Race Conscious Affirmative Action by Tax Exempt 501(c)(3) Schools and Colleges After *Students for Fair Admissions v. Harvard and UNC*

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Abstract

In the early 1980's, several years after its 1954 decision in *Brown v. Board of Education*, the Supreme Court decided a case that significantly impacted tax exempt 501(c)(3) schools that consider race in making admissions decisions. In *Bob Jones v. United States*, the Court held that a private school that denies admission to African Americans, or otherwise significantly penalizes them, is not entitled to 501(c)(3) tax exempt status. The Court based its decision on a principal that has come to be known as the public policy doctrine – an off-shoot of the well-established illegality doctrine. Pursuant to the public policy doctrine, the Court upheld the decision of the IRS to deny 501(c)(3) tax exemption to a private school because its actions violated clear established public policy. Among the many determinants of established public policy is constitutional doctrine. Thus, since it had held for decades that discrimination against African Americans in school admissions violates the 14th Amendment's EPC, the Court naturally concluded that a private school engaged in such discrimination is not entitled to 501(c)(3) tax exemption.

Since its decision in *Bob Jones*, the Court ruled many times on the constitutionality of race-based actions – both within the education sphere and in other arenas as well. While the Court has consistently stuck to its guns on the matter of discrimination against African Americans being constitutionally forbidden, it has not shown the same fortitude in its analysis of affirmative action; that is, race-conscious decisions aimed at helping (as opposed to hurting) African Americans and other minority groups. In fact, in a line of decisions involving the workplace and education, the Court has consistently recognized that, while invidious racial discrimination against minority groups is always prohibited, benign affirmative action is at times permissible if done in the right way and for the right reasons. Accordingly, in the field of tax-exempt law, the public policy doctrine has likewise consistently been interpreted as prohibiting invidious racial discrimination against African Americans and other minority groups while simultaneously permitting the use of race-conscious affirmative action.

In its October 2022 term, the Supreme Court will hear yet another in a line of cases aimed at addressing the issue of the 14th Amendment's limitations on the use of race in educational admissions. But this case is different. The Court's race-conscious affirmative action cases typically involved claims by White people that affirmative action aimed at helping African Americans or other minority groups impermissibly harms (or discriminates) against them as White people. In *SFAA v. Harvard/UNC*, instead of White people complaining about harm, it is one minority group (Asian Americans) who is alleging harm because of race-conscious affirmative action aimed at helping other minority groups (mainly African Americans, Hispanics and Native Americans). Specifically, the Court will decide whether race-conscious affirmative action is necessarily prohibited if it has a negative impact on members of other minority populations as opposed to on members of the majority White population. This essay will examine the potential impact of this important constitutional law decision on the applicability of the public policy doctrine as a possible limitation of the use of race-conscious affirmative action by 501(c)(3) tax exempt entities.