

THE YALE LAW JOURNAL

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Charitable Giving and Civil Rights: A Defense of Private Remedial Action

ABSTRACT. Private charitable organizations have long enjoyed the freedom to determine their mission and render appropriate charitable assistance, including by taking race, ethnicity, gender, and other traits into account when responding to the harmful effects of past discrimination, a practice this Feature terms “private remedial action.” The legality of this kind of trait-conscious assistance is strongly supported by the early American history of trait-based associations, federal tax law, and core values of free association. However, new legal and political attacks on affirmative action of all types have put charities on the defensive, leading many groups to change their programs and behavior even when the law is on their side. In one notable decision, *American Alliance for Equal Rights v. Fearless Fund*, a divided Eleventh Circuit panel forced a charity to stop awarding grants to Black women-owned businesses, finding that doing so likely violated the Civil Rights Act of 1866. In the wake of *Fearless Fund*, the Trump Administration has embarked on sweeping efforts to stop private organizations from engaging in what it terms “illegal discrimination” and “DEI.” If left to stand, rulings like *Fearless Fund* will threaten thousands of charitable programs, cause charities to operate from fear of losing their tax-exempt statuses rather than from commitments to their missions, and create a substantial chilling effect.

This Feature argues that these attacks on private remedial action are not supported in law or public policy and that the charities’ longstanding practice is not illegal discrimination. To the contrary, Congress has passed no civil-rights law targeting donative assistance, and public policy and the First Amendment right of expressive association strongly support the efforts of private groups to address social problems free from government interference. Absent a return to the pre-*Fearless Fund* status quo or new legislation, courts and the IRS should develop appropriate standards for private remedial action that are both consistent with a common-law approach to charity and mindful of the important role charities play in solving social problems in a free and pluralistic civil society.

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Tyler, LaVerne Woods, conference participants at the NYU National Center on Philanthropy and the Law, GW Law faculty-workshop participants, and Dean Stephen C. Payne for research support. Thanks also to Mikael Tessema and the entire editorial team at the *Yale Law Journal*, and to Fraser Trotter for research assistance. And, to JV.



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INTRODUCTION

George Floyd's murder in the spring of 2020 demonstrated for many that decades after the civil-rights movement, anti-Black discrimination remains a pervasive, intractable social problem.¹ A white police officer, bearing the uniform of the state, used excessive force to kill a defenseless Black man while bystanders watched, like a modern-day lynching. In the convulsion that followed, public and private actors pledged a renewed commitment to identifying and remedying societal discrimination.² Academics and journalists documented the many ways that centuries of systemic discrimination continue to affect Black people.³ Researchers documented pervasive racial inequalities in housing,⁴ access to credit and finance,⁵ and wages.⁶ Scholars pointed to a racial wealth gap⁷ and explained that even facially neutral laws can exacerbate racism when layered on top of longstanding inequalities.⁸

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1. See Amy Forliti, Steve Karnowski & Tammy Webber, *Chauvin Guilty of Murder and Manslaughter in Floyd's Death*, ASSOCIATED PRESS (Apr. 20, 2021, 10:06 PM EDT), <https://ap-news.com/article/derek-chauvin-trial-live-updates-04-20-2021-955a78df9a7a51835ad63afb8ce9b5c1> [https://perma.cc/E5SF-CAL5].
 2. See Audra D.S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html> [https://perma.cc/S8LB-8984]; Gilian Friedman, *Here's What Companies Are Promising to Do to Fight Racism*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/article/companies-racism-george-floyd-protests.html> [https://perma.cc/8DCH-HMKL].
 3. See Mitch Smith, Ernesto Lodoño & Glenn Thrush, *Here Are the Most Significant Findings Against the Minneapolis Police*, N.Y. TIMES (June 16, 2023), <https://www.nytimes.com/2023/06/16/us/police-doj-report-highlights-minneapolis.html> [https://perma.cc/5GUP-8BVP]; Council of Econ. Advisors, *Racial Discrimination in Contemporary America*, WHITE HOUSE (July 3, 2024), <https://bidenwhitehouse.archives.gov/cea/written-materials/2024/07/03/racial-discrimination-in-contemporary-america> [https://perma.cc/73B8-ETPM].
 4. Owen Minott, *Understanding and Addressing Racial and Ethnic Disparities in Housing*, BIPARTISAN POL'Y CTR. 4 (Dec. 2021), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2021/12/BPC_Racial-Disparities-Brief_RV2-3.pdf [https://perma.cc/XBW5-RUXU].
 5. Rocio Sanchez-Moyano & Bina Patel Shrimali, *The Racialized Roots of Financial Exclusion*, 15 CMTY. DEV. INNOVATION REV. 9, 10-12 (2021).
 6. Ellora Derenoncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, 136 Q.J. ECON. 169, 170 (2021).
 7. See generally MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2019) (discussing how the racial wealth gap was created and sustained).
 8. See generally DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021) (discussing how America's facially neutral tax code rewards the preferences and practices of white people while pushing Black people further behind).

A flood of new programs across the private, public, and nonprofit sectors followed.⁹ Many law firms instituted diversity fellowships for summer hiring.¹⁰ New scholarships and initiatives for racial minorities and other disadvantaged groups spread across higher education.¹¹ Nonprofit charities undertook a variety of diversity, equity, and inclusion (DEI) initiatives.¹² Private foundations adopted grant programs with a DEI focus.¹³ The federal government and state governments dispensed aid to traditionally disadvantaged groups.¹⁴

While these kinds of equal-opportunity programs were not new, their widespread implementation triggered a backlash that had been simmering for years. The catalyst was the Supreme Court's 2023 case, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*). There, the Court held that the use of race as a positive factor in higher-education admissions decisions violates the Equal Protection Clause of the Constitution.¹⁵ Although *SFFA* addressed just

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9. See, e.g., *Growing Tomorrow's Leaders*, MORRISON FOERSTER, <https://www.mofo.com/culture/diversity/diversity-training-programs> [<https://perma.cc/CF3E-QKNB>] (highlighting the firm's commitment to "promot[ing] greater inclusion," as indicated by membership of the Leadership Council on Legal Diversity); Kim Bhasin, Gerald Porter, Jr. & Jeff Green, *Corporations Face a Reckoning on Race*, BLOOMBERG NEWS (July 22, 2020, 11:59 AM ET), <https://www.bloomberg.com/news/storythreads/2020-07-22/corporations-face-a-reckoning-on-race> [<https://perma.cc/4YLM-JEHD>] (discussing corporate conversations about race in 2020).
 10. See, e.g., *Akin Gump Hosts Its Largest Strauss Diversity & Inclusion Scholar Class*, AKIN GUMP (July 6, 2020), <https://www.akingump.com/en/insights/press-releases/akin-gump-hosts-its-largest-strauss-diversity-and-inclusion-scholar-class> [<https://perma.cc/CX54-KJMZ>] (announcing the recipients of the firm's Diversity and Inclusion Scholarship).
 11. Sarah Wood & Walter Hudson, *A Year Later, Institutions Reflect on Systemic Changes Following the Murder of George Floyd*, EDUC. LEDGER (May 24, 2021), <https://www.theeducatedger.com/home/article/15109296/a-year-later-institutions-reflect-on-systemic-changes-following-the-murder-of-george-floyd> [<https://perma.cc/9RF8-3EFL>].
 12. Samantha Mercado, *Philanthropy and DEI: Building on Momentum Post-2020*, PHILANTHROPY NEWS DIG. (Nov. 14, 2023), <https://philanthropynewsdigest.org/news/philanthropy-and-dei-building-on-momentum-post-2020> [<https://perma.cc/DQ3P-29V3>]; *Foundations Report Greater Focus on Diversity, Equity, and Inclusion*, PHILANTHROPY NEWS DIG. (Oct. 10, 2023), <https://philanthropynewsdigest.org/news/foundations-report-greater-focus-on-diversity-equity-and-inclusion> [<https://perma.cc/D788-X9BM>].
 13. See *Grants for Organizational Diversity, Equity, and Inclusion*, NONPROFIT ORG. FOR PHILANTHROPIC INITIATIVES, <https://www.thenopi.org/toolkit/diversity-grants> [<https://perma.cc/BW26-R56G>] (outlining various private foundations with diversity, equity, and inclusion (DEI) grants, including the American Philosophical Foundation, the Hewlett Foundation, and the David and Lucile Packard Foundation).
 14. See Small Business Act, 15 U.S.C. §§ 631, 637(a)(4)(A) (2024); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 5003(c)(3)(A), 135 Stat. 4, 88-89; Notice of Funds Availability, Emergency Relief Program of 2022, 88 Fed. Reg. 74404, 74408 (Oct. 31, 2023).
 15. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 230 (2023).

one narrow aspect of affirmative action by state (or quasi-state) actors,¹⁶ an issue with a long and controversial pedigree,¹⁷ the case has become a tipping point for civil-rights policy on a grander scale. Chief Justice Roberts's proclamations—in dicta—that “[r]acial discrimination [is] invidious in all contexts,”¹⁸ and “[e]liminating racial discrimination means eliminating all of it,”¹⁹ are clarion calls to those opposing consideration of race or other identity-based traits.

On cue, one prominent interest group, the American Alliance for Equal Rights (AAER) argued that all racial or similar ethnic preferences, whether by state or private actors, and even for charitable purposes, cause social harm, violate the fundamental principle of equality, and are unlawful.²⁰ To that end, lawsuits by AAER and others challenging trait-conscious preferences have surged

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16. To comply with Title VI, federal agencies typically condition funding for private entities on prohibiting practices that discriminate on the basis of race. See C.R. Div., *Title VI of the Civil Rights Act of 1964*, U.S. DEP’T JUST. (Mar. 24, 2025), <https://www.justice.gov/crt/fcs/TitleVI> [<https://perma.cc/B5NY-3P7Q>]. While noting that “discrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds also constitutes a violation of Title VI,” the *SFFA* majority declined to decide whether Title VI was an independent basis for invalidating Harvard’s and the University of North Carolina’s admissions programs. *SFFA*, 600 U.S. at 198 n.2 (citing *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003)). Justices Gorsuch and Thomas would have construed Title VI independently of the Equal Protection Clause. *Id.* at 287 (Gorsuch, J., joined by Thomas, J., concurring).
 17. Initially in 1978, the Court allowed race-based affirmative action in admissions under the Equal Protection Clause (and Title VI), but subject to strict scrutiny, meaning that any plan must further a compelling government interest and be narrowly tailored to serve that interest. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (plurality opinion). Twenty-five years later in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court again upheld an affirmative action plan but with restrictions, including a time limit.
 18. *SFFA*, 600 U.S. at 214 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)).
 19. *Id.* at 206.
 20. *About American Alliance for Equal Rights*, AM. ALL. FOR EQUAL RTS., <https://americanallianceforequalrights.org/about> [<https://perma.cc/49P9-PJTT>] (noting that “an individual’s race should not be used to help them, or harm them, in their life’s endeavors”); Brief of Appellant at 11–12, *Am. All. for Equal Rts. v. Fearless Fund Mgmt.*, 103 F.4th 765 (11th Cir. 2024) (No. 23-13138). American Alliance for Equal Rights and Students for Fair Admissions were both founded by the same man, Edward Blum. See Daniel Wiessner, *Texas Grant Program Settles Conservative Group’s Race Bias Lawsuit*, REUTERS (Aug. 12, 2024, 1:25 PM ET), <https://www.reuters.com/legal/legalindustry/texas-grant-program-settles-conservative-groups-race-bias-lawsuit-2024-08-12> [<https://perma.cc/3W6W-QENR>].

across the country against both public²¹ and private DEI initiatives.²² In one startling, unprecedented ruling, *American Alliance for Equal Rights v. Fearless Fund*, a divided panel of the Court of Appeals for the Eleventh Circuit construed the Civil Rights Act of 1866 to mandate that the state interfere with the charitable work of a private association and shut down its grant program for the benefit of Black women-owned businesses,²³ promptly leading other private charitable associations to change or end their remedial programs.²⁴

On the heels of *Fearless Fund*, the second Trump Administration initiated a purge of DEI-related programs. As one of its first acts, the Administration

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21. *Vitolo v. Guzman*, 999 F.3d 353, 362, 365 (6th Cir. 2021) (finding that preferences based on race and gender under the American Rescue Plan Act failed strict and intermediate scrutiny under the Equal Protection Clause); *Strickland v. Dep't of Agric.*, 736 F. Supp. 3d 469, 484 (N.D. Tex. 2024) (finding the same as to USDA's use of race and sex in the Emergency Relief Program of 2022); *Ultima Servs. Corp. v. Dep't of Agric.*, 683 F. Supp. 3d 745, 774 (E.D. Tenn. 2023) (holding that the Small Business Act's rebuttable presumption of disadvantage based on race failed strict scrutiny and violated the Equal Protection Clause); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 476-77 (E.D. Wis. 2021) (granting a temporary restraining order after finding that a loan-forgiveness plan for farmers likely violated the Equal Protection Clause by considering race); *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1275, 1294 (M.D. Fla. 2021) (issuing a preliminary injunction after finding that the American Rescue Plan likely could not just use race to define "socially disadvantaged farmers and ranchers"); *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 509 (N.D. Tex. 2024) (challenging the premise of a government agency providing support for minority businesses). Some states adopted statutes to attack existing programs, including scholarships for minority students and women. *See, e.g., Diversity, Equity, and Inclusion Initiatives at Public Institutions of Higher Education*, 2023 Tex. Gen. Laws 2936 (codified at TEX. EDUC. CODE ANN. § 51.3525 (West 2024)) (prohibiting state colleges and universities from promoting DEI or giving preference on the basis of protected statuses).
 22. Lauren Aratani, *How the US Supreme Court's Affirmative Action Ruling Unleashed Anti-DEI Cases*, GUARDIAN (Sep. 6, 2024, 7:00 AM ET), <https://www.theguardian.com/law/article/2024/sep/06/dei-affirmative-action-lawsuits> [<https://perma.cc/FD84-L3ED>] (reporting that in the year after *SFFA* was decided, "68 lawsuits that call DEI into question" were filed); *see* Jeff Green & Kelsey Butler, *Corporate Diversity Becomes Next DEI Target After US Supreme Court Decision*, BLOOMBERG (Nov. 22, 2023, 5:30 AM ET), <https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/S4IT61T1UMoX> [<https://perma.cc/2KHH-6883>]; Tatyana Monnay, *Blum's Group Drops DEI Lawsuit Against Morrison Foerster*, BLOOMBERG (Oct. 6, 2023, 5:24 PM ET), <https://www.bloomberglaw.com/product/blaw/bloombergtterminalnews/bloomberg-terminal-news/S24M4RT0G1KW> [<https://perma.cc/NK32-S3EL>].
 23. *See* 103 F.4th 765, 775-80 (11th Cir. 2024). The author of this Feature submitted an amicus brief in *Fearless Fund* in support of the appellees.
 24. Claire Suddath, *Edward Blum's American Alliance for Equal Rights Scores a Win—Sort Of*, BLOOMBERG (Aug. 15, 2024, 4:00 PM ET), <https://www.bloomberglaw.com/news/newsletters/2024-08-15/edward-blum-s-american-alliance-for-equal-rights-scores-a-win-sort-of> [<https://perma.cc/5REF-7NUM>] (explaining how the American Alliance for Equal Rights has gotten at least six organizations to back down on their DEI programs).

ordered all federal agencies to take “appropriate . . . measures . . . to encourage the private sector to end illegal DEI discrimination and preferences and comply with all federal civil-rights laws.”²⁵ The Administration then challenged a wide array of programs, public and private.²⁶ Altogether, the Administration is leveraging federal power against trait-conscious practices in the private sector under the guise of “illegal discrimination” and “DEI” in ways that threaten to outlast its time in power.

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25. Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Exec. Order No. 14,173, § 4, 90 Fed. Reg. 8633, 8634-35 (Jan. 31, 2025) (ordering the end of “diversity, equity, and inclusion” and requiring the Attorney General to “deter DEI programs or principles . . . that constitute illegal discrimination or preferences”). Subsequently, the Education Department under the Trump Administration issued a “Frequently Asked Questions” (FAQ) page about the use of racial preferences in education under Title VI. While noting that *SFFA* was limited to admissions decisions, the FAQ said the Court used “broad reasoning” that will have broad “implications for race-based policies for education generally.” Off. for C.R., *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act*, U.S. DEP’T EDUC. 2 (Mar. 1, 2025), <https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf> [<https://perma.cc/NA5K-RTQD>]. Similarly, the State of Indiana began investigating DEI initiatives at private universities. Cate Charron, *Rokita First State AG to Threaten Private Colleges over DEI, Echoing Trump with Harvard*, INDYSTAR (June 16, 2025, 8:09 AM ET), <https://www.indystar.com/story/news/politics/2025/06/16/how-attorney-general-todd-rokita-impact-nonprofit-status-private-colleges/84031759007> [<https://perma.cc/RS6F-WRN8>].
 26. In just a few months, the Administration has, among other measures: terminated all “equity-related” grants and all DEI performance requirements for grantees, Ending Radical and Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14,151, 90 Fed. Reg. 8339, 8339 (Jan. 20, 2025); required that all federal grantees agree as a term of their grant to be in “compliance in all respects with all applicable Federal anti-discrimination laws,” Exec. Order No. 14,173, 90 Fed. Reg. at 8634; demanded that all federal agencies take steps “to encourage the private sector to end illegal discrimination and preferences, including DEI,” Exec. Order No. 14,173, 90 Fed. Reg. at 8635; issued a memorandum “intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex,” Memorandum on Ending Illegal DEI and DEI Discrimination and Preferences from Pam Bondi, U.S. Att’y Gen., to Dep’t of Just. Emps. 1 n.1 (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388501/dl> [<https://perma.cc/DQ7X-JDL2>]; asserted that “a school may not take account of a student’s race in distributing” financial aid, scholarships, prizes, administrative support, or job opportunities “even if race is only being considered as a positive or plus factor,” Off. for C.R., *supra* note 25, at 5; began investigations into forty-five universities for partnering with “The Ph.D. Project,” an organization that provides “doctoral students with insights into obtaining a Ph.D. and networking opportunities, but limits eligibility based on the race of participants,” *Office for Civil Rights Initiates Title VI Investigations into Institutions of Higher Education*, U.S. DEP’T EDUC. (Mar. 14, 2025), <https://www.ed.gov/about/news/press-release/office-civil-rights-initiates-title-vi-investigations-institutions-of-higher-education-o> [<https://perma.cc/77TE-9NML>]; and began investigations into six universities for allegedly awarding impermissible race-based scholarships and one university for allegedly administering a program that segregates students on the basis of race, *Office for Civil Rights Initiates Title VI Investigations, supra*.

This ongoing assault on remedial identity-based programs writ large has put private groups on the defensive. The Administration's declaration that DEI is now "illegal discrimination" opens the door to arguments that DEI initiatives are a basis for revoking a charity's tax-exempt status under § 501(c)(3) of the Internal Revenue Code either as illegal activity or as contrary to public policy.²⁷ Charitable organizations have become uncertain whether to use not only race-conscious criteria but also any trait that is the subject of antidiscrimination laws, such as gender identity, sexual orientation, or ethnicity.²⁸ Privately run charities have erased "diversity, equity, and inclusion" from their materials and changed their day-to-day operations out of fear of federal-government investigations²⁹ or *Fearless Fund*-like lawsuits.³⁰ Programs for the benefit of minorities, women,

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27. See Ellen P. Aprill, *Revoking Tax-Exemption for Pursuit of DEI and Other Alleged Forms of Discrimination*, 79 TAX LAW. (forthcoming 2026) (manuscript at 14-15), <https://ssrn.com/abstract=5233657> [<https://perma.cc/X7MP-Y5T2>].
 28. Camila Gomez, *Colleges Rushed to Comply With Trump's Anti-DEI Guidance. A Judge Just Struck It Down. Now What?*, CHRON. HIGHER ED. (Aug. 15, 2025), <https://www.chronicle.com/article/colleges-rushed-to-comply-with-trumps-anti-dei-guidance-a-judge-just-struck-it-down-now-what> [<https://perma.cc/PS7Q-FME5>] (noting that Education Department directives "prompted dozens of colleges to overhaul offices, eliminate jobs, and even cancel cultural events").
 29. The Trump Administration's executive order does not define "illegal" discrimination, but by targeting private actors, and when combined with the *Fearless Fund* ruling, the chilling effect on lawful activity will be substantial. See Alex Daniels, 'Strategic Ambiguity' of Trump DEI Orders Raises Big Questions About What's Legal, CHRON. PHILANTHROPY (Apr. 4, 2025), <https://www.philanthropy.com/article/strategic-ambiguity-of-trump-dei-orders-raises-big-questions-about-whats-legal> [<https://perma.cc/7W7W-ZZQE>] ("Some are scrubbing their websites and other published materials free of anything suggesting they are promoting DEI.").
 30. These include challenges to the American Association for University Women's fellowship for women from underrepresented backgrounds to attend professional school, the American Bar Association's scholarship to encourage racial and ethnic minorities to apply to law school, the Gates Foundation's (and two other foundations') scholarships for certain ethnic groups, and *Health Affairs*'s training and publication opportunities for ethnic groups underrepresented in the medical journal, among others. See, e.g., Joint Stipulation of Dismissal at 1, *Do No Harm v. Am. Ass'n of Univ. Women*, No. 24-cv-1782 (D.D.C. Aug. 9, 2024), <https://donoharmmedicine.org/wp-content/uploads/2024/08/DNH-v.-AAUW-Joint-Stipulation-of-Dissmissal-08.09.2024.pdf> [<https://perma.cc/9GJN-8DHN>] (settling a § 1981 challenge to a race-based scholarship provided that the American Association of University Women no longer uses race as a consideration); Karen Sloan, *ABA Drops 'Minority' Requirement from Law Student Scholarship Amid Lawsuit*, REUTERS (Nov. 3, 2025, 2:34 PM EST), <https://www.reuters.com/legal/government/aba-drops-minority-requirement-law-student-scholarship-amid-lawsuit-2025-11-03> [<https://perma.cc/GEC6-3Y94>]; Press Release, Am. All. for Equal Rts., American Alliance for Equal Rights Files Request to IRS to Examine Racial Practices at Three Tax-Exempt Foundations: Gates Foundation, Lagrant Foundation and Creative Capital Foundation (Apr. 1, 2025), <https://americanallianceforequalrights.org/american-alliance-for-equal-rig>

and many religious groups, such as cash grants, scholarships, and other aid, are potentially suspect. The chilling effect on private behavior is real and cause for alarm.³¹

Yet, despite the rush to judgment, outside of the specific context of the use of race in higher-education admissions, the *SFFA* decision left the law of private association and the generic use of DEI policies wholly untouched. The Chief Justice's urging in *SFFA* that all racial discrimination be eliminated, however noble in intention, is maddeningly misleading. Individuals have always had wide latitude in their private lives to choose their intimate associates and to form groups that exclude others, including based on traits, whether race, gender, or sexual orientation. Indeed, civil-rights laws operate against a baseline freedom to make choices, or discriminate, based on race or otherwise. In fact, many civil-rights statutes carve out spheres of exemption where discrimination may continue.³² The First Amendment guarantees associational rights and protects religious freedom.³³ The Chief Justice's remarks cannot be taken literally.

Moreover, as a moral-policy judgment that equates prejudiced behavior with affirmative action to remediate social harm, the Chief Justice missed the importance of associational freedom and pluralism in American civic life. From the early days of U.S. history, private individuals have lawfully formed associations, often with trait-based criteria as an organizing principle, often in opposition to government, and often to promote causes and provide trait-conscious assistance in furtherance of their missions.³⁴ Civil-rights law and charitable tax law have

hts-files-request-to-irs-to-examine-racial-practices-at-three-tax-exempt-foundations-gates-foundation-lagrange-foundation-and-creative-capital-foundation [https://perma.cc/NH33-4KPA]; Brian Flood, *Do No Harm Drops Lawsuit Against Health Journal After It Scraps 'Discriminatory' Scholarship Requirements*, FOX NEWS (Jan. 22, 2024, 11:00 AM ET), <https://www.foxnews.com/media/do-no-harm-drops-lawsuit-against-health-journal-after-scraps-discriminatory-scholarship-requirements> [https://perma.cc/XW54-U4RF]; Verified Complaint at 9, *Am. All. for Equal Rts. v. Hidden Star*, No. 24-cv-128 (W.D. Tex. Feb. 5, 2024) (concerning a charity's use of a grant contest based on being a racial minority).

31. See David A. Brennan, *The Chilling Effect of SFFA v. UNC/Harvard on Race-Based Affirmation by Tax-Exempt Charities*, 29 FLA. TAX REV. (forthcoming 2025) (manuscript at 19, 23-25), <https://ssrn.com/abstract=5193533> [https://perma.cc/6U4A-QL52]; Lori Villarosa, Ben Francisco Maulbeck & Gihan Perera, *Racial Justice Programs Under Fire: Foundations Are Running Scared When They Should Double Down*, CHRON. PHILANTHROPY (Feb. 6, 2024), <https://www.philanthropy.com/opinion/racial-justice-programs-under-fire-foundations-are-running-scared-when-they-should-double-down> [https://perma.cc/9VK3-MQ6M] (listing examples of "the pervasiveness of . . . philanthropic backsliding" including altering language on websites, reducing advocacy activity, adopting race-neutral approaches, and imposing extra-legal reviews on grantees).
32. See *infra* Section II.B.2.
33. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).
34. See *infra* Section I.A.

developed alongside trait-based associations that lawfully provide trait-conscious assistance. Private efforts to address social inequality by mission-driven groups are longstanding, known to Congress, and barred by no law.

This Feature focuses on the legality of private, voluntary efforts to remedy the effects of discrimination, or what the Feature terms remedial action. In general terms, remedial action refers to an entity's use of personal identifying characteristics such as race, ethnicity, gender, sexual orientation, or other traits to determine eligibility for a program of donative assistance in furtherance of the organization's mission. Private remedial action is a form of affirmative action, but occurring in the charitable, donative context, conducted by mission-driven organizations.³⁵ The Feature uses the terms "charity" and "charitable" generically to refer both to charities and other groups recognized under § 501(c)(3) of the Internal Revenue Code, including those organized for charitable, religious, educational, scientific, and literary purposes.³⁶ The types of programs potentially include any form of donative assistance, such as grants, scholarships, internships or fellowships, and other forms of cash or in-kind funding.³⁷

Part I of the Feature establishes that there is a strong presumption in favor of the legality of private remedial action. The Part first traces the early development of associational law in the United States, which allowed the routine formation of trait-based associations pursuing trait-conscious remedial action. The Part then surveys the charitable-tax-law developments in the twentieth century that fostered and supported the elimination of discrimination as a charitable purpose, including by remedial action. Finally, the Part contends that this history is

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35. Cf. Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 5 (2002) (defining affirmative action to "mean a program in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment"). Like Schuck's definition, private remedial action involves control over resources, but exclusively by private actors and in the donative context.
 36. Section 501(c)(3) also describes amateur-sports organizations and organizations to prevent cruelty to children or animals. I.R.C. § 501(c)(3) (2024). Other organizations are also eligible to receive deductible charitable contributions. See *id.* § 170(c)(3)-(5).
 37. The free provision of services, such as healthcare, advice, or counseling could also qualify as DEI programs or policies. DEI is, however, a misleading term because it has no inherent meaning. DEI is easily construed as including illegal discrimination, say in the form of mandatory hiring quotas. In practice, however, DEI refers to a panoply of programs and policies that seek to educate or promote values such as inclusivity or fairness. Some forms of DEI, such as training about bias and the fostering of community understanding of different cultural perspectives, may even be legally supported (if not required) as a way of helping to prevent illegal discrimination. See Press Release, Mass. Off. of the Att'y Gen, AG Campbell Issues Guidance for Businesses on Diversity, Equity, Inclusion, and Accessibility Employment Initiatives in the Workplace (Feb. 13, 2025), <https://www.mass.gov/news/ag-campbell-issues-guidance-for-businesses-on-diversity-equity-inclusion-and-accessibility-employment-initiatives-in-the-workplace> [<https://perma.cc/Z9FE-92FM>]. Charities, including schools, might also use DEI to develop programming that acknowledges trait-based differences.

consistent with the First Amendment's strong protections for freedom of association that cover even exclusionary trait-based conduct. This freedom furthers the constitutional values of group identity, pluralism, and independence from government orthodoxy.

Part II of the Feature considers the implications of the *Fearless Fund* ruling that private remedial action is a form of illegal discrimination. The ruling, if adopted more widely, threatens the freedom long enjoyed by private charities to associate, determine their missions, and render appropriate assistance. Part II also examines the decision as a matter of statutory interpretation and concludes that the court's interpretation is deeply flawed, that the 1866 Act does not apply, and that remedial action is not "illegal discrimination."

Part III turns to the separate question of whether remedial action, as a presumptively legal activity, may nonetheless result in loss of tax-exempt status as a practice that is contrary to public policy. The Part discusses two versions of the public-policy doctrine, a soft version that complements the illegality doctrine (discussed in Part II), and a hard version articulated by the Supreme Court in *Bob Jones University v. United States*.³⁸ The Part concludes that remedial action is not only consistent with but also furthers public policy by promoting pluralism and private philanthropic solutions to social problems independent from government.

Part IV then considers whether the First Amendment protects remedial action under the doctrine of expressive association, finding that precedent strongly supports trait-conscious acts of expression that are deeply connected to an organization's mission. The Feature then offers concluding observations. The way forward, pending any congressional action, is for the IRS and the courts to continue to develop the common law of charity and to determine, based on the context, the extent to which remedial action may be used as part of a charitable program.

I. REMEDIAL ACTION IS PRESUMPTIVELY LEGAL

When the Fearless Foundation decided to help Black women-owned businesses, it followed a strong tradition of free association and private remedial action that dates to America's Founding period and that has long been supported in federal tax law and by the First Amendment. Section I.A puts remedial action in historic context to show that trait-based associations and, relatedly, trait-conscious assistance, including on the basis of race, have long been an integral aspect of American civil society and presumptively legal. Section I.B explains how federal tax law has supported trait-conscious assistance in a charitable context,

38. 461 U.S. 574 (1983).

confirming its presumed legality. Section I.C considers the value of free association and group autonomy to civil society, including the freedom to associate as a group or exclude from a group, and limits to that freedom imposed by civil-rights laws to prevent widespread social harm.

A. Trait-Based Associations in the Founding Period

In American civil life, there is a longstanding culture of free association. From Alexis de Tocqueville's observations on associational life in America in the early nineteenth century,³⁹ to the present-day count of nearly 1.9 million nonprofits,⁴⁰ voluntary associational activity has been a sign of American civic values of pluralism, tolerance, innovation, independence from government, care for others, friendship, and community spirit. Most associations are tax-exempt charities (more than 1.5 million),⁴¹ a tribute to civic-minded groups of people focused on improving the human condition. Charities meet basic needs, disseminate knowledge, provide healthcare, nourish the soul, and support the marginalized. As private associations, charities define and pursue their missions largely free from government interference. This freedom is the essence of free association and the core strength of private life.

The "independent" sector of voluntary associations,⁴² however, would not exist without legal protections that have evolved over time. After the Revolution,

39. Writing in the postcolonial period, Alexis de Tocqueville famously observed that associations were everywhere one looked:

Americans . . . are forever forming associations. There are . . . [associations] of a thousand different [noncommercial] types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. In every case, at the head of a new undertaking, where in France you would find the government . . . in the United States you are sure to find an association.

2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 485 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966) (1840).

40. INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. NO. 55-B, DATA BOOK 2024, at 30 tbl. 14 (2025), <https://www.irs.gov/pub/irs-pdf/p55b.pdf> [<https://perma.cc/9YS2-AQT4>] (reporting 1,873,538 tax-exempt organizations). While this figure includes a limited number of nontraditional nonprofit entities such as mutual insurance companies, *id.*, it excludes many churches and small organizations not required to file an exemption application with the IRS, *id.* at 30 n.2.

41. *Id.* at 30 tbl. 14 (reporting 1,548,798 organizations recognized under § 501(c)(3)). Section 501(c)(3) provides tax exemption for several purposes, of which "charitable" is one.

42. See John W. Gardner, *Foreword: The Independent Sector*, in *AMERICA'S VOLUNTARY SPIRIT: A BOOK OF READINGS*, at ix, xiv (Brian O'Connell ed., 1983) (coining the term "Independent

the private law of charity was unsettled as to what types of association were allowed and even whether philanthropy was in the public interest.⁴³ A landmark decision from the early nineteenth century, *Trustees of Dartmouth College v. Woodward*,⁴⁴ paved the way for charities to exist as private organizations independent from government. In that case, the Court protected the privately run Dartmouth College from an attempted takeover by the State.⁴⁵ Chief Justice Marshall embraced private charities as private binding associations,⁴⁶ finding that “[t]hese

Sector” and describing it as one that allows for “nonmajoritarian impulses, movements, and values”).

43. See HOWARD S. MILLER, *THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY*, 1776-1844, at 15 (1961) (describing the law’s “general uncertainty and confusion”). While most state constitutions were “silent respecting philanthropy,” some states such as Pennsylvania and Massachusetts “include[ed] statements of general encouragement [for philanthropy] in their fundamental law,” *id.*, and others such as Rhode Island and Connecticut remained “friendly” to charitable uses in the decades following independence, *id.* at 17. Yet states also imposed restrictions: Pennsylvania additionally made incorporation for charitable associations onerous, New York virtually outlawed charitable trusts, and Virginia showed “suspicion of all philanthropic associations” outright. *Id.* at 19-20. Figures as prominent as George Washington feared that independent private associations harbored the seeds of troublesome dissent. See Benjamin Soskis, *A History of Associational Life and the Nonprofit Sector in the United States*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 23, 25-26 (Walter W. Powell & Patricia Bromley eds., 3d ed. 2020) (“For Federalists, behind the promise of association lurked the dangers of faction . . .”). Other objections to private charity voiced by Jeffersonians and Federalists concerned charitable giving that deprived heirs of their rightful property, dangerously advanced clerical power, and allowed foolish projects in perpetuity. See MILLER, *supra*, at 43-44. The Democratic-Republicans would come around to the view that private associations were an important “safeguard against public corruption and tyranny.” Soskis, *supra*, at 25.
44. 17 U.S. (4 Wheat.) 518 (1819). Another case, *Philadelphia Baptist Ass’n v. Hart’s Executors*, 17 U.S. (4 Wheat.) 1 (1819), decided the same year and also written by Chief Justice Marshall, ironically had a restraining effect on associational law. That case involved amounts left by will to the Philadelphia Baptist Association (a form of trait-conscious assistance). The Court refused to allow the gift, deferring to Virginia’s law that associations must be incorporated to receive personal property by devise. *Hart’s Ex’rs*, 17 U.S. (4 Wheat.) at 1. Marshall accepted the (later overturned) view that the Court’s jurisdiction depended upon whether the 1601 Statute of Charitable Uses, recognizing charitable trusts, was still the law of the State, and declined to use its equity powers to honor the donor’s gift. *Id.* at 12-13; see Charitable Uses Act 1601, 43 Eliz. 1 c. 4 (Eng.).
45. See *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 629-36. Recent demands by Trump Administration officials that private universities submit to curriculum changes and even a government overseer echo the nineteenth-century dispute about university independence. See, e.g., Liz Essley Whyte & Douglas Belkin, *Trump Administration Proposes Terms for Federal Oversight of Columbia University*, WALL ST. J. (May 5, 2025, 5:22 PM ET), <https://www.wsj.com/us-news/education/trump-columbia-university-consent-decree-proposal-d21830f2> [https://perma.cc/7E7J-XPP2].
46. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 648. In *Dartmouth College*, the State of New Hampshire sought to replace the college’s trustees with the State’s own appointees, in violation of the

eleemosynary institutions do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant.”⁴⁷ Equally important, decades later in *Vidal v. Girard’s Executors*, the Court recognized the legitimacy of charitable trusts as a matter of common law, not dependent on statutory authority.⁴⁸ The decision thus allowed charities the freedom to grow independently from government, in accordance with donor intent.⁴⁹

With these key supports in place,⁵⁰ voluntary associational and philanthropic activity took hold in early American life. Associations like those observed by de Tocqueville advanced causes from temperance to poor relief.⁵¹ At the same time, trait-based associations and assistance were commonplace, reflecting the civil society of the time. Societal discrimination was rampant—institutionalized in the form of slavery—and both racial and nonracial groups, including women, were often excluded from socioeconomic life and denied basic legal rights.

In response, identity-based associations conducting private charitable work formed to counter the effects of societal discrimination and to foster identity and empowerment among a diverse population, what some have referred to as a “balkanized pluralism.”⁵² Before the Civil War, for example, mass immigration helped foster private associations among immigrants. “Immigrants who arrived

college’s charter, which allowed for a self-perpetuating governing body. The Court enforced the private contract between the donors and trustees of the college.

47. *Id.* at 647. The *Dartmouth College* decision thus “affirmed a sort of eleemosynary disestablishment, laying down rough lines of demarcation between public and private realms.” Soskis, *supra* note 43, at 31.
48. 43 U.S. (2 How.) 127, 196 (1844). The case distinguished *Hart’s Executors* and confirmed American courts’ equitable jurisdiction over charitable trusts, regardless of whether the Statute of Charitable Uses remained in effect. *Id.* at 192–96. State law ultimately followed suit, both by embracing the charitable trust, and over time by liberalizing nonprofit corporate law. Some states allow nonprofits to form for any “lawful” purpose. See JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 52, 65 (6th ed. 2021).
49. Once “private charity received an unambiguous blessing from the federal courts, . . . [b]y the 1850s, Americans had largely overcome their suspicion of voluntary associations and private charity.” Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600–2000*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 32, 37–38 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).
50. As discussed *infra* Part IV, the First Amendment also has a vital supporting role, especially since 1984, protecting not only the right to speech but also the right of expressive association.
51. Soskis, *supra* note 43, at 31.
52. See Will Kymlicka, *Ethnic Associations and Democratic Citizenship*, in *FREEDOM OF ASSOCIATION* 177, 177 (Amy Gutmann ed., 1998); Elizabeth Sepper, James D. Nelson & Charlotte Garden, *Expressive Association at Work*, 124 MICH. L. REV. (forthcoming 2026) (manuscript at 5), <https://ssrn.com/abstract=5176842> [<https://perma.cc/4FTJ-39Y3>] (noting that employment and civil society “display differing visions of pluralism—one oriented toward inclusion, the other balkanized”).

in the United States in the nineteenth century quickly established their own charitable networks”⁵³ Women formed charitable corporations to “gain[] important training in entrepreneurial, commercial, and political activity.”⁵⁴ Jewish people formed philanthropies on a large scale – growing to constitute nearly half of all charitable associations in New York City,⁵⁵ including the Jews’ Hospital (now known as Mount Sinai), which “trained Jewish doctors who had difficulty securing positions at non-Jewish institutions.”⁵⁶ Black Americans in the North used their own “churches, schools, and mutual aid societies” to create “a black civil society.”⁵⁷

This associational activity continued throughout the Civil War period. Peter Dobkin Hall observes, “Socially excluded groups, such as free blacks and immigrants, established their own congregations and fraternal associations,” and women, “[b]arred from electoral politics, . . . used associations to create a ‘separate sphere’ of educational, religious, and cultural activity.”⁵⁸ Charities were instrumental in abolitionist efforts, as the “[c]onflict over slavery produced both national and local organizations and stimulated philanthropic contributions to promote emancipation and aid emancipated slaves.”⁵⁹

During Reconstruction, Congress enlisted the government to provide trait-conscious assistance, passing several statutes intended to provide aid for Black people.⁶⁰ One landmark piece of legislation in 1865 established the Freedmen’s

53. Soskis, *supra* note 43, at 31. The development was hardly a new one, as trait-based charities predated the Revolution. See MILLER, *supra* note 43, at 4 (referencing the “Scot’s Charitable Society” of 1657 and the Charitable Irish Society of 1737).

54. Soskis, *supra* note 43, at 33.

55. *Id.* at 31. They formed many philanthropies outside of the New York City metropolitan area as well; for example, in 1802, “Jews in Charleston incorporated a Hebrew Orphans Society.” *Id.*

56. *Id.*

57. *Id.* at 33. Many early charitable-trust cases involved trait-based assistance. See, e.g., *Vidal v. Girard’s Ex’rs*, 43 U.S. (2 How.) 127, 131 (1844) (involving poor white orphan boys); *Magill v. Brown*, 16 F. Cas. 408, 447-48 (C.C.E.D. Pa. 1833) (No. 8,952) (involving Indian relief); *Phila. Baptist Ass’n v. Hart’s Ex’rs*, 17 U.S. (4 Wheat.) 1, 2 (1819) (involving Baptists); *Witman v. Lex*, 17 Serg. & Rawle 88, 89 (Pa. 1827) (involving a fund for German Lutherans). The cases did not concern the validity of the use of traits but related to state law respecting trusts more generally.

58. Hall, *supra* note 49, at 38-39.

59. *Id.* at 40.

60. “From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks.” Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985); see also *id.* at 755-83 (detailing several such Reconstruction measures).

Bureau,⁶¹ an agency of the federal government that provided critical assistance to Black people, including education, land, medical care, funding, and counseling.⁶² The Bureau “educated approximately 100,000 students, nearly all of them black,”⁶³ invested in buildings “secured by deed for Negro education forever,”⁶⁴ and established “more than a dozen colleges and universities for the education of black students.”⁶⁵ As Eric Schnapper notes, “Freedmen were the only beneficiaries of programs such as education, labor regulation, Bureau farms, land distribution, adjustments of real estate disputes, supervision of the civil and criminal justice systems through the freedmen’s courts, registration of marriages, and aid to orphans.”⁶⁶ Once established, the Freedmen’s Bureau “actively courted the

61. There were, in fact, three significant statutes concerning the Freedmen’s Bureau during its lifetime. The first, in 1865, established the Bureau and its operations. See Freedmen’s Bureau Act of 1865, ch. 90, 13 Stat. 507. The second, in 1866, modified the Bureau’s authority and created a two-year sunset provision. See Freedmen’s Bureau Act of 1866, ch. 200, 14 Stat. 173. The final statute, in 1868, extended the Bureau’s education programming but ended all other activities in 1869. Act of July 6, 1868, ch. 135, 15 Stat. 83.

62. George Rutherglen, *The Origins of Arguments Over Affirmative Action: Lessons from the Civil Rights Act of 1866*, in *THE GREATEST AND THE GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY* 209, 218 (Christian G. Samito ed., 2018) (finding that the Bureau provided “food, shelter, and medical care to the slaves who had fled to Union lines or who were displaced by the war,” rented land to the formerly enslaved, and helped to “supervis[e] and regulat[e] the contracts between planters and ex-slaves”). In extensive debates prior to the Freedmen’s Bureau Act’s enactment, members of Congress and President Johnson (in the message accompanying his ultimately overridden veto message) argued that providing assistance for Black people was indeed the very purpose of the Bureau. See *id.* at 217 (noting that although the legislation was framed in neutral terms “to benefit all refugees regardless of race . . . ‘opponents and supporters generally viewed it as largely, if not exclusively, for the assistance of freedmen’” (quoting Schnapper, *supra* note 60, at 763)); see also CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton) (“[T]he true object of this bill is the amelioration of the condition of the colored people.”). After the enactment of the first Freedmen’s Bureau Act in 1865, “the Bureau undertook all the remedial activity contemplated by the earlier bill and generally provided that assistance to blacks alone.” Schnapper, *supra* note 60, at 761.

63. Schnapper, *supra* note 60, at 781.

64. *Id.* at 781 n.147 (quoting GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN’S BUREAU* 174 (1955)).

65. *Id.* at 781.

66. *Id.* at 761 (citing H.R. EXEC. DOC. NO. 39-11, at 2-23 (1865)). Similarly, other acts of Congress from the same time period were explicitly race conscious. Congress appropriated funds, for example, for an organization whose purpose was “the relief of destitute colored women and children.” Act of July 28, 1866, ch. 296, 14 Stat. 310, 317; see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 324-26 (2023) (Sotomayor, J., dissenting) (noting this and other further examples of race-based Reconstruction statutes).

participation of voluntary societies” in its race-conscious efforts,⁶⁷ an early public-private partnership whose workings were understood as perfectly legal during their time.⁶⁸

In the decades following Reconstruction, associations formed and provided race-conscious assistance. Early private foundations like the Peabody Fund (formed in 1868), John F. Slater Fund (formed in 1882), and General Education Board (formed in 1903) were “created by wealthy northern philanthropists to provide education to free blacks.”⁶⁹ Several of these funds directed monies to “a network of black colleges and vocational schools that promoted a conservative gospel of black self-help.”⁷⁰ In addition, other trait-based groups also used associations to foster religious and ethnic affinity and create opportunity. With the influx of immigration after the Civil War, “Jews established their own philanthropies, hospitals, social agencies, and clubs” as a “response to the rise of institutional anti-Semitism.”⁷¹ By the time of the Second World War, the arrival of German and Irish immigrants further “broadened the range of voluntary and philanthropic endeavors.”⁷²

While an exhaustive history of early American associational life is beyond the scope of this Feature, a clear hallmark of that history is that associations reflected the diverse experiences and ambitions of the American people. Trait-based groups, spanning more than a century, were commonplace and part of the American tradition of independence and community building. All these trait-based or trait-conscious associations, in one form or another, necessarily provided trait-conscious assistance in furtherance of their mission. Both the associations, and the aid they provided, as the foregoing analysis suggests, were presumptively legal.

67. Soskis, *supra* note 43, at 36 (noting that the Bureau would partner with private groups who would fund the ongoing upkeep of hospitals and schools and salaries of employees).

68. The Freedmen’s Bureau Act could be viewed as one of the first public-private partnerships when it comes to providing charitable assistance. See Rutherglen, *supra* note 62, at 218 (noting that a main achievement of the Freedmen’s Bureau Act was “the establishment of schools for the freed people, often with the assistance of northern charitable organizations”). At the time, private charities were actively involved in providing assistance based on race. See Soskis, *supra* note 43, at 32-35.

69. Hall, *supra* note 49, at 43. Relatedly, “[a] variety of activist groups arose to oppose lynching, to defend the civil rights of blacks, and to call international attention to the racial situation in the United States.” *Id.*

70. Soskis, *supra* note 43, at 36.

71. Hall, *supra* note 49, at 43.

72. *Id.* at 41.

B. Federal Tax-Law Support for Remedial Action

Associational activity during the nineteenth and early twentieth centuries, trait-based or otherwise, was principally a matter of state law.⁷³ Then, as now, associations formed locally, according to state-based authorities and jurisdictions. The advent of the federal income tax, however, added a new dynamic to associational law by subjecting associations to federal taxing authority, elevating charitable associations over others and forcing a federal tax-law approach to charitable status.⁷⁴ For trait-based associations and assistance, the development is important because tax law transformed the threshold question from one of *per se* legality to the consistency of trait-conscious activity with the relevant tax status.

Critically, over the course of the twentieth century, federal tax law was not overly prescriptive of associational activities and, for charitable organizations, followed the broad “legal” sense of charity and the common law of charitable trusts.⁷⁵ The foundational law, the Revenue Act of 1913, provided (and still provides) an exemption for “any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes.”⁷⁶ The 1913 statute also included exemptions for other categories of associations, including social-welfare organizations, labor unions, fraternal benefit organizations,

73. As discussed *infra* Part II, federal civil-rights legislation applied to associations as a formal matter, but trait-conscious assistance was not within the scope of those statutes.

74. State and local taxation in the nineteenth century was an eclectic mix of property and excise taxes and fees. State income taxes were creatures of the twentieth century. See generally Edward T. Howe & Donald J. Reeb, *The Historical Evolution of State and Local Tax Systems*, 78 SOC. SCI. Q. 109, 114 (1997) (noting that Wisconsin had the first modern state income-tax statute in 1911).

75. Early legislation created a partnership between private charities and the state in which the state adopted a supporting role, filling in gaps left by charities. See MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION* 31 (2004).

76. Revenue Act of 1913, ch. 16, 38 Stat. 114, 172. The language of the 1913 statute came verbatim from a 1909 federal excise tax with the addition of scientific purposes and the use of the word “shareholder” instead of “stockholder.” See STAFF OF JOINT COMM. ON TAX’N, 109TH CONG., *HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS* 46 (Comm. Print 2005). Prevention of cruelty to children or animals was added to the list of purposes in 1918; literary purposes and “community chest, fund, or foundation” were added to the types of organizations in 1921. *Id.* at 47. An earlier income tax in 1894 (later ruled unconstitutional) exempted “corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.” *Id.* at 27, 46. The fact that charitable associations received an exemption at this early stage of the income tax speaks to their historical civic presence.

and chambers of commerce.⁷⁷ The list of exempt entities broadly described recognizable associations of the time, many of which would have been trait-based groups.

In composing the exemption language, Congress did not write on a blank slate but with a backdrop of centuries of legal history. The term charity had essentially two understandings—the ordinary sense and the legal sense.⁷⁸ As the name suggests, the ordinary sense relies on conventional notions of charity as helping the needy and distressed.⁷⁹ The legal sense includes the ordinary sense but is much broader⁸⁰ and based on the purposes of an organization, with four recognized branches: charitable, educational, religious, and a residual category of “purposes beneficial to the community.”⁸¹ The last purpose is intentionally open-ended and allows concepts of charity to evolve with “contemporary standards”⁸² through case-by-case determinations of charitable status: a mixed common-law and charitable-trust-law approach to charity.

Although it was unclear whether Congress used “charitable” in the ordinary or the legal sense in 1913,⁸³ Treasury regulations adopted in 1959 definitively

77. STAFF OF JOINT COMM. ON TAX’N, 109TH CONG., *supra* note 76, at 31-32.

78. *Id.* at 61.

79. *Id.*

80. The legal sense of charity dates at least to the Statute of Elizabeth in 1601 and the law of charitable trusts. The 1601 statute “has been described as ‘the starting point of the modern law of charities.’” FREMONT-SMITH, *supra* note 75, at 28 (quoting GEORGE W. KEETON, *THE MODERN LAW OF CHARITIES* 10 (1962)). The statute contained a diverse but not comprehensive list of purposes, “leading to the conclusion that the statute was not an attempt at a definition of charity, but an enumeration of some of the charitable purposes that had become the subject to benefactions.” *Id.* at 30. The role of the 1601 statute in American charity law was the subject of intense debate, which shaped development of associations in the states throughout the nineteenth century. See *supra* notes 42-47 and accompanying text.

81. *Comm’rs for Special Purposes of Income Tax v. Pemsel* [1891] AC 531 (HL) 28 (appeal taken from Eng.); see also Richard L. Schmalbeck, *The Treasury Regulations Defining “Charity”: If Only 11* (2015) (unpublished manuscript), <https://ncpl.law.nyu.edu/wp-content/uploads/2016/08/Tab-B-Schmalbeck-paper.pdf> [<https://perma.cc/9DD4-EUBS>] (citing the *Pemsel* decision and Lord McNaughten’s “famous formulation” of charity in the broad sense).

82. STAFF OF JOINT COMM. ON TAX’N, 109TH CONG., *supra* note 76, at 63.

83. Legislative history from the period is inconclusive as to which standard of charity Congress intended to adopt, but committee reports from later in the century suggest the legal sense. See *id.* at 66 (first citing H.R. REP. NO. 75-1860, at 19 (1938), *reprinted in* JACOB S. SEIDMAN, *SEIDMAN’S LEGISLATIVE HISTORY OF THE FEDERAL INCOME TAX LAWS 1938-1861*, at 16, 17 (1938), which notes that the charitable tax exemption provides “benefits resulting from the promotion of the general welfare”; and then citing H.R. REP. NO. 91-413, pt. 1, at 35 (1969), *as reprinted in* 1969 U.S.C.A.N. 1645, 1688, which describes “charitable” as “a term that has been used in the law of trusts for hundreds of years”). Further, the 1913 exemption language borrowed from the 1894 statute, which followed *Pemsel* by just three years, strongly

resolved the matter in favor of the legal sense of the term.⁸⁴ The move thus formally aligned the tax code with a broad definition of “charitable” that had guided the development of charities in the nineteenth century prior to the introduction of the income tax, including the formation of trait-based groups. The Supreme Court later embraced the Treasury Department’s approach, acknowledging that “[t]he form and history of the charitable exemption and deduction sections of the various income tax Acts”—including in the nineteenth century—“reveal that Congress was guided by the common law of charitable trusts.”⁸⁵

The 1959 Treasury regulations not only explicitly adopted the legal sense of charity but also defined the term to allow for private remedial action. Under the regulations (still in effect), charitable includes the “promotion of social welfare by organizations designed to . . . eliminate prejudice and discrimination.”⁸⁶ Written in the midst of the civil-rights movement’s fight for racial equality for Black people, the regulations explicitly elevated the elimination of prejudice to a legitimate purpose of charities.⁸⁷

Further, at about the same time, other parts of the federal government began to make state-sponsored affirmative action a national priority. President Kennedy issued an executive order making it “the policy of the executive branch . . . to encourage by positive measures equal opportunity for all qualified persons within the Government.”⁸⁸ The order established the President’s Committee on Equal Employment Opportunity, which required federal contractors to “take affirmative action to ensure that [job] applicants” are employed without regard to race.⁸⁹ President Johnson went a step further in 1965, placing responsibility for affirmative action in the Department of Labor and creating an Office of Federal Contract Compliance “to assure that all federal contractors took

suggesting as a matter of interpretation that Congress was drawing on common-law concepts of charity (the legal sense). See *id.* at 63, 65 (explaining that until 1959, the regulations defined charity in its ordinary sense, meaning relief of the poor, but that congressional intent on the matter was not clear, leading eventually to the 1959 regulations); see also BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 108 (8th ed. 2003) (noting that “[t]here is little concrete evidence to support a proposition that Congress intended the application of either [the ordinary or the legal] definition” of charity).

84. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959) (adopting the meaning of charity “in its generally accepted legal sense”).

85. *Bob Jones Univ. v. United States*, 461 U.S. 574, 588 n.12 (1983). The Court also cited *Pemsel* as a leading authority of the construction of charity. *Id.* at 589 (citing *Pemsel* [1891] AC 531 (HL) at 28).

86. Treas. Reg. § 1.501(c)(3)-1(d)(2) (2025).

87. The regulation undoubtedly reflected the civil-rights movement at the time. See Schmalbeck, *supra* note 81, at 19–20.

88. Exec. Order No. 10,925, 26 Fed. Reg. 1977, 1977 (Mar. 8, 1961).

89. *Id.* § 301(1), 26 Fed. Reg. at 1977.

affirmative, pre-contract steps to hire and promote more minority employees, and use more minority-owned subcontractors.”⁹⁰

While the federal government sanctioned affirmative action in the workplace, the IRS, in line with the 1959 regulation, subsequently recognized that private remedial action can serve a charitable purpose, depending on the organization’s mission,⁹¹ including through issuing loans,⁹² conducting training programs,⁹³ and educating minority groups.⁹⁴ Private remedial action also emerged in the form of private scholarships, with millions of dollars set aside over many decades for minority-based scholarships,⁹⁵ as well as funds based on gender and for religious purposes.⁹⁶ To that end, the tax code describes charitable scholarships as those that are “awarded on an objective and nondiscriminatory basis,”⁹⁷

90. See Schuck, *supra* note 35, at 47 (citing ALBERT G. MOSLEY & NICHOLAS CAPALDI, *AFFIRMATIVE ACTION: SOCIAL JUSTICE OR UNFAIR PREFERENCE?* 5 (1996)).

91. See I.R.S. Gen. Couns. Mem. 39,082 (Nov. 30, 1983) (recognizing that an individual has “great personal freedom to choose the beneficiaries of his or her accumulated wealth” and reasoning that whether a racial restriction “actually fosters racial discrimination” requires “an examination of the facts and circumstances on a case-by-case basis”).

92. See, e.g., Rev. Rul. 68-655, 1968-2 C.B. 213 (concluding that an organization that made loans to white homeowners to promote neighborhood racial integration qualified for tax-exempt status).

93. See, e.g., Rev. Rul. 77-272, 1977-2 C.B. 191 (concluding that an organization that conducted vocational training programs for the exclusive benefit of a single minority group—American Indians—was consistent with federal policy goals and therefore qualified for tax-exempt status).

94. See, e.g., Rev. Rul. 75-285, 1975-2 C.B. 203 (concluding that an organization that “recruit[ed] and educat[ed] members of minority groups to further their efforts in obtaining entry into apprenticeship programs” qualified for tax-exempt status).

95. For example, the United Negro College Fund awards “more than \$100 million in scholarships” each year to minority students attending “more than 1,100 schools across the country” and has helped “more than 500,000 students earn their college degrees.” See *Scholarships*, UNITED NEGRO COLL. FUND, <https://uncf.org/scholarships> [<https://perma.cc/PHE4-3AA6>].

96. See, e.g., Joy Miller, *The Top 150 Scholarships, Grants, and Fellowships for Women—Ultimate Guide*, MY DEGREE GUIDE (Aug. 12, 2019), <https://www.mydegreeguide.com/scholarships-for-women> [<https://perma.cc/Y3HK-MTK9>] (listing scholarships for women by degree level and field of study); Jeffrey Rodman, *20 Most Generous Grant Making Foundations for Christian Organizations*, HERE-4-YOU CONSULTING (Nov. 15, 2022), <https://npfunds.com/20-most-generous-grant-making-foundations-for-christian-organizations> [<https://perma.cc/9G22-T2BN>] (listing foundations that often provide grants to Christian organizations).

97. Treas. Reg. § 53.4945-4(a)(3)(ii)(a) (2025).

language the IRS consistently has administered in a way that allows for private remedial action on the basis of race, gender, or religion.⁹⁸

The 1959 Treasury regulations also aligned with developments in charitable-trust law, which, according to the Supreme Court, is a guide to the meaning of “charitable” for tax purposes.⁹⁹ Historically, it was a common practice for settlors of charitable trusts to include racial or other trait-based restrictions on the donated property.¹⁰⁰ Examples include gifts to a school for “poor white male orphans,”¹⁰¹ a park “for white people only,”¹⁰² a scholarship fund for white male Protestants,¹⁰³ and an asylum for “respectable white women.”¹⁰⁴ Until the mid-twentieth century, these types of restrictions were routinely upheld.¹⁰⁵ During

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98. The IRS regularly approves identity-based scholarship programs. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201132026 (May 19, 2011); I.R.S. Priv. Ltr. Rul. 201104049 (Nov. 5, 2010); I.R.S. Priv. Ltr. Rul. 200116045 (Jan. 19, 2001); I.R.S. Priv. Ltr. Rul. 201638025 (June 20, 2016); *see also* I.R.S. Priv. Ltr. Rul. 202426018 (Apr. 1, 2024) (approving medical-school-scholarship selection procedures that restrict eligibility to recipients based on ancestry); I.R.S. Priv. Ltr. Rul. 202138009 (June 29, 2021) (approving a scholarship program that may provide a “preference to applicants of a particular sex, race, ethnic background, or religion so long as such preference does not violate public policy”); I.R.S. Priv. Ltr. Rul. 201833028 (May 24, 2018) (approving a scholarship program where “preference may be given to applicants of a particular sex, race, ethnic background or religion so long as such preference does not violate public policy and is so applied on an objective and nondiscriminatory basis to the group of qualified applicants”); I.R.S. Priv. Ltr. Rul. 200603029 (Oct. 28, 2005) (approving a scholarship program for a boys-only boarding school); I.R.S. Priv. Ltr. Rul. 9632024 (May 17, 1996) (concluding that a proposed scholarship for American Indians or members of other ethnic minorities to attend four-year colleges after graduating from two-year tribal colleges was consistent with public policy as “reflected in the traditional and long-standing relationship between the federal government and Indian tribes”).
99. *Bob Jones Univ. v. United States*, 461 U.S. 574, 587 n.11 (1983) (“[T]he IRS properly considered principles of charitable trust law in determining whether the institutions in question may truly be considered ‘charitable’ for purposes of entitlement to the tax benefits conferred by § 170 and § 501(c)(3).”).
100. Settlors would limit their “direct benefits or eligibility to persons of a particular national origin, religion, gender, sexual orientation, age group, political affiliation, or other characteristics or background.” RESTATEMENT (THIRD) OF TRS. § 28 cmt. f (A.L.I. 2012).
101. *Pennsylvania v. Bd. of Dirs.*, 353 U.S. 230, 231 (1957) (per curiam).
102. *Evans v. Newton*, 382 U.S. 296, 297 (1966).
103. *Lockwood v. Killian*, 375 A.2d 998, 1000 (Conn. 1977) (reciting a will designating a charitable trust for “needy, deserving boys . . . who are members of the Caucasian race and . . . of the Protestant Congregational Faith”).
104. *In re Long’s Estate*, 5 Pa. D. & C.3d 602, 604 (Ct. C.P. 1978). The women also needed to be indigent, above age forty-five, and single or widowed. *Id.*
105. Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463, 477 (2002) (finding that before 1968, “the state of the law regarding [invidious] discriminatory donative transfers was that they generally were upheld unless they violated a specific policy . . . or the Equal Protection Clause”).

the civil-rights movement, however, charitable-trust law began to change, with courts occasionally excising what were termed “invidious” discriminatory restrictions.¹⁰⁶

At the same time, the use of a trait (including race) to remedy the effects of discrimination could be valid, forging a legal distinction between discrimination against the trait (termed invidious) and discrimination in favor of it (affirmative action). According to the Restatement (Third) on Trusts,

What the law of charitable trusts does or does not allow inevitably varies from time to time and place to place, as well as from context to context. For example, trust-law policies regarding restrictions on gender, sexual orientation, or age are especially sensitive to *context*, as the scope of more general statutory and constitutional protections evolve in these matters Similarly, the law of charitable trusts as such does not object to what is sometimes called “affirmative action,” attempting to respond to a social problem in its own terms, at least as reasonably perceived by a substantial (even if not majority) segment of society or of the affected community.¹⁰⁷

In other words, the charitable-trust-law approach to private remedial action is like that of the IRS: to consider the context, which may include reference to developments in the legal and policy landscape.¹⁰⁸ Charity law also recognizes that, as a matter of private law, the reason for a trait-based exclusion can matter. To exclude a group from assistance because of animus is not charitable.¹⁰⁹ To favor

106. The issue became “what provisions of this general type may, as a matter of trust law and policy, be inconsistent with the nature of charitable purposes.” RESTATEMENT (THIRD) OF TRS. § 28 cmt. f (A.L.I. 2012). If discriminatory provisions “involve invidious discrimination,” they “are not valid.” *Id.* Roisman catalogs the case law of decisions involving trait-based restrictions in charitable trusts after 1968, finding that many were struck down because of state action, while “on occasion, a court did reform a racially discriminatory trust solely on the basis of trust principles.” Roisman, *supra* note 105, at 487–501.

107. RESTATEMENT (THIRD) OF TRS. § 28 cmt. f (A.L.I. 2012); *see also id.* (“When a scholarship or other form of assistance or opportunity is to be awarded on a basis that, for example, explicitly excludes potential beneficiaries on the basis of membership in a particular racial, ethnic, or religious group, the restriction is ordinarily invidious and therefore unenforceable.”). On the other hand, it is not always the case that “a criterion such as gender, religion, or national origin may not be used in a charitable trust when it is a reasonable element of a settlor’s charitable purpose and charitable motivation.” *Id.*

108. *See infra* Part III.

109. The Restatement gives, as an example of invidious discrimination, a “playground from which Black children are excluded.” RESTATEMENT (THIRD) OF TRS. § 28 cmt. f (A.L.I. 2012). It is hard to imagine a positive reason for such an exclusion; thus, the animus may be assumed by

a group that is disadvantaged in some way, including because of societal discrimination, however, may be charitable.

In short, federal tax law developed in the twentieth century consistent with centuries of precedent and associational history to embrace a broad concept of charitable purposes, one that reflects community efforts to address common problems. The *Bob Jones* decision importantly confirmed that charity is a common-law concept guided by the law of charitable trusts. To that end, IRS rulings allowed for private remedial action, which also complemented government efforts at affirmative action.

C. Free Association and Its Limits

Private remedial action not only is rooted in history and supported by tax law but also is presumptively legal as an integral part of free association. Free association is a fundamental human freedom and necessarily involves discrimination. Although the word discrimination is laden with historical and negative connotations, discrimination is not inherently right or wrong, is often legal, and furthers important constitutional values.

On an individual level, the freedom to associate and to discriminate allows people to choose their friends, colleagues, lovers, spouses, babysitters, and even children (i.e., through adoption), based in part or even exclusively on a person's traits.¹¹⁰ This freedom of intimate association is a fundamental element of personal liberty,¹¹¹ even if the choice is irrational or morally flawed.

Free association extends beyond intimate personal relationships to group formation. Individuals choose their churches, community associations, reading groups, schools, clubs, and which causes to join and charities to support, whether as a group member, volunteer, or donor. Like personal intimacy, group association is a vital freedom, partly expressive in nature, and protected by the

virtue of the exclusion itself. This is often true of anti-Black discrimination in particular—there is a strong presumption of animus because of the brutal and sordid history of anti-Black discrimination in the United States.

110. George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION, *supra* note 52, at 35, 36. Freedom of association is “integral to a free human life, to being a free person.” *Id.* at 36.

111. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984) (noting that intimate association allows for “personal bonds” that “foster diversity and act as critical buffers between the individual and the power of the State”). State efforts to force people to exclude certain partners from the marriage relationship have been struck down as unconstitutional. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11-12 (1967); *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015).

First Amendment.¹¹² Group association promotes many key values, including “democratic participation, personal development, and pluralism among groups.”¹¹³ Even if the benefits from association flow to group members (such as personal development and belonging), there are positive externalities to allowing the group to form (pluralism and viewpoint diversity) that provide public benefits in the form of a robust civil society. Thus, “collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”¹¹⁴ The “right to assemble—to form relationships, to gather, to exist as groups of our choosing—is fundamental to liberty and genuine pluralism.”¹¹⁵

Groups are also exclusionary.¹¹⁶ By definition, not everyone can be a member. A religious group may exclude the nonreligious, an environmental group may exclude polluters, a neighborhood group may exclude out-of-towners, and so on. To form an association is to foster an identity, exclude some persons, and provide benefits to those included. Exclusion is necessary to sustain group identity: “If [voluntary] associations cannot limit eligibility and control admission, their particular projects and expressive aspects will be inhibited, diluted, or subverted.”¹¹⁷ The forced inclusion of unwanted members may impair the ability of

112. *Jaycees*, 468 U.S. at 622 (“An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”).

113. Sepper et al., *supra* note 52 (manuscript at 9); see also *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (“The freedom to associate . . . tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.”).

114. *Jaycees*, 468 U.S. at 622; see also Kent Greenawalt, *Freedom of Association and Religious Association*, in *FREEDOM OF ASSOCIATION*, *supra* note 52, at 109, 110 (“Associations help prevent a tyranny of the majority and forestall absolutist pretensions of government officials.”); Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in *FREEDOM OF ASSOCIATION*, *supra* note 52, at 75, 76 (“[L]iberal democracy is consistent with and even requires the incongruence between voluntary groups and public norms that always accompanies freedom of association.”); John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 201 (2010) (“[The] primary value [of group autonomy] is that it permits dissent to manifest through groups.”).

115. Inazu, *supra* note 114, at 149.

116. As discussed *infra* Part IV, the basis for exclusion might be a person’s viewpoint or a person’s trait. The First Amendment protects both. Thus, a private parade organizer may exclude a gay-rights message from the parade (viewpoint exclusion), and a private voluntary organization may exclude a gay man from its leadership (trait-based exclusion). Both are facets of pluralism. See Rosenblum, *supra* note 114, at 77 (“The moral (and immoral) uses of pluralism require exclusion.”).

117. *Id.* at 76.

a group to express only the views it intends to express.¹¹⁸ Exclusion thus goes hand in hand with expressive freedom: compelled inclusion of a group member by the state undermines group autonomy and expressive association.¹¹⁹

Abrasive as it may sound, the freedom to discriminate and engage in trait-based exclusion is a baseline freedom that receives constitutional protection. With stark language, the Supreme Court illustrated the principle of associative discriminatory freedom in determining admission to a private club. In *Moose Lodge No. 107 v. Irvis*,¹²⁰ a private lodge secured its freedom not to serve the Black guest of a lodge member. Writing for the Court, then-Justice Rehnquist upheld “the right of private clubs to choose members upon a discriminatory basis.”¹²¹ Dissenting for other reasons, Justice Douglas nonetheless agreed with the principle shared by the majority that

[t]he associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or a woman who his or her associates must be. The individual can be as selective as he desires.¹²²

One does not have to approve of the discrimination in which Moose Lodge engaged (or Justice Douglas’s choice language) to embrace the principle of free association that the case upholds. And while it is easy to condemn the anti-Black discrimination of the Lodge, “[e]ven groups that discriminate based on [protected] factors . . . help create a diversity of views and outlooks.”¹²³

118. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.”).

119. See Kateb, *supra* note 110, at 62 n.7 (concluding that Justice Souter’s “unequivocal meaning is that compelled inclusion alters the meaning (if not always the content) of expression, literal or symbolic”).

120. 407 U.S. 163 (1972).

121. *Id.* at 171.

122. *Id.* at 179–80 (Douglas, J., dissenting); see also *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (“Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person . . . solely on the basis of personal prejudices including race.”); Rosenblum, *supra* note 114, at 80 (citing Justice Douglas’s dissent as “the rule”). Douglas, however, would have found state action through the granting of a liquor license to the lodge, thus invoking the Equal Protection Clause. *Moose Lodge*, 407 U.S. at 181–83 (Douglas, J., dissenting). *Moose Lodge* is still the law. See *Cowtown Found., Inc. v. Dep’t of Agric.*, 638 F. Supp. 3d 1, 8 (D.D.C. 2022).

123. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1926 (2006) (discussing whether discriminatory groups should receive public funding).

At the same time, *Moose Lodge* provokes the question of when the exercise of private discriminatory freedom goes too far.¹²⁴ As Justice Blackmun explained in *Gilmore v. City of Montgomery*, “Invidious discrimination takes its own toll on the freedom to associate.”¹²⁵ When one group is systematically excluded from participating in society, society itself is harmed, and free association is weakened. In other words, free association and the exclusion that sustains it, if left unchecked, undermine the values it purports to serve. Commentators recognize that the constitutional balance rests between free association on the one hand and harm to the “vital claims” to equal treatment on the other.¹²⁶ If private discriminatory practices rise to the level of causing widespread social harm and undermining equality, then state intervention may be necessary to stop the discrimination.¹²⁷ At that point, private discrimination is no longer truly private but has entered the public domain where it is the proper subject of state regulation.

The tension for association law and public policy is to get the balance right. When the vital claims of some groups face sufficient harm from the exclusionary practices of others, Congress should intervene with legislation (or a constitutional amendment) to restrict associational freedom. Civil-rights statutes serve that function. Thus, the first civil-rights statute—the Civil Rights Act of 1866—required racial equality in the provision of basic rights of contract and property.¹²⁸ A century later, the civil-rights laws of the 1960s barred private discrimination in employment, housing, education, places of public accommodation, access to financing, and other areas. These statutes were public-policy responses

124. For decades prior to *Moose Lodge*, segregationists argued that freedom of association protected segregation in the face of civil-rights public-accommodation laws. Those arguments appropriately lost in court. See ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 9-12 (2009).

125. 417 U.S. 556, 575 (1974).

126. See, e.g., Inazu, *supra* note 114, at 205 (arguing that free association “ought to be constrained when a private group wields so much power . . . that it prevents other groups from meaningfully pursuing their own visions of pluralism and dissent”); Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION, *supra* note 52, at 3, 16 (suggesting that the test should be whether discrimination “interfere[s] with anyone’s basic liberties or opportunities”); Kateb, *supra* note 110, at 40 (“Some regulation is surely necessary to prevent or remedy serious harm to the vital claims of those outside any given association . . .”); Greenawalt, *supra* note 114, at 116-17 (“Since association itself is a valued activity, perhaps government intervention should occur only when membership significantly affects public and commercial opportunities.”).

127. “[L]egally compelled association is justified when exclusion denotes second-class citizenship” or “a badge of civic inferiority,” not just for the purposes of “avoiding harm to personal dignity and securing self-respect.” Rosenblum, *supra* note 114, at 75, 84.

128. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144) (codified as amended at 42 U.S.C. §§ 1981-1983).

to specific social problems caused by private discrimination, problems that led to the Civil War in the nineteenth century and decades of unrest and conflict during the civil-rights movement of the twentieth century. The Supreme Court upheld them all as lawful exercises of congressional power, associational freedom notwithstanding.¹²⁹

At the same time, just as these civil-rights statutes limit associational freedom to prevent social harm, civil-rights statutes also highlight the baseline freedom to discriminate by what they do not cover. For example, the Reconstruction-era statutes are limited to racial discrimination and do not cover other traits. The twentieth-century statutes vary considerably based on context and trait—some bar discrimination based on multiple protected traits, while others are specific to certain traits.¹³⁰ The twentieth-century statutes also contain explicit exceptions. Title II bars discrimination in public accommodations but does not cover discriminatory practices at private clubs.¹³¹ Title VII forbids discrimination in employment but allows free association (or discrimination) to continue for religious organizations,¹³² religious schools,¹³³ small employers or private clubs,¹³⁴ and Indian tribes.¹³⁵ The Fair Housing Act, which bars discrimination in the sale or rental of housing on the basis of “race, color, religion, sex, familial

129. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). It was not until 1968, however, that the Supreme Court held that the Civil Rights Act of 1866 prohibited private racial discrimination. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

130. Compare Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (barring employment discrimination based on “race, color, religion, sex, or national origin”), with Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (protecting voting rights from abridgement based on “race or color”).

131. The Title II exception is for private establishments, defined as “a private club or other establishment not in fact open to the public.” 42 U.S.C. § 2000a(e) (2024). If the private establishment makes its facilities “available to the customers or patrons” of a public accommodation, then it may not discriminate to that extent. *Id.* If the private establishment is a social club and has a policy of discrimination based on race, color, or religion, then it is generally not eligible for tax-exempt status as a social club. I.R.C. § 501(i) (2024).

132. The exemption is for “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C. § 2000e-1(a) (2024).

133. *Id.* § 2000e-2(e)(2).

134. *Id.* § 2000e(b).

135. *Id.*

status, or national origin,”¹³⁶ allows discrimination for owner-occupied housing¹³⁷ and single-family-home sales or rentals by the owner.¹³⁸

The Supreme Court also has limited the coverage of some statutes by statutory interpretation to allow, for example, affirmative action in employment, which it described as private, voluntary efforts to fix the problems of racial discrimination.¹³⁹ Further, as to scope, courts may determine that civil-rights statutes, as applied, reach too far and improperly tread on private speech or expressive association protected by the First Amendment. As Part IV explains, case law provides that associations may exclude based on trait for a variety of associational reasons.

Striking the proper balance between associational freedom and socially harmful exclusion is difficult. When it comes to discriminatory conduct, however, the baseline presumption favors association, which includes a freedom to discriminate and exclude. Civil-rights statutes deliberately shift that baseline and limit associational freedom to defend the vital claims of others against harmful private exclusionary practices. Absent such a law or state action, however, the baseline presumptive legal freedom remains.¹⁴⁰

* * *

This Part of the Feature put private remedial action into its historical and legal context, revealing a strong presumption of its legality. For over two hundred years, trait-based associations have provided trait-conscious assistance, which the law has countenanced and indeed encouraged. Federal tax and charitable-trust law support remedial action as a tool to eliminate discrimination. The law of free association establishes a baseline freedom for associative activity. Absent clear congressional action, the presumption favoring private remedial action prevails.

^{136.} *Id.* § 3604(b).

^{137.} *Id.* § 3603(b)(2).

^{138.} *Id.* § 3603(b)(1).

^{139.} *See, e.g., United Steelworkers of Am. v. Weber*, 443 U.S. 193, 209 (1979).

^{140.} *See* WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* 3 (2002) (“Liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value.”).

II. REMEDIAL ACTION IS NOT ILLEGAL DISCRIMINATION: THE CASE OF FEARLESS FUND

This Part of the Feature argues that the *Fearless Fund* decision is wrong as a matter of statutory interpretation and, therefore, that the race-conscious charitable assistance provided by the Fearless Foundation was legal. Section II.A briefly outlines the case, the logic of the Eleventh Circuit panel’s interpretation, and the potential implications of the panel’s ruling. Section II.B argues that the panel’s interpretation of § 1981 is erroneous.

A. Fearless Fund and Its Implications

In *Fearless Fund*, a panel of the Eleventh Circuit ruled that the Fearless Foundation’s race-conscious funding program was likely illegal discrimination.¹⁴¹ The implications for free association and charity law are significant. As a matter of free association, the ruling would deny private organizations the freedom to pursue the mission of eliminating the effects of racial discrimination in society. It is nigh impossible to pursue that mission without providing race-conscious assistance at the same time. Further, if race-conscious charitable assistance is illegal discrimination, then any charitable association (including schools, universities, hospitals, social-service providers, religious organizations, and many more) that considers race (or ethnicity) as a part of its mission in connection with a charitable program of assistance becomes a potential target for IRS audits through exploitation of the illegality doctrine. And even if the ruling is construed as narrowly as possible to apply only to explicit racial terms in formal contract provisions, the chilling effect on organizations that in any way consider race in connection with conducting a charitable program will be substantial. This latter concern is well exemplified by the Trump Administration’s executive orders attacking, without defining, “illegal discrimination” and the behavioral changes that have followed.¹⁴²

¹⁴¹. Am. All. for Equal Rts. v. Fearless Fund Mgmt., 103 F.4th 765, 769 (11th Cir. 2024).

¹⁴². See *supra* notes 25-31 and accompanying text.

In *Fearless Fund*, the mission of the Fearless Foundation,¹⁴³ a charitable association, was to help Black women-owned businesses.¹⁴⁴ To further that mission, the Foundation administered a contest to award grants of \$20,000 to small businesses with at least fifty-one percent Black woman ownership.¹⁴⁵ The Foundation supported the grant contest and its mission by pointing to the historic and ongoing discrepancies in the funding of Black women-owned businesses as compared to businesses owned by majority groups.¹⁴⁶ The contest was, therefore, explicitly intended to further the Foundation's remedial goals of addressing the funding gap in this specific population.

The American Alliance for Equal Rights (AAER) – also a charitable association – challenged the grant contest as a violation of § 1981.¹⁴⁷ As noted previously, § 1981 generally requires racial equality in contract formation and enforcement.¹⁴⁸ AAER argued that the Foundation's grant-contest application form was a contract and violated § 1981 because of its race- (but not gender-) exclusive criteria.¹⁴⁹

The Eleventh Circuit panel agreed with AAER.¹⁵⁰ The panel's interpretation of § 1981 used simple logic. First, § 1981 applies to racially discriminatory private conduct.¹⁵¹ Second, the Supreme Court has held that even though the statute was principally intended to address the harmful effects of anti-Black discrimination, § 1981 protects all racial groups from discrimination, not just Black

143. The case involved a network of organizations, including Fearless Fund Management, a venture-capital firm, and the Fearless Foundation, the charitable arm of the Fund. The Fund is a venture-capital firm and not a charity. The lawsuit was against four affiliated entities, but the Foundation was the sole administrator of the contest, making the Foundation “the primary Defendant.” *Am. All. for Equal Rts. v. Fearless Fund Mgmt.*, No. 23-CV-3424, 2023 WL 6295121, at *1 n.1 (N.D. Ga. Sep. 27, 2023).

144. The Foundation was formed to reduce racial and gender disparities in venture-capital funding by “bridg[ing] the gap in [such] funding for women of color founders building scalable, growth aggressive companies.” *Fearless Fund*, 103 F.4th at 769.

145. *Id.* at 769–70.

146. Brief for Appellees at 4–8, *Fearless Fund*, 103 F.4th 765 (No. 23–13138).

147. Brief of Appellant, *supra* note 20, at 3.

148. *See supra* note 128 and accompanying text.

149. Brief of Appellant, *supra* note 20, at 3–6.

150. The Eleventh Circuit instructed the district court to enter a preliminary injunction against the grant contest based on AAER's likely success on the merits. *Fearless Fund*, 103 F.4th at 769.

151. *Id.* at 775–76; *see also* *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975) (stating “that § 1981 affords a federal remedy against discrimination in private employment on the basis of race”).

people.¹⁵² Third, the grant contest was in contractual form.¹⁵³ Given these three points, the only question was whether the Foundation used race as a criterion to exclude people from its contest. The Foundation did, and therefore, the panel concluded that AAER was likely to prevail on its claim that the Foundation's contest violated § 1981.¹⁵⁴

As a technical matter, the panel's ruling applies only to § 1981. Thus, the only charitable assistance directly affected is assistance provided by contract. The exact same assistance, cash grants of \$20,000 for Black women-owned business grantees, presumably could be provided legally under § 1981 through an unconditional gift agreement.¹⁵⁵ The Eleventh Circuit panel's logic, however, applies with equal force to § 1982, which uses similar language to § 1981 to bar racial discrimination in private dealings in "property."¹⁵⁶ Courts have interpreted that term broadly.¹⁵⁷ In the charitable context, it would include cash and in-kind assistance in the form of grants, scholarships, and tangible or intangible assets. Thus, even in the absence of a contract, a charitable association that provided assistance in the form of property in a race-conscious manner would violate § 1982. Further, even if the Foundation opened the contest to all applicants regardless of race, § 1981 and § 1982 would remain problematic if the Foundation then chose Black women-owned-business grantees because of their race.¹⁵⁸

152. *Fearless Fund*, 103 F.4th at 777 n.6 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976)).

153. One of the contract-like features of the contest requirements was that grantees had to agree to provide their name, image, and likeness for use by the Foundation in connection with the program. *Id.* at 775. The Foundation argued (unsuccessfully) that the agreement was not a contract because there were no enforceable provisions for entrants. *Id.* at 776.

154. *Id.* at 779. The panel also ruled that AAER was "substantially likely" to overcome the Foundation's First Amendment defense. *Id.*; see discussion *infra* Part IV.

155. The contract requirement demonstrates the underlying formalism of the Eleventh Circuit's interpretation, which ties the legality of race-conscious charitable assistance to the definition of a contract.

156. Compare 42 U.S.C. § 1982 (2024) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."), with *id.* § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .").

157. See Roisman, *supra* note 105, at 509-12 (discussing relevant cases and the scope of § 1982).

158. Section 1981 covers intentional discrimination. The explicit use of race-based criteria makes an easy case and is not something that the Foundation contested, as the point of the grant program was to help Black women-owned businesses. A forced change to the grant terms would mean that the charity is legally barred from explicitly pursuing its mission, a compromise to its speech. See *infra* Part IV.

Thus, under the Eleventh Circuit panel's approach, most race-conscious private remedial action would be illegal.

New and existing Supreme Court precedent could expand the erroneous *Fearless Fund* decision even further.¹⁵⁹ The Court has interpreted race in the context of the 1866 Act to reflect its meaning at the time of enactment, namely, "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."¹⁶⁰ Thus, under the Eleventh Circuit panel's reading, remedial action is barred not only when it comes to skin color but also if a charity uses other ethnic characteristics as a basis for providing charitable assistance, including for people of Arab, Jewish, Finnish, Roma, Basque, Swedish, Norwegian, German, Greek, Italian, Spanish, Mongolian, Russian, Hungarian, Chinese, and Latin ancestry.¹⁶¹ As discussed in Section I.A, many trait-based associations were formed historically on the basis of ethnicity to foster group identity and provide benefits to group members. *Fearless Fund* thus directly calls into question whether thousands of such associations can continue to provide remedial action, either to formal members or otherwise.¹⁶²

159. Take, for example, the case of the Kamehameha Schools. Established with a donation from Hawaiian princess Bernice Pauahi Bishop, the school preferences students "who can prove some Hawaiian ancestry. As a result, almost all students attending Kamehameha are Native Hawaiians." Amy Qin, *This School Has Taught Native Hawaiians Since 1887. Is That Discrimination?*, N.Y. TIMES (Oct. 22, 2025), <https://www.nytimes.com/2025/10/21/us/politics/hawaii-kamehameha-schools-discrimination-lawsuit.html> [<https://perma.cc/5445-9X4L>]. Students for Fair Admissions has recently filed a suit against the school alleging that it discriminates on the basis of race. *Id.*; see Complaint at 2, *Students for Fair Admissions v. Kamehameha Schs.*, No. 25-cv-00450 (D. Haw. Oct. 20, 2025). A 2006 challenge against the Kamehameha Schools, also based on § 1981, was rebuffed by the full Ninth Circuit by a vote of eight to seven based on Title VII's affirmative-action exception, Congress's reenactment of § 1981 in the Civil Rights Act of 1991, and the historical context unique to Native Hawaiians. See *Doe v. Kamehameha Schs.*, 470 F.3d 827, 829, 839–50 (9th Cir. 2006) (en banc), *cert. dismissed*, 550 U.S. 931 (2007).

160. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612–13 (1987) (using dictionaries in use in 1866 to define race and finding that the legislative history of the 1866 Act "reflect[ed] this common understanding," noting that the debates are replete with references to Scandinavian, Chinese, German, and other races).

161. *Id.* at 610–13.

162. As one example, a ProPublica search of registered nonprofits with "Jewish" in their names pulls over three thousand results. PROPUBLICA NONPROFIT EXPLORER, "Jewish," 3,565 results (Sep. 22, 2025), <https://projects.propublica.org/nonprofits/search?q=Jewish> [<https://perma.cc/FKT5-HQEM>]. Many of these organizations undoubtedly are providing charitable assistance on the basis of Jewish identity. This assistance is now subject to doubt. For instance, the Jewish Federations of North America (JFNA) is one of the largest charities in the United States. JFNA provides hundreds of millions of dollars annually for crisis relief, aid networks,

In addition, the Eleventh Circuit panel's failure to take any notice of the charitable context of the Foundation's contest could have spillover effects on other civil-rights statutes. If providing charitable assistance to a historically disadvantaged group is illegal discrimination under one statute, then it is an easy step to reach the same conclusion under a different statute. Federal funding recipients, for example, are barred from engaging in racial discrimination under Title VI in *any* program (including services such as counseling), and are barred from sex discrimination in education under Title IX. If all forms of charitable assistance must be blind to color, ethnicity, and sex, then providing charitable assistance in education for women or men in a trait-conscious manner, taking into account gender identity or sexual orientation in program administration, or providing programming that accounts for race or gender differences may all lose federal funding.¹⁶³ The Trump Administration already is making this argument against DEI programs generally,¹⁶⁴ but the argument would gain force if the *Fearless Fund* decision took hold.¹⁶⁵

Further, the implications of a verdict of illegal discrimination flow through to an organization's tax-exempt status. Under the illegality doctrine of charity law, a charity may not have an illegal purpose,¹⁶⁶ which may be shown by illegal

trips to Israel, and safety nets for seniors and vulnerable Jewish people with differing levels of need. See *Who We Are*, JEWISH FED'NS N. AM., <https://www.jewishfederations.org/about-us/who-we-are> [<https://perma.cc/Q7P3-8VMM>] ("We serve Jews of all ages, backgrounds, nations, and stations in life."). Combining Supreme Court precedent with *Fearless Fund* would suggest that JFNA and similar charities could now be engaging in "illegal discrimination" under § 1981.

163. A separate issue is whether the receipt of charitable tax benefits counts as federal financial assistance under Title VI. For a convincing analysis, see Lloyd Hitoshi Mayer, *Are Nonprofit Tax Exemptions and Deductions "Federal Financial Assistance"? Should They Be?*, 29 FLA. TAX REV. (forthcoming 2025) (manuscript at 4), <https://ssrn.com/abstract=5006275> [<https://perma.cc/KGE5-27GC>] (arguing that federal tax benefits including tax deductions for charitable contributions "do not constitute federal financial assistance as that term is used in [federal antidiscrimination] statutes").

164. Memorandum from Pam Bondi, *supra* note 26.

165. See, e.g., Anumita Kaur, *Anti-DEI Efforts Shutter Cultural Centers that College Students Call Lifelines*, WASH. POST (Aug. 14, 2025), <https://www.washingtonpost.com/education/2025/08/14/multicultural-centers-universities-closing> [<https://perma.cc/YQ69-BGVJ>] (reporting on the closing of trait-based cultural centers at college campuses because of state laws restricting DEI).

166. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (finding that "the purpose of a charitable trust may not be illegal"); see also Jean Wright & Jay H. Rotz, *Illegality and Public Policy Considerations*, INTERNAL REVENUE SERV. 2 (1993), <https://www.irs.gov/pub/irs-tege/eotopicl94.pdf> [<https://perma.cc/ZFM9-KPKQ>] ("One of these basic charitable principles is that charitable organizations may not engage in behavior that is illegal or violates public policy."); RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 1.01(c) (A.L.I. 2021) ("A

activity.¹⁶⁷ The contours of the sparingly used doctrine,¹⁶⁸ however, are not clear, an uncertainty that leaves organizations open to risk.¹⁶⁹ The IRS's formal guidance on illegality appropriately emphasizes violations of criminal law.¹⁷⁰ However, nonbinding IRS guidance refers to civil as well as criminal violations.¹⁷¹ In either case, the test is the extent to which the illegal activity is substantial enough to become a proxy for an illegal purpose.¹⁷²

purpose is not charitable if it is unlawful, its performance requires the commission of criminal or tortious activity, or it is otherwise contrary to fundamental public policy.”). A charity could not, for example, have criminal tax fraud as a purpose. *See Church of Scientology of Cal. v. Comm’r*, 83 T.C. 381, 504-05 (1984), *aff’d*, 823 F.2d 1310, 1315 (9th Cir. 1987).

167. *See, e.g.*, Rev. Rul. 75-384, 1975-2 C.B. 204 (ruling that an organization formed with the lawful purpose of promoting world peace violated the illegality doctrine because the organization encouraged substantial unlawful protest activity as a means of obtaining its lawful objectives); Rev. Rul. 80-278, 1980-2 C.B. 175 (noting that a factor in charitable status is whether a charity’s “activities are not illegal, contrary to a clearly defined and established public policy, or in conflict with express statutory restrictions”). The general approach of basing purposes on activities is an established method of divining purposes. Treasury Regulation § 1.501(c)(3)-1(c) (as amended in 2014) sets forth the general rule that an organization is disqualified as not being organized exclusively for exempt purposes if it engages in a substantial amount of activity that does not further exempt purposes, whether or not the activity is illegal.
168. *See infra* Section III.A (discussing IRS illegality rulings).
169. The Court’s *Bob Jones* decision affirmed the illegality doctrine without explanation, citing a nineteenth-century trust-law decision. *Bob Jones*, 461 U.S. at 591 (stating that a “charitable use must be ‘consistent with local laws and public policy’” (quoting *Perin v. Carey*, 65 U.S. (24 How.) 465, 501 (1861))). The Court further noted in a footnote that that it “need not decide whether an organization providing a public benefit and otherwise meeting the requirements of § 501(c)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law and public policy.” *Id.* at 596 n.21. The IRS has referred to the doctrine in a handful of nonprecedential documents over decades. *See, e.g., infra* notes 247-251 and accompanying text.
170. *See, e.g.*, Rev. Rul. 75-384, 1975-2 C.B. 204 (noting that a “purpose is illegal if the trust property is to be used for an object which is in violation of the criminal law, or if the trust tends to induce the commission of [a] crime”). As discussed in Part III, *infra*, the Court in *Bob Jones* imposed a high bar for revocation of charitable status based on extratextual factors. The case thus strongly confirms that the IRS should reserve the illegality doctrine for egregious cases where there can be no doubt as to the illegality of an organization’s purpose. Revenue Ruling 75-384 predates the *Bob Jones* decision. *See Bob Jones*, 461 U.S. at 592 n.18 (noting that Congress could not have intended to allow exemption for organizations that train pickpockets or terrorists (both criminal activities) even if the purpose was educational). Although the Court in *Bob Jones* did not invoke the illegality doctrine in citing the pickpocketing and terrorism examples, both are compelling in part because the activities are criminal and indisputably not of public benefit.
171. Wright & Rotz, *supra* note 166, at 5.
172. *See id.* In determining whether an illegal activity is substantial enough to evince an illegal purpose, the IRS explained that it considers both quantitative and qualitative aspects of the activity. *Id.* The quantitative test focuses on the “time and attention the organization gives to the illegal activity,” while the qualitative test looks to the “seriousness of the illegality

Charities that provide race-conscious charitable assistance in states covered by the *Fearless Fund* ruling (Alabama, Florida, and Georgia) are therefore at risk should the IRS choose to test the limits of the illegality doctrine. As a civil, not criminal, violation, a single or even several instances of providing assistance should not result in loss of tax exemption due to illegality. But for organizations that provide race-conscious charitable assistance as an integral part of their missions, the risk would be significant both as to the substantiality of the activity, which presumably would be a major part of charitable operations, and, sidestepping substantiality entirely, having an illegal purpose.

If the delivery of charitable assistance violates civil-rights law (as per the Eleventh Circuit panel), then the organization's purpose, which includes the racial preference, may also be viewed as illegal.¹⁷³ Thus, in denying the legality of their grant program, the Eleventh Circuit panel implicitly suggested that the very purpose of the Foundation to prefer Black women-owned businesses is an illegal one.¹⁷⁴ The same would hold for scholarship organizations like a college fund for minority students, or even for a religious organization that favors a particular ethnic group.¹⁷⁵ This legal threat to charitable purposes raises the stakes for mission-driven organizations that are in any way trait-based.¹⁷⁶ Here, the risk has less to do with whether the IRS ultimately would succeed in a revocation

involved." *Id.* Factors that show seriousness include involvement by the organization's directors or officers in directing the activity and the nature of the activity. *Id.* For example, directing a single bank robbery or act of terrorism would likely be "so serious" as to warrant loss of tax exemption even if the activity was insubstantial as compared to other lawful activities. *Id.*; see also I.R.S. Gen. Couns. Mem. 34,631 (Oct. 4, 1971) ("[I]f only .01% of [the charity's] activities were directed to robbing banks, it would not be exempt."). For civil violations, the IRS considers the extent of the activity in relation to other activities. I.R.S. Gen. Couns. Mem. 34,631 (Oct. 4, 1971) (noting that if the illegal activity is a violation of local pollution regulations, they must be a "sizeable percentage" of the charity's operations).

173. A purpose to advance Black women-owned businesses would not be per se illegal because it could be advanced by legal means, for example, through education. Thus, a charity might be formed to educate the public about the importance of diversity in business ownership. But the same argument could be made about criminal tax fraud—education about fraud is not illegal. Separating means and ends in these cases is difficult and highlights that the attack on private remedial action is in effect an attack on mission.
174. See also Aprill, *supra* note 27 (manuscript at 20) (noting that the Eleventh Circuit upheld a challenge to the Foundation based on alleged racial discrimination).
175. The 1866 Act, unlike twentieth-century statutes, does not contain any exceptions for religious organizations, thus at a minimum requiring that the issue be litigated under the First Amendment. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27–29.
176. As Ellen Aprill points out, "guidance as to substantial illegal purpose has for the most part involved only criminal, not civil, illegality" and therefore organizations could challenge any "expansion of the doctrine to non-criminal activities." See Aprill, *supra* note 27 (manuscript at 17–18).

proceeding based on civil-law violations, and more about the chilling effect that arises from the uncertainty.

Notably, the Trump Administration is already purporting to rely on the illegality doctrine to deny federal benefits in other contexts. In a recently finalized Department of Education regulation,¹⁷⁷ the Administration will exclude student loans of individuals employed by “organizations that have engaged in certain illegal activities” from the federal Public Service Loan Forgiveness program.¹⁷⁸ The disfavored organizations include those that are “[e]ngaging in a pattern of aiding and abetting illegal discrimination,” which the regulation defines as a substantial illegal purpose.¹⁷⁹ Although the regulation does not directly affect the organization,¹⁸⁰ the hostility is clear. Thus, if trait-conscious charitable assistance is illegal discrimination, then for purposes of the regulation, a charitable organization like the Fearless Foundation, or a school that awards minority scholarships, may be engaged in an illegal purpose and be considered “a threat to our national security and to the social and economic stability of the United States.”¹⁸¹ Although the IRS might not, and should not, use the regulation to reach the same conclusion under the illegality doctrine, the risk to organizations is clear.¹⁸² The regulation thus further highlights the stakes for charities that

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177. William D. Ford Federal Direct Loan Program, 90 Fed. Reg. 48966 (Oct. 31, 2025) (to be codified at 34 C.F.R. § 685.219). The Department of Education issued a notice of proposed rulemaking in August 2025, William D. Ford Federal Direct Loan Program, 90 Fed. Reg. 40154 (proposed Aug. 18, 2025), following an executive order from March 2025 titled “Restoring Public Service Loan Forgiveness,” Exec. Order No. 14,235, 90 Fed. Reg. 11885 (Mar. 7, 2025).
 178. William D. Ford Federal Direct Loan Program, 90 Fed. Reg. at 48967; *see also* Exec. Order No. 14,235, § 1, 90 Fed. Reg. at 11885 (“[I]t is the policy of my Administration that individuals employed by organizations whose activities have a substantial illegal purpose shall not be eligible for public service loan forgiveness.”).
 179. William D. Ford Federal Direct Loan Program, 90 Fed. Reg. at 49001 (to be codified at 34 C.F.R. § 685.219(b)(30)(v)); *see also* Exec. Order No. 14,235, § 2(d), 90 Fed. Reg. at 11885 (ordering the Secretary of Education to define “substantial illegal purpose” in this manner).
 180. The harm is indirect, as individuals with federal student loans would be discouraged from working for organizations deemed to have any of the purposes listed in the regulation.
 181. William D. Ford Federal Direct Loan Program, 90 Fed. Reg. at 40160–61; *see also* Exec. Order No. 14,235, § 1, 90 Fed. Reg. at 11885 (providing that disqualified organizations are “activist organizations that not only fail to serve the public interest, but actually harm our national security and American values”).
 182. The regulation purports to rely on the illegality doctrine of charity law as “a tested approach taken by [the IRS] to avoid subsidizing employers engaged in unlawful conduct.” William D. Ford Federal Direct Loan Program, 90 Fed. Reg. at 40156. The illegality doctrine, however, is not a tool for policing unlawful conduct, or selecting certain activities for scrutiny (e.g., immigration, discrimination, or violating state law), *but see id.* at 40175, but a limited, and underdeveloped, legal doctrine to assess an organization’s purpose, for use in clear-cut cases, *see supra* notes 166–172 and accompanying text and *infra* notes 264–269 and accompanying text.

engage in trait-conscious charitable programs and the potential wider impact of the *Fearless Fund* decision.¹⁸³

In short, the implications to free association and to the provision of private donative assistance from *Fearless Fund* are significant. The case would deny private organizations the freedom to address the needs of their communities and to recognize the identity of the people they serve without looking over their shoulder for Big Brother's approval.¹⁸⁴ As discussed in the next Section, however, Congress has not passed an antidiscrimination law targeting donative assistance, and the *Fearless Fund* decision is not a persuasive interpretation of § 1981.

B. Legality of Private Remedial Action

The starting point for considering the legality of private remedial action is the legal landscape of free-association and charity law, which, as discussed in Part I, establishes a strong presumption in favor of legality. Civil-rights laws are major, usually controversial, interventions in private associational life, not undertaken lightly. Congress has passed antidiscrimination statutes targeting areas where private acts of discrimination indisputably caused widespread social harm, including in public accommodations, employment, housing, educational opportunities, and voting. Congress, however, has never passed a statute directed toward discrimination in the use of charitable funds. After decades (if not centuries) of allowing the affirmative use of traits in the provision of charitable assistance, the issue has not warranted legislation or even much (if any) legislative discussion.

The absence of an antidiscrimination statute specifically targeting charitable assistance is therefore significant. It strongly reinforces the presumptive legality of private associational conduct and should give courts pause before adopting a new interpretation of a statute that substantially infringes on associational

Indeed, litigants have already challenged the new rule as an erroneous application of this doctrine. See Zach Montague & Stacy Cowley, *2 Lawsuits Challenge New Rule Limiting Student Loan Forgiveness for Public Servants*, N.Y. TIMES (Nov. 3, 2025), <https://www.ny-times.com/2025/11/03/us/politics/student-loan-forgiveness-public-servants-trump.html> [<https://perma.cc/PD92-8KQL>].

183. The regulation also targets medical care for transgender people, which is potentially a form of trait-based assistance. See Exec. Order No. 14,235, § 2(c), 90 Fed. Reg. at 11885 (targeting transgender care as “the chemical and surgical castration or mutilation of children”); William D. Ford Federal Direct Loan Program, 90 Fed. Reg. at 49000 (to be codified at 34 C.F.R. § 685.219(b)(3), (b)(30)(iii)). Once illegality takes a foothold with respect to the affirmative use of any single trait, the door opens to arguments that any use of trait as a basis for charitable assistance, even if otherwise lawful, is inconsistent with charitable tax exemption under the public-policy doctrine.

184. See generally GEORGE ORWELL, 1984 (1949).

freedoms. It also means that any statutory prohibition on private remedial action must occur indirectly, as a matter of statutory interpretation by courts, not Congress.

The *Fearless Fund* decision has provided such an interpretation, applying § 1981, a statute concerned with contractual opportunities, to charitable assistance. The Eleventh Circuit panel's mechanical approach to the 1866 Act, however, is not persuasive. The panel ignores the charitable context for the Foundation's grant program, fails to address § 1981's history and uncertain scope, and does not consider congressional intent or make any effort to weigh private rights of association.

1. Section 1981 in Historical Context

In truth, the meaning and scope of the 1866 Act and § 1981 have never been clear. For the first 100 years of its existence, the Act did not apply to purely private acts of discrimination, and so would certainly not have applied to private remedial action.¹⁸⁵ Rather, the Court read the statute as providing equality in legal capacity of contract and property rights. This conclusion is plain from the statutory text. Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”¹⁸⁶ “[W]hite citizens” are the baseline for determining applicable rights. If a right is “enjoyed by white citizens,” then § 1981 guarantees that the “same right” may be enjoyed by “[a]ll persons,” pointing to equal legal capacity.¹⁸⁷

This plain-meaning interpretation also follows the remedial purpose of the statute.¹⁸⁸ Before and after the Civil War, many states denied Black people the

185. The Civil Rights Cases, 109 U.S. 3, 11 (1883); *see id.* at 16–18 (discussing the effect of the 1870 reenactment). In this era, one notable case was *Hurd v. Hodge*, 334 U.S. 24, 30–31 (1948), where the Court applied § 1982 to bar a racially discriminatory covenant on private property. This application to private conduct, however, had as a prerequisite the state action of judicially enforcing the covenant. *Id.* at 33–34.

186. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a)).

187. *Id.* Section 1981 was “intended only to guarantee all citizens the same legal capacity to make and enforce contracts.” *Runyon v. McCrary*, 427 U.S. 160, 189 (1976) (Stevens, J., concurring). For example, as to the charitable context, § 1981 and § 1982 guarantee every person of every race the same legal capacity to be considered a *beneficiary* of charitable assistance, whether that assistance is in contract or property form. To find otherwise would be to deny a person the right to receive charitable assistance in the abstract.

188. *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 386 (1982) (“The principal object of the legislation was to eradicate the Black Codes.”).

legal capacity to enter into contracts or to own property.¹⁸⁹ Sections 1981 and 1982 therefore were primarily remedial statutes intended to make clear that fundamental contract and property rights may not be denied because of race,¹⁹⁰ a denial in legal capacity that would require state action. Thus, under the historic view of the Act, neither the text nor the prime impetus for the statute clearly bars private acts of discrimination. Justice Thomas echoed this view of § 1981 in *SFFA*, arguing that the text of the 1866 Act simply provided that all persons “were equal citizens entitled to the same rights . . . as white citizens,” and that the Act did not “forb[id] racial discrimination generally” but “required an equality in certain specific rights.”¹⁹¹

Nevertheless, the Supreme Court changed course to find that the 1866 Act did in fact bar private discrimination, first with respect to § 1982 in *Jones v. Alfred H. Mayer Co.*,¹⁹² and then with respect to § 1981 in *Johnson v. Railway Express Agency, Inc.*¹⁹³ While both cases were stark departures from long-established precedent, the impact of both decisions was diminished because Congress had already broken the key legal (and policy) ground via the Fair Housing Act and Title VII.¹⁹⁴ Accordingly, *Jones*, which involved housing discrimination, and *Johnson*, which involved employment discrimination (by contract), were not arrogations by the Court that established major new civil rights, but were more like adjustments to the older statute that complemented these later congressional enactments.¹⁹⁵

189. See *United States v. Vaello Madero*, 596 U.S. 159, 174 (2022) (Thomas, J., concurring) (“Black Codes . . . restricted freed slaves’ rights to make and enforce private contracts, to own and convey real and personal property, to hold certain jobs, to seek relief in court, and to participate in common life as ordinary citizens.” (quoting John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992))).

190. See Roy E. Finkenbine, *Law, Reconstruction, and African American Education in the Post-Emancipation South*, in CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY 161, 162–64 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003).

191. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 235 (2023) (Thomas, J., concurring) (quoting Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 958 (1995)).

192. 392 U.S. 409, 412–13 (1968) (holding that § 1982 applies to private conduct).

193. The Court extended the reasoning of *Jones* to § 1981 in *Johnson v. Railway Express Agency, Inc.* See 421 U.S. 454, 466 (1975) (“Congress clearly has retained § 1981 as a remedy against private employment discrimination . . .”).

194. The Fair Housing Act (FHA) barred private housing discrimination, the very issue before the Court in *Jones* but not applicable to the *Jones* plaintiff because of the FHA’s effective date. *Jones*, 392 U.S. at 413–17, 417 n.21.

195. *Jones* was the seminal decision regarding private discrimination, as subsequent § 1981 cases relied on the Court’s analysis in *Jones*. The Court in *Jones* read the “same right” language to mean that if a white person excluded Black people from the market for sale of a property, a

Once the Court initiated these private rights of action, however, questions of scope inevitably arose. *McDonald v. Santa Fe Trail Transportation Co.*, another employment-discrimination case, addressed whether § 1981 protected white people.¹⁹⁶ The Court held that it did, emphasizing the equality goal of § 1981 and relying on legislative history to show that the statute was not limited to its remedial purpose of providing redress for Black people. The Court also rejected a mechanical reading of the statute, namely that the “white citizens” phrase did not mean that the statute only benefited nonwhite people.¹⁹⁷

Runyon v. McCrary raised a different question about the statute’s scope.¹⁹⁸ Not an employment case, *Runyon* involved a contracting opportunity to attend a private school. Two private schools refused to enter into contractual relationships with two families because of their race. Affirming that § 1981 applied to private discrimination,¹⁹⁹ the Court held for the families, emphasizing the commercial nature of the contracts. Specifically, the Court noted that the families sought “educational services” from the schools, and that under the “contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments.”²⁰⁰ Further, the “educational services . . . were advertised and offered to members of the general public.”²⁰¹ In other words, the schools were

Black person would not have the “same right” as a white person. *Id.* at 420. Therefore, the text barred private acts of discrimination. *Id.* at 421. The Court also provided an extensive review of the legislative history of the 1866 Act. *See id.* at 431–37. Both its textual reading and its views of the legislative history were widely debated by other Justices and commentators. *See id.* at 452 (Harlan, J., dissenting) (finding “an inherent ambiguity in the term ‘right,’” as referring either to “equal status under the law” or as an “‘absolute’ right enforceable against private individuals” but concluding that taken alone the text “suggest[s] the former interpretation”).

196. 427 U.S. 273, 275–76 (1976). The employers argued that the “as is enjoyed by white citizens” phrase “unambiguously limits [the statute] to the protection of nonwhite persons against racial discrimination.” *Id.* at 286. Under this reading, because white citizens are the baseline for guaranteed rights, there is nothing for a white person to gain; that is, the statute on its face was intended to protect nonwhite citizens who did not have rights equal to that of white citizens.

197. *Id.* at 287 (“While a mechanical reading of the phrase . . . would seem to lend support to [the employers’] reading of the statute, we have previously described this phrase simply as emphasizing ‘the racial character of the rights being protected.’” (quoting *Georgia v. Rachel*, 384 U.S. 780, 791 (1966))).

198. 427 U.S. 160, 168–75 (1976).

199. *Id.* at 170 (relying on legislative history to conclude that § 1981 “reaches purely private acts of racial discrimination” (citing *Jones*, 392 U.S. at 437–43, which uses legislative history to reach that conclusion for § 1982)).

200. *Id.* at 172.

201. *Id.*

contracting in the manner of a service provider, much like a vendor or a public accommodation.

Similar to both *Jones* and *Johnson*, *Runyon*'s holding occurred against a policy baseline that generally disfavored anti-Black discrimination in education. But unlike *Jones* or *Johnson*, *Runyon* broke controversial new ground because Congress had not taken the step of barring discrimination in private schools.²⁰² Thus, by extending § 1981 beyond employment discrimination to more personal contractual relationships, the *Runyon* Court prompted questions about how far the statute might reach.

Justice Powell, for example, concurring in *Runyon*, made clear his view that § 1981 does not apply to all contracts. Some contracts, he said, "have a discernable rule of exclusivity which is inoffensive to § 1981."²⁰³ These would include "personal contractual relationships" where "there is reason to assume that, although the choice made by the offeror is selective, it reflects 'a purpose of exclusiveness' other than the desire to bar members of the Negro race. Such a purpose, certainly in most cases, would invoke associational rights long respected."²⁰⁴ Dissenting Justices White and Rehnquist raised concerns similar to Powell's²⁰⁵ and invoked the pre-*Johnson* interpretation of § 1981 as not applying to private discrimination.²⁰⁶ In response, Justice Stewart's majority opinion emphasized that the case did not prevent "a private social organization [from] limit[ing] its

202. As a constitutional decision, *Brown v. Board of Education* applied only to public schools. 347 U.S. 483, 493 (1954) (holding that racial discrimination in public schools is unconstitutional).

203. *Runyon*, 427 U.S. at 187 (Powell, J., concurring) (quoting *McCary v. Runyon*, 515 F.2d 1082, 1088 (4th Cir. 1975)).

204. *Id.* at 187-88. Justice Powell said there could not be a bright line with respect to § 1981's coverage, but wrote that

choices . . . that are "private" in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts.

Id. at 189; see also Schuck, *supra* note 35, at 13 ("Parents looking for babysitters or people seeking professional services are seldom equal opportunity employers. . . . [D]ifferent principles are appropriate in different public and private domains by virtue of the distinct values that are morally relevant there.").

205. *Runyon*, 427 U.S. at 192, 212 (White, J., dissenting) (expressing uncertainty about whether, under the majority opinion, § 1981 would apply when "whites and blacks . . . choose to form a variety of associational relationships pursuant to contracts which exclude members of the other race," including "associations designed to further the interests of blacks or whites").

206. *Id.* at 194 ("The right to make contracts, enjoyed by white citizens, was therefore always a right to enter into binding agreements only with willing second parties. . . . [T]he language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract.").

membership on racial or any other grounds.”²⁰⁷ The holding was far more limited, only “prohibit[ing] private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes.”²⁰⁸

After *Runyon*, the Court began to narrow the scope of § 1981 and even cast doubt on the Court’s decision that § 1981 covered private behavior at all.²⁰⁹ In response, Congress substantially amended § 1981 as part of major legislation spanning multiple Congresses and overcoming a presidential veto.²¹⁰ The 1991 legislation codified that § 1981 applies to private acts of discrimination, therefore putting that issue to rest. Congress was silent, however, on the other issue in *Runyon*, namely how far § 1981 reached into personal contractual relationships.

2. Fearless Fund and Section 1981

The rich history of § 1981 is largely absent from the Eleventh Circuit panel’s opinion. Yet the history is vital to approaching the issue before the court, namely whether § 1981 applies to race-conscious charitable assistance. The panel’s mechanical, ahistoric approach to § 1981 belies the significance of its holding, which is casually to extend the Act to a realm of private association without legal precedent or clear indication from Congress, and with disregard of the implications to free association.

As to precedent, in the more than 150 years since its enactment, there is no evidence that § 1981 (or its counterpart § 1982) ever applied to bar remedial action. Since the Court changed course in 1975, most applications of § 1981 have been in the commercial-employment context as a supplement to Title VII, which already bars private discrimination in employment. With respect to remedial action, one scholar found that after the Supreme Court held that the 1866 Act applied to private conduct, courts did not apply § 1981 or § 1982 to racially discriminatory donative transfers.²¹¹ There is thus little to no precedent for applying

207. *Id.* at 167 (majority opinion).

208. *Id.* at 168, 172, 175-79.

209. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 171-72 (1989).

210. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (amending 42 U.S.C. § 1981). The 1991 Act overrode one of the Court’s interpretations, codified that § 1981 applies to private conduct, and in a new section provided for damages in cases of intentional discrimination in employment. *See id.* §§ 2-3, 101-102, 105 Stat. at 1071-74 (codified at 42 U.S.C. §§ 1981(c), 1981 note, 1981a).

211. *See Roisman, supra* note 105, at 478-80 (“Despite the Supreme Court’s 1968 decision in *Jones*, racially discriminatory donative transfer decisions after that date generally continued to apply the principles of the earlier cases, without considering the possible pertinence of the 1866 Civil Rights Act.”). Roisman concluded that “the courts continued to decide donative transfer cases

§ 1981 outside of its usual commercial context to police private charitable grant-making.

With no precedent supporting § 1981's expansion, common sense and judicial restraint suggest that before applying a statute in a new direction that intrudes on private civil freedom and the common law,²¹² some consideration of congressional intent is warranted.²¹³ There is, however, no evidence that Congress intended to prohibit private efforts to remedy discrimination in a race-conscious manner, either when the statute was initially enacted in 1866 or amended in 1991.

In 1866, providing charitable assistance for Black people was part of Congress's plan of reconstruction after the Civil War.²¹⁴ The Freedmen's Bureau Act (FBA) was a signature achievement to that end, conducted in partnership with private actors. Indeed, a main objection by opponents of the FBA was that it

as they had," *id.* at 480, and that "no cases were decided on the basis of sections 1981 or 1982," *id.* at 487. Roisman argued that both § 1981 and § 1982 should apply to donative transfers, but only to strike down invidious discrimination. *See id.* at 480, 487, 535-52.

212. *Cf. Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35-36 (1983) ("It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813) (alterations in original))).

213. Justices of the Supreme Court disagree on the role congressional intent should play in deciding the meaning of statutes. Justice Gorsuch recently rejected "legislative intent" in his textualist interpretation of Title VII in *Bostock v. Clayton County*, 590 U.S. 644, 676 (2020). Dissenting in the same case, however, Justice Alito thought inquiries into congressional intent to be important. *Id.* at 721 (Alito, J., dissenting). Regardless, when it comes to the 1866 Act, the Court has long relied explicitly on congressional intent. *See, e.g., Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006) ("Trying to make it a cure-all not only goes beyond any expression of congressional intent but would produce satellite § 1981 litigation of immense scope."); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 307 (1994) ("Even on those assumptions, however, we cannot find in the 1991 Act any clear expression of congressional intent . . ."); *Patterson*, 491 U.S. at 183 ("Congress cannot be said to have intended such a result with respect to breach of contract claims."); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) ("Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976) ("This cumulative evidence of congressional intent makes clear, we think, that the 1866 statute . . . was not understood or intended to be reduced by Representative Wilson's amendment, or any other provision, to the protection solely of nonwhites."); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) ("The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality."). Despite the importance placed on congressional intent by the high court, the Eleventh Circuit panel did not even once refer to Congress. *See Am. All. for Equal Rts. v. Fearless Fund Mgmt.*, 103 F.4th 765 (11th Cir. 2024).

214. *See supra* Section I.A.

represented public welfare as opposed to private charity. One congressman was explicit that welfare, like charity, should remain a private matter. Representative Anthony Knapp, for example, objected that the FBA would favor Black people to the detriment of white widows and orphans, averring that “[i]f this bill is to be put upon the ground of charity, I ask that charity shall begin at home.”²¹⁵ Similarly, President Johnson vetoed the Act because he believed that welfare efforts to assist the freed slaves, widows, and orphans—white or Black—were a matter of private charity. The government, he said, should leave “the care of education to the much more competent and efficient control of the States, of communities, of private associations, and of individuals.”²¹⁶ As Johnson’s remark implies, race-conscious private charitable assistance was seen as legal and appropriate during this time.

Justice Thomas argues in his concurring opinion in *SFFA* that the Reconstruction legislation was colorblind, not preferring one race or another.²¹⁷ For instance, he points out that the FBA did not classify by race but by freed status, and that the FBA also served white refugees.²¹⁸ Thomas also argues that even when the law of that era explicitly used race to provide legal benefits, for example, to “colored” servicemen or “destitute colored people,”²¹⁹ the use of race was meant as a screen (to identify victims of race-based exploitation) or a proxy (for people living in shantytowns) and not genuinely a race-based benefit.²²⁰ Be that as it may, the issue for private remedial action is whether the 1866 Act prohibited private actors from engaging in race-conscious assistance, requiring, for example, that private actors prove that their aid for freed slaves or other destitute persons was in no way based on their skin color. Considering that, as Thomas suggests, legislation sometimes used race as a proxy for government assistance, private persons must have had the same leeway to be conscious of race when providing help. More centrally, however, Thomas’s view of § 1981 as originally written appears to be that it did not apply to private acts of discrimination at all.²²¹

215. Schnapper, *supra* note 60, at 757. Knapp continued, “I shall claim my right to decide who shall become the recipients of so magnificent a provision, and with every sympathy of my nature in favor of those of my own race. *Id.*”

216. *Id.* at 769–70. President Johnson’s veto was overridden after changes to the Freedmen’s Bureau Act, including four “race-conscious provisions” that were not in the original bill. *Id.* at 772, 775.

217. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 233 (2023) (Thomas, J., concurring).

218. *Id.* at 247.

219. *Id.* at 248.

220. *Id.*

221. See *supra* note 191 and accompanying text.

In short, private charitable efforts to assist Black people were part of the post-Civil War reform effort and were known to Congress. For Congress to pass a landmark civil-rights act like the FBA and at the same time, in the 1866 Act, make it illegal for private charities to provide Black people with the same assistance the government was providing would defy logic and common sense.²²² Quite simply, the remedial use of race in the provision of charitable donative assistance was not recognized as a harm or something that Congress intended to address in 1866, much less prohibit.

Further, Congress's 1991 amendment of § 1981²²³ reveals no subsequent intent to affect the legality of private remedial action. Importantly, a main purpose of the 1991 change was to codify the Court's interpretation in *Johnson and Runyon* that § 1981 applied to purely private acts of discrimination.²²⁴ Thus, Congress intended to embrace those holdings. At the same time, Congress also disagreed with other of the Court's interpretations, which it rejected.²²⁵ The significance is that Congress carefully calibrated the legislation to the legal landscape at the time. When, as here, Congress codifies or substantially amends a statute, Congress presumptively acts with knowledge of the surrounding law. Thus, by amending the law in some ways, and leaving it alone in others, Congress to a degree acquiesces in, and strengthens, prevailing understandings.²²⁶

As discussed in Section I.B, by the year 1991, charities had long taken race into account in designing charitable remedial programs consistent with civil-rights laws, Treasury regulations, and IRS rulings.²²⁷ Congress presumably knew of this body of law and doctrine in 1991, having been made acutely aware

222. Schnapper, *supra* note 60, at 788 (“[I]f the Civil Rights Act had forbidden benign race-conscious programs, it would have virtually shut down the Freedmen’s Bureau.”).

223. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (amending 42 U.S.C. § 1981).

224. *See id.* §§ 3, 101, 105 Stat. at 1071-72 (codified at 42 U.S.C. § 1981(c)).

225. *See id.* § 101(2)(b), 105 Stat. at 1072 (overturning *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)).

226. *See, e.g.,* *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (“And the force of precedent here is enhanced by Congress’s amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding.”); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (describing and defending canons of interpretation that “emphasize the importance of not changing existing understandings any more than is needed to implement the statutory objective”).

227. BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 122 (12th ed. 2019) (citing authorities from before 1991 and noting that “[t]ax-exempt organizations are often involved in affirmative action efforts, with benefits decisions based on race, gender, and the like, such as preferential social assistance and scholarship and award programs”).

of anti-Black racial discrimination by social clubs²²⁸ and in education.²²⁹ Further, for Congress to bar private remedial action, as *Fearless Fund* suggests, would be to threaten countless existing charitable associations and gifts that are dedicated in perpetuity to a purpose, the fulfillment of which would be undermined or made impossible if remedial action is made illegal. Doing so would also entail court supervision to approve new purposes for gifts, often with the direct involvement of the state attorney general, and contrary to donor wishes.²³⁰ The reliance interests, built over decades, are considerable.²³¹

Yet there is no indication that Congress intended to change that legal baseline in 1991, or any hint that Congress believed that § 1981 or § 1982 applied to private remedial action.²³² If Congress had intended to prevent charities from using race in an affirmative way, and so to run counter to longstanding law and established practice, it would have made its intent plain either in the statute or somewhere in the legislative history, but the 1991 legislation, like the 1866 Act, is silent on the issue.²³³

228. I.R.C. § 501(i) (2024).

229. Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 599–601 (1983) (concluding that Congress acquiesced to the IRS’s interpretation of the law barring invidious racial discrimination in private-school admissions). Ironically, Congress attempted to undermine IRS efforts at repealing tax exemptions for discriminating private schools by denying the agency funding to enforce its antidiscrimination rulings, demonstrating that at a minimum, Congress was aware of IRS rulings in this area. See FISHMAN ET AL., *supra* note 48, at 388–89 (discussing congressional action to freeze appropriations to the IRS).

230. The doctrine of *cy pres* holds that if a charitable organization becomes unlawful, impossible, or impractical to carry out, a court may redirect a gift earmarked for the affected charity to a similar charity instead. RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 3.02 (A.L.I. 2021).

231. Gifts for a particular purpose, like a scholarship for the benefit of a minority group, are required by law to be spent consistent with the donor’s intent. See generally Roger Colinvaux, *Strings Are Attached: Shining a Spotlight on the Hidden Subsidy for Perpetual Donor Limits on Gifts*, 56 LOY. L.A. L. REV. 1169 (2023) (discussing donor limits on gifts); Reid Kress Weisbord & Christiana Markella de Borja, *Restricted Charitable Gifts to the Government*, 135 YALE L.J.F. 1 (2025) (discussing donor limits on gifts to the government).

232. Neither the text nor the legislative history suggest any change from prior law or practice when it comes to remedial action. Rather, committee reports illuminate that while § 1981 applied in a variety of contexts, charitable assistance was not considered one of them. See H.R. REP. NO. 102-40, pt. 2, at 35 & n.66 (1991) (listing “[p]rivate schools,” “community recreation facilities,” “hotel lounges,” and “private recreation facilities”); *id.*, pt. 1, at 146 (listing “jury service, voting rights, access to country clubs, admissions to schools and hospitals, automobile franchises, licensing requirements, and rental housing”).

233. A canon of statutory interpretation, the so-called “dog that did not bark” canon, refers to a presumption in favor of prior law if the legislative record amending the law is completely silent about the prior legal issue. Congress’s silence in both 1866 and 1991 on private remedial

Moreover, Congress's silence is important for another reason: the implications to associational freedoms not touched on in *Fearless Fund*. As noted earlier, § 1981 and § 1982 are not limited to skin color but cover a host of characteristics, including some that are tied to religion or ethnicity.²³⁴ Thus, under the panel's interpretation, some charities with a religious mission may not be permitted to take ethnic characteristics into account when providing charitable assistance in contract form or as property. For example, a university that awarded a grant to a Jewish student group to provide counseling for students harmed by discrimination on campus would be at risk for illegal discrimination. The same would apply to Arab or Muslim student groups. Similarly, many scholarship programs, funded over decades, are based on national or religious identity.²³⁵ Under *Fearless Fund*, many of these may now be illegal under either § 1981 (if a scholarship is a contract) or § 1982 (because a scholarship is the provision of property). Yet, there is no evidence that Congress intended in 1866 or in 1991 to prohibit the provision of charitable assistance on the basis of ethnicity. To interpret the statute to bar consideration of ethnicity in charitable giving is an astounding conclusion, given the sector's longstanding reliance on the legality of this type of aid.²³⁶

Further, the panel's interpretation requires the unequal treatment of traits for charitable purposes. The rule of *Fearless Fund* makes it all but illegal for charities to engage in race-conscious charitable assistance. At the same time, private charities remain free to provide charitable assistance based on gender, sexual orientation, or any other trait not covered in § 1981 or § 1982. Race, therefore, is

action is significant. See Anita S. Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1, 47 (2016) ("If a preexisting legal rule has generated significant reliance interests that would be upset by an unannounced, effectively *sub silentio*, change in the law, that fact can and should justify application of the dog that did not bark canon."); see also *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (using the canon to interpret whether the Voting Rights Act amendments in 1982 applied to judicial elections).

234. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (reiterating the Court's holding that legislative history confirmed that "at the time § 1982 was adopted, Jews constituted a group of people that Congress intended to protect").

235. See, e.g., *Hillel Jewish Scholarships Portal*, HILLEL, <https://www.hillel.org/jewish-scholarships-portal> [<https://perma.cc/PVU4-UHYV>] (listing over "600 college scholarships for Jewish students"); *Available Scholarships*, NAT'L ITALIAN AM. FOUND., <https://www.niaf.org/programs/available-scholarships> [<https://perma.cc/F9MM-9R9W>] (listing scholarships offered "to outstanding Italian American students"); Kelly Lamano, 26 *Valuable Scholarships for Asian American Students in 2025*, GOING MERRY (Mar. 14, 2025), <https://www.going-merry.com/blog/asian-american-scholarships> [<https://perma.cc/JQ4L-WC9X>] (identifying specific scholarships offered to students of Chinese or Korean descent).

236. See Schuck, *supra* note 35, at 88 ("Religion and ethnicity are essential parts of our lives, and government should not curtail how we express them in the private sphere." (quoting TAMAR JACOBY, *SOMEONE ELSE'S HOUSE: AMERICA'S UNFINISHED STRUGGLE FOR INTEGRATION* 541 (1998))).

singled out for scrutiny against private remedial efforts to eliminate the effects of discrimination. While it may have made sense for Congress to have limited the 1866 Act to race in the post-Civil War context, expanding the statute by interpretation to cover race-conscious charitable assistance but no other trait creates an anomaly that does not make sense, then or now. Charities would be barred from using race-conscious measures to remedy the effects of racial discrimination, but could take action based on gender or sexual orientation to target discrimination based on those traits.²³⁷ This is not only a perversion of the 1866 Act, which was designed primarily to *help* Black people, but also would appear to lead to its own problems of equal protection by denying aid to people based on salient ethnic identities but not based on other traits.

The principal flaw in *Fearless Fund* is that the panel ignored the charitable context, focusing instead on the fact that the Foundation used a contract to deliver assistance. The Eleventh Circuit panel viewed the Fearless Foundation's grant program like a commercial sweepstakes or employment contracting opportunity,²³⁸ even applying Title VII's "remedial program exception."²³⁹ But the contest was, at bottom, a donative grant program providing cash assistance for Black women-owned businesses. Donative assistance is not like offering services to the public for consideration. Rather, it more closely resembles a type of personal relationship Justice Powell described in *Runyon*, one with a "discernable rule of exclusivity" as an exercise of free association.²⁴⁰

The ruling of *Fearless Fund* is not foreordained or necessary. Existing law already provides a mechanism that would allow for private remedial action to be exempted from the 1866 Act. Currently, to make a § 1981 claim, a plaintiff must make a *prima facie* showing that, among other things, "discrimination

237. Yet another anomaly is that race-conscious charitable assistance not in contract or property form, such as counseling, would be allowed. The gaps in coverage (in contract or property, only when awarded by race) that would result highlight the nonsensical approach to the panel's interpretation.

238. The panel suggested there was a similarity between operation of the Foundation's grant program and a business that fired all its Black employees because they were Black. *Am. All. for Equal Rts. v. Fearless Fund Mgmt.*, 103 F.4th 765, 779 (11th Cir. 2024).

239. The panel assumed, without deciding, "that the remedial-program exception" of Title VII "applies to § 1981 cases . . . that arise *outside the employment context*." *Id.* at 777 (emphasis added). The panel then found that the Foundation "flunk[ed]" the test. *Id.* The panel did not explain why a "remedial-program exception" developed for employment-law purposes should apply as the test for the legality of a charitable program, even hypothetically. The contours of a legal "remedial program" tailored to the workplace bear little to no relation to remedial programs implemented for charitable purposes, and so should not be held to the same legal standards. In the context of a charitable program, it would not make sense to include groups that are not the target of the assistance.

240. *Runyon v. McCrary*, 427 U.S. 160, 187 (1976) (Powell, J., concurring) (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1088 (4th Cir. 1975)).

concerned an area enumerated by the statute.”²⁴¹ For the reasons this Feature has articulated, private remedial action is not an area enumerated by the statute. The burden should therefore shift back to the plaintiff who could still prevail upon a showing that the stated reason for exclusion “was a pretext for unlawful discrimination.”²⁴² This approach to private remedial action would be consistent with congressional intent and the courts’ current administration of the statute, albeit ignored by the Eleventh Circuit.

* * *

In summary, the 1866 Act was not designed or intended as a tool to regulate charitable assistance. The Civil Rights Act of 1866 says nothing about charitable donations. There is no evidence that Congress intended this post-Civil War statute to prohibit charities from providing aid based on race or any other trait. Consistent with the country’s baseline freedom and associational history, notwithstanding the *Fearless Fund* decision, private remedial action remains presumptively legal. It is not “illegal discrimination.”

III. TAX-EXEMPT STATUS AND PUBLIC-POLICY WHIPLASH

A remaining basis upon which private remedial action could be restricted relates to public policy. The Trump Administration has made clear through executive orders and other actions that it is strongly opposed to DEI in the private sector as against public policy.²⁴³ The issue is the legal significance of an executive-branch declaration that an otherwise lawful practice is against public policy.

According to the Supreme Court, a charitable organization may not be organized and operated in a manner that is contrary to established public policy.²⁴⁴ The public-policy doctrine of tax law, however, defies easy characterization. For purposes of tax exemption, there are, in a sense, two versions of the doctrine: a soft version, where the IRS cites public policy as a supplemental reason for denying tax status, and a hard version, where public policy stands as an independent basis for revocation. Private remedial action easily withstands both versions, and, more importantly for this Feature, directly furthers public policy by allowing private associations the freedom to address social harms without interference by the government.

²⁴¹. 2 RODNEY A. SMOLLA, *FEDERAL CIVIL RIGHTS ACTS* § 13:10 (3d ed. 2025). If the plaintiff makes the necessary showing, the burden shifts to the defendant to “offer a legitimate, non-discriminatory reason for its actions to rebut the presumption of discrimination.” *Id.* (citing *Williams v. Lindenwood Univ.*, 288 F.3d 349, 355 (8th Cir. 2002)).

²⁴². *Id.*

²⁴³. See *supra* notes 25–31 and accompanying text.

²⁴⁴. *Bob Jones Univ. v. United States*, 461 U.S. 574, 579 (1983).

A. “Soft” Public Policy

The soft version, more often invoked, is a branch of the illegality doctrine.²⁴⁵ Thus, if a charity fails for its illegality, the charity will also likely fail as contrary to public policy.²⁴⁶ Accordingly, courts and the IRS will reject an organization where illegal activity is of concern, and at the same time cite public policy. Categories of illegality that are contrary to public policy include violent antiwar or other illegal demonstrations,²⁴⁷ polygamous marriage,²⁴⁸ criminal tax fraud,²⁴⁹ child pornography,²⁵⁰ drug use,²⁵¹ promoting a holy war,²⁵² and

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245. See *supra* text accompanying notes 166–183; Wright & Rotz, *supra* note 166, at 2 (“[T]he ‘illegality doctrine’ encompasses illegal activity as well as activity in violation of public policy.”). Both doctrines arise from the law of charitable trusts and the common-law definition of charity. Thus, just as a charitable trust cannot be formed for an illegal purpose, it may also not have a purpose that is contrary to public policy, a principle that carries over to charities not in trust form.
246. Even this seemingly obvious point is not straightforward, as amply demonstrated by the civil-rights movement of the twentieth century. The generational fight for civil-rights legislation was a fight to change the public policy of segregation with antidiscrimination rules through peaceful disobedience of the law. See Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 KAN. L. REV. 397, 413 (2004). “In most situations, the activity in question has violated a law, so the underlying public policy simply lends weight to the illegality argument rather than having to stand alone.” Wright & Rotz, *supra* note 166, at 8.
247. See, e.g., I.R.S. Priv. Ltr. Rul. 201712014 (Dec. 29, 2016) (revoking a civil-disobedience organization’s exemption); I.R.S. Priv. Ltr. Rul. 200837039 (May 19, 2008) (describing an organization’s antiwar protest demonstrations as urging demonstrators to commit violations of local ordinances and breaches of public order).
248. See I.R.S. Priv. Ltr. Rul. 201325015 (Mar. 28, 2013) (denying an exemption from the federal income tax on the grounds that the organization promoted and practiced polygamy, which is against public policy); I.R.S. Priv. Ltr. Rul. 201323025 (Mar. 14, 2013) (same); I.R.S. Priv. Ltr. Rul. 201310047 (Dec. 11, 2012) (same).
249. *Church of Scientology of Cal. v. Comm’r*, 83 T.C. 381, 525–26 (1984), *aff’d*, 823 F.2d 1310 (9th Cir. 1987).
250. *Mysteryboy Inc. v. Comm’r*, No. 21011-08X, 2010 WL 291758, at *1 (T.C. Jan. 26, 2010); see also I.R.S. Priv. Ltr. Rul. 200826043 (Mar. 21, 2008) (denying an organization tax-exempt status because of its promotion of decriminalizing child pornography and consensual adult-minor sex).
251. *Iowaska Church of Healing v. United States*, No. 21-02475, 2023 WL 2733774, at *1 (D.D.C. Mar. 31, 2023), *aff’d sub nom.*, *Iowaska Church of Healing v. Werfel*, 105 F.4th 402 (D.C. Cir. 2024); see also I.R.S. Priv. Ltr. Rul. 201917008 (Apr. 26, 2019) (denying an organization tax-exempt status because its primary purpose was to provide financial support to individuals prescribed cannabis); I.R.S. Priv. Ltr. Rul. 201333014 (May 20, 2013) (same); I.R.S. Priv. Ltr. Rul. 201224036 (Mar. 19, 2012) (same).
252. *United States v. Mubayyid*, 476 F. Supp. 2d 46, 54–55 (D. Mass. 2007).

violence.²⁵³ Illegality also encompasses violations of federal tax law. For example, if an organization violates the rule of § 501(c)(3) against private inurement or engages in political activities, these doctrines provide an independent basis for denying charitable status (as illegal to the tax status) and are thus also contrary to public policy.²⁵⁴ In all these “soft-doctrine” cases, public policy is not the exclusive or even main ground for disqualification as a charity but is an extra reason, and ultimately superfluous.²⁵⁵ As far as remedial action is concerned, its presumptively legal status makes the soft version of the public-policy doctrine inapplicable.²⁵⁶

B. “Hard” Public Policy

1. Bob Jones’s Requirements

Applying the hard version of the doctrine requires more consideration. The issue is whether an organization’s legal remedial activity, standing alone, may disqualify a charity from tax exemption on public-policy grounds. Normally, disqualifying activities are up to Congress. The text of § 501(c)(3), for example, explicitly conditions charitable status on not engaging in certain otherwise lawful activities.²⁵⁷ These include distribution of profits to insiders, political campaign activity, and substantial lobbying.²⁵⁸ The statutory text, however, does not

253. *Synanon Church v. United States*, 579 F. Supp. 967, 971 (D.D.C. 1984), *aff’d*, 820 F.2d 421 (D.C. Cir. 1987). Several of the private letter rulings from notes 247 to 251 are also cited in Alex Zhang, *Antidiscrimination and Tax Exemption*, 107 CORN. L. REV. 1381, 1396–97 (2022), which divides public-policy private letter rulings since 2004 into four categories. Two rulings on Professor Zhang’s list, Private Letter Ruling 201531022 and Private Letter Ruling 201405022, arguably do not turn on the public-policy doctrine. When these are omitted from the list, Zhang’s four categories might be better characterized as two: illegal activity and invidious racial discrimination. Richard Schmalbeck notes that many of the decisions in which the IRS cites public-policy doctrine involve primarily violations of other tax-law doctrines. Richard Schmalbeck, *Bob Jones and the Public Policy Doctrine, 40 Years Later*, N.Y.U. NAT’L CTR. ON PHILANTHROPY & L. 29 (2024), <https://ncpl.law.nyu.edu/wp-content/uploads/2024/09/Schmalbeck-July-2024EOTRBib-Final-.pdf> [<https://perma.cc/W58X-DL4Q>].

254. Many of the rulings cited *supra* notes 247–253 involve illegal activity *and* violations of tax-law doctrines such as private inurement, private benefit, and the absence of a charitable purpose.

255. Richard Schmalbeck highlights four private rulings where the public-policy doctrine was invoked and concludes that none of them “required invocation of the public policy doctrine,” which was mentioned “more or less in passing.” Schmalbeck, *supra* note 253, at 33.

256. As discussed *supra* Section II.A, however, if courts follow the *Fearless Fund* decision, then both the illegality doctrine and the soft version of the public-policy doctrine become relevant.

257. I.R.C. § 501(c)(3) (2024).

258. *Id.*

provide for a generic public-policy requirement for charitable status.²⁵⁹ Nonetheless, the Court determined in *Bob Jones University v. United States* that Congress used the term “charitable” in its common-law legal sense, thereby incorporating concepts from charitable-trust law that a charity may not have an illegal purpose or one that is contrary to public policy.²⁶⁰ The Court then added its own gloss to the public-policy doctrine, requiring that the violated public policy be not just any public policy but a policy that is “established” or “fundamental.”²⁶¹

Thus, the Court sets forth the version of the public-policy doctrine referred to above as “hard” because it applies as an independent ground for revocation of charitable tax exemption.²⁶² In *Bob Jones*, for example, both universities involved were unquestionably educational organizations, and so were furthering exempt purposes and providing a public benefit. The activity in question—racial discrimination in their admissions, dating, and marital policies—was legal, private behavior.²⁶³ Therefore, the only basis for revoking tax-exempt status was that the racially discriminatory activity offended public policy in such a fundamental way that it would not make sense to bestow the benefits of charitable tax exemption on the organization.

In embracing a not-contrary-to-fundamental-public-policy requirement, the Court recognized the significance of its action and carefully circumscribed its holding as a narrow interpretive exception to the statute. “[A] declaration that a given institution is not ‘charitable’ should be made *only* where there can be *no*

259. *Id.*; *Bob Jones Univ. v. United States*, 461 U.S. 574, 613 (1983) (Rehnquist, J., dissenting) (“Nowhere [in the text of the statute] is there to be found some additional, undefined public policy requirement.”).

260. *Bob Jones*, 461 U.S. at 582, 591-92 (majority opinion). The Court did not, however, say that the law of charitable tax exemption was coextensive with charitable-trust law in all respects. See Buckles, *supra* note 246, at 437 (“[T]he majority in *Bob Jones* carefully declined to decide whether Congress intended to incorporate into the Code any elements of the common law of charitable trusts ‘other than the requirements of public benefit and a valid public purpose.’” (quoting *Bob Jones*, 461 U.S. at 588 n.12)).

261. *Bob Jones*, 461 U.S. at 586, 591-95, 598, 604.

262. See generally *id.* (using “charitable” as an umbrella term covering the other listed purposes of § 501(c)(3)).

263. The illegality doctrine was not invoked in *Bob Jones*, presumably because at the time the IRS notified Bob Jones University of its intent to revoke tax-exempt status in 1970, *id.* at 581, racial discrimination in private schools was legal. That changed in *Runyon v. McCrary*, 427 U.S. 160 (1976). See also Schmalbeck, *supra* note 253, at 29 (noting that Bob Jones University’s policies “against inter-racial marriage and dating were not illegal”). Bob Jones University did, however, lose federal funding because of its discriminatory policies. *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 599 (D.S.C. 1974), *aff’d*, 529 F.2d 514 (4th Cir. 1975) (unpublished table decision). A legal requirement of nondiscrimination as a condition of federal funding is not, however, the same as making discrimination illegal private behavior.

doubt that the activity involved is contrary to a fundamental public policy.”²⁶⁴ For a public policy to be fundamental, there must be consistent promulgations of each branch of the federal government. Thus, the Court cited the “unbroken line” of decisions from all three branches of government that invidious racial discrimination in education was against public policy.²⁶⁵ The Court noted that in the almost thirty years since *Brown v. Board of Education*,²⁶⁶ “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,”²⁶⁷ which was the “declared position of the whole government.”²⁶⁸ Further, sensitive to abuse of the doctrine by the IRS, the Court made clear that the IRS is not “invested with authority to decide which public policies are sufficiently ‘fundamental’ to require denial of tax exemptions.”²⁶⁹ That authority resides with Congress.

Bob Jones therefore presents an exceptionally high standard for any policy to be sufficiently fundamental, without explicit congressional direction, as to match this country’s rejection of anti-Black discrimination in its historic context of slavery and Jim Crow laws.²⁷⁰ Accordingly, the IRS has heeded the Court’s warning

264. *Bob Jones*, 461 U.S. at 592 (emphasis added). The Court later emphasized “that these sensitive determinations should be made only where there is no doubt that the organization’s activities violate fundamental public policy.” *Id.* at 598.

265. *Id.* at 593. The Court also found that “all three branches” of the federal government had an “unmistakably clear” position. *Id.* at 598.

266. 347 U.S. 483 (1954).

267. *Bob Jones*, 461 U.S. at 593.

268. *Id.* at 599.

269. *Id.* at 598 n.23 (quoting and agreeing with Justice Powell’s concurrence on this point). Although the Court did not explicitly extend this caution to IRS determinations of illegal purposes, the Court’s concern about IRS abuse of discretion to revoke tax exemption based on extratextual requirements is equally apt in that context as well.

270. Although the scope of the doctrine is not clear, most commentators agree that it is of limited applicability. See Aprill, *supra* note 27 (manuscript at 10-16); Schmalbeck, *supra* note 253, at 35 (noting that “[t]he bar on what constitutes a violation of public policy must be very high”); Lloyd Hitoshi Mayer & Zachary B. Pohlman, *What is Caesar’s, What is God’s: Fundamental Public Policy for Churches*, 44 HARV. J.L. & PUB. POL’Y 145, 151 n.14 (2021) (collecting critical commentary of *Bob Jones*); RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 4.01 cmt. c (A.L.I. 2021) (“The term ‘public policy’ is modified by ‘fundamental’ in § 1.01(c) to distinguish such a rare case [contrary to fundamental public policy] from the more common case in which a charity has a controversial or unpopular, yet valid, purpose [contrary to public policy].”). The doctrine is further limited by applying only to § 501(c)(3) organizations, meaning that a discriminatory organization could escape its strictures by forming a noncharitable nonprofit organization. Zhang agrees that the doctrine has been applied sparingly but also argues that it should be liberalized to cover discrimination based on traits in addition to race. Zhang, *supra* note 253, at 1384, 1389.

and invoked the hard public-policy doctrine of *Bob Jones* overwhelmingly in cases involving anti-Black discrimination in education.²⁷¹

2. Applying *Bob Jones* to Remedial Action

Nevertheless, *Bob Jones* is not expressly limited to any single public policy. It is reasonable therefore to ask whether private remedial action is an activity that is contrary to fundamental public policy so as to trigger *Bob Jones* and revocation of charitable tax status. AAER, in a harbinger of arguments to come, makes that case, at least for race-conscious scholarships. In a complaint to the IRS about the minority scholarship program of the Gates Foundation, AAER relied on the Court's "sweeping decision" in *SFFA* "that racial discrimination in *all* its forms is contrary to established public policy,"²⁷² and on the Trump Administration's executive orders attacking private-sector-based DEI.²⁷³ In AAER's reading, the *SFFA* dicta and the executive orders are sufficient to establish a fundamental

271. See Brennen, *supra* note 31 (manuscript at 36–37) (describing how the Supreme Court has never used the public-policy doctrine to revoke or deny § 501(c)(3) tax exemption outside the context of the type of racial preference at play in *Bob Jones*). For a compilation of IRS Private Letter Rulings where tax-exempt status was denied for this reason, see Zhang, *supra* note 253, at 1396 n.72, which cites

I.R.S. Priv. Ltr. Rul. 201041046 (Oct. 15, 2010) (denying tax-exempt status because private school did not promote its racial nondiscrimination policy and did not conduct outreach to minorities); I.R.S. Priv. Ltr. Rul. 201036024 (Sep. 10, 2010) (denying tax-exempt status to school for presumptive race discrimination); I.R.S. Priv. Ltr. Rul. 201033039 (Aug. 20, 2010) (denying tax-exempt status to school that did not provide evidence to overcome inference of racial discrimination); I.R.S. Priv. Ltr. Rul. 200909064 (Feb. 27, 2009) (denying tax-exempt status for race discrimination) . . . I.R.S. Priv. Ltr. Rul. 200703039 (Jan. 19, 2007) (denying tax-exempt status to school for failing to show race nondiscrimination); I.R.S. Priv. Ltr. Rul. 200447038 (Aug. 24, 2004) (same).

See also Wright & Rotz, *supra* note 166, at 8 (noting that *Bob Jones* was, as of 1994, "the only case . . . in which an organization was alleged only to have violated public policy and not any specific law").

272. Letter from Edward Blum, President, Am. All. for Equal Rts., to Robert Malone, Dir., Exempt Orgs. and Gov't Entities, Internal Revenue Serv. 7 (Apr. 1, 2025), https://americanallianceforequalrights.org/wp-content/uploads/American_Alliance_for_Equal_Rights_Files_Request_to_IRS.pdf [<https://perma.cc/W9W7-BJQU>]. As evidence, AAER cited Chief Justice Roberts's dicta that "[r]acial discrimination is invidious in all contexts" and that "[e]liminating racial discrimination means eliminating all of it." *Id.* (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 206, 214 (2023)).

273. AAER cited executive orders of the Trump Administration that call for ending "all discriminatory programs, including illegal DEI" policies and, "most importantly," the President's order to "all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences," which are "dangerous, demeaning, and immoral" and "violate the civil rights of this Nation." *Id.* (quoting different executive orders).

public policy against private remedial action and warrant the IRS revoking the charitable status of the Gates Foundation, one of the largest charities in the United States, for having a minority-based scholarship program.

Undoubtedly, actions of the Supreme Court and the executive branch are relevant articulations of public policy. The *Bob Jones* standard, however, does not and should not rest on dictum in a single Supreme Court opinion and a flurry of executive orders by the Trump Administration. If the words “fundamental” or “established” are to have any meaning when it comes to elevating a public policy above others, the words must reflect not only a strong degree of consensus among the three branches of government but also a policy that is sufficiently important to the nation such that a charitable tax exemption is anathema. Desegregation of private education met that bar, but a requirement of race or trait neutrality in private charitable activities (and missions) does not.

At only two years old, it is hard to forecast how *SFFA* will fit within the pantheon of Supreme Court decisions. *SFFA* was a split decision, following decades of split decisions, with vigorous dissents all the way through, about the fairly narrow issue of race-based affirmative action in higher education. Applying *Bob Jones*, it would be premature, after just two years, to give Chief Justice Roberts’s dicta that racial discrimination is invidious in all contexts the force of law when it comes to tax-exempt status. By comparison, the *Brown* decision, which *Bob Jones* relied on to show an established policy, was unanimous and after thirty years had become a bedrock decision of constitutional law that paved the way for each branch of government to acknowledge the evils of segregated education, whether public or private.²⁷⁴ Any policy emanating from *SFFA* against private charitable efforts to eliminate the effects of discrimination, regardless of context, is by contrast essentially brand new. As discussed in Part I, trait-conscious groups have long formed in response to societal discrimination. Treasury regulations and IRS guidance supporting private remedial action have deep historical roots in the United States. And perhaps most importantly, Congress has never weighed in with legislation on the topic.²⁷⁵ Private efforts to combat the effects of discrimination in a trait-conscious way are longstanding, legal, and supported by the government.²⁷⁶

274. The Court in *Brown* also “identifie[d] education as an essential governmental function” — making the analogy very strong when private actors engage in the same activity, thus supporting the Court’s judgment in *Bob Jones* that the policy extends beyond the state. Buckles, *supra* note 246, at 421–22. When charities are not performing essential government functions, however, the reasoning that they should be held to the same standards as the government is much weaker. See *id.*

275. Cf. *id.* at 409 (“Federal legislation constitutes perhaps the most recognizable expression of this nation’s public policy.”).

276. See *supra* Part I.

Similarly, the vague executive orders of the Trump Administration may reflect the months-old policy of the current administration as anti-DEI, but they do not reflect an established policy.²⁷⁷ This is amply demonstrated by the contradictory views of the Biden and Trump Administrations. On its first day, the Biden Administration declared that “[a]ffirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government.”²⁷⁸ Four years later, the Trump Administration ordered the end of federal DEI programs.²⁷⁹ The next Democratic administration undoubtedly will repeal many of President Trump’s executive orders. This is public-policy whiplash, not a sign of the fundamental agreement necessary to invoke *Bob Jones*.

The Court in *Bob Jones* was appropriately wary about resting a decision on public-policy grounds, in part because of the vagaries of policy and the role of the IRS as the gatekeeper to charitable status. If the IRS has the power to exclude private charitable associations from generally available tax benefits based on its assertions of the public interest, as AAER contends, the charitable sector will lose its independence from government. Charity would be subject to the policy whims of presiding administrations of both political parties. For private charitable associations to be consistent with public policy and tax exempt one year, and inconsistent the next, only to become consistent again, is unstable for organizations, their beneficiaries, the communities they serve, and for civil society. Thus, it would be unwise, if not unjust, for a court or the IRS to strike down remedial action as a matter of public policy until and unless there is “no doubt” about the “firm[ness]” of the policy as fundamental.²⁸⁰

3. Remedial Action Furthers Public Policy

Moreover, there are important reasons to support private remedial action. Most fundamentally, charitable associations are *alternatives* to government. Charities undertake privately funded solutions to social problems generally free

277. See Aprill, *supra* note 27 (manuscript at 15) (arguing that a new administration’s change in policy “cannot suddenly create a fundamental public policy”). Executive Order 14,173 continues to be embroiled in litigation, with district courts reaching different conclusions about the order’s probable legality. Compare *Chi. Women in Trades v. Trump*, 778 F. Supp. 3d 959, 972, 984–85 (N.D. Ill. 2025) (granting a preliminary injunction on First Amendment grounds), with *Nat’l Urb. League v. Trump*, 783 F. Supp. 3d 61, 105 (D.D.C. 2025) (denying a preliminary injunction).

278. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7009 (Jan. 20, 2021).

279. Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8633 (Jan. 21, 2025).

280. See *supra* notes 264–269 and accompanying text.

from government interference. Indeed, that is often the point, whether charities are filling gaps that the government cannot fill, innovating to create solutions that the government will not try, or reflecting the needs of communities that the government cannot or will not reach.²⁸¹ The ability of charitable organizations to do what the government does not is strongly consistent with public policy, pluralism, and the promotion of private solutions to social problems.

As Justice Powell emphasized in his *Bob Jones* concurrence, charities provide critical associational benefits. He highlighted “the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints.”²⁸² Quoting Justice Brennan, Powell agreed that charitable status “contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.”²⁸³ Tax exemption as a charity, Powell said, “is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life. Given the importance of our tradition of pluralism, ‘[t]he interest in preserving an area of untrammelled choice for private philanthropy is very great.’”²⁸⁴ To stamp out private efforts to help disadvantaged groups merely because an identifying trait is used to provide the help would enforce government orthodoxy and viewpoint conformity on private associational life.

Nevertheless, to a degree, the not-contrary-to-fundamental-public-policy doctrine of *Bob Jones* intentionally undermines Justice Powell’s vision. By fashioning even a tightly circumscribed public-policy limitation on charities, the Court imposed public policy on private organizations without explicit direction from Congress,²⁸⁵ providing an outer limit to the scope of private philanthropy

281. See Buckles, *supra* note 246, at 463 (“[T]he wide range of approaches adopted by charities for fostering public welfare combine to form a rich, diverse pool of goals and strategies that collectively serve the common good better than a single, uniform plan for advancing the public interest touted by some central authority with finite capacities. In a word, the nonprofit sector values *diversity*.”).

282. *Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring). Indeed, Justice Powell expressed doubt that all or even most charities could satisfy the majority’s “public benefit” standard to retain § 501(c)(3) status. *Id.* at 608, 609 n.3 (noting the divergent views of charitable organizations, making it unlikely that many reflect a “community conscience” but rather “illustrate the commendable tolerance by our Government of even . . . views that . . . are ‘at odds’ with the position of our Government”).

283. *Id.* at 609 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring)).

284. *Id.* at 609–10 (quoting *Jackson v. Statler Found.*, 496 F.2d 623, 639 (2d Cir. 1974) (Friendly, J., dissenting)).

285. Critical to the Court’s argument (and to Justice Powell), however, was Congress’s indirect approval of the antidiscrimination rule through legislative acquiescence. *Id.* at 600–01, 610.

and philanthropic freedom. This is a valid criticism of the *Bob Jones* decision, yet it also highlights the truly exceptional nature of the case as the culmination of decades of a historic policy struggle about equality in education.

Further, and at the same time, the Court (and the IRS) took refuge in the centuries-old law of charitable trusts. The Court noted that for over sixty years (which was then essentially the entire history of the federal income tax), the IRS appropriately relied on charitable-trust law in determining the meaning of charity.²⁸⁶ As discussed in Part I, by the 1970s, charitable-trust law had responded to changes in society to recognize a distinction between invidious discrimination and remedial discrimination, with the former contrary to public policy, and the latter permissible.²⁸⁷ The IRS's pre-*Bob Jones* rulings merely echoed existing developments in the law of charitable trusts.

This private-law distinction between invidious and remedial discrimination is meaningful and worth preserving in charity law. There are social problems that trait-conscious assistance is designed to cure. Economic disparities, healthcare access, educational opportunities, representation in the workplace — there are untold ways that individuals suffer the effects of societal trait-based exclusions. Charities provide a way for interested communities to organize, fund, and address the problems they face. For the government to bar charitable assistance from taking trait into account ignores those communities' experiences of past discrimination, shuts off a remedy, and allows harm to fester.

This is not to say that private efforts at eliminating the effects of discrimination through trait-conscious means might not one day become contrary to public policy.²⁸⁸ The virtue of a common-law approach to charity is that *if* there is emerging consensus that private remedial action is wrong, that consensus should be allowed to emerge along with social change. The bitter partisan divides on affirmative action in all branches of government, however, show that the law has not yet evolved to that state, nor has society.

The strong tradition of charity law is one of disunity and nonconformity when it comes to mission and tolerance for the missions of other organizations

In other words, the Court believed that Congress had the power to condition charitable tax status for schools on an antidiscrimination policy and had effectively done so through acquiescence.

286. *Id.* at 597.

287. RESTATEMENT (THIRD) OF TRS. § 28 cmt. f (A.L.I. 2012); *see also* HOPKINS, *supra* note 227, at 123 (noting that “the courts and the IRS have recognized, in the exempt organizations context, the distinction between ‘discrimination against’ and ‘discrimination for,’” where the former may pose problems under the public-policy doctrine but “the latter can be tolerated as [allowable] forms of affirmative action”).

288. “Just as the public policy changed over many years to prohibit racial discrimination which had previously been allowed, public policy could change in other areas as well.” Wright & Rotz, *supra* note 166, at 9.

and their chosen means to pursue them.²⁸⁹ Until and unless Congress acts to take that power away, courts should defer to positive private charitable efforts at remedial action, which are fully consistent with and advance public policy.

IV. FIRST AMENDMENT PROTECTION

Prior Parts of this Feature have argued that private remedial action is a longstanding practice grounded in the freedom to associate, fostered by tax law and supported by public policy. Further, Congress has passed no law to stop private efforts at eliminating the effects of discrimination through trait-conscious means. Remedial action should therefore benefit from a strong presumption of legality. Yet if a First Amendment defense becomes necessary, trait-conscious charitable assistance warrants protection to maintain the pluralism, independence, and traditional role of nonprofit associations in solving social problems and ensuring political and cultural diversity in civil society.²⁹⁰ First, this Part introduces the First Amendment doctrine of expressive action. It then assesses private remedial action as expressive association.

A. *Expressive-Association Rights*

As explained in Section I.C of this Feature, private associations are exclusionary by nature. Exclusion creates and sustains an association's identity. However, if exclusionary conduct meaningfully interferes with the associational rights of others, Congress (or a state legislature) has significant power to limit associational freedom with antidiscrimination rules. There is thus an inherent tension between the freedom to associate and antidiscrimination law.²⁹¹ The law of

289. The Trump Administration's executive order barring federal DEI efforts, while hostile to private efforts at affirmative action, does not change the underlying law nor touch directly on the topic of donative assistance. Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8634-35 (Jan. 21, 2025).

290. As the Court said in *Dale*, the expressive-association right "prevent[s] the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000), and "preserv[es] political and cultural diversity," *id.* at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

291. See Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 595-96 (2001) ("Enforcing antidiscrimination laws against groups that want to exclude [based on trait] intrudes on associational decisions. Refusing to apply antidiscrimination laws on this basis compromises the commitment to equality."); David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 203-04 ("As a matter of democratic theory, the right of association is something we cannot live without; but as a matter of social governance, the right, if uncontained, is something we cannot live with."); Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional*

expressive association mediates that tension and, while no case is directly on point, supports the legality of private remedial action.²⁹²

The Court recognized expressive-association rights as a defense to civil-rights laws in *Roberts v. United States Jaycees*.²⁹³ That case involved a challenge to a Minnesota public-accommodations statute that required the Jaycees, a non-profit membership organization, to include women as members. The Court said that the Jaycees was an expressive association entitled to protection under the First Amendment, but nonetheless upheld the Minnesota statute because, the Court reasoned, forcing the Jaycees to admit women would not significantly burden its ability to express its message.²⁹⁴ The Court noted that the Jaycees's exclusion of women occurred against the backdrop of widespread societal discrimination against women that prevented them from achieving "wide participation in political, economic, and cultural life"²⁹⁵ and cited the denial of "publicly available goods, services, and other advantages caus[ing] unique evils that government has a compelling interest to prevent."²⁹⁶

Sixteen years later, in *Boy Scouts of America v. Dale*,²⁹⁷ the Court applied expressive-association doctrine again, this time to favor an association's exclusion. In *Dale*, the Boy Scouts excluded a gay scoutmaster from its leadership in violation of a New Jersey public-accommodations law.²⁹⁸ The Boy Scouts argued that having an openly gay man in a leadership position would contradict its values as an association.²⁹⁹ In upholding the exclusion, Chief Justice Rehnquist said the

Bounds of the Right of Association, 35 U.C. DAVIS L. REV. 821, 823 (2002) (quoting Cole, *supra*, at 203-04).

292. See U.S. CONST. amend. I; Alexander Volokh, *Expressive Discrimination: Universities' First Amendment Right to Affirmative Action*, 77 FLA. L. REV. 75, 79 (2025) (stating that "[i]n the expressive-association context: the right to speak in groups includes the right to *choose* whom to speak with, i.e., the right to choose whom *not* to associate with in speaking," which is a "principle of 'expressive discrimination'" (quoting Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1160 (2002))).

293. 468 U.S. at 626. *Jaycees* in turn relied on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), as the foundational case for establishing a right of association in the First Amendment. *Jaycees*, 468 U.S. at 633.

294. *Jaycees*, 468 U.S. at 626. Two similar cases followed suit. See *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). Writing for the Court in *Jaycees*, Justice Brennan noted that "[t]he right to associate for expressive purposes is not . . . absolute" and required that the association make a "substantial" showing on the "basis in the record" that the antidiscrimination law "will change the message communicated by the group's speech." *Jaycees*, 468 U.S. at 623, 627-28.

295. See *Jaycees*, 468 U.S. at 625.

296. *Id.* at 628.

297. 530 U.S. 640 (2000).

298. *Id.* at 644-45.

299. *Id.* at 650-53.

right of expressive association protected three key values: pluralism, independence from government, and free speech.³⁰⁰ These constitutional values transformed the trait-based exclusion by the Boy Scouts into an expressive act. The Court agreed with the Boy Scouts that Dale's gay identity undermined the Scouts' ability to advocate for its values, essentially forcing the organization to send contradictory messages to the Scout community.

Dale established a three-part test for an expressive-association claim: (1) whether the organization "engages in 'expressive association,'"³⁰¹ (2) whether state action "would significantly affect [the group's] ability to advocate public or private viewpoints,"³⁰² and (3) whether the interest of the state outweighs the seriousness of the burden on the "organization's rights of expressive association."³⁰³ In making these determinations, courts "give deference to an association's assertions regarding the nature of its expression" and "to an association's view of what would impair its expression."³⁰⁴ The Court also defers to the organization on the seriousness of the burden.³⁰⁵

300. In some detail, Chief Justice Rehnquist elaborated:

In *Roberts v. United States Jaycees*, we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate."

Id. at 647-48 (citations omitted) (quoting *Jaycees*, 468 U.S. at 622-23).

301. *Id.* at 648.

302. *Id.* at 650. In *Dale*, the state action was the gay scoutmaster's "forced inclusion" under New Jersey law. *Id.*

303. *Id.* at 658.

304. *Id.* at 653; see also *Green v. Miss U.S. of Am., LLC*, 52 F.4th 773, 803 (9th Cir. 2022) (VanDyke, J., concurring) ("To warrant associative protection, a group must: (1) engage in expressive activity; (2) that would be impacted by the forced inclusion of an unwanted individual; and (3) show that the government's interest underlying the law does not outweigh the group's interest in the freedom of expression. This framework—by design and in practice—is highly protective of and deferential to associations." (citation omitted)).

305. See *Green*, 52 F.4th at 805 (VanDyke, J., concurring) (requiring courts to "give deference to an association's assertions regarding the nature of its expression" and "to an association's view of what would impair its expression" (quoting *Dale*, 530 U.S. at 653)); Elizabeth Sepper, *The Return of Boy Scouts of America v. Dale*, 68 ST. LOUIS U. L.J. 803, 806 (2024); Luke A. Boso,

After *Dale*, there was a period of “retrenchment” in expressive-association cases, but the doctrine is now in the midst of a “resurgence.”³⁰⁶ Four notable recent decisions in the Second,³⁰⁷ Fifth,³⁰⁸ and Ninth Circuits³⁰⁹ mark what appears to be a trend, where free association allows exclusion based on different characteristics, including sexual orientation, transgender status, and reproductive-health choices, notwithstanding civil-rights statutes to the contrary.³¹⁰ The Supreme Court also recently cited *Dale* favorably in a non-expressive-association First Amendment case, 303 *Creative v. Elenis*.³¹¹

B. Private Remedial Action as Expressive Association

Private remedial action has a strong case for First Amendment protection as a form of expressive association. As an initial matter, many if not most charitable associations will qualify as expressive. The label of “expressive association is not reserved for advocacy groups.”³¹² Rather, it applies to “a group [that] engages in some form of expression, whether it be public or private.”³¹³ The Boy Scouts, for example, qualified as an expressive association based on its mission statement “to instill values in young people,”³¹⁴ which it achieved through its activities, including “having its adult leaders spend time with the youth members.”³¹⁵

Exclusionary Expressive Conduct, 66 B.C. L. REV. 295, 299-303, 329-35 (2025) (criticizing the Court’s deferential position in *Dale*).

306. See Sepper, *supra* note 305, at 815-27 (detailing a resurgence of expressive-association cases after a post-*Dale* retrenchment); Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1167-70 (2024) (discussing recent expressive-association cases challenging antidiscrimination statutes).

307. *Slattery v. Hochul*, 61 F.4th 278, 289-91 (2d Cir. 2023); *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 178-80 (2d Cir. 2020).

308. *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 937, 940 (5th Cir. 2023).

309. *Green*, 52 F.4th at 779, 783-85.

310. Several of these cases are discussed in more detail *infra* Section IV.B.

311. 600 U.S. 570, 586, 589, 592, 603 (2023). That said, “the Court has never articulated a strong expressive-association vision.” Volokh, *supra* note 292, at 93.

312. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

313. *Id.* “[A]ssociations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.” *Id.* at 655. The Jaycees qualified as an expressive association because it took “public positions on a number of diverse issues” and its members “regularly engage in a variety of civic, charitable, lobbying, fundraising, and other activities.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626-27 (1984).

314. *Dale*, 530 U.S. at 649.

315. *Id.*

For charities like the Fearless Foundation that engage in remedial action, there will often be an expressive component to the assistance. The Foundation in particular aims to advance its belief that Black women-owned businesses are underfunded due to discrimination; its grant contest both communicated and addressed that mission.³¹⁶ Trait-conscious scholarships and other charitable programs similarly have an expressive component, combining a mission-based belief in the need to promote groups disadvantaged in society with charitable assistance through scholarships. In other words, the mission drives the activities, and the activities express the mission.

The second consideration is whether a ban on private remedial action “would significantly affect [the group’s] ability to advocate public or private viewpoints.”³¹⁷ In *Dale*, the Court credited the Boy Scouts’ belief that a gay scoutmaster was an implausible messenger of the group’s values. “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”³¹⁸ Thus, per the Court, a person’s trait can affect advocacy of an association’s message.

As compared to private remedial action and a granting charity like the Fearless Foundation, the selection of grantees is the mission and the message. Grantees are a main, if not the main, associative relationship. Grantee choice embodies the charity’s expressive mission and relates directly to the charity’s identity as an association. To compel the Foundation to open its grant contest outside of its target group is a form of compelled charitable giving, association, and expression, making the Foundation accept grantees it “does not desire,”³¹⁹ who presumably are less effective messengers.³²⁰ It would substantially affect the

316. Brief for Appellees, *supra* note 146, at 3, 11.

317. *Dale*, 530 U.S. at 650.

318. *Id.* at 653. The organization has since removed the restriction on homosexual scoutmasters. *Boy Scouts of America Lifts Ban on Gay Adult Leaders*, PHILANTHROPY NEWS DIG. (July 29, 2015), <https://philanthropynewsdigest.org/news/boy-scouts-of-america-lifts-ban-on-gay-adult-leaders> [<https://perma.cc/U4NH-XJDK>].

319. *Dale*, 530 U.S. at 640. If Fearless made its grantees “members,” then it would seem *Dale* would clearly protect it. *Id.*

320. *Cf. id.* at 655–56 (“The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other.”).

Foundation's ability to advocate for Black women-owned businesses by making the Foundation send a contradictory message.³²¹

Like *Dale*, other more recent cases protect acts of association tied to an organization's mission. Thus, normally nonexpressive action, like hiring an employee,³²² can take on an expressive component. In *Slattery v. Hochul*,³²³ for example, the Second Circuit upheld the expressive-association rights of an employer not to hire, or to fire, employees because of their reproductive-health decisions in clear violation of a New York law.³²⁴ The employer, a nonprofit organization that operated pregnancy centers, wanted to associate only with personnel "who [could] credibly communicate to patients its 'opposition to abortion and to sexual relationships outside of marriage.'"³²⁵ Invoking *Dale*, the court said that "[c]ompelled hiring, like compelled membership, may be a way in which a government mandate can affect in a significant way a group's ability to advocate public or private viewpoints"³²⁶ and relates "to the structure and identity of the association as an association."³²⁷ In comparison, the relationship between grantor and grantee inherently has a stronger associational component

321. The Foundation urged that its message that "Black women-owned businesses are vital to our economy" was part and parcel of its grant program. *Am. All. for Equal Rts. v. Fearless Fund Mgmt.*, No. 23-CV-3424, 2023 WL 6295121, at *6 (N.D. Ga. Sep. 27, 2023) (quoting *Fearless Strivers Grant Contest*, FEARLESS FUND (2023), <https://www.fearless.fund/strivers-grant-contest> [<https://perma.cc/274A-R4SY>]). The district court agreed, finding that "the Foundation clearly intends to convey a particular message in promoting *and operating* its grant program." *Id.* (emphasis added). It held that to apply § 1981 to Fearless's grant program "would impermissibly 'modify the content of [Fearless's] expression – and thus modify [its] speech itself.'" *Id.* (quoting *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1256 (11th Cir. 2021)).

322. Employers typically do not convey a message when making hiring decisions, as offering a job is not usually an act of expression. Sepper et al., *supra* note 52 (manuscript at 52).

323. 61 F.4th 278 (2d Cir. 2023).

324. *Id.* at 289. Earlier, in *New Hope Family Services, Inc. v. Poole*, 966 F.3d 145, 179–80 (2d Cir. 2020), the Second Circuit allowed an employer to proceed on its claim, made on expressive-association grounds, that it should be permitted to refuse adoption services to same-sex couples in violation of state law. *See also* *Fulton v. City of Philadelphia*, 593 U.S. 522, 542–43 (2021) (holding that the City of Philadelphia burdened a Catholic foster care's free exercise by refusing to contract with the organization unless it agreed to certify married same-sex couples as foster parents).

325. *Slattery*, 61 F.4th at 284.

326. *Id.* at 288 (quoting *New Hope*, 966 F.3d at 179). The court also found that even if preventing discrimination against someone who has an abortion using legal means is a compelling state interest, this "cannot overcome the expressive rights of an association dedicated to outlawing or otherwise opposing that specific conduct." *Id.* at 289.

327. *Id.* at 290 (quoting Richard W. Garnett, *Jaycees Reconsidered: Judge Richard S. Arnold and the Freedom of Association*, 58 ARK. L. REV. 587, 606 (2005)).

than that between employer and employee,³²⁸ and more closely resembles a membership-type relationship, which *Dale* protected. In expressive-association cases, courts do not focus on the reason for the exclusion, but on how the exclusion affects the association. As discussed, when it comes to private remedial action, the charitable mission defines the exclusion. To ban the activity is to silence the expression, and, as noted above, even the mission itself.³²⁹

The third *Dale* prong requires balancing the government's interest against the burden to the association's rights of expressive association. The burden to association from shutting down a charitable program as a form of expression appears substantial, as it would essentially handcuff a charity's remedial purpose. Against this burden, however, the state would appear to have only a weak interest in preventing or eliminating all private trait-conscious charitable assistance.

As discussed in Part I, general-association and charity law has long allowed private charitable efforts to form trait-based groups and work to eliminate the effects of discrimination, as do numerous civil-rights statutes.³³⁰ Indeed, the rights of intimate and expressive association are based on protecting this freedom against state interference.³³¹ Since civil-rights law has not previously been deployed in the context of charitable donations by either Congress or the executive branch, even with decades of experience of private remedial action, the government's interest in trait neutrality does not extend meaningfully to charitable donative assistance. There are also countervailing government interests supporting expressive association: freedom of association generally, philanthropic freedom to solve social problems free from state interference and government orthodoxy, pluralism in civil society, and elimination of the effects of discrimination.

A variation on the government's interest might be that the state has a distinct interest when it comes to racial discrimination, and thus § 1981 and § 1982, which are limited to race, should extend to private donative assistance and trump the First Amendment. This would be to apply the view articulated by Chief Justice Roberts's dicta in *SFFA* that "[r]acial discrimination [is] invidious in all contexts."³³² Even as to racial discrimination, however, the government's interest in

328. Sepper et al., *supra* note 52 (manuscript at 5) (arguing that expressive-association doctrine generally should not apply to the employer-employee relationship and noting that unlike the workplace, which "unite[s] people with varying identities and beliefs," "voluntary groups tend to gather people based on their shared values or characteristics").

329. See *supra* notes 173-174 and accompanying text.

330. See *supra* Part I.

331. See *supra* Section I.C.

332. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 214 (2023) (alteration in original) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)).

imposing trait-neutral criteria on private actors is of questionable standing.³³³ Free-association principles and statutory exceptions apply to private race-conscious decisions just as with other traits. Further, in the First Amendment context, the nature of the trait generally does not affect the speech's constitutional status³³⁴ (or the standard of review).³³⁵ In other words, race-based expression is not singled out for special scrutiny. Moreover, as discussed in Part II, taking a race-exclusive approach to charitable assistance (banning it), raises equality issues of its own by denying charities the ability to help people based on one trait but not others, thus treating traits unequally for charitable assistance purposes.

Relatedly, the Supreme Court has recognized the importance of private remedial initiatives. Even in the case of Title VII's ban on discrimination in employment, the Supreme Court pointed out that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action"³³⁶ and that some forms of affirmative action fit "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance."³³⁷ As to private remedial action, Title VII is silent and inapplicable.³³⁸

A final consideration relates to the social harm caused by the exclusion. Charitable assistance, by definition, is exclusive; ineligibility for aid is part and parcel

333. See *supra* Part III; cf. *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1163 (W.D. Wash. 2011) (allowing a gay softball league to discriminate against heterosexual men and noting that the plaintiffs "failed to argue that there is a compelling state interest in allowing heterosexuals to play gay softball").

334. Volokh, *supra* note 292, at 122-23 ("The doctrine doesn't distinguish between race and other bases of discrimination."). This also makes sense. The First Amendment protects private speech, regardless of viewpoint. Volokh considers whether the trait could make a difference to how compelling the government's interest is, with a more compelling interest perhaps to eradicate racial discrimination as compared to other forms, but he concludes that this distinction is not present in the First Amendment case law. *Id.* at 124-26.

335. In the equal-protection context, when the Court reviews the state's discriminatory conduct, there are different standards of review depending on whether the state discriminates based on race, gender, or other trait. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985). There is no parallel in the First Amendment context, with the Court, for example, giving civil-rights statutes that regulate private conduct different review standards based on the trait. Volokh, *supra* note 292, at 125 ("The case law thus resists any distinction between eradicating different forms of discrimination in terms of the strength of the governmental interest.").

336. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 207 (1979).

337. *Id.* at 209. Title VII implementing regulations espouse "the clear Congressional intent to encourage voluntary affirmative action." 29 C.F.R. § 1608.1 (2025). Pursuant to the regulations, "[v]oluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII." *Id.*

338. See *supra* notes 132-135 and accompanying text.

of the donative plan. Any harm that ineligible grantees such as those excluded from the Fearless Foundation's contest may experience, however, is not reasonably comparable to the systematic deprivations of access to economic advantages that traditionally warrant civil-rights protections, such as those the Court protected in *Jaycees*.³³⁹ To the contrary, any social harm from charitable efforts to favor certain disadvantaged groups, and exclude based on trait, seems unproven—and the policy against it recent. Thus, such harm does not rise to the level of a compelling interest.

Altogether, private remedial action fares well under the *Dale* expressive-association factors. The Eleventh Circuit panel in *Fearless Fund*, however, rejected the Foundation's First Amendment defense.³⁴⁰ The panel relied on *303 Creative v. Elenis*.³⁴¹ There, the Court allowed a website designer not to make wedding sites for gay couples. Forcing her to do so, the Court said, would "compel" the designer "to create speech she does not believe."³⁴² The Court distinguished between an exclusion based on message as opposed to status.³⁴³ Under that distinction, a belief (the message) is protected by the First Amendment but the act of discrimination (denying services because of status or trait) is not.³⁴⁴ The Eleventh Circuit panel invoked that distinction to find that unlike the website designer, the Fearless Foundation's grant program excluded based on status, not message, because the program "flatly" excluded "business owners who aren't 'black females.'"³⁴⁵ Thus, under this reading, the Foundation is allowed to exclude grantees who do not believe it is important to advance the interests of Black women-owned businesses, but may not actually prefer Black women-owned businesses.

The message-status distinction, however, is ill-fitted for mission-based associations like the Foundation where a person's trait is essential to the mission and provision of assistance.³⁴⁶ As discussed, for the Foundation, the exclusion

339. See *supra* notes 293-296 and accompanying text.

340. *Am. All. for Equal Rts. v. Fearless Fund Mgmt.*, 103 F.4th 765, 769 (11th Cir. 2024). The Foundation referenced expressive association but did not base its argument on *Dale*. See Brief for Appellees, *supra* note 146, at 17-24.

341. 600 U.S. 570 (2023).

342. *Id.* at 579.

343. *Fearless Fund*, 103 F.4th at 778 (quoting *303 Creative*, 600 U.S. at 595 n.3).

344. *Id.* The website designer said she did not deny service because the customers were gay, but because she did not want to promote same-sex weddings. *Id.* at 778-79 (citing *303 Creative*, 600 U.S. at 582, 598).

345. *Id.* at 779 (quoting the official rules of the competition).

346. Charities are private associations of individuals that form to promote a charitable mission, which can be accomplished only through action in furtherance of that mission. When a charity

based on trait serves, and is part of, its expressive association. The identity of the grantees as Black women-owned businesses is an important part of the message that Black women-owned businesses are underfunded due to societal discrimination. Calling attention to the grantees' identity is essential to that message. Neither the message, nor the association, would have the same impact if the Foundation's grantees were all white. Indeed, that is what makes for an expressive association.³⁴⁷

Justice Gorsuch acknowledged as much in his opinion for the Court in *303 Creative*. Even though that case was about "pure speech"³⁴⁸ and not expressive association, Gorsuch repeatedly relied on *Dale* for support, citing it as a key First Amendment decision that "protects *acts* of expressive association."³⁴⁹ Gorsuch understood the connection between an act of exclusion based on trait and the viewpoint of the association, saying that if the Scouts could not exclude Dale because he was gay, they would be forced to "propound a point of view contrary to [the Scouts'] beliefs."³⁵⁰ Thus, the message-status distinction at play in the pure-speech context of *303 Creative* does not work in expressive-association cases like *Dale* and *Fearless* where the message and the status are inextricably linked.

A handful of other First Amendment cases provide indirect support for expressive trait-based exclusions. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,³⁵¹ a parade organizer was allowed to exclude a float that

uses identity-based criteria as part of a charitable program, it does so to further its mission and as an instrument to its association (which is to further the mission). Separating mission from action is difficult, as both are integral to the organization's status as a charity. Tax law supports this idea of a charity, requiring § 501(c)(3) organizations to satisfy both an organizational and an operational test. Treas. Reg. § 1.501(c)(3)-1(a) (2025). The organizational test requires the organization to be formed exclusively for a charitable (or other exempt) purpose. *Id.* § 1.501(c)(3)-1(b). The operational test requires that the organization operate for that purpose. *Id.* § 1.501(c)(3)-1(c). These tests are two sides of the same coin — mission and action in furtherance of mission. *See also* Inazu, *supra* note 114, at 196 (urging the Court to reject "an artificial distinction between expression and conduct and recogniz[e] that, in some cases, they are one and the same").

347. The Eleventh Circuit panel did not cite *Dale*. *See generally Fearless Fund*, 103 F.4th 765 (relying on other cases and expressive-conduct grounds rather than expressive association).

348. *303 Creative*, 600 U.S. at 586.

349. *Id.* (emphasis added).

350. *Id.* at 589 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000)); *see also* Sepper, *supra* note 305, at 806 (characterizing *Dale*'s holding in the same way); *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 658, 660, 662 (2018) (Thomas, J., joined by Gorsuch, J., concurring in part and concurring in the judgment) (finding that "creating and designing custom wedding cakes" is "expressive conduct," and thus to force a cakemaker "to create custom wedding cakes for same-sex weddings" would "alter [the cakemaker's] *own* message"). A charity's creation of a grant program to promote a cause is also expressive conduct.

351. 515 U.S. 557 (1995).

avored LGBTQ rights. The Court noted “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”³⁵² When the vehicle for the message is a parade, “every participating unit [in the parade] affects the message conveyed by the private organizers.”³⁵³ Thus, under *Hurley*, the choice of participant is expressive conduct.

Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.,³⁵⁴ relied on *Hurley* to consider whether charitable spending of donated funds is protected speech. There, a charity, the AmazonSmile Foundation, donated a percentage of proceeds from customer purchases on Amazon to a charity the customer designated from a list of charities approved by AmazonSmile. AmazonSmile excluded a religious charity (Coral Ridge) that opposed homosexual conduct from its list of eligible charities. Coral Ridge sued alleging religious discrimination by a public accommodation. The court found that AmazonSmile’s “choice of what charities are eligible to receive donations”³⁵⁵ was expressive conduct protected by the First Amendment. To force AmazonSmile “to donate to an organization it does not wish to promote”³⁵⁶ would “modify the content of [Amazon’s] expression”³⁵⁷ and be an unconstitutional interpretation of Title II.³⁵⁸ Like a private

352. *Id.* at 573.

353. *Id.* at 572. The Court said that excluding the float was no different from a private club “exclud[ing] an applicant whose manifest views were at odds with a position taken by the club’s existing members.” *Id.* at 581. Although *Hurley*, like 303 *Creative*, was message- and not status-based exclusion, the Court framed the issue as “whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey.” *Id.* at 559. As applied to *Fearless Fund*, forced inclusion of non-Black women-owned businesses (like a float in a parade of grantees) would undoubtedly “impart[] a message the organizers d[id] not wish to convey.” *Id.*; see also Kateb, *supra* note 110, at 62 n.7 (describing Justice Souter’s “unequivocal meaning” in *Hurley* “that compelled inclusion alters the meaning (if not always the content) of expression, literal or symbolic”).

354. 6 F.4th 1247 (11th Cir. 2021).

355. *Id.* at 1255.

356. *Id.* at 1256.

357. *Id.* (alteration in original) (quoting *Hurley*, 515 U.S. at 578).

358. When the charitable-giving platform is run by the federal government, the answer is the same. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (“Control over access to a nonpublic [charitable-giving] forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”).

organization's choice of grantee, the decision of how to allocate charitable dollars is protected speech.³⁵⁹

Taking stock of the host of First Amendment cases that support exclusionary freedom, there is little doubt that charitable programs can be expressive, just like parades and websites. Charitable associations therefore have significant leeway under the First Amendment to define their programs and the content of the message. The only debatable point appears to be whether or when an act of inclusion (which necessarily involves exclusion) is a part of the message.³⁶⁰ To that question, private remedial action fits favorably within the case law.

A final observation concerns the role of the First Amendment in balancing among competing sets of constitutional values: here, the private freedom to associate and group autonomy versus a civil right (if any) not to be subjected to discrimination. Congress is the lead actor, creating statutory civil rights against a free-association baseline. As argued throughout this Feature, it matters that Congress has not adopted an antidiscrimination rule specifically for donative assistance. In that respect, private remedial action and the Fearless Foundation have stronger cases under the First Amendment than other successful claimants, if only because those cases all involved discrimination in a context (employment, public accommodations) that Congress or a state has already said is problematic. This provides courts with more leeway, and legitimacy, to weigh competing sets of values. When Congress has not acted with clarity, the strong presumption in favor of freedom should prevail.

CONCLUSION

This Feature has argued that private remedial action is legal. As private conduct, the Constitution does not apply, and Congress has not passed any law barring the practice. To the contrary, tax law has fostered private remedial action at

359. *Coral Ridge* is especially hard to distinguish from *Fearless*, given that both cases involve the choice of disbursement of charitable funds. Other cases also support the proposition that spending is speech. See Volokh, *supra* note 292, at 157 (first citing *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), for the proposition that contributions to facilitate speech are also speech; and then citing *Cornelius*, 473 U.S. at 799, for the proposition that “donations to a variety of charities, not all of which were speech related,” also receive First Amendment protection). Charitable solicitations are also protected. *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

360. Whether race should be treated differently for purposes of remedial action is another issue. In *Fearless Fund*, the Eleventh Circuit panel based its distinction of *Coral Ridge* on the fact that the case did not involve racial discrimination. *Am. All. for Equal Rts. v. Fearless Fund Mgmt.*, 103 F.4th 765, 779 n.7 (11th Cir. 2024). As discussed *supra* notes 334-335 and accompanying text, race should not make a difference to the First Amendment analysis, and, further, race should not be singled out as the only trait charities may not assist.

least since 1959, and trait-based associations, which inevitably provide trait-conscious assistance, have long been part of the fabric of civil society. Private remedial action therefore benefits from a strong presumption of legality, and should, if necessary, be protected by the First Amendment right to expressive association.

Nevertheless, based on a mechanical reading of a post-Civil War statute, *Fearless Fund* held that private remedial action in contract form is illegal discrimination. Further, taken to its logical conclusion, the Eleventh Circuit panel's reasoning extends beyond contracts to outright cash gifts and in-kind assistance. The ruling unsettles decades of precedent and policy, upends the purposes of untold charities and charitable programs, and constrains long-held principles of free association that are vital to pluralism and independence in civil society.

Other courts, including the Supreme Court, can and should chart a different course. The main deficiency of the panel's approach, and the one from which its statutory interpretation inevitably flows, is its ignorance of the charitable context. If the Fearless Foundation was making a commercial, employment-like decision, as the panel intimates, affirmative action to favor a race necessarily would be limited by employment-discrimination laws. But remedial action is not employment. It is a form of charitable giving, core associational activity that Congress has not sought to regulate.

Further, private remedial action is different from affirmative action that is practiced or endorsed by the state. State-sanctioned affirmative action has always been controversial because of the state's power.³⁶¹ If the state puts a thumb on the scale in favor of any one group as a matter of law, concerns of equal protection and fairness are heightened. Moreover, affirmative action as typically understood occurs against a baseline of a nondiscrimination legal mandate, that is, as an exception to the rule. This necessarily confines the scope of allowable affirmative action.

Private remedial action, however, is simply private mission-driven associational activity, and is not measured against a legal baseline barring discrimination. Groups voluntarily donate resources to devise solutions to social problems they see in their communities. Any trait-conscious assistance used to solve social problems is not sanctioned by the state and only applies within the scope of the association and its resources. Private remedial acts are also more flexible and less influential than a state scheme; they can change as circumstances change. By advancing the values of private groups, their impact on society more broadly is far less sweeping than state-sanctioned conduct.³⁶²

361. See Schuck, *supra* note 35, at 86-87 ("A racial preference mandated by public law is much more objectionable than one that a private entity decides to establish to reflect its own values and for its own purposes.").

362. *Id.* at 85-88 (embracing voluntary private trait-based preferences as "[lying] at the core of a liberal society").

All this accentuates why Congress, not the judiciary, is the appropriate actor to mandate any broadly applicable nondiscrimination rule that impacts civil society. Yet when it comes to private remedial action, not only has Congress not acted; the actions Congress has taken consistently carve out different spheres of private action from a nondiscrimination mandate. Indeed, the most natural opportunity for Congress to have regulated private remedial action would have been in connection with barring discrimination in public accommodations.³⁶³ But Congress did not define a public accommodation to include a private club or a private charity.³⁶⁴ Thus, until and unless Congress acts, private remedial action remains legal, and, as argued, is not contrary to fundamental public policy.

The issue then shifts to the tax status of organizations that engage in private remedial action and to the role of the IRS. As this Feature has argued, private remedial action has long been supported by tax law as an activity that can further the charitable purpose of eliminating discrimination. That status quo, however, is not stable, as illustrated by decisions like *SFFA* and *Fearless Fund*, the Trump Administration's antipathy to DEI initiatives, and pending cases.³⁶⁵ Further, IRS guidance in this area is decades old, and civil society has changed since the civil-rights era when the 1959 regulation was written.

Charity is not easy to cabin, or define with bright lines, nor should it be. The IRS may not deny charitable status because it disagrees ideologically with an

363. Public-accommodations statutes, as the Court noted in *Jaycees*, are “the primary means for protecting the civil rights of historically disadvantaged groups.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). As also noted in *Jaycees*, many states have adopted “expansive definition[s]” of a public accommodation, “reflect[ing] a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.” *Id.* at 626.

364. In fact, many of the Court's First Amendment decisions upholding private-association rights occur amid concern from the Court about overly broad state public-accommodations statutes that capture mission-driven organizations. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (explaining that the state's interpretation of its statute was “applied in a peculiar way”); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656–57 (2000) (explaining that “New Jersey's statutory definition of ‘a place of public accommodation’ is extremely broad” and noting that as the definition has expanded so has “the potential for conflict between state public accommodations laws and the First Amendment rights of organizations”); 303 *Creative LLC v. Elenis*, 600 U.S. 570, 580–81 (2023) (explaining that the Colorado statute “defines a ‘public accommodation’ broadly to include almost every public-facing business in the State”); see also *Slattery v. Hochul*, 61 F.4th 278, 283 (2d Cir. 2023) (“Unlike other antidiscrimination statutes, the [New York law] contains no express exemption for religious employers or for small employers with objections to abortion.”).

365. Such pending cases include *SFFA v. Kamehameha Schools* and *Roberts v. Progressive Preferred Insurance Co.* See Complaint, *supra* note 159, at 2; *Roberts v. Progressive Preferred Ins. Co.*, No. 23 CV 1597, 2024 WL 2295482 (N.D. Ohio May 21, 2024), *appeal argued*, No. 24-03454 (6th Cir. July 24, 2025).

organization's purpose.³⁶⁶ But the IRS does, in the first instance, have the authority to decide, within the parameters of existing guidance,³⁶⁷ whether an activity furthers a charitable purpose.³⁶⁸ If the IRS denies charitable status to an organization because of its private remedial action, that decision is subject to judicial review.³⁶⁹ Through litigation, charity law can develop. Indeed, charity law is meant to evolve with contemporary standards, and on a case-by-case basis.

Any future standard for assessing the charitability of private remedial action could usefully borrow from the Court's equal-protection jurisprudence, perhaps adopting a kind of intermediate scrutiny for trait-based charitable preferences.³⁷⁰ This would require appropriate balancing of the remedial interest served against the harm from the trait-based classification. Relevant factors would include the reason for the preference, the evidence of the social harm addressed by the remedy, and whether a group excluded from the charitable assistance has been subjected to systematic discrimination. In addition, in weighing the costs and benefits of private remedial action, courts (and the IRS) should be mindful of the special role that philanthropy plays in addressing social problems and show appropriate deference to the associational rights of charities to pursue charitable ends, as an alternative to government and free from undue government interference.³⁷¹

366. *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034 (D.C. Cir. 1980) (“[R]egulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials.”).

367. Ultimately, both existing and future administrative rulings or guidance by the IRS can be subject to scrutiny from courts and Congress in the judicial and political processes.

368. See I.R.C. § 508(a) (2024).

369. *Id.* § 7428. The IRS announced its intention to provide “guidance on the application of the fundamental public policy against racial discrimination, including consideration of recent caselaw, in determining the eligibility of private schools for recognition of tax-exempt status under § 501(c)(3).” Off. of Tax Pol’y & Internal Revenue Serv., *2025-2026 Priority Guidance Plan*, U.S. DEP’T TREAS. 7 (Sep. 30, 2025), <https://www.irs.gov/pub/irs-counsel/2025-2026-initial-pgp.pdf> [<https://perma.cc/C948-TYMJ>].

370. Justice Stevens’s general (but unadopted) approach to equal protection seems apposite in the charitable context. He queried:

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a “tradition of disfavor” by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 453 (1985) (Stevens, J., concurring) (arguing for a single rational-review standard).

371. If in any given case, private remedial action does not further a charitable purpose under § 501(c)(3), there are other avenues. The most straightforward is to conduct the activity within a taxable entity, which could engage in it just like any other lawful civil activity with

State action to make private associational conduct illegal is one of the most intrusive acts the state can take in a free society. Unfortunately, the Eleventh Circuit's *Fearless Fund* decision, and the Trump Administration's amorphous attacks on DEI, impose a one-sided, colorblind vision of civil rights on private charitable organizations, curtailing their freedom to develop and express their mission, without any input from Congress or a constitutional command. Despite such dramatic overreach, this Feature has demonstrated that private remedial action has long been presumptively legal in American history and should remain so today.

no regulatory role for the IRS. A further option is to conduct the remedial activity within a noncharitable exempt entity like a § 501(c)(4) social-welfare organization or a § 501(c)(6) trade association. For example, the organization's social-welfare purpose could be to educate the public on the racial wealth gap, and as an additional activity, it engages in private remedial action. Or a trade association could run a remedial program to help create training opportunities in certain trades. Even if the IRS ruled that the remedial activity does not further exempt purposes, it would be treated like any other "unrelated" activity and subject to a substantiality test. See Rev. Rul. 81-95, 1981-1 C.B. 332.