HOW MIGHT A UNIVERSITY'S TAX-EXEMPT STATUS NOT BE REVOKED BY THE IRS FOR LEGACY AND DONOR ADMISSIONS, PARTICULARLY AFTER *STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT & FELLOWS OF HARVARD COLLEGE*, AND AFTER *LOPER BRIGHT ENTERPRISES V. RAIMONDO*?

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I. INTRODUCTION

Particularly after the Supreme Court decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard University*[1] ("*SFA"*), holding admissions programs failed strict scrutiny by using race as a stereotype or negative, a number of law review articles have attempted to utilize the reasoning of the majority opinion particularly in a variety of settings.[2]

Some have even attempted to use *SFA* in the area of taxation.[3] One area in which *SFA* might be utilized is to attempt to revoke the tax-exempt status of

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

2. *See, e.g.*, Lauren Rogal, *Legacy and Largesse: The Tax Law of College Admissions*, 43 VA. TAX REV. 169 (2023); Laura Snyder, *What a Decision on Affirmative Action Teaches About Taxation*, 51 RUTGERS L. REC. 102 (2023); Deborah Hellman, *The Zero-Sum Argument, Legacy Preferences, and the Erosion of the Distinction Between Disparate Treatment and Disparate Impact*, 109 VA. L. REV. ONLINE 185 (2023); Harvard Law Review*, Title VI – College Admissions – Community Groups Argue Harvard's Legacy and Donor Admissions Policy is Illegal Race Discrimination – Complaint Under Title VI of the Civil Rights Act of 1964, Chica Project v. President & Fellows of Harvard College (Off. for C.R., U.S. Dep't. of Educ., filed, July 3, 2023)*, 137 HARV. L. REV. 1272 (Feb. 2024); Jeh Charles Johnson, *The Demise of Affirmative Action: Where Do We Go From Here?*, 95 N.Y. STATE BAR ASS'N J. 8 (2023); Justin Cole & Gregory Curfinan, *Back to Bakke: The Compelling Need for Diversity in Medical School Admissions*, 22 YALE J. HEALTH POL'Y, L. & ETHICS 60 (2023); Nicole J. Benjamin, *A Supreme Challenge*, R.I. BAR J., Sept./Oct. 2023, at 3.

3. *See generally* Rogal, *supra* note 2; *see generally* Snyder, *supra* note 2.

universities for discrimination in admissions, particularly in granting legacy (close relatives of alumni) and donor (financial contributor) admissions.[4] It might be argued legacy and donor admissions violate explicit tax regulations for tax-exempt status by providing a private benefit and/or that such admissions violate a strong national policy against racial discrimination in education and thus provide a basis to deny tax-exempt status.

However, it is the position of this article, based on past similar attempts and arguments to revoke tax-exempt status, that such a social policy decision or political question should not be ceded to the I.R.S., but rather should be determined by the legislature or the tax-exempt institutions themselves.

II. I.R.S. DEFERENCE TO THE LEGISLATURE TO DETERMINE STRONG NATIONAL POLICIES?

In light of *SFA*, Professor Lauren Rogal makes a relatively convincing case that the I.R.S. could revoke Harvard's tax-exempt status because of legacy and donor preferences.[5] Even if a case can be made for revoking the tax-exempt status of a university, the I.R.S. should avoid exercising such authority, in deference to the legislature deciding issues of political and social consequence.[6]

In Bob Jones University's 1983 refund lawsuit against the I.R.S. for revoking its tax-exempt status so Social Security taxes were due, Justice Powell, concurring, and Justice Rehnquist, dissenting, were hesitant in acknowledging the I.R.S.'s power to revoke tax-exempt status.[7]

The Supreme Court found there was an established national policy against racial discrimination in education, and that the I.R.S. could properly conclude it could not grant a tax-exempt status application when the taxpayer so racially discriminated.[8] Justice Rehnquist, in his dissent, refused at all to acquiesce in the I.R.S.'s determination that Bob Jones University's discriminatory conduct allowed for the revocation of its tax-exempt status.

> I have no disagreement with the Court's finding that there is a strong national policy in this country opposed to racial discrimination. I agree with the Court that Congress has the power to further this policy by denying § 501(c)(3) status to organizations that practice racial discrimination. But as of yet Congress has failed to do so. Whatever the reasons for the failure, this Court should not legislate for Congress.[9]

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4. *See, e.g.*, Rogal, *supra* note 2.

5. *See generally id.*

6. *See* John R. Dorocak, *How Might a Church's Tax-Exempt Status (and Other Advantages) Be Revoked Procedurally for Opposition to Same-Sex Marriage or Be Defended Possibly as Free Exercise of Religion?*, 53 WILLAMETTE L. REV. 161, 172 (2017).

7. Bob Jones Univ. v. United States, 461 U.S. 574, 606-12 (1983) (Powell, J., concurring); *id.* at 622 (Rehnquist, J., dissenting).

8. *Id.* at 575 (syllabus).

9. *Id.* at 622 (Rehnquist, J., dissenting).

Although he concurred in the *Bob Jones University* decision, Justice Powell had similar misgivings about ceding power to the I.R.S. concerning social or political decisions.

> I am unwilling to join any suggestion that the [I.R.S.] is invested with the authority to decide which public policies are sufficiently "fundamental" to require denial of tax-exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote "public policy."… This Court often has expressed concern that the scope of an agency's authorization be limited to those areas in which the agency may be said to have expertise….
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> ….
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> These should be legislative policy choices. It is not appropriate to leave the I.R.S. "on the cutting edge of developing national policy."[10]

In an analogous area, for some time now, the I.R.S. has suspended inquiries concerning revoking churches' tax-exempt status, at least ostensibly because of a procedural problem, rather than because of any judgment on the agency's part that such inquiries are beyond the agency's authority.[11] The I.R.S. described the *United States v. Living Word Christian Center* litigation as, "[i]n 2009, a federal district court held that the person holding this position was of insufficient rank to make the Section 7611 determination, which led the I.R.S. to suspend tax inquiries of houses of worship."[12] Furthermore, the I.R.S. declared in Revenue Procedure 2016-3 that it will not rule in advance whether an organization is or continues to be exempt under § 501(a) as a § 501(c) organization.[13]

Some have suggested the question of whether a church's tax-exempt status should be revoked for failure to accept, for example, same-sex marriage, might be a non-judicial political question.[14] This author and others have argued judicial reluctance, as expressed by Justices Rehnquist and Powell in *Bob Jones University*, and administrative reluctance, as expressed by the I.R.S. regarding the revocation of churches' tax-exempt status, should prevail on questions of a social and political nature.[15]

In any event, it may be that the case against a university's tax-exempt status for legacy and donor admissions might not be as clear or convincing as some might argue.

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10. *Id.* at 609-12 (Powell, J., concurring) (quoting Jereome Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301, 301 (1978)); Dorocak, *supra* note 6, at 170 n.37 and accompanying text.

11. Erika K. Lunder & L. Paige Whitaker, *Churches and Campaign Activity: Analysis Under Tax and Campaign Finance Law*, CONG. RSCH. SERV., 7-8 (2012).

12. *Id.* at 4 n.23 and accompanying text.

13. Rev. Proc. 2016-3, 2016-1 I.R.B. 126; Dorocak, *supra* note 6, at 171-72.

14. Norman Leon, *The Second Circuit's Application of Standing in In Re: United States Catholic Conference: Another Plea for Clarity and Consistency*, 57 BROOK. L. REV. 429, 455 (1991) (citing Flast v. Cohen, 392 U.S. 83, 95 (1968)).

15. *See* Dorocak, *supra* note 6, at 172; *see generally* Lindsay N. Kreppel, *Will the Catholic Churches' Tax-Exempt Status Be Threatened Under the Public Policy Limitation of Section 501(c)(3) if the Same-Sex Marriage Becomes Public Policy?*, 16 DUQ. BUS. L. J. 241 (2014).

III. THE TAX LAW CASE AGAINST TAX-EXEMPT STATUS OF UNIVERSITIES FOR LEGACY AND DONOR ADMISSIONS?

As previously indicated, Professor Lauren Rogal attempts to make a case for the revocation of a university's tax-exempt status because of legacy and donor admissions.[16] I.R.C. § 501(c)(3) provides organizations operated exclusively for educational, charitable, and scientific purposes, among others, are tax-exempt.[17] I.R.C. § 501(c)(3) also provides an organization tax-exempt under the Code subsection must be organized and operated so "no part of the net earnings of which inures to the benefit of any private shareholder or individual."[18] A § 501(c)(3) organization may not have private inurement[19] to certain individuals or a private benefit to private rather than public interests.[20]

In applying the above-discussed rules in depth to legacy and donor admissions at universities, Professor Rogal first concludes there is not private inurement in such admissions.

> Although legacy admissions target individuals with a personal connection to the university, they do not constitute private inurement because the beneficiaries are not insiders under the Code. Alumni do not individually wield substantial influence over the affairs of the university by virtue of their alumnus status….
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> Donors are also unlikely to be insiders for private inurement purposes. The regulations state that one factor pointing towards insider status is the contribution of 2% of the organization's total revenues over a five-year period.[21]

In the Virginia Tax Review article, Professor Rogal does find private benefit to alumni as secondary beneficiaries, so the private benefit requirement of Treasury Regulation § 1.501(c)(3)-1(d)(ii) status is violated.[22]

> The secondary beneficiaries of legacy preferences are alumni relatives, usually parents….
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> Alumni satisfy the quantitative requirement for a charitable class. They typically number in the thousands…. However, the class as a whole does not "possess charitable characteristics," and legacy programs do not target those class members who individually qualify. A legacy admissions program that solely assisted the children of *low-income* alumni would presumably satisfy the *American Campaign Academy* analysis[.] [23]

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16. *See* Rogal, *supra* note 2.
17. I.R.C. § 501(c)(3).
18. *Id.*
19. Treas. Reg. §§ 1.501(a)-(1)(c) (2017), 53.4958-2(a)(1) (2008), 53.4958-3(b) (2002).
20. Treas. Reg. § 1.501(c)(3)-11(d)(ii); *see* Rogal, *supra* note 2, at nn.97-113 and accompanying text.
21. Rogal, *supra* note 2, at 189.
22. *Id.* at 189-90.
23. *Id.* at 190 (citing Am. Campaign Acad. v. Comm'r, 92 T.C. 1053 (1989)).

In *American Campaign Academy v. Commissioner*, "[t]he Academy trained students in political campaign skills… but in practice, only selected Republicans."[24] Professor Rogal writes how, in *American Campaign Academy*,

> [t]he Court did not address whether the primary beneficiaries – the students – comprise a charitable class. Rather it ruled that the secondary beneficiaries – GOP candidates and organizations – were private and not incidental. First, they were a private class because, while numerous and indefinite, they did not individually "possess charitable characteristics" such as "poor, distressed, underprivileged, religious, educational, scientific, etc." Second, the benefit was not incidental[.][25]

In the *American Campaign Academy* case, the I.R.S. did not discuss a private benefit to primary beneficiaries, the students, but Professor Rogal argues that such a position is incorrect, although consistent with Revenue Ruling ("Rev. Rul.") 56-403.[26] In Rev. Rul. 56-403, "[t]he Service ruled in 1956 that awarding scholarships to members of a specific fraternity furthered an educational purpose."[27] In discussing Rev. Rul. 56-403, Professor Rogal admits, "[e]ducational purposes, however, do not necessitate any beneficiary characteristics. Traditionally, so long as the class was sufficiently large and indefinite, tax authorities paid cursory attention to qualitative parameters."[28] Or, in other words, educational purpose did not require a finding that the primary beneficiaries possessed charitable characteristics.

Thus, it appears some might argue tax-exempt status of a university should be revoked for legacy and donor admissions because of a private benefit to secondary beneficiaries (alumni relatives), and the Service is incorrect in a position which apparently would not find a private benefit to primary beneficiaries, the students. It would appear the position thus advocated would fall within what Justice Rehnquist labeled in *Bob Jones University* as a failure by Congress to act so "[t]his Court should not legislate for Congress."[29] Even if the argument could be said to be within the I.R.S. agency's "agency's authorization" as expressed by Justice Powell in *Bob Jones University*, it would seem Justice Powell's concerns about the agency deciding "which public policies are sufficiently 'fundamental'" and his concern that the agency "not to promote 'public policy'" would still apply.[30]

IV. DEFERENCE TO I.R.S. POLICY MAKING?

One problem with the analysis that a university's tax-exempt status should be revoked by the I.R.S. because of private benefit to secondary beneficiaries,

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24. *Id.* at 188 nn.145-47 and accompanying text.
25. *Id.* at 188 (quoting *Am. Campaign Acad*, 92 T.C. at 1077).
26. *Id.* at 190 (referencing Rev. Rul. 56-403, 1956-2 C.B. 307).
27. *Id.* at 186 n.125 and accompanying text.
28. *Id.* at 186.
29. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 622 (Rehnquist, J., dissenting).
30. *Id.* at 611 (Powell, J., concurring) and accompanying text.

likely alumni parents, would, of course, be, and likely be readily admitted, that the I.R.S. has had a long and consistent policy of allowing universities tax-exempt status, despite legacy and donor preferential admissions.[31] Professor John D. Colombo characterizes the academy in *American Campaign Academy* as a captive school.[32]

> [N]o obvious line exists for deciding when benefits conferred by an organization otherwise clearly engaged in "training the individual" are "too private."[33] For example, the I.R.S. apparently has no problem with exempting organizations that conduct professional seminars or training, such as continuing legal education.[34] Clearly, the benefits of these organizations are limited to a fairly narrow group. Law students familiar with the "slippery slope game" will quickly recognize the trap of trying to distinguish between "proper" limited audiences and "improper" ones…. Obviously, the private benefit limitation, whatever it may be, leaves entirely too much discretion to the I.R.S. and courts to decide when an exemption is warranted and virtually no guidelines for exercising it.[35]

It seems clear Professor Rogal's analysis turns on finding a private benefit to secondary beneficiaries for legacy and donor contributions, moving away from the I.R.S.'s analysis that it does not examine private benefit to primary beneficiaries in an educational institution. This analysis may well be appealing, but the question may be, how does the I.R.S. move from a position it has apparently maintained, that private universities may be tax-exempt, despite legacy and donor admissions?

In applying the principles of the recently overruled Supreme Court case *Chevron, U.S.A. v. Natural Resources Defense Council*, the Tax Court, quoting other sources, indicated, "[s]harp changes of agency course constitute 'danger signals' to which a reviewing court must be alert."[36]

> If a court, using traditional tools of statutory construction, such as the plain language, structure, and legislative history of the law, ascertains that Congress has addressed the precise question at issue, that is the end of the matter. Thus, "If Congress has spoken to the issue with which we are concerned, there is no need for deference" to an agency's construction of the law.[37]

The Tax Court further explained *Chevron* as follows.

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31. *See, e.g.*, John D. Colombo, *Why Is Harvard Tax Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 881-82 (1993).

32. *Id.* at 850-51.

33. *Id.* at 851.

34. *Id.* (citing Kentucky Bar Found., Inc. v. Comm'r, 78 T.C. 921 (1982), Rev. Rul. 74-16 1974-1 C.B. 126, Rev. Rul. 65-298 1965-2 C.B. 163, and Rev. Rul. 68-504, 1968-2 C.B. 211).

35. *Id.*

36. Ga. Fed. Bank v. Comm'r, 98 T.C. 105, 110 (1992) (citing West v. Bowen, 879 F.2d 1122, 1127 (3d Cir. 1989); *see generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

37. *Ga. Fed. Bank*, 98 T.C. at 108 (citing *Chevron*, 467 U.S. at 842-43) (internal citations omitted).

> If, on the other hand, the court concludes that the statute is silent or ambiguous with respect to the specific issue, the question for the court is "Whether the agency's answer is based on a permissible construction of the statute."
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> ….
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> Many factors have been applied to aid in the decision as to whether the agency's interpretation is a reasonable construction of the statute.[38]

The Tax Court continued as follows: "If an agency reverses a prior statutory interpretation, however, its most recent expression maybe accorded less deference than a consistently maintained position…. An agency which changes its position must acknowledge that its interpretation has shifted and must supply a persuasively reasoned explanation for the change."[39]

Thus, for the inquiry of whether a university's tax-exempt status might be revoked for legacy or donor admissions, a first question, under *Chevron,* would have been whether or not I.R.C. § 501(c)(3) is ambiguous concerning the tax-exempt status of universities which grant the legacy and donor admissions. The second question would have been whether or not the I.R.S.'s interpretation of said statute is permissible or reasonable under a *Chevron* analysis, as that interpretation has apparently been for many years, allowing the exemption, or as it might be, if changed to denying the exemption.

However, in *Loper Bright Enterprises v. Raimondo*, in the majority opinion, Justice Roberts wrote that the Administrative Procedures Act "incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions."[40] In *Loper Bright Enterprises*, the Supreme Court reversed *Chevron* and held the Administrative Procedures Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority.[41]

As previously discussed, I.R.C. § 501(c)(3) provides organizations operated exclusively for educational, charitable, and scientific purposes, among others, are tax-exempt.[42] I.R.C. § 501(c) also provides an organization tax-exempt under the Code must be organized and operated so "no part of the net earnings of which inures to the benefit of any private shareholder or individual."[43] Besides private inurement to certain individuals,[44] the I.R.S.'s Treasury Regulations make clear there may not be a private benefit to private rather than public interests.[45]

In reviewing I.R.C. § 501(c) to determine whether a university is tax-exempt despite legacy and/or donor admissions, under the previous *Chevron* analysis, or the current *Loper Bright Enterprises* analysis, § 501(c)(3) would first need to be determined to be ambiguous, for deference to the I.R.S.'s administrative inter-

38. *Id.* at 109 (quoting *Chevron*, 467 U.S. at 843).
39. *Id.* at 109-10.
40. *Loper*, 144 S. Ct. at 2262.
41. *Id.*
42. I.R.C. § 501(c)(3).
43. *Id.*
44. Treas. Reg. §§ 1.501(a)-(1)(c) (2017), 53.4958-2(a)(1) (2008), 53.4958-3(b) (2002).
45. Treas. Reg. § 1.501(c)(3)-(1)(d)(ii) (2017).

pretation under *Chevron*, or for presumably independent judicial judgement under *Loper Bright Enterprises*. I.R.C. § 501(c)(3) appears fairly clear and unambiguous in specifying tax-exempt status for organizations operated exclusively for educational purposes such as universities.

Any statutory ambiguity would likely not arise in the matter of private inurement to certain individuals. However, where there is ambiguity, some might suggest, is in whether or not there is private benefit to either primary or secondary beneficiaries.[46] The argument to revoke tax-exempt status of universities for legacy and donor admissions, then, turns on interpretation of the I.R.S.'s own regulations about private benefit to primary beneficiaries, such as the students, or secondary beneficiaries, such as parent alumni.[47] As indicated, the Tax Court itself has stated and quoted others, "[s]harp changes of agency course constitute 'danger signals' to which a reviewing court must be alert."[48] The I.R.S. has a long history of granting tax-exempt status to educational institutions, despite educational institutions apparently having a long history of legacy and donor admissions.[49] For the revocation of tax-exempt status of a university for legacy or donor admissions, private benefit to those students so admitted or to secondary beneficiaries, such as their parent alumni, must be found.

As indicated, to find a private benefit to such primary beneficiaries would apparently require rejecting Rev. Rul. 56-403 which regards educational purpose as not necessitating any beneficiary charitable class characteristics for primary beneficiaries.[50] Rejecting Rev. Rul. 56-403 would, of course, appear to be a "sharp change" in administrative position. Finding a private benefit to secondary beneficiaries, such as parent alumni, under the *American Campaign Academy* case, might be a defensible position,[51] but of course would be a "sharp change" from an I.R.S. position of consistently granting tax-exempt status to educational institutions despite legacy and donor admissions. Likely, the benefit in *American Campaign Academy* to secondary beneficiaries is much more "private" than the benefit to alumni or donor parents.

Some strong national policy might be sufficient to overcome a university's tax-exempt status, such as the policy against racial discrimination in the *Bob Jones University* litigation. Possibly First Amendment free speech or free exercise of religion rights might weigh against the revocation of tax-exempt status, although Justices Powell and Rehnquist, as previously indicated, have cautioned against the

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46. *See supra* notes 22-28 and accompanying text.

47. For a recent Supreme Court case in which the Court, in light of *Loper Bright Enterprises*, granted certiorari and then vacated and remanded a D.C. Court of Appeals case, upholding a Tax Court case, which, in turn, granted the I.R.S. summary judgement based on the reasonableness of a Treasury Regulation, Treas. Reg § 301.7623-2(b), under I.R.C. § 7623 regarding the whistle-blower rewards to an informant, *see* Lissack v. Comm'r, 144 S. Ct. 2707 (2024), *vacating and remanding*, 68 F.4th 1312 (D.C. Cir. 2023), *aff'g* 157 T.C. 63 (2021); Maureen Leddy, *SCOTUS Revives Whistleblower's Claim After Chevron Overturned*, THOMAS REUTERS (July 5, 2024), https://tax.thomsonreuters.com/news/scotus-revives-whistleblowers-claim-after-chevron-overturned/?.

48. *See supra* note 36 and accompanying text.

49. *See* Colombo, *supra* note 31 and accompanying text.

50. *See supra* notes 26-28 and accompanying text.

51. *See supra* notes 22-25 and accompanying text.

I.R.S. deciding, as Justice Powell stated, "which public policies are sufficiently 'fundamental'" and which do "not to promote 'public policy.'"[52]

V. STRONG NATIONAL POLICIES AGAINST AND FOR TAX-EXEMPT STATUS OF UNIVERSITIES?

Despite Justices Powell's and Rehnquist's reservations about the I.R.S. determining fundamental and public policy, the Supreme Court majority in *Bob Jones University* held the I.R.S. could determine there was a strong national policy against racial discrimination in education so it could deny tax-exempt status to Bob Jones University.[53] The majority opinion explained as follows:

> Until 1970, the IRS extended tax-exempt status to Bob Jones University under § 501(c)(3). By letter of November 30, 1970… the IRS formally notified the University of the change in IRS policy, and announced its intention to challenge the tax-exempt status of private schools practicing racial discrimination in their admissions policies.[54]

The Court further explained the procedural history.

> On January 19, 1976, the IRS officially revoked the University's tax-exempt status, effective as of December 1, 1970, the day after the University was formally notified of the change in IRS policy…. [A]fter its request for a refund was denied, the University instituted the present action….[55]
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> ….
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> In Revenue Ruling 71-447, the IRS formalized the policy first announced in 1970, that § 170 and § 501(c)(3) embraced the common law "charity" concept. Under that view, to qualify for a tax exemption pursuant to § 501(c)(3), an institution must show, first, that it falls within one of the eight categories expressly set forth in that section, and second, that its activity is not contrary to settled public policy.[56]
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> ….
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> Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the Congressional purposes. 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.[57]

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52. Bob Jones Univ. v. United States, 461 U.S. 574, 611 (1983) (Powell, J., concurring); *see also supra* note 30 and accompanying text; *see infra* note 70 and accompanying text.

53. *Bob Jones Univ.*, 461 U.S. at 575.

54. *Id.* at 581.

55. *Id.* at 581-82.

56. *Id.* at 585.

57. *Id.* at 586.

The Court explained, "[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."[58] The Court further explained, "[o]ver 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."[59]

In light of the language in the Supreme Court's leading case against Bob Jones University, can it be said there is a firm national policy against legacy and donor admissions to universities so that university's tax-exempt status should be revoked or denied? The *Bob Jones University* opinion stated, "[w]e emphasize, however, that these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy."[60]

Some Massachusetts-based organizations have filed a complaint with the United States Department of Education's Office of Civil Rights alleging that Harvard's practices of preferring "applicants whose relatives are alumni or donors in the undergraduate admissions process constitutes illegal race discrimination under Title VI of the Civil Rights Act of 1964."[61] If such a complaint is successful, is a violation of the strong national policy against racial discrimination in education established so that the I.R.S. could then revoke Harvard's and similar educational institutions' tax-exempt status? If such a decision is left to the I.R.S., it appears this may be the type of social engineering by the administrative agency Justices Powell and Rehnquist warned against. And it may be that the racial discrimination, which might be able to be shown, would have a disparate impact on racial minorities through the use of legacy and donor admissions.[62]

> To make out a prima facie case for a Title VI disparate impact claim, complainants must (1) identify a specific policy or practice that (2) causes (3) a significant racial disparity that results in (4) harm or adversity…. The complaint ultimately falls short in meeting the third element: establishing that there is a significant racial disparity.[63]

At least one explanation of the Title VI claim against Harvard states, "[t]o find that Harvard violated Title VI, the Department of Education would need to compare the racial makeup of qualified students to the racial makeup of students admitted to Harvard."[64] The same source indicates, "[b]ecause of these dual preferences [preferences to legacies and children of donors as well as affirmative action], it is possible that no significant racial disparity will emerge when

58. *Id.* at 591.

59. *Id.* at 593.

60. *Id.* at 598.

61. *Chica Project*, *supra* note 2, at 1272-73.

62. *Id.* at 1276, 1279-81; *see also* Hellman, *supra* note 2.

63. *Chica Project*, *supra* note 2, at 1276 (citing U.S. Dep't of Just. Title VI Legal Manual § 7.C at VII-9).

64. *Id.* at 1279 (citing Title VI Legal Manual, § 7A at VII-3 n.2 "(noting cases decided under Title VII may be instructive for agencies)").

comparing the overall groups of qualified students to admitted students… based on 2009-2014 data[.]"[65] In addition, the source adds:

> If the Department of Education concludes the prima facie case has been satisfied, the burden shifts to Harvard to demonstrate their practices are an educational necessity… but the Department of Education might not be convinced that legacy preferences significantly contribute to the financial well-being of the institution – empirical evidence suggest legacy preferences do not actually cause increased alumni donations.[66]

Thus, the showing would need to be that legacy and donor preferences result in significantly more white students admitted than would otherwise be the case.[67] If the I.R.S. has apparently suspended inquiries concerning revoking churches' tax-exempt status, would not the agency be similarly circumspect about revoking a university's tax-exempt status?[68] Churches taking political positions on issues such as California's Proposition 8 ban on same sex marriage and religious doctrine positions opposed to same sex marriage might be able to assert First Amendment freedom of speech and free exercise of religion rights to prevent any revocation or denial of tax-exempt status.[69]

Secular universities might not be able to assert a First Amendment free exercise right, although all universities might be able to assert a First Amendment free speech right. But could either right be asserted against a revocation or denial of tax-exempt status? Bob Jones University and other institutions did not succeed in asserting free exercise rights in the face of revocation and denial of tax-exempt status on account of racial discrimination in education.[70]

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65. *Id.* at 1280.

66. *Id.* at 1280-81 (citing, *inter alia*, Chad Coffman, Tera O'Neil & Brian Star, *An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities*, *in* AFFIRMATIVE ACTION FOR THE RICH, 101, 101-02 (Richard D. Kahlenberg ed., 2010)).

67. *Id.* at 1275 nn.28-34.

68. *See supra* notes 11-15 and accompanying text.

69. *See* Dorocak, *supra* note 6, at 172; *see generally* John R. Dorocak & Lloyd E. Peak, *Political Activity of Tax-Exempt Churches, Particularly After Citizens United v. Federal Election Commission and California's Proposition 8 Ban on Same Sex Marriage: Render Unto Caseser What Is Caeser's*, 9 FIRST AMEND. L. REV. 448 (2011).

70. Bob Jones Univ. v. United States, 461 U.S. 574, 602-06 (1983); *but see* AAUP *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AMER. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure (last visited Aug. 1, 2024). Although the AAUP 1940 Statement addresses mainly academic freedom and tenure of those teaching, the 1970 Interpretive Comments state the following in part at n.1 of those Comments:

> [P]articularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in *Keyishian v. Board of Regents*, 385 US 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

VI. CONCLUSION: DECISION MAKING BY LEGISLATURES AND UNIVERSITIES?

Harvard University was founded in 1636,[71] long before the colonists revolted against oppressive taxes.[72] It may seem somewhat anomalous that Harvard and other universities might lose their tax-exempt status because of the decision by an administrative government agency as to what constitutes a strong government policy.

Traditionally, diversity in charitable purposes has likely been the norm. Justice Powell wrote in the *Bob Jones University* 1983 Supreme Court case, "[e]ven more troubling to me is the element of conformity that appears to inform the Court's analysis."[73] Justice Powell continued, "[i]n my opinion, such a view of § 501(c)(3) ignores the important role played by tax-exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."[74] At least one commentator, perhaps foreseeing the *SFA* case, has been quoted elsewhere arguing for the right of tax-exempt charities to discriminate, contrary to public policy, on the basis of public benefit.

> 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 the applicant as a factor when making its admissions decisions. While this might mean an end to one type of social justice action by the government (race-based affirmative action that is), it should not mean the end of that type of action by tax-exempt charities, at least not if the public benefit theory is an accurate reflection of charitable existence…. Thus the Service's efforts in using constitutional law principles to decide issues of "established

71. *The History of Harvard*, HARV. UNIV., https://www.harvard.edu/about/history/ (last visited Aug. 1, 2024).

72. John R. Dorocak, *What Would a Socialist Tax Look Like?*, 178 TAX NOTES FED. 561, 567 nn.60, 61, 109 TAX NOTES INTL. 471, 477 nn.60, 61 (2023) and accompanying text. ("Lately it seems there have been attempts to rewrite the narrative of the country's founding…. *See* Nikole Hannah-Jones, *The 1619 Project: A New Origin Story* (2021); and Mary Grabar, *Debunking the 1619 Project: Exposing the Plan to Divide America* (2021)."); ("The traditional narrative is that the United States was born out of a conservative revolution protesting, among other things, taxation without representation…. Compare Willard M. Wallace, 'American Revolution,' Encyclopedia Britannica (updated Dec. 4, 2022) ('The American Revolution was principally caused by colonial opposition to British attempts to impose greater control over the colonies' and to make them repay the crown for its defense of them during the French and Indian War (1754-63). Britain did this primarily by imposing a series of deeply unpopular laws and taxes, including the Sugar Act (1764), the Stamp Act (1765) and the so-called Intolerable Acts (1774).') with the Boston Tea Party's Ships & Museum, 'American Revolution' ('The American Revolution was an epic political and military struggle waged between 1776 and 1783 when 13 of Britain's North American colonies rejected its imperial rule. The protest began in opposition to taxes levied without colonial representation by the British monarchy and Parliament.)").

73. Dorocak, *supra* note 6, at 181 nn.96-97 and accompanying text (citing *Bob Jones Univ.*, 461 U.S. at 609 (Powell, J., concurring)).

74. *Id.*

public policy" is inconsistent with the entire underpinnings for why tax-exempt charities exist.[75]

As has been also noted elsewhere, Justice Thomas, dissenting in *Lawrence v. Texas*, wrote, in the governmental sphere, a particular law was "uncommonly silly" and still constitutional.[76] Justice Arthur Goldberg, concurring in the case Justice Thomas quoted from, *Griswold v. Connecticut*, suggested that there was "[a] right to be let alone," in the private sphere.[77]

If legacy or donor admissions are to be prohibited at a university, such action can be taken much more directly by the state for state educational institutions, by a private university of its own accord,[78] or by Congress amending § 501(c)(3) to prohibit a tax exemption.

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75. David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779, 847 (2002).

76. Dorocak, *supra* note 6, at 182 n.100 and accompanying text (citing Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting))).

77. *Id.* at 182 n.101 and accompanying text (citing *Griswold*, 381 U.S. at 494 (Goldberg, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

78. *See Chica Project*, *supra* note 2, at 1272 n.5 ("As of 2023, Colorado is the only state that has banned legacy admissions at public universities…." (citing Elliott Wenzler, *Two Years After Colorado Banned Legacy Admissions, the State's Public Colleges and Universities Say the Only Real Change is Perception*, COLO. SUN (Aug. 18, 2023, 3:55 AM), https://coloradosun.com/2023/08/18/two-years-after-colorado-banned-legacy-admissions-colleges-universities-say-the-only-real-change-is-perception.)) ("Several universities have ended legacy admissions of their own accord, including Texas A&M, the University of Georgia, and Johns Hopkins University." (citing Greg Winter, *Texas A&M Ban on "Legacies" Fuels Debate on Admissions*, N.Y. TIMES (Jan. 13, 2004), https://www.nytimes.com/2004/01/13/us/texas-a-m-ban-on-legacies-fuels-debate-on-admissions.html; Ronald J. Daniels, *Why We Ended Legacy Admissions at Johns Hopkins*, ATL. (Jan. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/01/why-we-ended-legacy-admissions-johns-hopkins/605131)); *see also* Soumya Karlamangla, *California May Ban Legacy Admissions at Universities*, N.Y. TIMES (June 17, 2024), https://www.nytimes.com/2024/06/17/us/california-legacy-admissions.html; Jaweed Khaleem, *California Lawmakers Pass Bill Banning Legacy and Donor College Admissions*, L.A. TIMES (Aug. 31, 2024, 3:00 AM), https://www.latimes.com/california/story/2024-08-31/california-moves-to-ban-legacy-and-donor-college-admissions **(**"In April, Maryland banned legacy admissions in all higher education, a month after Virginia did the same for public universities and colleges. Three years ago, Colorado became the first state to make legacy admissions illegal."); Michael T. Nietzel, *California Becomes Fifth State to Ban Legacy Admission Preferences*, FORBES, https://www.forbes.com/sites/michaeltnietzel/2024/10/01/california-becomes-5th-state-to-ban-legacy-admissions-preferences/ (Oct. 1, 2024, 5:21 AM). ("California Governor Gavin Newsom has signed [on September 30, 2024] Assembly Bill 1780, which prohibits legacy and donor preferences in the admissions decisions of the state's private, nonprofit institutions. The prohibition goes into effect in September of 2025…. With Newsom's signature of the bill, California becomes the fifth state to enact some type of ban against colleges giving an advantage to the relatives of alumni or institutional donors and the second state to do so for private institutions. In August, Illinois became the fourth state to pass a legacy admission prohibition, following Maryland, which enacted a legacy admission ban in April that applies to both public and private colleges. Colorado passed its ban in 2021, and Virginia did so earlier this year."); *see also California Bans Legacy and Donor Preferences in Admissions at Private, Nonprofit Universities*, GOVERNOR GAVIN NEWSOM (Sept. 30, 2024), https://www.gov.ca.gov/2024/09/30/california-bans-legacy-and-donor-preferences-in-admissions-at-private-nonprofit-universities/; *California Governor Signs Law Banning College Legacy and Donor*

Admissions, ASSOCIATED PRESS, https://apnews.com/article/california-colleges-legacy-admissions-1db4e1163c48045ce5c996ef7d5a9896# (Oct. 1, 2024, 2:28 PM).