimes recognize that affirmative action is necessary to achieve compelling interests.¹²²

Several aspects of Fourteenth Amendment jurisprudence relating to affirmative action make it problematic for the Service to rely on Fourteenth Amendment Equal Protection Clause principles to determine “established public policy.” First, because it has changed several times in the past 20 years, the Supreme Court’s standard of review for determining whether race-based affirmative action violates the Equal Protection Clause is anything but “clear[ly] established.” Second, because the Court in *Bakke* failed to reach a majority consensus on the proper role race should play in government affirmative action, circuit courts are split on the issue of whether race can ever be considered by government. Finally, the Service, by its very nature, is not a government agency with sufficient expertise to make proper determinations about racial discrimination. These three aspects of Fourteenth Amendment

121. Although the Service appears to look to Equal Protection Clause jurisprudence to determine “establish public policies” on race, the Service’s reference in the Bishop Estate TAM to a case potentially implicating both the Fourteenth Amendment and the Fifteenth Amendment indicates that the Service might also look to Fifteenth Amendment standards.

122. See, e.g., see *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (holding that student diversity may be a compelling rationale for use of race as a factor in admission decisions).

jurisprudence demonstrate the inappropriateness of Service's primary reliance on Equal Protection Clause principles to determine if race based affirmative action by charities violates "established public policy."

1) Fluctuating standard of review

Though currently stabilized at strict scrutiny, the standard of review under the Fourteenth Amendment for government-sponsored race-based affirmative action has been in flux in recent years. Between 1978 (in *Bakke*) and 1995 (in *Adarand*), the Supreme Court has outlined various frameworks within which it will evaluate whether government affirmative action plans comply with the Equal Protection Clause. In each framework the consensus of the Court has fluctuated between various standards of review for benign racial preferences. These standards have included intermediate level scrutiny and differing types of strict scrutiny. Though the current stance is that strict scrutiny applies to even benign racial preferences, it is far from "clear[ly] established" that this standard either applies in the same manner for all circumstances or will continue to apply in the future.

In the first of the modern era cases to address the issue of what standard of review applies, the Supreme Court, in *Regents of the University of California v. Bakke*,¹²³ held that government affirmative action programs are subject to strict scrutiny review.¹²⁴ In a plurality opinion, Justice Powell emphasized that

123. 438 U.S. 265 (1978).

124. *Bakke* involved the Court's review of a state medical school's special admissions program that considered the applicant's economic background and race. See *id.* at 272-75. Under the regular admissions program applicants with undergraduate grade point averages below 2.5 on a scale of 4.0 were automatically rejected. Several of the non-rejected applicants were evaluated for admissions purposes based on various criteria, none of which included race of the applicant. The criteria included interview performance, overall grade point average, science grades, medical school admissions test scores, letters of recommendation, extracurricular activities, and other biographical data. Under the special admissions program, applicants did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the regular admissions process. Among the factors used to determine an applicant's eligibility for the special admissions program was the applicant's disadvantaged economic status and the applicant's membership in one of several racial minority groups. See *id.* Under this special admission program, the school did not admit any white and economically disadvantaged applicants. See *id.* at 276. A rejected white male applicant sued the school alleging that the special admissions program operated to exclude him on the basis of his race in violation of federal and state constitutional provisions and federal civil rights laws. See *id.* at 276-78. *Bakke*, the plaintiff, alleged that the "special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, Art. I, §

the appropriate standard of review under the Equal Protection Clause for governmental preferences for racial minorities is the same as it is for invidious discrimination against such minorities: strict scrutiny. Though both parties in *Bakke* agreed that all racial preferences by government are subject to the equality restrictions of the Equal Protection Clause, the parties disagreed on the level of scrutiny to be applied by a reviewing court. The medical school argued that intermediate scrutiny was appropriate because strict scrutiny should be applied only to classifications that disadvantage “discrete and insular minorities.” The rejected white applicant argued that strict scrutiny is appropriate because rights protected under the Equal Protection Clause are personal rights and, thus, are not contingent upon the race of the person claiming protection. Justice Powell agreed with the white applicant, concluding that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”¹²⁵ Powell rejected the “discrete and insular minorities” rationale because the Court had never before required that rationale as a “prerequisite to subjecting racial . . . distinctions to strict scrutiny.”¹²⁶ Powell further noted that “[t]his perception of racial . . . distinctions is rooted in our Nation’s constitutional and demographic history.”¹²⁷

Two years after *Bakke*, in 1980, the Court in *Fullilove v. Klutznick*¹²⁸ applied a different type of strict scrutiny when it upheld a federal minority set-aside statute, reasoning that a court must give “appropriate deference to Congress” when assessing the constitutionality of a federal statute.¹²⁹ Although

21, of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d.” *Id.* at 277-78. The California Supreme Court held that the special admissions program violated the Equal Protection Clause and ordered the medical school to admit the white applicant. See *Regents of the Univ. of Cal. v. Bakke*, 553 P.2d 1152, 1166 (1976) (holding that Equal Protection Clause required that “no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race”). The Supreme Court, agreeing with California’s highest court, held that the medical school’s special admissions program impermissibly discriminated against the white applicant in violation the Equal Protection Clause. See *Bakke*, 438 U.S. at 320. Nevertheless, the Court concluded that race could be taken into account in future admissions. See *id.* (concluding that so much of the California court’s judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.)

125. *Id.* at 289-90.

126. See *id.* at 290.

127. *Id.* at 291.

128. 448 U.S. 448 (1980).

129. *Id.* at 472. At issue in *Fullilove* was the constitutionality of a Minority Business Enterprise (MBE) provision of federal law which generally required that at least 10% of federal funds granted for public works projects be used to obtain services

the Court in *Fullilove* recognized that racial preferences by government “must necessarily receive a most searching examination,” it refused to adopt the *Bakke* approach to strict scrutiny when analyzing benign racial preferences articulated by Congress.¹³⁰ Instead, the Court in *Fullilove* applied traditional strict scrutiny analysis, but gave “appropriate deference to the Congress”¹³¹ in its exercise of legislative authority to craft a statute that was narrowly tailored to remedy present effects of past discrimination.¹³² The Court in *Fullilove* emphasized that this “appropriate deference” strict scrutiny standard applies only to Congress in its creation of statutes. The special deference standard does not apply to either judicial decrees or to judicial reviews of application of remedial statutes.¹³³

In 1989, nine years after *Fullilove*, the Court, in *Richmond v. J. A. Croson Co.*,¹³⁴ concluded that, under the Equal Protection Clause, state and

or supplies from minority-owned businesses. Several private construction contractors and others claimed that the MBE provision, both on its face and as applied, violated the Equal Protection Clause. The District Court and the Court of Appeals upheld the validity MBE program, and the Supreme Court affirmed.

130. See *id.* at 492. (This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *Bakke*.)

131. *Id.* at 472. “A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to ‘provide for the . . . general Welfare of the United States’ and ‘to enforce, by appropriate legislation,’ the equal protection guarantees of the Fourteenth Amendment.” *Id.* (citations omitted).

132. See *id.* at 480. The Court in *Fullilove* found that Congress had done extensive research into how past discrimination had hurt the development of minority business and how companies involved in public works projects continued to act in discriminatory fashions. *Id.* at 465.

133. See *id.* at 473. “Here, we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President.” *Id.*

134. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The City of Richmond passed a Minority Business Utilization Plan (The Plan). The Plan called for prime contractors working on City funded building project to subcontract at least 30% with one or more Minority Business Enterprises (MBE). The City Council stated that the ordinance was passed a responds to the barriers MBE faced due to past and present racial discrimination. The Plan allowed contractor to use subcontractor within the local communities and outside of the local communities as long those subcontractor was with the definition of MBE. An MBE was defined as an enterprise which is controlled and owned by a member of a minority group. A member of a minority group was defined as a “citizens of the United States who are Black, Spanish-speaking , Orientals, Indians, Eskimos or Aleuts.” A contractor could receive a waiver where it was shown that the contractor was unable to find suitable MBE for the job. The program was challenged by J.A Croson Company (Croson), a mechanical plumbing and Heating contractor. Croson

local government race-based set-aside programs were subject to strict scrutiny, notwithstanding the program's remedial or benign purpose. In *Croson*, the Court reviewed a remedial racial program enacted by the City of Richmond that was similar to the program reviewed by the Court in *Fullilove*.¹³⁵ The Court held that the City of Richmond's affirmative action program for minorities violated the Equal Protection Clause of the Fourteenth Amendment.

Writing the opinion for the plurality,¹³⁶ Justice O'Connor stated that the Court would not follow the *Fullilove* opinion, but would instead follow the Court's opinion in *Wygant*.¹³⁷ Justice O'Connor reasoned that standards used in *Fullilove* were not applicable here because there the question was whether a congressionally enacted program violated equal protection of the Fifth Amendment Due Process Clause.¹³⁸ According to Justice O'Connor, while States are limited in how they can deal with race, the federal government is

had been awarded a contract to install plumbing fixture for the city jail. Croson attempted to subcontract with a MBE to supply the fixture need for the job. Croson was only able to find one MBE that expressed interest in participating in the project but after receiving its bid that would increase the price of the project by 7% the company determined that the MBE was not suitable. Croson's request for a waiver was denied and the City informed the company that the project was to be rebid. Croson filed suit in the Federal District Court for the Eastern District of Virginia, maintaining that the program was unconstitutional. The District Court upheld the plan. The Fourth Circuit Court of Appeals affirmed the District Court, hold that under the Supreme Court's *Fullilove* opinion the plan was constitutional. The Supreme Court vacated the decision and remanded the case back to the Court of Appeals for further consideration in like of the Court opinion in *Wygant v Jackson Bd. of Educ.*, 476 U.S. 267 (1986). After further review the Court of Appeals held that the plan violated the Fourteenth Amendment Equal Protection Clause. The Supreme Court affirmed.

135. *Fullilove*, 448 U.S. at 448.

136. See *Croson*, 488 U.S. at 476. Justice O'Connor delivered the opinion with respect to Parts I, III-B and IV. With respect to Part II, Justice O'Connor was joined by Chief Justice Rehnquist, Justice White, and on Parts III-A and V she was joined by the Chief Justice, Justices White and Justice Kennedy.

137. *Wygant*, 476 U.S. at 267. In *Wygant*, the Court had to determine if the school board had violated the Equal Protection Clause when it fired a white teacher so that it could keep a black teacher in order to provide a "role model" for Black students. The Court held that schools could not use "societal discrimination" as a compelling interest in order to justify the use of race as a determining factor. The Court held that only by showing evidence that the school board was engaged in discrimination could the school board action be a constitutional use of race.

138. See *Croson*, 488 U.S. at 491. "Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here." *Id.*

given much broader power to combat racial problems.¹³⁹ States could enact programs that were designed to remedy discrimination but those programs had to be within the “constraints of section one of the Fourteenth Amendment”.¹⁴⁰ That meant that any remedial racial program promulgated by a state would be subject to strict scrutiny to ensure that race was not used improperly.¹⁴¹ The plan could be held constitutional only if it served a compelling government interest and was narrowly tailored to achieve that interest.¹⁴²

Justice O’Connor rejected Justice Marshall’s position which called for a lesser standard when reviewing programs that seek to benefit racial minorities. Justice O’Connor maintained that it “bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classification based on race or gender”.¹⁴³ Only by employing a heightened judicial standard will the Court fulfill its role to protect minorities from discrimination.¹⁴⁴ Justice O’Connor found that the city had not produced any evidence of discrimination in the local construction business to justify a remedial program.¹⁴⁵ Under *Wygant*, the city could not depend on showing a pattern of past discrimination because it “provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.”¹⁴⁶ Absent any proof of discrimination, Justice O’Connor held that the plan failed to meet the compelling interest prong of the test.¹⁴⁷ The Court also found that the plan was “overinclusive” because it provided relief to racial minorities that were not present in the City and had not suffered past discrimination.¹⁴⁸

Under *Croson*, the Court ruled that states must show evidence of discriminatory practice before they can enact remedial racial programs. The

139. See *id.* at 490. “Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.” *Id.*

140. See *id.* at 492.

141. See *id.* at 493. “Indeed the purpose of strict scrutiny is to ‘smoke out’ illegitimate use of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Id.*

142. *Id.*

143. *Id.* at 494.

144. See *id.* at 495.

145. See *id.* at 505. “[N]one of the evidence presented by the city points to any identified discrimination in the Richmond construction industry.” *Id.*

146. *Id.* at 498.

147. See *id.* at 505. “We, therefore, hold that the city failed to demonstrate a compelling interest”

148. See *id.* at 506. “The gross overinclusiveness of Richmond’s racial preference strongly impugns the city claim of remedial motivation.” *Id.*

Court held that only a showing of present discrimination will satisfy the compelling interest requirement under the strict scrutiny test. This standard appears to only apply to states because the Court stated that Congress possessed powers that were excluded from the state. However, as later Supreme Court cases would demonstrate, even Congress' power under the Fourteenth Amendment is not plenary.

In 1990, one year after *Croson*, the Court returned to its pre-*Croson* stance when it held in *Metro Broadcasting*,¹⁴⁹ that a minority preference policy instituted by the Federal Communication Commission (FCC) did not violate the Equal Protection Clause.¹⁵⁰ The Court employed the same reasoning in *Metro Broadcasting* that it used in *Fullilove* in holding that Congressional programs should be given deference.¹⁵¹ The Court even held that *Croson* had "reaffirmed the lesson of *Fullilove*" that remedial programs created by Congress to address racial discrimination are subject to a different level of scrutiny than those passed by state and local governments.¹⁵² The Court held that because Congress is unlikely to be controlled by a racial or minority group there was no need to use strict scrutiny which had been employed in *Croson*.¹⁵³ The Court held that because the "struggle" for racial justice has been a fight between "individual States" and "the national society," the threat which strict scrutiny desired to eliminate was not present.¹⁵⁴ The Court used an intermediate level of scrutiny and held that the program was permissible if it met an "important objective"

149. *Metro Broad. v. Fed. Communication Comm'n*, 497 U.S. 547 (1990). At issue in *Metro* was a program instituted to improve the number of minority owned media outlet. The program give minority applicant enhancements when awarding new licenses and set up a "distress sale" program that were limited transfer of existing television and radio station to minorities . The program was challenged by Shurberg Broadcasting claiming that the awarding enhancement and the distress sale program violated the equal protection component of the Fifth Amendment Due Process Clause. The Court of Appeals for the District of Columbia affirmed the award enhancement but held that the distress sale violated the equal protection right of non-minorities. The Supreme Court reversed, holding that the program did not violate the equal protection component of the Fifth Amendment.

150. See *id.* at 552. "The issue in these cases . . . is whether certain minority preference policies of the Federal Communication Commission violate the equal protection component of the Fifth Amendment." *Id.*

151. *Id.* at 565.

152. *Id.* at 565. Quoting Justice O'Connor in *Croson*, the court stated, "Congress may identify and redress the effect of society-wide discrimination." *Id.* (quoting *Croson*, 488 U.S. at 490).

153. See *id.* at 565-66. Citing Justice Scalia's concurring opinion in *Croson*, the court discussed the difference between State remedial programs and those passed by Congress. *Id.* (citing *Croson*, 488 U.S. at 522-23).

154. *Id.* at 566.

and was “substantially related to achievement of those goals.”¹⁵⁵ In *Metro Broadcasting*, the Court again stated that deference should be given to “the factfinding of Congress” when determining whether a program is related to an important governmental interest.¹⁵⁶

Finally, in 1995, five years after *Croson*, the Court, in *Adarand Constructors, Inc. v. Peña*,¹⁵⁷ returned to strict scrutiny review of government affirmative action programs.¹⁵⁸ In *Adarand*, the Court held that all government racial classifications, even remedial classifications, must be analyzed under a strict scrutiny standard, requiring their invalidation unless they are necessary to further compelling government interests.¹⁵⁹ The Court thus overruled *Metro Broadcasting* to the extent that it was inconsistent with this strict scrutiny requirement.¹⁶⁰

Writing the opinion for the Court, Justice O’Connor rejected the standard used in *Metro Broadcasting*, holding that any use of race as a determining factor will receive the highest level of scrutiny.¹⁶¹ Justice O’Connor also made it clear that the Court had departed from the standard used

155. *Id.* “We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective.” *Id.*

156. *Id.* at 569. The Court in *Metro* found that the FCC was merely effectuating the wishes of Congress when it promulgated the minority ownership program. The Court held that Congress had determined that minority ownership benefitted the public by creating more diversity over the public air ways. The Court also found that Congress had hearings and passed numerous pieces of legislation to increase minority ownership. *Id.* at 572-579.

157. 515 U.S. 200 (1995).

158. *Id.* *Adarand* involved an equal protection challenge to “subcontractor compensation clauses” in federal agency contracts, which provided that general contractors would receive additional compensation for hiring minority subcontractors. *Id.* at 205. A white contractor challenged the use of compensation clauses under the Equal Protection Clause, claiming that the government improperly used race as a factor in selecting a contractor. *Id.* at 210. Relying on *Fullilove* and *Metro Broadcasting*, the federal district court granted the government’s motion for summary judgment and the Tenth Circuit affirmed. *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992), *aff’d* by, *Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1547 (10th Cir.). On appeal, the Supreme Court vacated the Tenth Circuit’s judgment and remanded the case for further proceedings. *Adarand*, 515 U.S. at 239.

159. *Adarand*, 515 U.S. at 235.

160. *Id.* at 227, 232-34. “By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it.” *Id.* at 234 (emphasis added).

161. *Id.* at 227. “[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.” *Id.*

in *Fullilove* that subjected federal programs to a more deferential standard.¹⁶² Justice O'Connor reasoned that the Constitution held the federal government to the same standard as the states.¹⁶³ Thus, by subjecting federal programs to a lesser standard there was no way of determining whether the programs were "motivated by illegitimate notions of racial inferiority or simple racial politics."¹⁶⁴ The use of a strict scrutiny test would guard against any "illegitimate" use of race in any government program.¹⁶⁵ Justice O'Connor stated that the standard used in *Metro Broadcasting*, threatens to "undermine" the protection offered by the Constitution to protect individuals and not "groups."¹⁶⁶ In the final analysis, the Court in *Adarand* made it clear that any program that used racial classifications would be subject to strict scrutiny.

The Court's various positions on the correct standard of review for government affirmative action illustrate how dangerous it is for the Service to rely primarily on Equal Protection Clause standards in making its own "established public policy" determinations about affirmative action by charities. For one thing, the standard for determining if benign racial preferences by government violate the Equal Protection Clause has changed repeatedly over the years. If a public policy upon which the Service acts must be "clear[ly] established," it is not clear at all whether the Court's current strict scrutiny standard will apply to benign racial preferences in the not-to-distant future. Second, the Court's various discussions about why a particular review standard is chosen center around the governmental nature of the preference decisions (e.g., state decisions versus federal decisions). Since charities are not governmental bodies, nor are they generally subject to governmental restrictions, it seems inappropriate to apply a standard that emanates from discussions of governmental qualities.

2) *Circuit split: race as a factor*

In addition to the fluctuating nature of the standard of review, the current split in the federal circuits courts about whether race can ever be a

162. Id. at 235. "[I]t follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." Id.

163. Id. at 215-18. Justice O'Connor cited *Bolling v. Sharpe*, 347 U.S. 497 (1954), holding for the first time that the Fifth Amendment Due Process Clause contains an equal protection component that prohibits federally segregated schools.

164. *Adarand*, 515 U.S. at 226.

165. Id. "Indeed, the purpose strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant us of a highly suspect tool." Id.

166. Id. at 227.

factor in government affirmative action is also problematic for the Service. The circuits in which this split is most apparent are the Fifth Circuit, in *Hopwood v. Texas*,¹⁶⁷ and in the Sixth, Ninth and Eleventh Circuits in *Grutter v. Bollinger*,¹⁶⁸ *Smith v. University of Washington Law School*¹⁶⁹ and *Johnson v. Board of Regents of the University of Georgia*.¹⁷⁰ In *Hopwood*, the Fifth Circuit held that it was a violation of the Equal Protection Clause for a state to use race as a factor when making decisions about public law school admissions.¹⁷¹ However, in *Bollinger*, *Smith* and *Johnson*, the Sixth, Ninth and Eleventh Circuits held that race may be used as a factor by a state when making university admissions decisions. The Ninth Circuit majority in *Smith* described the Fifth Circuit's opinion in *Hopwood* as "flawed" to the extent that it held otherwise.¹⁷²

This circuit split demonstrates that, while it is clear that government discrimination against black people always violates the Equal Protection Clause, it is unclear whether race-based affirmative action is necessarily unconstitutional. Circuit courts uniformly interpret *Bakke* to hold that strict scrutiny applies to both invidious discrimination and benign affirmative action for racial minorities. Accordingly, both types of racial preferences will be upheld if the government can show that the preference is necessary to accomplish a compelling interest. This standard effectively means that any racial preference by government in favor of members of a racial majority that disadvantage members of a racial minority necessarily violates the Equal Protection Clause. Indeed, no modern day federal court has ever concluded that it was necessary to discriminate against racial minorities in order to accomplish a compelling government interest. On the other hand, Equal Protection Clause strict scrutiny does not mean that racial preferences in favor of racial minorities that disadvantage racial majorities necessarily violate the Equal Protection Clause. The Fifth Circuit's view is that it is never necessary to favor a racial minority over a racial majority in order to accomplish a compelling government interest. The Sixth, Ninth and Eleventh Circuits' views are that it may be necessary to make such racial preferences in order to accomplish compelling government interests. This aspect of Equal Protection Clause strict scrutiny is the central ever be a factor in government affirmative action efforts.

167. 78 F.3d 932, 934 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996).

168. 2002 U.S. App. LEXIS 9126 (6th Cir. 2002).

169. 233 F.3d 1188 (9th Cir. 2000), cert. denied, 532 U.S. 1051 (2001).

170. 263 F.3d 1234 (11th Cir. 2001).

171. *Hopwood*, 78 F.3d at 962. Similarly, the Fourth Circuit, in *Podberesky v. Kirwan*, 38 F.3d 147, 161-62 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995), held that a race-exclusive scholarship program offered by a state university violated the Equal Protection Clause of Fourteenth Amendment.

172. *Smith*, 233 F.3d at 1201.

3) *Service lacks expertise on racial matters*

The Service, by its very nature, is not a government agency with sufficient expertise to make proper constitutional law determinations about racial discrimination. This lack of expertise means that the Service is not an appropriate governmental body to decide if a particular racial preference by a tax-exempt charity is consistent or inconsistent with Equal Protection Clause strict scrutiny and, hence, “established public policy.” The Supreme Court has emphasized this aspect of Equal Protection Clause decision-making authority in *Regents of the University of California v. Bakke*.¹⁷³ In *Bakke*, Justice Powell refused to consider the Board of Regents’ asserted justification for its affirmative action plan for the medical school, in part, because that governmental entity lacked sufficient authority and expertise to make appropriate racial findings.¹⁷⁴

After emphasizing that constitutional affirmative action plans are designed to remedy specific acts of prior discrimination (as opposed to general societal discrimination),¹⁷⁵ Justice Powell refused to even consider the Board of Regent’s asserted findings of such discrimination because of the Board’s lack of expertise on racial matters:

173. 438 U.S. 265 (1978).

174. See *id.* at 309. See also Brian K. Landsberg, *Balanced Scholarship and Racial Balance*, 30 Wake Forest L. Rev. 819, 822 (1995) (discussing Justice Powell’s opinion in *Bakke*).

175. See, e.g., Brennan, *The Power of the Treasury*, *supra* note 54, at 424-25. Professor Brennan writes:

In a plurality opinion, Justice Powell emphasized that the medical school established its special admissions program to remedy specific acts of prior discrimination, not general societal discrimination. While recognizing the importance of the state’s interest in “ameliorating . . . the disabling effects of identified discrimination,” Justice Powell noted that “remedying of the effects of ‘societal discrimination’ [is] an amorphous concept of injury that may be ageless in its reach into the past.” Thus, a governmental entity seeking to justify “a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals” must make “judicial, legislative, or administrative findings of constitutional or statutory violations.” Absent such findings, it cannot be said that “the government has any greater interest in helping one individual than in refraining from harming another.”

Id.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. . . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. Lacking this capability, petitioner has not carried its burden of justification on this issue.¹⁷⁶

Powell's opinion in *Bakke* demonstrates that agencies that are not authorized to make racial findings cannot properly decide if an asserted compelling interest for discrimination is sufficiently "compelling" to satisfy Equal Protection Clause strict scrutiny. Thus, absent proper judicial or legislative guidance, an administrative agency like the Service, whose expertise is in taxation, cannot decide if a specific act of discrimination by a tax-exempt charity would be permitted or prohibited by the Equal Protection Clause if the charity were a state actor. It stands to reason that it would likewise be inappropriate for the Service to use that same constitutional standard as a proxy for "established public policy."

4) *Conclusions*

The standard of review regarding government affirmative action and the circuit split regarding whether race may be used as a factor demonstrates the danger of the Service relying on Equal Protection Clause standards to determine "established public policy." Equal Protection Clause principles do not indicate whether race based affirmative action is *necessarily* unconstitutional. While the state of Texas may not prefer racial minorities when deciding on university admissions, the state of Washington may prefer racial minorities when making such decisions. Neither state, however, may discriminate against racial minorities in making admission decisions. Relying on this aspect of Equal Protection Clause jurisprudence, one can draw two

176. *Bakke*, 438 U.S. at 309-10 (footnote omitted) (citations omitted).

conclusions regarding the Service's enforcement of the public policy limitation. First, it would be appropriate for the Service to determine that a charity's invidious discrimination against racial minorities violates "established public policy" because the Supreme Court has never held that this type of racial preference is necessary to accomplish a compelling interest. Second, it would *not* be appropriate for the Service to determine that a charity's preference of racial minorities over racial majorities necessarily violates "established public policy" because the Supreme Court has held that this type of racial preference may, at times, be necessary to accomplish a compelling interest. Further, the Service has no authority or special capacity to determine when a particular interest of a charity is compelling or not. Thus, it would be inappropriate for the Service to look solely to Equal Protection Clause standards to determine if a tax-exempt charity that engages in race-based affirmative action violates "established public policy" regarding racial preferences.

c. Fifteenth Amendment equality

Should the Service equate violation of the Fifteenth Amendment by a charity, if that charity were a state actor and if the suspect charitable act concerned voting in a state election, with a violation of the public policy limitation? As with the Fourteenth Amendment, the following analysis suggests not. Indeed, the *Bob Jones University* principle that charities cannot violate established public policy is only implicated when the public policy violation is "clear."¹⁷⁷

The Court in *Bob Jones University* surely contemplated that the Service would make some evaluation of the societal acceptability of the charity's challenged action. The Fifteenth Amendment does not permit such evaluation. Thus, a hypothetical Fifteenth Amendment violation should not be used as the sole determinant of whether a private charity has violated "established public policy."

While the Fourteenth Amendment (at least under current law) permits the government to make racial preferences that satisfy strict scrutiny, the Fifteenth Amendment does not employ the same strict scrutiny standard.¹⁷⁸ Equal Protection Clause strict scrutiny under the Fourteenth Amendment requires a reviewing court to initially determine whether the state has used race as a basis for treating otherwise similarly situated people differently. If it finds that the state has made such a racial classification, the Fourteenth Amendment

177. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983). "[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." *Id.*

178. *Miller v. Johnson*, 515 U.S. 900, 915 (1996).

permits the reviewing court to uphold the admitted racial distinction if the classification is necessary to accomplish a compelling government interest. This aspect of Fourteenth Amendment Equal Protection Clause strict scrutiny differs drastically from the standard of review of racial preferences by government in voting under the Fifteenth Amendment. Even though the Fourteenth Amendment permits states to make racial distinctions in some circumstances, the Fifteenth Amendment absolutely bars racial preferences no matter what justification is proffered by the state.

Thus, even if a state denies the right to vote to an historically advantaged race as a type of recompense to an historically disadvantaged race (*i.e.*, an affirmative action-like denial), the state's denial of the right to vote always violates the Fifteenth Amendment. The Supreme Court recently made this point clear in *Rice v. Cayetano*.¹⁷⁹

In *Rice v. Cayetano*, the Supreme Court held that Hawaii's denial to non-native Hawaiians of the right to vote in a statewide election violated the Fifteenth Amendment's prohibition against discrimination based on race.¹⁸⁰ After reciting a detailed history of Hawaiian civilization and the

179. 528 U.S. 495 (2000). *Rice* represents the first time since reconstruction that the Court relied exclusively on the Fifteenth Amendment, not the Fourteenth Amendment, to invalidate a voting scheme. This was also the first time the Court used the Fifteenth Amendment to invalidate a voting scheme that denied historically advantaged groups, instead of historically disadvantaged groups, the right to vote. See Deichert, *supra* note 76, at 1084 n.59. "*Rice* was the first case decided under the Fifteenth Amendment dealing with the outright denial of the franchise to a non-minority racial group on the basis of race." *Id.* Thus, *Rice* is an important case on many levels.

180. *Rice*, 528 U.S. at 524. The controversy in *Rice* began when Harold Rice, a white citizen of Hawaii, sued the governor of Hawaii to invalidate Hawaii's law that granted only certain long-time native Hawaiians the right to vote for trustees of the Office of Hawaiian Affairs (OHA). OHA, a state agency created by a 1978 amendment to the Hawaiian Constitution, is charged with effectuating "the betterment of conditions of native Hawaiians . . . [and] Hawaiians." OHA accomplishes its betterment goal by representing descendants of Hawaiians and native Hawaiians on issues concerning government control of valuable land stolen from Hawaiians and native Hawaiians by westerners. Although Mr. Rice could trace his Hawaiian genealogy back to the mid-1800's, he was not considered to be either Hawaiian or native Hawaiian under the law because he could not trace his ancestry back to 1778 the year westerners invaded the Hawaiian islands. *Rice* alleged that this voting rights limitation was in fact a proxy for race. Accordingly, *Rice* asserted that the Hawaiian only limitation is a classification based on race that is subject to strict scrutiny review under the Fourteenth and Fifteenth Amendments. *Rice* further claimed that the limitation of the class of eligible voters to certain long-time Hawaiians and native Hawaiians does not satisfy the strict scrutiny standard. Both *Rice* and the state of Hawaii moved for summary judgment. The federal district court in Hawaii granted summary judgment for the state of Hawaii. The district court concluded that Congress and Hawaii recognize a guardian-ward relationship with

challenged Hawaiian voting law, the Court's analysis focused on the principles underlying the Fifteenth Amendment.¹⁸¹ The Court concluded that the Fifteenth Amendment applies to all denials or abridgments, based on race, of the right to vote no matter the race of the complaining individual.¹⁸² After the Court determined that Hawaii's voting law indeed made a distinction based on race,¹⁸³

native Hawaiians which is analogous to the relationship between the United States and Indian tribes. Thus, the voting restriction, according to the district court, was not subject to strict scrutiny review; rather it was subject to rational basis review. Accordingly, the district court held the voting restriction did not violate either the Fourteenth or the Fifteenth Amendment because the restriction was rationally related to Hawaii's "responsibility under [the law]" to provide "for the betterment of native Hawaiians." *Rice v. Cayetano* 963 F. Supp. 1547, (Haw. 1997).

The Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals for the Ninth Circuit noted that *Rice* only challenged the voting limitation and not the underlying programs of OHA or OHA itself. Thus, that court concluded that it was "bound to 'accept the trusts and their administrative structure as [it found] them, and assume that both are lawful.'" Even though the laws containing the Hawaiian-only limitations "contain racial classifications on their face," the Court of Appeals held that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Rice* then sought review by the United States Supreme Court, which granted certiorari in *Rice v. Cayetano* and reversed the Ninth Circuit, holding that Hawaii's denial of *Rice*'s right to vote was "a clear violation of the Fifteenth Amendment." *Rice*, 528 U.S. at 521.

181. Because it was able to resolve the case based solely on Fifteenth Amendment grounds, the Court never reached the Fourteenth Amendment issues. *Id.* at 524.

182. *Id.* at 512. "Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Id.*

183. In examining how to determine if a particular state law makes a racial distinction – even if that law does not explicitly mention race, the Court noted that sometimes circumstantial evidence concerning the intent of the lawmakers may show that a particular law makes a racial classification. *Id.* For example, in *Guinn v. United States*, 238 U.S. 347 (1915), the Court concluded that Oklahoma's vote restriction scheme – which was similar to Hawaii's in that it did not mention race but instead used ancestry to exclude at least one race from voting – violated the Fifteenth Amendment. In 1910, Oklahoma enacted a literacy requirement for voting eligibility. However, "lineal descendants" of persons previously "entitled to vote" were exempted from the literacy requirement. *Id.* at 357. The Court invalidated the Oklahoma scheme because it was a transparent racial exclusion that tended to perpetuate laws that excluded black people from the voting franchise. *Id.* at 364-65. The majority in *Rice* concluded that Hawaii's distinction based on ancestry clearly demonstrated an intent by Hawaii to make a racial distinction. In essence, according to the Court, Hawaii's use of ancestry as a proxy for race is the same as if the statute explicitly mentioned race. *Rice*, 528 U.S. at

the Court went on to show that no justification proffered by the state could justify the racial distinction.

The first justification offered by the state to justify the racial classification was that “exclusion of non-Hawaiians from voting is permitted under our cases allowing the differential treatment of certain members of Indian tribes.”¹⁸⁴ After rejecting the validity of the state’s Indian tribe analogy,¹⁸⁵ the Court noted that even if the analogy applied Hawaii’s law would still violate the Fifteenth Amendment because of the racial classification for voting.¹⁸⁶ The Indian tribe cases involve Congress’ special treatment of Indians who are members of federally recognized tribes.¹⁸⁷ Those cases do not involve, as does the instant case, denial of the right to vote based solely on race.¹⁸⁸ The second justification offered by the state was that “the limited voting franchise is sustainable under a series of cases holding that the rule of one person, one vote does not pertain to certain special purpose districts such as water or irrigation

514. “Ancestry can be a proxy for race. It is that proxy here.” *Id.*

Many commentators have criticized this aspect of *Rice*. See discussion *supra* note 77. The commentators argue that distinctions based on Hawaiian lineage are not racial distinctions because Hawaiian ancestry is not race.

184. *Id.* at 518.

185. *Id.* at 518-19. The Indian tribe analogy involved Hawaii’s comparison of the quasi-sovereign legal status of various Indian tribes to that of Hawaiians and native Hawaiians. The Court noted that judicial decisions interpreting the effect of federal legislation and federal treaties have held that Indian tribes often retain elements of so-called “quasi-sovereign authority” relating to self-governance after United States invasion or take-over. *Id.* Thus, the Court, beginning primarily with *Morton v. Mancari*, 417 U.S. 535, 553-55 (1974), has sustained federal enactments that give employment preferences to members of these tribes giving employment preferences to persons of tribal ancestry. Since the OHA trustees are charged with protecting the interests of native Hawaiians, as Indian tribes are charged with protecting the interests of Native Americans, the state in *Rice* relied on this analogy to justify its preferences to persons of Hawaiian ancestry. The Court rejected the state’s tribal analogy because the Court was unwilling to conclude that Congress has made the determination that native Hawaiians have a status like that of Native Americans in organized Indian tribes. Further, the Court was unwilling to conclude that this congressional determination has delegated to the State of Hawaii plenary authority to protect that status.

186. *Rice*, 528 U.S. at 520-21. “Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.” *Id.*

187. See, e.g., *United States v. Antelope*, 430 U.S. 641 (1977); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977).

188. *Rice*, 528 U.S. at 521. “Although the [Indian] classification had a racial component, . . . the preference was ‘not directed towards a racial group consisting of Indians,’ but rather ‘only to members of federally recognized tribes.’” *Id.*

districts.”¹⁸⁹ The Court rejected this justification for two reasons. First, unlike special purpose district elections which are excepted from the one person one vote requirement, the OHA trustee elections are statewide elections. Thus, the Court would have to justify extending the one person one vote exception to statewide elections – something that the Court was unwilling to do.¹⁹⁰ Second, even if the Court were to extend the one person one vote exception to apply to the OHA statewide election, Hawaii’s argument still fails, according to the Court, because that exception applies for Fourteenth Amendment purposes only. The concern with the OHA election eligibility rule is whether it violates the race-neutrality command of the Fifteenth Amendment. Because the Fifteenth Amendment has “independent meaning and force,” the Court was not convinced that “compliance with the one-person. . . one-vote rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment.”¹⁹¹ Thus, the Court refused to find any exception to the race-neutrality command of the Fifteenth Amendment.

The third justification proffered by the State for its racial classification was that “the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust.”¹⁹² The Court rejected this justification for two reasons. First, the fiduciary and beneficiary interests are not in fact aligned under the challenged scheme. Indeed, while the benefits of the trust are intended primarily for “native Hawaiians,” the state permits “native Hawaiians” and “Hawaiians” to vote for trustees. Thus, instead of creating an alignment of interests, the challenged scheme actually “creates a differential alignment” between trustees and beneficiaries.¹⁹³ Second, even if the interests were aligned, the Court concluded that the state’s argument still fails because the essence of the alignment is to allow race to “qualify some and disqualify others from full participation in our democracy.”¹⁹⁴ This race qualification requirement, according to the Court, is inconsistent with the principle of race-neutrality, which underlies the Fifteenth Amendment.¹⁹⁵

This analysis of the *Rice* decision demonstrates that it would be inappropriate for the Service to rely significantly on Fifteenth Amendment jurisprudence when making its public policy decisions about tax-exempt charities. The sole purpose of the Fifteenth Amendment is to eradicate racial preferences by government with respect to voting in governmental elections. Thus, in order for the Service to properly rely on Fifteenth Amendment

189. Id. at 522.

190. Id.

191. Id. at 523.

192. Id.

193. Id.

194. Id.

195. Id.

standards, it would have to make at least two preliminary conclusions regarding the relationship of Fifteenth Amendment equality standards to the public policy limitation. The first conclusion the Service would have to make is that Fifteenth Amendment equality applies even to circumstances in which neither the “United States” nor “any State” has acted.¹⁹⁶ This conclusion is necessary because, by its very terms, the Fifteenth Amendment only applies to denials or abridgments of voting rights by one of these governmental units. No court has extended application of this constitutional prohibition to any non-governmental actor. With some exceptions not relevant here, tax-exempt charities are not government actors. Thus, the Service must conclude that, for some reason yet unexplained by the judiciary, the Fifteenth Amendment applies to both government actors and to non-government actors. Such a conclusion would be baseless.

Another conclusion the Service would have to make in order to apply Fifteenth Amendment standards to tax-exempt charities is that the standards were intended to apply, not just to “the right . . . to vote,” but also to rights other than voting, such as the right to attend school.¹⁹⁷ Again, by its very terms, the Fifteenth Amendment only applies in the context of voting. No court has ever found otherwise. Indeed, the Supreme Court, in *Rice v. Cayetano*, specifically noted that the only concern of the Fifteenth Amendment is denials or abridgments of the right to vote.¹⁹⁸ The Service intimated in the Bishop Estate TAM that it would apply these Fifteenth Amendment equality-in-voting standards to a tax-exempt trust that denied those lacking sufficient Hawaiian lineage admission to the trust’s schools.¹⁹⁹ The Service made no mention in the Bishop Estate TAM of “the right . . . to vote” ever being an issue. Thus, once again, in order for the Service to rely almost exclusively on holdings in cases like *Rice v. Cayetano* to define the parameters of the public policy limitation, it must conclude that the Fifteenth Amendment applies to circumstances that do not involve issues of voting. Reaching such a conclusion would be inconsistent with constitutional jurisprudence concerning the Fifteenth Amendment.²⁰⁰

196. See U.S. Const. amend. XV.

197. *Id.*

198. *Rice*, 528 U.S. at 512. “The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise.” *Id.*

199. See discussion *supra* notes 77-86 and accompanying text.

200. Another conclusion the Service *might* have to make in order to apply Fifteenth Amendment standards to tax-exempt charities is that the standards apply to citizens and non-citizens alike. On its face, the Fifteenth Amendment only applies to rights of “citizens of the United States.” It is not clear whether or not those denied admission to the Kamehemeha schools were United States citizens. However, given the

The Service's reliance on constitutional law equality standards to determine when and if a particular tax-exempt charity has violated "established public policy" is inappropriate. Equality principles concerning racial preferences, for example, are not readily applicable in non-constitutional settings. Two of the most significant constitutional equality provisions – the Equal Protection Clauses of the Fourteenth Amendment and the Fifteenth Amendment – have various characteristics that make direct application of these provisions to tax-exempt charities problematic. Although both equality standards apply in situations involving racial preferences, one standard requires judgment by an arbiter as to the acceptability of the racial preferences (Fourteenth Amendment) whereas the other standard is not concerned at all with acceptability just with whether a racial preference exists (Fifteenth Amendment). Who's to say which of these standards applies for "established public policy" purposes? Additionally, concerns exist regarding level of scrutiny, the capacity of the Service to make appropriate determinations about race and the appropriateness of extending constitutional provisions to non-constitutional settings without judicial guidance. Thus, the Service's apparent reliance on equality aspects of the Constitution as the guide-star to determine equality for purposes of the public policy limitation is inappropriate; that is, the Service cannot use the Constitution as a proverbial sword to revoke the tax-exempt status of a charity. But what about the other way around? That is, might a tax-exempt charity use the Constitution as a shield to prevent the Service from revoking the charity's tax-exemption?

C. *Freedom of Expressive Association: a Shield to Protect Charitable Status*

1. *Introduction*

The United States Constitution protects two types of associational freedoms: freedom of intimate association and freedom of expressive association.²⁰¹ This subpart will focus exclusively on the constitutional right to

Hawaii is a popular destination for foreign visitors, it is not entirely improbable that at least some who were denied admission to the school were non-United States citizens.

201. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984):

Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this

freedom of expressive association and its use by private groups as a shield against anti-discrimination laws aimed at preventing discrimination against homosexuals. The purpose of this examination is to evaluate whether a private charity that discriminates against homosexuals in violation of state law may use freedom of expressive association as a shield to protect it from the Service's attempts to revoke its tax-exempt status on public policy grounds. More broadly, the ultimate issue is whether and how the Service should consider a charity's constitutional defenses, such as a claim of freedom of expressive association, in ascertaining whether the charity violates "established public policy."

2. *Freedom of expressive association*

Subject to certain constraints, the First Amendment guarantees citizens the right to free speech.²⁰² The Supreme Court has recognized that "implicit in [this right]" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."²⁰³ The right to associate in this way is critical when it comes to preventing the tyranny of the views of the majority over those of the minority. Thus, protecting a group's right to freedom of expressive association aids in preserving political and cultural diversity in society and in shielding unpopular expression from repression by the majority.

Among the many government actions that might violate a group's freedom of expressive association is "intrusion into the internal structure or affairs" of the group.²⁰⁴ One type of intrusion might be a regulation or other law that "forces the group to accept members it does not desire."²⁰⁵ Such force might significantly impair the group's ability to express its often unpopular

respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Id. at 617-618. See also Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. Davis L. Rev. 821, 829-30 (2002), explaining the origins of freedom of association in the 1950's.

202. See U.S. Const. amend. I.

203. *Roberts*, 468 U.S. at 622.

204. Id. at 623.

205. Id.

views.²⁰⁶ Accordingly, freedom of expressive association “plainly presupposes a freedom not to associate.”²⁰⁷ The standard utilized by the Court to determine if forced inclusion of a person in a group infringes that group’s freedom of expressive association is to determine whether the person’s presence significantly impairs the group’s ability to advocate its viewpoints.²⁰⁸

Like many constitutionally protected rights, however, freedom of expressive association is not an absolute freedom. The freedom must yield if a particular law or regulation is adopted to serve a compelling governmental interest that is unrelated to the suppression of ideas and cannot be achieved in a significantly less intrusive manner.²⁰⁹ Thus, a private group’s constitutional right to freedom of expressive association may yield to a state’s often compelling interest in eliminating many types of discrimination in society, including discrimination based on race, gender and age.

3. *Use of freedom of expressive association as a shield against violation of state anti-discrimination law*

The Supreme Court recently decided a freedom of expressive association case, *Boy Scouts of America v. Dale*, that implicitly raises questions about the extent to which the Service may use “established public policy” to revoke (or deny) tax-exempt charitable status. *Boy Scouts of America* does not actually involve a denial of tax-exempt status; instead, the case involves the First Amendment right of one of the country’s largest membership charities,²¹⁰ the Boy Scouts of America (the Boy Scouts), to violate state law by excluding a person from its organization based on the person’s sexual orientation. Though not explicitly recognized in federal civil rights laws, many people would argue that it is nearly universally accepted in society that discrimination based on sexual orientation is wrong. Indeed, this is one of the many arguments raised by Justice Stevens in his dissent in *Boy Scouts of America* when he explains that old negative opinions about homosexuality have been replaced by more

206. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

207. *Id.* at 648.

208. *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988).

209. *Roberts*, 468 U.S. at 623. “Infringements on [the right to freedom of expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.*

210. The Service defines a “membership organization” (or membership charity) as “an organization that is composed of individuals or organizations who (1) share in the common goal for which the organization was created; (2) actively participate in achieving the organization’s purposes; and (3) pay dues.” See IRS Form 990 (instructions for Part II, Line 11).

enlightened and informed views.²¹¹ Additionally, an overwhelming majority of states now have statutory laws that explicitly prohibit discrimination based on sexual orientation.²¹² Nevertheless, the Court's conclusion in *Boy Scouts of America* is that freedom of expressive association permits private non-governmental organizations, like the Boy Scouts, to exclude homosexuals if forced inclusion would significantly impair the organization's message.²¹³ In essence, *Boy Scouts of America* stands for the proposition that private non-governmental groups may use freedom of expressive association as a shield against forced compliance with state anti-discrimination laws.²¹⁴

In *Boy Scouts of America v. Dale*,²¹⁵ James Dale an openly gay former Eagle Scout sued the Boy Scouts, a private membership charity,²¹⁶ after that organization revoked Dale's adult membership based solely on his sexual

211. See *Boy Scouts of America*, 530 U.S. at 669 (Stevens dissent). "Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those [negative] opinions." *Id.*

212. Thirteen states currently have statutory laws that explicitly prohibit discrimination based on sexual orientation. See Cal. Gov't. Code § 12940 (West Supp. 2001); Conn. Gen. Stat. Ann. §§ 46(a)-81(c) (West Supp. 2001); D.C. Code Ann. § 2-1402.11 (2001); Haw. Rev. Stat. §§ 368-1, 378-2 (Supp. 2000); MD. Ann. Code art. 49B, §§ 5, 16, 14, 8 (Supp. 2001); Mass. Ann. Laws ch. 151, §§ B1, B3, B4 (Law. Co-op. Supp. 2001); Minn. Stat. Ann. §§ 363.03, 363.12 (West Supp. 2001); Nev. Rev. Stat. Ann. §§ 610.020, 613.340 (Michie 2000); N.H. Rev. Stat. Ann. §§ 354-A:7, :8 (Supp. 2001); N.J. Stat. Ann. §§ 10:2-1, :5-4, :5-12 (West Supp. 2001); R.I. Gen. Laws §§ 28-5-2, 28-5-7 (Supp. 2001); Vt. Stat. Ann. Tit. 21, § 495 (Supp. 2001-2002); Wis. Stat. Ann. § 111.36 (West Supp. 2001). Also, there are 42 out of 3,097 U.S. counties that to some extent prohibit discrimination based on sexual orientation. See Lambda Legal Defense and Education Fund, at www.lambdalegal.org/cgi-bin/iowa/states/antidiscrimi-map (Jan. 7, 2002). See also Brody, *Entrance, Voice and Exit*, fns 70-72 and accompanying text "While federal law bars discrimination on the basis of race, color, religion, or national origin in 'places of public accommodation,' many States and municipalities have gone further, both in their enumeration of protected classifications, and in their definition of 'public accommodation.' The U.S. Constitution, however, provides an outer limit to the reach of these statutes and ordinances." (footnotes omitted).

213. *Boy Scouts of America*, 530 U.S. at 647-48.

214. One author has noted that "*Boy Scouts of America v. Dale* represents the first defeat for the application of a State anti-discrimination law; time will tell how broadly it will apply." See Brody, *Entrance, Voice, and Exit*, supra note 201.

215. *Boy Scouts of America*, 530 U.S. at 640.

216. The opinion simply describes the Boy Scouts as a "private, not-for-profit organization engaged in instilling its system of values in young people". See *id.* at 643. However, the Service identifies the Boy Scouts as an organization exempt from taxation by section 501(c)(3) of the Code and entitled to receive tax deductible contributions from the public.

orientation.²¹⁷ Dale's primary claim against the Boy Scouts was that his exclusion violated a New Jersey law that prohibits discrimination based on sexual orientation by places of public accommodation.²¹⁸ The Boy Scouts

217. Dale applied for and was granted adult membership in the Boy Scouts in 1989. Shortly thereafter, Dale, for the first time, acknowledged to himself and to others that he is gay. Dale then became president of his college lesbian/gay organization. A newspaper later published an article about Dale and his advocacy of gay issues, including the need for youths to have gay role models. The article included a picture of Dale with a caption identifying him as president of his college lesbian/gay organization. During that same month, in 1990, Dale received a letter from his local Boy Scouts council revoking his membership because the Boy Scouts "specifically forbid[s] membership to homosexuals." See *Boy Scouts of America*, 530 U.S. at 665.

218. See *Boy Scouts of America*, 530 U.S. at 661-662 (citing N. J. Stat. Ann. § § 10:5-4 and 10:5-5 (West Supp. 2000)). New Jersey's anti-discrimination law provides:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons.

N. J. Stat. Ann. § 10:5-4 (West Supp. 2000). New Jersey's anti-discrimination law defines "place of public accommodation" as including:

any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school,

responded that the anti-discrimination law is unconstitutional as applied to its exclusion of Dale because of the Boy Scouts' First Amendment right not to associate with homosexuals, which the Boy Scouts considers inconsistent with its core values.²¹⁹ A New Jersey trial court rejected Dale's discrimination claim and granted summary judgment to the Boy Scouts.²²⁰ However, the state appellate and supreme courts sided with Dale.²²¹ The New Jersey Supreme Court held that the Boy Scouts is a place of public accommodation covered by the state's anti-discrimination law; it violated this law by revoking Dale's membership based solely on his sexual orientation; and it is not shielded from

high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students.

N. J. Stat. Ann. § 10:5-5 (West Supp. 2000).

219. See *Boy Scouts of America*, 530 U.S. at 651-52 (The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms 'morally straight' and 'clean.').

220. See *id.* at 645. The New Jersey Superior Court's Chancery Division held that New Jersey's anti-discrimination law does not apply because the Boy Scouts is "not a place of public accommodation" and, further, is exempt from coverage under the law because the Boy Scouts is a private group. The court also held that the First Amendment right to freedom of expressive association prevented New Jersey from forcing the Boy Scouts to accept Dale as a member.

221. See *id.* at 646. The New Jersey Superior Court's Appellate Division affirmed reversed and remanded for further proceedings, holding that the anti-discrimination law applied to the Boy Scouts, that the Boy Scouts violated that law and that the Boy Scouts was not entitled to insulation from liability by the First Amendment right of freedom of expressive association. *Dale v. Boy Scouts of America*, 706 A.2d 270 (1998). The New Jersey Supreme Court affirmed the judgment of the Appellate Division. *Dale v. Boy Scouts of America*, 734 A.2d 1196 (1999).

coverage of this law by the First Amendment right to freedom of expressive association.²²²

On appeal, the United States Supreme Court reversed the New Jersey Supreme Court, concluding that New Jersey's interpretation of its anti-discrimination law violated the Boy Scouts' freedom of expressive association by forcing the organization to grant adult membership to Dale.²²³ In reaching this conclusion, the Supreme Court determined that the Boy Scouts is engaged in expressive activity, that the nature of that expression is that homosexuality is immoral, and that the forced inclusion of Dale would significantly impair the Boy Scouts' ability to advocate its views against homosexuality.²²⁴ In determining that the Boy Scouts engages in protected First Amendment expression, the Court reviewed the Boy Scouts' mission, which includes "helping to instill values in young people."²²⁵ Adult scout leaders, as Dale once was, are charged with instructing young members in various outdoor activities while also inculcating the young boys with the Boy Scouts values. The communication of such values, per the Court, is clearly a type of expression.²²⁶

After determining that the Boy Scouts engaged in expressive activity, the Court evaluated the nature of that expression and the impact on that expression of forcing the Boy Scouts to keep Dale as a member.²²⁷ The Court notes that the Boy Scouts' core values include those contained in the Scout Oath and Law, especially those represented by the terms "morally straight" and

222. See *Boy Scouts of America*, 530 U.S. at 646-47. The New Jersey Supreme Court "agree[d] that [the Boy Scouts] expresses a belief in moral values and uses its activities to encourage the moral development of its members." *Dale v. Boy Scouts of America*, 734 A.2d at 1223. However, the court noted that it was "not persuaded . . . that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." *Dale v. Boy Scouts of America*, 734 A.2d at 1224 (internal quotation marks omitted). Further, the court determined that the state has a compelling interest to eliminate "the destructive consequences of discrimination from our society," and that this anti-discrimination law infringes no more speech than is necessary to accomplish this purpose. *Dale v. Boy Scouts of America*, 734 A.2d at 1227-28.

The Boy Scouts also claimed that New Jersey's law violated its right to intimate association. See *Boy Scouts of America*, 530 U.S. at 646-47. However, the New Jersey Supreme Court concluded that the Boy Scouts' "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." *Dale v. Boy Scouts of America*, 734 A.2d at 1221 (quoting Duarte, supra at 546).

223. See *Boy Scouts of America*, 530 U.S. at 649-56.

224. See id. at 650-56.

225. See id. at 648.

226. See id. at 649-50.

227. See id. at 650.

“clean.”²²⁸ The Boy Scouts asserted that homosexual behavior is inconsistent with these core values.²²⁹ Though the Court recognized that these terms may be subject to multiple interpretations,²³⁰ it gave great weight to the Boy Scouts’ statement of its view that engaging in homosexual conduct is contrary to being “morally straight” and “clean.”²³¹ The Court also gave great weight to the Boy Scouts’ view that Dale’s continued adult membership as assistant scoutmaster would significantly impair the Boy Scouts’ expression.²³² According to the Court, because Dale was a “leader[]” in his community and “open and honest” about his sexual orientation, his mere presence forces the Boy Scouts “to send a message . . . that [it] accepts homosexual conduct as a legitimate form of behavior.”²³³ The Supreme Court concluded that this intrusion upon the Boy

228. See *id.* at 648-50.

229. See *id.* at 652-53.

230. As an example, the Court states that “some people may believe that engaging in homosexual conduct is not at odds with being ‘morally straight’ and ‘clean.’ And others may believe that engaging in homosexual conduct is contrary to being ‘morally straight’ and ‘clean.’” *Id.* at 651.

231. In fact, the Court flatly refused to adopt the New Jersey Supreme Court’s analysis of the Boy Scouts’ beliefs that the “exclusion of members solely on the basis of their sexual orientation is inconsistent with [the Boy Scouts’] commitment to a diverse and ‘representative’ membership . . . [and] contradicts [the Boy Scouts’] overarching objective to reach ‘all eligible youth.’” *Id.* at 651 (quoting *Dale v. Boy Scouts of America*, 734 A.2d at 1226). The Supreme Court notes that “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.” See *id.* at 686. See also *Democratic Party of United States v. Wis. ex rel. La Follette*, 450 U.S. 107, 124 (1981) (“[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.”); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (“Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.”).

232. See *Boy Scouts of America*, 530 U.S. at 655-56. “As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.” (citations omitted). See also *La Follette*, 450 U.S. at 123-24 (considering whether Wisconsin law burdened the National Party’s associational rights and stating that “a State, or a court, may not constitutionally substitute its own judgment for that of the Party”). However, the Court cautions that an expressive association may not shield against anti-discrimination laws by nakedly asserting that mere acceptance of a particular member will impair its message. Apparently, something more is required.

233. *Boy Scouts of America*, 536 U.S. at 659. It is unclear from the majority opinion whether the Court would have reached the same conclusion about significant impairment had Dale not been a “leader” in his community and “open and honest” about his sexual orientation. That is, the Court’s explanation does not indicate whether the Boy Scouts’ refusal to admit Dale would have been upheld as freedom of expressive

Scouts' First Amendment right is not outweighed by New Jersey's interest in preventing discrimination against homosexuals by places of public accommodation.²³⁴

The thrust of the Court's opinion in *Boy Scouts of America v. Dale* is that private groups may use freedom of expressive association as a shield against a state's enforcement of its anti-discrimination laws. It is ironic, however, that a state's attempt to curb the tyranny of the majority by enacting laws to protect the minority may be thwarted by a constitutional law provision also aimed at preventing the tyranny of the majority. This conflict, between government attempts to lessen discrimination and private claims of a Constitutional right to free expression, presents a paradox that is not insignificant. Indeed, the juxtaposition of these two societal goals – lessening

association if Dale was either not a "leader" or not "open and honest." This issue is made even more relevant by the Court's discussion of its earlier decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). See *Boy Scouts of America*, 530 U.S. at 653-54. In *Hurley*, the Court considered whether a Massachusetts law interpreted as requiring private organizers of a St. Patrick's Day parade to include an Irish-American gay, lesbian and bisexual group violated the organizers' freedom of expressive association. In concluding that the exclusion was protected by the First Amendment, the Court in *Hurley* noted that the private parade organizers did not exclude the gay, lesbian and bisexual group because of the members' sexual orientation. Rather, the group was excluded because they wanted to march behind a banner announcing its members' sexual orientation. The Court in *Hurley* concluded that the private parade organizers have the right to choose not to propound the view that homosexuality is socially acceptable by having members of a gay, lesbian and bisexual organization marching behind a banner. See *Hurley*, 515 U.S. at 574-75.

234. *Boy Scouts of America*, 530 U.S. at 658. Originally, state public accommodation laws were adopted to prevent discrimination in traditional places of public accommodation, such as inns and trains. See, e.g., *Hurley*, 515 U.S. at 571-72 (explaining the history of Massachusetts' public accommodations law); *Romer v. Evans*, 517 U.S. 620, 627-29 (1996) (describing the evolution of public accommodations laws). Today, however, public accommodation laws have expanded to cover places not usually thought of as places of public accommodation, like summer camps and roof gardens. See, e.g., *Boy Scouts of America*, 530 U.S. at 658 (citing N. J. Stat. Ann. § 10:5-5(l) (West Supp. 2000)) (noting that New Jersey's definition of place of public accommodation is so broad as to include a list of over 50 types of places). New Jersey is the only state that has gone so far as to interpret its public accommodation statute as not requiring that a place of public accommodation be a physical location, thus encompassing membership organizations like the Boy Scouts. Compare *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993); cert. denied, 510 U.S. 1012 (1993); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (1998); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 891 P.2d 385 (1995); *Quinnipiac Council, Boy Scouts of America, Inc. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352 (1987); *Schwenk v. Boy Scouts of America*, 551 P.2d 465 (1976).

discrimination against allowing free expression – implicates fundamental aspects of true democracy. Thus, good or bad, the Court in *Boy Scouts of America* resolves the anti-discrimination / free expression conflict in favor of free expression, at least where the anti-discrimination law protects homosexuals and the free expression violates anti-discrimination law by denouncing homosexuality. Query: What does this decision mean with respect to Service enforcement of the public policy limitation? Must a public policy prohibiting discrimination against homosexuals, like an anti-discrimination law prohibiting such discrimination, also yield to an appropriate private claim of a Constitutional right to free expression?

4. *Problems with using freedom of expressive association as a shield to protect tax-exempt charities that discriminate*

In deciding whether a particular charity violates “established public policy,” the Service could confront a constitutional law claim that, for lack of a better term, *justifies* the charity’s clearly discriminatory action or policy. How should the Service consider such a claim? Should constitutional law claims such as freedom of expressive association be considered proverbial shields that prevent the Service from revoking the charity’s tax-exempt status? What should be the relevance of the fact that the charity, though acting within its federal First Amendment rights, violates a state law that might embody “established public policy” regarding discrimination? This Article is not focused on the issue of whether a state may enforce its sexual orientation anti-discrimination laws against a private charity that has a valid freedom of expressive association basis for its discrimination. Clearly, the Court in *Boy Scouts of America v. Dale* concludes that such state laws are unconstitutional and, therefore, unenforceable.²³⁵ But what about the federal tax laws that attempt to accomplish a goal similar to that strived for by state anti-discrimination laws? Is the Service, like states, also barred by valid freedom of expressive association claims from enforcing its version of federal anti-discrimination law for charities (*i.e.*, the public policy doctrine) against private charities that discriminate?

In order to demonstrate how a possible freedom of expressive association shield claim might be raised to fend off Service enforcement of the public policy limitation, consider the following hypothetical:

235. See *Boy Scouts of America*, 530 U.S. at 661. See also discussion *supra* notes 210-34 and accompanying text.

The public is outraged over the discovery that the Male Scouts of America (Male Scouts) excludes homosexuals from membership. While state law prohibits such exclusion by places of public accommodation like Male Scouts, a competent court determines that forcing the Male Scouts to comply with the state law would violate the Male Scouts' freedom of expressive association. In the wake of discovering that the Male Scouts is a tax-exempt charity, the Service audits the Male Scouts for compliance with section 501(c)(3). Pursuant to its audit, the Service properly determines that discrimination against homosexuals like discrimination against black people violates "clear established public policy." Accordingly, the Service issues appropriate notice to the Male Scouts that the Service intends to revoke the Male Scouts' tax-exempt status because of this public policy violation. The Male Scouts then responds to the Service that it cannot revoke its tax-exemption on this ground because a competent court previously determined that the "no homosexuals" policy is protected expression. How should the Service respond?

The primary focus of this hypothetical is not the Service's determination that discrimination against homosexuals violates "established public policy." Indeed, for purposes of the hypothetical, this determination is assumed to be correct.²³⁶ Rather, the primary focus of the hypothetical is the issue of how the Service should contend with an alleged constitutional law justification for this clear violation of public policy. Stated differently, the concern is whether the First Amendment's prohibition against government infringing on a private group's freedom of expressive association would be violated if the Service revoked the Male Scouts' tax-exempt status.

The Service could respond to the Male Scouts' justification for its discrimination by arguing that no First Amendment right is violated because revoking their tax exempt status does not *prevent* the Male Scouts from associating to express anti-homosexual views. Unlike New Jersey's law in *Boy Scouts of America v. Dale*, which outright prohibited discrimination by organizations like the Male Scouts,²³⁷ the public policy limitation only prohibits violations of "established public policy" while the organization maintains tax-exempt status pursuant to section 501(c)(3).²³⁸ Thus, whereas the Boy Scouts

236. Just as the prior "prediction" about the future of constitutional law, this prediction about the future of anti-discrimination law is mere speculation, based somewhat on current trends in law.

237. See *Boy Scouts of America*, 530 U.S. at 640.

238. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

would not be able to operate at all if the state's anti-discrimination violation finding were upheld, the Male Scouts *could* continue to operate (albeit in a taxable, as opposed to tax-exempt, form) even if the Service's public policy violation finding is upheld.

The Service's public policy violation claim against the hypothetical Male Scouts under this scenario is arguably a stronger case than New Jersey's anti-discrimination claim against the Boy Scouts. While the Boy Scouts must cease operations as a result of a successful anti-discrimination claim, the Male Scouts can continue to operate both with and without its 501(c)(3) tax-exemption. This analysis, of course, ignores the reality that many entities actually fail without the 501(c)(3) tax-exemption.²³⁹ Nevertheless, the pivotal question is: what is the relevance of the nature of the punishment here (loss of exemption instead of loss of existence) to resolving the constitutional law issue of whether the Boy Scouts' right to freedom of expressive association is implicated by the Service's revocation action?

The Supreme Court's opinion in *Boy Scouts of America* is, at least, partially instructive on the issue of the proper focus of a court in deciding a freedom of expressive association case. In its analysis of whether New Jersey's law unconstitutionally infringed the Boy Scouts' freedom of expressive association, the Court had to "determine whether the forced inclusion of Dale . . . would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."²⁴⁰ Thus, the Court's focus was on the nature of the Boy Scouts' expression and the effect on that expression of keeping Dale as a member.²⁴¹ Similarly, the focus with regard to the Service's proposed action against the Male Scouts would likely be the nature of the Male Scouts' expression. However, even assuming that the nature of the Male Scouts' expression is the same as the Boy Scouts' and, assuming further, that keeping a homosexual as a member might significantly impair the Male Scouts' expression, the Male Scouts hypothetical raises another issue that was not addressed in *Boy Scouts of America*. That non-addressed issue is: what significance is attached to the distinction between necessarily preventing a private group from operating at all if it excludes homosexuals (*Boy Scouts of America*) versus preventing the group from operating with the special tax status afforded by section 501(c)(3) if it excludes homosexuals (Male Scouts hypothetical)? On this point, *Boy Scouts of America* is not very helpful.

The Supreme Court has never addressed the specific issue of whether it is constitutional to require an organization to forego its constitutionally protected freedom of expressive association in order for the organization to obtain or maintain a 501(c)(3) tax-exemption. However, the Court has

239. See discussion *supra* notes 46-58 and accompanying text.

240. *Boy Scouts of America*, 530 U.S. at 650.

241. See *Id.*

addressed the closely related issue of whether it is constitutional to force a charity to give up certain First Amendment rights (lobbying Congress for example) in order to obtain or maintain 501(c)(3) tax-exempt status.²⁴² In *Regan v. Taxation With Representation*, the Supreme Court held that Congress' requirement that charities agree not to lobby Congress in order to satisfy requirements for 501(c)(3) tax-exempt status is not a violation of the First Amendment because Congress is not required to effectively fund lobbying by way of a tax-exemption.²⁴³ Although lobbying Congress is a First Amendment free speech right, the Court in *Taxation With Representation* held that the right is not violated by the government's withdrawal of 501(c)(3) tax exemption pursuant to statutory law.²⁴⁴ Similarly, even if the Male Scouts' exclusion of homosexuals is made in furtherance of its right to freedom of expressive association, that right is not necessarily violated by denying or revoking 501(c)(3) tax-exemption.

This conclusion that the Males Scouts could not successfully claim, on public policy grounds, that freedom of expressive association would shield it against the Service's revocation of tax-exemption is also in line with other aspects of federal law. For example, in the labor law area, federal employees are often required to give up certain First Amendment rights in order to keep their federal jobs.²⁴⁵ Again, as in *Taxation With Representation*, the federal

242. See *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

243. See *id.* The Court explains:

TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. But TWR is just as certainly incorrect when it claims that this case fits the *Speiser-Perry* model. The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

Id. at 545.

244. See *id.* at 546. "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying. We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.*

245. See, e.g., *Connick v. Meyers*, 461 U.S. 138 (1983). In *Connick*, the Court recognizes the authority of governmental employers to discharge employees because of inappropriate speech when it writes:

government is not required to fund a private actor's free speech right. Thus, the Service's public policy power, as currently conceived and even in the face of a proper freedom of expressive association claim, could be applied to revoke or deny the tax-exempt status of the hypothetical Male Scouts of America.

IV. THEORETICAL CONCERNS WITH USING CONSTITUTIONAL LAW PRINCIPLES TO DEFINE THE SCOPE OF THE PUBLIC POLICY LIMITATION

A. *The Public Benefit Subsidy Theory*

Part II showed how the Service is guided by constitutional law decisions in developing its tax policy with respect to the tax-exempt status of private charities. Part III highlighted the many interpretation problems associated with the Service relying significantly on constitutional law principles when making its public policy determinations. In Part IV, this Article argues that, for theoretical reasons, the Service's significant reliance on constitutional law decisions is inappropriate. Reliance on constitutional law norms is inconsistent with the theory that tax-exempt charities are private actors who provide goods and services that government either cannot or will not provide.

Legislative history concerning "the reason for being" of tax-exempt charities is non-existent. It is as though Congress was more concerned, historically at least, with the constitutionality of *imposition* of an income tax, than with rationales for *exemptions* from that tax.²⁴⁶ Thus, courts and commentators have had to take it upon themselves to explain the basis for the charitable tax-exemption. Although many such theories have been developed over the years,²⁴⁷ the most widely-accepted is the public benefit or traditional

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147. See also 5USCS § 7324(a) (2002) "The Hatch Act" (generally prohibiting federal employees from taking an active part in political campaigns).

246. The charitable tax-exemption has been described as more "intuitive" than anything else. Presumably, this means that Congress just felt it "right" to exempt entities such as schools, churches and the like from the income tax.

247. Some other theories that espouse an explanation for the existence of tax-exempt charities include: 1) the income measurement theory; 2) the capital subsidy theory and 3) the donative theory.

subsidy theory.²⁴⁸ The public benefit subsidy theory holds that charities are exempt from taxation because they serve public purposes that are government-like, but government either cannot (or will not) satisfy the public need in the particular area. Concisely put, the theory states that the tax-exemption is a government subsidy provided to organizations so as to encourage activities that are “recognized as inherently meritorious and conducive to the general welfare.”²⁴⁹ In essence, the charitable tax-exemption, per the public benefit subsidy theory, is a subsidy for certain activities favored by significant segments of the society, whether government supports the activity or not.

Congress’ grant of the subsidy indirectly by way of a tax-exemption, instead of having the government provide direct subsidies to deserving entities and meritorious activities, supports the notion that the charitable tax-exemption is intended to support activities that do not necessarily have governmental or majority appeal. An indirect subsidy by way of a tax-exemption lessens the involvement of government in the affairs of charities. Indeed, since a tax-exemption is by its very nature “automatic,” its grant is not readily subject to the annual whims of government concerning budget balancing matters and the like.²⁵⁰ Take the example of Congress’ attempt in the mid-nineteen nineties to lessen government financial support for death penalty relief organizations by threatening decreased direct funding of said organizations unless the organizations agreed to curtail activities with respect to certain types of cases.²⁵¹ The death penalty groups refused and, accordingly, Congress reduced their funding. Despite this unfortunate circumstance, these death penalty groups, because of their tax-exempt status, were able to continue to operate even without direct government subsidies because of their tax-exempt charitable status. The tax-exemption enabled these private organizations to operate without the burden of income tax payment obligations and the tax-deduction enabled the organizations to raise funds in the form of increased charitable contributions.²⁵²

248. See generally, Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. Rev. 501, 606 n.292 (1990); Brody, *Of Sovereignty and Subsidy*, *supra* note 6.

249. James J. Fishman et al., *Nonprofit Organizations: Cases and Materials*, 316 (1995) (citing Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, IV Research Papers Sponsored by the [Filer] Commission on Private Philanthropy and Public Needs, 2025, 2039 (1977)).

250. May L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight Under the Government Performance and Results Act*, 35 Wake Forest L. Rev. 751, 759 (2000). “[T]he funding of tax expenditures by foregone revenues tends to be less publicly visible than the funding of discretionary spending programs. Tax expenditures, like entitlements, are not subject to the appropriations process.” *Id.*

251. See National Law Journal, July 31, 1995.

252. See discussion *supra* notes 48-58 and accompanying text.

B. *The Inconsistency of Reliance on Constitutional Principles with the Public Benefit Subsidy Theory*

Of all theories that attempt to justify the tax-exemption for charities, the public benefit subsidy theory seems to be the most intuitive and widely-accepted. The public benefit subsidy theory is supported by historical notions of charity dating back to the Statute of Charitable Uses in 1601.²⁵³ An aspect of this theory, that charities lessen the burdens of government, has been enshrined in the regulations pertaining to 501(c)(3) tax-exemption.²⁵⁴ Additionally, the Supreme Court has espoused a version of this theory in its decisions concerning the propriety of the Service's regulatory activities respecting charities.²⁵⁵ For example, in *Bob Jones University v. United States*, the Court notes that: "[I]n enacting . . . § 501(c)(3), Congress sought to provide

253. The preamble to the Elizabethan Statute of Charitable Uses outlines some of the various types of charitable purposes that were recognized at that time in the seventeenth century. However, these purposes were only indicators, or typical, of the various charitable purposes that would be recognized by the Crown. They were not exclusive. The preamble provides:

whereas lands . . . have been heretofore given . . .
by the queen . . . her most noble progenitors [and]
other well [intentioned] persons, some for the
relief of [the] aged, . . . some for maintenance of
[the] sick, . . . [some for schools, bridges, and
highways and some for the benefit of the poor]. . .

See Statute of Charitable Uses (preamble) (1601).

The two major goals of the Statute of Uses were to 1) establish commissions throughout England so that misapplication of charitable trusts could be investigated and 2) define "charitable purposes" so that the various commissions would know what trusts to investigate and protect. These common law beginnings of organized philanthropy have had a tremendous influence on our modern day charitable framework, especially concerning tax-exempt charities.

254. See, e.g., Treas. Reg. § 1.501(c)(3)-1(d)(2) (1990). Section 1.501(c)(3)-1(d)(2) provides in part that:

[Charity] includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare. . .

Id.

255. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.”²⁵⁶

Given that the public benefit subsidy theory espouses a separate-from-government role for tax-exempt charities, it would be highly inconsistent with this theory to suggest that charities are subject to constitutional law restrictions that constrain government activity. If we ever reach the day when the Supreme Court invalidates race-based affirmative action by government, this might inevitably mean that state colleges and universities could not use the race of an applicant as a factor when making its admissions decisions. While this might mean the end to one type of social justice action by government (race-based affirmative action that is), it should not mean the end to that type of action by tax-exempt charities, at least not if the public benefit subsidy theory is an accurate reflection of charitable existence. Indeed, pursuant to the public benefit subsidy theory, the fact that government is constitutionally prohibited from doing that which many in society see as remedying the lingering effects of slavery is a more than adequate justification for tax-exempt charities to act. Thus, the Service’s efforts in using constitutional law principles to decide issues of “established public policy” is inconsistent with the entire underpinnings for why tax-exempt charities exist.

V. CONCLUSION

When the Supreme Court decided in *Bob Jones University* that charities cannot violate established public policy, it failed to provide the Service with sufficient guidance on how to use various sources of public policy to determine “established public policy” on particular matters. As a result, the Service has taken upon itself to define public policy by looking almost exclusively to constitutional law principles. The Bishop Estate TAM is a prime example of this strong reliance by the Service on constitutional law principles. In evaluating whether the Bishop Estate’s exclusion of persons having no Hawaiian ancestry was consistent with “established public policy,” the Service relied on a line of Fourteenth Amendment cases. These cases hold that state actors cannot make distinctions based on race unless those distinctions are “necessary” to accomplish “compelling” government interests. None of these cases involve scrutiny of actions by private actors, only state actors. To make matters worse, the Service apparently relied on a Fifteenth Amendment case, *Rice v. Cayetano*, in deciding whether the Bishop Estate’s “no non-Hawaiian” policy is consistent with Fourteenth Amendment principles and, hence, with established public policy.

256. Id. at 587-88.

It is entirely inappropriate for the Service to look almost exclusively to constitutional law principles to decide when a charity violates established public policy. The public policy doctrine is a statutory principle, not a constitutional one, emanating from section 501(c)(3) of the Internal Revenue Code. As such, the public policy doctrine defines acceptable conduct for those entities subject to the statute - charities. While some charities may be state actors and, thus also subject to separate restrictions imposed by constitutional law, most charities are not state actors. The Supreme Court has been very clear to point out that, absent special statutory enactments like the 1964 Civil Rights Act, private actors such as charities are not directly subject to constitutional law provisions like the Equal Protection Clause of the Fourteenth Amendment.

The Service's significant reliance on Equal Protection Clause principles to decide whether a charity violates established public policy presents some interpretational concerns in regards to race-based affirmative action that are not insignificant. For one, it is not at all clear what standard of review the Service should use to determine if a particular charity's race policies violate public policy. Over the years, the Supreme Court has fluctuated between strict scrutiny and intermediate level scrutiny for benign, as opposed to invidious, racial preferences. What standard should the Service use for benign affirmative action policies by charities? Even if the Service chooses the correct standard, how should it use a standard that requires consideration of compelling government interests in circumstances where the actor is not governmental? A second concern with applying Equal Protection Clause standards to charities relates to the current circuit split on the issue of whether race can ever constitutionally be used as a factor in making government decisions. If some circuits say considering race is acceptable, some circuits say considering race is not acceptable, and the Supreme Court has not addressed the issue, how is the Service to decide which circuit to follow? A third concern relates to the nature of the Service as a tax agency – it lacks the necessary expertise to decide either whether a particular use of race is necessary or whether the reason for its use is compelling.

The Service should await guidance from Congress on the issue of how constitutional law principles should affect tax law decisions about the tax-exemption for charities authorized by section 501(c)(3) of the Internal Revenue Code. Alternatively, the Service could engage in a type of analysis that considers a variety of sources constitutional, non-constitutional, federal and non-federal – in deciding if a particular charity is in violation of “established public policy.” Thus, this Article examines the relationship between constitutional law and tax law in an effort to continue discussion of how federal tax authorities should respond when a tax-exempt charity engages in activities that would be unconstitutional if done by a government actor. Additionally, this Article examines the matter of whether a private charity should be permitted to use the Constitution as a shield in tax cases, like the Boy

Scouts did in a non-tax case, to prevent revocation, on public policy grounds, of its 501(c)(3) tax exemption.